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<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject:** **State aid SA.34308 (2013/C) (ex 2013/NN) – Greece –**  
***Possible state aid to Hellenic Defence Systems HDS (EAS - Ellinika Amyntika Systimata)***

Madam,

The Commission wishes to inform Greece that, having examined the information supplied by your authorities on the measures referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

## 1. PROCEDURE

- (1) In the context of its economic adjustment programme, Greece has undertaken an extensive privatisation programme.<sup>1</sup> Hellenic Defence Systems S.A. ('HDS', or *Ellinika Amyntika Systimata A.E.* – EAS in Greek) has been earmarked as a State-owned company for privatisation.
- (2) In January 2012 the Hellenic Republic Asset Development Fund ('HRADF')<sup>2</sup> informed the Commission services about the proposed privatisation of HDS. In order to clarify whether any state aid issues could arise in that privatisation project, the Commission opened a case *ex officio* and initiated a preliminary assessment on 1 February 2012.
- (3) In that context, the Commission learned that HDS has benefitted from certain State measures in the past. The Commission requested information by letters dated 16

<sup>1</sup> See the *Second Economic Adjustment Programme for Greece – First Review December 2012*, [http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2012/pdf/ocp123\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf).

<sup>2</sup> The Hellenic Republic Asset Development Fund (HRADF) is a *société anonyme* established on 1 July 2011 in order to manage the privatisation process.

February 2012, 4 April 2012, by e-mail dated 10 April 2012 and by letters dated 4 May 2012, 4 July 2012 and 24 July 2012. The Greek authorities provided replies on 9 March 2012, 18 July 2012 and 20 August 2012. Meetings between the Commission services and representatives of the Greek authorities and HRADF took place on 26 March 2012, 30 April 2012 and 11 September 2012 in Athens.

## 2. THE BENEFICIARY

- (4) HDS is a company active in the manufacturing of defence-related and civil-use products. It is 99.8% owned by the Greek State, 0.18% by Piraeus Bank (a private financial institution) and 0.02% by individuals. HDS has approximately 1000 employees (31 July 2011) and therefore qualifies as a large enterprise.<sup>3</sup> According to the Greek authorities, its production breakdown in 2011 was as follows:
- Military production:<sup>4</sup> approximately 95% of turnover,<sup>5</sup> of which 79% domestic sales,<sup>6</sup> 16% rest of Europe, 5% third countries;
  - Civil production:<sup>7</sup> approximately 5% of turnover, of which 100% domestic sales.
- (5) HDS has 5 industrial facilities in various places in Greece: Four industrial facilities in the Athens greater area (Lavrion, Mandra, Hymettus and Elefsis) and one in Aeghion. Civil production is carried out in a factory in the Lavrion industrial facility and a production line in the Hymettus facility.
- (6) HDS has two main 100% subsidiaries, Electromechanica Kymi Ltd (manufacturing of dual use products)<sup>8</sup> and Ipiros Metalworks Industry SA (manufacturing of civil use products)<sup>9</sup> and nine smaller ones..
- (7) HDS was established in 2004, after the merger of "Greek Power and Cartridge Company SA" (known as "PYRKAL") and "Hellenic Arms Industry SA" (known as "EBO").
- (8) The Commission will regard HDS at the level of the Group for any assessment regarding HDS in the present Decision. According to the information provided by the Greek authorities, HDS's key financial data for the period 2004-2011 are as follows:

**Table 1: HDS's key financial data 2004-2011 (in EUR million)**

	2004*	2005*	2006*	2007	2008	2009	2010	2011
Turnover	93.3	88.0	89.0	63.8	62.1	53.9	31.3	39.2
EBT	-131.6	-91.4	-105.7	-118.9	-146.9	-173	-138.7	10.9**
Registered capital	400.3	461.4	489.0	493.0	493.0	493.0	493.0	651.2
Own equity	66.0	35.7	-42.4	-282.7	-416.3	-594.0	-676.3	-537.7
Losses of previous	216.0	347.6	439.0	544.7	663.6	810.5	983.5	1,122.2

<sup>3</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.05.2003, p.36.

<sup>4</sup> Such as infantry weapons, ammunition, weapon systems, and aircraft fuel tanks.

