COMMISSION DECISION

of 20 September 2000

amending Commission Decision 1999/395/EC on State aid implemented by Spain in favour of Sniace SA, located in Torrelavega, Cantabria

(notified under document number C(2000) 2741)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2001/43/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

I. BACKGROUND

A. Commission Decision 1999/395/EC [2]

(1) By its decision to open the procedure provided for pursuant to Article 88(2) of the Treaty regarding certain measures undertaken in favour of Sociedad Nacional de Industrias y Aplicaciones de Celulosa Espanola SA [3], (hereinafter 'Sniace'), the Commission expressed its doubts whether the repayment agreements between Sniace and the wages fund Fogasa and the rescheduling agreement between Sniace and the Social Security Treasury, among other measures, constituted compatible State aid within the meaning of the Article 87(1) of the Treaty.

(2) By its Decision 1999/395/EC, the Commission came to the conclusion that the treatment of Sniace's debts, through the abovementioned agreements, were not consistent with prevailing market conditions in so far as the rate of interest was below market rates. Accordingly, the Decision stated that, the abovementioned agreements were incompatible with the common market.

(3) Spain challenged Decision 1999/395/EC before the Court of Justice by application lodged at the Court Registry on 24 December 1998 (Case C-479/98). The Decision was also challenged by the beneficiary, Sniace, before the Court of First Instance by application lodged at the Court Registry on 24 August 1999 (Case T-190/99). Both cases are currently pending.

B. The judgment of the Court of Justice of the European Communities of 29 April 1999 in case C-342/96, *Spain* v. *Commission* [4], relating to State aid granted by Spain to Tubacex (hereinafter the 'Tubacex judgment')

(4) On 29 April 1999 the Court of Justice delivered its judgement in Case C-342/96 *Spain* v. *Commission* on State aid granted by Spain in favour of Tubacex (hereinafter the Tubacex judgment). The Court annulled Commission Decision 97/21/ECSC,EC [5], 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.

(5) In its ruling 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.

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

(7) The Court noted that in these repayment and rescheduling agreements, the State did not act as a public investor whose conduct must be compared with 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 owing to it.

(8) 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.

(9) Based on the above arguments, the Court annulled Decision 97/21/ECSC,EC to the extent that it declared the measures to be incompatible with the EC Treaty.

[1] OJ C 110, 15.4.2000, p. 33.
[2] OJ L 149, 16.6.1999, p. 40.
[3] OJ C 49, 14.2.1998, p. 2.
[4] [1999] ECR I-2459.
[5] OJ L 8, 11.1.1997, p. 14.

II. **PROCEDURE**

(10) Having reexamined its Decision 1999/395/EC in the light of the Tubacex judgment, the Commission decided to initiate the procedure laid down in Article 88(2) of the Treaty. The case was registered under C5/2000.

(11) The Commission informed the Spanish Government of its decision by letter dated 16 February 2000 (SG(2000) D/101521).

(12) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Communities* ([6]). The Commission invited interested parties to submit their comments on the re-analysis of the measures in the light of the Tubacex judgment and, consequently, on the envisaged partial revocation of its Decision 1999/395/EC.

III. **COMMENTS FROM INTERESTED PARTIES**

No comments were submitted by interested parties.

IV. **COMMENTS FROM SPAIN**

(13) By letter registered 19 April 2000 under A/33374, the Spanish Government replied to the Commission's letter opening the procedure. The main points were as follows.

(14) The Spanish authorities disagree with the decision of the Commission to open the formal investigation procedure inasmuch as in their view the investigation procedure was not necessary to carry out the envisaged partial revocation of Decision 1999/395/EC.

(15) As regards the rescheduling agreement between Sniace and the Social Security Treasury the Spanish authorities do 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 claim that, owing 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 agreeing an interest rate lower than the legal interest rate.

(16) Thus, the Spanish authorities reiterate 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 recalls that while a private creditor can agree any interest rate with the debtor, the Social Security authorities are bound by Article 20 of the Social Security General Laws ([7]) which states that the legal interest rate is to be applied in the rescheduling agreements of debt.

(18) The Commission considered in the opening decision that the comparison of the terms contained in the private creditors' agreement in October 1996 with the terms of the rescheduling agreement between the Social Security Treasury and Sniace may not constitute a correct application of the 'private creditor' test as defined by the Court. In this regard, the Spanish authorities stated that owing to legal constrains of public administration, the circumstances of public creditors cannot be similar to those of private creditors. However, they emphasise that in spite of the different circumstances, it should be noted that the agreements between the Social Security Treasury and Sniace and agreements between Fogasa and Sniace were less generous than those reached in the private creditors' agreement.

