COMMISSION DECISION

of 27 November 2002

on the measures implemented by Spain in favour of Refractarios Especiales SA

(notified under document number C(2002) 4486)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/283/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 called on interested parties to submit their comments pursuant to the provisions cited above [1], and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 20 April 2001 the Commission received a complaint concerning State aid allegedly granted by Spain to Refractarios Especiales SA. The complainant expressed concern regarding a number of financial measures from which the company was to benefit and which would distort competition on the relevant market.

(2) By letters of 3 May (D/51821), 17 July (D/52905) and 4 October 2001 (D/54067) the Commission requested Spain to submit information on the different measures. Reminders to these requests were sent by letters of 20 June (D/52500) and 7 November 2001 (D/54592). By letter of 23 July 2001 (registered as A/35988 on 25 July 2001) Spain requested an extension of the deadline for replying. The extension was granted by letter of 20 August 2001 (D/53447). By letters dated 19 June (registered as A/34832 on 20 June), 13 September (registered as A/37203 on 17 September) and 27 November 2001 (registered as A/39427 on 30 November 2001) Spain submitted the information requested by the Commission.

(3) On 15 January 2002 the Commission decided to initiate the procedure laid down in Article 88(2) of the Treaty with respect to the measures in question, and by letter of 17 January 2002 (D/228167) it informed Spain of this decision. The Commission reminded Spain of its invitation to comment on the decision and asked for further information by letter of 11 March 2002. Spain reacted to the decision to initiate the procedure by letter of 13 March 2002 (registered as A/31982 on 14 March 2002) and answered the questions in the reminder by letter of 2 May 2002 (registered as A/33339 on 6 May 2002).

(4) The decision to initiate the procedure was published in the *Official Journal of the European Communities* [2] with an invitation to interested parties to submit their comments on the aid. Spain forwarded a copy of the Commission's decision to the beneficiary company, Refractarios Especiales SA (hereinafter Refractarios) only on 18 March 2002. Refractarios subsequently asked, by letter of 20 March 2002 (registered as A/32170 on 21 March 2002), for an extension of the deadline to enable it to respond to the decision initiating the procedure. The Commission granted an extension by letter of 22 March 2002 (D/51295). The Commission received comments from three interested parties, including Refractarios. By letters of 5 April (D/51501) and 29 April 2002 (D/52067) Spain was invited to comment on them. Further questions were sent by letters of 21 May (D/52462) and 3 September 2002 (D/54883). The latter included a copy of the agreement between the tax authorities and Refractarios, which had been submitted to the Commission by that party (letter of 18 July 2002, registered as A/35709 on 25 July 2002). The Commission reminded Spain of its questions by letters of 27 June (D/53342) and 7 October 2002 (D/55591). Spain provided answers to the questions by letters of 2 July 2002 (registered as A/34994 on 5 July 2002) and 9 October 2002 (registered the same day as A/37400).

[1] OJ C 55, 2.3.2002, p. 33.

[2] See footnote 1.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Refractarios Especiales SA

(5) Refractarios, located in Valencia, Spain, produces specialised heat-resistant ceramics (refractories). It sells its products mainly to companies in the metallurgy, cement and ceramics sectors. Currently it has around 89 employees and an annual turnover of around EUR 8 million. Its balance sheet total stood at EUR 11 400 000 at the end of 2000. The company qualifies as an SME in accordance with Commission recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ([3]).

(6) The table below summarises the company's results over the period 1996 to 2001.

(ESP million)

	1996	1997	1998	1999	2000	2001
Sales	1 190,5	1 053,5	1 217,1	1 209,5	1 269,6	1 340,8
Operating result	(142,5)	(174,5)	(78,2)	(46,9)	17,4	2,8
Annual result	(55,7)	(179,5)	9,6 ([4])	73,9	17,2	0,1

The crisis in steel production in the early 1990s meant that a crisis also faced the refractories sector, including Refractarios. The company closed its plant in Asturias, which produced for the steel sector, and maintained its plant in Valencia. The relative improvement since 1997 is due to the development of new products sold in particular to the cement industry. Apart from domestic sales, the products are exported to other countries in Europe and to some countries in Africa and America. The company hopes to export to Asian countries too. Sales value, in particular for innovative products, increased by 8,7 % between 2000 and 2001. For 2002 the company expects a further 14 % increase.

([3]) OJ L 107, 30.4.1996, p. 4.

([4]) In the auditor's report attached to the annual accounts, the auditor explains that the company received ESP 60 million as payment on account for the sale of land on which the factory is located. Accounting for this item more prudently would have meant that the company incurred a loss of ESP 50 million instead of generating a profit of ESP 9,6 million.

2.2. Measures taken by Spain

(7) Refractarios has had recurrent difficulties in paying its debts, in particular towards the General Social Security Treasury (hereinafter social security), the Valencia office of the Tax Agency of the Ministry of Finance (hereinafter tax authorities) and the Wage Guarantee Fund (hereinafter Fogasa).

2.2.1. *Suspension of payments procedure in 1990 to 1992*

(8) A suspension of payments procedure was terminated in March 1992 with the following agreements dating from 12 September 1991:

— social security: a debt of ESP 459 786 309 (EUR 2 763 371) was rescheduled over a 10-year period with no repayments in the first two years, and no interest to be paid on the rescheduled amounts ([5]). The debt was covered by a mortgage on the land, buildings, machinery and installations owned by Refractarios. The net present value of the instalments, calculated on the basis of a commercial interest rate of 18,24 %, amounts to 36 % of the initial value ([6]),

— tax authorities: on similar terms as those for social security, a debt of ESP 71 701 058 (EUR 430 932) was rescheduled over a 10-year period with no repayments in the first two years, and no interest to be paid on the rescheduled amounts. It was covered by the same mortgage,

— ordinary creditors accepted a debt write-off of 81,5 % on a total debt of ESP 1 080 million (EUR 6 490 931).

([5]) Interest was incurred if the agreed instalments were not paid.

