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COMMISSION

COMMISSION DECISION

of 23 December 2002

**on the State aid implemented by Germany for Klausner Nordic Timber GmbH & Co. KG,
Mecklenburg-Western Pomerania**

(notified under document number C(2002) 5378)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/875/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

1.1. Stages of the procedure

(1) Following a series of complaints concerning State aid granted to Klausner Nordic Timber GmbH & Co. KG (hereinafter 'KNT'), Germany was asked by the Commission in 1999 and 2000 to provide all relevant information that would enable it to examine whether the aid was compatible with the common market. The measures concerned State aid granted to KNT for the construction and expansion of a sawmill in Wismar (Mecklenburg-Western Pomerania). The information provided by Germany was deemed to be incomplete and did not allay the Commission's concerns as to whether the measures were compatible with previously approved aid schemes.

(2) By letter of 17 August 2000, Germany was required by the Commission in accordance with Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾ and with the judgment of the Court of Justice of the European Communities of 5 October 1994 in Case 47/91 *Italy v Commission* ⁽³⁾ to present all the information necessary to assess whether the measures in favour of KNT were covered by aid schemes which had previously been approved by the Commission.

(3) By letter of 13 November 2000, the annexes to which were received by separate post on 16 November, Germany provided some of the information necessary to assess whether the aid recipient was to be regarded as an SME within the meaning of the Community guidelines on State aid for small and medium-sized enterprises ⁽⁴⁾ ('Community SME guidelines') and Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽⁵⁾ and, therefore, as being eligible for aid in the assisted areas where the two projects are located, with a maximum gross aid intensity of 50 %.

(4) The Commission informed Germany by letter of 20 June 2001 of its decision to initiate the procedure under Article 88(2) of the EC Treaty and to require the provision of information in accordance with Article 10(3) of Council Regulation (EC) No 659/1999.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ [1994] ECR I-4635.

⁽⁴⁾ OJ C 213, 23.7.1996, p. 4.

⁽⁵⁾ OJ L 107, 30.4.1996, p. 4.

⁽¹⁾ OJ C 219, 4.8.2001, p. 3.

- (5) Germany replied to the decision initiating the procedure and the information injunction by letter of 2 August 2001, the annexes to which were received on 12 November.
- (6) The decision initiating the procedure was published in the *Official Journal of the European Communities* ⁽⁶⁾. At the same time, the Commission called on all interested parties to submit their comments.
- (7) The Commission received comments from a number of third parties. The comments were forwarded to Germany, which replied by letter of 31 October 2001.
- (8) On 15 January 2002, the Commission adopted Decision 2002/468/EC ⁽⁷⁾ terminating the formal investigation procedure. Some of the assistance for KNT was considered to be incompatible and was required to be repaid.
- (9) On 27 March 2002, KNT lodged a complaint with the Court of First Instance of the European Communities to the effect that the Commission had not correctly interpreted an approved aid scheme. Together with the complainant, the Commission sought to have the procedure suspended so that it could withdraw its decision, which was unsound in law.
- (10) Further details also came to light. On 9 and 11 September 2002, the Commission asked Germany for its views on the new particulars presented by KNT in a letter of 26 September 2002 (the annexes were received on 1 October).
- (13) In its appeal to the Court of First Instance, the representatives of the recipient argued that, in interpreting the German Investment Allowance Law and the decision authorising it, the Commission had made a mistake in law, particularly as regards the definition of 'recipient' within the meaning of the Community SME guidelines. The Investment Allowance Law provides for a tax exemption for the acquisition and production of capital goods and buildings by firms established in the new *Länder*. The representatives also claimed that the Law defined the recipient of the investment allowance as economically and organisationally separate operating units and not as a single economic unit. According to them, the Commission had misinterpreted its Decision authorising the Investment Allowance Law and its Decision 2002/468/EC was unsound in law in view of the measure authorised on the basis of the Law. Neither the Member State nor the recipient had any interest in maintaining in force a partly negative decision. Accordingly, the Commission has decided to withdraw Decision 2002/468/EC. Additional information and clarifications were needed in order to take a new decision and Germany has provided these. In the light of this new information, the Commission considers it appropriate and justified to carry out a new assessment, not only of the measure authorised under the Investment Allowance Law but also of the guarantee for a DEM 29 750 000 loan that had also been declared incompatible with the common market in Decision 2002/468/EC. No legitimate expectations or acquired rights of third parties stand in the way of a reassessment.

1.2. Reasons for withdrawing Decision 2002/468/EC

- (11) In Decision 2002/468/EC, the Commission had declared as incompatible with the common market a measure that had apparently been authorised by Germany on the basis of an approved aid programme. According to the Commission, the measure did not satisfy the conditions laid down in the Investment Allowance Law.
- (12) The Commission took the view that the aid recipient, since it employed more than 250 workers at the time the measure was authorised, was not eligible for an aid intensity of more than 10 %. The authorised aid framework provides for an aid ceiling of 10 % for recipients with more than 250 workers. The Commission considered that the measure was covered by the aid programmes only up to 10 % of the eligible costs since the recipient, which was defined as an 'economic unit', employed more than 250 workers at the time the aid was granted. According to the Commission, no other justification for the compatibility of the excess amount of aid with the common market

2. THE MEASURE

2.1. The aid recipient

- (14) The legal person to which the aid was granted, KNT, was formed on 28 May 1997 and constructed a new sawmill in Wismar, Mecklenburg-Western Pomerania, in 1998. KNT processes coniferous timber. The business is conducted by the general partner ⁽⁸⁾ Klausner Nordic Timber GmbH ('KNT-GmbH'). The shares in the limited partnership KNT are owned by Fritz Klausner, a natural person, who also owns all the capital of KNT; he is the sole limited partner ⁽⁹⁾ of KNT.

⁽⁸⁾ The general partner is liable with all its assets for the liabilities of a limited partnership and, under sections 161 and 164 of the Ö-HGB (Austrian Commercial Code) and of the HGB (German Commercial Code), has the right to manage and represent the partnership.

⁽⁹⁾ The limited partner is liable only to the extent of his or her limited-partner contribution. Under section 164 of the HGB, the limited partner has no authority to manage or represent the partnership. However, the limited partner's approval is required for the general partner to conduct transactions going beyond the ordinary course of business.

⁽⁶⁾ See footnote 1.

⁽⁷⁾ OJ L 165, 24.6.2002, p. 15.

- (15) Fritz Klausner also holds shares in other companies.
- (16) Klausner Holzindustrie GmbH ('KHI-GmbH') is an Austrian limited liability company responsible for the management of Klausner Holzindustrie GmbH & Co. KG ('KHT'), which operates a sawmill in St Johann (Tyrol). KHI-GmbH is the general partner of KHT.
- (17) The shareholders of KHI-GmbH are:
- (a) Fritz Klausner (25 %);
 - (b) Margarethe Klausner (Fritz Klausner's mother) (50 %);
 - (c) Anne Klausner (Fritz Klausner's sister) (25 %).
- (18) The partners of KHI are:
- (a) KHI-GmbH (general partner; no capital interest);
 - (b) Fritz Klausner (limited partner; capital interest of 75 %; no voting rights since 1 January 1997);
 - (c) Margarethe Klausner (limited partner; capital interest of 25 %).
- (19) Klausner Holz Thüringen Geschäftsführung GmbH ('KHT-GmbH') is a German limited liability company which manages the business of Klausner Holz Thüringen GmbH & Co. KG ('KHT'). KHT operates a sawmill in Friesau (Thuringia). Fritz Klausner owns all the shares in KHT-GmbH; he managed the company until 19 June 1997.
- (20) The partners of KHT are:
- (a) KHT-GmbH (general partner; no capital interest; managing director);
 - (b) Fritz Klausner (limited partner; capital interest of 20 %);
 - (c) KHI (limited partner; capital interest of 80 %).
- (21) KHT Hobelwerk Beteiligungs GmbH ('KHO-GmbH'), which is wholly owned by Fritz Klausner, was formed on 15 May 1997. It is the general partner of KHT Hobelwerk GmbH & Co. KG ('KHO'), which operates a planing mill in Thuringia.
- (22) Klausner Nordic Services GmbH ('KNS'), which is wholly owned by Fritz Klausner, is a service company for local enterprises.
- (23) Klausner Nordic Energie GmbH ('KNE'), which is wholly owned by Fritz Klausner, operated a power plant.
- (24) The companies with which Fritz Klausner was involved from 1996 to 1999 are the following:

Name	Share of Fritz Klausner		Employees		Turnover in million EUR		Balance-sheet total in million EUR	
	1996	1997	1996	1997	1996	1997	1996	1997
KNT	Not relevant ⁽¹⁰⁾	100 %	Not relevant	6	Not relevant	[...] (*)	Not relevant	[...]
KNT GmbH	Not relevant	100 %	Not relevant	1	Not relevant	0	Not relevant	0,03
KHT	20 %	20 %	159	167	[...]	[...]	[...]	[...]
KHT GmbH	100 %	100 %	1	1	0	0	0,028 ⁽¹¹⁾	0,03
KHO	100 %	100 %	0	2	[...]	[...]	[...]	[...]
KHT Hobelwerk Beteiligungs GmbH	Not relevant	Not relevant	Not relevant	Not relevant	Not relevant	Not relevant	Not relevant	Not relevant
KHI	75 %	75 %	4,5	3	[...]	[...]	[...]	[...]
KHI GmbH	25 %	25 %	1	0	0	0	0,131	0,1

(*) Business secret.

⁽¹⁰⁾ Not relevant. The company was formed at a later date.⁽¹¹⁾ The figures in italics were provided by KHT.

Name	Share of Fritz Klausner		Employees		Turnover in million EUR		Balance-sheet total in million EUR	
	1998	1999	1998	1999	1998	1999	1998	1999
KNT	100 %	100 %	153	211	[...]	[...]	[...]	[...]
KNT GmbH	100 %	100 %	1	0	0	0	0,02	0,028
KHT	20 %	20 %	171 (173)	206	[...]	[...]	[...]	[...]
KHT GmbH	100 %	100 %	1	0	0	0	0,03	0,029
KHO	100 %	100 %	19	26	[...]	[...]	[...]	[...]
KHT Hobelwerk Beteiligungs GmbH	100 %	100 %	1	0	0	0	0,02	0,026
KHI	75 %	75 %	1	1	[...]	[...]	[...]	[...]
KHI GmbH	25 %	25 %	0	0	0	0	0,1	0,145
KNS	Not relevant	100 %	Not relevant	50	Not relevant	1,4	Not relevant	0,18
KNE	Not relevant	100 %	Not relevant	7,66	Not relevant	0,3	Not relevant	0,03

2.2. The measures

2.2.1. Measure for the construction of a new production plant in Wismar ('first aid package')

(25) The Economics Ministry of Mecklenburg-Western Pomerania decided on 18 April 1997 (the decision was modified on 12 March 1998) to grant KNT investment aid for the construction of a sawmill in Wismar under the 27th outline plan for the joint Federal Government/Länder scheme for improving regional economic structures (1998 to 2002) ⁽¹²⁾. The sawmill is located in an assisted area under Article 87(3)(a) of the EC Treaty. The grant was equivalent to the ceiling of DEM 43 818 300 (EUR 22,4 million), corresponding to a gross intensity of 38,21 % of the eligible investment costs of DEM 114 669 000 (EUR 58,6 million). According to Germany, the aid was conditional on the creation of 115 jobs.

(26) By decision of 26 April 1998, which was modified on 25 July 1998, Germany also granted KNT an investment allowance for 1997 of DEM 2 635 086 (EUR 1,3 million) under the Investment Allowance Law 1996, an aid scheme approved by the Commission ⁽¹³⁾. The aid intensity amounts to 2,3 % of the eligible costs.

(27) By a decision of 1 September 1999, a further investment allowance was granted on the basis of the Investment Allowance Law amounting to DEM 2 500 000 (EUR 1,3 million), representing 2,18 % of the eligible investment costs.

(28) In 1997 Mecklenburg-Western Pomerania also assumed a guarantee to secure 80 % of a low-interest loan of DEM 30 million (EUR 15,3 million) under its guarantee guidelines which had been approved by the Commission ⁽¹⁴⁾. The aid element contained in this measure amounted to 0,5 %, according to the German authorities, who assumed that KNT ranked as an economically sound enterprise. This represents aid amounting to EUR 61 355,03, equivalent to an intensity of 0,1 % of the eligible costs.

(29) According to Germany, the aid intensity of the measure mentioned amounted to 43,18 % of the eligible costs. The actual aid intensity is 42,79 % of the eligible costs.

(30) The enterprise argued that it had actually invested DEM 124 401 024 (EUR 63,6 million) and that, for this reason, the aid intensity should be lowered to 39,80 %. This information was not confirmed by Germany, however, and the Commission was not presented with any further evidence. The Commission is therefore basing itself on the decisions of the German authorities that granted the aid in which the eligible costs were specified and the aid amount determined and approved.

⁽¹²⁾ Commission letter of 26 January 1999 (SG(99) D/582) N 100/98; see also OJ C 80, 24.3.1999, p. 3.

⁽¹³⁾ Investitionszulagengesetz 1996, N 494/95; Commission letter of 27 December 1995, (SG(95) D/17154).

⁽¹⁴⁾ OJ C 184, 21.7.1992, p. 4 (N 627/1991).

2.2.2. *Measure for the extension of the Wismar mill and the construction of a second sawmill*

- (31) In Decision 2002/468/EC, the Commission pointed out that, even after two requests had been made, Germany had not provided full information on the aid granted to KNT in respect of the extension project. After additional information had been provided by KNT and following a request from the Commission for confirmation, Germany eventually provided all the particulars along with written documents concerning the extension project and the aid granted to it. The increase in the investment for the extension project was justified by the additional costs of acquiring and assembling a second saw and the associated investment in appropriate plant (dry hammer and sorting shed). Evidence for the realisation of these additional investments was provided in documents submitted by Germany.
- (32) According to the most recent figures provided by Germany, the eligible costs for the extension of the Wismar mill and the installation of a second saw amount to DEM 61 612 000 (EUR 31 501 715,39). The following aid measures were granted for this project:
- (a) an investment grant of DEM 8 879 000 (EUR 4,45 million) under the 27th outline plan for the joint Federal Government/Länder scheme (1998 to 2002), which had been approved by the Commission. The grant was made by the Land by decision of 8 September 1998 and the aid intensity amounts to 14,41 % of the eligible costs;
 - (b) investment allowances totalling DEM 11 140 587 (EUR 5 696 091,68): An initial tranche of DEM 7 755 095 (EUR 3 965 117,11) was granted for investment in 1999 and a second instalment of DEM 3 385 492 (EUR 1 730 974,57) for investment in 2000. The aid intensity represents 18,08 % of the eligible costs;
 - (c) a low-interest loan of DEM 8 549 999,60 (EUR 4 371 545,38) under the SME programme of the Reconstruction Loan Corporation (KfW), a scheme approved by the Commission⁽¹⁵⁾: In accordance with Decision 2002/468/EC, the aid intensity of this loan is 1 % of the loan amount. This gives aid of DEM 85 499,99 (EUR 43 715,45), representing 0,14 % of the eligible costs;
 - (d) an 80 % guarantee granted jointly in 1999 by the Federal Government and the Land of Mecklenburg-Western Pomerania to secure a loan of DEM 29 750 000 (EUR 15,21 million) on the basis of the Commission-approved Federal guarantee programme⁽¹⁶⁾ for companies carrying out new projects in the new Länder and on the basis of the

above guarantee guidelines of the Land of Mecklenburg-Western Pomerania: The aid element of this measure amounts to 0,5 % of the guarantee, bearing in mind that KNT is to be regarded as an economically sound enterprise. Only part of this credit, i.e. DEM 12 750 000 (EUR 6 518 971,49)⁽¹⁷⁾, is earmarked for financing investment. The remainder, i.e. DEM 17 million (EUR 8 691 961,98), is earmarked for financing operating assets. The aid amounts to 0,5 % of 80 % of the loan amount of DEM 12 750 000 (EUR 6 518 971,49), i.e. DEM 51 000 (EUR 26 075,89), equivalent to 0,08 % of the eligible costs.

