II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 31 January 2001

on State aid implemented by Spain for the Fesa-Enfersa group (Fertiberia)

(notified under document number C(2001) 324)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/467/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1] and in particular Article 7(3) thereof,

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

Whereas:

I. PROCEDURE

(1) In the context of the assessment of State aid granted to Ercros [3], the Commission became aware of the existence of possible aid to Fesa-Enfersa (now Fertiberia), a fertiliser conglomerate in which Ercros had a majority stake until Grupo Villar Mir (a Spanish industrial group) took it over in April 1995 [4].

(2) By letter dated 12 May 1999, the Commission requested information on the aid that was thought to have been granted to Ercros and to the Fesa-Enfersa group. By letter dated 26 May 1999, the Spanish authorities asked for a 45-day extension of the deadline in order to compile a full file going back to 1992.

(3) After a reminder sent on 7 September 1999, the Spanish authorities submitted the requested information by letter dated 12 November 1999.

(4) The case was registered as an NN case on 15 November 1999.

(5) The Spanish authorities submitted further information by letters dated 11 January 2000, 14 January 2000, 3 February 2000 and 7 March 2000.

(6) By letter dated 16 June 2000, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the aid.

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(1) OJ L 83, 27.3.1999, p. 1.
(2) OJ C 315, 4.11.2000, p. 11.
(3) Decision of 20 July 1999 in Case NN62/99 (OJ C 62, 4.3.2000, p. 18). See also http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie/nn062-99.pdf.
(4) See in particular the ninth paragraph of point 2.2 of the Decision of 20 July 1999 cited in footnote 3.

(7) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([5]). The Commission invited interested parties to submit their comments on the aid.

(8) By letters dated 26 July 2000, 27 July 2000, 12 December 2000 and 24 January 2001, Spain submitted its comments.

(9) The Commission received no comments from interested parties.

II. DETAILED DESCRIPTION OF THE AID

II.1. The Fesa-Enfersa group

(10) In 1989 Explosivos Río Tinto SA and Sociedad Anónima Cros merged to form Ercros SA. Before merging, they put together their fertiliser assets in a newly created entity called Fesa Fertilizantes Españoles SA ('Fesa'). Ercros was Fesa's sole shareholder.

(11) In the same year Ercros acquired State-owned Empresa Nacional de Fertilizantes SA ('Enfersa'), another fertiliser manufacturer. Subsequently Fesa became Enfersa's sole shareholder. The resulting conglomerate was known from then on as the Fesa-Enfersa group.

(12) In 1992 Fesa-Enfersa filed for insolvency in the context of extremely adverse market conditions in the European fertiliser sector. It was suffering from serious liquidity problems. The company was declared insolvent on 4 December 1992 by Madrid Court of First Instance No 64, with liabilities amounting to ESP 117 000 million and losses of ESP 20 000 million.

II.2. Restructuring of the group and creation of Fertiberia

(13) A first restructuring plan was submitted in December 1992 in the context of the insolvency proceeding. It provided for a drastic reduction in capacity and workforce.

(14) The plan was subsequently developed and finalised in the period 1993 to 1994.

(15) On 14 June 1993 a composition was concluded with Fesa-Enfersa's creditors.

(16) On 20 July 1993, and in accordance with the restructuring plan, Fesa-Enfersa set up a subsidiary, Fertiberia SL, with its viable assets. Fertiberia SL did not take over any of Fesa-Enfersa's debts. The latter remained as a liability-bearing company.

(17) In 1995 the family-owned Grupo Villar Mir took control, through its affiliate company Inmobiliaria Espacio SA, of the Fesa-Enfersa group by acquiring 53,60 % of its capital for an amount of ESP 720 000. The purchase included Fesa-Enfersa's subsidiary Fertiberia SL. Grupo Villar Mir also took an option to acquire a further 20 % of Fesa-Enfersa's capital, which it exercised in 1997 by paying ESP 261 270 000.

(18) In 1997 Fesa-Enfersa, following its restructuring, merged with Fertiberia SL and became Fertiberia SA ('Fertiberia'). Today, Grupo Villar Mir owns 99,35 % of Fertiberia's capital.

(19) The Fesa-Enfersa group (now 'Fertiberia') is the main fertiliser manufacturer in Spain and is one of the 10 largest players on the European market. Its installed capacity represents 8,6 % of total installed capacity in western Europe.

(20) In 1997 Fertiberia employed 1 900 workers and generated turnover of ESP 73 900 million, with profits of ESP 1 727 million. In 1998 sales amounted to ESP 70 200 million and the company made a loss of ESP 127 million. According to the information provided by the Spanish authorities, Fertiberia suffered a loss of ESP 6 000 million in 1999, but again recorded profits of ESP 350 million in 2000.

(21) Fertiberia is not a small or medium-sized enterprise ('SME') within the meaning of the Community guidelines on State aid for small and medium-sized enterprises ([6]).

(22) Fertiberia has plants at Lleida, Sagunto, Cartagena, Puertollano, Seville, Huelva, Palos, Avilés and Luchana Barakaldo. With the exception of the one at Lleida, all the plants are located in assisted areas.

([5]) See footnote 2.

