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COMMISSION DECISION

of 30 July 1996

on State aid granted in favour of Compañía Española de Tubos por Extrusión SA, located in Llodio, Álava

(Only the Spanish text is authentic)

(Text with EEA relevance)

(97/21/ECSC, EC)

(OJ L 8, 11.1.1997, p. 14)

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(97/21/ECSC, EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the ECSC Treaty and in particular Article 4 (c) thereof,

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

Having regard to Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry [1], and in particular Article 6 (4) thereof,

Having, in accordance with Article 93 (2) of the EC Treaty and Article 6 (4) of Decision No 3855/91/ECSC, given notice to the parties concerned to submit their comments, and having regard to the comments received,

Whereas:

I

Compañía Española de Tubos por Extrusión SA (hereinafter referred to as 'Tubacex') is a privately-owned company based in Llodio (Álava) producing seamless steel tubes, with a steel-making subsidiary, Acería de Álava, based in Amurrio (Álava).

Having experienced serious financial difficulties in recent years, in June 1992 Tubacex declared itself provisionally insolvent in accordance with Spanish insolvency law, and suspended debt repayments. This suspension was lifted in October 1993 following a creditor's agreement essentially providing for convertible bonds in exchange for debt.

On 25 February 1995, following a lengthy preliminary investigation into various aspects of this financial restructuring of the company and related matters, the Commission decided to initiate proceedings pursuant to Article 93 (2) of the EC Treaty and Article 6 (4) of Decision No 3855/91/ECSC (hereinafter referred to as the 'steel aids code') in respect of the following:

(i) the possible aid elements in the sale of land to the Basque Government (the lifting of the Social Security Treasury embargo, and the Pta 220 million price paid by the Basque Government);

(ii) the possible aid elements in credit arrangements with the wage guarantee fund (Fogasa); and

(iii) the financial restructuring of Tubacex, particularly the possible aid elements in the participation of the Social Security Treasury and other public authorities in the lifting of the suspension of debt repayments, in particular the conversion into capital of debts and the lifting of mortgages and embargoes allowing property to be offered as security for the bond issue.

By letter dated 10 March 1995 the Commission informed the Spanish Government of the decision to initiate the procedure. Other Member States and interested parties were informed by publication of the letter in the *Official Journal of the European Communities* [2].

[1] OJ No L 362, 31. 12. 1991, p. 57.
[2] OJ No C 282, 26. 10. 1995, p. 3.

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II

The Spanish Government replied to the Commission's letter opening the procedure by letter dated 10 April 1995 providing further documentation in support of its view that none of the matters under investigation constituted aid (for a fuller description of the Spanish Government's argumentation please refer to Chapters III and IV of this Decision).

In the course of the procedure the Commission received various comments from other Member States and interested third parties. These were from Austria (tube producer), Germany (national tube producers' association and Ministry of Economic Affairs), France (national tube producers' association), Italy (national steel producers' trade association), Spain (national steel producers' association) and the United Kingdom (tube producer). The United Kingdom Government also submitted comments, but these were not received until 7 December 1995, outside the deadline for comments under the procedure, and could not thus be taken into account.

With the exception of the Spanish national steel producers' association, which argued that no State aid was involved, all parties supported the Commission's action in opening the procedure. They maintained that the matters under investigation constituted State aid. They also alleged that various other possible aids, not falling within the scope of the procedure, had been granted to the company.

The comments of the Austrian tube producer in fact related to the activities of another company, not subject to the procedure.

The German Ministry of Economic Affairs questioned the decision of the Social Security Treasury not to exercise its rights as a preferred creditor, to lift preventive embargoes in general and in particular to agree to the sale of land to the Basque Government. It also questioned Fogasa's decision to accept already mortgaged property as loan guarantees. All these matters in its view indicated the presence of illegal aid elements that distorted competition.

The German tube producer's association alleged that since 1990/91 Tubacex had significantly increased its Community market share, including its share of the German market, through under-pricing which in its view could only be sustained by aid or the expectation of aid.

The French tube producers association referred to Tubacex's deteriorating financial position since 1990 and questioned how it had been possible for the company to continue to operate without aid, without going bankrupt. In the association's view it was essential for the Commission to know who were the shareholders and creditors of the company. The association also considered that Tubacex's new subsidiary, Tubacex Tubos Inoxidables, had received illegal aids, and expressed concern about continued media reports of public financial assistance towards a wider restructuring of the seamless tube sector into a new grouping Unión de Tubos Vascos (UTV), combining Tubos Reunidos and Productos Tubulares as well as Tubacex.

