COMMISSION DECISION

of 11 December 2002

on the State aid implemented by Spain for Sniace SA

(notified under document number C(2002) 4824)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/284/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 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 14 thereof,

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

Whereas:

I. PROCEDURE

(1) By letter dated 2 March 1998 the Commission received a complaint alleging that Sniace SA (hereinafter referred to as 'Sniace') had received illegal aid in the form of a subordinated loan of EUR 12 020 242 (PTA 2 000 million) granted on non-market terms. The Commission requested Spain to submit information thereon and, since insufficient particulars were received in reply, on 11 December 1998 it registered the case as non-notified aid.

(2) By letter dated 11 April 2000 the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. Spain submitted its comments by letter dated 5 June 2000.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [3]. The Commission invited interested parties to submit their comments on the aid. In this context, it received comments from Sniace. On 10 August 2000 it forwarded them to Spain, which was given the opportunity to react thereon but chose not to.

(4) By letter dated 2 October 2001 the Commission addressed an information injunction to Spain, which replied by letter dated 17 December 2001. By letter dated 19 December 2001 Sniace sent further comments and proposed that a meeting be held in order to clarify the situation. The meeting took place in April 2002. By letter dated 31 May 2002 Spain submitted additional information to the Commission.

II. DETAILED DESCRIPTION OF THE MEASURE

(5) Sniace is a company based in Torrelavega, Cantabria. Sniace is highly vertically integrated and is active in the areas of forestry management and production of paper, synthetic fibres and derived chemical products. In 2000 it employed around 600 people. From 1992 to 1996 it was under the suspension of payments procedure, from which it emerged after an agreement with its main private creditors was signed on 26 September 1996. The Cantabrian Regional Government commissioned during 1996 a viability plan from the private consultancy Coypsa. The plan was agreed on by the interested parties on 29 September 1996. As part of this plan, in 1997 the company renegotiated its debts with the remaining creditors, including Social Security. In October 1998 the Commission adopted an initial negative decision on the terms of that rescheduling agreement, on the grounds of the level of the interest rates negotiated. However, in September 2000, in the light of a judgment delivered by the Court of Justice in a similar case concerning the Spanish company Tubacex [4], the Commission decided to revoke its initial

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 162, 1.6.2000, p. 15.
[3] See footnote 2.
[4] Case C 342/96, 9.4.1999, Rec. 1999, p. I-02459.

decision and adopted a positive decision declaring that no aid was involved ([5]).

(6) In this same context, in January 1998 Caja Cantabria decided to grant a loan of EUR 12 020 242 (PTA 2 000 million) to Sniace. The loan is to run for eight years, from the date of signature of the contract (4 February 1998) until 2 January 2006. It is a subordinated equity loan. As a subordinated loan it will be reimbursed only at maturity and in the event of bankruptcy of the company it will be reimbursed after all the common creditors' claims but before the shareholders'. As an equity loan, the interest incurred depends on the profits made by the company. The interest rate is made up of two components: a fixed component of 2 % and a variable component that depends on the company's profits. The variable component is to be paid only when the company generates profits and was set at 5 % for profits up to EUR 3 million (PTA 500 million), 8 % for profits between EUR 3 and 6 million (PTA 500 to 1 000 million) and 10 % for profits over EUR 6 million (PTA 1 000 million). This variable component cannot however exceed the outcome of applying MIBOR + 2 % to the remaining principal. For 1998, the interest was fixed at 6,75 %. The loan may be converted into shares or bonds, if the parties so decide.

(7) Caja Cantabria is a credit institution with the legal status of a private foundation. It is a non-profit institution, with the results of its activity being used to finance social and cultural activities. A majority of the voting rights (63 %) of its different decision-making bodies are held by political representatives in the region. Article 7 of Cantabrian Regional Law 1/1990 of 12 March 1990 on the decision-making bodies of the savings banks provides for the following representation in the general meeting and the other decision-making bodies: municipalities: 38 %; provincial councils: 25 %; depositors: 22 %; social and cultural institutions: 10 %; employees: 5 %. Under Article 10(2) of the same Law, the representation of the provinces is assigned directly to the region. In addition, the public authorities are involved in the appointment of the representatives of social and cultural institutions. Where it is not possible to have representatives of the founding members or bodies among them, the representation of public bodies is increased further ([6]). Lastly, the fragmented nature of the clients' representation increases the influence of the publicly appointed members.

