II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 10 March 2009

on measure C 5/2000 (ex NN 118/97) implemented by Spain in favour of SNIACE SA, located in Torrelavega, Cantabria, and amending Decision 1999/395/EC

(Notified under document C(2009) 1479)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2009/612/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) By letter of 17 April 1997, the Commission received a complaint from the Austrian undertaking Lenzing AG, the Community's main producer of viscose fibres, concerning a number of measures granted to its Spanish competitor Sociedad Nacional de Industrias y Aplicaciones de Celulosa Española SA (hereinafter SNIACE).

(2) By letter of 7 November 1997, the Commission informed the Spanish Government of its decision to initiate the procedure laid down in Article 88(2) of the Treaty.

(3) By Decision 1999/395/EC [2] (hereinafter the Decision of 1998), the Commission considered the aid granted in favour of SNIACE by the Fondo de Garantía Salarial (the Wages Guarantee Fund, hereinafter FOGASA) and the Tesorería General de la Seguridad Social (the General Social Security Treasury, hereinafter the TGSS) to be unlawful and incompatible with the common market because the debt repayment agreements concluded between SNIACE and FOGASA and the rescheduling agreement concluded between SNIACE and the TGSS did not comply with market conditions as the interest rates applied to the agreements were below market rates. That unfavourable decision ordered Spain to require the recipient to repay the contested aid.

(4) In the Judgment of the Court of Justice of the European Communities of 29 April 1999 in Case C-342/96 *Spain* v *Commission* (hereinafter *Tubacex*) [3], the Court considered that the debt rescheduling agreements concluded by the TGSS and FOGASA did not constitute State Aid as those public institutions had acted as a private creditor would have done to try to recover amounts owed to it, provided that the interest rate was at least equal to the rate that a private creditor would have applied [4] and that the rescheduling agreement did not result in new debts being accumulated.

[1] OJ C 275, 16.11.2007, p. 18.
[2] OJ L 149, 16.6.1999, p. 40.
[3] [1999] ECR I-2459.
[4] Paragraph 48 of the *Tubacex* judgment.

(5) In the light of the *Tubacex* judgment, the Commission decided to reassess the Decision of 1998, as it considered that its conclusions were applicable to SNIACE. Consequently, by letter of 16 February 2000 addressed to the Spanish authorities, the Commission decided to initiate the formal investigation procedure [1] laid down in the first subparagraph of Article 88(2) of the Treaty in order to partially revoke the Decision of 1998 (hereinafter the second initiation of the procedure).

(6) By letter of 21 March 2000, Spain sent its comments to the Commission on the decision concerning the second initiation of the procedure.

(7) In the light of the comments made by the Spanish authorities and interested parties after the second initiation of the procedure, the Commission terminated the formal investigation procedure on 20 September 2000 by means of Commission Decision 2001/43/EC [2] (hereinafter the Decision of 2000), concluding that the measures granted to SNIACE did not constitute State aid pursuant to the *Tubacex* judgment. The Decision of 1998 was partially amended pursuant to the Decision of 2000, whereby the first paragraph of Article 1 was replaced and Article 2 revoked.

(8) In its Decision of 2000, the Commission considered that the public creditors, by applying the legal interest rate, had sought to maximise their prospects of recovering the sums due to them without suffering any financial loss. In the Commission's opinion, 'Spain acted as a hypothetical private creditor would have done, vis-a-vis SNIACE.' [3]

(9) In the light of the Decision of 2000, the undertaking Lenzing brought an action against the Decision of 2000 before the Court of First Instance.

(10) The Court of First Instance annulled the Decision of 2000 in its judgment of 21 October in Case T-36/99 [4] because the Commission made a manifest error of assessment when applying the private creditor behaviour test to the public creditor. The Court of Justice confirmed the judgment of the Court of First Instance [5].

(11) As a result of that annulment, the second formal investigation procedure is still open.

(12) By letters of 3 December 2004, 13 May 2005, 18 July 2005 and 7 August 2008, the Commission requested additional information from the Spanish authorities, which was provided by letters of 28 February 2005, 4 July 2005, 29 September 2005, 10 September 2008 and 15 September 2008.

[1] OJ C 110, 15.4.2000, p. 33.
[2] OJ L 11, 16.1.2001, p. 46.
[3] Recital 30.
[4] [2004] ECR II-3597.
[5] Case C-525/04 [2007] ECR I-9947.

2. DESCRIPTION OF THE MEASURE

(13) The beneficiary of the measures is SNIACE, an undertaking founded in 1939. The undertaking produces cellulose, paper, viscose fibres, synthetic fibres and sodium sulphate. SNIACE's turnover in 2007 was EUR 15 million.

(14) FOGASA and the TGSS concluded debt repayment and rescheduling agreements with SNIACE as described in recitals 15 to 21.

Agreements concluded with FOGASA

(15) FOGASA is an autonomous body answerable to the Ministry of Employment and Immigration which is financed by contributions from undertakings. Its main function, according to the first subparagraph of Article 33(1) of the Workers' Statute, is to pay 'to workers the remuneration owed to them in the event of insolvency or administration of their employers'. Under paragraph 4 of Article 33, FOGASA is required to subrogate itself to the rights and actions of workers in order to obtain repayment of the sums advanced.

