OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 1 February 2007 [1]

I — Introduction

1. The present case relates to the Commission's State-aid proceedings brought against the Kingdom of Spain, which had granted a number of advantages to the Spanish cellulose fibre manufacturer Sociedad nacional de Industrias y Aplicaciones de Celulosa Española SA ('Sniace'). In two decisions the Commission ultimately found that none of these measures was to be regarded as constituting State aid within the meaning of Article 87(1) EC.

2. Following the Austrian cellulose fibre manufacturer Lenzing AG's action against those two Commission decisions of 28 October 1998 [2] and of 20 September 2000, [3] the Court of First Instance partially annulled those decisions by judgment of 21 October 2004 in Case T-36/99. [4]

3. The Court is now dealing with an appeal by the Kingdom of Spain against the judgment at first instance. In essence the case raises two issues.

4. It must first of all be clarified, for the purposes of admissibility, whether the Commission's decisions are of individual concern, within the meaning of the fourth paragraph of Article 230 EC, to Lenzing, in its capacity as a competitor. It is necessary to examine whether such an undertaking's market position is significantly affected by the alleged aid measure.

5. Secondly, the case is concerned with the issue of whether an advantage is conferred on an undertaking where, after initially

1 — Original language: German.

2 — Commission Decision 1999/395/EC of 28 October 1998 on State aid implemented by Spain in favour of SNIACE SA, located in Torrelavega, Cantabria, notified under document number C(1998) 3437 (OJ 1999 L 149, p. 40).

3 — Commission Decision 2001/43/EC of 20 September 2000 amending Commission Decision 1999/395/EC on State aid implemented by Spain in favour of SNIACE SA, located in Torrelavega, Cantabria, notified under document number C(2000) 2741 (OJ 2001 L 11, p. 46).

4 — *Lenzing v Commission* [2004] ECR II-3597.

concluding agreements with that undertaking for the rescheduling of debts and for their payment by instalment which the undertaking has subsequently failed to honour, public bodies do not implement any enforcement measures. For this purpose it is necessary to define more closely the private creditor test. In this connection the Commission objects to the extent of the control which the Court of First Instance exercised over its interpretation and application of this test.

II — Facts of the case and proceedings

A — *Facts of the case*

6. According to the judgment of the Court of First Instance under appeal, the facts underlying these proceedings are as follows: [5]

'8 Lenzing AG ("the applicant") is an Austrian company which produces and markets cellulose fibres (viscose, modal and lyocell).

9 Sniace SA ("Sniace") is a Spanish company which produces cellulose, paper, viscose fibres, synthetic fibres and sodium sulphate. ...

10 In March 1993, the Spanish courts ordered suspension of payments by Sniace, which had been in financial difficulties for several years. In October 1996, Sniace's private creditors agreed to convert 40% of their debts into shares in that company; this agreement led to the lifting of the order suspending payments. Sniace's public creditors used their right of abstention and decided not to take part in that agreement.

11 On 5 November 1993 and 31 October 1995, Sniace and Fogasa concluded agreements relating to the repayment to Fogasa of the arrears in wages and compensation which it had paid to Sniace's workers. The first agreement provided for repayment of the sum of ESP 897 652 789 plus interest of ESP 465 055 911 calculated at the statutory rate of 10%, in six-monthly instalments payable over eight years ("the agreement of 5 November 1993"). The second agreement provided for repayment of the sum of ESP 229 424 860, plus interest of ESP 110 035 018 calculated at the statutory rate of 9%, in six-

5 — Paragraphs 8 to 29 of the judgment under appeal.

monthly instalments payable over eight years ("the agreement of 31 October 1995"). On 10 August 1995, in order to guarantee the debts owing to Fogasa, Sniace granted a mortgage over two of its properties. The amount repaid by Sniace under those two agreements came to ESP 186 963 594 as at June 1998.

12 On 8 March 1996, the General Social Security Fund ("the Social Security Fund") concluded an agreement with Sniace with a view to rescheduling the latter's debts in respect of social security contributions amounting to ESP 2 903 381 848 for the period February 1991 to February 1995 ("the agreement of 8 March 1996"). That agreement provided for repayment of that amount, plus interest at the statutory rate of 9%, in 96 monthly instalments over a period ending in March 2004. It was amended by an agreement of 7 May 1996, under which repayment was to be deferred for one year and then to be made in 84 monthly instalments together with interest at the statutory rate of 9% ("the agreement of 7 May 1996"). Sniace failed to honour those agreements, which were therefore replaced by a new agreement concluded on 30 September 1997 between Sniace and the Social Security Fund ("the agreement of 30 September 1997"). The amount to be repaid came to ESP 3 510 387 323, corresponding to arrears of social security contributions for the period February 1991 to February 1997, plus default charges of ESP 615 056 349, and was to be made over 10 years. During the first two years, only the interest, calculated at an annual rate of 7.5%, was payable, while in subsequent years repayments were to cover both principal and interest. By April 1998, Sniace had repaid ESP 216 118 863 under the agreement of 30 September 1997.'