<sup>5</sup> Average percentage of 2008-2010.

<sup>6</sup> Greek Ministry of Defence contracts.

<sup>7</sup> Such as small pistols, explosives for construction works and fireworks.

<sup>8</sup> Uniforms and accessories.

<sup>9</sup> Process of copper alloys for coin blanks etc.

\* Only for HDS S.A., no data on Group level.

\*\* According to the notes of the 2011 financial statement, the positive EBT in 2011 resulted from the addition of "Revenues from unused provisions" of EUR 97.9 million and not from increased sales.

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### 3. DESCRIPTION OF THE MEASURES

#### 3.1. Measure 1: State guarantees

- (9) According to the information provided by Greece, between 2004 and 2011 the State guaranteed 11 loans to HDS from various banks based in Greece with varying interest rates for a guarantee premium ('fee') of 1%. The total amount of the loans is EUR 942.05 million. According to the information provided by Greece, out of that amount, HDS appears to have defaulted on total payments of over EUR 246 million, with a subsequent triggering of the respective State guarantee. The Greek authorities have explained that no assets were pledged for those loans. The provision of these guarantees was not notified to the Commission for a state aid assessment. on
- (10) In their submission of 9 March 2012, the Greek authorities provided a list of the guarantees and the default payments, as set out in tables 2 and 3:

**Table 2: Greek State guarantees for loans to HDS**

State Guaranteed Loans							
Notice	Bank	Type of Loan	Disbursement Date	Date of Guarantee Granted	Commission Fee	Total Amount	Interest rate
Amounts in EUR							
1	National Bank	Bond loan	2009	23/7/2009 (GOVERNMENT GAZETTE 1554/28-9-2009)	1%	195 000 000	2.6055%+1.85%
2	National Bank	Loan	2005	17/3/2005 (GOVERNMENT GAZETTE 387/24-3-2005)	1%	30 000 000	3,54%+0.14%
3	Alpha bank	Bond loan	2006	18/4/2006 (GOVERNMENT GAZETTE 550/3-5-2006)	1%	164 000 000	4.019%+0.12%
4	National Bank	Loan	2004	3/3/2004 (GOVERNMENT GAZETTE 494/5-3-2004)	1%	10 000 000	EUR 6M +0.135%
5	National Bank	Bond loan	2008	21/4/2008 (GOVERNMENT GAZETTE 788/6-5-2008)	1%	213 000 000	4.63%+0.29%
6	Emporiki Bank	Bond loan	2007	25/4/2007 (GOVERNMENT GAZETTE 720/8-5-2007)	1%	175 000 000	4.605%+0.06%
7	National Bank	Loan	2004	15/12/2004 (GOVERNMENT GAZETTE 1886/20-12-2004)	1%	15 050 000	3.36%+0.14%
8	National Bank	Loan	2004	21/6/2004 (GOVERNMENT GAZETTE 963/28-6-2004)	1%	40 000 000	EUR 6M +0.135%
9	Alpha bank	Loan	2005	28-6-2005 (GOVERNMENT GAZETTE 911/4-7-2005)	1%	60 000 000	2.974%+0.09%
10	National Bank, Alpha bank, EFG Eurobank	Bond loan	2011	29/7/2011 (GOVERNMENT GAZETTE 1823/12-8-2011)	1%	30 000 000	N/A
11	Tbank	Bond loan	2011	4/11/2011 (GOVERNMENT GAZETTE 2495/4-11-2011)	1%	10 000 000	N/A
<b>Total</b>						<b>942 050 000</b>	

