II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 March 1992

on State aid in favour of Hilaturas y Tejidos Andaluces SA, now called Mediterráneo Técnica Textil SA and its buyer

(Only the Spanish text is authentic)

(92/317/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 to the parties concerned to submit their comments as provided for in the said Article 93, and having regard to those comments,

Whereas :

I

Hilaturas y Tejidos Andaluces SA or Hytasa, now called Mediterráneo Técnica Textil SA was a State undertaking up to 1990 belonging to the Spanish State via the Property Office of the Ministry of the Economic Affairs and Finance (Patrimonio).

It was established in Seville in 1937 by a private entrepreneur. In consequence of its financial difficulties the company was taken over by the Patrimonio in 1982.

Hytasa operated as an integrated manufacturer for cotton products carrying out ginning, spinning, weaving, finishing and tailoring operations ; spinning, weaving and finishing are the operations of the wool sector.

The firm owns a factory in Seville where the textile operations are carried out (spinning, weaving and finishing) and three other plants in other small towns of the region for the agro-industrial operations (ginning). Agricultural plots for a total of 100 000 m^2 also belong to the company.

Since the time of the acquisition of the company and up to 1986 Patrimonio launched a restructuring plan financed via the provision of a Spanish sectoral aid scheme and via capital injections for Pta 6 600 million ; the plan aimed at improving the productivity of Hytasa by reducing the workforce without increasing the productive capacities.

Notwithstanding those efforts the negative economic results reduced the capital of Hytasa to virtually nil at the eve of the Spanish accession to the Communities in 1986 ; the 1985 economic results pointed out a turnover of about Pta 6 billion and losses reaching the level of 27 % on sales.

II

Following a complaint, the Commission requested the Spanish authorities by letter dated 4 April 1989, to send it all relevant information on alleged capital contributions that the State had made to cover operating losses of Hytasa SA after the accession of Spain to the Communities.

By letter dated 4 August 1989, the Spanish authorities provided first information. This reply being insufficient to assess the compatibility of the State interventions with the

provisions of Articles 92 and 93 of the EEC Treaty, the Commission requested further information by letter of 21 August 1989. This information was partially submitted by letter of 24 November 1989.

The main information included in these documents concerns the capital increases paid since 1986 (for a total of Pta 7 100 million), and the sale of unproductive assets (mainly land).

On 30 May during a meeting with Commission officials the Spanish authorities announced that the process of privatization was at a final stage and supplied some information on the matter, and notably the list of companies invited to make an offer together with further details on the sale of unproductive assets, totalling Pta 4 582 million.

On 5 June 1990 other information, in particular the sale's promotion documents were provided by the Patrimonio directly to the Commission.

Further information was requested by the Commission on 7 June 1990.

On 25 June 1990 the Patrimonio again supplied information on the privatization conditions and in particular the financial terms for the sale: Pta 4 300 million capital injection by the Patrimonio, price of Pta 100 million for the total capital of the company, capital increases for Pta 3 700 million (25 % at the time of the sale) to be carried out by the buyer; as well as the criteria to determine the best offer among the several received.

Such conditions were confirmed during a meeting between Spanish representatives and Commission officials held on 28 June 1990.

On 9 July 1990 the Spanish authorities supplied further information on the five year recovery plan for Hytasa. This plan assumed that sales will increase up to Pta 6,2 million in 1994 (+ 29 % v. the 1990 forecast) and that the workforce will be reduced to 700 (– 30 % v. 1990).

The abovementioned capital contributions together with the revenues from the sale of the assets were mainly utilized to finance both capital investments and the costs of workforce cut-back operations. In this respect, it should be noted that, over the period 1986 Hytasa spent some Pta 5 000 million in investments and over Pta 700 million towards redundancy costs, its workforce passing from 1 177 people by the end of 1986 to 1 034 by July 1990.

During the same period, Hytasa's turnover went down from Pta 6 170 million in 1986 to Pta 4 198 million in 1989 recording operating losses of Pta 395 million and Pta 1 633 million, respectively.

The Spanish authorities also informed the Commission that, with a view to privatizing Hytasa, they made approaches to 160 companies thought likely to be interested in the deal, by sending them a promotional brochure on the company. Later on, more detailed information was furnished to those that made known their interest, After negotiations with potential bidders, three final purchase bids were received. Finally, from amongst them, the Spanish authorities selected the one offering the highest benefit in economic terms, together with the best assurance for the future viability of the company.

According to the Spanish authorities' opinion such assurance for the future of Hytasa had to be found in the features of the industrial recovery plan suggested by the buyer, as well as in his financial ability to carry out the foreseen further capital increases, in his professional experience in the textile sector and in the comparative advantage represented by the existence of industrial and commercial structures already belonging to the buyer that had to help him implement the industrial plan of Hytasa in a short time.