7. Following a complaint from Lenzing, the Commission reviewed these and other measures for the benefit of Sniace pursuant to Article 88(2) EC in order to ascertain whether they constituted prohibited aid under Article 87 EC. In its decision of 28 October 1998 the Commission found that the agreements concluded by the Social Security Fund and Fogasa with Sniace constituted aid which was incompatible with the common market, in so far as the applicable statutory rate of interest was below the market rate, and ordered recovery of that aid.

8. Subsequently judgment was delivered in the *Tubacex* case, [6] in which the Court held that in principle the application of the statutory interest rate could not be regarded as aid. Following that judgment the Commission amended its first decision — which had not yet become fully effective due to proceedings brought by Lenzing and Spain

6 — Case C-342/96 *Commission v Spain* [1999] ECR I-2459.

— by its further decision of 20 September 2000, in which it found that the agreements concluded by the Social Security Fund and Fogosa with Sniace also did not constitute aid which had to be recovered.

B — *The judgment under appeal*

9. By application lodged at the Registry of the Court of First Instance on 11 February 1999, Lenzing brought an action for the partial annulment of the decision of 28 October 1998. It subsequently extended this action to cover the version arising from the decision of 20 September 2000.

10. The Commission claimed that the Court of First Instance should dismiss the action as inadmissible, or, in any event, as unfounded. The Kingdom of Spain was granted leave to intervene in support of the form of order sought by the Commission.

11. In its judgment under appeal, the Court of First Instance annulled Article 1(1) of Commission Decision 1999/395/EC of 28 October 1998, as amended by Commission Decision 2001/43/EC of 20 September 2000. The Court of First Instance held that the Commission should not have assumed that the Spanish bodies had conducted themselves like private creditors. In a comparable situation private creditors would not have tolerated Sniace's failure to honour the rescheduling agreements.

C — *The appeal*

12. By its appeal, lodged at the Court Registry on 27 December 2004, the Kingdom of Spain submits that the Court should:

— set aside in full the judgment of the Court of First Instance under appeal;

— in the new judgment to be delivered, grant all the forms of order which it sought at first instance;

— order the respondent to pay the costs under Article 69(2) of the Rules of Procedure.

13. The Commission supports Spain's appeal and claims that the Court of Justice should,

— set aside in full the judgment under appeal;

— uphold all of the forms of order which the Commission sought at first instance; and

— order Lenzing AG to pay the costs of the appeal proceedings.

14. Lenzing AG, by contrast, claims that the Court should:

— dismiss the Kingdom of Spain's appeal;

— order the appellant to pay the costs of the respondent.

III — Legal assessment

15. The Kingdom of Spain and the Commission submit two grounds of appeal. Firstly, they contend that the Court of First Instance was wrong to hold that the decisions being challenged were of individual concern to Lenzing and that on that basis it was entitled to bring an action. [7] Secondly, in their view, the Court of First Instance made an error in law in the interpretation and application of the private creditor test. [8]

A — *Admissibility of Lenzing's pleading of 20 June 2005*

16. Before the appeal can be assessed it is necessary to consider briefly whether Lenzing's pleading of 20 June 2005, which was received at the Court of Justice on 20 July 2005, may be taken into account. In this pleading Lenzing reacted to the Commission's response invoking Article 117(2) of the Rules of Procedure. According to that provision, parties may react to a response which contains a plea in law which was not raised in the appeal without (first) obtaining the consent of the President of the Court.

7 — Paragraphs 4 to 23 of the appeal.

8 — Paragraphs 24 to 65 of the appeal.

17. However, in the present case it is not necessary to examine whether the Commission in fact lodged a cross-appeal or merely submitted additional arguments in support of Spain's appeal. The President did in fact subsequently authorise Spain's reply and rejoinders from Lenzing and the Commission pursuant to Article 117(1) of the Rules of Procedure. Since Lenzing's pleading was received before the expiry of the period set in that regard, it is consequently admissible in any case and may be taken into account. The same applies to Lenzing's rejoinder, which was received at the Court of Justice within the time-limit on 20 December 2005 and wholly related to the pleading of 20 June 2005.

B — *First ground of appeal: individual concern to the applicant*

18. By the first ground of appeal, the Kingdom of Spain and the Commission claim that the Court of First Instance erred in law in accepting that Lenzing was individually concerned, within the meaning of the fourth paragraph of Article 230 EC, by the Commission's decisions which have been challenged.

1. Requirements relating to individual concern

19. The Court has consistently held that persons other than those to whom a decision is addressed may claim to be concerned within the meaning of the fourth paragraph of Article 230 EC only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. [9]

20. The requirements for competitors to be individually concerned for the purposes of the law on aid vary considerably depending on the stage of proceedings in which an action is brought and the objective of that action.

21. Recently in the *ARE* judgment, the Court summarised the conditions under which (potential) competitors of the beneficiary may be able to bring an action against Commission decisions, where, in the absence of a formal review procedure under Article 88(2) EC, the Commission does not object to

9 — Case 25/62 *Plaumann v Commission* [1963] ECR 95, at p. 107, and Case C-198/91 *Cook v Commission* [1993] ECR I-2487, paragraph 20.

the measures of Member States. [10] In this regard there are two possible types of action: on the one hand, the action may be aimed at compelling the formal review procedure; on the other hand, it may challenge the Commission's decision in the case.