(8) As indicated when the procedure was initiated, because of this situation, the Commission considers that Caja Cantabria's decisions to finance certain companies may be based on reasons of public interest rather than the private investor principle. The Commission decided that it had to assess whether the above loan to Sniace was granted under normal market conditions.

III. COMMENTS FROM INTERESTED PARTIES

(9) Sniace was the only intervening party. Its comments may be summarised as follows:

(a) the preliminary investigation stage lasted too long, and during that period both the company and the Spanish authorities cooperated with the Commission departments. The company therefore had legitimate expectations that the loan would be regarded as not involving aid;

(b) Caja Cantabria was a private institution; the public representatives that were appointed to its decision-making bodies acted with full independence. Its funds were of private origin and its loans therefore could not constitute State aid;

(c) in any event, the loan was granted in accordance with national laws and at normal market conditions. Sniace had been through difficult times in the recent past but was now performing well: it generated profits in 2000 and was likely to do so again in 2001. Moreover, the company had assets valued at some EUR 150 million (PTA 25 000 million). There was therefore no risk of the loan not being repaid;

(d) other private banks stated that they would have lent to Sniace on similar terms. The differences with Caja Cantabria's loan were minimal and if they constituted State aid, it would be below the threshold for *de minimis* aid. The Commission should therefore approve the loan on the current terms;

([5]) OJ L 11, 16.1.2001, p. 46.

([6]) This is the case for Caja Cantabria. For example, the composition of the general meeting was, on 31 December 2001: municipalities: 40 %; provincial councils: 27 %; depositors: 23 %; social and cultural institutions: 5 %; employees: 5 %. At the same date, 10 out of 15 members of the board of directors (including the chair, the two vice-chairs and the secretary) were appointed by public authorities.

(e) if the Commission were however to decide that the loan involved aid, Sniace invited the Commission to approve it under the derogations provided for in Article 87(3)(a) or (c).

IV. **COMMENTS FROM SPAIN**

(10) In their letter of 5 June 2000 the Spanish authorities stated that they understood the surprise expressed by the company at the Commission's decision to initiate the formal investigation procedure after such a lengthy preliminary examination.

(11) They also reiterated that Caja Cantabria was a private credit institution and that the public representatives on its decision-making bodies were required by law to act with complete independence and were personally accountable for their actions in the same way as any other member of any decision-making body in any other private financial institution. Accordingly, Spain concluded, the loan in question constituted a contract between a private credit institution and a private company and did not involve State aid.

(12) By its letters of 17 December 2001 and 31 May 2002, which followed the information injunction issued by the Commission on 2 October 2001, Spain reaffirmed that the subordinated loan did not contain State aid. By its letter of 31 May 2002, Spain submitted the viability plan implemented by Sniace in 1996. Spain stressed, however, that the viability plan was not relevant for the purpose of assessing the subordinated loan, given that the loan was not mentioned therein and was granted by Caja Cantabria only in February 1998.

V. **ASSESSMENT**

1. **Legal basis**

(13) Article 87(1) of the EC Treaty provides that 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 shall, in so far as it affects trade between Member States, be incompatible with the common market. Article 87(3) provides for the possibility of considering aid to be compatible with the common market, under certain circumstances.

(14) The Commission has made public the criteria it applies when examining the compatibility of national regional aid with the common market under the provisions of Article 87 in its guidelines on national regional aid ([7]). Where aid is granted to undertakings in the synthetic fibres sector, the Commission has also published specific assessment criteria in the code on aid to the synthetic fibres industry ([8]). Where aid is granted for restructuring companies in difficulty, the criteria applied are set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([9]).

(15) The Commission has also made public the criteria it applies when assessing the existence of aid in loans by the State to undertakings in its communication to the Member States on the application of Articles 87 and 88 to public undertakings ([10]).

(16) As indicated in the above communication, and in line with long-standing practice, in order to determine whether a loan involves aid and, if so, how much, the Commission applies the principle of the private investor operating under normal market conditions. Any loan granted by a lender to a client under normal market economy conditions involves a degree of risk. The risk attached to any loan arrangement is usually reflected in two distinct parameters: the interest rate charged and the security required to cover the loan.

