COMMISSION DECISION

of 5 November 2003

concerning aid to the company González y Díez S.A. to cover exceptional costs (aid for 2001 and incorrect use of the aid for 1998 and 2000), amending Decision No 2002/827/ECSC

(notified under document number C(2003) 3910)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2004/340/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) On 2 July 2002 the Commission adopted Decision 2002/827/ECSC ([2]) which ruled that aid to the company González y Díez S.A to cover exceptional costs was incompatible with the common market — aid in respect of 2001 and incorrect use of the aid in respect of 1998 and 2000 — and stipulated the recovery of the said aid.

(2) In a letter dated 19 February 2003 the Commission, after having reexamined the file and its Decision 2002/827/ECSC and having regard to certain arguments presented by the said company in the context of case T-291/02 heard by the Court of First Instance of the European Communities, informed Spain of its decision to initiate the procedure laid down in Article 88(2) of the Treaty with a view to repealing Articles 1, 2 and 5 of Decision 2002/827/ECSC and replacing the latter by a new final decision.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ([3]). The Commission gave interested parties the opportunity to make their representations concerning the aid in question.

(4) The Commission received representations from interested parties. It communicated these representations to Spain, providing the opportunity to comment on them, but received no comments.

2. BACKGROUND

2.1. Notification dates

(5) The notification dates prior to aid for the coverage of exceptional costs of the company González y Díez S.A. and the dates of the letters communicating the granting of aid to González y Díez S.A., are as follows:

1998:

(a) prior notification:	31 March 1998
(b) grant of aid:	16 April 1999

2000:

(a) prior notification:	5 October 1999 (supplemented by letters dated 24 July and 8 November 2000)
(b) grant of aid:	19 March 2001

([1]) OJ C 87, 10.4.2003, p. 17.
([2]) OJ L 296, 30.10.2002, p. 80.
([3]) See footnote 1.

2001:

(a) prior notification	21 November 2000 (supplemented by letters dated 19 and 21 March 2001)
(b) grant of aid:	13 May 2002

2.2. **Commission Decisions**

(6) Regarding the aid in 1998: Decision 98/637/ECSC ([4]) authorising a global amount for aid to all companies in the sector in Spain.

(7) Regarding the aid in 2000: Decision 2001/162/ECSC ([5]) authorising a global amount for aid to all companies in the sector in Spain.

(8) Regarding the aid in 2001: Decision 2002/241/ECSC ([6]) announcing that the Commission would decide at a later date on aid to González y Díez S.A.

(9) Decision 2002/827/ECSC did not authorise the aid to González y Díez S.A. notified for 2001. On the other hand the said decision considered that part of the aid granted for the years 1998 and 2000 had been used incorrectly and should be recovered.

2.3. **Letters of information concerning aid to cover exceptional costs of the company González y Díez S.A.**

(10)

Commission:	25 October 1999
Response from Spain:	2 December 1999
Commission:	17 December 1999
Commission:	7 September 2000
Response from Spain:	8 November 2000
Commission:	warning of 24 April 2001
Response from Spain:	29 June 2001
Commission:	17 July 2001
Commission:	14 December 2001
Response from Spain:	28 February 2002
Commission:	10 April 2002
Response from Spain:	24 April 2002

2.4. **Decision No 2002/827/ECSC**

(11) From a material point of view the object of Decision 2002/827/ECSC was, on the one hand, the incorrect use of certain aid received by the company González y Díez S.A. in 1998 and 2000. In effect the Commission considered that the conditions under which that aid had been authorised by Decisions 98/637/ECSC and 2001/162/ECSC had not been respected. On the other hand, Decision 2002/827/ECSC had also ruled on certain notified aid for 2001, which had been advanced by Spain to the company, and which was not considered to be compatible with the provisions of Article 5 of Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry ([7]). As regards form, Decision 2002/827/ECSC had been adopted on the basis of the ECSC Treaty and within the framework of the procedure laid down in Decision 3632/93/ECSC.

2.5. **Appeal for annulment**

(12) On 17 September 2002 the company González y Díez S.A. presented an appeal against Decision 2002/827/ECSC before the Court of First Instance (case T-291/02).

2.6. **Grounds justifying the reopening of the proceedings**

(13) In light of some of the arguments presented during the said appeal for annulment to the Court of First Instance and after having reexamined the file and its Decision, the Commission expressed its doubts about whether the procedural rules applicable had been fully respected. These doubts relate in particular to whether its letter of 13 December 2001 should be regarded as a letter of formal notice or as advance warning of formal notice. Even though the problems to which the case relates had been mentioned publicly in Decision 2002/241/ECSC published in the *Official Journal of the European Communities* ([8]), the addressee of the letter and the beneficiary of the aid could, in light of the letter's wording, consider that the matter had not officially reached the phase of 'formal notice'. The Commission also indicated that the procedural rules currently applicable to the sectors previously governed by the

([4]) OJ L 303, 13.11.1998, p. 57.
([5]) OJ L 58, 28.2.2001, p. 24.
([6]) OJ L 82, 26.3.2002, p. 11.
([7]) OJ L 329, 30.12.1993, p. 12.
([8]) See footnote 6.

ECSC Treaty, i.e. Article 88(2) of the EC Treaty, as set out in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([9]), offer better guarantees than those of the ECSC Treaty for full respect of the rights of the Member State, the beneficiary company and all other interested parties. The Commission therefore decided to reopen the formal proceedings with a view to repealing Articles 1, 2 and 5 of Decision 2002/827/ECSC and replacing the latter by a new final decision, and informed Spain thereof in a letter dated 19 February 2003.

3. DETAILED DESCRIPTION OF THE AID

3.1. Aid to cover exceptional costs for the years 1998 and 2000, and its use

(14) Pursuant to Article 5 of Decision No 3632/93/ECSC, Spain granted the company González y Díez S.A. aid totalling 651 908 560 pesetas (EUR 3 918 049.35) for the year 1998 and 463 592 384 pesetas (EUR 2 786 246.34) for the year 2000, to cover exceptional costs resulting from the restructuring of the coal industry and unrelated to current production (liabilities inherited from the past).

(15) That aid was granted to the company González y Díez S.A. to cover the cost of closing down annual production capacities of 48 000 tonnes in 1998 and 38 000 tonnes in 2000. The company's production capacity therefore had to change from 286 000 tonnes per year at the beginning of 1998 to 238 000 tonnes per year by the end of that year and from 238 000 tonnes per year at the beginning of 2000 to 200 000 tonnes per year by the end of that year. Those production capacity cuts were to take place in 1998 at the open-cast mine of Buseiro and in 2000 at the underground mine of Sorriba (subsector Prohida) (26 000 tonnes) and at the open-cast mine of Buseiro (12 000 tonnes).

(16) The plans by the company González y Díez S.A. to cut production capacity in the years 1998 and 2000 were included in the framework of the 'Plan for the modernisation, rationalisation, restructuring and reduction of activity 1998 to 2000', notified by Spain to the Commission and to which the Commission had given its consent in its Decision No 98/637/ECSC in accordance with the principles and objectives of Decision No 3632/93/ECSC. The 1998 to 2002 Plan notified by Spain envisaged global coal production capacity reductions without specifying individual targets for the companies, since these had to submit proposals for the closure of production units, the reduction of production capacity or if necessary both, to be able to qualify under certain conditions for the aid mentioned in Article 5 of Decision No 3632/93/ECSC.

(17) The Commission decided to analyse the granting of aid to González y Díez S.A. to cover exceptional costs in light of the information published in the press as a result of the 100 % acquisition of that company by Mina la Camocha S.A. on 23 July 1998.

(18) The Commission analysed the annual management report for the year 1998 of the company Mina la Camocha S.A. and deduced that on 23 July 1998 the company had acquired 100 % of the shares of the company González y Díez S.A. at a purchase price of 784 439 000 pesetas. The balance sheet of the company Mina la Camocha S.A. on 31 December 1998 indicates financial assets amounting to 784 439 000 in total, entered as 'Holdings in the companies of the group'. On the liabilities side of the balance sheet there is a sum totalling 700 million pesetas entered as 'debts to companies of the group'. Note No 15 of the management report specifies that on 29 and 30 December 1998 the company González y Díez S.A. transferred funds to the company Mina la Camocha S.A. totalling 600 million pesetas and 100 million pesetas respectively.

(19) The annual management report of the company González y Díez S.A. relating to the financial year 1998 shows that the company received State aid totalling 651 908 560 pesetas to compensate its coal production cut by 48 000 tonnes per year. The operating account for 1998 shows a completely exceptional net operational profit of 700 015 591 pesetas. The management report of the company González y Díez S.A. also shows that on 29 and 30 December 1998 funds were transferred to the company Mina la Camocha S.A. in amounts of 600 million pesetas and 100 million pesetas respectively.