22. If the action is aimed at compelling the formal review procedure, on the ground that competitors will be able to enforce their rights to participate in this procedure, it is sufficient if the applicants are persons, undertakings or associations whose interests *might* be affected, in particular competing undertakings and trade associations. [11] The capacity to bring an action in this respect is made relatively extensive in order to safeguard the procedural rights of potential competitors in the formal procedure which are guaranteed under Article 88(2) EC. [12]

23. By contrast, the situation is different where the action seeks to have the contested decision, which was adopted without a formal review procedure, annulled on substantive grounds. In that case it will not be sufficient that the applicant may be regarded as concerned within the meaning of Article 88(2) EC. It must, rather, demonstrate that it is *individually* concerned. This requires that its market position is substantially affected by the aid scheme to which the decision at issue relates. [13]

24. This stricter criterion also applies *after* the formal review procedure has been conducted pursuant to Article 88(2) EC. According to the *Cofaz* judgment, in these circumstances the approval of aid on the basis of a formal review procedure pursuant to Article 88(2) EC will be of individual concern to a competitor applicant if it played an active role in that procedure, provided that its market position is significantly affected by the aid which is the subject of the contested decision. [14] This is the measure against which Lenzing's individual concern must be assessed.

25. In the present case there is no question as to Lenzing's participation in the proceedings. Accordingly, it can be left open here as to whether in other proceedings the Court of

10 — Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 34 et seq.

11 — *ARE* (cited in footnote 10, paragraphs 35 and 36).

12 — *ARE* (cited in footnote 10, paragraphs 34 and 35).

13 — *ARE* (cited in footnote 10, paragraph 68 et seq., formulated in a broader way in paragraph 37).

14 — Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 25.

First Instance correctly assumed that a party may be individually concerned even without having participated in the proceedings. [15]

26. Spain and the Commission doubt, on the contrary, whether the measures in favour of Sniace significantly affected Lenzing's market position.

2. Burden of proof concerning significant adverse effect

27. The Commission objects first of all on the ground that the Court of First Instance failed to appraise the obligation to present facts and the burden of proof in the context of an action by a competitor in respect of aid. It is the applicant who has the obligation to present the facts and who bears the burden of proving that its action is admissible.

28. According to the judgment under appeal, it suffices for the competitor to adduce pertinent reasons to show that the Commission's decision may adversely affect its legitimate interests by seriously jeopardising its position on the market in question. [16]

29. Contrary to the Commission's view, this does not represent any understanding of the obligation to present the facts and the burden of proof that differs from that in *Cofaz*. It is true that in other decisions — at least in the respective French version — instead of merely adducing ('indiquer'), demonstrating ('démontrer') is required. [17] However, it is not apparent that the Court of First Instance derived more circumscribed requirements, in the judgment under appeal, from the term 'adduce' — which, incidentally, was also used in *Cofaz* [18] — than from the term 'demonstrate'. Rather, the Court of First Instance found, on the basis of uncontested statements of facts which were consequently accepted as being true, that Lenzing's market position had been significantly affected.

3. The complaint of a hypothetical review

30. The Commission also errs in objecting to the review by the Court of First Instance

15 — Case T-435/93 *ASPEC and Others v Commission* [1995] ECR II-1281, paragraph 64; Case T-149/95 *Ducros v Commission* [1997] ECR II-2031, paragraph 34; and Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, paragraph 72. See, by contrast, the order of 21 February 2006 in Case C-367/04 P *Deutsche Post and DHL v Commission* (not published in the ECR, paragraph 41).

16 — Paragraph 80 of the judgment under appeal.

17 — *ARE* (cited in footnote 10, paragraph 37) and Case T-69/96 *Hamburger Hafen- und Lagerhaus and Others v Commission* [2001] ECR II-1037, paragraph 41.

18 — *Cofaz* (cited in footnote 14, paragraph 28).

on the basis that it is hypothetical. A finding that a market position is jeopardised by aid which has been paid out necessarily contains hypothetical elements, since it involves a comparison between the actual situation and a situation which would have arisen if the aid had not been paid. [19] There are no concrete market data as to a situation in which aid was not paid out, as requested by the Commission.

4. 'Significantly affected'

31. The first plea in law is essentially directed against the finding that the effect on Lenzing's market position was significant.

32. The Court of First Instance found that Lenzing set out pertinent reasons as to why the decision under challenge could adversely affect its legitimate interests by seriously jeopardising its market position. It supported this on the basis of Lenzing's and Sniace's activities on the viscose market, which was characterised by a very limited number of manufacturers, tough competition and overcapacity. It could not, the Court of First Instance held, be ruled out that Sniace was able to sell its products at lower prices than its competitors as a result of the aid.

