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

11 July 2002 *

In Case T-152/99,

Hijos de Andrés Molina SA (HAMSA), in liquidation, established in Seville (Spain), represented by L.M. Olivencia Brugger and J.L. Ballester García-Izquierdo, lawyers, with an address for service in Luxembourg,

applicant,

supported by

Kingdom of Spain, represented by D.S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

intervener,

* Language of the case: Spanish.

v

Commission of the European Communities, represented by I. Martínez del Peral and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 1999/484/EC of 3 February 1999 concerning State aid which the Spanish Government has granted to the company Hijos de Andrés Molina SA (HAMSA) (OJ 1999 L 193, p. 1),

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

composed of: P. Lindh, President, R. García-Valdecasas, J.D. Cooke, M. Vilaras and N.J. Forwood, Judges,

Registrar: O. Speltdoorn, Legal Secretary,

having regard to the written procedure and further to the hearing on 3 May 2001, gives the following

Judgment

Facts of the case

1 Hijos de Andrés Molina SA (hereinafter the 'applicant' or the 'firm') is established in the province of Jaén (Spain) and is engaged in the manufacture of meat products, animal feedingstuffs and cheeses, as well as pig farming and slaughtering. The shares of the firm were originally held by the Molina family.

2 On 13 March 1995, the Juzgado de Primera Instancia nº 4 de Jaén (Jaén Court of First Instance) ordered suspension of payments for the applicant, which had been in economic and financial difficulties for several years.

3 By agreement concluded on 5 May 1995, the Molina family transferred the bare ownership of its shares to the Instituto de Fomento de Andalucía (hereinafter the 'IFA'), a State entity dependent on the Regional Government of Andalusia (Spain), for the sum of one peseta (ESP 1). Under the terms of that agreement, full ownership of the said shares would automatically revert to the Molina family on 31 December 1997.

4 In December 1995, the applicant drew up a restructuring plan (hereinafter the 'restructuring plan' or the 'plan'). That plan was revised once in April 1997 (hereinafter the 'April 1997 revision') and for a second time in January 1998.

5 By letter of 1 July 1996, in accordance with Article 93(3) of the EC Treaty (now Article 88(3) EC), the Spanish Government belatedly notified the Commission of a number of grants of aid to the applicant by the IFA:

— 'rescue aid' granted between May and December 1995, in the form of:

  — two guarantees, one for ESP 100 million and the other for ESP 50 million;

  — three loans, for ESP 350 million, ESP 125 million and ESP 25 million, respectively, at an annual interest rate of 6%, converted on 9 April 1996 to the Madrid interbank offered rate (hereinafter 'MIBOR') plus 0.5%);

— 'restructuring aid', granted between January and June 1996, in the form of:

  — three guarantees, for ESP 100 million, ESP 75 million and ESP 25 million, respectively (the last one being granted in the amount of ESP 21 748 150);

— two loans, for ESP 1 739 million (at a rate equal to MIBOR plus 0.5%) and ESP 850 million (at an interest rate of 10.5%), respectively.

6 In examining this notification, the Commission found that the applicant had also received the following aid prior to May 1995:

— a loan of ESP 375 million at 10% interest, paid on 12 August 1993;

— a guarantee of ESP 375 million, granted on 18 June 1993;

— a loan of ESP 550 million at 6% interest, paid on 28 June 1994;

— a guarantee of ESP 200 million, granted on 28 June 1994.

7 It also found that, subsequent to the notification, the applicant had received the following aid:

— a loan of ESP 1 100 million at MIBOR plus 0.5%, paid on 5 November 1996;

— a loan of ESP 700 million at MIBOR plus 0.5%, paid in two instalments, the first on 2 June 1997 and the second on 31 July 1997;

— a guarantee of ESP 450 million, granted on 6 February 1998;

— a guarantee of ESP 300 million, granted on 2 May 1997;

— a loan of ESP 275 951 288 arising when, on 2 August 1996, the IFA, through its public sector company Sociedad para la Promoción y Reconversión de Andalucía SA, took over the debt of a ESP 300 million loan granted to the applicant by the financial institute Caixa d'Estalvis i de Pensions de Barcelona.

8 By letter of 29 April 1997, the Commission informed the Spanish Government of its intention to open the procedure provided for in Article 93(2) of the EC Treaty, and invited it to submit its observations. The other Member States and interested parties were informed by publication of that letter in the *Official Journal of the European Communities* of 26 June 1997 (OJ 1997 C 196, p. 10) of the opening of the procedure and invited to submit any observations they might have. The Spanish Government sent its observations by letters of 4, 11 and 23 July and 21 August 1997. Interested third parties submitted their observations by letters of 27 January, 6 February, 26 and 28 May and 22 July 1997. By letter of 16 March 1998, the Spanish Government presented its comments on those observations.

9 On 29 April 1997, the IFA capitalised ESP 4 680 million of the amount the applicant owed it. The latter's capital was then reduced to ESP 500 million. These

operations left the IFA holding 80.6% of the applicant's shares and the Molina family holding only the remaining 19.4%.

10 On 28 May 1997, the general meeting of the applicant's creditors approved an agreement concerning the granting of debt remission (hereinafter the 'debt remission agreement'), which was ratified by the Juzgado de Primera Instancia n^{0} 4 de Jaén on 3 November 1997. The Spanish tax and social security authorities granted debt remissions to the applicant through individual agreements. The applicant was thus granted the following remissions of debt from the State bodies:

— a remission of ESP 2 192 754 000 on a debt of ESP 2 211 154 000 by the IFA;

— a remission of ESP 69 089 000 on a debt of ESP 87 489 000 by the Junta de Andalucía (Andalusia Regional Executive);

— a remission of ESP 158 800 000 on a debt of ESP 177 199 000 by the Ayuntamiento de Jaén (Municipality of Jaén);

— a remission of ESP 338 589 000 on a debt of ESP 927 876 000 by the tax authorities;

— a remission of ESP 789 938 000 on a debt of ESP 1 479 million incurred through non-payment of social security contributions, by the Ministry of Labour;

— a remission of ESP 5 144 000 on a debt of ESP 11 221 000 by the Confederación Hidrográfica del Guadalquivir.

11 By letter of 10 October 1997, the Commission informed the Spanish Government of its decision to extend the procedure to the capitalisations and remissions of debt by those State bodies and invited it to submit its observations. By publication of that letter in the *Official Journal of the European Communities* of 27 November 1997 (OJ 1997 C 361, p. 3), the other Member States and interested parties were notified of the extension of the procedure and invited to submit any observations they might have. The Spanish authorities sent their observations by letter of 19 December 1997, and interested third parties by letters of 15 and 23 December 1997. The Spanish authorities supplied additional information in letters of 2 and 16 March, 16 July, 8 September and 21 October 1998.

12 On 3 February 1999, the Commission adopted Decision 1999/484/EC concerning State aid which the Spanish Government has granted to the company Hijos de Andrés Molina SA (HAMSA) (OJ 1999 L 193, p. 1; hereinafter the 'contested decision').

13 The operative part of the contested decision reads as follows:

'Article 1

The following aid, granted by Spain to the company Hijos de Andrés Molina SA, is illegal due to the fact that it was granted before the Commission had decided on its compatibility at the draft stage. Moreover, it is incompatible with the common market within the meaning of Article 92(1) of the Treaty, without fulfilling the conditions for exemption provided for in Article 92(2) and (3), and shall therefore be abolished.

1. State aid in the form of guarantees:

(a) the guarantee for ESP 375 million granted on 18 June 1993 and called in on 29 September 1996 in an amount of ESP 401 934 206;

(b) the guarantee for ESP 200 million granted on 28 June 1994 and called in on 29 January 1996 in an amount of ESP 207 578 082;

(c) the guarantee for ESP 100 million granted on 16 August 1995 and replaced on 19 August 1996 and 11 November 1997 by a guarantee for the same amount;

(d) the guarantee for ESP 50 million granted on 14 September 1995 and replaced on 19 August 1996 and 11 November 1997;

(e) the following three guarantees: one for ESP 100 million, granted on 8 October 1996, one for ESP 75 million, granted on 20 August 1996 and one for ESP 21 748 150, granted on 11 November 1997;

(f) the following two guarantees: one for ESP 450 million, granted on 6 February 1998 and the other for ESP 300 million, granted on 2 May 1997.

2. State aid in the form of loans:

(a) a loan of ESP 375 million, paid on 12 August 1993;

(b) a loan of ESP 550 million, paid on 28 June 1994;

(c) two loans, one of ESP 350 million and one of ESP 125 million, paid on 24 October 1995;

(d) a loan of ESP 25 million, paid on 17 October 1996;

(e) a loan of ESP 1 739 million, paid on 30 December 1995;

(f) a loan of ESP 850 million, paid on 11 July 1996;

(g) a loan of ESP 1 100 million, paid on 5 November 1996;

(h) a loan of ESP 700 million, paid in two parts: ESP 400 million on 2 June 1997 and ESP 300 million on 31 July 1997;

(i) a loan of ESP 275 951 288, corresponding to the taking over by the Instituto de Fomento de Andalucía, through its public sector company Sociedad para la Promoción y Reconversión de Andalucía SA, of an ESP 300 million loan made to Hijos de Andrés Molina SA by the financial institute Caixa d'Estalvis i de Pensions de Barcelona.

3. State aid in the form of remission of debts by State organisations:

Cancellation of part of HAMSA's debts by State organisations, approved at the meeting of HAMSA's creditors on 28 May 1997, involving the following amounts:

— Municipality of Jaén: ESP 158 800 000,

— Tax authorities: ESP 338 589 000,

— Junta de Andalucía: ESP 69 089 000,

— Social security: ESP 789 938 000,

— Confederación Hidrográfica del Guadalquivir: ESP 5 144 000.

Article 2

Spain shall, without delay, terminate the loan contracts and revoke the guarantees referred to in Article 1 which are still in force.

Article 3

1. Spain shall take the necessary measures to recover the aid referred to in Article 1:

— in the case of the guarantees, the difference between the interest rate granted and the free market rate,

— in the case of the loans, guarantees called in and debts cancelled, 100 % of the amounts concerned.

2. Recovery shall be carried out in accordance with the procedures of national law. The sums to be recovered shall attract interest from the date on which the aid in question was granted. The interest must be calculated on the basis of the commercial rate, with reference to the rate used for the calculation of the subsidy equivalent in the context of regional aids.

....'

Procedure and observations of the parties

14 By application lodged at the Registry of the Court of First Instance on 24 June 1999, the applicant brought its action for annulment of the contested decision.

15 By application lodged at the Registry of the Court of First Instance on 23 September 1999, the Kingdom of Spain applied for leave to intervene in the case in support of the form of order sought by the applicant. The President of the Fifth Chamber (Extended Composition) granted leave to intervene by order of 25 January 2000.

16 The Kingdom of Spain lodged its statement in intervention on 3 March 2000, and the main parties submitted their observations thereon.

17 Upon hearing the report of the Judge Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure and,

by way of measures of organisation of procedure, requested the parties to answer a number of written questions and to produce certain documents. The parties complied with those requests. The applicant and the Kingdom of Spain were also asked to give certain explanations orally at the hearing.

18 The parties presented oral argument and answered the questions put by the Court at the hearing held in open court on 3 May 2001.

19 The applicant claims that the Court should:

— annul the contested decision in its entirety;

— in the alternative, annul the contested decision in part;

— order the Commission to pay the costs.

20 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

21 The Kingdom of Spain supports the form of order sought by the applicant.

Legal background

22 In support of its application, the applicant first relies on five pleas in support of its claim for partial annulment of the contested decision alleging:

— infringement of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the Treaty, and manifest error of assessment as regards the loans and guarantees granted by the IFA in 1993 and 1994;

— infringement of Article 92(3)(c) of the Treaty and of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12; hereinafter the 'guidelines'), and manifest error of assessment as regards rescue aid granted between May and December 1995;

— infringement of Article 92(3)(c) of the Treaty and the guidelines, and manifest error of assessment as regards restructuring aid granted subsequent to December 1995;

— infringement of Article 92(1) of the Treaty, and manifest error of assessment as regards the conversion of its debts into capital by the IFA;

— infringement of Article 92(1) of the Treaty, and manifest error of assessment as regards the remissions of debt granted by the State creditors.

