II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 December 1989

concerning aids in Spain which the central and several autonomous governments have granted to Magefesa, producer of domestic articles of stainless steel, and small electric appliances

(Only the Spanish text is authentic)

(91/1/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having given notice in accordance with the above Article to interested parties to submit their comments and having regard to those comments,

Whereas :

I

Magefesa is the name of a Spanish holding basically formed by four industrial companies with factories in three different Spanish autonomous Communities, namely :

— Indosa : Derio (Vizcaya), — Basque Country,

— Gursa : Guriezo, — Cantabria,

— Cunosa : Limpias, — Cantabria,

— Migsa : San Roque (Cadiz), — Andalusia.

Magefesa has been a widely known producer in Spain. In 1983, according to estimates by private consultants, the market shares for its basic product range reached the following figures : pressure cookers (79,1 %), pans (50,7 %), stainless steel cutlery (24,2 %), electric coffee makers (36,6 %) and electric grills (85,5 %). For the same year its consolidated turnover amounted to Pta 12 144 million with an export rate of 26 %. As regards the exports to other Member States, they accounted for 12 % of the global sales volume.

After 1983 Magefesa started to experience serious financial difficulties. In this respect, suffice to say that its turnover passed from Pta 8 037 million in 1984 to Pta 1 979 million in 1986 ; in other words its global sales fell by 88 % in three years. On the other hand, the accumulated losses at the end of 1986 exceeded Pta 15 000 million and the group's net worth amounted to — Pta 11 000 million. This situation placed Magefesa on the verge of bankruptcy. According to the explanations put forward at the time, such a glaring decline was caused by significant failures in management. Apparently this process of loss of predominance on national market still became more acute when Magefesa attempted to counter its effects by embarking on high-risk operations abroad that finally proved irrecoverable. Despite those problems Magefesa's labour force stayed pratically constant ; at the beginning of 1986 it employed 3 200 persons with the following geographic distribution : 1 472 workers in the Basque Country ; 1 354 in Cantabria ; 123 in Andalusia ; the remaining 251 people corresponded to the sales network.

With a view to preventing a standstill at its factories and eventual bankruptcy, in November 1985 Magefesa committed its management to a Spanish private consulting firm, Gestiber. In February 1986 this firm presented an action programme for negotiation with the trade unions, finally accepted in May 1986. For its implementation, this programme relied on the active participation of

the central State and the governments of the autonomous Communities where the industrial sites of Magefesa were located, by the granting of a series of State aids.

As a first step, the autonomous governments concerned created three interposed companies: Ficodesa (Basque Country); Gemacasa (Cantabria) and Manufacturas Damma (Andalusia). These had two main objectives: on the one hand, to enable the public authorities to monitor both the use of the aids to be granted, and the implementation of Gestiber's directives; on the other, to ensure the operation of Magefesa's companies, mostly by preventing the seizure by creditors of their financial resources and inventories. For this latter purpose, on the basis of joint agreements these interposed societies market the entire production of Magefesa previously acquired from the individual companies; at the same time they administer the funds, raw materials and semi-finished goods needed by the companies whom they provide in proportion to work progress or justified expenses.

II

Following a complaint, by letter dated 13 January 1987 to the Spanish authorities, the Commission requested details on the State interventions decided in favour of the companies of Magefesa. In the same letter, the Commission reminded the Spanish authorities of their obligations under Article 93 of the EEC Treaty to notify to it any aid at the proposal stage, drawing their attention to the uncertain status and unlawfulness of the aids granted previously to a formal decision on their compatibility.

After a request for prolongation of the reply deadline, first information was furnished by letter of 15 May 1987. Additional information was provided in the course of a meeting held with Spanish representatives on 16 September 1987, where they tried to clarify the complex structure of interventions; they also announced that the missing information concerning the restructuring of Magefesa would follow. At last, in December 1987 the Commission received a memorandum on the action strategy for Magefesa drawn up by Gestiber. This document was informally transmitted to the Commission by the company. Despite the request of the Commission, the Spanish Permanent Representation declined to transmit it officially.

According to the information provided, at both central and autonomous level the public authorities had awarded an aid package to Magefesa basically aimed to prevent its bankruptcy, and lessen the adverse social consequences of an adjustment in its labour force.

