

JUDGMENT OF THE COURT (Sixth Chamber)

2 July 2002 *

In Case C-499/99,

Commission of the European Communities, represented by G. Rozet and R. Vidal, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by R. Silva de Lapuerta, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to adopt, within the prescribed period, the measures necessary to comply with Commission Decision 91/1/EEC of 20 December 1989 concerning aids in Spain which the central and several autonomous governments granted to Magefesa, producer of domestic articles of

* Language of the case: Spanish.

stainless steel and small electric appliances (OJ 1991 L 5, p. 18) and Commission Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa group and their successors (OJ 1999 L 198, p. 15), declaring that certain aid to companies in the Magefesa group was granted unlawfully and is incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of those decisions,

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, J.-P. Puissochet (Rapporteur), R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 24 January 2002,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 22 December 1999, the Commission of the European Communities brought an action under the second paragraph of Article 88(2) EC for a declaration that, by failing to adopt, within the prescribed period, the necessary measures to comply with Commission Decision 91/1/EEC of 20 December 1989 concerning aids in Spain which the central and several autonomous Governments have granted to Magefesa, producer of domestic articles of stainless steel and small electric appliances (OJ 1991 L 5, p. 18) and Commission Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa group and their successors (OJ 1999 L 198 p. 15), declaring that certain aid to companies in the Magefesa group was granted unlawfully and is incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of those decisions.

Background to the litigation

The facts

- 2 The Magefesa group consists, so far as concerns the present case, of four industrial companies which manufacture household goods: Industrias Domésticas SA ('Indosa'), based in the Basque Country, Cubertera del Norte SA ('Cunosa')

and Manufacturas Gur SA ('Gursa') based in Cantabria, and Manufacturas Inoxidables Gibraltar SA ('Migsa') based in Andalucia.

- 3 At the end of 1985 the Magefesa group was on the brink of insolvency and, to avoid its having to cease trading, a private consultancy firm (Gestiber) was appointed to manage the group. Gestiber put forward an action plan which, among other things, provided for a reduction in the workforce and for securing aid from central government and from the Governments of the autonomous regions of the Basque country, Cantabria and Andalucia, where the group's various factories were situated.
- 4 In order to allocate the aid, intermediary companies were created by the Governments of those three autonomous regions: Fiducias de la cocina y derivados SA ('Ficodesa') in the Basque Country, Gestión de Magefesa en Cantabria ('Gemacasa') in Cantabria and Manufacturas Damma SA ('Manufacturas Damma') in Andalucia.
- 5 The situation continued to deteriorate and Indosa was declared insolvent on 19 April 1994 but continued to trade, Cunosa ceased trading in 1994 and was declared insolvent on 13 April 1994, Migsa ceased trading in 1993 and was declared insolvent on 27 May 1999. Gursa was inactive from 1994.
- 6 As regards the intermediary companies, Ficodesa was declared insolvent on 19 January 1995 and Manufacturas Damma has been inactive since 1993 but has not been declared insolvent. The current situation in respect of Gemacasa is not known.

The Commission's decisions

- 7 In 1987, the Commission received a complaint concerning the State aid granted to the Magefesa group. It initiated the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC) and, by Decision 91/1, notified to the Spanish Government on 5 March 1990, it identified the following aid as illegal and incompatible with the common market:

— loan guarantees amounting to ESP 1 580 thousand million;

— a loan of ESP 2 085 thousand million at other than market conditions;

— non-repayable subsidies amounting to ESP 1 095 thousand million;

— an interest subsidy estimated at ESP 9 million.

- 8 By the same decision, the Spanish authorities were requested, in particular, to withdraw the loan guarantees, to convert the soft-loan into a normal loan and to recover the non-repayable subsidies.

- 9 In 1997, the Commission received seven complaints about the advantages which the undertakings in the Magefesa group had gained as a result of their failure to repay the aid declared incompatible in 1989 and their failure to comply with their financial and fiscal obligations. It decided to initiate the procedure provided for in Article 93(2) EC in respect of the aid granted to those undertakings or their successors since 1989.
- 10 At the conclusion of that procedure the Commission, by Decision 1999/509, which was notified to the Spanish Government on 29 October 1998, declared illegal and incompatible with the common market the aid in the form of persistent non-payment of taxes and social security contributions:
- by Indosa and Cunosa, until they were declared insolvent;
 - by Migsa and Gursa, until they ceased to operate;
 - by Indosa, after it was declared insolvent and until May 1997.
- 11 By the same decision, the Spanish authorities were asked to take the measures necessary to recover the aid from the recipient companies. The decision specified that the amounts to be recovered must include the interest which accrued between the granting of the aid and the date of its actual repayment.