(16) Under the provisions of Royal Decree 505/85 of 6 March 1985 [6], FOGASA may conclude repayment agreements relating to the sums advanced to workers in payment of wages and compensation in order to assist the recovery of sums due, which will bear interest at the statutory rate in force.

(17) FOGASA concluded two debt repayment agreements with SNIACE on 5 November 1993 and 31 October 1995. In the first case the sum owed was ESP 1 362 708 700 (including interest) and in the second it was ESP 339 459 878 (including interest).

(18) The first agreement, of 5 November 1993 (hereinafter the FOGASA I agreement), related to the amounts paid by FOGASA in wages and compensation that SNIACE owed to its staff. The debt amounted to ESP 897 652 759, to which interest at a rate of 10 % amounting to ESP 465 055 911 had to be added, making a total of ESP 1 362 708 700. The debt was linked to mortgaging of SNIACE's assets and was to be repaid in accordance with a schedule, which was renegotiated on 18 March 1999, setting out the amounts in pesetas (ESP) as follows:

[6] BOE (*Boletín Oficial del Estado* — Official State Gazette) No 92, 17.4.1985, p. 10203.

Table 1

The FOGASA I agreement

(ESP)

	Initial agreement of 5 November 1993	Renegotiated agreement of 18 March 1999
1994	20 000 000	20 000 000
1995	55 000 000	55 000 000
1996	90 000 000	40 000 000
1997	110 000 000	50 000 000
1998	160 000 000	80 000 000
1999	160 000 000	80 000 000
2000	392 527 956	259 427 000
2001	375 180 746	259 427 000
2002		259 427 000
2003		259 427 000
Total	1 362 708 702	1 362 708 000

(19) The second agreement of 31 October 1995 (hereinafter the FOGASA II agreement) related to the amounts that FOGASA had continued to pay after the agreement of 5 November 1993 in wages and compensation that SNIACE owed to its staff. The new debt amounted to ESP 229 424 860, to which interest at a rate of 9 % amounting to ESP 110 035 018 had to be added, making a total of ESP 339 459 878. The debt was linked to mortgaging of SNIACE's assets and was to be repaid in accordance with a schedule that was renegotiated on 18 March 1999 that set out the amounts in pesetas (ESP) as follows:

Table 2

The FOGASA II agreement

(ESP)

	Initial agreement of 31 October 1995	Renegotiated agreement of 18 March 1999
1995		5 000 000
1996	20 000 000	10 000 000
1997	20 000 000	10 000 000
1998	20 000 000	10 000 000
1999	30 000 000	20 000 000
2000	30 000 000	20 000 000
2001	30 000 000	20 000 000
2002	40 000 000	50 000 000
2003	149 459 878	156 262 000
Total	339 459 878	301 262 000

The TGSS

(20) Under Article 20 of the General Law on Social Security [1], the TGSS may agree to the deferment or payment in instalments of the social security contributions owed and surcharges relating to those contributions. Article 27 of that Law states that surcharges for payments outside the time limit must be added to the deferred debt.

(21) The agreement of 8 March 1996, as amended by the agreements of 7 May 1996 and 30 September 1997, provided for the rescheduling of the debt payment to a total amount of ESP 3 510 387 323 plus accrued interest, which, at a rate of 7,5 %, amounted to ESP 615 056 349. The principal corresponded to arrears in payment of social security contributions from February 1991 to February 1997. Payment was to be made in 120 monthly instalments. During the first two years, only the interest, calculated at the statutory rate of 7,5 %, was payable, whereas in years three to 10 both principal and interest were to be repaid at annual repayment rates of 5 % (from October 1999 to September 2001), 10 % (from October 2001 to September 2003), 15 % (from October 2003 to September 2005) and 20 % (from October 2005 to September 2007).

3. REASONS THAT LED TO INITIATION OF THE PROCEDURE

(22) In its decision to initiate the procedure, the Commission considered that the Court of Justice's analysis in the *Tubacex* case was fully applicable to the measures in question in the Decision of 1998 and, therefore, that that decision should be partially revoked and the agreements concluded between SNIACE and the public creditors should be reassessed.

(23) Indeed, in the light of the *Tubacex* judgment, the Commission expressed some doubts concerning the measures implemented by the public creditors:

— firstly, concerning the presence of elements constituting State Aid in the measures deemed incompatible in the Decision of 1998 and, if so, their compatibility; and

— secondly, concerning the behaviour of a private creditor who, in a comparable situation, would have demanded a higher interest rate than that required by the public creditors.

[1] BOE No 154, 20.6.1994, p. 20658.

4. COMMENTS FROM INTERESTED PARTIES

(24) No comments were submitted by interested parties.

5. SPAIN'S COMMENTS

(25) The Spanish Government submitted its comments by letter of 21 March 2000.

(26) The Spanish authorities disagree with the Commission's decision to open the formal investigation procedure, inasmuch as in their view the investigation procedure was not necessary to carry out the envisaged partial revocation of the Decision of 1998.