(20) The management report of the company González y Díez S.A. explains that on 11 November 1998 the company signed a rider to the contract of 13 March 1998 with Unión Eléctrica Fenosa SA reducing by 48 000 tonnes the quantity of coal it had to supply to Térmica de Soto de la Barca, which thus amounts to 238 000 tonnes per annum for the period 1999-2000. The report makes no reference to closure of installations as a consequence of this cut in production and mentions changes made to the exploitation systems

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

which had resulted in a reduction in the activities of open-cast subcontractors, with González y Díez S.A. itself having carried out virtually all the coal extraction activities.

(21) Having analysed the accounts of the company González y Díez S.A. for the financial year 1998, the Commission checked that the aid totalling 651 908 560 pesetas granted to the company to cover the technical costs of closing down extraction installations corresponding to an annual production capacity reduction of 48 000 tonnes was entered in the company's accounts as an operational profit. The Commission was unable to identify the costs related to the annual production capacity reduction of 48 000 tonnes.

(22) The gross operating profit of the company González y Díez S.A. in the financial year 1998 amounted to 998 185 023 pesetas and the net profit in the financial year to 700 015 591 pesetas. The profits for 1998 are far larger than those in previous financial years, which amounted to 141 084 825 pesetas in 1997 and 65 722 182 pesetas in 1996. The result for the financial year 1999 was a loss of 408 740 pesetas. The 1998 profit on 30 June of that year, i.e. before 100 % of the shares of González y Díez S.A. were acquired by Mina la Camocha S.A., amounted to 50 420 961 pesetas.

(23) The transfers of 600 million pesetas and 100 million pesetas from González y Díez S.A. to Mina la Camocha S.A. on 29 and 30 December 1998, respectively, were apparently made possible by the profit González y Díez S.A. earned in the financial year 1998 from the aid to cover exceptional closure costs.

(24) The acquisition of the company González y Díez S.A. by Mina la Camocha S.A. on 23 July 1998 could be explained by the prospect of receiving an extraordinary payment resulting from the State aid expected for reducing the quantities of coal stipulated in the contract between González y Díez S.A. and the electricity company. In effect, according to the management reports the value of the company acquired (González y Díez S.A.) is twice that of the purchasing company (Mina la Camocha S.A.). Moreover, the company Mina la Camocha S.A. has a very weak financial structure: its total assets, worth 22 443 136 000 pesetas on 31 December 1998, represent forty-six times its own capital amounting to 481 403 000 pesetas on the same date. The company Mina la Camocha S.A. is also subject to a closure plan and receives each year aid for the reduction of activity pursuant to Article 4 of Decision No 3632/93/ECSC. For its part, the company González y Díez S.A. receives operational aid each year pursuant to Article 3 of that Decision.

(25) Taken together, the above information therefore indicated:

(a) that the capital of González y Díez S.A. was acquired in total on 23 July 1998 by the company Mina la Camocha S.A. for a price of 784 million pesetas;

(b) that during the course of the financial year 1998 González y Díez S.A. received 652 million pesetas of aid as compensation for a supposed production capacity cut of 48 000 tonnes;

(c) that during the course of the financial year 1998, González y Díez S.A. recorded net profits of approximately 700 million pesetas;

(d) that at the end of 1998 González y Díez S.A. transferred approximately 700 million pesetas to Mina la Camocha S.A.

(26) This information suggests that the aid received by González y Díez S.A. greatly exceeded the costs of the supposed capacity reduction, since they were entered entirely as operational income and these exceptional profits could be transferred to the parent company.

(27) In the report sent by Spain on 2 December 1999 the company González y Díez S.A. acknowledged that the operating profit for the financial year 1998 included aid totalling 651 908 560 pesetas, intended to cover the exceptional closure costs. However, the company González y Díez S.A. stressed that the payments in question were two loans from one company to the other, which were repaid with interest before 2 August 1999. As regards the exceptional closure costs, the company's report does not verify the exceptional costs resulting from the restructuring of González y Díez S.A. In contrast, the report refers to expenditure of 319 896 354 pesetas corresponding to the repayment of loans and subsidies unrelated to the restructuring for the period 1998 to 2000, expenditure of 232 589 000 pesetas on investment in equipment for open-cast operation, and expenditure of 158 973 459 pesetas on investment for the modernisation of the underground mines.

(28) In a letter dated 19 March 2001 Spain informed the Commission that it had granted further aid to González y Díez S.A. totalling 463 592 384 pesetas for the year 2000, to cover the exceptional costs of cutting annual production by 38 000 tonnes in that year.

(29) The Commission analysed the management report of the company González y Díez S.A. for the year 2000 and found that the aid totalling 463 592 384 pesetas had been accounted for as operational income, while it was not possible to identify in the company's accounts the expenditure occasioned by the closure of production capacities. The operational profit in 2000 was 217 383 757 pesetas, so that the accounts would have recorded a loss if the company had not received the aid of 463 592 384 pesetas to cover the costs of production capacity cuts.

3.2. **Aid to cover exceptional costs in the year 2001**

(30) Without the Commission's prior authorisation, Spain granted the company González y Díez S.A. aid totalling 383 322 896 pesetas (EUR 2 303 817) for the year 2001, which was intended to cover the costs of cutting annual production capacity by 34 000 tonnes. This reduction was to take place in 2001 at the underground mine of Sorriba (Prohida subsector). The company's production would change from 200 000 tonnes per year at the beginning of 2001, to 166 000 tonnes per year at the end of that year.

(31) In Decision 2002/241/ECSC the Commission did not rule on aid totalling 394 000 000 pesetas which Spain planned to grant to González y Díez S.A. for the year 2001 (the aid notified exceeded the aid granted) to cover exceptional restructuring costs. The Commission justified its decision not to rule on that aid on the grounds that it was awaiting an analysis of information to be communicated by Spain on the aid granted to the said company for the years 1998 and 2000.

(32) In a letter dated 13 December 2001 the Commission requested Spain to provide information on the aid totalling 383 322 896 pesetas (EUR 2 303 817) that Spain had granted to González y Díez S.A. in 2001.

(33) In letters dated 28 February 2002 and 24 April 2002, Spain sent the Commission the technical reports of González y Díez S.A. dated 13 February and 26 February 2002, on the costs of closing down installations in 2001.

(34) In the letter from González y Díez S.A. dated 26 February 2002, which Spain sent to the Commission on 28 February 2002, the company states that the value of the mining operations abandoned as a result of the reduction of activity in 1998, 2000 and 2001 amounts to 657 700 000 pesetas.

(35) On 13 May 2002 Spain notified the Commission that the aid for 2001 totalling 383 322 896 pesetas (EUR 2 303 817) had already been paid to the company.

4. **REPRESENTATIONS BY INTERESTED PARTIES**

(36) In the context of the present proceedings the company González y Díez S.A. sent its representations to the Commission by means of:

(a) a letter dated 28 April 2003 to the Institute for the restructuring of coal mining (Ministry of Finance), forwarded to the Commission with a letter from Spain dated 30 April 2003 and accompanied by a report endorsed by mining experts and other supplementary documents;

(b) a letter dated 26 May 2003 sent directly to the Commission's Directorate General for Energy and Transport by the law office Uría & Menéndez.

The report endorsed by mining experts responds to the 'request for information' (point 5) of the Commission's decision initiating the present proceedings ([10]).

(37) After some initial considerations on the mining operations at the La Prohida subsector of the Sorriba Group (underground operation) and the Buseiro Group (open-cast operation), the report justifies the costs of reducing activity in the years 1998, 2000 and 2001.

The information submitted is much more complete than that sent to the Commission in the proceedings that led to Decision No 2002/827/ECSC, and includes new elements.

In effect, in the information relating to the present proceedings González y Díez S.A. modifies its presentation of the facts compared with the proceedings leading to Decision 2002/827/ECSC. The company now justifies the expenditures incurred for all the closure operations in the La Prohida subsector of the Sorriba Group, instead of continuing to do this only for the abandonment of 170 000 tonnes above level 3 of the said subsector.

According to this new presentation of the facts, the report endorsed by independent experts says the following (in summarised form) about the expenditures associated with the closure of the La Prohida subsector of the Sorriba Group:

([10]) See footnote 1.