(19) Finally, the Spanish authorities reiterated the views expressed under the procedure which led to Decision 1999/395/EC.

V. **ASSESSMENT**

(20) 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 1999/395/EC constitute State aid within the meaning of Article 87(1) of the Treaty. If any such aid were found to exist, the Commission would then need to consider whether it was compatible with the common market.

(21) The factual and legal context of the Tubacex judgment is similar to the one raised by Spain before the Court of Justice in Case C-479/98 and by Sniace before the Court of First Instance in Case T-190/99 against Decision 1999/395/EC. The Commission considers that the arguments developed by the Court in this judgment are relevant with equal force to the agreements between Sniace and Fogasa and between Sniace and the Social Security Treasury which were deemed to contain State aid in Decision 1999/395/EC.

(22) It should firstly be noted that Sniace was already subject to the pre-existing statutory obligation to repay the wages advanced by Fogasa and to pay its debts in respect of social security contributions. The agreements in question did not therefore create any new debt owed by Sniace to the public authorities. Thus, in the repayment agreements of Fogasa and in the rescheduling agreements of the Social Security Treasury, the State did not act as a public investor whose conduct must be

([6]) See footnote 1.

([7]) BOE 154, 20.6.1994, p. 20658.

compared with 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 owing 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 owing 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 the particular case of Sniace, following an application made by the company in 1992, the Spanish Courts ordered suspension of payments in March 1993. By using their abstention rights ([8]), public creditors did not subscribe to the creditors agreement of October 1996 within the framework of the suspension of payments procedure agreement. As the Commission noted in the opening decision ([9]), by using their abstention rights, the public creditors were protecting their claims.

(25) The separate agreements between Fogasa and Sniace and between the Social Security Treasury and Sniace did not accord Sniace any more generous treatment than that reached in the private creditors' agreement.

(26) However, the circumstances of the private creditors were not the same as those of public creditors because of their status, the securities provided and abstention rights that the public institutions enjoyed. Consequently, the Commission considers that such a comparative approach does not constitute in this particular case a correct application of the 'private creditor' 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) ([10]), 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.

(27) The Commission notes that Article 1108 of the Spanish Civil Code establishes that the legal interest rate is that 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 money loan 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 made. Therefore, legal interest rate would be the highest rate a private creditor could expect to obtain if he pursued the recovery of the debt by legal means.

(28) 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.

(29) Finally, the particular circumstances of Sniace at the time the rescheduling agreements with Fogasa and the Social Security Treasury were made should be underlined. The company had been in serious financial difficulties, resulting in the suspension of all debt repayments and there were serious doubts about its future existence. As the Commission noted in its Decision 1999/395/EC, by not proceeding to execution and thereby possibly provoking the liquidation of the company, the Social Security Treasury acted in such a way as to maximise its prospects of recovering the debt.

(30) 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 Sniace, 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 would have done, *vis-a-vis* Sniace.

CONCLUSION

(31) In the light of the above, the reassessment of the alleged aid deemed as incompatible with the common market Decision 1999/395/EC leads to the conclusion that the repayment agreements between Fogasa and Sniace and the debt rescheduling agreement between the Social Security Treasury and Sniace do not constitute State aid.

(32) Accordingly, the Commission considers it appropriate to amend its Decision 1999/395/EC,

HAS ADOPTED THIS DECISION:

Article 1

Decision 1999/395/EC is hereby amended as follows:

1. The first subparagraph of Article 1 is replaced by the following:

'The following measures which Spain has implemented in favour of Sociedad Nacional de Industrias y Aplicaciones de Celulosa Española SA (Sniace) do not constitute State aid:

([8]) According to Spanish law, public institutions such as the Social Security Treasury enjoy the privilege of not subscribing to a creditors agreement.
([9]) See footnote 3.
([10]) [1999] ECR I-3913.

(a) the agreement of 8 March 1996 (as amended by the agreement of 7 May 1996) between Sniace and the Social Security Treasury to reschedule debts covering ESP 2 903 381 848 (EUR 17 449 676,34) in principal, as further amended by the agreement of 30 September 1997 to reschedule debts covering ESP 3 510 387 323 (EUR 21 097 852,72) in principal;

(b) the agreements of 5 November 1993 and 31 October 1995 between Sniace and the wage guarantee fund Fogasa covering ESP 1 362 708 700 (EUR 8 190 044,23) and ESP 339 459 878 (EUR 2 040 194,96) respectively'

2. Article 2 is revoked.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 20 September 2000.

For the Commission

Mario MONTI

Member of the Commission