II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 November 1992

concerning aid granted by the Spanish government to the Merco company (agricultural processing industry)

(Only the Spanish text is authentic)

(93/133/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first paragraph of Article 93 (2) thereof,

After giving notice, in accordance with the Article referred to above, to the parties concerned to submit their comments and having regard to those comments,

Whereas :

I

By telex messages dated 20 December 1990 and 23 April 1991 the Commission, following a complaint, asked the Spanish Government for information concerning aid which it had allegedly granted to the public company known as Merco, in the form of an injection of capital amounting to Pta 5 900 million.

In a letter dated 27 May 1991 from its Permanent Representative, the Spanish Government confirmed that in 1990 the sum of Pta 5 900 million had been paid to the Merco company pursuant to a decision by its two public shareholders, the 'Dirección General del Patrimonio del Estado' and the Forppa (Fondo para la Ordenación y Regulación de la Producción de los Precios Agrarios), in the form of an injection of capital.

On the basis of the information at its disposal the Commission took the view that this injection of capital of Pta 5 900 million was a measure intended to make good losses suffered by Merco and that in such circumstances a private investor operating under the normal conditions of a market economy would not normally have provided such a subscription of capital. Accordingly, the payment was aid within the meaning of Article 92 (1) of the EEC Treaty.

Since the aid threatened to distort competition and affect trade between Member States in the products concerned, the Commission decided to initiate the procedure provided for in Article 93 (2) of the EEC Treaty.

By letter of 23 July 1991 the Commission requested the Spanish Government to submit its comments and to provide further information on the aid, as had been requested in the Annex to the telex of 23 April 1991. The other Member States and other interested parties were also asked to submit their comments (1).

II

The Spanish Government presented its comments in a letter dated 4 October 1991. It took the view that the injection of capital of Pta 5 900 million was not State aid within the meaning of Article 92 of the Treaty ; the decision, taken by its public shareholders, had been based on economic criteria since the Spanish Government had decided to reorganize the company and to restrict it to profitable activities.

This reorganization consisted on the one hand of the closure of the 'oil' division and on the other of an injection of capital amounting to Pta 5 900 million. The 'oil' division was the cause of a major part of the company's profitability problems. In 1990 this division had cost about Pta 2 022 million.

(1) OJ No C 246, 21. 9. 1991, p. 4.

Nevertheless, the Spanish authorities considered that even if the injection of capital were to be regarded as State aid it would be compatible with the common market on the grounds that financial assistance was necessary to give effect to the plans to cut back the company's activities through the closure of the 'oil' division. In addition, since the activities of this 'oil' division were principally concentrated in less-favoured regions, the aid qualified for the exemptions under Article 92 (3) (a) and (c) of the Treaty.

However, the Spanish Government admitted that the injection of capital of Pta 5 900 million was not sufficient to ensure that the Merco company would become profitable and that other reforms would have to be undertaken, in particular with regard to the company's financial structure.

Within the framework of the procedure three interested parties forwarded their observations. Those observations were communicated to the Spanish Government by letters of 13 November 1991 and 24 January 1992.

III

The public company Mercorsa (Mercados en Origen de Productos Agrarios) was set up in 1972 by Ministry of Agriculture Decree No 3178/70 of 15 October 1970. In 1987 the company changed its corporate status and its name, becoming Merco.

Its public shareholders are the Dirección General del Patrimonio del Estado (Ministry of Finance) with 69,3 % capital participation and the Forppa (public body coming under the Ministry of Agriculture) holding a 30,7 % share.

Merco is engaged in marketing agricultural products. It has a capital of Pta 8 782 million and employs 900 people. It carries on its activities in 55 agricultural purchasing centres established at the points of production, which market agricultural products in Spain and abroad.

In 1990 the company's turnover was about Pta 71 000 million, which meant that it ranked in 1990 as one of the most important companies in Spain. Its turnover broke down between the various divisions of the company as follows :

Sales in 1990	Tonnes	Total in millions of Pta
Fruit and vegetables	95 713	6 002,1
Olive oil	158 657	32 717,7
Cereals and grains	878 812	23 760,7
Oilseed products and cotton	92 133	6 960,4
Other products	1 793	1 190,7
Total	1 227 108	70 632

In 1990 Merco, operating in the olive-oil bottling sector under the name of Uteco-Jaén, was the third-largest company in this sector in Spain, accounting for 8,9 % of total Spanish sales, i.e. 29 798 773 litres. In this connection it should be pointed out that in 1986 the company had been in only twelfth place, with 1,7 % of total sales.

