EUROPEAN COMMISSION

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COMMISSION DECISION

of 23.02.2011

ON THE STATE AID
No C 48/2008 (ex NN 61/2008)

Implemented by Greece

in favour of Ellinikos Xrysos SA.

(Only the Greek version is authentic)

(text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) TFEU,[1] in respect of the aid C 48/2008 (ex NN 61/2008)[2],

Having called on interested parties to submit their comments pursuant to the provisions cited above, and having regard to their comments,

Whereas:

I PROCEDURE

(1) On 9 July 2007, the Commission received a complaint alleging that Greece had granted two State aid measures in favour of Ellinikos Xrysos SA (hereinafter: "Ellinikos Xrysos"). After exchanges of information, on 10 December 2008 the Commission opened the formal investigation procedure on the alleged measures.

(2) Greece submitted its comments to the Commission's opening decision on 23 February 2009.

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1 With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU; the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

2 Commission decision D(2008)7853 final of 10 December 2008 (OJ C 56, 10.3.2009, p. 45).

(3) The opening decision was published in the Official Journal of the European Union on 10 March 2009[3]. Comments were received from four interested parties: from Ellinikos Xrysos, the beneficiary of the alleged measures, on 10 April 2009; from European Goldfields Ltd, the main shareholder of Ellinikos Xrysos, on 10 April 2009; from the Cassandra Mines trade unions on 2 April 2009; from the Hellenic Mining Watch, a Greek society whose purpose is the "protection of the environment and the public against the negative consequences of mining and safeguarding of the national wealth[4]", on 6 April 2009.

(4) The comments were transmitted to Greece by letters of 6 May 2009 and 7 July 2009. Greece replied to the interested parties' comments by letters of 3 June 2009, 20 July 2009 and 23 September 2009.

(5) The Commission requested further information from the Greek authorities on 19 June 2009, 11 December 2009 and 22 April 2010, to which Greece and Ellinikos Xrysos replied by letters of 23 July 2009, 29 July 2009, 15 January 2010, 11 February 2010, 12 February 2010, 4 May 2010 and 27 May 2010. Further informal exchange of information took place by email in May 2010 between the Commission services and the Greek authorities. Meetings took place between the Commission services and the Greek authorities on 11 February 2009 and 24 June 2010, as well as between the Commission services and the alleged beneficiary on 2 February 2009 and 26 June 2009.

II DETAILED DESCRIPTION OF THE AID

II.a. Background information on mining rights and permits

(6) A mining right is the right to enter upon and occupy a specific piece of ground for the purpose of working it, either by underground excavations or open workings, to obtain the mineral ores which may be deposited therein. It is transferred with the mining property, as an integral part of it.

(7) The mining right is distinct to the mining permit, which is a permit to execute mining operations. It is granted by the competent authorities, after assessment of submitted feasibility reports and environmental studies. In the case at hand, at the time of the 2003 sale, mining permits were granted by the Ministry of Development.

II.b. The beneficiary

(8) Ellinikos Xrysos is a large Greek mining company, active in the business of mining gold, copper, lead, silver and zinc. In 2009 it had a turnover of EUR 44.7 million (with earnings after taxes of EUR 1.7 million) and ca. 350 employees. At the time of the aid measures in question (see paragraphs 11 and 15-18 below), Ellinikos Xrysos was a large company, because it was linked to a large company. According to the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises[5]: a) The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding

3 See footnote 2.
4 As defined in its submission to the Commission.
5 OJ L 124, 20.5.2003, p. 36.

EUR 43 million (Annex, title 1, article 2, paragraph 1); b) to remove from the category of SMEs groups of enterprises whose economic power may exceed that of genuine SMEs, a distinction should be made between various types of enterprises, depending on whether they are autonomous (paragraph 9 of introduction); c) an "autonomous enterprise" is any enterprise which is not classified as a linked enterprise (Annex, title 1, article 3, paragraph 1); and d) a linked enterprise is one whose majority of the shareholders' or members' voting rights is held by another enterprise (Annex, title 1, article 3, paragraph 3, subparagraph a). In the case at hand, in December 2003 (time of the 2003 sale) Ellinikos Xrysos' shares belonged by 53.3% (160,000 shares over a total of 300,000) to the company "Greek Mines SA", a subsidiary of the company "Aktor SA". Aktor's latest two annual turnovers, i.e. of 2001 and 2002, amounted to EUR 120.9 million and EUR 302.6 million, respectively. Also, its latest two annual balance sheet totals amounted to EUR 151.9 million and EUR 260 million, respectively[6]. These figures indeed qualify Aktor as a large company. Thus, Ellinikos Xrysos was a large company at the time of the aid measures in question.

(9) The present shareholders of Ellinikos Xrysos are European Goldfields Greece BV (65% of shares), Hellas Gold BV (30% of shares) and Aktor SA (5% of shares), a Greek constructions and energy company. European Goldfields Greece BV and Hellas Gold BV are subsidiaries of European Goldfields Ltd, a Canadian company involved in the acquisition, exploration and development of mineral properties in the Balkans.

(10) Ellinikos Xrysos owns and operates the Cassandra Mines. It bought them and their mining rights from the Greek State in December 2003. The Cassandra Mines are located in Northern Greece. They include the gold mining projects of Olympias and Skouries and the copper-zinc mining project of Stratoni.

(11) Before 2003, the Cassandra Mines were owned by the company TVX Hellas SA, which had acquired them in 1995 from the Greek State through a public tender for DR 11 billion (approximately EUR 39.8 million[7]).

(12) In 2002, the Greek State Council annulled the mining and gold processing permits of the Cassandra Mines, in particular of Olympias and Stratoni. The Olympias mining and gold processing permits were annulled for environmental reasons, which are considered as serious. On the other hand, the Stratoni mining permit was annulled because the Greek State had improperly issued it, through an incompetent authority.

(13) Following the above annulment by the Greek State Council, the competent Ministry of Development issued two acts, regarding Stratoni: 1) on 7 January 2003, ordering the interruption of operations in Stratoni; and 2) on 29 January 2003, ordering the adoption of additional security measures in Stratoni. On 18 February 2003, the Ministry of Development, in line with the above annulment decision of the Greek State Council, issued another act allowing Ellinikos Xrysos to start operations in Stratoni and annulling its previous acts of 7 and 29 January

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6 As published in the website of Ellaktor SA, parent company of Aktor SA.

7 Adjusted according to the Greek general index of industrial production prices for the period 1995-2003. The sale in question concerns industrial (mining) assets, therefore the adjustment has to be representative of the price changes in the industrial sector. Thus, the Commission used the index of industrial production prices.

2003. This act of 18 February 2003 was valid at the time of the Mines' sale to Ellinikos Xrysos.

(14) Following also the above annulment of the mining and gold processing permits of the Cassandra Mines, Kinross (a Canadian mining company), the owner of TVX Hellas, stopped financing it in order to preserve shareholder value. This action forced TVX Hellas to file for bankruptcy.

II.c. Measure 1: Price of sale below market value

(15) On 12 December 2003, the Cassandra Mines were transferred from TVX Hellas to the Greek State for EUR 11 million, under an extrajudicial settlement, in the context of which a clearing of mutual claims took place (the claim of TVX Hellas against Greece amounted to EUR 293.5 million). On the same day, the Greek State sold the Cassandra Mines to Ellinikos Xrysos for EUR 11 million, without any evaluation of the assets or any open tender. The sale included: a) Mines of Stratoni, Skouries and Olympias, together with the relevant mining rights; b) land; c) stock of minerals; and d) fixed assets (mining-processing equipment, houses for workers and industrial buildings). According to the Greek authorities, the measure's objective was to find an owner willing to operate the mines and thus to protect the employment and the environment.

II.d. Measure 2: Waiver of tax and reduction of legal fees

(16) The sale of the Cassandra Mines from Greece to Ellinikos Xrysos was realised through a contract between the two parties, which was ratified by Law 3220/2004[8]. According to that law, Ellinikos Xrysos was exempted from any kind of tax. There was also a reduction of legal and other fees to only 5% of the actual amount that should have normally been paid. According to the Greek authorities, the measure's objective was to create an incentive for potential buyers, because the value of the Mines was negative.

(17) According to Greek law[9], tax on transfer of real estate property is 7% of the value of the transferred property for the first EUR 15,000 and 9% for the rest. Also, according to Greek Mining Code[10], the specific tax on transfer of mining rights is 5% of the value of the transferred right (i.e. value of the mine).

(18) For measures 1 and 2, in the present decision the Commission has arrived at a total aid figure of EUR 15.34 million, having examined:

   (a) the value of the three individual mines which comprise them (Stratoni, Olympias and Skouries), based on economic factors applying at the time of the sale, and also the ability of those mines to be operational (see detailed analysis in paragraphs 63-79 below);

   (b) the value of the land of the Cassandra Mines, as attributed by a valuation report (see paragraph 19 below) and verified against the price paid for most part of this land in a 1995 open tender (see detailed analysis in paragraphs 80-90 below);

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8 Government's Gazette of 28 January 2004.

9 Law 1521/1950 ratified by Law 1587/1950 in FEK 294 A.

10 Greek Mining Code of 1973, FEK 277A, 5/10/1973.

(c) the value of the stock of minerals that Ellinikos Xrysos acquired through the 2003 sale, based also on the above valuation report (see detailed analysis in paragraphs 91-97 below);

(d) the amount of the due taxes that Ellinikos Xrysos was exempted from in the sale contract (see detailed analysis in paragraphs 118-125 below).

(19) In the opening decision of 10 December 2008 the Commission questioned whether the Cassandra Mines were sold by Greece to Ellinikos Xrysos at their market value, since the sale was realised without an open tender or an independent valuation of the assets, and also whether such a sale below market value was compatible with TFEU. Reference was made to a valuation report of the Cassandra Mines assets, issued on behalf of European Goldfields, shareholder of Ellinikos Xrysos. According to that report, the fair-market value of the Cassandra Mines assets was USD 500 million (equal to EUR 411 million on 30 June 2004, using that date's exchange rate of 1.2155 USD/EUR[11]). This report was issued by Behre Dolbear International Ltd (hereinafter "the Behre Dolbear report"), "a pre-eminent international minerals industry consultant", according to European Goldfields[12].

