II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 April 1996

on State aid in favour of La Seda de Barcelona SA, located at El Prat de Llobregat, Cataluña, and at Alcalá de Henares, Comunidad de Madrid

(Only the Spanish text is authentic)

(Text with EEA relevance)

(96/655/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having, in accordance with the abovementioned Articles, given notice to the parties concerned to submit their comments to it,

Whereas:

I

On 30 November 1994, the Commission decided to initiate proceedings pursuant to Article 93 (2) of the EC Treaty in respect of the following:

— the agreement between the Fondo de Garantía Salarial (hereinafter 'Fogasa') and La Seda de Barcelona SA (hereinafter 'LSB') by which the latter will reimburse over a fixed period Pta 1 221 136 511 with respect to the payment by Fogasa of wages and severance pay owed by LSB to its former employees,

— the agreement by which a guarantee for up to Pta 1 700 000 000 was provided by the Institut Català de Finances (hereinafter 'ICF') in support of three loans taken out by LSB, together with the accrued interest thereon,

— the decision of the Comunidad de Madrid to approve the provision of a guarantee for up to Pta 1 000 000 000 in support of a loan taken out by LSB, together with the accured interest thereon, and

— the proposal of the Comunidad de Madrid to award rescue aid to LSB pending revision of its restructuring plan and completion of the Commission's investigation.

In taking that decision, the Commission noted that, on the information provided by the Spanish Government, it was unable to determine whether or not the agreement between Fogasa and LSB contained State aid.

Similarly, the Commission was unable to decide whether or not State aid was contained in either the guarantee provided by ICF or the guarantee whose provision had been approved by the Comunidad de Madrid. However, as LSB appeared to be a company in difficulty, the Commission concluded that both of the State guarantees contained at least an element of State aid. Therefore, as there is significant trade within the European Economic Area (hereinafter 'EEA') in all of LSB's products, the Commission considered that the guarantees would be likely to distort competition. As the restructuring plan that the guarantees were intended to facilitate would be unlikely to restore LSB to viability, the restructuring aid did not appear to satisfy the conditions laid down for the authorization of such aid or to comply with the code on aid to the synthetic fibres industry. Accordingly, the Commission considered that the guarantees appeared incompatible with the common market and the functioning of the EEA Agreement.

Moreover, the Commission was unable to authorize the proposal of the Comunidad de Madrid to provide rescue aid to LSB because, although it satisfied the conditions for the authorization of such aid, the Spanish Government had not provided sufficient information to allow the Commission to determine whether or not the aid, which would be provided in the form of a guarantee, would conform to the conditions laid down for the authorization of State guarantees. Accordingly, the Commission considered that the proposed rescue aid also appeared incompatible with the common market and the functioning of the EEA Agreement.

By letter dated 27 December 1994, the Commission informed the Spanish Government of the decision to initiate proceedings pursuant to Article 93 (2) of the EC Treaty. Other Member States and interested parties were informed by publication of the letter in the *Official Journal of the European Communities* (1).

II

By letter dated 21 February 1995, the Spanish Government submitted comments on the Commission's decision to initiate proceedings pursuant to Article 93 (2) of the EC Treaty, and stated that the Comunidad de Madrid had in fact provided a guarantee for up to Pta 1 000 000 000 in support of a loan taken out by LSB and the accrued interest thereon.

By letter dated 19 May 1995, the Commission asked the Spanish Government to clarify the current situation regarding the ownership of LSB, and requested full details of the various agreements. By letter dated 27 July 1995, the Spanish Government requested additional time to reply, which the Commission granted by letter dated 2 August 1995. By letter dated 6 October 1995, the Commission reminded the Spanish Government to reply.

By letter dated 20 October 1995, the Spanish Government reiterated the recent history of LSB, and provided some of the requested information. By letter dated 26 October 1995, the Spanish Government provided copies of various documents and, by letter dated 27 November 1995, a copy of the revised restructuring plan being implemented by LSB. Finally, by letter dated 5 February 1996, the Spanish Government informed the Commission of the agreement reached recently as to the ownership of the shareholding in LSB sold by Akzo NV in July 1991.

By letter dated 26 September 1995, in parallel with the correspondence arising directly out of the decision to initiate proceedings pursuant to Article 93 (2) of the EC Treaty, the Commission asked the Spanish Government to comment on press reports that the Catalan authorities had decided to inject capital in LSB, and that the Comunidad de Madrid was also likely to do so. By letter dated 20 December 1995, the Spanish Government noted that LSB had asked its shareholders to approve an increase of Pta 2 000 000 000 in its share capital. However, the Spanish Government was not aware of any intention by the Catalan authorities to invest in LSB, and the Comunidad de Madrid did not have any such intention.

III

In its comments, the Spanish Government reiterated that LSB, which in Spain's largest producer of synthetic and cellulosic fibre and yarn, had been affected by the serious national economic crisis in 1991 to 1993, which had exacerbated the impact of intensifying international competition in the synthetic fibres industry. High interest rates, pressure on prices and a fall in demand for some of LSB's products had reduced its profits and, in July 1991, prompted LSB's majority shareholder, Akzo NV, to sell the whole of its shareholding (57,508 % of the share capital, amounting to Pta 2 895 566 900) for the token price of Pta 1. Subsequent legal action as to the validity of the sale contract had led to confusion as to the ownerhsip of LSB whose Board of Directors had formerly been controlled by Akzo. Pending the outcome of the legal action, trading in LSB's shares was suspended.