According to an auditing report (for the 1990 financial year) carried out by Price Waterhouse in 1991, Merco had a deficit in 1990 of Pta 8 727 million, to which were to be added the deficits from earlier financial years amounting to Pta 9 800 million. Thus as of 31 December 1990 the total deficit amounted to Pta 18 527 million. According to this report Merco would be able to continue operating only if it received additional injections of capital.

According to the company's 1990 annual report the results of the various divisions of the company were as follows :

(in Pta million)

Fruit and vegetables :	− 1 560,3
Olive oil :	− 2 480,2
Cereals :	− 369,2
Oilseed products and cotton :	+ 250,3
	(79,4 less than the preceding year)

According to the same annual report, on 31 December 1990 the company's non-commercial debts totalled about Pta 33 billion (Pta 30 billion in short-term debts and Pta 2 966 million in long-term debts).

IV

In the past, Merco has received other very substantial State aids. It should be recalled that in a letter of 27 December 1990 the Commission informed the Spanish authorities of the closure of the procedure under Article 93 (2) of the EEC Treaty, initiated in relation to aid granted to Mercorsa (Merco), Olcesa and Uteco-Jaen/ Merco-Jaen (Aid No C 28/90 ex NN 17/89), for the following reasons :

As regards the Mercorsa (Merco) company, the Commission considered that the aid, which took the form of an increase in capital, had been undertaken prior to accession. The Spanish authorities had shown that the increase in capital of Pta 1 592 million in 1986 formed part of a general operation decided and agreed upon before 1 January 1986 as part of a restructuring programme.

As for the low-interest loan of Pta 2 340 million granted to Uteco-Jaen/Merco-Jaen in 1987, the Commission considered that this loan was unobjectionable under Articles 92 to 94 of the Treaty since a link had been shown between the 1987 loan referred to above and expenditure incurred by Merco from 1984 onwards in the restructuring of Uteco-Jaen. Thus, intervention by the State authorities through Merco corresponded to a legal obligation under Law 12/1984 — a decision preceding Spain's accession to the European Communities under which the financial reorganization of Uteco-Jaen up to an amount of Pta 15 410 million was recognized as a State obligation. The Merco company had provided the necessary funds for restructuring since 1984.

Finally, as regards the loan of Pta 2 500 million granted to Uteco-Jaen/Merco-Jaen in 1986, the Commission took the view that when the undertaking to take action for the benefit of this company was entered into, the provisions of Articles 92 and 93 of the EEC Treaty did not yet apply in Spain.

V

Under Article 92 (1) of the EEC 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 is, in so far as it affects trade between Member States, incompatible with the common market.

The Commission set out its position in regard to contributions by public authorities to the capital of undertakings in September 1984 and informed the Member States accordingly by letter of 17 September 1984 [1].

Under the terms of that communication there is State aid when fresh capital is injected into undertakings in circumstances that would not be acceptable to a private investor operating under normal market-economy conditions. This is the case where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return (in dividends or capital gains) cannot from the capital invested be expected within a reasonable time, or when, because of its inadequate cash flow if for no other reason, the company would be unable to raise the funds needed for an investment programme on the capital market.

The Commission's approach has been endorsed by the Court of Justice [2].

The Court had concluded that in order to determine whether a capital contribution was a State aid it was necessary to ascertain whether the undertaking could have obtained the necessary finance on the capital market. If the facts indicated that it could not have survived without public intervention because it would have been unable to obtain the necessary capital from a private investor it could justifiably be concluded that the contribution it had received amounted to a State aid.

Given Merco's losses in 1990 of Pta 8 727 million, together with losses from previous years amounting to Pta 9 800 million and a volume of indebtedness whereby on 31 December 1990 its non-commercial debt amounted to approximately Pta 33 billion (see section III), it is unlikely that the undertaking could have obtained sufficient funds on the capital market to ensure its survival, since no private undertaking basing its decision solely on the likelihood of profit and taking no account of social factors or regional or sectoral-policy considerations would have made such an injection of capital. Accordingly, the Pta 5 900 million of capital injected is a State aid covered by Article 92 (1).

