JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

21 October 2004 *

In Case T-36/99,

Lenzing AG, established in Lenzing (Austria), represented initially by H.-J. Niemeyer, then by I. Brinker and U. Soltész, lawyers,

applicant,

v

Commission of the European Communities, represented by V. Kreuschitz and D. Triantafyllou, acting as Agents, assisted by M. Núñez-Müller, lawyer, with an address for service in Luxembourg,

defendant,

supported by

* Language of the case: German.

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

intervener,

APPLICATION for partial annulment of Commission Decision 1999/395/EC of 28 October 1998 on State aid implemented by Spain in favour of Sniace, SA, located in Torrelavega, Cantabria (OJ 1999 L 149, p. 40), as amended by Commission Decision 2001/43/EC of 20 September 2000 (OJ 2001 L 11, p. 46),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber, Extended Composition),

composed of: R. García-Valdecasas, President, P. Lindh, J.D. Cooke, H. Legal and M.E. Martins Ribeiro, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 23 October 2003,

gives the following

Judgment

Applicable national legislation

1 Under Article 20 of Royal Legislative Decree No 1/94 of 20 June 1994 approving the codified text of the general law on social security (BOE No 154 of 29 June 1994, p. 20658; hereinafter 'the General Law on Social Security'):

'1. Debts owed in respect of social security contributions or of increased contributions, and also debts in respect of social security resources other than contributions, may be rescheduled or paid by instalments.

...

3. The rescheduling or repayment by instalments of social security debts shall be granted in the form and on the conditions laid down by regulation. In order to be valid, the administrative decision allowing rescheduling or repayment by instalments must make provision for a guarantee to cover the obligation, in accordance with the regulatory provisions in force, by the provision of rights *in rem* or *in personam*, unless exceptional reasons justify granting a derogation.

4. The rescheduling or repayment by instalments of social security debts shall give rise to the payment, from the date on which authorisation for rescheduling or payment by instalments was granted until the date of payment, of interest at the statutory rate in force at the time of authorisation, pursuant to Law No 24/1984 of 29 June 1984 on the amendment of the statutory rate of interest.'

2 Under Article 27 of the General Law on Social Security, the rescheduled debts are subject to default charges.

3 The conditions governing the rescheduling and payment by instalments of debts in respect of social security are set out in Royal Decree No 1637/1995 of 6 October 1995 approving the General Regulation on the levying of the resources of the social security system (BOE No 254 of 24 October 1995, p. 30844). Article 40(1) of that Royal Decree provides, in particular:

'The payment of debts in respect of social security may be rescheduled or made by instalments, both during the period of voluntary payment and during enforced payment, at the request of debtors who owing to their economic and financial situation and other special circumstances, which the General Social Security Fund assesses, are unable to pay their debts.'

4 The rescheduling of debts in respect of social security contributions is also regulated by Articles 11 to 27 of the Decree of the Minister of Employment and Social Security of 22 February 1996 implementing the General Regulation on the levying of the resources of the social security scheme (BOE No 52 of 29 February 1996, p. 7849).

5 The Fondo de Garantía Salarial (Wages Guarantee Fund; 'Fogasa') is an independent organisation under the control of the Ministry of Employment and Social Security; it has legal personality and the capacity to bring legal proceedings in order to achieve its objectives. Its main function, according to paragraph 1 of Article 33 of Royal Legislative Decree No 1/1995 of 24 March 1995 approving the codified text of the Law on the regulations governing employees (BOE No 75 of 29 March 1995, p. 9654; 'the regulations governing employees') consists in paying 'to workers the wages

which they have not been paid because of insolvency, suspension of payments, bankruptcy or insolvency proceedings brought by the creditors of the business'. Under paragraph 4 of Article 33, Fogasa is required to subrogate itself in the rights and actions of workers in order to obtain repayment of the sums advanced.

6 The formalities to be completed in order to obtain repayment of those sums are set out in Royal Decree No 505/85 of 6 March 1985 on the organisation and operation of Fogasa (BOE No 92 of 17 April 1985, p. 10203), which supplements the regulations governing employees. Article 32 of the Royal Decree provides:

'1. In order to assist the recovery of sums due, [Fogasa] may conclude repayment agreements defining matters concerning the form, time-limits and guarantees, linking the effect of the subrogatory action to the requirements of keeping the undertaking running and of preserving jobs.

Sums whose repayment has been rescheduled shall bear interest at the statutory rate in force.

2. The conclusion of an agreement for rescheduled repayment of the debt shall, where appropriate, be brought to the knowledge of the court seised of enforcement proceedings.

3. Failure to carry out the agreement shall entail rescission of the agreement; [Fogasa] shall exercise all the actions incumbent on it and may seek the reopening of proceedings which have been suspended.

...'

7 The conclusion of agreements for repayment of the sums advanced by Fogasa is regulated by the Decree of the Ministry of Employment and Social Security of 20 August 1985 (BOE No 206 of 28 August 1985, p. 27071). That decree lays down the objective criteria with which Fogasa must comply and states that these are to apply 'within the limits of the necessary discretion which allows the specific characteristics of each case to be taken into account'. Article 2(1) of that decree lays down the maximum periods over which the debt may be rescheduled. Article 3 provides that a guarantee 'deemed to be sufficient' must be required. Last, under Article 6(3), Fogasa may reject any request to reschedule payments or to pay in instalments.

Facts of the case

8 Lenzing AG ('the applicant') is an Austrian company which produces and markets cellulose fibres (viscose, modal and lyocell).

9 Sniace SA ('Sniace') is a Spanish company which produces cellulose, paper, viscose fibres, synthetic fibres and sodium sulphate. It is established in Cantabria (Spain), which since September 1995 has been a region eligible for aid pursuant to Article 92 (3)(a) of the EC Treaty (now, after amendment, Article 87(3)(a) EC).

10 In March 1993, the Spanish courts ordered suspension of payments by Sniace, which had been in financial difficulties for several years. In October 1996, Sniace's private creditors agreed to convert 40% of their debts into shares in that company; this agreement led to the lifting of the order suspending payments. Sniace's public creditors used their right of abstention and decided not to take part in that agreement.

11 On 5 November 1993 and 31 October 1995, Sniace and Fogasa concluded agreements relating to the repayment to Fogasa of the arrears in wages and compensation which it had paid to Sniace's workers. The first agreement provided for repayment of the sum of ESP 897 652 789 plus interest of ESP 465 055 911 calculated at the statutory rate of 10%, in six-monthly instalments payable over eight years ('the agreement of 5 November 1993'). The second agreement provided for repayment of the sum of ESP 229 424 860, plus interest of ESP 110 035 018 calculated at the statutory rate of 9%, in six-monthly instalments payable over eight years ('the agreement of 31 October 1995'). On 10 August 1995, in order to guarantee the debts owing to Fogasa, Sniace granted a mortgage over two of its properties. The amount repaid by Sniace under those two agreements came to ESP 186 963 594 as at June 1998.

12 On 8 March 1996, the General Social Security Fund ('the Social Security Fund') concluded an agreement with Sniace with a view to rescheduling the latter's debts in respect of social security contributions amounting to ESP 2 903 381 848 for the period February 1991 to February 1995 ('the agreement of 8 March 1996'). That agreement provided for repayment of that amount, plus interest at the statutory rate of 9%, in 96 monthly instalments over a period ending in March 2004. It was amended by an agreement of 7 May 1996, under which repayment was to be deferred for one year and then to be made in 84 monthly instalments together with interest at the statutory rate of 9% ('the agreement of 7 May 1996'). Sniace failed to honour those agreements, which were therefore replaced by a new agreement concluded on 30 September 1997 between Sniace and the Social Security Fund ('the agreement of 30 September 1997'). The amount to be repaid came to ESP 3 510 387 323, corresponding to arrears of social security contributions for the period February 1991 to February 1997, plus default charges of ESP 615 056 349, and was to be made over 10 years. During the first two years, only the interest, calculated at an annual rate of 7.5%, was payable, while in subsequent years repayments were to cover both principal and interest. By April 1998, Sniace had repaid ESP 216 118 863 under the agreement of 30 September 1997.

13 On 4 July 1996 the applicant lodged a complaint with the Commission concerning a number of instances of State aid which it alleged had been granted to Sniace over several years beginning in the late 1980s. It sent further information to the Commission by letters of 26 November and 9 December 1996. The Spanish authorities submitted observations by letter of 17 February 1997.

14 By letter of 10 March 1997, the Commission informed the applicant that no action was being taken in respect of its complaint on the ground that there was insufficient proof that Sniace had received State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC).

15 By letter of 17 April 1997, the applicant sent further information to the Commission in support of its complaint, including a viability plan concerning Sniace carried out in August 1996 by a private consultancy at the request of the Ministry of Industry of the Regional Government of Cantabria. The applicant had a meeting with the Commission on 17 May 1997. By letter of 18 June 1997, it provided the Commission with certain information on the European viscose fibres market.

16 By letter of 7 November 1997, the Commission informed the Spanish Government that it had decided to open the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC) in respect of certain of the alleged aid of which the applicant complained, including the agreements of 5 November 1993 and 31 October 1995 and the 'non-recovery of social security contributions since 1991', and invited it to submit its observations. The other Member States and interested parties were informed of the opening of that procedure and were invited to submit any observations which they might have when that letter was published in the *Official Journal of the European Communities* of 14 February 1998 (OJ 1998 C 49, p. 2). The Spanish Government communicated its observations by letter of 19 December 1997. Certain interested parties, including the applicant by letter of 27 March 1998, submitted their observations, on which the Spanish Government commented by letter of 24 June 1998. By letter of 16 April 1998, the Spanish Government answered certain questions put by the Commission by letter of 23 February 1997.

17 On 28 October 1998, the Commission adopted Decision 1999/395/EC on State aid implemented by Spain in favour of Sniace SA, located in Torrelavega, Cantabria (OJ 1999 L 149, p. 40; 'the decision of 28 October 1998').

18 The operative part of that decision reads as follows:

'Article 1

The following State aid which Spain has granted to Sociedad Nacional de Industrias y Aplicaciones de Celulosa Española SA (Sniace) is incompatible with the common market:

(a) in so far as the rate of interest was below market rates, the agreement [of] 8 March 1996 (as amended by agreement of 7 May 1996) between Sniace and the Social Security Fund to reschedule debts covering ESP 2 903 381 848 in principal, as further amended by agreement of 30 September 1997 to reschedule debts covering ESP 3 510 387 323 in principal; and

(b) in so far as the rate of interest was below market rates, the agreements of 5 November 1993 and 31 October 1995 between Sniace and the wage guarantee fund Fogasa covering ESP 1 362 708 700 and ESP 339 459 878 respectively (including interest).