- 12 Article 3 of Decisions 91/1 and 1999/509 called on the Spanish authorities to inform the Commission, within two months from the date of notification of each decision, of the measures taken for their implementation.
- 13 Taking the view that the Kingdom of Spain had not complied with either Decision 91/1 or Decision 1999/509 within the time-limit prescribed, the Commission brought the present proceedings.

Decision 91/1

Actions of the Spanish Government

- 14 The aid held by Decision 91/1 to be incompatible with the common market is as follows:
- as regards aid granted by Fogasa (National fund guaranteeing the rights of workers in the case of insolvency of their employer), a loan of ESP 2 085 thousand million at other than market conditions to the Magefesa group;

- as regards aid granted by the Autonomous Community of the Basque Country, a loan guarantee of ESP 300 million paid directly to Indosa, a loan guarantee of ESP 672 million to Ficodesa for companies belonging to the Magefesa group and an interest subsidy of ESP 9 million;

- as regards aid granted by the Autonomous Community of Cantabria, loan guarantees of ESP 512 million to Gemacasa for Cunosa and Gursa and non-repayable subsidies of ESP 262 million also granted to Gemacasa for Cunosa and Gursa;

- as regards aid granted by the Autonomous Community of Andalucia, loan guarantees of ESP 96 million granted to Manufacturas Damma for Migsa and non-repayable subsidies of ESP 29 million also granted to Manufacturas Damma for Migsa.

¹⁵ In order to comply with Decision 91/1, Fogasa decided, in concert with Magefesa, to amend the conditions of the loan it had granted in order to provide for payment of interest at the market rate. The Commission takes the view that Fogasa has thus complied with Article 2 of Decision 91/1 and its application does not concern that aspect of the aid.

¹⁶ In respect of the other aid, the Kingdom of Spain informed the Commission by letters of 23 October 1991, 8 April 1994 and 23 April 1997 of the measures taken by the Spanish authorities. As the Commission disputes that the Kingdom of Spain has complied with Decision 91/1, it is necessary to examine whether those measures can be regarded as sufficient to put an end to the illegal aid within

a period which the Court assesses, firstly having regard to the time-limit set by the Commission's decision, in the present case two months, and secondly taking account of the obligation imposed on Member States and Community institutions to cooperate in good faith. According to the terms of Decision 91/1, the Spanish authorities were to inform the Commission of the measures taken within the stipulated two-month period.

- 17 As regards the aid granted by the Government of the Autonomous Community of the Basque Country, the obligation was to recover the sums used for the repayment of loans for which the guarantee had been invoked following the insolvency of the Magefesa group, and to obtain repayment of the non-repayable subsidies and interest subsidies. In order to do that, the Basque Government approached the intermediary company Ficodesa, whom it replaced as the body responsible for repayment of the guaranteed loans. It took the view that it could not go directly to the companies in the Magefesa group as they were only debtors of Ficodesa.
- 18 The only action taken by the Basque Government was to request Ficodesa to repay all the sums paid to Indosa those requests being made by letters sent between 1988 and 1993 in respect of the loan guarantee, and by a letter of 25 January 1995 in respect of the other aid. Then, to no avail, it registered all the sums owing to it as claims in Ficodesa's insolvency. However, it has never demanded any money, even a minimal sum, from Indosa, the actual recipient of the aid.
- 19 Second, as regards the aid granted by the Government of the Autonomous Community of Cantabria, that government did nothing more than assure the Commission, in a first letter in 1991, that it had decided to comply with Decision 91/1. In a second letter in 1994 it merely informed it of the cessation of all new aid to the companies in the Magefesa group. Lastly, in a letter in 1997, the Spanish authorities informed the Commission that the loan guarantees granted by the Cantabrian Government had been annulled between the end of 1994 and the beginning of 1995, but its letter did not mention what had happened to the non-repayable subsidies it had granted.