Moreover, the Spanish authorities have not provided the Commission with any information to indicate that the company's balance sheet allowed the capital subscription to be treated as a commercial transaction.

In this connection it should also be pointed out that in their letter of 4 October 1991 the Spanish authorities themselves acknowledged that the capital subscription of Pta 5 900 million was not enough by itself to make Merco a profitable concern. This clearly shows that the subscription is to be considered a State aid covered by Article 92 (1). By keeping Merco artificially operative it prevented market forces from making their normal impact — that is, from removing an uncompetitive undertaking.

VI

The aid granted to Merco in 1990 affects trade between the Member States given that all the agricultural products marketed by it are traded between Member States : See the following table.

[1] Communication to the Member States on public authorities' holdings in company capital (Bulletin EC 9-1984).

[2] See, *inter alia*, the Judgments of 10 July 1986 in Case 234/84, *Belgium v. Commission* [1986] ECR 2263 and of 21 March 1991 in Case 305/89, *Commission v. Italy* [1991] ECR I-1603.

	1990						1991					
	Intra-EEC		A		B		Intra-EEC		A		B	
	ECU 000	000 kg	ECU 000	000 kg	ECU 000	000 kg	ECU 000	000 kg	ECU 000	000 kg	ECU 000	000 kg
Cotton seed (1)	2 224	12 688	144	639	8	40	2 912	16 343	1 159	6 098	0	0
Sunflower seed (2)	648 485	1 201 479	50 889	82 539	26 476	41 546	465 820	995 496	17 617	25 436	6 177	11 242
Olive oil (3)	788 033	314 168	444 828	190 717	27 490	13 861	1 124 864	436 486	778 905	319 417	57 428	23 720
Cereals (4)	5 295 436	24 429 093	164 350	537 775	188 341	863 848	6 220 824	26 954 427	250 932	767 024	445 821	2 179 137
Fruit (5)	5 276 044	7 190 975	1 656 086	2 715 977	117 714	165 046	6 050 293	7 508 485	1 961 096	2 769 572	127 143	155 823
Vegetables (6)	5 439 985	12 034 124	790 849	1 059 719	169 819	528 943	6 216 291	13 414 299	964 981	1 292 583	211 850	703 320

A: EC imports from Spain.
B: Spanish imports from the EC.
(1) CN code 1207 20.
(2) CN code 1206 00.
(3) CN code 1509.
(4) CN Chapter 10.
(5) CN Chapter 08.
(6) CN Chapter 07.

If financial aid granted by public authorities strengthens the position of certain undertakings as against their competitors in the Community, it must be considered to affect the latter. This is all the more true when — as in the case in point — the aid serves to prop up the financial position of an undertaking that ought in the normal course of events to have disappeared.

The inescapable conclusion is therefore that the aid to Merco is liable to affect trade between Member States and distort competition, and hence that it falls within the scope of Article 92 (1) of the EEC Treaty.

VII

The aid should have been notified to the Commisison as required by Article 93 (3) of the Treaty. Since the Spanish Government failed to do so, the Commission was unable to make its position known before the measure was implemented. Since the provisions of Article 93 (3) of the Treaty were not complied with, the aid has been illegal under Community law ever since it was granted.

In this connection it must be pointed out that the imperative character of the procedural rules set out in Article 93 (3) of the Treaty, compliance with which is important from the point of view of public order, and the direct effect of which has been recognized by the Court of Justice in its judgments of 19 June 1973 in Case 77/72 [1], 11 December 1973 in Case 120/73 [2], 22 March 1977 in Case 78/76 [3] and 21 November 1991 in Case C-354/90 [4], is such that the illegality of the aid in question cannot be remedied by subsequent action.

Moreover, where aid is incompatible with the common market, the Commission can make use of the option afforded it by the judgment of the Court of Justice of 12 July 1973 in Case 70/72 [5], confirmed by the judgments of 24 February 1987 and 20 September 1990 in Cases 310/85 [6] and C-5/89 [7], and can require Member States to recover from recipients all aid illegally granted.

VIII

Article 92 (1) of the EEC Treaty lays down that aid displaying the characteristics it specifies is, in principle incompatible with the common market.