Source: Letter of the Greek authorities of 9 March 2012

**Table 3: Payments by the Greek State on guaranteed loans defaulted by HDS**

Default Date	Payment (Amounts in EUR)	Default Date	Payment (Amounts in EUR)
<b>2004</b>		<b>2010</b>	
04/11/2004	114,488.89 €	12/02/2010	4,379,817.52 €
22/12/2004	468,800.00 €	24/03/2010	3,009,311.11 €
<b>Total</b>	<b>583,288.89 €</b>	26/04/2010	13,031,740.42 €
<b>2005</b>		05/05/2010	751,528.16 €
05/05/2005	117,800.83 €	17/05/2010	5,225,444.38 €
25/05/2005	2,019,904.02 €	18/05/2010	4,048,325.34 €
21/06/2005	266,301.39 €	25/05/2010	2,016,656.51 €
22/06/2005	474,615.55 €	26/05/2010	1,777,653.18 €
26/09/2005	570,400.00 €	01/06/2010	2,128,493.66 €
<b>Total</b>	<b>3,449,021.79 €</b>	21/06/2010	1,265,215.28 €
<b>2006</b>		22/06/2010	3,004,192.66 €
01/02/2006	117,903.33 €	30/06/2010	5,393,169.24 €
09/03/2006	999.60 €	12/08/2010	4,311,407.48 €
03/02/2006	1,998,140.47 €	24/09/2010	2,970,222.22 €
09/03/2006	13,476.79 €	25/10/2010	12,832,641.51 €
01/02/2006	267,764.58 €	05/11/2010	746,811.01 €
01/02/2006	1,472.71 €	16/11/2010	5,254,155.62 €
02/02/2006	458,923.33 €	18/11/2010	4,115,424.66 €
09/03/2006	2,221.14 €	22/11/2010	1,998,269.35 €
02/02/2006	919,200.00 €	26/11/2010	1,769,186.24 €
02/02/2006	4,396.23 €	20/12/2010	1,246,493.75 €
29/12/2006	919,200.00 €	22/12/2010	2,990,612.37 €
<b>Total</b>	<b>4,703,698.18 €</b>	31/12/2010	5,412,461.54 €
<b>2007</b>		<b>Total</b>	<b>89,679,233.21 €</b>
26/03/2007	558,133.33 €	<b>2011</b>	
25/04/2007	3,384,681.43 €	14/02/2011	4,427,424.25 €
07/05/2007	193,931.11 €	24/03/2011	2,916,800.00 €
19/11/2007	4,137,791.10 €	26/04/2011	12,649,951.85 €
26/11/2007	2,078,654.57 €	05/05/2011	749,881.03 €
20/12/2007	268,064.58 €	05/05/2011	300.00 €
24/12/2007	3,766,733.33 €	17/05/2011	5,197,233.15 €
31/12/2007	919,200.00 €	18/05/2011	4,048,325.34 €
<b>Total</b>	<b>15,307,189.45 €</b>	23/05/2011	1,989,382.17 €
<b>2008</b>		26/05/2011	1,764,136.44 €
24/03/2008	558,133.00 €	01/06/2011	2,099,625.53 €
29/04/2008	3,471,620.57 €	20/06/2011	1,227,172.22 €
05/05/2008	908,431.11 €	22/06/2011	2,997,736.31 €
22/12/2008	1,326,655.91 €	30/06/2011	5,251,753.85 €
22/12/2008	3,769,034.40 €	12/08/2011	4,279,682.72 €
31/12/2008	919,200.00 €	26/09/2011	2,882,920.50 €
<b>Total</b>	<b>10,953,074.99 €</b>	25/10/2011	12,434,443.69 €
<b>2009</b>		07/11/2011	754,878.54 €
24/03/2009	555,066.67 €	16/11/2011	5,282,866.85 €
27/04/2009	3,381,327.83 €	18/11/2011	4,115,424.65 €
05/05/2009	909,257.35 €	22/11/2011	1,978,118.67 €
18/05/2009	5,222,685.43 €	28/11/2011	1,757,087.29 €
18/05/2009	4,048,325.34 €	01/12/2011	2,087,765.80 €
22/05/2009	3,022,899.01 €	20/12/2011	1,209,182.29 €
22/05/2009	2,259,296.30 €	22/12/2011	3,022,476.01 €
26/05/2009	1,954,981.64 €	30/12/2011	5,181,046.16 €
22/06/2009	1,303,258.33 €	<b>Total</b>	<b>90,305,615.31 €</b>
22/06/2009	3,387,185.71 €		
30/06/2009	5,534,584.62 €		
<b>Total</b>	<b>31,578,868.23 €</b>		

Source: Letter of the Greek authorities of 9 March 2012

### 3.2. Measure 2: 2003 grant

(11) According to the information provided by the Greek authorities, in 2003, the State provided a grant of EUR 10 million to HDS for the implementation of an

investment plan [...]\*. This grant was not notified to the Commission for a state aid assessment.

