OPINION OF ADVOCATE GENERAL MISCHO

delivered on 24 January 2002 [1]

1. The Commission claims that the Court should declare that, by failing to adopt and bring into force within the prescribed period the laws, regulations and administrative provisions necessary to comply with the Commission Decisions 91/1/EEC of 20 December 1989, concerning aids in Spain which the central and several autonomous governments have granted to Magefesa, producer of domestic articles of stainless steel and small domestic appliances [2] (the '1989 Decision'), and 1999/509/EC of 14 October 1998, concerning aid granted by Spain to companies in the Magefesa group and their successors [3] (the '1998 Decision'), the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of the aforementioned decisions.

I — Background

The companies concerned

2. The Magefesa group consists essentially of four industrial companies, namely Investigación y Desarrollo Udala SA ('Indosa'), based in the Basque Country, Cubertera del Norte SA ('Cunosa') and Manufacturas Gur SA ('GURSA'), both based in Cantabria, and Manufacturas Inoxidables de Gibraltar SA ('MIGSA'), based in Andalusia.

3. The situation of these companies can be summarised as follows:

— Indosa was declared insolvent on 19 April 1994 at the request of its employees but has continued to trade.

— Cunosa ceased trading in 1994 and was declared insolvent on 13 April 1994 at the request of its employees. Winding-up operations began in March 1998.

— MIGSA ceased trading in 1993 and was declared insolvent on 27 May 1999 at the request of its employees.

1 — Original language: French.
2 — OJ 1991 L 5, p. 18.
3 — OJ 1999 L 198, p. 15.

— GURSA has been inactive since 1994 but has not been declared insolvent.

5. Ficodesa was declared insolvent on 19 January 1995 at the request of the employees of the Magefesa group. Damma has been inactive since 1993 but has not been declared insolvent.

4. With a view to allocating the aid at issue, a number of management companies were set up in the autonomous regions concerned: Fiducias de la Cocina y Derivados SA ('Ficodesa') in the Basque Country, Gestión de Magefesa en Cantabria SA ('Gemacasa') in Cantabria, and Manufacturas Damma SA ('Damma') in Andalusia. The role played by these companies is described as follows in the 1989 Decision: [4]

The 1989 Decision

6. The operative part of the 1989 Decision reads as follows:

'... These [companies] had two main objectives: on the one hand, to enable the public authorities to monitor both the use of the aids to be granted, and the implementation of [the Spanish private consulting firm] Gestiber's directives; on the other, to ensure the operation of Magefesa's companies, mostly by preventing the seizure by creditors of their financial resources and inventories. For this latter purpose, on the basis of joint agreements these interposed societies market the entire production of Magefesa previously acquired from the individual companies; at the same time they administer the funds, raw materials and semi-finished goods needed by the companies whom they provide in proportion to work progress or justified expenses.'

'*Article 1*

The public assistance to the companies of Magefesa consisting of:

(i) loan guarantees amounting to ESP 1 580 thousand million;

(ii) a loan of ESP 2 085 thousand million at other than market conditions;

4 — Preamble, Recital I, last paragraph.

(iii) non-repayable subsidies amounting to ESP 1 095 thousand million;

(iv) an interest subsidy estimated at ESP 9 thousand million;

were granted illegally, and moreover are incompatible with the common market within the meaning of Article 92 of the EEC Treaty.

Article 2

Accordingly, the aid elements therein involved have to be withdrawn. Therefore, the Spanish Government is hereby requested to get the following stipulations complied with:

(a) the withdrawal of the State loan guarantees given amounting to ESP 1 580 thousand million;

(b) either the conversion of the soft-loan into a normal credit at both interest and repayment market conditions, or its withdrawal, or any other appropriate measure to ensure that the aid elements are wholly abolished. Whatever measure is adopted, it must take effect from the time the loan was initially granted;

(c) in case of conversion, the assurance that the instalments related to the abovementioned loan will be recovered in accordance to the schedule fixed;

(d) the recovery of ESP 1 104 thousand million corresponding to the non-repayable subsidies granted.

Article 3

The Spanish authorities will inform the Commission, within two months of the notification of this Decision, of the measures they have taken to comply therewith. Should the Decision's execution take place later than the said period, the national provisions regarding interest on arrears payable to the State will be applicable.

Article 4

The Decision is addressed to the Kingdom of Spain.'

7. The aids declared to be incompatible with the common market were granted by the following entities :

— The *Basque Government*:

— a loan guarantee of ESP 300 million granted directly to Indosa;

— a guarantee of ESP 672 million granted to Ficodesa for use by those companies in the Magefesa and Licasa sub-groups that were based in the Basque Country, one of those companies being Indosa;

— aid, in the form of a non-refundable grant amounting to ESP 794 million and an interest subsidy amounting to ESP 9 million, also granted to Ficodesa for the benefit of those companies in the Magefesa and Licasa sub-groups that were based in the Basque Country.