- (33) According to Germany, the project was also financed by equity amounting to DEM 33 041 513,02 (EUR 16 893 857,35). This amount comprises the loan of DEM 6 949 999,99 (EUR 3 553 478,57) under the KfW environmental programme; the aid element is DEM 186 971,48 (EUR 95 597) and is, according to Germany, to be classed as *de minimis* aid.
- (34) These figures were confirmed by the decision of the Economics Ministry of the Land of Mecklenburg-Western Pomerania dated 25 September 2002 and amending the grant decision of 20 August 1998, which had previously been amended by decisions of 22 October 1999 and 28 March 2002.
- (35) In the 1999 decision, potential extraordinary depreciation was mentioned with an aid intensity of 1,42 %. This aid was ultimately not granted because it related to investments for 1999 and 2000. The Development Areas Law does not provide for depreciation on investments after 31 December 1998. In the amending decision of 25 September 2002, the German authorities assumed an overall aid intensity for the extension project of 33,99 %. The actual intensity amounts to 33,05 % of the eligible costs.

2.3. Grounds for initiating the procedure

- (36) Despite the information provided by Germany in response to the information injunction, the Commission still had doubts as to whether the newly established sawmills could be regarded as SMEs and whether the aid as a whole was covered by approved aid schemes.
- (37) KNT is eligible for these gross aid intensities for the construction and extension of the sawmill in Wismar only if it is a genuine SME. It must therefore meet the

⁽¹⁵⁾ NN 109/93, SG(94) D/372 of 14 January 1994 (OJ C 373, 29.12.1994, p. 3).

⁽¹⁶⁾ N 287/91, Decision of 3 July 1991.

⁽¹⁷⁾ This amount comprises the KfW loan of DEM 8 549 999,60 (EUR 4 371 545,38) and part of the loan granted under the KfW environmental programme.

conditions laid down in the Community SME guidelines. One of the conditions in the decision approving the aid schemes under which public funds were granted or are still to be granted is compliance with the definition of an SME contained in Recommendation 96/280/EC and the Community SME guidelines.

- (38) It had to be ascertained in particular whether the legal entity KNT, which had been granted various aid measures, could in itself be viewed as the aid recipient. The particular question was whether it constituted an 'economic unit' within the meaning of Community legislation⁽¹⁸⁾ or whether the 'assisted enterprise' also encompassed other enterprises of the Klausner group. The doubts related in particular to the relations between KNT and KHT as well as to the degree of their economic integration. In this regard, the size of the enterprise to which the aid was granted had first to be determined before the Commission could assess whether the aid recipient met the definition of an SME.
- (39) With the still incomplete information from Germany on the enterprises belonging to the Klausner group, the Commission was unable to make a determination on the SME status of the aid recipient and thus on the question of whether the aid granted to KNT is covered by a regional aid scheme previously approved by the Commission or is to be viewed as new aid. However, the Commission also had doubts regarding the compatibility of all the measures with the common market.
- (40) Accordingly, the Commission decided to initiate the procedure under Article 88(2) of the EC Treaty and to issue an information injunction under Article 10(3) of Regulation (EC) No 659/1999.

3. COMMENTS FROM INTERESTED PARTIES

- (41) After initiating the procedure, the Commission received comments from eight interested parties.
- (42) Two competitors of the Klausner sawmills complained about not gaining access to the profit-and-loss statement and balance sheet of the Klausner group, which were not published. According to these competitors, taking the figures specified by the enterprise for raw materials consumption, the turnover and balance-sheet total for 1996 had to have exceeded the SME thresholds. Moreover, neither KNT nor KHT made an equity contribution towards the financing of the two projects.

Given its scale, the project did not comply with the SME provisions from the outset. The large amount of aid conferred major advantages on KNT in relation to its competitors, most of whom had a turnover of less than EUR 1,5 million and an equity ratio of below 15 %. Since the start of operations in Wismar, large volumes of timber were sold at a price which would not be tenable under normal financial conditions and assuming the same raw material sources. Finally, both sawmill enterprises were of the opinion that KNT's argument that the raw material procurement and product sales by KNT and KHT occurred on two different markets was incorrect. They maintained that the raw timber from Russia and the Baltic region was also used in Austria and by KHT in Friesau. Moreover, a large part of KNT's production was sold in central and southern Germany as well as in Austria and Italy, where the Austrian timber industry is likewise very active.

- (43) Both the Swedish Timber Association and the Association of the Swedish Forestry Industry sent in their comments after the procedure had been initiated. According to them, the investment aid and credit guarantees for KNT signified that, in addition to the related particle board and laminated wood plants in Wismar, one of Europe's largest sawmills had been constructed. No capacity shortage justifying such investments had been recorded in any of these market segments, however. Sawn timber is to be viewed as a mature product not in heavy demand and there is a strong need for consolidation in the industry. Substantial demand for product development aimed at increasing the use of timber also exists in various market segments. According to the ECE Timber Committee, the production and consumption of sawn timber were as follows in Europe between 1991 and 2000:

	(in million m ³)	
	1991	2000
Production	66,5	96,1
Consumption	72,5	91,7
Surplus/deficit	-6,0	+4,4

As the following figures illustrate, production increased in northern Europe in the 1990s:

	(in million m ³)	
	1991	2000
Sweden	11,2	14,8
Finland	6,4	13,3
Baltic States	?	5,3
Germany	11,6	17,4

⁽¹⁸⁾ See judgment of 14 November 1984 in Case 323/82 *Intermills v Commission* [1984] ECR 3809.

- (44) The Swedish associations emphasised that the subsidised formation of KNT and other mills has contributed to the increase in overproduction which the European industry has been seeking intensively to bring under control for many years. This overproduction had led, among other things, to declining prices for sawn timber and increasing raw material costs. According to the KHT website, the production capacity of the Wismar plant is 1,3 million m³.
- (45) Regarding the SME status of the enterprise, the Swedish industry was unable to comment on the question of whether KNT could be classified as a 'small or medium-sized enterprise' in the various phases in which the State aid was granted. According to information in its possession, however, the plant in Wismar is 50 % larger than the largest Swedish sawmill built in the last three years. In conclusion, the associations pointed out that KNT was one of Europe's largest sawmills and, together with the corporate group to which it belongs, exerted a substantial influence on the market in which it is active.
- (46) A German law firm reacted to the decision to initiate the procedure with the statement that KHT and KNT were active as individual enterprises on the market. Its letter stated that the SME criteria had not been met at the time the aid was granted, but no further details have been provided. Moreover, the law firm stated that the aid intensity of the guarantee was over 0,50 % since the enterprises KNT and KHT were unable to finance the doubling of the Wismar mill's capacity. The letter stated in conclusion that the State aid was granted to KNT to support economic development in the new *Länder* without any consideration for the provisions of Community law.
- (47) The Austrian Chamber of the Timber Industry expressed its regret that the balance sheets of KNT and KHT could not be inspected. In its opinion, the aid was granted without the necessary equity bases. It confirmed that the Klausner group procured its raw materials from areas in which the Austrian industry traditionally made its raw timber purchases. Klausner production was able to compete with production from Austrian sawmills only as a result of low prices that did not reflect market conditions.
- (48) The German Sawmill Association pointed out that KNT and KHT were described as production facilities on their websites. Even assuming that the family owners of all 'Klausner companies' and the overlapping, only partially non-voting shares of Fritz Klausner in KHT, held via Klausner Holzindustrie GmbH & Co. KG in St. Johann, did not enjoy or offer the possibility of exerting control, KHT-GmbH, which Fritz Klausner owns, is still though responsible for the management of KHT.
- (49) KNT likewise responded via its legal representatives to the decision to initiate the procedure. The previously missing information on the number of employees and the financial data of various group companies were supplemented and the aid intensity of the two projects was recalculated. With regard to the construction of the sawmill in Wismar, KNT distinguished between the total aid intensity calculated (as envisaged in the aid notice) on the basis of the investment expenditure (43,18 %) and an intensity calculated on the basis of the actual investments (39,80 %). For the extension project, the total aid intensity amounted to 49,82 % and the 'de facto aid intensity' to 30,08 %. KNT also provided more detailed information on the investment allowance for the investments made in 1999, putting the total investment expenditure for the extension project at DEM 37 891 390. The aid intensity was also recalculated for the extension project on the basis of the total investment expenditure, resulting in a figure of 44,67 %. Finally, an aid intensity of 31,13 % was calculated for the investment totalling DEM 62 032 981 in 1999 and 2000.
- (50) KNT also commented on its integration with other companies of the Klausner group. In its view, KNT must be considered as being independent of KHT, given that Fritz Klausner does not exercise joint control over KNT and KHT. KNT refers to Article 1(3) of the Annex to Recommendation 96/280/EC, whereby companies that are to be considered independent are those which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME. According to KNT, the word 'jointly' implies joint exercise of control, which is why the enterprises with one or more holdings must pursue a common interest. Although Fritz Klausner, according to KNT, holds shares in KNT and KHT, he has no possibility in corporate law to make decisions regarding the business operations of KHT.
- (51) KNT furthermore argued that there are no joint economic interests and no economic integration of KNT and KHT. The concepts of the two enterprises are different, being based on different geographical and logistical features and different raw material and sales market conditions. For example, the mill in Wismar is located in an international Baltic Sea port and imports Nordic timber for the production of high-grade sawn timber. The production from Wismar is exported solely by the economically advantageous sea route. In contrast,

given its geographical location, the mill in Thuringia has less favourable marketing options. It processes mainly German timber and distributes its lower-grade production to a neighbouring area because of high transport costs. Therefore, there is no close cooperation between the two enterprises, which also do not pursue any common economic interest. KNT and KHT do not, it is argued, have joint management or joint departments for administrative tasks. They also have different suppliers and buyers. Apart from certain product groups, the two enterprises did not compete with each other.

- (52) KNT added that the independence of KNT and KHT is evident from the current websites of the two enterprises. The link between the websites of KNT and KHT was made to establish a timber cluster via which independent timber processors and suppliers were to be presented. Other companies were to be added, but the project failed. No other link existed between KNT and KHT. Finally, the fact that KHT appears in the aid applications as a contact person for KNT is because Fritz Klausner was the manager of KHT until mid-1997. Today the enterprises have nothing whatsoever in common administratively.

4. COMMENTS FROM GERMANY

- (53) By letter of 2 August 2001, Germany commented on the decision to initiate the procedure. Firstly, it turned to the credit guarantee of DEM 29,75 million assumed by the Federal Government and the *Land* of Mecklenburg-Western Pomerania by virtue of the decision of 6 April 1999. According to Germany, this guarantee served to finance the second saw line on condition that the investment cost increase for the first saw line be secured through an obligation on the part of the lending banks before the credits could be disbursed. The guarantee was a condition for the realisation of the investments and the related positive effects for the region. By letter of 11 November 1998, the Commission agreed that an aid intensity of 0,5 % should be set with respect to guarantees for sound enterprises. The legality and compatibility of the guarantee derived from the Commission decision approving the Federal Government's guarantee programme.
- (54) Germany replied as follows to the Commission's questions set out in the information injunction. The Commission had requested copies of all the resolutions adopted at the general meetings of KHT and KNT partners since their formation. Germany informed the Commission that no written documents on the KHT partner resolutions existed. Regarding KNT, Germany presented a resolution of 7 April 1999 concerning a

capital increase and a resolution of 28 December 2000 on the acceptance of a general partner in KNT GmbH & Co. KG. It also attached a copy of the agreements between KNT or KHT and three of their respective suppliers. These were not always the largest suppliers. No agreement existed between KNT and KHT, on the one hand, and the suppliers, on the other, because KNT and KHT were independent companies. A list of all persons with management duties was presented for KHT but not for KNT.

- (55) Germany likewise discussed the comments of interested parties. Concerning access to the annual reports of KNT and KHT, it pointed out that no legal reporting requirement exists for limited partnerships with limited liability companies as general partners (GmbH & Co. KG) in accordance with Section 264a of the German Commercial Code. Concerning the equity share in the project financing, it stated that KNT's equity capital amounted to DEM [...]. Finally, it pointed out that the projects in Wismar met the conditions of the joint Federal Government/*Länder* scheme for regional economic development, under which it is necessary to strengthen the infrastructure and competitiveness of the region via investment. KNT was also having to contend with the difficulties stemming from mounting competition on the timber market.
- (56) With respect to the annual reports, the Commission notes that, in fact, no reporting requirement existed under German law until 31 December 1999. Regarding the equity contribution, the Commission notes that such an obligation first existed in Germany as of 1 January 2000.

5. ASSESSMENT

- (57) On the basis of the information provided by Germany, the Commission distinguished between two aid packages for KNT, one for the construction of the sawmill in Wismar and the other for its extension.
- (58) The aid granted to KNT in 1997/98 for the construction of a sawmill in Wismar with a total gross aid intensity of 42,79 % was allegedly granted under regional aid schemes previously approved by the Commission ⁽¹⁹⁾.
- (59) Regarding the aid granted in the period 1998 to 2000 for the extension of the sawmill in Wismar, it is evident from the latest set of documents sent to the Commission by Germany that the total amount of aid corresponded to an aid intensity of 33,99 %.
- (60) Pursuant to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts competition or

⁽¹⁹⁾ 27th outline plan for the joint Federal Government/*Länder* scheme, the Investment Allowance Law and the guarantee guidelines of the *Land* of Mecklenburg-Western Pomerania.

threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market in so far as it affects trade between Member States. The aid for KNT was granted through State resources. It distorts or threatens to distort competition because it was granted to an individual undertaking in a branch of production and thus conferred on it an advantage over its competitors. Trade between Member States is affected in so far as KNT is active in a branch characterised by such trade. Germany has not disputed the fact that the measures constitute aid.

turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million and which conform to the criterion of independence.

- (61) The Commission notes that the measures were implemented in structurally weak areas under Article 87(3)(a) of the EC Treaty. It also notes that the maximum admissible gross aid intensity in these regions was 35 % and 50 % for large enterprises and SMEs respectively on the basis of the relevant schemes and the list of development areas applicable at the time the aid was granted ⁽²⁰⁾. These rates represent ceilings which apply to the total aid granted if, for example, aid is granted under various regional schemes or from local, regional, national or Community resources.
- (62) In light of the total aid intensity of the first aid package, the aid granted to KNT for the construction of the sawmill required that the aid recipient ranked as an SME within the meaning of the Community SME guidelines and Recommendation 96/280/EC.
- (63) At the time that Decision 2002/468/EC was adopted, the total aid for the extension of the sawmill in Wismar was not fully known to the Commission even after institution of the formal procedure together with its information injunction. At the time, the total aid intensity of the second aid package obviously exceeded 35 %. This means that the aid recipient had to satisfy the SME definition given in Recommendation 96/280/EC and in the Community SME guidelines applicable at the time.

- (65) 'Independent enterprises' are enterprises which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise.

- (66) In this connection, the Commission recalls its position on SMEs, which consists in providing this category of enterprises with special incentives and removing certain handicaps. Point 1.2 of the Community SME guidelines explains that one of the main such handicaps is the difficulty in obtaining capital and credit as well as access to information, particularly information concerning new technologies and potential markets, and the higher costs entailed by new regulatory arrangements.

- (67) The bonus (i.e. the increase in the admissible amount of aid) for SMEs is therefore justified not only by the contribution which these enterprises make to the common good but also, in light of their positive role, by the necessary compensation for the handicaps they face. It must be ensured, however, that the bonus is, in fact, granted only to enterprises which have to contend with these handicaps. In particular, the definition of an SME must be so restrictive that only those enterprises which have the envisaged positive effect on third parties and are disadvantaged by the abovementioned handicaps are covered. The definition cannot, therefore, be extended to many larger companies which do not necessarily have a positive effect on third parties or which do not absolutely have to reckon with the handicaps typically faced by SMEs. Aid granted to such companies could lead to further distortions of competition and intra-Community trade.