### **3.3. Measure 3: 2011 capital increases**

- (12) According to HDS's financial statement of December 2011, its share capital was increased by EUR 158.2 million during the course of 2011.
- (13) In particular, according to HDS's semi-annual report of June 2011, during the first half of 2011 there were two capital increases, of EUR 50.6 million (March 2011) and EUR 62.5 million (May 2011). Based on the above information and given the total share capital increase of EUR 158.2 million during the course of 2011, it appears that a third capital increase of EUR 45.1 million took part in the second half of 2011.
- (14) It appears that only the State, as the main shareholder, contributed to these capital increases.
- (15) The Greek authorities have provided incomplete information about these capital increases. The measures were not notified to the Commission for a state aid assessment.

## **4. COMMENTS BY THE GREEK AUTHORITIES**

- (16) As regards the State guarantees (**measure 1**), the Greek authorities have argued that they were necessary to cover loans that would provide liquidity for HDS's military production.
- (17) As for the 2003 grant (**measure 2**), the Greek authorities argue that the grant was used for the modernisation of the Aeghion industrial facility. Such modernisation was necessary, in order for HDS to meet the requirements of on-going orders placed by the Greek Ministry of Defence related to military products.
- (18) As regards the 2011 capital increase (**measure 3**), the Greek authorities have argued that this measure was necessary for the continuation of HDS's operation in view of its privatisation. However, the Greek authorities have not provided arguments about the full share capital increase, as identified above.
- (19) Despite inquiry by the Commission services, the Greek authorities have not provided any arguments related to the state aid qualification of measures 1, 2 and 3, or any arguments on possible compatibility of the measures with the Treaty on the Functioning of the European Union ('TFEU').

## **5. ASSESSMENT**

### **5.1. Presence of state aid**

- (20) By virtue of Article 107(1) TFEU, any aid granted by a 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.
- (21) In order to conclude on whether state aid is present, it must therefore be assessed whether the cumulative criteria listed in Article 107(1) TFEU (i.e. transfer of State

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\* Information covered by the obligation of professional secrecy, according to the Commission Communication on professional secrecy in State aid decisions (OJ C 297 of 9.12.2003, p. 6)

resources, selective advantage, potential distortion of competition and affectation of intra-EU trade) are met for each of the measures identified.

*5.1.1. State resources and selective advantage of measure 1 (State guarantees)*

- (22) The Commission notes that the State guarantees have been provided directly by the Greek Ministry of Finance, as a function of Ministerial decisions and therefore they are imputable to the State and entail State resources.
- (23) The Commission must also assess whether measure 1 entailed a selective advantage to HDS. In order to determine this, the Commission must assess whether the undertaking received "an economic advantage, which it would not have obtained under normal market conditions".<sup>10</sup>
- (24) As regards the undue advantage to HDS, the Commission takes note of the *Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees* ('Guarantee Notice'), sections 2.2 and 3.2. According to the Guarantee Notice, when the borrower does not pay a risk-carrying price for the guarantee, it obtains an advantage. In some cases, the borrower, as a firm in financial difficulty, would not find a financial institution prepared to lend on any terms, without a State guarantee.
- (25) In the case at hand, the Commission has not indication of the corresponding guarantee premium benchmark that could be found in the financial market for similar guarantees. However, an annual guarantee premium of 1% does not *prima facie* appear to reflect the risk of default for the guaranteed loans, given the significant financial difficulties of HDS, and in particular its negative equity, its accumulated losses and the default of payments for some loans. Furthermore, the Commission notes that the guarantees appear to have exceeded 80% coverage of the guaranteed amounts and bore no collateral. Thus, the Commission doubts whether a market economy guarantor would provide HDS with a guarantee for that price and under those conditions.
- (26) Furthermore, in the absence of the State guarantee, the Commission doubts as to whether any financial institution would have been prepared to lend to HDS on any terms, given its financial condition.<sup>11</sup> In this regard, it is noted that HDS had already defaulted upon several loans since 2004, triggering the use of the State guarantees covering those loans, and leading to payments by the State of over EUR 246 million to the benefit of HDS. It thus already had a default history that would discourage a prudent creditor from offering its guarantee to HDS. As the guarantees were granted for the sole benefit of HDS, the advantage inferred from this measure is selective in nature.
- (27) Against this background, the Commission comes to the preliminary conclusion that the guarantees under measure 1 provided by the Greek State to HDS entail a selective economic advantage. At this stage, given the financial difficulties of HDS during the period concerned, the Commission considers that the whole amount of the State guaranteed loans, i.e. EUR 942.05 million, should be considered as an economic advantage to HDS. .