33. In particular, the Court of First Instance took the view that it was irrelevant whether Lenzing was able to achieve good results and improve its market position during the period in question. The fact that the market position of the undertaking concerned was substantially affected did not necessarily mean a fall in profitability, a reduction in market share or the incurring of operating losses. The crucial question in that connection was whether the undertaking concerned would have been in a more favourable situation has it not been for the decision which it was seeking to have annulled. That could validly include the situation in which it lost the opportunity to make a profit because the public authorities had conferred an advantage on one of its competitors. [20]

34. The criticism of Spain and the Commission refers to this last point. They argue that Lenzing's dominant position on the market for viscose fibres and its sound commercial position mean that the measures in favour of Sniace could not have significantly affected Lenzing's market position.

19 — In the case of aid that has not yet been paid out, predictions must even be made as to two hypothetical situations.

20 — Paragraph 90 of the judgment under appeal.

35. Spain, in particular, emphasises that the effects of the measures in favour of Sniace on Lenzing's market position have not been sufficiently specified. It argues that, in so far as the Court of First Instance assumes that there were lost opportunities to make a profit, these ought to have been defined and specified. In any case, lost opportunities to make a profit would not, by themselves, suffice to demonstrate the existence of a significant effect on market position.

36. The Commission concurs in full with this argument and amplifies it. It submits that, for the purposes of admissibility of an action brought by a competitor, proof is required that an adverse effect has been suffered by that competitor and that that adverse effect is significant, real and directly attributable to the disputed aid.

37. Essentially this plea in law raises the question as to the circumstances in which a market position is significantly affected ('substantiellement affectée') within the meaning of *Cofaz*. The thrust of the submissions put forward by Spain and the Commission is that this must involve significant losses on the part of the competitor.

38. However, there is no basis for this view either in the case-law or in the written law. On the contrary, as will be shown below, it is sufficient if, had it not been for the aid, the position of the competitor bringing the action would have developed better in a distinctly identifiable way.

39. The criterion of significant effect serves to identify competitors who, as a result of aid which is approved, are distinguished individually in such a manner that they fulfil the requirements for admissibility listed in the *Plaumann* case. [21] Accordingly, competitors who have the capacity to bring an action are affected by that aid by being differentiated from all other persons and distinguished individually just as in the case of the person to whom the decision under challenge is addressed. This individually identifying effect distinguishes a significant adverse effect on a market position, which, according to the *Cofaz* case, gives rise to an entitlement to bring an action, from an adverse effect which is not significant in this sense.

40. In basic terms, every advantage which is conferred on selectively determined market operators affects the market position of all competitors who do not enjoy this advantage. This applies in particular to the operating aid highlighted by Lenzing. However, its market position is also positively or negatively influenced by many other factors. Thus, the mere fact that a measure may exercise an influence on the competitive relationships existing on a particular market cannot in itself suffice to allow every trader in any competitive relationship whatever with the addressee of the measure to be regarded as being directly and individually concerned by that measure. [22]

21 — *Plaumann v Commission* and *Cook v Commission*, both cited in footnote 9.

22 — Joined Cases 10/68 and 18/68 *Eridania and Others v Commission* [1969] ECR 459, paragraphs 7 and 8.

41. Rather, an effect of the aid which distinguishes one of the competitors individually can be assumed only if the aid favours the recipient over the competitor in such a way that this factor occupies a special position. This special position must allow the Community judicature to separate the effects of the advantage for the recipient from the other circumstances influencing the market position of the competitor bringing the action and to attribute a separate weight to them for the competitor. Accordingly, it may be inferred from the Court's wording in the order in *Deutsche Post and DHL* that the applicant must show *the magnitude of the prejudice* to its market position. [23]

42. Consequently, the Commission is correct to stress that the significant adverse effect on the market position of a competitor who is bringing an action may not be confused with the — possibly only threatened — distortion of competition under Article 87 EC, which is a feature of prohibited aid. Of course, the prohibition of aid is not merely limited to aid the competition-distorting effect of which distinguishes particular competitors individually. [24]

43. Accordingly, no general statements are possible as to how it can be proved whether a market position is significantly affected. In particular, it does not depend on whether the situation of the competitor bringing the action has developed positively or negatively. Both the overall positive and negative development of an undertaking may depend on quite different determining factors, with the result that aid to other undertakings may simply aggravate a negative development or weaken a positive development. The only conclusive factor can therefore be whether, had it not been for the aid, the position of the competitor bringing the action would have developed better in a distinctly identifiable way.

44. It is therefore necessary to consider the structure of the relevant market and the effect of the alleged aid. [25] Where markets have a very large number of suppliers — for example, the entirety of all the land and forestry undertakings in the Community [26] — it is more improbable that individual competitors will be significantly affected by aid granted to other undertakings. The market situation of individual market operators is, of course, influenced by the conduct

23 — Order in Case T-358/02 *Deutsche Post and DHL v Commission* [2004] ECR II-1565, paragraph 37.

24 — See, in this regard, the order in *Deutsche Post and DHL* (cited in footnote 15, paragraph 47).

25 — Thus, in paragraph 50 et seq. of the judgment in Case T-146/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v Commission* (not published in the ECR), which concerned aid in favour of petrol stations, the Court of First Instance considered the respective *local* competitors of the petrol station operator which was the beneficiary of the measure.