([6]) Normally, in determining whether or not an interest rate is in line with market conditions, the Commission makes a comparison with the value at the relevant time of the reference rate fixed for the Member State concerned. However, at the time no such rate had been fixed for Spain. Therefore, in accordance with the Council resolution of 20 October 1971 on general regional aid schemes (OJ C 111, 4.11.1971, p. 1), the Commission must make a comparison with the average rate of interest in the relevant market, which in this case is the average rate of interest charged by private banks in Spain on loans over more than three years. In 1991, according to statistics published by the Bank of Spain, this rate was 18,24 %. The Commission has used this rate on several previous occasions (see for example Decision 91/1/EEC Magefesa (OJ L 5, 8.1.1991, p. 18) and Decision 96/655/EC La Seda de Barcelona (OJ L 298, 22.11.1996, p. 14)).

(9) The mortgage obtained by the social security and tax authorities placed a charge on the property amounting to a maximum of ESP 531 487 366 (EUR 3 194 303) (this equalled the outstanding debts) plus ESP 106 000 000 (EUR 637 073) for foreclosure costs. The total, ESP 637 487 366 (EUR 3 817 377), corresponded to between 81 % and 85 % of the property's estimated value ([7]). The land was not mortgaged in favour of other creditors.

(10) The lay-off of workers in Asturias resulted in a debt of ESP 90 685 363 (EUR 545 030,01) to Fogasa ([8]). By an agreement concluded on 19 November 1992, this debt was rescheduled over an eight-year period with no payments for the first six months. Quarterly payments were to gradually increase from around ESP 2 million to more than ESP 8 million. The total payments would sum up to ESP 133 171 960 (EUR 800 380), implying a simple interest rate of 10 %, which corresponded to the legal rate of interest at the time. The agreement contained an obligation on Refractarios to establish a security in favour of Fogasa in order to guarantee the debt.

2.2.2. *Efforts to recover the outstanding debts until 2000*

(11) The period up to 2000 showed a mixed picture as regards the company's results. Consequently, Refractarios at times had difficulties in paying its debts. In addition to the financial problems, there was an increasing environmental problem owing to its location in the centre of Quart de Poblet (Valencia). On the other hand, a change in the land-use plan that would significantly raise the value of Refractarios' property was under discussion.

(12) Between December 1991 and March 1995 Refractarios accumulated new social security debts. The social security authorities took several measures to recover the debt. They sought various distraints on the mortgaged property, totalling ESP 193 905 984 (EUR 1 165 398). A further distraint obtained on 28 February 1995 concerned two properties; the first had a surface area of 427 m^2 and was valued at ESP 13 944 650 (EUR 83 809), the second had an area of 680,9 m^2. On 7 June 1995 the procedure for auctioning the land was initiated but was then suspended after an appeal was allowed. Following an agreement reached in 1995, on 10 May 1996 all new debts, namely ESP 252 575 951 (EUR 1 518 012), and further interest and surcharges on this debt up to a maximum amount of ESP 384 million (EUR 2 307 887), including ESP 64 million (EUR 384 648) for foreclosure costs, were brought under the coverage of a second mortgage on the same property. The social security debt at this time amounted to ESP 712 362 259 (EUR 4 281 383). Together with the debt towards the tax authorities (see below), the debt covered by the mortgages amounted to EUR 4 712 315. The mortgages placed a charge on the property amounting to a maximum of ESP 932 187 366 (EUR 5 602 559). Apart from the earlier mortgage and distraints obtained by the social security authorities, the property was further burdened by a distraint in favour of another creditor for an amount of ESP 6 916 233 (EUR 41 567).

(13) In the second half of the 1990s the situation became more complicated: the crisis in the sector wore off and Refractarios had some success in entering more profitable niche markets. At the same time the environmental problems due to the company's location in the city centre worsened and the change in the land-use plan remained uncertain, which had a negative effect on the potential value of the land. The procedures for changing the land-use plan did not come to a successful conclusion. The value of the land, buildings and installations remains unclear: a valuation dated 16 March 1998 ordered by the social security authorities, assuming a change in the land-use plan, shows a low value of EUR 3 207 820 ([9]). Refractarios mentions very

([7]) According to an estimate made on 3 July 1990 by the Social Security Executive Recovery Unit, the value of the two plots of land and buildings that were later brought under the mortgage amounted to ESP 448 908 000 plus ESP 82 290 000 (totalling EUR 3 192 564). Refractarios' viability plan referred to another valuation, carried out on 16 May 1990, which estimated the value of the second plot at ESP 122 160 000, bringing the total to EUR 3 432 187. The value of the machinery and installations was estimated at ESP 220 250 000 (EUR 1 323 729), which brings the total estimated value to between ESP 751 448 000 and ESP 791 318 000 (EUR 4 516 293 to EUR 4 755 917).

([8]) In the event of insolvency or bankruptcy of the employer, Fogasa pays compensation to the workers made redundant, and assumes by law their rights, but only for the statutory amounts. This is laid down in Royal Decree 505/1985 of 6 March 1985 on the organisation and operation of the Wage Guarantee Fund (Spanish Official Gazette No 92, 17.4.1985, p. 10203), by which Spain transposed Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ L 283, 28.10.1980, p. 23). On the basis of Article 32 of the Royal Decree, Fogasa can conclude recovery agreements with the companies concerned. The detailed arrangements and conditions for recovery are laid down in the Ministerial Order of 20 August 1985 (Spanish Official Gazette No 206, 28.8.1985, p. 27071).

([9]) According to the valuation of 16 March 1998 requested by the social security authorities, the value of land and buildings would be EUR 1 528 776 if the land-use plan did not change and EUR 3 207 820 if the land-use plan did change.

different values for 2000: a valuation at the time of the agreement with the construction company indicated a land value of about EUR 6 million, whereas the agreed price in the sales contract for the land and buildings (dated 6 June 2002) amounts to EUR 7 747 046.

(14) Between September 1997 and October 1998 Refractarios accumulated new social security debts. It paid its contributions in full as from 1999. The social security authorities responded by not agreeing to further postponements and by seeking distraints. Some of the measures failed, though, and in the end, the social security authorities obtained repayment of only ESP 33 721 558 (EUR 202 670,65). They did not enforce the auction of the mortgaged land. The debt at the start of the second suspension of payments procedure amounted to ESP 978 750 620 (EUR 5 882 414,16), of which EUR 4 700 000 was covered by the mortgage.

