II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 31 October 2000

amending Decision 97/21/ECSC, EC on State aid implemented in favour of Compañía Española de Tubos por Extrusión SA, located in Llodio, Álava

(notified under document number C(2000) 3268)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2001/142/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and, in particular Article 4(c) thereof,

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

Having regard to Commission Decision 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry and, in particular Article 6(5) thereof [1],

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

Whereas:

I. **Background**

A. *Commission Decision 97/21/ECSC, EC [3]*

(1) By its decision to open the procedure provided for pursuant to the former Article 93(2) of the EC Treaty and Article 6(4) of Commission Decision 3855/91/ECSC [4] regarding certain measures granted in favour of Compañía Española de Tubos por Extrusión SA (hereinafter 'Tubacex') and its steel-making subsidiary, Acería de Álava [5], the Commission expressed its doubts whether the repayment agreements between these companies and the wages fund Fogasa and the rescheduling agreement between these companies and the Social Security Fund, among other measures, constituted compatible State aid within the meaning of the former Article 92(1) of the EC Treaty and Article 1 of Decision 3855/91/ECSC.

(2) By its Decision 97/21/ECSC, EC the Commission came to the conclusion that the these measures, itemised below, were not consistent with prevailing market conditions in so far as the rate of interest were below market rates. Accordingly, the Decision stated that these measures were incompatible with the common market:

(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 in principal 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 Treasury and Acería de Álava to reschedule debts amounting to ESP 274 409 604;

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

[1] OJ L 338, 28.12.1996, p. 42.
[2] OJ C 110, 15.4.2000, p. 12.
[3] OJ L 8, 11.1.1997, p. 14.
[4] OJ L 362, 31.12.1991, p. 57.
[5] OJ C 282, 26.10.1995, p. 3.

B. *The judgement of the Court of Justice of the European Communities of 29 April 1999 in case C-342/96, Spain v Commission* ([6]) *relating to State aid granted by Spain to Tubacex*

(3) Following an application by Spain, the Court of Justice delivered its judgment in the abovementioned case, annulling Decision 97/21/ECSC, EC, which had declared as incompatible aid to Tubacex the rescheduling agreements between Tubacex and the Social Security Treasury and the repayment agreements between Tubacex and the Fogasa, in so far as the rate of interest was below market rates.

(4) In its ruling case the Court concluded that Fogasa does not award loans to undertakings in liquidation or in difficulties, but settles all valid claims put forward by employees with money which it pays and then recovers from the undertakings. Moreover, Fogasa may conclude repayment agreements enabling it to reschedule the sums payable or to make them payable by instalments.

(5) Similarly, the Social Security Fund may agree to rescheduling the payment of debts in respect of social security contributions or to their payment by instalments.

(6) The Court noted that in these repayment and rescheduling agreements, the State did not act as a public investor whose conduct must be compared to the conduct of a private investor laying out capital with a view to realising a profit but as a public creditor which, like private creditor, seeks to recover sums due to it.

(7) The interest normally applicable to that type of debt is intended to make good the loss suffered by the creditor because of the debtor's delay in performing its obligation to pay off its debt, namely default interest. If the rate of default interest applied to the debts of a public creditor is lower than the rate charged for the debts owed to a private creditor, it is the latter rate which ought to be charged.

(8) Based on the above arguments, the Court annulled Decision 97/21/ECSC, EC to the extent that it declared the measures granted in favour of Tubacex to be incompatible with the EC Treaty. (Since the decision as regards incompatibility of the measures with the Steel Aids Code (to the extent that these measures also benefited Acería de Álava) had not been challenged, the Court did not annul that part of the Decision).

II. **Procedure**

(9) Having examined the Court judgment, the Commission decided to (re-)open the proceedings that had preceded the annulled decision.

([6]) Rec. 1999, p. I-2459

(10) The Commission informed the Spanish Government of its decision by letter dated 16 February 2000 (SG(2000) D/101515).

(11) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([7]). The Commission invited interested parties to submit their comments on the re-analysis of the measures in the light of the Court judgment and, consequently, on the envisaged partial revocation of its Decision 97/21/ECSC, EC.

III. **Comments from interested parties**

(12) No comments were submitted by interested parties.

IV. **Comments from Spain**

(13) By letter dated 20 March 2000, the Spanish Government replied to the Commission's letter opening the procedure. The main points were as follows.

(14) The Spanish authorities disagreed with the decision of the Commission to open the formal investigation procedure inasmuch in their view the investigation procedure was not necessary to carry out the envisaged partial revocation of Decision 97/21/ECSC, EC.

(15) As regards the rescheduling agreements between the companies and the Social Security Treasury, the Spanish authorities did not support the view of the Commission that 'it seems probable that, in the case of out-of-court agreements concerned with or having the effect of rescheduling pre-existing debts, the logic of the creditor's behaviour would lead him to seek to obtain from the debtor a rate of interest on arrears that would be higher than the legal interest rate as compensation for not pursuing the recovery of the debt by legal means'. On the contrary, they claimed that, due to the financial situation of the company as well as costs, delay and uncertainty involved in legal proceedings, out-of-court agreements would frequently lead to agree an interest rate lower than the legal interest rate.

(16) Thus, the Spanish authorities reiterated their argument that the granting of deferments applying the legal interest rate protects the interests of the social security system, in terms of recovering debts, better than any other form of action that a private creditor could have taken.

(17) Moreover, the Spanish Government recalled that while a private creditor can agree any interest rate with the debtor, the Social Security authorities are bound by Article 20 of Social Security General Law ([8]) which lays down that the legal interest rate is to be applied in the rescheduling agreements of debt.