(27) As regards the rescheduling agreement between SNIACE and the TGSS, the Spanish authorities do not share the Commission's view that 'it seems probable that, in the case of out-of-court agreements concerned with or having the effect of rescheduling pre-existing debts, the creditor would seek to obtain from the debtor a rate of interest on arrears that would be higher than the legal interest rate as compensation for not pursuing the recovery of the debt by legal means'. On the contrary, they claim that, owing to the financial situation of the company as well as the cost, duration and uncertainty inherent in legal proceedings, out-of-court agreements would frequently lead to agreeing an interest rate lower than the legal interest rate.

(28) Thus, the Spanish authorities reiterate their argument that the granting of a deferment applying the legal interest rate protects the interests of the social security system, in terms of recovering debts, better than any other form of action that a private creditor could have taken.

(29) The Spanish Government also recalls that while a private creditor can agree any interest rate with the debtor, the Social Security authorities are bound by Article 20 of the General Law on Social Security, which lays down that the legal interest rate is to be applied in the debt rescheduling agreements.

(30) In its decision to initiate the procedure, the Commission considered that the comparison of the terms contained in the private creditors' agreement of October 1996 with the terms of the rescheduling agreement between the social security authorities and SNIACE might not be the correct way of applying the 'private creditor' test, as defined by the Court of Justice. In this regard, the Spanish authorities stated that, due to legal obligations of the public administration, the situation of public creditors could not be treated in the same way as the situation of private creditors. However, they emphasised that, in spite of the differences, the terms and conditions of the agreements between the social security authorities and SNIACE, on the one hand, and between FOGASA and SNIACE, on the other hand, were stricter than the terms reached in the private creditors' agreement.

(31) Finally, the Spanish authorities reiterated the views expressed in the procedure which led to the Decision of 1998.

6. ASSESSMENT OF THE MEASURES

6.1. *ON THE JUSTIFICATION OF THE SECOND INITIATION OF THE PROCEDURE*

(32) The Spanish authorities maintain that it was not necessary to initiate a new formal investigation procedure to resolve the case and that respect for the rights of interested parties was not a sufficient reason for doing so.

(33) For its part, the Commission considers that the *Tubacex* judgment was sufficiently relevant for the Spanish authorities and the interested parties to be informed of it. Indeed, that judgment could alter the assessment criteria as laid down in the decision to initiate the procedure of 7 November 1997.

6.2. *DETERMINING THE EXISTENCE OF AID FOR THE PURPOSES OF ARTICLE 87(1) OF THE TREATY*

(34) In the second initiation of the procedure, the Commission raised the question of whether the agreements concluded between SNIACE and its public creditors included State Aid and, if so, whether they could be declared compatible.

(35) The *Tubacex* judgment allows State interventions in the form of debt rescheduling to be considered as not constituting State Aid if they fulfil the criteria laid down in that judgment (see recital (4))

(36) In the judgment in Case T-36/99 annulling the Decision of 2000, the Court of First Instance rejected the grounds on which the Commission had considered that the TGSS and FOGASA had behaved as a private creditor would have done. For that purpose, and in the light of the judgment of the Court of First Instance, the following should be verified:

(a) the situation of the public creditors compared with that of the private creditors;

(b) the situation of the Banco Español de Crédito (hereinafter Banesto), a private creditor, compared with that of the TGSS and that of FOGASA;

(c) the prospects of recovering the total sums owed to the TGSS and FOGASA without suffering any financial loss, and

(d) SNIACE's prospects of future profitability and viability.

(37) The criteria laid down in the *Tubacex* judgment and in the judgment of the Court of First Instance in Case T-36/99 are cumulative. As soon as the measures taken by the public creditors do not fulfil at least one of them, the Commission must discard the private creditor principle.

6.2.1. AGREEMENTS CONCLUDED WITH FOGASA

(38) Unlike the facts that gave rise to the *Tubacex* judgment, the two agreements with FOGASA were concluded approximately two years apart and related to different debts. The Commission considers that they do not constitute a single agreement. When the second agreement was concluded, FOGASA did not try to combine them into one agreement covering all the amounts owed. FOGASA only unified outstanding debts by means of the agreement of 18 March 1999 [1], that is to say, four years after the second agreement was concluded between FOGASA and SNIACE.

(39) For the purposes of this assessment, the Commission will first analyse the FOGASA I agreement and then the FOGASA II agreement, taking into account the criteria applicable to private creditors.

FOGASA I Agreement

(40) SNIACE and FOGASA concluded the first debt re-scheduling agreement on 5 November 1993 for the amount of ESP 1 362 708 700 (including interest). The agreement was concluded after FOGASA paid the wages and compensation that SNIACE owed to its staff.

(41) For the purposes of its analysis, the Commission must distinguish between the time when the agreement was concluded (*ex-ante* analysis) and the time when it was implemented (*ex-post* analysis). In fact, it could be the case that, after analysing an agreement in terms of its characteristics at the time when it was concluded, the conclusion is reached that the agreement does not contain aid, and that its implementation, in different circumstances from those initially envisaged, alters that initial opinion and the conclusion is reached that it does contain aid.

Assessment of the FOGASA I agreement at the time of its conclusion

FOGASA's position compared with that of private creditors, including Banesto

(42) The Commission notes that the first debt rescheduling agreement with FOGASA dates from 5 November 1993, that is almost 8 months after the suspension of payments declaration issued by the court of first instance on 25 March 1993 requiring that FOGASA pay SNIACE's employees. At that time, FOGASA linked the agreement to the mortgaging of SNIACE's assets in order to guarantee at least a part of its loan. The rate applied by FOGASA was 10 %, as laid down by the legislation in force when the agreement was concluded.