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<sup>10</sup> Joined cases T-228/99 and T-233/99, paragraph 251.

<sup>11</sup> The Greek authorities, despite having been asked, have not provided information on the credit rating of the company during the period concerned, therefore it was not possible at this stage to compare the conditions of these guarantees with those paid by similarly rated.

*5.1.2. State resources and selective advantage of measure 2 (2003 grant)*

- (28) The Commission notes that the grant was provided directly by the Greek Ministry of Defence and therefore it is imputable to the State and entails State resources.
- (29) The Commission also notes that a grant by the State [...] confers an advantage to that company, as the latter would normally have to finance [...] through its own financial resources or a loan. The measure was granted to only one company.
- (30) Thus, the Commission comes to the preliminary conclusion that the grant of EUR 10 million provided HDS with a selective advantage.

*5.1.3. State resources and selective advantage of measure 3 (2011 capital increases)*

- (31) The Commission notes that the Greek State is the main shareholder of HDS and that the share capital increase of HDS appears to have been provided only by the Greek Ministry of Finance, therefore it entails State resources and is imputable to the State.
- (32) In order to assess whether measure 3 entailed an advantage to HDS, the Commission must assess whether the 2011 capital increases provided the undertaking with *an economic advantage that it would not have obtained under normal market conditions*.<sup>12</sup> Given that HDS appears to have been a company in serious difficulty, any market economy investor would have required the implementation of a plan to restore the firm's viability, so that the company can provide a sufficient return for its shareholders. However, the 2011 share capital increase does not seem to have been coupled with such a plan or any other prospect of viability. In any event, it is doubtful that the market economy investor principle could be applied in this case without taking into consideration the fact that HDS also benefitted from other State aid measures. Therefore it appears that the 2011 capital increases were not realised under normal market economy circumstances and thus entailed an advantage to HDS.
- (33) The Greek authorities have argued that the share capital increase was necessary for the continuation of HDS's operation and therefore the implementation of the privatisation plan. This argument might only be accepted if, at the very least, it could be demonstrated that the State would obtain higher revenue by privatising HDS after the capital increase, rather than by applying for insolvency and liquidation of the company. The Greek authorities have not provided such justification.
- (34) Thus, the Commission considers that the measure appears to have conferred an advantage to the company, since any other prudent shareholder would not have provided such a capital increase. The measure was selective as the capital was provided by the State only for HDS.
- (35) Thus, the Commission comes to the preliminary conclusion that the EUR 158.2 million capital increase provided HDS with a selective advantage.

*5.1.4. Distortion of competition and effect on intra-EU trade for measures 1, 2 and 3*

- (36) Since HDS competes in the EU market for defence-related or civil and dual use products with other EU companies, the measures identified above have the potential to distort competition and affect trade between Member States.

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<sup>12</sup> Joined cases T-228/99 and T-233/99, para.251.

### 5.1.5. Conclusions on the presence of state aid for measures 1, 2 and 3

- (37) On the basis of the reasoning set out above, the Commission considers at this stage that measures 1, 2 and 3 constitute state aid within the meaning of Article 107(1) TFEU.

## 5.2. Unlawful aid

- (38) The Commission notes that the above measures were implemented in breach of the stand-still obligation pursuant to Article 108(3) TFEU, as the Greek authorities have disbursed them without prior notification to the Commission. Thus, the Commission considers at this stage that the measures granted to HDS qualify as unlawful state aid.