According to the sale contract supplied later by the Spanish authorities the terms of the sale were the following:

— sale price for all the shares of the company is stated at Pta 100 million,

— the buyer over a period of three years will not sell his shares unless he is authorized by Patrimonio. For the same period, changes in shareholdings will be restricted to operations ensuring the maintenance of a majority stake by the present buyer,

— for a three-year period the buyer will not carry out temporary lay-offs unless an agreement is reached with the unions of the workers or within schemes for anticipated retirements,

— the company will not pay out dividends for a five-year period,

— for the same period the buyer will not split the company or sell part of it but they will keep all the present facilities and some estate properties,

— the proceeds of the eventual sale of other estates will be kept within the company,

— the buyer will implement the recovery plan attached to the sale contract,

— all new brand names and other untangible assets will be acquired by Hytasa,

— the capital increase of Pta 4 300 million carried out by Patrimonio at the time of the sale will be used to improve the financial conditions of Hytasa, to make investments, and to pay dismissals,

— the buyer renounces to the financial benefits that could arise from an old claim of Hytasa against Patrimonio and the Ministry of Economy,

— the buyer agrees to consider the balance sheet of Hytasa as of 30 June 1990 as part of the contract with the condition that all important financial events occurring in consequence of acts prior to the sale of the company will be borne by the seller,

— the buyer is engaged to increase by Pta 3 700 million the capital of the company and to immediately pay 25 % of that sum.

After having examined the foregoing information, on 18 July 1990 the Commission decided to initiate the Article 93 (2) procedure in respect of the Pta 7 100 million capital contributions provided by the State to Hytasa between the moment of the accession of Spain to the Communities in January 1986 and 1988. The Commission considered that those financial interventions constituted an aid within the meaning of Article 92 (1), and that this aid did not qualify in principle for any of the exemptions to incompatibility provided for in Article 92 (2) and (3). The Article 93 (2) procedure initiated also covered the potential additional aid the State could have granted in accepting the purchase bid of Pta 100 million for its shareholding in Hytasa, in view that the firm's net worth was of over Pta 6 000 million before the State's providing the Pta 4 300 million capital contribution under the sale terms.

The Commission decision to initiate the Article 93 (2) procedure was notified to the Spanish Government by letter of 3 August 1990. This letter invited the Spanish Government to submit its observations and to provide the detailed information requested therein, as well as any other information it might consider relevant for the Commission to assess the eventual compatibility of the aid.

The other Member States and third interested parties were informed of the Commission decision by publication in the *Official Journal of the European Communities*(1) of the text of the letter sent to the Spanish Government.

On 11 September 1990 the Spanish authorities asked for a prorogation of one month of the terms to submit their comments. Their request was accepted by the Commission in a letter dated 20 September 1990.

The comments by the Spanish Government to the opening of the procedure pursuant to Article 93 of the EEC Treaty together with other information were supplied on 16 October 1990.

First of all, the Spanish Government stated that it disagreed with the provisional conclusion of the Commission that the increases in capital in 1986 to 1988 of Pta 7 100 million and the capital contribution of Pta 4 300 million before Hytasa's sale constitute State aid which does not qualify for exemption under the EEC Treaty.

Concerning the capital increases in 1986 to 1988, the Spanish Government stressed that they had formed part of a restructuring plan designed to secure the company's viability and that the investments carried out by the Government were based on sound criteria which would equally have been applied by a private investor. In its opinion, this produced good results until 1988 when there was a downturn on the market. Furthermore, the Spanish Government considered that the public interventions in question could not be said to have adversely affected competition in the common market, since the market presence of the firm declined in terms both of production capacity and actual output during that period.

Particularly in respect of the capital contributions in 1986 and 1987, the Spanish authorities stated that they took place in response to circumstances which developed prior to Spain's accession to the Communities.

As regards the terms of the sale, the Spanish Government stated that the sale of Hytasa did not involve State aid either. This was substantiated, in its opinion, by the fact that Hytasa was sold to the highest bidder, after being openly put up for sale on the international market. In addition, it emphasized that a going concern could not normally be valued on the basis of its net worth, as the Commission did, but in the light of the present value of the anticipated returns of the firm purchased. In this respect, the Spanish Government stressed that Hytasa's operation losses in 1989 exceeded Pta 1,6 billion and were already amounting to Pta 0,973 billion for the first months of 1990, and that reducing the workforce of Hytasa by 380 jobs under the restructuring programme of the buyers could cost as much as Pta 2 040 million.

(1) OJ No C 320, 20. 12. 1990, p. 14.