(15) As regards the tax authorities, a few new small debts were incurred in 1996 (one amount) and 1997 (two amounts). Major problems arose in 1998 and Refractarios failed to pay a further two amounts in 1999. The payment of the agreed instalments of the old debt also became a problem in 1998. The tax authorities set various distraints on machinery in order to recover their claims. After 1999 Refractarios complied fully with its tax obligations. The total debt at the start of the new suspension of payments procedure amounted to ESP 129 217 530 (EUR 776 613) to which was to be added interest at some ESP 70 million (EUR 420 709) and payments due since the start of the suspension of payments procedure, amounting to ESP 17 874 651 (EUR 107 429). The total amount was consequently EUR 1 304 751.

(16) Refractarios did not pay any of the agreed instalments to Fogasa. Neither did Fogasa obtain a guarantee from Refractarios for its debt. Given this breach of the agreement, Fogasa was entitled to demand immediate payment of the full amount. However, it did not force any payment upon Refractarios. Neither did it charge further interest. In July 1997 Refractarios asked Fogasa to renegotiate the debt, but Fogasa did not agree to this proposal. In 2001, the Social Affairs Tribunal ([10]), ruled that this refusal did not comply with the formal requirements for interrupting the statutory limitation period. Despite the Commission's repeated requests Spain has not provided any evidence that Fogasa insisted on the agreed instalments or on payment of the whole amount until the new suspension of payments procedure. It is not clear whether Fogasa simply forgot the debt, or whether it deliberately failed to demand payment.

([10]) See recital 18.

2.2.3. *Suspension of payments procedure in 2000 to 2002*

(17) On 24 January 2000 Refractarios started a new suspension of payments procedure in order to settle its accumulated debt burden. This procedure was concluded on 17 June 2002. It is based on the following agreements:

— on 6 June 2000 Refractarios and a construction company reached an agreement whereby the latter was to buy the company's current property. Given the existing mortgages, this agreement was conditional upon other debt agreements between Refractarios and the social security and tax authorities. The proceeds (ESP 1 289 million, or EUR 7 747 046) would be used for buying new land, building a new factory (to be done by the same construction company), relocation, and settlement of part of the outstanding debts. ESP 527 million (EUR 3 167 333) would be paid directly to the social security and tax authorities. The existence of the agreement and the overall sales price were mentioned in the report drafted by the court-appointed auditor in the suspension of payments procedure. However, its terms and conditions were not known to the public authorities,

— in February 2002 Refractarios reached an agreement with the ordinary creditors on a remission of 75 % of their claims. These debts amounted to ESP 434 383 557 (EUR 2 610 698) in total,

— on 26 March 2002 Refractarios and the social security authorities agreed on a debt rescheduling and reduction. Out of the total debt of EUR 5 882 414,16 Refractarios was to pay EUR 2 763 371,37 immediately after finalisation of its transaction with the construction company. A further EUR 1 309 748,27 (22 %) was to be rescheduled over a period of 10 years with a 3,5 % annual interest rate and was to remain covered by a mortgage on Refractarios' installations and machinery. The remainder of the debt, EUR 1 809 294,52, was to be remitted. The present value as a percentage of the original debt is 68,4 %. It was an explicit condition of the agreement that Refractarios was punctually to pay the instalments and its current social security contributions.

— on 22 May 2002 Refractarios and the tax authorities agreed on a debt rescheduling and remission. Out of a total debt of EUR 1 275 705,87

(ESP 212 259 597) Refractarios was to pay EUR 621 944,88 (49 %). The remainder (51 %) was to be remitted. As with the social security authorities, the agreement contained an explicit condition that Refractarios was punctually to pay the instalments and fulfil its current tax liabilities.

(18) By letter of 13 March 2000, Fogasa demanded that its claims be included in the suspension of payments procedure. However, the court-appointed auditor in this procedure ruled that the debt was time-barred. By letter of 9 February 2001 Fogasa demanded payment of its debt direct from Refractarios (ESP 133 171 960 or EUR 800 380). At the same time it again demanded that the claim be included in the suspension of payments procedure. Fogasa appealed against the auditor's decision, but lost the case ([11]).

(19) As regards the land-use plan, it is noted that in spring 2002 the Department for Public Works, Urban Planning and Transport of the Regional Government of Valencia was considering a General Transition Plan for the municipality of Quart de Poblet, which also included changes for Refractarios' site. In its letter of 2 July 2002 Spain stated that the plan was expected to be definitively approved within two months.

2.2.4. *New investment aid*

(20) Finally, Refractarios applied or intended to apply to the Valencia Finance Institute (IVF) for a loan of EUR 3 million and a capital injection of EUR 300 000 and to the Regional Government's Department for Economic Affairs for a 20 % (EUR 1 million) investment grant. The finance section of Refractarios' restructuring plan takes these aid measures into account. However, Spain confirmed that neither the loan nor the aid had been granted so far.

3. GROUNDS FOR INITIATING THE PROCEDURE UNDER ARTICLE 88(2)

(21) In its decision to initiate the procedure under Article 88(2) ([12]), the Commission expressed its doubts whether the Spanish authorities had acted in the same way as a market economy creditor would have done. These doubts concerned in particular Fogasa's failure in 1992 to demand a guarantee for the rescheduled debt and to take steps to ensure actual repayment. Further doubts concerned the 1992 agreement between Refractarios and the tax and social security authorities, the long period in the second half of the 1990s during which these creditors apparently accepted arrears in Refractarios' payments, and possible aid involved in a new agreement to reschedule debts. Since the Commission had hardly any information on the existence of a restructuring plan, it could not ascertain whether possible aid would comply with the conditions set out in the Community guidelines on state aid for rescuing and restructuring firms in difficulty (hereinafter the rescue and restructuring aid guidelines ([13])).

4. COMMENTS FROM INTERESTED PARTIES

(22) Following publication of the decision to initiate the procedure ([14]), the Commission received comments from Cérame-Unie (a European ceramics industry association), from a competitor, RHI, and from the beneficiary, Refractarios. The latter's comments are summarised together with the comments from Spain in section 5.

(23) Cérame-Unie and RHI fully shared the doubts expressed by the Commission. They stressed the presence of overcapacity throughout the refractories sector and argued that any aid would have adverse effects on competitors and trade within the internal market. Cérame-Unie provided a substantial number of articles and documents on the sector.