In late 1991, in recognition of its financial difficulties and the need to improve its competitiveness, LSB decided that it was necessary to restructure its business operations and draw up a restructuring plan. However, although the total value of LSB's assets was in excess of Pta 40 000 000 000, the uncertainty as to the ownership of the majority of the shares of the company and the fact that the sale of Akzo's majority shareholding had effectively left LSB without a Board of Directors meant that the company was not managed properly. LSB became totally paralysed, unable to negotiate with normal sources of finance, and it also fell into debt with its suppliers. Consequently, LSB decided to seek State guarantees in order to obtain credit on normal commercial terms and to implement the restructuring plan. LSB began to implement the plan in 1992 but the measures specified therein had been revised *inter alia* to take account of the Commission's observations as set out in its letters dated 2 August 1993 and 27 December 1994, which was the letter by which it informed the Spanish Government of its decision to initiate proceedings pursuant to Article 93 (2) of the EC Treaty.

Restructuring had involved a significant downsizing of LSB's workforce through a mix of compulsory redundancies and natural wastage:

(1) OJ No C 253, 29. 9. 1995, p. 3.

No of persons employed by LSB, 1990 to 1994

1990	1991	1992	1993	1994
2 629	2 281	1 785	1 707	1 513

Part of the cost of downsizing was covered by the agreement with Fogasa under which LSB will reimburse with interest the sums paid on its behalf by Fogasa with respect to valid claims of its former employees for wages and severance pay. The balance of the cost of downsizing was financed in part by credit obtained with the support of the loan guarantees provided by ICF and the Comunidad de Madrid, and in part by the company's own resources.

Full implementation of the revised restructuring plan would result in the following changes in LSB's capacity:

Production and actual and proposed capacity data for LSB before and after restructuring

(1 000 tonnes)

Product	Production in 1992 (as stated in Annex 1 to the Spanish Government's letter dated 6 October 1993)	Installed capacity (as stated in revised restructuring plan submitted by the Spanish Government by letter dated 27 November 1995)	Capacity in 1992, prior to implementation, of the restructuring plan (as stated in Annex 1 to the Spanish Government's letter dated 6 October 1993)	Planned capacity after restructuring (as stated in revised restructuring plan) % change measured against capacity in 1992
Textile filament yarn				
Viscose	3,3	4,2	4,2	3,7 [– 11,9 %]
Polyamide	2,0	8,0	8,0	0,0 [– 100,0 %]
Polyester	3,6	21,5	6,5	5,0 [– 15,4 %]
Industrial filament yarn				
Polyamide	1,7	5,0	2,1	3,0 [+ 42,9 %]
Polyester	4,4	9,0	7,5	9,0 [+ 20,0 %]
Staple fibre				
Polyester	43,8	60,0	60,0	50,0 [– 16,7 %]
Polymer granulate				
Polyamide	2,5	Not stated in plan	3,0	3,0 [0,0 %]
Polyester	22,7	34,0	52,0	34,0 [– 34,4 %]

Recently, LSB's majority shareholders appointed a new Board of Directors and, consequently, the company has returned to normality in terms of the day-to-day management of business operations and decision-making. Moreover, although the final judgment has not yet been given on the dispute as to the ownership of the shareholding formerly belonging to Akzo, the various parties had reached an agreement among themselves: 12,6 % will be retained by the original purchaser; 24,9 % will be held by a private company, Inversiones Ibersuizas SL; and the balance (20 %) is accounted for by a reduction in LSB's share capital.

Agreement between Fogasa and LSB by which the latter will reimburse over a fixed period Pta 1 221 136 511 with respect to the payment by Fogasa of wages and severance pay owed by LSB to its former employees

The Spanish Government stated that Fogasa is an independent organization attached to the Ministry of Employment and Social Security and financed by a levy on employers. Fogasa's main role is to pay the former employees of a company that is bankrupt or otherwise in serious difficulty, any wages and severance pay owed to them by that company. Fogasa does not grant loans to the companies concerned but settles all valid claims by their former employees and draws up an agreement with the companies by which they must reimburse with interest the total sums paid on their behalf by Fogasa.

During 1992, at the outset of its continuing process of restructuring, LSB laid off 447 employees who, consequently, were owed wages and severance pay. In accordance with Royal Decree 505/1985 dated 6 March 1985 on the organization and operations of Fogasa, as revised by Order dated 20 August 1985, Fogasa examined the individual claims of all of the former employees of LSB and settled those it considered valid. Subsequently, Fogasa and LSB drew up an agreement, dated 12 June 1992, under which LSB will reimburse Fogasa Pta 1 221 136 511 by quarterly instalments over eight years. This amount is the sum of the money paid to LSB's former employees by Fogasa, totalling Pta 939 335 777 (Pta 233 828 880 in respect of wages and Pta 705 506 897 in respect of severance pay), and Pta 281 800 734 for interest at 10 % payable on that sum over the period, this being the so-called legal interest rate on 30 July 1992; the Spanish Government stated that, by 31 May 1995, LSB had reimbursed Pta 55 573 431. In addition, LSB was required to pay Fogasa an initial sum with respect to the administrative cost of drawing up the agreement, which came into force on 30 July 1992.