23 The applicant also relies on three pleas with a view to obtaining the annulment of the decision in its entirety, alleging:

— manifest error of assessment as regards the general assessment of the measures from which it benefited;

— infringement of Article 92(3)(a) of the Treaty;

— absence of effect of the contested measures on trade between Member States and failure to state reasons in that regard.

The first plea: aid granted in 1993 and 1994

Arguments

24 The applicant and the Kingdom of Spain argue that the guarantees granted by the IFA in 1993 and 1994 (see paragraph 6 above) were granted under general aid scheme N 624/92, which the Commission approved by decision dated 16 December 1992, and general aid scheme N 428/93, which the Commission approved by decision dated 2 September 1993. They argue that since the decisions of the Commission authorising those aid schemes cannot have retroactive effect, they necessarily imply future approval of later measures falling within those aid schemes.

25 They do not dispute the Commission's assertion that the two aid schemes constitute an amendment to aid scheme NN 71/88. They do, however, disagree on the conclusions which the Commission draws. The applicant maintains that the Commission cannot derive any arguments from the letter of 12 September 1989 from the Spanish authorities concerning aid scheme NN 71/88, which actually concerned aid for mining activities in the province of Huelva (Spain). The applicant states that the requirement by the Commission, that aid to agricultural firms must be the subject of prior notification to the Commission, does not apply in this case.

26 As regards the loan and guarantee granted by the IFA in 1993, the applicant and the Kingdom of Spain take the view that the potential beneficiaries of aid scheme NN 71/88 were firms, in general, established in Andalusia, as was the case for aid scheme N 624/92. They allege that the restrictions associated with the status of being a cooperative, a worker-owned company, or a self-employed person as

contemplated by scheme NN 71/88 do not concern the applicant. The applicant adds that the loans contemplated in aid scheme N 624/92 were intended not only to finance fixed and current assets, but also to refinance liabilities.

27 As regards the loan and guarantee granted by the IFA in 1994, the applicant and the Kingdom of Spain argue that the beneficiaries of aid scheme N 428/93 were not necessarily small and medium-sized enterprises (SMEs).

28 The Commission contends, first, that aid schemes N 624/92 and N 428/93 authorised the aid granted in 1992 and 1993, respectively. Second, it disagrees that the aid granted in 1993 and 1994 meets the conditions for granting in aid scheme NN 71/88 and in aid schemes N 624/92 and N 428/93 which derive from it.

Findings of the Court

29 It is appropriate, first of all, to recall the background to aid schemes N 624/92 and N 428/93.

30 They originated in one of the two general aid schemes registered by the Commission under reference NN 71/88, namely the scheme providing for the grant of aid by the IFA to firms established in Andalusia (hereinafter 'IFA aid scheme NN 71/88'). The other aid scheme bearing this reference concerned investment aid for the mining area in the province of Huelva.

31 The measures provided for under IFA aid scheme NN 71/88 consisted of subsidies, preferential interest rates, guarantees, loans and acquisitions of holdings. A specific budget was earmarked for each of the categories of measure.

32 By decision of 26 October 1989, the Commission approved aid schemes NN 71/88. It indicated to the Spanish authorities that, in the event that some of the measures provided for in the schemes were extended, the authorities were obliged to notify it, in accordance with Article 93(3) of the Treaty, of 'any corresponding budget plans'. It also reminded them that they were obliged to notify it 'at the planning stage pursuant to the same article, of any modification, even minor, to the system of aid in Andalusia'. Lastly, it asked them 'to forward to it, before the end of the first quarter of each year, a report showing, for each type of aid, the amount of aid granted during the preceding year, the investment aided and the number of cases involved, broken down by region and according to province and sector'. With respect to the preferential interest rates and IFA loans, the Commission stated that the report had to be drawn up 'for each of the four types of preferential interest rates and for each of the two types of loans'.

33 According to the file, IFA aid scheme NN 71/88 received several annual extensions, including modifications to the budgets earmarked for the different categories of measures, and even some of the features of the scheme. Several times the Spanish authorities failed to give notice of extensions and modifications at the planning stage, as required by the Commission in its decision of 26 October 1989 and in its subsequent approval decisions, but waited until after it had started to award the aid in question. Thus, the data on the aid scheme for 1992 (registered under reference N 624/92 were only forwarded to the Commission on 18 October 1992, and the data on the aid scheme for 1993 (registered under reference N 428/93) only on 1 July 1993. The Commission, however, does not

seem to have raised any objections to this practice, and each of its approval decisions in turn thus had *de facto* retroactive effect. The decision concerning aid scheme N 624/92 could in fact only be adopted on 16 December 1992, and the one for aid scheme N 428/93 on 24 September 1993.

34 It follows from the foregoing considerations that the argument of the applicant and the Kingdom of Spain to the effect that the loan of ESP 375 million and the guarantee for the same amount granted by the IFA in 1993 fall within aid scheme N 624/92 cannot be accepted. That scheme can only cover aid granted by the IFA in 1992.

35 Likewise, the loan of ESP 550 million and the guarantee of ESP 200 million granted to the applicant in 1994 cannot be covered by aid scheme N 428/93, because that scheme can only cover aid granted in 1993. In any event, the conditions of that scheme were not met in this case. In their letter of 1 July 1993, giving notice of the scheme, the Spanish authorities had, in fact, explicitly defined the recipient of the scheme as being SMEs, meaning essentially companies with a workforce of under 250, and either an annual turnover not exceeding ECU 20 million or a total yearly balance sheet of not more than ECU 10 million. The parties all agree that the applicant exceeds those limits.

36 Nor can the loan and the guarantee granted by the IFA in 1993 fall within aid scheme N 428/93, since the applicant is not an SME, as observed in the previous paragraph. In any event, none of the parties are arguing that this loan and this guarantee are part of that scheme.

37 Likewise, as regards the loan and the guarantee granted by the IFA in 1994, none of the parties argue that those measures come within aid scheme 462/94, which

constitutes an extension of the IFA aid scheme for the period 1994 to 1999. During the administrative procedure, the Kingdom of Spain only referred to aid scheme N 462/94 to attempt to justify the alleged rescue and restructuring aid granted to the applicant in 1995 and 1996 (recital 11 of the contested decision).

38 It follows that it has not been demonstrated that the loans and guarantees granted by the IFA to the applicant in 1993 and 1994 fall within the general aid schemes approved by the Commission. Consequently, the Commission was justified in considering them to be *ad hoc* measures intended to enable the firm to continue its activities. The first plea must, therefore, be dismissed as unfounded, without it being necessary to examine the other arguments put forward by the parties.

The second plea: the rescue aid

Arguments of the parties

39 The applicant and the Kingdom of Spain maintain that the guarantees and loans granted by the IFA between May and December 1995 (see paragraph 5 above) constitute rescue aid within the meaning of the guidelines and that, consequently, they should have been approved by the Commission pursuant to Article 92(3)(c) of the Treaty.

40 They begin by stating that, six months after the abovementioned loans had been granted, the Spanish authorities retroactively changed the interest rate initially set to the market rate, that is, MIBOR + 0.5%. They disagree that this was a mere 'accounting adjustment', arguing that it was the result of a true legal agreement,

and that the outstanding interest was calculated on the basis of the market rate and then included in the capitalisation effected on 29 April 1997 (see paragraph 9 above). The fact that the loans were not repaid and the accompanying interest was not paid is of no relevance, since the guidelines are silent on this point.

41 Next, the applicant and the Kingdom of Spain assert that the guarantees and loans in question were closely linked to the drawing up of the restructuring plan, had as their sole purpose to keep the firm in business, were warranted by the existence of serious social difficulties, and had no adverse effects on the relevant market in other Member States. This aid is, therefore, fundamentally different from that granted to the applicant in 1993 and 1994. The Kingdom of Spain adds that, in any event, the Commission cannot use the illegality of that aid to deny that the guarantees and loans granted between May and December 1995 were rescue aid.

42 Lastly, the applicant maintains that the Commission is departing from its usual decision-making practice. It refers, in particular, to Commission Decision 96/115/EC of 21 June 1995 on the aid granted by the Italian State to the company Enichem Agricoltura SpA (OJ 1996 L 28, p. 18; hereinafter the 'Enichem decision') and the position taken by the Commission in Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031. The Kingdom of Spain adds that that judgment confirms that aid need not necessarily be granted in a single payment.

43 The Commission disagrees that the guarantees and loans granted between May and December 1995 constitute rescue aid, arguing that they do not meet the conditions laid down in point 3.1 of the guidelines.

44 It argues, first, that the interest rate used for the loans in question was lower than the market rate, and that the retroactive rate change by the Spanish authorities is merely an accounting adjustment, since the principal of the loan has not been repaid and the interest has never been paid. The fact that the outstanding interest was included in the capitalisation on 29 April 1997 is of no consequence, since the capitalisation itself constitutes State aid.

45 The Commission contends, secondly, that the purpose of rescue aid is to keep the firm in business for a limited period, generally not exceeding six months, to allow for realistic recovery measures to be devised. The applicant had already been the recipient of aid having the same purpose as the loan and guarantees at issue here, in 1993 and 1994. Moreover, whilst rescue aid need not necessarily be paid out in one lump sum, it cannot be granted repeatedly over a long period.

46 Lastly, the Commission takes the view that the Enichem decision and the *Ducros* v *Commission* judgment, cited above, are completely irrelevant.

Findings of the Court

47 It must be borne in mind that, in the terms of Article 92(3)(c) of the Treaty, 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' may be considered to be compatible with the common market.

48 It should also be pointed out that, according to settled case-law, the Commission has wide discretion in its assessments under Article 92(3) of the Treaty (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 56, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 36). Judicial review by the Community Courts must, therefore, be limited to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers (Case T-266/94 *Skibsvaerftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 170). It is not for the Community judicature to substitute its economic assessment for that of the Commission (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 56).

49 Point 3.1 of the guidelines states the following:

'... rescue aid must:

— consist of liquidity help in the form of loan guarantees or loans bearing normal commercial interest rates,

— be restricted to the amount needed to keep a firm in business (for example, covering wage and salary costs and routine supplies),

— be paid only for the time needed (generally not exceeding six months) to devise the necessary and feasible recovery plan,

— be warranted on the grounds of serious social difficulties and have no undue adverse effects on the industrial situation in other Member States.

A further condition is that, in principle, the rescue should be a one-off operation. A series of rescues that effectively merely maintain the status quo, postpone the inevitable and in the meantime transfer the attendant industrial and social problems to other, more efficient producers and other Member States is clearly unacceptable. Rescue aid should therefore normally be a one-off holding operation mounted over a limited period during which the company's future can be assessed.

...'.

50 In the contested decision, the Commission found that the loans and guarantees granted by the IFA between May and December 1995 could not be termed rescue aid within the meaning of the guidelines, because the applicant had already received aid 'of the same type and for same reason' (recital 107). It thus found that the requirement that rescue aid should be an exceptional measure needed to keep the firm in business and applied for a limited time was not met in the case at

hand. It should be observed that, contrary to the contention of the Kingdom of Spain, it is not the illegality as such of the aid granted prior to the purported rescue aid on which the Commission based its claims.

51 It cannot be contended that these claims are based on a manifest error of assessment. As the Court file and the examination of the first plea show, it is established that the IFA had already granted loans and guarantees to the applicant in 1993 and 1994, which were of the same type and for the same reason as the alleged rescue aid, and that those measures were already intended to enable the firm to overcome its financial difficulties and stay in business.