(17) The possible aid involved in a given loan by a public lender will correspond to the difference between the interest rate that the firm would have to pay, if it had to cover the risk attached to the loan as a private lender would require, and the rate actually paid. The Commission has also indicated to the Member States ([11]) that its published reference rates are set in such a way that they reflect the average level of interest rates charged, in the different Member States, on medium- and long-term loans (five to 10 years) backed by normal security. The current reference rates are thus equivalent to the five-year interbank swap rates plus a premium, which is 75 basis points in the case of Spain.

([7]) OJ C 74, 10.3.1998, p. 9.
([8]) OJ C 94, 30.3.1996, p. 11.
([9]) OJ C 368, 23.12.1994, p. 12. These guidelines were revised in 1999 (OJ C 288, 9.10.1999, p. 2). The 1999 version of the guidelines does not apply because the alleged aid measures were granted prior to their publication (see Section 7 of the 1999 version).
([10]) OJ C 307, 13.11.1993, p. 3.
([11]) Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

(18) In the same notice, the Commission also states that the reference rate thus determined is a floor rate which may be increased in situations involving a particular risk, for example in the case of an undertaking in difficulty or where the security normally required by banks is not provided. In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan under normal market conditions.

2. **The aid is granted by the State or through state resources**

(19) Caja Cantabria is a credit institution with the legal status of a private foundation, which besides carrying on the normal activities of a credit institution pursues social and economic objectives at regional level. Representatives of public authorities in the region hold a majority (63 %) of the voting rights in its decision-making bodies. Because of the rules that govern it, Caja Cantabria can be regarded as a public undertaking according to the definition given in Article 2(c) of Commission Directive 80/723/EEC of 25 June 1980 (the Transparency Directive) ([12]) as last amended by Directive 2000/52/EC ([13]). According to that provision a public undertaking is an undertaking over which the public authorities may exercise directly or indirectly a dominant influence, and such dominant influence shall be presumed when the public authorities can, directly or indirectly, appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

(20) The Commission cannot agree with the argument put forward by Spain and by Sniace that the loan is an arrangement between a private institution and a private company and that automatically no aid is involved. Nor does the fact that the possibility of granting subordinated equity loans is provided for by a national law ([14]) automatically mean that no aid is involved. The loan has to be examined according to the criteria used to assess measures of this type.

(21) The fact that the public authorities may exercise a dominant influence over Caja Cantabria does not automatically imply that the State actually exercised its control in a particular case. Indeed, even if the State is in a position to exercise a dominant influence over an undertaking's operations, actual exercise of that control in a particular case cannot be automatically presumed ([15]). To that end, the Commission has to examine whether the public authorities were involved, in one way or another, in the adoption of the particular measures.

(22) In the present case, the Commission has examined the evidence arising from the circumstances of the case and the context in which the subordinated loan was granted and has concluded that the measure can be regarded as imputable to the State, for the reasons set out below.

(23) Firstly, the public authorities played a very active role in the relaunch of Sniace and its return to normal activity after the suspension of payments period. The economic situation of Sniace was discussed on numerous occasions in the Regional Assembly of Cantabria. At its session of 4 June 1996, the Regional Assembly voted unanimously a motion point 4 of which called on the Regional Government to:

> 'Use all the means available to the Regional Government for applying political and administrative pressure to ensure that Banesto and Banco de Santander uphold its vision of Sniace's future, as well as its commitment to its future' ([16]).

(24) At the same time, the Cantabrian Government commissioned from the consultancy Coypsa the viability plan that formed the basis of Sniace's return to normal activity ([17]) and was subsequently accepted by the company and the unions.

(25) After the signature of the viability plan in September 1996, the local authorities also played an active part in its implementation. A working group was set up including representatives of the Cantabrian Government, Torrelavega City Council, Sniace's management, the trade unions, the consultancy Coypsa, and, for a number of meetings, the private bank Banesto. The working group met regularly in order to discuss implementation of the viability plan, including the aspects linked to its financing.

([12]) OJ L 195, 29.7.1980, p. 35.
([13]) OJ L 193, 29.7.2000, p. 75.
([14]) Law 27/1984 of 26 July 1984 on industrial conversion and reindustrialisation.
([15]) Judgment of the Court of Justice in Case C-482/99 [2002] ECR I-4397.
([16]) Diario de Sesiones de la Asamblea Regional de Cantabria, No 34, 4 June 1996, p. 1230.
([17]) This is confirmed, *inter alia*, by the statement made by Mr Alvarez Redondo, representative of the Cantabrian Government, to the Regional Assembly of Cantabria on 17 July 1996: 'We should not forget that the viability plan was an initiative of the Regional Government', Diario de Sesiones de la Asamblea Regional de Cantabria, No 98, 17 July 1996, p. 1885 ('*No podemos olvidar que la realización del Plano de Viabilidad ha sido una iniciativa del Consejo de Gobierno*').

