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([1]) Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 October 2002

on State aid implemented by Germany for the Leuna 2000 refinery

(notified under document number C(2002) 4038)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/281/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

I. **PROCEDURE**

(1) By letter dated 19 August 1997, registered under the number SG(97) D/7156, the Commission informed Germany that it had decided on 23 July 1997 to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of aid granted to the Leuna 2000 refinery in Saxony-Anhalt.

(2) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the aid.

(3) The Commission received four sets of comments from interested parties. It forwarded them on 6 March 1998 to Germany, which was given the opportunity to react. A response was received from Germany by letters dated 8 April 1998 and 15 May 1998.

(4) On 17 February 1999, the Commission decided to send an injunction requiring Germany to provide certain information.

(5) The Commission sent letters to the German authorities on 19 August 1997, 4 February 1998, 6 March 1998, 7 April 1998, 26 May 1998, 29 May 1998, 23 June 1998, 15 July 1998, 29 July 1998, 16 September 1998, 17 September 1998, 28 January 1999, 17 March 1999, 22 March 1999, 29 April 1999, 15 May 1999, 29 June 1999, 31 October 2000 and 27 November 2000.

(6) The Commission sent to letters to Elf on 31 July 1998, 16 September 1998, 23 September 1998, 4 January 1999, 15 January 1999, 4 February 1999, 24 February 1999, 13 October 1999, 21 January 2002 and 11 April 2002.

(7) The Commission received correspondence from Germany by letters dated 5 September 1997, 18 September 1997, 6 November 1997, 11 February 1998, 9 March 1998, 8 April 1998, 24 April 1998, 15 May 1998, 19 August 1998, 4 November 1998, 20 December 1998, 15 December 1998, 16 January 1999, 27 January 1999, 8 March 1999, 9 March 1999, 16 March 1999, 16 April 1999, 27 April 1999, 10 May 1999, 31 May 1999, 2 June 1999, 10 June 1999, 26 June 1999, 2 July 1999, 28 September 1999, 6 November 2001, 22 February 2002 and 17 July 2002.

[1] OJ C 394, 30.12.1997, p. 14.
[2] See footnote 1.

(8) Correspondence from Elf or its representatives was received by letters dated 31 July 1998, 24 August 1998, 12 November 1998, 1 December 1998, 11 December 1998, 5 January 1999, 26 January 1999, 27 January 1999, 3 June 1999, 7 June 1999, 18 October 2000, 26 November 2001, 12 December 2001, 18 December 2001, 30 January 2002, 22 April 2002 and 28 May 2002.

(9) In addition, several meetings took place between the Commission and the parties involved.

II. **DESCRIPTION OF THE MEASURE**

(10) The Mitteldeutsche Erdöl-Raffinerie GmbH (Mider) refinery in Leuna/Spergau currently has a capacity of 10 million tonnes of crude oil a year. The crude oil comes directly through a pipeline from Russia and/or from Rostock and/or from Danzig. According to the company, the refinery employs around 2 550 persons. The main products are petrol, diesel, heating oil, kerosene and methanol.

(11) The origins of the present State aid case go back to the Commission decisions of 30 June 1993 (aid cases N 109/93 and NN 11/93) ([3]) and of 25 October 1994 (aid N 543/94). The decisions related to a package of aid to be paid by the *Treuhandanstalt*, the former east German privatisation institution and predecessor of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* (BvS). The aid was to be paid to Elf ([4])/Mider in the context of the privatisation and restructuring of the Zeitz/Leuna refineries and the petrol station network Minol. In 1992 Elf set up Mider as a wholly owned subsidiary to build the new Leuna 2000 refinery.

(12) The privatisation and the construction of the new plant were part of the efforts to restructure the old Leuna chemical site. In its decision of June 1993, the Commission decided, *inter alia*, not to raise objections to EUR 749,3 million (DEM 1 465,5 million) in investment aid for the construction of the new refinery. In November 1994, the Commission approved EUR 20,5 million (DEM 40 million) in further aid for additional investment amounting to EUR 102,3 million (DEM 200 million).

(13) Most of the aid measures were granted on the basis of various regional aid programmes authorised by the Commission. The original investment was estimated to be EUR 2 301 million (DEM 4 500 million) for the construction of the new refinery, corresponding to a gross aid intensity of 32,56 %. The total amount of investment aid approved amounted to EUR 769.7 million (DEM 1 505,5 million) on a total investment volume of EUR 2 403,1 million (DEM 4 700 million). The aid intensity of the overall investment project amounted to 32 % gross, i.e. below the maximum permitted ceiling of 35 % gross for large firms in the new *Länder*.

(14) The most important part of the overall project was the construction of the refinery installations. For this, Mider concluded a building contract on which a fixed price was agreed for turnkey delivery, a so-called 'lump-sum turnkey EPC ([5]) contract', with the consortium Thyssen-Lurgi-Technip joint venture (TLT) to carry out the construction. The costs agreed for building the plant by the TLT consortium were budgeted at EUR 1 692,4 million (DEM 3 310 million). The other costs were the costs for the preparation of the project, the accompanying infrastructure and the costs for putting the plant into operation.

(15) In 1997, the Commission received from Germany, in the context of its monitoring obligation, a copy of a report on a 1996 study carried out by the consultants Solomon Associates Ltd for the BvS. The report was intended to determine the price for the acquisition of shares in the new refinery. In a Memorandum of Understanding of 30 April 1994, the BvS granted Elf/Mider a put-option on the Mider shares that would allow the BvS to enter the project at the request of Elf/Mider ([6]).

(16) The Solomon study initially concluded that the costs indicated by Elf, on which the Commission's decisions were based, were well above the normal building costs for a comparable plant. Solomon calculated the costs on the basis of a statistical method for a theoretical plant.

(17) The Solomon report puts the normal costs for an EPC contract at EUR 1 207 million (DEM 2 400 million). The difference between the figure calculated by Solomon and the costs calculated on the basis of the EPC contract amounted to EUR 340 million (DEM 665 million), including adjustments made by Solomon ([7]).

([3]) OJ C 214, 7.8.1993.

([4]) Elf is currently part of Total Fina Elf SA.

([5]) Engineering, planning and construction.

([6]) The Memorandum of Understanding and the corresponding put-option were the subject of the Commission Decision of 2 February 2000 on the so-called 'Settlement Agreement' (N 94/98) between the BvS, the *Land* of Saxony-Anhalt and Elf/Mider. It is described in section VII of this Decision.

([7]) In its decision to initiate proceedings, the Commission specified an amount of EUR 460,2 million (DEM 900 million), but it did not take into account adjustments made by Solomon totalling DEM 235 million which reduced the gap.

III. GROUNDS FOR INITIATING THE PROCEDURE PROVIDED FOR IN ARTICLE 88(2)

(18) When the Commission initiated the procedure provided for in Article 88(2) of the EC Treaty, it expressed doubts as to the implementation of its original decisions and as to the information on which its decisions approving the aid were based. Consequently, the Commission also expressed doubts as to the compatibility of the aid. In particular, the Commission regarded the information provided by Germany as insufficient to remove its doubts regarding the actual costs of the construction of Leuna 2000 and the funds actually invested by Elf/Mider. ([8]).

(19) The Commission found that the information received until then did not contain any documentation that would justify the divergence between the investment expenditure estimated by Elf and the price determined by Solomon.

(20) An inflated presentation of the costs of the eligible investment on which the aid measures were based could have resulted in an amount of aid that was higher than the amount strictly needed for carrying out the project. This would be in conflict with the principle of the necessity of aid.

(21) Moreover, the level of aid could exceed the maximum aid intensity for investment aid allowed for the region. If misuse of aid were to be established, the Commission would be obliged under Article 88(2) of the EC Treaty to decide that the Member State abolish or alter the aid within a period of time to be determined by the Commission.

IV. COMMENTS FROM INTERESTED PARTIES

(22) The Commission received four sets of comments from interested parties, including Elf/Mider, in response to the initiation of the formal investigation procedure.

(23) A competitor in the petrochemical sector drew attention to the negative impact of the Leuna investment project on competition in the petroleum industry. A response came also from the United Kingdom, which expressed its concern that the maximum regional aid ceiling might be exceeded. It also referred to the detrimental impact of the aid on competition in the petroleum sector and on British competitors, particularly in view of European refinery capacities. A letter was also received from a consortium of two Russian companies interested in the acquisition of a holding in Mider and contesting the statement in the initiation of proceedings that they had withdrawn from the planned acquisition of shares. They claimed that the consortium would be willing to pay a purchase price equalling the amount to be paid by the BvS under the put-option for the Mider shares.

(24) In its comments, Elf/Mider focussed on the procedural aspects of the initiation proceedings as well as on substantive aspects. As concerns the procedure, Elf/Mider stated that the Commission's powers in reviewing existing aid schemes are restricted to issues related to compliance with the original decisions only. The review should not lead to a complete re-examination of the existing aid measures and their compatibility with the common market. Moreover, according to Elf/Mider, the initiation of the investigation procedure was not justified in this case as it was based principally on the Solomon report. That report had a different purpose, namely the valuation of the Mider shares possibly to be purchased by the BvS. Solomon's approach consisted of a subjective assessment of whether construction costs were justified or reasonable on the basis of what another oil company would be willing to invest. The assessment was thus unrelated to and lower than the actual costs borne by Mider. A final procedural comment related to the text of the Commission's decision to initiate the investigation procedure, arguing that the Commission's notice on the decision to initiate the Article 88(2) procedure was unclear and at times contradictory.

(25) The substantive comments from Elf/Mider aim to demonstrate that the information on which the Commission based its original decisions on State aid for the Leuna 2000 refinery was correct and that the investments had been made as envisaged. In addition, it was argued that the regional aid programmes had been administered properly, while the amount of aid and the aid intensity approved by the Commission had not been exceeded.

(26) Elf/Mider also stated that the conditions of the put-option on the Mider shares contained in the 1994 Memorandum of Understanding could not be considered part of the initiation of proceedings. The put-option was already part of the 'settlement agreement' between Elf and the BvS of 30 December 1997. The Settlement Agreement had become the subject of separate State aid proceedings (N 94/98). Therefore, questions concerning the Memorandum of Understanding and the put-option had no relevance to the present case.

([8]) In its decision to initiate proceedings, the Commission also requested information on the put-option contract, which was to be examined at a subsequent stage.

V. COMMENTS FROM GERMANY

(27) Information was provided on the actual construction costs, and explanations were given to justify additional costs. Germany also argued that the fixed-price lump-sum contract was justified by the tight schedule within which the refinery had to be constructed and the unforeseeable factors that had to be covered.

VI. EXPERT'S STUDY AND INFORMATION INJUNCTION

(28) In the course of its investigation, the Commission commissioned an independent study of its own to re-examine the construction costs of the refinery. Parpinelli Tecnon from Milan, a member of the Tecnon Consulting Group, (Tecnon) had been selected by the Commission in July 1998 to undertake a study. The external consultants had to examine whether the aid granted by Germany for the construction of the new petrochemical refinery at Leuna had been used in line with the Commission's approval decisions. Tecnon's study was to focus on two main issues. Firstly, establishing the value of the refinery and of the building contract between Elf/Mider and the TLT consortium. Secondly, auditing and verifying the actual payments for the overall project and comparing these with the initial plan on which the Commission's decisions were based.

(29) Tecnon submitted a preliminary report in January 1999. The study confirmed that the eligible overall investment project costs were approximately EUR 2 403,1 million (DEM 4 700 million) ([9]), as noted in the original Commission decisions. This amount comprised EUR 1 730,7 million (DEM 3 385 million) to be paid out to the consortium TLT, commissioned by Elf/Mider to construct the refinery on a turnkey EPC contract basis.

(30) Tecnon had full access to the accounting and financial data of Elf/Mider relating to the construction of the Leuna 2000 refinery. However, Tecnon did not have access to the accounts of TLT and other data not directly involved in the investigation proceedings.

(31) As Tecnon consequently did not have information on vendor bids or data on actual invoices from subcontractors, it determined the market price of the EPC contract and the refinery investment on the basis of data on other refinery projects. Tecnon declared that this method was basically the same methodology as that used in the previous estimate of the EPC contract value made by Solomon, but now tailored to the specific plant.

(32) According to the estimate based on Tecnon's file data, the amounts paid by Mider to TLT under the EPC contract and other orders exceeded by DEM 700 million the market value of the goods and services provided; this was in line with the estimate made by Solomon. As regards the payments made by Elf/Mider, however, the study concluded that the available accounting documents indicated that the declared costs were paid in conformity with the amounts specified. It was also established that the suppliers received the invoiced payments and that the investments were effected in line with the amended 1994 TLT contract. Tecnon also concluded that the amendments and changes that were made during the construction period fell within the norm that could be expected for a project of this nature and size.

(33) Germany and Elf/Mider contested the results of the study and the methodology applied. Major objections were that the report was based, like the Solomon report ([10]), on assumptions of the market value and not on the costs of the refinery which was actually constructed. Moreover, the study did not take into account specific circumstances related to the Leuna 2000 project. Comments were made on the estimation of the market value, the accuracy of the analysis and the fact that a number of site-specific issues that justified additional costs had not been taken into account. These included the stricter environmental standards Elf/Mider had to apply, the conditions of the old Leuna site and other unexpected costs.

(34) The Commission continued to have serious doubts as to the credibility and completeness of the information provided by Germany. The results of the expert's report suggested that the price paid by Elf/Mider to TLT for the construction of the refinery had been inflated, and thus the aid was not limited to the minimum required. Moreover, the Commission was convinced that crucial documentation had not yet been made available. In order to assess indisputably whether an abuse of aid had occurred, the Commission needed access to TLT's financial and market-related data, notably the vendor bids and data on actual invoices from subcontractors.

(35) The Commission therefore requested Germany by Decision of 17 February 1999 to submit the vendor bids received by TLT at the time the EPC contract was

([9]) The actual overall building costs amounted to EUR 2 607,6 million (DEM 5 100 million), including the interest costs.

([10]) In November 1998, Solomon issued a second revision of the report commissioned by the BvS. In this study, it revised its estimate upwards, and the difference between Solomon and TLT was now EUR 181,5 million (DEM 355 million) instead of the previous EUR 340,1 million (DEM 665 million).

prepared and used by TLT in formulating the contract price. Germany was also requested to provide documents showing the actual prices paid to subcontractors by TLT for specified work done and the corresponding invoices. Germany was further required to provide detailed cost statistics and financial reports of TLT.

(36) TLT expressed its willingness to provide the requested information. Tecnon carried out an additional study to review and analyse the supplementary information. The consultants considered the documentation supplied to be complete, with all the information requested in the injunction having been made available. The new information from TLT allowed Tecnon to submit a final version of its report in August 1999.

(37) In its final report, Tecnon stated that the difference of EUR 357,9 million (DEM 700 million) in cost calculations had been explained in a plausible way and seemed to be justified by the specific features of the Leuna site. Additional costs of DEM 400 million arising from increased material and construction necessities were verified mainly on the basis of audited financial data ([11]). These higher costs were explained by expensive infrastructure development as a result of many factors including meeting German regulations, notably environmental requirements. These costs were effectively incurred. They relate to transactions with third parties –the subcontractors- as a result of bids in a free and competitive market. Higher engineering costs of DEM 100 million were explained by a higher man-hour rate in comparison with Tecnon's file data. However, Tecnon had no reason to doubt TLT's rates because of the competitive nature of the TLT consortium's structure. The division of revenue to the three consortium partners was formulated in such a way that Technip and Lurgi earned revenue from the sale of engineering services, whilst Thyssen's share was mainly based on a percentage allocation of net profit. Therefore, it was in Thyssen's interest to monitor the actual engineering costs. Additional engineering costs of DEM 300 million relate to overrun costs. On the basis of its analysis, Tecnon considered TLT's explanation to be conceptually valid. These overrun costs were caused by several factors and included underestimation of the influence of the new pressure code for piping, the complexity of instrument systems, the change in the Mider team and numerous bankruptcies of suppliers.

(38) Tecnon stated that there was sufficient evidence to conclude that the differences between the actual reported results and Tecnon's estimate were likely to be covered by the ± 20 % accuracy margin of its analysis and by additional costs which were not foreseen by TLT in drawing up its budget. These costs were difficult to establish without direct knowledge of the negotiations between the contractors and the local, regional and national authorities during the construction phase. Tecnon was able to confirm that the higher costs verified by it were actually paid by TLT. Tecnon also confirmed that TLT's reported profit on the project was not excessive if compared to the risks that TLT incurred.

([11]) It was established that independent auditors had verified the financial and cost accounting data. Their reports and statements were made available. For instance, the Commission had access to statements on the actual cost value which has been certified by KPMG.

VII. **COMMISSION DECISIONS RELATING TO THE CASE**

(39) In the context of this investigation, two other Commission decisions relating to the Leuna 2000 investment project should be mentioned. The first case concerns the Commission's Decision of 1 October 1997 ([12]) not to approve the extension of the Investment Premium Law (C 28/96). This Law served as the legal basis for the granting of an EUR 184,1 million (DEM 360 million) investment premium covering 8 % of the investment costs of the refinery. The decision made the aid already awarded to Elf/Mider illegal and incompatible. The investors have in the meantime reimbursed the aid that had been paid out already. Elf/Mider requested the Court of First Instance to annul this Decision (Case T-9/98). On 22 November 2001, the Court annulled the Commission's Decision in so far as it concerned the situation of the applicant ([13]). The Commission will deal with the consequences of this Court judgment separately, but the judgment will not lead to additional aid being paid to Elf/Mider (see in that regard paragraphs 31 and 37 of the judgment in Case T-9/98).

(40) As concerns the other related case N 94/98, the Commission approved by decision of 2 February 2000 a settlement agreement concluded between the BvS, the *Land* of Saxony-Anhalt and Elf/Mider on 30 December 1997. In it, Germany recognised an EUR 184,1 million (DEM 360 million) claim for damages by Elf/Mider. The contribution of the BvS was intended to compensate, in particular, a claim that had emerged from the breach of the Memorandum of Understanding concluded between both parties on 30 April 1994 on the put-option.

([12]) OJ L 73, 12.3.1998, p. 38.
([13]) *Mitteldeutsche Erdöl-Raffinerie* v *Commission* [2001] ECR II-3367.