The aids consisted of: loan guarantees amounting to Pta 1 830 milion; a loan at other than market conditions of Pta 2 085 million; subsidies totalling Pta 1 095 million; interest subsidies being worth Pta 9 million; and extraordinary subsidies to the workers made redundant valued at Pta 1 500 million. They are discussed in detail in the fourth recital.

After a first analysis, the Commission considered that the aid in question was caught by the prohibition provided for in Article 92 (1) of the Treaty, and did not *prima facie* satisfy the conditions for exemption under paragraphs 2 and 3 of that Article. Therefore, the Commission decided to initiate the Article 93 (2) procedure in respect of the aid.

The decision was communicated to the Spanish Government by letter dated 28 November 1988, giving it notice to submit its comments. The other Member States were informed by letters dated 6 February 1989. Notice to other third interested parties was given on 15 February 1989 by means of the publication in the *Official Journal of the European Communities*.

III

The Spanish Government answered the Commission's letter by telex dated 15 February 1989.

Concerning the loan at other than market conditions, the Spanish Government stated that it originated in an arrangement made by Fogasa — the national fund for the safeguarding of employees' rights in the event of insolvency of their employers — and Magefesa.

Fogasa had paid, in place of Magefesa within the ceilings established in its regulation, salaries and indemnities pending of payment to the workers made redundant. The loan in question was decided by the fund with Magefesa to recover the said advances. Therefore, the Spanish Government concluded that this loan should not be viewed as an aid to Magefesa but rather an aid to the workers, these latter being the direct beneficiaries of the measure.

As regards the subsidies, the Spanish Government claimed that, like in the previous case, they were aids to the workers and not to Magefesa. The governments of the autonomous Communities had paid that money to Magefesa to enable it to pay off the remaining part of salaries and indemnities due and not advanced by the national fund, because they exceeded the ceilings established under its regulation. In consequence, this State intervention should be seen as a measure for complementary social protection of redundant workers.

As to the assistance granted by one of the autonomous governments concerned, in particular that of the Basque Country in the form of loan guarantees and subsidies, the Spanish Governments claimed that they were awarded under an aid regime existing in Spain before its entry into the Community and notified at the time of the accession without the Commission making any observation. The Spanish Government also argued that the aid regime in question was of a regional nature, for which, according to

the Spanish opinion, the Commission foresees the compatibility of operating aids.

Lastly, concerning the extraordinary subsidies granted in favour of workers accepting dismissal, the Spanish Government stated that, contrary to the Commission's first appraisal, this measure had not had any effect on the negotiations between Magefesa and its workers for the completion of the manning level adjustment. This State intervention should be viewed as a general measure under the social policy of the Spanish Government intended to mitigate the adverse consequences of unemployment for those workers no longer being entitled to unemployment pay.

Following receipt of the comments from the Spanish Government, by letter of 27 February 1989 the Commission drew the attention of the Spanish authorities to the fact that no answer was given to an essential point for reservation raised in the letter communicating the initiation of the Article 93 (2) procedure ; the absence of notification of a sound restructuring plan for the companies of Magefesa that, duly endorsed by the public authorities, could serve as a reference for the discussion about the compatibility of the aid.

The Spanish authorities replied by telex dated 31 March 1989, communicating that to that date the administrative authorities concerned had not approved any industrial restructuring plan for the companies of Magefesa.

Within the framework of the consultation of other interested parties, the governments of three other Member States, and two industrial federations, submitted observations, all supporting the Commission's position and underlying the danger of distortion of competition arising from the aid.

The Spanish Government was informed of the abovementioned observations by letter dated 6 September 1989, giving it notice to submit its comments within a one-month period. The Spanish authorities answered by telex of 20 October 1989, reaffirming their former observations submitted to the Commission in the sense of considering all the interventions rightful and compatible with the Treaty.

IV

On its examination of the public interventions in support of Magefesa, the Commission has verified to what extent those measures contain aid elements in the light of Articles 92 to 94 of the Treaty.