— The *Cantabrian Government*:

— a loan guarantee amounting to ESP 512 million granted to Gemacasa for use by Cunosa and GURSA;

— a non-refundable grant of ESP 262 million in favour of the same parties.

— The *Andalusian Government*:

— a loan guarantee amounting to ESP 96 million granted to Damma for use by MIGSA;

— a non-refundable grant of ESP 29 million[5] in favour of the same parties.

— The *Fogasa* (the national fund for the safeguarding of employees' rights in the event of insolvency of their employers): a loan of ESP 2 085 thousand million at other than market conditions.

8. To comply with the 1989 Decision, the companies forming part of the Magefesa group and Fogasa concluded an agreement for repayment of the loan granted by the latter; that refund agreement was modified to meet the requirements of the decision. The Commission does not challenge this measure.

9. Concerning the other aid, the Kingdom of Spain informed the Commission, by letters of 23 October 1991, 8 April 1994 and 23 April 1997, of the measures taken by the Spanish authorities.

10. The Commission considers those measures to be inadequate.

5 — According to the Commission — and the Spanish Government does not dispute this assertion — the figure of ESP 39 million appearing in the 1989 decision has since been corrected in the light of information supplied by the Spanish authorities.

The 1998 Decision

11. The operative part of the Decision reads as follows:

'*Article 1*

The aid in the form of the persistent non-payment of taxes and social security contributions:

— by Indosa and Cunosa until they were declared bankrupt,

— by MIGSA and GURSA until their activities were interrupted, and

— by Indosa after its declaration of bankruptcy and until May 1997,

is illegal, as it was granted by Spain in breach of its obligations under Article 93(3) of the EC Treaty.

The aid is considered to be incompatible with the common market within the meaning of Article 92(1) of the Treaty, as it does not meet any of the necessary conditions for the application [of] any of the derogations provided for by Article 92(2) and (3).

Article 2

1. Spain shall take the necessary measures to recover from the beneficiaries the aid referred to in Article 1 which was granted to them illegally.

2. The aid shall be recovered in accordance with the procedures and provisions laid down in Spanish law. The sums to be recovered shall include the interest which has accrued between the granting of the aid and the date on which it is actually repaid. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid in Spain.

Article 3

Spain shall inform the Commission within a period of two months from the date of notification of the present Decision of the measures to be taken to comply therewith.'

12. The 1998 Decision was the subject of an action for annulment brought by the Kingdom of Spain. In *Commission* v *Spain*, [6] the Court dismissed the main submissions, while annulling the contested decision in so far as it included in the amount of aid to be recovered interest falling due after Indosa and Cunosa were declared insolvent on aid unlawfully received prior to that declaration.

13. The Spanish Government informed the Commission, by letters of 21 January 1998, in the framework of the adversarial proceedings, and of 21 January 1999 and 22 July 1999, in response to the 1998 Decision, of the measures taken to recover the aid granted.

14. The Commission disputes the effectiveness of these measures.

6 — Case C-480/98 [1998] ECR I-8717.

II — The action

15. The Commission claims that the Court should:

— declare that, by failing to adopt and bring into force within the prescribed period the laws, regulations and administrative provisions necessary to comply with the Commission Decisions of 20 December 1989 and 14 October 1998 declaring certain aid to undertakings belonging to the Magefesa group to have been granted unlawfully and to be incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of the aforementioned Decisions;

— order the Kingdom of Spain to pay the costs.

16. The Kingdom of Spain contends that the Court should dismiss the action for failure to fulfil obligations and order the Commission to pay the costs.

17. The Kingdom of Spain requests further that the proceedings be stayed pending the judgment in Case C-480/98. However, that judgment having already been delivered, the Kingdom of Spain's application for a stay has been rendered redundant.

III — Analysis

Aid declared incompatible by the 1989 Decision

A — Aid granted by the Basque Government

18. Concerning the loan guarantees, the Commission observes that 'the Basque Government decided on 28 June 1988 (i.e. prior to adoption of the 1989 Decision) to intervene by repaying the loans that had been guaranteed and seeking reimbursement from the debtor.[7]... Pursuant to that decision, the Basque Government made a number of payments, between 1998 and 1993, to the creditor lending institutions concerned, those payments amounting in total to ESP 1 365 717 623... As the payments proceeded the Basque Government sought reimbursement from Ficodesa.

7 — On this point the Commission submits an agreement made by the Basque Government on 28 June 1998 confirming the subrogation with regard to the guarantees granted Indosa and Ficodesa.

As at 30 December 1993, the amount recovered pursuant to enforcement procedures totalled ESP 1 638 315 148...'