(26) The Regional Assembly of Cantabria also took an interest in the implementation of the viability plan. Representatives of the private bank Banesto, one of Sniace's main creditors, appeared before the Regional Assembly of Cantabria on 5 July 1996 and 22 January 1997.

(27) Secondly, the involvement of the local authorities in the implementation of the plan included active involvement in the aspects related to its financing. On 22 January 1997 Dr Robles, a representative of Banesto, took part in a hearing at the Regional Assembly of Cantabria. During the hearing, Dr Robles declared that the bank was ready to provide Sniace with a loan of up to EUR 10,2 million (PTA 1 700 million) and a credit line of around EUR 18 million (PTA 3 000 million), on condition that Sniace needed them and that proper collateral was provided ([18]). Replying to specific questions on Banesto's position, Dr Robles pointed out that the need for collateral was the main problem in the ongoing negotiations with Sniace ([19]).

(28) The Commission also takes into account the following indications from press reports ([20]): in the summer of 1997 Caja Cantabria confirmed that it was prepared to provide half of the EUR 12 million loan, on condition that Banesto would provide the other half. Unlike Banesto, Caja Cantabria was at the time involved only to a limited extent in Sniace's financing.

(29) Negotiations on the loan were held under the auspices of Sniace's working group. The daily *El Diario Montañes* ([21]) reports a statement made by Sniace's CEO Blas Mezquita at the end of the working group meeting that took place on 24 November 1997 at the premises of the Industry Ministry of the Regional Government of Cantabria. According to that report, Mr Blas Mezquita declared that the main decision taken by the working group was that the Cantabrian Government would intervene directly as an intermediary to secure the EUR 12 million loan to Sniace.

(30) A the end of January 1998, following Banesto's refusal to grant the subordinated loan to Sniace, Caja Cantabria agreed to provide the entire EUR 12 million subordinated loan. According to press reports, at the board meeting that decided to grant the loan, a representative of the bank's clients and the representative of the Cantabrian industry association voted against the granting the loan ([22]). According to the industry association CEOE-Cepyme, the subordinated loan did not afford Caja Cantabria all the necessary guarantees ([23]).

(31) Thirdly, other circumstances indicate that the subordinated loan can be regarded as imputable to the State. The choice of the financial instrument, a subordinated loan, is unusual for credit institutions acting on a purely commercial basis. Subordinated loans are reimbursed only at maturity and in the event of bankruptcy of the company will be reimbursed after all the common creditors' claims but before the shareholders'. A bank with no exposure towards the prospective debtor, as was the case for Caja Cantabria, would normally have required better collateral and a higher level of security for any new loan it decided to grant.

(32) Moreover, the subordinated loan was very important in securing Sniace's financial viability. The company had a negative net worth of EUR 10,4 million at the end of 1997, which became positive to the tune of EUR 6,4 million at the end of 1998 thanks to the subordinated loan under scrutiny, a capital increase, and the renegotiation of old debts with creditors. Additionally, the loan formed a very large proportion of Sniace's debt, amounting in 1998 to 73 % of its long-term debt towards credit institutions and 26 % of its total debt towards credit institutions. Lastly, it represented roughly one fifth of 1998 turnover.

(33) Sniace was at the time the loan was granted a major player in the local economy. With a workforce of 600, it was a sizeable employer in the region of Cantabria, where unemployment stood at 20,9 % of the active population in 1997 ([24]). Sniace's importance for the Cantabrian economy is confirmed by the fact that the company's return to viability was presented in the debate on Cantabrian Government policy held on 15 June 1998 as a remarkable achievement of the Government's industrial policy ([25]).

(34) For the reasons set out above, the Commission concludes that in the case under scrutiny it is highly unlikely that the public authorities were not involved in the adoption of Caja Cantabria's decision to grant the subordinated loan to Sniace. The facts surrounding the grant of the loan indicate that the public authorities were involved in the process of granting the loan. The subordinated loan can therefore, in the present case, be considered to imputable to the State.