As regards the other matters that were the subject of the proceedings opened pursuant to Article [88(2) EC], namely a loan guarantee ... totalling ESP 1 billion approved by Law No 7/93, the financing arrangements for the planned construction

of a waste treatment plant and the partial cancellation of debts by the Torrelavega City Council, these measures do not constitute aid and the procedure can be closed. However, Spain must inform the Commission within a period of two months from the date of this decision of the modified assessments made by Torrelavega City Council in respect of Sniace's business taxes for the years 1995 to date. As regards the unpaid environmental levies during the period 1987 to 1995, the Commission will take a separate decision in due course.

Article 2

1. The Kingdom of Spain shall take the necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to it.

2. Recovery shall be effected in accordance with the procedures of national law. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery. Interest shall be calculated on the basis of the applicable reference rate.

Article 3

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

Article 4

This Decision is addressed to the Kingdom of Spain.'

The *Tubacex* judgment and the decision of 20 September 2000

19 By application lodged at the Court Registry on 24 December 1998, the Kingdom of Spain brought an action for annulment of the decision of 28 October 1998 (Case C-479/98). The proceedings in that case were suspended, by decision of the President of the Court of Justice of 23 February 1999, pending delivery of the judgment of the Court of Justice in Case C-342/96 *Spain* v *Commission*, which raised similar issues.

20 The latter case was an action for annulment of Commission Decision 97/21/ECSC, EC of 30 July 1996 on State aid granted in favour of Compañía Española de Tubos por Extrusión SA, located in Llodia, Álava (OJ 1997 L 8, p. 14). By that decision, the Commission had found that certain repayment agreements concluded by Compañía Española de Tubos por Extrusión ('Tubacex'), its subsidiary Acería de Álava and Fogasa and also certain agreements concluded by those undertakings and the Social Security Fund whereby contributions payable were to be rescheduled or paid by instalments contained aid elements which had been granted illegally and were incompatible with the common market pursuant to Article 87 EC and Commission Decision 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57), 'in so far as the rate of interest was below market rates'. In the Commission's view, the application of the statutory interest rate of 9% to the agreements in question was not consistent with normal market conditions, under which the average rate of interest charged by private banks in Spain on loans for more than three years was considerably higher.

21 On 29 April 1999, the Court of Justice delivered its judgment in Case C-342/96 ([1999] ECR I-2459; 'the *Tubacex* judgment'). It first of all stated that Fogasa did not award loans to undertakings in liquidation or in difficulties, but settled all valid claims put forward by employees with money which it paid and then recovered from the undertakings. It further stated that Fogasa might conclude repayment agreements enabling it to reschedule the sums payable or to make them payable by instalments and that the Social Security Fund might likewise agree to rescheduling the payment of debts in respect of social security contributions or to their payment by instalments. The Court then noted that the State had not acted as a public investor whose conduct must be compared to the conduct of a private investor laying out capital with a view to realising a profit in the relatively short term, but as 'a public creditor which, like a private creditor, seeks to recover sums due to it and which, to that end, concludes agreements with the debtor, under which the accumulated debts are to be rescheduled or paid by instalments in order to facilitate their repayment' (paragraph 46). It stated that the agreements in question had been concluded on account of the fact that Tubacex had already been subject to the pre-existing statutory obligation to repay the wages advanced by Fogasa and to pay its debts in respect of social security contributions and that the agreements had not therefore created any new debts owed by Tubacex to the public authorities (paragraph 47). Last, the Court held that '[t]he interest normally applicable to that type of debt is intended to make good the loss suffered by the creditor because of the debtor's delay in performing its obligation to pay off its debt, namely default interest' and that '[i]f the rate of default interest applied to the debts of a public creditor is not the same as the rate charged for the debts owed to a private creditor, it is the latter rate which ought to be charged if it is higher than the former' (paragraph 48). In the light of those factors, the Court annulled Decision 97/21 'in so far as it declares incompatible with Article [87 EC] the measures adopted by the Kingdom of Spain in favour of [Tubacex], inasmuch as the interest rate of 9% charged on the sums owed by the latter to [Fogasa] and to the Social Security Fund is lower than the prevailing market rates'.

22 In Case C-479/98, the Commission, by letter of 17 June 1999, informed the Court that, in light of the *Tubacex* judgment, it intended to withdraw the decision of 28 October 1998 in part and before doing so to reopen the procedure provided for in Article 88(2) EC in order to obtain the comments of third parties. It therefore sought, pursuant to Article 82a(1)(b) of the Rules of Procedure of the Court,

suspension of the procedure in that case pending partial withdrawal of the decision. By decision of 1 July 1999, the President of the Court of Justice granted that request.

23 Following the *Tubacex* judgment, the Commission reconsidered the decision of 28 October 1998. By letter of 16 February 2000, it informed the Spanish Government of its decision to reopen the procedure provided for in Article 88(2) EC in respect of the 'elements of aid ... deemed incompatible with the common market set out in Article 1 of the decision [of 28 October 1998]' and invited it to submit its comments. The other Member States and interested parties were informed that the procedure was being reopened and were invited to submit their comments when that letter was published in the *Official Journal of the European Communities* of 15 April 2000 (OJ 2000 C 110, p. 33). The Spanish Government submitted its comments by letter of 19 April 2000.

24 On 20 September 2000, the Commission adopted Decision 2001/43/EC amending the decision of 28 October 1998 (OJ 2001 L 11, p. 46; 'the decision of 20 September 2000').

25 Part V, 'Assessment', of the decision of 20 September 2000 reads as follows:

'(20) The Commission must consider whether or not any of the elements deemed as incompatible with the common market set out in Article 1 of [the decision of 28 October 1998] constitute State aid within the meaning of Article 87(1) [EC]. If any such aid were found to exist, the Commission would then need to consider whether it was compatible with the common market.

(21) The factual and legal context of the *Tubacex* judgment is similar to the one raised by Spain before the Court of Justice in Case C-479/98 and by Sniace before the Court of First Instance in Case T-190/99 against [the decision of 28 October 1998]. The Commission considers that the arguments developed by the Court in this judgment are relevant with equal force to the agreements between Sniace and Fogosa and between Sniace and the Social Security [Fund] which were deemed to contain State aid in [the decision of 28 October 1998].

(22) It should firstly be noted that Sniace was already subject to the pre-existing statutory obligation to repay the wages advanced by Fogasa and to pay its debts in respect of social security contributions. The agreements in question did not therefore create any new debt owed by Sniace to the public authorities. Thus, in the repayment agreements of Fogasa and in the rescheduling agreements of the Social Security [Fund], the State did not act as a public investor whose conduct must be compared with that of a private investor providing capital with a view to realising a profit but as a public creditor which, like a private creditor, may seek to recover sums owing to it. Consequently, in assessing the contested State aid, the Commission has to compare the default rate of interest applied to the debts of the public creditor with the rate charged for the debts owed to private creditors acting in similar circumstances.

(23) However it should be noted that particular circumstances of debtors and creditors are likely to prove problematic for the determination of a common applicable behaviour of private creditors seeking to recover sums owing to them. Consequently, the Commission has to base its assessment on an analysis of the behaviour of private creditors on a case by case approach.

(24) In the particular case of Sniace, following an application made by the company in 1992, the Spanish Courts ordered suspension of payments in March 1993. By

using their abstention rights, public creditors did not subscribe to the creditors agreement of October 1996 within the framework of the suspension of payments procedure agreement. As the Commission noted in the opening decision, by using their abstention rights, the public creditors were protecting their claims.

(25) The separate agreements between Fogasa and Sniace and between the Social Security [Fund] and Sniace did not accord Sniace any more generous treatment than that reached in the private creditors' agreement.

(26) However, the circumstances of the private creditors were not the same as those of public creditors because of their status, the securities provided and abstention rights that the public institutions enjoyed. Consequently, the Commission considers that such a comparative approach does not constitute in this particular case a correct application of the "private creditor" test as defined by the Court, which as it subsequently underlined in its judgment of 29 June 1999 in the DMT case (C-256/97), supposes that the public creditors' behaviour under examination should be compared with that of a hypothetical private creditor finding himself, as far as possible, in the same situation.

(27) The Commission notes that Article 1108 of the Spanish Civil Code establishes that the legal interest rate is that which applies for compensation of damage and harm when the debtor delays the payment and no determined interest rate has been agreed. In addition, Article 312 of the Spanish Commercial Law rules that in case of a money loan and in the absence of any specific agreement between the parties, the debtor is obliged to repay the legal value ("valor legal") of the debt at the time the repayment is made. Therefore, legal interest rate would be the highest rate a private creditor could expect to obtain if he pursued the recovery of the debt by legal means.

(28) As a consequence, a private creditor could not have obtained from the debtor a rate of interest on arrears that would be higher than the legal interest rate as a compensation for not pursuing the recovery of the debt by legal means.

(29) Finally, the particular circumstances of Sniace at the time the rescheduling agreements with Fogasa and the Social Security Fund were made should be underlined. The company had been in serious financial difficulties, resulting in the suspension of all debt repayments and there were serious doubts about its future existence. As the Commission noted in [the decision of 28 October 1998], by not proceeding to execution and thereby possibly provoking the liquidation of the company, the Social Security [Fund] acted in such a way as to maximise its prospects of recovering the debt.

(30) In the light of the above, the Commission can accept that in this particular case, by rescheduling and applying the legal interest rate to debts owed by Sniace, Spain was seeking to maximise the recovery of the sums due to it without suffering any financial loss. Consequently, Spain acted as a hypothetical private creditor would have done, vis-à-vis Sniace.'

26 In the light of those considerations, the Commission concluded in the decision of 20 September 2000 that 'the repayment agreements between Fogosa and Sniace and the debt rescheduling agreement between the Social Security Treasure and Sniace [did] not constitute State aid' (recital 31) and that 'it [was] appropriate to amend [the decision of 28 October 1998]' (recital 32).

27 The operative part of the decision of 20 September 2000 provides:

'Article 1

[The decision of 28 October 1998] is hereby amended as follows:

1. The first subparagraph of Article 1 is replaced by the following:

"The following measures which Spain has implemented in favour of [Sniace] do not constitute State aid:

(a) the agreement of 8 March 1996 (as amended by the agreement of 7 May 1996) between Sniace and the Social Security [Fund] to reschedule debts covering ESP 2 903 381 848 (EUR 17 449 676.34) in principal, as further amended by the agreement of 30 September 1997 to reschedule debts covering ESP 3 510 387 323 (EUR 21 097 852.72) in principal;

(b) the agreements of 5 November 1993 and 31 October 1995 between Sniace and [Fogasa] covering ESP 1 362 708 700 (EUR 8 190 044.23) and ESP 339 459 878 (EUR 2 040 194.96) respectively."