## 5.3. Difficulties of HDS

- (39) The Commission recalls that point 10(a) of the Rescue and Restructuring Guidelines ('R&R Guidelines')<sup>13</sup> establishes that a firm is regarded as being in difficulty in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months. The Commission also notes that in accordance with point 11 of the R&R Guidelines, a firm may be considered to be in difficulty *"where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value"*.
- (40) With regards to point 10(a) of the R&R Guidelines, based on the information above, the company's registered capital, as appearing in its financial statements of the years 2004-2011, was not lost by more than half. However, this information is misleading. The Commission notices that in the same period the company's own equity was reduced to minimal (2005) or negative level (2006-2011). Where a company has negative equity, there is an a priori assumption that the criteria of point 10(a) are met, because the negative equity implies in fact that the entire registered capital of a limited liability company has been lost. The General Court has confirmed that a company with negative equity is a company in difficulty.<sup>14</sup> In that respect, the Commission notes that HDS's registered capital only appears not to have been lost by more than half, because the company did not adopt appropriate measures, in order to tackle the decrease of its own equity,<sup>15</sup> as foreseen by Greek legislation.<sup>16</sup> On the basis of the above, the Commission considers that the company indeed meets the requirements of point 10 of the R&R Guidelines.
- (41) With regards to point 11 of the R&R Guidelines, based on the information above, HDS appears to have had diminishing turnover and increasing losses already since 2004, whereas it has had a negative own equity since 2006. According to the 2004 financial statements, there are indications that HDS had mounting debt already

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<sup>13</sup> Communication from the Commission – Community guidelines on state aid for rescuing and restructuring firms in difficulty, OJ C 2044, 1.10.2004, p.2.

<sup>14</sup> Joined Cases T-102/07 *Freistaat Sachsen v Commission* and T-120/07 *MB Immobilien and MB System v Commission*, [2010] ECR II-585.

<sup>15</sup> In this case, such measures could be either the capitalisation of losses or a capital increase. A capitalisation of losses would result in the wiping out of the company's registered capital. On the other hand, a capital increase should be of sufficient amount, in order to offset the company's negative equity.

<sup>16</sup> According to Article 47 of Greek Law 2190/1920, in case that a company's own equity falls below 50% of its share capital, the company's shareholders must decide (within 6 months from the expiry of the relevant fiscal year) either to dissolve the company or to adopt other measures.



since 2003, although the 2003 financial statements of the company have not been made available to the Commission.

- (42) In view of the above, the Commission has reached the preliminary conclusion that HDS was a firm in difficulty within the meaning of the R&R Guidelines at the time when the measures identified above were granted, i.e. since 2003.

#### **5.4. Application of Article 346 TFEU**

- (43) During discussions between the Commission services and the Greek authorities in relation to the envisaged privatisation of HDS (see recital (3) above) the Greek authorities mentioned the possibility of invoking Article 346 TFEU for past state aid measures in favour of the military activities of HDS.
- (44) According to Article 346 TFEU, "*any Member State may take such measures as it considers necessary for the protection of the essential interests of its security, which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes*".
- (45) The Commission notes that on the basis of the above, internal market rules apply to military markets insofar as their non-application cannot be justified by essential security interests. Such interpretation is supported by case-law, according to which the derogation in Article 346(1)(b) TFEU must be interpreted narrowly<sup>17</sup>.
- (46) The Greek authorities have argued that HDS is a company that serves mainly the Greek army and provides necessary supplies *inter alia* ammunition, guns and weapons of various kinds. They have also argued that HDS is necessary for the security interests of the country, as well as for the fulfilment of various defence-related obligations at bilateral or international level.
- (47) However, the Greek authorities never formally invoked or indeed substantiated their claims. They have not explained how the exception of Article 346 TFEU would apply in relation to the past aid measures in favour of HDS. For instance, since HDS appeared to produce also civil and dual-use products, it is not clear how the measures at stake would be justified under Article 346 TFEU. The exception of Article 346 TFEU cannot therefore be taken into account for the present assessment.

#### **5.5. Compatibility with the internal market**

- (48) Insofar as the measures identified above 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.
- (49) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met.<sup>18</sup> The Greek authorities have been asked by the Commission, but have not provided any possible grounds for compatibility of the measures in question.