(20) The Commission also questioned whether the waiver of tax and the reduction of legal fees constituted reliefs from financial obligations to the State that were compatible with TFEU.

III COMMENTS FROM GREECE AND INTERESTED PARTIES

III.a. Comments from Greece and the beneficiary

(21) The comments of Greece and the beneficiary overlap to a large extent, therefore the Commission will expose them together, as follows in paragraphs (22)-(31) below.

(22) According to the Greek authorities and the beneficiary, Greece only acted as an intermediary in the 2003 sale, because TVX Hellas, being within the bankruptcy procedure, could not directly sell the Mines to Ellinikos Xrysos. It is also claimed that Greece has never been owner of the Mines and has not received any amount of money from the 2003 sale, as the EUR 11 million were paid directly to TVX Hellas. It is also argued that in 1995, the sale transaction took place between TVX Hellas and the previous owner, a private company in bankruptcy, therefore there are no State resources involved in the 2003 sale.

(23) Furthermore, the Greek authorities and the beneficiary claim that, at the time of the sale, the Cassandra Mines' market value was reduced or even negative, because of the long stop in operations and the annulment of the mining permits. The negative market value of the Mines would also be demonstrated by the fact that Kinross, the owner of TVX Hellas and a market economy operator, attributed negative value to the Mines when it capitalised significant losses from their investment. It is also

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[11] In its decision of 10 December 2008 to open the formal investigation procedure, the Commission used the exchange rate of 28 September 2004, date when the Behre Dolbear report was published, and converted the report's attributed value of USD 500 million to EUR 408 million. In the context of the decision at hand, the Commission has decided to use the more appropriate exchange rate of 30 June 2004, because that was the date for which the Behre Dolbear report and its attributed values were valid.

[12] Behre Dolbear also appears in various mining valuation reports and studies (by United Nations, Citibank, the Government of India, also companies like Anglo Asian Mining Plc, Chaarat Holding Holdings Ltd and Central African Mining and Exploration Company Plc).

stated that the positive price paid by Ellinikos Xrysos, also a private company, is justified by the contract's annulling clause, which eliminated the buyer's risk. In addition, it is submitted that land acquired by a mining company can only be used for mining activities and does not have a market value, because Greek law gives priority to mining activities in such areas. Therefore, it is argued that the reduction of value of the mining rights, due to the long stop in operations and the annulment of mining permits, affected a reduction of value also to land. Finally, regarding the gold mineral stock which was part of the assets sold to Ellinikos Xrysos, it is claimed that in 2003 it had negative value because of the relatively low price of gold and the relatively high related costs such as transport and processing..

(24) In addition to the above and as regards market economy criteria to be taken into account in a transaction, the Greek authorities and the beneficiary argue that these criteria also include environmental and social concerns, in the context of company image and staff satisfaction. This is supported by the fact that TVX Hellas, a market economy operator, also took under consideration labour and environmental issues by paying relevant indemnifications. It is also argued that not selling the Mines would also mean substantial environmental costs to be borne by the Greek State, in the area of EUR 15.7 million. At the same time, it is submitted that the price paid by Ellinikos Xrysos is also justified by market economy criteria, as it was equal to the price asked by TVX Hellas, a private company. According to Greece and the beneficiary, if TVX Hellas could, it would have asked for a higher price. In addition, it is stated that the price paid by Ellinikos Xrysos was equal to the assets' book value in the financial statements of TVX Hellas. Finally, it is submitted that the price paid in the 2003 sale represented the real value of the Mines, meaning the value of the Stratoni mine, since it was the only one operating. As regards Skouries, according to Greece and the beneficiary no mining activity or investment has ever taken place there but only mining research, conducted by TVX Hellas before the 2003 sale. It is also argued that in order to create a mining facility in Skouries, significant investment is needed. For the above reasons, it is claimed that the 2003 sale did not confer an advantage to Ellinikos Xrysos.

(25) As regards the Behre Dolbear report, neither Greece nor the beneficiary argues against the credibility of Behre Dolbear. Instead, they both argue against the report, claiming that it cannot be taken into account, because its purpose was to attract investors' attention and its point in time (June 2004) was not the same as that of the sale (December 2003). Also, it is argued that the value of the Mines estimated by Behre Dolbear concerns the assets together with the relevant mining permits, however Ellinikos Xrysos only acquired the assets, whereas the mining permits would be granted later by the Greek state. In addition, it is argued that the report does not refer to the sold assets but to the value of Ellinikos Xrysos as a going concern, therefore it is not indicative of the value of the assets sold by the Greek State in December 2003. Finally, it is submitted that in page 37 of the report, table 5.3, Behre Dolbear estimates the net present value of the near-production Cassandra Mines to be negative USD 2.59 million, therefore the price actually paid (EUR 11 million) was above the market value of the Mines.

(26) If however the Behre Dolbear report is used, Greece argues that only the Income Approach (out of three different methods that the report includes) could be accepted, as it is an internationally used main method of valuation, but only for its validation date and with the prerequisite of mining permits granted and serious investments realised.

(27) On the other hand, the Greek authorities and the beneficiary admit that Greece sold the assets directly to Ellinikos Xrysos without an open tender or an evaluation, because of time pressure to protect the employment and the environment. Also, it is stated that TVX Hellas had claims of EUR 293.5 million against Greece, due to damages from the investments to the mines (which stopped operations because of the 2002 annulling decisions) and expenses for the protection of the environment. In addition, it is argued that the sale contract did not foresee any clause for minimum work posts, because mining requires a lot of workers and at the same time an obligation for jobs cannot be quantified. Finally, it is stated that in case of a recovery order by the Commission, there could be a request for the contract to be annulled, asking the Greek State to return EUR 11 million to the company and receive back the assets.

(28) Furthermore, the Greek authorities state that the value determined by the 1995 open tender could be taken into account, and that the value of land could be considered as unchanged. Also, it is stated that the method used in the Behre Dolbear report (the Income Approach method) can be accepted, but only in relation to the date of the report (30 June 2004), with mining permits granted and serious investments realised. Finally, it is accepted that at the time of the sale, Stratoni had valid mining permits and therefore was operational and fulfilled the Behre Dolbear report's clause of a "near production facility".

(29) As regards the tax waiver and the reduction of legal fees, according to the beneficiary the foreseen tax on transfer of mines was not applicable in the case at hand. Furthermore, according to Greece, the value of the Mines was negative, therefore an incentive for potential buyers was needed. Also, Greece argues that article 173 of Greek Mining Code foresees a tax rate of 5%, but only to transactions "against consideration", "με επαχθή αιτία", which, according to Greece, means transactions caused by unfortunate incidents, e.g. death of the owner, therefore it was not applicable in the case at hand. Furthermore, the beneficiary argues that the sale contract is not yet definitive because of an annulling clause, therefore the application of any tax would be premature. Finally, the beneficiary argues that the reduction of legal fees does not involve State resources, because lawyers are private operators, and the fees' tax and duties were paid duly.

(30) Greece acknowledges that 7%-9% tax is indeed levied in all cases of land sale, regardless of whether it is a sale of company assets or individual ones.

(31) Finally, Greece and the beneficiary argue that, even if the 2003 sale constituted aid in favour of Ellinikos Xrysos, the latter would be eligible for aid under the 1998 Regional aid guidelines and the 2002 Multisectoral framework for large investment projects, applicable at the time of the sale, as a company located in an article 107(3)(a) TFEU area. Also, the beneficiary argues that it could be eligible for aid under GBER, the Environmental aid guidelines of 2008 and Article 107(3)(c) TFEU, as the investment in question was related to a sector and an area of vital national importance. As regards the tax waiver, according to the beneficiary it was equal to EUR 38,000 therefore lower than the *de minimis* threshold (EUR 100,000 over any period of three years)[13] and did not result in any benefit for Ellinikos Xrysos.

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[13] As set by the Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid, applicable at the time of the 2003 sale.

III.b. Comments from other interested parties

(32) The Commission also received comments to the opening decision from the Hellenic Mining Watch (in paragraphs 32-34: "HMW")[14]. HMW claims that the Cassandra Mines assets include also substantial real estate, which increases their total value considerably but was not taken into account by the Behre Dolbear report. Also, HMW contradicts the invocation of unemployment reasons for the transfer of the Mines without compliance with legal procedures, claiming that the sale contract did not include any obligation for Ellinikos Xrysos to recruit a certain or minimum number of workers.

(33) Furthermore, HMW contradicts the invocation of environmental reasons for the transfer of the Mines without compliance with legal procedures, claiming that Article 1 of the 2003 sale contract discharges Ellinikos Xrysos from any liability for damage to the environment, which came about or whose cause came about prior to the publication of the Law ratifying the sale contract. Finally, HMW alleges that the Mines assets also included a stock of gold-bearing minerals of significant value, amounting to EUR 80 million, which was not mentioned in the contract of the sale to Ellinikos Xrysos.

(34) In its reaction to HMW's comments, Greece dismisses them and reiterates that Ellinikos Xrysos did not benefit from State aid. In particular, Greece argues that it was nor the owner neither the vendor of the Mines but merely an intermediary in a transaction between two private parties. Furthermore, Greece claims that HMW's allegations are vague, inaccurate and contradictory. Finally, Greece supports that HMW seeks the return of the Cassandra Mines to the State because its ultimate goal is the protection of the environment.

(35) Finally, the Commission also received comments to the opening decision from the Cassandra Mines trade unions[15], contesting that the measures would entail illegal State aid and referring to the contribution of the Mines to the economy and employment.