According to the information available to the Commission, the Spanish authorities decided the following interventions in relation to Magefesa — save otherwise indicated, all of them granted in 1986 :

(i) *Loan guarantees*

The governments of the autonomous Communities of the Basque Country, Cantabria and Andalusia have awarded to Magefesa, respectively : Pta 972 512 and 96 million worth of guarantees on bank loans.

Such interventions undoubtedly constitute an aid to Magefesa since they have enabled it to arrange credits to continue trading. These credits had been unlikely to obtain otherwise without the State guarantee given its serious financial difficulties.

Previous to the abovementioned grants, in 1985 the Government of Cantabria had awarded guarantees amounting to Pta 250 million. This intervention falls out of the scope of application of Article 92 (1) of the Treaty because it was put into effect before the entry of Spain into the Community.

(ii) *A loan at other than market conditions*

As a result of the insolvency of Magefesa, Fogasa — a social fund dependent upon the central authorities, basically financed by parafiscal levies on the employer's social security contribution — committed itself to pay the redundant workers, in place of Magefesa, salaries due and legal severance payments within the ceilings established in its regulations. The amount committed was of Pta 2 085 million. Simultaneously, at the request of Magefesa, Fogasa arrange with it the possibility of reimbursing the money paid in its place in increasing annual instalments throughout eight years, bearing a 10,5 % annual interest rate. This rate contrasts with the prevailing market rates in 1986. According to the statistics published by the Spanish central bank, the average annual interest rate for guaranteed credits falling due after more than three years was 14,65 % in 1986. On the other hand, the repayment conditions established, with 51 % of the debt principal to be reimbursed over the last two years of postponement and interest accrued to be paid together with the last instalments, have been deliberately decided to facilitate the companies' recovery. None of the abovementioned conditions fits with those normally applicable to credit operations under market conditions, less still when considered the serious financial difficulties experienced by Magefesa.

In consequence, the public intervention in question constitutes aid, inasmuch as it has granted Magefesa a financial advantage derived from the reduced interest rate applied in the postponement and the artificial conditions established for debt principal and interests repayment.

(iii) *Non-refundable subsidies*

The governments of the autonomous Communities of the Basque Country, Cantabria and Andalusia awarded non-repayable subsidies to Magefesa, amounting to Pta 794, 262 and 39 million, respectively. (The aid from the Andalusian Government was granted in 1987.) These subsidies were intended to enable Magefesa to pay off the remaining part of salaries and indemnities due and not advanced by Fogasa to the redundant workers because they surpassed its general ceilings.

These interventions by the autonomous Communities constitute aids to Magefesa, since their award provided Magefesa with money to cancel a part of its current liabilities without any obligation of reimbursement, what ranks these subsidies as a straightforward remission of debt.

(iv) *Interest subsidies on loans*

The Basque Government awarded an additional aid in the form of grants reducing the effective rate of interest on loans contracted by Magefesa. The subsidies were paid for interest surpassing the 11 % annual rate. On this basis, Magefesa has received Pta 9 million.

This intervention constitutes clear operating aid to Magefesa, obtaining a cash compensation for current expenses taken in charge by the State.

(v) *Extraordinary subsidies*

The last public intervention consists of an extraordinary decision by the Spanish Ministry for Labour, granting the redundant workers of Magefesa subsidies equivalent to the extension to the maximum admissible of the benefits of unemployement pay. The estimated cost for the state of this measure is Pta 1 500 million. the workers concerned had already used part of of those legal benefits during temporary lay-offs. In Spain the entitlement period to unemployment pay is fixed at a limited portion of time which is progressively reduced as the beneficiary is paid by the State during temporary lay-offs. According to the information available to the Commission, this public intervention was implemented with the objective of ensuring a more suitable unemployment cover for the workers made redundant in view of the adverse prospects of reemployment in the areas where the companies were located. Moreover, the extraordinary decision took place once the workers concerned had resigned their labour relationships with Magefesa. In consequence, this intervention cannot be judged to have favoured the undertaking and, therefore, does not constitute aid to Magefesa, but an extraordinary assistance having a basic positive effect on the social protection position of the workers.

Once the public interventions in relation to Magefesa have been reviewed, it is important at this point to make certain consideration in connection with the comments by the Spanish Government.