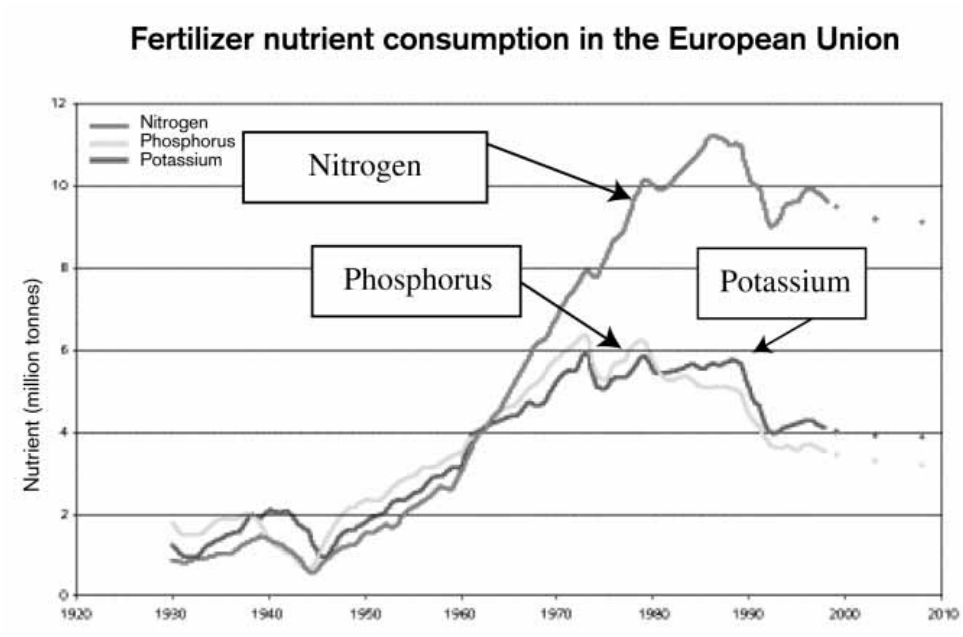
([6]) OJ C 213, 19.8.1992, p. 2.

II.3. **Evolution of the fertiliser sector and restructuring of the European industry** (7)

II.3.1. *Fertiliser consumption*

(23) Fertiliser consumption in Europe showed strong sustained growth from the 1950s until the mid 1980s in the context of intensive and increasing agricultural output. The energy crisis caused only temporary dips in production that did not affect the upward trend. In the early 1990s there was a sharp fall in demand following the 1992 reform of the common agricultural policy and the introduction of a more liberal import regime.

(24) The following figure shows that, after a sharp fall in demand in the early 1990s, the fertiliser market recovered during the period in which the restructuring took place:



(Source: EFMA)

II.3.2. *The crisis in the early 1990s*

(25) Between 1985 and 1995, the restructuring of the Community fertiliser industry resulted in the number of major fertiliser producers falling from approximately 30 to 10 and the workforce from 100 000 to 40 000. Capacity was also cut back considerably. During this drastic restructuring process, the Community fertiliser industry reduced nitrogen fertiliser capacities by 25 % and phosphate fertiliser capacities by 33 %. Some 66 plants were permanently closed and the workforce was halved. In this context of lower prices and reduced volumes, the whole industry suffered heavy losses.

(26) The total cost of the restructuring is estimated to have been some EUR 1,5 to 2 billion. The plants which remained in operation were modernised, and logistics and sales units were streamlined in order to improve competitiveness and adapt to changes in supply and demand.

II.3.3. *Recovery in the mid 1990s*

(27) The reduction in fertiliser capacity and the partial recovery in fertiliser demand in the Community resulted in a more balanced supply and demand situation in the period following the restructuring, which led to an improvement in capacity utilisation and a reduction in unit costs. Having experienced heavy losses in 1992 and 1993 and a break-even situation in 1994, the industry was finally able to report profits in 1995 (a 10 % gross return before tax).

(7) This section is based on research undertaken by the European Fertiliser Manufacturers Association (EFMA). See in particular the studies Forecast of Food, Farming and Fertiliser Use in the European Union 1999 to 2009 and The Fertiliser Industry of the European Union, which may be consulted on the EFMA's website www.efma.org/publications/.

II.3.4. *Further fall in consumption*

(28) However, the industry's current forecasts indicate a decline in nitrogen consumption in the Community to a level of 9,17 million tonnes by the 2005/2006 marketing year. This represents a reduction of 5,2 % when compared with the consumption level of 1995/1996. According to the EFMA, the main factor influencing this forecast is the new reform of the common agricultural policy. The Agenda 2000 proposals include the following key measures:

— 10 % compulsory set-aside to 2006,

— intervention price for cereals cut by 15 %,

— dairy reform postponed to 2006,

— rural development policy decentralised.

II.3.5. *New wave of restructuring in the fertiliser industry*

(29) Total fertiliser deliveries to the most important markets in western Europe increased by approximately 3 % in 1999/2000 compared with the 1998/1999 season. The increase occurred in a period of very low prices (20 % lower on average than in the previous season). As a result of the lower price levels, most major European fertiliser producers decided to carry out restructuring measures. In the words of the industry itself, '1999/2000 was probably the most difficult and challenging year in the history of the fertiliser industry. Dramatic losses were incurred in 1999; only 1993 had seen worse results. [...] The losses [EUR 500 million] were not due to operating costs alone; a major part could be attributed to the industry's restructuring efforts' ([8]).

(30) In this context, two leading companies in the sector, Norsk Hydro and Kemira (respectively 34,1 % and 11,1 % of installed capacity in Europe) unveiled plans to restructure their fertiliser activities ([9]).

