OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 9 July 1998 *

1. In these proceedings the Kingdom of Spain seeks annulment of Commission Decision 97/21/ECSC, EC of 30 July 1996 on State aid granted in favour of Compañía Española de Tubos por Extrusión SA, located in Llodio, Álava. [1]

Facts and national legislation

2. The Compañía Española de Tubos por Extrusión SA (hereinafter 'Tubacex') is a company governed by private law, established at Llodio (Álava). It specialises in the production of seamless steel tubes and has a steel-producing subsidiary, Acería de Álava, established in Amurrio (Álava).

In June 1992, after a long period of serious financial difficulties, Tubacex was declared provisionally insolvent in accordance with the national legisation governing insolvency, [2] and suspended payments. Ist workers thereupon turned to the Fondo de Garantía Salarial (Wages Guarantee Fund; hereinafter 'the Fogasa'), for payment of wages due. The Fogasa is an independent organisation under the control of the Ministry of Employment and Social Security and financed by contributions paid by undertakings. Its role is to pay workers the salaries which they have not been paid [3] by undertakings which have been declared insolvent or which find themselves in financial difficulty; those undertakings must then reimburse the Fogasa. [4] On that point, Article 32(1) of Royal Decree No 505/85 provides that '[i]n order to assist the recovery of sums due, the Wages Guarantee Fund may conclude repayment agreements defining matters concerning the form, time-limits and guarantees, linking the effect of the subrogatory action to the requirements of keeping the undertaking running and of preserving jobs. Sums whose repayment has been rescheduled shall bear interest at the statutory rate in force.'

The Decree of the Ministry of Employment and Social Security of 20 August 1995 sets out the criteria with which the Fogasa must comply 'within the limits of the margin required for manoeuvre, to enable the particular features of every individual case to be taken into account'. Article 2(1) fixes the limits within which the Fogasa may reschedule

* Original language: Italian.

1 — OJ 1996 L 8, p. 14.

2 — The undertaking emerged from insolvency in October 1993, thanks to an agreement with its creditors under which the suspension of debt repayments was lifted.

3 — See Article 33 of the statute governing labour relations and Article 2(1) of Royal Decree No 505/85 of 6 March 1985 concerning the organisation and operation of the Fogasa.

4 — See Article 33(4) of the statute governing labour relations and Article 2(4) of Royal Decree No 505/85.

repayments. Article 3, which concerns guarantees, provides that a guarantee 'considered sufficient' is to be requested. Pursuant to Article 6(3), the Fogasa may also reject any request for the debt to be rescheduled or paid in instalments.

3. Within that legislative framework, the Fogasa entered into an agreement with Tubacex and Acería de Álava on 10 July 1992 under which it was to pay the wages owed, which amounted in total to ESP 444 327 300. For their part, the two companies undertook to repay that amount, plus ESP 211 641 186 by way of interest at the rate of 10%, over a period of eight years. This agreement was amended twice [5] and was replaced on 10 March 1994 by a new agreement which underwent amendment on 3 October 1994. [6]

4. I shall now turn to the agreements which Tubacex and Acería de Álava entered into with the Tesorería General de la Seguridad Social (General Social Security Fund; hereinafter 'the TGSS') under which the companies' debts in respect of social security contributions were to be rescheduled and paid in instalments.

The basis for those agreements was Article 20 of the General Law on Social Security, which provides:

'1. Debts owed in respect of social security contributions or in increased contributions may be rescheduled or paid by instalments.

...

3. Rescheduling of social security debts or their payment by instalments may be permitted in accordance with the forms and procedure defined by the Ministry of Employment and Social Security, taking into account the circumstances of each individual case.'

5 — Under the first amendment, on 8 February 1993, the sum of ESP 376 194 837 was payable as principal and ESP 183 473 133 by way of interest. This was to be paid over 16 six-monthly instalments subject to a rate of interest of 9%. The second amendment was made on 16 February 1994 and this fixed the principal at ESP 372 000 000 to which interest of ESP 154 138 830 was added, repayable at a rate of 9%.

6 — The agreement of 10 March 1994 provided for payment of ESP 465 727 750 as principal and ESP 197 580 900 by way of interest. The rate of interest fixed was 9%. Following the agreement of 3 October 1994 the sum to be repaid amounted to ESP 469 491 521 as principal and ESP 205 335 378 in interest, repayable over eight years. Payment of the interest was deferred to the final three years, while 70% of the principal was repayable as of 30 December 1998.

Provision is also made for surcharges for delay to be added to rescheduled debts. [7]

The conditions under which payments may be rescheduled or paid by instalments are set out in Royal Decree No 1517/1991 of 11 October 1991. Article 39 of that Decree, headed 'Discretion of the administration', provides that '[t]he decision to permit social security debts to be rescheduled or paid by instalments is at the discretion of the administration and a request may be made that an adequate guarantee be furnished in accordance with the conditions laid down in Article 30 of the present Royal Decree ...'.