The complaint concerning the Basque Government's failure to withdraw loan guarantees

19. As regards the non-refundable grant and the interest subsidy, the Commission indicates that 'the Basque Government sent a letter of formal notice, on 25 January 1995, to "the legal representatives of the company Ficodesa, a member of the Magefesa group...". At that point in time, Ficodesa, which had applied for suspension of payments on 4 May 1994, had been legally insolvent for a week (since 19 January 1995)...'.

20. Again according to the Commission, 'Ficodesa having been declared insolvent, the payments made under the guarantees and as non-refundable aid were recognised, by the meeting of that company's creditors, as debts in the total amount of ESP 2 168 717 623'.

21. On the basis of these facts, which the Spanish Government does not dispute, the Commission formulates, in essence, two complaints regarding implementation of the 1989 Decision. One concerns the Basque Government's failure to withdraw the loan guarantee granted Ficodesa and the other that government's failure to take action against Indosa.

22. The Commission contends that 'by taking over the guaranteed loan and by subsequently applying to Ficodesa to reimburse the amounts lent in this way as the due dates specified in the loan schedule were reached', 'the Basque Government... simply converted a loan it had itself guaranteed into a loan granted directly by it on the same terms, that is to say, at other than market conditions, a loan which thus constituted aid. Hence, even supposing that Ficodesa had been punctilious about reimbursing the amounts claimed, the Basque Government would still not have complied with the 1989 Decision. To have done so, the Basque Government would have had to reimburse the loan in full, without waiting for payment to fall due, and proceed forthwith to seek reimbursement from the beneficiary'.

23. The Spanish Government considers it to be 'untrue that the Basque Government simply converted a loan it had itself guaranteed into a loan granted by it on non-commercial terms. It cancelled the guarantee, substituted itself for the entities that had granted the loan, sought to enforce full reimbursement of that loan with interest for late payment and a 20% surcharge and arranged for the resulting amount to be included in the list of debts recognised by the meeting of creditors'.

24. What view should be taken of this first complaint by the Commission?

25. There can be no doubt that the Kingdom of Spain is required under Article 2 of the 1989 Decision to proceed to 'the withdrawal of the State loan guarantees given amounting to ESP 1 580 thousand million'.

26. That being so and given the Court's consistently held view [8] that the obligation on a Member State to withdraw a subsidy regarded by the Commission as incompatible with the common market is concerned with re-establishing the previously existing situation, the Basque Government was under an obligation to put an end to any effects arising out of the loan guarantees granted by it and declared incompatible with the common market.

27. As the Commission rightly points out, to have fulfilled that obligation the Basque Government would have had to reimburse the loan in full in 1989, without waiting for payment to fall due, and proceed forthwith to seek reimbursement from the beneficiary. This very solution had moreover been proposed by the Council of State, Spain's supreme consultative body, when it was consulted in 1990 as to how the Kingdom of Spain should implement the 1989 Decision. [9]

28. Acting in this way would indeed have been the only means of putting an end to the effects of the guarantee. Simply withdrawing the guarantee was no longer an option since the guarantee had already been converted into a loan in 1988, that is to say prior to the 1989 Decision. On the other hand, in making payments to the creditor lending institutions between 1988 and 1993, that is as payment fell due, and in then seeking reimbursement from Ficodesa of the amounts paid in this way, the Basque Government did not withdraw the guarantee but simply continued to execute it.

29. The Spanish Government's contention that, in seeking reimbursement of the amounts paid to the creditor lending institutions, the Basque Government complied with the 1989 Decision cannot be accepted. It must be borne in mind that the aid in question took the form of a guarantee, not that of a subsidy. It was hence only to be expected that the Basque Government should have sought reimbursement of the amounts paid. The mere fact that the Basque Government had sought reimbursement did not therefore demonstrate that it had cancelled the guarantee.

8 — See in particular Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 75, and Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 21.

9 — See the preamble to the 1998 Decision, paragraph V(a).

30. I take the view therefore that the necessary steps were not taken for the loan guarantees granted by the Basque Government to be withdrawn.

The complaint concerning the Basque Government's failure to take action against Indosa

31. Another complaint levelled by the Commission at the Kingdom of Spain is that the Basque Government could not be considered to have taken the necessary steps to secure reimbursement of the amounts paid or to recover the non-repayable grant and interest subsidy when 'all the measures instituted by it were directed against Ficodesa. And yet Ficodesa was only an intermediary company with no productive capacity or assets of its own, set up for the sole purpose of channelling public aid to Indosa'. According to the Commission, 'there can be no doubt that the true beneficiaries of the aid were the companies in the Magefesa group, and in particular Indosa, rather than Ficodesa'.

32. The Commission observes in this connection, an observation which the Spanish Government does not gainsay, that the loan guarantee of ESP 672 million, the non-repayable grant and the interest subsidy were granted to Ficodesa 'for use by' the companies in the Magefesa and Licasa sub-groups based in the Basque Country, one of those companies being Indosa. The Commission emphasises too, and again this is not disputed by the Spanish Government, that the loan guarantee of ESP 300 million was granted directly to Indosa rather than to Ficodesa.