(43) For its part, Banesto had granted lines of mortgage credit to SNIACE in 1987 and 1991, that is to say some time before the FOGASA I agreement was concluded, at rates of 16 % and 18 % respectively (the market conditions at that time).

(44) Thus, it should be noted that, when the suspension of payments occurred in 1992, SNIACE had at least two creditors: FOGASA, to which it owed the wages that SNIACE had been unable to pay to its employees, and BANESTO, because of the loans that it had granted to SNIACE and which SNIACE had still not entirely repaid.

(45) From the time when the suspension of payments was announced, BANESTO could have asserted its rights as a preferential mortgage creditor of SNIACE. However, only under the agreement of 26 de September 1996, in other words, three years after the FOGASA I agreement was concluded, did SNIACE transfer to Banesto, as payment of part of its debts, the shares that it owned in the undertaking Inquitex and some plots of land that were covered by the mortgage.

(46) For its part, FOGASA was legally obliged to pay the wages in the event of suspension of payments. From the time when FOGASA had to pay the wages of the SNIACE workers, it began to negotiate a rescheduling agreement with SNAICE in order to recover its loan. The fact that BANESTO did not enforce its mortgage loans against SNIACE rather demonstrates that FOGASA acted prudently and wisely when it concluded the rescheduling agreement and obtained guarantees as soon as the suspension of payments was notified, unlike the private creditor BANESTO.

(47) FOGASA and SNIACE therefore rapidly concluded negotiations that showed the parties' willingness to arrive at an amicable solution.

Possibility of recovering in full the sums owed to FOGASA without suffering any financial loss

(48) After accepting the SNIACE workers' demand that they should be paid the wages and compensation owed to them pursuant to the judicial proceedings that had declared the suspension of payments, FOGASA concluded a debt rescheduling agreement whereby SNIACE would repay to it the sums involved. FOGASA applied the legal rate of interest laid down by Spanish law, namely 10 % at the time when the parties concluded the agreement.

[1] Letter from FOGASA dated 22 August 2008, p. 2, sent by the Spanish authorities.

(49) The Commission considers that, by granting to SNIACE a rescheduling of its debts, FOGASA applied the principle of the *Tubacex* judgment, whereby 'a creditor does not seek to make any special profit on the money which is due to him, but merely wishes to recover in full the sums he has advanced without suffering any financial loss. To that end, where he agrees to the rescheduling of his debt for the purpose of ensuring that it is repaid, he requires the further payment of interest, the purpose of which is to compensate him for depreciation of the money as a result of the rescheduling' ([1]).

Prospects of future financial profitability

(50) At the time when the agreement was concluded, FOGASA was aware of the crisis that SNIACE was undergoing, which is why it had intervened on behalf of the workers so that they could be paid the wages and compensation that SNIACE could not pay them because its payments had been suspended.

(51) Admittedly, at the material time the only genuine viability plan for SNIACE proposed to FOGASA was to reschedule the debts. However, after the serious social conflict that the undertaking experienced in 1992, its activity gradually revived, offering a glimpse of the prospect of future profitability, although the situation of the undertaking was still fragile.

(52) The absence of an agreement with the private creditors and the fact that they had not enforced payment of the debts since 1993 shows that there was some basis for thinking that the undertaking was on the right track and that, therefore, it was not advisable to increase the risk that the undertaking would cease activities.

Conclusion on the FOGASA I agreement

(53) The Commission considers that, at the time when it was concluded, the FOGASA I agreement did not constitute State Aid.

Analysis of the implementation of the FOGASA I agreement

(54) Between 5 November 1993 and 18 March 1999, the date on which FOGASA concluded a new rescheduling agreement extending the debt payment period for a further two years, SNIACE had only repaid about 50 % of its debt.

Position of the public creditors compared with that of the private creditors

(55) Rather than enforce the guarantees and mortgages established in its favour at the time of the 1993 agreement, FOGASA preferred to amend the rescheduling agreement in order to maximise the prospects of recovering its loans. On the other hand, the Commission notes that on 26 September 1996, Banesto accepted, as part-payment of SNIACE's debt, some plots of land owned by that undertaking, as well as shares that SNIACE owned in the undertaking Inquitex.

(56) The Commission considers that FOGASA's behaviour is not comparable to that of BANESTO, which tried to protect a part of its loan by concluding the 1996 agreement, unlike FOGASA, which in no way tried to recover its loan under the agreement concluded with SNIACE.

Possibility of recovering in full the sums owed to FOGASA without suffering any financial loss

(57) The Commission points out that, at the time when the agreement was renegotiated, FOGASA did not require additional payment of interest as the total amount payable was the same, although the final date was delayed by two years ([2]). Consequently, the Commission considers that Spain's argument ([3]) that it wanted to protect its investment from monetary depreciation must be rejected.

Prospects of future profitability

(58) The Commission has established, in the light of Table 3 below, that at the time when the agreement of 18 March 1999 amending the agreement of 5 November 1993 was concluded, the undertaking was faced with increasing debts, recurring losses and negative equity capital, which raised doubts concerning the prospects of recovering the loan:

([1]) Paragraph 32.