52 The references by the applicant and the Kingdom of Spain to the Enichem decision and the judgment in *Ducros* v *Commission*, cited above, are of no relevance. Those cases concerned restructuring aid, not rescue aid.

53 Moreover, with respect to the loans at issue in this plea, it should be pointed out that the applicant and the Kingdom of Spain do not dispute that the interest rate initially set was lower than the market rate. The question of whether a measure constitutes aid within the meaning of Article 92(1) of the Treaty must be resolved having regard to the situation existing at the time the measure was implemented. If the Commission took subsequent factors into account, it would confer an advantage on Member States which, like the Kingdom of Spain in this case, fail in their obligation to give notice at the planning stage of aid they intend to grant. Consequently, the fact that the rate of interest applied to these loans was subsequently fixed at the market rate — whether or not one qualifies this as a mere 'accounting adjustment' — is of no relevance.

54 It follows that the second plea must be rejected as unfounded.

The third plea: restructuring aid

Arguments of the parties

55 To begin with, the applicant asserts that the Commission has committed a manifest error in its interpretation of the restructuring plan.

56 First, it points out that the plan provides for a reduction in its production capacity.

57 It alleges, with the support of the Kingdom of Spain, that the 1995 production figures shown in the table contained in recital 27 of the contested decision are not representative because, as indicated in the restructuring plan, it was going through a deep crisis at that time. It then points out that it took specific measures to reduce its production capacity, including closure of a slaughterhouse, a cutting plant and its meat pâté production, and judicial sale of one of the feedingstuffs firms. The Kingdom of Spain disputes the Commission's contention that these reduction measures do not correspond to the capacity actually used. The applicant adds that the April 1997 revision simply provides 'in the light of experience' for capacity reductions more extensive than those originally envisaged. As for the investments made, they were intended simply to prevent certain assets from deteriorating or becoming obsolete.

58 Second, the applicant argues that the Commission was not justified in inferring from the fact that the restructuring plan had been drawn up on the basis of information which was insufficient and unreliable that it was inappropriate. It explains that, as pointed out by the court-appointed auditors in their report on

the firm's situation when the file was presented concerning the cessation of payments, the accounts contained a number of irregularities. It refers in particular to the absence of books 'appropriate for the keeping of annual accounts', a lack of 'planning', as well as the inadequacy of its accounting records. Its former auditor was, moreover, the subject of sanctions because of those irregularities. The applicant adds that its accounts for 1994, as drawn up by the Molina family, were inaccurate and had not yet been approved by the general assembly at the time the plan was drawn up. It also points out that the limited special revision of its accounts on 7 May 1995, which an auditing firm had been assigned to carry out, was not available at that time, either. The applicant and the Kingdom of Spain state that, despite those difficulties, the IFA managed to draw up a realistic and appropriate restructuring plan.

59 Third, the applicant and the Kingdom of Spain argue that the Commission did not take due account of the results achieved by the firm during the period in which the restructuring plan was implemented. They state that it achieved profits of ESP 808 million in 1997 and ESP 244 million in the first quarter of 1998, that its gross margin improved considerably, that its expenses were brought down significantly, and that its self-financing capacity was turned around to become positive. The fact that outside companies were interested in purchasing it attests to the success of the restructuring plan. The applicant and the Kingdom of Spain point out that the procedure for sale of the firm was conducted strictly in accordance with the publicity and competition rules, with a specialist consultant charged with the task of identifying potential purchasers and examining their offers. Lastly, the Kingdom of Spain takes the view that the Commission is distorting the facts when it states at recital 117 of the contested decision that, in their letter of 8 September 1998, the Spanish authorities, whilst stating that the applicant had become viable again, had acknowledged that it would be going into liquidation. In fact, they only canvassed the liquidation of the firm in connection with the prospect of a negative decision by the Commission.

60 Next, the applicant and the Kingdom of Spain maintain that the aid granted by the IFA after December 1995 constitutes restructuring aid within the meaning of the guidelines.

61 First, they reiterate that the restructuring plan enabled the firm to become viable again within a reasonable time and, in particular, led to a reduction in its production capacity and assets. The applicant refers again to the difficult background against which the plan was drawn up (see paragraph 58 above) and points out that the Commission has, in practice, several times made decisions authorising restructuring aid notwithstanding the fact that a restructuring plan was drawn up only several years after the granting of the aid. It also points out that, in the Enichem decision, the Commission confined itself to 'hoping' that the restructuring would enable the firm in question to become viable again in the long term. In the present case, the applicant became viable again within three years of implementation of the restructuring plan. The applicant adds that, in a number of decisions, the Commission has considered the existence of a privatisation process to be proof enough of the relevant firm's becoming viable again, and that, in the Enichem decision, it accepted a mere undertaking on the part of the Italian authorities to privatise the restructured sector of activity of the firm in question. The applicant and the Kingdom of Spain also reiterate that the grants of aid in 1993 and 1994 come within the general aid schemes approved by the Commission and, consequently, are different from those granted to the firm after December 1995. Consequently, the argument of the Commission to the effect that the aid was not paid out in one lump sum cannot be accepted. Lastly, the applicant refers to the position adopted by the Commission in the proceedings in *Ducros* v *Commission*, cited above.

62 Second, the applicant and the Kingdom of Spain assert that measures were taken to offset as far as possible adverse effects on competitors, in accordance with point 3.2.2(ii) of the guidelines. They argue that there is no structural overcapacity in the meat products sector and that meat processing does not come within the excluded sectors referred to in the Annex to Commission Decision 94/173/EC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC (OJ 1994 L 79, p. 29). They also point out that, according to Decision 94/173, investment in the feedingstuffs sector may be supplemented by Community financing if annual production is under 20 000 tonnes, which is the case for the applicant. They add

that the restructuring plan provided for a reduction (or at least, a rechannelling) of production capacity and that, as acknowledged in the contested decision, this was done in all of the applicant's production divisions. Lastly, the Kingdom of Spain expresses surprise at the statement of the Commission in its defence, that '[its] conclusion that the aid granted to [the applicant] did not meet the conditions laid down in the guidelines was not based on the absence of reductions of capacity'. In the contested decision, the Commission at several points relies on the fact that the restructuring plan provided for an increase in production capacity as a ground for declaring the aid incompatible with the common market.

63 Third, the applicant and the Kingdom of Spain maintain that the aid in question was proportionate to the costs and benefits of restructuring.

64 In that connection, the applicant takes the view that the Commission cannot infer anything from the fact that only the State had contributed to the restructuring in the form of new resources. It points out that, in *Ducros* v *Commission*, cited above, the Court of First Instance held that the decisive factors were, first, the fact that the existing capacity had been reduced, and, second, that the State had undertaken to privatise the firm in question. In the Enichem decision, the Commission adopted the same position. The applicant also points out that its employees and private creditors have agreed to sacrifices in order to ensure its viability. As regards the private creditors, it mentions in particular that their average percentage of debt remission was higher than that of the public creditors. It affirms that its debt to private creditors accounted for much more than 4% of its total debt and points out that, in Commission Decision 98/364/EC of 15 July 1997 concerning State aid in favour of 'Grupo de Empresas Álvarez' (GEA) (OJ 1998 L 164, p. 30; hereinafter the 'GEA decision'), the Commission held that the condition of proportionality of State aid had been met by a 'significant reduction of debts... through a suspension of payment proceeding'. Lastly, in Commission Decision 97/17/EC of 30 July 1996 concerning aid granted to Santana Motor SA (OJ 1997 L 6, p. 34; hereinafter the 'Santana Motor decision'), the Commission was content to take account of the difficult socioeconomic situation in the region concerned, which is precisely the one in which the applicant is established.

65 Fourth, the applicant and the Kingdom of Spain dispute the contention in recital 132 of the contested decision that it had to be concluded that, until June 1997, there was only a string of specific aid payments intended solely to keep the firm in business, since the Commission only received tardy notice of the restructuring plan and did not have the opportunity to give an opinion on the plan in due time or to consider the need to impose conditions during its implementation. The applicant states that, in reality, the Commission received the plan 18 months prior to the adoption of the contested decision. The Kingdom of Spain, for its part, argues that the plan was drawn up at the right time, namely, after a six-month period necessary to determine the cause of the firm's difficulties and propose measures which might guarantee its viability. The applicant and the Kingdom of Spain add that the Commission was never interested in the restructuring plan, did not propose any measures or conditions, and did not hold any meetings with the Spanish authorities to discuss the plan, or ask for any clarifications about it. Lastly, the applicant reiterates that, in the Enichem decision, the Commission declared rescue and restructuring aid granted three years before the restructuring plan was drawn up to be compatible with the common market.

66 Fifth, the applicant points out that the guidelines provide that the Commission is to take account of regional development needs when it assesses restructuring aid in the assisted regions. In the present case, the Commission did not take account at all of the specific socioeconomic situation in the province of Jaén.

67 The Commission begins by disputing that it has committed a manifest error in its assessment of the restructuring plan.

68 It states, first of all, that the plan clearly provided for an increase in production capacity for all of the applicant's production divisions, as well as for investments involving sizeable injections of capital. It maintains that the criticisms of the applicant and the Kingdom of Spain about the figures in the table in recital 27 of

the contested decision are not founded, since the firm's production had already started to decline in 1992. The Commission adds that, although it is true that reductions in production capacity were made subsequently for some of the applicant's production divisions, they were not reductions in the capacity actually used. Rather, they were the result of individual decisions adopted according to the circumstances then prevailing, particularly the fact that the sales volumes achieved in 1996, 1997 and 1998 turned out to be lower than the forecasts in the restructuring plan.

69 Second, the Commission states that the restructuring plan was incomplete and based on insufficient and unreliable information, as indeed the Spanish authorities themselves argued. It disputes the relevance of the reference made by the applicant and the Kingdom of Spain to the circumstances surrounding the drawing up of the plan and emphasises that the necessary adjustments were only made in April 1997.

70 Third, the Commission considers that the complaints made by the applicant and the Kingdom of Spain about its assessment of the results achieved by the firm under the restructuring plan are groundless.

71 Next, the Commission disputes the assertion that the aid in question fulfils the conditions laid down in the guidelines.

72 First, it reaffirms that the restructuring plan was drawn up only two and a half years after the first aid was granted to the applicant, that it was neither reliable nor complete, that it did not provide for any reduction in production capacity, and that it did not allow the firm to become viable again. It also takes the view that the applicant cannot draw a parallel between the present case and the Enichem case.

73 Second, the Commission maintains that no measures have been taken to offset as far as possible the adverse effects of the aid on competitors. First of all, it confirms that the restructuring plan did not provide for any reduction in production capacity. It then points out that it did not mention any structural overcapacity in the meat-processing sector in the contested decision. Reference was made to overcapacity only as regards feedingstuffs, pig farming and pig slaughtering. It adds that, under the third indent of point 2.1 of the Annex to Decision 94/173, investments relating to animal feed production for units producing less than 20 000 tonnes per year in Objective 1 regions are not excluded from Community financing where there is a proven shortage of capacity. Lastly, the Commission adds that since the applicant was located in a less favoured region, it considered the possibility of effecting a more flexible assessment as regards the requirement of production capacity reduction.

74 Third, the Commission maintains that the aid in question was not proportionate to the costs and benefits of restructuring. It argues, first of all, that the Molina family did not contribute any additional capital, since only the IFA was involved in the recapitalisation, and that nor did it sustain any loss as a result of the reduction of its holdings in the applicant. It then affirms that the write-off by the private creditors of part of their claim as part of a suspension of payments proceeding cannot be considered to be a contribution by the firm to its own restructuring. It points out that, in any event, the remissions of debt granted by private creditors were negligible. The Commission also disputes the relevance of the references made by the applicant to the GEA, Santana Motor and Enichem decisions, and to *Ducros* v *Commission*, cited above.

