OPINION OF ADVOCATE GENERAL MISCHO

delivered on 8 June 2000 *

1. The Magefesa group and its successor companies manufacture household goods in Spain, such as pressure-cookers, pans and stainless steel cutlery. Until 1983 it held a significant share of the Spanish market, but from then onwards it began to experience financial difficulties, and in 1984 it was organised into a complex network comprising two holding companies and a commercial group (the parent company plus the production companies Cunosa, Migsa, Indosa and Gursa).

2. At the end of 1985 the Magefesa group was on the brink of insolvency. In order to prevent it from having to cease trading, an action programme was proposed, the main elements of which were a reduction in the workforce and the granting of assistance by the central government and the governments of the autonomous regions where the various factories in the group were located (Basque Country, Cantabria and Andalusia). The governments of those autonomous regions themselves set up three intermediary companies (Ficodesa, Gemacasa and Manufacturas Damma) to monitor how the aid was used and to ensure the continued operation of the Magefesa undertakings.

3. In its first decision, [1] which was not contested by the Spanish Government, the Commission declared that the aid, consisting of loan guarantees amounting to ESP 1 580 thousand million, a loan of ESP 2 085 thousand million at other than market conditions, non-refundable subsidies amounting to ESP 1 095 thousand million and an interest subsidy estimated at ESP 9 million, was illegal and incompatible with the common market. The decision also requested the Spanish authorities to withdraw the loan guarantees, to convert the soft-loan into a normal loan and to recover the non-refundable subsidies.

4. In 1997, the Commission received seven complaints about the advantages which the undertakings in the Magefesa group had gained as a result of their failure to repay the aid declared incompatible in 1989 and their failure to meet their financial and tax obligations. It decided to initiate the procedure provided for by Article 93(2) of the EC Treaty (now Article 88(2) EC) in respect of the aid granted to those under-

* Original language: French.

1 — Commission Decision 91/1/EEC of 20 December 1989 concerning aids in Spain which the central and several autonomous governments have granted to Magefesa, producer of domestic articles of stainless steel, and small electric appliances (OJ 1991 L 5, p. 18).

takings or those which had succeeded them since 1989.[2] Subsequently, in Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa group and their successors[3] (hereinafter 'the contested decision'), the Commission declared that the persistent non-payment of taxes and social security contributions by Indosa and Cunosa until they were declared insolvent, by Migsa and Gursa until their activities were suspended, and by Indosa after its declaration of insolvency and until May 1997, was illegal and incompatible with the common market. The decision also requested the Spanish authorities to take the necessary measures to recover the aid from the beneficiaries, specifying that the sums to be recovered should include the interest which had accrued between the granting of the aid and the date on which it was actually repaid.

5. In its application for annulment of the contested decision the Spanish Government relies on four pleas in law alleging infringement of Article 92 of the EC Treaty (now, after amendment, Article 87 EC), breach of the principle of legal certainty, failure to state reasons, and the impossibility of recovering interest.

2 — See Communication 97/C 330/02 (OJ 1997 C 330, p. 2).
3 — OJ 1999 L 198, p. 15.

The first plea in law: incorrect application of Article 92(1) of the Treaty

Arguments of the parties

6. The applicant claims that the Commission misapplied Article 92(1) of the Treaty in deciding that the non-payment by Indosa, Cunosa, Migsa and Gursa of certain sums to the social security fund and the Spanish Treasury constituted aid incompatible with the common market.

7. It relies on two arguments.

8. First, it submits that the rules on court-supervised recovery schemes which had been applied to those companies were a general law applicable to any undertaking in insolvency proceedings or which had incurred debts to the social security authorities or the treasury.

9. Such a general law, it argues, could not, by definition, constitute State aid. The Court has consistently held that the requirement that the national measure in question be of a specific nature is one of the

defining characteristics of the concept of State aid.

10. The parties refer here to the *Piaggio* judgment,[4] in which the Court held that the national scheme in question could be covered by Article 92 of the Treaty since it introduced, for a certain category of undertakings, rules which derogated from ordinary insolvency law.