([2]) Letter from the Spanish authorities of 4 July 2005, Annex I.

([3]) Spain's letter of 21 March 2000: 'the interest applied as a consequence of the rescheduling protects the creditor from the loss that it will incur as the money loses value over time'.

Table 3

(EUR million)

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Sales	69,3	43,0	4,8	39,3	65,9	34,5	33,6	56,6	57,5	82,0
Results	– 24,8	– 27,9	– 22,8	– 10,7	0,9	– 11,7	– 3,0	– 9,6	– 7,4	1,7
Cash flow	– 15,3	– 19,8	– 20,0	– 6,0	6,4	– 8,8	2,2	– 2,2	– 0,6	8,7
Total debts	84,1	82,8	95,4	112,6	116,5	108,2	104,9	106,1	112,8	121,8

(59) Although it is true that the undertaking had modestly positive results in 1995, it must be recognised that its financial situation indicated that its prospects of profitability were uncertain.

Conclusion on the implementation of the FOGASA I agreement

(60) The Commission has arrived at the conclusion that FOGASA did not behave as a private creditor would have done:

(a) by not trying to obtain as partial payment of the debt certain assets over which it had acquired rights upon the conclusion of the 1993 agreement;

(b) owing to the uncertain prospects of profitability caused by the continued deterioration of the financial situation;

(c) by not requiring the additional payment of interest when the 1999 rescheduling agreement was negotiated or not applying default interest to the unpaid sums in accordance with the agreement.

FOGASA II agreement

(61) SNIACE and FOGASA concluded a second debt rescheduling agreement on 31 October 1995 for the amount of ESP 339 459 878 (including interest). That agreement was concluded after FOGASA had again paid the wages and compensation that SNIACE owed to its staff.

Situation of the public creditors compared with that of the private creditors

(62) As with the implementation of the FOGASA I agreement, the Commission considers that FOGASA's behaviour is not comparable to that of BANESTO, which sought to protect a part of its loan by concluding the 1996 agreement, whereas FOGASA, which had only recovered a part of the debts that were covered by the 1993 agreement, concluded a new agreement in 1995 relating to new debts.

Possibility of recovering in full the sums owed to FOGASA without suffering any financial loss

(63) That new agreement was concluded despite the fact that:

(i) the agreement of 5 November 1993 had not been complied with in full;

(ii) it related to new debts contracted with FOGASA, which, once again, had satisfied the demands of SNIACE workers concerning the payment of their wages; and

(iii) the financial fragility of SNIACE, which was an undertaking in crisis as a result of repeated losses incurred over many years, negative equity capital and its substantial debt as shown in the table contained in recital (59), was well-known.

(64) Moreover, it is clear that FOGASA did not contemplate the possibility of enforcing repayment of the debt by enforcing the mortgage established in its favour. Admittedly, enforced repayment could have resulted in the closure of the undertaking, but there is no doubt that, if SNIACE had been liquidated, FOGASA could have recovered all or part of the debt after the undertaking's assets were transferred.

(65) On this point, the Commission notes that the Spanish authorities have repeatedly maintained that it was impossible to estimate the value of the undertaking, which would have made it possible to calculate the amount that could be recovered, and that, in any case, in the event of liquidation, the value of the undertaking's assets could have depreciated significantly [1]. Clearly, for that reason, FOGASA discarded the possibility of liquidating SNIACE in favour of the rescheduling solution.

[1] The Spanish authorities' reply of 4 July 2005: 'Neither FOGASA nor the [TGSS] have sufficient data to estimate the value of the undertaking's properties at that time.'

(66) The Spanish authorities added in their reply of 29 September 2005 that 'if, at any time, [FOGASA] had refused to enter into a recovery agreement without justifying that refusal, it would have been infringing the legislation binding on the organisation and would have been acting arbitrarily.' The Commission infers from the Spanish authorities' statement that FOGASA did not try to justify possible rejection of debt rescheduling. For the Spanish authorities, the mere fact of trying to recover the debt in full, including through the closure of SNIACE, is insufficient ([1]).

Conclusion on the FOGASA II agreement

(67) The Commission has arrived at the conclusion that FOGASA did not behave as a private creditor would have done:

(a) by not requiring payment of the debts that were covered by the 1993 agreement in accordance with the schedule laid down in that agreement;

(b) owing to the uncertain prospects of profitability caused by the continued deterioration of the financial situation;

(c) by accepting the conclusion of an agreement relating to new debts.

6.2.2. THE TGSS AGREEMENT

(68) As has been mentioned in recital (13), the TGSS concluded an agreement with SNIACE on 8 March 1996, which was amended on 7 May 1996 and 30 September 1997. Although it was concluded approximately 18 months after the first agreement was concluded, the final agreement related to the same debts. The Commission therefore considers that these agreements amounted to a single agreement that was amended a number of times.

Position of the public creditors compared with that of the private creditors

(69) At the time when the first agreement was concluded between the TGSS and SNIACE, on 8 March 1996, and the time when it was first amended, on 7 May 1996, the private creditors had still not reached an agreement. Only when the agreement was amended for the second time, that is on 30 September 1997, could the TGSS's position be compared with that of the private creditors.

([1]) The Spanish authorities' reply of 29 September 2005.