IV ASSESSMENT OF THE AID

(36) On the basis of the above facts and also of the arguments of Greece and other third parties, the Commission will assess the measures in question in what follows in this section. First, the Commission will assess the presence of aid in the measures under scrutiny, in order to conclude if there is aid or not (sub-section IV.a). Secondly, where a measure indeed involves aid, the Commission will assess its compatibility with the internal market (sub-section IV.b).

IV.a. Presence of aid in the meaning of Article 107(1) TFEU

(37) In order to ascertain whether a measure constitutes an aid, the Commission has to assess whether the contested measure fulfils the conditions of Article 107(1) TFEU. This provision states that "Save as otherwise provided in the Treaties, any aid granted by Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

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14 See paragraph (3).

15 See paragraph (3).

(38) In the light of this provision, the Commission will assess hereunder whether the contested measures in favour of Ellinikos Xrysos constitute State aid.

Measure 1: Price of sale below market value

a. Advantage

(39) Where the State sells an asset at a price below market value, this entails an advantage to the buyer (who receives an asset at a subsidised price) which may constitute State aid. Conversely, an asset is sold at market value (and hence State aid is excluded) where that price is determined by an independent valuator and matches the sale price or where the sale is performed through a competitive, open, transparent and unconditional tender and the highest bid is picked[16].

(40) In the case at hand, the Cassandra Mines were sold without an open tender or a valuation of any kind. However, in order to avoid State aid, the State has to act as a rational, profit-maximising private owner, i.e. a "market economy vendor", and seek the best financial outcome from a sale. Thus, in the case at hand the Commission made an assessment of the behaviour of the Greek State as a market economy vendor.

(41) The Greek authorities and the beneficiary argue that environmental and social issues should also count as market economy criteria, because they concern company image and staff satisfaction. According to them, their argument is supported by the fact that TVX Hellas, a market economy operator, also took under consideration labour and environmental issues by paying indemnifications for its employees as well as for past environmental liabilities (liabilities for the time before the 2003 sale). They claim that, in the same manner, a market economy vendor would agree to a reduced price, in order to satisfy environmental and social concerns.

(42) The Commission cannot accept the above argument. Environmental and social concerns are, by their very nature, public policy concerns pursued by public authorities. A market economy vendor could take into account unemployment and environmental issues, at most, to a limited extent, to protect or to create a business reputation as a socially or environmentally responsible agent, and not to the substantial detriment of its financial interests. At any rate, a rational market economy vendor, in the context of a sale, would evaluate and quantify any payments or costs deriving from those issues, in order to decide how these could influence the acceptable price. In the case at hand, the Commission notes that the contract does not include any such financial specification, and Greece has not shown that at the time of the sale it made any evaluation of such financial costs.

(43) The Greek authorities and the beneficiary also claim that the Mines had negative market value, which is demonstrated by the fact that Kinross, the owner of TVX Hellas and a market economy operator, attributed negative value to the Mines when it capitalised significant losses from their investment.

(44) The Commission cannot accept the above argument. Indeed, the Commission notes that TVX Hellas stopped its business in the Cassandra Mines because of the annulment of the mines' permits by the State Council. However, Stratoni had a

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16 Competition Policy Report, 1993, p. 256.

valid mining permit at the time of its sale by TVX Hellas to Greece (see paragraph 13 above), whereas the permit of Olympias remained annulled. Therefore the Commission considers that the decision of TVX Hellas to sell the Cassandra Mines was related to the failure of its substantial investment in Olympias. Therefore, the behaviour of TVX Hellas was related to the value of the Olympias investment and not to the value of Stratoni.

(45) The Greek authorities and the beneficiary admit that Greece sold the assets directly to Ellinikos Xrysos without an open tender or a valuation, because of time pressure to protect the employment and the environment. As regards the latter, they argue that not selling the Mines would mean substantial environmental costs to be borne by the Greek State, in the area of EUR 15.7 million. As regards employment, the Greek authorities and the beneficiary accept that the sale contract did not foresee any clause for minimum work posts, but argue that an obligation for jobs cannot be quantified and that mining requires a lot of workers.

(46) The Commission notes on the above that indeed the sold assets' value was not assessed in any way prior to the sale and the sale was not conducted through an open process but through direct contacts with the buyer. As regards the environmental costs allegedly to be borne by Greece, the Commission notes that there is no trace of those costs in the contract or in any contemporaneous document. The Commission also notes that no additional environmental obligations, beyond the legislation applicable, were imposed to the buyer. The Commission considers that, if environmental cost is to be considered as a factor for the determination of the price of a sale, a private vendor would carefully evaluate and quantify these costs before determining the sale price. Greece has not shown that, at the time of the sale, it made any such evaluation and quantification or otherwise took into consideration any such environmental costs.

(47) The Commission also notes that the 2003 sale contract indeed did not foresee any clause requiring the buyer to keep or create any minimum work posts. Therefore, the Commission cannot accept that the buyer was burdened with an obligation to maintain more jobs than economically needed, since the sale contract did not have any obligation for the maintenance of specific number of jobs. Thus, the Commission considers that, from the perspective of a private vendor, no reason related to the number of jobs and the protection of employment can explain a sale price lower than the market value of the mines.

(48) Thus, on the basis of paragraphs (46)-(47) above, the Commission cannot accept the arguments of Greece and the beneficiary in paragraph (45) above.

(49) On the above matter of employment and environmental protection (see paragraph 45), the Hellenic Mining Watch contradicts the invocation of unemployment reasons for the transfer of the Mines without compliance with legal procedures, claiming that the sale contract did not include any obligation for Ellinikos Xrysos to recruit a certain or minimum number of workers. The Hellenic Mining Watch also claims that Ellinikos Xrysos received an advantage, because Article 1 of the 2003 sale contract discharges Ellinikos Xrysos from any liability for damage to the environment, in case that such a damage came about or its cause came about prior to the publication of the Law ratifying the sale contract.

(50) As regards the second argument of the Hellenic Mining Watch above, the Commission notes that indeed the 2003 sale contract discharges Ellinikos Xrysos from any liability for damage to the environment in case that such a damage came about or its cause came about prior to the publication of the Law ratifying the sale

contract. The Commission considers that the above provision of the contract does not grant an autonomous, specific advantage to Ellinikos Xrysos that would be different from the sales price. Clauses about apportioning various financial liabilities for the past between vendor and buyer are not infrequent in private contracts. Ultimately, the parties to a sale take such clauses into account, as factors in determining the sale price. Therefore, the ultimate question in the present case is whether the sale, taking into account the conditions, reflected the market value of the mines.

(51) Furthermore, the Greek authorities and the beneficiary argue that the 2003 sale did not grant an advantage to Ellinikos Xrysos, because the price paid by Ellinikos Xrysos was equal to the assets' book value in the financial statements of TVX Hellas, the owner of Cassandra Mines before the Greek State.

(52) The Commission cannot accept the above argument. Indeed, the Commission considers that the book value of TVX Hellas cannot be taken into account for the assessment of the assets' value, since it takes into account depreciation in the company's books for taxation reasons[17], therefore it represents the assets' accounting value. According to well-established case law[18], accounting value is not always the same as market value, when the aim is to evaluate assets for the purpose of establishing their price in a sale. Also, the assets in question were transferred on a stand alone basis, therefore the depreciation affected by the previous owner only concerned its own bookkeeping and taxation.

(53) The Greek authorities and the beneficiary also claim that the price paid by Ellinikos Xrysos is justified by market economy criteria, as it was equal to the price asked by TVX Hellas, a private company. If the latter could, it would have asked for a higher price.

(54) The Commission cannot accept the above argument. Indeed, the Commission notes that the price paid by Greece to TVX Hellas was the result of a clearing of the two parties' claims against each other. The Commission also notes that the claim of TVX Hellas against Greece amounted to EUR 293.5 million (see paragraph 15 above). In this sense, in case that the two parties had claims of different amounts, the final outcome of their clearing could be different, however it would be linked to the sale of the same assets. Therefore, the Commission considers that the above clearing of claims was not representative of the value of the sold assets.

(55) At the same time, the Commission notes that the above claims were indemnifications requested by the two parties. In particular, Greece's claim concerned environmental damages allegedly caused by TVX Hellas. TVX Hellas' claim concerned environmental expenses and losses from investments that the company suffered allegedly due to the mining permits' annulment in 2002. The Commission also notes that the value of the assets was not assessed in any way at the time of the above clearing. Therefore, the price of EUR 11 million for the sale of the Cassandra Mines to Greece was linked to the two parties' alleged responsibilities and not to the value of the assets.

(56) Finally, the Commission notes that the decision of TVX Hellas to sell the Cassandra Mines was related to the failure of its substantial investment in Olympias, therefore to the value of the Olympias investment and not to the value

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17 Depreciation affected with the use of rates set by the tax authorities.

18 See Case T-415/05, Hellenic Republic vs European Commission, paragraphs 307-308.

of Stratoni. Ellinikos Xrysos had not realised any such investments, therefore was not affected by the failure of that investment. Thus, the Commission considers that the price of EUR 11 million for the sale of the Cassandra Mines to Greece was a price representing only the commercial relationship between TVX Hellas and Greece and also the specific situation of TVX Hellas at the time of the sale. Therefore it could not be representative of a separate commercial agreement, such as the one between Greece and Ellinikos Xrysos.

(57) On the basis of the above (see paragraphs 54-56), the Commission concludes that there was no connection of the clearing of claims between Greece and TVX Hellas to the value of the assets.

(58) On the basis of the above, and in order to establish whether the sale price reflected well the assets' market value, the Commission separated the assets in three categories: a) mines; b) land; and c) stock of minerals. For the calculation of the assets' market value, the Commission relied on the Behre Dolbear report (see paragraph 19 above). As regards land, the Commission has verified this report's value by using the price paid for the land in question in a previous tender in 1995 (see paragraph 11 above).