(24) Cérame-Unie sent a copy of the agreement between the tax authorities and Refractarios, stressing that it explicitly stated that the tax authorities had taken into account not only the economic situation and viability of the company, but also the general and social interest in maintaining the jobs. Cérame-Unie also pointed out that the approved composition with creditors did not make any reference to long-term viability or to any restructuring plan and argued that insufficient grounds were given for the debt relief provisions. In its opinion, the aid did not comply with the requirements set out in the rescue and restructuring aid guidelines.

([11]) Judgment of 2 July 2001 of Juzgado de lo Social (Social Affairs Tribunal) No 3, Oviedo, demanda 525/2001, sentencia 503/2001. The judgment confirms that Fogasa had not done anything to suspend the limitation period.

([12]) See footnote 1.

([13]) OJ C 288, 9.10.1999, p. 2.

([14]) See footnote 1.

5. COMMENTS FROM SPAIN AND FROM REFRACTARIOS

(25) Spain and Refractarios held that throughout the period under investigation the social security and tax authorities and Fogasa had acted as any private creditor would have done. In their opinion, none of the measures constituted State aid within the meaning of Article 87(1) of the Treaty.

(26) Spain and Refractarios produced in support of their arguments detailed descriptions of the financial situation in which the social security and tax authorities would have found themselves if they had proceeded with enforcing their claims to bankruptcy. Given the limited value of the land before the possible change in the land-use plan, and given that the workers' claims took priority, bankruptcy would have been financially less attractive than acting in the way they did.

(27) With respect to the 1991 agreement, Refractarios argued that the terms accepted by the public creditors compared favourably with the terms accepted by a private preferential creditor, namely Banesto Leasing. This company did not demand the return of the machinery that it had leased to Refractarios, but subscribed to the agreement between the company and its creditors on the same conditions as the ordinary creditors. For this reason too no State aid within the meaning of Article 87(1) of the Treaty was involved in the agreements with the public authorities.

(28) With respect to the reference made in the agreement between the tax authorities and Refractarios to the 'general and social interest in maintaining the jobs', Spain explained that this statement could be regarded as merely formal and, in a way, made necessary by the fact that the agreement constituted an act outside the usual scope of the tax authorities' activities and different from the normal channels for managing the collection of claims, although covered by current legislation. It should be understood as a generic explanation of the reasons prompting the authorities to act as always in the general interest.

(29) Concerning Fogasa, Spain indicated that the Fund was financed by company contributions which did not constitute State resources. Spain argued that Fogasa had taken all possible steps to recover its claim. In its opinion, that was shown by the court ruling in the appeal case when Fogasa demanded that its claim be included in the 2000 suspension of payments procedure. Refractarios also argued that the rescheduling of its debt to Fogasa was advantageous to the latter in comparison with the outcome for other creditors.

(30) Refractarios maintained furthermore that any advantages it had obtained could not have affected trade between Member States, since its output was less than 0,2 % of total output in the EU. Moreover, the market structure was oligopolistic. For these reasons also, it had not received State aid within the meaning of Article 87(1) of the Treaty.

(31) If the Commission found that aid was involved, Refractarios claimed that it should be regarded as compatible with the common market. At the time of the 1991 agreements the company was in difficulty, the aid was closely linked to a restructuring programme and limited to the minimum necessary. Any aid in the 2002 agreements with the public authorities fulfilled the criteria of the rescue and restructuring aid guidelines. Refractarios submitted a restructuring plan with detailed information on the restoration of its viability and all the measures planned, and argued that any aid was limited to the minimum necessary.

(32) Another argument put forward by Refractarios was that any aid linked to the 1991 agreements with creditors, or the authorities' subsequent actions in relation to the composition with creditors, was time-barred pursuant to Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([15]).

(33) As regards the market, Refractarios held that, although in recent years there had been some stagnation in the demand for low-quality refractories in industrialised countries, this had been offset by growing demand for these products from developing countries. Moreover, Refractarios had over the past 10 years specialised in higher quality, more durable and higher priced products, for which the market was booming.

(34) Finally, Refractarios argued that any aid should be deemed compatible with the common market on the

([15]) OJ L 83, 27.3.1999, p. 1.

basis of the Community guidelines on State aid for environmental protection ([16]), since its aim would be to assist the relocation of activities out of an urban area, as provided for by point 39 of the guidelines.

5.1. **Reactions to comments from third parties**

(35) Spain did not react to the comments from third parties.

6. **THE RESTRUCTURING PLAN**

(36) Refractarios' current restructuring plan has three main components: 1. relocation; 2. further concentration on the high-quality segment of the market; and 3. financial restructuring, based on major debt write-offs.

(37) Relocation of the company clearly solves the environmental problems. The total cost of the investment amounts to EUR 7 300 000, of which the main item is equipment (EUR 3 900 000).

(38) The new plant would have a capacity of 10 200 tonnes per year, of which 8 000 tonnes would be for producing tailored refractories and 2 200 tonnes for non-tailored refractories. This would roughly double existing capacity and significantly increase the proportion dedicated to products with higher value added and higher gross margins.

(39) The following table gives a financial overview of the restructuring for the year 2002:

(EUR '000)

Costs		Funding	
Land	1 731	Sale of land	7 747
New plant	5 571	Loan from IVF	3 005
Payments to social security	2 763	Capital injection	301
Payments to the tax authorities	426	Investment aid	950
Payments to ordinary creditors	679		
Working capital	833		
Total	12 003	Total funding	12 003

([16]) OJ C 37, 3.2.2001, p. 3.

(40) The restructuring plan provides estimates for expected annual results over the period 2002 to 2006 under various assumptions. Even in the worst-case scenario the company would still be profitable each year over this period.

7. **ASSESSMENT**

7.1. **General considerations**

(41) Article 87(1) of the Treaty lays down the principle that, save as otherwise provided in the Treaty, any aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

(42) According to the case-law of the Court of Justice, when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid ([17]). The products marketed by Refractarios are traded between the Member States and there is competition between manufacturers. Any aid would strengthen the position of Refractarios in these markets. The company's small turnover compared to that of (some) competitors, its small market share and the oligopolistic structure of the market do not mean that trade between Member States is not affected. Moreover, the fact that trade is affected is confirmed by the fact that Refractarios exports part of its production to other countries.

(43) In order to establish whether Refractarios has benefited from a selective advantage, the Commission has to assess the measures taken by the public creditors and their agreements with Refractarios. If these measures and agreements correspond to the way in which a private creditor would have acted under similar circumstances, they do not constitute State aid.