(70) It may be conceded, at that stage, that the TGSS went further than the private creditors by concluding an agreement to maximise the prospects of recovering their loans.

Possibility of recovering in full the sums owed to the TGSS without suffering any financial loss

(71) Under Spanish legislation, the TGSS may conclude debt rescheduling agreements provided that it applies the legal interest rate in force when the agreement is concluded.

(72) In this way, the TGSS tried to protect its loans without suffering financial losses, following the *Tubacex* judgment.

Prospects of profitability of the undertaking

(73) At the time when that agreement was concluded, as has already been stated in recital (63(iii)), SNIACE was an undertaking in crisis as a result of repeated losses incurred over several years, negative equity capital and its substantial debt.

(74) Moreover, the Spanish authorities were unable to respond favourably to the Commission's request (letter of 7 August 2008 D/53117) that it be provided with the minutes of the meetings that took place between the TGSS and SNIACE in 1994 ([2]). Those records would have enabled the Commission to determine the context of the negotiations and assess the TGSS's opinion on SNIACE's actual prospects of fulfilling its commitments both past and future. Instead, the Spanish authorities stated in their reply of 10 September 2008 that they did not have those documents.

(75) It is clear, then, that the TGSS knew SNIACE's financial situation, in particular, its failure to fulfil its commitments towards FOGASA. As the agreement was concluded in 1996, the TGSS could have verified from the undertaking's accounting documents that SNIACE had only partially honoured the agreement of 1993 and that, moreover, it had concluded a new agreement with FOGASA in 1995 (that is to say, approximately 6 months before the agreement with the TGSS), which related to new debts.

Conclusion on the agreement with the TGSS

(76) The Commission has arrived at the conclusion that the TGSS did not act as a private creditor would have done:

([2]) The Spanish authorities informed the Commission (letter of 28 February 2005 in reply to the Commission's letter of 3 December 2004) that a number of meetings had been organised between SNIACE and the TGSS.

(a) because SNIACE did not fully repay its loan from another public creditor (FOGASA) which, moreover, had agreed to an accumulation of debts; and

(b) owing to uncertain prospects of profitability caused by the continued deterioration of the financial situation.

6.2.3. CONCLUSION ON THE EXISTENCE OF AID

(77) In the Commission's opinion, only the measure that led to the agreement of 5 November 1993 between FOGASA and SNIACE can be regarded as fulfilling the private creditor criterion. Therefore, that measure does not grant an advantage to SNIACE.

(78) On the other hand, the Commission considers that the implementation of the FOGASA I agreement, as amended on 18 March 1999, the FOGASA II agreement and the TGSS agreement grant advantages to SNIACE for the purposes of Article 87(1) of the Treaty for the reasons set out above. In fact, those measures grant an advantage to SNIACE by enabling it to reschedule its legal obligations relating to the payment of social security contributions and the debts contracted with FOGASA, which SNIACE would normally have had to fulfil if those creditors had been private creditors.

(79) As regards the other criteria, the Commission considers, firstly, that the measures are financed by State funds, as both FOGASA and the TGSS are public bodies whose resources arise from the payment of compulsory contributions.

(80) Secondly, the contested measures are selective as they apply only to SNIACE.

(81) Thirdly, the markets in which SNIACE operates are characterised by a high level of trade between Member States. SNIACE markets part of its production in Europe, where it competes with other undertakings. Consequently, the aid granted to SNIACE may affect trade between Member States. Accordingly, those measures threaten to distort competition between producers of textile products.

(82) Therefore, the Commission considers that the measures relating to the implementation of the FOGASA I agreement, the FOGASA II agreement and the TGSS agreement constitute State Aid for the purposes of Article 87(1) of the Treaty.

6.3. *EXAMINATION OF THE COMPATIBILITY OF THE AID*

(83) The compatibility of the measures considered as State Aid under Article 87(1) of the Treaty must be assessed on the basis of the exemptions provided for in paragraphs 2 and 3 of the same article.

(84) The exemptions provided for in Article 87(2) and in Article 87(3)(b), (d) and (e), are clearly not applicable as the measures are not intended to promote the execution of a major project of common Community interest or to remedy a serious disturbance in the economy of a Member State, or to promote culture and heritage conservation. Nor do they come under another category of aid determined by decision of the Council acting by qualified majority on a proposal from the Commission.

(85) Consequently, the exemptions relating to the development of certain regions or sectors provided for in Article 87(3)(a) and (c), should be assessed.

(86) As regards aid intended to promote the development of certain sectors, and taking into account the nature of the measures in question, the only relevant criteria are those relating to aid for rescuing and restructuring firms in difficulty.

(87) As regards aid intended to promote the development of certain regions, the Commission notes that the region in which SNIACE is situated may opt, from September 1995, for regional aid under Article 87(3)(a), and that, before that date, it could opt for regional aid under Article 87(3)(c).

(88) Consequently, the Commission has to analyse the measures in the light of the Community guidelines on aid for rescuing and restructuring firms in difficulty and the guidelines on regional aid. Pursuant to the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid [1], the measures must be assessed in accordance with the guidelines in force at the time when the aid was granted.

Aid for rescuing and restructuring firms in difficulty

(89) As regards the rules relating to aid for rescuing and restructuring firms in difficulty, it is clear that, since the publication of the Eighth Report on Competition Policy of 1979 and in all its successive guidelines, the Commission requires a restructuring plan enabling the viability of the firms in difficulty to be restored [2].