26 — As in the *ARE* case, cited in footnote 10.

of a large number of other operators. Advantages for one of these operators are thus hardly likely to have identifiable effects on its competitors. [27]

45. Even where markets have few operators but do have a relatively fragmented demand, it can be difficult for competitors to point to significant effects of aid. However, the position will be different if an operator in such an easily reviewable market is able significantly to expand production as a result of the aid. [28]

46. A similar situation obtains in the present case. There are relatively few suppliers in the viscose market. At the time in question there was also overcapacity in this market and the aid made it possible for a market operator, Sniace, to survive. Consequently, whilst the aid did not bring about any increase in capacity, the continuing use of existing capacity which would otherwise have ceased, in a market with few suppliers and overcapacity, had particularly discernible effects on the competitors' position on the market. Thus, had that capacity ceased to exist, those competitors could possibly have acquired the corresponding market shares or, in the event of a reduction in supply, could at least have obtained higher prices.

47. The Commission, however, had submitted information to the Court of First Instance suggesting that Lenzing would not have even been in a position to exploit the demise of Sniace. Whilst, according to the Court of First Instance's findings, Sniace sold its products at lower prices than its European competitors, [29] Lenzing announced 'its increasing independence vis-à-vis pressure from prices on the world market' and the need to import to satisfy demand. [30] Even Lenzing itself admits that its capacity was fully utilised in the first half of 1996. [31] In addition the pressure on prices did not come from Sniace alone but also from Asian suppliers.

48. In this respect it must first of all be recalled that an appeal pursuant to Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice is restricted to points of law. The Court of First Instance alone is competent to establish and appraise the relevant facts and to assess the

27 — See also in this regard the order in *Deutsche Post and DHL v Commission* (cited in footnote 23, paragraph 15 et seq.), where, according to the Commission's submissions, a large number of markets and a large number of undertakings were affected, and Case T-117/04 *Werkgroep Commerciële Jachthavens Zuidelijke Randmeren and Others v Commission* [2006] ECR II-3861, paragraph 60), in which some 1 200 undertakings were in the same position.

28 — *ASPEC* (cited in footnote 15, paragraph 70).

29 — Paragraph 88 of the judgment under appeal.

30 — Paragraph 62 of the judgment under appeal.

31 — Paragraph 8 of the pleading of 20 June 2005.

evidence. Accordingly, unless the facts and the evidence have been distorted, their appraisal does not constitute a question of law which would as such be subject to review by the Court of Justice in the context of an appeal. [32]

49. Whether Lenzing had sufficiently demonstrated that the demise of Sniace would have improved its position on the market is a question of fact which is in principle beyond review by the Court of Justice.

50. There is no obvious distortion of facts either. Indeed, the circumstances mentioned by the Commission call into question the significant effect on Lenzing's market position temporarily at most. Even if, on grounds of lack of own capacity, Lenzing could not immediately have taken over Sniace's market share, it could be assumed from its above-average performance over the preceding years that Lenzing would have been able to acquire at least part of Sniace's market share in the medium term.

51. As far as the influence of Sniace's continued existence on prices is concerned, the Court of First Instance correctly relies, in paragraph 88, on a specialist article submitted by the Commission itself, according to which Sniace exerted a negative influence on pricing in excess of its small market position capacity. In spite of additional influences, such as from Asian competitors, this negative influence would have disappeared if Sniace had collapsed.

52. Accordingly, the Court of First Instance was entitled to assume, without distorting the facts, that Lenzing, the most significant competitor on this market, would have made greater profits had it not been for the aid to Sniace, or that it lost profit opportunities because of that aid. Whilst these lost profit opportunities are not quantified in figures, this might well have been impossible and it is not necessary anyhow. It is of course clear — at least on the basis of the information available — that Sniace's survival has particular significance in contrast to the other factors influencing Lenzing's market position.

53. Consequently, the Court of First Instance was correct in law to hold that Lenzing was distinguished individually by the Commission's decision. The objections of Spain and the Commission are therefore unsuccessful and this ground of appeal should be rejected.

32 — See, concerning the law on aid, Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* [2006] ECR I-4845, paragraph 60; and generally Case C-390/95 P *Antillean Rice Mills and Others v Commission* [1999] ECR I-769, paragraph 29; Case C-237/98 P *Dorsch Consult* [2000] ECR I-4549, paragraph 35 et seq.; and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 49.

C — *Second ground of appeal: the private creditor test*

54. By the second ground of appeal, Spain and the Commission take issue with the Court of First Instance's application of the private creditor test. This test is relevant in the present case for the purpose of determining the existence of aid. The parties are in dispute as to whether there is aid in a situation where the Social Security Fund and Fogasa did not enforce the secured debts which were owed to them, even though Sniace had breached the rescheduling agreements concerning outstanding social security contributions and the repayment agreements relating to the wages and salaries advanced by Fogasa. According to the Commission decision of 28 October 1998, there was a considerable advantage in this since, had the claims been enforced, Sniace could possibly have been closed down. [33]

1. Breach of the *Tubacex* judgment

55. In the first part of this ground of appeal Spain and the Commission submit that the Court of Justice already recognised in *Tubacex* [34] that similar conduct did not constitute aid. They submit that the Court of First Instance misconstrued this judgment and — on the contrary — regarded the rescheduling and repayment agreements which form the subject-matter of this dispute as *per se* constituting aid.