11. It must be noted, however, that the Commission does not dispute that Spanish insolvency legislation is of a general nature. But it argues that it is not that legislation in itself that should be classified as State aid. What constitutes State aid is the systematic non-payment of certain debts by the undertakings in the Magefesa group and the accumulation of further debts following the decision by the public creditors not to ask for those companies to be wound up.

12. It follows that there is no need, in this case, to pursue the question of the general nature of the legislation at issue, since the contested decision does not relate to the legislation itself, but to how it was applied by the authorities in this case.

13. First of all, it should be noted that the Spanish Government does not dispute, and even confirms, the Commission's view that under the provisions relating to court-supervised recovery schemes and the recovery of debts, public creditors have broad discretion in choosing the methods they wish to use to recover the debts owed to them.

14. Therefore, the measures criticised by the Commission — the decision by the public creditors not to call for the companies in question to be wound up — do not automatically flow from the application of a general law, but from the discretion exercised by the authorities in question.

15. We must examine whether, as the contested decision states, the way in which the public authorities exercised their rights under general legislation in the specific case of the undertakings in question could be classified as aid within the meaning of Article 92 of the Treaty.

16. It is at this point that the applicant's second argument becomes relevant. It analyses the public authorities' conduct in the procedures criticised by the Commission as follows.

4 — Case C-295/97 *Piaggio* [1999] ECR I-3735.

17. According to the applicant, the companies in question were not accorded any favourable treatment. Spanish law allows a company to continue to operate while subject to a court-supervised scheme and does not require creditors to apply for it to be wound up or to apply for the commencement of insolvency proceedings. The relevant provisions merely allow creditors to make such an application in certain situations.

18. It is for the creditors, it argues, to assess whether such a step would be likely to increase their chances of recovering all or part of the debts owed to them, or whether, on the contrary, the prospects for recovery would be better if the creditors allowed the company to continue operating without applying for it to be wound up or commencement of insolvency proceedings.

19. Account must also be taken of the fact that the creditors have a wide range of other methods available to them for obtaining repayment. In particular, there are various enforcement procedures which they can apply in order to obtain repayment or guarantees.

20. This, the applicant contends, particularly applies to public authorities, which enjoy a number of special advantages conferred upon them by the law. Insolvency proceedings are therefore not necessarily their best chance of obtaining repayment of the debts owed to them. For example, the authorities could use enforcement proceedings to seize and enforce the sale of the debtor's assets, in other words to obtain a similar result to that produced by a winding-up order.

21. This being the case, it argues, it was perfectly reasonable for the public authorities not to have applied for the commencement of insolvency proceedings in respect of the companies in question.

22. According to the applicant, this view is borne out by the fact that, far from according the debtor companies favourable treatment, the authorities had taken all legal steps to obtain payment of the sums due to them.

23. The applicant gives a long list of the various measures taken, unsuccessfully, by both the tax authorities and the social security fund to obtain repayment of the debts owed to them.

24. The applicant also stresses that none of the companies had any debts remitted, and that assets were seized and sold as a result of the non-payment of debts.

25. It therefore considers that there can be no question of aid having been granted in this case, since the companies concerned did not receive any advantage whatsoever through State funding.

26. The Commission disputes the applicant's argument that the authorities took all possible legal steps to recover the debts owed to them.

27. It stresses that for years the undertakings in the Magefesa group failed to pay the sums due to the social security fund and the treasury without the authorities taking any steps to have insolvency proceedings commenced or succeeding in obtaining payment of the sums due by other means.

28. Although Cunosa and Indosa were finally declared insolvent, that was at the request of private creditors, which clearly shows that the public authorities did not act in this case as a private creditor would in a similar situation, a test used in the case-law of the Court to determine the existence of State aid.

29. The Commission also submits that Indosa was given indefinite and apparently unconditional authorisation to continue operating simply by agreement between its creditors, without court approval, and that the insolvency proceedings remained open for five years. This unusual and unorthodox situation underlines the 'special' nature of the action taken by the authorities in this case.