Moreover, the settlement agreement expressly provided that Elf/Mider was to repay to the BvS any sum paid to it as 8 % investment premium in excess of the amount of EUR 184,1 million (DEM 360 million).

(41) The Commission found that the sum of EUR 122,7 million (DEM 240 million) to be paid by the BvS did not constitute aid. The remaining amount of EUR 61,4 million (DEM 120 million) to be paid by Saxony-Anhalt as compensation for the non-receipt of the investment premium under the Investment Premium Law was considered to be aid. In its decision the Commission declared, however, that this aid was compatible with the Community rules on State aid. Germany undertook that this amount would not be paid directly to the beneficiary, but would be put in a so-called escrow account (blocked account) and would remain blocked until a final decision in the present case was taken.

VIII. **ASSESSMENT OF THE AID**

(42) According to the information provided by Germany, the overall eligible investment costs for the refinery amounted to EUR 2 403,1 million (DEM 4 700 million). The Commission's experts have checked this figure and have found no evidence that the eligible costs were improperly calculated. The amount was also confirmed by a report drawn up by the authorities of the *Land* of Saxony-Anhalt (*Verwendungsnachweisprüfung*). The amount of aid in support of the investment originally amounted to EUR 769,7 million (DEM 1 505,5 million). The aid intensity of the project was 32 % and consequently below the permissible aid ceiling of 35 % of eligible investment costs. The project did not receive any resources from the EU Structural Funds.

(43) The aid for the refinery construction so far amounts to EUR 585,7 million (DEM 1 145,5 million). This figure corresponds with the original amount approved by the Commission minus the DEM 360 million deducted after the negative decision on the Investment Premium Law. If the EUR 61,4 million (DEM 120 million) aid blocked on the escrow account following the decision on the settlement agreement were to be added, the project would receive an aid amount of EUR 647 million (DEM 1 265,5 million).

(44) Since the eligible investment costs for the project amount to EUR 2 403,1 million (DEM 4 700 million) and the aid to EUR 647 million (DEM 1 265,5 million), the gross aid intensity would amount to 26,9 % ([14]). This would mean that, according to the information available to the Commission and after verification of this information, the aid intensity of the project would be well below the ceiling of 35 % allowed for the region of Saxony-Anhalt. On the basis of this calculation, the aid ceiling would only be exceeded if the findings of the Commission's investigation indicated that the refinery construction costs were inflated by more than EUR 554,4 million (DEM 1 084,3 million) ([15]).

(45) This figure of EUR 554,4 million is well above the possible overstated amount of EUR 357,9 million (DEM 700 million) specified in Tecnon's preliminary report. It is also well beyond the cost difference specified in the Solomon study, which was the basis for the present investigation. The findings in Tecnon's final report on the basis of actual company data did not show any overstatement of costs.

(46) Moreover, it has been established that the costs presented were justified, actually paid by Elf/Mider and fully accounted for. Court and parliamentary inquiries in Germany into the construction costs of the Leuna 2000 refinery have similarly not revealed any misrepresentation of costs or any misuse of State aid. Nor did the report of the German parliamentary investigation committee (*Untersuchungsausschuss Parteispenden*) published in July 2002 establish any irregularities in connection with the construction of the Leuna refinery.

(47) As far as the Solomon report is concerned, the objective was to establish a market value for the shares with a view to a possible sale to the BvS. This valuation was not intended to represent the actual construction costs of the refinery. It was based on an estimate and not on actual company data. Although the consultants of Tecnon had information from Elf/Mider on the specific features of the Leuna refinery, the methodology applied in their preliminary study was also based on estimates in the absence of the market-related data used by the TLT consortium to determine their bid. The provision of the requested data from TLT explained the differences between their initial analysis and the actual construction costs based on the EPC contract. Tecnon concluded that the difference in cost calculations was explained in a plausible way and within the accuracy margin of their study.

(48) As regards the third party comments following the initiation of proceedings, the Commission notes that no evidence has been found that aid was granted beyond

([14]) Elf/Mider stated that this percentage has been reduced to between 22 % and 24,3 % due to changes in the financial and physical design of the project.

([15]) This calculation is based on the difference between 35 % of DEM 4 700 million (DEM 1 645 million) and the amount actually granted (DEM 1 265,5 million). The difference between these two amounts (DEM 379,5 million) is the aid that could theoretically still be paid out in compliance with the aid intensity of 35 %. It corresponds to an eligible investment base of DEM 1 084,3 million.

the scope originally approved. As demonstrated above, the aid intensity remains well within the maximum percentage allowed. The conditions of the put-option of the BvS were dealt with separately in the decision taken in 2000 on the settlement agreement.

IX. **CONCLUSION**

(49) The information received and the analysis that has been carried out by the Commission in the course of this investigation procedure have not shown any evidence of any misuse of aid. No overstatement of eligible costs or granting of aid beyond the scope of the original decisions authorising aid for the Leuna 2000 investment project has been demonstrated. Consequently, the Commission's doubts as to the compatibility of the aid granted to Elf/Mider with Article 87 of the EC Treaty and Article 61 of the EEA Agreement have been allayed and the proceedings can be terminated.

(50) As already stated in the decision on the settlement agreement, the Commission will not object to the amount of EUR 61,4 million (DEM 120 million) currently blocked in an escrow account ([16]) being paid to the beneficiary. In accordance with the provisions of this agreement, any amount exceeding the sum of EUR 184,1 million (DEM 360 million) is to be repaid to the BvS.

(51) However, the Commission's decision to terminate the investigation proceedings is subject to the condition that the Commission may reopen the investigation if new facts come to light which contradict the conclusions reached in this examination,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has granted in the context of the construction of the Leuna 2000 refinery and which was the subject of the Commission Decisions N 109/93, NN 11/93 and N 543/94 is compatible with the common market within the meaning of Article 87 of the Treaty. The full implementation of aid measures amounting to EUR 647 million (DEM 1 265,5 million) is accordingly authorised. This amount comprises EUR 61,4 million (DEM 120 million) approved under the Commission's Decision on the settlement agreement (N 94/98).

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 October 2002.

For the Commission

Mario MONTI

Member of the Commission

([16]) Plus the corresponding interest.

COMMISSION DECISION

of 27 November 2002

on the State aid implemented by Germany for Doppstadt GmbH

(notified under document number C(2002) 4482)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/282/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

I. PROCEDURE

(1) By letter dated 5 October 1999, Germany notified the Commission pursuant to Article 88(3) of the EC Treaty of restructuring aid for the privatisation of former LandTechnik Schönebeck GmbH to Mr Ferdinand Doppstadt. The company was renamed Doppstadt GmbH in May 1999.

(2) By letter dated 1 August 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the aid.

(4) The Commission received no comments from interested parties.

(5) Doppstadt GmbH is a hive-off vehicle (Auffanggesellschaft), which arose out of the former LandTechnik Schönebeck GmbH (LTS) and its wholly-owned subsidiary GS Fahrzeug- und Systemtechnik GmbH. LTS belonged to a group of eight former eastern German companies, from which, under the initial privatisation in 1994, the EFBE Verwaltungs GmbH & Co Management KG, now Lintra Beteiligungsholding GmbH, emerged. Since the original privatisation plan failed in December 1996, the Federal Agency for Special Tasks associated with unification (BvS: Bundesanstalt für vereingungsbedingte Sonderaufgaben) decided in January 1997 to continue the restructuring of potentially viable Lintra subsidiaries with a view to preparing them for sale. Since LTS had received aid that was to be assessed in the context of the other notified restructuring aid, the case was registered as non-notified aid. The aid paid to LTS via Lintra Beteiligungsholding was the subject of the Commission's decision on aid to Lintra Beteiligungsholding GmbH [3] (Lintra decision).

II. DETAILED DESCRIPTION OF THE AID

(6) The aid recipient, Doppstadt GmbH, is a hive-off vehicle, which arose out of the former LandTechnik Schönebeck GmbH (LTS) and its wholly-owned subsidiary GS Fahrzeug- und Systemtechnik GmbH (GS).

(7) On 10 May 1999 the operational business of LTS and GS was transferred to a new company with a share capital of EUR 25 641 [4]. On the same day the

[1] OJ C 278, 30.9.2000, p. 17.
[2] See footnote 1.
[3] Commission Decision 2001/673/EC of 28 March 2001 on State aid implemented by Germany for EFBE Verwaltungs GmbH & Co Management KG (now Lintra Beteiligungsholding GmbH, together with Zeitzer Maschinen, Anlagen Geräte GmbH; LandTechnik Schlüter GmbH; ILKA MAFA Kältetechnik GmbH; Motoren- und Systembautechnik GmbH; SKL Spezialapparatebau GmbH; Madgeburger Eisengießerei GmbH, Saxonia Edelmetalle GmbH and Gothaer Fahrzeugwerk GmbH) (OJ L 236, 5.9.2001, p. 3).
[4] Converted into euro at EUR 1 = DEM 1,95; the values have been rounded up.

company's shares were transferred to Mr Ferdinand Doppstadt. The company's name is Doppstadt GmbH. LTS and GS were subsequently dissolved.

(8) Doppstadt has its registered office in Schönebeck, Saxony-Anhalt. It produces various categories of carrier vehicle, environmental-engineering equipment, chaff cutters and system components. It employed 305 persons in May 2002.

(9) The investor, Mr Doppstadt, was chosen under open tendering procedure early in 1999. There were 21 interested firms. Mr Doppstadt's offer emerged from negotiations with the bidders as the best bid. The purchase price for the newly established company was EUR 25 641.

(10) The investor is operations manager of a group of seven companies active in the vehicles, customer service and foreign distribution sector. Prior to the acquisition, his companies had a total workforce of 38.

1. **Restructuring**

(11) The restructuring period was originally intended to last from May 1999 to the end of December 2002. The original restructuring plan provided for investments and restructuring measures (including public funding) amounting to EUR 39 722 million. The object of the investment is, in particular, to replace obsolete machinery and tools, increase the quality and flexibility of the production process and comply with environmental standards.

(12) The investor will increase the share capital of the company to EUR 10,25 million by 31 December 2002 and provide the company with the necessary working capital of at least EUR 14 million.

(13) According to the information provided, the aim of the restructuring is the completion and targeted extension of the Doppstadt product range. An essential part of the restructuring plan is to use the synergies of the Doppstadt group by marketing the vehicles under the established Doppstadt brand. The future strategy is to concentrate on municipalities and positioning Doppstadt GmbH as a supplier of a complete range of carrier vehicles. In addition, under the new plan, up to 25 % of production capacity will be used for subcontracting for Doppstadt Calbe GmbH. The remaining capacity will be used to produce models in their current and developed versions plus new products. It was also explained that 25 % of future turnover would be generated by shifting production from the plants located in Velbert and Calbe.

(14) Products will be marketed with the help of DVG Doppstadt Vertriebsgesellschaft GmbH, using the current distribution network in Germany and abroad. A sales volume of at least 500 units of the main product, the TRAC special carrier vehicle (Trac) is anticipated, and an annual increase in sales of 10 % to 15 % is forecast by the end of the restructuring operation.

(15) The company's business development forecast for 2002 assumed a profit of EUR […] (*) million on a turnover of EUR […] (*) million. For 2003, the profit forecast was EUR […] (*) million on a turnover of EUR […] (*) million.

(16) The geographic breakdown of Doppstadt GmbH's sales in 2000 was as follows: Germany […] (*) %, CIS […] (*) %, western Europe […] (*) %.

(17) In the decision to initiate the formal investigation procedure (initiation decision) the Commission established that the financing for the restructuring plan was as follows:

(*) Text which has heen omitted is slown as […] and represents business secrets.

(EUR million)

Costs		Financing		
		BvS/*Land*		Investor
Investments	27,13	Approved schemes:		6,934
		GA contribution ([5])	8,14	
		Investment premium ([6])	5,42	
		Grant from Saxony-Anhalt	12,079	
Restructuring costs	12,58			
Loss compensation	6,4	BvS grant	13,552	
Working capital	6,685	BvS	2,6	14,07
Original production facilities	6,6	BvS	6,6	
Waiver of claims	5,415	BvS	5,415	
Total	74,901		53,896	21,004
			= 72 %	= 28 %

Note: the table contains rounded figures and is not arithmetically correct.

([5]) 27th Framework Plan for the joint Federal/Länder task 'Improving regional economic structures'. State aid C 84/98, approved by Commission decision of 21 April 1999, communicated to Germany by letter, SG(1999) 03472, 17 May 1999.

([6]) Investment Subsidy Law (Investitionszulagengesetz) 1996; State aid N 494/A/95; decision communicated to Germany by letter, SG (96) 3794, 11 April 1996.

(18) In addition to the above measures, Germany also included an EUR 2,8 million contribution towards the labour costs of the restructuring. This is provided by the Doppstadt GmbH workforce through a partial pay restraint during the restructuring period.

2. **The decision to initiate the proceedings under Article 88(2) of the EC Treaty**

(19) In the initiation decision, the Commission noted that the investor, Mr F. Doppstadt, had no previous experience in the field of carrier vehicles and had limited financial resources. In addition, the Commission noted that the information on the relevant markets in its possession was not sufficient to enable it to conclude whether the rather ambitious sales targets on which the long-term viability of the company was based were realistic and plausible. Therefore, the Commission had doubts about the ability of the restructuring plan to ensure the company's long-term viability.

(20) In the initiation decision the Commission also noted that it did not have enough information to conclude that the EUR 5,3 million waiver granted to LTS in 1997 was not aid for current restructuring. Account was taken of this, therefore, in the initiation decision, in the restructuring finance. It was consequently established that the public share of the financing would be EUR 53,896 million, or 72 % of the total costs. The beneficiary's contribution would be EUR 21,004 million (28 %). The Commission doubted, therefore, whether the investor's contribution could be significant, as provided for in the rescue and restructuring guidelines.

(21) The Commission further noted that the planned restructuring consisted mainly of investments. In all, EUR 27,133 million (69 %) of the total restructuring cost of EUR 39,732 million would be investment. This indicates that the purpose of the project is to finance new investment rather than a restructuring operation. In this particular case there are doubts about the

proportionality of the aid. If the project is regarded as new investment instead of restructuring, its aid intensity will have to respect the ceiling for regional aid.

(22) The Commission also pointed out that additional claims against the former LTS might arise out of the final decision in the still-pending case concerning Lintra Beteiligungsholding (C 41/99); these would have to be added to the costs of the present restructuring plan. Such additional claims should be taken into account in assessing whether the restructuring plan will ensure the company's long-term viability and whether the aid is proportional.

III. COMMENTS FROM GERMANY

(23) Germany submitted its comments on the initiation decision by letter dated 6 November 2000. It informed the Commission of changes to the restructuring plan by letter dated 21 September 2001. Its comments are reproduced below.

1. Liabilities resulting from the 'Lintra' decision

(24) As regards any additional claims against the former LTS that should be taken into account in this proceeding, Germany would refer to its opinion in case C 41/99 concerning Lintra Beteiligungsholding. The opinion relates to Lintra's claims against LTS ([7]), amounting to a total of EUR 4 088 648,54. They were settled by LTS in liquidation.

2. Classification of the project as restructuring

(25) As regards describing the privatisation of the former LTS as a restructuring operation, Germany would explain that the restructuring plan satisfies all the criteria set out in the guidelines. The new investor has carried on the business of LTS/GS, which had been in liquidation since 1999, without interruption. The first restructuring measure was to set up the hive-off vehicle, Doppstadt GmbH, which continued the businesses of the two earlier companies on the following basis:

— 192, initially, of the original 260 employees,

— same order book,

— existing contracts with the same suppliers,

— same volume of output, but a different product range,

— same production plant,

— same processes, raw materials and inventory,

— same technical conditions.

(26) The firm was therefore initially continued under the same unprofitable conditions as existed when the predecessor companies went into liquidation. At the same time, the restructuring plan devised by the buyer was gradually put into effect.

(27) According to Germany, the restructuring plan consists the following measures:

(a) Internal measures

— personnel: training of the workforce taken over; providing for the future by expanding training activities,

— sales: integration into the Doppstadt group's established sales network,

— product range: adapting the existing range by discontinuing unprofitable vehicles and replacing them with new, modern products and promising market segments,

— non-capitalisable restructuring measures: review of the production-line layout and rationalisation of work processes with the aim of converting the firm from being a mass-production manufacturer to a modern supplier of customised special machines;

(b) Investments

— dealing with the investment backlog: modernisation of existing plant to satisfy statutory environmental protection requirements, improving quality, increasing flexibility, replacing old tools and machinery;

(c) Financial measures

— capital contribution by buyer, workforce, BvS and Saxony-Anhalt; loss compensation.

([7]) When it was part of Lintra, LTS was called LandTechnik Schlüter GmbH.

(28) According to Germany, the investments are only part of the firm's restructuring and are an inseparable component of the overall restructuring plan. The investments alone cannot make the firm profitable in the long term without the work processes also being reorganised and rationalised, the product range modernised and the finances restructured.

(29) Therefore, according to Germany, the restructuring plan satisfies the criteria of the rescuing and restructuring guidelines and cannot be considered as a new investment for the purposes of regional development.

3. **Viability of the restructuring plan**

(30) As far as the investor is concerned, Germany explains that the Doppstadt family, in whose firm Ferdinand Doppstadt worked before he went into business on his own, has more than 30 years' experience of manufacturing carrier vehicles. Direct use was made, in the development of the carrier vehicles, of the practical experience gained, in the family's own business, of agriculture, services for local authorities, and sales and other customer services for Unimog and other brands. In the early 1970s Doppstadt developed the control hydraulics for the Mercedes Benz MB-trac 65. At that time Doppstadt also carried out trials for the Deutz-Intrac.

(31) The focus of the Doppstadt group has always been on developing highly customised specific system solutions in niche markets. In the past, Doppstadt has drawn on its own or, in some cases, other manufacturers' existing carrier vehicles to power or connect up with Doppstadt-developed attachments (for example the Grizzly as a combination of the Steyr-Tracs with the Doppstadt converter).

(32) As regards the financial resources of the investor, Germany explains that under the privatisation contract, the buyer's financial obligations are secured by a bank guarantee of EUR 2,05 million, a commitment by a bank in the usual form to secure investment obligations of EUR 6,934 million and a commitment by a bank for a capital loan to secure operational financing amounting to EUR 14,07 million. According to Germany, these undertakings for funding from the company's banks should be sufficient to allay the Commission's doubts as to the investor's credit standing.