Article 41 of that Decree, headed 'Form, conditions and procedures', provides:

'1. The rescheduling or repayment by instalments [of social security debts] may be permitted in the form and in accordance with the conditions prescribed by the Ministry of Employment and Social Security.

2. ... rescheduling or repayment by instalments of social security debts shall give rise to the payment, from the date on which authorisation was granted for rescheduling or payment by instalments until the date of payment, of interest at the statutory rate in force at the time of authorisation ... .'

The detailed rules for the implementation of Royal Decree No 1517/1991 are laid down in the Ministerial Decree of 8 April 1992. Of particular relevance here is Article 11, which provides that '[t]he rescheduling or repayment by instalments of debts owed to the bodies responsible for managing social security and their general departments may be permitted at the discretion of the Tesorería General de la Seguridad Social'.

5. Tubacex owed the TGSS a series of debts, which were settled by the October 1993 agreement [8] under which the suspension of debt repayments was lifted. As a result of that agreement, Tubacex and Acería de Álava again ceased payment of social security contributions, thus accumulating a debt of ESP 1 156 601 560 for Tubacex, and ESP 255 325 925 for Acería de Álava. Those debts were increased by late payment surcharges, pursuant to Article 27 of the General Law on Social Security (referred to above). [9]

7 — See Article 27 of the General Law on Social Security.

8 — See footnote 2 above.

9 — Thus Tubacex then owed the sum of ESP 253 335 669 and Acería de Álava the sum of ESP 49 083 697. When added to the principal, the total debts amounted to ESP 1 409 957 329 and ESP 274 409 604 to be paid by Tubacex and Acería de Álava respectively.

On 25 March and 2 April 1994 the TGSS entered into agreements with Tubacex and Acería de Álava for recovery of the debts. Under those agreements, the parties agreed to reschedule the debts and to pay them in instalments in accordance with the provisions of national law referred to above. Under both agreements, interest at 9% was to be applied. [10]

The contested decision

6. On 30 July 1996, following a preliminary investigation, the Commission adopted the contested decision. Article 1 states:

'The following measures by Spain in relation to Compañía Española de Tubos por Extrusión SA (Tubacex) and Acería de Álava contained aid elements which were granted illegally and are incompatible with the common market pursuant to Article 92 of the EC Treaty and Decision No 3855/91/ECSC in so far as the rate of interest was below market rates:

1. the 10 July 1992 loan agreement between the wage guarantee fund (Fogasa), Tubacex and Acería de Álava covering ESP 444 327 300 in principal, as amended by agreements of 8 February 1993 and 16 February 1994 (covering principal of ESP 376 194 872 and ESP 372 000 000 respectively);

2. the 10 March 1994 loan agreement between Fogasa, Tubacex and Acería de Álava covering ESP 465 727 750 in principal, as amended by the agreement of 3 October 1994 covering ESP 469 491 521 in principal;

3. the agreement of 25 March 1994 between the Social Security Fund and Acería de Álava to reschedule debts amounting to ESP 274 409 604;

10 — Under the first of those agreements, Acería de Álava had to repay the principal sum of its debt, amounting to ESP 274 409 604. Repayment was to be phased over a period of five years and 51% of the amount payable was not to be paid until the fifth year. The second agreement, concluded with Tubacex, provided that rescheduled payment of debt amounting to ESP 1 409 957 329 was to be made under conditions similar to those applicable to Acería de Álava.

4. the agreement of 12 April 1994 between the Social Security Fund and Tubacex to reschedule debts amounting to ESP 1 409 957 329.'

Accordingly, Spain was called upon under Article 2 to 'abolish the aid elements contained in the measures referred to in Article 1 by withdrawing them or by applying normal market conditions to the interest rate, with effect from when the Fogasa loans were initially granted and from when the rescheduling of the post-suspension Social Security debts was agreed; and by recovering the sum corresponding to the difference between this rate and the rate actually charged up until the date of abolition of the aid.'

By the present proceedings, the Kingdom of Spain contests that decision. In particular, it contests the Commission's finding to the effect that the detailed rules for repayment of the debts to the Fogasa, as well as the rescheduling of the undertakings' social security debts, constitute State aid.