30. It adds that Indosa ran up further debts after it was declared insolvent.

Assessment

31. What are we to make of these various arguments?

32. According to the case-law of the Court, in order to assess whether the conduct of the public authorities constitutes State aid, it must be compared with how a private investor would have behaved in the same circumstances.

33. In this context, as the parties to the proceedings submit, account must be taken of the fact that public creditors enjoy a number of privileges which the law does not necessarily give to private creditors for

the purpose of recovering the debts owed to them.

34. The comparison to which I refer should therefore be with what the Commission describes as a 'hypothetical private creditor', who has all the legal remedies available which the law confers on public creditors.

35. It must be assumed that such a creditor will aim to recover the sum due to him or, at the very least, to minimise his losses. He will therefore try to assess the chances of a recovery by the company, and the risk of his losses increasing, if the company is allowed to continue to operate.

36. If we assume a similar approach by the public authorities, we are forced to conclude that they cannot be expected to demand that the company should be declared insolvent as soon as it fails and not to take any account of its longer-term potential.

37. Conversely, however, it is not acceptable for the public authorities passively to allow debts to be run up over long periods without the slightest prospect of improvement — a situation in which a private creditor would take whatever steps were necessary to limit his losses.

38. An examination of the circumstances of the case shows that the Commission was right to consider that the public authorities allowed debts to be run up in circumstances which would not have been acceptable to a private creditor in a similar situation.

39. In particular, the applicant itself admits that the non-payment of sums due to the treasury and the social security fund continued for years and that it was at the initiative of private creditors that Indosa and Cunosa were finally declared insolvent.

40. Similarly, the Spanish Government does not dispute that the continuance in operation of Indosa, far from reducing its pre-insolvency liabilities, actually produced new losses of more than ESP 2 000 million, which seem unlikely ever to be repaid since, according to the Commission's statements, which have not been challenged, by 14 December 1998 the company had repaid only some 2.5% of that sum, and its continued operation had proved to be harmful to the interests of the regional treasury.

41. As the contested decision explains, in view of the size of their claims, the public creditors were in a position to oppose Indosa's continued operation, which had, moreover, not been ordered by a court. It was for them to take due account of the company's background, and particularly of the fact that it had not paid any social security contributions or taxes for five years and that all the proceedings instituted in order to recover those sums had failed because the company did not have sufficient assets.

42. The public authorities should therefore have been aware that it was unlikely that the company's continued operation would enable it to repay its liabilities. Nor could they have been unaware of the risk that the company would run up new debts, which would further reduce the likelihood of the initial debts being paid.

43. The contested decision is therefore right to conclude that, by allowing Indosa to continue operating without, at the very least, making that subject to payment by Indosa of its outstanding tax and social security obligations in order to prevent its debts from increasing, the public authorities' conduct was likely to reduce their chances of recovering the debts due to them, whereas a private creditor would not have adopted such conduct.

44. It follows from the above that the applicant has not proved that the Commission infringed Article 92 of the Treaty, and that this plea must be rejected.

The second plea in law: breach of the principle of legal certainty

45. The applicant argues that the principle of legal certainty, which is enshrined in the case-law of the Court, demands that any Community measure which produces legal effects, particularly where it is likely to have financial implications, must be sufficiently clear and precise to enable those concerned to ascertain the exact scope of their obligations.

46. It considers that, in the present case, the Commission has breached this principle by declaring aid of an unknown sum to be illegal and by requiring the applicant to recover the aid without knowing the sum to be repaid.

47. I do not agree with the applicant's analysis.

48. As the Commission explains, the contested decision gives a detailed description

of the measures constituting the aid in question and the period during which they occurred. It also gives precise estimates of almost all the sums involved, in addition to a description of the obligations relating to them.

49. The applicant, to which the contested decision was addressed, was therefore perfectly able to determine the scope of the obligations imposed upon it.