(a) *The modified restructuring plan*

(33) Germany also provided a modified restructuring plan. According to Germany, the plan had to be amended due to problems that were encountered in relation to the main product, the Trac, after it had been introduced onto the market.

(34) Germany explains that the failure to reach the initially planned turnover and financial targets was mainly due to not reaching the turnover targets for carrier vehicles. When the investor took over the company, it was assumed that the main product of the LTS, the Trac, could be brought to the market immediately. The implementation of the restructuring measures (production, logistics and distribution) started on the basis of the assumption that the Trac was market-ready. Consequently, personnel and stocks were increased considerably. The first Tracs were delivered at the end of 2000, and only then did it become evident that the Trac was technically outdated and did not correspond to the customers' requirements for a modern multi-purpose carrier vehicle.

(35) The modified restructuring plan prolongs the restructuring period by one year. Positive results are expected in 2003 instead of 2002 as originally forecast. The main elements of the modified plan are the following:

(36) A new manager was appointed for production, engineering and development in January 2001. A special design team was set up for the modernisation of the Trac series, and a new product was developed. The work processes were optimised and teamwork introduced. The workforce was reduced by 71 persons by 30 June 2001.

(37) Cooperation with dealers was rethought, and requirements in this respect were redefined. An additional manager is being sought, and external consultants were commissioned to help the company through the restructuring process. An advisory committee was set up in August 2001 to improve controls and to help identify potential problems in time.

(38) As regards investments, it was explained that by 18 June 2001 investments worth EUR 10,063 million had already been carried out. However, the total amount of investment is EUR 9,581 million less than what is was, since the company will no longer build its own power station. Due to liberalisation of the energy markets, it will not be necessary or economic to operate a company power station.

(39) The cost of other restructuring measures will go up from the original EUR 12,589 million to EUR 17,367 million, an increase of EUR 4,777 million. By June

2001 measures worth EUR 13,603 million were being carried out. The need for additional financing was caused by the need to modernise the Trac-series. EUR […] (*) million is needed for the development of the Tracs. For presentation of the product in trade fairs and for other measures supporting the marketing and sales of the Tracs, EUR […] (*) million is needed. An additional EUR […] (*) million is needed for reorganisation of the company (introducing teamwork, improvement of internal communication, increase of productivity and external consultants). In addition, the current situation of the company requires additional working capital of EUR […] (*) million.

(40) Germany explains that the additional measures are being financed by state aid. However, since the reduced investment costs result in a corresponding decrease in investment aid, total restructuring aid under the new plan will be EUR 45,409 million, which is less than the amount provided for in the original plan. The financing by the investor remains the same. Consequently, the modified restructuring plan results in total restructuring costs of EUR 69,26 million. This is EUR 3,071 million less than the costs in the original plan.

(41) With regard to the financing of the restructuring as identified by the Commission in the initiation decision, Germany acknowledges that the BvS loan of EUR 2,6 million and the transfer of assets worth EUR 6,6 million are restructuring aid. However, Germany stresses that the price of EUR 25 641 paid by the investor for the new company should be included in the investor contribution.

(42) The forecast in the new plan for the future financial development of the firm is shown in the following table:

(EUR million)

	2001 (original)	2001 (new)	2002 (original)	2002 (new)	2003 (original)	2003 (new)
Turnover	[…] (*)	[…] (*)	[…] (*)	[…] (*)	[…] (*)	[…] (*)
Result	[…] (*)	[…] (*)	[…] (*)	[…] (*)	[…] (*)	[…] (*)

Note: the table contains rounded figures.

(43) Germany explains that under the new plan the return of the company to viability is deferred by one year compared with the original plan. Positive results are anticipated in 2003 instead of 2002 as originally planned. Initially, the increase of turnover will be mainly generated by production on the environmental-engineering side. From 2003, after the new Trac-series has been brought to market, these products will be a cornerstone of the new plan, generating one-third of turnover. Trac vehicles (including spare parts) will account for some […] (*) % of total turnover in 2003.

Expected share of total company turnover accounted for by Trac vehicles (including spare parts)

	2001		2002		2003	
	EUR million	%	EUR million	%	EUR million	%
Total turnover	28,8	100	[…] (*)	100	[…] (*)	100
Trac	3,8	13,3	[…] (*)	[…] (*)	[…] (*)	[…] (*)
Spare parts	2,8	9,9	[…] (*)	[…] (*)	[…] (*)	[…] (*)

Note: the table contains rounded figures.

(44) Germany states that to achieve the estimated turnover for Tracs the new planning provides for sales of […] (*) Trac vehicles in 2002 and […] (*) in 2003. At the end of the restructuring, sales of between […] (*) and […] (*) units a year are envisaged.

(b) *Market information*

(45) Germany explained that Doppstadt GmbH is active in the carrier vehicles of various categories segment of the market. Its range includes customised municipal and special vehicles that can be used in a variety of situations and in many different areas. The vehicles can be used as conventional tractors for farming but in other areas too, as they are able to use a wide range of accessories and special-purpose equipment found in other sectors. The information supplied shows that it is possible to use a wide range of equipment in the agricultural, local authority, forestry and construction sectors. The target markets for Doppstadt carrier vehicles are mainly local authorities (towns and municipalities), private agricultural contractors and forestry firms. The new product range offered by Doppstadt in carrier vehicles covers categories from 60 kW up, but is aimed in particular at the upper segment above 85 kW.

(46) According to Germany, the tractor market is used to define the market volume on the Community market and of competitors. It must be borne in mind, however, that both tractors and carrier vehicles are not entirely homogeneous markets with interchangeable products, since the potential applications of rival products are not entirely the same. Doppstadt carrier vehicles are designed as multi-purpose vehicles for the use of special equipment. Even though to some extent the vehicles can perform the same functions as lorries, they are generally not to be used for tasks where one would expect lorries to be used. The overlaps with lorries are not particularly great, therefore, and in more than 90 % of all products tractors and carrier vehicles are interchangeable. Tractors are therefore the reference market for determining the relevant market volume.

(47) From 1995 to 1997 demand for tractors on the Community market was marked by annual growth rates of around 6 %. From 1997 to 1998 the growth rate fell to 2 %. Since 1998, demand for new vehicles has been stagnant. In contrast to other segments, however, the demand for tractors with a rating of more than 85 kW has significantly increased in recent years. This segment's share of registrations in Germany increased from 25 % to 33 % between 1995 and 1999.

(48) The biggest competitors in the German tractor market include Fendt (21 %), John Deere (20 %), Case/Steyr (13 %), Deutz-Fahr (9 %), New Holland (6 %) and Massey Fergusson (5 %), which together account for about three quarters of the market. The remaining 25 % of the market is shared by a number of European and Asian manufacturers. Before the launch of the new Trac, Doppstadt had about a 3 % share of the carrier vehicle market in 2001.

(49) The Community tractor market is dominated by the manufacturers New Holland (16 %), Agco (12 %), John Deere (12 %), Case/Steyr (10 %) and Massey Ferguson (8 %) as the major competitors. At 0,2 % in 1999, Doppstadt's market share was negligible.

(50) As regards the future prospects of the market, Germany explains that since the market is regulated by the Community, demand for tractors and carrier vehicles for the agricultural machinery sector in western Europe is relatively stable and unaffected by world trends in the price of wheat, etc. However, farmers' requirements regarding the commercial vehicles they use have changed in recent years, especially as regards flexibility and power. Many former small farmers now also work as contractors for larger farms and/or local authorities and therefore need powerful and versatile carrier vehicles, working very different types of ground at higher speeds and capable of covering longer distances.

(51) According to Germany, demand for carrier vehicles in the local government sector (road maintenance, parks and landscaping) is influenced essentially by more demanding statutory requirements in environmental matters and must therefore be considered stable.

(52) As a conclusion Germany states that the market for tractors and carrier vehicles is stagnant at present. Nevertheless, there is market potential for Doppstadt GmbH in the growth regions, especially since the company offers customised special vehicles in niche sections of the upper and lower performance classes, which are marked by high growth rates despite the stagnation in demand overall.

(53) According to the information submitted by Germany, in particular one main product, the Trac, has to be considered a niche product between the traditional tractor (Ackerschlepper) and Daimler-Chrysler's multi-purpose vehicle the Unimog. Germany supplied a market analysis by Management Engineers, a consultancy with a special focus on engineering, which in particular explains the prospects of the new Trac. According to the market analysis, the previously encountered technical problems have been solved by the new Trac. The Trac now meets the technical requirements demanded by the target market. The study concludes that there exists a niche in the market for the Trac, which has not been occupied by competitors. According to the study the niche arises for the following reasons:

(54) The new Trac mainly targets the segment above 85 kW, where there has been ingrowth over recent years, despite the stagnation on the overall tractor market. Vehicle registrations in that segment in Germany have increased from 31 % to 40 % of the total from 1995 to 2001.

(55) The Trac is based on the former Mercedes Benz model 'MB-Trac', which is not produced any more but is still widely used, although it will soon be out of date. The new Trac is the likely choice for the replacement. Doppstadt, which bought the patent for the MB-Trac, can use its former distribution channels.

(56) The new Trac can be used for many different purposes, even outside the traditional target market for tractors (agriculture), where there is a growing need for these products. Other customers are municipalities and firms that need special- and multi-purpose vehicles, e.g. airports, construction firms and railway companies.

(57) As Daimler-Chrysler plans to concentrate its multi-purpose concept (the Unimog) on road-going vehicles, this niche is expected to grow. The market study estimates possible sales figures of […] (*) to […] (*) Tracs per annum in Europe after the year 2003. An inquiry at Doppstadt sales agents included in the analysis produced the following estimated sales figures:

Estimated Trac sales figures (as indicated by sales agents)

	2003	2004	2005	2006
Germany	[…] (*)	[…] (*)	[…] (*)	[…] (*)
Europe	[…] (*)	[…] (*)	[…] (*)	[…] (*)

(c) *Development of the company*

(58) Besides the Trac the company's turnover is mainly to be generated by environmental-technological machines. The turnover of that segment after the integration of some of the investor's activities at another location in 2000 could be increased from the earlier EUR 294 358 to EUR 9,6 million and in 2001 exceeded the EUR 13 million forecast by the plan.

(59) Furthermore, Germany states that the new Trac has now been launched successfully on the market. According to Germany, […] (*) models were sold by Doppstadt in the first three months after the market launch in March. A first positive monthly result of EUR […] (*) was achieved in April 2002. Current orders up to May 2002 numbered […] (*). Compared to the previous year turnover could be increased by 40 %. Latest figures show that the turnover and result up to July 2002 kept in line with the plan. Unfortunately in August the company faced a downturn as it had to close its production due to the eastern German floodings.

4. **Financing of the restructuring and proportionality of the aid**

(a) *Workers' contribution to the restructuring*

(60) As regards the workers contribution of EUR 2,82 million to the restructuring, Germany takes the view that the fact that the workforce is foregoing part of its wages or salaries must be considered as a contribution from the firm's own resources within the meaning of point 3.2.2.(iii) of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([8]). The crucial factor in respect of this criterion is whether there is a contribution by the firm being restructured, which is the beneficiary of the aid. This may mean either the contribution of funding by the investor or some other contribution by the firm. The waiver by employees of income in the form of wages must be a relevant contribution to a successful restructuring and may be added to the beneficiary's contribution. Consequently, Germany argues that the EUR 2,82 million wage reduction accepted by the workforce must be considered as an integral part of the financing plan and taken into account when calculating the overall costs of restructuring.

(b) *The waiver by BvS of the claim for EUR 5,424 million against LTS*

(61) Germany explains that BvS had not waived its claims against LTS in liquidation. In April/May 2000, the auditors corrected LTS's annual accounts, so that EUR 5,424 million (including accrued interest) is again shown as a liability vis-à-vis the BvS in the accounts for the year ending 31 December 1998. The sum will be paid from the liquidation proceeds of LTS. Since BvS has not waived the claim, the amount should not be considered as aid to the present restructuring, as claimed by the Commission in the initiation decision.

IV. **ASSESSMENT OF THE AID**

1. **Existence of state aid**

(62) According to Article 87(1) of the EC Treaty, 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

([8]) OJ C 368, 23.12.1994, p. 12.

affects trade between Member States, be incompatible with the common market. Pursuant to the established case-law of the European Courts, the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.

(63) The Commission notes that in the present case the aid is granted through State resources to an individual company favouring it by reducing the costs it would normally have to bear if it wanted to carry out the notified restructuring project. Moreover, the recipient of the aid, Doppstadt GmbH, is a company whose activities are the production of carrier vehicles and environmental-engineering equipment, which are economic activities involving trade between Member States. Therefore, the aid in question falls within the scope of Article 87(1) of the EC Treaty.

(64) The Commission further notes that, as regards this aid, the German authorities failed to comply with their obligation under Article 88(3) EC Treaty to inform the Commission in sufficient time of the plans to grant the aid. From a formal point of view, therefore, the aid is unlawful. This does not necessarily mean, however, that the aid is incompatible with the common market. Thus, the individual measures must be examined under Article 87 EC Treaty.

2. **Possible grounds of compatibility**

(65) A derogation from Article 87(1) of the EC Treaty can result from either Article 87(2) or Article 87(3) of the EC Treaty.

(66) Germany is not claiming that the aid should be regarded as compatible with the common market under Article 87(2). Indeed, it is evident that this provision does not apply.

(67) This case falls under Article 87(3) of the EC Treaty, a provision that gives the Commission discretion to permit State aid in certain specified circumstances. The derogations of Article 87(3)(b), (d) and (e) were not invoked in the present case and are indeed not relevant. Article 87(3)(a) empowers the Commission to approve State aid meant to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Saxony-Anhalt falls within this definition. In this case, however, the main purpose of the aid is to promote the development of a particular economic sector rather than to promote the economic development of a region. Thus the aid should be assessed under Article 87(3)(c) rather than Article 87(3)(a) EC Treaty.

(68) The project concerns the restructuring of the company in accordance with the restructuring plan submitted by the investor. Restructuring aid for firms in difficulty is assessed pursuant to the Community guidelines on State aid for rescuing and restructuring firms in difficulty. Rescue and restructuring aid may, under Article 87(3)(c) of the Treaty, facilitate the development of certain economic activities where it does not adversely affect trading conditions to an extent contrary to the common interest if the conditions laid down in the guidelines are met.

(69) In the present case, under paragraph 101 of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty ([9]), the 1994 guidelines are applicable, since neither the total aid nor a portion thereof was granted after the 1999 guidelines were published.

3. **Scope of the assessment**

(70) In the initiation decision, the Commission found that further claims against Doppstadt might arise out of the Lintra decision ([10]).

(71) The Lintra decision was adopted on 28 March 2001. By letter dated 29 June 2001 Germany informed the Commission that the unlawful aid of EUR 3 252 373 allocated to the former LTS by the decision of 28 March 2001 had been recovered with interest, being a total of EUR 4 088 648,54. A payment instruction dated 22 June 2001 was forwarded to the Commission. The unlawful aid was paid back by LTS in liquidation. The measures in question, therefore, are no longer the subject of the assessment in the present decision.

(72) The Commission further notes that, according to the modified restructuring plan, EUR 6,165 million of the total public contributions to the restructuring of EUR 45,409 million is being granted under approved schemes. Therefore, this aid is considered as existing aid within the meaning of Article 1(b)(ii) of Council Regulation (EC) No 659/99 of 22 March 1999 laying down detailed rules for the application of Article 93 of

([9]) OJ C 288, 9.10.1999, p. 2.
([10]) See footnote 3.

the EC Treaty ([11]) and the compatibility of it with the common market need not be further assessed by the Commission in this decision. Consequently, aid to the amount of EUR 39,244 million is being examined as ad hoc aid in the present decision. It is pointed out, however, that the existing aid of EUR 6,165 million will also be taken into account in the assessment of the aid's proportionality under point 3.2.2(iii) of the guidelines.

(73) In the initiation decision, the Commission provisionally assessed the aid in the light of the original restructuring plan. Germany subsequently submitted a modified version of the restructuring plan, which must now be taken into account in order to assess the aid. The Commission must therefore consider developments that occurred after the aid was granted but before the date when the modified plan was submitted, to the extent necessary to assess the new plan.

4. **Firm in difficulty**

(74) In general, a newly founded company cannot be considered as a firm in difficulty. However, due to the exceptional transformation process in the new *Länder*, the Commission has agreed to apply the restructuring guidelines in cases where companies are offered a new chance (Auffanglösungen) ([12]), if it is not a question of simply selling individual assets and the activity of the insolvent company is continued. Applying the guidelines to such companies can be justified in the light of the problems in the new *Länder* in general and of the company in particular.

(75) Doppstadt has its registered office in the new *Länder*. All assets of the former LTS and GS which were necessary for the production to be taken over were transferred to it. The activities of the former LTS and GS were continued by Doppstadt. Consequently, Doppstadt constitutes a genuine 'new opportunity' and the measures in favour of it can be regarded as restructuring aid.

(76) According to point 2.1 of the guidelines, typical symptoms of a firm in difficulty are deteriorating profitability or increasing losses, diminishing turnover, declining cash flow and low net asset value. The Commission notes that LTS has been loss-making since its establishment in 1995 ([13]). The losses in 1998 were EUR 8,3 million and in 1999, when the Commission was informed of the present plan, the losses were EUR 4,652 million. Doppstadt is a firm in difficulty, therefore, and the aid for its restructuring is being assessed under the guidelines.

5. **Classification of the project as restructuring**

(77) In the initiation decision, the Commission expressed doubts about whether the project was basically a restructuring operation, since the restructuring measures consisted mostly of investments.

(78) The Commission notes that the modified project as communicated by Germany assumes a total reduction in investment costs of EUR 9,515 million ([14]). This would result in the investment costs being 50 % of the costs of the restructuring measures. The share of investments in the restructuring plan has therefore considerably decreased. In addition, Germany rightly claims that the investments alone would not be sufficient to make the firm profitable in the long term without the work processes also being reorganised and rationalised and the product range and distribution modernised, as provided for in the restructuring plan. For these reasons, the Commission considers that the plan as a whole fulfils the criteria of being a restructuring, and not just an investment, project.