Security was provided by LSB in the form of a preferential mortgage on land and buildings on its 'El Retamar' property in Alcalá de Henares, Comunidad de Madrid. After technical verification of data provided by LSB, Fogasa accepted that the value of the property concerned was Pta 8 000 000 000.

For all of these reasons, the Spanish Government believed that the agreement did not constitute State aid.

Agreement by which a guarantee for up to Pta 1 700 000 000 was provided by ICF in support of three loans taken out by LSB, together with accrued interest thereon

The Spanish Government stated that, on 30 January 1992, the Governing Board of ICF, which is owned by the Generalitat de Catalunya, authorized the provision of a loan guarantee to LSB. Subsequently, by contact dated 21 February 1992, ICF provided such a guarantee in support of three loans taken out by LSB totalling Pta 1 500 000 000 and the interest thereon up to a maximum of Pta 200 000 000. In accordance with the guarantee, ICF would assume LSB's debts if LSB were to default on the loans.

Details of the loans are as follows:

— Caja de Ahorros de Cataluña awarded LSB a loan of Pta 750 000 000, repayable quarterly over five years ending 31 March 1999, with a two-year grace period and with interest charged at 15 % for the first year and variable thereafter by reference to the Madrid Interbank Offered Rate (hereinafter 'Mibor'), with an initial commission charge of 0,25 %,

— Caja de Ahorros y Pensiones de Barcelona/Caja General de Ahorro Popular awarded LSB a loan of Pta 500 000 000, repayable quarterly over five years ending 31 March 1999, with a two-year grace period and interest charged at 15 % for the first year and thereafter at Mibor + 1,5 %, with an initial commission charge of 0,25 %,

— Banca Catalana SA awarded LSB a loan of Pta 250 000 000, repayable quarterly over five years ending 27 March 1999, with a two-grace period and interest charged at Mibor + 1 %, with an initial commission charge of 0,5 %.

LSB is repaying the principal and the interest in accordance with the repayment schedules specified in the various loan contracts.

With respect to the provision of the guarantee, LSB paid ICF an initial administrative charge of 0,5 % of the sum guaranteed, i.e. Pta 8 500 000. LSB also pays an annual premium of 1,75 % of the guaranteed amount outstanding as at 1 January and 1 July, with respect to administrative costs and in recognition of the risk attached to the provision of the guarantee; to 31 December 1994, LSB had paid ICF Pta 82 926 825 by way of this annual premium.

As security for the guarantee, LSB gave ICF preferential mortgages on two properties at El Prat de Llobregat, in Catalonia. At the time of provision of the guarantee, ICF estimated the combined value of the property to be Pta 9 269 000 000, whereas a valuation prepared for LSB estimated it to be Pta 25 980 374 330.

The terms of the mortgage give ICF absolute preference over all other creditors and, if LSB were declared bankrupt, ICF would as a mortgagee have the right of abstain from any agreement among other creditors to resolve the situation of bankruptcy without prejudice to its rights as a creditor. This right is provided for in the first paragraph of Article 900 of the Spanish Commercial Code. More generally, under the Spanish Civil Code, mortgagees have preference over other creditors up to the amount of the debt inquestion, according to their relative ranking with other mortgagees.

The Spanish Government argued that, if LSB had sought a similar guarantee from a private financial institution instead of ICF, it would have obtained conditions similar to those imposed by ICF which had acted normally and in accordance with the prevailing market conditions.

For all of these reasons, the Spanish Government believed that the agreement did not constitute State aid.

Decision of the Comunidad de Madrid to approve the provision of a guarantee in support of a loan taken out by LSB and the accrued interest thereon, totalling no more than Pta 1 000 000 000

The Spanish Government stated that, on 21 April 1993, the Comunidad de Madrid had decided to authorize the provision of a loan guarantee to LSB because it was concerned that LSB would otherwise be unable to raise the funds required to implement in full its restructuring plan, which could have had serious consequences for the company's future viability and, in particular, future employment on its site at Alcalà de Henares. However, the validity of the decision to approve the guarantee expired before it could be put into effect. Therefore, on 21 July 1994, the Comunidad de Madrid took a new decision to authorize the provision of a guarantee in support of a loan taken out by LSB. Subsequently, be agreement dated 16 September 1994, the Comunidad de Madrid provided a guarantee in support of a loan totalling Pta 1 000 000 000 taken out by LSB with Bankinter SA, and the associated interest payments. The loan is repayable quarterly over five years ending 28 September 1999, including two years' grace, with interest charged over the period at Mibor +0,5 %. In accordance with the State guarantee, the Comunidad de Madrid would assume LSB's debts if the company were to default on the loan.