33. Concerning the aid granted to Ficodesa, the Spanish Government replies that that the necessary steps had in fact been taken, the Basque Government having first taken steps to enforce repayment by Ficodesa of the amounts in question and having subsequently, in the course of the receivership procedure, secured the inclusion of those amounts among the debts recognised by the meeting of Ficodesa's creditors on its insolvency.

34. The Spanish Government asserts further that the Basque Government could not seek recovery of that aid directly from Indosa since, in its view, 'the aid granted by the Basque Government in the form of guarantees and non-refundable aid was so granted in favour of Ficodesa; it followed that reimbursement of that aid could be sought from that company alone, as it alone was the Basque Government's debtor'.

35. The Spanish Government adds that 'efforts by the Basque Government to seek recovery of the amounts concerned from companies that might in turn have received those amounts from Ficodesa were bound to fail, as was clear from the Basque Government's attempt on 7 June 1996 to

secure recognition of the debt owed to it in the course of the Magefesa receivership procedure. The creditors decided, at their meeting on 3 July 1996, not to accept the Basque Government's claim in the insolvency despite having accepted Ficodesa's claim'.

36. As regards the guarantee granted directly to Indosa, the Spanish Government observes that 'the Basque Government did apply to Indosa for reimbursement of the amounts corresponding to its claims on that company. Thus it was that on 12 June 1995 the meeting of creditors accepted its claim to [ESP] 2 800 200'.

37. The Commission's second complaint gives rise to the following remarks.

38. First, concerning the aid granted to Ficodesa, the Spanish Government does not deny that it was granted for use by Indosa and that Indosa was in reality the prime beneficiary thereof.

39. Nor does the Spanish Government deny that Ficodesa was only an intermediary company with no productive capacity or assets of its own, set up for the sole purpose of channelling public aid to Indosa.

40. That being the case, it is my view that, once it became clear that the requests for reimbursement made to Ficodesa were proving unsuccessful, the Basque Government should also have taken steps to recover the aid from the real beneficiary.

41. Recovery of the aid from Indosa falls within the framework of the implementation of the 1989 Decision inasmuch as Article 1 of that Decision refers to 'public assistance to the companies of Magefesa', one of those companies being Indosa.

42. Further, as the Commission also observes, to decide otherwise would be to allow Member States to circumvent the requirements of the Treaty concerning State aid by arranging for such aid to be granted via intermediary companies that are not the real beneficiaries of the aid. For Article 2 of the 1989 Decision, which orders recovery of the aid, to be effective, the competent authorities must therefore take steps to recover the aid not only from any management company that may have been its initial recipient but also, should it prove necessary in order to abolish the aid entirely, from the company that is the real beneficiary.

43. The Spanish Government maintains, however, that the Basque Government

was unable to seek recovery of the aid from Indosa, Ficodesa alone being the Basque Government's debtor. In essence therefore, it pleads that it would be 'absolutely impossible' for it to recover the aid from Indosa as it has no right to recover the aid from that company.

44. The Court has, however, consistently held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law. [10]

45. More particularly, in *Italy* v *Commission*, [11] the Court, responding to the Italian Government's contention that 'under Italian law [the Italian Republic] *has no right to recover* [12] from the purchasers of the four subsidiaries sums which were not taken into consideration in the conditions of sale of the undertakings in question', [13] held that 'even if in Italian law ENI cannot recover sums which were not taken into account in the conditions of sale of the four subsidiaries, that cannot stand in the way of the full application of Community law and can therefore have no effect on the obligation to recover the aid in question'. [14]

46. It follows from those decisions that the fact that the Basque Government does not have a right to recover from Indosa has no bearing on its obligation to seek recovery of the aid in question from the real beneficiary thereof. All the more so as the Basque Government had a hand in establishing the arrangement whereby the aid was allocated to the real beneficiary, Indosa, via an intermediary company, Ficodesa. Indeed, as is clear from the 1989 Decision, it was the Basque Government itself which created Ficodesa. [15] In those circumstances, it is the Basque Government itself which is answerable for the fact that there is no right of recovery *vis-à-vis* Indosa.

47. The Spanish Government maintains further that the Spanish authorities are required, in taking measures to recover aid, to act in accordance with receivership procedures and hence to comply with the rules governing those procedures. If, in keeping with the national rules in force, the meeting of creditors does not accept a claim, as happened in the case of Magefesa, the creditor can thus make no call on the debtor's assets to recover its debt.

10 — See in particular Case C-5/89 *Germany* v *Commission* [1990] ECR I-3437, paragraph 18, and Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 122.

11 — Case C-303/88 [1991] ECR I-1433.