75 Fourth, the Commission states that it received the restructuring plan only on 23 July 1997, and was thus unable to give an opinion in time or impose conditions for its implementation. It also disputes the allegation that no meetings were held between its officials and the Spanish authorities, and maintains that it

kept them continually informed of the doubts it had about the legality of the aid and the capacity of the plan to enable the firm to become viable again.

76 Fifth, the Commission maintains that, in order to assess whether the aid is compatible with the common market, the importance of the socioeconomic situation of a region varies according to whether the aid is regional (Article 92(3)(a) of the Treaty) or sectoral (Article 92(3)(c) of the Treaty). The former has as its objective the development of less favoured regions by favouring investment and job creation in the context of durable development, and is deemed to be compatible only when it can be guaranteed that a balance will be struck between the distortions of competition caused by its being granted and the benefits it provides for regional development. This last requirement is generally considered not to be met in the case of individual grants of aid, except in the case of multi-sectoral schemes which are open for all firms in the sectors concerned in the less favoured region in question. It explains that, in the light of those criteria, it concluded in the contested decision that the aid granted to the applicant had not been drawn up as regional aid for new investment or job creation, or even as aid to overcome infrastructure-related handicaps across the board for all firms in the region, but rather as aid intended for the rescue and restructuring of a specific firm. Under point 2.4 of the guidelines, the only exemption for these types of aid is under Article 92(3)(c) of the Treaty. Referring by way of counterargument to Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, the Commission does acknowledge, however, that consequences for the region must be taken into consideration 'in a sectoral assessment'. It points out that, in the contested decision, it duly examined the aid in question in the light of point 3.2.3 of the guidelines, which lays down specific conditions for restructuring aid in assisted regions. It explains that when regional developmental needs so warrant, it can require the firm in question to effect a lower capacity reduction than it would impose in other cases. Lastly, the Commission reiterates that, in its Santana Motor decision, it took account of the socioeconomic context along with other factors which are not present in the case at hand.

Findings of the Court

77 Pursuant to point 3.2.1 of the guidelines:

'Aid for restructuring raises particular competition concerns as it can shift an unfair share of the burden of structural adjustment and the attendant social and industrial problems on to other producers who are managing without aid and to other Member States. The general principle should therefore be to allow restructuring aid only in circumstances in which it can be demonstrated that the approval of restructuring aid is in the Community interest. This will only be possible when strict criteria are fulfilled and full account is taken of the possible distortive effects of the aid.'

78 The guidelines require restructuring aid to be part of a plan. Under point 3.2.2 of the guidelines, approval of the plan is subject to three substantive conditions: it must enable long-term restoration of viability of the undertaking, avoid undue distortions of competition and ensure the proportionality of the aid in relation to the restructuring costs and benefits. Moreover, it is incumbent on the firm to implement the restructuring plan, as accepted by the Commission, fully (point 3.2.2(iv)) and the implementation and satisfactory progress of the plan must be monitored by the Commission, to which detailed annual reports must be submitted (point 3.2.2(v)).

79 It is necessary to examine whether the Commission committed a manifest error of assessment in considering whether these conditions were met in the present case. It should be borne in mind that, subject to the special provisions for assisted areas

(see paragraph 109 below), all of the conditions must be met for the Commission to approve restructuring aid (point 3.2.2 of the guidelines).

— Restoration of viability

80 The first subparagraph of point 3.2.2 of the guidelines states as follows:

'The *sine qua non* of all restructuring plans is that they must restore the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions. Consequently, restructuring aid must be linked to a viable restructuring/recovery programme submitted in all relevant detail to the Commission. The plan must restore the firm to competitiveness within a reasonable period.... [T]he restructuring plan must be considered capable of putting the company into a position of covering all its costs including depreciation and financial charges and generating a minimum return on capital such that, after completing its restructuring, the firm will not require further injections of State aid and will be able to compete in the market place on its own merits. Like rescue aid, aid for restructuring should therefore normally only need to be granted once.'

81 The Court finds that, in the contested decision, the Commission established a number of factors which sufficiently demonstrated that the restructuring plan does not meet the abovementioned requirements.

82 First, it stated that the plan had been drawn up 'based on insufficient and unreliable information' (recital 111), that it referred 'only to the aid already

granted between May and December 1995 and to the loan of ESP 1 739 million granted in 1996', and that it 'provided for the firm's other financial needs to be met on the market and for the possible grant of further State aid, of an unspecified amount' (recital 112).

83 An examination of the plan shows that these allegations are well founded on the facts. In the introduction to the April 1997 revision, the Spanish authorities even explicitly state that the restructuring plan is based on incomplete and inaccurate information. In their observations, the applicant and the Kingdom of Spain merely refer to a number of difficulties surrounding the drawing up of the plan; this does not, however, alter the fact that it is inadequate.

84 Second, the Commission found that the measures provided for in the restructuring plan were not of such a nature as to restore the viability of the firm.

85 First of all, in recitals 26 and 27 of the contested decision, where it described the measures and production forecasts, it pointed out that '[u]nder the... plan, the firm's profitability was to be restored by substantially increasing the production of all its divisions' and considered that it was 'unrealistic to base the firm's return to viability on an increase in production... in a sector suffering from structural overcapacity' (recital 113).

86 In response to this line of argument, the applicant and the Kingdom of Spain state that the restructuring plan provided for a reduction in production capacity and dispute that there was structural overcapacity in the relevant sectors.

87 With respect to the first point, an examination of the restructuring plan shows that it did not envisage cutbacks in the applicant's production capacity. On the contrary, it provides for increases in capacity for most of its production divisions and for major investments to be made. In addition, the applicant, when expressly asked by the Court as part of its measures of organisation of procedure (see paragraph 17 above) to identify the specific passages in the plan which provided for a reduction in its production capacity, essentially limited itself to referring to a few reductions in its assets.

88 Admittedly, it is common ground that the applicant was going through a deep crisis in 1995, and that its production figures for that year, as reproduced in the table in recital 27 of the contested decision, were thus particularly low. When the firm's production forecasts in the same table are read together with these figures, they could give a somewhat erroneous impression of the scope of the measures relating to production capacity in the restructuring plan. However, the information provided by the applicant in response to a written question from the Court (see paragraph 17 above) shows that its total sales figures and the production figures for each of its production divisions had already started to decline sharply in 1993. Thus, even if 1994 rather than 1995 is used as a reference year, the plan forecasts show beyond a doubt that the production of the applicant's divisions remained the same or, in some cases, even increased. Accordingly, the criticisms of the Commission's use of figures in the contested decision cannot be accepted.

89 Admittedly, too, the Commission does refer in the contested decision to capacity reductions effected subsequently by the applicant (see recitals 46, 124 and 141 of the contested decision). It must be borne in mind, however, that as rightly pointed out by the Commission in recital 125 of the contested decision, those reductions are merely notional, because they relate to production divisions which were already no longer in use. For instance, with respect to the closure of a

slaughterhouse with a capacity of 240 pigs an hour, the April 1997 revision explicitly states that it had 'not been used for three years' (page 104). Likewise, the revision shows that the cutting plant which was closed was already no longer in use (page 104) and that the two feedingstuffs plants had 'remained practically unused' (page 34).

90 For the same reasons, the applicant cannot rely on the Enichem decision. In that case, the firm had made sizeable reductions not only in its workforce, but also in all of its production capacity for its entire range of products.

91 Nor have the applicant and the Kingdom of Spain presented any convincing evidence which disproves the statement of the Commission that the Community market has structural overcapacity in the areas of feedingstuffs and the farming and slaughter of pigs (recital 123 of the contested decision).

92 Second, the Commission stated in the contested decision that '[t]he internal restructuring measures were equally unrealistic because they were based on insufficient and unreliable information' (recital 113). For the reasons given in paragraphs 82 and 83 above, it cannot be disputed that this conclusion is well founded.

93 Third, the Commission, whilst recalling that '[i]n principle, State aids must be assessed at the time they are granted, not in the light of subsequent developments' (recital 115), did examine the results attained by the applicant under the restructuring plan, and found that they showed that the plan had not really enabled it to become viable again.

94 It essentially found that, whilst there had been an improvement in the applicant's results in recent years, a number of factors seriously undermined the positive picture.

95 First of all, the Commission observed that, even though the applicant had received aid continuously since 1993, 'the only alternative to bankruptcy for HAMSA, which had been on the brink of failure since at least 1994, was to capitalise its debts' (recital 114). This observation, the pertinence of which cannot be disputed, is based on perfectly correct findings of fact. For instance, it is clearly established that considerable amounts of aid were granted to the applicant without interruption between 1993 and 1997. Moreover, the April 1997 revision explicitly states that, if ESP 4 680 million of the applicant's debts to the IFA were not converted into capital, it would have to be put into liquidation.

96 Second, the Commission considered that, in order for it to find that the firm had become viable again, its situation had to be remedied, so that it was not possible to 'disregard the company's financial responsibilities, which have absorbed its assets, nor to be satisfied with any recent positive cash flow, in view of the firm's continual losses' (recital 115). Again, these considerations, in addition to the fact that their pertinence cannot be doubted, are corroborated by the evidence. Thus, it has been established that the applicant's losses totalled ESP 1 231, 2 616, 2 123, 3 229, 2 690 and 1 503 million in 1992, 1993, 1994, 1995, 1996 and 1997, respectively, and that, in the first quarter of 1998, they still totalled ESP 126 million. The profits referred to by the applicant and the Kingdom of Spain only exist if one takes account of the extraordinary expenses and income of the firm. In the document annexed to their written observations of 21 October 1998, however, the Spanish authorities admit themselves that in the present case it is appropriate to take account of the net operating result 'in order to avoid any distortion in the understanding of the changes in the firm's situation'. Likewise, in its written observations, the Kingdom of Spain indicates that 'the reason why the extraordinary results are not taken into account for the purposes of auditing the

changes in the firm's situation is that they... are not achieved regularly by the firm, so that, even though they may make the firm viable in the short term, it is not possible to credit them with restoring the viability of the firm in the long term'. Moreover, the applicant's total debt reached ESP 6 208, 6 966, 7 969, 9 194, 14 005, 6 159 and 6 834 million, depending on the year, from 1992 to 1998. Lastly, contrary to what the applicant stated, its expenses were not brought down by very much, but rather remained relatively stable between 1995 and 1998.

97 Third, the fact that an outside firm expressed interest in purchasing the applicant was found by the Commission not to be decisive. The Commission's reasons on this point cannot be held to be manifestly erroneous. According to the Court file, the purchase offer did not concern the firm as a whole, as a viable economic entity, but rather focused on certain of its assets relating to the meat-processing sector, on the assumption that the firm would then be placed in liquidation. The offer, moreover, contained important restrictions concerning the liabilities and other expenses the purchaser was ready to take on (recitals 50(c) and 119 of the contested decision). Furthermore, it has not been sufficiently established that the purchase offer envisaged did not itself contain any element of State aid. It was not preceded by an open, transparent and unconditional tendering procedure, but came after a simple procedure to have potential purchasers identified and any offers assessed by a specialised consultant.

98 Nor can the applicant rely on the Enichem decision, since the facts on which that decision was based are fundamentally different from the ones present in the case at hand. In the case giving rise to that decision, there was a restructuring plan providing for sizeable capacity reductions (see paragraph 90 above), and the restructured activities of the firm in question had generated positive results already in the first year under the plan and the financial forecasts predicted 'a good level of profitability, acceptable to a private investor' as of the following year. In addition, the authorisation for the aid in that case had been subject to a number of strict conditions aimed at guaranteeing that the proposed measures

would lead to the desired result. Lastly, privatisation was considered as making 'viability... more certain' because the income from the sale of the subsidiaries of the firm receiving the aid would be 'used in full to reduce the indebtedness to be covered by the aid approved'.

99 It follows from the foregoing considerations that the Commission did not commit any manifest error in finding that the first substantive condition imposed by the guidelines was not fulfilled.