([18]) *Diario de Sesiones de la Asamblea Regional de Cantabria*, No 150, 22 January 1997, p. 2812.
([19]) *Diario de Sesiones de la Asamblea Regional de Cantabria*, No 150, 22 January 1997, p. 2817.
([20]) *El Diario Montañes*, 17 August 1997, pp. 1 and 16; 20 August 1997, p. 17; 23 August 1997, p. 18; 3 September 1997, p. 16; 28 October 1997, p. 16.
([21]) Issue of 25 November 1997, p. 16.
([22]) *Alerta*, 30 January 1998, p. 29.
([23]) *Alerta*, 29 January 1998, p. 33.
([24]) Source: Eurostat Newcronos Database, regional statistics.
([25]) *Diario de Sesiones de la Asamblea Regional de Cantabria*, No 119.1, 15 June 1998, p. 3849.

(35) The next section assesses whether or not the terms of the loan are in line with those that a private lender acting under normal market conditions would have granted in the same circumstances.

3. **The aid favours a particular undertaking**

(36) The loan granted by Caja Cantabria is an eight-year loan without any security and carrying a variable annual interest rate that can range from 2 % if the company does not make any profits to MIBOR + 4 where it generates very high profit levels. In order to determine whether any aid is involved and, if so, how much, it is necessary to compare the conditions of the loan with those that would have been acceptable to a credit institution acting under normal market conditions. To this end, the particular situation of Sniace has to be considered.

(37) For several years Sniace experienced severe difficulties that culminated with the company being under the suspension of payments procedure from 1992 to 1996. The procedure was lifted thanks to a viability plan and an agreement which Sniace concluded with its private creditors whereby the latter accepted a rescheduling and reduction of their claims, thereby allowing the company to reduce its debts. The company then negotiated separately with its public creditors and secured a rescheduling of its social security debts. The plan established a business strategy for the company, with new investments, in particular in a power generation plant to be co-financed by the private company Abengoa, which should enable Sniace to reduce its production costs. Other investments were also carried out in order to modernise the production plant and to allow full and optimum use of all its installations.

(38) Sniace is a major company in the paper industry, where variable production costs are very high. The viability plan is centred on this aspect, identifying the company's advantages and its handicaps and establishing cost reduction measures. The viability plan provided for the company's return to viability and profits. The company in fact achieved large profits in 2000, which are expected to continue in 2001. All the company's creditors had agreed to contribute to its implementation either by signing the creditors' agreement or by renegotiating in 1997 the terms of reimbursement. Also in 1997, the company's share capital was increased through an issue of new shares in order to reduce its debt burden. From the industrial point of view, in 1997 the company had also already began to return to its normal production activity and was ready to carry out the major investments considered necessary, such as building its own power generation plant.

(39) In these circumstances the Commission considers that a credit institution acting under normal market conditions might have decided to provide the loan that Caja Cantabria granted Sniace. The question is, however, whether it would have done so on the same terms as Caja Cantabria did.

(40) The Commission cannot accept Sniace's suggestion that if aid is deemed to exist it should be calculated with reference to the terms included in letters sent by private banks concerning identical loans that they might have considered granting to Sniace. The letters are not an offer of credit made in January 1998 but a statement in 1999 of what the banks might have done in the past. They do not therefore constitute evidence that the banks were prepared, at that precise point in time and in the specific circumstances in which the subordinated loan was granted, to offer conditions similar to those provided by Caja Cantabria. The Commission also points out that no information regarding negotiations with Banesto have been provided by the Spanish authorities, although it is clear that that bank negotiated the terms of a subordinated loan with Sniace before withdrawing from the deal. For these reasons, the amount of aid involved in the subordinated loan has to be calculated according to the criteria that have been developed and made public by the Commission in various communications as indicated above.

(41) Sniace did not provide any security for the loan. The fact that the Sniace had assets valued at approximately EUR 150 million cannot be considered as a satisfactory substitute for security, because Caja Cantabria had no specific claims on those assets. On the contrary, in the event of bankruptcy the bank's claim could be met only after all common creditors' claims had been satisfied. Neither can the loan's convertibility into equity or bonds – allowing redemption before its maturity — provide a real alternative for the security normally required. In granting such a loan, any private lender acting under normal market conditions either would have required first-quality assets to secure the loan or would have increased the interest rate charged in order to cover the increased risk.