(a) the total length of the galleries dug at level 3 to work the 170 000 tonnes abandoned is 1 030 metres, representing a total cost of EUR 738 523.68 (122 880 000 pesetas);

This work was entered as an operational cost in the company's accounts; for that reason it cannot be identified in the fixed-asset capital of the situation balance on the date of their abandonment;

(b) the total length of the galleries abandoned at level 3 of the La Prohida subsector and which were used for working the reserves above level 3 is 1 640 metres, of which 1 496 metres feature in the register of fixed-assets with a residual value of EUR 610 716.04 (101 614 599 pesetas) on 31 December 2001;

(c) the total length of the galleries abandoned at levels 2 and 4 of the La Prohida subsector is 1 625 metres, of which 1 093 metres feature in the register of fixed assets with a residual value of EUR 395 808.55 (65 857 001 pesetas) on 31 December 2001;

(d) the length of the galleries abandoned at the 1st level assigned to the La Prohida subsector is 490 m; the residual value of these galleries and other assets abandoned in this subsector, as featured in the fixed-asset records, was EUR 1 046 970.83 (174 201 288 pesetas) on 31 December 2000;

(e) thus, the residual value of the entire La Prohida subsector, including the galleries entered in the fixed-asset register and the remaining fixed assets, amounts to 341 672 888 pesetas (EUR 2 053 495.41) according to the company's accounts;

(f) the experts add that of this total nothing was yet imputed to losses of assets in the balance of 22 404 600 pesetas (EUR 134 654.36), of which an amount of 19 417 316 pesetas (EUR 116 700.42) will constitute a loss in the financial year 2003, given that the difference of 2 987 284 pesetas (EUR 17 953.94) is recorded in the financial years 2001 and 2002 as an amortisation;

(g) the report endorsed by independent experts justifies the work to modify the ventilation circuit by the need for the Tres Hermanos subsector to communicate with level 1 of La Prohida; for that reason various inclined planes were created along with other work in the 'Tres Hermanos' sector located at a lower level than La Prohida; the total cost was EUR 602 146 29 (100 188 713 pesetas); the same work was evaluated in the document from Uría & Menéndez at EUR 698 489.70 (16 218 907.20 pesetas);

(h) the refurbishment of the outside at the La Prohida sector incurred expenditure of EUR 61 609.60 (10 250 975 pesetas);

(i) the company provided an allowance in the balance, of EUR 601 012.10 (100 000 000 pesetas) in anticipation of possible expenses incurred on the outside of the mine.

(38) As regards the open-cast mining sector of Buseiro, the report endorsed by independent experts confirms that until 1998 the deposit had been worked integrally, i.e. the overhead and wall veins of seam I. The movements of excavation residues and the mine waste tips produced until now correspond with the integral working of the said seam I.

At the time when the trough of the syncline was worked, it was decided to abandon the wall vein of seam I because of the poor quality of the coal. However, according to the experts in the northern zone of the trough an overburden excavation estimated at 1 005 080 m^3 had already taken place to gain access to the wall vein.

The total cost of earth movement corresponding to this overburden excavation is EUR 1 902 805.52 (316 600 200 pesetas). This expenditure is recorded in the company's accounts as 'operational costs'.

The report confirmed by independent experts includes other expenditure incurred by planning changes, such as:

(a) restoration costs (higher than allowed for) of 24.87 ha, valued at EUR 547 066.46 (91 024 200 pesetas); this cost corresponds to the value of the guarantees signed with the government of the Principality of Asturias; the costs are recorded under the heading 'production costs';

(b) purchase of additional land for mine waste tips, to the value EUR 372 176.75 (61 925 000 pesetas), recorded as fixed assets of the company;

(c) creation of a mine waste tip located on the east side and communication tracks with the west side and its later restoration to accommodate the overburden excavation in the northern zone of the trough, to the value of EUR 1 227 156.65 (204 181 686 pesetas);

The experts consider that those costs could have been attributable in whole or in part to the reduction of activity, and that no data are available to carry out any evaluation of them;

Of this total of EUR 1 227 156.65, an amount of EUR 772 763.27 (128 576 989 pesetas) was attributed to losses of fixed assets in the financial year 2002, and an amount of EUR 249 662.02 (41 540 265 pesetas) to amortisation in the years 1999, 2000 and 2001; the balance of EUR 204 731.36 (34 064 432 pesetas) is still to be written off from the fixed assets;

(d) the report by independent experts verifies that in the financial year 2002 an amount of EUR 1 693 504.15 (281 775 381 pesetas) was allowed as the total amount of the guarantees demanded by the Principality of Asturias, of which EUR 547 066.40 correspond to the restoration of land following the reduction of activity mentioned earlier.

(39) The Commission notes that the experts state in various parts of their report that they were not able physically to visit the workings referred to as being inactive or used for the creation of mine waste tips in the open-cast top excavation zones. The data and reports submitted by the company which the experts were able to check during visits to the mining operations and offices of González y Díez S.A., carry more weight than the others for the purposes of the Commission's analysis. In many cases the experts could do no more than confirm the information submitted by the company.

(40) From a legal point of view, in its communication dated 26 May 2003 the company González y Díez S.A. considers that the Commission does not have the competence to give a ruling. Neither the ECSC Treaty, nor the EC Treaty, nor the Nice Protocol on the financial consequences of the expiry of the ECSC Treaty and the Coal and Steel Research Fund confer such competence upon it. The Commission does not indicate what legal instrument allows it to initiate and determine proceedings on coal aid agreed upon before the expiry of the ECSC Treaty, which occurred on 23 July 2002. The EC Treaty does not empower the Commission to examine aid for coal mining granted by the Member States earlier than 24 July 2002. The general principles of non-retroactivity of legal rules and legitimate expectations go against the application of legal rules to situations that precede their entry into force. No text establishes the possibility of the retroactive application of the EC Treaty to situations earlier than 24 July 2002 and, in particular, to aid for coal mining agreed upon before that date. Consequently, the Commission was not authorised to initiate and decide the said proceedings.

(41) In the opinion of the company González y Díez S.A., the procedure chosen by the Commission is inappropriate for the purpose intended, namely the repeal of Articles 1, 2 and 5 of Decision 2002/827/ECSC and replacement of the latter by a new final decision. The principle of legality would require the Commission to have immediately and officially repealed Articles 1, 2 and 5 of the said Decision. The principle of legitimate expectations would have no relevance, since it would not suit the interested party to maintain them because their repeal would benefit that party. Thus, this procedure would not be the appropriate course for the Commission since Regulation (EC) No 659/1999 does not allow the Commission to repeal the said Decision as part of the formal investigation procedure established in Article 4(4) of the said Regulation. It would only be possible to initiate the formal investigation procedure once Articles 1, 2 and 5 of Decision 2002/827/ECSC had been annuled by the Court of First Instance or, as required by the principle of legality, once they had been officially repealed by the Commission.

(42) The company González y Díez S.A. also communicated the costs deriving from the reduction of its activities, on the basis of the report endorsed by independent experts dated 25 April 2003 and of the reports by the auditors Salas & Maraver dated January 2001 and 28 May 2001, which had been transmitted in the framework of the proceedings that led to Decision No 2002/827/ECSC.

(43) In the opinion of the company González y Díez S.A. the reduction of supplies during the period 1998 to 2002 would have been 125 426.58 t, more than the expected 120 000 t, changing from 286 139.46 t in 1998 to 160 712.88 t in 2002.

(44) González y Díez S.A. considers it necessary to bear in mind that Decision 2002/827/ECSC 'is based on data supplied in the context of the previous proceedings of formal aid investigation' and, as already mentioned, those data have been superseded in light of the present state of complete abandonment of the La Prohida subsector. The letter also says that González y Díez S.A. has totally abandoned the western zone of the open-cast deposit of Buseiro.

(45) González y Díez S.A. adds comments and clarification on the report by the independent experts, among which the following can be emphasised:

(a) González y Díez S.A. criticises the fact that the Commission considers that the 1 005 080 m^3 of overburden excavation might have been overestimated. In the company's opinion this overburden excavation could in reality be 6 687 064 m^3. However, the independent experts had stated that they were unable to quantify the overburden excavation of 1 005 080 m^3 but that, on the basis of information from the company, it can be considered reasonable. In the opinion of González y Díez S.A., 'the company could not amortise the costs deriving from the excess volume of dead rock and soil moved' when the independent experts stated that the expenditure was attributable to 'operating costs' and not to investment.

(b) González y Díez S.A. refers to the cancellation of the contract with Transportes Peral, when in the letter of 8 November 1999 from Mina la Camocha (the owner of González y Díez S.A.), sent by Spain on 2 December 1999, it is stated that there were no installation closures and that González y Díez S.A. had to invest 232 589 000 pesetas to operate with its own resources instead of contracting.

(46) The document from González y Díez S.A. gives information about the acquisition of land for 61 925 000 pesetas, the creation of a mine waste tip on the east side whose residual value on 31 December 1998 was 34 064 432 pesetas, access tracks to the tip, whose residual value on the same data was 170 117 254 pesetas, and the restoration of open-cast workings, of which 91 024 200 pesetas correspond to the restoration of the western mine waste tip. González y Díez S.A. indicates that the said tip is used to store the surplus excavation residue from the western deposit of Buseiro and not only the overburden excavation from the northern zone, which justifies those expenses as a consequence of the operational planning change whose result was that the work carried out to store a larger volume of excavation residue is now no longer necessary. The latter justifies the purpose of the mine waste tip activity and its restoration as a consequence of the abandonment of operations on the west side of Buseiro.

(47) The document from González y Díez S.A. justifies the expenditure at the Buseiro workings on the basis of indent (e) residual costs deriving from legal obligations in the context of land restoration, this being a legal obligation, and indent (k) exceptional intrinsic depreciations, of the Annex to Decision No 3632/93/ECSC.