(59) On the use of the Behre Dolbear report, Greece and the beneficiary argue that it cannot be taken into account, because its purpose was to attract investors' attention. The Commission cannot accept this argument, because the attraction of investors' attention is a principal and legitimate purpose of any valuation report, issued on behalf of market economy operators who seek funds in the financial markets. The validity of any valuation has to be verified, however the mere fact that valuation reports are intended to attract investors is not enough to discredit any valuation report.

(60) Also, Greece and the beneficiary argue that the report cannot be taken into account because its point in time (June 2004) was not the same as that of the sale (December 2003).

(61) The Commission cannot accept the above argument. The Commission notes that the Behre Dolbear reports' date is indeed 30 June 2004, however its content can be considered as contemporary to the sale of December 2003, because it derives from historical metal prices of the period 1993-2003.

(62) The Greek State and Ellinikos Xrysos argue that the report does not refer to the sold assets but to the value of Ellinikos Xrysos as a going concern, therefore it is not indicative of the value of the assets sold by the Greek State in December 2003. The Commission cannot accept this argument, because the report provides an analytical assessment of the value of the sold assets on an individual basis, in order to calculate the overall value of the company.

a.a Estimation of mines value

a.a.1. Argumentation on the value of the mines

(63) The Greek authorities and the beneficiary claim that, at the time of the sale, the Cassandra Mines' market value was reduced or even negative, because of the long stop in operations and the annulment of the mining permits. They also argue that the price paid in the 2003 sale represented the value of the Stratoni mine, since it was the only operational one. In particular, Greece accepts that, at the time of the

sale, Stratoni had valid mining permits and therefore was operational and fulfilled the Behre Dolbear report's clause of a "near production facility".

(64) The Commission notes that the 2002 annulling decisions only affected the value of Olympias, because indeed at the time of the sale Stratoni had valid mining permits, therefore it had a value. At the same time, TVX Hellas stopped business because of the failure of its investment in the process of gold extraction, when the Olympias permits were annulled, therefore its behaviour was related only to the value of the Olympias investment and not to the value of Stratoni.

(65) As regards Skouries, the Greek authorities and the beneficiary claim that no mining activity or investment has ever taken place there but only mining research, conducted by TVX Hellas before the 2003 sale, and significant investment is needed in order to create a mining facility there.

(66) The Commission notes that indeed Skouries did not have mining permits or an established mining infrastructure. However, the Greek authorities and the beneficiary have not submitted any information or substantial argument demonstrating that Skouries was not administratively allowed or economically feasible to be operated. Also, according to the Behre Dolbear report, the capital costs for mine development and construction in Skouries were USD 268 million in 2004, i.e. EUR 220 million. In its report, Behre Dolbear states its belief that these costs are "reasonable". Therefore the Commission considers that there were no administrative or economic obstacles to the granting of mining permits or to the construction of a mining infrastructure and the realisation of operations in Skouries.

(67) On the basis of the above (paragraphs 63-66), the Commission considers that, at the time of the sale, the market value of Olympias was indeed jeopardized by the 2002 annulling decisions, however the market value of Stratoni and Skouries was not. Therefore, at the time of the 2003 sale a market value for the Cassandra Mines could be estimated.

a.a.2. Calculation of mines value

(68) In order to calculate the value of the Cassandra Mines, the Commission examined for each of the three individual mines which comprise them (Stratoni, Olympias and Skouries) the same two issues: a) the value of the mine, which should be based on economic factors applying at the time of the sale; and b) the mine's ability to be operational, in order to realise the above mentioned value. On the basis of these two issues, the Commission comes to the conclusion that Stratoni and Skouries had a certain value which was able to be realised and that Olympias had a value that was difficult to be established at the time of the 2003 sale.

(69) In order to estimate the value of the mines, the Commission used the Behre Dolbear report. The latter report uses three methods to set the fair market value of the Cassandra Mines: a) the Income Approach valuation[19]; b) the Related Transactions (comparable sales) valuation; and c) the Market Capitalisation approach[20]. The attributed values of the three methods are, respectively: a) USD

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[19] The time periods considered in the cash flow analysis of the Income Approach for the three mines are: a) 2004-2035 for Olympias; b) 2004-2015 for Stratoni; and c) 2004-2034 for Skouries.

[20] The Income Approach valuation determines fair market value by discounting the cumulative benefits generated by an asset, which converts the benefits over the lifetime into a present value. The Related Transactions valuation determines fair market value based on present day transactional values for gold

130.3-402.5 million or EUR 107.2-331.1 million; b) USD 504.7 million or EUR 415.2 million; and c) USD 614.9 million or EUR 505.9 million. The range of the Income Approach valuation is due to the different pricing scenarios used therein (see paragraph 72 below). From these three methods, the Commission used the Income Approach. Motivation for this is presented in Table 1 below:

Table 1: Motivation for the use of the Income Approach

INCOME APPROACH	RELATED TRANSACTIONS	MARKET CAPITALISATION
The Income Approach provides analytical values for each of the three mining projects and based on metal prices that were known at the time of the sale of the Mines. When estimating the value of an asset in a transaction, one can take into account only factors standing at the time of the transaction.	The base of the Related Transactions valuation is questionable, because two different mines cannot be the same. According to Behre Dolbear, related transactions are controversial, due to the fact that every mineral deposit, even of the same commodity, is different to some extent from other deposits, as regards mineralogy, mining conditions, metallurgy, environmental aspects, social issues present, ore grades etc.	The Behre Dolbear report also includes a comment for the Market Capitalisation method, by American Appraisal Associates. According to that comment, the Market Capitalisation is recommended as a secondary valuation method or as a rule of thumb, suitable to check valuation determinations by primary methods.
Behre Dolbear appears to put more trust in the value deriving from the Income Approach, since it states that "Historically, Behre Dolbear would have placed significant weight on the value derived by the Income Approach" (summary of values in p. 43 of the Behre Dolbear report).		The Income Approach is a primary valuation method. Therefore, the Income Approach is the one to rely on. In addition, in the case at hand the Market Capitalisation method verifies only the value resulting from market capitalisations of first half of 2004, which are not accepted as this information is ex posteriori. Therefore, the Market Capitalisation method cannot be used even as a secondary valuation method.

(70) Greece accepts that, if the Behre Dolbear report is used, only the Income Approach can be accepted, as it is an internationally used main method of evaluation, but only for its validation date (30 June 2004) and with the prerequisite of mining permits granted and serious investments realised.

(71) Based on the Income Approach, the Commission estimates the value of the mines at the time of the 2003 sale, as follows (see paragraphs 72-79 below):

properties where fair market value can be determined. Finally, the Market Capitalisation approach is based on the present day value accorded on public stock markets for gold companies in relation to those companies' proven and probable reserves.

(72) The Income Approach estimates the fair market value of the Cassandra Mines at a near-production level[21], as the result of the mines' operations, with well defined costs and proven and probable reserves[22]. The report uses three different pricing scenarios with prices of: a) 1993-2003 average; b) first half of 2004 only; and c) 1993-2003 average plus first half of 2004 (divided by 2). The Commission considers that it can take into account only the 1993-2003 average scenario, instead of the other two, because it is based on prices and costs that were known at the time of the sale, which took place in December 2003. In addition, the 1993-2003 historic prices used by Behre Dolbear do not show any specific trend throughout the whole 1993-2003 period, i.e. they fluctuate between different years, and therefore the Commission considers that the 1993-2003 average incorporates better the historic developments in the metal market. Also, the prices of first half of 2004 are not representative of the value of the mines, because they are only a snapshot and therefore do not take into account fluctuation. The latter's consideration is critical, in order to minimize the effect of any possible extraordinary changes or random events and to have a reliable picture of the mines' value.

(73) Greece and the beneficiary argue that Behre Dolbear estimates the net present value of the near-production Cassandra Mines to be negative USD 2.59 million (page 37, table 5.3 of the report), therefore the price actually paid (EUR 11 million) was above the market value of the Mines.

(74) The Commission notes that, on a stand alone basis, the net present values (at near-production level) attributed by the Income Approach to the three mining projects are: a) to Olympias, negative USD 28.79 million, i.e. negative EUR 23.7 million; b) to Stratoni, USD 10.48 million, i.e. EUR 8.6 million; and c) to Skouries, USD 15.72 million, i.e. EUR 12.9 million. The above three values indeed sum up to negative USD 2.59 million.

(75) However, the Commission does not accept the above argument of Greece and the beneficiary. From the above values, the Commission notes that indeed the net present value (at near-production level) of Olympias at the time of the sale was negative. Nevertheless, the Commission considers that the negative net present value of Olympias means that, at the time of the sale, the expected profits resulting from operating the mine at the price level observed over the past 11 years would be negative. At such a gold price level, any owner of Olympias would choose not to operate the mine and would seek to avoid the losses to the greatest extent possible. As it turns out, by not operating the mine, the buyer could limit the losses to EUR 5.5 million, costs that the buyer had contractually to bear for environmental protection and maintenance purposes. From this alone, one cannot infer however that therefore the value of Olympias should be evaluated at EUR 5.5 million negative. This is because, in principle, owning a mine also confers an option value: the owner can operate the mine when times are good (gold prices are high enough) and choose not to operate when times are bad (gold prices are not high enough). Accordingly, Ellinikos Xrysos may have chosen to take over the mine as part of the package of Cassandra Mines or in view of later being able to undertake necessary investments into the Olympias mine to profitably restart exploitation in case gold prices were to rise to levels (substantially) above the level observed over the past period of 1993-2003.

[21] In operation, under development or at a final feasibility study stage.

[22] Mineral reserves are resources known to be economically feasible for extraction. Reserves are either probable or proven.

(76) Obtaining a reliable estimate of this option value is fairly complicated, however. More importantly, any such value would have to be adjusted for the (possibly high) likelihood that, even though gold prices would be high enough to allow profitable operation, no permit would be obtained for this mine. As indicated above (see paragraph 12), the Olympias mining and gold processing permits were annulled for environmental reasons, which are considered as serious. Therefore it would appear appropriate to regard Olympias as having an option value which can conservatively be put to zero. The net value of Olympias would accordingly be estimated at EUR 5.5 million negative.