50. This is particularly true here in that the calculation of the sums to be repaid must necessarily cover all the elements determining the tax debt of the companies in question and their social security contributions, in other words amounts fixed by national legislation which are perfectly ascertainable by the competent national authorities.

51. The Commission is therefore right to refer to the case-law [5] to the effect that the Commission does not have to determine the amount of aid to be repaid where such a calculation involves the taking into account of elements determined by national law.

52. This is particularly true where, as in the present case, according to a statement by the defendant which the applicant has not contradicted, a lack of cooperation on the part of the authorities concerned prevented the Commission from obtaining certain items of information.

53. It follows that the second plea must be rejected.

The third plea in law: failure to state reasons

54. The applicant claims that the contested decision does not include a statement of reasons explaining why the non-payment of certain unspecified sums to the Spanish Treasury and the social security fund by four undertakings, two of which are insolvent and the other two of which are not trading, constitutes public aid which is incompatible with the common market, affects intra-Community trade and distorts competition, when the State in question merely applied its national regulations on insolvency and exercised all legal remedies.

55. It therefore argues that there has been a breach of the obligation to state reasons provided for in Article 190 of the EC Treaty (now Article 253 EC).

5 — Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1.

56. As we saw earlier, however, in the present case the national authorities cannot be considered to have merely applied the legislation in force and exhausted all possible legal remedies.

57. Furthermore, the undertakings in question were active at the time when the disputed aid was granted, and they were therefore capable of distorting competition. The contested decision refers here to Magefesa's share of the market and the volume of intra-Community trade.

58. Finally, even if, as a result of the lack of cooperation from the authorities in question, the contested decision gives an incomplete estimate of the amount of the aid concerned, it stresses the significant amount of the sums owed in each case, [6] thus giving a clear indication of how they might affect competition.

59. It follows from the above that the contested decision contains a sufficient statement of reasons. This plea must therefore be rejected.

6 — See in particular the tables given in the contested decision.

The fourth plea in law: the charging of interest

Arguments of the parties

60. The applicant contends that the Commission was not entitled to require, in the context of the obligation to recover the aid at issue, interest to be charged on the debts owed by undertakings which are the subject of insolvency proceedings.

61. It argues that, according to the case-law of the Court, illegal aid should be recovered in accordance with the procedural rules laid down by national law, provided that they are not applied in such a way that the recovery of aid required under Community law becomes impossible in practice.

62. Under Article 884 of the Spanish Commercial Code, 'from the date on which insolvency is declared, the debts of the insolvent party shall cease to incur interest', with the single exception of mortgage loans and secured loans. This rule, the applicant argues, is justified by the creditors' common interest in preventing new liabilities from attaching to the assets of the company concerned at the time of the declaration of insolvency, which would be likely to exacerbate the situation of existing creditors.

63. The above article, it is claimed, is therefore a rule of national law which must be observed in the context of the recovery of aid, since it does not make such recovery impossible and it is not discriminatory in relation to similar situations governed solely by national law.

64. The applicant adds that the relevant case-law of the Court[7] merely requires interest to be charged 'where appropriate'.

65. The Commission first of all points out, and is not challenged on this point by the Spanish Government, that Article 884 of the Spanish Commercial Code does not preclude the payment of interest by the undertakings Migsa and Gursa, since they have not been declared insolvent.

66. Nor, as regards Indosa and Cunosa, do the parties dispute that Article 884 does not preclude a claim for the interest due up to the declaration of insolvency, or payment of interest on aid granted after that declaration, in so far as that interest constitutes debts of the assets in the insolvency rather than 'debts of the insolvent party'.

7 — See Case C-348/93 *Commission* v *Italy* [1995] ECR I-673 and Case T-459/93 *Siemens* v *Commission*. [1995] ECR II-1675.

67. The argument put forward by the applicant must therefore be deemed to apply only to the interest which accrued after the declaration of insolvency on the debts of Indosa and Cunosa.

Assessment

68. It should first of all be pointed out that the Commission is right to assert that the rule laid down in Article 884 of the Spanish Commercial Code is not a procedural rule.