[1] OJ C 119, 22.5.2002, p. 22.

[2] Point 227 of the Eighth Report of the European Commission on Competition Policy of 1979. Point 3.2.2(i) of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 31.12.1994, p. 12). Point 31 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2). Point 34 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

(90) In the present case, the Spanish authorities have never argued that the measures are rescuing and restructuring aid. Nor have they tried to show that they form part of a restructuring programme for the purposes of the rules applicable on the date when the contested aid was granted. A programme of that kind must include, inter alia, internal restructuring measures and compensatory measures, as required by the Eighth Report of the Commission on Competition Policy of 1979 (points 227 and 228) and the guidelines adopted from 1994 ([1]). The absence of a restructuring plan confirms that the sole purpose of the aid was to keep the firm operating without requiring any restructuring measures in return.

(91) As regards the viability plan that the applicant submitted to the Commission before the procedure was initiated, the Spanish authorities confined themselves to stating, in particular, in their letter of 30 June 1997 in reply to the Commission's letter of 16 May 1997, that the expert's conclusion that 'SNIACE's viability can only be guaranteed by granting subsidies enabling investment projects to be implemented and debt to be renegotiated' was a purely personal opinion expressed in a private study, and did not necessarily reflect the opinion of the Spanish authorities ([2]).

(92) Consequently, as there was no restructuring programme, the measures adopted within the framework of the FOGASA II and TGSS agreements and the implementation of the FOGASA I agreement are not justified on the basis of the Eighth Report of the European Commission on Competition Policy of 1979 or the Community guidelines on State Aid for rescuing and restructuring of 1994, 1999 or 2004.

Regional aid

(93) As for the exemptions laid down in Article 87(3)(a) and (c) relating to aid intended to promote or facilitate the development of certain areas, the Commission points out that the area in which SNIACE is established may opt, from September 1995, for regional aid under Article 87(3)(a), and that, before that date, it could opt for regional aid under Article 87(3)(c).

(94) However, the aid granted to SNIACE lacks the necessary characteristics to facilitate the development of certain economic regions for the purposes of the said article, as it was granted in the form of operating aid, that is without being subject to any condition relating to investment or job creation.

(95) Since 1979 ([3]) the Commission only authorises aid that is not subject to an initial investment or job creation in regions that may opt for regional aid where the Member State succeeds in proving the existence of handicaps and gauges their importance, which has not occurred in this case.

(96) Consequently, the measures adopted within the framework of the FOGASA II and TGSS agreements and the implementation of the FOGASA I agreement cannot be justified on the basis of the Commission communication of 1979 or the Guidelines on regional aid of 1998.

Aid for the synthetic fibres sector

(97) As regards the rules on the textile fibres sector applicable at the time when the agreements were concluded ([4]), the Commission considers that the only possible aid option was investment aid. However, the contested measures do not have any of the features of investment aid. The measures adopted within the framework of the FOGASA II and TGSS agreements and the implementation of the FOGASA I agreement are not justified on the basis of the guidelines of 1992 or 1996.

Conclusion on the compatibility of the aid

(98) The Commission considers that the implementing provisions of the FOGASA I agreement, as amended on 18 March 1999, and the conclusion of the FOGASA II and TGSS agreements cannot be declared compatible.

7. PROCEDURE FOR RECOVERY OF THE UNLAWFUL AID

(99) Since the Commission considers that the implementation of the FOGASA I agreement, as amended on 18 March 1999, and of the FOGASA II and TGSS agreements are incompatible with the Treaty, the beneficiary must return the amounts received.

(100) The procedures for recovering unlawful aid declared incompatible were laid down in the Notice from the Communication 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State Aid' (hereinafter the Notice of 2007) ([5]). The case-law of the Court, firstly, and paragraph 37 of the Notice of 2007 state that the Commission is not required to fix the exact amount to be recovered. However, the decision must include information enabling Spain to determine that amount.

([1]) See point 3.2.2(i) of the 1994 Guidelines: '… aid must be linked to a viable restructuring/recovery programme …'.
([2]) Letter of the Spanish authorities sent by fax on 30 June 1997, p. 2.
([3]) Second paragraph of point 4 of the Commission Communication on regional aid systems (OJ C 31, 3.2.1979, p. 9). Point 4.15 of the Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).
([4]) OJ C 346, 30.12.1992, p. 2 and OJ C 94, 30.3.1996, p. 11.
([5]) OJ C 272, 15.11.2007, p. 4.

(101) Commission Regulation (EC) No 794/2004 [1] implementing Council Regulation (EC) No 659/1999 [2] provides that the aid to be recovered pursuant to a recovery decision is to include interest at an appropriate rate fixed by the Commission. Interest is to be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery. The interest rate is to be applied on a compound basis until the date of recovery of the aid.

(102) However, regarding the method for calculating the interest, the Court of Justice, in its judgment of 11 December 2008 in Case C-295/07, *Commission v Département du Loiret and Scott SA* [3], stated that the method for calculating the present-day value of unlawful aid is a substantive and not a procedural matter [4]. The Decision of 2000 and the Decision on the second initiation of the procedure were adopted long before Regulation (EC) No 794/2004.