(77) By contrast, the Commission considers that the individual values attributed to Stratoni and Skouries reach a value of EUR 21.5 million, as the sum of the two mines' values according to the Behre Dolbear report (EUR 8.6 million plus EUR 12.9 million, respectively, see paragraph 74 above), because:

a. Stratoni had a valid mining permit, an established mining infrastructure and a positive value to derive from its operations (positive net present value), therefore it was operational at the time of the sale;

b. As regards Skouries, the Commission considers that there were no administrative or economic obstacles to the granting of mining permits or to the construction of a mining infrastructure and the realisation of operations. At the same time, Skouries also had a positive value to derive from its operations (positive net present value).

(78) Greece and the beneficiary argue that the value of the Mines estimated by Behre Dolbear cannot be taken into account, because it concerns the assets together with the relevant mining permits, but Ellinikos Xrysos only acquired the assets, whereas the mining permits would be granted later by the Greek State. The Commission does not accept this argument, because, as demonstrated above, Stratoni indeed had a valid mining permit at the time of the sale. As regards Skouries, as also demonstrated above, there were no administrative obstacles to the granting of its mining permit. Also, the cost of applying for and obtaining a mining permit for Skouries was limited to the fees of geologists and other experts, for the preparation of the studies required for the permit, as well as the fee for a Letter of Guarantee required by the competent Ministry. According to the submission of the Greek authorities, the above costs equal (respectively) to approximately EUR 5,000 on an ad hoc basis plus EUR 600,000 per year, at maximum. The Commission considers these amounts to be at a low level, comparing to the overall capital costs for mine development and construction in Skouries, equal to USD 268 million in 2004, i.e. EUR 220 million (see paragraph 66 above). Thus, the Commission considers that the above mining permit costs were not an obstacle for a company willing to invest in Skouries. The Commission also notes that the Behre Dolbear report also includes "administration" costs in the calculation of the mine's net present value, therefore the Commission considers the above costs (of applying for and obtaining a mining permit for Skouries) to have been taken into account by the Behre Dolbear report.

(79) From the above, the value of the mines can be estimated at EUR 16 million for the three mines (EUR 21.5 million – EUR 5.5 million).

a.b Calculation of land value

(80) The Greek authorities and the beneficiary argue that land, in cases where it is acquired by a mining company, can only be used for mining activities and does not

have a market value, because Greek law gives priority to mining activities in such areas. Therefore, the reduction of value of the mining rights, due to the long stop in operations and the annulment of mining permits, affected a reduction of value also to land.

(81) On the above issue, the Commission considers the land in question as an asset of a mining undertaking and not as "real estate", in the broad sense of the term, due to the particular characteristics of mining operations (pollution, disturbance of environment etc), which would make the possibility of trading those assets separately from the mines questionable.

(82) However, the Commission also considers that any business asset has a value, because it contributes or can contribute to operations and to the realisation of earnings. The Cassandra Mines was an undertaking operational at the time of the sale, therefore the Commission considers that the land could be used for the operations of the Mines and thus indeed had a value. Therefore, the Commission cannot accept the above argument of Greece and Ellinikos Xrysos.

(83) The Hellenic Mining Watch claims that the Cassandra Mines assets include also substantial real estate, which increases their total value considerably but was not taken into account by the Behre Dolbear report.

(84) However, the Commission notes that the Behre Dolbear report indeed takes into account land, other than the mines. In particular, the Behre Dolbear report considers land as a non-mineral asset of the Cassandra Mines and gives it a value of EUR 6 million[23], separately to the Income Approach method.

(85) Behre Dolbear states in the report that the value provided for land is the one reported by Ellinikos Xrysos, and has not been estimated by Behre Dolbear. Thus, the Commission needs to verify this value.

(86) For the above verification, the Commission uses the price paid for land in the 1995 open tender for the sale of the Cassandra Mines to TVX Hellas (see paragraph 6 above). This is not a primary calculation but a secondary one, intended to test the validity of the Behre Dolbear report's value (EUR 6 million).

(87) The Greek authorities accept that the value determined by the 1995 open tender could be taken into account, and that the value of land can be considered as unchanged. The Commission notes that, in the context of the 1995 sale of the Cassandra Mines to TVX Hellas, land was assigned a price of DR 1.2 billion. The Commission notes the absence of valid price references or price indexes for the particular land of the Cassandra Mines, which is considered as an asset of a mining undertaking and not as "real estate" in the broad sense of the term (see paragraph 81 above). Such valid price references or price indexes, if available, would allow the calculation of an updated reference value. In their absence, the Commission considers the 1995 price as the best available estimate in the case at hand. Therefore, the Commission takes as a starting point a fair market value for the land of DR 1.2 billion or EUR 3.5 million (using the exchange rate of 340.75 DR/EUR at which Greece entered the Eurozone in 2001).

(88) Also, after 1995, TVX Hellas acquired 70 additional land plots (in period 1997-2000, most part in 1998-1999). The Commission notes that the acquisition value of

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23 See p. 42 of the Behre Dolbear report, "Non-mineral assets and liabilities".

those 70 additional land plots is EUR 1.1 million, as presented in the financial statements of TVX Hellas. The Commission considers that acquisition value to be market oriented, since it was obtained in the market. Adding together the above two values (EUR 3.5 million plus EUR 1.1 million), the total land's fair market value can be established at EUR 4.6 million.

(89) The above amount of EUR 4.6 million is the nominal value of land in 2003, based on prices of 1995 and 1997-2000. The Commission considers that this value would need to be adjusted according to the Greek general index of industrial production prices, for the periods 1995-2003 and 1998-2003. The index of industrial production prices is used because the land in question is an asset of an industrial company, therefore the adjustment has to be representative of the price changes in the industrial sector. This adjustment of the 1995 and 1997-2000 sales prices leads to a final result of EUR 5.9 million in December 2003.

(90) The Commission notes that the above value of EUR 5.9 million closely matches the value of EUR 6 million, reported by Behre Dolbear in the valuation report (see paragraph 84 above). The Commission considers that this close match confirms the soundness of the valuation of the land by Ellinikos Xrysos used by the Behre Dolbear report, and therefore justifies taking the figure of EUR 6 million as representing the fair market value in December 2003.

a.c Calculation of stock of minerals value

(91) The 2003 sale also included a quantity of stock of minerals with concentrates[24] of gold. The Greek authorities and the beneficiary argue that in 2003 the above stock had negative value because of the relatively low price of gold and the relatively high related costs.

(92) In particular, the Greek authorities have provided a calculation of the "break even" price point, for which the trade of the above stock would be gainful. Taking into account the concentration of gold in the mineral, i.e. 0.7 ounces of gold per tonne, and the price of gold on 12 December 2003, i.e. USD 407 per ounce, the value of gold concentrated in the stock of mineral was USD 284.9 per tonne. Also, the Greek authorities have provided the costs related to the trade of the above stock: treatment charges of USD 245 per ounce and USD 171.5 per tonne; transport costs of USD 50 per tonne; cleansing penalties of USD 270 per tonne; and refining charges of USD 5 per ounce and USD 4.1 per tonne. The calculation of the above results in a negative sale price of USD 210.7 per tonne.

(93) The Commission has indeed verified the above calculation. The Commission considers that, for the above reasons of price and cost, at the time of the sale the trade of this stock was loss-making. Perhaps the trade of the stock of gold minerals would be gainful, if transport cost changed/was expected to change, but this was an uncertain event. Also, the Behre Dolbear report does not provide the value of stock of gold minerals. Therefore, the Commission considers that the value of this stock cannot be calculated.

(94) The Hellenic Mining Watch alleges that the stock of gold-bearing minerals had significant value, amounting to EUR 80 million. The Commission notes that this value of EUR 80 million was not supported by any data or evidence by the

[24] A concentrate is the residue valuable metal, from which most of the waste rock has been removed. The residue metal becomes the raw material for smelting, i.e. extractive metallurgy.

Hellenic Mining Watch. On this basis as well as on the basis of the above calculation, resulting that the value of this stock cannot be calculated, the Commission does not accept this argument of the Hellenic Mining Watch.

(95) The Commission notes that the assets sold in December 2003 also included two mineral deposits of lead and zinc. The Behre Dolbear report includes an estimation of the value of existing concentrates of lead and zinc of 30 June 2004[25]. This estimation is separate to the calculation of the mines' Net Present Value and does not form part of the valuation under the Income Approach. It provides the net smelter return[26] for the owner of the mine: firstly, the value of the contained metals (lead, silver and zinc) is calculated, on the basis of the current prices and the available quantities; secondly, the "smelter pay schedule" (the cost of further processing, charged by the buyer of the minerals to their producer) is applied, taking into account specific conditions for the deduction of that cost (specific depreciation percentages, treatment and refining charges and freight costs); finally, the smelter pay schedule is deducted from the above value of the contained metals[27].

(96) The Commission notes that the above method is the standard method for calculating metal payments. Therefore the Commission will use the above method in order to estimate the market value of the mineral deposits that Ellinikos Xrysos bought in December 2003, using the mineral deposits' quantities and metal prices of December 2003[28]. By applying the above method for the mineral quantities and the metal prices of December 2003 as well as the specific smelter pay schedule conditions of Ellinikos Xrysos, the Commission concludes that the market value of the mineral deposits which Ellinikos Xrysos bought in December 2003 amounted to USD 3.7 million or EUR 3 million (using the exchange rate of 1.2254 USD/EUR of the date of the minerals' sale to Ellinikos Xrysos, 12 December 2003).