Afterwards, the Spanish Government pointed out that even if the terms of the sale did involve some aid, the sale of Hytasa was more than just putting the company into private hands. It meant implementing a recovery plan drawn up by the buyers, that would participate in its financing with a capital contribution of Pta 3 700 million and would incorporate their know-how into the company's assets. Consequently, in its opinion, the sale was not at all designed to keep simply the company in business, but to ensure its economic, technical and financial recovery, for which reason, the public interventions in question complied with the provisions applicable under Community law.

In addition the Spanish authorities stressed that in the light of the above, selling the company was both the best and the only feasible course of action from a Community, national and regional point of view : actually winding up the company would have cost far more for the dismissal of a workforce of more than 1 050, the cost to the State in unemployment benefits, the loss of the company assets, and State aid to help rebuild the industrial fabric.

Lastly, the Spanish authorities indicated that the firm's location in Seville, an area classified by the Commission as eligible for regional economic aid, suggested that the exemption provided for in Article 92 (3) (a) of the EEC Treaty would in any case be applicable.

The other information attached to the comments concerned the capital investments carried out by Hytasa in the period between 1986 and its privatization ; a summary of the bids for the sale of the company and an explanation of the reasons for the choice made ; general data on the buyers ; a copy of the sale contract ; a restructuring plan.

As for the identity of the buyer, that up to then was not yet disclosed to the Commission, it has to be noted that Hytasa was actually sold on 25 July 1990 to two private companies : Hilatura Gossypium SA located in Barcelona and Industria Textil del Guadiana, SA located in Mérida (Badajoz). Also these two companies, that evenly shared the capital of Hytasa, operate in the textile sector, mainly producing cotton yarns and fabrics with a combined turnover of over Pta 7 000 million (1990).

By letter received by the Commission on 21 January 1991 the German federation of the textile industry favourably commented upon the Commission's initiative to open the procedure pursuant to Article 93 of the EEC Treaty and stressed the importance of Hytasa as a producer in a highly competitive market. These comments were transmitted by the Commission to the Spanish authorities on 6 February 1991.

On 27 March 1991 the Spanish Government supplied its remarks to the comments of the German confederation of the textile industry pointing out that Hytasa covered the 0,22 and 0,08 % of the Community market of cotton and wool yarn respectively, and that, more in particular, sales on the German market were an average DM 129 000 in the years 1988 to 1990.

III

Apart from the fact that the selected purchase bid for Hytasa was the highest one in economic terms, the Spanish authorities stressed that the sale was not at all designed to keep the company artificially alive, but to ensure its economic, technical and financial recovery.

An initial restructuring programme for Hytasa, drawn up by the new owners, was submitted by the Spanish authorities in their comments to the opening of the procedure.

This plan foresaw the implementation of an investment programme worth Pta 2 500 million ; the main interventions of the plan concerned the cotton sector, in particular the ginning and spinning operations. As a result of such investments a general increase of the productions (1992 *vis-à-vis* 1989) ranging from 20 % to 300 %, according to the product, with the only exception of the spinning of wool yarns (– 25 %), was expected.

Together with the productive investments the plan foresaw also a large reduction in the workforce from the level of about 1 000 to 700 in a five-year period ; the cost to be borne by Hytasa to provide an incentive for the departures was estimated to be around Pta 2 040 million ; the aim of this policy was to double the amount of the sales per employee, thus reaching the long-term viability of the company.

According to the plan, the account of Hytasa gradually had to improve and after reporting cumulated losses reaching, up to 1993, the amount of Pta 4 700 million, a small profit of Pta 139 million was foreseen in the last year (1994).

It should be remarked here that the capital contribution of Pta 4 300 million provided by the State before the sale, plays an outstanding role in the restructuring programme. This contribution was expressly intended to bolster the financial state of the company, and to cover the expenses for incentivated dismissals and for investments.

On 18 March 1991 a meeting between Commission officials and representatives of Patrimonio was held on the issue of the restructuring plan of Hytasa.

The main points raised by the Commission officials concerned the necessity that a recovery plan for the company :

— provides for a reduction in the production capacities, sales and market share,

— ensures the viability of the company,

— does not involve aid exceeding the minimum necessary requirements.

Taking this into consideration, the Commission officially requested the Spanish authorities to present, by 10 May 1991, a newly revised restructuring plan for Hytasa involving reductions in both production capacity and market share, whilst also ensuring the company's viability. Concerning the last requirement, it should be remarked that the Commission had also serious doubts as to the restructuring programme securing Hytasa's viability, as the company was expected to record persistent negative financial results.

Having received no reply, the Commission reminded the Spanish authorities by letter of 27 May 1991 of its request, warning them that in the absence of an alternative restructuring plan by 31 May 1991, the Commission would be obliged to take a final position on the basis of the information available to that date.