- 20 Finally, as to the aid granted by the Government of the Autonomous Community of Andalusia, the Instituto de Fomento Andaluz ('IFA') successor to Soprea, a company controlled by the Andalusian Government and of which the intermediary company, Manufacturas Damma, which was set up to support Migsa, was the subsidiary, repaid the guaranteed loan on 6 November 1990, that is to say, after the notification of Decision 91/1. IFA then merely requested, by letter of 20 November 1990, the reimbursement of the sum paid and then declared that debt as a claim in the insolvency of Manufacturas Damma in June 1992. As regards the non-repayable subsidies, the Andalusian Government did not take proceedings against Manufacturas Damma because it did not have any attachable assets; nor did it take action against Migsa directly, which was the actual recipient of the aid.

Impossibility of recovering the aid

- 21 Where a Commission decision requiring the cessation of State aid incompatible with the common market has not been the subject of a direct action or where such an action has been dismissed, the only defence available to a Member State in opposing an infringement action by the Commission under Article 88(2) EC is to plead that it was absolutely impossible for it to implement the decision properly (Case C-348/93 *Commission v Italy* [1995] ECR I-673, paragraph 16, and Case C-261/99 *Commission v France* [2001] ECR I-2537, paragraph 23).
- 22 The Spanish Government, which does not dispute its failure to recover the aid granted, submits that it took all the measures within its power to recover the sums granted by calling on the intermediary companies administering the aid, which are the sole creditors of the companies in the Magefesa group, to take action against them to recover those sums. Additionally, it argues that while it was possible to register those debts as claims in the insolvency of those companies, they could not be recovered as those companies were in court-supervised administration and under Spanish law only a creditor may participate in the general body of creditors.

- 23 Moreover, the Spanish Government submits that the purpose of the obligation to recover the aid is to restore the previous position by preventing the recipient from enjoying any competitive advantage over its competitors. However, when a company which has received aid ceases to trade, as is the case for all the companies in the Magefesa group except Indosa, there is no longer any prejudice to its competitors and the demand for repayment no longer serves that purpose.
- 24 The Court has held that when, during the implementation of a Commission decision on State aid, a Member State encounters unforeseen and unforeseeable difficulties or becomes aware of consequences unforeseen by the Commission, it must submit those problems to the Commission for its assessment, proposing appropriate amendments to the decision in question. In such a case, under the rule imposing on Member States and Community institutions reciprocal duties of genuine cooperation which underlies in particular Article 10 EC, the Commission and the Member State must work together in good faith with a view to overcoming the difficulties whilst fully observing the provisions of the Treaty and in particular those on aid (*Commission v Italy*, cited above, paragraph 16; *Commission v France*, cited above, paragraph 24, and Case C-378/98 *Commission v Belgium* [2001] ECR I-5107, paragraph 31).
- 25 However, the condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant government merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real step to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled the difficulties to be overcome (see, to that effect, Case 94/87 *Commission v Germany* [1989] ECR 175, paragraph 10, and Case C-280/95 *Commission v Italy* [1998] ECR I-259, paragraph 14).
- 26 First, in the present case all the actions relied on by the Spanish authorities took place between 1990 and 1995. Consequently the majority took place after the

time-limit set by Decision 91/1, within which those authorities should have informed the Commission of the measures taken to comply with it. Second, throughout the entire period, the companies in the Magefesa group continued to operate with the help of the aid in question and in particular with the help of the payment of the loan guarantees.

- 27 Consequently, the Spanish Government, which did not inform the Commission of the measures it proposed to take or of the difficulties it encountered in the implementation of Decision 91/1 and which, in reality, allowed the Autonomous Communities concerned to do nothing more than request the intermediary companies to recover the aid, knowing perfectly well that they were themselves in great financial difficulty, did not seek to reach agreement with the Commission nor demonstrate the absolute impossibility of recovering the aid granted to companies in the Magefesa group, which, as stated in the previous paragraph, continued to operate after Decision 91/1.
- 28 An infringement must be assessed at the expiry of the time-limit fixed in the Commission's decision by which the Member State must notify the Commission of the measures it proposes to take (see, to that effect, *Commission v Belgium* above, paragraph 26). In this case it was 5 May 1990. The continuation after that date of the activities of the companies in receipt of aid declared illegal therefore invalidates the Spanish Government's argument that the Commission's infringement action is redundant following the order for court-supervised administration of those companies, which, it alleges, for that reason cannot be accused of enjoying any competitive advantage.
- 29 Since the Kingdom of Spain does not therefore dispute its failure to adopt the measures required of it by the Commission in Decision 91/1 and has not contested the merits of those measures, the failure to fulfil obligations must be held to have been proved.