The Italian steel producers' association noted Tubacex's losses in recent years and complained that through below-cost pricing Tubacex had significantly increased its market share in Italy during the period 1991 to 1993, a trend that had been maintained following the financial restructuring of the company. It was of the opinion that such policies must have been sustained by aid.

The United Kingdom producer also complained that it had suffered injury due to low-price competition from Tubacex supported by State aid. It considered that the behaviour of the Social Security Treasury could be categorized as aid since its debt had accumulated at a non-commercial rate of interest; it had failed to exercise its preferential rights and cancelled its embargoes, thereby weakening its prospects of recovering such debts; and, by accepting convertible bonds, it had not recovered the total amount owed. It also considered that past reschedulings of debt and the rescheduling of post-suspension debts involved aid, since commercial interest rates were higher than those charged. It also considered the terms of the Fogasa loans to be similarly uncommercial.

As regards the sale of land to the Basque Government, the United Kingdom producer queried why the Social Security Treasury embargo and the Banco de Credito Industrial (BCI) mortgages could be lifted prior to the sale; and the absence of an open invitation to tender.

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In addition, the United Kingdom producer expressed the view that a series of other measures, including loans from public banks shown in the 1986 to 1989 accounts, could constitute State aids. In particular it questioned the Commission's conclusions during its preliminary investigation that no aid had been granted in relation to other internal restructuring measures as well as the wider restructuring of the sector following renewed media reports that the Basque Government had decided to give Pta 3,306 billion of social aid to support the latter.

The comments received were communicated to the Spanish Government by Commission letter dated 24 January 1996.

III

The Spanish Government replied by letter dated 16 February 1996, reiterating its previous arguments that no State aid was involved since Tubacex and Acería de Álava were both treated in accordance with generally applicable rules. In support of its views the Spanish Government provided information on, *inter alia*, the nature of Tubacex's public debt, the identity of the preferential creditors, the role of the Social Security Treasury in the acceptance of the creditors' agreement (including the reasons why it renounced its preferential rights and lifted its embargoes on Tubacex properties), the interest applied to Social Security Treasury's debts, the lifting of BCI/BEX (Banco Exterior de España) mortgages, the sale of land to the Basque government, the Fogasa credit arrangements and repayments made (details of relevant information are set out in Chapter IV of this Decision). In addition, various observations were made on the comments received from third parties. In general the Spanish authorities disputed the allegations about the extent of Tubacex's financial difficulties and the claims that Tubacex had been engaged in underpricing sustained by aid to increase market share, maintaining that Tubacex's growth on the market was due basically to its sound commercial policy, and pointing out that it was difficult to make comparisons over prices since stainless steels cover various types and qualities, some cheaper and some more expensive.

Since the information provided was incomplete in certain respects, the Commission requested further clarifications by letter dated 5 March 1996. In response to this and subsequent further requests for clarifications, the Spanish Government provided supplementary information by letters dated 26 March, 30 May, 13 and 24 June 1996.

IV

On the basis of the information available, the facts relating to the issues under investigation within the framework of the procedure would appear to be as follows:

The sale of land to the Basque Government

In opening the procedure, the Commission noted that according to press reports the sale appeared to have been completed within a very short period of time; that there had been no open invitation to tender; that the land had carried BCI mortgages and a Social Security embargo until just prior to the sale, and that it was not known what had happened to the land subsequently. It expressed doubts about the value of land and the decision of the Social Security to agree the sale of embargoed assets without the proceeds being used to repay its debts and concluded that there was a likelihood that the sale price contained State aid elements.

In its comments under the procedure, the Spanish Government stated that negotiations for the sale of the land started at the beginning of 1993 so that the sale did not take place as quickly as might be inferred from press reports. The land sold (69 555 m^2) had formed part of a larger area of land in Amurrio (from which it was segregated) covering an area of 243 629 m^2 owned by Tubacex, all of which was subject to a preventive embargo by the Social Security Treasury. There were also mortgages on the property as security on loans with the public bank BCI.

Following the sale of the land on 1 June 1993, it was allocated to Amurrioko Industrialdea, set up to develop a business park. A 4 000 m^2 plot of the land was sold to a private company, Hormigones Alaveses in July 1994. Work on phase I of the development of the rest of the site started in January 1995 (with

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the construction of industrial buildings and offices of approximately 3 000 m^2). Work will continue this year with the construction of a further 5 400 m^2 of industrial buildings.