56. Article 87(1) EC defines the State aid regulated in the EC Treaty as being 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, in so far as it affects trade between Member States. The concept of State aid within the meaning of this provision is thus wider than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking. [35] In particular, it is established that the conduct of a public body with responsibility for collecting social security contributions which tolerates late payment of such contributions undoubtedly gives the beneficiary undertaking a significant commercial advantage by mitigating, for that undertaking, the burden associated with normal application of the social security system. [36]

33 — Recital 80.

34 — Cited in footnote 6.

35 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; Case C-256/97 *DMT* [1999] ECR I-3913, paragraph 19; Case C-276/02 *Spain v Commission* [2004] ECR I-8091, paragraph 24; Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; and joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 29.

36 — *DMT*, cited in footnote 35.

57. In order to determine whether such an advantage constitutes aid for the purposes of Article 87 EC, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions. [37] Accordingly, agreements on the terms of the repayment or rescheduling of debts concluded with public creditors must be compared with the conduct of a hypothetical private creditor which, so far as possible, is in the same position vis-à-vis its debtor as the public creditor and is seeking to recover the sums owed to it. [38]

58. The view put forward by Spain and the Commission, to the effect that the conduct of the Social Security Fund and Fogasa should not necessarily be regarded as actual aid, confirms the need for this comparison. However, the Court of First Instance does not question this initial premiss, since it introduces precisely such a comparison in paragraph 149 of the judgment under appeal. The argument put forward by Spain and the Commission in this regard is therefore invalid.

59. In the past, when assessing the conduct of public creditors, the Commission evidently allowed itself to be guided in particular by whether the interest in the event of the debtor's default corresponded to the market interest. In the present case, as in *Tubacex*, only the statutory interest rate was applied, which was clearly below the market rate. According to the Commission's view, the amount of aid which had to be recovered was to be calculated on the basis of the difference in interest between those respective rates. [39]

60. However, in the *Tubacex* case the Court of Justice rejected this point of reference on the basis that even a private creditor could merely demand the statutory rate from defaulting creditors. [40] On 20 September 2000, on the basis of that judgment, the Commission amended its decision of 28 October 1998 and found that Sniace's agreements with the Social Security Fund and Fogasa did not constitute State aid.

61. Contrary to the submissions of Spain and the Commission, the Court of First Instance does not question the *Tubacex* judgment, but rather, concurring with Lenzing, finds fault with the fact that the Commission did not address the extent to which the concessions granted by Fogasa and the Social Security Fund in regard to the enforcement of the debts owed to them constituted advantages which ought to have been regarded as aid. Those specific advantages were not the subject-matter of the *Tubacex* judgment. Consequently, this part of the appeal should be rejected.

37 — *DMT*, cited in footnote 35, paragraph 22, and *Tubacex*, cited in footnote 6, paragraph 41.

38 — *DMT* cited in footnote 35, paragraph 25.

39 — In relation to the present case, see Article 1 and recitals 83 and 90 of the decision of 28 October 1998.

40 — *Tubacex*, cited in footnote 6, paragraphs 48 and 49.

2. Application of the private creditor test

62. Spain and the Commission are of the opinion that the Commission correctly found that the Social Security Fund and Fogasa had acted like private creditors in the present case.

63. The Court of First Instance, however, contradicted this finding and rejected three reasons in particular on which the Commission had relied in this regard.

64. In paragraphs 155 and 156 the Court of First Instance refused to compare the situation of Fogasa and the Social Security Fund with private creditors who waived 40% of the debts owed to them as part of a rescheduling of debts, since the debts owed to these creditors were not secured. They were for that reason not in a comparable situation.

65. In paragraphs 157 and 158, the Court of First Instance goes on to contradict the comparison with the conduct of an additional secured creditor, which, like the public creditors, did not enforce the debts owed to it. It was not in fact known whether Sniace also defaulted on payments to this creditor or breached rescheduling agreements. Consequently it could not be examined whether this creditor was in a situation comparable to that of the Social Security Fund and Fogasa.

66. Finally, in paragraphs 159 and 160, the Court of First Instance rejected the proposition that both creditors had maximised their prospects of recovering the sums due to them. On the one hand, it was not necessary to maximise their debt recovery if there was adequate security, while, on the other hand, the Commission was not in a position to assess Sniace's future viability.

67. From this the Court of First Instance concluded that the Commission had made a manifest error in applying the private creditor test.

68. The Commission challenges that finding by submitting that the Court of First Instance misunderstood the applicable assessment criteria. It did not review the Commission's decision for a manifest error of assessment, but in detail.

69. The Commission and Spain also submit that even private creditors would conclude rescheduling agreements and that they would in particular have done so in the circumstances of this case.