7.2. **The 1991 agreements with the social security and tax authorities**

(44) The terms under which the social security and tax authorities accepted the rescheduling of the amounts

([17]) Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 50.

owed to them are certainly favourable to them in comparison with the payments to ordinary creditors, who accepted a debt write-off of 81,5 %. However, a comparison with ordinary creditors is not sufficient to prove the absence of aid, since the public creditors held preferential claims and were therefore in a different position.

(45) The terms were also favourable in comparison with the only private preferential creditor, namely Banesto Leasing SA. However, the Commission considers that the positions of Banesto Leasing and the public preferential creditors cannot be compared and the argument cannot suffice to prove the absence of aid in the agreements between Refractarios and the public creditors. Firstly, Refractarios' debt towards this company amounted to ESP 8 919 299 (EUR 53 606), which is much smaller than the public debts. Secondly, the cost that Banesto would have incurred to obtain a higher repayment would have been greater, in relative terms, than any possible gain. Thirdly, the real value of the machinery would undoubtedly have been very small if it had had to be sold under a bankruptcy scenario in the 1990 to 1992 suspension of payments procedure.

(46) Spain argued that the absence of interest was appropriate compensation for the guarantee constituted by the mortgage. The General Social Security Law contained an obligation to apply the legal interest rate when extraordinary deferments were granted, but this obligation would not apply in situations where the social security authorities granted a rescheduling of the debts of a company which had suspended payments. The Commission notes, however, that this does not rule out the possibility that, under a scenario of immediate enforcement of payments and subsequent bankruptcy, the public authorities might still have been better off. The fact that the social security and tax authorities did not accept any debt reduction, but only a debt rescheduling, does not detract from this conclusion.

(47) In this situation, in order to establish whether the public creditors acted in accordance with the private creditor principle, the Commission deems it necessary to make an estimate of the maximum amount that the tax and social security authorities could have recovered if they had not signed the agreements, which would have meant that the company would have gone into bankruptcy.

(48) Article 32(1) of the Labour Statute provides that wage debts for the last 30 working days take precedence over all other claims in so far as they do not exceed twice the minimum wage. These debts take precedence over debts guaranteed by mortgage. Article 32(2) and (3) establishes further privileges for wage debts. Since there are separate procedures for recovering workers' claims which are not delayed by a suspension of payments procedure, workers also have a de facto 'super-privilege' in respect of severance pay. The total amount of these payments in 1991 was estimated at EUR 3 700 000. As Refractarios argues, it is quite possible that even higher amounts of compensation might have been negotiated in practice.

(49) The balance sheet drawn up by the court-appointed auditor in the suspension of payments procedure (the report) and dated 29 October 1990 shows total assets of EUR 15 486 722, of which land accounts for EUR 6 974 048, buildings EUR 2 344 763, other tangible fixed assets EUR 2 191 455, intangible fixed assets EUR 2 540, stocks EUR 2 980 058, debtors EUR 1 001 991 and cash/banks EUR 27 464. However, in a bankruptcy scenario the value that would be realised is estimated at much less. For example, the valuation of the land carried out for the social security authorities on 3 July 1990 estimates the value of the site in Valencia at EUR 3 200 000. Installations on this site were valued at EUR 1 300 000. The land in Asturias was valued at EUR 1 million and other plots in Valencia at EUR 300 000. Other assets that would be difficult to realise under a bankruptcy procedure were intangible fixed assets, but also stocks: almost half of these consisted of finished products, whereas the crisis in the sector was in full swing. It should also be noted that the amounts for stocks and in particular for debtors and cash/banks may well have changed over the year that elapsed between the drafting of the report and the conclusion of the agreements with creditors, among other things owing to the losses sustained during that period. Moreover, the Commission takes account of the fact that the balance sheet may contain an upward bias, since the suspension of payments procedure can be initiated only when it shows a positive difference between total assets and total liabilities. Taking all these considerations together, and applying the private creditor principle, in September 1991 the value of all the assets under a bankruptcy scenario could have been estimated at a figure close to the value of the land, buildings and equipment as estimated by the valuations other than the one in the report. This would give a total of some EUR 6 million.

(50) Subtracting the payments to workers from the total value of assets gives a figure of EUR 2 200 000, which would be available for the preferential creditors in the

first instance. This represents 69 % of a total debt of EUR 3 200 000 ([18]).

(51) This, however, is still a theoretical calculation that does not take into account various factors that can be expected to have a negative impact on the actual amount which the public creditors would obtain under a bankruptcy scenario. The actual proceeds of selling land and installations when forced by bankruptcy may be much lower still. Moreover, the calculation does not take into account costs of the bankruptcy procedure and costs of selling the land. Moreover, the public creditors would have received their payments only after a substantial period of time, something which is normal in such procedures. Confirmation that a lower actual value can be expected under a bankruptcy scenario is given also by the fact that the other creditors accepted a very significant debt waiver. Of course, the agreed payments would depend on the future viability of the company, and with the benefit of hindsight it is clear that the financial problems were not solved. However, the mortgage was precisely intended to cover the uncertainty, and the risk of further delays in paying the agreed instalments was at least to some extent covered by normal application of interest and surcharges when delays occurred. It must also be noted that the interest rate to be paid on arrears is the legal rate of interest, which at the time stood at around 10 %, implying a decrease in the present value of the debts in any case.

(52) Taking all these considerations into account, there was very little difference for the social security and, in particular, the tax authorities between what they expected to obtain in payment under the agreements and what they could have expected to obtain under a bankruptcy scenario ([19]). Therefore, the Commission considers that the terms under which the social security and tax authorities agreed on a debt rescheduling correspond to those which a market economy creditor could have accepted in the circumstances. Consequently, the Commission concludes that the 1991 agreements with those authorities are in accordance with the private creditor principle and do not constitute State aid to Refractarios.

([18]) Refractarios (letter of 15 April 2002, p. 45) argued that in the event of bankruptcy only 17 % of the debt would have been repaid, but this calculation is based only on the value of the land and installations which were later mortgaged.

([19]) Another argument put forward by Spain is that if the public authorities had insisted on a better result, there would have been fewer resources left for ordinary creditors and these may have been less inclined to agree to a debt reduction. This argument, however, is only valid in the eventuality of the public authorities trying to obtain more than they could reasonably expect under a bankruptcy scenario.