LSB did not pay the Comunidad de Madrid any initial administrative charge, but must pay an annual premium of 0,75 % of the sum guaranteed to cover administrative costs and in recognition of the risk attached to provision of the guarantee.

As security for the guarantee, LSB gave the Comunidad de Madrid mortgages on two properties belonging to LSB at Alcalá de Henares: the more valuable of these properties was that on which LSB had given a preferential mortgage to Fogasa under its agreement with LSB. According to a valuation prepared for LSB at the time of provision of the loan guarantee, the combined value of the two properties was Pta 12 274 165 000, while the Comunidad de Madrid's own valuation, based on the valuations prepared for LSB, estimated their combined value to be Pta 11 442 000 000. The Spanish Government also noted that, under the agreement, the Comunidad de Madrid could require alternative or additional security if this were deemed necessary.

For all of these reasons, the Spanish Government believed that the agreement did not constitute State aid.

Proposal of the Comunidad de madrid to award rescue aid to LSB pending revision of its restructuring plan and completion of the Commission's investigation

As noted above, by agreement dated 16 September 1994, the Comunidad de Madrid provided a guarantee in support of loans taken out by LSB notwithstanding that the Commission was in the process of assessing the compatibility of, *inter alia*, the decision to authorize such a guarantee, and despite the fact that the Commission had not yet received a copy of the revised restructuring plan. Therefore, the plan to award rescue aid was abandoned.

IV

By letter dated 3 April 1995, the Commission asked Akzo Nobel NV, formerly Akzo NV, to comment on its involvement with LSB. Akzo replied by letters dated 2 May, 9 May and 15 May 1995.

Akzo stated that, prior to the transfer of its shareholding in July 1991 and acting as majority shareholder in LSB, it had given LSB certain financial assistance to facilitate restructuring. Part of this assistance was provided by Akzo in the form of guarantees allowing LSB to raise additional funds from privately owned banks in order to avoid an immediate liquidity problem. The banks claimed against these guarantees shortly after the transfer of Akzo's shareholding, and their claims were subsequently paid by Akzo which waived its rights to the capital amounts, totalling Pta 3 700 000 000. Although Akzo had not in any way guaranteed any of LSB's other debts, it further assisted LSB by taking over the funding of 57,5 % of the company's outstanding unguaranteed bank debt. By subrogation, this gave Akzo a claim on LSB amounting to Pta 4 117 141 026 and, on the basis of a loan subordinated to their interest-bearing debt, Akzo made this amount available to LSB until 1 September 1993 and waived its right to interest during that period. In Akzo's opinion, this assistance gave LSB a reasonable financial structure and should have enabled the company to carry out the necessary restructuring. At this time, Akzo expected that, by 1 September 1993, it would be possible to agree a market interest rate and a normal repayment schedule.

However, in September 1993, Akzo was informed that the financial position of LSB had deteriorated further and that only limited progress had been made towards restructuring. Again, in order to avoid a liquidity crisis, Akzo extended the period of the interest-free subordinated loan to September 1994. At the company's request and in consultation with the Generalitat de Catalunya, Akzo decided in December 1994 to forgive the repayment of the subordinated loan, thereby enabling LSB to improve its debt/equity ratio and to concentrate on the profitable parts of its business. Akzo stated that the decision to waive interest on the subordinated loan and to forgive repayment of the principal was without any financial compensation or other offsetting benefits from the Spanish authorities, whether given or promised. The forgiven debt was recorded as 'extraordinary income' in LSB's 1994 accounts and contributed to LSB's profits that year.

V

Pursuant to the Article 93 (2) procedure comments were received from the BritishPolyolefin Textiles Association (hereinafter 'BPTA'), the International Rayon & Synthetic Fibres Committee (hereinafter 'CIRFS') and Hoechst Trevira GmbH & Co KG.

BPTA emphasized continuing support for the code on aid to the synthetic fibre industry and firmly opposed aid in support of any producer of the fibres and yarns coming within the scope of the code, principally on the grounds that aid in support of the production of any one fibre by a specific company would have an effect on other producers irrespective of whether or not they produced the same fibre as the aid beneficiary. BPTA also questioned why LSB had required the support of State guarantees.

CIRFS, of which LSB is a member, and Hoechst Trevira expressed strong support for enforcement of the code and for the prohibition of any aid that did not conform with it. Hoechst Trevira also stated its view that, although the average rate of capacity utilization for the production of polyester industrial filament yarn within Europe had improved from 66 % in 1993 to 78 % in 1994, further improvement would be tempered by the effect of the installation of new capacity in France by AlliedSignal Fibers Europe SA. Hoechst Trevira also provided their own projection of future levels of capacity.

By letter dated 14 November 1995, the Commission sent these comments to the Spanish Government which, by letter dated 7 February 1996, reiterated the circumstances in which the State guarantees had been provided and stated their view that State aid was not contained in either of the guarantee agreements or in the agreement between Fogasa and LSB. The Spanish Government also noted that full implementation of the restructuring plan would result in a net reduction in LSB's production capacity, and provided a copy of the relevant page from the revised restructuring plan.

VI

The Commission must determine whether or not the terms of the agreement between Fogasa and LSB constitute State aid within the meaning of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement and, similarly, whether or not the guarantees provided by ICF and the Comunidad de Madrid are to be regarded as State aid.