6. **Restoration of viability**

(79) According to point 3.2.2(i) of the guidelines, the restructuring plan must restore the long-term viability of the company within an appropriate period and on the basis of realistic assumptions as to its future operating conditions. The improvement of the company's situation and its return to viability must mainly result from internal measures contained in the restructuring plan

([11]) OJ L 83, 27.3.1999, p. 1.

([12]) See the Commission's approvals of 16 and 30 April 1997: State aid N 874/96 and NN 139/96 in favour of UNION Werkzeugmaschinen GmbH (letter D/3428, 2.5.1997); State aid N 892/96 in favour of FORON Haus- und Küchentechnik GmbH (letter D/4047, 28.5.1997). This approach is now confirmed by point 7, footnote 10, of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty: 'The only exceptions of this rule are any cases dealt with by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben in the context of its privatisation remit and other similar cases in the new *Länder*, involving companies emerging from a liquidation or a take-over of assets occurring up to 31 December 1999'.

([13]) Transformation of LandTechnik Schlüter GmbH into LandTechnik Schönebeck GmbH on 31 May 1995.

([14]) The reduction in costs is due to the decision not to invest in a company power station on account of the liberalisation of the energy markets.

and may not be based only on external factors such as price and demand increases, over which the company has no great influence.

(80) In the initiation decision, the Commission expressed its doubts about the ability of the restructuring plan to ensure the long-term viability of the company, since the investor, Mr Doppstadt, appeared not to have any previous experience in the field of carrier vehicles and had limited financial resources. In addition, the Commission noted that the market information in its possession was not sufficient to enable it to conclude whether the rather ambitious sales targets on which the long-term viability of the company was based were realistic and plausible.

(81) As regards the investor's lack of experience, Germany States that the family firm of Doppstadt, in which Mr Doppstadt worked before becoming the manager of Doppstadt GmbH, had 30 years of experience in the manufacture of carrier vehicles. Moreover, due to the technical problems encountered with the initial market launch of the Trac, Germany has submitted a modified restructuring plan according to which the management has been exchanged and reinforced by external advisors in order to ensure a successful modernisation of the Trac-concept. Therefore a potential lack of expertise now appears do be adequately addressed. This is also confirmed by the expert study submitted by Germany which States that the initial technical shortcomings have now been removed in the newly developed Trac.

(82) Concerning the viability of the new plan, the Commission notes that around […] (*) % of the turnover is achieved with environmental-engineering products (mainly sieve seed cleaners and verge mowers), which according to the available information appear to perform successfully on the market. Both in the old and the new plan, the sale of the Trac carrier vehicle forms a considerable part of the turnover. The proportion of total turnover accounted for by Tracs in the old plan was some […] (*) %, and in the new plan some […] (*) %. Together with the sale of spare parts, Tracs account for about […] (*) % of total anticipated turnover in the new plan as well. The success of the product Trac is essential, therefore, if the company is to break even and hence to restoring long-term viability.

(83) It is noted that the modified plan defers the return of the company to viability by one year, compared with the original plan. A profit is now expected in 2003 instead of 2002 as originally anticipated. Initially the increase in turnover will come from sales of environmental-engineering equipment. In 2002 the sales following the market launch of the new Trac will lead to a further increase. The new plan assumes sales of […] (*) Tracs in 2002 and […] (*) in 2003. At the end of the restructuring period, sales of between […] (*) and […] (*) units a year are envisaged.

(84) According to Germany, this increase in sales figures can be achieved despite the general stagnation on the tractor market, since the Trac is aimed at a niche where such sales appear feasible. As evidence that the proposed sales figures are realistic, Germany has submitted a market analysis that in particular assesses the prospects for Doppstadt's new Trac concept.

(85) According to this information the technical shortcomings of the previous product have been solved and the product is now competitive in technical terms. The analysis of the product segment in this market study States that the proposed sales figures are achievable with the new Trac, as there appears to be an increasing demand for this product. This is also supported by the fact that the predecessor of the Trac needs to be replaced and hitherto there has been no similar all-purpose product on the market. Furthermore, according to the most recent information, a partially comparable product will be withdrawn from the market. Accordingly, the market analysis submitted by Germany concludes that sales figures of […] (*) to […] (*) Tracs per year are achievable by the end of 2003.

(86) The extension of the restructuring period in the plan appears sufficient for bringing the new product onto the market. According to the latest information submitted by Germany, the proposed sales figures for the Trac are achievable. Even if the company should not fully meet its targets, the break-even point may be deferred, but the return to viability as such would not be jeopardised, since, in the light of the latest information, the new product appears generally competitive. This seems to be confirmed by the latest developments following the market launch of the Trac.

(87) The Commission's doubts as to whether the restructuring plan can restore the viability of the company have thus been allayed.

7. **Proportionality of the aid**

(88) According to the guidelines, the aid should be proportional to the restructuring costs and benefits. Point 3.2.2(iii) of the guidelines stipulates that the aid must be limited to the strict minimum needed to enable

restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources. No aid should go to finance new investment not required for the restructuring.

(89) In the initiation decision, the Commission raised doubts whether the beneficiary had made a significant contribution to the restructuring from its own or external commercial resources, since its contribution appeared to amount to only 28 %.

(90) By letter dated 21 September 2001, Germany communicated changes to the original restructuring plan. Part of the changes relate to changes in financing of the restructuring and the amount of aid. Aid for investments was significantly reduced, whereas aid for some other restructuring costs was increased. However, the total aid was reduced by EUR 3,071 million compared with the original restructuring plan. The financing of the restructuring according to the communicated changes would be the following:

(EUR million)

Costs		Financing			
		BvS/*Land*		Investor	Workers
Investments	17,617	Approved schemes:		6,934	
		GA contribution and investment premium	6,165		
		Grant from Saxony-Anhalt	12,079		
Restructuring costs	17,367				
Loss compensation	6,4	BvS	16,215		
Working capital	18,352	BvS	4,28	14,095	
Original production- relevant assets	6,6	BvS	6,6		
Contribution to personnel costs	2,8				2,8
Total	69,26		45,409	21,03	2,8
			= 66 %	= 30 %	= 4 %

Note: table contains rounded figures.

(91) As regards the employees' contribution of EUR 2,8 million to the restructuring, the Commission notes that this amount is included in the restructuring costs, since it is a genuine contribution to the total costs of the restructuring. However, it is not considered as an investor contribution, since it constitutes neither financing from the financial resources of the investor, nor by the company Doppstadt GmbH ([15]).

(92) The EUR 5,424 million given in the initiation decision as restructuring costs is no longer taken into account in the table in recital 90, since Germany has corrected LTS's the annual accounts and this amount will, according to Germany, thereby be paid back to the BvS from the proceeds of LTS's liquidation. Since the amount has consequently not been waived by the BvS in favour of the restructured company, it is not included in the restructuring costs as aid to the restructuring.

(93) As regards the doubts expressed in the initiation decision concerning the amount of the investor's contribution to the restructuring, the Commission notes that the reduced amount of aid and the non-consideration of the EUR 5,424 million as a

([15]) See Commission Decision 2002/186/EC in Zemag (OJ L 62, 5.3.2002, p. 44).

restructuring cost and a restructuring aid result in an investor contribution of 30 %. In accordance with its previous practice in eastern German restructuring aid cases, this can be considered as a significant contribution within the meaning of the guidelines ([16]) and therefore the doubts whether the aid is in proportion to the restructuring costs and benefits have been allayed.

V. **CONCLUSION**

(94) The Commission finds that Germany has unlawfully implemented EUR 39,127 million in aid to Doppstadt GmbH in breach of Article 88(3) of the Treaty. In view of the above explanations, however, the Commission concludes that these measures are compatible with Article 87(3)(c) of the Treaty and hence with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Germany has implemented for Doppstadt GmbH, amounting to EUR 39,244 million, is compatible with the common market within the meaning of Article 87(3) of the EC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27 November 2002.

For the Commission

Mario MONTI

Member of the Commission

([16]) See the Decision of 9 June 1999 in Wismarer Propeller- und Maschinenfabrik (NN 152/98) (OJ C 88, 25.3.2000, p. 3) and the Decision of 26 June 2000 in Hydraulik Markranstädt GmbH (NN 48/98) (OJ C 62, 4.3.2000, p. 18).

COMMISSION DECISION

of 27 November 2002

on the measures implemented by Spain in favour of Refractarios Especiales SA

(notified under document number C(2002) 4486)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/283/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1], and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 20 April 2001 the Commission received a complaint concerning State aid allegedly granted by Spain to Refractarios Especiales SA. The complainant expressed concern regarding a number of financial measures from which the company was to benefit and which would distort competition on the relevant market.

(2) By letters of 3 May (D/51821), 17 July (D/52905) and 4 October 2001 (D/54067) the Commission requested Spain to submit information on the different measures. Reminders to these requests were sent by letters of 20 June (D/52500) and 7 November 2001 (D/54592). By letter of 23 July 2001 (registered as A/35988 on 25 July 2001) Spain requested an extension of the deadline for replying. The extension was granted by letter of 20 August 2001 (D/53447). By letters dated 19 June (registered as A/34832 on 20 June), 13 September (registered as A/37203 on 17 September) and 27 November 2001 (registered as A/39427 on 30 November 2001) Spain submitted the information requested by the Commission.

(3) On 15 January 2002 the Commission decided to initiate the procedure laid down in Article 88(2) of the Treaty with respect to the measures in question, and by letter of 17 January 2002 (D/228167) it informed Spain of this decision. The Commission reminded Spain of its invitation to comment on the decision and asked for further information by letter of 11 March 2002. Spain reacted to the decision to initiate the procedure by letter of 13 March 2002 (registered as A/31982 on 14 March 2002) and answered the questions in the reminder by letter of 2 May 2002 (registered as A/33339 on 6 May 2002).

(4) The decision to initiate the procedure was published in the *Official Journal of the European Communities* [2] with an invitation to interested parties to submit their comments on the aid. Spain forwarded a copy of the Commission's decision to the beneficiary company, Refractarios Especiales SA (hereinafter Refractarios) only on 18 March 2002. Refractarios subsequently asked, by letter of 20 March 2002 (registered as A/32170 on 21 March 2002), for an extension of the deadline to enable it to respond to the decision initiating the procedure. The Commission granted an extension by letter of 22 March 2002 (D/51295). The Commission received comments from three interested parties, including Refractarios. By letters of 5 April (D/51501) and 29 April 2002 (D/52067) Spain was invited to comment on them. Further questions were sent by letters of 21 May (D/52462) and 3 September 2002 (D/54883). The latter included a copy of the agreement between the tax authorities and Refractarios, which had been submitted to the Commission by that party (letter of 18 July 2002, registered as A/35709 on 25 July 2002). The Commission reminded Spain of its questions by letters of 27 June (D/53342) and 7 October 2002 (D/55591). Spain provided answers to the questions by letters of 2 July 2002 (registered as A/34994 on 5 July 2002) and 9 October 2002 (registered the same day as A/37400).

[1] OJ C 55, 2.3.2002, p. 33.

[2] See footnote 1.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Refractarios Especiales SA

(5) Refractarios, located in Valencia, Spain, produces specialised heat-resistant ceramics (refractories). It sells its products mainly to companies in the metallurgy, cement and ceramics sectors. Currently it has around 89 employees and an annual turnover of around EUR 8 million. Its balance sheet total stood at EUR 11 400 000 at the end of 2000. The company qualifies as an SME in accordance with Commission recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ([3]).

(6) The table below summarises the company's results over the period 1996 to 2001.

(ESP million)

	1996	1997	1998	1999	2000	2001
Sales	1 190,5	1 053,5	1 217,1	1 209,5	1 269,6	1 340,8
Operating result	(142,5)	(174,5)	(78,2)	(46,9)	17,4	2,8
Annual result	(55,7)	(179,5)	9,6 ([4])	73,9	17,2	0,1

The crisis in steel production in the early 1990s meant that a crisis also faced the refractories sector, including Refractarios. The company closed its plant in Asturias, which produced for the steel sector, and maintained its plant in Valencia. The relative improvement since 1997 is due to the development of new products sold in particular to the cement industry. Apart from domestic sales, the products are exported to other countries in Europe and to some countries in Africa and America. The company hopes to export to Asian countries too. Sales value, in particular for innovative products, increased by 8,7 % between 2000 and 2001. For 2002 the company expects a further 14 % increase.

([3]) OJ L 107, 30.4.1996, p. 4.

([4]) In the auditor's report attached to the annual accounts, the auditor explains that the company received ESP 60 million as payment on account for the sale of land on which the factory is located. Accounting for this item more prudently would have meant that the company incurred a loss of ESP 50 million instead of generating a profit of ESP 9,6 million.

2.2. Measures taken by Spain

(7) Refractarios has had recurrent difficulties in paying its debts, in particular towards the General Social Security Treasury (hereinafter social security), the Valencia office of the Tax Agency of the Ministry of Finance (hereinafter tax authorities) and the Wage Guarantee Fund (hereinafter Fogasa).

2.2.1. *Suspension of payments procedure in 1990 to 1992*

(8) A suspension of payments procedure was terminated in March 1992 with the following agreements dating from 12 September 1991:

— social security: a debt of ESP 459 786 309 (EUR 2 763 371) was rescheduled over a 10-year period with no repayments in the first two years, and no interest to be paid on the rescheduled amounts ([5]). The debt was covered by a mortgage on the land, buildings, machinery and installations owned by Refractarios. The net present value of the instalments, calculated on the basis of a commercial interest rate of 18,24 %, amounts to 36 % of the initial value ([6]),

— tax authorities: on similar terms as those for social security, a debt of ESP 71 701 058 (EUR 430 932) was rescheduled over a 10-year period with no repayments in the first two years, and no interest to be paid on the rescheduled amounts. It was covered by the same mortgage,

— ordinary creditors accepted a debt write-off of 81,5 % on a total debt of ESP 1 080 million (EUR 6 490 931).

([5]) Interest was incurred if the agreed instalments were not paid.

([6]) Normally, in determining whether or not an interest rate is in line with market conditions, the Commission makes a comparison with the value at the relevant time of the reference rate fixed for the Member State concerned. However, at the time no such rate had been fixed for Spain. Therefore, in accordance with the Council resolution of 20 October 1971 on general regional aid schemes (OJ C 111, 4.11.1971, p. 1), the Commission must make a comparison with the average rate of interest in the relevant market, which in this case is the average rate of interest charged by private banks in Spain on loans over more than three years. In 1991, according to statistics published by the Bank of Spain, this rate was 18,24 %. The Commission has used this rate on several previous occasions (see for example Decision 91/1/EEC Magefesa (OJ L 5, 8.1.1991, p. 18) and Decision 96/655/EC La Seda de Barcelona (OJ L 298, 22.11.1996, p. 14)).

(9) The mortgage obtained by the social security and tax authorities placed a charge on the property amounting to a maximum of ESP 531 487 366 (EUR 3 194 303) (this equalled the outstanding debts) plus ESP 106 000 000 (EUR 637 073) for foreclosure costs. The total, ESP 637 487 366 (EUR 3 817 377), corresponded to between 81 % and 85 % of the property's estimated value ([7]). The land was not mortgaged in favour of other creditors.

(10) The lay-off of workers in Asturias resulted in a debt of ESP 90 685 363 (EUR 545 030,01) to Fogasa ([8]). By an agreement concluded on 19 November 1992, this debt was rescheduled over an eight-year period with no payments for the first six months. Quarterly payments were to gradually increase from around ESP 2 million to more than ESP 8 million. The total payments would sum up to ESP 133 171 960 (EUR 800 380), implying a simple interest rate of 10 %, which corresponded to the legal rate of interest at the time. The agreement contained an obligation on Refractarios to establish a security in favour of Fogasa in order to guarantee the debt.

2.2.2. *Efforts to recover the outstanding debts until 2000*

(11) The period up to 2000 showed a mixed picture as regards the company's results. Consequently, Refractarios at times had difficulties in paying its debts. In addition to the financial problems, there was an increasing environmental problem owing to its location in the centre of Quart de Poblet (Valencia). On the other hand, a change in the land-use plan that would significantly raise the value of Refractarios' property was under discussion.

(12) Between December 1991 and March 1995 Refractarios accumulated new social security debts. The social security authorities took several measures to recover the debt. They sought various distraints on the mortgaged property, totalling ESP 193 905 984 (EUR 1 165 398). A further distraint obtained on 28 February 1995 concerned two properties; the first had a surface area of 427 m^2 and was valued at ESP 13 944 650 (EUR 83 809), the second had an area of 680,9 m^2. On 7 June 1995 the procedure for auctioning the land was initiated but was then suspended after an appeal was allowed. Following an agreement reached in 1995, on 10 May 1996 all new debts, namely ESP 252 575 951 (EUR 1 518 012), and further interest and surcharges on this debt up to a maximum amount of ESP 384 million (EUR 2 307 887), including ESP 64 million (EUR 384 648) for foreclosure costs, were brought under the coverage of a second mortgage on the same property. The social security debt at this time amounted to ESP 712 362 259 (EUR 4 281 383). Together with the debt towards the tax authorities (see below), the debt covered by the mortgages amounted to EUR 4 712 315. The mortgages placed a charge on the property amounting to a maximum of ESP 932 187 366 (EUR 5 602 559). Apart from the earlier mortgage and distraints obtained by the social security authorities, the property was further burdened by a distraint in favour of another creditor for an amount of ESP 6 916 233 (EUR 41 567).

(13) In the second half of the 1990s the situation became more complicated: the crisis in the sector wore off and Refractarios had some success in entering more profitable niche markets. At the same time the environmental problems due to the company's location in the city centre worsened and the change in the land-use plan remained uncertain, which had a negative effect on the potential value of the land. The procedures for changing the land-use plan did not come to a successful conclusion. The value of the land, buildings and installations remains unclear: a valuation dated 16 March 1998 ordered by the social security authorities, assuming a change in the land-use plan, shows a low value of EUR 3 207 820 ([9]). Refractarios mentions very

([7]) According to an estimate made on 3 July 1990 by the Social Security Executive Recovery Unit, the value of the two plots of land and buildings that were later brought under the mortgage amounted to ESP 448 908 000 plus ESP 82 290 000 (totalling EUR 3 192 564). Refractarios' viability plan referred to another valuation, carried out on 16 May 1990, which estimated the value of the second plot at ESP 122 160 000, bringing the total to EUR 3 432 187. The value of the machinery and installations was estimated at ESP 220 250 000 (EUR 1 323 729), which brings the total estimated value to between ESP 751 448 000 and ESP 791 318 000 (EUR 4 516 293 to EUR 4 755 917).