7.3. **Steps taken by the social security and tax authorities to recover their claims in the period up to the commencement of the 2000 suspension of payments procedure**

(53) The Commission notes that the social security authorities did not remain passive between December 1991 and June 1995. They charged interest and surcharges on the new debts that arose and sought various distraints. And, finally, in June 1995 they started the procedure for selling the property by auction. By this time, the total debts amounted to EUR 4 712 315 and were only partly secured by the mortgage. This total debt is only slightly lower than the maximum value of the property arrived at in 1990, when it was valued at between EUR 4 516 293 and EUR 4 755 917. However, the annual accounts at least from 1994 onwards refer to the potential increase in the value of the land that would result from a change in the land-use plan. On the basis of these steps taken, the Commission concludes that the behaviour of the social security authorities was in accordance with the private creditor principle since it did not significantly depart from the way in which a private creditor would have acted in similar circumstances. The acceptance of the agreement on suspending the auction and establishing an additional mortgage, reached in 1995, can also be justified by the expectation of an increase in the value of the land following modification of the land-use plan and by the fact that Refractarios accumulated no further debts as from April 1995. The Commission therefore concludes that the actions of the social security authorities during this period and the agreement on the additional mortgage do not constitute State aid to Refractarios.

(54) The Commission cannot explain the surprisingly low result of the valuation of the property ordered by the social security authorities in 1998. It is in sharp contrast with the valuation commissioned by Refractarios in 2000 and with the selling price stipulated in the contract with the construction company. However, it is clear that there would have been a real increase in value following modification of the land-use plan. The increase in the debt towards the social security and tax authorities during the period 1996 to 1998 amounts to EUR 1 200 000 and EUR 860 000 respectively. The total increase in debt is more than the expected increase in value under the 1998 valuation, but less than the increase in value that eventually took place. Moreover, the new debts arose during a relatively short period of time, mainly during 1998. Even by initiating proceedings for enforced collection, the social security and tax authorities would not have been able to avoid a further accumulation of debts.

(55) Given this mixture of irregularly growing debts and hopes for a better economic situation and a change in

the land-use plan, the Commission concludes that by restricting themselves to distraints and threats of foreclosure of the mortgage and not proceeding up to declaration of bankruptcy (as described in section 2.2.2), the social security and tax authorities acted in a way that maximised their chances of recovering the debts Refractarios owed them. Hence, the Commission finds no State aid in favour of Refractarios in their behaviour.

7.4. **The 2002 agreements**

(56) There were no agreements with preferential private creditors in the suspension of payments procedure to which the agreements between Refractarios and the public creditors can be compared. Neither is the reference in the agreement between the tax authorities and Refractarios to the 'general and social interest in maintaining the jobs' sufficient proof of the existence of aid, nor is there evidence of aid in the absence of an explicit evaluation of the company's future viability or in the lack of grounds for such an agreement. Therefore, the Commission deems it necessary to make an estimation of the maximum amount that the tax and social security authorities could have recovered if they had not agreed, which would have meant the company going into bankruptcy.

(57) According to Spain, the payments to workers for salaries and severance pay covered by the 'super-privilege' (*de jure* and de facto) amount to EUR 1 577 031,80. As mentioned earlier, it is quite possible that even higher amounts of compensation might have been negotiated in practice. The payments to workers for salaries could increase even further owing to the delay between declaration of bankruptcy and approval of the collective dismissal of the workers by the labour authority. Spain estimates that this could take five months and therefore takes into account a further amount of EUR 892 013.

(58) The main assets of value under bankruptcy were the land and buildings. The price in the sales agreement was ESP 1 289 759 146 (EUR 7 751 609). This value was, however, part of a more comprehensive deal on the acquisition of new land and the construction of the new plant which was negotiated in the context of litigation between the two parties. It was also subject to terms and conditions unknown to the public authorities. The public authorities may well have expected that the agreement was conditional on modification of the land-use plan. Therefore Spain considers it 'somewhat risky' to base its assessment on the price stipulated in the sales agreement. Furthermore, as Spain argued, the auction procedures would have required the authorities to start the first round of bidding on the basis of the 1998 valuation, namely EUR 3 200 000. If a second or third round of bidding were necessary, the starting price would be set 25 % and 50 % below this level respectively. The public authorities could therefore, like a diligent private creditor, have taken a more cautious value. The Commission considers that an auction before modification of the land-use plan would indeed have involved a significant risk and the value in the sales contract cannot suffice as a proper estimate. However, from the sales agreement it must also have been clear that the 1998 valuation was unrealistically low. So the proper value at the time may have been estimated at anything between those two extremes, depending on the risk aversion of the potential buyer ([20]).

(59) The balance of assets and liabilities drawn up by the court-appointed auditor in the suspension of payments procedure (the report) indicates a sum of EUR 3 090 859 for intangible fixed assets, other fixed assets, stocks, debtors and cash/banks. Under cautious and pessimistic expectations the value realised under a bankruptcy procedure might have been lower. For example, intangible fixed assets would be very difficult to realise in a bankruptcy situation and the 'other fixed assets' may prove of little value when they are no longer used and are the subject of a forced sale. It should also be noted that the amounts for stocks and in particular for debtors and cash/banks may well have changed over the year between the report and the actual agreements ([21]).

(60) The tax authorities agreed on an immediate payment without further instalments depending on the financial future of Refractarios. In contrast, the actual value of the agreement with the social security authorities depends partly on the future financial situation of the company. The agreements do not refer directly to the restructuring plan or to the future viability of the company, but the public authorities were aware that the losses of the late 1990s had decreased and turned into a modest profit over 2000. Also, Refractarios was fulfilling its new obligations. They may have known of

([20]) Refractarios argues that the public authorities based their expectations of recovery on the original valuation made in 1990, which indicated a value of EUR 4 516 293.

([21]) The report is dated 12 September 2000. Refractarios' profits for 2000 and 2001 amounted to EUR 104 000 and EUR 768 402 respectively. The annual accounts were approved only on 27 June 2002, so they would have been unknown to the social security and the tax authorities at the time of their agreements with Refractarios. A private creditor would probably have made a global analysis, but would not have had the figures for the annual results either.

more recent developments, such as the increase in sales, in particular of innovative products. Actual developments have in the meantime confirmed this considerable increase over 2001 and the expected sales figure for 2002 again shows a strong increase.