12 — Emphasis added by author.

13 — Case C-303/88, paragraph 56.

14 — Case C-303/88, paragraph 60.

15 — See section I of the preamble, last paragraph.

48. In that connection, the Spanish Government merely refers to the Magefesa case, from which it infers that, in the case of Indosa, the Basque Government's claim would not have been accepted by the meeting of creditors. However, no specific steps were taken by the Basque Government to have its claim accepted by the meeting of Indosa's creditors.

49. Furthermore, were such a claim not to have been accepted, this would have been the direct consequence of the fact that the Basque Government had no right to recover from Indosa. The absence of such a right being, as already discussed, attributable to the Basque Government itself, it can have no effect on the obligation to recover the aid in question.

50. Moreover, even if the absence of a right to recover or a (hypothetical) refusal to recognise the Basque Government as a creditor in the Indosa insolvency proceedings could be considered as an unforeseen and unforeseeable difficulty for the Basque Government, which in itself strikes me as highly debateable, the Spanish Government would still, according to settled case-law, [16] have been obliged to submit the problem to the Commission for consideration and, in accordance with the principle underlying Article 10 EC in particular, which imposes a duty of genuine cooperation on the Member States and the Community institutions, work together in good faith with the Commission with a view to overcoming the difficulties whilst fully observing the Treaty provisions. There is, however, no evidence of the Spanish Government, to which it fell to take the initiative, [17] having taken any steps whatsoever to submit the problem to the Commission. As is apparent from the documents before the Court, it confined itself to pleading the absence of any right to recover from Indosa on the part of the Basque Government.

51. It should, as the Commission points out, be added that in the pre-litigation phase the Basque Government had also sought to justify its failure to take any action against Indosa by arguing that it was impossible, because of shortcomings in their accounts, to determine the amounts from which each company in the group had benefited.

52. It need only be observed on this point that, if the obligation to recover aid is to have any meaning at all, difficulties of an accounting nature concerning the precise identification of the beneficiary of aid cannot be regarded as rendering recovery of the aid in question 'absolutely impossible'.

53. I therefore take the view that in applying for the recovery of the aid only to Ficodesa, which was simply the manage-

16 — See in particular Case C-261/99 *Commission* v *France* [2001] ECR I-2537, paragraph 24, and Case C-378/98 *Commission* v *Belgium* [2001] ECR I-5107, paragraph 31.

17 — See Case C-378/98, paragraph 50.

ment company through which the aid was channelled, rather than to Indosa, the real and main beneficiary of the aid, the Basque Government failed to do what was necessary in order to implement the 1989 Decision properly.

54. Second, concerning the ESP 300 million loan guarantee which the Basque Government granted directly to Ficodesa, the Commission states in its application that 'although 10 years have elapsed since the 1989 Decision was adopted, the Basque Government has taken no action against Indosa'.

55. Responding to this argument, the Spanish Government points out that on 12 June 1995 the meeting of Indosa's creditors accepted that there was a claim for ESP 2 800 200.

56. That action does not, however, seem to me sufficient to remove aid in the form of an ESP 300 million loan guarantee which had been converted into a loan and which should therefore have been repaid by Indosa. Suffice it to observe in this connection that the claim accepted by the creditors' meeting does not even represent 1% of the amount of the guarantee converted into a loan.

57. I take the view therefore that the Commission's second complaint is also well founded.

58. It follows from the foregoing that, since the two complaints submitted by the Commission are well founded and since together they cover all the aid granted by the Basque Government, the Commission has, in my view, shown that Articles 2 and 3 of the 1989 Decision have not been properly implemented in respect of the aid granted by the Basque Government.

B — Aid granted by the Cantabrian Government

59. The Commission contends that the Cantabrian Government took no action to recover the aid granted either against the beneficiaries thereof (Cunosa and GURSA) or against the management company (Gemacasa) through which the aid was channelled.

60. The Spanish Government replies that, while the Cantabrian Government cancelled a number of guarantees between December 1994 and May 1995, it was impossible to recover the amounts concerned from GURSA, Cunosa and Gema-

casa because these companies were no longer trading and had no assets that would allow the outstanding debts to be enforced.

61. The Commission rightly considers that the 1989 Decision was not properly implemented in respect of the aid granted by the Cantabrian Government. As the Court has consistently held, the condition that it is absolutely impossible to implement a Commission decision properly 'is not satisfied where the defendant government merely informs the Commission of the legal and practical difficulties involved in implementing the decision, without taking any step whatsoever to recover the aid from the undertakings in question, and without proposing to the Commission any alternative arrangements for implementing the decision which would have enabled the alleged difficulties to be overcome'. [18]

62. Therefore, given that the Cantabrian Government confines itself to saying that it was impossible to obtain reimbursement, without any steps having been taken to do so, the 1989 Decision cannot be considered to have been properly implemented in respect of the aid granted by that government.