The alleged infringement of Article 118 of the Treaty

7. The Spanish Government submits, first, that the contested decision infringes Article 118 of the Treaty. [11] The measures which the Commission has treated as State aid are, in fact, arrangements arising under employment law, more specifically from the social security rules, a sphere falling within the exclusive competence of the Member States and in which the Commission's role is simply to propose and to coordinate. In particular it claims that Fogasa merely pays workers the wages which have not been paid by the undertaking, its role thus being to provide the wages guarantee which forms an integral part of the actual provisions of the contract of employment. Recovery of debts owed by undertakings to the Social Security Fund where contributions payable have not been paid is governed by the General Law on social security; that is, in consequence, a social security rule laying down the detailed rules for payment of obligations provided for by that same law.

11 — Under Article 118, 'the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to:
— employment;
— labour law and working conditions;
— basic and advanced vocational training;
— social security;
— prevention of occupational accidents and diseases;
— occupational hygiene;
— the right of association and collective bargaining between employees and workers.
To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations. Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.'

In essence, the Spanish Government maintains that the Commission infringed Article 118 of the Treaty in treating social security measures as State aid. I am not swayed by that argument. As the Commission rightly observed in its written pleadings, the aid elements identified by the contested decision are not to be found in the intervention by the Fogasa or the TGSS *per se*, but rather in the rules for repayment to those bodies of the sums owed by the undertakings and, specifically, in the fact that the rate of interest applied is fixed by statute rather than the market. In other words, as the Commission itself acknowledges, neither the payment of the wages by the Fogasa nor the renegotiation of the debt by the TGSS were classified *per se* as State aid. The aid consists in the fact that the undertakings, albeit called upon to repay the amounts advanced or rescheduled to the bodies concerned, are being granted preferential treatment in that the statutory rate of interest applied is lower than the market rate.

Thus the contested decision does not disclose any infringement of Article 118. It does not touch on the fact that the Fogasa and the TGSS intervened; nor does it tamper with the 'social role' entrusted to those bodies. It focuses entirely on the financial relationship between those bodies and the undertakings concerned. Moreover, the Court has already classified certain national social security measures as State aid. In fact, it is settled law that 'Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects' (see Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 13) and that 'the social character of State aid is not sufficient to exclude it outright from being categorised as aid for the purposes of Article 92 of the Treaty'. [12] It follows that, contrary to the arguments put forwarded by the Spanish Government, the social character of the intervention by the Fogasa and the TGSS is not enough to preclude application of Article 92.

The general nature of the measures at issue

8. The Kingdom of Spain also submits that the action taken by the Fogasa and the TGSS does not meet the conditions necessary to be classified as State aid within the meaning of Article 92 of the Treaty. It is alleged that the aid consists in the application of a statutory rate of interest, rather than the market rates. According to the Spanish Government, however, application of the statutory rate is prescribed by law and it is a rule applicable *erga omnes*, that is to say, applicable to all undertakings which have dealings with the Fogasa and the TGSS. In other words, assistance of that nature from the State is available to any undertaking and thus does not constitute preferential treatment for the benefit of 'certain undertakings or the production of certain goods', as required by Article 92(1).

12 — See Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 20 and 21.

However, that argument also fails to persuade. It goes without saying that measures of general application do not fall within the scope of Article 92. However, the Court has already given warning that even intervention which is *prima facie* applicable to all undertakings may in fact be selective and therefore to be regarded as intended to favour particular undertakings or the production of particular goods. This arises, for instance, whenever the administration, when called upon to apply a general rule, enjoys a measure of discretion. Indeed, in *France* v *Commission* (mentioned above), the Court held that the national legislation at issue was 'liable to place certain undertakings in a more favourable situation than others and thus to meet the conditions for classification as aid with the meaning of Article 92(1) of the Treaty', since the national body concerned 'enjoys a degree of latitude which enables it to adjust its financial assistance having regard to a number of considerations'. [13]

In the light of that case-law, therefore, the fact that the administration enjoys a measure of discretion precludes classification of the measure at issue as one of general application. And, of course, as the Commission rightly observes, just such a measure of discretion existed in the present case. It is expressly provided for in the legislation governing both the Fogasa and the TGSS. With respect to the Fogasa, the Decree of the Ministry of Employment and Social Security of 20 August 1995 specifies, when laying down the general criteria with which the Fogasa must comply, that such criteria apply 'within the limits of the margin required for manoeuvre, to enable the particular features of every individual case to be taken into account'. Moreover, Article 2(1) of that Decree prescribes the maximum time-limits within which debts can be rescheduled; thus, in practice, the Fogasa is free to choose the deadline by which the undertaking must repay its debts. A further measure of discretion is implied by Article 3 of the Decree, concerning guarantees, in that it provides that a guarantee 'considered sufficient' may be requested. Lastly, under Article 6(3), the Fogasa may refuse any request for rescheduling of the debt or for payment by instalments. As for the TGSS, a measure of discretion is expressly provided for by the same legislation. Article 39(1) (headed 'Discretion of the administration') provides that '[t]he decision to permit ... debts to be rescheduled ... is *at the discretion* of the administration'. [14]

Thus, both the Fogasa and the TGSS enjoy a margin of discretion. Obviously, that discretion does not concern the rate of interest fixed — which is, of course, the statutory rate — but rather the determination of the rules which in practice shape the assistance given. This, according to the case-law of the Court, is enough to preclude a finding that the intervention is of a general nature and consequently outside the scope of Article 92(1).