([8]) In the event of insolvency or bankruptcy of the employer, Fogasa pays compensation to the workers made redundant, and assumes by law their rights, but only for the statutory amounts. This is laid down in Royal Decree 505/1985 of 6 March 1985 on the organisation and operation of the Wage Guarantee Fund (Spanish Official Gazette No 92, 17.4.1985, p. 10203), by which Spain transposed Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ L 283, 28.10.1980, p. 23). On the basis of Article 32 of the Royal Decree, Fogasa can conclude recovery agreements with the companies concerned. The detailed arrangements and conditions for recovery are laid down in the Ministerial Order of 20 August 1985 (Spanish Official Gazette No 206, 28.8.1985, p. 27071).

([9]) According to the valuation of 16 March 1998 requested by the social security authorities, the value of land and buildings would be EUR 1 528 776 if the land-use plan did not change and EUR 3 207 820 if the land-use plan did change.

different values for 2000: a valuation at the time of the agreement with the construction company indicated a land value of about EUR 6 million, whereas the agreed price in the sales contract for the land and buildings (dated 6 June 2002) amounts to EUR 7 747 046.

(14) Between September 1997 and October 1998 Refractarios accumulated new social security debts. It paid its contributions in full as from 1999. The social security authorities responded by not agreeing to further postponements and by seeking distraints. Some of the measures failed, though, and in the end, the social security authorities obtained repayment of only ESP 33 721 558 (EUR 202 670,65). They did not enforce the auction of the mortgaged land. The debt at the start of the second suspension of payments procedure amounted to ESP 978 750 620 (EUR 5 882 414,16), of which EUR 4 700 000 was covered by the mortgage.

(15) As regards the tax authorities, a few new small debts were incurred in 1996 (one amount) and 1997 (two amounts). Major problems arose in 1998 and Refractarios failed to pay a further two amounts in 1999. The payment of the agreed instalments of the old debt also became a problem in 1998. The tax authorities set various distraints on machinery in order to recover their claims. After 1999 Refractarios complied fully with its tax obligations. The total debt at the start of the new suspension of payments procedure amounted to ESP 129 217 530 (EUR 776 613) to which was to be added interest at some ESP 70 million (EUR 420 709) and payments due since the start of the suspension of payments procedure, amounting to ESP 17 874 651 (EUR 107 429). The total amount was consequently EUR 1 304 751.

(16) Refractarios did not pay any of the agreed instalments to Fogasa. Neither did Fogasa obtain a guarantee from Refractarios for its debt. Given this breach of the agreement, Fogasa was entitled to demand immediate payment of the full amount. However, it did not force any payment upon Refractarios. Neither did it charge further interest. In July 1997 Refractarios asked Fogasa to renegotiate the debt, but Fogasa did not agree to this proposal. In 2001, the Social Affairs Tribunal ([10]), ruled that this refusal did not comply with the formal requirements for interrupting the statutory limitation period. Despite the Commission's repeated requests Spain has not provided any evidence that Fogasa insisted on the agreed instalments or on payment of the whole amount until the new suspension of payments procedure. It is not clear whether Fogasa simply forgot the debt, or whether it deliberately failed to demand payment.

([10]) See recital 18.

2.2.3. *Suspension of payments procedure in 2000 to 2002*

(17) On 24 January 2000 Refractarios started a new suspension of payments procedure in order to settle its accumulated debt burden. This procedure was concluded on 17 June 2002. It is based on the following agreements:

— on 6 June 2000 Refractarios and a construction company reached an agreement whereby the latter was to buy the company's current property. Given the existing mortgages, this agreement was conditional upon other debt agreements between Refractarios and the social security and tax authorities. The proceeds (ESP 1 289 million, or EUR 7 747 046) would be used for buying new land, building a new factory (to be done by the same construction company), relocation, and settlement of part of the outstanding debts. ESP 527 million (EUR 3 167 333) would be paid directly to the social security and tax authorities. The existence of the agreement and the overall sales price were mentioned in the report drafted by the court-appointed auditor in the suspension of payments procedure. However, its terms and conditions were not known to the public authorities,

— in February 2002 Refractarios reached an agreement with the ordinary creditors on a remission of 75 % of their claims. These debts amounted to ESP 434 383 557 (EUR 2 610 698) in total,

— on 26 March 2002 Refractarios and the social security authorities agreed on a debt rescheduling and reduction. Out of the total debt of EUR 5 882 414,16 Refractarios was to pay EUR 2 763 371,37 immediately after finalisation of its transaction with the construction company. A further EUR 1 309 748,27 (22 %) was to be rescheduled over a period of 10 years with a 3,5 % annual interest rate and was to remain covered by a mortgage on Refractarios' installations and machinery. The remainder of the debt, EUR 1 809 294,52, was to be remitted. The present value as a percentage of the original debt is 68,4 %. It was an explicit condition of the agreement that Refractarios was punctually to pay the instalments and its current social security contributions.

— on 22 May 2002 Refractarios and the tax authorities agreed on a debt rescheduling and remission. Out of a total debt of EUR 1 275 705,87

(ESP 212 259 597) Refractarios was to pay EUR 621 944,88 (49 %). The remainder (51 %) was to be remitted. As with the social security authorities, the agreement contained an explicit condition that Refractarios was punctually to pay the instalments and fulfil its current tax liabilities.

(18) By letter of 13 March 2000, Fogasa demanded that its claims be included in the suspension of payments procedure. However, the court-appointed auditor in this procedure ruled that the debt was time-barred. By letter of 9 February 2001 Fogasa demanded payment of its debt direct from Refractarios (ESP 133 171 960 or EUR 800 380). At the same time it again demanded that the claim be included in the suspension of payments procedure. Fogasa appealed against the auditor's decision, but lost the case ([11]).

(19) As regards the land-use plan, it is noted that in spring 2002 the Department for Public Works, Urban Planning and Transport of the Regional Government of Valencia was considering a General Transition Plan for the municipality of Quart de Poblet, which also included changes for Refractarios' site. In its letter of 2 July 2002 Spain stated that the plan was expected to be definitively approved within two months.

2.2.4. *New investment aid*

(20) Finally, Refractarios applied or intended to apply to the Valencia Finance Institute (IVF) for a loan of EUR 3 million and a capital injection of EUR 300 000 and to the Regional Government's Department for Economic Affairs for a 20 % (EUR 1 million) investment grant. The finance section of Refractarios' restructuring plan takes these aid measures into account. However, Spain confirmed that neither the loan nor the aid had been granted so far.

3. GROUNDS FOR INITIATING THE PROCEDURE UNDER ARTICLE 88(2)

(21) In its decision to initiate the procedure under Article 88(2) ([12]), the Commission expressed its doubts whether the Spanish authorities had acted in the same way as a market economy creditor would have done. These doubts concerned in particular Fogasa's failure in 1992 to demand a guarantee for the rescheduled debt and to take steps to ensure actual repayment. Further doubts concerned the 1992 agreement between Refractarios and the tax and social security authorities, the long period in the second half of the 1990s during which these creditors apparently accepted arrears in Refractarios' payments, and possible aid involved in a new agreement to reschedule debts. Since the Commission had hardly any information on the existence of a restructuring plan, it could not ascertain whether possible aid would comply with the conditions set out in the Community guidelines on state aid for rescuing and restructuring firms in difficulty (hereinafter the rescue and restructuring aid guidelines ([13])).

4. COMMENTS FROM INTERESTED PARTIES

(22) Following publication of the decision to initiate the procedure ([14]), the Commission received comments from Cérame-Unie (a European ceramics industry association), from a competitor, RHI, and from the beneficiary, Refractarios. The latter's comments are summarised together with the comments from Spain in section 5.

(23) Cérame-Unie and RHI fully shared the doubts expressed by the Commission. They stressed the presence of overcapacity throughout the refractories sector and argued that any aid would have adverse effects on competitors and trade within the internal market. Cérame-Unie provided a substantial number of articles and documents on the sector.

(24) Cérame-Unie sent a copy of the agreement between the tax authorities and Refractarios, stressing that it explicitly stated that the tax authorities had taken into account not only the economic situation and viability of the company, but also the general and social interest in maintaining the jobs. Cérame-Unie also pointed out that the approved composition with creditors did not make any reference to long-term viability or to any restructuring plan and argued that insufficient grounds were given for the debt relief provisions. In its opinion, the aid did not comply with the requirements set out in the rescue and restructuring aid guidelines.

([11]) Judgment of 2 July 2001 of Juzgado de lo Social (Social Affairs Tribunal) No 3, Oviedo, demanda 525/2001, sentencia 503/2001. The judgment confirms that Fogasa had not done anything to suspend the limitation period.

([12]) See footnote 1.

([13]) OJ C 288, 9.10.1999, p. 2.

([14]) See footnote 1.

5. COMMENTS FROM SPAIN AND FROM REFRACTARIOS

(25) Spain and Refractarios held that throughout the period under investigation the social security and tax authorities and Fogasa had acted as any private creditor would have done. In their opinion, none of the measures constituted State aid within the meaning of Article 87(1) of the Treaty.

(26) Spain and Refractarios produced in support of their arguments detailed descriptions of the financial situation in which the social security and tax authorities would have found themselves if they had proceeded with enforcing their claims to bankruptcy. Given the limited value of the land before the possible change in the land-use plan, and given that the workers' claims took priority, bankruptcy would have been financially less attractive than acting in the way they did.

(27) With respect to the 1991 agreement, Refractarios argued that the terms accepted by the public creditors compared favourably with the terms accepted by a private preferential creditor, namely Banesto Leasing. This company did not demand the return of the machinery that it had leased to Refractarios, but subscribed to the agreement between the company and its creditors on the same conditions as the ordinary creditors. For this reason too no State aid within the meaning of Article 87(1) of the Treaty was involved in the agreements with the public authorities.

(28) With respect to the reference made in the agreement between the tax authorities and Refractarios to the 'general and social interest in maintaining the jobs', Spain explained that this statement could be regarded as merely formal and, in a way, made necessary by the fact that the agreement constituted an act outside the usual scope of the tax authorities' activities and different from the normal channels for managing the collection of claims, although covered by current legislation. It should be understood as a generic explanation of the reasons prompting the authorities to act as always in the general interest.

(29) Concerning Fogasa, Spain indicated that the Fund was financed by company contributions which did not constitute State resources. Spain argued that Fogasa had taken all possible steps to recover its claim. In its opinion, that was shown by the court ruling in the appeal case when Fogasa demanded that its claim be included in the 2000 suspension of payments procedure. Refractarios also argued that the rescheduling of its debt to Fogasa was advantageous to the latter in comparison with the outcome for other creditors.

(30) Refractarios maintained furthermore that any advantages it had obtained could not have affected trade between Member States, since its output was less than 0,2 % of total output in the EU. Moreover, the market structure was oligopolistic. For these reasons also, it had not received State aid within the meaning of Article 87(1) of the Treaty.

(31) If the Commission found that aid was involved, Refractarios claimed that it should be regarded as compatible with the common market. At the time of the 1991 agreements the company was in difficulty, the aid was closely linked to a restructuring programme and limited to the minimum necessary. Any aid in the 2002 agreements with the public authorities fulfilled the criteria of the rescue and restructuring aid guidelines. Refractarios submitted a restructuring plan with detailed information on the restoration of its viability and all the measures planned, and argued that any aid was limited to the minimum necessary.

(32) Another argument put forward by Refractarios was that any aid linked to the 1991 agreements with creditors, or the authorities' subsequent actions in relation to the composition with creditors, was time-barred pursuant to Article 15 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 ([15]).

(33) As regards the market, Refractarios held that, although in recent years there had been some stagnation in the demand for low-quality refractories in industrialised countries, this had been offset by growing demand for these products from developing countries. Moreover, Refractarios had over the past 10 years specialised in higher quality, more durable and higher priced products, for which the market was booming.

(34) Finally, Refractarios argued that any aid should be deemed compatible with the common market on the

([15]) OJ L 83, 27.3.1999, p. 1.

basis of the Community guidelines on State aid for environmental protection ([16]), since its aim would be to assist the relocation of activities out of an urban area, as provided for by point 39 of the guidelines.

5.1. **Reactions to comments from third parties**

(35) Spain did not react to the comments from third parties.

6. **THE RESTRUCTURING PLAN**

(36) Refractarios' current restructuring plan has three main components: 1. relocation; 2. further concentration on the high-quality segment of the market; and 3. financial restructuring, based on major debt write-offs.

(37) Relocation of the company clearly solves the environmental problems. The total cost of the investment amounts to EUR 7 300 000, of which the main item is equipment (EUR 3 900 000).

(38) The new plant would have a capacity of 10 200 tonnes per year, of which 8 000 tonnes would be for producing tailored refractories and 2 200 tonnes for non-tailored refractories. This would roughly double existing capacity and significantly increase the proportion dedicated to products with higher value added and higher gross margins.

(39) The following table gives a financial overview of the restructuring for the year 2002:

(EUR '000)

Costs		Funding	
Land	1 731	Sale of land	7 747
New plant	5 571	Loan from IVF	3 005
Payments to social security	2 763	Capital injection	301
Payments to the tax authorities	426	Investment aid	950
Payments to ordinary creditors	679		
Working capital	833		
Total	12 003	Total funding	12 003

([16]) OJ C 37, 3.2.2001, p. 3.

(40) The restructuring plan provides estimates for expected annual results over the period 2002 to 2006 under various assumptions. Even in the worst-case scenario the company would still be profitable each year over this period.

7. **ASSESSMENT**

7.1. **General considerations**

(41) Article 87(1) of the Treaty lays down the principle that, save as otherwise provided in the Treaty, any aid 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 common market.

(42) According to the case-law of the Court of Justice, when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid ([17]). The products marketed by Refractarios are traded between the Member States and there is competition between manufacturers. Any aid would strengthen the position of Refractarios in these markets. The company's small turnover compared to that of (some) competitors, its small market share and the oligopolistic structure of the market do not mean that trade between Member States is not affected. Moreover, the fact that trade is affected is confirmed by the fact that Refractarios exports part of its production to other countries.

(43) In order to establish whether Refractarios has benefited from a selective advantage, the Commission has to assess the measures taken by the public creditors and their agreements with Refractarios. If these measures and agreements correspond to the way in which a private creditor would have acted under similar circumstances, they do not constitute State aid.

7.2. **The 1991 agreements with the social security and tax authorities**

(44) The terms under which the social security and tax authorities accepted the rescheduling of the amounts

([17]) Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 50.

owed to them are certainly favourable to them in comparison with the payments to ordinary creditors, who accepted a debt write-off of 81,5 %. However, a comparison with ordinary creditors is not sufficient to prove the absence of aid, since the public creditors held preferential claims and were therefore in a different position.

(45) The terms were also favourable in comparison with the only private preferential creditor, namely Banesto Leasing SA. However, the Commission considers that the positions of Banesto Leasing and the public preferential creditors cannot be compared and the argument cannot suffice to prove the absence of aid in the agreements between Refractarios and the public creditors. Firstly, Refractarios' debt towards this company amounted to ESP 8 919 299 (EUR 53 606), which is much smaller than the public debts. Secondly, the cost that Banesto would have incurred to obtain a higher repayment would have been greater, in relative terms, than any possible gain. Thirdly, the real value of the machinery would undoubtedly have been very small if it had had to be sold under a bankruptcy scenario in the 1990 to 1992 suspension of payments procedure.

(46) Spain argued that the absence of interest was appropriate compensation for the guarantee constituted by the mortgage. The General Social Security Law contained an obligation to apply the legal interest rate when extraordinary deferments were granted, but this obligation would not apply in situations where the social security authorities granted a rescheduling of the debts of a company which had suspended payments. The Commission notes, however, that this does not rule out the possibility that, under a scenario of immediate enforcement of payments and subsequent bankruptcy, the public authorities might still have been better off. The fact that the social security and tax authorities did not accept any debt reduction, but only a debt rescheduling, does not detract from this conclusion.

(47) In this situation, in order to establish whether the public creditors acted in accordance with the private creditor principle, the Commission deems it necessary to make an estimate of the maximum amount that the tax and social security authorities could have recovered if they had not signed the agreements, which would have meant that the company would have gone into bankruptcy.

(48) Article 32(1) of the Labour Statute provides that wage debts for the last 30 working days take precedence over all other claims in so far as they do not exceed twice the minimum wage. These debts take precedence over debts guaranteed by mortgage. Article 32(2) and (3) establishes further privileges for wage debts. Since there are separate procedures for recovering workers' claims which are not delayed by a suspension of payments procedure, workers also have a de facto 'super-privilege' in respect of severance pay. The total amount of these payments in 1991 was estimated at EUR 3 700 000. As Refractarios argues, it is quite possible that even higher amounts of compensation might have been negotiated in practice.

(49) The balance sheet drawn up by the court-appointed auditor in the suspension of payments procedure (the report) and dated 29 October 1990 shows total assets of EUR 15 486 722, of which land accounts for EUR 6 974 048, buildings EUR 2 344 763, other tangible fixed assets EUR 2 191 455, intangible fixed assets EUR 2 540, stocks EUR 2 980 058, debtors EUR 1 001 991 and cash/banks EUR 27 464. However, in a bankruptcy scenario the value that would be realised is estimated at much less. For example, the valuation of the land carried out for the social security authorities on 3 July 1990 estimates the value of the site in Valencia at EUR 3 200 000. Installations on this site were valued at EUR 1 300 000. The land in Asturias was valued at EUR 1 million and other plots in Valencia at EUR 300 000. Other assets that would be difficult to realise under a bankruptcy procedure were intangible fixed assets, but also stocks: almost half of these consisted of finished products, whereas the crisis in the sector was in full swing. It should also be noted that the amounts for stocks and in particular for debtors and cash/banks may well have changed over the year that elapsed between the drafting of the report and the conclusion of the agreements with creditors, among other things owing to the losses sustained during that period. Moreover, the Commission takes account of the fact that the balance sheet may contain an upward bias, since the suspension of payments procedure can be initiated only when it shows a positive difference between total assets and total liabilities. Taking all these considerations together, and applying the private creditor principle, in September 1991 the value of all the assets under a bankruptcy scenario could have been estimated at a figure close to the value of the land, buildings and equipment as estimated by the valuations other than the one in the report. This would give a total of some EUR 6 million.