63. The Spanish Government observes further that, in any event, Cunosa and MIGSA (as also GURSA) have ceased trading or have already been wound up. It follows, according to the Spanish Government, that 'if the purpose of the obligation to reimburse aid is to re-establish the previously existing situation and thereby ensure that the beneficiary of such aid does not enjoy a competitive advantage over its competitors, then demanding reimbursement does not contribute to achieving the intended result'.

64. That argument cannot be accepted.

65. It fails, first of all, to take account of the Court's consistently held view that 'the *only* [19] defence available to a Member State in opposing an application by the Commission under Article 93(2) of the Treaty for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to implement the decision properly'. [20]

66. Second, the Spanish Government's argument implies that implementation of a decision taken by the Commission on the basis of Article 88(2) EC would be con-

18 — Case C-280/95 *Commission* v *Italy* [1998] ECR I-259, paragraph 14. See also Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 10, and Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 20.

19 — Emphasis added by author.

20 — See, in particular, Case C-261/99, paragraph 23, Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 39, and Case C-280/95, paragraph 16.

ditional on an assessment of a company's competitive situation at the time of implementation of a decision ordering that aid be recovered. Such a condition, besides having no legislative basis, would render wholly nugatory a decision which is based precisely on an analysis of the competitive impact of the aid granted. In practice, therefore, the effect of the condition would be for the decision to be subject to review whenever it came to implementing it.

67. Finally, the Commission quite rightly points out that 'as long as the undertakings concerned have not been wound up, there will still be a possibility of their starting trading again'. The Commission emphasises that this is more than just a theoretical possibility, being, in its view, borne out by 'the fact that the companies Idisur SAL, Loc SAL and Vitrinor SAL, set up by the employees of MIGSA, Cunosa and GURSA respectively, operate in part using those firms' assets, a state of affairs which prompted the Ministry of Finance to initiate an inquiry into whether one set of firms had succeeded the other'.

68. This information is not disputed by the Spanish Government. It merely stated, at the time of its rejoinder, that Cunosa had been wound up. It does not however supply any information about the company's liquidation that would bear out the conclusion that this had already occurred before the present action was commenced and hence that the argument put forward by the Commission, based as it is on cessation of trading, no longer applies to Cunosa.

C — Aid granted by the Andalusian Government

69. On the question of the loan guarantee, the Commission submits — and this is not disputed by the Spanish Government — that on 6 November 1990 the Instituto de Fomento Andaluz ('IFA') paid the guaranteed sum to the lending institution concerned. On 20 November 1990 the IFA sent a letter to Damma seeking prompt reimbursement of the amount concerned. According to the Commission, no other action was taken, apart from the IFA's application in June 1992 for this debt to be registered as a liability in the Damma insolvency proceedings.

70. On the question of the non-refundable grant, the Commission submits — and this is not disputed by the Spanish Government — that on 21 November 1990 the Andalusian Government instituted, of its own motion, a review procedure with a view to cancelling the grant. It subsequently decided not to carry that procedure through on the ground that, as Damma had no assets that could be attached, the procedure might not meet with success.

71. Specifically, the Commission complains that the 1989 Decision was not properly implemented, the Andalusian Government having failed to take any steps in respect of MIGSA, the real beneficiary of the aid, with a view to recovery thereof.

72. I concur with the Commission's view for the reasons developed earlier when considering the aid granted to Ficodesa by the Basque Government for use by Indosa. The circumstances are identical in that Damma, like Ficodesa, is only an intermediary company which carries on an activity and has no assets of its own, set up for the sole purpose of channelling aid, and that, like Indosa, MIGSA is the real beneficiary of the aid granted. The Andalusian Government should therefore have applied to MIGSA for recovery of the aid; the absence of a right to recover cannot be deemed to render such recovery 'absolutely impossible'.

Aid declared incompatible by the 1998 Decision

73. As regards the 1998 Decision, the Spanish Government emphasises that it considers that decision to be illegal and that an application for its annulment, registered as Case C-480/98, has for that reason been made.

74. Quite apart from the fact that the present case is concerned not with the validity of the 1998 Decision but with its implementation, it should be noted that the Court, in its judgment in Case C-480/98, upheld that decision on the essential points, revising only the basis for calculating the interest to be included in the amount of aid to be recovered. Attention should therefore be confined to implementation of the 1998 Decision.

A — Aid granted to Indosa

75. The Commission observes that the Social Security Treasury ('SST') and the Hacienda Foral de Vizcaya (the Basque regional treasury) account, together with Indosa's other public creditors, for 82.65% of the amount of the loans declared as liabilities in the insolvency and consequently command a substantial majority in the meeting of that company's creditors.