The new plan was submitted by the Spanish authorities on 13 June 1991; it foresees radical changes in the productive and commercial policy of Hytasa.

In particular the company will only sell final goods like cotton and wool-finished fabrics and cotton cloths; as a consequence it will decrease its spinning and weaving operations (1994 *vis-à-vis* 1989) by 13 % to 25 %, and will increase the production of finished textiles and cloth by 50 % to 320 %, according to the product.

In order to fulfil the additional needs of half-finished material Hytasa will resort to external suppliers.

The cumulative operating results of the new plan are negative for about Pta 795 million, but show a good return — Pta 716 million or 9 % of margin on sales — in the final year.

The same revised plan foresees a direct workforce of 720 (down from a figure of 1 050 in 1990) and an external job requirement estimated by the Commission at about 150 (up from an estimated amount of 35).

A comparison between the two plants puts into evidence several points that could let one doubt the soundness of their assumptions or their results; actually the several contradictions between the two plans do not allow the Commission to agree with the final favourable forecast of the revised plan.

In particular the Spanish authorities did not give any explanation on the means to effect a further increase in the second plan of the overall value of sales by 23 % while the company will stop the sale of yarns and raw fabrics still foreseen in the previous plan, and while it will keep the sale of finished goods and clothing at roughly the quantitative level of the first plan. Moreover, no explanation is given to justify a larger direct workforce (720 instead of 700) when a reduction in production is foreseen.

IV

On its examination of the capital contributions of Patrimonio del Estado to Hytasa both in 1986 to 1988 and under its sale contract, as well as of the other terms of the sale contract the Commission has verified to what extent these public interventions contain State aid elements within the meaning of Article 92 (1) of the EEC Treaty.

It should be remarked here that 'Patrimonio del Estado' is an intrinsic part of the Spanish State with status of Directorate-General within the Spanish Ministry of Economic Affairs. Its financial requirements are wholly covered by the State on the basis of budgetary appropriations. Accordingly, the financial resources of Patrimonio del Estado are to be considered as resources of the State and, consequently, the capital contributions provided to Hytasa constitute public interventions.

The provision of public funds to companies in the form of capital contribution may involve elements of State aid if those funds are provided in circumstances that would not be acceptable to a private investor operating under normal market conditions. This is the case, amongst others, where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return — in dividends or capital gains — cannot be expected within a reasonable time from the capital invested, or where, because of its inadequate cash flow if for no other reason, the company would be unable to raise the funds needed for an investment programme on the capital market. This position was made known by the Commission in its letter to the Member States of 17 September 1984 on the application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings. In this respect, it should also be noted that, recently, in its communication of 24 July 1991 [1] introducing a new reporting system to identify when aid is present in financial flows between public authorities and publicly-owned companies, the Commission has reminded Member States of the principles it will use in determining whether aid is involved in such State interventions (see Part III of the communication).

[1] OJ No C 273, 18. 10. 1991, p. 2.

In addition, the Court of Justice has clarified the application of Article 92 (1) of the EEC Treaty in respect of public holdings (see Judgments in Cases 323/82 (Intermills) [1], 234/84 (Meura) [2] and 40/85 (Boch) [3]). In order to determine whether a capital contribution is State aid, the Court held that it is necessary to see whether the company in question could have obtained the finance on the private capital market. Where the evidence suggests that the beneficiary could not have survived without public funds because it could not have raised the capital required on the open market from a private investor, it is right to conclude that the payment constitutes State aid.

Taking into account that at the time of the first provision of capital by 'Patrimonio del Estado' in 1986, Hytasa had made losses for a long period, and considering that the State had already been obliged in the past to recapitalize the company subsantially on repeated occasions to keep it in business, without getting any result in terms of capital return for its investments, it is unlikely that a private investor, basing his decision on the foreseeable probability of profit, and disregarding any social consideration or considerations of regional or sectoral policy, would have provided Hytasa over 1986 to 1988 with successive capital increases totalling Pta 7 100 million.

As regards the terms of the sale of Hytasa, the Commission considers proven that the company went to the highest bidder. Nevertheless, this fact is not sufficient to assure that no State aid element is involved in the sale of the company. In order to arrive at this conclusion, it has to be proved that the sale took place in an unconditional open bid, that is to say, through a tendering process where any potential buyer is invited to bid for the company and where the State does not impose any condition for settling the sale. In this respect, the information provided by the Spanish authorities indicates that the State imposed certain conditions to the buyers, limiting temporarily the disposal of the shareholding acquired. In addition, given that the State provided financial resources to the company just before its privatization, it is necessary to verify the rationality of the State behaviour as a private investor in respect of its capital contribution of Pta 4 300 million before concluding the Sale, and of its accepting a price of Pta 100 million for the 100 % capital shareholding held by Patrimonio del Estado in Hytasa.