- (68) This principle is stated in the recital 22 of Recommendation 96/280/EC, which reads as follows:

5.1. The SME status of the aid recipient

5.1.1. Definition of an SME

- (64) Under Recommendation 96/280/EC, 'small and medium-sized enterprises' are enterprises which have fewer than 250 employees and either an annual

'Whereas, therefore, fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap.'

The Commission takes particular care to ensure that the independence criterion is not circumvented. In order to guarantee that only genuine SMEs benefit from a scheme, legal constructs of SMEs which constitute economic groupings with greater market power than that of an SME must be excluded.

⁽²⁰⁾ Aid N 613/96, approved by Commission decision of 18 December 1998.

5.1.2. *Size of the relevant enterprise*

- (69) Article 87(1) of the EC Treaty relies on the definition of an undertaking when defining an aid recipient. As the Court of Justice confirmed ⁽²¹⁾, an undertaking need not constitute a separate legal entity but may consist of a group of companies. For purposes of implementing Community law, undertakings must be equated with 'economic units'. Consequently, it is necessary to distinguish between various factors, such as companies' shareholding patterns, the persons of the shareholders/partners and the degree of economic integration.
- (70) The legal person benefiting from the two aid packages is KNT. When initiating the procedure, the Commission stated that there were indications that KNT was not to be regarded as the relevant enterprise. Various elements suggested that the aid recipient was possibly larger than the legal person KNT and might encompass other companies related to Fritz Klausner.
- (71) Of the enterprises in which Fritz Klausner is present, three companies operate sawmills, namely KHI, KNT and KHT. The sawmill operations of KHI were discontinued in 1996, however. It must be investigated whether KNT itself constitutes a 'single economic unit' or whether the two other sawmills KNT and KHT can be regarded as companies which together form a single economic unit.
- In terms of ownership relations
- (72) Fritz Klausner possesses the entire capital of KNT and is also the sole shareholder in KNT-GmbH, the general partner of KNT. He therefore decides both on the normal and the extraordinary business transactions of KNT.
- (73) Fritz Klausner owns all the shares in KHT-GmbH, the general partner of KHT. He owns only 20 % of the capital of KHT-KG. The other limited partner of KHT is KHI. Fritz Klausner owns 75 % of the capital of KHI, although he has not been entitled to vote at general meetings of partners since 1 January 1997. According to Germany, the management authority at KHT-GmbH has been restricted so that KHT-GmbH must now muster three quarters of the voting rights of KHT's partners.
- Fritz Klausner cannot therefore decide alone on the normal and extraordinary business transactions of KHT but requires the approval of his mother, Margarethe Klausner.
- (74) The Commission notes, however, that all persons with shares in KHT-GmbH, KHT, KHI-GmbH and KHI belong to the same family.
- (75) Further elements mentioned by the Commission when it instituted the procedure point to the fact that KNT and KHT have coordinated their activity.
- In terms of economic integration
- (76) When initiating the procedure, the Commission presented the arguments deployed by Germany to prove that KNT and KHT should be considered as different economic units.
- (77) According to Germany, KNT and KHT have different business concepts based on their geographical and logistical features. The two companies do not pursue the same interests and do not work together.
- (78) The KNT sawmill is located in Wismar, a Baltic Sea port of international importance. It processes high-quality timber from the best regions in northern Europe. It obtains this high-quality timber with its small knots primarily from Scandinavia, Russia and the Baltic States. It exports its production by sea to the Netherlands, Belgium, France, the United Kingdom, Denmark, North Africa and Japan.
- (79) The KHT sawmill is located in Friesau in the low mountain region of eastern Germany. It obtains its raw material from within a radius of 200 km, processing mainly German timber. This timber is of low quality and, because of high transport costs (rail and road), the mill's markets are limited to Germany, Italy and the USA.
- (80) In addition, according to Germany, the two companies have their own management and personnel departments.
- (81) When it instituted the procedure, the Commission specified several elements which suggested that the activities of KNT and KHT-KG are coordinated.

⁽²¹⁾ See footnote 18.

- (82) At the time the procedure was initiated, there was a link on the KNT website ⁽²²⁾ to that of KHT; the names of both companies appeared under the heading 'Plant locations'. They were described as being located in central Europe, from where they supplied customers all over the world. Both companies were described as enterprises producing high-quality wood whose customers came from the wood processing industry.
- (83) For the rest, in contrast to Germany's statements, the two companies appeared to share certain management activities. According to the presentation on the websites, they had a joint sales manager, Anne Leibold, and a joint manager responsible for purchasing, Matthias Wittkemper. For such major business activities as material procurement and marketing, KNT and KHT therefore had the same manager and so appeared to the outside world as a single enterprise.
- (84) Finally, KHT represented KNT in certain business tasks. The decisions of the *Land* of Mecklenburg-Western Pomerania concerning the granting of investment aid to KNT for the construction of the sawmill were communicated to KNT 'for the attention of' KHT.
- (85) Germany did not comment specifically on any of these points. It merely presented a list of KNT and KHT managers which showed that the companies did not have joint management. It also provided the Commission with the agreements of KNT and KHT with three of their suppliers. Germany did not comment, however, on the specific questions raised.
- (86) KNT reacted to these specific questions, as summarised in recitals 48 to 51. It stated that the two companies pursued different economic interests and did not share any management tasks.
- (87) The Commission is still of the opinion that sufficient elements indicate some coordination of activities by KNT and KHT. After the procedure had been initiated, the websites of the companies were reorganised. KNT argues that the link which existed at the time was set up in connection with the formation of a timber cluster via which various independent producers and suppliers from the timber industry would be able to present their business activities. Following the failure of the project, the link between KNT and KHT was removed. The Commission notes, however, that on both KNT's and KHT's website the two companies were described as the two plant locations. Both were moreover described as companies which supplied their customers with high-quality sawn timber in Europe and worldwide. The comments by interested parties confirmed that both KNT and KHT are present in central Europe, in the Nordic countries and on all markets on which Nordic and Austrian sawmill enterprises are active. KNT and KHT obviously do not have any clearly separate procurement and supplier markets. Even if such a division existed, the fact that each location is specialised in a specific market segment does not rule out the possibility that they belong to the same economic unit.
- (88) Regarding the management positions in the two companies, their websites were changed so that the names of Anne Leibold and Matthias Wittkemper still appear only on the KHT management list. They were removed from the KNT list on the companies' websites. Anne Leibold as sales manager and Matthias Wittkemper as purchasing manager do not appear on the overview of KNT management personnel which was presented by Germany for the period from 1 January 1998 to 31 December 1999, but only on that of KHT. This change was not justified to the Commission, which doubts that these changes can be sufficiently justified. It cannot therefore be concluded that KNT and KHT do not carry out joint management tasks.
- (89) It is evident from the comments by interested parties that KNT and KHT are perceived as one and the same enterprise and as one of the market's largest participants.
- (90) For the above reasons, the Commission has concluded that the legal person KNT cannot alone be regarded as the aid recipient. On the basis of the information available to it, it concludes that the relevant enterprise is larger and also encompasses KHT. KHT and KNT are actually linked to each other through one of their partners. They pursue the same economic activity; purchasing and marketing are carried out by the same managers; and the two enterprises appear on their respective websites under the heading 'Plant locations'.

5.2. Compatibility of the total amount of aid for the construction of the sawmill in Wismar

- (91) When the procedure was initiated, the Commission had already come to the conclusion that there was no reason to institute proceedings in respect of the investment grant of DEM 43 818 000 (EUR 22 403 787,65), the investment allowance of DEM 2 635 086 (EUR 1 347 298) and the guarantee with an aid intensity of 0,5 % that had been made available for the construction of the mill in Wismar, which could be regarded as aid that had been granted previously.

⁽²²⁾ <http://www.knt.de/>, 21 May 2001; <http://www.kht.de/>, 21 May 2001.

- (92) However, the Commission had doubts regarding the conformity of the investment allowance of DEM 2,5 million. This measure involved aid in the form of a tax benefit which is granted automatically if the legal conditions (i.e. the realisation of the investment) are met. The State does not have any discretion when granting this tax benefit; the decision of the tax authorities does not create a subjective right but merely constitutes an act to determine whether the conditions for a claim exist. Therefore, the moment an investment is realised is to be regarded as the date on which the benefit is granted. In the present case, 1998 is to be considered the year in which this measure was granted since it was granted for investments realised in that year.
- (93) The Investment Allowance Law provides for a tax exemption for the acquisition and production of capital goods and buildings by enterprises in the new *Länder*. It defines those eligible for an allowance as economically and organisationally separate operating units. In the present case, KNT is the sole beneficiary of the aid within the meaning of the Investment Allowance Law. In 1998 KNT had fewer than 250 employees and was thus eligible for an investment allowance of 10 %. The investment allowance amounting to DEM 2,5 million (EUR 1 278 229,70) was, therefore, covered by an approved aid scheme and constitutes existing aid on condition that the cumulation rules are complied with.
- (94) The Commission must ascertain whether the aggregate aid intensity is admissible and does not exceed the ceiling for regional aid. In 1998 the aggregate aid intensity for the project was 42,79 %.
- (95) Recommendation 96/280/EC stipulates:
- ‘Where, at the final balance-sheet date, an enterprise exceeds or falls below the employee thresholds or financial ceilings, this is to result in its acquiring or losing the status of ‘SME’ only if the phenomenon is repeated over two consecutive financial years.’
- (96) The reference year to be considered is 1997 since this is the year of the last annual balance-sheet date. Although the aid recipient had 167 employees in 1997, it achieved a balance-sheet total of EUR [...] and turnover of EUR [...], exceeding the thresholds for the definition of an SME. However, this was not repeated over two consecutive financial years as the SME thresholds were not exceeded in 1996, when the aid recipient had 159 employees and a balance-sheet total of EUR [...].
- (97) Accordingly, the recipient did not forgo its SME status in 1998 and was still an SME in that year, when the aid was granted. The establishment aid granted is thus compatible with the ceiling for regional aid. Other aid was granted under approved schemes and is existing aid.
- 5.3. Compatibility of the total amount of aid for the extension of the sawmill**
- (98) When the procedure was initiated, the Commission had already come to the conclusion that the investment grant of DEM 8 879 000 (EUR 4 539 760) for the extension of the project was existing aid. The procedure was thus initiated in respect of the other measures involved in the extension project.
- (99) The low-interest loan of DEM 8 549 999,60 (EUR 4 371 545,98) with an aid intensity of 0,14 % was granted in 1999. Together with the aid already granted for the same project, the aid intensity of all the aid granted for the extension project amounts to 14,55 % of the eligible costs, i.e. below the ceiling of 35 % for large enterprises on the basis of the list of regional development areas. Irrespective of the size of the recipient, the low-interest loan is thus covered by an approved aid scheme and is to be regarded as existing aid on condition that the rules on aid cumulation are complied with.
- (100) The loan of DEM 6 949 999,99 (EUR 3 553 478,57) granted under the KfW environmental programme with an aid element of DEM 186 971,46 (EUR 95 597) was also granted in 1999. Its aid intensity amounts to 0,3 % of the eligible costs. The low-interest loan has to be regarded as existing aid provided that the rules on aid cumulation are complied with since the aggregate intensity at that time was below 35 %.
- (101) The investment allowance of DEM 7 775 095 (EUR 3 965 117,11) is regarded as aid granted in 1999 since the corresponding investment took place in that year. Its aid intensity amounts to 12,58 % of the eligible costs. The investment allowance has to be regarded as existing aid on condition that the rules on aid cumulation are complied with.
- (102) The 80 % guarantee for aid of DEM 51 000 (EUR 26 075,89) was granted in 1999. It has an aid intensity of 0,08 % of the eligible costs. It has to be regarded as existing aid on condition that the rules on aid cumulation are met.

(103) The investment allowance of DEM 3 385 492 (EUR 1 730 974,57) was granted in 2000 since the corresponding investment was carried out that year. Its aid intensity is 5,5 % of the eligible costs. It has to be regarded as existing aid on condition that the rules on aid cumulation are complied with.

Article 2

The following aid which Germany has implemented for Klausner Nordic Timber GmbH & Co constitutes existing aid:

(104) The total aid intensity of the measures granted for the extension project amounts to 33,05 %. Consequently, irrespective of the size of the recipient, all the measures are compatible with the rules on cumulation. Moreover, the amount contributed by the aid recipient accounts for at least 25 % of the finance for the productive investments, as required by point 4.2 of the guidelines on national regional aid ⁽²³⁾ with effect from 1 January 2000, when Germany implemented the appropriate measures proposed by the Commission. This was confirmed by Germany in its letter of 26 September 2002. The Commission has, therefore, come to the conclusion that the aid for the extension project constitutes existing aid.

(a) the investment allowance of DEM 2 500 000 (EUR 1 278 229,70) for the construction of the Wismar plant;

(b) the low-interest loan of DEM 6 949 999,60 (EUR 3 553 478,52) granted under the KFW environmental programme for the extension of the Wismar plant;

(c) the investment allowance of DEM 7 775 095 (EUR 3 975 342,95) for the extension of the Wismar plant;

(d) the 80 % guarantee to secure a loan of DEM 12 750 000 (EUR 6 518 971,49) for the extension of the Wismar plant;

(e) the investment allowance of DEM 3 385 492 (EUR 1 730 974,57) for the extension of the Wismar plant.

6. CONCLUSION

(105) With Decision 2002/468/EC, the Commission misinterpreted the Investment Allowance Law. It has, therefore, decided to withdraw that Decision, which is based on a clear mistake in law. Moreover, after the Decision had been adopted, Germany provided new information on the aid granted for the investment project. On the basis of that information and the attached documents, the Commission has come to the conclusion that the aid granted to KNT in respect of the construction and extension projects is covered by existing schemes and thus constitutes existing aid,

Article 3

This Decision is addressed to the Federal Republic of Germany.

HAS ADOPTED THIS DECISION:

Done at Brussels, 23 December 2002.

Article 1

Decision 2002/468/EC is herewith withdrawn.

For the Commission

Mario MONTI

Member of the Commission

⁽²³⁾ OJ C 74, 10.3.1998, p. 9.

COMMISSION DECISION**of 19 February 2003****on the measures implemented by Spain for Hilados y Tejidos Puigneró SA***(notified under document number C(2003) 518)***(Only the Spanish text is authentic)****(Text with EEA relevance)***(2003/876/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letter dated 12 March 2001, the Commission, after receiving a complaint from an interested party in the textile sector, required the Spanish authorities to supply information on alleged State aid measures. The Commission subsequently received a second complaint.
- (2) By letter dated 18 April 2001, Spain submitted incomplete information in response to the questions that the Commission had raised in its letter. By letter of 17 May 2001, the Commission sent a reminder requesting the missing information. The Spanish authorities responded by letters of 14, 25 and 29 June 2001.
- (3) By letter dated 19 September 2001, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty and requested further information on the possible State aid measures. By letter dated 19 October 2001, the Spanish authorities requested more time, and provided incomplete information by letters dated 5 and 9 November 2001. By the same letter the Spanish

authorities responded to the Commission's enquiry concerning possible confidential information contained in its decision to initiate the procedure. The Commission replied by letter dated 26 October 2001, stating that it was not able to grant Spain's request. On 14 November 2001, a meeting was held between the Commission departments and the Spanish authorities, at their request, which was also attended by representatives of the Catalan Institute of Finance (Instituto Catalán de Finanzas, hereinafter 'ICF'). By letter dated 14 December 2001, the Commission urged the Spanish authorities to supply the information still missing, which the Spanish authorities submitted by letters dated 18 January and 1 and 14 February 2002. A letter from the beneficiary, dated 23 January 2002, was annexed to the letter of 1 February 2002.

- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* on 1 December 2001 together with an invitation to interested parties to submit their comments. The Commission received no comments from interested parties.
- (5) By decision of 7 May 2002 the Commission extended the procedure to include new measures. By letter of 13 May 2002 the Commission informed Spain of its decision. Spain submitted further information by letters dated 2, 10 and 15 July 2002. The decision to extend the procedure was published in the *Official Journal of the European Communities* on 10 July 2002. The Commission received one comment on 15 July 2002, to which the Commission invited Spain to react by letter dated 4 September 2002. Spain submitted its comments on 11 October 2002.

II. DESCRIPTION**1. The company**

- (6) The company Hilados y Tejidos Puigneró SA (hereinafter 'Puigneró') is active in the production of yarns and

⁽¹⁾ OJ C 399, 1.12.2001, p. 6 and OJ C 164, 10.7.2002, p. 6.

fabrics as well as in textile finishing and has its registered office in Barcelona. The company was founded in 1957 and is privately owned by the Puigneró family. In 1982 the company was converted into a limited company. Puigneró operates three plants at Sant Bartomeu del Grau, Roda de Ter and Prats de Lluçanès. All three areas are defined as assisted areas according to Article 87(3)(c) of the Treaty.

- (7) By decision of 10 November 2000, the Court of First Instance No 4 at Vic (Barcelona) declared that the company was in suspension of payments and therefore insolvent. The Suspension of Payments Act of 26 July

1922 grants a company whose assets exceed its liabilities the possibility of suspending payment of certain individual debts while at the same time being allowed to continue trading to avoid worsening its financial situation. On the basis of agreements with its creditors, a decision lifting the suspension of payments is about to be adopted or may already have been adopted.

- (8) According to data from 1998 Puigneró was the biggest company in the sector in Spain in terms of workforce and the second biggest in terms of turnover. Some key data describing the company are presented below:

(EUR million)

	1993	1994	1995	1996	1997	1998	1999	2000
Workforce				n.a.	n.a.	1 600	1 800	1 600
Turnover				115	142	126	98	90
Balance sheet total		124	124	158	163	162	177	184
Operating result		3,99	9,35	4,69	6,38	6,47	6,70	-32,97
Result for the year	-12,09 ⁽²⁾	2,33	8,82	2,16	0,82	1,05	1,65	-104,70

- (9) According to recent information, turnover in 2001 amounted to EUR 62 million, 32 % lower than estimated. Losses in 2001 amounted to EUR 2,5 million. The workforce has been reduced to 780 employees.
- (10) Puigneró sells 60 % of its output domestically, disposes of some 30 % on the European market and exports the remaining 10 % to Tunisia and Morocco.
- (11) Considering Puigneró's workforce (more than 250), the company does not qualify as a small or medium-sized enterprise (SME) in accordance with Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽³⁾.

2. The complaints

- (12) According to the first complainant, Puigneró accumulated significant debts with various public institutions, including substantial amounts of unpaid taxes and social security contributions. The company's public debt exceeded its annual turnover. Only 2 % of its liabilities was owed to banks, and these liabilities consisted mainly of commercial loans secured by

guarantees issued by public institutions. This indicated that the company did not enjoy the confidence of the private financial markets. Following the Court decision declaring that the company was in suspension of payments, the company also received a loan, amounting to ESP 2 000 million (EUR 12,02 million), from a public institution, the ICF. The complainant therefore took the view that Puigneró had distorted competition through its manifest non-compliance with its public obligations. The complainant also maintained that Puigneró had already been declared in suspension of payments on previous occasions.

- (13) The second complainant also stressed Puigneró's large debt towards the tax and social security authorities. In its view, the public authorities had failed in their duty to enforce mandatory collection of the debt. It also suspected that the loan referred to above lacked valid guarantees, in which case it constituted State aid.
- (14) Moreover, in a subsequent letter both complainants raised concerns over the pricing policy applied by the company, especially in the textile-finishing sector. They claimed that Puigneró was distorting competition on the relevant market by selling its products at below production cost.

⁽²⁾ This figure is mentioned in subsequent annual accounts as a negative tax base to be offset against any future profits. The result for that year may have been a bigger loss, but not a smaller one.

⁽³⁾ OJ L 107, 30.4.1996, p. 4.

- (15) The Commission received a third letter from the first complainant, underlining its concern that Puigneró was continuing to benefit from a transfer of public funds and was therefore distorting trading conditions on the market. However, a few months later it withdrew the complaint.

3. The market

- (16) The textile market in the European Union is a saturated, highly competitive market. Several subsectors of the textile industry suffer from overcapacity. EU employment in the textile and clothing sector has greatly declined, leading also to a fall in the number of enterprises operating in these sectors in recent years. Over the period from 1995 to 1999, production in all subsectors of the textile industry declined, with the exception of industrial and other textiles, where production rose slightly (measured in constant prices). Decreases were strongest in yarn and thread, followed by textile finishing. Apparent consumption of textiles also decreased ⁽⁴⁾.
- (17) The yarns sector is also the most worrying for Puigneró due to its low profitability and competitiveness in relation to competitors in Asian and North African countries. The yarns sector represented 23 % of total turnover according to the figures available for 2000; finished and printed fabrics made up the bulk of the company's annual turnover, accounting for 50,6 % in 2000.

4. The aid measures

- (18) The following measures have been taken in favour of Puigneró:

4.1. Measures taken by the ICF

- (19) The ICF is a public institution operating under the Catalan Regional Government's Department for Economic Affairs and Finance. It was established by Act No 2/1985 of 14 January 1985 to assist the Regional Government in exercising the powers conferred on it by Catalonia's Statute of Autonomy, with regard to the financial system, and to act as the main instrument of the Regional Government's public credit policy. In 1998 the ICF's legal status was changed from an autonomous financial agency to a public-law entity operating under private law. The ICF's material resources and capacity to

take on risks are determined each year in the budget of the Regional Government. The various departments of the Regional Government establish sector-based priorities to be followed by the ICF ⁽⁵⁾. As an entity dependent on the Catalan Regional Government, the ICF is subject to parliamentary control. It must file a quarterly report on the guarantees and loans granted and the results obtained. The ICF is also subject to the external control mechanisms established both by the Catalan Public Finance Act and the Catalan Public Enterprise Statute. The ICF's accounting and financial statements are thus regularly audited by the relevant bodies within the Catalan administration. The Regional Government is responsible for making the managerial appointments. The Director-General for finance policy and the Director-General for budget and treasury are members of its Management Committee. The ICF granted the following loans and guarantees.

- (20) Loan granted in 1993: ESP 500 million (approximately EUR 3 million). The loan was granted on 23 April 1993 and formalised on 28 April 1993. Its original duration was six years with a two-year grace period. For the remaining four years the instalments on the principal were to be paid on a quarterly basis (ESP 31 250 000 each). The interest rate was set at Mibor 3-months + 1 %. The duration of the loan was extended to ten years on 30 May 1996. At that time the first three instalments had been paid as stipulated. The remaining amount was to be paid back in 85 monthly instalments of ESP 4 779 412 (EUR 28 725) each.
- (21) As security Puigneró provided a mortgage on its industrial site at Prats de Lluçanès. The mortgage totalled ESP 970 million (EUR 5 829 817), of which ESP 50 million (EUR 300 506) was for execution costs. At the time, this site was already burdened with four other mortgages, two of which for a total value of ESP 500 million, dating from 31 July 1992 and 4 September 1992 respectively. The third provided security for an amount of ESP 50 million (EUR 300 506). The value of the fourth mortgage is not indicated. The 1995 annual accounts mention this mortgage as being for a total of ESP 1 200 000 000 (EUR 7 212 145), but this amount concerns both the site at Prats de Lluçanès and that at Roda de Ter, which is worth 3,5 times more. The actual loan secured by this mortgage amounted in 1995 to ESP 495 350 000 (EUR 2 977 114). The decision by the ICF specifies that the loan was to be further secured by shares in the company owned by the main shareholder, but this is not formalised in the original document. In the extension granted in 1996 this guarantee is mentioned, however.

⁽⁴⁾ The EU Textile and Clothing Sector 2000 OETH, May 2000.

⁽⁵⁾ The 2000 annual report states that one of the main reasons for withdrawal of an application is non-compliance with these sector-based priorities (p. 14).

- (22) The outstanding part of the loan at the start of the suspension of payments procedure amounted to ESP 82 678 246 (EUR 496 906,27).
- (23) Guarantee granted in 1996: ESP 600 million (approximately EUR 3,61 million). The guarantee was granted on 2 July 1996 and formalised on 10 July 1996 for three years. It served to guarantee commercial credit lines provided by several banks up to a maximum amount of ESP 600 million (EUR 3,61 million). The credit provided by the banks was to total ESP 750 million (EUR 4,51 million). The guarantee was subsequently extended for a further two years on 31 March 1999. The cost of the guarantee consists of 0,5 % by way of a fee and 1,75 % in administrative costs and risk premium.
- (24) As securities Puigneró provided a mortgage on seven properties, a personal guarantee from the main shareholder and 9 620 shares in the company (66,8 % of the total number of the company's shares). Two of the properties formed part of the industrial site at Prats de Lluçanès, the others were apartments and houses at Prats de Lluçanès ⁽⁶⁾. The mortgage provided security for a maximum amount of ESP 1 135 055 866 (EUR 6 821 823), of which ESP 105 586 592 (EUR 634 588) was for execution costs. This total amount corresponds to the execution value mentioned in the contract. The nominal value of each share is ESP 500 000; the execution value of each share mentioned in the contract is ESP 17 954. The maximum coverage of all the shares is ESP 154 944 134 (EUR 931 233).
- (25) The original guarantee and the first extension never had to be called as all the obligations were met. Various properties had already been distrained by the Tax Agency and mortgaged in favour of other creditors. It seems that another mortgage on a property owned by the main shareholders was later added for security.
- (26) Guarantee granted in 1998: ESP 500 million (approximately EUR 3 million). The guarantee was granted on 4 June 1998 for a maximum period of three years. The guarantee covered 50 % of the amount of a number of policies relating to discounting of bills which had been agreed between Puigneró and two banks. The cost of the guarantee is the same as above, and the security consisted of a mortgage on 23 properties of which 15 were owned by Puigneró and eight by the main shareholder. These properties formed part of the industrial site at Sant Bartomeu del Grau or were houses in that locality. The execution value of all these properties together mentioned in the guarantee is ESP 1 075 million. It appears that this guarantee has not been called either.
- (27) The guarantee agreements include a clause according to which the value of the securities given has to be revalued and the shortfall made up by other securities if the accounting value of the shares decreases by 10 % or more. This was indisputably the case as the company was declared insolvent by the Court in November 2000. However, the ICF states that it did not enforce the clause on the topping-up of the guarantee since it was unaware of the existence of other assets.
- (28) Extension of guarantees in July 2001; reduction to a total of ESP 800 million (EUR 4,8 million): the 1996 and 1998 guarantees were once more extended by a further two years until 2003 on 17 July 2001. On this occasion the total amount covered by the guarantee was reduced to ESP 800 million (EUR 4,8 million). The risk premium was not modified, nor were further securities added.
- (29) Modification of guarantees in November 2001: on 29 November 2001 the two guarantees were modified once more, reducing the coverage by another ESP 300 million (EUR 1,8 million). This amount was used to guarantee a loan to cover the severance payments related to the restructuring (basically deriving from closure of the site at Roda de Ter). This guarantee is valid until July 2003 like the others. The modifications did not affect the mortgages by which the guarantee was covered. Spain maintains that the actual total value of the guarantees amounted to ESP 800 million (EUR 4,81 million).
- (30) Loan granted on 14 December 2000: The loan amounts to ESP 2 000 million (EUR 12,02 million) and was initially granted for one year. It was subsequently twice extended by another year. The interest rate is Euribor 3 months +1 %. The loan is conditional on implementation of a detailed action programme for 2001 and aims to bring about a temporary improvement in the company's cash flow. It is therefore explicitly devised as a bridging measure to enable the company to meet its day-to-day running costs and carry on its business 'normally'.
- (31) The securities provided for the loan consist of a mortgage on 27 properties owned by the company (including the three industrial sites) and on 10 properties owned by the main shareholder, together with shares in the company provided by its shareholders (14 400 shares with a nominal value of ESP 500 000 each) and a personal guarantee by the main shareholders. The total execution value of the properties mentioned in the mortgage is ESP 3 570 million (EUR 21 396 030,92). As for the properties owned by the shareholders, no valuation was provided.

⁽⁶⁾ The houses at Prats de Lluçanès were valued at ESP 163 million (EUR 0,98 million) in July 2001. No previous valuation of the same properties exists.

- (32) Puigneró met the interest payments on the loan, at least until November 2001.
- (33) Agreement on deferral and remission of debt reached as part of the suspension of payments procedure: the ICF subscribed to the agreement between Puigneró and its preferential creditors. This agreement does not concern the 2000 loan, which was granted after the suspension of payments procedure was initiated. The total debt covered by the suspension of payments procedure is ESP 149 590 014 (EUR 899 054). 39,70 % of the debt was to be paid out of the sale of the industrial site at

Roda de Ter. For the remaining debt ICF was to subscribe to the agreement with ordinary creditors, which provided for a debt remission of 70 %.

4.2. Deferral and remission of social security debt

- (34) The social security authorities charged the legal interest rate on all the debts. According to the annual accounts, the debt at the close of each year amounted to the sums indicated in the following table.

(ESP million)

	1992	1993	1994	1995	1996	1997	1998	1999	2000
Social security debt	k. A.	k. A.	4 727,3	5 259,8	5 996,3	6 190,2	7 288,7	8 815,7	9 963,1

- (35) As for the various arrangements on payment in instalments and rescheduling of the accumulated debts, at least the following agreements were concluded ⁽⁷⁾:

Date	Amount (ESP million)	Amount (EUR)	Mortgage on:	Maximum burden on the property (ESP million)
December 1989 ⁽⁸⁾	671,5	4 036 109	Industrial site at Roda de Ter	4 612,2
21 February 1996	5 097,6	30 637 419	Not established. Intention was to mortgage the industrial site at Roda de Ter	n.a.
25 November 1999	6 778,5	40 739 884	Industrial site at Roda de Ter	8 815,7

- (36) The entry into force of the agreements was subject to Puigneró formalising the relevant mortgages in the public register and complying with its current obligations as well as paying the instalments stipulated in the terms. The Commission notes, however, that the annual accounts for 1995, 1996, 1997, 1998 and 1999 all mention a mortgage in favour of the social security authorities for an amount of ESP 4 612 105 000 (EUR 27 719 309). This amount is raised only in the 2000 annual accounts to ESP 8 815 705 000 (EUR 52 983 454). The mortgages mentioned were placed only on the industrial site at Roda de Ter.

⁽⁷⁾ The Spanish authorities have provided copies of the more recent agreements, whereas the company's financial statements provide information on earlier agreements. Moreover, further agreements are mentioned in the statement of affairs for the suspension of payments as of 10 November 2000. It should be noted that any new agreement with the same authority covers new debt together with accumulated previous debt.

⁽⁸⁾ The exact amount of the agreement has not been confirmed, therefore the amount shows the approximate amount remaining to be paid on 31 December 1995. The same amount still remained unpaid on 31 December 1996.

- (37) Following non-compliance with the 1996 agreement, the social security authorities imposed the following distraints on the company's assets:

Date of Decision	Amount (ESP)	Amount (EUR)	Properties concerned
30.9.1997	5 814 331 967	34 944 839	Industrial sites and various dwellings at Sant Bartomeu del Grau and Roda de Ter
14.10.1998	984 328 232	5 915 932	Ditto
8.9.1999	849 654 219	5 106 525	Only industrial sites at San Bartomeu del Grau and Roda de Ter
June 2001			Same properties as in 1997 and 1998

- (38) The 1999 agreement was signed in November of that year, despite Puigneró's repeated failures to fulfil the terms of the previous agreements. The new agreement included the debt covered by the previous agreements together with newly accumulated debt. In addition to what was common to the other agreements, this agreement expressly stated that the authorities reserved the right to call securities in the event of non-compliance and to convert distraints into mortgages on the properties serving as securities. It also stated that in the event of the slightest non-compliance the authorities would initiate the enforced collection procedure. According to Spain, this agreement did not in fact come into effect since the company failed to meet its payments.