76. The Commission contends that Indosa's public creditors nevertheless took no steps to ensure that the receivers proceeded once and for all to liquidate the company's assets or submit a proposal to the meeting of creditors; nor had they applied to the judge to dismiss the receivers as sanction for their failure to act.

77. The Commission acknowledges that on 28 December 1998 the SST applied to the court dealing with the Indosa insolvency for a winding-up order against Indosa or the conclusion of an agreement with its

creditors that would 'put an end to the irregular situation concerning the Indosa insolvency'. According to the Commission, that application had, however, no basis in Spanish insolvency law and failed, and could indeed only fail, to prompt a judicial response.

78. The Spanish Government disputes the assertion that the application prompted no response. It describes the proceedings that took place in 1999 before the Juzgado de Primera Instancia No 7 of Bilbao, which culminated with an order on 17 November 1999, in which that court accepted that a meeting of creditors should be convened. Initially scheduled for 18 February 2000, that meeting was in fact held, according to the Spanish Government, on 4 July of that year. Again according to the Spanish Government, it was agreed at that meeting, on a proposal moved by the SST and unanimously approved by those present, that the company should be wound up, on the basis of an agreement, within four months.

79. In foregoing the right to a hearing, the Commission has chosen not to state its views on this latest information, provided in the Spanish Government's rejoinder. I take this to mean that the Commission does not dispute that information.

80. It can be concluded from the foregoing that, in the wake of the 1998 Decision, the competent Spanish authorities took practical measures to have Indosa wound up.

81. As the Commission itself points out, the Court held in *Commission* v *Belgium* [21] that 'the fact that, on account of the undertaking's financial position, the Belgian authorities could not recover the sum paid does not constitute proof that implementation was impossible, because the Commission's objective was to abolish the aid, *and... that objective could be attained by proceedings for winding up the company*, [22] which the Belgian authorities could institute in their capacity as shareholder or creditor'.

82. In other words, if no other option is available for recovering the aid, the measure that should be taken to achieve the Commission's aim of the aid is to wind the company up.

83. In this instance, there is nothing to suggest that the SST could have done more, in order to recover the aid, than apply for Indosa to be wound up. The SST having made such an application, it is my view that the necessary steps were taken to recover the aid granted Indosa and referred to in the 1998 Decision. The action for failure to fulfil obligations is not therefore, in my view, founded in respect of implementation of Article 2 of the 1998 Decision.

21 — Case 52/84 [1986] ECR 89, paragraph 14.

22 — Emphasis added by author.

84. On the question whether the Kingdom of Spain properly implemented Article 3 of the 1998 Decision, which required it to inform the Commission within a period of two months from the date of notification of that decision of the measures to be taken to comply therewith, it should be noted that the Spanish Government informed the Commission, by letter of 21 January 1999, of the action taken by the SST on 28 December 1998. More particularly, the Spanish Government attached with that letter a letter of 29 December 1998 from the SST, accompanied by supporting documents, containing a reference to that action.

85. The Spanish Government's letter is, however, dated more than two months later than the notification of the 1998 Decision, which occurred on 29 October 1998.[23]

86. I therefore take the view, as regards the aid granted Indosa, that the Kingdom of Spain has not properly implemented Article 3 of the 1998 Decision.

B — Aid granted to Cunosa

87. The Commission points out that Cunosa was declared insolvent in April 1994 at the request, not of its public creditors, but of its employees; winding-up proceedings were commenced in March 1998. In the Commission's view, the Spanish authorities did not take, in those proceedings, the necessary measures to recover the aid, including interest accrued in accordance with Article 2(2) of the 1998 Decision.

88. The Spanish Government's only reply, as regards the social security liabilities, is that an appeal against the order handed down on 7 February 1996 by the Juzgado de lo Social No 1 of Santander, declaring the company to be insolvent, is currently pending before the Tribunal Superior de Justicia of Cantabria.

89. However, while not disputing that no steps were taken subsequent to the 1998 Decision, the Spanish Government does not even explain in what way the aforementioned appeal, which was in all likelihood lodged prior to the 1998 Decision, contributes to implementation of that Decision.

90. Similarly, as regards the liabilities towards the national treasury, the Spanish Government fails to explain how the measure adopted on 23 June 1999 — in any case well past the time-limit set in Article 3 of the 1998 Decision — by the National Recovery Office, that of notifying Industrias Domésticas Inoxidables del Sur SAL of

23 — See Case C-480/98 *Commission* v *Spain*, paragraph 9.

the hearing and sending it a copy of the documents concerned, there being reason to believe the firm was a successor to Cunosa in the exercise of its activities, contributed in any meaningful way to recovery of the aid declared incompatible with the common market.

91. I am of the view therefore that the Commission is right in considering the Spanish authorities to have taken no steps to recover the aid granted to Cunosa and declared incompatible with the common market by the 1998 Decision.