Agreement between Fogasa and LSB by which the latter will reimburse over a fixed period Pta 1 221 136 511 with respect to the payment by Fogasa of wages and severance pay owed by LSB to its former employees

The Commission does not object to the intervention of Fogasa in so far as it settled the valid claims of certain former employees of LSB to due wages and severance pay. In this respect, the agreement does not contain any element of State aid. such action to protect employees' rights is consistent with Article 3 (j) of the EC Treaty.

However, the obligations that a company has under employment legislation or collective agreements with trades unions to provide redundancy benefits and/or early retirement pensions are part of the normal costs of business, which companies have to meet from their own resources. Any contribution by the State to these costs must be counted as aid regardless of whether the payments are made directly to the firm or are administered to the employees through a government agency.

In accordance with Royal Decree 505/1985, as revised, the rate of interest payable by LSB under the agreement with Fogasa is the legal interest rate, which was 10 % when the agreement came into force. Normally, in determining whether or not such a rate is consistent with the prevailing 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, no such rate has yet been fixed for Spain. Therefore, in accordance with the Council's resolution dated 20 October 1971 [1], the Commission must make a comparison with the average rate of interest in the market concerned which, in this case, is the average rate of interest charged by private banks in Spain on loans over longer than three years; this is the rate with which the Commission has made comparisons on previous occasions when it has had to make an assessment of whether or not State aid was contained in agreements between Fogasa and private companies [2].

In 1992, according to statistics published by the Banco de España, the average rate of interest charged by private banks on loans over longer than three years was 17,28 % — considerably more than the rate at which interest is payable under the agreement between Fogasa and LSB. In addition, the agreement does not provide for additional interest to be charged with respect to late payments. Accordingly, the terms of the agreement are inconsistent with market conditions at the time the agreement was drawn up between the parties.

Furthermore, by 31 May 1995, LSB should have reimbursed Pta 413 307 741 in accordance with the schedule laid down in the agreement, but had only reimbursed Pta 55 573 431. Therefore, LSB was at this time Pta 357 734 310 in arrears and in breach of its obligations under the agreement. However, it appears that Fogasa has not taken a decision to execute the mortgage notwithstanding that such action is provided for in Royal Decree 505/1985, as revised. This is inconsistent with the behaviour of a creditor operating under normal market conditions.

[1] OJ No C 111, 4. 11. 1971, p. 1.
[2] OJ No L 5, 8. 1. 1991, p. 18.

Therefore, the agreement does constitute aid within the meaning of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement, and as such is illegal because the Commission was not informed, pursuant to Article 93 (3) of the EC Treaty, of the plan to provide the aid before it was put it into effect. The Commission is unable to determine the precise amount of illegal State aid contained in the agreement, but affirms that it is at least equivalent to the financial advantage arising from the fact that the interest rate payable by LSB under the agreement is only 10 %.

Agreement by which a guarantee was provided by ICF in support of three loans taken out by LSB and the interest thereon, totalling no more than Pta 1 700 000 000

As ICF is financed by the Generalitat de Catalunya, the guarantee is a State guarantee. Under the agreement, LSB pays an annual premium to ICF with respect to the provision of the guarantee and the interest rate payable by LSB on the loans obtained with the benefit of the guarantee, net of the annual premium paid to ICF, may be considered comparable with the rate that a company that was not in financial difficulties would have been charged by a commercial guarantor in a free market. Moreover, the contract provides that, if the guarantee were mobilized, ICF would be able to recover any sums paid under the guarantee by the execution of mortgages on property judged by ICF to have a value in excess of the total amount guaranteed. Finally, the guarantee does not cover the whole of LSB's debts and is limited in duration.

Consequently, the Commission can accept that a commercial guarantor operating under normal market conditions might have been likely to be willing to provide a guarantee on terms comparable to those of the State guarantee. However, the Spanish Government has not suggested that any commercial guarantor was in fact willing to provide such a guarantee. On the contrary, the Spanish Government has stated on a number of occasions that LSB was obliged to seek a State guarantee in order to obtain commercial credit because of the uncertainty as to the ownership of the shares formerly belonging to Akzo NV and the ensuing paralysis of day-to-day management and loss of confidence in the company's ability to meet its financial obligations to its creditors. Therefore, the Commission must conclude that, without the State guarantee, LSB could not have obtained loans from the private sector on comparable terms, and also that no commercial guarantor would have been willing to provide a guarantee on comparable terms to those of the State guarantee. Because the State guarantee constitutes an undertaking by ICF to meet LSB's obligations if it were itself unable to do so, the provision of the guarantee affected commercial creditors' perception of the risk associated with lending to LSB. Consequently, the State guarantee enabled LSB to obtain funds to restructure its business operations that would not otherwise have been available.

Accordingly, the agreement does contain State aid within the meaning of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement which, like the State aid contained in the agreement between Fogasa and LSB, is illegal because the Commission was not informed, pursuant to Article 93 (3) of the EC Treaty, of the proposal to provide the guarantee before it was put into effect. However, the Commission is again unable to quantify the precise amount of illegal State aid contained in the agreement.