69. The aim of the article is to determine the sum which is ultimately owed to the creditors, and it is therefore bound to concern the substance of the law.

70. The Commission is also right to state that, if the interest on the sums illegally granted were not repaid, the beneficiary would obtain a financial advantage comparable to an interest-free loan.

71. Must we therefore deduce that the plea submitted by the applicant must be rejected in its entirety?

72. I do not believe so.

73. Account must be taken of the fact that, unlike the circumstances in the judgments referred to above, in the case in point the repayment would have to be made in the context of an insolvency, and would thus be competing with the claims of all the insolvent company's creditors, both private and public.

74. The rule requiring the public authorities to forego the interest referred to above is a general rule in that it applies to all creditors, private and public, in all insolvency proceedings.

75. It therefore by no means constitutes favourable treatment for an undertaking or category of undertakings. It also leaves no margin of discretion for the creditors, who automatically forfeit the sums in question. This applies, I should point out, for both private and public creditors. The waiver imposed in favour of the debtor is thus not solely at the expense of the public purse.

76. The contrast between the effect of the provision in question and the conduct of the public authorities, which I have analysed in my examination of the first plea, speaks for itself.

77. The article in question must therefore be seen as expressing a choice by the national legislature, whose task it is to lay down insolvency rules and to find a balance between the various interests involved.

78. It follows that such a rule must be regarded as falling within the scope of the institutional autonomy which Community law confers on the Member States.

79. Furthermore, the national rule in question does not make it impossible in practice to implement the repayment obligation, since it relates to only part of the interest due, and only applies if the undertaking which has received the aid is declared insolvent.

80. Nor can it be claimed that the rule involves an element of discrimination contrary to Community law, since it applies in the same manner in all insolvency proceedings and to all creditors.

81. I would add that, if the Commission's argument were followed, a Member State would be required to make an additional exception to the principle of equality of creditors, to the benefit of the public authorities and at the expense of private creditors. The interpretation of Article 92 proposed by the Commission would be tantamount in practice to conferring a type of privilege on certain claims of the public authorities.

82. Even if a number of exceptions may be made to it, that principle of equality is of fundamental importance, since the aim of insolvency proceedings is to establish an ordered framework for the repayment of debts, which the law has introduced instead of competition between creditors, in their common interest.

83. Furthermore, altering the scope of creditors' rights in insolvency proceedings would affect the system of property ownership in the Member States, whereas Article 222 of the EC Treaty (now Article 295 EC) specifically makes this area the responsibility of the Member States.

84. I therefore consider that the interpretation proposed by the Commission in this case would endow Article 92 of the Treaty with effects on a scale which I feel were not intended by the authors of the Treaty.

85. In its rejoinder, however, the Commission added that the obligation to demand payment of interest was laid down in Article 14(2) 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. [8] It argues that there are no exceptions to this obligation and that it should therefore apply even if the recipient company is the subject of insolvency proceedings.

86. However, it should be pointed out that Article 14(1) of Regulation No 659/1999, which was not in force at the time when the contested decision was adopted, states that '[t]he Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.

87. This provision also applies to the repayment of interest, since that obligation is an element of the recovery of the aid.

88. It is apparent from the above that, in the present case, the repayment of the interest accrued by Indosa's and Cunosa's debts after the declaration of insolvency would be contrary to the principles flowing from the Treaty.

8 — OJ 1999 L 83, p. 1.

89. This plea should therefore be upheld in so far as it relates to the repayment of interest accrued, after the declaration of insolvency, on the aid illegally received by Indosa and Cunosa before that declaration.

Conclusion

90. For the reasons set out above, I propose that the Court should annul Commission Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa group and their successors in so far as it requires the Kingdom of Spain to obtain repayment of the interest accrued after the declaration of insolvency on aid illegally received by Indosa and Cunosa before that declaration; that it should dismiss the remainder of the action and that it should require the applicant to pay two thirds of the Commission's costs in addition to its own.