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<sup>17</sup> Case T-26/01 *Fiocchi Munizioni v Commission*, judgement of 30.9.2003, p. 61, in which the Court stated that, it is clear from Article 346(1)(b) EC, read in conjunction with Article 346(2) EC, that the derogation is not intended to apply to activities relating to products other than the military products identified on the Council's list of 15 April 1958.

<sup>18</sup> C-364/90 *Italy v Commission* [1993] ECR I-2097, at para 20.

- (50) The Commission has nonetheless assessed whether any of the possible compatibility grounds laid on the TFEU would *prima facie* be applicable to the measures under assessment. The Commission considers at this stage that the exceptions laid down in Article 107(2) TFEU are not applicable. The same conclusion would apply to the exceptions foreseen in Article 107(3), points (d) and (e), TFEU.
- (51) In view of the fact that HDS seemed to be in difficulty already in 2008 and continues to be in difficulty at present, it does not appear at this stage that the exception relating to the development of certain areas or of certain sectors laid down in Article 107(3)(a) TFEU could be applicable.
- (52) The Commission also has to assess whether any of the measures concerned could be compatible on the basis of Article 107(3)(b) TFEU under the crisis rules enshrined in the Temporary Framework.<sup>19</sup> However, the Commission notes that HDS was a company in difficulty before 1 July 2008 and therefore would not be eligible for aid under the Temporary Framework. Moreover, the measures under assessment do not appear to fulfil the rest of the conditions of applicability of the Temporary Framework.
- (53) In that respect, and given the fact the HDS would qualify as a firm in difficulty, the only relevant criteria appear to be those concerning aid for rescuing and restructuring firms in difficulty under Article 107(3)(c) TFEU on the basis of the R&R Guidelines. Indeed, according to point 20 of the R&R Guidelines, "*aid to firms in difficulty may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest only if the conditions set out in these Guidelines are met.*"
- (54) However, the Commission notes that the conditions for rescue and restructuring aid do not seem to be met. In particular:
- (55) Measure 1 could not have qualified as either rescue aid or restructuring aid. Section 3.1.1 of the R&R Guidelines lays out the conditions for the provision of rescue aid, among which that "*in the case of non-notified aid the Member State must communicate, no later than six months after the first implementation of a rescue aid measure, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and /or that the guarantee has been terminated.*" In addition, section 3.3 stipulates that rescue and/or restructuring aid should not be granted repeatedly to a firm in difficulty ("one time, last time" principle). These conditions are not met, since the guarantees were granted repeatedly in time and none of the guarantees have been terminated. To the contrary, HDS has defaulted on the payment of certain guaranteed loans. Furthermore, no restructuring or liquidation plan has been communicated to the Commission, nor have other conditions for authorising restructuring aid under section 3.2.2 of the R&R Guidelines apparently been fulfilled.<sup>20</sup>
- (56) In the same vein, measures 2 and 3 do not appear to qualify as restructuring aid according to section 3.2.2 of the R&R Guidelines, since no restructuring plan has been communicated to the Commission, nor has the latter received any information

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<sup>19</sup> Temporary Framework for state aid measures to support access to finance in the current financial and economic crisis, OJ C 16 of 22.1.2009, p. 1, as modified by the Communication from the Commission amending the Temporary Community Framework for state aid measures to support access to finance in the current financial and economic crisis, OJ C 303, 15.12.2009, p. 6. The Temporary Framework expired in December 2011.

<sup>20</sup> These conditions relate in particular to the restoration of long- term viability (paragraph 34 and seq.), avoidance of undue distortions of competition (paragraph 38 and seq.) and aid limited to the minimum: real contribution, free of aid (paragraph 43 and seq.).

about efforts to restore the firm's viability or to meet other conditions of the R&R Guidelines.

- (57) In view of the above, the Commission has doubts on the compatibility of measures 1, 2 and 3 with the internal market.

## 6. DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, considers at this stage that Measures 1, 2 and 3 constitute State aid and has doubts on their compatibility with the internal market. The Commission therefore requests Greece to submit its comments and to provide all such information as may help to assess the measures, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Greece that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Greece that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of 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 this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
1049 Brussels  
Belgium

Fax No: +32-2-296-1242

Yours faithfully,  
For the Commission

Joaquín ALMUNIA  
Vice-president of the Commission