In its present decision, the Commission is in no way objecting to the intervention of Fogasa and the autonomous governments in favour of the workers of Magefesa to safeguard their rights by paying in place of their companies salaries and indemnities that otherwise they would lose. This side of the intervention to protect the rights of the employees and guarantee the payment of their outstanding claims must be deemed justified and necessary taking account of the need for a balanced economic and social development in the Community. In its present decision, the Commission is examining the other side of the intervention instead, that is to say, the decisions taken by the social fund and the autonomous governments in relation to Magefesa after their interventions in favour of the workers. It is here where the elements of aid to the enterprise appear.

V

As previously explained, the abovementioned public interventions in favour of Magefesa have directly and indirectly strengthened its financial position by relieving it of expenses it should have met by its own, and by creating the suitable conditions to obtain credit. These public interventions are also apt to affect trade between Member States ; where financial assistance from the State strengthens the position of certain enterprises compared with that of others competing with them in the Community, it must be deemed to affect those other enterprises.

On this score, the products marketed by Magefesa are traded between Member states and there is competition among producers. In 1987 intra-Community exports of stainless steel cutlery, kitchen wares in iron and steel, electric grills and electric coffee or tea makers (NIMEXE codes : 82.14-10, 73.38-21, 85.12-55, 85.12-71) amounted to : ECU 52,1, 36,3, 19,4, and 81,4 million respectively, of which : ECU 1,8, 0,3, 1,3 and 0,2 million originated in Spain. For its part, imports into Spain of the same goods from other Member States amounted to : ECU 5,6, 2,9, 0,7 and 2,9 million respectively.

Moreover, Magefesa has operated on Community markets in the past and used to be one of the largest Spanish producers in the sector. Likewise, according to the estimates of its action programme, Magefesa is planning to

attain an export share of 25 to 30 %, of which its sales to other Member States will account for 50 %.

In view of the abovementioned considerations the aid to Magefesa affects trade between Member States and distorts competition within the meaning of Article 92 (1) of the Treaty.

VI

Concerning the legal status under Community law of the aid to Magefesa, save that granted by the Basque Government, the aid to Magefesa was not awarded under existing regimes, but on the basis of *ad hoc* decisions of the authorities concerned that should have been notified to the Commission at the proposal stage. Therefore, in the light of Community law it is illegal.

As regards the legality of the aid granted by the Basque Government under existing aid regime to which no objections to its implementation were raised, the Commission, on the basis of the information submitted has verified whether, in this particular case, the requirements for aid granting under the said regime have been respected. One of those requirements was the existence of a restructuring plan for both the sector concerned and the beneficiaries, duly endorsed by authorities charged for the follow-up of the aid regime. In this respect, the Spanish Government has confirmed that the authorities concerned have not approved any restructuring plan for the companies of Magefesa, this fact constitutes a misapplication of the aid regime. For this reason, the Commission has therefore to raise the illegality of the Basque intervention.

The illegal character of all aid at issue here results from the failure to respect the rules of procedure as laid down in Article 93 (3) of the Treaty. In cases of aid incompatible with the common market, the Commission — making use of a possibility given to it by the Court of Justice in its Judgment of 12 July 1973 in case 70/72, Commission v. Federal Republic of Germany [1], confirmed in the Judgment of 24 February 1987 in case 310/85, Deufil GmbH & Co. v. Commission [2] — can require Member States to recover aid granted illegally from recipients. In this respect it has to be recalled that — in view of the imperative character of the rules of procedure as laid down in Article 93 (3) of the EEC Treaty which also are of importance as regards public order, the direct effect of which the Court of Justice has recognized in its ruling of 19 June 1973 in case 77/72, Carmen Capolongo v. Azienda Agrícola Maya [3] — the illegality of the aid at issue here cannot be remedied *a posteriori*.

VII

Article 92 (1) of the Treaty provides that aid meeting the criteria laid down therein is in principle incompatible with the common market. The exceptions provided for in Article 92 (2) are not applicable in this case because of the nature of the aid, not directed towards the attainment of such objectives.