2. Article 2 is revoked.

Article 2

This Decision is addressed to the Kingdom of Spain.'

28 The decision of 28 October 1998, as amended by the decision of 20 September 2000, will be referred to below as 'the contested decision'.

29 By order of 4 December 2000, the President of the Court of Justice ordered that Case C-479/98 be removed from the Register of the Court.

Procedure

30 By application lodged at the Registry of the Court of First Instance on 11 February 1999, the applicant brought the present action for partial annulment of the decision of 28 October 1998.

31 By separate document lodged at the Registry of the Court of First Instance on 21 May 1999, the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance.

32 By document lodged at the Registry of the Court of First Instance on 8 July 1999, the Kingdom of Spain sought leave to intervene in the present case in support of the form of order sought by the Commission. By order of 11 October 2001, the President of the Fifth Chamber, Extended Composition of the Court of First Instance granted that application.

33 By order of 10 December 1999 of the President of the Fifth Chamber, Extended Composition of the Court of First Instance, the present proceedings were stayed pending delivery of the judgment in Case C-479/98, in accordance with the third paragraph of Article 47 of the EC Statute of the Court of Justice (now the third paragraph of Article 54 of the Statute of the Court of Justice) and with Article 77(a) and Article 78 of the Rules of Procedure of the Court of First Instance.

34 By letter of 24 January 2001, the Registry of the Court of First Instance invited the main parties to submit their comments on the continuance of the present proceedings in the light of the decision of 20 September 2000 and the order of the President of the Court of 4 December 2000 removing Case C-479/98 from the register. The applicant submitted its comments by letter registered at the Registry of the Court of First Instance on 12 February 2001, in which, inter alia, it amended the form of order sought (see paragraph 41 below). By letter registered at the Registry on 16 February 2001, the Commission stated, in essence, that the subject-matter of the present proceedings was not affected by the decision of 20 September 2000.

35 On 11 April 2001, the applicant submitted its observations on the objection of inadmissibility.

36 By order of 8 October 2001, the Court of First Instance (Fifth Chamber, Extended Composition) joined the objection of inadmissibility to the main proceedings.

37 The Kingdom of Spain lodged its statement in intervention on 14 February 2002 and the main parties submitted their observations thereon.

38 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure, and, in the context of measures of organisation of procedure, invited the Commission to produce certain documents and the Kingdom of Spain to answer a number of written questions and to produce one document. The Commission and the Kingdom of Spain complied with those requests within the prescribed period. The Court also invited the applicant to answer one question orally at the hearing.

39 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 23 October 2003.

Forms of order sought by the parties

40 In its application, the applicant claims that the Court should:

— annul Article 1 of the decision of 28 October 1998 in so far as the Commission states that:

'1. the non-recovery of the debts, penalty charges and interest owing to the Social Security Fund and the agreements to reschedule the debt concluded between Sniace and the Social Security Fund on 8 March 1996, 7 May 1996 and 30 September 1997 and

2. the non-recovery of the debts and default interest owed to ... Fogasa, and the agreements concluded between Sniace and ... Fogasa on 5 November 1993 and 31 October 1995,

with the exception of the rates of interest different from the market rates, do not constitute State aid within the meaning of Article [87(1) EC]';

— order the Commission to pay the costs.

41 In its letter of 12 February 2001 (see paragraph 34 above), the applicant amends the first head of the form of order sought as follows:

'annul Article 1 of [the contested decision] in so far as the Commission declares that:

the non-recovery of the debts, default charges and interest owed to the Social Security [Fund] and the debt-rescheduling agreements concluded between Sniace and that body on 8 March 1996, 7 May 1996 and 30 September 1997, and

the non-recovery of the debts and default interest payable to Fogasa, and the agreements concluded between Sniace and Fogasa on 5 November 1993 and 31 October 1995

do not constitute State aid within the meaning of Article 87(1) EC'.

42 In its observations on the objection of inadmissibility, the applicant claims that the Court should declare the action admissible.

43 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in any event, dismiss the action as unfounded;

— order the applicant to pay the costs.

44 The Kingdom of Spain, intervener, claims that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

Admissibility

45 The Commission and the Kingdom of Spain claim that the action is inadmissible on the ground that the applicant, first, has not shown that it has an interest in bringing the action and, second, is not individually concerned by the contested decision.

The absence of an interest in bringing the action

Arguments of the parties

46 The Commission states that, in the decision of 20 September 2000, it finds that neither the rescheduling and repayment agreements as such nor the rates of interest provided for therein constitute State aid within the meaning of Article 87(1) EC. It claims that that decision became definitive since the applicant did not bring an action for its annulment and that it is therefore the forms of order sought, as set out in the application, that define the subject-matter of the dispute. Those forms of order refer only to Article 1 of the decision of 28 October 1998, and do so only in so far as the failure on the part of the Social Security Fund and Fogasa to recover 'their debts, default charges and interest' from Sniace is not regarded as State aid within the meaning of Article 87(1) EC.

47 The Commission contends that the applicant has no interest in bringing an action. It submits that if the Court should grant the form of order sought by the applicant and annul the decision, that 'would not affect the definitive nature of [the decision of 20 September 2000] and would not in any way change the version of [the decision of 28 October 1998] as thus amended'. In effect, 'the annulment of Article 1 of [the decision of 28 October 1998] in the terms requested by the applicant [would not affect the validity of] the definitive version of Article 1(1) of [the decision of 28 October 1998] as amended by [the decision of 20 September 2000], which expressly established that the impugned measures do not constitute State aid'.

48 In its rejoinder, the Commission submits that the decision of 20 September 2000 'is not a mere "rectification" of [the decision of 28 October 1998], nor does it replace [that decision]; on the contrary, it constitutes an entirely fresh assessment of, inter alia, the aid which had been deemed compatible with the common market in [the decision of 28 October 1998]'. The procedure opened pursuant to Article 88(2) EC following the *Tubacex* judgment (see paragraph 23 above) did not cover only the question of the interest rates but concerned 'all the measures which culminated in

the adoption of [the decision of 28 October 1998], but now taking [that judgment] into account'. Likewise, in the decision of 20 September 2000, the Commission 'expressly examined in full and evaluated those measures from the point of view of the right to the aid, in particular the agreements between Fogasa or the Social Security Fund and Sniace'. The Commission maintains that the applicant should therefore 'also' have brought an action for annulment of the decision of 20 September 2000.

49 The Kingdom of Spain submits that Article 1(1) of the decision of 28 October 1998 was 'rendered devoid of content by the amendment effected by [the decision of 20 September 2000]' and that the present action is therefore devoid of purpose.

50 The applicant contends that the claim for annulment in the application refers to the decision of 28 October 1998 only in so far as the Commission stated therein that 'the non-recovery of the debts, penalty charges and interest owing to Social Security Fund and the agreements to reschedule the debt concluded between Sniace and the Social Security Fund and the non-recovery of the debts and default interest owed to ... Fogasa, and the agreements between Sniace and Fogasa, do not constitute State aid within the meaning of Article 87(1) EC'. That claim for annulment is not directed against the declaration in Article 1 of that decision that 'the difference between the rates of interest agreed in those agreements and the higher market rate constitutes State aid'.

51 The applicant explains that the decision of 20 September 2000 partially amended the decision of 28 October 1998 in that the Commission considers in the later decision that the abovementioned difference between the rates of interest does not constitute State aid either. The decision of 20 September 2000 does not amend the other aspects of the decision of 28 October 1998 and, more specifically, not the aspect criticised in the application. The subject-matter of the dispute, as formulated in the application, therefore remains unaltered.

52 The applicant further states that, even if the decision of 20 September 2000 must be regarded as having repealed and replaced the decision of 28 October 1998, it would be entitled to amend the form of order which it sought, as it did in its letter of 12 February 2001 (see paragraphs 34 and 41 above). The applicant relies in that regard on the judgment of the Court of Justice in Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749.

53 For those various reasons, the applicant maintains that it has shown that it has an interest in bringing the action.

Findings of the Court

54 It should first be observed that an amendment, in the course of proceedings, of the contested decision constitutes a new factor which allows the applicant to amend its pleas and the form of order sought (*Alpha Steel*, cited above, paragraph 8; Joined Cases T-46/98 and T-151/98 *CCRE* v *Commission* [2000] ECR II-167, paragraphs 33 to 36; and Joined Cases T-227/99 and T-134/00 *Kvaerner Warnow Werft* v *Commission* [2002] ECR II-1205, paragraph 22).

55 In the decision of 28 October 1998, the Commission considered, inter alia, that the agreement of 8 March 1996, as amended by the agreements of 7 May 1996 and 30 September 1997, between Sniace and the Social Security Fund and the agreements of 5 November 1993 and 31 October 1995 between Sniace and Fogasa constituted State aid within the meaning of Article 87(1) EC only 'in so far as the rate of interest was below the market rate'. In the application, the applicant seeks annulment of that aspect of the decision of 28 October 1998 on the ground, in particular, that 'the State aid consists of ... all the social security contributions still payable, plus default charges and interest at the market rate [and also] all sums payable to Fogasa, plus interest at the market rate'. As regards the Social Security Fund, the applicant contends, more particularly, that the fact that that body has at least since 1991 allowed Sniace not to pay its debts in respect of social security contributions, that in 1996 and 1997 it did not recover its debts in spite of the fact that Sniace had not

honoured the agreements of 8 March and 7 May 1996 but, on the contrary, had concluded a third rescheduling agreement, that it did not demand real securities and that it waived payment of default charges and interest at the market rate, constitute State aid. As regards Fogasa, the applicant claims, in essence, that the fact that that body did not recover its debts from Sniace, when Sniace had not honoured the agreements of 5 November 1993 and 31 October 1995, and that it made no provision in those agreements for payment of default charges and default interest, constitute State aid.

56 By the decision of 20 September 2000, the Commission amended the decision of 28 October 1998, but did not repeal or replace it. The only alteration is that, applying the standard of a private creditor rather than that of a private investor, the Commission considered that the interest rates applied by the Social Security Fund and Fogasa in the rescheduling and repayment agreements concluded with Sniace did not constitute State aid either. The aspect of the decision of 28 October 1998 referred to by the form of order seeking annulment of the application is therefore affected only incidentally by the decision of 20 September 2000. The latter decision must therefore be regarded as a new factor allowing the applicant to adjust its pleas and the form of order sought, is it did in its letter of 12 February 2001. It would be contrary to the proper administration of justice and to a requirement for procedural economy to make the applicant lodge a new application before the Court for annulment of the decision of 20 September 2000.