(42) In view of the characteristics of the loan and taking into account the history of Sniace, and the fact that in 1998 the company was beginning gradually to emerge from serious difficulties that threatened its survival, the

Commission considers that the normal interest rate to cover the risk involved would have been 12,2 %. This corresponds to the interbank rate used by the Commission for calculating its market reference rate plus the normal 75 basis points it adds for loans in Spain and a further 600 basis points for the absence of security. This is in line with the indications contained in the Commission notice on the method for setting reference rates, which mentions that the reference rate may be increased by 400 basis points or more in situations involving particular risk. The normal market rate would yield annual interest of EUR 1 466 701 on a typical year (from 1999 to 2005) ([26]). Over the eight-year loan period, total interest paid would amount to EUR 9 454 365 at 1998 prices.

(43) Calculation of the interest rate paid by Sniace during the life of the loan must take into account the fact that actual interest paid depends on two factors — Sniace's profitability and the MIBOR rate for the period 1998 to 2006 — that could not be known to the parties when the loan was granted. In the worst-case scenario, of Sniace not making a profit for any year up to 2006, interest paid would amount to EUR 240 000 on a typical year (from 1999 to 2005) ([27]) Over the loan period, total interest paid would amount to EUR 2 066 108 at 1998 prices.

(44) It is not possible to calculate a best-case scenario on the basis of the information available to the parties at the time the loan was granted. However, the Commission considers that a useful approximation can be made by calculating the interest that would be paid by Sniace if it achieved the profit targets set out in the viability plan ([28]). In this scenario, the Commission has calculated that the total interest paid would amount to EUR 4 340 602 at 1998 prices.

(45) The Commission therefore concludes that the advantage conferred on Sniace would be EUR 7 388 258 in the worst-case scenario, and EUR 5 113 763 in the approximated best-case scenario. The advantage conferred on Sniace is in any event well above the EUR 100 000 *de minimis* threshold.

([26]) In 1998, interest charges would have been slightly lower, at EUR 1 325 849, because the loan was granted on 4 February and thus interest accrued for less than one calendar year.

([27]) For 1998, interest charges were fixed by the parties at EUR 733 564.

([28]) And making two further assumptions: firstly that profit would remain constant for the years 2002 to 2005 at the same level forecast in the plan for the years 1999 to 2001, and secondly that the resulting interest paid would always be lower than the MIBOR + 2 ceiling.

4. **The aid affects trade between Member States**

(46) As there is extensive trade between Member States in the paper, synthetic fibres and derived chemical products sectors, the advantage conferred on Sniace is liable to distort competition in the Community by giving Sniace an advantage over competitors not receiving aid. The measure therefore constitutes State aid within the meaning of Article 87(1) of the Treaty.

VI. **ASSESSMENT OF THE COMPATIBILITY OF THE AID ELEMENT**

(47) The Commission does not agree with the comments made by Spain and Sniace that the company had legitimate expectations that a positive decision would be taken on the grounds of the length of the preliminary examination period. On the contrary, the Court of Justice has on several occasions ruled that companies cannot rely on legitimate expectations where aid has not been granted in full compliance with the rules. In the present case the measure was not notified, and a preliminary examination cannot prejudge the final decision on a case.

(48) The Commission has to assess whether the aid may be considered compatible with the common market under one of the derogations laid down in the Treaty. In its reply to the decision initiating the procedure, Sniace stated that, on account of its nature as quasi-capital, the loan had been used to finance the normal current needs of the company. No specific allocation was made.

(49) The Commission considers that the aid cannot be regarded as investment aid and must be classed as operating aid. Although the company is located in an area eligible for regional aid under the derogation in Article 87(3)(a), such ad hoc aid is not regarded as regional aid proper. The aid does not satisfy the requirements to qualify as aid for initial investment or the requirements to be deemed aid for job creation as indicated in the guidelines on national regional aid. Nor does it satisfy the conditions set out therein for the approval of operating aid in Article 87(3)(a) regions ([29]). Accordingly, the aid cannot be considered compatible under that legal framework.

(50) Since Sniace produces synthetic fibres, aid granted to it could be covered by the code on aid to the synthetic

([29]) OJ C 74, 10.3.1998, p. 9. See in particular point 2, footnote 10 and point 4.17.

fibres industry. The code however only imposes special conditions on investment aid for production equipment specified in the code, so that any other type of aid has to be assessed according to the horizontal rules. As the aid is not in direct support of the industrial processes of extrusion, texturisation or polymerisation or in direct support of any ancillary process linked to the contemporaneous installation of extrusion/texturisation capacity, as described in the code, the aid in question cannot be deemed to fall within the scope of the code (see recitals 55 and 56 below).