13 — See Case C-241/94, cited above, paragraph 24. In that judgment, the Court pointed out that the national body in question 'enjoys a degree of latitude which enables it to adjust its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided' (paragraph 23).

14 — My emphasis.

The Spanish Government goes on to observe that the Commission altered its own stance with regard to classification of the aid at issue. At first, it held that the aid consisted in the application of the statutory rate of interest; subsequently, it maintained that it consists in the measure of discretion enjoyed by the Fogasa and the TGSS in defining the detailed rules. That is not the position, however. Those two stances are clearly linked and they complement one another in defining the existence of State aid. The application of the statutory rate of interest rather than the market rate is the advantage granted to the recipient undertaking: the existence of discretion provides confirmation that this is not a measure of general application but one which is adopted for the benefit of '*certain* undertakings or the production of certain goods', as required by Article 92(1).

Whether the aid was granted from State resources and whether it distorted competition

9. The Spanish Government maintains that the intervention of the Fogasa and the TGSS does not amount to State aid in that it does not entail any expenditure, or any loss of revenue, on the part of the public authorities.

I do not agree. Indeed, it goes without saying that the application of the statutory rate of interest entails a financial sacrifice on the part of the State which may be precisely quantified, since it is the difference between the income accrued on application of the market rate and that accrued on application of the lower, statutory rate.

As for the alleged absence of any distortion of competition, the Spanish Government argues essentially that the application of the statutory rate of interest is, in itself, a neutral action because that rate would be applied to any undertaking with dealings with the Fogasa and the TGSS. In any event, any distortion would be very slight, given that the market rate set by the banks is only marginally higher than the statutory rate and that the debt, on which the interest was calculated, was not very high. Thus the impact of the alleged aid on the financial situation of the undertakings in question would be negligible. Here, too, however, I share the Commission's view that payment of the wages and social security contributions is one of the general operational costs which all undertakings are required to pay from their own resources. [15] Thus, whenever those financial burdens are mitigated — as they were here by the fact that payments were rescheduled at a rate of interest other than the market rate — the undertaking concerned enjoys outside help which cannot but alter the conditions of competition.

15 — According to established case-law, 'the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking' (see *France* v *Commission*, cited above, paragraph 34, and Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 12 and 13).

10. The Kingdom of Spain then submits that, in defining the aid, the Commission did not consider the fact that the social security legislation provides for a 20% penalty payment in cases where the debt is not repaid on time. That penalty should have been taken into account when the Commission came to assess the financial benefit for the undertakings.

However, that argument is unsound. The aid reviewed by the Commission consists in the application of a statutory rate of interest, whereas the penalties referred to form part of the principal debt. They are two quite separate issues. As the Commission observes, if payment of the penalties had been waived in the case of those undertakings, that would have constituted yet another form of State aid.

The behaviour of a private creditor

11. Lastly, the Kingdom of Spain submits that the Commission erred in its finding of State aid in so far as it refers to the requirements that would have been set by a private bank, specifically in its reference to the rate of interest set by the banks. In the present case, the public authorities did not grant a loan for profit, but acted in the same way as any private creditor who seeks to recover a debt from an insolvent party. In the latter case, when a debtor falls into financial difficulties, the requirements set by creditors are not designed to make a profit, but merely to recover the amount owed.

I disagree. Certainly, neither the Fogasa nor the TGSS was motivated by commercial gain, that is to say, they were not seeking to make a profit by granting a loan to the recipient companies or by rescheduling repayments. But that is precisely where the aid lies. Those undertakings derived a financial advantage from a source *extra commercium* and the rules on State aid are directed specifically towards preventing State intervention which alters market conditions in ways which run counter to the forces of free and undistorted competition. Moreover, it appears to me that the public authorities in this case departed even from the criterion proposed by the Spanish Government, namely, that of a private creditor who seeks to recover a debt. It is quite difficult, in fact, to imagine a private creditor who would grant credit and allow repayments to be rescheduled on preferential terms when dealing with undertakings in financial difficulty. On the contrary, far from encouraging a creditor to grant preferential terms for repayment of existing debts, the serious financial difficulties facing the recipient undertakings would normally lead a creditor to rule out the extension of fresh credit.

Conclusion

12. In the light of the foregoing, I propose that the Court:

(1) dismiss the action;

(2) order the Kingdom of Spain to pay the costs.