Article 92 (3) of the Treaty lists aid which may be compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community as a whole and not in that of a single Member State. In order to ensure the proper functioning of the common market, and having regard to the principle embodied in Article 3 (f), the exceptions provided for in Article 92 (3) must be construed narrowly when any aid scheme or individual aid award is scrutinized. In particular, they may be invoked only when the Commission is satisfied that, without the aid, market forces alone would be insufficient to guide the recipients towards patterns of behaviour that would serve one of the objectives of the said exceptions.

With regards to the exceptions provided for in Article 92 (3) (a) and (c) for aid that promoted or facilitates the development of certain areas, save San Roque (Cádiz), none of the areas where the plants of Magefesa are located — Derio (Vizcaya), Guriezo and Limpias (Cantabria) — presents a standard of living abnormally low, or serious underemployment, within the meaning of Article 92 (3) (a). For its part, even though these latter locations are situated in assisted areas pursuant to Article 92 (3) (c), the assistance to Magefesa does not have the requisite features of aid to facilitate the development of certain economic areas within the meaning of this Article, inasmuch as it was granted in the form of operating aid, that is to say, not conditional on investment or job creation as explained in the 1979 Commission communication on the principles of coordination of regional aid systems [4]. As regards the aid in San Roque (Cádiz), the assistance was not granted under the corresponding regional aid scheme but on the basis of an *ad hoc* decision of the autonomous government. Moreover, operating aid in Article 92 (3) (a) areas can only be covered by this exception when granted under restricted and controlled conditions; in particular, when related to companies in difficulties, the assistance, among other requirements, must be strictly conditional on the implementation by the beneficiaries of restructuring measures which lead to their being truly viable. This requirement is not fulfilled by the aid in question as explained below.

[1] [1973] ECR, p. 813.
[2] [1987] ECR, p. 901.
[3] [1973] ECR, p. 611.
[4] OJ No C 31, 3. 2. 1979, p. 9.

As regards the exemptions provided for in Article 92 (3) (b), the aid measures in question were not intended to nor have the featues of 'a project of common interest' or of a project likely to 'remedy a serious disturbance' in the Spanish economy. Moreover, the Spanish authorities have not invoked this.

Article 92 (3) (c) also lays down an exemption for 'aid to facilitate the development of certain activities'. The aid to Magefesa falls under aid to companies in difficulties, as the group's financial situation was on the verge of bankruptcy at the moment the aid was awarded.

Aid to firms in difficulties carries the greatest risk of transferring unemployment and industrial problems from one Member State to another; it acts as a means of preserving the status quo by preventing forces at work in the market economy from their normal consequences in terms of disappearance of uncompetitive firms in their process of adaptation to changing conditions in competition; at the same time, such aid may bring about disruptive effects on competition and trade by its induced influence upon the pricing policies of beneficiaries opting for undercutting strategies to stay on the market.

For this reason, the Commission has developed a special approach for the assessment of aid to firms in difficulty. Although the Commission has expressed its reservation in principle as to the compatibility of operating aid with the common market, it however does not condemn all assistance to troubled companies. On numerous occasions the Commission has stated its views on such measures, formulating the basic conditions to be observed. In general, such interventions must be restricted to the aid needed to keep the company in business till the necessary measures to restore viability are put into effect; on the other hand, they must be strictly conditional on the implementation of a sound restructuring or conversion programme capable of restoring the long-term viability of the beneficiary. On its assessment about the compatibility of such aid proposals, the Commission takes into account the conditions giving rise to the State interventions, and judges whether, in return for the aid, the proposals contain a compensatory justification in the form of a contribution by the beneficiary, over and above the normal play of market forces altered by the aid, to the achievement of Community objectives as established in Article 92 (3) of the Treaty.

In the case at issue, the Spanish authorities have even failed to provide the Commission with the evidence that the aid granted to the companies of Magefesa is linked to a restructuring programme aimed to restore their long-term viability.