(48) As regards costs for the abandonment of the La Prohida subsector of the Sorriba Group, the information in the document from González y Díez S.A. coincides with that in the report by independent experts and is justified on the basis of the following indents of the Annex to Decision No 3632/93/ECSC: indent (f) for ventilation shafts, recovery of a crossing and future costs, also partly attributable to indents (l) and (g); indent (k) for the abandonment of the 1 030 m at level 3 and the residual value of the remaining galleries of the La Prohida subsector; indents (f) and (g) for the restoration work at La Prohida.

(49) The document from González y Díez S.A. also includes information on the repayable loan of 313 500 000 pesetas intended for investment projects and granted between 1990 and 1993 in the context of the Strategic Plan for Competitive Action (hereinafter 'SPCA'). The document also states that in the same context non-refundable aid was granted to the company for investment, to the value of 209 million pesetas. The document states that 233 492 186 pesetas were paid in the years 1999–2000 to repay the loan and interest accrued.

The document from González y Díez S.A. gives a detailed description of the Directive from the Ministry of Industry and Energy dated 30 May 1985, regulating the granting of subsidies and aid in connection with the programme of energy resource mining and the objectives of the scheme, which are mainly to promote the production of coal under viable economic conditions, to increase productivity, or to restrict the production costs, of coal treatment installations and of geological and mining prospecting. The document reports on the Agreement signed on 30 December 1999 and the Annexes signed subsequently with the Ministry of Industry and Energy. The objective of the agreement was:

(i) to establish a new system of operation by soutirage after prior improvement of the mining operation;

(ii) to increase annual production to 240 000 tonnes of marketable coal;

(iii) to improve output per worker, and safety; and

(iv) to reduce operating costs.

The total budget amounted to 1 160 million pesetas.

The Agreement signed between González y Díez S.A. and the Ministry of Industry and Energy provided for the granting of the following subsidies for the period 1990 to 1993:

(i) for research and technical development activities: 23 million pesetas, non-refundable (20 % of the investment costs);

(ii) for operating and ore treatment activities: 209 million pesetas, non-refundable (30 % of the investment costs) and 313.5 million pesetas (30 % of the investment costs), as a refundable subsidy.

González y Díez S.A. claims that these last two items of subsidy totalling 209 000 000 and 313 500 000 pesetas respectively were intended for carrying out investments in installations and activities designed to increase mining output: an output that had to be reduced from 1998 onwards at the Buseiro deposit and from 2000 onwards at the Sorriba deposit (La Prohida subsector). González y Díez S.A. claims, in short, that despite undertaking to cut production capacity in 1998 and 2000 at Buseiro and La Prohida, it was in parallel continuing to repay the Spanish Administration amounts of a subsidy initially intended to increase production capacity.

(50) The document from González y Díez S.A. is accompanied by 20 annexes relating to reports, agreements and evidence of payments, which all constitutes more complete information than that submitted before.

5. **REPRESENTATIONS BY SPAIN**

(51) With a letter dated 29 April 2003, Spain sent the Commission a copy of the agreements signed between the then Ministry of Industry and González y Díez S.A. within the framework of the SPCA between 1990 and 1993, and the refundable and non-refundable subsidies granted in that context.

With the same letter Spain sent a copy of the report prepared by the Government of the Principality of Asturias, which is the Spanish authority responsible for mining operations. In its report it says that the precise terms and conditions of the activity reduction presented by González y Díez S.A. are not known. The Government of the Principality of Asturias states that since 1998 all work in the Buseiro sector has taken place at more than 545 m above sea level (a.s.l.).

The company González y Díez S.A. also sent the Commission a letter dated 14 April 2003, which had been sent to it at its request by the Government of the Principality of Asturias, in which it is stated inter alia that since 2001 no coal has been extracted from the Prohida subsector and that since 1 January 2002 the said mine group has remained inactive and abandoned. The letter defines the Prohida subsector as that part of the mine located between level 1, 277 a.s.l., and the surface, taking level 2 at a height of 330 a.s.l., level 3 at 385 a.s.l., and level 4 at 454 a.s.l.

The said letter from the Government of the Principality of Asturias also indicates that it can be inferred from the Work Plans that production fell from 302 423 tonnes in 1997 to 160 686 tonnes in 2002.

In a letter dated 30 June 2003, the Commission invited Spain to comment on the representations made by the interested parties (González y Díez S.A.). Spain did not submit any comments.

6. **EVALUATION OF THE AID, AND CONCLUSIONS**

(52) Having regard to all the information available, including the new data, the Commission has analysed the aid in detail.

6.1. **Legal framework and competence of the Commission**

(53) The ECSC Treaty and the laws adopted for its implementation, in particular Decision No 3632/93/ECSC, expired on 23 July 2002. Until the ECSC Treaty's expiry State aid to the coal industry was examined in relation to the rules established by Decision 3632/93/ECSC. Decisions 98/637/ECSC and 2001/162/ECSC, authorising aid to coal sector companies in Spain for 1998 and 2000, were adopted in that context.

(54) The present Decision relates to events that took place before 24 July 2002, concerning aid subject to the ECSC Treaty system and in an area to which the system of the EC Treaty now applies. Thus, this Decision straddles two successive systems.

(55) The legal approach that the Commission considers applicable in this matter was explained in detail in its Communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty ([11]) (2002/C 152/03). The Commission refers to that Communication and in particular to paragraphs 22 to 26 and 45 to 47 for the definition of the applicable legal framework.

(56) The basic principle is that from 24 July 2002 onwards, sectors covered until that date by the ECSC Treaty and by the rules of procedure and law deriving therefrom, become subject to the rules of the EC Treaty and the rules of procedure and law deriving from the latter. From that date the Commission has competence in relation to State aid to the coal industry pursuant to Article 88(2) of the EC Treaty. If the Commission observes that illegal aid has been granted by a Member State or from the resources of a state and that this is incompatible with the Common Market, it decides that the State in question must cease the said aid. The Commission also has the duty to monitor effectively the compliance with its decisions. For that reason the Commission must continue monitoring, both before and after the expiry of the ECSC Treaty, the implementation by Member States of Decisions 98/637/ECSC and 2001/162/ECSC adopted pursuant to Decision No 3632/93/ECSC, and has the power to adopt the necessary measures in the event of incorrect use of the aid.

(57) Communication 2002/C 152/03 is based on the principle that the EC Treaty and the ECSC Treaty are two elements of the same legal system. The EC Treaty is of general application while the ECSC Treaty had a sectoral scope and was therefore an exception from the former. In effect, the relationship between these Treaties is governed by the provisions of Article 305(1) of the EC Treaty, which states that the provisions of the EC Treaty do not affect those of the Treaty Establishing the European Coal and Steel Community, in particular as regards the rights and obligations of the Member States, the powers of the said Community's institutions and the rules laid down in the said Treaty for the functioning of the common market in coal and steel. Consequently, the general Treaty is applicable in all cases where the sectoral Treaty does not apply. Thus, contrary to what is claimed by the company González y Díez S.A., the expiry of the ECSC Treaty cannot result in a legal vacuum since that Treaty is enshrined in a legal system which automatically fills the vacuum produced by the disappearance of one of its elements. In addition it must be stressed that in this case the basic rules applicable by virtue of the ECSC and EC systems, in other words Decision No 3632/93/ECSC and Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid for coal mining ([12]), have virtually the same basic content.

(58) Contrary to what the company suggests in its representations, the 'Nice Protocol on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel' does not resolve the issue of the legal framework after the expiry of the ECSC Treaty in a general way, but rather, provides clarification of a very specific issue (the future use of certain ECSC funds), which bears no relationship to the issues with which the present Decision deals.

(59) The Commission also points out that the 'legal vacuum' theory advanced by the company González y Díez S.A. would lead to results not only erroneous from a legal standpoint but also contrary to the interests of the company itself. In effect, if it were correct that the Commission lacked the competence to repeal its Decision 2002/827/ECSC after the expiry of the ECSC Treaty, it would follow according to the same logic that neither was the Court competent to annul a ECSC Decision after the expiry of the said Treaty. The inevitable consequence would be that Decision 2002/827/ECSC continued to be fully valid and that its legal consequences could not be modified. The Commission considers that this view is simply unsustainable from a legal and logical standpoint.

(60) On the other hand, the company complains that Articles 1, 2 and 5 of Decision 2002/827/ECSC were not immediately repealed rather than initiating the procedure for their repeal. It must be stressed in this connection that a final decision on the appropriateness of revoking those provisions could only be adopted after examining the representations made by Spain, the applicant party and any other interested party. It is obvious that the company González y Díez S.A. would have preferred immediate revocation without prior resumption of the procedure, but such a decision could have prejudiced the rights of other interested parties, for example possible competitors. The withdrawal of a negative decision is a favourable act for the beneficiary of the aid, but it may be prejudicial to the interests of its competitors. For the Commission, this means that such a withdrawal cannot be decided without first offering possible interested parties the opportunity to make their representations.