Decision 1999/509

- 30 As stated at paragraph 10 of the present judgment, the *sui generis* aid covered by that decision is the non-payment of taxes and social security contributions by Cunosa until its declaration of insolvency, by Migsa and Gursa until they ceased trading, and by Indosa until May 1997, after its declaration of insolvency.
- 31 In its judgment in Case C-480/98 *Spain v Commission* [2000] ECR I-8717 concerning the action by the Kingdom of Spain for annulment of Decision 1999/509, the Court held, at paragraph 21, that in the particular circumstances of that case the non-payment of taxes and social security contributions by Indosa, Cunosa, Migsa and Gursa during the periods mentioned in the contested Decision constituted illegal aid which was incompatible with the common market within the meaning of Article 87(1) EC.
- 32 The Court upheld part of the action by the Kingdom of Spain, concerning the recovery of interest due, after the declaration of insolvency of Indosa and Cunosa, on aid illegally received before that declaration, and annulled Decision 1999/509 on that sole point (*Spain v Commission*, above, paragraphs 34 to 39).

Steps taken by the Spanish Government

Social security debts

- 33 As regards the aid granted to Indosa, the Social Security Treasury ('SST') attached assets totalling ESP 45 000 000 in order to cancel Indosa's debt after the

declaration of insolvency. It also attached 1 600 500 shares held by Indosa in the capital of Compañía de Menaje Doméstico SL. In the context of Indosa's insolvency proceedings, the sale of those shares was suspended by a court order and a creditors general meeting was called. With respect to the debt prior to the insolvency, on 28 December 1998 SST asked the court for an order putting Indosa into liquidation or for the conclusion of an agreement with its creditors to end the insolvency. A meeting of creditors took place on 4 July 2000 to decide whether Indosa should continue or stop trading, and it approved the liquidation of the company within four months.

- 34 As to the aid accorded to Cunosa, Gursa and Migsa, the SST either did not initiate the declaration of insolvency of those companies or took the view that such a procedure was ineffective as a means to recover the aid. In any case, it is clear from the documents before the Court that it did not request the liquidation of those companies. Moreover, it appears from the documents before the Court, that the SST did not want to assert any claims competing with those of the employees.

Fiscal debts

- 35 Those debts only relate to Indosa. On 28 December 1998, the Public Treasury sent a letter to the administrator requesting the immediate payment of the fiscal debts subsequent to the insolvency and an agreement with the creditors for the payment of the general pool of creditors' debts in order to close the procedure. On 23 June 2000, the National Recovery Office began the procedure for recovery of debts under the Spanish insolvency rules, according to seniority of the debt. In addition, as stated at paragraph 33 of the present judgment, at Indosa's creditors' meeting it was decided to proceed to liquidation, which authorised the Public Treasury to try to recover its debt, if the assets of the company allowed.

The alleged impossibility of recovering the aid

- ³⁶ As is the case for Decision 91/1, the only ground of defence raised by the Spanish Government is the absolute impossibility of taking the measures required by Decision 1999/509, since the action duly brought by the Kingdom of Spain against that decision did not succeed and the illegality of the aid in question was confirmed by the Court.
- ³⁷ Given the position of the companies benefiting from the aid, the only way of implementing Decision 1999/509 was to try to have them wound up by the court so that the tax authorities and the managing body for social security contributions could enforce their claims against the assets, if there were any, and if the ranking of their claims permitted. The absence of recoverable assets is, in such circumstances, the only way for the Spanish Government to show the absolute impossibility of recovering the aid.
- ³⁸ The Court has already ruled that the fact that, on account of the financial position of the beneficiary of the aid in question, the authorities of the Member State concerned could not recover the sum paid does not constitute proof that implementation was impossible, since the Commission's objective was to abolish the aid, which could have been achieved by the liquidation of the company (Case 52/84 *Commission v Belgium* [1986] ECR 89, paragraph 14).
- ³⁹ Even though the Spanish Government submits that it recovered Gursa's only assets, it is not disputed that neither the SST nor the Public Treasury tried to put Gursa and Migsa into liquidation and so the Government cannot prove that there