(50) Subtracting the payments to workers from the total value of assets gives a figure of EUR 2 200 000, which would be available for the preferential creditors in the

first instance. This represents 69 % of a total debt of EUR 3 200 000 ([18]).

(51) This, however, is still a theoretical calculation that does not take into account various factors that can be expected to have a negative impact on the actual amount which the public creditors would obtain under a bankruptcy scenario. The actual proceeds of selling land and installations when forced by bankruptcy may be much lower still. Moreover, the calculation does not take into account costs of the bankruptcy procedure and costs of selling the land. Moreover, the public creditors would have received their payments only after a substantial period of time, something which is normal in such procedures. Confirmation that a lower actual value can be expected under a bankruptcy scenario is given also by the fact that the other creditors accepted a very significant debt waiver. Of course, the agreed payments would depend on the future viability of the company, and with the benefit of hindsight it is clear that the financial problems were not solved. However, the mortgage was precisely intended to cover the uncertainty, and the risk of further delays in paying the agreed instalments was at least to some extent covered by normal application of interest and surcharges when delays occurred. It must also be noted that the interest rate to be paid on arrears is the legal rate of interest, which at the time stood at around 10 %, implying a decrease in the present value of the debts in any case.

(52) Taking all these considerations into account, there was very little difference for the social security and, in particular, the tax authorities between what they expected to obtain in payment under the agreements and what they could have expected to obtain under a bankruptcy scenario ([19]). Therefore, the Commission considers that the terms under which the social security and tax authorities agreed on a debt rescheduling correspond to those which a market economy creditor could have accepted in the circumstances. Consequently, the Commission concludes that the 1991 agreements with those authorities are in accordance with the private creditor principle and do not constitute State aid to Refractarios.

([18]) Refractarios (letter of 15 April 2002, p. 45) argued that in the event of bankruptcy only 17 % of the debt would have been repaid, but this calculation is based only on the value of the land and installations which were later mortgaged.

([19]) Another argument put forward by Spain is that if the public authorities had insisted on a better result, there would have been fewer resources left for ordinary creditors and these may have been less inclined to agree to a debt reduction. This argument, however, is only valid in the eventuality of the public authorities trying to obtain more than they could reasonably expect under a bankruptcy scenario.

7.3. **Steps taken by the social security and tax authorities to recover their claims in the period up to the commencement of the 2000 suspension of payments procedure**

(53) The Commission notes that the social security authorities did not remain passive between December 1991 and June 1995. They charged interest and surcharges on the new debts that arose and sought various distraints. And, finally, in June 1995 they started the procedure for selling the property by auction. By this time, the total debts amounted to EUR 4 712 315 and were only partly secured by the mortgage. This total debt is only slightly lower than the maximum value of the property arrived at in 1990, when it was valued at between EUR 4 516 293 and EUR 4 755 917. However, the annual accounts at least from 1994 onwards refer to the potential increase in the value of the land that would result from a change in the land-use plan. On the basis of these steps taken, the Commission concludes that the behaviour of the social security authorities was in accordance with the private creditor principle since it did not significantly depart from the way in which a private creditor would have acted in similar circumstances. The acceptance of the agreement on suspending the auction and establishing an additional mortgage, reached in 1995, can also be justified by the expectation of an increase in the value of the land following modification of the land-use plan and by the fact that Refractarios accumulated no further debts as from April 1995. The Commission therefore concludes that the actions of the social security authorities during this period and the agreement on the additional mortgage do not constitute State aid to Refractarios.

(54) The Commission cannot explain the surprisingly low result of the valuation of the property ordered by the social security authorities in 1998. It is in sharp contrast with the valuation commissioned by Refractarios in 2000 and with the selling price stipulated in the contract with the construction company. However, it is clear that there would have been a real increase in value following modification of the land-use plan. The increase in the debt towards the social security and tax authorities during the period 1996 to 1998 amounts to EUR 1 200 000 and EUR 860 000 respectively. The total increase in debt is more than the expected increase in value under the 1998 valuation, but less than the increase in value that eventually took place. Moreover, the new debts arose during a relatively short period of time, mainly during 1998. Even by initiating proceedings for enforced collection, the social security and tax authorities would not have been able to avoid a further accumulation of debts.

(55) Given this mixture of irregularly growing debts and hopes for a better economic situation and a change in

the land-use plan, the Commission concludes that by restricting themselves to distraints and threats of foreclosure of the mortgage and not proceeding up to declaration of bankruptcy (as described in section 2.2.2), the social security and tax authorities acted in a way that maximised their chances of recovering the debts Refractarios owed them. Hence, the Commission finds no State aid in favour of Refractarios in their behaviour.

7.4. **The 2002 agreements**

(56) There were no agreements with preferential private creditors in the suspension of payments procedure to which the agreements between Refractarios and the public creditors can be compared. Neither is the reference in the agreement between the tax authorities and Refractarios to the 'general and social interest in maintaining the jobs' sufficient proof of the existence of aid, nor is there evidence of aid in the absence of an explicit evaluation of the company's future viability or in the lack of grounds for such an agreement. Therefore, the Commission deems it necessary to make an estimation of the maximum amount that the tax and social security authorities could have recovered if they had not agreed, which would have meant the company going into bankruptcy.

(57) According to Spain, the payments to workers for salaries and severance pay covered by the 'super-privilege' (*de jure* and de facto) amount to EUR 1 577 031,80. As mentioned earlier, it is quite possible that even higher amounts of compensation might have been negotiated in practice. The payments to workers for salaries could increase even further owing to the delay between declaration of bankruptcy and approval of the collective dismissal of the workers by the labour authority. Spain estimates that this could take five months and therefore takes into account a further amount of EUR 892 013.

(58) The main assets of value under bankruptcy were the land and buildings. The price in the sales agreement was ESP 1 289 759 146 (EUR 7 751 609). This value was, however, part of a more comprehensive deal on the acquisition of new land and the construction of the new plant which was negotiated in the context of litigation between the two parties. It was also subject to terms and conditions unknown to the public authorities. The public authorities may well have expected that the agreement was conditional on modification of the land-use plan. Therefore Spain considers it 'somewhat risky' to base its assessment on the price stipulated in the sales agreement. Furthermore, as Spain argued, the auction procedures would have required the authorities to start the first round of bidding on the basis of the 1998 valuation, namely EUR 3 200 000. If a second or third round of bidding were necessary, the starting price would be set 25 % and 50 % below this level respectively. The public authorities could therefore, like a diligent private creditor, have taken a more cautious value. The Commission considers that an auction before modification of the land-use plan would indeed have involved a significant risk and the value in the sales contract cannot suffice as a proper estimate. However, from the sales agreement it must also have been clear that the 1998 valuation was unrealistically low. So the proper value at the time may have been estimated at anything between those two extremes, depending on the risk aversion of the potential buyer ([20]).

(59) The balance of assets and liabilities drawn up by the court-appointed auditor in the suspension of payments procedure (the report) indicates a sum of EUR 3 090 859 for intangible fixed assets, other fixed assets, stocks, debtors and cash/banks. Under cautious and pessimistic expectations the value realised under a bankruptcy procedure might have been lower. For example, intangible fixed assets would be very difficult to realise in a bankruptcy situation and the 'other fixed assets' may prove of little value when they are no longer used and are the subject of a forced sale. It should also be noted that the amounts for stocks and in particular for debtors and cash/banks may well have changed over the year between the report and the actual agreements ([21]).

(60) The tax authorities agreed on an immediate payment without further instalments depending on the financial future of Refractarios. In contrast, the actual value of the agreement with the social security authorities depends partly on the future financial situation of the company. The agreements do not refer directly to the restructuring plan or to the future viability of the company, but the public authorities were aware that the losses of the late 1990s had decreased and turned into a modest profit over 2000. Also, Refractarios was fulfilling its new obligations. They may have known of

([20]) Refractarios argues that the public authorities based their expectations of recovery on the original valuation made in 1990, which indicated a value of EUR 4 516 293.

([21]) The report is dated 12 September 2000. Refractarios' profits for 2000 and 2001 amounted to EUR 104 000 and EUR 768 402 respectively. The annual accounts were approved only on 27 June 2002, so they would have been unknown to the social security and the tax authorities at the time of their agreements with Refractarios. A private creditor would probably have made a global analysis, but would not have had the figures for the annual results either.

more recent developments, such as the increase in sales, in particular of innovative products. Actual developments have in the meantime confirmed this considerable increase over 2001 and the expected sales figure for 2002 again shows a strong increase.

(61) On the other hand, the report drawn up by the court-appointed auditor in 2000 refers to a loan from the IVF, a capital injection and investment aid as a major source of finance for the relocation. The fact that these measures had not been granted casts some doubt on the viability of the company after the debt rescheduling. However, there has been no confirmation of a refusal to grant such measures either. Furthermore, both the social security and the tax authorities included a clause in the agreements requiring Refractarios to pay its current obligations punctually, on pain of invalidation of the agreements. Lastly, the social security authorities had the agreed instalments secured by means of a mortgage to be established on the new property.

(62) Taking the above elements together, under cautious and pessimistic assumptions and in accordance with the private creditor principle, the total amount available for the claims held by the social security and tax authorities can be estimated at a value very close to the net present value of the actual amounts they received under the agreements. The net present value to the tax authorities as a percentage of the original debt is significantly lower than the net present value to the social security authorities. This may reflect a clever negotiating strategy on the part of Refractarios, in which it put maximum pressure on the relatively smaller creditor. In any event, the Commission has to base its decision in the first place on the facts.

(63) It must be noted that in the event of bankruptcy the public authorities would collect their claims only after significant delay. Furthermore, the differences between the recovery expectations and the actual negotiated amounts are small in absolute terms. Given the uncertainties, the delay and the costs of a bankruptcy procedure, the Commission concludes that the agreements between Refractarios and the social security and tax authorities are in accordance with the private creditor principle.

(64) Consequently, the Commission finds no State aid in the agreements between the social security and tax authorities on the one hand and Refractarios on the other.

7.5. **Further investment aid**

(65) Spain confirmed that it had not granted any investment aid, and there is no evidence of the contrary. The Commission cannot therefore assess such aid. The fact that Refractarios announced applications for aid of this type and that the amounts are mentioned in the report and the viability plan does not change this finding. The Commission notes, however, that a substantial part, if not all, of the investment may not qualify as initial investment within the meaning of point 4.4 of the guidelines on national regional aid, since it appears to concern a relocation without any fundamental change in the product or the production process ([22]). The Commission also notes that the viability plan provides for only a small capital injection by other private parties (EUR 300 500), which raises doubts as to whether a possible capital injection by a public authority (such as the abovementioned loan of EUR 3 005 000 from the IVF) would be in line with the private investor principle. The Commission will therefore ask Spain to inform it of any investment aid granted to Refractarios in relation to the relocation and of any capital injection by public authorities over the next three years.

7.6. **Fogasa**

(66) The Commission notes that Fogasa is an independent body set up by the Spanish authorities and governed by Spanish law. It is attached to the Ministry of Labour and Social Affairs. The Ministry appoints the chair and four out of 14 members of the Governing Council and also the Secretary General, who is responsible for the Fund's management. The payment and destination of the funds is determined by law. The Court of Justice has ruled in several judgments that parafiscal charges may constitute State aid ([23]). On various occasions the Commission has made it clear that the use of funds by Fogasa may constitute State aid, and this has also been confirmed by the Court ([24]).

([22]) OJ C 74, 10.3.1998, p. 9.

([23]) For example Case C-78/76 *Steinike and Weinlig* v *Germany* [1997] ECR 595.

([24]) See, for example, the *Magefesa* case, Commission Decision 91/1/EEC (cited in footnote 6) and Commission Decision 1999/509/EC of 14 October 1998 (OJ L 198, 30.7.1999, p. 15) (confirmed by the Court on 2 July 2002 in Case C-499/99 *Commission* v *Spain*, not yet published); the *La Seda de Barcelona* case, Commission Decision 96/655/EC (cited in footnote 6); and the *Tubacex* case, Commission Decisions 97/21/ECSC, EC (OJ L 8, 11.1.1997, p. 14) and 2001/142/EC (OJ L 52, 22.2.2001, p. 26) and Court judgment in Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459.

(67) Fogasa does not award loans to firms in liquidation or in difficulty, but settles all valid claims put forward by employees with money which it pays out and then recovers from the firms concerned. The Commission does not object to Fogasa having settled the valid claims of certain employees of Refractarios to wages due and severance pay in the early 1990s. In this respect, the agreement does not contain any element of State aid. Such action to protect employees' rights is consistent with Directive 80/987/EEC ([25]). However, such payments are part of the normal costs of business and, therefore, when the company continues its activities after the suspension of payments procedure, the resulting debt to Fogasa should be paid in accordance with the market creditor principle.

(68) The Commission cannot rule out the possibility that the terms of the agreement on the rescheduling of Refractarios' debt to Fogasa were justified by expectations that much less would have been recovered in the event of bankruptcy, an eventuality that might have resulted from less favourable rescheduling terms. Although this agreement is dated more than half a year after the conclusion of the suspension of payments procedure, Refractarios' economic position was still weak and the crisis in the sector was not yet over. The average rate of interest charged by private banks on loans of more than three years' duration was 17,28 % ([26]), which was considerably higher than the simple interest rate of 10 % payable under the agreement. However, under Spanish legislation a creditor cannot impose a higher interest rate on arrears than the legal interest rate, so it is the latter that the Commission should take into account ([27]). The Commission therefore finds no State aid in the agreement.

(69) However, Fogasa's failure to demand additional interest when the agreed instalments were not paid, its failure to insist on a guarantee for the rescheduled debt, the fact that it did not make any effort to secure actual payments until the new suspension of payments in 2000, and its failure to do anything to avoid the risk of the debt being time-barred, cannot be justified under the market creditor principle. Such negligence definitely does not correspond to the behaviour of a private creditor under market conditions. A diligent private creditor would not have forgotten its claim and, when faced with the breaches of the agreement, would undoubtedly have acted to obtain further security and additional interest for the late payments. The fact that in 1995 the social security authorities were able to obtain a further mortgage demonstrates that this was a feasible option, even if the value of such a mortgage would have been uncertain given the real value of the property. In conclusion, Fogasa's inaction has given rise to State aid.

(70) Refractarios' failure to furnish a guarantee and to pay the agreed instalments gave Fogasa the right to claim immediately the full amount of the original debt. A private creditor may not have used this ultimate remedy at the first occasion, but would at some point in time, and in any event well before the end of the limitation period, have enforced payment of the debt. The Commission deems that this moment would at the latest have been June 1995. At that point in time the arrears reached the amount of some EUR 100 000. Moreover, on 7 June 1995 the social security authorities also took action with respect to the arrears Refractarios had accumulated with them, starting the procedure for auctioning off the land under the mortgage. Spain has maintained that this was how a private creditor would have acted. The arrears with Fogasa concerned a much smaller amount than the arrears with social security, but Fogasa had not yet obtained a guarantee, unlike the social security and tax authorities. It should therefore have acted earlier rather than later than the social security authorities. Consequently the Commission considers the full amount of the debt to Fogasa as State aid, at least from June 1995 onwards.

(71) The aid is illegal, because the Commission was not informed pursuant to Article 88(3) of the Treaty before it was put into effect.

7.7. **Compatibility of the aid granted by Fogasa**

(72) The Commission has examined whether the exceptions laid down in Article 87(2) and (3) of the Treaty apply. The exceptions in Article 87(2) could serve as a basis for deeming the aid to be compatible with the common market. However, the aid (a) does not have a social character and is not granted to individual consumers, (b) is not intended to make good the damage caused by natural disasters or exceptional occurrences and (c) is not required in order to compensate for the economic disadvantages caused by the division of Germany. Neither does it qualify for the exceptions in Article 87(3)(a), (b) and (d) of the Treaty that refer to

([25]) See footnote 8.
([26]) See footnote 6.
([27]) See in particular the Court's judgment in *Tubacex*, cited in footnote 24 above.

promotion of the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, to projects of common European interest and to the promotion of culture and heritage conservation.

(73) Neither did Spain attempt to justify the aid on the grounds enumerated above.

(74) As far as the first part of the exception in Article 87(3)(c) of the Treaty is concerned, namely for aid to facilitate the development of certain economic activities, the Commission notes that the aid was not aimed at assisting R&D activities or investment by an SME. Neither did the aid pursue environmental objectives; the environmental problems due to Refractarios' location arose mainly in later years and there is no direct link between the aid and any action to alleviate those problems. Neither does it appear likely that the purpose of the aid was to rescue and restructure Refractarios. The fact that Fogasa tried to recover its claim demonstrates that the aid did not serve any purpose at all. The most likely purpose may have been to avoid an immediate financial crisis for the company. In that case the aid could be classed as rescue aid. However, no condition was attached to the aid that would suffice to fulfil the requirements which the Commission usually applies to such aid, notably the condition that a (new) restructuring plan be submitted within a certain period of time. The aid cannot therefore be found compatible with the common market on this ground.

(75) Refractarios argued that any aid resulting from the 1991 agreements with creditors would be compatible with the common market as restructuring aid to a firm in difficulty. This, however, does not apply to the aid granted by Fogasa: the aid does not derive from the agreement with Fogasa, but from Fogasa's failure to take action to ensure compliance with the 1992 agreement. As explained above, this aid arose at least from June 1995 onwards. It cannot be linked to implementation of the restructuring. Such behaviour did not involve setting any conditions as regards the restoration of viability and could certainly not be regarded as constituting the minimum aid necessary in such a situation. Considering these and all the above arguments, the Commission concludes that the aid is incompatible with the common market.