([11]) OJ C 152, 26.6.2002, p. 5.

([12]) OJ L 205, 2.8.2002, p. 1.

6.2. **Rules of procedure applicable**

(61) The present Decision is being adopted after the expiry of the ESCS Treaty on 23 July 2002. As the Commission explained in detail in points 26 and 45 of its Communication 2002/C152/03, this implies that the procedural rules applicable from 23 July 2002 are those deriving from the EC Treaty: Article 88 of that Treaty, Regulation (EC) No 659/1999 and the procedural provisions of Regulation (EC) No 1407/2002. As explained in point 26 of Communication 2002/C152/03, the basic principle is that the rules applicable are those which were in force at the time of taking the procedural step in question. Consequently, the procedural rules do not have retroactive effect and the rules applicable are those which were in force at the time of the procedure. In other words, from 24 July 2002 the Commission will apply exclusively the procedural rules of Regulation (EC) No 659/1999 in any pending case.

(62) The present Decision is there made within the framework defined by Article 88(2) of the EC Treaty and by Regulation (EC) 659/1999. In particular, as regards the incorrect use of the aid corresponding to the years 1998 and 2000, the procedure applicable is that provided for in Article 16 of the Regulation. Article 10 et. seq. in particular are applicable in respect of the aid for 2001.

6.3. **Funding rules applicable**

(63) As regards the funding rules applicable:

(a) After the expiry of the ECSC Treaty, the Commission will continue monitoring the implementation by Member States of the decisions authorising State aid adopted pursuant to Decision No 3632/93/ECSC, as explained in point 45 of Communication 2002/C152/03. In the event of non-compliance, the case will be dealt with in accordance with the procedure laid down in Regulation (EC) No 659/1999. Consequently, as regards the possible incorrect use of the aid corresponding to the years 1998 and 2000, the Commission will check whether the conditions established in its Decisions 98/637/ECSC and 2001/162/ECSC have been respected. Those Decisions were adopted in 1998 and 2000 on the basis of the ECSC regulations applicable at the time, and they are decisions which continue to be firm and binding. Consequently, in connection with the use of the aid, compliance with the conditions established in the two ECSC Decisions in question must be checked in relation thereto.

In any event, the Commission points out that the conditions contained in the said Decisions refer to the requirements that follow from Decision No 3632/93/ECSC and that those requirements are also contained in Regulation (EC) No 1407/2002, in force since 23 July 2002.

The cost categories that can be covered by the aid to which Article 5 refers are defined in the Annex to Decision No 3632/93/ECSC. In particular, the cost categories to which the Annex refers, which can correspond to 'technical costs of closure', are as follows:

(i) residual liabilities deriving from fiscal, legal or administrative provisions (indent (e) of the Annex);

(ii) additional underground safety work resulting from restructuring (indent (f) of the Annex);

(iii) mining damage provided that it has been caused by pits previously in service (indent (g) of the Annex);

(iv) residual costs resulting from contributions to bodies responsible for water supplies and for the removal of waste water (indent (h) of the Annex);

(v) other residual costs resulting from water supplies and the removal of waste water (indent (i) of the Annex);

(vi) exceptional intrinsic depreciation provided that it results from the restructuring of the industry (without taking account of any revaluation which has occurred since 1 January 1986 and which exceeds the rate of inflation (indent k) of the Annex).

(b) As regards the aid for 2001, which was effectively paid before being authorised, the Commission examined its compatibility in principle in relation to Article 7 of Regulation (EC) No 1407/2002, as explained in point 47 of Communication 2002/C 152/03. When it rules after 23 July 2002 on State aid granted up to that date without its prior approval, the Commission will apply the specific provisions of Regulation (EC) No 659/1999. The Commission points out that as regards the facts to which the present Decision relates, the content of Article 7 of Regulation (EC) No 1407/2002 is virtually equivalent to that of Article 5 of Decision No 3632/93/ECSC. The result of the financial analysis should therefore be similar, although it is

the latter Decision which is being applied. In the event of a possible divergence, the Commission would likewise take into account the principle of legal security to determine the rule applicable.

6.4. **Evaluation**

(64) There is not the least doubt about the aid character of all these measures. For the aid granted in 1998 and 2000, its character as aid is not in dispute and it is merely necessary to check whether the use made of it does or does not comply with the authorising Decisions. In any case it is clear that all these measures satisfy the requirements stipulated in Article 87(1) of the Treaty (and more particularly those stipulated in indent c) of Article 4 of the ECSC Treaty). In effect, they are subsidies which selectively favour certain companies in a particular sector; consequently, they affect competition and trade between the Member States and the funds are clearly from the public purse. Accordingly, the Commission must examine, in their case, their compatibility with the authorising Decisions 98/637/ECSC and 2001/162/ECSC and with the Treaty.

(65) On 31 March 1998 and 5 October 1999 Spain notified to the Commission aid to cover 'technical costs of closure' for the years 1998 and 2000, pursuant to Article 5 of Decision No 3632/93/ECSC.

(66) In its notification of the aid to cover exceptional costs for the years 1998 and 2000, Spain presented a global figure for all privately owned coal companies. Spain's justifiication for this global notification was that it did not know at the time of the notification which specific companies would agree to plans for closure or activity reduction during the course of the year.

(67) In its Decisions 98/637/ECSC and 2001/162 ECSC the Commission authorised global aid to cover the technical costs of closure of the Spanish privately owned companies for the sum of 10 325 millions pesetas for 1998 and 9 959 millions pesetas (EUR 59 854 795,48) for 2000.

(68) The aid authorised by the Commission in its Decisions 98/637/ECSC and 2001/162/ECSC is intended to cover the specific cost categories set out in the Annex to Decision No 3632/93/ECSC, namely:

— the loss in value of fixed assets of companies that have to carry out total or partial closures (indent (k) of the Annex);

— other exceptional costs resulting from the progressive closures related to the restructuring of the coal industry (indents (e), (f), (h) and (i) of the Annex).

(69) In its Decisions 98/637/ECSC and 2001/162/ECSC the Commission requested that Spain grant individual aid to the companies in accordance with the criteria laid down in Decision No 3632/93/ECSC.

In Article 2 of its Decision 98/637/ECSC the Commission stipulated that:

'In accordance with Article 86 of the ECSC Treaty, Spain shall adopt all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising under this Decision. It shall ensure that the aid authorised is used for the purposes intended and that any unspent, overestimated or incorrectly used aid for any item covered by this Decision is repaid to it.'

The wording of Article 2 of Decision 2001/162/ECSC is practically identical.

In the justification for its two Decisions the Commission says that:

'Spain must ensure that the aid granted to undertakings to cover exceptional costs is in line with the categories of costs specified in the Annex to Decision No 3632/93/ECSC.'

In addition, in its Decision 2001/162/ECSC relating to the year 2000 the Commission adds in its justification:

'Spain must ensure that, within the framework of the provisions of Article 86 of the Treaty, the aid is limited to that which is strictly necessary in the light of the social and regional considerations which characterise the decline of the Community's coal industry. The aid may not give any economic advantage, whether directly or indirectly, to productions for which no aid is authorised or to other activities distinct from coal production. In particular, Spain must ensure that aid granted to undertakings under Article 5 of Decision No 3632/93/ECSC to cover the technical cost of closure is not used by the undertakings as aid for current production (Articles 3 and 4 of the Decision) and that the closure of capacity for which the aid is intended is definitive and that it is carried out in optimum conditions of safety and environmental protection.'

(70) Aid to cover exceptional costs must in any case meet the criteria of Article 5(1) of Decision No 3632/93/ECSC, namely that it can be regarded as compatible with the common market if its amount does not exceed those costs.

(71) The Commission initially analysed the incorrect application of the aid for the years 1998 and 2000 and the compatibility of the aid for 2001 on the basis of the data submitted by the Member State and by the beneficiary company. The conclusions of that analysis were the logical outcome of the information sent to the Commission. The Commission referred to its Decision No 2002/827/ECSC for a detailed explanation of the said analysis.

(72) In response to the Commission's decision to reopen the formal procedure to examine the aid granted to González y Díez S.A., the company made new representations which included detailed and well documented reports endorsed by new independent experts. The Commission points out that since its first request on 25 October 1999, the company had been given numerous opportunities to provide information about the fate of the aid under examination and that the reports from the company are now much more complete.

(73) Nevertheless, the Commission notes that the new independent experts were unable to verify many of the data concerning activity reduction, since at the time of their report (2003) the works had been abandoned or completed. Those verifications could have been carried out when the Commission asked for the reports on previous occasions, since the works were accessible at that time. For that reason, the Commission must draw its conclusions on the basis of the information sent by Spain on 29 and 30 April 2003, and in previous reports when necessary to obtain a complete picture of the facts.