In respect of the former question, a private investor operating under normal market economic conditions would intend to maximize the profitability of its investment and would only have made that capital contribution if, later on, such contribution would place him better off in economic terms considering the sale operation as a whole. The capital contribution provided by the State within the framework of the sale contract of Hytasa could only have as expected monetary return the offer presented by the bidders for the company's shareholding. Both the capital contribution from the State and the price to be paid by the buyers were thus interrelated, since, under the terms of the sale contract, the buyers would not have paid Pta 100 million for Hytasa's capital, should the State not have previously provided the Pta 4 300 million capital contribution.

In the light of the foregoing considerations, given that the State has recovered Pta 100 million equivalent to the present value paid by the buyers of Hytasa for its capital, and considering that in the absence of the Pta 4 300 million capital contribution, the State would not have obtained any money, since the purchaser's bid was conditional on the provision by the State of that capital, the aid element contained therein amounts to Pta 4 200 million, that is to say, the difference between Pta 4 300 million and 100 million.

Concerning the other State aid element potentially involved in the acceptance by the State of a Pta 100 million price for Hytasa's shareholding, the Commission cannot conclude that an additional aid element exists in connection with this behaviour. This is substantiated by the fact that the capital shareholding in Hytasa cannot be considered as having a value for the State higher than the abovementioned price, in view of the fact that the company's past financial record, as well as the anticipated final results of the company, indicated to the State that no positive return could be expected from its capital shareholding in Hytasa without a radical change in the company's marketing and production structure that the State did not attempt to undertake.

It should also be noted that in the light of the information available to the Commission, the behaviour of the Spanish Government in selling Hytasa on the communicated terms does not reveal any State aid element additional to the Pta 4 200 million previously identified, when the chosen option of selling the company as a going concern is compared to the alternative of liquidating the company. It has to be noted that in this respect, according to the information submitted by the Spanish authorities, the cost for Hytasa to reduce its workforce will amount on average to Pta 6 million per employee. Therefore the total cost to liquidate the company would presumably reach an amount of more than Pta 6 000 million. Since the net worth of the company before the last Pta 4 300 million capital injection was about Pta 6 000 million the Patrimonio would not have drawn any net positive surplus from the liquidation alternative for Hytasa. Consequently, the identified State aid element under the sale terms continues to be the net disbursement by the State of Pta 4 200 million in the form of capital contribution previous to the company's sale.

In assessing the behaviour of the State against that of a market economy private investor, the Commission must take into account that 'the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' (Case 234/84 (Meura), ground 14). If these costs were considered

[1] [1984] ECR 3809.
[2] [1986] ECR 2263.
[3] [1986] ECR 2321.

by the Commission, it would amount to granting Member States the power to rescue companies in difficulties on the basis of pure national interest. This situation, which could create serious distortions of competition contrary to the common interest, would be in contradiction with the principles of the EEC Treaty empowering the Commission to determine the compatibility of State assistance in the context of the Community as a whole and not in that of a single Member State. Putting the abovementioned costs together with those corresponding to the behaviour of the State as owner/shareholder of a company would amount to emptying the market-economic private-investor principle of its meaning.

Therefore, in summary, after detailed examination, the Commission has reached the conclusion that the State aid granted to Hytasa is made up of the Pta 7 100 million corresponding to the capital contributions from Patrimonio del Estado within the period 1986 to 1988, and the aid element of Pta 4 200 million involved in the last capital contribution from Patrimonio del Estado before the company's privatization, both interventions having artificially strengthened Hytasa's financial position.

This aid to Hytasa affects trade between Member States and distorts or threatens to distort competition in the common market within the meaning of Article 92 (1) of the EEC Treaty.

In fact, 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 (Judgment of the Court of Justice in Case 730/79 (Philip Morris)) (1).

In this respect, it should be noted that the goods produced and marketed by Hytasa are traded between Member States and there is competition among producers. In 1988 the Community global production of textiles amounted to ECU 86 691 million of which over 20 % corresponded to the cotton industry and over 15 % to the wool sector.

Community production of cotton spun yarns and fabrics, grouped within the MFA categories 1, 2 and 2a, is following slightly depressed trends around the amounts of 1 000 000 tonnes and 700 000 tonnes respectively. The Spanish production represents around 11 % of the Community output of spun yarns (category 1) and 13 % of fabrics (category 2). No statistics are available for finished fabrics. The company Hytasa represents about 3,0 % of the Spanish production of spun yarns. No comparable data are available for fabrics, finished fabrics and tailoring.

The intra-Community trade is very substantial for both cotton yarns, fabrics and finished fabrics, it represents 22, 34 and 63 % of Community production.