(97) The Commission notes that, according to the submission of the beneficiary, the mineral deposits of lead and zinc, acquired in December 2003, were sold in December 2004 (1 December 2004 and 31 December 2004), therefore post to the date of the Behre Dolbear report. Thus, the Commission considers that the specific conditions of the above method (value calculation for deposits of June 2004, see paragraph 95 above) are valid also for the value calculation of the mineral deposits of December 2003, since there was no other sale of minerals between December 2003 and June 2004 that could have set different conditions.

a.d Conclusion on advantage

(98) The above calculation yields a total value for the Cassandra mines of EUR 25 million, as the sum of the value of mines (EUR 16 million), land (EUR 6 million) and stock of minerals (EUR 3 million).

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25 See Appendix 11, "Stratoni concentrates cash flow".

26 The net smelter return is the amount of money which the smelter or refinery pays the mining operator for the mineral product and is usually based on a spot, or current price of the mineral, with deductions for the costs associated with further processing.

27 For information purposes, the Commission notes that the result of this calculation for 30 June 2004, as provided in the Behre Dolbear report, is a value of USD 3.5 million, i.e. EUR 2.9 million (using the exchange rate of 1.2155 USD/EUR of 30 June 2004).

28 Quantities of mineral deposits (as submitted by the beneficiary): 3.050 tonnes of lead and 2.350 tonnes of zinc; Metal prices (sources: www.kitco.com and www.lme.com): USD 684/tonne for lead, USD 5.6/ounce for silver and USD 973/tonne for zinc.

(99) This total value is significantly lower than the value presented by the Behre Dolbear report as fair-market value of the Cassandra Mines assets (USD 500 million or EUR 411 million, see paragraph 19 above). The value presented by the Behre Dolbear report was mentioned in the Commission's decision of 10 December 2008 to initiate the formal investigation procedure, as an indication that the sale price was below market value of the Mines.

(100) The reason to depart from the above value of the Behre Dolbear report (USD 500 million) is that it derives from two valuation methods which are not adequate in the case at hand (see Table 1 above). In particular, it derives from two evaluation methods, namely the "Related Transactions" and the "Market Capitalisation" methods, which cannot be accepted because: a) The base of the Related Transactions valuation is questionable, as two different mines cannot be the same: every mineral deposit, even of the same commodity, is different to some extent from other deposits; b) the Market Capitalisation is recommended as a secondary valuation method or as a rule of thumb, suitable to check valuation determinations by primary methods like the Income Approach. In the case at hand, the Market Capitalisation method cannot be used even as a secondary valuation method, because it verifies only the value of the Income Approach resulting from market capitalisations of first half of 2004, which cannot be accepted because this information is ex posteriori to the date of the sale; and c) Behre Dolbear states its trust in the value deriving from the Income Approach.

(101) Furthermore, the total value at which the Commission concludes (EUR 25 million) is much lower than the value range provided by the Income Approach (EUR 107.2 million-EUR 331.1 million, see paragraph 69 above). The reason for this is that the latter concerns: a) values of assets that were not transferred in December 2003, e.g. receivables, cash and stock of minerals (the one of June 2004, different than the one of December 2003, see calculation in paragraphs 91-97); and b) mineral resources characterised in the Behre Dolbear report as speculative and uncertain[29], (mineable material or exploration potential). The latter are not included in the cash flows for the determination of the net present value under the Income Approach (see paragraph 72 above), which derives only from proven and probable reserves, excluding all other resources. In addition, the above value range also includes different values of Olympias under different pricing scenarios, however the Commission does not accept those values (see paragraphs 72-76 above). Finally, the above value range is influenced by the above mentioned different pricing scenarios, of which the Commission accepts only one (see paragraph 72 above).

(102) Therefore, the Commission concludes that the market value of the Cassandra Mines assets amounted to EUR 25 million at the time of their sale to Ellinikos Xrysos.

(103) The Commission considers that the advantage amount, from which Ellinikos Xrysos benefitted, equals EUR 14 million, as the difference between the total fair market value of the Cassandra Mines assets (EUR 25 million) and the price paid in the sale (EUR 11 million).

(104) On the basis of the above analysis of the arguments put forward by Greece and the beneficiary as well as the calculation of the sold assets' market value and the

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29 See pages 10, 16 and 20.

latter's comparison to the price actually paid by Ellinikos Xrysos, the Commission considers that the criterion of advantage is fulfilled.

b. State resources

(105) The Greek authorities and the beneficiary argue that Greece only acted as an intermediary in the 2003 sale and has never been owner of the Mines. They also argue that Greece has not received any amount of money from the 2003 sale, as the EUR 11 million were paid directly to TVX Hellas. Finally, the Greek authorities and the beneficiary argue that the 1995 sale transaction took place between TVX Hellas and the previous owner, a private company in bankruptcy.

(106) The Commission notes that Greece was an active party of the two transactions, realised through two different contracts. In the second contract, Greece assumed the obligations of a vendor but also was entitled to the revenue of the sale. The latter was paid directly to TVX Hellas in order to cover a certain obligation of the Greek State, therefore the latter's role as a vendor and not as just an intermediary is again verified. As regards the argument that the 1995 sale took place between TVX Hellas and a private company, the Commission considers that it is irrelevant to the criterion of State resources in the case at hand, because this criterion is examined only for the 2003 sale.

(107) Thus, the Commission does not accept the arguments put forward by the Greek authorities and the beneficiary and considers that the criterion of State resources is fulfilled.

c. Selectivity

(108) The Cassandra Mines were sold to Ellinikos Xrysos, therefore the latter benefitted selectively from the difference between the sale price and the sold assets' market value. Thus, the Commission considers that the measure is selective as it favours only this specific company.

(109) Neither Greece nor the beneficiary contested this point.

d. Distortion of competition and affectation of trade between Member States

(110) Ellinikos Xrysos is active in a sector whose products are widely traded among Member States. In particular, there is zinc, copper, lead, gold and silver mining in eleven Member States, apart from Greece, i.e. in United Kingdom, Italy, Finland, Poland, Slovakia, Romania, Bulgaria, Spain, Ireland, Portugal and Sweden[30]. As regards the trade of zinc, copper, lead, gold and silver, those are traded in all Member States[31]. Also, the aid measure in question granted Ellinikos Xrysos an advantage over its competitors (see paragraphs 39-104 above). When State aid strengthens the position of an undertaking compared with other undertakings competing in trade between Member States, those other undertakings must be regarded as affected by that aid. Thus, the criterion of distortion of competition and affectation of trade between Member States is indeed fulfilled.

(111) Neither Greece nor the beneficiary contested this point.

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30 Source: European Association of Mining Industries, http://www.euromines.org.

31 Source: European Mineral Statistics 2004-2008, British Geological Survey, http://www.bgs.ac.uk/.

e. Conclusion on the existence of aid in measure 1

(112) On the basis of the above, the Commission concludes that the 2003 sale of the Cassandra Mines to Ellinikos Xrysos constitutes State aid in favour of Ellinikos Xrysos in the meaning of Article 107(1) TFEU. The amount of aid equals to EUR 14 million, as the difference between the price paid in the 2003 sale, i.e. EUR 11 million, and the market value of the sold assets at the time of the sale, i.e. EUR 25 million.

Measure 2: Waiver of tax and reduction of legal fees

a. State resources

(113) According to Greece and the beneficiary, the reduction of legal fees does not involve State resources, because lawyers are private operators and not public employees, and the fees' tax and duties were paid duly. Also, according to Greece, the buyer's legal fees were not paid by the State. At the same time, the reduction of legal fees is stipulated in the sale's contract, Article 5, where it is stated that the legal rights and fees "are reduced to 5% of the minimum fee level, as foreseen by the relevant laws".

(114) The Commission agrees that lawyers are not public employees. On the other hand, the Commission notes that notaries are indeed public servants. However, notaries do not receive a salary; their income comes exclusively from their clients and not from the State budget.

(115) The Commission also notes that, in sale contracts, legal fees are borne by both parties. In the case at hand, the Commission accepts the Greek authorities' submission that the State did not pay the above fees in the place of the buyer.

(116) Thus, the Commission considers that the reduction of legal fees does not involve State resources and therefore does not constitute State aid in the sense of Article 107(1) of TFEU.

(117) As regards the waiver of tax, taxes are aimed to finance the budget of the State. Therefore the non-collection of taxes deprives the State of resources. Thus, the Commission considers that the waiver of tax indeed involves State resources.

b. Advantage

(118) The Commission notes that two taxes were due in the case of the sale of the Cassandra Mines: 1) a tax on the transfer of the mines, equal to a rate of 5%; and 2) a tax on the transfer of the land, equal to a rate of 7%-9%.

(119) Ellinikos Xrysos argues that the application of any tax in the 2003 sale would be premature, as the sale contract was not definitive, because of an annulling clause. The Commission does not accept this argument, because the specific annulling clause only foresees undoing the sale in case of the two parties not respecting certain obligations, in order to safeguard its effect, which is a usual clause for the majority of contracts and does not make them not definitive. In addition, the contract indeed stipulates its validation, in particular in its Article 9, where validation is set for the date of publication of the contract's ratifying law in the Government's Gazette. Finally, the contract makes no reference to any kind of non-definitive status. Thus, the Commission considers that the contract was indeed definitive and the appropriate taxes should have been applied.

(120) The Greek authorities and the beneficiary also argue that the value of the Mines was negative, therefore an incentive for potential buyers was needed. On this argument, the Commission notes that the value of the Mines at the time of the sale was not negative but positive and amounted to EUR 16 million (as calculated in paragraphs 68-79 above).

(121) The Commission notes that according to the Greek Mining Code, transfers of mines are taxed at a rate of 5% on the basis of their value, applicable to transactions against consideration, "με επαχθή αιτία". The Greek authorities argue that transactions "against consideration" are those caused by unfavourable incidents, e.g. death of the owner, therefore the 5% tax stands only for such transactions and was not applicable in the case at hand. The Commission cannot accept this argument, because, according to its investigation, transactions "against consideration" are those where the person who acquires an asset gives as compensation a return and in general when there is a consideration for the acquisition. This is also the well-established and accepted interpretation of the issue[32].