— Avoidance of undue distortions of competition

100 In order to avoid undue distortions of competition, measures must be taken 'to offset as far as possible adverse effects on competitors'. In particular, the second subparagraph of point 3.2.2(ii) of the guidelines states:

'Where on an objective assessment of the demand and supply situation there is a structural excess of production capacity in a relevant market in the European Community served by the recipient, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market in the European Community by irreversibly reducing or closing capacity production. A reduction or closure is irreversible when the relevant assets are scrapped, rendered permanently incapable of producing at the previous rate, or permanently converted to another use....'

101 In the contested decision, the Commission concluded that this condition was not fulfilled, after having found that some of the applicant's activities were 'carried out in sectors where the Community market has structural overcapacity' (recital 123), that the restructuring plan did not provide for any reductions in capacity (recital 125) and that the reductions effected subsequently did 'not seem to apply to capacity actually used by the firm' (recital 125).

102 It follows from paragraphs 85 to 91 above that the applicant and the Kingdom of Spain have not established that the findings are manifestly erroneous. Consequently, the Court finds that the Commission was justified in finding that the second substantive condition imposed by the guidelines was not fulfilled.

— Proportionality of the aid to the costs and benefits of restructuring

103 With regard to the proportionality of the aid to the costs and benefits of restructuring, the first subparagraph of point 3.2.2(iii) of the guidelines states:

'The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid recipients will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing.... Aid for financial restructuring should not unduly reduce the firm's financial charges....'

104 In the contested decision, the Commission found that this third condition was not fulfilled inter alia because 'the only party that contributed to the restructuring plan by bringing in new resources was the State' (recital 127).

105 The arguments put forward by the applicant and the Kingdom of Spain do not prove that this finding was a manifest error.

106 First, the debt remissions granted to the applicant by its private creditors, including the Molina family, and the sacrifices agreed to by its employees cannot be likened to a contribution by the firm receiving the aid through its own resources or external commercial financing within the meaning of the first subparagraph of point 3.2.2(iii) of the guidelines. The same must be said of the reduction of the Molina family's holdings in the applicant.

107 Second, the circumstances of the present case are vastly different from those leading to the decisions in GEA, Santana Motor, Enichem and the judgment in *Ducros* v *Commission*, cited above, and on which the applicant relies. In GEA, there was clear provision that the firm receiving the aid would cover a major part of the restructuring costs using its own resources. In its decision in Santana Motor, the Commission took into account inter alia the fact that the intensity of the aid accounted for only 36.3% of the total costs of restructuring and was roughly equal to the reductions in capacity (30%) made by the firm. In Enichem, in addition to the points mentioned in paragraph 98 above, the Commission observed that 'the beneficiary will contribute significantly to the financing of the restructuring and liquidation plan, by reinvesting in it the incomes arising from the sale of assets and subsidiaries and also from the same final privatisation of [the] restructured business area'. Lastly, in the decision contested in *Ducros* v *Commission*, cited above, whilst the Commission had taken into account inter

alia the fact that the existing capacity of the two firms receiving the aid would be reduced and that the Italian State had undertaken to privatise one of them, it should be borne in mind that the planned reduction was 50% and the privatisation was to be achieved by means of an 'unconditional call for tenders which will enable the market to fix the price of [the firm], thus removing any disproportionate aspect of the aid' (paragraph 68).

108 It follows from all of the foregoing considerations, without it being necessary to examine the two last conditions imposed by point 3.2.2 of the guidelines (paragraphs 78 and 79 above) that the Commission made no manifest error in finding that the aid in question constituted not restructuring aid, but rather 'a string of specific aid payments intended solely to keep the firm in business' (recital 132 of the contested decision).

— Special conditions applicable to restructuring aid in assisted areas

109 The guidelines provide in point 3.2.3 that the Commission must take the needs of regional development into account when assessing restructuring aid in assisted areas, whilst emphasising that the criteria set out in point 3.2.2 (see paragraph 78 above) remain applicable to those regions. Thus, point 3.2.3 provides inter alia:

'In particular, the result of the restructuring operation must be an economically viable business that will contribute to the real development of the region without requiring continual aid. Recurrent injections of aid will thus not be viewed any more leniently than in non-assisted areas. Likewise, restructuring plans must be followed through and monitored. To avoid undue distortions of competition the aid must also be in proportion to restructuring costs and benefits. Somewhat more flexibility can be shown in assisted areas, however, with regard to the requirement for a reduction in capacity in the case of markets in structural overcapacity. If regional development needs justify it, the Commission will require a smaller capacity reduction for this purpose in assisted areas than in non-assisted areas and will differentiate between areas eligible for regional aid pursuant to Article 92(3)(a) of the Treaty and those eligible pursuant to Article 92(3)(c) to take account of the greater severity of the regional problems in the former areas.'

110 In the contested decision, the Commission applied these principles correctly, contrary to the applicant's submissions.

111 First of all, it reaffirmed that the applicant had received recurring aid over a five-year period without that aid having guaranteed that the firm's viability would be restored, that the restructuring plan had not been implemented correctly and could not be adequately monitored, and that the aid was not in proportion to the costs and benefits of the restructuring (recitals 136 and 137). It follows from the considerations discussed in paragraphs 80 to 99 and 103 to 108 above that, in any event, as regards the criteria for a restoration of viability and proportionality of the aid, these statements are not marred by any manifest error of assessment.

112 Second, the Commission examined the arguments of the Spanish authorities concerning the reductions in production capacity allegedly effected by the applicant, before repeating that the restructuring plan did not provide for any

such reductions and stating that the subsequent reductions 'were specific adjustments not carried out as part of a restructuring plan' (recitals 139 and 140).

113 The Commission did take full account of the fact that the applicant is located in a less favoured region. In recital 141 of the contested decision, it explicitly stated that it was willing to be less stringent regarding the required reductions in production capacity because of that fact. It had to conclude, however, that even on a more flexible reading of the rules, the aid in question could not qualify for an exemption, since the other conditions in the guidelines were not met.

114 It must be held that this conclusion is not a manifest error. As emphasised in point 3.2.3 of the guidelines, the fact that an ailing firm is located in an assisted area does not justify a wholly permissive approach to aid, and the guidelines state that 'distortions of competition must be minimised even in the case of aid to firms in assisted areas'. Likewise, in Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 71, the Court emphasised that the possibility, which amounts to an exception, of relaxing the requirement for reducing capacity where the market concerned shows structural excess capacity does not call into question 'the primary requirement that there be a coherent and realistic restructuring plan enabling the undertaking to be restored to viability'. Accordingly, the Commission cannot be criticised for having refused to allow a firm an exemption based on regional development needs when that firm, even supposing it has carried out reductions in capacity which — on a relaxed reading of the rules — could be found to be sufficient, does not meet one or more of the other conditions imposed by the guidelines.

115 Consequently, without it being necessary to examine the other complaints and arguments put forward on this point by the applicant and the Kingdom of Spain, the third plea must be dismissed as unfounded.

The fourth plea: the capitalisation of part of the debts of the applicant

Arguments of the parties

116 The applicant and the Kingdom of Spain maintain that the capitalisation of ESP 4 680 million of the firm's debts owed to the IFA is not State aid within the meaning of Article 92(1) of the Treaty and that the IFA in fact acted like a private investor in carrying out that operation.

117 They argue that this operation was provided for in the restructuring plan and was necessary to restore the viability of the firm.

118 They state that the primary objective of the operation was to enable the IFA to monitor the applicant. If this had not been the case, the Molina family would have automatically acquired control of a restored firm on 31 December 1997, and the IFA would have become an 'ordinary creditor' without influence on the implementation of the restructuring plan, the recovery of debts and the future of the firm.

119 The applicant and the Kingdom of Spain also argue that if the IFA had not effected this capitalisation, the firm would have had to be put into liquidation with a declaration of bankruptcy pursuant to Article 260 of the Ley de Sociedades Anónimas (Companies Act), which would not have been the most economically advantageous solution. This procedure, which would have left the firm under the direct control of the Molina family, would have also exhausted the

assets of the firm and, consequently, prevented most of the creditors, including the IFA, from recovering the amounts owing to them. The applicant adds that the capitalisation operation was more advantageous than liquidation. It points out that, at the hearing, the figure of ESP 3 700 million mentioned in the letter of 21 October 1998 from the Spanish authorities only referred to its assets in the meat-processing sector. In fact, that same letter also mentioned that the total value of the firm's assets was ESP 6 125 million, i.e. more than the capitalisation.

120 Lastly, the Kingdom of Spain argues that the capitalisation of the applicant's debts did not entail any injection of new funds into the firm.

121 The Commission takes the view that the capitalisation constitutes State aid because a private investor would not have carried it out in such circumstances.

122 It adds that, according to the case-law, it is sufficient that the capitalisation effected by the public authorities is of a value higher than the liquidation value of the assets of the firm in question for there to be a finding that there is State aid. In response to a written question from the Court (see paragraph 17 above), it refers to the letter of 21 October 1998 from the Spanish authorities and states that the firmest offer to purchase the applicant evaluated its assets at ESP 3 700 million, that is to say at an amount very much lower than the capitalisation value.

123 The Commission adds that the obligation imposed by the Spanish company legislation to re-establish the financial equilibrium of a firm whose property has been significantly reduced due to losses applies only when the intention is to keep the firm as a going concern, with the possibility of placing the firm in liquidation

remaining open, since it may prove economically a more attractive option than a large-scale capitalisation. It points out that the applicant's main creditors were public bodies which, by virtue of that fact, enjoyed privileges and even bank guarantees.

124 In response to the argument of the Kingdom of Spain to the effect that the capitalisation did not entail any injection of new capital, the Commission observes that, as indicated in recital 88 of the contested decision, that operation was not taken into account in the calculation of the total amount of State aid granted to the applicant in order to avoid double posting.

Findings of the Court

125 It is useful to recall that, according to settled case-law, investment by public authorities in the capital of undertakings, in whatever form, may constitute State aid (see Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 18).

126 In order to determine whether the conversion into capital of part of the applicant's debts to the IFA constitutes State aid, it is appropriate to apply the criterion used in the contested decision, that of the private investor, which was not contested by the Kingdom of Spain. Thus, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the public investor might have provided capital of such an amount. It has been stated in that regard that although the conduct of a private investor with which the intervention of a public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with

a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term (*Italy* v *Commission*, cited above, paragraph 20; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraphs 20 to 22; Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 79; and Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 96).

127 It must also be remembered that the assessment by the Commission of the question whether an investment satisfies the private investor criterion involves a complex economic appraisal (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraphs 10 and 11, and *Alitalia* v *Commission*, cited above, paragraph 105). When the Commission adopts a measure involving a complex economic appraisal, it enjoys a wide discretion and judicial review of that measure on this point is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (*Belgium* v *Commission*, cited above, paragraph 11). In particular, the Court is not entitled to substitute its own economic assessment for that of the Commission (*BFM and EFIM* v *Commission*, cited above, paragraph 81, and *Alitalia* v *Commission*, cited above, paragraph 105).

128 It is in the light of those principles that the arguments put forward by the parties in the present case must be assessed.

129 In the contested decision, the Commission found that the capitalisation operation did not meet the private investor criterion, in the light of two main considerations.

130 It found, first of all, that a private investor would not have agreed to capitalise a firm's debt of ESP 4 680 million in order to acquire 80% of its share capital, which was thereby reduced to ESP 500 million, when the firm's financial situation, particularly its volume of debt, was such that a normal return on the capital invested could not be expected within a reasonable time (recitals 58 and 60).

131 This finding cannot be said to be a manifest error. As the information in paragraph 96 above shows, during the years immediately preceding the operation which is the subject of the present action, the applicant sustained repeated, sizeable losses in relation to its sales figures and had become very heavily indebted. It had, furthermore, needed several grants of aid by the public authorities merely to survive.