(51) This leaves the possibility of assessing the aid according to the rescue and restructuring guidelines, under which operating aid may under certain circumstances be considered compatible. Firstly, it must be demonstrated that Sniace was a firm in difficulty, unable to recover through its own resources. Secondly, the assessment of the aid must be carried out on the basis of a restructuring plan aimed at restoring the firm's long-term viability.

(52) As regards the difficulties experienced by Sniace, high production costs, falling market shares and declining markets led the company to seek a suspension of payments in 1992. The suspension of payments was ordered in March 1993 and lifted in October 1996, when the private creditors agreed to convert 40 % of the company's debt into equity, while the public-sector creditors decided not to subscribe to the agreement. It is therefore clear that, in 1996, at the time the viability plan was drawn up, Sniace was a company in difficulty. Table 1 summarises the company's financial situation in the years 1991 to 1996.

TABLE 1

(in EUR)

Year	1991	1992	1993	1994	1995	1996
Turnover	69 342 781	43 015 266	4 797 844	38 790 217	65 944 130	34 558 196
Operating income	– 13 700 984	– 25 322 689	– 23 221 491	– 6 843 112	– 5 536 157	– 8 695 810

(53) In June 1996 the Cantabrian Government commissioned a viability plan for Sniace from the private consultant Coypsa. The plan analyses the situation of Sniace following the suspension of payments and sets out the actions to be taken in subsequent years, at industrial and financial level, to ensure the company's long-term viability.

(54) Sniace endorsed the viability plan in September 1996 and started to implement it in 1997 and 1998, as reported in point 3.2 of the company's 1998 annual report. The same point of the annual report mentions explicitly the subordinated loan (described in point 11.1 of the report) as part of the implementation of the viability plan. For this reason, Spain's claim that the viability plan is not relevant for the purpose of assessing the subordinated loan cannot be accepted.

(55) The main element of the viability plan consisted in a set of measures aimed at reducing production costs, and in particular energy costs. Of particular importance in this respect was the plan to build a cogeneration plant in partnership with the Spanish company Abengoa SA. The cogeneration plant was to reduce significantly the impact of energy purchases on production costs, and thus make the company's products more competitive, particularly for the most energy-intensive products such as paper and synthetic fibres.

(56) Other measures provided for in the plan were aimed at reducing costs arising from the production of liquid wastes (new waste treatment and water management installations), as well as operating costs (reduction of overheads, rationalisation of the administrative and sales departments, closure of non-essential premises in Barcelona and Madrid).

(57) The plan did not envisage permanent capacity reductions on the existing production lines. Nor did it provide for investments that would have increased installed capacity, with the exception of the increase in energy production capacity following construction of the new cogeneration plant.

(58) The financial requirements for implementing the plan were estimated at: a credit line of EUR 3 million to restart production on the lines that had been stopped following the suspension of payments; a credit line of EUR 18 million to finance working capital; and EUR 9,2 million to finance the investments envisaged in the plan. The plan also set out the necessary conditions for

maintaining pre-existing debt at a serviceable level, mainly through converting it into long-term debt.

(59) It is therefore necessary to establish whether, on the basis of the viability plan, Sniace fulfilled the criteria to be eligible for restructuring aid. To this end, it has to be demonstrated that the viability plan satisfies the following conditions, set out in point 3.2.2 of the rescue and restructuring guidelines:

(a) the plan must restore the long-term viability of the company on the basis of realistic assumptions;

(b) the aid must avoid undue distortions of competition;

(c) the aid must be proportional to the restructuring costs and benefits;

(d) the company must implement the plan in full and respect its conditions.

(60) The restoration of Sniace's long-term viability should be achieved within a reasonable timescale and on the basis of realistic assumptions as to its future operating conditions. The improvement in viability must result mainly from internal measures, so as to allow the company to operate successfully once the restructuring has been completed.