57 It follows that the applicant has an interest in securing the annulment of the contested decision.

The question as to whether the applicant is individually concerned

Arguments of the parties

58 The Commission observes that, according to a consistent line of decisions, persons other than those to whom a decision is addressed may only claim to be individually

concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95).

59 It states that in the context of control of State aid, a Commission decision closing a procedure initiated pursuant to Article 88(2) EC is of individual concern to the undertakings who were at the origin of the complaint which led to that procedure and whose views were heard and determined the conduct of the procedure, provided, however, that their position on the market is substantially affected by the aid which is the subject of that decision (Case 169/84 *COFAZ and Others* v *Commission* [1986] 391, paragraphs 24 and 25; Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraph 40; Case T-435/93 *ASPEC and Others* [1995] ECR II-1281, paragraph 63; and Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 72). The Commission points out that in *Comité d'entreprise de la Société française de production and Others* v *Commission* the Court of Justice held that '[a]n undertaking cannot therefore rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, account being taken of the extent of its possible participation in the procedure and the magnitude of the prejudice to its position on the market' (paragraph 41).

60 In the present case, in the Commission's submission, the applicant does not show in sufficient detail in the application that its position on the market was substantially affected by the alleged aid granted to Sniace or rely on circumstances of fact which distinguish it in the same way as the person to whom the decision is addressed. It merely puts forward general arguments and gives no indication of the effects which the alleged aid had on its particular situation.

61 In any event, it does not appear, according to the Commission, that the alleged aid substantially affected the applicant's position.

62 In that regard, the Commission states, first, that the applicant is 'by far' the largest producer of viscose fibres and that it has considerably improved its results on the market since 1991. In support of those assertions, the Commission relies on the following factors:

— the group to which the applicant belongs produces approximately 275 000 tonnes of cellulose fibres each year and is one of the three world leaders on the viscose fibres market;

— the applicant, Säteri and Courtaulds plc together account for approximately 90% of Community production of viscose fibres;

— between 1991 and 1997, the applicant's market share on the world market for artificial and synthetic viscose spinning fibres has consistently increased, from 9.2% to 16.4%;

— between 1991 and 1997, the applicant's production regularly increased, from 152 700 tonnes per year to 270 800 tonnes per year;

— for the applicant, '1995 was ... characterised by very strong demand, 1996 by full use of its production capacity, 1997 by record production and, last, 1998 by record results';

— the applicant announced good results for the first quarter of 1999;

— for the third quarter of 1997, it announced an increase in its selling prices, 'its increasing independence vis-à-vis pressure from prices on the world market' and the need to import to satisfy demand;

— the applicant's consolidated turnover increased by 7.2% between the first half of 2000 and the corresponding period for 2001.

63 In its defence, the Commission further states that it follows from the figures communicated by the applicant that the applicant managed to increase its market share in the Community between 1995 and 2000 although, during that period, the market shares of its competitors (with the exception of Säteri) consistently fell.

64 Second, the Commission claims that the problems existing on the market, which caused a fall in demand, temporary surplus production capacity and a fall in prices, are not the consequence of the alleged aid granted to Sniace but of external factors such as imports from Asia, the small number of potential outlets on the export markets in Asia, the trade barriers to exports to non-member countries encountered by European producers and the fall in purchases of viscose-based articles in Europe.

65 Third, the Commission states that Sniace produces only 25 000 tonnes of viscose fibres per year and that it is among the small European and world producers. Sniace has had to face up to numerous economic difficulties and also to industrial disputes, which forced it to halt production during a large part of the 1990s. It points out that Sniace suspended payments between March 1993 and October 1996.

66 The Kingdom of Spain further states that the applicant does not put forward any specific circumstance which would enable it to be distinguished in a way comparable to the person to whom the contested decision is addressed. The mere fact that the applicant is a competitor of the recipient of the alleged aid is not sufficient to distinguish it.

67 The applicant contends that it is individually concerned by the contested decision.

68 First, it was at the origin of the complaint that led to the opening of the procedure referred to in Article 88(2) EC and it played an active role in that procedure.

69 Second, the alleged aid had an appreciable effect on its position on the viscose fibres market. There is fierce competition between the applicant and Sniace on that market, which has been in constant decline for a number of years and has significant production surpluses. Competition on prices is keen and, owing to the alleged aid, Sniace is able to sell its products 20% more cheaply than its competitors in the European Union. The applicant states that the information which it provided in its application and in the annexes thereto, and also the references which it made to the observations of its competitors set out in the decision of 28 October 1998, are sufficient to show that it is individually concerned by the contested decision. It claims that all the matters which it put forward in its written submissions show that 'all Sniace's competitors are facing significant competition on prices and, although their costs structure is better, need to take other rationalisation measures, because Sniace is being artificially kept alive' and that 'this overall situation, which is unfavourable to say the least, also concerns the applicant, which has optimised its equipment and costs structure and obtains good results as a consequence of a commercial policy conceived on new bases and in spite of a difficult economic environment'. The applicant admits that the difficulties experienced on the viscose fibres market influence the prices of that product but states that, 'within the framework created by the external market data', the alleged aid itself has obliged Sniace's competitors to reduce their prices and to take rationalisation measures.

70 The applicant contends that the Commission cannot deny that it has *locus standi* on the ground that it has an important position on the market or that it increased its sales during the relevant period. In the judgments cited by the Commission, the Community Courts did not take such factors into consideration when finding that the applicants were not individually concerned by the contested decisions. In Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, the Court of First Instance held that the situation on the market of the undertaking concerned was affected by a Commission decision authorising aid provided that there was a competitive relationship between that undertaking and the recipient of the aid. The applicant further contends that the positive results which it obtained would have been even better if Sniace had not been in a position to conduct the 'aggressive price policy ... which was made possible by the aid'. Last, it claims that the alleged aid allowed Sniace to maintain itself artificially on the market when its disappearance would have meant, for its competitors, a reduction in surplus capacity and an improvement in the commercial situation.

71 The applicant submits that 'the circle of undertakings with *locus standi* must be determined by reference to the purpose of the provisions on aid'. Consequently, the criteria employed by the Commission and by the Community judicature to establish whether aid 'distorts or threatens to distort competition' within the meaning of Article 87(1) EC may also be applied for the purpose of determining whether an undertaking has *locus standi*. The applicant observes that, in the Commission's view, competition is always affected within the meaning of that provision when, as here, the aid is granted in a 'particularly problematical sector' and aid to undertakings in difficulties tends by its very nature to distort competition. The applicant also relies on the principle that 'the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such preclude the possibility that intra-Community trade may be affected' (*ASPEC and Others* v *Commission*, cited above, paragraph 64, and *BP Chemicals* v *Commission*, cited above, paragraph 72). Last, the applicant states that the alleged aid granted to Sniace was operating aid and that this practically always entails a substantial distortion of competition.

72 Third, the applicant states that the Commission's assertions in relation to Sniace's position on the viscose fibres market directly contradict certain findings in the decision of 28 October 1998. In particular, Sniace's market share in the Community is between 10.3% and 13% and in Spain it had a market share of 35.5% in 2000. Furthermore, the home page on Sniace's internet site states that it is one of the largest producers of viscose fibres in Europe.

Findings of the Court

73 According to well-established case-law, persons other than those to whom a decision is addressed may only claim to be individually concerned where that decision 'affects them by virtue of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed' (*Plaumann*, cited above, at p. 107, and *Comité d'entreprise de la Société française de production and Others* v *Commission*, cited above, paragraph 39).

74 With more particular regard to the field of State aid, not only the undertaking in receipt of the aid but also the undertakings competing with it which have played an active role in the procedure opened pursuant to Article 88(2) EC in respect of an individual aid have been recognised as being individually concerned by the Commission decision closing that procedure, provided that their position on the market is significantly affected by the aid which is the subject of the contested decision (*COFAZ and Others* v *Commission*, cited above, paragraph 25).

75 An undertaking cannot therefore rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, account being taken of the extent of its possible participation in the procedure and the magnitude of the prejudice to its position on the market (*Comité d'entreprise de la Société française de production and Others* v *Commission*, cited above, paragraph 41).

76 In the present case, it is common ground that the applicant and Sniace are present on the viscose fibres market. At a number of points in the decision of 28 October 1998, moreover, the Commission expressly describes the applicant as a competitor of Sniace. The Court must therefore consider to what extent the applicant's participation in the procedure and the effect of the aid on its position on the market are capable of distinguishing it, in accordance with Article 230 EC.

77 First, as regards the applicant's participation in the procedure, it was the detailed complaint dated 4 July 1996, lodged by the applicant, and supplemented by its letters of 26 November and 9 December 1996, that was at the origin of the opening of the procedure. Admittedly, the Commission initially took the view that there was insufficient proof that Sniace had received State aid and therefore stated that it intended to take no further action. However, it was precisely in light of further detailed information supplied by the applicant in letters of 17 April and 18 June 1997 and at the meeting of 17 May 1997 that the Commission decided to review its position and to initiate the procedure under Article 88(2) EC.

78 The decision to open the procedure was based mainly on the arguments and evidence put forward by the applicant. The applicant also submitted detailed comments, by letter of 27 March 1998, following publication of the decision.

79 It is therefore established that the applicant was at the origin of the complaint which led to the opening of the procedure and that it participated actively in that procedure.

80 Second, as regards the extent to which the applicant's position on the market was affected, it should be borne in mind, that, as stated in paragraph 28 of the judgment in *COFAZ and Others* v *Commission*, cited above, it is not for the Community Court, when it is considering whether the application is admissible, to make a definitive finding on the competitive relationship between the applicant and the undertakings in receipt of the aid. In that context, it is for the applicant alone to adduce pertinent reasons to show that the Commission's decision may adversely affect its legitimate interests by seriously jeopardising its position on the market in question.

81 In the present case, the Court finds that in the application the applicant emphasised the fact that the alleged aid had adversely affected its competitive position on the viscose fibres market in that it had allowed Sniace to keep itself artificially in activity when that market is distinguished by a very small number of producers, keen competition and serious overcapacity.

82 In order to demonstrate the existence of that overcapacity, the applicant made express reference to certain pages of the comments which it had submitted on 27 March 1998 following the opening of the procedure provided for in Article 88(2) EC and which are annexed to the application. Those pages contain data on consumption, production and production capacity of viscose fibres in the Community for 1992 to 1997, issued by the Comité international de la rayonne et des fibres synthétiques (CIRFS).

83 At the hearing, moreover, the applicant referred to certain information in its complaint of 4 July 1996, also annexed to the application. In that complaint, it provided information about the viscose fibres market, identified the producers of

viscose then present on the market, giving an estimate of their respective production capacities, and provided details of the quantities of viscose fibres sold by Sniace for the years 1991 to 1995, distinguishing in particular the quantities sold in Spain from those exported to Italy.