(122) The market value of the mines in 2003 was EUR 16 million (as calculated in paragraphs 68-79 above). Thus, the Commission considers that the appropriate tax for the mines sold in 2003 would equal to EUR 0.8 million.

(123) In addition, Greece acknowledges that 7%-9% tax is indeed levied in all cases of land sale, regardless of whether it is a sale of company assets or individual ones. On this issue, the Commission received two different letters, one from the Ministry of Finance and one from the Ministry of Environment and Climate Change (competent for mining issues), contradicting each other. The Commission pointed this contradiction to the Greek authorities but did not receive any letter with a final opinion. Thus, the Commission accepts the information submitted by the Ministry of Finance, as the competent service for taxation issues.

(124) The market value of land in 2003 was EUR 6 million (as calculated in paragraphs 80-90 above). Thus, the Commission considers that the 2003 land sale should have resulted in a tax of EUR 0.54 million[33].

(125) As the 2003 sale contract foresees zero tax for the transfer, the Commission considers the above amounts (totalling EUR 1.34 million) as the advantage from which Ellinikos Xrysos benefitted.

(126) Greece and the beneficiary claim that the tax waiver was equal to EUR 38,000 and therefore was lower than the *de minimis* threshold[34] and did not benefit the buyer. The Commission cannot accept this argument, because the *de minimis* threshold, equal to EUR 100,000 at the time of the 2003 sale, applies irrespective of the form of the aid or the objective pursued. Therefore one cannot distinguish the different aid measures at hand, i.e. measures 1 and 2, and only take into account part of measure 2, i.e. the tax waiver. Thus, the Commission, taking under consideration both of the aid measures of the case at hand and finding that they involve aid

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32 See e.g. "Interpretation and case law of Civil Law", Vasilios Vathrakokoilis, Judge of the Supreme Court, vol. 2, 2003, p. 636.

33 Calculation applying the 7%-9% tax: EUR 15.000 * 0.07 + EUR 5,990,000 * 0.09 = EUR 1,050 + EUR 539,100 = EUR 540,150.

34 See footnote 15 above.

amounts of over the *de minimis* threshold of EUR 100,000, considers that aid granted fails to satisfy the conditions for aid to be considered *de minimis*. On the basis of the above, the Commission maintains its conclusion of paragraph (125) above.

c. Selectivity

(127) The criterion of selectivity is fulfilled in the same way as in paragraph (108) above.

d. Distortion of competition and affectation of trade between Member States

(128) Finally, criterion of distortion of competition and effect on trade between Member States is fulfilled in the same way as in paragraph (110) above.

e. Conclusion on the existence of aid in measure 2

(129) On the basis of the above, the Commission concludes that the waiver of tax constitutes State aid of EUR 1.34 million in favour of Ellinikos Xrysos in the meaning of Article 107(1) TFEU. On the other hand, the Commission considers that the reduction of legal fees does not constitute State aid in the meaning of Article 107(1) TFEU.

IV.b. Compatibility of the aid with the Internal Market

General

(130) Inasmuch as the measures constitute State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.

(131) Articles 107(2) and 107(3) TFEU provide for exemptions to the general rule that State aid is incompatible with the internal market as stated in Article 107(1).

(132) In the following the Commission will assess the compatibility of the measures under those exceptions.

Exemptions under Article 107(2) TFEU

(133) The exemptions in Article 107(2) TFEU do not apply in the present case because this measure does not have a social character, has not been awarded to individual consumers, is not designed to make good damage caused by natural disasters or exceptional occurrences and has not been awarded to the economy of certain areas of the Federal Republic of Germany affected by the division of that country.

Exemptions under Article 107(3) TFEU

(134) Further exemptions are laid out in Article 107(3) TFEU. The exceptions laid down in Article 107(3)(b), (d) and (e) are clearly not applicable and have not been invoked by the Greek authorities. In the following, the Commission will assess the measures' potential compatibility under Article 107(3)(a) and (c).

(135) Article 107(3)(a) states that "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment" may be declared compatible with the internal market. The

Cassandra Mines are located in an assisted area under Article 107(3)(a) TFEU, therefore Ellinikos Xrysos could potentially be eligible for regional aid.

(136) The Guidelines on national regional aid applicable at the time of the 2003 sale ("the 1998 Regional aid guidelines"[35]) set out the conditions for the approval of regional investment aid.

(137) According to the 1998 Regional aid guidelines, the object of regional investment aid is to secure either productive investment (initial investment) or job creation which is linked to investment.

(138) As regards the possibility to consider aid for job creation, it shall be stressed that under regional aid, job creation means a net increase in the number of jobs in a particular establishment compared with the average over a period of time and that any jobs lost during that period must therefore be deducted from the apparent number of jobs created during the same period. Furthermore, the amount of aid shall be calculated on the basis of the wage cost, in particular it must not exceed a certain percentage of the wage cost of the person hired, calculated over a period of two years.

(139) In comparison to these requirements, the Commission observes that the sale contract only included a vague clause allowing Ellinikos Xrysos the discretion to recruit any number of employees, according to its needs; secondly the above mentioned conditions are not fulfilled. The Commission therefore is on the view that job creation in the sense of the Guidelines was not secured.

(140) As regards the definition of an initial investment, the 1998 Regional aid guidelines define it as an investment in fixed capital relating to the setting-up of a new establishment, the extension of an existing establishment, or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment (through rationalisation, diversification or modernisation)[36].

(141) The Commission accepts that the acquisition of Skouries qualifies as an initial investment, on the basis of the above definition of the Guidelines. Indeed, at the time of the 2003 sale there was no established mining infrastructure in Skouries, therefore an investment in fixed capital was in order, relating to the setting-up of the new mine's construction (see paragraph 66 above).

(142) Regarding Stratoni, the Commission considers it is doubtful that the sale of Stratoni can be considered as an initial investment in the meaning of the Guidelines[37].

(143) However, according to the 1998 Regional aid guidelines, an investment in fixed capital undertaken in the form of the purchase of an establishment which has closed or which would have closed had it not been purchased may also be regarded as initial investment.

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[35] OJ C 74, 10.3.1998, p. 9.

[36] Point 4.4. of the Guidelines.

[37] Indeed, Stratoni had a valid mining permit and an established mining infrastructure, therefore it was operational at the time of the sale (see paragraph 77a). Thus, it does not seem that the sale of Stratoni was related to the setting-up of a new establishment, the extension of an existing establishment, or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment.

(144) At this regard, the Commission notes that Greece has indeed demonstrated that the mines were closed or would have been closed had they not been purchased by Ellinikos Xrysos[38]. Thus, such investment could be considered as initial investment.

(145) Nevertheless, the fact that the sale of the Cassandra mines is to be considered as initial investment doesn't mean that this investment is compatible on the basis of the 1998 Regional aid guidelines. Indeed, two conditions set by these guidelines are not fulfilled, as follows in paragraphs (146)-(152):

(146) Firstly, the sale of the Cassandra mines is an *ad hoc* measure. On this aspect, the 1998 Regional aid guidelines explicitly mention the following: "A derogation from the incompatibility principle established by Article [107(1)] of the Treaty may be granted in respect of regional aid only if the equilibrium between the resulting distortions of competition and the advantages of the aid in terms of the development of a less favoured region can be guaranteed […] An individual *ad hoc* aid payment made to a single firm, or aid confined to one area of activity, may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited. Such aid generally comes within the ambit of specific or sectoral industrial policies and is often not in keeping with the spirit of regional aid policy as such. The latter must remain neutral towards the allocation of productive resources between the various economic sectors and activities. The Commission considers that, unless it can be shown otherwise, such aid does not fulfil the requirements set out in the preceding paragraph".

(147) Despite the fact that Greece was requested to argue on the compatibility of the aid on the basis of Article 107(3)(a) TFEU and the 1998 regional aid guidelines, in the context of the Commission's opening decision of 10 December 2008, the Commission notes that Greece did not to demonstrate at all that the sale of the Cassandra mines was founded on an equilibrium between the resulting distortions of competition and the advantages of the aid in terms of the development of a the less favoured region in question.

(148) Secondly, regional aid must have an incentive effect, i.e. it must provide a real incentive to undertake investments which would not otherwise be made in the assisted areas. In that sense, the Guidelines mention that "aid schemes must lay down that an application for aid must be submitted before work is started on the projects"[39]. This condition is also valid for *ad hoc* aid measures[40]. Greece did not demonstrate that the beneficiary complied with the above requirement and submitted an aid application before starting the project.

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[38] The Commission considers that admittedly the State as the owner of the mines would not have exploited them economically itself. Therefore, the purchase by Ellinikos Xrysos of the mines could be considered as indispensable to prevent disappearance of these assets from the assisted region in question.

[39] Point 4.2 of the Guidelines.

[40] See case T-162/06 *Kronoply* v *Commission* [2009] ECR II-1, paragraphs 80 and 81. In this judgment, the Court of First instance doesn't determine whether the aid concerned has an incentive effect but clearly states that the incentive effect is a condition for the compatibility of regional aid and that point 4.2 of the 1998 regional aid guidelines "refers to a circumstance of a chronological nature and therefore points to an examination *ratione temporis*, which is perfectly suitable for determining whether an incentive effect exists". For a negative decision based on the lack of incentive effect of an aid to a direct foreign investment by a large enterprise, see also Commission Decision of 14 October 1998 on a proposal by Austria to grant aid to LiftgmbH (case C(1998) 3212).

(149) Also as regards the incentive effect of the aid, the Commission notes that Greece did not realise any open and unconditional tender, in order to sell the Cassandra Mines. The Commission considers that such an open and unconditional tender would have been the test to verify if there were or not any willing investors in the market for the mines. Since no such tender took place, the Commission is of the view that Greece did not verify the level of willingness of the market to invest in the Cassandra Mines, and thus did not verify the need for an aid with incentive effect.