The Community production of yarns of carded and combed wool and fabrics grouped within the MFA categories 47, 48 and 50 respectively has followed different trends according to the product.

In particular, the carded yarns sector is shrinking and 1989 production can be assessed at around 230 000 tonnes per year. Combed yarns are following a flat trend with a production of 205 000 tonnes.

After an increase of production during the years 1984 to 1988, fabrics in the recent years show a flat trend around 200 000 tonnes.

Spain manufactures 6 % of the Community production of wool carded and combed yarns and fabrics. Hytasa represents about 3 % of the Spanish production of spun yarns (carded and combed together). No comparable data are available for fabrics and finished fabrics.

The intra-Community trade of pure wool yarns covers around 7 % and 5 % for carded and combed yarns ; the trade concerning mixed yarns (with synthetic fibres) is nearly one and a half times more important. The intra-Community trade of fabrics of pure wool represents 16 % of the production ; in this case mixed fabrics are about one-third of the trade.

The company Hytasa participates in Community trade both directly for sales of wool fabrics in the foreign countries and indirectly by occupying, for both wool and cotton products, a large share of the Spanish market.

The Community markets for the products manufactured by Hytasa are highly competitive because of the fact that these products are price competitive more than quality competitive, and because of the present stagnation on the side of the demand coupled with an increasing pressure on the side of the imports from third countries. As a consequence the prevailing prices are depressed and large production capacities stay idle.

The market difficulties for the cotton products have been recognized within the Multi Fibre Agreement, and the categories of cotton yarns and fabrics are the first ones in the scale of sensitivity.

Also the wool sector, especially for the production of yarns can be considered particularly sensitive and the difficulties have recently increased.

In these circumstances, any aid granted to a particular competitor is liable to produce serious distortive effects on competition conditions.

V

Concerning the legal status of the aid to Hytasa under Community law, it has to be concluded that it is illegal, since the Spanish Government failed to notify it in advance to the Commission as provided for by Article 93 (3) of the EEC Treaty.

(1) [1980] ECR 2688.

The situation produced by this breach of the Treaty provisions is particularly serious since the aid in question has already been paid to the recipient. In this respect, it has to be recalled that, in view of the imperative character of the rules of procedure laid down in Article 93 (3) of the EEC Treaty which also are of importance as regards public policy — the direct effect of which the Court of Justice has recognized in its ruling in Cases 77/72 (Capolongo) (1), 120/73 (Lorenz) (2) and 78/76 (Steinicke) (3) — the illegality of the aid at issue here cannot be remedied *a posteriori*.

Notwithstanding this, it should be noted that the Commission is obliged to carry out its due procedures in relation to Article 93 (2) as recognized in the Court of Justice ruling in Case 301/87 (Boussac Saint Frères) (4).

VI

Article 92 (1) of the EEC Treaty provides that aid of the type described therein is in principle incompatible with the common market.

The exceptions provided for in Article 92 (2) EEC 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 EEC 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 recipients towards patterns of behaviour that would serve one of the objectives of the said exceptions.

Applying the exceptions to cases which do not contribute to such objectives or where the aid is not necessary for those purposes would amount to conferring advantages on the industries or firms of certain Member States, whose financial position would be artificially strengthened, thereby affecting trade between Member States and distorting competition without any justification based on the common interest, as referred to in Article 92 (3) of the EEC Treaty.

The aid to Hytasa in the form of capital contributions of Pta 7 100 million over the period 1986 to 1988 represented a big effort to create the basis for a definitive viable restructuring of the company. This is provided by the fact that is was mainly used in practice during that period to finance rationalization investments amounting to over Pta 5 000 million, as well as dismissals costing over Pta 700 million. It should also be noted that, notwithstanding the investments carried out, Hytasa kept the actual production for the period in question well below its capacity ceilings. On the other hand the Commission can also share the Spanish authorities' view that the capital contributions in 1986 and 1987 were in response to circumstances which developed prior to Spain's accession to the Communities.

The Commission considers that this judgment can also be extended to the contribution that took place in 1988. Preaccession industrial policy in Spain in respect of public companies was sometimes based on principles radically different from those inspiring the competition policy under the EEC Treaty. At that time, certain loss-making public companies were run according to decisions opposed to sound managerial principles and were kept artificially in business thanks to the financial assistance of the State. After the accession of Spain to the Communities, these companies have been forced to adapt themselves to an environment of fair competition. The aids to Hytasa here in question were mainly aiming at facilitating that adaptation. This fact confirms that this aid was not used to artificially relaunch the activities of the company, which would have produced an unacceptable negative for the sector; in the light of the foregoing considerations, the Commission has reached the conclusion that the capital contributions of Pta 7 100 million in 1986 to 1988 can be considered as compatible with the common market pursuant to the exception provided for in Article 92 (3) (c) of the EEC Treaty, for they contributed to implement genuine restructuring for the activities of the company, without having unacceptable effects contrary to the common interest.