132 Second, the Commission pointed out that there was no valid and reliable restructuring plan which would enable the applicant to regain viability (recital 60). In this connection, it is sufficient to note that the applicant and the Kingdom of Spain have not shown that this finding was a manifest error (see paragraphs 80 to 99 above) and that, moreover, a private investor contemplating carrying out such large-scale financing and recapitalisation as that in this case would have actually required a restructuring plan capable of making the company viable (*BFM and EFIM* v *Commission*, cited above, paragraph 86).

133 The arguments put forward by the applicant and the Kingdom of Spain do not invalidate these findings.

134 Thus, to begin with, even if the capitalisation of the applicant through conversion of part of its debts to the IFA could be considered to be an essential element of the

restructuring plan, this would not be sufficient to satisfy the private investor criteria, since the plan was incomplete and unreliable, and since there was no provision for a significant reduction of the costs and production capacities of the firm.

135 Second, the argument that this operation was aimed at preventing the Molina family from reacquiring control of the applicant and the IFA from becoming an 'ordinary creditor' without influence on the implementation of the restructuring plan is hardly convincing. As rightly pointed out by the Commission in its written observations, it is, as a starting proposition, highly unlikely that a private investor would have agreed to acquire the bare ownership of all of the shares of the applicant in order to rehabilitate it, whilst being required to transfer it back to the former owners at a predetermined date in return for purely notional consideration. It is, moreover, common ground that the IFA was a preferential creditor by virtue of its status as a public body. It thus had some chance of recovering at least part of its claims in the event of the company's being liquidated. Following the capitalisation, however, the IFA became the main shareholder of the applicant and thus found itself in a much less favourable position. It is doubtful that a private investor holding privileged claims would have agreed to putting itself in such a position with the primary goal of being able to monitor the restructuring of its own debtor company whilst it could not be reasonably expected, in the light of inter alia the points discussed in paragraphs 131 and 132 above, that it would be restored to viability.

136 Third, the argument of the applicant and the Kingdom of Spain that the recapitalisation operation was necessary to avoid the applicant's being put into liquidation is not conclusive. In particular, the applicant and the Kingdom of Spain have not shown that liquidation would not have been the most economically advantageous solution for the IFA in this case. As pointed out in paragraph 135 above, the IFA was a preferential creditor so that it would probably have recovered part of what it was owed in the event of liquidation.

Nor have the applicant and the Kingdom of Spain presented any specific evidence whatsoever to substantiate their argument that liquidation proceedings would have exhausted the applicant's assets. Nor, moreover, is there anything to indicate that the Molina family would not have been in a position to conduct such proceedings effectively themselves.

137 It follows that the fourth plea must be dismissed as unfounded.

The fifth plea: the debt remissions granted to the applicant

Arguments of the parties

138 The applicant and the Kingdom of Spain maintain that the debt remissions granted by the public bodies in May 1997 do not constitute State aid within the meaning of Article 92(1) of the Treaty.

139 First, they point out that the Spanish law of 26 July 1922 concerning suspension of payments institutes a general type of procedure applicable to all companies in difficulty, aimed at protecting both private and public creditors. The condition that it should relate to a specific undertaking, which is one of the defining features of State aid, is thus not met in the present case (Case C-200/97 *Ecotrade* [1998] ECR I-7907). They add that the suspension of payments proceedings is of a judicial nature and that the Spanish judge examines whether the measures taken as part of those proceedings comply with the applicable Spanish law.

140 Second, the applicant argues that its private creditors have agreed to a major sacrifice through their debt remissions. It states that they were not 386 but 400 in number, that its debt to private investors accounted for more than 4.4% of its total debt, and that the Commission failed to take account of very important private investors, some of whom held preferential claims, in its analysis. The table in recital 43 of the contested decision, which only lists eight private creditors, is thus not representative. It also reiterates that the average percentage of remission by the private creditors (59.58%) was higher than for public creditors (50.75%). The Kingdom of Spain argues that the debt remissions by public bodies were not aimed at favouring the applicant, but rather to enable them to recover a larger share of their claim. It emphasises that the debt remission amounts were set using a method accepted by all of the creditors and applied without distinction to public and private creditors. It also complains that the Commission did not specify in the contested decision that the bank guarantees held by the Junta de Andalucía and the social security covered only a part of their claims, and states that it informed the Commission that the Banco Atlántico had granted a first-ranking mortgage to the applicant on 24 January 1994.

141 More specifically, with respect to the IFA, the applicant and the Kingdom of Spain argue that it acted like a private investor when it wrote off 99% of its claim. This enabled the IFA to revalue its holdings in the share capital of the firm to bring it to 80.6% of the amount of its debt remission. The applicant adds that the restructuring plan provided that it would be necessary to end the suspension of payments proceedings and that the IFA, in its capacity as main shareholder of the firm, had to reduce the firm's financial outgoings. Lastly, it points out that, in the GEA decision, the Commission authorised debt remissions by public bodies accounting for 78% of their claims, even though they were not shareholders of the firm in question.

142 The applicant points out that the social security's debt remission accounted for a mere 53.41% of its claim, lower than the average percentage of remission by private creditors and almost identical to the average percentage for all creditors

(53.24%). The Kingdom of Spain adds that if the social security had signed on to the debt remission agreement, its debt remission would have equalled 98.8% of its claim. It points out that the social security granted no debt remission for its mortgage claims. The social security's other, unsecured, preferential claims had a level of remission (56%) equivalent to the average level of remission by preferential creditors. The Commission does not mention that the social security had exercised its right of abstention for all of its claims and increased its mortgage guarantees. It had also made the implementation of its individual agreement with the applicant subject to prior approval by the creditors which were parties to the debt remission agreement. Lastly, the applicant and the Kingdom of Spain refer to Commission Decision 1999/88/EC of 14 July 1998 concerning State aid in favour of 'Porcelanas del Norte SAL (Ponsal)/Comercial Europea de Porcelanas SAL (Comepor)' (OJ 1999 L 29, p. 28; hereinafter the 'Ponsal decision').

143 As regards the tax authorities, the applicant points out that their claim was not secured by a mortgage and that its debt remission equalled only 36.49% of its claim, a percentage lower than the average percentage of remission by public and private creditors. The Kingdom of Spain states that the tax authorities had exercised their right of abstention and that if they had signed on to the debt remission agreement, their remission would have corresponded to 98.8% of their claim. The applicant and the Kingdom of Spain add that the tax authorities had made the implementation of their individual agreement with the applicant subject to prior approval by the creditors which were parties to the debt remission agreement. Lastly, the applicant refers to the GEA decision.

144 The applicant points out that debt remission granted by the Confederación Hidrográfica del Guadalquivir concerned only 45.84% of its claim, in other words, a percentage lower than the average percentage of remission by public and private creditors.

145 Lastly, the claims of the Ayuntamiento de Jaén and the Junta de Andalucía accounted for a mere 5% of the total amount of public claims, and were not covered by mortgage security. The applicant and the Kingdom of Spain allege

that these two public bodies waived their right of abstention and signed on to the debt remission agreement with a view to recovering as much as possible of their claims. This type of position was accepted by the Commission in Commission Decision 97/21/EC, ECSC of 30 July 1996 on State aid granted in favour of Compañía Española de Tubos por Extrusión SA, located in Llodio (Álava) (OJ 1997 L 8, p. 14).

146 The Commission contends that the debt remissions granted by the public creditors do not meet the private investor criterion and, therefore, constitute State aid.

147 It points out, first of all, that it never disputed that these debt remissions complied with Spanish legislation governing suspension of payments, and that it confined itself to analysing the behaviour of public creditors as compared with that of private creditors. It emphasises that the competent Spanish court and the private creditors apparently did not oppose the decision by the State, the principal creditor, to agree voluntarily to a much greater sacrifice than the private creditors.

148 The Commission adds that the fact that bankruptcy proceedings are of a general nature does not preclude that a measure taken as part of those proceedings by the public authorities may have some features of State aid (Opinion of Advocate General Fennelly in *Ecotrade*, cited above, points 31 and 32).

149 Next, referring to its communication on public authorities' holdings in company capital (*Bulletin of the European Communities* 9-1984), it states that a public acquisition of holdings in a company which occurs concomitantly with a private acquisition of holdings does not constitute State aid when the share held by the private investor has a genuine economic significance. Reasoning by analogy, it

argues that 'for public loans to be written off in accordance with the criteria of private investors..., the concomitant cancellation by private creditors must also be significant and real'. It argues that in the present case that condition is not met given that the applicant's debt to the private sector corresponded to 4.4% of its total debt and the average percentage of remission by private creditors was much lower than that of public creditors. The Commission also points out that the public creditors enjoy a certain priority in liquidation proceedings, and that the rather sizeable claims of the social security were secured by a mortgage. It considers that the argument advanced by the Kingdom of Spain based on the method used to set the amounts of debt remissions (see paragraph 140 above) is totally irrelevant.

150 The Commission doubts that the actions of the IFA, in the light of the high level of debt of the applicant, could have the effect of increasing value to the extent claimed by the applicant and the Kingdom of Spain. It points out that they have not, in any event, provided any analysis with figures to support their argument. Nor was the capitalisation of the firm carried out consistent with the private investor criterion. Lastly, it contests the relevance of the reference to its GEA decision.

151 The Commission states that the Spanish authorities had not informed it of the increase of the social security's mortgage security. It observes that, in their observations of 19 December 1997, the Spanish authorities had indicated that the social security had granted a debt remission of 98.75% for its unsecured preferential claims and 'written off' its mortgage claims. It also points out that, in the case which gave rise to the Ponsal decision, the Spanish authorities had shown, with supporting figures, that, of all the insolvency arrangements provided for by the Spanish legislation, the one chosen was the only one which allowed public creditors to recover at least one quarter of the amount of their claims. In the present case, however, no such analysis with figures has been submitted.

152 As regards the debt remission granted by the tax authorities, the Commission acknowledges that it was proportionately lower than that of the other public bodies, but believes that account should be taken of the 'context of the total volume of public claims' (see paragraph 155 below). It adds that the reference to the GEA decision is not relevant to the present case.

153 The Confederación Hidrográfica del Guadalquivir, according to the Commission, was a preferential creditor and its debt remission was equal to, but not lower than, that of the private creditors who had non-preferential claims for similar amounts.

154 The Commission states with respect to the Ayuntamiento de Jaén and the Junta de Andalucía that they granted debt remissions which were much higher than those of the private creditors. It adds that the Junta de Andalucía held mortgage security for ESP 21 million.

155 Lastly, the Commission emphasises that the debt remissions granted by the various public bodies should be examined, not individually, but from an overall standpoint, 'in the light of the total volume of claims of the public creditors as compared to the private creditors and the sacrifice agreed to by some in return for their respective cancellations'. It points out that the average percentage of remission on the part of the public creditors, including the IFA, was 72.62%, whilst for the private creditors the figure was 59.58%.

Findings of the Court

156 First, it should be observed that the specific nature of a State measure, namely its selective application, constitutes one of the characteristics of State aid within the

meaning of Article 92(1) of the Treaty. In that regard, it is necessary to determine whether or not the measure in question entails advantages accruing exclusively to certain undertakings or certain sectors of activity (see Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 24; *Ecotrade*, cited above, paragraphs 40 and 41; and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 39).

157 In the present case, the argument relied on by the applicant and the Kingdom of Spain to the effect that the Spanish law of 26 July 1922 concerning suspension of payments institutes a general procedure, applicable to all companies in difficulty, cannot be accepted. Whilst it is true that the law does not have authority to apply selectively in favour of certain categories of undertakings or sectors of activity, it must be remembered that the debt remissions criticised by the Commission do not flow automatically from the application of the law, but from the discretionary decisions made by the public bodies in question. It is, moreover, settled case-law that where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature (Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 27).

158 Nor can the argument that the debt remissions at issue here were granted in the course of judicial proceedings and in accordance with the applicable Spanish law be accepted. It is settled case-law that Article 92(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 16, and *CETM* v *Commission*, cited above, paragraph 53).