84 The Commission has adduced no evidence such as would cast doubt on the accuracy of the information supplied by the applicant. On the contrary, it recognises, both in its objection of inadmissibility and in the decision of 28 October 1998, that the viscose fibres market suffered from overcapacity. Thus, at recital 74 to that decision, it expressly states that 'Sniace operates in a sector in decline, which has resulted in rationalisations in capacity being made by some of its competitors', that '[p]roduction in the EEA of these fibres declined from 760 000 tonnes in 1992 to 684 000 tonnes in 1997 (a reduction of 10%) and consumption fell in the same period by 11%' and that '[t]he average capacity utilisation rate in that period was about 84%, which is low for such a capital-intensive sector'.

85 It should further be noted that the Commission recognised, both in the decision of 28 October 1998 (recital 80) and in the decision of 20 September 2000 (recital 29), that the serious financial difficulties encountered by Sniace had seriously jeopardised its prospects of survival and that if the Social Security Fund had proceeded to enforce its claims, that could have resulted in the closure of the company. In view of the very small number of producers on the market and the production overcapacity on that market, Sniace's disappearance might have had appreciable effects on the competitive position of the remaining producers in the form of a reduction in their surplus capacity and an improvement in their commercial situation. Although Sniace was admittedly not one of the largest viscose fibre producers in the Community, its position on the market was by no means insignificant. Accordingly, it must be noted particularly that the Commission stated at recital 9 of the decision of 28 October 1998 that Sniace's viscose fibres production capacity was 'approximately 32 000 tonnes (about 9% of Community capacity)'.

86 The Court finds that these are factors such as would show that the applicant's position on the market is substantially affected by the contested decision.

87 In addition, the applicant emphasised that the alleged aid had allowed Sniace to sell its products, in the Community, at prices approximately 20% lower than the average prices of its competitors. In support of that assertion, the applicant referred to the statements of Courtauld plc and Säteri, referred to at recitals 15 and 17 to the decision of 28 October 1998. In its reply, it provided further support for that assertion in the form of an express reference to its letter of 18 June 1997, annexed to the application, in which it had supplied the Commission with further information on the European viscose fibres market. That letter contains tables indicating, in particular, for the years 1989 to 1996, the quantities of viscose fibres and modal delivered by Sniace and the applicant in Spain and also by Sniace and the Austrian producers in France and Italy. That letter also contains information on import prices applied in France and Italy by Sniace and other producers between 1989 and 1996. The applicant also annexed to its reply tables giving the same information for the years 1997 to mid-2001. It follows from those various items that in most cases, and with the exception of producers from the countries of Eastern Europe, Sniace's prices were lower than those of other European producers.

88 The Commission does not dispute that Sniace sold its products at lower prices than its European competitors. It states only that the general fall in prices, of more than 30%, observed on the market between 1990 and 1996 is not a consequence of the alleged aid granted to Sniace but of external factors, including imports from Asia. According to the specialist publication *European Chemical News*, moreover, which the Commission annexed to its objection of inadmissibility, 'market observers say [that] Sniace continues to exert a negative influence on pricing in excess of its small market position capacity'.

89 Thus, it cannot be precluded that the alleged aid, some of which was described by the Commission itself as an 'appreciable advantage' (recital 80 to the decision of 28 October 1998), allowed Sniace to sell its products at lower prices than its competitors, including the applicant.

90 Last, the Commission's argument based on the fact that the applicant had good results and increased its production during the years in question is wholly irrelevant. The fact that its position on the market is substantially affected does not necessarily mean that its profitability falls, that its market share is reduced or that operating losses are incurred. The question in that connection is whether the applicant would be in a more favourable situation in the absence of the decision which it seeks to have annulled. As the applicant rightly states, that may validly cover the situation in which it loses the opportunity to make a profit because the public authorities confer an advantage on one of its competitors.

91 It follows from the foregoing considerations that the applicant properly showed the reasons why the contested decision was liable to harm its legitimate interests by substantially affecting its position on the market. The Court therefore holds that the applicant is individually concerned by the contested decision.

92 The action must therefore be declared admissible.

Substance

93 The applicant puts forward two pleas in law in support of its application. The first alleges infringement of Article 87(1) EC and the second breach of the obligation to state reasons.

Arguments of the parties

94 In the context of the first plea, the applicant maintains, first of all, that in the *Tubacex* judgment, the Court of Justice dealt only with the question whether certain terms of the debt rescheduling and repayment agreements concluded with the Social Security Fund and Fogasa, and more particularly the rates of interest provided for, contained elements of State aid. It submits that the Court did not adjudicate on the agreements as such or examine the legal issues raised in the present case. Referring to paragraph 46 of the *Tubacex* judgment, the applicant states that while it is true that the Court based its assessment on the Commission's premiss that non-recovery by those two bodies of their debts did not assume the character of State aid, it did not however adopt that premiss on its own behalf. In the applicant's submission, the Court of Justice could not call that premiss in question, since it had not been disputed by, and did not harm, the Kingdom of Spain.

95 The applicant concludes that it cannot be inferred from the *Tubacex* judgment that the Court of Justice considers, in principle, that the debt repayment and rescheduling agreements concluded between the Social Security Fund and Fogasa, on the one hand, and undertakings in difficulties, on the other, do not in themselves constitute State aid. That question must be examined in each individual case by reference to the circumstances of the case, on the basis of the private creditor test.

96 Next, the applicant submits that the Social Security Fund and Fogasa have a discretion as to whether or not to defer payment and, where appropriate, to decide the relevant terms. The condition that the aid should relate to a specific undertaking, which is one of the defining features of the concept of State aid, is therefore satisfied in the present case.

97 The applicant further claims that the Commission did not correctly apply the private creditor test in the present case.

98 First, the applicant asserts that the Commission bases its argument on the incorrect premiss that 'recovery of a debt when it becomes due requires particular justification'. It explains, in that regard, that where a debtor is solvent, a private creditor recovers its debts immediately they become payable. Likewise, as a general rule, where a debtor is experiencing economic difficulties, a private creditor is not inclined to allow the debtor to defer payment, but relies directly on its rights, if necessary by realising the securities which it holds. A private creditor refrains from recovering debts which are payable only where that approach constitutes the most sensible solution from an economic aspect, for example where, by comparison with the other options available, it enables the creditor to recover the greatest proportion of its debts or to avoid incurring even heavier losses.

99 Second, the applicant submits that in the present case the conduct of the Social Security Fund and Fogasa was not consistent with what could be expected of a hypothetical private creditor in the same situation.

100 In support of that assertion, it claims, first, that the suspension of payments procedure did not prevent those bodies from recovering their debts. It explains that 'the judicial protection of a debtor in the context of [that procedure] is limited to the debts which arose before [that] procedure was opened'. The debts owed to the Social Security Fund and to Fogasa which arose after the opening of the suspension of payments procedure could therefore have been recovered at any time. As regards the debts which arose in 1991 and 1992, they could have been recovered at that time. In any event, they could have been enforced from October 1996.

101 Second, the applicant claims that a private creditor which, like the Social Security Fund and Fogasa, has preferential claims and securities would not have granted payment facilities to a debtor experiencing financial difficulties but would have enforced its debts. The applicant disputes the merits of the argument which the Commission derives from the fact that in this case no private creditor of Sniace enforced payment, including the Spanish bank Banesto, whose debt was, however,

guaranteed by a mortgage. The applicant maintains that the position of all those creditors, with the exception of Banesto, was not as good as that of the Social Security Fund and Fogasa. Furthermore, the Commission gives no indication either in the contested decision or in its written pleadings from which it might be determined whether those creditors were in a situation comparable to that of the Social Security Fund and Fogasa. In particular, no information is given about 'the prospects of recovering the debts which the private creditors waived', about the size of the debts or about the securities which the creditors held. In the applicant's submission, no conclusions could be drawn from Banesto's actual conduct unless 'a number or even the majority of the private creditors placed in a situation comparable to Fogasa's had acted like Banesto'. Last, the applicant claims that it cannot be precluded that some of Sniace's private creditors were also shareholders in that undertaking.

102 The applicant also maintains that it cannot be claimed that the conclusion of the rescheduling and repayment agreements in question was intended to preserve the debts owed to the Social Security Fund and to Fogasa. It submits that a private creditor 'would have immediately attempted to obtain satisfaction from the debtor's assets, in order to recover at least a proportion of the debts owed to it'. For such a creditor, 'deferring and rescheduling payment is justified only if, by comparison with other solutions, it ensures that [the creditor] will recover the largest possible proportion of the debts owed to it' and that it 'would suspend payment only if it could rely on an improvement in the debtor's economic situation'. Such an improvement was not foreseeable in the present case, for the following reasons:

— Sniace's turnover had fallen significantly in 1995 and 1996;

— no restructuring measure capable of ensuring the undertaking's profitability and viability had been envisaged and the viability plan prepared in August 1996 had not been regarded by the Spanish Government as constituting an official restructuring plan;

— in 1996, the viscose fibres market was suffering from considerable surplus capacity;

— a fresh fall in demand for viscose fibres in the Community during the following years was envisaged.

103 The applicant further disputes the relevance of the Commission's argument that the debts owed to the Social Security Fund and to Fogasa are preferential debts. It claims that if Sniace had become bankrupt, the debts owed to those bodies would not have been 'recoverable without limit', since debts guaranteed by real securities take priority. It notes, in particular, that Fogasa would have had 'absolute priority over other creditors only in respect of the last 30 days preceding the time of claiming the debt'. As regards the preceding period, the debtors with real securities would have taken in priority to Fogasa.

104 Third, the applicant submits that a private creditor would have never refrained from recovering its debts from a debtor in financial difficulties and at the same time agreed that it should accumulate new debts to it.

105 Thus, as regards Fogasa, the applicant states that, after concluding the agreement of 5 November 1993, which concerned only the debts which arose before that date, it continued to pay Sniace's employees' wages every month. In the applicant's submission, the fact that Fogasa was required by law to continue to pay those wages each month does not justify its failure to recover the debts which had become payable, by means of enforcement if necessary, thus allowing the debts to accumulate.

106 The applicant claims that the Social Security Fund also allowed Sniace's debts to accumulate. Sniace's debts to the Social Security Fund rose from ESP 746 million in 1991 to ESP 3 2000 million in 1995 and the Social Security Fund took no steps to recover its debts until 1996. In 1995, the arrears in social security contributions owed by Sniace greatly exceeded its own capital, which amounted to ESP 1 730 million. The applicant criticises the fact that the Social Security Fund did not sell the assets which it had seized from Sniace and states that on 31 December 1993 assets to the value of ESP 1 034 million had been seized and that Sniace's debts in respect of social security contributions already came to approximately ESP 2 400 million.