- (39) Puigneró did not fulfil the terms of these agreements. The social security authorities did not receive any interest payment at all on the rescheduled debts.

- (40) In the light of points 35 to 39 above, the Commission finds that none of the new debts accumulated after the 1989 agreement were covered by any guarantee until the dstraint imposed in 1997. Furthermore, according to the debt rescheduling agreements a mortgage was to be established only on the industrial site at Roda de Ter. The distraints concerned dwellings as well as the industrial site at Sant Bartomeu del Grau. The industrial site and dwellings at Prats de Lluçanès were not affected at all.

- (41) The debt to social security recognised in the suspension of payments procedure amounts to ESP 7 871 million (EUR 47,3 million). This debt can be broken down as follows:

(EUR)

Site	Period	Debt
Roda de Ter	11.1990 to 9.2000	1 735 524,19
Prats de Lluçanès	11.1998 to 9.2000	1 327 762,56
Sant Bartomeu del Grau	4.1990 to 9.2000 7.1977 to 12.1983	40 369 520,83 3 874 704,99
Total		47 307 512,57

- (42) On 16 July 2002 Puigneró reached an agreement with all its preferential creditors (except one) on debt rescheduling and remission. Puigneró undertook to sell off within three years its production plant at Roda de Ter with the aim of obtaining a selling price of EUR 47 million. The proceeds of the sale would be used to pay each preferential creditor a minimum of 39,7 % of its claims (EUR 18 818 879,24 in the case of social security). If a higher value were to be obtained, the difference would be distributed among all creditors. Of the remaining debts 70 % would be remitted and 30 % (EUR 8 546 552,84 in case of social security) would be rescheduled over a period of 12 years, with no payment in the first year, increasing instalments and an interest rate of 3 %. The other preferential creditors that subscribed to this agreement include the Catalan Water Agency, the Official Credit Institute and the ICF.

4.3. Deferral and remission of tax debt

- (43) The debt to the tax authorities decreased from 1992 to 1994 and in 1997. In 1998 and later years, it increased substantially. The Tax Agency also charged the legal interest rate on all the debts, to be paid together with the principal. According to the annual accounts, the tax debt at the close of each year amounted to the sums indicated in the following table:

(ESP million)

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001 ⁽⁹⁾
Tax debt	3 516,6	n.a.	2 426,2	2 805,3	2 791,7	2 023,0	3 073,3	3 738,0	7 364,0	7 720,3

- (44) As for the various arrangements on payment in instalments and rescheduling of the accumulated debts, at least the following agreements were concluded ⁽¹⁰⁾:

Date	Amount (ESP million)	Amount (EUR)	Properties to be mortgaged	Maximum burden of the mortgage (ESP million)
9 March 1990 ⁽¹¹⁾	1 474,4	8 861 118	Unknown	Unknown
19 October 1992	3 516,6	21 135 184	All three industrial sites including machinery. However, the property register does not mention any mortgages on the sites at Prats de Lluçanès and Sant Bartomeu del Grau, neither do later guarantee agreements refer to such mortgages, so it appears that these were not established.	6 702,7
5 October 1999	4 018,8	24 639 554	Maintenance of mortgage on industrial site at Roda de Ter in order to cover ESP 1 195,1 million of debt and new mortgage on (all) the company's machinery in order to cover the remaining debt	Not established, agreement cancelled. The 2000 annual report, however, mentions a burden on all three industrial sites and machinery for a total value of 6 058,9.

- (45) The entry into force of the agreements was subject to Puigneró formalising the relevant mortgages in the public register and complying with its current obligations as well as paying the instalments stipulated in the terms. The 1999 tax agreement furthermore expressly stated that the authorities reserved the right to call securities in the event of non-compliance. As for the 1999 agreement with the social security authorities, the authorities reserved the right to convert distrains into mortgages on the properties serving as securities. It also stated that in the event of the slightest non-compliance the authorities would initiate the enforced collection procedure.

- (46) Puigneró did not fulfil the terms of these agreements. It paid only the first instalments.

- (47) When Puigneró failed to make the scheduled payments the Tax Agency decided to impose distrains and mortgages for an amount equivalent to the debt. The following distrains were imposed on the company's assets as listed in the decision declaring that the company was in suspension of payments:

Date of decision	Amount (ESP million)	Amount (EUR)	Property concerned
22.4.1991	807,3	4 851 937	Industrial sites at Sant Bartomeu del Grau and Roda de Ter and 12 other properties, but apparently not the industrial site at Prats de Lluçanès
1996	478,8	2 877 935	Dwellings at Prats de Lluçanès
6.3.1998	2 050,4	12 322 888	All three industrial sites and almost all houses and apartments owned by the company

⁽⁹⁾ Estimate made by the Tax Agency on 27 December 2001.

⁽¹⁰⁾ The Spanish authorities have provided copies of the more recent agreements, whereas the company's financial statements provide information on earlier agreements. Moreover, further agreements are mentioned in the statement of affairs for the suspension of payments as of 10 November 2000. It should be noted that any new agreement with the same authority covers new debt together with accumulated previous debt.

⁽¹¹⁾ The exact amount of the agreement has not been confirmed, therefore the amount shows the amount remaining to be paid on 31 December 1995.

(48) From the above, the Commission concludes in the first place that the Tax Agency apparently considered the site at Roda de Ter sufficient collateral until 1996, when an additional distraint on houses and apartments at Prats de Lluçanès was established.

(49) The total amount covered by the mortgages at the start of the suspension of payments procedure was ESP 3 486 million. The recognised debt to the Tax Agency in the suspension of payments procedure amounted to ESP 7 584 million (EUR 45,6 million). The debt can be broken down as follows:

Period	Capital	Surcharges	Interest	Total
1978-1990	4 843 837	1 514 548	8 535 310	14 893 695
1987-1991	2 554 166	510 833	558 068	3 623 067
1982-1992	976 503	195 301	213 359	1 385 163
1989-1991	2 351 018	535 244	2 313 660	5 199 922
1991-2000	16 335 366	3 267 073	2 170 619	21 773 058
Total	27 060 890	6 022 999	13 791 016	46 874 905

(50) On the basis of the agreement concluded between Puigneró and its preferential creditors on 16 July 2002, the Tax Agency was to receive a minimum amount of EUR 18 550 936,36 out of the proceeds of the sale of the site at Roda de Ter. For the remainder of the debt, the Tax Agency also subscribed to the agreement with ordinary creditors, under which it was to receive a further EUR 8 424 303 over a period of 12 years.

4.4. Properties, mortgages, distraints and value of assets

(51) As can be seen from the above, almost all properties served as collateral for various debts, loans and guarantees throughout the period in question. An overview is provided in Annex I to this Decision. The 2000 annual accounts provide the following description:

(ESP)

Property	Value of the mortgage	Beneficiary
Industrial site at Roda de Ter	8 815 705 000	Social security
Industrial sites at Sant Bartomeu del Grau and Prats de Lluçanès	1 200 000 000	Fondo de Garantía de Depósitos en Cooperativas de Crédito

(ESP)

Property	Value of the mortgage	Beneficiary
Dwellings	27 000 000	Caja de Ahorros Comarcal de Manlleu
Dwellings	40 000 000	Caja de Ahorros Comarcal de Manlleu
Industrial site at Prats de Lluçanès and along the road from Vic to Gironella	2 725 000 000	ICF
Industrial sites at Sant Bartomeu del Grau, Roda de Ter and Prats de Lluçanès	6 058 859 000	Tax Agency
Total	18 416 564 000	

(52) The properties owned by the company are noted with the value at which they were entered in the property register. Some of them were registered in the 1960s and 1970s and the majority during the 1980s. Therefore, the mortgages that burden these properties far exceed the value mentioned in the register.

(53) In the context of the 1992 agreement with the Tax Agency, the latter's technical department valued the assets that were to be mortgaged. Twenty of the properties, including the industrial sites at Sant Bartomeu del Grau, Roda de Ter and the smaller one at Prats de Lluçanès, were estimated to be worth ESP 8 994 million (EUR 54,1 million) ⁽¹²⁾.

(54) Another valuation by an independent valuer, dated 20 May 2001, concerned only the industrial site at Roda de Ter (No 2 994), whose value was estimated at ESP 10 000 million (EUR 60 101 210). According to Spain, no further assessment of the value of the other properties was made before the new valuation carried out in July 2001.

⁽¹²⁾ As a matter of fact, there were two agreements in 1992. The first agreement concerned the industrial sites at Roda de Ter and Sant Bartomeu del Grau and a number of dwellings in those localities. The second carries the same date, but Spain has not provided a copy of the annex in which the properties are detailed. Some further dwellings may also have been included in the second mortgage, but the bulk of that mortgage most likely consisted of the industrial site at Lluçanès. This is confirmed by the fact that its value compared to the other value roughly corresponds to the value of the Lluçanès site in 2001 compared to the value of the other two sites in the 2001 valuation. The 1995 annual accounts mentioned that the debt to the Tax Agency was secured by a mortgage on all three industrial sites. This again confirms the likelihood that the second agreement concerned the industrial site at Lluçanès, even though the mortgages on this site and on the site at Sant Bartomeu del Grau were not formalised.

- (55) The Court required Puigneró to commission an independent expert to value all its assets. The valuation is dated 21 July 2001 and was carried out for the purpose of drawing up the company's statement of affairs for the suspension of payments proceedings. The valuation in 2001 established the values as presented in the table below. The Commission notes that the auditor did not approve the creation in Puigneró's accounts of a revaluation reserve on the basis of this new valuation. In his report on Puigneró's financial statement for 2000, he commented that this revaluation reserve introduced into the equity funds did not comply with generally accepted accounting principles ⁽¹³⁾.

Item	ESP million	EUR million
Industrial sites	16 156,9	97,1
Dwellings	1 160,5	7,0
Machinery	6 683,2	40,2
Other installations	1 734,7	10,4
Total, including also transport equipment, tools, stocks etc.	29 443,7	177,0

- (56) Based on these values for the properties, the Commission made an estimate of the values in previous years, assuming constant increments and equal increments for the industrial sites at Roda de Ter and Sant Bartomeu del Grau. Since Spain has not submitted more precise information, the Commission has no alternative but to rely on these calculations. They are presented in Annex II to this Decision.

⁽¹³⁾ The statement of affairs included in the Court decision shows assets totalling ESP 32 086 million (EUR 192,84 million) and liabilities totalling ESP 22 088 million (EUR 132,75 million), giving an asset surplus of ESP 9 998 million (EUR 60,09 million). For a company to qualify for the suspension of payments procedure, its assets must exceed its liabilities. This may induce companies to overvalue their assets. It should be noted that, according to the information available, the value of Puigneró's assets increased by approximately 67 % between 1992 and 2001. There is no doubt that a company's properties may increase in value, but some deterioration will also inevitably take place in buildings over nine years, especially where the company has been facing financial difficulties and is unlikely to have any spare cash for major investments to improve the condition and value of its assets. Consequently, the valuation would not seem to have been established on prudential principles. However, neither can the possibility be ruled out that the valuation may reflect a fair market value.

III. GROUNDS FOR INITIATING THE PROCEDURE UNDER ARTICLE 88(2)

- (57) The Commission considered that the conditions according to which Puigneró had been able to defer its public debt appeared to include elements of State aid. In arriving at this conclusion the Commission particularly noted the significant length of time over which these debts had accumulated. The Spanish authorities did not seem to have taken any action with a view to enforcing debt collection as provided for under Spanish law. Moreover, according to the information provided by the Spanish authorities, at least a partial debt waiver was envisaged.
- (58) The Commission also took the view that the conditions according to which the EUR 12,02 million loan was granted appeared to include elements of State aid, given that Puigneró appeared to be a company in difficulty and the funding was provided by a public body at the same interest rate as that applied to companies not facing financial difficulties. Furthermore, it remained unclear whether the guarantees provided for the loan were valid and sufficient.
- (59) During the course of the investigation procedure it became apparent that Puigneró had received previous loans in 1993 as well as two guarantees, in 1996 and 1998 respectively, from the same public body as above, namely the ICF. As Puigneró was already in difficulty it was doubtful whether the securities provided, consisting mainly of the same assets that secured all other transactions, were sufficient and valid. Hence, given the low cost of the loan and the guarantees, the possibility could not be ruled out that these transactions too included elements of State aid.

IV. COMMENTS FROM INTERESTED PARTIES AND SPAIN'S RESPONSE

- (60) According to the Belgian textile federation, Febeltex, Belgian textile companies active in the clothing sector had long been competing with Puigneró under unfavourable conditions. Febeltex maintained that Puigneró was applying abnormally low sales prices on the market, particularly in the United Kingdom, and that Puigneró's actions had distorted competition in that it had been able to snatch a large market share from its European competitors on the Benelux and Spanish markets.

- (61) According to Spain, Puigneró had never been active on the Belgian clothing market, but in the sectors of yarns and textile finishing.

recover the entire debt, partly because severance payments take precedence over all other claims and partly because of the low price that would be obtained for the mortgaged assets in a public auction.

V. COMMENTS FROM SPAIN AND PUIGNERÓ

- (62) Spain argued that Puigneró was a company in temporary difficulties which had been declared to be in suspension of payments in order to enable the authorities to recover at least a proportion of their claims. The procedure is used in situations where the economic problems are temporary and can be overcome.

- (68) For its part, the company supposed that practical reasons may have prompted the authorities to decide not to proceed with an enforced sale of assets, as it was easier for the public authorities to try to recover the debt by allowing the company to continue trading than to initiate an enforced liquidation.

- (63) Spain furthermore maintained that the Spanish authorities could not be accused of having remained inactive since they had granted payment deferrals in accordance with the legislation in force together with corresponding guarantees and instalments. Default interest had also been charged as provided for in Spanish law.

- (69) As for the agreements that Puigneró concluded with it, the ICF maintained that the securities provided were at all times sufficient to cover the loans and guarantees granted. According to the ICF, although most of the properties, around 27 in number and including all the industrial plants, had already been distrained by the social security and tax authorities, and 10 additional properties owned by the shareholders had been given to secure guarantees previously granted by the ICF, it was confident that the remaining value of the mortgage was sufficient to cover the new loan of EUR 12,02 million granted in December 2000.

- (64) However, Spain acknowledged that the authorities had not tried to realise any of the company's assets securing the public debts. The Spanish authorities defended their action on the ground that the Suspension of Payments Act of 26 July 1922 prevents creditors requesting a declaration of bankruptcy while proceedings for suspension of payments are in progress.

- (70) On the other hand, Spain also stated that given the semi-mountainous area where the plants are located and the significant value of the plants, an enforced sale of assets would be unlikely to yield their full value.

- (65) Spain gave two main reasons for not having initiated any enforced executions: first, that Spanish labour law gave preferential treatment to employees and, second, that an enforced liquidation of assets was likely to yield a lower price than their market value. The Spanish authorities therefore took the view that the option of using deferrals and distrains had proved preferable as it had placed them in a better position in the suspension of payments proceedings.

- (71) The Spanish authorities concluded that their actions had been in accordance with the relevant legislation. They therefore took the view that a private creditor would have acted in the same way and that the measures did not constitute aid.

- (66) The Spanish authorities furthermore claimed that they had acted as a diligent creditor by imposing distrains and mortgages on Puigneró's assets equivalent to the value of their claims. They thus maintained that securities were sufficient to cover the entire debt.

- (72) However, Spain also referred to public objectives, e.g. the villages in which two of the three industrial sites are located are very small; Sant Bartomeu del Grau has some 1 215 inhabitants and Prats de Lluçanès has some 2 790. In the ongoing suspension of payments proceedings, the main concern of the public authorities (and at all events of the Catalan Regional Government) was to minimise the economic and social impact that could result from Puigneró's difficult situation.