(61) In the case under scrutiny, the viability plan covers the period 1997 to 2001. On the basis of the information contained in the plan, it can be concluded that the plan laid the foundations for ensuring Sniace's long-term viability. The thrust of the viability plan is to reduce production costs, especially in those areas, like energy purchases and environmental costs, that in the past made Sniace's products uncompetitive in the market. Another important element of the plan is the optimisation of capacity utilisation in order to respond to demand conditions and avoid costly energy purchases in the medium term. According to the plan, the company was to achieve limited profitability already in 1997, and satisfactory profitability from 1999 onwards (see Table 2 below).

TABLE 2

(in EUR)

Year	1997	1998	1999	2000	2001
Turnover	70 100 049	70 100 049	69 056 657	69 056 657	69 056 657
Operating income	835 142	1 069 128	5 129 284	5 129 284	5 129 284

(62) The fact that the assumptions on which the viability plan was based were realistic is confirmed by the evolution of Sniace's actual performance as set out in Table 3 below. Although Sniace's turnover recovery and return to profitability took longer than expected in the plan, turnover and operating income levels in 2000 and 2001 were largely in line with what had been anticipated in the plan.

TABLE 3

(in EUR)

Year	1997	1998	1999	2000	2001
Turnover	33 648 943	56 110 490	51 043 676	72 333 369	65 703 334
Operating income	– 9 603 554	– 7 050 166	– 7 164 563	4 991 273	4 376 660

(63) On these bases, the Commission concludes that the viability criterion is satisfied.

(64) As regards the impact of the aid on Sniace's competitors, the guidelines on restructuring aid require measures to be taken to avoid undue distortion of competition. This means that, where there is a structural excess of capacity in the sector, the restructuring plan should contribute, in proportion to the aid received and its repercussions on the relevant market, to the restructuring of the industry by irreversibly reducing or closing capacity.

(65) According to the guidelines, the fact that a company is located in an assisted area does not in itself justify a permissive approach to the granting of restructuring aid. However, the obligation to avoid undue distortions of

competition can be applied more flexibly in assisted areas, and particularly in the areas regarded as disadvantaged under Article 87(3)(a), as has been the case since 1995 for Torrelavega in Cantabria.

(66) While it is certainly true that competition exists within the European Union in the sectors in which Sniace operates, it is important to note that the viability plan did not envisage any increase in installed capacity in those sectors. The construction of the cogeneration plant, in particular, was not intended to remove an existing productive bottleneck thereby leading to more intensive use of installed capacity. The plant would instead allow the impact of energy costs on total production costs to be reduced by replacing power previously purchased from the grid with energy produced in-house. The improved utilisation of existing capacity after completion of the restructuring process and the implementation of the rationalisation measures were necessary in order to allow Sniace to return to profit in 2000. The aid in question, while necessary to return to viability a company located in an assisted area, does not allow Sniace to increase, during the implementation of the plan, its capacity at the expense of its competitors. The increase in power generation capacity is indeed indispensable in order to reduce the company's operating costs and achieve profitability in the medium term.

(67) As regards the proportionality of the aid to the restructuring costs, Sniace's return to viability can be regarded as not depending solely on the aid received. This is true even taking the worst-case scenario of Sniace not making a profit in any year between 1999 and 2005 (this scenario did not materialise) and thus setting the aid element at EUR 7 388 258. In this case, the aid intensity would amount to only 24,5 % of the EUR 30,2 million total costs included in the viability plan. The above percentage would be further reduced where Sniace paid Caja Cantabria higher levels of interest (as was the case in 2000 and 2001).

(68) The Commission concludes that the aid obtained by Sniace is limited to the minimum necessary and does not create excessive liquidity liable to be used for activities that could create distortions of competition and would be unrelated to the restructuring process. The aid in question is furthermore linked to measures that are necessary for implementing the viability plan and does not excessively reduce the company's financing costs.

(69) For the reasons stated above, the Commission concludes that the restructuring aid under scrutiny is compatible with the common market.

VII. **CONCLUSION**

(70) The Commission finds that the loan granted by Caja Cantabria to Sniace involves State aid within the meaning of Article 87(1). Consequently, Spain has unlawfully implemented the aid in question in breach of Article 88(3). However, as established by the above assessment, the aid fulfils the conditions for the derogation laid down in Article 87(3)(c) and is therefore compatible with the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Spain has implemented for Sniace SA, amounting to a maximum of EUR 7 388 258, is compatible with the common market pursuant to Article 87(3)(c) of the Treaty.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 11 December 2002.

For the Commission

Mario MONTI

Member of the Commission