II.3.6. *Norsk Hydro*

(31) On 7 March 2000 Norsk Hydro presented its plans to downsize its European fertiliser business and close 1 million tonnes of nitrate fertiliser production capacity. This represents about 20 % of Hydro's total nitrate production capacity and plays an important part in the company's efforts to restore the profitability of its fertiliser business. The cuts, which are to be made in the first half of 2001, will affect between 500 and 600 jobs. Norsk Hydro's fertiliser business incurred an operating loss of 318 million in 1999; the corresponding loss in 1998 was EUR 72 million.

II.3.7. *Kemira Agro*

(32) In 1999 Kemira Agro's operating income fell significantly, with the company recording a loss of EUR 39 million. Prices of plant nutrients fell further, by 5 to 15 %, particularly within nitrogen fertilisers in western Europe, and ended at an all-time low. Kemira Agro announced its decision to focus on speciality fertilisers and to withdraw partly or completely from the nitrogen fertiliser business. As a result, NPK fertiliser production was wound up at Pernis in the Netherlands.

II.3.8. *Fertiberia*

(33) According to the information provided by the Spanish authorities, Fertiberia has undertaken restructuring measures which involve stopping nitrate production at Cartagena (260 000 tonnes), closing a urea plant at Huelva (75 000 tonnes) and closing three plants producing sulphuric acid also at Huelva. As a result, 160 jobs have been cut. The cost of the restructuring amounts to EUR 78 million, which, according to the information provided by the Spanish authorities, has been exclusively financed by the company without any support from the State.

(34) As a result of the restructuring measures taken by Fertiberia, Spain has informed the Commission that the company will record profits of ESP 350 million in 2000 (based on the 3/4-year results).

II.4. **Fesa-Enfersa's restructuring plan and aid measures granted in this context (period 1992-1997)**

(35) As indicated in point 13 above, a first restructuring plan was presented in December 1992 in the context of the insolvency proceeding. It provided for a drastic reduction in capacity and workforce. The plan was subsequently developed and finalised in the period 1993-1994 and implemented over the period 1992-1997.

([8]) EFMA Annual Review 1999-2000, p. 9.

([9]) See these companies' websites: http://www.hydro.com and http://www.kemira.com.

(36) The restructuring plan was aimed at returning the company to profitability by the end of the period 1992–97. It comprised the following measures:

Restructuring cost

(ESP 000 million)

Investments	9,9
Composition with creditors and redundancy payments	4,073
Pension rights	9,927
Reconstruction of working capital	20,058
Total	**43,958**

The funds labelled 'Reconstruction of working capital' were intended both to provide such capital and to cover the liquidity requirements during the restructuring period.

(37) The shareholder's contribution was set at ESP 4 000 million. An American industrial investor with whom talks were being held for a takeover of Fesa-Enfersa, but who was unwilling to assume the group's liabilities, was to provide an additional amount of between ESP 5 000 million and ESP 7 000 million. Those talks were broken off in early 1995 when a new private investor, Grupo Villar Mir, made an offer to take over Fesa-Enfersa. Grupo Villar Mir decided to make investments amounting to ESP 19 500 million over the period 1995-1999.

(38) The restructuring plan involved 1 487 redundancies and an average reduction of 49,3 % in existing capacity.

(39) The private investor (Grupo Villar Mir) that acquired Fesa-Enfersa in 1995 agreed to pay a total of ESP 262 million for the group. According to the Spanish authorities, Grupo Villar Mir also agreed not to demand dividends amounting to ESP 6 000 million over the period 1995-1998. However, when the Commission decided to initiate the procedure, Spain had not submitted conclusive evidence that the aid recipient had contributed significantly to the restructuring plan from its own resources.

(40) The group's results evolved as follows over the restructuring period (1993-1997):

(ESP 000 million)

YEAR	Profits/(Losses)
1993	(24 654)
1994	(7 431)
1995	(615)
1996	4 325
1997	1 727
1998	(127)
1999	(6 000)
2000	350

(41) According to the Spanish authorities, the losses incurred by Fertiberia in 1998 and 1999 correspond to a change in business conditions due mainly to the impact of the Agenda 2000 reforms on the common agricultural policy coupled with the acute crisis in south-east Asia, traditionally a net fertiliser importer. The Spanish authorities claim that these events could not be anticipated at the time most of the restructuring plans were drafted in the early 1990s. The situation triggered a new wave of restructuring among the major European manufacturers. Fertiberia itself is currently implementing a restructuring plan involving the closure of more plants as well as further job cuts. As a result, the company returned to profit (to the tune of ESP 350 million) in 2000. The Spanish authorities have confirmed that they do not intend to grant any more State aid and that the current restructuring will be implemented by the company using exclusively its own resources.

II.5. State measures in the context of Fesa-Enfersa's restructuring (period 1992-1997)

(42) The state measures were as follows.

(43) Three short-term loans were granted by the State-owned Instituto de Crédito Oficial ('ICO') to Fertiberia SL, as follows:

Date	Amount (Esp 000 Million)	Interest Rate
25 October 1993	6 400	16,25 %
14 June 1994	4 175	11,50 %
29 July 1994	2 538	11,50 %

(44) These loans were to cover working capital requirements during the initial phase of the group's restructuring. In December 1994 they were converted into non-interest-bearing equity loans, with their repayment being linked to a percentage of the company's cash flow ([10]). In the event of the company becoming insolvent, these loans were to be repaid after all other creditors had been satisfied but before shareholders received any payment. In January 1996 the terms of the loans were amended so that their repayment was no longer linked to the cash flow but to profits ([11]). As from December 1997, the loans were required to be repaid in fixed annual instalments until 2030 irrespective of the level of profits.