(a) Review of a manifest error of assessment

70. In my view, the Court of First Instance was correct to hold in paragraph 150 that, in applying the private creditor test, the Commission has a broad discretion. This review in fact requires the appraisal of complex economic information from the perspective of a hypothetical private creditor. To the extent to which the Commission's review of Article 87(1) EC includes such an appraisal, in reviewing it the Community judicature [41] must confine itself to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. [42]

71. As the Commission rightly submits, its prognosis will be manifestly erroneous only if it would not be justifiable from any conceivable point of view, that is, if no conceivable private creditor behaving rationally would have conducted itself in the same way as the State creditor in the circumstances of the case.

72. If, conversely, it is possible that a private creditor might have behaved in the way that the Commission ultimately accepted, then the latter's assessment cannot be manifestly erroneous. Otherwise, establishing a manifest error would be tantamount to the Community Courts substituting their own prognosis of the conduct of private creditors for that of the Commission.

73. In the judgment under appeal, the Court of First Instance convincingly explained why the reasons stated by the Commission did not justify the conclusion that the Social Security Fund and Fogasa had behaved in the manner of private creditors. [43] It was on that very basis that the Court of First Instance concluded that the Commission had made a manifest error of assessment.

74. However, the grounds rejected included the submission that another secured private creditor had also waived the enforcement of the debts owed to it, although Sniace had also defaulted on the debts owed to that creditor. In relation to this the Court of First Instance correctly found in paragraphs 157 and 158 of the judgment under appeal that the reasons for this conduct had not been sufficiently clarified to establish that a private creditor finding itself in the position of the Social Security Fund and Fogasa would have

41 — It should, however, be pointed out that the national court must make a similar assessment to that of the Commission when it examines whether a measure which has not been notified to the Commission constitutes aid and accordingly, pursuant to Article 88(3) EC, may not be implemented (see Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 49 et seq.; Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 31; and Case C-368/04 *Transalpine Ölleitung and Others* [2006] ECR I-9957, paragraph 39).

42 — Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraphs 10 and 11.

43 — See above, point 64 et seq.

behaved in exactly the same way. Nevertheless, it has also not been proven that a private creditor would not have behaved in that way. On the basis of the information available, the conduct of this creditor shows that the Commission's assumption as to the conduct of a hypothetical private creditor was at least possible.

75. Accordingly, the finding of a manifest error of assessment by the Commission in paragraph 154 et seq. of the judgment under appeal contains an error of law and may not be upheld.

(b) Review as to a failure to state reasons and determination of the facts

76. An infringement of Community law by the Court of First Instance will not, however, lead to the setting aside of a judgment under appeal if that judgment's operative part appears well founded on other legal grounds. [44] Since Lenzing also objected to the statement of reasons for the Commission decision in the case at first instance, it is necessary to examine whether this plea in law can succeed.

77. The statement of reasons for Community measures required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court of Justice to exercise its power of review. [45] The statement of reasons must, unless there are exceptional circumstances, be notified to the person concerned at the same time as the decision adversely affecting him, and an infringement of Article 253 EC cannot be remedied before the Court of Justice. [46]

78. The obligation to state reasons is in fact distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. [47] However, since review by the Court is restricted as a result of the Commission's wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of particularly fundamental importance. Those guarantees include — contrary to the Commission's submissions — in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case and to give adequate reasons for its decisions. [48]

44 — Case C-30/91 P *Lestelle v Commission* [1992] ECR I-3755, paragraph 28; Case C-93/02 P *Biret International v Council* [2003] ECR I-10497, paragraph 60; and Case C-226/03 P *José Martí Peix v Commission* [2004] ECR I-11421, paragraph 29.

45 — Case 1/69 *Italy v Commission* [1969] ECR 277, paragraph 9; Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 48; Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 26; and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 137.

46 — Case C-351/98 *Spain v Commission* [2002] ECR I-8031, paragraph 84.

47 — Case C-17/99 *France v Commission* [2001] ECR I-2481, paragraph 35, and Case C-66/02, cited in footnote 45.

48 — Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission* [1992] ECR I-2901, paragraph 26.

79. Consequently, the Commission must give logical and consistent reasons as to why, from amongst the various conceivable ways in which a private creditor could conduct itself, it selected the very one which matched the conduct of the State creditor. The extent to which the Commission established the relevant factual basis for this assumption must also be apparent from the statement of reasons.

80. In this respect it is first of all necessary to hold that the statement of reasons for the decision under challenge did not contain any reference to the private creditor which waived the enforcement of its secured claims despite Sniace's default. An essential factor suggesting that the Commission's resulting assessment might be possible was therefore lacking. Even if this reason had been listed, it would not have been able to constitute an adequate ground for the decision, as the Commission was, up to that point, unable to state whether this creditor was in a comparable position. As the Court of First Instance noted in paragraph 158 of the judgment under appeal, the Commission had not in fact clarified the matter up to that point.