(76) The Commission does not agree with Refractarios when it argues that any aid related to the rescheduling of debt was time-barred and that the limitation period of 10 years after which the Commission no longer has the powers to recover aid had expired. It has to be stressed that the first action by the Commission was the request for information sent on 3 May 2001, i.e. less than 10 years after the agreement concluded between Refractarios and Fogasa. In accordance with settled case-law ([28]), such a letter means that the Commission had by that time investigated the case with a view to assessing the measures. Moreover, the aid is due to Fogasa's failure to take action to recover its claim at least from June 1995 onwards. Therefore, the aid is not affected by the limitation period laid down in Article 15 of Regulation (EC) No 659/1999 and the incompatible aid should be recovered from the beneficiary.

8. **CONCLUSIONS**

(77) The Commission finds that the terms under which the tax and social security authorities agreed on a debt rescheduling in the context of the suspension of payments procedure of 1990 to 1992 are in accordance with the private creditor principle. It therefore concludes that these agreements do not constitute State aid to Refractarios.

(78) The Commission finds that the efforts made between 1992 and 2000 by the social security and tax authorities to recover their claims from Refractarios are in accordance with the private creditor principle. It therefore concludes that their actions do not constitute State aid to Refractarios.

(79) The Commission finds that the terms under which the tax and social security authorities agreed on a debt rescheduling in the context of the suspension of payments procedure of 2000 to 2002 are in accordance with the private creditor principle. It therefore concludes that these agreements do not constitute State aid to Refractarios.

(80) Fogasa's failure to act at least from June 1995 onwards to recover, or at least to secure, its claim on Refractarios, constitutes State aid. This aid is incompatible with the common market and has to be recovered from the beneficiary. In order to restore the situation that would have existed if the aid had not been granted, the calculation of the amount to be recovered shall include interest from the date on which it was at

([28]) Judgment of the Court of First Instance in Case T-95/96 *Gestevision Telecinco* v *Commission* [1998] ECR II-3407.

the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid,

HAS ADOPTED THIS DECISION:

Article 1

The agreements concluded in 1991 between the General Social Security Treasury and the Tax Agency of the Ministry of Finance on the one hand and Refractarios Especiales SA on the other, the actions taken by those authorities to recover their claims during the 1990s, and the agreement concluded in 2002 between the General Social Security Treasury and Refractarios Especiales SA do not involve State aid to that company within the meaning of Article 87(1) of the Treaty.

Article 2

The failure of the Wage Guarantee Fund to act to recover the amount owed it by Refractarios Especiales SA from June 1995 onwards constitutes State aid to that company within the meaning of Article 87(1) of the Treaty.

Article 3

The State aid referred to in Article 2 is incompatible with the common market.

Article 4

1. Spain shall take all necessary measures to recover from the beneficiary the aid referred to in Article 2 and unlawfully made available to the beneficiary.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

Article 5

Spain shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 6

This Decision is addressed to Kingdom of Spain.

Done at Brussels, 27 November 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 11 December 2002

on the State aid implemented by Spain for Sniace SA

(notified under document number C(2002) 4824)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/284/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, [1] and in particular Article 14 thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above, [2] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 2 March 1998 the Commission received a complaint alleging that Sniace SA (hereinafter referred to as 'Sniace') had received illegal aid in the form of a subordinated loan of EUR 12 020 242 (PTA 2 000 million) granted on non-market terms. The Commission requested Spain to submit information thereon and, since insufficient particulars were received in reply, on 11 December 1998 it registered the case as non-notified aid.

(2) By letter dated 11 April 2000 the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. Spain submitted its comments by letter dated 5 June 2000.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [3]. The Commission invited interested parties to submit their comments on the aid. In this context, it received comments from Sniace. On 10 August 2000 it forwarded them to Spain, which was given the opportunity to react thereon but chose not to.

(4) By letter dated 2 October 2001 the Commission addressed an information injunction to Spain, which replied by letter dated 17 December 2001. By letter dated 19 December 2001 Sniace sent further comments and proposed that a meeting be held in order to clarify the situation. The meeting took place in April 2002. By letter dated 31 May 2002 Spain submitted additional information to the Commission.

II. DETAILED DESCRIPTION OF THE MEASURE

(5) Sniace is a company based in Torrelavega, Cantabria. Sniace is highly vertically integrated and is active in the areas of forestry management and production of paper, synthetic fibres and derived chemical products. In 2000 it employed around 600 people. From 1992 to 1996 it was under the suspension of payments procedure, from which it emerged after an agreement with its main private creditors was signed on 26 September 1996. The Cantabrian Regional Government commissioned during 1996 a viability plan from the private consultancy Coypsa. The plan was agreed on by the interested parties on 29 September 1996. As part of this plan, in 1997 the company renegotiated its debts with the remaining creditors, including Social Security. In October 1998 the Commission adopted an initial negative decision on the terms of that rescheduling agreement, on the grounds of the level of the interest rates negotiated. However, in September 2000, in the light of a judgment delivered by the Court of Justice in a similar case concerning the Spanish company Tubacex [4], the Commission decided to revoke its initial

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 162, 1.6.2000, p. 15.
[3] See footnote 2.
[4] Case C 342/96, 9.4.1999, Rec. 1999, p. I-02459.

decision and adopted a positive decision declaring that no aid was involved ([5]).

(6) In this same context, in January 1998 Caja Cantabria decided to grant a loan of EUR 12 020 242 (PTA 2 000 million) to Sniace. The loan is to run for eight years, from the date of signature of the contract (4 February 1998) until 2 January 2006. It is a subordinated equity loan. As a subordinated loan it will be reimbursed only at maturity and in the event of bankruptcy of the company it will be reimbursed after all the common creditors' claims but before the shareholders'. As an equity loan, the interest incurred depends on the profits made by the company. The interest rate is made up of two components: a fixed component of 2 % and a variable component that depends on the company's profits. The variable component is to be paid only when the company generates profits and was set at 5 % for profits up to EUR 3 million (PTA 500 million), 8 % for profits between EUR 3 and 6 million (PTA 500 to 1 000 million) and 10 % for profits over EUR 6 million (PTA 1 000 million). This variable component cannot however exceed the outcome of applying MIBOR + 2 % to the remaining principal. For 1998, the interest was fixed at 6,75 %. The loan may be converted into shares or bonds, if the parties so decide.

(7) Caja Cantabria is a credit institution with the legal status of a private foundation. It is a non-profit institution, with the results of its activity being used to finance social and cultural activities. A majority of the voting rights (63 %) of its different decision-making bodies are held by political representatives in the region. Article 7 of Cantabrian Regional Law 1/1990 of 12 March 1990 on the decision-making bodies of the savings banks provides for the following representation in the general meeting and the other decision-making bodies: municipalities: 38 %; provincial councils: 25 %; depositors: 22 %; social and cultural institutions: 10 %; employees: 5 %. Under Article 10(2) of the same Law, the representation of the provinces is assigned directly to the region. In addition, the public authorities are involved in the appointment of the representatives of social and cultural institutions. Where it is not possible to have representatives of the founding members or bodies among them, the representation of public bodies is increased further ([6]). Lastly, the fragmented nature of the clients' representation increases the influence of the publicly appointed members.

(8) As indicated when the procedure was initiated, because of this situation, the Commission considers that Caja Cantabria's decisions to finance certain companies may be based on reasons of public interest rather than the private investor principle. The Commission decided that it had to assess whether the above loan to Sniace was granted under normal market conditions.

III. COMMENTS FROM INTERESTED PARTIES

(9) Sniace was the only intervening party. Its comments may be summarised as follows:

(a) the preliminary investigation stage lasted too long, and during that period both the company and the Spanish authorities cooperated with the Commission departments. The company therefore had legitimate expectations that the loan would be regarded as not involving aid;

(b) Caja Cantabria was a private institution; the public representatives that were appointed to its decision-making bodies acted with full independence. Its funds were of private origin and its loans therefore could not constitute State aid;

(c) in any event, the loan was granted in accordance with national laws and at normal market conditions. Sniace had been through difficult times in the recent past but was now performing well: it generated profits in 2000 and was likely to do so again in 2001. Moreover, the company had assets valued at some EUR 150 million (PTA 25 000 million). There was therefore no risk of the loan not being repaid;

(d) other private banks stated that they would have lent to Sniace on similar terms. The differences with Caja Cantabria's loan were minimal and if they constituted State aid, it would be below the threshold for *de minimis* aid. The Commission should therefore approve the loan on the current terms;

([5]) OJ L 11, 16.1.2001, p. 46.

([6]) This is the case for Caja Cantabria. For example, the composition of the general meeting was, on 31 December 2001: municipalities: 40 %; provincial councils: 27 %; depositors: 23 %; social and cultural institutions: 5 %; employees: 5 %. At the same date, 10 out of 15 members of the board of directors (including the chair, the two vice-chairs and the secretary) were appointed by public authorities.

(e) if the Commission were however to decide that the loan involved aid, Sniace invited the Commission to approve it under the derogations provided for in Article 87(3)(a) or (c).

IV. **COMMENTS FROM SPAIN**

(10) In their letter of 5 June 2000 the Spanish authorities stated that they understood the surprise expressed by the company at the Commission's decision to initiate the formal investigation procedure after such a lengthy preliminary examination.

(11) They also reiterated that Caja Cantabria was a private credit institution and that the public representatives on its decision-making bodies were required by law to act with complete independence and were personally accountable for their actions in the same way as any other member of any decision-making body in any other private financial institution. Accordingly, Spain concluded, the loan in question constituted a contract between a private credit institution and a private company and did not involve State aid.

(12) By its letters of 17 December 2001 and 31 May 2002, which followed the information injunction issued by the Commission on 2 October 2001, Spain reaffirmed that the subordinated loan did not contain State aid. By its letter of 31 May 2002, Spain submitted the viability plan implemented by Sniace in 1996. Spain stressed, however, that the viability plan was not relevant for the purpose of assessing the subordinated loan, given that the loan was not mentioned therein and was granted by Caja Cantabria only in February 1998.

V. **ASSESSMENT**

1. **Legal basis**

(13) Article 87(1) of the EC Treaty provides that 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 shall, in so far as it affects trade between Member States, be incompatible with the common market. Article 87(3) provides for the possibility of considering aid to be compatible with the common market, under certain circumstances.

(14) The Commission has made public the criteria it applies when examining the compatibility of national regional aid with the common market under the provisions of Article 87 in its guidelines on national regional aid ([7]). Where aid is granted to undertakings in the synthetic fibres sector, the Commission has also published specific assessment criteria in the code on aid to the synthetic fibres industry ([8]). Where aid is granted for restructuring companies in difficulty, the criteria applied are set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([9]).

(15) The Commission has also made public the criteria it applies when assessing the existence of aid in loans by the State to undertakings in its communication to the Member States on the application of Articles 87 and 88 to public undertakings ([10]).

(16) As indicated in the above communication, and in line with long-standing practice, in order to determine whether a loan involves aid and, if so, how much, the Commission applies the principle of the private investor operating under normal market conditions. Any loan granted by a lender to a client under normal market economy conditions involves a degree of risk. The risk attached to any loan arrangement is usually reflected in two distinct parameters: the interest rate charged and the security required to cover the loan.

(17) The possible aid involved in a given loan by a public lender will correspond to the difference between the interest rate that the firm would have to pay, if it had to cover the risk attached to the loan as a private lender would require, and the rate actually paid. The Commission has also indicated to the Member States ([11]) that its published reference rates are set in such a way that they reflect the average level of interest rates charged, in the different Member States, on medium- and long-term loans (five to 10 years) backed by normal security. The current reference rates are thus equivalent to the five-year interbank swap rates plus a premium, which is 75 basis points in the case of Spain.

([7]) OJ C 74, 10.3.1998, p. 9.
([8]) OJ C 94, 30.3.1996, p. 11.
([9]) OJ C 368, 23.12.1994, p. 12. These guidelines were revised in 1999 (OJ C 288, 9.10.1999, p. 2). The 1999 version of the guidelines does not apply because the alleged aid measures were granted prior to their publication (see Section 7 of the 1999 version).
([10]) OJ C 307, 13.11.1993, p. 3.
([11]) Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

(18) In the same notice, the Commission also states that the reference rate thus determined is a floor rate which may be increased in situations involving a particular risk, for example in the case of an undertaking in difficulty or where the security normally required by banks is not provided. In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan under normal market conditions.

2. **The aid is granted by the State or through state resources**

(19) Caja Cantabria is a credit institution with the legal status of a private foundation, which besides carrying on the normal activities of a credit institution pursues social and economic objectives at regional level. Representatives of public authorities in the region hold a majority (63 %) of the voting rights in its decision-making bodies. Because of the rules that govern it, Caja Cantabria can be regarded as a public undertaking according to the definition given in Article 2(c) of Commission Directive 80/723/EEC of 25 June 1980 (the Transparency Directive) ([12]) as last amended by Directive 2000/52/EC ([13]). According to that provision a public undertaking is an undertaking over which the public authorities may exercise directly or indirectly a dominant influence, and such dominant influence shall be presumed when the public authorities can, directly or indirectly, appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

(20) The Commission cannot agree with the argument put forward by Spain and by Sniace that the loan is an arrangement between a private institution and a private company and that automatically no aid is involved. Nor does the fact that the possibility of granting subordinated equity loans is provided for by a national law ([14]) automatically mean that no aid is involved. The loan has to be examined according to the criteria used to assess measures of this type.

(21) The fact that the public authorities may exercise a dominant influence over Caja Cantabria does not automatically imply that the State actually exercised its control in a particular case. Indeed, even if the State is in a position to exercise a dominant influence over an undertaking's operations, actual exercise of that control in a particular case cannot be automatically presumed ([15]). To that end, the Commission has to examine whether the public authorities were involved, in one way or another, in the adoption of the particular measures.

(22) In the present case, the Commission has examined the evidence arising from the circumstances of the case and the context in which the subordinated loan was granted and has concluded that the measure can be regarded as imputable to the State, for the reasons set out below.

(23) Firstly, the public authorities played a very active role in the relaunch of Sniace and its return to normal activity after the suspension of payments period. The economic situation of Sniace was discussed on numerous occasions in the Regional Assembly of Cantabria. At its session of 4 June 1996, the Regional Assembly voted unanimously a motion point 4 of which called on the Regional Government to:

> 'Use all the means available to the Regional Government for applying political and administrative pressure to ensure that Banesto and Banco de Santander uphold its vision of Sniace's future, as well as its commitment to its future' ([16]).

(24) At the same time, the Cantabrian Government commissioned from the consultancy Coypsa the viability plan that formed the basis of Sniace's return to normal activity ([17]) and was subsequently accepted by the company and the unions.

(25) After the signature of the viability plan in September 1996, the local authorities also played an active part in its implementation. A working group was set up including representatives of the Cantabrian Government, Torrelavega City Council, Sniace's management, the trade unions, the consultancy Coypsa, and, for a number of meetings, the private bank Banesto. The working group met regularly in order to discuss implementation of the viability plan, including the aspects linked to its financing.

([12]) OJ L 195, 29.7.1980, p. 35.
([13]) OJ L 193, 29.7.2000, p. 75.
([14]) Law 27/1984 of 26 July 1984 on industrial conversion and reindustrialisation.
([15]) Judgment of the Court of Justice in Case C-482/99 [2002] ECR I-4397.
([16]) Diario de Sesiones de la Asamblea Regional de Cantabria, No 34, 4 June 1996, p. 1230.
([17]) This is confirmed, *inter alia*, by the statement made by Mr Alvarez Redondo, representative of the Cantabrian Government, to the Regional Assembly of Cantabria on 17 July 1996: 'We should not forget that the viability plan was an initiative of the Regional Government', Diario de Sesiones de la Asamblea Regional de Cantabria, No 98, 17 July 1996, p. 1885 ('*No podemos olvidar que la realización del Plano de Viabilidad ha sido una iniciativa del Consejo de Gobierno*').

(26) The Regional Assembly of Cantabria also took an interest in the implementation of the viability plan. Representatives of the private bank Banesto, one of Sniace's main creditors, appeared before the Regional Assembly of Cantabria on 5 July 1996 and 22 January 1997.

(27) Secondly, the involvement of the local authorities in the implementation of the plan included active involvement in the aspects related to its financing. On 22 January 1997 Dr Robles, a representative of Banesto, took part in a hearing at the Regional Assembly of Cantabria. During the hearing, Dr Robles declared that the bank was ready to provide Sniace with a loan of up to EUR 10,2 million (PTA 1 700 million) and a credit line of around EUR 18 million (PTA 3 000 million), on condition that Sniace needed them and that proper collateral was provided ([18]). Replying to specific questions on Banesto's position, Dr Robles pointed out that the need for collateral was the main problem in the ongoing negotiations with Sniace ([19]).

(28) The Commission also takes into account the following indications from press reports ([20]): in the summer of 1997 Caja Cantabria confirmed that it was prepared to provide half of the EUR 12 million loan, on condition that Banesto would provide the other half. Unlike Banesto, Caja Cantabria was at the time involved only to a limited extent in Sniace's financing.

(29) Negotiations on the loan were held under the auspices of Sniace's working group. The daily *El Diario Montañes* ([21]) reports a statement made by Sniace's CEO Blas Mezquita at the end of the working group meeting that took place on 24 November 1997 at the premises of the Industry Ministry of the Regional Government of Cantabria. According to that report, Mr Blas Mezquita declared that the main decision taken by the working group was that the Cantabrian Government would intervene directly as an intermediary to secure the EUR 12 million loan to Sniace.

(30) A the end of January 1998, following Banesto's refusal to grant the subordinated loan to Sniace, Caja Cantabria agreed to provide the entire EUR 12 million subordinated loan. According to press reports, at the board meeting that decided to grant the loan, a representative of the bank's clients and the representative of the Cantabrian industry association voted against the granting the loan ([22]). According to the industry association CEOE-Cepyme, the subordinated loan did not afford Caja Cantabria all the necessary guarantees ([23]).

(31) Thirdly, other circumstances indicate that the subordinated loan can be regarded as imputable to the State. The choice of the financial instrument, a subordinated loan, is unusual for credit institutions acting on a purely commercial basis. Subordinated loans are reimbursed only at maturity and in the event of bankruptcy of the company will be reimbursed after all the common creditors' claims but before the shareholders'. A bank with no exposure towards the prospective debtor, as was the case for Caja Cantabria, would normally have required better collateral and a higher level of security for any new loan it decided to grant.