The Spanish Government maintains that the price paid for the land was lower than the market price. Although the relevant documentation relating to the segregation of the land showed a valuation of Pta 70 million, this conformed to the historical book value of the property only for land registry purposes. Documentary evidence has been provided of a number of much higher valuations. The first was an independent valuation commissioned by Tubacex to protect its interests in the negotiations. This valuation, dated 24 May 1993, inadvertently excluded a strip of land on the other side of the road by mistake but the delineation of the land valued corresponded to the 69 555 m^2 eventually sold on 1 July 1993 for Pta 220 350 billion. Subsequently on 9 November 1993 there was a further valuation by independent experts appointed by the Álava commercial register, as required by the law on public limited companies, for the purposes of assignment as a contribution in kind to the incorporation of Amurrioko Industrialdea. This valuation assessed the land at Pta 260 million.

In addition the Spanish authorities have also submitted documentary evidence of a land valuation by Amurrio Council for tax purposes in February 1995 and the sale price paid for the 4 000 m^2 plot of the land by Hormigones Alaveses in July 1994.

A comparison of the different valuations/prices can be seen in the following table:

in pta

	Valuation	Value/m^2
May 1993 valuation	317,25 million	5 000/m^2
Sale price June 1993	220,35 million	3 168/m^2
November 1993 valuation	260 million	3 738/m^2
February 1995 valuation for tax purposes		4 024/m^2
Price of 4 000 m^2 plot sold July 1994	14,4 million	3 600/m^2

As regards the absence of an open invitation to tender, the Spanish Government maintains that a direct negotiated sale is the usual method of sale for private companies, being in the interests of both buyer and seller, and was thus a valid procedure in this case carried out with the approval of the receivers appointed by the court under the debt suspension procedure.

According to the Spanish Government, the BCI mortgages on the larger parcel of land were lifted on 21 May 1993 because the associated loans (both principal and interest) had previously been fully paid off. The repayments were made over several years prior to the suspension of debt repayments in June 1992 with the exception of the final three instalments on a 1986 loan of Pta 960 million made on 1 July and 1 October 1992 and 1 January 1993 (these not being subject to the suspension procedure). The Social Security Treasury agreed on 3 June 1993 to lift its embargo on the parcel of land sold because it received (with the agreement of the court-appointed receivers) partial repayment of its pre-suspension debt from the sale receipts and remaining embargoes on the larger property (from which the land sold had been segregated) and on other properties more than covered the debts.

Fogasa Loans

In deciding to open the procedure the Commission doubted whether the terms and conditions of two loans from Fogasa in July 1992 (after the suspension of debt repayments) and 1994 reflected market conditions. It also considered that the arrangements on security for the loans (by way of mortgages on property) required further investigation.

In its comments under the procedure, the Spanish Government maintains that the loans were fully in accordance with the legislation governing Fogasa and that no State aid was involved.

Fogasa is an independent organization under the control of the Ministry of Employment and Social Security and financed by a levy on employers. Fogasa's main role is to pay the wages and allowances of the employees of companies that are bankrupt or otherwise in serious financial difficulties

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owed to them by those companies. Fogasa does not award loans to the companies concerned but settles all valid claims from the workers with the money paid then recovered from the companies.

In this case once the suspension of payments had started, the workers in the companies affected applied to Fogasa for payment of the wages to which they were entitled. Thus after negotiations an agreement was concluded on 10 July 1992 between Fogasa, Tubacex and Acería de Álava whereby Fogasa would pay the workers provisional wages fixed at Pta 444 327 300. The firms undertook to pay back that amount plus Pta 211 641 186 in interest. The repayment period was eight years at 10 % simple interest per annum, to be paid in half-yearly instalments of Pta 40 998 011. Subsequently after the payments to the workers had been made, a revised loan agreement was concluded on 8 February 1993. This showed that the definitive amount owned was Pta 376 194 837 principal plus Pta 183 473 133 interest, to be repaid in sixteen half-yearly instalments at 9 % interest starting on 1 August 1993, with repayment instalments (including interest) ranging from around Pta 33 million at the outset to Pta 37 million towards the end of the repayment period (interest payments progressively reducing).

On 10 March 1994, following a social plan agreed with the workforce, a fresh loan agreement was concluded. This covered Pta 465 727 750 in principal plus Pta 197 580 900 in interest. The repayment period was eight years at 9 % simple interest, starting on 30 December 1994. No interest became payable until the last three years and 71 % of the repayments of principal did not fall due until 30 December 1998 onwards. According to the Spanish authorities, in the light of the signing of this second agreement, the firm proposed an immediate payment of Pta 4 194 839 against the first agreement and new associated mortgage arrangements (see below).