(61) On the other hand, the report drawn up by the court-appointed auditor in 2000 refers to a loan from the IVF, a capital injection and investment aid as a major source of finance for the relocation. The fact that these measures had not been granted casts some doubt on the viability of the company after the debt rescheduling. However, there has been no confirmation of a refusal to grant such measures either. Furthermore, both the social security and the tax authorities included a clause in the agreements requiring Refractarios to pay its current obligations punctually, on pain of invalidation of the agreements. Lastly, the social security authorities had the agreed instalments secured by means of a mortgage to be established on the new property.

(62) Taking the above elements together, under cautious and pessimistic assumptions and in accordance with the private creditor principle, the total amount available for the claims held by the social security and tax authorities can be estimated at a value very close to the net present value of the actual amounts they received under the agreements. The net present value to the tax authorities as a percentage of the original debt is significantly lower than the net present value to the social security authorities. This may reflect a clever negotiating strategy on the part of Refractarios, in which it put maximum pressure on the relatively smaller creditor. In any event, the Commission has to base its decision in the first place on the facts.

(63) It must be noted that in the event of bankruptcy the public authorities would collect their claims only after significant delay. Furthermore, the differences between the recovery expectations and the actual negotiated amounts are small in absolute terms. Given the uncertainties, the delay and the costs of a bankruptcy procedure, the Commission concludes that the agreements between Refractarios and the social security and tax authorities are in accordance with the private creditor principle.

(64) Consequently, the Commission finds no State aid in the agreements between the social security and tax authorities on the one hand and Refractarios on the other.

7.5. **Further investment aid**

(65) Spain confirmed that it had not granted any investment aid, and there is no evidence of the contrary. The Commission cannot therefore assess such aid. The fact that Refractarios announced applications for aid of this type and that the amounts are mentioned in the report and the viability plan does not change this finding. The Commission notes, however, that a substantial part, if not all, of the investment may not qualify as initial investment within the meaning of point 4.4 of the guidelines on national regional aid, since it appears to concern a relocation without any fundamental change in the product or the production process ([22]). The Commission also notes that the viability plan provides for only a small capital injection by other private parties (EUR 300 500), which raises doubts as to whether a possible capital injection by a public authority (such as the abovementioned loan of EUR 3 005 000 from the IVF) would be in line with the private investor principle. The Commission will therefore ask Spain to inform it of any investment aid granted to Refractarios in relation to the relocation and of any capital injection by public authorities over the next three years.

7.6. **Fogasa**

(66) The Commission notes that Fogasa is an independent body set up by the Spanish authorities and governed by Spanish law. It is attached to the Ministry of Labour and Social Affairs. The Ministry appoints the chair and four out of 14 members of the Governing Council and also the Secretary General, who is responsible for the Fund's management. The payment and destination of the funds is determined by law. The Court of Justice has ruled in several judgments that parafiscal charges may constitute State aid ([23]). On various occasions the Commission has made it clear that the use of funds by Fogasa may constitute State aid, and this has also been confirmed by the Court ([24]).

([22]) OJ C 74, 10.3.1998, p. 9.

([23]) For example Case C-78/76 *Steinike and Weinlig* v *Germany* [1997] ECR 595.

([24]) See, for example, the *Magefesa* case, Commission Decision 91/1/EEC (cited in footnote 6) and Commission Decision 1999/509/EC of 14 October 1998 (OJ L 198, 30.7.1999, p. 15) (confirmed by the Court on 2 July 2002 in Case C-499/99 *Commission* v *Spain*, not yet published); the *La Seda de Barcelona* case, Commission Decision 96/655/EC (cited in footnote 6); and the *Tubacex* case, Commission Decisions 97/21/ECSC, EC (OJ L 8, 11.1.1997, p. 14) and 2001/142/EC (OJ L 52, 22.2.2001, p. 26) and Court judgment in Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459.

(67) Fogasa does not award loans to firms in liquidation or in difficulty, but settles all valid claims put forward by employees with money which it pays out and then recovers from the firms concerned. The Commission does not object to Fogasa having settled the valid claims of certain employees of Refractarios to wages due and severance pay in the early 1990s. In this respect, the agreement does not contain any element of State aid. Such action to protect employees' rights is consistent with Directive 80/987/EEC ([25]). However, such payments are part of the normal costs of business and, therefore, when the company continues its activities after the suspension of payments procedure, the resulting debt to Fogasa should be paid in accordance with the market creditor principle.

(68) The Commission cannot rule out the possibility that the terms of the agreement on the rescheduling of Refractarios' debt to Fogasa were justified by expectations that much less would have been recovered in the event of bankruptcy, an eventuality that might have resulted from less favourable rescheduling terms. Although this agreement is dated more than half a year after the conclusion of the suspension of payments procedure, Refractarios' economic position was still weak and the crisis in the sector was not yet over. The average rate of interest charged by private banks on loans of more than three years' duration was 17,28 % ([26]), which was considerably higher than the simple interest rate of 10 % payable under the agreement. However, under Spanish legislation a creditor cannot impose a higher interest rate on arrears than the legal interest rate, so it is the latter that the Commission should take into account ([27]). The Commission therefore finds no State aid in the agreement.

(69) However, Fogasa's failure to demand additional interest when the agreed instalments were not paid, its failure to insist on a guarantee for the rescheduled debt, the fact that it did not make any effort to secure actual payments until the new suspension of payments in 2000, and its failure to do anything to avoid the risk of the debt being time-barred, cannot be justified under the market creditor principle. Such negligence definitely does not correspond to the behaviour of a private creditor under market conditions. A diligent private creditor would not have forgotten its claim and, when faced with the breaches of the agreement, would undoubtedly have acted to obtain further security and additional interest for the late payments. The fact that in 1995 the social security authorities were able to obtain a further mortgage demonstrates that this was a feasible option, even if the value of such a mortgage would have been uncertain given the real value of the property. In conclusion, Fogasa's inaction has given rise to State aid.