(45) Two further non-interest-bearing equity loans totalling ESP 10 500 million were granted to Fertiberia SL by the ICO in November and December 1994 to cover working capital requirements (ESP 5 000 million) and Fesa-Enfersa's debts (ESP 5 500 million). As from December 1997, these loans were required to be repaid in fixed annual instalments until 2030 irrespective of the level of working capital.

(46) An equity loan of ESP 1 500 million was granted by the ICO to Grupo Villar Mir in 1995. As from 1997, that loan was required to be repaid in fixed annual instalments.

(47) Lastly, under the composition with creditors, the latter waived a proportion of their claims. Out of a total of ESP 71 000 million, the private creditors, including Fesa-Enfersa's parent company, banks and suppliers, waived ESP 47 000 million, representing 66 % of their claims. The public creditors (Treasury, Social Security and the State-owned ICO) waived ESP 32 400 million out of a total of ESP 46 300 million, i.e. 69 % of their claims. The Treasury's claims were not covered by the State's 'abstention right' ([12]); the Social Security administration did not use its abstention right.

III. GROUNDS FOR INITIATING THE ARTICLE 88(2) PROCEDURE

(48) In its decision to initiate the formal investigation procedure laid down in Article 88(2) of the Treaty, the Commission, after its preliminary assessment, took the view that the only Community guidelines applicable in this case, in relation to the loans granted by the ICO, were the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([13]) (the 'restructuring aid guidelines').

(49) The Commission also voiced its concerns that the behaviour of the Treasury and the Social Security administration in the context of the Fesa-Enfersa group's insolvency could involve an element of State aid. The Spanish authorities explained that they did not exercise their abstention right because, in the absence of any assets that were free of charge, it was more advantageous for the State to take part in the composition with creditors. However, Spain had not produced any concrete evidence that this was the case or that the State recovered a higher proportion of its claims than it would have obtained otherwise.

(50) The restructuring aid guidelines set out certain conditions for the authorisation of aid by the Commission.

([10]) This was 25 % of the annual cash flow exceeding ESP 3 000 million, with a maximum limit of 5 % of the annual cash flow.

([11]) 15,55 % of profits before taxes.

([12]) Under Spanish bankruptcy law, the 'abstention right' is the privilege enjoyed by the State to opt not to be bound by the composition with creditors with regard to some of its claims.

([13]) OJ C 288, 9.10.1999, p. 2. Under point 101 of these new guidelines, the Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation on the basis of the new guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Communities* and on the basis of the guidelines in force at the time the aid is granted in all other cases. Since all the aid under examination in this case was granted before such publication, the applicable version is the Community guidelines on State aid for rescuing and restructuring firms in difficulty published in OJ C 368, 23.12.1994, p. 12. As some of the aid measures were granted before the latter guidelines were published, those measures must be assessed on the basis of the Commission's policy on State aid for rescuing and restructuring firms in difficulty as published in 1979 in the Eighth Report on Competition Policy.

(51) The preliminary assessment of the above measures in the light of the conditions laid down in the restructuring aid guidelines showed that:

(a) *Restoration of the company's viability*

(52) The Commission has, for all individual aid measures, to endorse the corresponding restructuring plan after assessing its potential to restore the company's long-term viability.

(53) The Commission noted when initiating the Article 88(2) procedure that Spain had not submitted the projected profit and loss accounts for the restructuring periods with estimated returns on capital and a sensitivity study based on several scenarios. The Spanish authorities only provided in their notification *ex post* profit and loss accounts for the same period.

(54) The Commission also noted that Fesa-Enfersa returned to profit in 1997, as forecast in the restructuring plan. However, Fesa-Enfersa had again been incurring increasing losses since 1998.

(55) The Commission concluded that, in the absence of detailed financial planning documents, an analysis of the different scenarios and a risk analysis, it could not endorse the plan drawn up in December 1992, subsequently developed and finalised in the period 1993 to 1994 and implemented over the period 1993 to 1997.

(b) *Proportionality of the aid*

(56) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. However, Spain had not submitted conclusive evidence that the aid beneficiary contributed significantly to the restructuring plan from its own resources.

(57) With regard to the above two conditions, the main conclusions were as follows: given the uncertainty as to restoration of the company's viability and in view of the questions arising concerning the type of significant contribution made by the aid beneficiary to the restructuring plan from its own resources, the aid measures in question did not appear to fulfil the minimum conditions laid down in the restructuring aid guidelines.

(58) In the light of the foregoing, the Commission took the view that:

— the measures in question involved State aid,

— they had been granted in breach of the notification obligation laid down in Article 88(3) of the Treaty, and

— there were doubts as to their compatibility with the common market.

IV. **COMMENTS FROM SPAIN**

(59) The observations submitted by Spain can be summarised as follows.

IV.1. **Behaviour of the Spanish State in the context of the insolvency proceeding**

(60) First, the proportion of claims waived by private creditors (66 %) was, globally speaking, slightly lower than the proportion waived by the public creditors (70 %).

(61) However, Spain claims that all creditors, private and public, waived their rights on the basis of the same percentages (ranging from 10 % to 99 %) which were applied to the same tranches of debt (i.e. for the tranche ESP 1-100 000, a 10 % waiver; for the tranche ESP 10 000-10 million, a 40 % waiver; for the tranche ESP 10 million-50 million, an 80 % waiver; for the tranche above ESP 50 million, a 99 % waiver or, alternatively, its conversion into capital). Some private creditors (such as Ercros or Grupo Torras) waived even higher percentages of claims than the Treasury or the Social Security administration.