On 3 October 1994 a revised second loan agreement was concluded stating that the definitive amount owed was Pta 496 491 521 in principal plus Pta 205 335 378 in interest to be repaid over eight years starting 30 December 1994. No interest payments fall due until the last three years and 70 % of the repayments of principal do not fall due until 30 December 1998 onwards.

The first loan agreement had originally been secured by a mortgage dated 5 August 1992 on Tubacex property of 56 627.64 m^2 at Llodio, already subject to mortgages with BCI and subject to embargoes with the Social Security. This property was subsequently released and replaced on 16 February 1994 by a mortgage on property owned by Tubacex Taylor Accesorios SA (TTA), independently valued at Pta 800 million, and Acería de Álava property valued at Pta 310 million. According to the Spanish authorities these properties (Pta 1 110 million) easily covered both the guaranteed loans.

The following table summarizes the various loan agreements and their terms and conditions:

Date of agreement	Principal (Pta)	Interest (Pta)	Rate of interest	Other terms/Conditions
First agreement				
10 July 1992	444 327 300	211 641 186	10 %	Equal instalments of Pta 40 998 011
8 February 1993	376 194 873	183 473 133	9 %	Roughly equal instalments ranging between Pta 33 and 37 million starting 1 August 1993
16 February 1994	372 000 000	154 138 830	9 %	No longer equal instalments. First payment 30 June 1994. 79 % of principal + all interest not payable until 30 June 1999 onwards
Second agreement				
10 March 1994	465 727 750	197 580 900	9 %	First payment 30 December 1994. No interest payable until 30 December 1999. 71 % of principal not due until 31 December 1998.

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Date of agreement	Principal (Pta)	Interest (Pta)	Rate of interest	Other terms/Conditions
3 October 1994	469 491 521	205 335 378		No significant changes

According to the Spanish authorities, the loans were granted by Fogasa in accordance with Royal Decree 505/85 of 6 March 1985 and an order of 20 August 1985 laying down detailed rules for the implementation of Article 32 of the Royal Decree authorizing Fogasa to enter into agreements covering the reimbursement of sums paid to workers.

According to the Commission's understanding of these arrangements, Fogasa has discretionary power to postpone or split up the repayments, up to a period of eight years with a grace period not exceeding six months. The deferred payments attract interest at the so-called 'legal interest rate'.

The legal rate of interest when the original agreements were concluded 1992 and 1994) was 9 %, i.e. the rate finally charged. According to the Spanish authorities, the companies have kept up to date with repayments according to the final definitive versions of both loan agreements, but they have provided no information in relation to repayments against the earlier versions of the agreements.

Lifting of suspension of debt repayments

In deciding to open the procedure the Commission considered that State aid might be involved in the participation of public creditors in the lifting of the suspension of debt repayments, in particular the decision of the Social Security Treasury to waive its preferential rights, the treatment of its debts and the role it (and the public bank BCI) had in lifting embargoes or mortgages on property offered as a guarantee for the convertible bond issue, particularly given that post-suspension Social Security Treasury debts had been incurred by Tubacex resulting in new embargoes being imposed (and subsequently lifted) and a subsequent rescheduling agreement for those new debts being necessary.

In its comments under the procedure the Spanish Government has provided information demonstrating that according to the definitive list of creditors drawn up by the court-appointed receivers in April 1993, the total debt of Tubacex was Pta 16 932 977 026 and the total debt of Acería de Álava was Pta 3 501 435 639. Preferential creditors had claims of Pta 2 107 068 319 and Pta 1 065 845 399 respectively, of which public bodies represented about Pta 2,115 billion (or about 12,5 % of total creditors). Of these public bodies the largest creditor was the Social Security Treasury. Debts owed to the latter amounted to Pta 1 017 877 003 in relation to Tubacex and Pta 129 521 620 in relation to Acería de Álava.

According to the Spanish authorities, at all times the Social Security had applied to the debts the legal rate of interest, plus charges for late payment as laid down in the applicable legislation.