159 Next, it should be remembered that State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community Courts must, in principle, having regard both to the specific features of the case before them and to the technical or complex nature of

the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 92(1) of the Treaty (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25).

160 In the contested decision, the Commission employed the private investor criterion to determine whether the debt remissions constituted State aid, making a distinction between the situation of the IFA and that of the other public bodies under examination.

161 With respect to the debt remission by the IFA, the Commission found, first, that it could not be justified 'by concluding that the IFA was acting as a shareholder [of the applicant]' (recital 64 of the contested decision). Next, it stated that 'a distinction must be drawn between the behaviour of the State as owner of share capital and its behaviour as a public authority' and that '[p]rivate companies and their private shareholders do not have the option of cancelling their debts towards the State', before concluding that 'the cancellation of the above debts' could not be regarded as being in conformity with the criteria of a private investor (recital 64 of the contested decision).

162 The findings of the Commission referred to in the preceding paragraph have no binding legal effects which might affect the interests of the applicant. As indicated in recitals 64, 90 and 97 of the contested decision, the amount of the IFA's debt remission was not taken into account for the calculation of the total amount of aid granted to the applicant, in order to avoid double posting. The IFA's remission, in fact, relates to the loans and guarantees granted by the IFA in 1993 and 1994, which were already included in the calculation. Accordingly, the IFA's debt remission is not covered by any paragraph of the operative part of the contested decision, and there is no reason to rule as to whether these findings are well founded.

163 With regard to the other public bodies, the Commission based its assessment on the premises that 'for public loans to be written off in accordance with the criteria of private investors and not to constitute State aid, the concomitant cancellation by private creditors must also be significant and real' (recital 65(c) of the contested decision; see paragraph 149 above).

164 It essentially compared the total amount of public claims with the private claims, the average percentage of debt remission for public claims with private claims, and privileges and mortgages held by public creditors with those held by private creditors (recitals 65 and 66 of the contested decision; see paragraphs 149, 152 and 155 above). It found that '[the applicant's] debt to the private sector accounted for only 4.4% of its total debt' (recital 65(a) and (a) of the first subparagraph of recital 66 of the contested decision), that the public creditors had granted proportionally higher debt remissions than the private creditors ((b) of the first subparagraph of recital 66 of the contested decision, and paragraph 155 above) and that, as a rule, public creditors, unlike private creditors, were 'insured or at least privileged' and even, in the case of the social security, held a mortgage (recital 65(b), and (c) and (d) of the second subparagraph of recital 66 of the contested decision). The Commission concluded from these various factors that 'the sacrifice made by the public creditors... [was] very substantial, while that of the privileged creditors... [was] negligible or non-existent (first subparagraph of recital 66 of the contested decision) and that, consequently, the debt remissions by the public authorities did not meet the private investor criterion'.

165 The method thus applied by the Commission in the contested decision is inadequate and, accordingly, cannot be accepted.

166 First of all, the share of the overall debt of an undertaking in difficulty represented by the claims of public bodies does not in itself constitute a decisive factor for determining whether the debt remissions granted by those bodies to the

undertaking bear some of the hallmarks of State aid. Placing reliance on this factor to the extent that the Commission did in this case amounts to an unjustified restriction on the possibilities of debt arrangement for an undertaking in difficulty when the total amount of public claims is higher than the private claims. Conversely, when the total amount of private claims is higher than the public claims, it is difficult to conceive of a measure for debt arrangement taken by a public body as constituting State aid.

167 Second, and in any event, it should be remembered that, by granting the debt remissions in dispute here, the public bodies in question did not have to act like public investors whose behaviour, according to settled case-law (*DM Transport*, cited above, paragraph 24), should be compared to the conduct of a private investor pursuing a structural policy — whether general or sectoral — guided by the longer-term prospects of profitability of the capital invested. Those bodies should actually be compared to a private creditor who is seeking to obtain payment of sums owed to it by a debtor in financial difficulties (see, to that effect, Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 46, and *DM Transport*, cited above, paragraph 24).

168 When a firm faced with a substantial deterioration of its financial situation proposes an agreement or series of agreements for debt arrangement to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation. If it turned out, for example, that in the event the firm was liquidated, the realisation value of its assets was only sufficient to cover mortgage and preferential claims, ordinary claims would have no value. In such a scenario, acceptance by an ordinary creditor of the cancellation of a major part of its claim would not really be a sacrifice.

169 It follows that, in the absence of knowledge about the factors which determine the respective values of the choices offered to creditors, the mere fact that there is an apparent lack of proportion between the amounts which the various creditors have written off is not in itself conclusive as to the reasons which led them to accept the debt remissions proposed.

170 In the present case, then, it was for the Commission to determine, for each of the public bodies in question, having regard inter alia to the abovementioned factors, whether the debt remissions granted by them were manifestly more generous than those which would have been granted by a hypothetical private creditor in a situation comparable *vis-à-vis* the applicant to that of the public body in question and seeking to recover the sums owed to it (*DM Transport*, cited above, paragraph 25).

171 In the present case, however, there can be no doubt that the Commission did not conduct such an analysis. It basically contented itself with assessing the overall situation of the public creditors as compared with the private creditors, drawing decisive conclusions from a simple comparison between the total amount of public claims and the total amount of private claims, and between the average percentage of remission for the public creditors and the private creditors, and from the finding that the public creditors, unlike most of the private creditors, held preferential claims and even mortgages. Although an apparent lack of proportion between the respective debt remissions by public and private creditors may be indicative of the existence of State aid, this factor in itself does not free the Commission from its obligation to examine, having regard to the circumstances of the case, whether the remissions granted by the public creditors go beyond what is justified by commercial constraints and thus can only be explained by an intention to confer an advantage on the firm in question.

172 By way of example, the situation of the social security illustrates that an approach as unsubtle as that of the Commission in the contested decision cannot be accepted. Recital 43 of the decision indicates that the social security held

ESP 630 million worth of mortgage security, that the total amount of its claim was approximately ESP 1 479 million and that the remission granted by it was ESP 789.938 million. Moreover, the evidence in the case shows that the social security was a preferential creditor with respect to this last amount. In other words, the amount it cancelled concerned only its unsecured claims. The question of whether a private creditor would have granted a debt remission on those unsecured claims depends essentially on whether a winding up of the firm in question would have allowed it to recover a greater portion of those claims. In other words, the actual nature of the sacrifice agreed to by the social security in this case depends on the extent to which the preferential creditors would have been reimbursed in the event of liquidation of the firm.

173 It follows from the foregoing that the fifth plea is well founded, without it being necessary to rule on the other arguments raised by the parties. It follows that Articles 1 and 3 of the contested decision must be annulled in so far as they concern State aid granted in the form of debt cancellation by public bodies.

The sixth plea: manifest error of assessment in the general analysis of the various measures

Arguments of the parties

174 Referring to the arguments it has made in support of its first five pleas, the applicant asserts that the Commission has committed a manifest error of assessment which vitiates the contested decision in its entirety by taking the view that the loans and guarantees granted in 1993 and 1994 do not fall within the previously authorised general aid schemes and by not distinguishing them from

the aid granted from May 1995 onwards; by considering that the aid granted between May and December 1995 does not constitute rescue aid within the meaning of the guidelines; by declaring that the restructuring plan provided for an increase in production capacity; by declaring that the debt remissions granted by the public bodies were incompatible with the common market; by proceeding with a tendentious interpretation of its financial figures and the interest shown by a third party in acquiring it; by analysing erroneously the content and effects of the restructuring plan; and by not taking into account the particularities of the province of Jaén.

175 The Kingdom of Spain, for its part, argues that the contested decision is based on inaccurate and incomplete evidence.

176 First of all, in recital 15 of the contested decision, the Commission erroneously records a causal link between the opening of the administrative procedure by the Commission and the debt remissions granted by the public bodies.

177 Second, in recital 18(a) of the contested decision, the Commission neglects to state that the applicant's production represented only 2.4% of the production of the top 50 firms on a national basis and 0.7% of the nationwide production.

178 Third, in recital 19 of the contested decision, the Commission erroneously gives the impression that, on 31 December 1997, the Molina family reacquired full ownership of all of the shares of the applicant, without giving consideration.

179 Fourth, the Commission does not recognise that the interest rate on the loans granted on 24 October 1995 was modified with retroactive effect.

180 Fifth, in recital 27 of the contested decision, the Commission makes no mention of the fact that the applicant's production figures for 1995 related to a period of deep crisis.

181 Sixth, in recitals 28 to 32 of the contested decision, the Commission gives the impression that the fresh funds were brought in by means of a permanent injection of financial resources in a manner which was disorderly and defied all logic, whereas in reality they were strictly in compliance with the restructuring plan.

182 Seventh, the table in recital 33 of the contested decision does not give figures for the first four months of 1997, which show a turnaround in the firm's situation.

183 Eighth, recital 34 of the contested decision contains value judgments on the forecasts in the restructuring plan.

184 Ninth, recital 35 of the contested decision neglects to mention some important information about the situation of the various production divisions of the applicant as at 31 December 1996.

185 Tenth, in recital 37 of the contested decision, the Commission makes no mention whatsoever of the 'efforts... made by the Spanish authorities to assert that there was no structural productive overcapacity in the market in which the applicant was carrying on its activities, and that there was no effect on intra-Community trade'.

186 Eleventh, in recital 46 of the contested decision, the Commission does not mention that the feedingstuffs division was only producing 20 000 tonnes per year, or that the Spanish authorities had referred to Decision 94/173.

187 Twelfth, in recital 48 of the contested decision, the Commission does not give an accurate account of the letter of 16 March 1998 from the Spanish authorities. There is, moreover, no mention of informal meetings of the Commission and the Spanish authorities, nor of the letter of 2 July 1998, in which they inform the Commission that a number of firms have shown interest in acquiring the applicant.

188 Thirteenth, in recital 50 of the contested decision, the Commission does not mention the information in the letter of 21 October 1998 from the Spanish authorities which showed the rather favourable situation of the firm. Moreover, it only mentioned the purchase conditions offered by one of the potential purchasers, without mentioning that a sale procedure had been set in motion in accordance with the publicity and competition rules, or that the Spanish authorities had coordinated their action with its services.

189 The Commission takes the view that the sixth plea should be dismissed as unfounded.

Findings of the Court

190 The Court finds that, in their plea based on a manifest error of assessment of the facts, the applicant and the Kingdom of Spain rely on a series of purely selective arguments which have either already been examined in this judgment or are completely irrelevant.

191 For instance, the various claims made by the applicant (paragraph 174 above) have already been dismissed as unfounded in connection with the first five pleas.

192 As for the claims made by the Kingdom of Spain (paragraphs 176 to 188 above), the first, second, seventh, twelfth and thirteenth are either not relevant or unfounded on the facts of the case. The other claims have already been dismissed as unfounded in the examination of the first five pleas.

193 It follows that the sixth plea cannot be upheld.

The seventh plea: infringement of Article 92(3)(a) of the Treaty

Arguments of the parties

194 The applicant argues that Article 92(3)(a) and (c) of the Treaty allows the Commission to declare aid intended to promote the development of less favoured

regions to be compatible with the common market. It states that the province of Jaén is situated in a region with a low population density, and where the standard of living is extremely low and there is serious underemployment. A halt to the firm's activities would have ruined the industrial sector and entailed a major reduction of the wealth-creation capacity in that province.

195 The applicant complains that the Commission excluded the possibility of applying to it the exception provided for in (a) without giving any justification other than 'the aid must be treated as sectoral aid' (recital 104 of the contested decision). The use of the term 'must' does not mean that the aid cannot also be of a regional nature.

196 The applicant adds that aid granted under Article 92(3)(a) of the Treaty must contribute to the long-term development of the region. It points out that, in the Commission's decision-making practice, this presupposes a restoration of the firm in question to viability, which is undeniable in the present case.