81. The Court of First Instance correctly rejected the remaining two reasons given in the decisions.

82. As far as the comparison with other private creditors which waived 40% of the debts owed to them as a result of a creditor agreement is concerned, which is dismissed in paragraphs 155 and 156, the Commission had already found, in its decision of 20 September 2000, that their position was not the same as that of the Social Security Fund and Fogasa, in particular with regard to securities. [49]

83. Greater weight attaches to the contention that the Social Security and Fogasa maximised their prospects of recovering their debts, without financial loss, by preventing the liquidation of Sniace, which is rejected in paragraphs 159 and 160.

84. In reality a private creditor would attempt, if possible, to enforce the debts owed to it without loss. As Lenzing emphasises, however, the Court of First Instance entirely correctly found that the grounds of the decision and the Commission's submissions on this point are contradictory.

85. First, there are contradictions with regard to the security in respect of the debts owed to the Social Security Fund and Fogasa. On the one hand, the Commission assumes in the present case that the debts owed to the Social Security Fund and Fogasa were secured, and it also set this out in part in

49 — Recital 26.

the statement of reasons for the decision.[50] On the other hand, it is considered necessary to prevent the liquidation of Sniace in order to recover the debts without any loss. Losses, however, are to be feared only if the securities are inadequate.

86. There are also contradictions if one supposes that the debts were not in fact adequately secured. If a creditor waits, this will increase the prospects of recovering debts without loss only if the debtor survives the crisis and improves its position. However, in the decisions which are challenged the Commission expresses doubt on several occasions as to the viability of Sniace[51] without explaining why, despite this, it proceeded on the basis that future prospects were positive.

87. In this regard, the Commission merely submitted during the judicial proceedings that it should have been able to rely on the Spanish Government's statement as to the existence of restructuring and viability plans.[52] If this were the only reason for assuming that Sniace was viable, then that would involve not only a defect in the reasoning of the decisions under challenge, but also an infringement of the obligation to clarify the facts of the case sufficiently. The Court of First Instance in fact found in paragraph 160 of the judgment under appeal that neither Spain nor the Commission had the necessary information available to them in order to assess whether Sniace was viable. The Court of Justice may no longer review this finding of fact as such in the appeal proceedings[53] and the parties do not question it either.

88. For the sake of completeness, it should also be pointed out that the submission of Spain and the Commission — which is not to be found in the grounds of the decision — that, in the event that Sniace survived, the Social Security Fund could have expected additional social security contributions and Fogasa would at least have been spared further expenses in respect of Sniace's employees also cannot form the basis for the conduct of a hypothetical private creditor.

89. It is in principle conceivable that private creditors may have similar motives — the expectation of future business and avoiding future costs. The present case, however, is concerned with public interests of the State which specific public institutions are tasked with realising. These interests typically constitute the grounds for granting aid in the classic sense. As Lenzing correctly points out, they consequently cannot be recognised as a ground on which to justify advantages for certain undertakings resulting from

50 — See recital 26 of the decision of 20 September 2000 and, in relation to Fogasa, recital 89 of the decision of 28 October 1998.

51 — See recitals 77, 81 and 89 of the decision of 28 October 1998.

52 — See paragraph 81 of the response and paragraph 160 of the judgment under appeal.

53 — See above, point 48.

waiving the enforcement of debts which they owe. Otherwise, it would also be possible to justify capital injections by public investors on the ground that jobs are thereby secured. The Court has already expressly rejected this. [54]

90. Consequently, the Commission's reasoning is either inappropriate for the purposes of justifying its decision which is being challenged or self-contradictory and accordingly cancels itself out. This contradiction could only be resolved by the Commission clarifying the facts on which the case is based to such an extent that it could decide which considerations would be relevant for a hypothetical private creditor and were to explain this in a sufficiently substantiated way in the grounds of its decision. Since no such considerations are mentioned, the statement of reasons in the contested decision is defective.

3. Conclusion

91. While the judgment under appeal does contain an error of law, in so far as the Court of First Instance finds a manifest error of assessment by the Commission, it must none the less be upheld on other grounds due to the inadequate statement of reasons for the Commission decision which is challenged. The appeal should therefore be dismissed.

54 — Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission (Hytasa)* [1994] ECR I-4103, paragraph 22.

IV — Costs

92. Under Article 122 of the Rules of Procedure, in conjunction with Articles 118 and 69(2) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(4) provides that Member States which intervene in proceedings are to bear their own costs, including the costs of the appeal proceedings. [55]

93. Accordingly, Spain must in any event bear its own costs. In addition, Lenzing requests that Spain — but not the Commission — be ordered to pay its costs in the appeal proceedings. However, since Spain and the Commission have both been unsuccessful, they should be ordered jointly and severally to pay the costs. [56] In this situation Lenzing cannot select one of the two parties liable for the costs, but rather both unsuccessful parties must be ordered to pay them.

55 — Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 191.

56 — See Joined Cases C-122/99 P and C-125/99 P *D and Sweden* v *Council* [2001] ECR I-4319, paragraph 65, and Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 32.

V — Conclusion

94. I accordingly propose that the Court of Justice should rule as follows:

(1) The appeal is dismissed.

(2) The Kingdom of Spain and the Commission of the European Communities shall each bear their own costs and shall also pay, jointly and severally, the costs incurred by Lenzing AG in the appeal proceedings.