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The make-up of Social Security's debt thus comprised past debts (pre-1991), on which interest and charges for delay had been imposed, debts incurred in 1991 (on which certain surcharges had been imposed) and debts in 1992 up to the period of debt suspension. This is shown in the following table:

(Pta)

	Tubacex	Acería de Álava
Delayed debt		
Principal	165 689 700	
Interest	88 748 398	
Surcharges	50 967 073	
Due 1991		
Principal	350 203 353	
Surcharges	58 709 151	
Due up to May 1992		
Principal	303 559 328	94 376 303
Interest		15 229 747
Surcharges		19 915 570
Total	1 017 877 003	129 521 620

The Social Security subscribed to the creditors' agreement on 30 September 1993, after other creditors had accepted the proposals during the period 15 June to 2 September 1993. As was noted in the opening of the procedure, the vast majority of debts covered in the settlement were with private creditors. These included unidentified existing bond holders owed Pta 3 621 198. The Spanish authorities have provided details of these existing bond holders, which appear to show that at least 85 % of the debt was with private creditors.

Accordingly the Spanish authorities argue that the Social Security Treasury had no significant role in the agreement.

The Social Security debt was settled as follows:

(Pta)

	Tubacex	Acería de Álava
Payment by cheque	227 319 289	28 925 658
Convertible bonds (guaranteed)	620 530 000	78 960 000
(non-guaranteed)	105 960 000	13 480 000
Promissory notes	64 067 714	8 155 962
Total	1 017 877 003	129 521 620

The Spanish authorities have stated that the Tubacex bonds were sold in July 1994, enabling the Social Security Treasury to recover that part of the debt (receipts were Pta 772 186 789). The remaining Pta 64 067 714 falls due during the period 2005 to 2008 in four equal annual instalments.

As regards the question why the Social Security Treasury chose to waive its preferential rights and to accept the agreement, the Spanish authorities maintain that:

— the Social Security Treasury had the discretionary power to participate in such agreements (Royal Decree 1517/91 refers) and had done so in other similar cases,

— the status of preferential creditor is relative only,

— the Social Security Treasury concluded that its interests in recovering its money were best served by participating in the agreement rather than exercising its rights which could have led to liquidation of the companies and consequent social problems,

— no part of the debt was written off,

— it expected to recover its debts (and it did so).

Questions were also raised in the procedure about the decision of the Social Security Treasury (and other public creditors such as BEX/BCI and Fogasa) to lift preventive embargoes and mortgages on Tubacex property, thus enabling the company to offer these properties as guaranteed security for the convertible bond issue, thus securing acceptance of the agreement (Pta 10 billion of the Pta 11,5 billion bond issue being so guaranteed).

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According to the Commission's analysis of the information available, the embargoes/mortgages and the properties involved were as follows:

Property	Institution	Date lifted
243 029 m^2 at Amurrio (except Acería de Álava)	BCI	21 May 1993
(includes 69 555 m^2 sold to Basque Government)	Social Security	3 June 1993 (for part of land sold to Basque Government) and 18 November 1993 (reinstated 25 January 1994 in respect of debts May 1992 to May 1993) lifted again 25 March 1994
6 270 m^2 at Amurrio	Social Security	18 November 1993
	BCI	18 November 1993
50 627,64 m^2 at Llodio	BCI	25 April 1994
	Social Security	18 November 1993 (reimposed 20 December 1993 in respect of May 1992 to May 1993 debts; lifted again 24 March 1994)
	Fogasa	9 March 1994 (replaced by TTA land and Acería de Álava land)
5 879,66 m^2 in Llodio	BCI	25 April 1994
	Social Security	18 November 1993 (reimposed December 1993 in respect of May 1992 to May 1993 debts, lifted again 24 March 1994)

The issue of convertible bonds (Pta 10 billion of which was guaranteed) was on 6 May 1994 underpinned by mortgage guarantees on all the above property plus land in Amurrio of 12 400 m^2, plus a right to seize shares in Tubacex Commercial and Acería de Álava (up to a combined value of Pta 3 billion).

According to the Spanish authorities, the BCI mortgages could be lifted because the associated loans had been repaid (including repayments in 1992 and 1993 on a Pta 960 million loan not subject to the suspension of debt repayments). As regards the lifting of the Social Security embargoes, the Spanish authorities have stated that the Social Security was obliged by clause 5 of the creditors' agreement to lift its embargoes on the debts covered. Furthermore, these were effectively replaced by the mortgage offered as security for the convertible bond issue so that Social Security's interests continued to be safeguarded.