The derogations provided for in Article 92 (2) of the Treaty are not applicable in this case, given the nature and purpose of the aid envisaged. The Spanish Government did not in fact claim an exemption under Article 92 (2).

Under the terms of Article 92 (3) of the Treaty, in order to maintain a sound common market and secure the aims of Article 3 (f) of the Treaty, derogations from the principle of the incompatibility of aid must be restrictively interpreted when any aid scheme or individual aid measure is scrutinized.

In particular, derogations may be granted only if the Commission has been able to verify that, were the aid not to be granted, the free play of market forces would not be sufficient in itself to induce the potential recipients to act with a view to attaining one of the objectives indicated.

To apply the derogations in cases where there is no contribution to such an objective or where the aid is not necessary to its attainment would have the effect of conferring advantages on undertakings in certain Member States, whose financial position would be artificially strengthened, and of altering the conditions of trade between Member States and distorting competition, with no justification based on the 'common interest' referred to in Article 92 (3) of the Treaty.

That being so, none of the exemptions provided for in the said Article 92 (3) can operate in favour of the aid referred to in this Decision.

The exemptions provided for at points (a) and (c) of Article 92 (3) in regard to aid to promote or facilitate the development of particular areas are not applicable.

Point (a) of Article 92 (3) provides for exemption for aid to promote the development of areas where the standard of living is abnormally low or where there is serious underemployment. Point (c) provides for exemption for the development of certain areas. Although Merco has been able to expand some of its activities in areas qualifying for regional aid under points (a) and (c) the aid measure in question was not authorized as part of a regional aid programme but by an *ad hoc* decision of the Spanish Government, and it took the form of arbitrary capital increases granted at that Government's discretion.

Even if the aid in question were to be considered regional aid, it would still not be eligible for the exemptions under Article 92 (3) (a) and (c) since aid granted pursuant to those provisions must contribute to the region's long-term development which, in this case, means that the aid would have been used, at the very least, to reestablish the profitability of the company (an aim which Merco has not achieved, according to the information supplied to the Commission) without producing any unacceptable negative effects on the conditions of competition within the Community.

[1] [1973] ECR 611.
[2] [1973] ECR 1471.
[3] [1977] ECR 595.
[4] [1991] ECR I-5505.
[5] [1973] ECR 813.
[6] [1987] ECR 901.
[7] [1990] ECR I-3437.

As regards the exemptions referred to in Article 92 (3) (b) of the EEC Treaty, the aid in question is obviously not intended to support a project of common European interest or to remedy a serious disturbance in the Spanish economy. Indeed, the Spanish Government has not put forward such reasons as a justification for the aid in question.

Finally, as regards the exemption referred to in Article 92 (3) (c) of the EEC Treaty, for aid to facilitate the development of certain economic activities, the Commission accepts that certain sectoral aids were compatible with the common market provided that two conditions laid down in the aforesaid Article 92 (3) (c) are fulfilled, namely, on the one hand, that the aid must be necessary for the development of the sector from the point of view of the Community and, on the other, that it must not affect trading conditions to an extent contrary to the common interest.

The injection of capital of Pta 5 900 million into Merco in 1990 cannot, given the company's financial situation as described in Section VI, be considered aid compatible with the common market.

The reorganization referred to in the observations made by the Spanish authorities, consisting of the abandonment of the 'oil' division, cannot be considered a satisfactory restructuring programme. Firstly, Merco had recently received aid under a restructuring plan which should have brought the company into profitability (see Section IV) and further restructuring in 1990 therefore seems unjustified.

Moreover, in their observations the Spanish authorities have recognized that the injection of capital of Pta 5 900 million could not, in itself, restore the company's profitability (see Section II). Indeed, Merco's abandonment of the 'oil' division will not make the company profitable either. It should be recalled that the company's other divisions, excepting the oilseed and cotton divisions, also made losses in 1990 (see Section III).

Given that no prior notice of the aid was given, that it was used to offset losses and reduce debts, that it was not linked to a satisfactory restructuring programme and that it could have had a negative impact on the company's Community competitors by maintaining the company's competitiveness through artificially improving its financial position, the aid in question is incompatible with the common market.