- (67) As for the current situation, the authorities argued that enforced collection would make it extremely difficult to

- (73) In its letter of 23 January 2002 Puigneró used a similar line of argument with a view to demonstrating that it had not received any illegal aid. As regards the 2000 loan from the ICF it stated, in support of that position, that given the collateral available it could have obtained a loan from private sources under the same conditions.

VI. VIABILITY PLAN

- (74) Spain submitted a viability plan worked out for Puigneró by a consultancy firm located in Barcelona. The plan was dated November 2000.
- (75) As for the reasons that led to the company's difficulties, the plan ascribed these mainly to the globalisation effect and extreme price-competitiveness of producers established outside the European market, which had radically changed market conditions. As for the company's future prospects, turnover was expected to remain at around the same levels as in 1999 and 2000. As a reduction in prices was anticipated, an increase in production was assumed. Moreover, turnover was to increase at an annual rate of around 9 % from 2003 to 2005. Thus, no reduction in capacity was planned.
- (76) The plan was rather general as regards financial aspects. It did not foresee any investor contribution to the restructuring of the company. Neither did it indicate clearly the total cost of the restructuring, nor did it provide details on how the restructuring would be financed (timetable, method of raising the necessary finance, etc.). A major 'source' of finance was to be the debt remission by the public authorities.
- (77) In their letter of July 2002, the Spanish authorities submitted a new version of the viability plan updated by Puigneró. In short, according to the new version, the company planned to reduce capacity in its loss-making

activities (chiefly spinning). It was to close down its plant at Roda de Ter, which would subsequently lead to reductions in other sectors, such as weaving. In the future it would concentrate on products with higher added value, such as finished textiles. As a consequence, there has been a substantial reduction in the workforce.

- (78) The company expects to generate gross operating profits as from 2002 and profits from 2004 onwards. The company is confident that these funds, together with the proceeds of the divestment of unproductive assets, will enable it to fulfil its obligations under the suspension of payments procedure.

VII. ASSESSMENT

1. Puigneró's financial situation

- (79) Puigneró has been facing financial difficulties over an extended period of time. First of all, the company entered into agreements on deferral/payment in instalments with the social security and tax authorities on several occasions, at least in 1989, 1990, 1992, 1996, 1999 and 2000. According to the available financial data, the company has had insufficient net assets for several years. The equity situation has evolved as follows:

(ESP million)

Equity funds	1993	1994	1995	1996	1997	1998	1999	2000
Share capital	2 884	5 500	5 500	7 200	7 200	7 200	7 200	7 200
Revaluation reserve		—	—	1 615	1 615	—	—	14 422
Other reserves		392	392	392	392	—	—	—
Accumulated results		(5 809)	(5 420)	(3 953)	(3 593)	(1 450)	(1 275)	(1 000)
Result of the year		389	1 467	360	136	174	275	(17 421)
Total equity		472	1 939	5 614	5 750	5 925	6 200	3 201
Adjusted total ⁽¹⁴⁾								(11 221)

⁽¹⁴⁾ Adjustment made on the basis of the comments by the company's auditors (see point 55).

- (80) As can be seen from the table, Puigneró had already lost most of its equity by the end of 1994⁽¹⁵⁾. On 7 June 1994 the share capital was increased by ESP 2 616 million (EUR 15 722 476,65). The equity level was restored to a sufficient level by a second capital increase only in 1996. The restoration was achieved to a large extent through a revaluation of assets that was subsequently cancelled to balance out some of the accumulated deficits. No fresh capital was therefore injected in respect of the amount of the revaluation.
- (81) In 2000 total losses amounted to – ESP 17 421 million (– EUR 104,7 million), an amount exceeding the company's turnover of ESP 14 914 million (EUR 89,6 million). In addition to normal operating costs, the expenditure included ESP 1 748 million (EUR 10,5 million) in extraordinary expenditure and ESP 8 166 million (EUR 49,1 million) in charges pertaining to previous years.
- (82) Puigneró partly restored its equity, although not to a sufficient level, in 2000 by introducing a revaluation reserve stemming from an increase in the value of its fixed assets (properties) following the valuation carried out by an independent expert on 21 July 2001 (see points 51 to 56 above). The book value of these assets increased by over 150 %. However, according to the auditor's report on Puigneró's financial statement for 2000, the revaluation reserve introduced into the equity funds did not comply with generally accepted accounting principles. The company's equity funds should therefore be reduced by ESP 14 422 million (EUR 86,68 million). Consequently, the value of its total equity funds at the end of 2000 was some – ESP 11 221 million (– EUR 67,44 million). In fact, due to the many uncertainties in Puigneró's annual accounts the auditors did not give an opinion on the state of the accounts but issued a qualified audit report for the year 2000.
- (83) Puigneró submitted a provisional balance sheet as of 31 December 2001 in its updated viability plan. The balance sheet still includes the revaluation reserve as part of the equity. Nevertheless, even allowing this revaluation reserve to constitute part of the equity, Puigneró's solvency ratio (38,7 %) is not sufficient. Moreover, it is clear that no fresh financing has been injected that would provide the business with badly needed capital.
- (84) Another confirmation of the company's protracted financial difficulties lies in the fact that in no year has Puigneró succeeded in complying fully with its tax and social security obligations, as regards both its new obligations and the instalments payable under earlier agreements. Although the Commission has no precise information on this for the year 1993, it must be noted that in that year in particular a substantial loss was incurred, whereas Puigneró had negotiated a debt rescheduling with the tax authorities just before.
- (85) Finally, it must be borne in mind that throughout the period under consideration the company was active in a sector that was suffering from strong competition from outside the EU (see points 16 and 17).
- (86) It therefore has to be concluded that the company has at least since 1993 been struggling with financial difficulties which have led to the current suspension of payments procedure. It thus meets the definition of a company in difficulty according to the Community guidelines on rescue and restructuring aid.
- 2. Aid within the meaning of Article 87(1) of the Treaty**
- (87) Article 87(1) of the Treaty lays down the principle that, save as otherwise provided in the Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.
- (88) The measures described in points 6 to 56 were granted by the State or through State resources. The tax and social security authorities form part of the state. The ICF is a public institution operating under the Regional Government's Department for Economic Affairs and Finance. When it grants a selective advantage, this advantage must be regarded as being financed by State resources and it is attributable to the State⁽¹⁶⁾.
- (89) Yarns, fabrics and finished textiles are products that are extensively traded within the EEA and between the EEA and third countries, and their markets are characterised by fierce competition and suffer from overcapacity. The

⁽¹⁵⁾ Exact data on earlier years are not available, but it appears from the 1995 annual report that the loss of equity must have taken place before 1994. The Commission notes that the 1995 annual report mentions losses that can be offset for tax purposes incurred during the period up to and including 1994 for a total amount of ESP 1 813,5 million (EUR 10 899 439), while 1994 showed a modest positive result.

⁽¹⁶⁾ The Commission furthermore notes that in response to Parliamentary questions the Regional Government replied two days before the 2000 loan was formalised that it planned to grant the loan through the ICF.

Commission notes that Puigneró is a major player in Spain in these sectors. Consequently, if the measures described in points 6 to 56 constitute a selective financial advantage, they reinforce Puigneró's position compared to its competitors in these markets and they certainly distort or threaten to distort competition and therefore affect trade between Member States.

mortgages and distraints and the loan agreement would not prevent further burdening. Therefore, the shares would not provide any value for a lender.

- (90) The remaining issue to establish whether or not the measures described in points 6 to 56 constitute State aid within the meaning of Article 87(1) of the Treaty is whether they favour a particular undertaking. For this, the Commission has to determine whether the measures benefited Puigneró in a selective way. This is assessed for each measure below.

3. The 1993 loan and the guarantees provided by the ICF

- (91) In order to establish whether the 1993 loan and the guarantees provided by the ICF constitute a selective advantage, the Commission applies the 'private investor principle'. This means that the Commission assesses whether under the same circumstances a private lender would have granted the loan and the guarantees on the same terms. If this is the case, there is no selective advantage in favour of Puigneró.

The 1993 loan

- (92) The ICF charged an interest rate that a private lender would have charged when granting a loan to financially healthy companies. Given the fact that Puigneró was in financial difficulties, such an interest rate was only justified if the loan was secured by sufficient collateral. As explained in points 6 to 56, the collateral consisted in shares in the company and a mortgage on property owned by the company.
- (93) The nominal value of the 4 200 shares in the company provided as collateral was ESP 2 100 000 000. They constitute 29,17 % of the total share capital. However, it seems that the use of the shares as collateral for the loan was not formalised. In any case, the actual value of the shares has to be established according to the company's financial situation at the particular point in time. When the loan was granted the company was in difficulties. Moreover, its assets were burdened by

- (94) As explained in points 6 to 56, a mortgage was created on part of the industrial site at Prats de Lluçanès. As indicated in paragraph (56) and Annex II, the Commission estimates the value of the industrial complex of Prats de Lluçanès, including the value of the dwellings at the site and the machinery, at time the loan was granted at ESP 1 208,9 million (EUR 7,26 million). However, the industrial site consists of two parts entered on the property register separately. The mortgage does not affect the larger of the two, nor the dwellings and machinery. Moreover, both parts of the industrial site, together with the other properties, had already been used as security for debts towards other financial institutions, and a substantial proportion of those debts had not yet been repaid in 1993 ⁽¹⁷⁾. Subtracting this amount from the total value for both parts of the industrial site leaves an amount which is clearly less than the maximum value of the mortgage of ESP 970 million. The actual coverage based on only the smaller part of the site must be even smaller.

- (95) A private lender would certainly have taken into account the fact that in the event of a forced public auction the value obtained can be considerably lower than the value of a company as a going concern. Therefore, a private lender in the ICF's position in 1993 would not have considered the securities as sufficient collateral to cover the loan and would not have provided the loan on the same terms. The ICF holds that in the event of an enforced auction, and where no third party puts in a sufficient bid, the ICF will itself acquire the property. Then as soon as possible, it will arrange its sale, but under better market conditions, so that the amount of the entire outstanding debt will be recovered. However, this would certainly involve costs and risks that a private lender would not have accepted on the same terms. Consequently the Commission concludes that the loan was not granted in conformity with the private investor principle and therefore constitutes State aid within the meaning of Article 87(1) of the Treaty in favour of Puigneró.

⁽¹⁷⁾ The property register shows mortgages in favour of Fondo de Garantía de Depósitos en Cooperativas de Crédito (maximum ESP 1 200 million, debt in 1995 still ESP 495,4 million) and Caixa d'Estalvis i Pensions de Barcelona (maximum ESP 886 million). The 1995 annual report also mentions two loans representing a total burden of ESP 500 million, under which ESP 397,9 million was still owed in 1995. It is not clear, however, where the smaller of these last two is registered in the property register.

(96) The extension of the loan in May 1996 does not change the situation. The company was still in difficulty and the property was still mortgaged to guarantee other transactions, although the outstanding debt under those transactions had somewhat decreased by that time. The first instalment of the loan was paid according to schedule. As explained in point 56 and Annex II, the Commission estimates the value of the industrial site in 1996 at ESP 1 822,8 million. However, the mortgage still encumbered only the smaller of the two parts. So the effective coverage must have been substantially smaller than the collateral needed to secure the loan sufficiently. The Commission therefore concludes that the extension of the loan also constitutes State aid within the meaning of Article 87(1) of the Treaty.

The July 1996 guarantee amounting to ESP 600 million (EUR 3,61 million)

(97) The ICF charged an annual fee of 1,75 % by way of administrative costs and risk premium for the guarantee, which according to the Commission should be viewed as a fee applied to healthy firms and/or for loans secured by sufficient collateral. However, Puigneró was in serious financial difficulties at the time and the collateral consisted in shares in the company, a personal guarantee provided by the main shareholder and a number of properties.

(98) As explained above, given that the company was in difficulty when the guarantee was granted and most of its assets were mortgaged, the shares in the company did not provide valid collateral for a guarantor.

(99) As regards the personal guarantee by the main shareholder, the Commission points out that any private guarantor would prefer a quantified and concrete security to a general, unspecified commitment. Spain has not provided any evidence of the value of this personal guarantee. In contrast, the main shareholder is likely to be personally liable for the tax debt of ESP 2 282 million, stemming from before the change in the legal form of the company in 1982, which was included in the total tax debt in 2000. The Commission therefore takes the view that the personal guarantee provided by the main shareholder adds little or no security.

(100) The smaller part of the industrial site at Prats de Lluçanès again served as security for the guarantee, but

the other part and the private dwellings were this time added as collateral. The dwellings did not account for a very large share of the value, around 7 % of the total in 2001. Since the smaller part of the site was already burdened by the mortgage to cover the loan, the major new asset was the larger part of the site. However, as explained above, this part of the property was already burdened by other mortgages. Although these mortgages concerned other properties too, it is clear that insufficient value was left for covering the new guarantee, in particular (but not only) when the 1992 mortgage in favour of Caixa d'Estalvis i de Pensions de Barcelona, for an amount of ESP 886 million, is taken into account.

(101) Taking into consideration the fact that the company was struggling with financial difficulties, the Commission concludes that the conditions under which the guarantee was granted do not comply with the private investor principle. The collateral would have been insufficient for a private guarantor, who would have required further securities and/or would have set a higher risk premium, or would not have granted the guarantee at all. The fact that the guarantee has never been called does not change this assessment. The Commission therefore concludes that the full amount covered by the guarantee constitutes aid, since the company could not have obtained it under the conditions granted by ICF.

The 1998 guarantee amounting to ESP 500 million (EUR 3,0 million)

(102) The annual premium for the 1998 guarantee was again 1,75 %, which, as already pointed out, should be viewed as a premium applied to healthy firms and/or for loans secured by sufficient collateral. Puigneró was in financial difficulties at the time and the collateral consisted of the industrial site and private dwellings at Sant Bartomeu del Grau, eight of them owned by the main shareholder.

(103) By the time this guarantee was granted, the company properties provided as collateral were already burdened by a mortgage in favour of Fondo de Garantía de Depósitos en Cooperativas de Crédito, for a debt of which only ESP 395,4 million still had to be paid, a distraint in favour of the Tax Agency for a tax debt of ESP 2 050,4 million and a distraint in favour of the social security authorities for a debt of ESP 5 814,3 million. These burdens concerned almost all the other properties, including the three industrial sites. Moreover, the other properties were also already

burdened: the 1992 mortgage in favour of the tax authorities and the earlier mortgage in favour of the social security authorities on the site at Roda de Ter, and the mortgages in favour of the ICF for the 1993 loan and the 1996 guarantee. As stated in point 56 and Annex II, the Commission estimates the value of all properties owned by the company, including the private dwellings and machinery, at ESP 17 284,0 million in 1998. Since the mortgage for the guarantee did not concern the machinery, it is doubtful whether enough would be left to cover the guarantee. Moreover, if the site at Sant Bartomeu del Grau were sold off, the distraints obtained by the Tax Agency and the social security authorities would take priority. The fact that eight properties owned by the main shareholder were added as collateral does not change this assessment: the Commission does not know their value, but the maximum for which these properties serve as collateral amounts to only ESP 6 947 058 (EUR 41 752). Consequently, by providing the guarantee the ICF incurred a risk for which it did not receive appropriate remuneration. Therefore, for similar reasons as those given in point 101 above, the Commission concludes that the guarantee constitutes State aid within the meaning of Article 87(1) of the Treaty.

- (104) The ICF argued that, where necessary, it considered it more beneficial to provide a company with an emergency guarantee than to enforce liquidation, which could prove more harmful for all creditors. However, when an emergency guarantee is provided under normal conditions, the risk has to be covered by other means, such as by an increased risk premium. The ICF's statement therefore confirms that the guarantee constitutes State aid.