107 Fourth, the applicant maintains that a private creditor would never have granted new payment facilities to a debtor which had not honoured its previous repayment commitments. In spite of the fact that Sniace had not implemented the agreements of 8 March and 7 May 1996, the Social Security Fund agreed to conclude the agreement of 30 September 1997. Fogasa concluded the agreement of 31 October 1995 although Sniace had only partially implemented the agreement of 5 November 1993. In June 1998, Sniace only paid one third of the amounts payable under the two agreements. More generally, as at the date of adoption of the contested decision, the Social Security Fund and Fogasa had recovered only a very small part of the debts owed to them by Sniace.

108 Fifth, the applicant maintains that a private creditor would have required sufficient securities and guarantees before agreeing to grant payment terms to a debtor in a difficult financial situation.

109 Unlike several financial institutions which were creditors of Sniace and which had obtained mortgage guarantees covering all their debts, the Social Security Fund did not seek guarantees from Sniace between 1991 and 1996 in return for not recovering the debts owed to it. The applicant criticises, more particularly, the fact that the Social Security Fund did not require real securities when it concluded the agreement

of 30 September 1997. Sniace merely proposed a 'joint mortgage' to the Social Security Fund and Fogasa in 1996, but that mortgage was never executed, even though the effective value of Sniace's operating capital stood at ESP 25 000 million on 31 December 1996. The applicant considers it wholly irrelevant that the Social Security Fund obtained a charge over Sniace's stock of machines in August 1998, since that was considerably after the agreements of 8 March and 7 May 1996 and 30 September 1997 were concluded. Nor can the Commission claim that the Social Security Fund was 'relatively certain' to recover the debts owed to it by Sniace on the ground that Sniace's unencumbered assets represented approximately ESP 20 000 million. The Social Security Fund ran the risk that Sniace would grant securities over those assets to third parties in order to obtain capital; and secured creditors take priority over all other creditors without real securities, including preferential creditors.

110 As regards the mortgage given to Fogasa, the applicant observes that, at recital 89 to the decision of 28 October 1998, the Commission states that '[d]espite repeated requests, the Spanish Government failed to provide specific details of the nature of [that] mortgage'.

111 Sixth, the applicant claims that a private creditor would have refrained from recovering the debts owed to it only if it would have been financially advantageous not to recover them. The interest and default charges which Sniace was required to pay to the Social Security Fund and to Fogasa did not represent an advantage for those bodies, since payment thereof was just as uncertain as payment of the principal amounts due.

112 As a preliminary point, the Commission asserts, with reference to paragraphs 45 to 47 of the *Tubacex* judgment, that in that judgment the Court of Justice concluded that 'neither the sums advanced by Fogasa to the employees of an undertaking in difficulty nor the agreements intended to allow the undertaking to repay those advances to Fogasa are in themselves in the nature of State aid'. In such matters,

'review from the aspect of the law on aid is therefore confined to examining certain terms contained in those repayment agreements'. In the Commission's submission, the same conclusions apply to the deferment of payment of the debts in respect of social security contributions granted by the Social Security Fund and also to the restructuring agreements concluded by that Fund. First, the intervention of each of those bodies should be compared not with the conduct of a private investor but with that of a private creditor and, second, those various agreements do not confer on the undertaking concerned the benefit of new public resources. In its rejoinder, the Commission claims that in the *Tubacex* judgment the Court did not adjudicate solely on the question of the interest rates but assessed, more generally, the agreements concluded between Fogasa and the Social Security Fund, on the one hand, and the Spanish undertakings in difficulties, on the other, from the aspect of the rules on State aid. Last, the Commission emphasises that it was in order to give effect to that judgment that it adopted the decision of 20 September 2000.

113 The Commission then states that the Social Security Fund and Fogasa acted under the statutory rules applicable to them and that they were subject to 'constraints and requirements which limited their discretion'. In its rejoinder, it states that 'the impugned measures taken by Fogasa and the Social Security Fund do not selectively favour certain specific undertakings, as Article 87(1) EC presupposes'. The Kingdom of Spain claims that, by allowing Sniace to reschedule its debts in respect of social security contributions, the Social Security Fund acted in accordance with the national legislation in force. That legislation applies generally to any undertaking in one of the situations envisaged, so that the Social Security Fund's decision to reschedule Sniace's debts is 'a general measure, not a decision adopted arbitrarily by the competent authorities'.

114 Furthermore, the Commission, supported by the Kingdom of Spain, denies that it incorrectly applied the private creditor test in this case.

115 First, the Commission and the Kingdom of Spain claim that the applicant is basing its action on the incorrect premiss that the Social Security Fund and Fogasa declined to recover the debts owed to them or deferred payment thereof by Sniace. The Commission submits that the fact that those bodies concluded rescheduling and

repayment agreements with Sniace shows, on the contrary, that they intended to ensure that Sniace would repay its debts. It also relies on the fact that those bodies did not participate in the agreement of October 1996.

116 Second, the Commission submits that the Social Security Fund and Fogasa adopted the conduct of a private creditor in this case.

117 First, during the period when payments were suspended, the Social Security Fund was unable to make Sniace pay its debts in respect of social security contributions for 1991 and 1992. Nor is there any reason to think that before that procedure was opened the Social Security Fund did not attempt to secure repayment of the amounts due. As regards the debts in respect of social security contributions for the period covered by the suspension of payments procedure, the Commission acknowledges that these could have been recovered during that procedure, but maintains that enforced recovery was not indispensable since the Social Security Fund had sufficient guarantees. Furthermore, Sniace had ceased trading during a large part of 1993 and 1996, and also early in 1997, and therefore did not have any income from which to pay its contributions.

118 Second, the Commission denies that the Social Security Fund and Fogasa should have enforced payment of the debts owed to them rather than conclude rescheduling and repayment agreements.

119 In that context, the Commission relies, first of all, on the fact that the Social Security Fund and Fogasa had better guarantees than the private creditors did. The debts owed to the Social Security Fund are preferential debts in the event of the debtor's insolvency. After deduction of the mortgage guarantees held by the private creditors, 'Sniace's unencumbered assets still represented approximately ESP 20 000 million', so that, as a preferential creditor, the Social Security Fund could, should Sniace

become insolvent, be 'relatively certain' of recovering the debts owed to it. The Commission further states that at the time of the agreement of 30 September 1997 Sniace was negotiating a first mortgage over its land and installations in favour of the Social Security Fund and Fogasa jointly. That mortgage was eventually not completed and on 31 August 1998 it was decided to guarantee the rescheduling of the debts in respect of social security contributions by maintaining various attachments of Sniace's immovable and movable assets. In that context, the Social Security Fund obtained, on 6 July 1998, a security over Sniace's stock of machines and thus 'acquired a right in respect of a nominal amount of ESP 3 485 038 195', i.e. an amount corresponding to virtually the entire principal component of the debt. As regards Fogasa, the Commission states that that body is also a preferential creditor and that a mortgage guaranteeing the entire debt was granted to it on 10 August 1995.

120 Next, the Commission states that none of Sniace's private creditors enforced the debts owed to it. In particular, Sniace's principal private creditor, Banesto, did not enforce the debts owed to it even though they were guaranteed, as to ESP 5 000 million, by a mortgage. The Commission also disputes the allegation that a private creditor in a situation comparable to Fogasa's would have realised the mortgage granted by Sniace. It contends that Fogasa had even less reason to enforce its debts because it was a preferential creditor in the event of Sniace's insolvency.

121 Last, the Commission claims that the Social Security Fund and Fogasa 'took a harder and more effective line than [Sniace's] private creditors'. The Commission and the Kingdom of Spain emphasise that those bodies did not take part in the agreement of October 1996. They explain that, owing to Sniace's very precarious financial situation, the private creditors, by participating in that agreement and, in accordance with its terms, converting 40% of the debts owed to them into shares in that company, in fact waived 40% of those debts. The Commission further states that the terms of repayment of those debts provided for in the agreement of October 1996 are significantly less favourable than those agreed with the Social Security Fund and Fogasa: in fact, repayment was to be over eight years and the principal did not attract interest.

122 Third, the Commission maintains that the Spanish authorities gave it a 'credible' assurance that the Social Security Fund had acted 'with the aim of preserving all the rights which it held over Sniace'. The Kingdom of Spain claims that the Social Security Fund and Fogasa had better prospects of recovering the debts owed to them if they concluded the impugned arrangements than if they had demanded immediate payment of those debts. The Commission acknowledges that it did not take account, in its assessment of the alleged aid, of either the viability plan prepared in August 1996 or the restructuring plan to which the Spanish authorities referred during the administrative procedure.

123 Fourth, the Commission claims that the applicant adduces no evidence in support of its allegation that the Social Security Fund allowed Sniace's debts in respect of social security contributions to accumulate between 1991 and 1996 without taking action. It affirms that, regard being had to the suspension of payments procedure, 'part of those amounts was not lawfully recoverable' and that Sniace had ceased trading during part of the relevant period. Furthermore, the Commission and the Kingdom of Spain observe that Fogasa has a statutory obligation to pay to workers the wages which they have not been paid owing, in particular, to suspension of payments and then to subrogate itself in the rights and actions of the workers in order to secure repayment of the sums advanced.

124 Fifth, the Commission claims that there is no evidence on which it might be assumed that Sniace did not honour the restructuring and repayment agreements.

125 Sixth, the Commission and the Kingdom of Spain contend that the Social Security Fund and Fogasa had sufficient guarantees (see paragraph 119 above).

126 Seventh, the Commission observes that, in accordance with the Spanish legislation, arrears in social security contributions are automatically increased by 20% and a statutory interest rate of at least 9% is applied to them. Failure to recover debts in

respect of social security contributions or deferment of payment of those debts does not therefore automatically confer a substantial financial advantage on the undertaking concerned. The Kingdom of Spain further submits, with reference to paragraph 47 of the *Tubacex* judgment, that the agreements for the rescheduling and repayment of the debts did not give rise to new debts owed by Sniace to the public authorities, so that it cannot be claimed that Sniace obtained any economic advantage whatsoever.

Findings of the Court

127 Under Article 87(1) EC, '[s]ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

128 It is appropriate, first of all, to consider whether the condition that the aid should relate to a specific undertaking, which is one of the defining features of State aid, is satisfied in the present case (Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 40, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 39).

129 It must be borne in mind that measures of purely general scope do not fall within Article 87(1) EC. However, the case-law has already established that even assistance which at first sight is applicable to undertakings in general may present a certain selectivity and, accordingly, be regarded as a measure intended to favour certain undertakings or certain products. That is the case, in particular, where the administration called upon to apply the general rule has a discretion when applying

the measure (Case C-214/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 23 and 24; *Ecotrade*, cited above, paragraph 40; and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 39).