(62) As regards the decision by the Spanish State not to use its abstention right, Spain stated that if it had done so it would not have received any payment given that the net value of Fesa-Enfersa's only asset at the time the composition with creditors was signed was insufficient to meet any claim. The Spanish State therefore did not waive any collateral representing economic value.

IV.2. **Restoration of viability**

(63) Spain forwarded a copy of the restructuring plan together with an analysis thereof. The analysis examines the methodology and commercial assumptions of the restructuring plan and makes observations on the financial projections over the period 1995-2000. It also includes a sensitivity study based on several scenarios. The analysis reaches the conclusion that the restructuring plan could ensure the company's viability.

(64) The analysis was based on two main scenarios:

(a) Reduction of the cash flow: this reduction can result from variations in the structure and situation of the fertiliser market as well as from variations in the structure of Fesa-Enfersa's costs. The sensitivity study yielded the following cash flow/sales ratio:

	1995	1996	1997-2000
Restructuring plan	10,6 %	11,5 %	12,3 %
Sensitivity study scenario	8,3 %	9,1 %	10 %

The impact of these projections was a reduction in the profit/sales ratio of between 3,5 % and 2 % and slight losses. These variations were not likely to affect the company's profitability.

(b) Early reimbursement of debts: in this scenario, it was assumed that Fertiberia had to reimburse early, in 1995, debts amounting to ESP 12 000 million. Such a scenario would result in extraordinary expenditure of ESP 10 000 million in 1995. A cash-flow deficit by the end of 1995 would require short-term borrowing of ESP 2 000 million for a period of one year. This projection shows that the company could continue to operate despite having a considerably reduced cash flow. By 2004, the cash flow would be ESP 12 000 million instead of ESP 24 600 million. This would not compromise the company's profitability.

(65) Lastly, Spain confirmed that the company returned to profit (to the tune of ESP 350 million) in 2000. The losses incurred in 1998 and 1999 were due, according to the Spanish authorities, to external circumstances that could not have been anticipated at the time the restructuring plan was drawn up. Moreover, the company undertook fresh restructuring without using state resources.

IV.3. **Contribution by the private investor**

(66) Spain confirmed that Fertiberia was fulfilling all the commitments entered into under the composition with creditors.

(67) Spain recalled that the new private investor, Grupo Villar Mir, had submitted an offer to take over Fesa-Enfersa; it had decided to make investments amounting to ESP 19 500 million over the period 1995 to 1999. Spain submitted, together with its observations, a certified statement to the effect that Inmobiliaria Espacio had supplied guarantees to five private banks to cover loans to Fertiberia totalling ESP 12 500 million.

V. **ASSESSMENT OF THE AID**

(68) The Fesa-Enfersa group was, and continues to be, a European-scale market player. The measures described improved the financial position of the Fesa-Enfersa group and, therefore, were likely to have an impact on the economic position of competitors in other Member States and hence affect trade between Member States. Consequently, the measures may distort or threaten to distort competition and affect trade between Member States.

V.1. **Three short-term loans and two equity loans granted by the ICO**

(69) The ICO is a State-owned company within the meaning of Article 6(1)(b) of the General Budget Law (approved by Royal Legislative Decree 1091/1988 of 23 September 1988) ([14]). Its objectives and operations are regulated by the Sixth Additional Provision of Royal Decree-Law 12/1995 of 28 December 1995 on urgent budget, tax and financial measures ([15]). Its financial resources therefore constitute State resources within the meaning of Article 87(1) of the Treaty.

(70) Since the ICO is a State-owned bank, any transfer of resources from the ICO to a company involves a transfer of State resources within the meaning of Article 87(1) of the Treaty.

(71) The purpose of these loans was to cover the capital and liquidity requirements of the Fesa-Enfersa group. The three short-term bridging loans were granted to Fesa-Enfersa through Fertiberia SL, a vehicle set up with the aim of implementing the group's restructuring plan.

([14]) Spanish Official Gazette No 234, 29.9.1988, p. 28406.
([15]) Spanish Official Gazette No 312, 30.12.1995, p. 37519.

(72) The three bridging loans totalling ESP 13 113 million were granted on market terms and were covered by an appropriate security (mortgage). Under certain conditions, a State measure of this nature could be deemed to constitute rescue aid within the meaning of the restructuring aid guidelines ([16]), but the Commission has not found any State aid element in the measure. However, the three bridging loans were subsequently converted into equity loans. That conversion as well as the terms of the new loans (non-interest-bearing equity loans with no reimbursement date) can be deemed to constitute restructuring aid. The conversion was directly linked to the implementation of the restructuring plan. The Commission will therefore base its examination of these loans on the criteria for assessing restructuring aid.

(73) Equity loans can be defined as loans which, in the event of the insolvency of the debtor company, are repaid after all other creditors have been satisfied but before shareholders receive any payment. Such loans are frequently made by public authorities. As regards the nature of equity loans, the question has been raised whether they should be included under liabilities in the balance sheet. The Contact Committee for the Directives on Accounting took the view that equity loans should be included under 'Creditors' and not under 'Capital and reserves' ([17]). This view was confirmed in the Interpretative communication concerning certain Articles of the Fourth and Seventh Council Directives on accounting ([18]).

(74) In 1994, in the context of the restructuring of Fesa-Enfersa, the three bridging loans were converted into non-interest-bearing equity loans with no reimbursement date. In the same year, two further equity loans totalling ESP 10 500 million were granted to Fertiberia SL to cover the company's cash-flow requirements and settle some of Fesa-Enfersa's outstanding debts.