As regards the question why Social Security acted as it did given that Tubacex had incurred fresh debts after the suspension of debt payments, leading to the Social Security re-imposing certain embargoes (subsequently lifted), the Spanish authorities have explained that these fresh embargoes on the post-suspension debt were replaced by a guarantee dated 22 March 1994 in the form of a pledge of all the shares in Tubacex Tubos Inoxidables SA (TTI), to which were allocated all the assets and liabilities relating to Tubacex's manufacture of stainless steel tubes, with a net value (according to an independent expert) of more than Pta 2 500 million, i.e. more than covering the debt.

Finally, as regards the rescheduling of the post-suspension debt, the Spanish authorities have stated that under the General Law on Social Security, as approved by Royal Decree 1517/91 of 11 October 1991, the Social Security Treasury is given discretionary power to agree to postponement of repayments and repayment in instalments, with interest charged at the legal rate of interest. On 25 March and 12 April 1994 agreements were concluded with Acería de Álava and Tubacex respectively. The terms and conditions were as follows:

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	Principal (Pta)	Rate of interest	Other terms and conditions
Acería de Álava	274 409 604	9 %	Five years repayment with monthly payments progressively increasing with 51 % of principal not due until fifth year
Tubacex	1 409 957 329	9 %	

In addition to commenting on the issues under investigation under the procedure, the Spanish Government also reacted to the observations by third parties that various other aids had been granted to the company. It pointed out that these matters did not fall within the scope of the procedure, and continued to maintain that no such aids had been granted. In particular the Spanish authorities reiterated that the costs of rationalization measures such as the reduction in the workforce had been financed by the company's own resources (the December 1993 2,251 billion capital increase and disposal of assets). They also reaffirmed that although the Basque Government is considering the possibility of granting social aid to Tubacex within the context of a possible wider restructuring of Tubacex, Tubos Reunidos and Productos Tubulares no decisions have yet been taken. Finally the Spanish authorities refuted the allegations that TTI had received illegal aids.

In the light of the information available the Commission accepts that the various additional allegations made by third parties do not fall within the scope of the procedure and that since these are not fully substantiated there are insufficient grounds for further investigation at this stage.

V

The Commission must determine whether or not the various matters subject to the procedure contain State aid within the meaning of Article 92 (1) of the EC Treaty and the steel aids code. In the light of the information available the Commission's assessment is as follows.

Sale of land to the Basque Government

Since the BCI mortgages and Social Security Treasury embargoes could be lifted because the related debts had been repaid or were otherwise covered by other securities, and the sale was approved by the receivers (representing, *inter alia*, the interests of the creditors), the Commission is prepared to accept that there was no aid involved in that aspect of the sale.

As regards the final sale price, it is unfortunate that no open invitation to tender was issued in this case since it would have demonstrated beyond doubt that the price paid was the market price. However, in the light of the various documents showing higher valuations than the price paid, the Commission considers that there is sufficient weight of evidence to conclude that the price was not above, and possibly below, market prices. The Commission therefore concludes that the transaction did not confer any undue financial advantage on the company and the price paid does not contain any State aid elements.

Fogasa Loans

As was made clear in the opening of the procedure, there can be no objection to Fogasa's intervention in so far as it settled the valid claims of workers in respect of wages that they would not otherwise have received. In this respect the agreements did not contain State aid, such action being consistent with Article 3 (j) of the EC Treaty. However the costs so covered are part of the normal costs of running a business, which companies normally have to meet from their own resources. Any contribution by the State to these costs must be regarded as aid if it conferred a financial advantage on the company regardless of whether the payments are made directly to the company or are administered to the employees through a government agency.

As noted above in Chapter IV, the rate of interest payable under the two agreements was the legal interest rate, which was 9 %. In determining whether or not such a rate is consistent with normal market conditions, in previous similar cases involving Fogasa loans, as in Commission Decision

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91/1/EEC [1] and in State Aid Case C 56/94 [2], the Commission made a comparison with the prevailing average rate of interest charged by private banks in Spain on loans over longer than three years.

In this case, according to statistics published by the Spanish Central Bank the average rate of interest charged by private banks on loans longer than three years during the period in question was as follows: 1992: 17,28 %; 1993: 16,19 %; 1994: 12,51 %. These rates are considerably more than the rates payable under the agreements, particularly the first. The other conditions of the loans (the evident rescheduling of the first agreement (presumably because of payment delays under the original version) and the bulk of repayments of principal and interest under both agreement timed towards the end, apparently to facilitate the company's recovery) are also not in conformity with credits under normal market conditions, particularly as the debt was secured by a mortgage on property and Fogasa would have been a preferred creditor in the event of bankruptcy or other financial difficulties.