(74) The company González y Díez S.A. makes a new claim in its document with comments on the decision to reopen the proceedings, arguing that instead of having abandoned 170 000 tonnes in the La Prohida subsector and 585 000 t in the Buseiro sector, what it did was to abandon the La Prohida subsector completely and to abandon totally the western zone of the open-cast deposit of Buseiro.

The Commission considers that the La Prohida subsector, as defined in the letter of 14 April 2003 from the Government of the Principality of Asturias, can be regarded as 'a production unit' for the purposes of Regulation (EC) No 1407/2002 and Commission Decision 2002/871/EC of 17 October 2002, establishing a joint framework for the communication of information needed for the application of Council Regulation (EC) No 1407/2002 on State aid to the coal industry ([13]). However, the western zone of Buseiro does not satisfy that definition if account is taken of the operation project of 1994.

The Commission can, however, accept that the aid to cover exceptional restructuring costs in the La Prohida subsector relate to the total closure of that production unit. The aid analysis carried out by the Commission is in line with Article 7 and the Annex to Regulation (EC) No 1407/2002, which only makes provision for aid for the total closure of production units.

In the case of the partial closure of the Buseiro sector the Commission can continue carrying out the analysis in accordance with the criteria of Article 5 and the Annex to Decision No 3632/93/ECSC, given that an analysis based on the requirement for total closure would be unfavourable to the company and, in the particular circumstances of this case, would conflict with the principle of legality. In effect, given that the final decision on this case should have been adopted before the entry into force of Regulation (EC) No 1407/2002 and that the delay cannot be attributed solely to the company, it would not be compatible with the principle of legality to make the company suffer the negative consequences that would result from a tightening of the basic rules during the said period.

6.4.1. *Aid that can be authorised (partially)*

(75) Now that the plans of the workings abandoned at level 3 of the La Prohida subsector have been analysed, the Commission considers that the value at cost price of the 1 030 metres of galleries needed for the working of the abandoned 170 000 tonnes is excessive. A considerable proportion of those galleries had already been used. Moreover, the construction of those galleries was put down to operation costs and about 40 % of that cost was covered by State aid. The justification put forward by the company for 100 % coverage of the implementation cost is equivalent to an accumulation of incompatible aids. Adopting the most favourable position for the company, the Commission can regard as justified 60 % of the cost of creating the 1 030 metres of galleries, namely EUR 443 114.21 (73 728 000

([13]) OJ L 300, 5.11.2002, p. 42.

pesetas). Part of the aid received during 2000 can be justified on the basis of indents (g) and (h) of the Annex to Regulation (EC) No 1407/2002. The remaining amount of EUR 295 409.47 (49 152 000 pesetas) is not compatible.

(76) The Commission can regard as justified the EUR 610 716.04 (101 614 599 pesetas) corresponding to the residual value of 1 496 metres of galleries abandoned at level 3 of La Prohida, which feature in the record of fixed assets on 31 December 2000. The Commission analysed the company's management report for the year 2001 and verified that this amount features as a loss of fixed assets. The aid is justified on the basis of indent k) of the Annex to Regulation (EC) No 1407/2002. The EUR 610 716.04 (101 614 599 pesetas) can be authorised for the year 2001, the year in which they are written off in the company's accounts.

(77) The Commission can regard as justified the EUR 395 808.55 (65 857 001 pesetas) and the EUR 1 046 170.83 (174 201 288 pesetas) that correspond, respectively, to the residual value on 31 December 2000 of the 1 093 metres of galleries abandoned on levels 2 and 4 and the 490 m abandoned on level 1 of other assets abandoned in the La Prohida subsector. The Commission bases its view on the total closure of that production unit. The Commission analysed the company's management report for 2001 and verified that this quantity is recorded as a loss of fixed assets. The aid is justified on the basis of indent (k) of the Annex to Regulation (EC) No 1407/2002 and the Commission proposes to authorise it against the financial year 2001.

(78) The Commission can authorise the EUR 134 654.36 (22 404 600 pesetas) that the company considers to be outstanding as the value of the difference between the metres of galleries abandoned in the La Prohida subsector and those which had a residual value in the register of fixed assets on 31 December 2000. On the basis of information from the company, the Commission verified that the corresponding assets feature in the register of fixed assets of the company on 31 December 2000. The Commission proposes to authorise that aid against the year 2001.

(79) The Commission can authorise the aid of EUR 61 609.60 (10 250 975 pesetas) for the restoration of the outside of the La Prohida sector. That aid is compatible with indents (h) and (c) of the Annex of Regulation (EC) No 1407/2002, and can be authorised against the year 2001.

(80) After analysing the 'Project for the open-cast working of the Buseiro zone' dated July 1994, submitted as an Annex in the document from Uría & Menéndez, the Commission noted that the Buseiro deposit shows numerous geological irregularities and therefore uncertainties in its future operation. The descriptions given by the independent mining experts of Layer I are partial, given that they correspond only to the southern part of the deposit. The Project mentions the complexity of the western side. As regards the real presence of Layer I, it indicates that this level cannot be worked in some places because of the high ash content, justifies the choice of variant 5 for the determination of reserve volumes and suggests an alternative to arrive at the figure of 450 000 tonnes. The Commission does not agree with the comments by González y Díez S.A. concerning the effect on the additional costs incurred in the Buseiro Group by the technical modifications of that project, and on the contrary accepts the view of the independent experts that the additional costs resulting from the reduction of production are those due to the overburden excavation of 1 005 080 m^3 in the northern zone. The Commission also considers that the said movement of 1 005 080 m^3 of excavation residues was overestimated, since although the independent experts were unable to evaluate that figure, the experts who proposed the report of January 2001 cite 'the experience obtained by the partial working of the bottom of the syncline in the northern zone (the only one in which the bottom was reached) where the coal ash in that vein (the wall vein) ranges between 40 % and 60 %'. After analysing the technical studies, the Commission concludes that the only expenditure attributable to activity reduction in the Buseiro sector is that corresponding to the overburden excavation in the northern zone, with its corresponding associated restoration costs in the external mine waste tip. The Commission also considers that the change of plan was due to geological factors already taken into account in the original project and that the extra costs due to those geological factors should in no case be covered by additional aid, since the company has received operational aid every year.

(81) The movement of earth involved in the overburden excavation of 1 005 080 m^3 was counted as an operational cost by the company, as is normal practice. Given that the company received aid to cover open-cast operational losses, which was of the order of 27 % of the production cost, the Commission, adopting the hypothesis most favourable to the company, can only authorise 73 % of the EUR 1 902 805.52 (316 600 200 pesetas). The Commission considers that it can authorise this aid against the year 1998. The aid is compatible with indent (i) of the Annex of Regulation (EC) No 1407/2002. Consequently, the Commission considers that the sum of EUR 513 757.49 (85 482 054 pesetas) is not compatible.

(82) The Commission considers that the attribution of the total residual value of the formation of the western mine waste tip and the access tracks as a loss due to the reduction of activity is excessive, since the possibility of abandoning the western side had been foreseen in the July 1994 plan and, to quote form the 1994 plan, 'raising the bottom of the cutoff automatically makes available more than sufficient capacity for internal dumping, since the total volume of dead rock is decreased and it can be disposed of in a large cavity at the north end present in the base at a height of approximately 530 a.s.l.'. However, given that the western mine waste tip was abandoned, and in view of the difficulty of evaluating the real cost that should be attributed to the reduction of activity at Buseiro, the Commission adopts the position most favourable for the company and therefore proposes to authorise the aid of EUR 204 731.36 (34 064 432 pesetas) and the aid of EUR 1 022 423.30 (170 117 254 pesetas) corresponding respectively, to the residual value of the creation of the mine waste tip and the access tracks on 31 December 1998. The Commission can authorise that aid against the years 1998 and 2000 on the basis of indent (i) of the Annex to Regulation (EC) No 1407/2002.

6.4.2. *Aid that cannot be authorised*

(83) The aid amounting to EUR 602 146.29 (100 188 13 pesetas) was intended for the creation of shafts and other work to provide ventilation for the 'Tres Hermanas' sector of the Sorriba group. That expenditure corresponds to investments in mining infrastructure necessary for the working of the 'Tres Hermanas' group. Expenditure on new investments cannot be regarded as liabilities inherited from the past within the meaning of Regulation (EC) No 1407/2002, nor in accordance with Decision No 3632/93/ECSC. On the other hand, as can be deduced from its notification of 19 December 2002 concerning the 2003 to 2007 plan for the restructuring of the coal industry, Spain does not intend to grant aid for investments of the type envisaged in Article 5(2) of Regulation (EC) 1407/2002. Such investment aid would moreover be incompatible with the aid to cover operating losses of the Sorriba group which Spain is granting to González y Díez S.A. Neither does the aid correspond to indent (l) of Section I of the Annex to Decision No 3632/93/ECSC. That category of aid is not included in the Annex to Regulation (EC) No 1407/2002 in accordance with which the Commission is currently analysing aids, but neither would it be compatible with indent (l) of Section I of the Annex to Decision No 3632/93/ECSC given that the investment referred to relates to working the reserves in the 'Tres Hermanas' subsector.