(150) In addition, the Commission notes that the acquisition of the Cassandra Mines was an investment in the mining sector. The latter is a capital-intensive sector where usually significant amounts of investments are required for business development and operations. Indeed, in the case at hand, according to the Behre Dolbear report, the capital costs for mine development and construction in Skouries were EUR 220 million (see paragraph 66 above). The Commission notes this amount to be considerably higher than the aid amount in question, i.e. EUR 15.34 million (see combined amounts in paragraphs 111 and 124 above). In particular, the above aid amount represents only 7% of the investment required in one of the mines. Furthermore, the Commission did not receive any evidence demonstrating that Ellinikos Xrysos could not realise the investment without aid. To the contrary, the Commission notes that the Greece and Ellinikos Xrysos agreed that the latter would indeed realise capital investments for the development of the mines[41]. Thus, the Commission considers that the aid in question did not have an incentive effect and was not necessary for investors willing to acquire the Cassandra Mines.

(151) Finally, Greece did not demonstrate in any way the incentive effect of the aid in question.

(152) On the basis of the above, the Commission considers that the sale of the Cassandra Mines does not fulfil the conditions of the 1998 Regional aid guidelines for declaring the aid compatible as initial investment aid.

(153) It could also be explored whether the aid can be declared compatible as operating aid under the same guidelines. The 1998 Regional aid guidelines define operating aid as aid aimed at reducing a firm's current expenses. In accordance with the Guidelines, operating aid may be granted on an exceptional basis in regions eligible under the derogation in Article 107(3)(a) TFEU.

(154) However, according to the Guidelines, operating aid is aid "aimed at reducing a firm's current expenses" (point 4.15). The Commission notes that current expenses are non-capital and usually recurrent expenditures necessary for the operation of a business. The Commission notes that the aid in question did not finance current expenses in the above sense but an investment in fixed capital (acquisition of mines and land) and a waiver of the due taxes for the above investment (acquisition taxes). Therefore, the aid in question did not finance current expenses. Thus, the Commission considers that the aid in question cannot be found to fulfill the definition of operating aid in the sense of the Guidelines.

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41 As stipulated in articles 3(2)-3(5) of the 2003 sale contract, Ellinikos Xrysos was obliged to prepare an investment plan within 24 months from the publication of the Law ratifying the sale contract, to submit it for the necessary administrative approvals and to realise the approved plan within the administratively set deadline.

(155) Also according to the Guidelines, operating aid may be granted in eligible regions, provided that its level is proportional to the handicaps it seeks to alleviate, and it is for the Member State to demonstrate the existence of any handicaps and gauge their importance. In the case at hand, Greece did not provide any kind of measurement or calculation of the handicaps of the region and of the level of the aid, in order to demonstrate that the latter is proportional to the former.

(156) Finally, according to the Guidelines, operating aid must be both limited in time and progressively reduced. The Commission notes that the sale in question did not have any kind of time limitation or progressive reduction. Indeed, both the sale price and the tax waiver, as fixed in the sale contract, were determined and validated with no reference to any kind of time limit or reduction.

(157) Thus, the Commission is of the view that the aid cannot be declared compatible as operating aid under the Guidelines.

(158) Therefore, the Commission concludes that the aid can not be declared compatible on the basis of the 1998 Regional aid guidelines.

(159) As regards compatibility under the general block exemption Regulation, declaring certain categories of aid compatible with the common market in application of Articles 107 and 108 TFEU[42], the Commission considers that on the basis of the financial figures submitted by the Greek authorities, Ellinikos Xrysos is a large enterprise, as demonstrated in paragraph (12) above. According to the general block exemption Regulation, Article 1(5), ad hoc aid to large companies is excluded from the scope of its application.

(160) Also according to the general block exemption Regulation, Article 8(3)), in case that any aid covered by it is granted to a large enterprise, the Member State should confirm the material incentive effect of the aid, on the basis of a document that analyses the viability of the aided project or activity, with and without aid. The Commission has not been provided with such evidence.

(161) Finally, according to the general block exemption Regulation, the acquisition of the capital assets directly linked to an establishment, where the establishment has closed or would have closed had it not been purchased, is considered an eligible cost provided that the transaction has taken place under market conditions. The Greek authorities admitted that the transaction took place without an open, unconditional and transparent competition or an independent valuation of the market value of the Cassandra Mines assets. Thus, the Commission considers that the sale in question did not take place under market conditions.

(162) In conclusion, the aid granted to Ellinikos Xrysos is not compatible under the general block exemption Regulation.

(163) Article 107(3)(c) TFEU states that "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest" may be declared compatible with the internal market.

(164) The Commission considers that the derogation under Article 107(3)(c) does not apply in the case at hand and that Ellinikos Xrysos is not eligible for rescue and/or

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42 OJ L 214, 9.8.2008, p. 3.

restructuring aid. Indeed, according to point 7 of the 1999 Community Guidelines on State aid for rescuing and restructuring firms in difficulty, applicable at the time of the 2003 sale[43], "[…] *a newly created firm is not eligible for rescue or restructuring aid, even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets*". Ellinikos Xrysos is a company which was established three days before the acquisition of the Cassandra Mines. Also, restructuring aid is conditional on the existence of a sound restructuring plan. Greece did not provide such a restructuring plan. In conclusion, the aid granted to Ellinikos Xrysos is not compatible under rescue and/or restructuring aid rules.

(165) Finally, and as regards environmental aid, Ellinikos Xrysos was obliged to meet the applicable environmental standards. In particular, it was obliged to realise investments for the protection of the environment and keep its mining operations in accordance with Greek and Community environmental laws. Since the above were compulsory by law, it was not necessary to provide Ellinikos Xrysos with aid in order to obey the law.

Conclusion on compatibility

(166) In the view of the above, the Commission concludes that the aid measures in question are incompatible with TFEU.

(167) In particular, the Commission considers that the difference between the market value of the Cassandra Mines assets and the price at which they were sold to Ellinikos Xrysos is incompatible aid in favour of Ellinikos Xrysos; also, the Commission considers that the amount of taxes which should have been paid by Ellinikos Xrysos for the acquisition of the mines and the land is incompatible aid in favour of Ellinikos Xrysos.

V CONCLUSION

(168) On the basis of the foregoing, the Commission concludes that the measures at hand constitute State aid in favour of Ellinikos Xrysos in the meaning of Article 107(1) TFEU. In particular, the Commission considers that the difference between the market value of the Cassandra Mines assets and the price at which they were sold to Ellinikos Xrysos constitutes aid in favour of Ellinikos Xrysos; also, the Commission considers that the amount of taxes which should have been paid by Ellinikos Xrysos for the acquisition of the mines and land constitutes aid in favour of Ellinikos Xrysos.

(169) In addition, the Commission concludes that the aid measures at hand are incompatible with the internal market. In particular, the Commission considers that the difference between the market value of the Cassandra Mines assets and the price at which they were sold to Ellinikos Xrysos is incompatible aid in favour of Ellinikos Xrysos; also, the Commission considers that the amount of taxes which should have been paid by Ellinikos Xrysos for the acquisition of the mines and land is incompatible aid in favour of Ellinikos Xrysos.

(170) According to the TFEU and the Court of Justice's established case law, the Commission is competent to decide that the State concerned must abolish or alter

[43] OJ C 288, 9.10.1999, p. 2.

aid[44] when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation[45]. In this context, the Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored[46].

(171) Following that case-law, Article 14 of Regulation (EC) No 659/99[47] laid down that "where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary."

(172) Thus, given that the measures at hand are to be considered as unlawful and incompatible aid, the amounts of aid must be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid. Recovery shall be hence affected from the time when the advantage occurred to the beneficiary, i.e. when the aid was put at the disposal of the beneficiary and shall bear recovery interest until effective recovery.

(173) The incompatible aid element of the measures is calculated as the sum of a) the difference between the market value of the Cassandra Mines assets and the price at which they were sold to Ellinikos Xrysos (EUR 14 million); and b) the amount of tax which should have been paid by Ellinikos Xrysos for the acquisition of the assets, i.e. mines and land (EUR 1.34 million). The above are equal to EUR 15.34 million.

(174) In addition to the above and as regards recovery, the Commission notes that the 2003 sale contract included two annulment provisions, in its Article 4. According to those provisions, Ellinikos Xrysos is allowed to annul the sale, in case of: a) an administrative or legal act by the Greek authorities to change the mining permits' status; or b) a judiciary decision (related to the mining permits' status) to stop the operations or the realization of the investment plan. In both cases, Ellinikos Xrysos would return the assets to the Greek State and would be refunded the total EUR 11 million, with a possible additional remuneration.

(175) The Greek authorities have submitted that the above two provisions could be activated by a decision of the Commission for the recovery of incompatible aid. Whether this is the case is a question of contract interpretation and national law. If however the provisions are activated, such activation should have no effect on the obligation of Greece to recover the aid amount indicated in this decision.

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 15.34 million unlawfully granted by Greece in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of

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44 Case C-70/72 *Commission v Germany* [1973] ECR 813, point 13.

45 Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, point 75.

46 Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, points 64-65.

47 OJ L 83, 27.3.1999, p. 1.

Ellinikos Xrysos S.A,, by way of a sale of assets and land below its value and a waiver of the associated taxes, with the aim of protecting the employment and the environment and also of creating an incentive for potential buyers of the Cassandra Mines, is incompatible with the internal market.

Article 2

1. Greece shall recover the aid referred to in Article 1 from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

4. Greece shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Greece shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

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

   (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
   (b) a detailed description of the measures already taken and planned to comply with this Decision;
   (c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Greece shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary

Article 5

This Decision is addressed to Greece.

Done at Brussels, 23.02.2011

For the Commission

Joaquín Almunia

Vice-president of the Commission

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days from the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

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State aid Greffe
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