197 The Kingdom of Spain maintains that the fact that the province of Jaén had a particularly high level of unemployment is sufficient for the aid in question to be authorised under Article 92(3)(a) of the Treaty. It emphasises that the granting of the aid to the applicant was aimed solely at preventing 500 jobs from being lost in an extremely disadvantaged region. It believes that the Commission, in excluding the possibility of applying that provision on the grounds that 'the aid in question was intended not as regional aid to encourage new investment or job creation, nor yet to remedy deficiencies in infrastructure across the board for all companies in the region', did not give coherent and sufficient reasons. In Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, the Court did hold that the fact that aid granted on the basis of *ad hoc* decisions did not preclude it from being described as regional aid.

198 Referring to the arguments it developed under the third plea (see paragraph 76 above), the Commission argues that the seventh plea must be dismissed as unfounded.

Findings of the Court

199 Under Article 92(3)(a) of the Treaty, 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment' may be considered to be compatible with the common market.

200 As discussed in paragraph 48 above, the Commission has wide discretion in its assessments under Article 92(3) of the Treaty and judicial review by the Community Courts in that regard must be limited to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers.

201 The Commission informed the Member States and other interested parties on several occasions of the criteria it intended to use to examine the compatibility of State aid having a regional purpose with the common market pursuant to Article 92(3)(a) and (c) of the Treaty. These criteria were brought together and explained in the guidelines on national regional aid published in 1998 (OJ 1998 C 74, p. 9).

202 The guidelines state that regional aid measures 'differ from the other categories of government support (in particular aid for R&D, environmental protection, or firms in difficulty) in that they are reserved for particular regions and have as

their specific aim the development of those regions'. They also state that '[r]egional aid is designed to develop the less favoured regions by supporting investment and job creation in a sustainable context'.

203 The guidelines on national regional aid further state:

'An individual *ad hoc* aid payment made to a single firm, or aid confined to one area of activity, may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited. Such aid generally comes within the ambit of specific or sectoral industrial policies and is often not in keeping with the spirit of regional aid policy as such. The latter must remain neutral towards the allocation of productive resources between the various economic sectors and activities. The Commission considers that, unless it can be shown otherwise, such aid does not fulfil the requirements set out in the preceding paragraph.

Consequently, the derogations in question will normally be granted only for multisectoral aid schemes open, in a given region, to all firms in the sectors concerned.'

204 Lastly, footnote 10 to the guidelines states that '*[a]d hoc* aid for firms in difficulty is governed by specific rules and is not conceived of as regional aid as such'.

205 In the contested decision, the Commission declared that the exception provided for in Article 92(3)(a) of the Treaty was inapplicable, after having found that 'the aid in question was intended not as regional aid to encourage new investment or job creation, nor yet to remedy deficiencies in infrastructure across the board for all companies in the region, but to rescue and restructure a specific company' and that, '[c]onsequently, the aid must be treated as sectoral aid and assessed in the light of Article 92(3)(c), which does not require that regional factors be taken into account in this context' (recital 104).

206 These findings are in keeping with the principles of the guidelines on national regional aid set out above and are based on sufficient, coherent reasons.

207 They are, moreover, based on the facts, since the examination of the first five pleas shows that, with the exception of the debt remissions granted by the public bodies, the Commission quite rightly considered the disputed aid as specific aid aimed only at allowing the firm to stay in business.

208 It should, moreover, be borne in mind that, in accordance with point 3.2.3 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (paragraph 109 above), the Commission did take full account of the fact that the applicant was located in a less favoured region when it assessed the alleged restructuring aid (paragraphs 110 to 114 above).

209 It follows from the foregoing that the Commission did not commit any manifest error of assessment in finding that the disputed aid did not fall within the exception provided for in Article 92(3)(a) of the Treaty. Accordingly, the argument based on alleged disregard of that provision cannot be accepted.

The eighth plea: no effect on trade between Member States and failure to state reasons on this point

Arguments of the parties

210 The applicant and the Kingdom of Spain argue that the Commission has not established that the disputed aid was of such a nature as to affect intra-Community trade. They also complain that the contested decision failed to give reasons on this point.

211 The applicant states that the firm held a mere 0.8% of the Spanish market for meat products and that its exports to other countries in the Community were negligible. It reiterates that, in accordance with the restructuring plan, it drew up a series of measures to reduce production capacity so as to ensure that the aid had a minimal impact on intra-Community trade.

212 The Kingdom of Spain also states that the Commission limited itself to examining the volume of imports and exports of the products with which the applicant's business is concerned. It alleges that if the Commission had taken account of the position of the firm in the various markets in which it operated and the fact that it did not export to other countries in the Community, it would not have concluded that Article 92 of the Treaty was inapplicable.

213 It also puts forward the following arguments:

— In the table in recital 67 of the contested decision, the Commission limits itself to reproducing the statements of the Spanish authorities concerning imports and exports of certain products in 1997 and does not mention that this trade was with non-EC countries.

— The Commission does not explain why it chose 1997 as a reference year.

214 The Kingdom of Spain adds that an analysis of the case-law reveals that a mere mention that the Member State in question imports and exports the product in question is not sufficient for a finding that intra-Community trade is affected. The Commission should have given some indication of, for example, the situation of the market concerned, the applicant's share of the national and Community market, and the flow of trade in the relevant products and services between Member States (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809; Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v

Commission [1985] ECR 809; Case 310/85 *Deufil* v *Commission* [1987] ECR 901; Case 57/86 *Greece* v *Commission* [1988] ECR 2855; Case 102/87 *Commission* v *France* [1988] ECR 4067; Case C-301/87 *France* v *Commission* [1990] ECR I-307; Case C-169/95 *Spain* v *Commission*, cited above; and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717).

215 The Commission believes that it has met the obligation to state reasons as required by the case-law.

216 It points out that the contested decision contains statistical data on trade between Spain and the other Member States for the products which are included in the applicant's activities. It adds that, according to the case-law of the Court, the fact that the firm receiving the aid has a weak market share or that it does itself not engage in exports does not preclude a potential effect of that aid on trade between Member States (Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, paragraph 40). The Commission states that 1997 was chosen because it is the last year for which complete data were available and that data for previous years were, in any event, similar. It adds that, in the contested decision, it also analysed the fact that there was structural excess capacity in some of the sectors in which the applicant was involved.

217 In its rejoinder, the Commission, citing *Vlaams Gewest* v *Commission*, cited above, adds that it was not obliged to conduct an extremely detailed, figure-based economic analysis, since it had explained how the effect on trade between Member States was manifest and moreover that, when aid has not been notified,

as in the present case, it is not obliged to prove the actual effect of that aid on competition and intra-Community trade.

Findings of the Court

218 In recital 67 of the contested decision, the Commission emphasises, first, that '[t]hese aids distort or threaten to distort competition' and that they 'clearly afford to [the applicant] advantages not enjoyed by other firms in the sector which have not received State aids'. In the same recital, it goes on to state that by 'taking into account the value of the trade in products of the sector in which [the applicant] concentrated its activity in 1997 and Spain's production as compared to that of the other Member States, this aid is likely to affect trade between Member States in so far as it favours national production to the detriment of production in the other Member States'. In support of these findings, it supplies a table showing, for 1997 and for each of the sectors in which the applicant operates, the volume and value of imports and exports between Spain and the other Member States.

219 It is undeniable that, in each of the sectors in which it is active, the applicant competes with other firms which have not received State aid, and that the disputed aid has given it a definite advantage over those other firms. It is also undeniable that the competition in those sectors has a Community aspect and, in particular, is present between Spanish firms and firms in other Member States. The criticisms made by the Kingdom of Spain of the table in recital 67 of the contested decision are, in this light, completely unjustified. The document from the Commission, attached as Annex 4 to its written observations on the

statement of intervention, shows that the information in that table really does concern intra-Community trade, and not trade with non-EC countries, and that the choice of a year other than 1997 as a reference year would have led to the same findings.

220 Moreover, according to settled case-law, when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (see Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11, and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 47). Furthermore, an aid may be of such a kind as to affect trade between Member States and distort competition even if the recipient undertaking, which is in competition with undertakings from other Member States, does not itself participate in cross-border activities. Where a Member State grants aid to an undertaking, internal supply may be maintained or increased, with the consequence that the opportunities for undertakings established in other Member States to offer their services to the market of that Member State are reduced (Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, paragraph 40, and Case C-75/97 *Belgium* v *Commission*, cited above, paragraph 47). The argument of the applicant and the Kingdom of Spain based on the fact that the firm is active only or mainly at the national level cannot, therefore, be conclusive. In addition, some of the sectors concerned have a structural overcapacity, which is all the more reason not to accept the argument (see paragraph 91 above).

221 Nor can the applicant and the Kingdom of Spain base an argument on the allegedly weak market share of the firm in the relevant sectors. It is settled case-law that the relatively small size of the undertaking which receives aid does not as such exclude the possibility that intra-Community trade might be affected (Case C-142/87 *Belgium* v *Commission*, cited above, paragraph 43, and Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, paragraph 42).

222 In the light of the foregoing, the Court finds that the Commission rightly concluded that trade between Member States had been affected by the granting of the disputed aid.

223 Likewise, the argument concerning the failure to state reasons in the contested decision regarding the condition that trade between Member States must be affected must also be dismissed.

224 Recital 67 of the contested decision, referred to in paragraph 218 above, in fact contains a sufficient, although succinct, discussion of the facts and legal considerations taken into account in the assessment of that condition. Information such as that in that recital enables the applicant and the Court to know the reasons why the Commission considered that the disputed aid fulfilled the condition.

225 Moreover, the Commission was not required to carry out an economic analysis of the actual situation on the relevant market, of the market share of the applicant, of the position of competing undertakings and of trade flows of the products and services in question between Member States, since it had explained how the aid in question distorted competition and affected trade between Member States (*Philip Morris* v *Commission*, cited above, paragraphs 9 to 12, and *Vlaams Gewest* v *Commission*, cited above, paragraph 67).

226 Furthermore, it should be noted that, in the case of aid granted illegally, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade between Member States. Such an obligation would ultimately favour Member States which pay aid without complying with

the duty to notify the aid laid down in Article 93(3) of the Treaty, to the detriment of those which notify the aid at the proposal stage (see Case C-301/87 *France* v *Commission*, cited above, paragraph 33, and *Vlaams Gewest* v *Commission*, cited above, paragraph 67).

227 In conclusion, the eighth plea must also be dismissed in its entirety.

Measures of organisation of procedure requested by the applicant

228 The applicant has asked the Court to order that the original of the notice of the judicial administrators shown in Annex 1 to the reply be produced, in case the authenticity thereof should be called into question, as well as all of the evidence gathered by the Commission since the beginning of the administrative procedure.

229 The Commission objects to this request.

230 The Court finds that, in the present case, it has sufficient information from the evidence in the file and finds that there is no need to order the requested measures of organisation of procedure.

Costs

231 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other grounds, order costs to be shared or order each party to bear its own costs. In the light of the extent of the parts of the contested decision which have been annulled, the Court considers it fair in the circumstances of the case to order the Commission to bear its own costs and 30% of the costs incurred by the applicant, and to order the applicant to bear 70% of its own costs.

232 The Kingdom of Spain is to bear its own costs, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

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

hereby:

1. **Annuls Article 1(3) of Commission Decision 1999/484/EC of 3 February 1999 concerning State aid which the Spanish Government has granted to the company Hijos de Andrés Molina SA (HAMSA);**

2. Annuls Article 3 of Decision 1999/484 in so far as it obliges the Kingdom of Spain to recover State aid granted in the form of debt cancellation by public bodies;

3. Dismisses the remainder of the application;

4. Orders the Commission to bear its own costs and 30% of the costs incurred by the applicant;

5. Orders the Kingdom of Spain to bear its own costs.

Lindh García-Valdecasas Cooke

Vilaras Forwood

Delivered in open court in Luxembourg on 11 July 2002.

H. Jung P. Lindh

Registrar President