It must therefore be concluded that the agreements contained State aid within the meaning of Article 92 (1) of the EC Treaty and the steel aids code which was illegal (not having been notified to the Commission pursuant to Article 93 (3) of the EC Treaty and Article 6 of the steel aids code respectively). It is difficult to quantify the precise amount of illegal aid involved but it is at least equal to the financial advantage arising from the reduced interest rate applied and effective from when the loans were originally granted.

Lifting of suspension of debt repayments

On the basis of the information available the Commission can conclude that the suspension of debt repayments in June 1992 and the lifting of the suspension in October 1993 were measures taken within the framework of generally applicable insolvency legislation in Spain. It is also clear that the public creditors, including the Social Security Treasury, were in the minority and followed the private creditors in agreeing to the creditors' agreement partially to write off debt through the convertible bond issue. Moreover although the Social Security was a preferred creditor and was not obliged to go along with creditors' agreement (which had been reached in accordance with the applicable legislation), it had discretionary power to waive its preferential rights and participate in the agreement. The Commission notes that the Social Security's decision did not appear to influence the private creditors' decision to accept the agreement and did not involve any write-off or reduction in the amount of suspended debt, virtually all of which has since been recovered, partly in cash and partly through the sale of its convertible bonds.

The lifting of the Social Security embargoes seems to have been a necessary consequence of subscribing to the agreement, rather than an action taken to facilitate its conclusion. Furthermore it seems that the BCI mortgages could also be lifted given that the associated loans had been repaid.

The Commission therefore concludes that the role of the public creditors, and in particular the Social Security, was in accordance with generally applicable rules and as such did not confer any special financial advantage on Tubacex and did not therefore constitute a State aid.

The question of why the Social Security acted as it did when post-suspension debts had accumulated has also been satisfactorily explained. However, the treatment of these post-suspension debts through the rescheduling agreement, notwithstanding that this was in accordance with the applicable legislation, does not seem to have been consistent with the prevailing market conditions. As noted above in relation to Fogasa, according to statistics published by the Spanish Central Bank, the average rate of interest charged by private banks on loans longer than three years at the time the rescheduling was agreed (1994) was 12,51 %. This compares with the legal rate of interest charged, which was 9 %. Following the approach adopted above in relation to Fogasa it must therefore be concluded that the rescheduling therefore contained State aid within the meaning of Article 92 (1) of the EC Treaty and the steel aids code which was illegal, not having been notified to the Commission. As in the case of the Fogasa loans, quantification of the precise amount of illegal aid is difficult, but the aid is at least equal to the financial advantage arising because the interest rate payable under the rescheduling agreements was only 9 %.

(1) OJ No L 5, 8. 1. 1991, p. 18.
(2) OJ No L 298, 22. 11. 1996, p. 14.

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VI

Having established that illegal State aid is contained in the Fogasa loan agreements and the rescheduling of the post-suspension Social Security debt, the Commission must decide whether or not such aid is compatible with the common market.

Since Acería de Álava is a company falling under Article 80 of the ECSC Treaty because it produces products listed in Annex I to the ECSC Treaty, the provisions of the ECSC Treaty and the steel aids code are applicable to the above measures to the extent that they benefited Acería de Álava.

Article 4 (c) of the ECSC Treaty prohibits subsidies in any form whatsoever. The steel aids code, adopted with the unanimous assent of the Council pursuant to Article 95 of the ECSC Treaty by way of derogation from the general prohibition under Article 4 (c), provides for the possibility of certain types of aid being compatible with the common market such as aid for research and development (Article 2), environmental protection (Article 3), closures (Article 4) and aid under general regional investment aid schemes in certain territories of the Community, but not including Spain (Article 5). Operating aid and rescue and restructuring aid are not allowed. The above measures do not therefore fall within any of the categories of permissible aid.

So far as the measures granted in favour of Tubacex are concerned, these are subject to Articles 92 and 93 of the EC Treaty, since its activities (the production of seamless stainless steel tubes) are regarded as non-ECSC activities. As was mentioned in the opening of the procedure, Member States are required to notify the Commission in advance of all aid schemes concerning the seamless tubes sector in accordance with the Commission framework for certain steel sectors not covered by the ECSC Treaty ([1]), which was established in recognition of the particularly sensitive nature of competition in the non-ECSC steel sector and the close links between first-stage processing of steel and the iron and steel industry, given that aid to subsidiaries of steel groups could ultimately benefit ECSC activities and thus impact on ECSC steel aid policy.

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 among Member States, in principle incompatible with the common market.