Decision of the Comunidad de Madrid to approve the provision of a guarantee in support of a loan taken out by LSB and the interest thereon, totalling no more than Pta 1 000 000 000

The Spanish Government stated that LSB was obliged to seek a further State guarantee from the Comunidad de Madrid because of the continuing uncertainty as to the ownership of the shares formerly belonging to Akzo NV.

Accordingly, by similar reasoning to that followed in the assessment of the agreement by which ICF provided a guarantee in support of certain loans taken out by LSB, the Commission is bound to conclude that LSB would not have been likely to be able to obtain additional credit on similar terms from Bankinter SA or any other source of commercial finance without the State guarantee provided by the Comunidad de Madrid, and that no private guarantor would have been willing to provide a guarantee on comparable terms to those of the State guarantee. As the State guarantee constitutes an undertaking by the Comunidad de Madrid to meet LSB's obligations if it were itself unable to do so, the provision of the guarantee affected the creditor's perception of the risk associated with lending to LSB. Consequently, it enabled LSB to obtain additional funds to restructure its business operations on terms that would not otherwise have been available.

Therefore, irrespective of whether or not its terms may be considered commercial, the agreement by which the Comunidad de Madrid provided a State guarantee also contains State aid within the meaning of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement. Moreover, this aid is also illegal because the Commission was again not informed, pursuant to Article 93 (3) of the EC Treaty, of the proposal to provide the guarantee before it was put into effect. The Commission is again unable to quantify the precise amount of illegal State aid involved.

Proposal of the Comunidad de Madrid to award rescue aid to LSB pending revision of its restructuring plan and completion of the Commission's investigation

As the Spanish Government abandoned its proposal to award rescue aid to LSB, the question of compatibility is no longer relevant.

VII

Having established that illegal State aid is contained in the agreement between Fogasa and LSB and in the agreements by which ICF and the Comunidad de Madrid provided guarantees in support of various loans taken out by LSB and the associated interest payments, the Commission must decide whether or not such aid is compatible with the common market and the functioning of the EEA Agreement.

Article 92 (1) of the EC Treaty lays down the principle that, except where otherwise allowable, State aid that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. Similarly, Article 61 (1) of the EEA Agreement states that, except where otherwise allowable, such aid is incompatible with the functioning of the EEA Agreement.

There is trade between Member States and within the EEA in all of the various products produced by LSB (for example, in 1994, approximately 40 000 tonnes of polyamide industrial filament yarn and approximately 75 000 tonnes of polyester industrial filament yarn) so that any aid in favour of LSB would strengthen its position against competing producers, thereby affecting trade between Member States and distorting competition.

Therefore, the Commission must determine whether any of the provisions of the EC Treaty and the EEA Agreement by which such State aid may be considered compatible with the common market and the EEA Agreement is applicable.

The State aid in question is contained in agreements intended to facilitate the restructuring of LSB in order to restore its long-term viability through the implementation of a restructuring plan; full implementation of the plan entails both social costs and investment costs. Accordingly, the aid must be assessed against the Community guidelines on State aid for rescuing and restructuring firms in difficulty [1]. These state that such aid must be linked to implementation of a sound restructuring plan that is intended to restore the company to long-term viability and includes measures that will offset, as far as possible, any adverse effects on competitors; and that the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and be related to the benefits anticipated from the Community's point of view.

As regards the first condition, through restructuring there has been a gradual downsizing of LSB's workforce, safeguarding the jobs of the remaining employees, and the company is rationalizing its business operations by withdrawing from those that are no longer viable and restructuring those that, on the basis of realistic assumptions as to the company's future operating conditions and development of the markets for the products concerned, can be made competitive again. For the latter operations, the plan describes the current and projected state of the relevant markets, positions LSB within them and outlines a strategy that includes specific investments that should be made in order to restore LSB to viability within a reasonable time scale. Therefore, the revised plan appears to be capable of putting LSB in a position where it can compete in the market place on its own merits without any further injection of State aid. This conclusion is supported by the information provided by the Spanish Government as to the company's current financial position, which shows increasing sales and an improvement in profits for 1995 on the 1994 figure, after discounting for the boost to LSB's results in 1994 resulting from Akzo's decision to forgive repayment of the subordinated loan totalling Pta 4 117 141 026. Accordingly, the first condition which must be met for the authorization of restructuring aid is satisfied.

As regards the second condition, which is that the restructuring plan must include measures to offset, as far as possible, adverse effects on competitors, the Commission must determine the effect that the plan would have on LSB's capacity. In this case, the Commission has to compare the capacity that LSB would have after restructuring with the capacity it had at the time that the first agreement in support of the implementation of the plan came into effect, namely 12 June 1992 which is the date of the agreement between Fogasa and LSB. Data on LSB's capacity in 1992 was given in the first annex to the Spanish Government's letter dated 6 October 1993.