In respect of the State aid element to Hytasa of Pta 4 200 million contained in the capital contribution made just before the company's sale, Article 92 (3) (a) lays down an exception for aid that promotes the development of areas where the standard of living is abnormally low or where there is serious underemployment. In this respect, although Hytasa is situated in Seville, which is an assisted area pursuant to Article 92 (3) (a) qualifying for regional aid, the aid measure to Hytasa in question was not granted under the corresponding regional aid schemes but on the basis of *ad hoc* decisions of the Spanish Government, taking the form of discretionary capital contributions.

(1) [1973] ECR 611.
(2) [1973] ECR 1471.
(3) [1977] ECR 595.
(4) [1990] ECR I-307.

Even if the aid in question have were to be considered as regional, it would not however be eligible for compatibility under Article 92 (3) (a), because aid granted pursuant to the provisions of that Article must contribute to the long-term development of the region — this notably means in this case that the aid must at least serve for restoring the company's viability, an objective not attained for Hytasa in the light of the information submitted so far to the Commission (this aspect was already discussed in part IV above) — without having unacceptable negative effects on competition conditions within the Community.

On the other hand, even though the Pta 4 200 million aid element was explicitly granted by the State on the condition that part of it be used by Hytasa in investments — a requisite feature for aid to facilitate the development of certain economic areas as established in the 1979 Commission communication (1) on the principles of coordination of regional aid systems — this aid to Hytasa cannot be considered automatically as compatible since, in view that its grant was made outside the scope of aid regimes approved by the Commission, the Commission must assess its compatibility on its own merits verifying, amongst other aspects, both that the aided investment projects are in line with the interest of the Community for the sector concerned and that they contribute to a sound restructuring of the company (both aspects are discussed further below).

In any case, the aid of Pta 4 200 million largely surpasses the level of investments of Pta 2 500 million foreseen by the company, a situation which is in any case unacceptable for investment aid.

As regards the exceptions provided for in Article 92 (3) (b) the aid measures in question were not intended to nor have the features 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 exception in their observations to the Commission.

As regards the exception for in Article 92 (3) (c) of the EEC Treaty, for aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, it should firstly be noted that the aid to Hytasa falls under the category of aid to companies in difficulties, as both the company's financial position and financial record have always been precarious. Aid to firms in difficulties carries the greatest risk of transfering 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. For this reason the Commission takes a strict approach in assessing the compatibility of aid for restructuring firms in difficulty. In particular, the Commission requires that such public intervention be strictly conditional on the implementation of a sound restructuring or conversion programme capable of restoring the long-term viability of the beneficiary, that must also contain a compensatory justification for the aid 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 EEC Treaty.

In this respect, as regards aid in the textile sector, the Commission worked out with the help of national experts a number of criteria to guide the Governments of the Member States on the interventions they might possibly wish to make therein. These criteria were defined in the Community guidelines of 1971 and 1977 on aid to the textile and clothing sectors which are still in force. The major principles set out therein are that aid should be such as to assist the adaptation of the industry by eliminating excess capacity, by facilitating joint R & D activities and by assisting structural changes. Genuine restructuring and adaptation is a prerequisite under the guidelines for the granting of any specific funds for investment purposes. In any case, aid should not simply seek to maintain uncompetitive position.

In the light of the foregoing considerations, it should be noted that the State aid element to Hytasa of Pta 4 000 million will produce its effects on competition mainly in future, as it will contribute to the realization by the company of future investments within the framework of the restructuring plan presented by the buyers. In these circumstances the Commission must verify carefully the characteristics of the planned restructuring programme. In connectio with this, it should be remarked that the Commission is suitably placed not only to anticipate and adjust the potential negative effects that this aid element could have on competition, but also to correct the negative effects that the increase in capacity caused by the aid in 1986 to 1988 could have in future if Hytasa relaunches artificially its activities.

(1) OJ No C 31, 3. 2. 1979, p. 9.

In this respect, after detailed examination of the initial restructuring programme for Hytasa and of its revised version, the Commission noted that even if some reductions in the productions and sale of intermediate goods are foreseen, they are largely offset by the increases in the manufacture and sale of finished products. As a consequence the Commission considers that the restructuring plan of Hytasa does not provide the commitment for reducing its activities that could be regarded as a compensatory justification for aid.

Moreover, since no programme for the disposal of productive assets is contained in the plan, nothing could prevent Hytasa in the future from easily re-expanding its activities by having recourse to its idle capacity and thus enjoying more favourable conditions than other competitors. In this respect, it should be noted that in the future the idle capacity rates of Hytasa in spinning and weaving operations, calculated by comparing the installed capacity before the privatization with the planned productions, will be around 50 %.