([7]) See footnote 2.
([8]) OBE 154, 20.6.1994, p. 20658.

(18) The Commission noted in the opening decision that the comparison of the terms contained in the private creditors' agreement in October 1993 and the terms of the rescheduling agreement between the Social Security authorities and the companies may not constitute a correct application of the 'private creditor' test as defined by the Court. In this respect, the Spanish authorities stated that due to legal constrains of public administration, circumstances of public creditors cannot be similar to those of private creditors indeed. However, they emphasised that despite the different circumstances, the agreements between the Social Security authorities/ Fogasa and the companies were not more favourable than those reached in the private creditors' agreement, on the contrary they were much less generous.

(19) Finally, the Spanish authorities reiterated the views expressed under the procedure which led to Decision 97/21/ECSC,EC and in their submissions to the Court.

V. **Assessment**

(20) It should be recalled that although the Court of Justice annulled only those parts of Decision 97/21/ECSC, EC relating to the measures granted to Tubacex, the Commission considers that the Court's analysis of the measures granted in favour of Tubacex in relation to Article 87(1) of the EC Treaty is fully applicable to the ECSC part of Decision 97/21/ECSC, EC in respect of the measures granted in favour of Acería de Álava. In order to safeguard the rights of Spain and all other interested parties, the Commission therefore signalled in its (re-)opening of the investigation proceedings that it would re-examine that part of the previous decision with a view to partially revoking it and to adopt a new decision on the basis of this re-assessment. The comments received under the procedure confirm that this approach is appropriate.

(21) The Commission must consider whether or not any of the elements deemed as incompatible with the common market set out in Article 1 of Decision 97/21/ECSC, EC constitute State aid within the meaning of Article 87(1) of the EC Treaty and Article 4(c) of the ECSC Treaty. If any such aid were found to exist, the Commission would then need to consider whether it was compatible with the common market.

(22) It should firstly be noted that the companies were already subject to the pre-existing statutory obligation to repay the wages advanced by Fogasa and to pay their debts in respect of social security contributions. The agreements in question did not therefore create any new debt owed by the companies to the public authorities. Thus, in the repayment agreements of Fogasa and in the rescheduling agreements of Social Security Fund, the State did not act as a public investor whose conduct must be compared to that of a private investor providing capital with a view to realising a profit but as a public creditor which, like a private creditor, may seek to recover sums due to it. Consequently, in assessing the contested State aid, the Commission has to compare the default rate of interest applied to the debts of the public creditor with the rate charged for the debts owed to private creditors acting in similar circumstances.

(23) However it should be noted that particular circumstances of debtors and creditors are likely to prove problematic for the determination of a common applicable behaviour of private creditors seeking to recover sums due to them. Consequently, the Commission has to base its assessment on an analysis of the behaviour of private creditors on a case by case approach.

(24) In this particular case the separate agreements between Fogasa and the companies and between Social Security and the companies did not accord the companies any more generous treatment than that reached in the private creditors' agreement reached in October 1993.

(25) However, the circumstances of those private creditors were not the same as those of public creditors because of their status, the securities provided,, etc. Consequently, the Commission considers that such a comparative approach does not constitute in this particular case a correct application of the 'private creditors' test as defined by the Court, which as it subsequently underlined in its judgment of 29 June 1999 in the DMT case (C-256/97) [9], supposes that the public creditors' behaviour under examination should be compared with that of a hypothetical private creditor finding himself, as far as possible, in the same situation.

(26) The Commission notes that Article 1108 of the Spanish Civil Code establishes that the legal interest rate is that one which applies for compensation of damage and harm when the debtor delays the payment and no determined interest rate has been agreed. In addition, Article 312 of the Spanish Commercial Law rules that in case of a loan in money and in the absence of any specific agreement between the parties, the debtor is obliged to repay the legal value (valor legal) of the debt at the time the repayment is done. Therefore, the legal interest rate would be the highest rate a private creditor could expect to obtain if he pursues the recovery of the debt by legal means.

(27) As a consequence, a private creditor could not have obtained from the debtor a rate of interest on arrears that would be higher than the legal interest rate as a compensation for not pursuing the recovery of the debt by legal means.

[9] Rec. 1999, p. I-3913.

(28) Finally, the particular circumstances of the companies at the time the rescheduling agreements with Fogasa and the Social Security Fund were made should be underlined. They had been in serious financial difficulties, resulting in the suspension of all debt repayments and serious doubts about their future existence. By not proceeding to execution and thereby possibly provoking the liquidation of the company, the public creditors acted in such a way as to maximise the prospects of recovering the debt.

(29) In the light of the above, the Commission can accept that in this particular case, by rescheduling and applying the legal interest rate to debts owed by the companies, Spain was seeking to maximise the recovery of the sums due to it without suffering any financial loss. Consequently, Spain acted as a hypothetical private creditor, which is in the same position vis-a-vis the companies, would have acted.

Conclusion

(30) In the light of the above, the re-assessment of the alleged aid deemed as incompatible with the common market by Decision 97/21/ECSC, EC leads to the conclusion that the repayment agreements between Fogasa and Tubacex and the debt rescheduling agreements between Social Security and Tubacex do not constitute State aid. The re-assessment leads to the same conclusion in relation to the agreements with Acería de Álava.

(31) Consequently, the Commission considers that it should amend its Decision 97/21/ECSC, EC accordingly.

HAS ADOPTED THIS DECISION:

Article 1

Decision 97/21/ECSC, EC is amended as follows:

1. Article 1 is replaced by:

'*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.'

2. Article 2 is revoked.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 31 October 2000.

For the Commission

Mario MONTI

Member of the Commission