LSB's capacity prior to the commencement of the restructuring plan was not noted in the revised restructuring plan which refers only to its 'installed capacity', without stating when the company had this level of capacity. However, the plan explicitly states that LSB had already completed a significant reduction in its capacity to produce polyester textile filament yarn before beginning the process of market analysis that led to the drawing up of a restructuring plan yet the capacity concerned is included in the data on LSB's 'installed capacity' set out

[1] OJ No C 368, 23. 12. 1994, p. 12.

in the plan. Furthermore, the Spanish Government has not at any time commented that the data it had previously provided on LSB's capacity in 1992 was in any way incorrect or incomplete. This data was reproduced in the Commission's notice on the initiation of proceedings pursuant to Article 93 (2) of the EC Treaty, but neither LSB nor any other interested party commented on it. Accordingly, the Commission must conclude that LSB's production capacity prior to the commencement of the restructuring plan is that stated in the first annex to the Spanish Government's letter dated 6 October 1993 rather than that noted as 'installed capacity' in the company's revised restructuring plan.

Full implementation of the revised restructuring plan will not result in any change in LSB's capacity to produce polyamide polymer granulate (which will remain at 3 000 tonnes as it was in 1992), and will bring about a reduction in its capacity to produce polyester polymer granulate (from 52 000 tonnes in 1992 to 34 000 tonnes) and in its capacity to produce viscose textile filament yarn (from 4 200 tonnes in 1992 to 3 700 tonnes). These reductions in capacity can be accepted as sufficient to minimize any adverse effects of the restructuring aid for those companies with which LSB is in competition in so far as it is possible to do so without undermining the objective of the restructuring plan, which is to return LSB to viability.

However, LSB's other products come within the scope of the code on aid to the synthetic fibres industry, which was introduced in 1977 with the aim of preventing aid that would lead to an increase in production capacity in this industry. Since its introduction, the code has been revised on a number of occasions and the illegal State aid contained in each of the agreements in question must be assessed against the 1993 to 1996 version of the code [1], which was in force when the Commission opened the present proceedings pursuant to Article 93 (2) of the EC Treaty which was still in force on 27 November 1995, the date of the letter by which the Spanish authorities provided the Commission with the final items of information necessary to complete the assessment of the compatibility of the aid.

The 1993 to 1996 version of the code stated that the authorization of investment aid was in all cases conditional on a significant reduction in the production capacity of the recipient, that is to say, its total capacity to produce fibres and yarns coming within the scope of the code.

To determine whether or not in this particular case a reduction of approximately 25 % is significant within the meaning of the code, the Commission must examine the specific details of the case in question, including the location of the company concerned and the implications for the industry.

First, as noted above, full implementation of the plan is intended to ensure the long-term viability of LSB and, thereby, safeguard the jobs of the remaining employees. LSB is located at El Prat de Llobregat, in Catalonia, and Alcalá de Henares, Comunidad de Madrid, and, since Spain's accession to the European Community, those areas have qualified for funding under Objective 2 for the Community's Structural Funds, which is to convert regions seriously affected by industrial decline.

Secondly, as regards the effect on capacity, full implementation of the revised restructuring plan will result in a 2 % reduction in EEA capacity to produce polyamide textile filament yarn, a reduction of less than 0,5 % in EEA capacity to produce polyester textile filament yarn and a 1,5 % reduction in EEA capacity to produce polyester staple fibre; but it will bring about an increase of less than 1 % in EEA capacity to produce polyamide industrial filament yarn, and an increase of approximately 1 % in EEA capacity to produce polyester industrial filament yarn. Regardless of any other changes affecting production and capacity in the industry within the EEA, these changes will have the net effect of reducing EEA capacity to produce the relevant products by about 1 % (from approximately 1 650 000 tonnes in 1992 to approximately 1 630 000 tonnes) and it will improve the average rate of utilization of capacity for these products, which was approximately 77,5 % in 1992. Therefore, any adverse effects on competition of the planned increase in LSB's capacity to produce industrial filament yarn will be more than offset by the planned reduction in its capacity to produce textile filament yarn and staple fibre.

Consequently, for the above reasons, the net reduction in LSB's capacity to produce synthetic fibres and yarns coming within the scope of the code, which will result from full implementation of the restructuring plan, can be considered significant. Therefore, the State aid contained in the agreement by which the Comunidad de Madrid provided a guarantee in support of a loan taken out by LSB complies with the relevant version of the code.

Thus, full implementation of the measures provided for in the revised restructuring plan will offset the potential adverse effects on competitors as far as possible without undermining the prospects for restoring LSB to viability. Accordingly, the second condition for the authorization of restructuring aid is satisfied.

[1] OJ No C 346, 30. 12. 1992, p. 2. The period of validity of this version of the code was extended twice — see OJ No C 224, 12. 8. 1994, p. 4 and OJ No C 142, 8. 6. 1995, p. 4.

As regards the third condition, namely that the aid must be limited to the strict minimum needed to facilitate restructuring, the amount of State aid contained in the agreement between Fogasa and LSB is directly related to the number of LSB's former employees whose claims to wages and severance pay were settled by Fogasa. Similarly, the State aid contianed in the agreements by which State guarantees were provided by ICF and the Comunidad de Madrid in suport of loans taken out by LSB do not of themselves have any immediate direct financial value to LSB but serve simply to facilitate access to credit on commercial terms which the company considers necessary to finance the restructuring plan. Consequently, the restructuring aid contained in the agreements would not result in LSB's having surplus cash which might be used for aggressive market-distorting activities or to undertake new investment unrelated to the restructuring. Accordingly, the third condition for the authorization of restructuring aid is satisfied.