130 In the present case, it is clear that the Social Security Fund and Fogasa have a certain discretion both when concluding restructuring and repayment agreements and when determining certain detailed terms in those agreements, such as the repayment timetable, the amount of the surcharges and the sufficiency of the guarantees offered in return for the settlement of the debts. First, that is clear from the rules governing the activities of the two bodies. Thus, as regards the Social Security Fund, it is expressly stated in Article 20 of the General Law on Social Security and in Article 40(1) of the Royal Decree of 6 October 1995 that the grant of restructuring or payment by instalments of debts in respect of social security contributions is an option for that body. It also follows from Article 40(1) of the Royal Decree of 6 October 1995 that the Social Security Fund has a discretion to assess the 'other special circumstances' which prevent debtors from paying their debts. As regards Fogasa, Article 32 of the Royal Decree of 6 March 1985 provides that the conclusion of repayment agreements also constitutes an option for that body. Furthermore, as stated by Advocate General La Pergola at point 8 of his Opinion in *Tubacex* (at [1999] ECR I-2461), the provisions of the decree of the Minister for Employment and Social Security of 20 August 1985 set out at paragraph 7 above confirm that Fogasa has a measure of discretion in the relevant matters. Second, the Commission itself states, at recitals 81 and 89 to the decision of 28 October 1998, that the Social Security Fund and Fogasa have a discretion to grant the restructuring or payment by instalments of the debts and to determine certain terms. Thus, at recital 81, the Commission states that '[i]t is ... evident that the applicable Social Security regulations afford the authorities a margin of discretion in the treatment of individual cases and that this is precisely what has occurred in this case'. At recital 89, it states that 'Fogasa has discretionary power to postpone or split up the repayments up to a period of eight years'.

131 Nor is the applicant criticising only the conclusion by the Social Security Fund and Fogasa of rescheduling or instalment agreements with Sniace. It also complains of

the fact that they accepted that Sniace did not comply with those agreements and, in the Social Security Fund's case, the fact that, apart from any rescheduling agreement, it tolerated Sniace's failure to discharge its debts in respect of social security contributions for several years beginning at least in February 1991. However, that conduct unquestionably comes within the discretion of those bodies.

132 Nor can the Kingdom of Spain rightly argue that the Social Security Fund's decision to reschedule Sniace's debts was not arbitrary. In order to exclude it qualifying as a general measure, there is no need to ascertain whether the conduct of the State body concerned is arbitrary. It is sufficient to establish, as has been done in the present case, that that body has a discretion when concluding rescheduling or repayment agreements and determining certain of the detailed terms of those agreements.

133 The Court therefore finds that the condition relating to the specific nature of the aid is satisfied in this case.

134 Next, it must be borne in mind that, according to consistent case-law, the aim of Article 87(1) EC is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products (Case 310/85 *Deuril* v *Commission* [1987] ECR 901, paragraph 8; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 12; and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 58). The concept of aid therefore covers not only positive benefits, such as subsidies, loans or the taking of shares in undertakings, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (*Banco Exterior de España*, paragraph 13).

135 In the present case, the Court finds that certain aspects of the conduct of the Social Security Fund and Fogasa of which the applicant complains secured a significant commercial advantage for Sniace.

136 Thus, as regards the Social Security Fund, it is apparent from the case-file that that body permitted Sniace not to pay its social security contribution debts for a period lasting at least from February 1991 to February 1997, thus allowing it to accumulate debts amounting to ESP 3 510 387 323, plus default surcharges amounting in all to ESP 615 056 349 and interest at the statutory rate. More particularly, it was not until 8 March 1996, that the Social Security Fund reacted by concluding a first rescheduling agreement when Sniace failed to pay its debts in respect of social security contributions. However, apart from the fact that that agreement was never implemented by Sniace (see paragraphs 138 below), the Social Security Fund agreed that Sniace could run up new debts in respect of social security payments until February 1997 on top of those covered by the agreement of 8 March 1996.

137 Where a public body with responsibility for collecting social security contributions tolerates late payment of such contributions, its conduct undoubtedly gives the recipient undertaking a significant commercial advantage by mitigating, for that undertaking, the burden associated with the normal application of the social security system (Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19).

138 It is also established that Sniace did not honour the agreement of 8 March 1996, as amended by the agreement of 7 May 1996. As the Kingdom of Spain states, that agreement never actually entered into force on the ground that Sniace '[had] never repaid the due debts'. However, rather than demanding immediate payment in full of the debt, as it would have been entitled to do in such circumstances, the Social Security Fund agreed to conclude a new restructuring agreement with Sniace on 30 September 1997. In adopting that approach, the Social Security Fund undoubtedly conferred an appreciable advantage on Sniace. As stated at recital 80 to the decision of 28 October 1998, enforced recovery of the debt owed by Sniace could, owing to its particularly difficult financial situation, have led to its closure.

139 The argument which the Commission derives from that fact that, in accordance with the applicable Spanish legislation, interest and default surcharges are automatically applied to arrears in social security contributions is irrelevant. Any interest or penalties for late payment which an undertaking experiencing serious financial difficulties may have to pay in return for generous payment facilities, such as those which the Social Security Fund granted to Sniace in this case, cannot wholly remove the advantage gained by that undertaking (see, to that effect, *DM Transport*, cited above, paragraph 21).

140 As regards Fogasa, it is apparent from the case-file that that body had concluded an agreement with Sniace on 5 November 1993 whereby Sniace undertook to repay ESP 897 652 789 by way of principal, plus ESP 465 055 911 by way of interest calculated at the statutory rate of 10%, or a total of ESP 1 362 708 700, in six-monthly instalments over eight years. The sum of ESP 897 652 789 represented the amounts paid by Fogasa in respect of wages and allowances payable by Sniace to its staff.

141 Annex 1 to that agreement, which was communicated by the Kingdom of Spain in answer to a question put by the Court (see paragraph 38 above), shows that the amount of six-monthly payments in respect of principal increased gradually as follows: ESP 20 000 000 (second half of 1994 and first half of 1995); ESP 35 000 000 (second half of 1995 and first half of 1996); ESP 55 000 000 (second half of 1996 and 1997) ESP 80 000 000 (1998 to 2000); and ESP 71 326 395 (2001). Interest was deferred until 2000 (four six-monthly instalments of ESP 116 263 978).

142 It is apparent from the information provided by the Kingdom of Spain in answer to a further question put to it by the Court (see paragraph 38 above) that Sniace honoured only a very small part of the agreement of 5 November 1993. Thus, in

1994 it paid only ESP 10 000 000 of the ESP 20 000 000 agreed; in 1995 only ESP 30 000 000 of the ESP 55 000 000 agreed; in 1996 only ESP 35 000 000 of the ESP 90 000 000 agreed; in 1997 only ESP 15 000 000 of the ESP 110 000 000 agreed and in 1998 only ESP 120 000 000 of the ESP 160 000 000 agreed. By agreement of 18 March 1999, moreover, the repayment scheme set out in Annex 1 to the agreement of 5 November 1993 was amended retroactively.

143 On 31 October 1995, Fogasa concluded a second agreement with Sniace, under which Sniace undertook to repay ESP 229 424 860 by way of principal, plus ESP 110 035 018 by way of interest calculated at the statutory rate of 9%, making a total of ESP 339 459 878, in six-monthly instalments over eight years. The sum of ESP 229 424 860 represented the amounts which Fogasa had continued to pay after the agreement of 5 November 1993 by way of wages and allowances payable by Sniace to its staff.

144 Annex 1 to the agreement of 31 October 1995, which was communicated by the Kingdom of Spain in answer to a question put by the Court (see paragraph 38 above), shows that the amount of the six-monthly instalments in respect of principal increased gradually as follows: ESP 10 000 000 (1 May 1996, 1 November 1996, 1 May 1997, 1 November 1997, 1 May 1998 and 1 November 1998); ESP 15 000 000 (1 May 1999, 1 November 1999, 1 May 2000, 1 November 2000, 1 May 2001 and 1 November 2001); ESP 20 000 000 (1 May 2002, 1 November 2002 and 1 May 2003); and ESP 19 424 860 (1 November 2003). Payment of interest was deferred until the last six-monthly instalment.

145 It follows from the information provided by the Kingdom of Spain in answer to a further question put by the Court (see paragraph 38 above) that Sniace did not honour the agreement of 31 October 1995 either. By December 1998, it had paid

only ESP 30 000 000 of the ESP 60 000 000 agreed. Between December 1998 and December 2001, it had paid only ESP 50 000 000 of the ESP 90 000 000 agreed. By agreement of 18 March 1999, moreover, the repayment scheme set out in the annex to the agreement of 31 October 1995, like that annexed to the agreement of 5 November 1993, was amended retroactively.

146 The Court accepts that, by agreeing to pay the wages and allowances forming the subject-matter of the agreements of 5 November 1993 and 31 October 1995, Fogasa was satisfying legitimate requests by Sniace's staff. That aspect of the intervention by that body does not involve elements of State aid. However, the wages and allowances payable to the staff of an undertaking are part of the undertaking's normal operating costs which it is required, in principle, to charge to its own resources. Any public intervention intended to finance those costs will therefore be liable to constitute aid whenever it has the consequence of conferring an advantage on the undertaking, whether the payments are made directly to the undertaking or to its staff via a public body. By allowing the instalments designed to repay the debt incurred in respect of the above payments not to be honoured, Fogasa conferred a clear commercial advantage on Sniace by mitigating a charge normally borne by its budget. That advantage is all the more obvious because, having regard to Sniace's failure to honour its obligations under the agreements of 5 November 1993 and 31 October 1995, Fogasa could have demanded immediate repayment of the total amount of its debts, if necessary by relying on the mortgage in its favour.

147 The Commission cannot justify the conduct of the Social Security Fund and Fogasa described above by reference to the fact that Sniace had suspended payments between March 1993 and October 1996. First, that does not explain why the Social Security Fund agreed that Sniace should continue not to pay its debts in respect of social security contributions for 1991 and 1992. Second, the suspension of payments procedure did not prevent Sniace from discharging its obligations to make payments under the repayment agreements concluded with the Social Security Fund and Fogasa, *a fortiori* since those agreements, with the exception of the agreement of 30 September 1997, had been concluded with the judicial receiver appointed by the Spanish courts as part of that procedure. Last, the applicant and the Commission are

agreed that Sniace's debts in respect of social security contributions which arose after the opening of the suspension of payments procedure could in any event be the subject of enforced recovery during that procedure. In any event, all the debts in respect of social security contributions which became payable after February 1991 and the debts owed to Fogasa covered by the agreements of 5 November 1993 and 31 October 1995 could also, in any event, be the subject of enforced recovery when the suspension of payments procedure ended, i.e. in October 1996.