(70) Refractarios' failure to furnish a guarantee and to pay the agreed instalments gave Fogasa the right to claim immediately the full amount of the original debt. A private creditor may not have used this ultimate remedy at the first occasion, but would at some point in time, and in any event well before the end of the limitation period, have enforced payment of the debt. The Commission deems that this moment would at the latest have been June 1995. At that point in time the arrears reached the amount of some EUR 100 000. Moreover, on 7 June 1995 the social security authorities also took action with respect to the arrears Refractarios had accumulated with them, starting the procedure for auctioning off the land under the mortgage. Spain has maintained that this was how a private creditor would have acted. The arrears with Fogasa concerned a much smaller amount than the arrears with social security, but Fogasa had not yet obtained a guarantee, unlike the social security and tax authorities. It should therefore have acted earlier rather than later than the social security authorities. Consequently the Commission considers the full amount of the debt to Fogasa as State aid, at least from June 1995 onwards.

(71) The aid is illegal, because the Commission was not informed pursuant to Article 88(3) of the Treaty before it was put into effect.

7.7. **Compatibility of the aid granted by Fogasa**

(72) The Commission has examined whether the exceptions laid down in Article 87(2) and (3) of the Treaty apply. The exceptions in Article 87(2) could serve as a basis for deeming the aid to be compatible with the common market. However, the aid (a) does not have a social character and is not granted to individual consumers, (b) is not intended to make good the damage caused by natural disasters or exceptional occurrences and (c) is not required in order to compensate for the economic disadvantages caused by the division of Germany. Neither does it qualify for the exceptions in Article 87(3)(a), (b) and (d) of the Treaty that refer to

([25]) See footnote 8.
([26]) See footnote 6.
([27]) See in particular the Court's judgment in *Tubacex*, cited in footnote 24 above.

promotion of the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, to projects of common European interest and to the promotion of culture and heritage conservation.

(73) Neither did Spain attempt to justify the aid on the grounds enumerated above.

(74) As far as the first part of the exception in Article 87(3)(c) of the Treaty is concerned, namely for aid to facilitate the development of certain economic activities, the Commission notes that the aid was not aimed at assisting R&D activities or investment by an SME. Neither did the aid pursue environmental objectives; the environmental problems due to Refractarios' location arose mainly in later years and there is no direct link between the aid and any action to alleviate those problems. Neither does it appear likely that the purpose of the aid was to rescue and restructure Refractarios. The fact that Fogasa tried to recover its claim demonstrates that the aid did not serve any purpose at all. The most likely purpose may have been to avoid an immediate financial crisis for the company. In that case the aid could be classed as rescue aid. However, no condition was attached to the aid that would suffice to fulfil the requirements which the Commission usually applies to such aid, notably the condition that a (new) restructuring plan be submitted within a certain period of time. The aid cannot therefore be found compatible with the common market on this ground.

(75) Refractarios argued that any aid resulting from the 1991 agreements with creditors would be compatible with the common market as restructuring aid to a firm in difficulty. This, however, does not apply to the aid granted by Fogasa: the aid does not derive from the agreement with Fogasa, but from Fogasa's failure to take action to ensure compliance with the 1992 agreement. As explained above, this aid arose at least from June 1995 onwards. It cannot be linked to implementation of the restructuring. Such behaviour did not involve setting any conditions as regards the restoration of viability and could certainly not be regarded as constituting the minimum aid necessary in such a situation. Considering these and all the above arguments, the Commission concludes that the aid is incompatible with the common market.

(76) The Commission does not agree with Refractarios when it argues that any aid related to the rescheduling of debt was time-barred and that the limitation period of 10 years after which the Commission no longer has the powers to recover aid had expired. It has to be stressed that the first action by the Commission was the request for information sent on 3 May 2001, i.e. less than 10 years after the agreement concluded between Refractarios and Fogasa. In accordance with settled case-law ([28]), such a letter means that the Commission had by that time investigated the case with a view to assessing the measures. Moreover, the aid is due to Fogasa's failure to take action to recover its claim at least from June 1995 onwards. Therefore, the aid is not affected by the limitation period laid down in Article 15 of Regulation (EC) No 659/1999 and the incompatible aid should be recovered from the beneficiary.

8. **CONCLUSIONS**

(77) The Commission finds that the terms under which the tax and social security authorities agreed on a debt rescheduling in the context of the suspension of payments procedure of 1990 to 1992 are in accordance with the private creditor principle. It therefore concludes that these agreements do not constitute State aid to Refractarios.

(78) The Commission finds that the efforts made between 1992 and 2000 by the social security and tax authorities to recover their claims from Refractarios are in accordance with the private creditor principle. It therefore concludes that their actions do not constitute State aid to Refractarios.

(79) The Commission finds that the terms under which the tax and social security authorities agreed on a debt rescheduling in the context of the suspension of payments procedure of 2000 to 2002 are in accordance with the private creditor principle. It therefore concludes that these agreements do not constitute State aid to Refractarios.

(80) Fogasa's failure to act at least from June 1995 onwards to recover, or at least to secure, its claim on Refractarios, constitutes State aid. This aid is incompatible with the common market and has to be recovered from the beneficiary. In order to restore the situation that would have existed if the aid had not been granted, the calculation of the amount to be recovered shall include interest from the date on which it was at

([28]) Judgment of the Court of First Instance in Case T-95/96 *Gestevision Telecinco* v *Commission* [1998] ECR II-3407.

the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid,

HAS ADOPTED THIS DECISION:

Article 1

The agreements concluded in 1991 between the General Social Security Treasury and the Tax Agency of the Ministry of Finance on the one hand and Refractarios Especiales SA on the other, the actions taken by those authorities to recover their claims during the 1990s, and the agreement concluded in 2002 between the General Social Security Treasury and Refractarios Especiales SA do not involve State aid to that company within the meaning of Article 87(1) of the Treaty.

Article 2

The failure of the Wage Guarantee Fund to act to recover the amount owed it by Refractarios Especiales SA from June 1995 onwards constitutes State aid to that company within the meaning of Article 87(1) of the Treaty.

Article 3

The State aid referred to in Article 2 is incompatible with the common market.

Article 4

1. Spain shall take all necessary measures to recover from the beneficiary the aid referred to in Article 2 and unlawfully made available to the beneficiary.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

Article 5

Spain shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 6

This Decision is addressed to Kingdom of Spain.

Done at Brussels, 27 November 2002.

For the Commission

Mario MONTI

Member of the Commission