In order to complete the information on the restructuring plan of Hytasa on 1 August 1991 the Spanish authorities submitted detailed papers on the initiatives taken by the company to reduce its workforce. The dismissals already carried out at an average cost of Pta 4,5 million per head concern 160 workers who were mainly close to the retiring age; moreover up to about 100 additional dismissals have been programmed, mainly due to incapacity to work of the employees; at the same time shifts of temporary lay-offs for an average of 210 workers over a period of four-and-a-half months have been set up.

The abovementioned reductions totalling about 260 do not seem to be able to fully meet the target of a stable workforce of 720 by 1992 contained in the restructuring plan; on the contrary the resort to temporary lay-offs — this possibility was in principle excluded by a clause of the sale contract — allows the company to keep its productive capacity stand by for possible opportunities to expand its sales and its market share.

This personnel policy is at odds with the possibility that the restructuring plan of Hytasa is a compensatory justification for the aid received.

The Spanish authorities not having submitted to date any new plan, the Commission is obliged to conclude that the State aid element to Hytasa of Pta 4 200 million involved in the capital contribution before the company's sale has to be considered as incompatible with the common market, as it affects trading conditions within the Community to an extent contrary to the common interest, for it does not contribute to a genuine restructuring fully ensuring the viability of the company.

VII

In case of aid which is incompatible with the common market, the Commission, making use of a possibility given to it by the Court of Justice in its Judgment in Case 70/72 (Kohlegesetz) [1], confirmed in Case 310/85 (Deufil) [2], can require Member States to recover from recipients aid granted illegally.

Consequently, Hytasa must repay the Pta 4 200 million illegally received.

Repayment must be made in accordance with the procedure and provisions of Spanish law, in particular those relating to interest on arrears on State liabilities, with interest starting to run on the date on which the illegal aid was granted. This measure is necessary in order to restore the *status quo* by removing all the financial benefit which the firm receiving the unlawful aid has improperly enjoyed since the date on which the aid was paid (see Judgment in Case 142/87 (Tubemeuse) [3]).

The Commission recalls that 'the relevant provisions of national law must be applied in such a way that the recovery required by Community law is not rendered practically' (Judgment in Case 94/87 (Commission v. Germany) [4], ground 12).

The sales contract provides that any important financial events occurring in consequence of acts prior to the sale of the company are to be borne by the seller. This clause would allow the State to indemnity the buyer for any reimbursement of aid imposed by the Commission deciding that part or whole of the aid is incompatible. This would clearly neutralize the essence of the Commission decision and would in particular perpetuate the incompatible distortion of competition produced by the aid. This clause and such provisions of national law constitute therefore a means of getting around the rules of the Treaty on aid; it is therefore illegal under Article 92 (1) and, by virtue of the principle of the primacy of Community law, may not be carried out,

[1] [1973] ECR 813.
[2] [1987] ECR 901.
[3] [1990] ECR I-959.
[4] [1989] ECR 175.

HAS ADOPTED THIS DECISION:

Article 1

The aid to Hilaturas y Tejidos Andaluces SA in the form of capital contributions of Pta 7 100 million over the period 1986 to 1988 was granted illegally, since it was granted by the Spanish Government in breach of the procedural rules established in Article 93 (3) of the EEC Treaty.

Nevertheless, the said aid meets the conditions which must be fulfilled in order for the Article 92 (3) (c) exception to apply, for which reason it is compatible with the common market.

Article 2

The State aid element of Pta 4 200 million contained in the capital contribution provided by 'Patrimonio del Estado' to Hytasa before its privatization in July 1990 is illegal, since it was awarded by the Spanish Government in violation of the provisions of Article 93 (3).

Furthermore, the said aid element does not meet any of the conditions which must be fulfilled in order for one of the exceptions of Article 92 (2) and (3) to apply, for which reason it is incompatible with the common market.

Article 3

The incompatible State aid element shall be withdrawn by way of recovery. Accordingly, 'Patrimonio del Estado' shall recover Pta 4 200 million from Mediterráneio Técnica Textil SA, (formerly Hytasa SA).

The aid element shall be recovered in accordance with the procedures and provisions of national law, in particular those relating to interest on arrears payable on State liabilities, with interest starting to run on the date on which the illegal aid was granted.

Article 4

Any agreement providing for an indemnity for the buyers by the State or the 'Patrimonio del Estado' for an obligation imposed by this Decision to reimburse aid shall not be carried out.

Article 5

The Spanish Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply herewith.

Article 6

The Decision is addressed to the Kingdom of Spain.

Done at Brussels, 25 March 1992.

For the Commission

Leon BRITTAN

Vice-President