(75) The conversion of the three bridging loans and the grant, also in 1994, of two further equity loans on the same terms can be deemed to involve elements of State aid.

([16]) See footnote 13.

([17]) See Accounting harmonisation in the European Communities. Problems of applying the Fourth Directive on the annual accounts of limited companies, Luxembourg, 1990, page 14. See also the definition of subordinated liabilities in Article 21 of Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

([18]) See document XV/7009/97-EN, point 2.3.3, page 5.

(76) Considering the situation of Fesa-Enfersa at the time the loans were granted, the aid element in a non-interest-bearing loan with no repayment date, which in the event of insolvency is to be repaid after all other creditors have been satisfied but before shareholders receive any payment, is equivalent to the amount of the loan. In the present case, the total amount of aid involved in the five loans is therefore ESP 23 613 million. The amendments made to the repayment terms in 1996 and 1997 do not alter this assessment since the establishment of a timetable for repayment (running until the year 2030) could have the effect of only marginally reducing the total amount of aid.

(77) This analysis was not contested by the Spanish authorities in their response to the decision initiating the procedure laid down in Article 88(2) of the Treaty. The Commission therefore confirms the view it took of these loans in its decision to initiate the procedure in the present case.

V.2. Equity loan granted to Inmobiliaria Espacio to increase Fertiberia SL's capital

(78) In 1995 an equity loan amounting to ESP 1 500 million was granted to Immobiliaria Espacio to enable Grupo Villar Mir, the new investor, to increase Fertiberia SL's capital in the context of the restructuring of Fesa-Enfersa, thereby strengthening the fertiliser group's position. The terms were similar to those laid down for the abovementioned equity loans.

(79) Considering the situation of Fesa-Enfersa at the time the loan was granted, the aid element in a non-interest-bearing loan with no repayment date, which in the event of insolvency is to be repaid after all other creditors have been satisfied but before shareholders receive any payment, is equivalent to the amount of the loan (ESP 1 500 million).

V.3. Behaviour of the Spanish State in the context of the composition with creditors

(80) By participating in the composition with creditors, the State institutions (the Treasury, the Social Security administration and the ICO) secured 30 % of their claims, while the private creditors recovered 33 % of their claims. The precise figures are shown in the following table:

(in ESP million)

Creditors	Amount of claim	Amount waived
Private creditors	71 039	47 161
Treasury and Social Security	26 671	18 631
ICO	19 702	13 794

(81) It should be noted here that in the Ercros case the Treasury and the Social Security administration did use their abstention right in the context of the insolvency proceeding. Accordingly, they were not bound by the composition agreement signed by Ercros's creditors. Unlike the claims covered by the composition, the State's claims were not reduced. If the State had accepted the composition it would, according to the information submitted by the Spanish authorities, have had to waive 98,6 % of its claims. In its Decision of 20 July 1999 ([19]), the Commission therefore concluded that the Spanish State had acted as a private creditor would have done in similar circumstances, and that, accordingly, its action did not involve any aid.

(82) In the present case, neither the Treasury nor the Social Security administration used their respective abstention rights.

(83) The Commission has examined the observations submitted by the Spanish authorities and has come to the conclusion that the behaviour of the Spanish State in the context of Fesa-Enfersa's insolvency did not involve any element of State aid, for the reasons set out below.

(84) The Court of Justice of the European Communities confirmed in Magefesa ([20]) that measures taken by the State in the context of insolvency proceedings may in certain circumstances involve elements of State aid.

(85) In the context of an insolvency proceeding, the State does not act as a public investor. Its conduct cannot therefore be compared to that of a private investor laying out capital with a view to making a profit in the relatively short term. The Commission must rather examine whether the State has acted as a diligent private creditor trying to maximise the chances of recovering its claim.

(86) As the Court held in Tubacex ([21]), a good test is to compare the behaviour of the State with the behaviour of the private creditors. This approach was confirmed by the Court in DMT ([22]), in which it stated that the public creditor must be compared 'with a hypothetical private creditor which, so far as possible, is in the same position vis-à-vis its debtor as the (public creditor) and is seeking to recover the sums owed to it' (paragraph 25 of the judgment).

(87) There are two relevant facts to be taken into consideration in assessing the behaviour of the Spanish State:

(i) the State did not make use of its abstention right in the context of the insolvency proceeding; and

(ii) the State, together with the private creditors but under different conditions, agreed to waive a substantial proportion of its claims.

(88) The Commission has examined, first, whether the decision of the Spanish State not to exercise its abstention right means that the entire amount of the debt waived constitutes State aid. The Spanish authorities have shown that the net value of Fesa-Enfersa's only asset (the plants) at the time the composition with creditors was concluded was zero. If Fesa-Enfersa had been liquidated, the Spanish State would very likely not have received any payments at all. It therefore did not waive any collateral representing economic value.

(89) The Commission can thus conclude that the Spanish State acted in the same way as a diligent private creditor trying to recover its claim would have done in similar circumstances.

(90) Nevertheless, it is not sufficient to demonstrate the overall advantages of the agreement reached in order to show that the requirements of the private creditor principle have been fulfilled: it also has to be established that the State and the private creditors were afforded equal treatment. There must therefore be a second stage in the analysis to determine whether the amounts paid to the State in return for waiving a proportion of its claims are similar to those received by the private creditors.