As the Commission noted in opening the procedure, there is trade between Member States in the products produced by Tubacex so that any aid in favour of Tubacex would strengthen its position against competing producers, thereby affecting trade among Member States and distorting competition.

Given the nature and objectives of the aid measures in question, the exceptions pursuant to Article 92 (2) to the principle set out in Article 92 (1) are not applicable in this case.

Article 92 (3) provides that certain categories of aid may be compatible with the common market. With regard to the exception laid down in Article 92 (3) (a) the province in which Tubacex is located is not an area eligible for such aid and in any case the Spanish authorities have not sought to argue that the exception applies. The derogation of Article 92 (3) (b) is clearly also inapplicable since the aid was not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Spain.

Article 92 (3) (c) lays down an exception for ‘aid to facilitate the development of certain activities’, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The aid to Tubacex could be categorized as an aid to a firm in difficulty, given its financial position when the aid was awarded, and could thus fall to be assessed under that provision.

The Commission considers that aid to firms in difficulties carries the greatest risk of transferring unemployment and industrial problems from one Member State to another; it acts as a means of preserving the *status quo* by preventing forces at work in the market economy from their normal consequences in terms of disappearance of uncompetitive firms in their process of adaptation to changing conditions in competition; at the same time, such aid may bring

([1]) OJ No C 320, 13. 12. 1988, p. 3.

▼B

about disruptive effects on competition and trade through its influence upon the pricing policies of beneficiaries opting for undercutting strategies to stay on the market.

For this reason the Commission has over the years developed a special approach for the assessment of aid to firms in difficulty (Eighth Report on Competition Policy, point 227; and Community guidelines on rescue and restructuring aid ([1])). This requires that the aid must be kept to the minimum needed to keep the company in business until the necessary measures to restore viability are put into effect and is conditional on the implementation of a sound restructuring plan to restore the company to long term viability, including measures such as capacity reductions that will offset adverse effects on competitors (particularly in sectors suffering from over-capacity, as in this case).

In this case the Spanish authorities have not sought to argue that the measures constituted rescue or restructuring aid and in any case no evidence of a restructuring plan or a reduction of Tubacex's market presence has been put forward. This confirms that the aid was intended simply to allow the company to continue in business.

VII

Accordingly, it must be concluded that the aid in favour of Tubacex and its subsidiary Acería de Álava, in the form of the two Fogasa loans and the rescheduling of the post-suspension Social Security debt, was illegal, was granted without prior notification to the Commission in breach of the provisions of the steel aids code and Article 93 (3) and was incompatible with the common market, on the grounds that:

— the aid in favour of Acería de Álava was incompatible with the steel aids code and thus Article 4 (c) of the ECSC Treaty, and

— the aid in favour of Tubacex was incompatible with the common market within the meaning of Article 92 of the EC Treaty.

Since the aids are illegal and incompatible with the common market, they should therefore be recovered and their economic effect annulled in order to restore the *status quo*,

HAS ADOPTED THIS DECISION:

▼M1

Article 1

The following measures which Spain has implemented in favour of Compañía Espanola de Tubos por Extrusión (Tubacex) and its steel-making subsidiary Acería de Álava do not constitute State aid:

(a) the 10 July 1992 loan agreement between the wage guarantee fund (Fogasa), Tubacex and Acería de Álava covering ESP 444 327 300 in principal, as amended by agreements of 8 February 1993 and 16 February 1994 (covering principal of ESP 376 194 872 and ESP 372 000 000 respectively);

(b) the 10 March 1994 loan agreement between Fogasa, Tubacex and Acería de Álava covering ESP 465 727 750 in principal, as amended by the agreement of 3 October 1994 covering ESP 469 491 521 in principal;

(c) the agreement of 25 March 1994 between the Social Security Fund and Acería de Álava to reschedule debts amounting to ESP 274 409 604;

(d) the agreement of 12 April 1994 between the Social Security Fund and Tubacex to reschedule debts amounting to ESP 1 409 957 329.

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

▼B

Article 3

As regards the other matters that were the subject of the proceedings commenced pursuant to Article 93 (2) of the EC Treaty and Article 6 (4) of Decision No 3855/91/ECSC, namely the sale of land to the Basque Government and the participation of public bodies (and in particular the Social Security Treasury) in the lifting of the suspension of debt repayments, those measures do not constitute aid and the procedure can therefore be closed.

Article 4

Spain shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply therewith.

Article 5

This Decision is addressed to the Kingdom of Spain.