(84) The Commission cannot authorise the aid of EUR 601 012.10 (100 000 000 pesetas) to make provision for the coverage of future costs incurred by surface damage due to the closure of the La Prohida subsector. The Commission observes that this provision and the corresponding sum were not included at all in the notification of the aid planned by Spain for 2001. Moreover, this sum exceeds the amount notified (and paid in advance) by Spain for that year. Consequently, the Commission cannot declare it compatible in this Decision.

(85) The costs amounting to EUR 547 066.46 (91 024 200 pesetas) corresponding to the agreements signed with the Government of the Principality of Asturias to guarantee the restoration of land after open-cast operation, are part of the production costs of coal extracted in the western zone of the Buseiro group. In effect, land restoration is the final part of the production cycle of an open-cast mine and the cost of that restoration is a component of the total cost of the coal extracted. In the case of the Buseiro gangue heap, the company does not provide justification that abandonment of the mine waste tip involves additional restoration costs and, on the contrary, it justifies those expenses on the basis of the legal obligation established by Royal Decree 1116/1984 of 9 May and the Order of the Ministry of Industry and Energy dated 13 June 1984 developing it, which establishes that after operations, the areas affected must be restored. The company has received State aid to cover all operating losses, including the restoration of the open-cast mine of Buseiro. The new aid would be on top of that received to cover operating losses and the Commission cannot authorise the aid amounting to EUR 547 066.46 (91 024 200 pesetas).

(86) The land acquired by the company for open-cast mining is registered among the company's fixed assets, but is not an asset that depreciates. The Commission cannot authorise the aid amounting to EUR 372 176.75 (61 925 000 pesetas) corresponding to the purchase price of the land, since this is not considered to be a lost asset and the aid is not covered by any of the points of the Annex of Regulation (EC) No 1407/2002.

(87) The refundable and non-refundable subsidies received by González y Díez S.A. in the context of the SPCA Agreement signed on 30 December 1989 with the Ministry of Industry and Energy, were intended to finance projects whose purpose is to promote coal production under economically viable conditions and to increase productivity. The loans were received during the period 1990 to 1993 when the projects were implemented. According to what can be deduced from Annex III of the agreement signed, the refundable loan of 313 500 000 pesetas was mainly intended for the establishment of the new system of operation by 'soutirage', which was and continues to be used by the company according to the report by independent experts, Annex III of the SPCA Agreement also refers to

'clear indications of exceptional open-cast operations, which would enhance the estimated profitability of the whole' and of an annual production target of 260 000 marketable tonnes, which was exceeded. The payment of 233 492 186 pesetas (EUR 1 403 316) in the years 1999 and 2000, however, corresponds to the repayment of loans received between 1990 and 1993, and is unrelated to the company's activity reduction plan notified to the Commission for the period 1998 to 2001. The Commission also points out that the payments made by the company in 1999 and 2000 are much higher than envisaged in the initial plan owing to the payment delays, as emerges from the letter of the Ministry of Industry and Energy (MINER) sent by registered post on 22 December 1997 and other documentation sent to the Commission. The Commission also points out that the refundable loan of 313 500 000 pesetas was accompanied by a non-refundable subsidy of 209 million pesetas and by another non-refundable subsidy of 23 million pesetas for research and technological development activities. In addition to these capital subsidies, the company received each year aid to cover approximately 40 % of the underground operation production costs and 27 % of the open-cast operation production costs. As explained earlier, the Commission proposes to authorise the entire residual value on 31 December 2000 of the fixed assets in the La Prohida subsector and in a substantial part of the Buseiro sector. The aid amounting to 233 492 186 pesetas (181 292 186 pesetas in 1998 and 52 200 000 pesetas in 2000) corresponding to the repayment of SPCA subsidies, which could include investments in mine works in the La Prohida subsector, would result in an accumulation of aid incompatible with the common market. Accordingly, the Commission cannot authorise that aid.

(88) Even if it considers that the reduction of coal deliveries is not the criterion for the granting of aid intended to cover exceptional restructuring costs, the Commission finds that it cannot agree with the view expressed by González y Díez S.A. on the reductions made, since the deliveries in 1997 and 1998 are higher by approximately 15 000 tonnes than those the company was providing in previous years.

(89) The Annex shows the aid authorised and the aid not authorised.

6.4.3. *Conclusions on the incorrect use of the aid granted by Spain 1998 and 2000*

(90) After analysing all the information available, the Commission notes that the aid received by González y Díez S.A. to cover exceptional costs of restructuring pursuant to Article 5 of Decision No 3632/93/ECSC, totalling 651 908 560 pesetas in 1998 and 463 592 384 pesetas in 2000, is recorded in the company's accounts as operating costs, thus generating exceptional gross operating profits, in 1998 and 2000, of 998 185 023 pesetas and 217 383 752 pesetas respectively. The net operating profits after taxes, without aid to cover exceptional costs, were 277 177 852 pesetas in 1998 and probably negative in 2000.

(91) The Commission notes that as a consequence of the use of the aid to cover exceptional restructuring costs (Article 5 of Decision No 3632/93/ECSC) as operating aid (Article 3 of Decision No 3632/93/ECSC), the company's own funds increased from 787 009 112 pesetas on the date of acquisition by Mina la Camocha S.A. to 1 624 447 451 pesetas on 31 December 2000, and that this increase occurred as a result of the exceptional profits in 1998 and 2000.

(92) The Commission considers that the aid granted to González y Díez S.A. for the years 1998 and 2000 pursuant to Article 5 of Decision 3632/93/ECSC exceeds the costs incurred by the restructuring carried out in 1998 and 2000 in accordance with Article 3 of that Decision, and was consequently not used for the purposes for which it had been authorised by the Commission.

(93) Neither during the proceedings that gave rise to Decision 2002/827/ECSC nor in the present formal infringement proceedings has the company González y Díez S.A. justified the origin of the exceptional profits between 1998 and 2001, which brought about the equivalent increase of its own funds. The company acknowledges, in its letter to its owner Mina la Camocha dated 11 November 1999, sent by Spain on 2 December 1999, that 'in no case was the aid intended to compensate costs of any nature and that the profits of the financial year 1998 include the aid of 651 908 560 pesetas granted by the MINER'.

(94) The Commission considers that the company González y Díez S.A. made incorrect use of the aid granted by Spain in 1998 pursuant to 98/637/ECSC, and in 2000 pursuant to Decision 2001/241/ECSC, totalling 521 075 440 pesetas (EUR 3 131 726.47), broken down as follows:

(a) Galleries created and not used:	49 152 000 pesetas	(EUR 295 409.47)
(b) Restoration of open-cast areas:	91 024 200 pesetas	(EUR 547 066.46)
(c) Value of open-cast land:	61 925 000 pesetas	(EUR 372 176.75)
(d) Overburden excavation in the northern zone:	85 482 054 pesetas	(EUR 513 757.49)
(e) Repayment of SPCA subsidies:	233 492 186 pesetas	(EUR 1 403 316.30)

6.4.4. *Conclusions on the aid to cover exceptional costs in 2001*

(95) In a letter dated 19 March 2001 Spain notified the Commission about aid to cover 'technical costs' in respect of closure, which it intended to grant to various companies during the financial year 2001, among which González y Díez S.A. was included with an amount of 393 971 600 pesetas (EUR 2 367 817).

(96) In its Decision 2002/241/ECSC the Commission did not rule on the above aid and announced that it would not do so until it had analysed the information provided by Spain in response to the Commission's questions on aid for the years 1998 and 2000.

(97) In its letter of 13 May 2002, Spain informed the Commission that it had granted the company González y Díez S.A. aid totalling 383 322 896 pesetas (EUR 2 303 817) to cover the technical costs of reducing annual capacity by 34 000 tonnes.

(98) The granting of that aid by Spain was not in line with Article 9(4) of Decision No 3632/93/ECSC, which establishes that:

'Member States may not put into effect planned aid until it has been approved by the Commission on the basis, in particular, of the general criteria and objectives laid down in Article 2 and of the specific criteria established by Articles 3 to 7.'

(99) Consequently, the aid of 383 322 896 pesetas (EUR 2 303 817) granted by Spain to González y Díez S.A. for the year 2001 is illegal.

(100) The Commission carried out a first evaluation of the compatibility of the aid of 383 322 896 pesetas (EUR 2 303 817), based on elements derived from the reports by González y Díez S.A. and in particular those of 13 February 2002 and 26 February 2002, sent by Spain respectively on 28 February and 24 April 2002.

(101) On 22 August 2002 the Commission received the management report of the company González y Díez S.A. for 2001, in response to its request for the annual reports of all the companies in order to check compliance with the provisions of Article 2(3) of Decision No 3632/93/ECSC.