C — Aid granted to GURSA

92. The Commission contends that GURSA's public creditors made no application for the firm to be declared insolvent, arguing that 'such proceedings were unlikely to meet with success'.

93. Concerning the social security liabilities, the Spanish Government points out that, after adoption of the 1998 Decision, the courts held, in third-party proceedings instituted by GURSA's employees against the SST, that the employees' were preferential creditors. However, again according to the Spanish Government, the SST had, by acting promptly, succeeded in seizing the company's only remaining assets and, by executing the seizure, in liquidating the sole assets of a company that had ceased trading in 1994 and had been without assets since then. Concerning the liabilities towards the national treasury, the Spanish Government simply states that the National Recovery Office adopted, on 23 June 1999, a similar measure to the one it had adopted in the case of Cunosa.

94. The Commission is right in finding that these measures do not suffice to implement the 1998 Decision properly.

95. Where a company does not have the assets that would be required to reimburse aid declared incompatible with the common market, and the Spanish Government does not dispute that this is the case in the present instance, abolishing the aid can only be done by winding the company up, as the Court held in Case 52/84 *Commission* v *Belgium*. In such a situation this is the only means available of fully abolishing the aid in question.

96. Furthermore, if, as the Spanish Government emphasises, GURSA has been inactive and without assets for a number of years, I fail to see what grounds there could still be for not winding the company up, unless it be the prospect of a resumption of activity, which might come about more easily if the aid has not been reimbursed.

97. The Spanish Government argues further that total liquidation of an insolvent company's assets and payment of its creditors must be carried out in accordance with national regulations concerning insolvency. It points out in this connection that public creditors cannot, if they have not obtained the required majority, have the company wound up against the will of the other creditors.

98. In the present instance, however, the non-fulfilment of obligations resides not in a failure on the part of the competent Spanish authorities to have the company wound up against the will of the other creditors but rather in the fact that, unlike in the case of Indosa, they took no steps whatsoever to obtain the winding-up of GURSA. The Spanish Government's argument does not therefore seem to me relevant for the purpose of rebutting the finding that the Kingdom of Spain did not properly implement the 1998 Decision as regards the aid granted to GURSA.

D — Aid granted to MIGSA

99. The Commission observes that MIGSA was declared insolvent on 27 May 1999 at the request, not of the SST or the tax authorities, but of its employees. Neither the SST nor the tax authorities took any steps to have MIGSA wound up or to secure the conclusion of an agreement with its creditors.

100. On the question of the liabilities towards the social security, the Spanish Government replies that the hostile attitude of the company's workforce and the heavy charges on its assets undermined efforts to achieve a sale. It maintains, however, that the SST intends to seize the company's only existing asset, which is moreover virtually worthless. The Spanish Government adds that, by virtue of a decision taken by the SST on 20 January 2000, responsibility for MIGSA's liabilities towards Indosa has been transferred to an administrator brought in to look after MIGSA's affairs. As regards the liabilities towards the national treasury; the Spanish Government reports the same measure as that adopted in the cases of Cunosa and GURSA.

101. These measures do not allow the aid granted MIGSA to be recovered and indeed the Spanish Government does not dispute this. It follows, in my view, as the Commission also observes, that the competent Spanish authorities should have taken steps to have MIGSA wound up, this being the only means still available of abolishing the aid.

102. As the Spanish authorities did not take such steps, I consider that the 1998 Decision was not properly implemented.

Costs

103. It can be concluded from the foregoing that the Kingdom of Spain has failed in most of its pleas. Therefore, since the Commission has applied for an order for costs against the Kingdom of Spain, I propose, in accordance with Article 69(3) of the Rules of Procedure, that the costs be shared, the Kingdom of Spain being ordered to pay, in addition to its own costs, three quarters of the Commission's costs and the Commission to bear one quarter of its own costs.

IV — Conclusions

104. In the light of the foregoing considerations, I therefore propose that the Court should:

— declare that, by failing to comply,

— as regards the aid granted by the Basque, Cantabrian and Andalusian Governments, with Articles 2 and 3 of the Commission Decision 91/1/EEC of 20 December 1989 concerning aids in Spain which the central and several autonomous governments have granted to Magefesa, producer of domestic articles of stainless steel and small domestic appliances;

— as regards the aid granted Cubertera del Norte SA, Manufacturas Gur SA and Manufacturas Inoxidables de Gibraltar SA, with Articles 2 and 3 of the Commission Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa group and their successors;

— as regards the aid granted to Investigación y Desarrollo Udala SA, with Article 3 of Decision 1999/509;

the Kingdom of Spain has failed to fulfil its obligations under the EC Treaty;

— dismiss the remainder of the application;

— order the Kingdom of Spain to pay, in addition to its own costs, three quarters of the costs of the Commission of the European Communities;

— order the Commission of the European Communities to bear one quarter of its own costs.