were no other recoverable assets. In respect of Cunosa, the winding up proceedings had already been commenced at the date on which the Commission took Decision 1999/509, but it is not clear from the documents before the Court that the Spanish authorities took any action in the course of those proceedings to recover the illegal aid out of the assets of that company, even if they subsequently appealed against the liquidation of Cunosa, a belated and undoubtedly pointless action.

- 40 On the other hand, as has been pointed out at paragraphs 33 and 35 of the present judgment, in Indosa's case, the SST and the Public Treasury, in two different ways, showed obvious diligence in recovering both the social security and fiscal debts. In addition, the Commission does not dispute that the creditors' meeting decided to put Indosa into liquidation. In relation to that company, the Spanish authorities took the measures necessary to comply with Decision 1999/509.
- 41 The Commission argues, nevertheless, that in any event, the measures adopted by the Kingdom of Spain were not taken within the period of two months from the notification of the Decisions 91/1 and 1999/509, so that the infringement of Article 3 of those decisions is established.
- 42 In that regard, it should be observed that the Commission did not set any deadline in Decision 1999/509 for the implementation of the measures required by that decision and there is no legal time-limit for implementation within the framework of the exceptional rules for bringing an action for failure to comply, based on the second paragraph of Article 88(2) EC. Nevertheless, in Article 3 of Decision 1999/509, the Commission set a time-limit of 2 months, which expired on 29 December 1998, within which the Spanish authorities were to inform it of the measures adopted for the implementation of that decision.

43 It is common ground that the Spanish Government did not inform the Commission before the expiry of the deadline of the measures which had already been taken and those which would be taken to recover the aid granted to Indosa, Cunosa, Migsa and Gursa and in particular, in the circumstances of this case, to recover Indosa's social security and fiscal debts.

44 Consequently, in respect of Decision 1999/509, the action must be considered as entirely founded in so far as the Kingdom of Spain is accused of having failed to take the measures necessary to recover the aid granted to Gursa, Migsa and Cunosa. On the other hand, in so far as the Kingdom of Spain is accused of not having taken the measures necessary to recover the aid granted to Indosa, the infringement action is founded only in respect of the failure to inform the Commission.

45 It follows from the foregoing observations that first, by failing to adopt the measures necessary to comply with Decision 91/1 in so far as it declared the aid granted to Indosa, Gursa, Migsa and Cunosa illegal and incompatible with the common market and with Decision 1999/509 in so far as it declared the aid to Gursa, Migsa and Cunosa illegal and incompatible with the common market, and second, by not informing the Commission within the prescribed period of the measures adopted for the implementation of Decision 1999/509 in so far as it declared the aid granted to Indosa illegal and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of those decisions.

46 For the rest, the Commission's action must be dismissed.

Costs

- 47 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. Declares that, first, by failing to adopt, within the prescribed period, the necessary measures to comply with Commission Decision 91/1/EEC of 20 December 1989 concerning aids in Spain which the central and several autonomous governments granted to Magefesa, producer of domestic articles of stainless steel and small electric appliances, in so far as it declared the aid granted to Industrias Domésticas SA (Indosa), Manufacturas Gur SA (Gursa), Manufacturas Inoxidables Gibraltar SA (Migsa) and Cuberta del Norte SA (Cunosa) illegal and incompatible with the common market and with

Commission Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa group and their successors, in so far as it declared the aid granted to Gursa, Migsa and Cunosa illegal and incompatible with the common market, and second, by failing to inform the Commission, within the prescribed period, of measures taken to implement Decision 1999/509 in so far as it declared aid granted to Indosa illegal and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of those decisions;

2. For the rest, dismisses the Commission's action;
3. Orders the Kingdom of Spain to pay the costs.

Macken

Puissochet

Schintgen

Skouris

Cunha Rodrigues

Delivered in open court in Luxembourg on 2 July 2002.

R. Grass

F. Macken

Registrar

President of the Sixth Chamber