(102) The management report of González y Díez S.A. for 2001 records 383 322 896 pesetas as 'extraordinary income' and justifies 'extraordinary expenditure' amounting to 389 268 288 pesetas in the following way: 319 268 288 pesetas as the residual value of the La Prohida subsector (Sorriba sector) and 70 000 000 pesetas as provision for expenses related to the abandonment of mining works to be effected in 2002. That aid is therefore correctly entered in the accounts of the company González y Díez S.A. Nevertheless, its compatibility with Article 7 and the Annex of Regulation (EC) No 1407/2002 must be examined.

(103) In response to the initiation of the present formal infringement proceedings, the Commission received new information from Spain about the aid.

(104) As a result of the analysis carried out by the Commission, aid totalling 374 328 463 pesetas (EUR 2 249 759.37) can be considered compatible with Article 7 of Council Regulation (EC) No 1407/2002, broken down as follows:

(a) Residual value of galleries used at level 3:	101 614 599 pesetas	(EUR 610 716.04)
(b) Residual value of the rest of the abandoned galleries on levels 2 and 4:	65 857 001 pesetas	(EUR 395 808.55)
(c) Residual value of level 1 galleries and other assets abandoned in the La Prohida subsector:	174 201 288 pesetas	(EUR 1 046 970.83)
(d) Lost value of abandoned assets not counted in 2001:	22 404 600 pesetas	(EUR 134 654.36)
(e) Exterior restorations:	10 250 975 pesetas	(EUR 61 609.60)

(105) The aid totalling EUR 602 146.29 (100 188 713 pesetas) to González y Díez S.A. for mine investments and infrastructures needed for the operations at the 'Tres Hermanas' group of the Sorriba group is incompatible with Article 7 of Regulation (EC) No 1407/2002, since the new investments cannot be regarded as liabilities inherited from the past. Moreover, investment aid of that nature would be incompatible with the aid provided to cover operating losses at the Sorriba group, which Spain on the other hand granted to González y Díez S.A.

(106) As regards the inclusion in the company's balance for 2001 of a provision amounting to EUR 601 012.10 (100 000 000 pesetas) to cover exceptional restructuring costs to be incurred in the future by the closure of the La Prohida subsector, the partial closure of the Buseiro sector, or both, the Commission points out that this provision and the corresponding amount had not been included at all in the notification of aid envisaged by Spain for 2001. Moreover, this sum exceeds the sum notified (and paid in advance) by Spain for the said year. Consequently, the Commission cannot declare it compatible in the present Decision.

(107) The Commission considers that the aid of 8 994 433 pesetas (EUR 54 057.63) granted by Spain to González y Díez S.A. for 2001 exceeds the closure costs, and is consequently incompatible with the common market.

6.4.5 *Recovery*

(108) Pursuant to Article 16 and Article 14(2) of Regulation (EC) No 695/1999, the aid corresponding to 1998 and 2000 that has been deemed incorrectly used in relation to Decisions 98/637/ECSC and 2001/162/ECSC must be repaid by the beneficiary company. It should be pointed out that these authorising Decisions (98/637/ECSC and 2001/162/ECSC) indicated very clearly that the aid authorisation was explicitly conditional upon its actual correspondence with certain categories of closure costs. In effect, these Decisions specified that the aid to cover exceptional costs had to satisfy the requirements of Article 5(1) of Decision No 3632/93/ECSC, which implied that its amount cannot exceed those costs. Given that the authorisation was subject to conditions and that the conditions imposed were not satisfied in the case of the aid examined in the present proceedings, any possible invocation of the principle of legitimate expectations is automatically excluded.

(109) Similarly, pursuant to Article 14(2) of Regulation (EC) No 659/1999, the aid for 2001 already paid and that has been declared incompatible in this Decision must also be repaid by the beneficiary company. Given that this aid was provided illegally before having been authorised by the Commission, any possible invocation of the principle of legitimate expectations is automatically excluded.

6.4.6. *Amendment of Decision 2002/827/ECSC*

(110) Decision 2002/827/ECSC can consequently be amended, by repealing some of its Articles,

HAS ADOPTED THIS DECISION:

Article 1

The State aid totalling EUR 3 131 726.47 granted by Spain to the company González y Díez S.A. to cover exceptional restructuring costs for the years 1998 and 2000 pursuant to Article 5 of Decision 3632/93/ECSC constitutes an incorrect application of Decisions 98/637/ECSC and 2001/162/ECSC and is incompatible with the common market.

Article 2

The State aid totalling EUR 2 249 759.37 (374 328 463 pesetas) granted by Spain to the company González y Díez S.A.to cover, for the year 2001, exceptional costs of closure incurred during the period 1998 to 2001 is compatible with Article 7 of Regulation (EC) 1407/2002.

Article 3

The following State aid that Spain intends to grant the company González y Díez S.A. is incompatible with Article 7 of Regulation (EC) 1407/2002:

(a) an amount of EUR 602 146.29 (100 188 713 pesetas) for the year 2001, intended for investments in mining infrastructure for the working of the 'Tres Hermanas' group of the Sorriba group;

(b) an amount of EUR 601 012.10 (100 000 000 pesetas), for the year 2001, intended to constitute a provision for covering future costs incurred by the closure of the 'La Prohida' subsector and the partial closure of the Buseiro sector, which took place during the period 1998 to 2001.

The aid mentioned in indents (a) and (b) of the first paragraph cannot therefore be granted.

Article 4

1. Spain shall adopt all the necessary measures to recover from the company González y Díez S.A.:

   (a) the aid mentioned in Article 1;

   (b) an amount of EUR 54 057.63 (8 994 433 pesetas), paid illegally before authorisation by the Commission for the financial year 2001, and constituting an unauthorised excess over the aid authorised pursuant to Article 2 and, where appropriate, any other amount paid illegally under the same circumstances.

2. The recoveries mentioned in indents (a) and (b) of paragraph 1 shall be effected without delay and in accordance with the procedures laid down by national law, provided that they allow immediate, effective implementation of this Decision. The aid to be recovered shall be liable to interest charges payable from the date on which it was placed at the disposal of the recipient to the date of recovery thereof. The interest shall be calculated on the basis of the reference rate used to calculate the grant equivalent in the context of regional aid.

Article 5

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

Article 6

Articles 1, 2 and 5 of Decision 2002/827/ECSC are repealed.

Article 7

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 5 November 2003.

For the Commission

Loyola de PALACIO

Vice-President

ANNEX

	Account register	euros	Ptas	Approval	Year	Justified euros	Justified Ptas	Unjustified euros	Unjustified Ptas
La Prohida (underground)									
Galleries made and not used (1 030 m)	Costs	738 523,68	122 880 000,00	60 %	2000	443 114,21	73 728 000,00	295 409,47	49 152 000,00
Galleries at level 3 (other) (1 496 m)	Fixed ass.	610 716,04	101 614 599,00	100 %	2001	610 716,04	101 614 599,00	0,00	0,00
Galleries at levels 2 and 4	Fixed ass.	395 808,55	65 857 001,00	100 %	2001	395 808,55	65 857 001,00	0,00	0,00
Galleries at level 1 and other activities	Fixed ass.	1 046 970,83	174 201 288,00	100 %	2001	1 046 970,83	174 201 288,00	0,00	0,00
Galleries still not written off from fixed ass.	Fixed ass.	134 654,36	22 404 600,00	100 %	2001	134 654,36	22 404 600,00	0,00	0,00
Ventilation shafts and galleries	Investm.	602 146,29	100 188 713,00	0 %	2001	0,00	0,00	602 146,29	100 188 713,00
Exterior restoration	Costs	61 609,60	10 250 975,00	100 %	2001	61 609,60	10 250 975,00	0,00	0,00
Provision for damage	Provision	601 012,10	100 000 000,00	0 %	2001	0,00	0,00	601 012,10	100 000 000,00
Buseiro (open-cast)									
Overburden excavation, north	Costs	1 902 805,52	316 600 200,00	73 %	1998	1 389 048,03	231 118 146,00	513 757,49	85 482 054,00
Mine waste tip, west	Fixed ass.	204 731,36	34 064 432,00	100 %	1998	204 731,36	34 064 432,00	0,00	0,00
Access tracks	Fixed ass.	1 022 425,30	170 117 254,00	100 %	1998	1 022 425,30	170 117 254,00	0,00	0,00
Restoration of open-cast area	Costs	547 066,46	91 024 200,00	0 %	1998	0,00	0,00	547 066,46	91 024 200,00
Land		372 176,75	61 925 000,00	0 %	1998	0,00	0,00	372 176,75	61 925 000,00
Repayment of SPCA loans		1 403 316,30	233 492 186,00	0 %	1998/2000	0,00	0,00	1 403 316,30	233 492 186,00
Total						5 309 078,70	883 356 295,00	4 334 884,90	721 264 155,00