(103) Consequently, the Commission considers that the method for calculating the recovery of the unlawful aid must be that used at the time of the annulled decision and that, therefore, the Member State will use the 'simple interest' method to calculate the amount to be repaid.

(104) For the purposes of the present case, the Commission distinguishes between, on the one hand, the partial implementation of the FOGASA I agreement and, on the other, the incompatible measures of the FOGASA II and TGSS agreements.

FOGASA I agreement

(105) As has been stated in recital (77), the Commission considers that the agreement concluded between FOGASA and SNIACE on 5 November 1993 fulfils the private creditor criterion and, therefore, does not constitute State Aid.

(106) However, as the said agreement was only partly honoured, the Commission considers that the FOGASA I agreement, as revised on 18 March 1999, constitutes incompatible and unlawful aid that must be recovered. The incompatibility affects, firstly, the sums not paid under the agreement by 18 March 1999 and, secondly, the remainder of the aid from that date.

(107) The aid to be recovered must include accrued interest calculated in accordance with the simple interest method (see recital (101)). The sums that were repaid pursuant to the FOGASA I agreement before it was revised, even though the interest rate was lower than the Commission's reference interest rate, do not constitute State Aid and it is therefore not necessary to recover them. Payments made other than the amounts paid under the agreements may be deducted from the sums to be recovered as unlawful and incompatible aid.

FOGASA II and TGSS agreements

(108) As has also been stated above, the Commission considers that Spain granted unlawful aid in the form of a repayment agreement concluded with FOGASA on 30 October 1995 and a debt rescheduling agreement concluded with the TGSS on 8 March 1996 contrary to Article 88(3) of the Treaty, and that such aid is incompatible with the common market and the functioning of the EEA Agreement.

(109) As the aid is unlawful and incompatible, it must be repaid in full and its economic effects must be annulled. The amounts to be recovered equate to the total debt covered by the second agreement with FOGASA and the agreement with the TGSS. To these must be added the simple interest calculated in accordance with the Commission's reference interest rate. The payments made may be deducted from the amounts to be recovered.

8. CONCLUSION

(110) In the light of the above considerations, Decision 1999/395/EC should therefore be amended.

(111) The first repayment agreement concluded between FOGASA and SNIACE does not constitute State Aid.

(112) However, the reassessment of the implementation of the repayment agreement concluded with FOGASA on 3 November 1993, the repayment agreement concluded with FOGASA on 30 October 1995 and the rescheduling agreements concluded with the TGSS leads to the conclusion that Spain granted unlawful aid contrary to Article 88(3) of the Treaty and that such aid is incompatible with the common market and the functioning of the EEA Agreement.

(113) As the aid granted is unlawful and incompatible with the common market, its repayment must be secured under Regulation (EC) No 659/1999 and its economic effects annulled,

[1] OJ L 140, 30.4.2004, p. 1.
[2] OJ L 83, 27.3.1999, p. 1.
[3] (Awaiting publication).
[4] Paragraph 83.

HAS ADOPTED THIS DECISION:

Article 1

Decision 1999/395/EC shall be amended as follows:

1. Article 1 shall be amended as follows:

(a) the first paragraph shall be replaced by the following text:

'The agreement concluded on 5 November 1993 between the undertaking Sociedad Nacional de Industrias y Aplicaciones de Celulosa Española SA (SNIACE) and the Fondo de Garantía Salarial (FOGASA) did not constitute, on the date on which it was concluded, State Aid for the purposes of Article 87(1) of the EC Treaty.'

(b) after the first paragraph, the following paragraph shall be inserted:

'The following State Aid implemented by Spain in favour of SNIACE is incompatible with the common market:

(a) the debt rescheduling agreement concluded on 8 March 1996 (as amended by the agreement of 7 May 1996 and subsequently by the agreement of 30 September 1997) between SNIACE and the Tesorería General de la Seguridad Social;

(b) the implementation of the agreement concluded on 5 November 1993 between SNIACE and FOGASA;

(c) the agreement concluded on 31 October 1995 between SNIACE and FOGASA.'

2. Articles 2 and 3 shall be replaced by the following text:

'*Article 2*

1. Spain shall obtain from the recipient the repayment of the aid specified in the second paragraph of Article 1.

2. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until the date of their actual recovery.

3. The recovery of the aid specified in the second paragraph of Article 1 shall be immediate and effective.

4. Spain shall ensure that this Decision is implemented within four months of the date of its notification.

Article 3

1. Spain shall submit the following information to the Commission within two months of notification of this Decision:

(a) the total amount (principal and interest) to be recovered from the recipient;

(b) a detailed description of the measures already adopted and planned for the purpose of complying with this Decision;

(c) the documents proving that the recipient has been ordered to repay the aid.

2. Spain shall keep the Commission informed of the progress of the national measures adopted pursuant to this Decision until the recovery of the aid specified in the second paragraph of Article 1 has been concluded. At the Commission's request, it shall immediately submit information on the measures already adopted and planned for the purpose of complying with this Decision. It shall also provide detailed information on the amounts of aid and interest already recovered from the recipient.'

Article 2

This Decision is addressed to the Kingdom of Spain

Done at Brussels, 10 March 2009.

For the Commission

Neelie KROES

Member of the Commission