By its letter communicating the initiation of the Article 93 (2) procedure, the Commission informed the Spanish Government that the strategy transmitted by Magefesa without official endorsement did not fulfil the necessary requirements to consider it a sound restructuring plan. This strategy, informally transmitted, outlined the measures undertaken to that date to rescue the companies of Magefesa. In particular, it set out the nature and application of the State aid received, as well as the degree of completion in the labour force reduction, where 1 780 out of the 2 027 jobs initially proposed had already been cut back. As regards future actions, on the marketing side the strategy described certain measures to boost the global sales in order to restore them to satisfactory levels; on the industrial side, it only proposed certain investments, improvements in production and exchanges of equipment between factories, whose costs were not even quantified except for the investments estimated at Pta 439 million that could be financed by selling idle properties. The strategy submitted did not contain definite commitments regarding the necessary measures to undertake to scale down the companies' activities in accordance with the new situation after the slump in sales. No undertakings were made as regards definite reductions in production capacity and eventual close-downs of industrial facilities. Furthermore, in the light of the information submitted to the Commission the financial viability and self-sufficiency of the group was in any case seriously endangered because apparently the future draft budget presented had not taken into consideration the reimbursement of a significant part of the liabilities postponed during the rescue phase. According to the explanations to the strategy, Magefesa could only meet these expenses with capital contributions or further postponements that could only be possible in case of State guarantee. In consequence, the Commission concluded that the strategy submitted by Magefesa was not capable of being well and truly viable in the long term.

It should also be noted that the Spanish authorities refused to endorse the abovementioned strategy, for which reason they were not even bound as regards the implementation of the actions proposed.

These reservations were transmitted to the Spanish authorities by the abovementioned letter of 28 November 1988. In its telex dated 15 February 1989 submitting comments under the procedure, the Spanish Government did not make any reference to the abovementioned reservations concerning the viability of Magefesa, but only focussed its attention on formal aspects of the aid granting. For that reason, by letter of 27 February 1989 the Commission once again reminded the Spanish authorities of its reservations and warned them that the eventual compatibility of the aid to Magefesa could only be inferred if such aid formed part of a sound restructuring plan that, duly endorsed by the public authorities concerned, were communicated to the Commission.

The Spanish authorities answered by telex dated 31 March 1989, where they stated that to that date the authorities concerned had not approved any restructuring programme for Magefesa.

This statement proves that the aid to Magefesa was granted regardless of any consideration about the group's future viability and restructuring with the apparent purpose of keeping its companies artificially in operation. Under the current principles of the Community State aid policy, this fact absolutely disqualifies the aid for the application of the Article 2 (3) (c) exemption.

VIII

Accordingly, in conclusion, the aid in question is illegal because the Spanish Government did not fulfil its obligations under Article 93 (3). Moreover, it does not meet the conditions which must be fulfilled in order for one of the exceptions of Article 92 (2) and (3) to apply. For these reasons the aid to Magefesa at issue is incompatible with the EEC Treaty. In consequence, the aid elements therein involved must be withdrawn,

HAS ADOPTED THIS DECISION:

Article 1

The public assistance to the companies of Magefesa consisting of:

(i) loan guarantees amounting to Pta 1 580 million;

(ii) a loan of Pta 2 085 million at other than market conditions;

(iii) non-repayable subsidies amounting to Pta 1 095 million;

(iv) an interest subsidy estimated at Pta 9 million;

were granted illegally, and moreover are incompatible with the common market within the meaning of Article 92 of the EEC Treaty.

Article 2

Accordingly, the aid elements therein involved have to be withdrawn. Therefore, the Spanish Government is hereby requested to get the following stipulations complied with:

(a) the withdrawal of the State loan guarantees given amounting to Pta 1 580 million;

(b) either the conversion of the soft-loan into a normal credit at both interest and repayment market conditions, or its withdrawal, or any other appropriate measure to ensure that the aid elements are wholly abolished. Whatever measure is adopted, it must take effect from the time the loan was initially granted;

(c) in case of conversion, the assurance that the instalments related to the abovementioned loan will be recovered in accordance to the schedule fixed;

(d) the recovery of Pta 1 104 million corresponding to the non-repayable subsidies granted.

Article 3

The Spanish authorities will inform the Commission, within two months of the notification of this Decision, of the measures they have taken to comply therewith. Should the Decision's execution take place later than the said period, the national provisions regarding interest on arrears payable to the State will be applicable.

Article 4

The Decision is addressed to the Kingdom of Spain.

Done at Brussels, 20 December 1989.

For the Commission

Leon BRITTAN

Vice-President