(91) The information submitted by Spain shows that:

— the amount waived by the private creditors (66 %) was, globally speaking, slightly lower than that waived by the public creditors (70 %),

— however, under the composition agreement submitted by the Spanish authorities, all creditors, private and public, waived their claims on the basis of the same percentages (ranging from 10 % to 99 %) which were applied to the same tranches of debt (i.e. for the tranche ESP 1-100 000, a 10 % waiver; for the tranche ESP 100 000-10 million, a 40 % waiver; for the tranche ESP 10 million-50 million, an 80 % waiver; for the tranche above 50 million, a 99 % waiver or, alternatively, its conversion into capital). Some private creditors (such as Ercros or Grupo Torras) waived even higher percentages of their claims than the Treasury or the Social Security administration,

([19]) See footnote 3.
([20]) Judgment of 12 October 2000 in Case C-480/98 Spain v Commission, not yet published. A provisional non-authentic version of the judgement can be found on the Court's website at http://curia.eu.int.
([21]) Judgment of 29 April 1999 in Case C-342/96 Spain v Commission [1999] ECR I-2459.
([22]) Judgment of 29 June 1999 in Case C-256/97 Déménagements-Manutention Transport SA (DMT) [1999] ECR I-3913.

— moreover, the amount of the private debt (ESP 71 000 million) was substantially higher than the amount of public debt (ESP 463 000 million, in taxes, social security contributions and payments due to the ICO).

(92) The Commission therefore concludes that the State was treated on an equal footing with the private creditors, since both were subject to the same terms as regards the waiver of their claims.

(93) No State aid element has thus been identified in the behaviour of the Spanish State in the context of Fesa-Enfersa's insolvency.

V.4. **Assessment of compatibility**

(94) As the aid measures, amounting to ESP 25 113 million, were not granted under an authorised aid scheme, the Commission has to assess their compatibility with the common market directly in the light of Article 87 of the Treaty.

(95) Article 87(1) provides that, save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

(96) Article 87 of the Treaty allows exceptions to the principle that State aid is incompatible with the common market. The exceptions in Article 87(2) could serve as a basis for considering the aid compatible with the common market. However, the aid measures under examination neither have a social character nor are granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences, nor are they granted to the economy of certain areas of Spain. The above exemptions are not therefore applicable in the present case.

(97) As regards the exceptions provided for in Article 87(3)(b) and (d), the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the Spanish economy, nor does it display the features of projects of that kind; nor is it intended to promote culture or heritage conservation.

(98) Further exceptions for regional aid are provided for in Articles 87(3)(a) and c). The aim of the aid measures under examination was, however, to support the production of fertilisers and not to promote the economic development of certain areas of Spain. Neither did the Spanish authorities maintain, in the various replies they transmitted to the Commission, that the measures constituted regional aid. The Commission is therefore assessing the measures on the basis of the exception provided for in Article 87(3)(c) of the Treaty. The Commission's assessment of aid to favour the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, is governed by specific Community guidelines.

(99) The Commission considers that the only Community guidelines applicable in this case are the Community guidelines on State aid for rescuing and restructuring firms in difficulty. Indeed there is no doubt that Fesa-Enfersa underwent very substantial restructuring.

(100) The restructuring aid guidelines set out certain conditions for the authorisation of aid by the Commission.

(101) The assessment of the above measures in the light of the conditions laid down in the restructuring aid guidelines shows that:

(a) *Eligibility of the firm*

(102) The Commission considers it sufficiently proven that the Fesa-Enfersa group qualifies as a company in difficulty within the meaning of the restructuring aid guidelines. As indicated in point 12 above, in 1992 Fesa-Enfersa filed for insolvency in the context of extremely adverse market conditions in the European fertiliser sector. It was suffering from serious liquidity problems. The company was declared insolvent on 4 December 1992 by Madrid Court of First Instance No 64, with liabilities amounting to ESP 117 000 million and losses of ESP 20 000 million.

(b) *Restoration of viability*

(103) The Commission must, for all individual aid measures, endorse the corresponding restructuring plan after assessing its potential to restore the company's long-term viability.

(104) On the basis of the information referred to in points 63, 64 and 65 above, the Commission considers that the Spanish authorities have submitted sufficient evidence that the restructuring plan included the projected profit and loss accounts for the restructuring periods with estimated returns on capital as well as a sensitivity study based on several scenarios including a risk analysis. Moreover, Spain has pointed out that Fesa-Enfersa returned to profit in 1997, that is to say before the end of the restructuring period (1992-1997). The restructuring plan fulfilled the condition that the aid must restore the long-term viability of the firm within a reasonable timescale.

(105) Spain has further claimed that the losses incurred by Fertiberia in 1998 and 1999 correspond to a change in business conditions which is mainly due to the impact of the Agenda 2000 reforms on the common agricultural policy coupled with the acute crisis in south-east Asia, traditionally a net fertiliser importer. This position is supported by the views recently expressed by the sector.

(106) At its annual meeting on 26 October 2000, the EFMA's General Assembly discussed the dramatic losses (EUR 500 million) suffered in 1999 by the western European fertiliser industry: worse results had only ever been recorded in 1993 ([23]). Consequently, towards the end of 1998, EFMA members began to embark on ambitious restructuring programmes ([24]). By the end of 2000, some 30 plants will have been closed, production will have ceased completely at 13 sites around Europe, and some 4 000 jobs will have been lost.

(107) Although the industry began to show better results, thanks in part to Community measures to control the dumping of fertiliser products from eastern Europe, profitability continued to be negatively affected by massive increases (more than 85 %) in the price of gas, which can represent up to 65 % of total manufacturing costs.