Extension of the 1996 guarantee in 1999

- (105) As explained in point 57 and Annex II, the Commission estimates that by the time the 1996 guarantee was extended, the value of the property, the complete site and private dwellings at Prats de Lluçanès, had increased. However, so had the burden on the property, in particular as a result of the dstraint obtained by the Tax Agency in March 1998. There is therefore no need to reassess whether the guarantee constitutes State aid.
- (106) It is clear that the value of the property was significantly lower than the total burden on it. Taking also into account the fact that the company was struggling with financial difficulties, the Commission concludes that the extension of the guarantee does not comply with the private investor principle. A private guarantor would have required further securities and/or would have set a higher risk premium or would not

have granted the guarantee at all. The Commission therefore concludes that the full amount covered by the guarantee constitutes aid, since the company could not have obtained it under the conditions granted by the ICF.

Extension and modification of the two guarantees in 2001

- (107) In 2001 Puigneró was already in suspension of payments. Its debt towards the public authorities and the ICF amounted to ESP 15 605 million (EUR 93,8 million). Puigneró had, furthermore, received a loan amounting to ESP 2 000 million (EUR 12,02 million) from the ICF in December 2000, also secured by the same properties. As a matter of fact, all the company's assets, including those provided as collateral for the guarantees, were mortgaged against both the company's substantial public debt and the loan granted in 2000.
- (108) Consequently, given that the extension of the guarantees was granted to an insolvent company against insufficient securities, the entire amount of the guarantees has to be deemed to constitute aid.

4. Non-payment of taxes and social security contributions

- (109) In line with the Commission Decision of 14 October 1998 ⁽¹⁸⁾, as confirmed by the Court of Justice ⁽¹⁹⁾, the persistent and systematic non-payment of social security contributions and taxes constitutes a transfer of public resources. Such transfers give the company a competitive advantage, since — unlike their competitors — they are not obliged to defray these costs as would ordinarily be the case ⁽²⁰⁾.
- (110) As the Court held in *Tubacex* ⁽²¹⁾, a good test is to compare the behaviour of the state with the behaviour of a private creditor. This was confirmed by the Court in *DMT*, where it held that 'the ONSS (the national

⁽¹⁸⁾ Commission Decision of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa group and their successors (notified under document number C(1998) 3211) (OJ L 198, 30.7.1999, pp.15-27).

⁽¹⁹⁾ Case C-480/98 *Spain v Commission* [2000] ECR I-8717.

⁽²⁰⁾ Advocate General Jacobs stated in his opinion of 24 September 1998 in Case C-256/97 *DMT* that it was clear that, in certain circumstances, continued and generous tolerance of late payment of social security contributions could confer an appreciable commercial advantage on the recipient undertaking and in extreme cases be tantamount to relief from those contributions (paragraph 33).

⁽²¹⁾ Case C-342/96 *Tubacex* [1999] ECR I-2459.

social security office) must be compared with a hypothetical private creditor which, so far as possible, is in the same position vis-à-vis its debtor as the ONSS and is seeking to recover the sums owed to it' ⁽²²⁾. This is referred to as the 'private creditor principle'.

ascertain the precise value of the distraints and mortgages. Throughout the 1990s the Spanish authorities relied only on a valuation made in 1992 by the Finance Ministry's technical departments.

(111) The Commission takes note of the fact that the social security authorities and the Tax Agency acted in accordance with the applicable Spanish law. The Commission also recognises the fact these authorities charged the mandatory default interest and tried to secure their claims by imposing distraints and mortgages on assets. The question is, however, whether a private creditor in the same situation would have been satisfied with these measures or would have proceeded with an enforced liquidation to recover at least a proportion of its claims. From the information available, the Commission concludes that the Spanish authorities have not acted in accordance with the private creditor principle.

(112) In the first place and from a general standpoint, substantial tax and social security obligations remained unpaid for a long time, while the company did not comply with the payment agreements it entered into. According to figures provided by the company, between 1995 and 2000 Puigneró paid the Tax Agency and the social security authorities a total amount of ESP 4 608 675 680 within the periods allowed for voluntary payment. Over the same period it paid ESP 587 966 845 during the enforced collection phase; all these payments were in fact effected between April 1997 and December 1998. Over the same period, the total outstanding debt to these public authorities increased by ESP 10 173,6 million. From these figures, from the annual accounts, from the overviews attached to the various payment agreements and from the tables in points 42 and 50 it can be clearly seen that most of the debt corresponded to obligations that remained unpaid for at least several years. A significant proportion of these obligations remained unpaid for more than five years. A private creditor in the same situation would not have tolerated arrears over such a long period, still less when further arrears were constantly arising and the company was not complying with the payment agreements it had entered into. Despite the legal interest that was charged and the securities that were offered, a private creditor would have lost confidence in recovering its claims and would have enforced payment much earlier.

(113) Secondly and more specifically, a private creditor would have carried out valuations of the properties in order to

(114) Thirdly, a private creditor would have agreed on debt rescheduling and mortgages only where there were prospects for an improvement in the situation. When a debtor fails to fulfil payment agreements it has signed, a private creditor would normally seek guarantees that the financial situation of the company was to improve. However, the payment agreements of 1992 and 1999 with the Tax Agency and the agreements concluded in 1996 and 1999 with the social security authorities do not contain any such guarantees or conditions, and the actual situation of the company demonstrates that there was no structural improvement. It must be recalled that the company was in financial difficulties with very low profits throughout the period between 1994 and 1999. It was operating in a market that was characterised by fierce competition, it continued to accumulate payment arrears and it did not abide by the agreements with the public authorities. A more coherent restructuring plan was only submitted in 2000, but this plan had to be fundamentally overhauled in 2001 since the situation had continued to deteriorate, contrary to expectations. So the Tax Agency and the social security authorities could not have believed that there were clear and well founded expectations that Puigneró's situation would improve and that it would be able to pay off the outstanding debts. In such a situation, the usual clauses whereby the agreements become null and void in the event of non-payment of any of the agreed instalments cannot suffice.

(115) Fourthly, the Commission notes that the Spanish authorities could have proceeded to an enforced liquidation of a substantial number of properties on which distraints had been placed to secure the debt, as these consisted of private flats and houses and would thus not have impaired the company's capacity to generate business income. Neither did the authorities enforce a partial closure of any of the industrial sites.

(116) Fifthly, on various occasions the Spanish authorities appear to have acted negligently. According to the agreements of 29 October 1992 with the tax authorities, Puigneró was to establish a mortgage on the three industrial sites within 30 working days to cover a total debt of ESP 3 516,6 million. However, the company established a mortgage only on the site at Roda de Ter and only on 5 May 1993. This meant that the mortgage on the site at Prats de Lluçanès in favour of the ICF, which guaranteed the 1993 loan, took

⁽²²⁾ Case C-256/97 *Déménagement—Manutention Transport* [1999] ECR I-3913.

priority over later distraints that were imposed to secure the tax debt. Moreover, it was precisely the site at Roda de Ter that was already burdened in favour of the social security authorities. The Commission does not know the exact amount of the debt towards social security outstanding in 1992/1993 that was covered by this mortgage, but given that the debt amounted to ESP 4 727,3 million in 1994, it assumes that the industrial site and dwellings at Roda de Ter were mortgaged for more than their actual value at the time (ESP 3 758,5 million in 1992). A private creditor in the same situation would have reacted immediately to the breach of the agreement, in particular taking into account the company's financial situation and track record in paying its debts.

- (117) Similarly, according to the agreement with the social security authorities of 21 February 1996, Puigneró was to establish a mortgage for a total amount of ESP 5 097,6 million. This mortgage was not formalised either. Only in October 1997 did the social security authorities proceed to set a dstraint. And finally, neither did the agreement of 25 November 1999 come into effect, owing to non-compliance by Puigneró. The total amount under the distraints of October 1997, October 1998 and October 1999 was ESP 7 648,3 million, which is well below the total social security debts of ESP 9 963,1 million in 2000. The 2000 annual accounts also mention a mortgage on the industrial site at Roda de Ter in favour of the social security authorities for an increased amount of ESP 8 815,7 million. It is not clear at what date this mortgage was established, but as it burdens only the site at Roda de Ter, it has to be concluded that the social security authorities once more accepted an overburdening of this site. A private creditor in the same situation would have reacted much earlier, enforcing payment or requiring security for the debt without delay, above all given the company's financial situation and track record in paying its debts.

- (118) The mortgage in favour of the Tax Agency increased substantially in 2000 to a total of ESP 6 058,9 million. Unlike the mortgage in favour of the social security authorities, this mortgage affects all three industrial sites, including machinery. However, this amount is again lower than the actual debt in 2000 (ESP 7 364,0 million). As a matter of fact, the 2000 annual results were heavily affected by losses from earlier years of ESP 2 282,1 million due to an old tax debt, which probably also explains the substantial rise in tax debt in that year. This old debt was incurred by the main shareholder before the change in the legal form of the company in 1982 and had not been taken into

account in earlier payment agreements. A private creditor would certainly have sought sufficient security for this debt at a much earlier stage.

- (119) Sixthly, a private creditor would have duly taken into account the likelihood that the property would have fetched a lower price in the event of an enforced liquidation. This is supported by the Spanish authorities' statement that the properties are located in a semi-mountainous area and would therefore be less attractive to possible purchasers. The Spanish authorities maintain that the price that could be obtained in an enforced auction is likely to be 50 % of market value at most. The company itself also maintains that in public auctions the realised value is in general substantially lower than the market price, occasionally even lower than 50 %. This is also supported by the fact that the ICF initially required a significantly higher value of securities to cover the principal of a loan or guarantee, although at a later stage it accepted securities that were burdened to an extent exceeding their value.
- (120) The Commission therefore considers that it should have been evident to the authorities that their position would only worsen by agreeing repeatedly to defer their claims. They allowed Puigneró to accumulate a significant amount of public debt, amounting to at least the value of all its total fixed assets if these were to be sold by means of a public auction. Thus, the Spanish authorities should have been aware of the fact that their claims were not fully covered by the distraints and mortgages imposed on the assets. Under these circumstances, it should have been evident to the Tax Agency and the social security authorities that setting distraints did not increase the prospects for recovering their claims, but only made it more difficult to recover the interest that was accumulating and the new debts that were arising.
- (121) Thus, in allowing a company in difficulty to go on trading over an extended period of time, and not using all the means available under Spanish law to recover their claims, both the Tax Agency and the social security authorities reduced their chances of recovering the amounts owed to them and granted an advantage to Puigneró that cannot be justified according to the private creditor principle. As regards the Tax Agency, this advantage dates back at least to early 1993 when Puigneró failed to abide by the 1992 payment agreement and established a mortgage only on the site at Roda de Ter, instead of on all three industrial sites. As regards social security, the advantage dates back at least to 1995. By that time the outstanding debt had increased significantly and the new debt was not covered by the mortgage that was established before 1992. The first action taken to secure this additional debt was the unsuccessful 1996 agreement. The aid

continued to exist as no action was taken on the breach of the 1996 agreement until the October 1997 distraint. The aid continued thereafter as the debts increased beyond the amount secured by additional distraints and as the social security authorities did not take appropriate action following the breach of the 1999 agreement. For both the Tax Agency and social security, the amount of aid must be considered to be equivalent to the total debt at the time.

the existing debts at the time that procedure started and are therefore relatively well protected. Consequently, the acceptance of new debts by the social security authorities and the Tax Agency does not constitute further aid to Puigneró.

(122) The Spanish authorities argued that, since none of the private creditors initiated bankruptcy proceedings, the public creditors behaved in the same way as the private creditors and their actions did not constitute State aid. However, the Commission considers that the other creditors were not in the same position as the public authorities. The main private creditors were the suppliers. A supplier does not tolerate persistent non-compliance with his customer's obligations. When the risk exposure reaches the supplier's limit, he will stop supplying or take other measures, such as requiring advance payment or payment guarantees. As a matter of fact, it is likely that the company was able to avoid enforced liquidation owing to the lack of private creditors who would have been more ready to proceed to enforced collection in the event of persistent non-payment. It may be only due to the guarantees granted by the ICF that the company continued to obtain supplies for production. Moreover, enforced debt collection by the public authorities may not have led to a complete bankruptcy, but could have led to a partial liquidation of the least profitable part of the company. The Commission therefore concludes that this argument fails to prove the absence of State aid.

(125) The Commission therefore concludes that the persistent non-payment of taxes between early 1993 and the start of the suspension of payments procedure in 2000 and the persistent non-payment of social security contributions as from 1995 until the start of the suspension of payments procedure in 2000 constitute aid within the meaning of Article 87(1) of the Treaty. Since the debts to social security and the Tax Agency already constituted aid prior to the suspension of payments procedure, there is no need for the Commission to assess whether the agreements concluded in 2002 involve additional aid.

5. The 2000 loan provided by the ICF

(126) The ICF charged the same interest rate as that applied to healthy companies for loans secured with sufficient collateral. The loan was granted after the start of the suspension of payments procedure and therefore takes priority over previous debt. However, this priority does not affect the order in which mortgages and distraints protect claims in the event of bankruptcy. Since at that time the company was already in difficulty, such a scenario was not at all unrealistic. Consequently, only if the loan were sufficiently secured would it not constitute State aid.

(123) As regards the further debts accumulated with the social security authorities and the Tax Agency up to the start of the suspension of payments procedure, the Commission concludes that these too constitute aid, in so far as the normal procedures would have enabled the authorities to enforce collection by the date of the start of the procedure. Up to November 2000 the company's financial situation continued to deteriorate (significantly), the debts had increased further and the securities became further overburdened following the 1999 payment agreements. Again, the Spanish authorities did not use all the legal means available for recovering their claims. Therefore, these subsequently accumulated debts constitute further aid.

(127) However, the securities were not sufficient. The mortgage consisted largely of the same collateral that secured all previously described transactions and the ICF would have been the last creditor in chronological order and therefore the last to claim its share of the assets. At the time the loan was granted all Puigneró's assets were burdened by earlier mortgages and distraints, to an extent exceeding what a private investor would have been prepared to accept. At this point the total unsettled payments owed to the ICF and the social security and tax authorities amounted to ESP 15 605 million (EUR 93,8 million). Other preferential creditors held mortgages for an amount of ESP 1 267 million. This means that the loan would increase the total burden still further beyond the value that could be expected in the event of an enforced public auction.

(124) Under Spanish law new debts that arise in the course of a suspension of payments procedure have priority over

(128) 9 620 of the shares had already been given as security for the guarantee in 1996, and only 4 380 shares had

not previously been given as security. In any case, as explained in points 91 to 108, since Puigneró was in financial difficulties, the shares did not represent any substantial value as a security. As regards the personal guarantee provided by the main shareholder, the Commission points out that any private lender would prefer a quantified and concrete security to a general, unspecified commitment. The Commission notes that Spain has not provided any evidence for the value of this personal guarantee. In contrast, the main shareholder is likely to be personally liable for the tax debt of ESP 2 282 million, accumulated by the company before the change in its legal form in 1982, which was included in the total tax debt in 2000.

(129) Finally, the properties owned by the shareholders provide insufficient value in themselves, in the first place because their total execution value mentioned in the loan contract amounts to only ESP 722 600 000 (EUR 4 342 914). Spain has not provided any estimate of their actual value. The Commission notes that eight of them, with a total execution value of ESP 396 100 000 (EUR 2 380 609), had only been mortgaged for the purposes of the 1998 guarantee, also in favour of the ICF ⁽²³⁾, and served as collateral only for the very small amount of EUR 41 752, which is much lower than the total value of the loan. The two other mortgages on two of these properties in favour of the Tax Agency, ESP 16 000 000 (EUR 96 162), may also still have been valid. Therefore, the Commission concludes that the properties owned by the shareholders could guarantee a maximum of EUR 4 342 914, although even this figure is not certain.

(130) The loan was granted with an interest rate corresponding to Euribor 3 months + 1 %. Thus, the interest rate, and notably the premium, corresponds to that applied to healthy companies.