Furthermore, it is clear from judgments of the Court of Justice in the 'Meura' and 'Boch' cases (Case 234/84, referred to above, and Case 40/85, *Belgium v. Commission*[1]) that this type of aid does not fulfil the conditions for the granting of any of the exemptions provided for in Article 92 where it does not help to make the company more efficient with the prospect that it will move into profit without further assistance within a reasonable time. In this case, as the Spanish authorities have admitted, Merco could not be made profitable by the injection of capital of PTA 5 900 million.

As the market becomes further integrated and as progress is made towards a single market without internal borders, distortions of competition due to the granting of aid are increasingly disturbing for competitors not receiving such aid. The Commission must therefore take this into account when examining aid measures. The Commission takes the view that all economic operators have a right to equal treatment in accordance with the EEC Treaty.

It can consequently approve restructuring aid only in special circumstances. Such aid must be linked to a true restructuring plan and may be granted only where it can be proved that the continued existence of a company and the reestablishment of its profitability are in the best interests of the Community. It is particularly important that the Commission ensure that aid does not allow beneficiaries to increase or maintain their market share at the expense of competitors not receiving such aid.

It follows from the above that the aid granted to Merco enabled the company to be kept artificially operative by postponing its liquidation — the natural consequence of the free play of market forces — and at the same time prevented other, competing producers from increasing their own market share.

Consequently, the aid granted to Merco in the form of an injection of capital of Pta 5 900 million is incompatible with the common market since it fulfils none of the conditions for the granting of exemptions under Article 92 (3) of the EEC Treaty.

IX

As was pointed out in Section VI above, the Commission may, in such cases, demand that the Member States oblige recipients of aid paid illegally to repay it.

In view of the above, the aid of Pta 5 900 million paid in the form of an injection of capital to the Merco company must be withdrawn and repaid.

Repayment must be made in accordance with the procedures and provisions laid down by Spanish legislation and in particular those concerning interest on overdue payments against monies owed to the Government, the interest being calculated from the date the illegal aid in question was paid. This appears necessary in order to

[1] [1986] ECR 2321.

restore the previous situation by abolishing all the financial advantages enjoyed by the company receiving the illegal aid since the date on which it was paid.

This Decision shall not prejudice any inferences the Commission might draw for the financing of the common agricultural policy by the European Agricultural Guidance and Guarantee Fund (EAGGF).

Finally, by letters of 1 and 31 July 1992 the Spanish authorities said that they had decided on the total liquidation of the company. The Commission takes the view that this does not alter the obligation to repay the aid.

It should be recalled that the repayment of an illegal aid is the logical consequence of having established its illegality (1).

The removal of the obligation to repay in the event of a company's liquidation would render meaningless the rules on State aid and the provisions on the repayment of illegal and incompatible aid adopted and consistently applied by the Commission (2). To avoid application of Articles 92 and 93 of the EEC Treaty a company which had received State financial support would simply have to be liquidated.

It should also be pointed out that the argument that the obligation to repay aid does not apply when a company has been liquidated has already been put forward, without success, before the Court of Justice (3),

HAS ADOPTED THIS DECISION:

Article 1

The aid granted by the Spanish Government in the form of an injection of capital of Pta 5 900 million in the Merco company in 1990 is illegal because it was granted in violation of the rules of procedure laid down in Article 93 (3). Furthermore, the aid is also incompatible with the common market under the terms of Article 92 (1) since it does not fulfil the conditions for the granting of an exemption under Article 92 (3).

Article 2

The Kingdom of Spain shall withdraw the aid referred to in Article 1 and other the Merco company to repay the sum in question within two months of receipt of notification of this Decision.

Repayment shall be made in accordance with the procedure and provisions laid down by national legislation, and in particular those concerning the default interest payable on monies owed to the Government, the interest running from the date on which the illegal aid concerned was paid.

Article 3

The Spanish Government shall inform the Commission within two months from the date of notification of this Decision of the measures it has taken to comply herewith.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 4 November 1992.

For the Commission

Ray MAC SHARRY

Member of the Commission

(1) Case 142/87 of 21 March 1990 ('Tubemeuse'), [1990] ECR I-959.

(2) See Commission Communication, OJ No C 318, 24. 11. 1983, p. 3.

(3) Case 142/87 (see above), paragraphs 49 to 51.