148 Nor does it assist the Commission's case that Sniace had ceased trading for part of 1993 and 1996 and also at the very beginning of 1997. First, that fact again does not in any way justify Sniace's failure to pay its debts in respect of social security contributions for 1991 and 1992. Nor does it explain why the income received by Sniace in 1994 and 1995 was not sufficient to enable it to pay its social security contributions for those two years. Second, as regards the agreements of 5 November 1993 and 31 October 1995, the Commission ignores the fact that the amount of the six-monthly instalments was much lower at the beginning of the repayment period than at the end (see paragraphs 141 and 144 above). Furthermore, payment of interest was deferred until the final two years of the repayment period in the case of the agreement of 5 November 1993 (i.e. until 2000 and 2001) and until the final instalment in the case of the agreement of 31 October 1995 (1 November 2003).

149 However, in order for the advantages described above to be capable of being classified as aid for the purposes of Article 87(1) EC, it must still be established that Sniace could not have obtained them under normal market conditions (*SFEI and Others*, paragraph 60, and *DM Transport*, paragraph 22). More specifically, the Court must consider whether the Commission made a manifest error in concluding that the Social Security Fund and Fogasa acted in the same way as a hypothetical private creditor in, so far as possible, the same situation vis-à-vis its debtor as those two bodies.

150 In that regard, it must be borne in mind that, in so far as the Commission's application of the private creditor test involves complex economic appraisals, such as the application of the private investor test, when reviewing it the Court must, according to a consistent line of decisions, confine itself to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (see, by analogy, Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 11; Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 39; and Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 127).

151 Before carrying out that examination, the Court must reject the Commission's assertion that the Court of Justice held in *Tubacex* that, in principle, neither the rescheduling agreements concluded by the Social Security Fund nor the repayment agreements concluded by Fogasa constitute in themselves State aid and that only certain terms in those agreements may be subject to review in the light of the rules on State aid. As the applicant rightly states, in the contested decision in that case the Commission had considered that the agreements concluded between those two bodies and the two Spanish undertakings concerned contained elements of State aid only in so far as the rate of interest applied was lower than the market rates. In that case, the Kingdom of Spain, the applicant, sought annulment only of that aspect of the decision. The Court of Justice was therefore not required to adjudicate on the question whether the very fact of having concluded those agreements and the other terms thereof were capable of constituting State aid.

152 In reality, it is for the Commission to ascertain, in each individual case and by reference to the facts of the case, whether the decision of the Social Security Fund or Fogasa to agree to reschedule the debts of an undertaking in difficulties and also the conditions of that rescheduling are consistent with the private creditor test.

153 It must further be stated that the argument which the Commission seeks to derive from the *Tubacex* judgment cannot succeed in any event. In the present case, the Social Security Fund and Fogasa are criticised not only for having concluded agreements with Sniace to reschedule the latter's debts but also, and principally, for having allowed Sniace not to honour those agreements.

154 It follows from the contested decision and from the Commission's written pleadings that there are three reasons why the Commission considers that the Social Security Fund and Fogasa acted like a private creditor in the present case.

155 First, the Commission draws a comparison between the conduct of those bodies and that of Sniace's private creditors. It bases its argument principally on the fact that the Social Security Fund and Fogasa, using their right of abstention, did not participate in the agreement of October 1996 and that, accordingly, they, unlike those private creditors, did not effectively waive 40% of the debts owed to them. The Commission further states that the repayment terms in that agreement are appreciably less favourable for the private creditors than those agreed with the Social Security Fund and Fogasa (recitals 24 and 25 to the decision of 20 September 2000, paragraphs 17, 52, 60, 65, 101 and 106 of the defence and paragraph 26 of the rejoinder).

156 That first comparison is manifestly incorrect. The Social Security Fund and Fogasa were in a different situation from that of Sniace's private creditors. They enjoyed a right of abstention, their debts are preferential debts and they have certain guarantees, namely securities in the case of the Social Security Fund and a mortgage in Fogasa's case. At recital 26 to the decision of 20 September 2000, moreover, the Commission itself states that 'the circumstances of the private creditors were not the same as those of the public creditors because of their status, the securities provided and abstention rights that the public institutions enjoyed' and that the 'comparative approach' between those two categories of creditors does not constitute a proper application of the private creditor test in this particular case.

157 Second, the Commission refers to the fact that Banesto did not enforce the debts owed to it although they were guaranteed by a mortgage (paragraphs 53 and 90 of the defence and paragraph 26 of the rejoinder).

158 This second comparison is clearly no more convincing than the first. There is nothing in the case-file from which it might be assumed that Banesto was in a situation comparable to that of the Social Security Fund and Fogasa. In that regard, it should be noted that the case-file does not contain even a brief indication of the circumstances in which Banesto decided not to enforce payment of the debts owed to it. In particular, no information is given about the terms of the repayment of Sniace's debt to Banesto, the question whether or not Sniace had hitherto honoured its contractual commitments to Banesto or whether Banesto, like the Social Security Fund, had allowed the debts to accumulate over a number of years. As regards the Social Security Fund, it should be noted, moreover, that, unlike Banesto, the debt owed to it was not secured by a mortgage. According to the information provided by the Kingdom of Spain in its written submissions, it was only during the second half of 1998 that Sniace provided sufficient guarantees to the Social Security Fund in return for the rescheduling of its debts.

159 Third, the Commission claims that by concluding the rescheduling and repayment agreements in question, the Social Security Fund and Fogasa were 'seeking to maximise the recovery of the sums due to [them] without suffering any financial loss' (recital 30 to the decision of 20 September 2000). At recital 29 to the decision of 20 September 2000, referring to the decision of 28 October 1998, the Commission states, in respect of the Social Security Fund, that 'by not proceeding to execution and thereby possibly provoking the liquidation of the company, [that body] acted in such a way as to maximise its prospects of recovering the debt'.

160 Those assertions are not substantiated. First, they directly contradict the Commission's repeated allegation that the Social Security Fund and Fogasa were preferential creditors and had sufficient securities, so that there was no incentive to

enforce their debts. Second, the Commission did not have sufficient information to be in a position to assess in full knowledge of the facts, Sniace's prospects of future profitability and viability. Thus, when invited by the Court, by way of the measures of organisation of procedure (see paragraph 38 above), to communicate developments in the results (turnover and profits or losses) and the volume of Sniace's indebtedness between 1991 and 2000, the Kingdom of Spain admitted that it did not have those figures. In those circumstances, no reliance can be placed in the Commission's assertion that 'the Spanish Government ... gave the defendant a credible assurance that the social security had acted ... with the aim of protecting all the rights which it held over Sniace'. What is more, the Commission had been given no credible and realistic restructuring plan for Sniace. Thus, as regards the viability plan prepared in August 1996, both the Commission and the Kingdom of Spain stated on a number of occasions that it was not acceptable and that it had not determined the conduct of the Spanish authorities (see, in particular, the decision to initiate the procedure under Article 87(2) EC and recital 103 to the decision of 28 October 1998). In its defence, the Commission even took care to state that that viability plan could not serve as the basis for its assessment (paragraph 68 of the defence). As regards the restructuring plan to which the Commission refers at paragraph 70 of its defence, it is sufficient to state that the Commission admits in the same paragraph that the plan was not submitted to it. At recital 102 to the decision of 28 October 1998, moreover, the Commission states that the Spanish authorities 'did not put forward any evidence of any valid restructuring plan'. When questioned about this plan at the hearing, the Commission confirmed that it had not taken it into account for the purposes of the contested decision.

161 The Court therefore finds on the basis of all the foregoing that the Commission made a manifest error of assessment when it concluded that the conduct of the Social Security Fund and Fogasa of which the applicant complains satisfied the private creditor test.

162 It follows that the first plea in law is well founded and that Article 1(1) of the contested decision must therefore be annulled, without there being any need to examine the second plea.

The request to produce documents

163 In its application, the applicant, relying on Article 21 of the (EC) Statute of the Court of Justice (now Article 24 of the Statute of the Court of Justice) and Article 65 of the Rules of Procedure, requests the Court to invite the Commission to produce the various observations submitted by the Spanish Government following the lodging of its complaint and the opening of the procedure pursuant to Article 88(2) EC.

164 In its reply, the applicant states that, in making that request, its clear intention was that the Court should adopt a measure of organisation of procedure pursuant to Article 64(4) of the Rules of Procedure.

165 The Commission and the Kingdom of Spain oppose that request. They submit that the applicant is clearly requesting the Court to adopt a measure of inquiry, within the meaning of Article 65 of the Rules of Procedure, but that it fails to specify the facts in issue which production of the documents is supposed to demonstrate. They further submit that the observations communicated by a Member State in the context of the administrative procedure are confidential.

166 In its rejoinder, the Commission observes that, in its reply, the applicant withdrew its request for a measure of inquiry and replaced it by a request for a measure of organisation of procedure. The Commission concludes that the applicant should, in accordance with the first subparagraph of Article 87(5) of the Rules of Procedure, be ordered to pay the costs corresponding to the head of claim which it thus withdrew.

167 The Commission communicated, in the context of the measures of organisation of procedure ordered by the Court (see paragraph 38 above), the various documents production of which the applicant had requested. In those circumstances, there is no need to adjudicate on that request, which has become devoid of purpose.

Costs

168 Under Article 87(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. As the Commission has been unsuccessful, it must be ordered to bear its own costs and also to pay those incurred by the applicant, in accordance with the form of order sought by the applicant.

169 The Court considers that there is no need to order the applicant to pay the costs incurred in respect of the head of claim whereby the applicant requests it to adopt measures of inquiry, a request which it withdrew in its reply. It is clear that the applicant intended from the outset that the Court should order production of certain documents by way of a measure of organisation of procedure and not as a measure of inquiry. The information provided by the applicant on that point in its reply must be understood not as a withdrawal but as a rectification of a simple error in the designation of the applicable provision of the Rules of Procedure.

170 Under Article 87(4) of the Rules of Procedure, the Kingdom of Spain must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition)

hereby:

1. **Annuls Article 1(1) of Commission Decision 1999/395/EC of 28 October 1998 on State aid implemented by Spain in favour of Sniace SA, located in Torrelavega, Cantabria, as amended by Commission Decision 2001/43/EC of 20 September 2000;**

2. **Orders the Commission to bear its own costs and to pay those incurred by the applicant;**

3. **Orders the Kingdom of Spain to bear its own costs.**

García-Valdecasas Lindh Cooke

Legal Martins Ribeiro

Delivered in Luxembourg on 21 October 2004.

H. Jung R. García-Valdecasas

Registrar President