(32) Moreover, the subordinated loan was very important in securing Sniace's financial viability. The company had a negative net worth of EUR 10,4 million at the end of 1997, which became positive to the tune of EUR 6,4 million at the end of 1998 thanks to the subordinated loan under scrutiny, a capital increase, and the renegotiation of old debts with creditors. Additionally, the loan formed a very large proportion of Sniace's debt, amounting in 1998 to 73 % of its long-term debt towards credit institutions and 26 % of its total debt towards credit institutions. Lastly, it represented roughly one fifth of 1998 turnover.

(33) Sniace was at the time the loan was granted a major player in the local economy. With a workforce of 600, it was a sizeable employer in the region of Cantabria, where unemployment stood at 20,9 % of the active population in 1997 ([24]). Sniace's importance for the Cantabrian economy is confirmed by the fact that the company's return to viability was presented in the debate on Cantabrian Government policy held on 15 June 1998 as a remarkable achievement of the Government's industrial policy ([25]).

(34) For the reasons set out above, the Commission concludes that in the case under scrutiny it is highly unlikely that the public authorities were not involved in the adoption of Caja Cantabria's decision to grant the subordinated loan to Sniace. The facts surrounding the grant of the loan indicate that the public authorities were involved in the process of granting the loan. The subordinated loan can therefore, in the present case, be considered to imputable to the State.

([18]) *Diario de Sesiones de la Asamblea Regional de Cantabria*, No 150, 22 January 1997, p. 2812.
([19]) *Diario de Sesiones de la Asamblea Regional de Cantabria*, No 150, 22 January 1997, p. 2817.
([20]) *El Diario Montañes*, 17 August 1997, pp. 1 and 16; 20 August 1997, p. 17; 23 August 1997, p. 18; 3 September 1997, p. 16; 28 October 1997, p. 16.
([21]) Issue of 25 November 1997, p. 16.
([22]) *Alerta*, 30 January 1998, p. 29.
([23]) *Alerta*, 29 January 1998, p. 33.
([24]) Source: Eurostat Newcronos Database, regional statistics.
([25]) *Diario de Sesiones de la Asamblea Regional de Cantabria*, No 119.1, 15 June 1998, p. 3849.

(35) The next section assesses whether or not the terms of the loan are in line with those that a private lender acting under normal market conditions would have granted in the same circumstances.

3. **The aid favours a particular undertaking**

(36) The loan granted by Caja Cantabria is an eight-year loan without any security and carrying a variable annual interest rate that can range from 2 % if the company does not make any profits to MIBOR + 4 where it generates very high profit levels. In order to determine whether any aid is involved and, if so, how much, it is necessary to compare the conditions of the loan with those that would have been acceptable to a credit institution acting under normal market conditions. To this end, the particular situation of Sniace has to be considered.

(37) For several years Sniace experienced severe difficulties that culminated with the company being under the suspension of payments procedure from 1992 to 1996. The procedure was lifted thanks to a viability plan and an agreement which Sniace concluded with its private creditors whereby the latter accepted a rescheduling and reduction of their claims, thereby allowing the company to reduce its debts. The company then negotiated separately with its public creditors and secured a rescheduling of its social security debts. The plan established a business strategy for the company, with new investments, in particular in a power generation plant to be co-financed by the private company Abengoa, which should enable Sniace to reduce its production costs. Other investments were also carried out in order to modernise the production plant and to allow full and optimum use of all its installations.

(38) Sniace is a major company in the paper industry, where variable production costs are very high. The viability plan is centred on this aspect, identifying the company's advantages and its handicaps and establishing cost reduction measures. The viability plan provided for the company's return to viability and profits. The company in fact achieved large profits in 2000, which are expected to continue in 2001. All the company's creditors had agreed to contribute to its implementation either by signing the creditors' agreement or by renegotiating in 1997 the terms of reimbursement. Also in 1997, the company's share capital was increased through an issue of new shares in order to reduce its debt burden. From the industrial point of view, in 1997 the company had also already began to return to its normal production activity and was ready to carry out the major investments considered necessary, such as building its own power generation plant.

(39) In these circumstances the Commission considers that a credit institution acting under normal market conditions might have decided to provide the loan that Caja Cantabria granted Sniace. The question is, however, whether it would have done so on the same terms as Caja Cantabria did.

(40) The Commission cannot accept Sniace's suggestion that if aid is deemed to exist it should be calculated with reference to the terms included in letters sent by private banks concerning identical loans that they might have considered granting to Sniace. The letters are not an offer of credit made in January 1998 but a statement in 1999 of what the banks might have done in the past. They do not therefore constitute evidence that the banks were prepared, at that precise point in time and in the specific circumstances in which the subordinated loan was granted, to offer conditions similar to those provided by Caja Cantabria. The Commission also points out that no information regarding negotiations with Banesto have been provided by the Spanish authorities, although it is clear that that bank negotiated the terms of a subordinated loan with Sniace before withdrawing from the deal. For these reasons, the amount of aid involved in the subordinated loan has to be calculated according to the criteria that have been developed and made public by the Commission in various communications as indicated above.

(41) Sniace did not provide any security for the loan. The fact that the Sniace had assets valued at approximately EUR 150 million cannot be considered as a satisfactory substitute for security, because Caja Cantabria had no specific claims on those assets. On the contrary, in the event of bankruptcy the bank's claim could be met only after all common creditors' claims had been satisfied. Neither can the loan's convertibility into equity or bonds – allowing redemption before its maturity — provide a real alternative for the security normally required. In granting such a loan, any private lender acting under normal market conditions either would have required first-quality assets to secure the loan or would have increased the interest rate charged in order to cover the increased risk.

(42) In view of the characteristics of the loan and taking into account the history of Sniace, and the fact that in 1998 the company was beginning gradually to emerge from serious difficulties that threatened its survival, the

Commission considers that the normal interest rate to cover the risk involved would have been 12,2 %. This corresponds to the interbank rate used by the Commission for calculating its market reference rate plus the normal 75 basis points it adds for loans in Spain and a further 600 basis points for the absence of security. This is in line with the indications contained in the Commission notice on the method for setting reference rates, which mentions that the reference rate may be increased by 400 basis points or more in situations involving particular risk. The normal market rate would yield annual interest of EUR 1 466 701 on a typical year (from 1999 to 2005) ([26]). Over the eight-year loan period, total interest paid would amount to EUR 9 454 365 at 1998 prices.

(43) Calculation of the interest rate paid by Sniace during the life of the loan must take into account the fact that actual interest paid depends on two factors — Sniace's profitability and the MIBOR rate for the period 1998 to 2006 — that could not be known to the parties when the loan was granted. In the worst-case scenario, of Sniace not making a profit for any year up to 2006, interest paid would amount to EUR 240 000 on a typical year (from 1999 to 2005) ([27]) Over the loan period, total interest paid would amount to EUR 2 066 108 at 1998 prices.

(44) It is not possible to calculate a best-case scenario on the basis of the information available to the parties at the time the loan was granted. However, the Commission considers that a useful approximation can be made by calculating the interest that would be paid by Sniace if it achieved the profit targets set out in the viability plan ([28]). In this scenario, the Commission has calculated that the total interest paid would amount to EUR 4 340 602 at 1998 prices.

(45) The Commission therefore concludes that the advantage conferred on Sniace would be EUR 7 388 258 in the worst-case scenario, and EUR 5 113 763 in the approximated best-case scenario. The advantage conferred on Sniace is in any event well above the EUR 100 000 *de minimis* threshold.

([26]) In 1998, interest charges would have been slightly lower, at EUR 1 325 849, because the loan was granted on 4 February and thus interest accrued for less than one calendar year.

([27]) For 1998, interest charges were fixed by the parties at EUR 733 564.

([28]) And making two further assumptions: firstly that profit would remain constant for the years 2002 to 2005 at the same level forecast in the plan for the years 1999 to 2001, and secondly that the resulting interest paid would always be lower than the MIBOR + 2 ceiling.

4. **The aid affects trade between Member States**

(46) As there is extensive trade between Member States in the paper, synthetic fibres and derived chemical products sectors, the advantage conferred on Sniace is liable to distort competition in the Community by giving Sniace an advantage over competitors not receiving aid. The measure therefore constitutes State aid within the meaning of Article 87(1) of the Treaty.

VI. **ASSESSMENT OF THE COMPATIBILITY OF THE AID ELEMENT**

(47) The Commission does not agree with the comments made by Spain and Sniace that the company had legitimate expectations that a positive decision would be taken on the grounds of the length of the preliminary examination period. On the contrary, the Court of Justice has on several occasions ruled that companies cannot rely on legitimate expectations where aid has not been granted in full compliance with the rules. In the present case the measure was not notified, and a preliminary examination cannot prejudge the final decision on a case.

(48) The Commission has to assess whether the aid may be considered compatible with the common market under one of the derogations laid down in the Treaty. In its reply to the decision initiating the procedure, Sniace stated that, on account of its nature as quasi-capital, the loan had been used to finance the normal current needs of the company. No specific allocation was made.

(49) The Commission considers that the aid cannot be regarded as investment aid and must be classed as operating aid. Although the company is located in an area eligible for regional aid under the derogation in Article 87(3)(a), such ad hoc aid is not regarded as regional aid proper. The aid does not satisfy the requirements to qualify as aid for initial investment or the requirements to be deemed aid for job creation as indicated in the guidelines on national regional aid. Nor does it satisfy the conditions set out therein for the approval of operating aid in Article 87(3)(a) regions ([29]). Accordingly, the aid cannot be considered compatible under that legal framework.

(50) Since Sniace produces synthetic fibres, aid granted to it could be covered by the code on aid to the synthetic

([29]) OJ C 74, 10.3.1998, p. 9. See in particular point 2, footnote 10 and point 4.17.

fibres industry. The code however only imposes special conditions on investment aid for production equipment specified in the code, so that any other type of aid has to be assessed according to the horizontal rules. As the aid is not in direct support of the industrial processes of extrusion, texturisation or polymerisation or in direct support of any ancillary process linked to the contemporaneous installation of extrusion/texturisation capacity, as described in the code, the aid in question cannot be deemed to fall within the scope of the code (see recitals 55 and 56 below).

(51) This leaves the possibility of assessing the aid according to the rescue and restructuring guidelines, under which operating aid may under certain circumstances be considered compatible. Firstly, it must be demonstrated that Sniace was a firm in difficulty, unable to recover through its own resources. Secondly, the assessment of the aid must be carried out on the basis of a restructuring plan aimed at restoring the firm's long-term viability.

(52) As regards the difficulties experienced by Sniace, high production costs, falling market shares and declining markets led the company to seek a suspension of payments in 1992. The suspension of payments was ordered in March 1993 and lifted in October 1996, when the private creditors agreed to convert 40 % of the company's debt into equity, while the public-sector creditors decided not to subscribe to the agreement. It is therefore clear that, in 1996, at the time the viability plan was drawn up, Sniace was a company in difficulty. Table 1 summarises the company's financial situation in the years 1991 to 1996.

TABLE 1

(in EUR)

Year	1991	1992	1993	1994	1995	1996
Turnover	69 342 781	43 015 266	4 797 844	38 790 217	65 944 130	34 558 196
Operating income	– 13 700 984	– 25 322 689	– 23 221 491	– 6 843 112	– 5 536 157	– 8 695 810

(53) In June 1996 the Cantabrian Government commissioned a viability plan for Sniace from the private consultant Coypsa. The plan analyses the situation of Sniace following the suspension of payments and sets out the actions to be taken in subsequent years, at industrial and financial level, to ensure the company's long-term viability.

(54) Sniace endorsed the viability plan in September 1996 and started to implement it in 1997 and 1998, as reported in point 3.2 of the company's 1998 annual report. The same point of the annual report mentions explicitly the subordinated loan (described in point 11.1 of the report) as part of the implementation of the viability plan. For this reason, Spain's claim that the viability plan is not relevant for the purpose of assessing the subordinated loan cannot be accepted.

(55) The main element of the viability plan consisted in a set of measures aimed at reducing production costs, and in particular energy costs. Of particular importance in this respect was the plan to build a cogeneration plant in partnership with the Spanish company Abengoa SA. The cogeneration plant was to reduce significantly the impact of energy purchases on production costs, and thus make the company's products more competitive, particularly for the most energy-intensive products such as paper and synthetic fibres.

(56) Other measures provided for in the plan were aimed at reducing costs arising from the production of liquid wastes (new waste treatment and water management installations), as well as operating costs (reduction of overheads, rationalisation of the administrative and sales departments, closure of non-essential premises in Barcelona and Madrid).

(57) The plan did not envisage permanent capacity reductions on the existing production lines. Nor did it provide for investments that would have increased installed capacity, with the exception of the increase in energy production capacity following construction of the new cogeneration plant.

(58) The financial requirements for implementing the plan were estimated at: a credit line of EUR 3 million to restart production on the lines that had been stopped following the suspension of payments; a credit line of EUR 18 million to finance working capital; and EUR 9,2 million to finance the investments envisaged in the plan. The plan also set out the necessary conditions for

maintaining pre-existing debt at a serviceable level, mainly through converting it into long-term debt.

(59) It is therefore necessary to establish whether, on the basis of the viability plan, Sniace fulfilled the criteria to be eligible for restructuring aid. To this end, it has to be demonstrated that the viability plan satisfies the following conditions, set out in point 3.2.2 of the rescue and restructuring guidelines:

(a) the plan must restore the long-term viability of the company on the basis of realistic assumptions;

(b) the aid must avoid undue distortions of competition;

(c) the aid must be proportional to the restructuring costs and benefits;

(d) the company must implement the plan in full and respect its conditions.

(60) The restoration of Sniace's long-term viability should be achieved within a reasonable timescale and on the basis of realistic assumptions as to its future operating conditions. The improvement in viability must result mainly from internal measures, so as to allow the company to operate successfully once the restructuring has been completed.

(61) In the case under scrutiny, the viability plan covers the period 1997 to 2001. On the basis of the information contained in the plan, it can be concluded that the plan laid the foundations for ensuring Sniace's long-term viability. The thrust of the viability plan is to reduce production costs, especially in those areas, like energy purchases and environmental costs, that in the past made Sniace's products uncompetitive in the market. Another important element of the plan is the optimisation of capacity utilisation in order to respond to demand conditions and avoid costly energy purchases in the medium term. According to the plan, the company was to achieve limited profitability already in 1997, and satisfactory profitability from 1999 onwards (see Table 2 below).

TABLE 2

(in EUR)

Year	1997	1998	1999	2000	2001
Turnover	70 100 049	70 100 049	69 056 657	69 056 657	69 056 657
Operating income	835 142	1 069 128	5 129 284	5 129 284	5 129 284

(62) The fact that the assumptions on which the viability plan was based were realistic is confirmed by the evolution of Sniace's actual performance as set out in Table 3 below. Although Sniace's turnover recovery and return to profitability took longer than expected in the plan, turnover and operating income levels in 2000 and 2001 were largely in line with what had been anticipated in the plan.

TABLE 3

(in EUR)

Year	1997	1998	1999	2000	2001
Turnover	33 648 943	56 110 490	51 043 676	72 333 369	65 703 334
Operating income	– 9 603 554	– 7 050 166	– 7 164 563	4 991 273	4 376 660

(63) On these bases, the Commission concludes that the viability criterion is satisfied.

(64) As regards the impact of the aid on Sniace's competitors, the guidelines on restructuring aid require measures to be taken to avoid undue distortion of competition. This means that, where there is a structural excess of capacity in the sector, the restructuring plan should contribute, in proportion to the aid received and its repercussions on the relevant market, to the restructuring of the industry by irreversibly reducing or closing capacity.

(65) According to the guidelines, the fact that a company is located in an assisted area does not in itself justify a permissive approach to the granting of restructuring aid. However, the obligation to avoid undue distortions of

competition can be applied more flexibly in assisted areas, and particularly in the areas regarded as disadvantaged under Article 87(3)(a), as has been the case since 1995 for Torrelavega in Cantabria.

(66) While it is certainly true that competition exists within the European Union in the sectors in which Sniace operates, it is important to note that the viability plan did not envisage any increase in installed capacity in those sectors. The construction of the cogeneration plant, in particular, was not intended to remove an existing productive bottleneck thereby leading to more intensive use of installed capacity. The plant would instead allow the impact of energy costs on total production costs to be reduced by replacing power previously purchased from the grid with energy produced in-house. The improved utilisation of existing capacity after completion of the restructuring process and the implementation of the rationalisation measures were necessary in order to allow Sniace to return to profit in 2000. The aid in question, while necessary to return to viability a company located in an assisted area, does not allow Sniace to increase, during the implementation of the plan, its capacity at the expense of its competitors. The increase in power generation capacity is indeed indispensable in order to reduce the company's operating costs and achieve profitability in the medium term.

(67) As regards the proportionality of the aid to the restructuring costs, Sniace's return to viability can be regarded as not depending solely on the aid received. This is true even taking the worst-case scenario of Sniace not making a profit in any year between 1999 and 2005 (this scenario did not materialise) and thus setting the aid element at EUR 7 388 258. In this case, the aid intensity would amount to only 24,5 % of the EUR 30,2 million total costs included in the viability plan. The above percentage would be further reduced where Sniace paid Caja Cantabria higher levels of interest (as was the case in 2000 and 2001).

(68) The Commission concludes that the aid obtained by Sniace is limited to the minimum necessary and does not create excessive liquidity liable to be used for activities that could create distortions of competition and would be unrelated to the restructuring process. The aid in question is furthermore linked to measures that are necessary for implementing the viability plan and does not excessively reduce the company's financing costs.

(69) For the reasons stated above, the Commission concludes that the restructuring aid under scrutiny is compatible with the common market.

VII. **CONCLUSION**

(70) The Commission finds that the loan granted by Caja Cantabria to Sniace involves State aid within the meaning of Article 87(1). Consequently, Spain has unlawfully implemented the aid in question in breach of Article 88(3). However, as established by the above assessment, the aid fulfils the conditions for the derogation laid down in Article 87(3)(c) and is therefore compatible with the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Spain has implemented for Sniace SA, amounting to a maximum of EUR 7 388 258, is compatible with the common market pursuant to Article 87(3)(c) of the Treaty.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 11 December 2002.

For the Commission

Mario MONTI

Member of the Commission