(131) Given that the loan was granted to an insolvent company against insufficient securities and without a corresponding risk premium, the Commission concludes that the entire amount of the loan constitutes aid.

(132) For the same reasons as set out in point 102, the argument that the loan may prevent losses on the outstanding loans and guarantees cannot be accepted.

⁽²³⁾ The property at Sant Feliu de Guíxols may actually have been added as security to the 1996 agreement, rather than the 1998 agreement.

6. Compatibility of the aid

(133) Having established that State aid is involved in the 1993 loan and the 1996 and 1998 guarantees provided by the ICF, in the non-payment of social security contributions and taxes, and in the loan provided by the ICF in 2000, the Commission must assess whether or not such aid is compatible with the common market.

(134) The Commission notes that Spain has not relied on any of the derogations provided for in the Treaty, maintaining its position that the measures do not constitute State aid.

(135) The Commission has assessed whether the exemptions set out in Article 87(2) and (3) of the Treaty apply. The exemptions in Article 87(2) of the Treaty can serve as a basis for considering aid to be compatible with the common market. However, in this case the aid (a) does not have a social character and is not granted to individual consumers, (b) is not intended to make good the damage caused by natural disasters or exceptional occurrences and (c) is not required in order to compensate for the economic disadvantages caused by the division of Germany. Neither does the aid qualify for the exemptions in Article 87(3)(a), (b) and (d) of the Treaty that refer to promotion of the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, to projects of common European interest and to the promotion of culture and heritage conservation.

(136) As far as the first part of the exemption in Article 87(3)(c) of the Treaty is concerned, for aid to facilitate the development of certain economic activities, the Commission notes that the aid was not intended for purposes such as R&D, investment by SMEs or protection of the environment. Article 87(3)(c) of the Treaty also provides for the authorisation of State aid to promote the development of certain economic activities or areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The company is located in three areas in Catalonia, all of which qualify for aid under Article 87(3)(c). However, the aid does not comply with the rules for regional investment: e.g., it is not linked to initial investment.

(137) As indicated in points 79 to 86, at the time the various aid measures were granted Puigneró was a company in difficulty. As the primary objective of the aid would have to be to restore the long-term viability of an undertaking in difficulty, the Commission will assess its

compatibility in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty adopted in 1994 and 1999 (hereinafter the '1994 guidelines' and '1999 guidelines' respectively ⁽²⁴⁾).

Rescue aid

- (138) For the following reasons, the 1993 loan, the 1996 and 1998 guarantees and the aid involved in the deferral of tax and social security obligations cannot be found compatible as rescue aid. In the first place, none of these measures were restricted to a 12 month period, as required by point 23(b) of the 1999 guidelines or, more generally, to the time needed to devise the necessary recovery plan, as required by section 3.1 of the 1994 guidelines. The loan and the guarantees were first granted for a three-year period and subsequently extended. The preparation of a recovery or restructuring plan was not set as a condition. The 2000 loan was initially granted for one year, but was subsequently extended twice for another year. This loan cannot therefore be found compatible as rescue aid either in the light of this requirement. In the second place, the measures do not constitute a one-off operation, but must be regarded as various separate measures taken over a longer period. Thirdly, Spain has not provided any evidence that the other criteria were respected. The Commission therefore does not have the necessary information for concluding that the amount of the aid was restricted to the amount needed to keep the firm in business and that the aid was warranted on the grounds of serious social difficulties, without having undue adverse spillover effects on the situation of the sector in other Member States.

Restructuring aid

- (139) The guidelines establish the following conditions on which the Commission can approve aid for restructuring:

Restoration of viability

- (140) The grant of the aid must be conditional on implementation of a restructuring plan which must be endorsed by the Commission in the case of all individual measures. The plan must restore the company's long-term viability within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. With respect to the measures taken after the entry into force of the 1999 guidelines, the plan must include all relevant details, in particular a market survey to allow consideration to be given to the effects that public support has on keeping an unhealthy company artificially alive, as this can force healthy companies into difficulties.
- (141) The Commission notes that there was no such restructuring plan in place until November 2000. The 1993 loan, the 1996 and 1998 guarantees and the aid involved in the deferral of tax and social security obligations were all granted without any such reassurance of a return to viability as normally contained in a viability plan. The Commission therefore cannot find these measures compatible with the common market.
- (142) The 2000 loan, in contrast, was granted following presentation of a viability plan and conditional on its implementation. However, the plan does not include a market analysis taking into account the present state and future prospects for supply and demand on the relevant product market, with scenarios reflecting best-case, worst-case and intermediate assumptions and the firm's position within it. Nor does the plan provide information on market shares or a Community-wide forecast for trends in demand, aggregate capacity and prices over the five years ahead. These serious shortcomings are reflected in the changes that subsequently had to be made to the plan, notably the closure of the production site at Roda de Ter. Another shortcoming is that it appears that the aid left the company short of capital, not creating a definitive solution to its financial difficulties but rather keeping it afloat in the short run.
- (143) Consequently, the documents and information submitted by the Spanish authorities do not allow the Commission to conclude that the measures offered sufficiently firm prospects for restoration of Puigneró's long-term viability within a reasonable timescale. On this ground alone, the Commission can find that the 2000 loan does

⁽²⁴⁾ OJ C 368, 23.12.1994, p. 12 and OJ C 288, 9.10.1999, p. 2. Point 101 of the 1999 guidelines explain which guidelines apply in principle to which measures. However, as the differences between the two sets of guidelines have hardly any impact on the assessment of the measures, the Commission refers in the following assessment only to the 1999 guidelines. Where the distinction is significant, the applicable guidelines are indicated. The 1994 guidelines (OJ C 368, 23.12.1994, p. 12) codified the approach that the Commission had been taking for a long time. The 1993 loan can therefore also be assessed under the same rules.

not comply with the conditions of the 1994 and 1999 guidelines and hence is incompatible with the common market.

again anticipated. It is therefore not possible to conclude with certainty that a definitive reduction in capacity will take place.

Avoidance of undue distortions of competition

- (148) Consequently, this condition in the 1994 and 1999 guidelines is not respected.

- (144) According to section 3.2.2(ii) of the 1994 guidelines, measures must be taken to offset, as far as possible, adverse effects on competitors. According to point 35 of the 1999 guidelines, compensatory measures, such as an irreversible reduction in capacity, must be taken to mitigate as far as possible any adverse effects of the aid on competitors.

Aid limited to the minimum

- (145) The textile market is a highly sensitive market which was characterised by overcapacity and declining output throughout the period during which the aid to Puigneró was granted. Any aid granted to a company operating in this market will therefore be likely to distort competition. There is no evidence of any measures having been taken to offset or mitigate the adverse effects on competitors. On the contrary, it appears that the aid enabled the firm to follow a low-price strategy, thereby ensuring an outlet for its production, but harming the interests of its competitors, as alleged by them. The Commission recalls the comment by a third party that Puigneró distorted competition on the market by applying abnormally low sales prices. Puigneró confirms in its new viability plan that its pricing policy had a negative effect on the overall level of market prices.

- (149) According to section 3.2.3(iii) of the 1994 guidelines and point 40 of the 1999 guidelines, the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken. Aid beneficiaries will also be expected to make a significant contribution to the restructuring plan from their own resources.

- (150) Spain has not provided a clear overview of the costs of the restructuring. The main elements seem to be the cost of closing down the Roda de Ter site and the financial restructuring. The main source of financing will be the proceeds of the sale of the Roda de Ter site. However, the sale is expected to take place within three years, and the price that could be achieved is not known for certain. Moreover, as was the case with the previous agreements, the agreements with the public authorities make no provision for the eventuality of the company not managing to sell the plant within the established time period. In that event, no other measures seem to have been taken to ensure the closure of the plant. In view of these uncertainties regarding the sale of the plant, it is not possible to conclude that this measure satisfies the investor contribution criterion.

- (146) In terms of turnover, the initial plan did not envisage any reduction in capacity, but rather an increase. Among the measures to be taken the company was planning to reduce prices in order to increase volume. However, the new viability plan provides for a reduction in capacity in that the company is to reduce its loss-making activities, mainly in the spinning sector, and refocus on products with higher added value.

- (151) A second major source of finance for the restructuring is, of course, the debt reductions as agreed by all the creditors. These concern, however, mainly the public creditors. Since the accumulation of the original debts throughout the years in itself constitutes State aid, the subsequent agreements on debt reductions cannot be seen as a contribution from the beneficiary or from external commercial financing. Thirdly, the plan counts on continued financing by private banks as covered by guarantees from the ICF. Fourthly, according to the plan further assets will be hived off. However, the plan does not specify which assets are to be sold, when or what the proceeds are expected to be. Fifthly, the shareholders have put up their assets, both property and shares in the company, as securities for guarantees and loans. However, as stated above, these (new) securities were relatively small and insufficient to cover the guarantees and loans. Finally, a partner is being sought who will

- (147) Moreover, Puigneró plans to close its entire plant at Roda de Ter. However, the company has three years in which to sell the plant and pay off part of the public debt with the proceeds. In the event that the sale does not materialise, there does not appear to be any clause ensuring definitive closure of the plant and hence an irreversible reduction in capacity. Moreover, despite the closure of one entire plant and a substantial reduction in the workforce, turnover is expected to remain at the same level as before. A steady increase in turnover is

bring capital to the company once the suspension of payments proceedings have been settled. Given the many uncertainties, it remains unclear whether the aid is limited to the minimum and whether there is a sufficient contribution to the cost from private resources.

- (152) In view of the considerations above, and especially the lack of any market survey and the lack of guarantees concerning the avoidance of undue distortions of competition, the Commission concludes that the 1993 loan does not comply with the requirements of the guidelines. In conclusion, all the measures that have been classed as aid must be deemed incompatible with the common market.

VIII. CONCLUSIONS

- (153) The Commission finds that the 1993 loan, the 1996 and 1998 guarantees and the 2000 loan provided by the ICF constitute aid to Puigneró within the meaning of Article 87(1) of the Treaty. The persistent non-payment of social security contributions and tax obligations as from 1995 and early 1993 respectively also constitutes State aid to Puigneró. Spain has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. The aid is, furthermore, incompatible with the common market.

- (154) According to Article 14 of Council Regulation No 659/1999⁽²⁵⁾ all aid that is incompatible with the common market is to be recovered from the beneficiary. In doing so, Spain can deduct any repayment of the loans or debts already made to the respective authorities,

- (c) a guarantee granted by the Catalan Institute of Finance in 1998 and its extension in 2001;
- (d) the persistent non-payment of social security contributions from 1995 until the start of the suspension of payments procedure, in so far as until the latter date the social security authorities could have enforced their collection in accordance with normal procedures;
- (e) the persistent non-payment of tax obligations from early 1993 until the start of the suspension of payments procedure, in so far as until the latter date the Tax Agency could have enforced their collection in accordance with normal procedures; and
- (f) a loan granted by the Catalan Institute of Finance in 2000 and its subsequent extensions.

Article 2

1. Spain shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary, deducting any repayment already made to the respective authorities.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid and shall be net of interest that has already been charged by the respective authorities.

Article 3

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

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 19 February 2003.

For the Commission

Mario MONTI

Member of the Commission

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Spain has implemented for Hilados y Tejidos Puigneró SA is incompatible with the common market.

The incompatible aid involves the following measures in favour of Puigneró:

- (a) a loan granted by the Catalan Institute of Finance in 1993 and its extension in 1996;
- (b) a guarantee granted by the Catalan Institute of Finance in 1996 and its extensions in 1999 and 2001;

⁽²⁵⁾ OJ L 83, 27.3.1999, p. 1.

ANNEX I

Overview of measures by the Spanish authorities

		(ESP million)									
		Prior to 1992	1992	1993	1994	1995	1996	1997	1998	1999	2000
Principal / maximum coverage											
Tax Agency		(1991) distraint on R+ and S+: 656.1/807.3	Payment agree-ments	Mortgage on R (1) for a debt of 3 516.6/6 702.7			Distraint on P (some dwellings only): ?/478,8		March: distraint on S+, R+ and P+ for total amount of 2 050,4	Payment agree-ments	
Social security		Mortgage on R: ?/4 612,1					Payment agree-ment	Distraint on S+ and R+ for total amount of 5 814,3	October: distraint on S+ and R+ for total amount of 984,3	Distraints on S+ and R+ for total of 849,7 November: Pay-ment agreement	
ICF				Loan, mortgage on P2: 500/976			May: Extension of 1993 loan July: guarantee, mortgage on P+: 600/1 135		June: guarantee, mortgage on S+: 500/1 075,0	Extension of 1996 guarantee	December: loan, mortgage on all properties and on properties owned by shareholder: 2 000/3 570
Others		(1) (1985) mortgage on S and P: 1 200	(1) mortgage (2) on P: 650/886 (2) mortgage on P2: 225 (3) mortgage on P2: 275 (4) mortgage on two dwellings: 67								

S = industrial site at Sant Bartomeu del Grau; S+ = industrial site and some or all of the other properties at Sant Bartomeu del Grau.
R = industrial site at Roda de Ter; R+ = industrial site and some or all of the other properties at Roda de Ter.
P = industrial site at Prats de Lluçanès; P+ = industrial site and some or all of the other properties at Prats de Lluçanès; P1 = larger part of the industrial sites at Prats de Lluçanès and San Bartomeu del Grau, but the property register does not mention any such mortgages.
(1) This mortgage results from the 1992 payment agreements. According to these agreements Puigneró was also to establish mortgages on the industrial sites at Prats de Lluçanès and San Bartomeu del Grau, but the property register does not mention any such mortgages.
(2) This mortgage is not mentioned in the annual accounts. It is mentioned in the property register for P1, but not for P2, although the other mortgage on P2 carries the same date.

ANNEX II

Overview of estimated value of properties

(ESP million)

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Value of Roda de Ter industrial site, machinery and dwellings ⁽¹⁾	3 758,5	4 173,6	4 634,6	5 146,5	5 714,9	6 346,1	7 047,1	7 825,4	8 689,7	9 649,8	10 715,3
Value of S.B. del Grau industrial site, machinery and dwellings	4 181,4	4 643,2	5 156,1	5 725,6	6 358,0	7 060,2	7 840,0	8 705,9	9 667,5	10 735,8	11 921,0
Value of Prats de Lluçanès industrial site, machinery and dwellings	1 054,2	1 208,9	1 386,2	1 589,6	1 822,8	2 090,2	2 396,9	2 748,5	3 151,8	3 614,2	4 144,4
Total value industrial sites	8 994,1	10 025,8	11 176,9	12 461,7	13 895,7	15 496,4	17 284,0	18 279,8	21 509,0	23 999,9	26 780,7
Tax debt	3 516,6		2 426,2	2 805,3	2 791,7	2 023,0	3 073,3	3 738,0	7 364,0		
Social security debt			4 727,3	5 259,8	5 996,3	6 190,2	7 288,7	8 815,7	9 963,1		
Tax and social security debt			7 153,5	8 065,1	8 788,0	8 213,2	10 362,0	12 553,7	17 327,1		
Burden of mortgages for other debts				2 267,0 ⁽²⁾	2 267,0	2 267,0	1 992,0	1 992,0	3 992,0		

⁽¹⁾ The 1992 payment agreements between Puigneró and the tax authorities contain estimates of the value of the properties in 1992. The 2001 values are based on the valuation carried out by an independent expert with a view to drawing up the statement of affairs for the suspension of payments procedure. The 1992 value of the properties at Roda de Ter and San Bartomeu del Grau and all the values between 1992 and 2001 are based on the assumption of equal annual increments in value for these properties (11,0 % for Roda de Ter and San Bartomeu del Grau and 14,7 % for Prats de Lluçanès; these increments include inflation). The figures do not include the value of 'other installations, tools, transport equipment, furniture, IT equipment and stocks', which altogether were valued in 2001 at ESP 5 443,8 million.

⁽²⁾ The actual debt covered by these mortgages amounts to only ESP 761,2 million.