(108) According to the EFMA, a better and more secure future will involve improving access for EFMA members to more competitively priced gas supplies and the correction of distortions in gas and fertiliser markets, especially those in the former Soviet Union.

(109) Page 8 of the EFMA Annual Review 1998-1999 ([25]) indicates that additional events took place which could not have been foreseen and which had a major impact on the European fertiliser industry.

(110) The factors which contributed to these European market conditions are both internal to Europe and also a result of worldwide trends and events. World urea markets continued to be depressed throughout 1998. This was caused by a combination of factors including the ban on urea imports imposed by China in 1997, the fall in Indian imports, the commissioning of new export capacities and the high level of exports from the former Soviet Union.

(111) This depression affected all sectors of the nitrogen industry but had a particular impact on the western European market. Given the state of the world markets, it became more and more difficult for European producers to use exports as a safety valve. At the same time import pressure, in particular from the former Soviet Union countries, did not ease.

(112) Against this background Fertiberia undertook further restructuring measures, which involved stopping nitrate production at Cartagena (260 000 tonnes), closing a urea plant at Huelva (75 000 tonnes) and closing three plants producing sulphuric acid also at Huelva. As a result, 160 jobs were cut. The cost of this restructuring amounts to EUR 78 million, which, according to the information provided by the Spanish authorities, has been financed exclusively by the company without any support from the State ([26]).

(113) As a result of the restructuring measures taken by Fertiberia, Spain has informed the Commission that the company will record profits of ESP 350 million in 2000 (based on the 3/4-year results).

(114) The Spanish authorities have confirmed that they do not intend to grant additional restructuring aid and that the current restructuring will be implemented by the company using exclusively its own resources.

([23]) See, for this and other references to the EFMA, the organisation's website: www.efma.org.

([24]) For further details see point II.3 above.

([25]) See footnote 23.

([26]) The Commission draws attention in this connection to the 'one time, last time' condition as laid down in the new version of the restructuring aid guidelines.

(115) In view of the foregoing, the Commission considers that the current crisis should not call into question the Spanish authorities' assertion that the original restructuring plan devised in 1992 was a realistic plan on the basis of which the company successfully returned to profit.

(116) The Commission has taken note of the fact that Spain has no intention of granting additional restructuring aid.

(117) After assessing the potential of the restructuring plan to restore the company's long-term viability, the Commission accordingly endorses it.

(c) *Avoidance of undue distortions of competition*

(118) The exception provided for in Article 87(3)(c) of the Treaty is conditional on the aid not distorting competition to an extent contrary to the common market. The restructuring aid guidelines specify that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors.

(119) This condition usually takes the form of a limitation on or reduction of the presence which the company can enjoy on the relevant product market. The limitation or reduction should be in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets.

(120) As regards mitigation measures, the restructuring plan provided for an average reduction of 49,3 % in existing capacity. According to information in the EFMA's possession, Fesa-Enfersa's share of the Community market fell from 7,9 % in 1992 to 5,7 % in 1997. The Commission notes that during the implementation of the restructuring plan, the company effectively reduced its production capacity by closing plants at Zaragoza, Valladolid, Seville, Escombreras and El Hondón, all of which are located in assisted areas. These capacity reductions gave rise to 1 487 redundancies, which represented 41 % of the existing workforce at the time.

(d) *Aid in proportion to the restructuring costs and benefits*

(121) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. The ratio of current liabilities to total liabilities after the restructuring was 0,49, slightly higher than a company of similar size operating on the same market [27]. The aid beneficiaries will therefore normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing.

(122) Taking into account the costs of the restructuring (ESP 44 000 million), the amount of the aid (ESP 25 113 million) cannot be deemed to have been excessive. When it initiated the procedure, the Commission expressed doubts as to whether the private investor had made a significant contribution to the restructuring plan from its own resources.

(123) The shareholder's contribution was set at ESP 4 000 million plus an amount of between ESP 5 000 million and ESP 7 000 million to be provided by an American industrial investor with which talks were being held for a takeover of Fesa-Enfersa. The talks were broken off in early 1995 when a new private investor, Grupo Villar Mir, submitted an offer to take over Fesa-Enfersa.

(124) The new investor decided to make investments amounting to ESP 19 500 million over the period 1995-1999. Spain submitted, together with its observations, a certified statement to the effect that Immobiliaria Espacio had supplied guarantees to five private banks to cover loans to Fertiberia totalling ESP 12 500 million.

(125) In view of the foregoing, the Commission finds that the private investor did make a significant contribution to the restructuring plan from its own resources.

(126) In conclusion, the abovedescribed aid measures granted to Fesa-Enfersa fulfil the conditions laid down in the Community guidelines on state aid for rescuing and restructuring firms in difficulty and can consequently be authorised.

VI. **CONCLUSION**

(127) The Commission finds that Spain has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. However, the Commission concludes that the aid granted to Fesa-Enfersa fulfils the conditions laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty and can therefore be authorised,

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[27] For example, in the case of Grande Paroisse (Elf Aquitaine), the ratio was 0,48 in 1997 and 0,44 in 1998.

HAS ADOPTED THIS DECISION:

Article 1

The restructuring aid which Spain has implemented for the Fesa-Enfersa group (now 'Fertiberia SA'), amounting to ESP 25 113 million, is compatible with the common market within the meaning of Article 87(3)(c) of the Treaty.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 31 January 2001.

For the Commission

Mario MONTI

Member of the Commission