In conclusion, as long as LSB implements in full the revised restructuring plan and as long as the concomitant closure of capacity is irreversible, the State aid contained in the agreements satisfies the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

Nevertheless, restructuring aid must not do any more than restore the aid beneficiary to viability in accordance with the plan and must not be used to expand capacity except in so far as this is considered essential to restore viability and is provided for in the restructuring plan facilitated by the aid. This is why the Commission generally requires the submission of detailed annual reports on the implementation of such plans.

Finally, the Commission has stated that it will only authorize State guarantees if the guarantee contract lays down specific conditions for their mobilization which provide for the guarantor to recover any sums paid under the guarantee.

The agreements by which the guarantees were provided by ICF and the Comunidad de Madrid do lay down such conditions, and the Commission does not have any reason to believe that the State guarantors would not go on to execute the mortgages provided by way of security for the guarantees if LSB were to default on its obligations to its creditors with respect to the guaranteed loans.

Therefore, all of the State aid contained in the agreements meets the criteria that must be fulfilled in order to apply the exception provided in Article 92 (3) (c) of the EC Treaty and Article 61 (3) (c) of the EEA Agreement, which allow for the authorization of aid to facilitate the development of certain economic areas or activities where such aid does not adversely affect trading conditions to an exent contrary to the common interest. Therefore, the aid is compatible with the common market and the functioning of the EEA Agreement.

VIII

If LSB were to fail to reimburse the full amount paid to its former employees by Fogasa within the period specified in the agreement with Fogasa, together with the full amount of interest payable under the agreement, and if Fogasa decided not to execute the mortgage provided by LSB as security or to take any other action to recover all of the amount owed by the company, the Commission would have to assess whether or not there was any new State aid in favour of LSB and, if so, whether or not it was compatible with the common market and the functioning of the EEA Agreement. Similar considerations would arise if LSB were to default with respect to the repayment of the principal and interest on some or all of the loans supported by the guarantees provided by ICF and if the Comunidad de Madrid and one or both of these guarantors then assumed responsibility for LSB's debts but did not execute the mortgages provided by LSB as security for the provision of the guarantees or take any other action to recover the full amount concerned.

Nevertheless, the Commission must again emphasize that it does not have any reason to suppose that LSB is likely to default with respect to the repayment of principal and interest on any of the loans supported by the guarantees provided by ICF and the Comunidad de Madrid, or that the company is likely to default on its obligation to reimburse the full amount paid to its former employees by Fogasa, and the associated interest payments, as required within the period laid down in the agreement with Fogasa,

HAS ADOPTED THIS DECISION:

Article 1

1. Subject to compliance with the conditions specified in Article 1 (2) and (3), the elements of State aid contained in the agreements listed below are compatible with the common market by virtue of Article 92 (3) (c) of the EC Treaty and compatible with the functioning of the EEA Agreement by virtue of Article 61 (3) (c) thereof:

— the agreement between the Fondo de Garantía Salarial and La Seda de Barcelona SA by which the company will reimburse over a fixed period Pta 1 221 136 511 with regard to the payment by the Fondo de Garantía Salarial of wages and severance pay owed by the company to its former employees,

— the agreement by which a guarantee was provided by the Institut Català de Finances in support of three loans taken out by La Seda de Barcelona SA and the interest thereon, totalling in all no more than Pta 1 700 000 000, and

— the agreement by which a guarantee was provided by the Comunidad de Madrid in support of a loan taken out by La Seda de Barcelona SA and the interest thereon, totalling in all no more than Pta 1 000 000 000.

2. By 31 December 1999, as a result of the full implementation of the restucturing plan, which was submitted to the Commission by the Spanish Government by letter dated 27 November 1995, the capacity of La Seda de Barcelona SA to produce all forms of staple fibre and filament yarn based on polyamide, polyester, polypropylene or acrylic shall not exceed 67 000 tonnes.

3. By no later three months after the end of the current financial year and by no later than three months after the end of each subsequent financial year until the Commission is satisfied that La Seda de Barcelona SA has fully implemented the revised restructuring plan, the Kingdom of Spain shall report annually to the Commission (a) progress by the company in implementing the plan, including a statement of its capacity, measured in tonnes, to produce each of its products (b) the receipt of any aid by the company since the date of this Decision, (c) the company's financial position, (d) the total amount reimbursed by the company with respect to its agreement with the fondo de Garantía Salarial and the total amounts repaid by the company in respect of the loans and interest thereon supported by the guarantees provided by the Institut Català de Finances and the Comunidad de Madrid and (e) the total amount paid by the company to the Institut Català de Finances and the Comunidad de Madrid by way of an annual premium for the provision by those bodies of a loan guarantee.

Article 2

The Kingdom of Spain shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply with Article 1 (2) and (3) thereof.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 30 April 1996.

For the Commission

Karel VAN MIERT

Member of the Commission