COMMISSION

COMMISSION DECISION

of 22 July 1993

concerning aid granted by the Spanish authorities on the occasion of the sale by Cenemesa/Cademesa/Conelec of certain selected assets to Asea-Brown Boveri

(Only the Spanish text is authentic)

(93/627/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having given notice in accordance with the above Article to interested parties to submit their comments and having regard to those comments,

Whereas:

I

The so-called Cenemesa group (CCC) is formed by three privately-owned companies whose aim was the production of heavy electrical equipment, namely:

— Constructora Nacional de Maquinaria Eléctrica, SA (Cenemesa)

— Catalana de Maquinaria Eléctrica SA (Cademesa) and

— Constructora Nacional de Equipos Eléctricos SA (Conelec)

These companies operated eight industrial plants situated in six different Spanish Autonomous Communities:

Company	Factories at	Autonomous Community
Cenemesa	Córdoba	Andalusia
	Erándio (Vizcaya)	Basque country
	Reinosa	Cantabria
	Madrid	Madrid
	Valladolid	Castille/León
Cademesa	Sabadell (Barcelona)	Catalonia
Conelec	Galindo (Vizcaya)	Basque country
	Trápaga (Vizcaya)	Basque country

The abovementioned plants are currently owned and operated by several subsidiaries of the transnational group, Asea-Brown Boveri (hereinafter referred to as 'ABB'), (see following sections of this Decision).

At the end of 1988 the abovementioned industrial facilities represented 50 % of the Spanish production capacity in the electrical equipment sector. They employed 5 102 workers which constituted in turn 47 % of the global sectoral workforce. Their basic product range covered: power transformers, generators, industrial and traction motors, and switchgear.

The formation of the CCC group took place in the middle of the 1980s when several transnational companies decided to abandon their industrial activities in Spain as a result of the long-lasting crisis experienced worldwide in the capital goods sector:

In October 1983, in consequence of continued financial difficulties, Westinghouse Española SA — Spanish subsidiary of the transnational group Westinghouse Electric — filed a Court application for suspension of payments. At the same time, representatives of the transnational initiated talks with the Spanish administration to discuss plans for selling the Spanish subsidiary which would otherwise have been liquidated.

Further to these discussions, Westinghouse Electric agreed to sell its 98 % stake in the Spanish subsidiary at a token price of Pta 1 per share to Arbobyl Ltd, a British privately-held company specialized in taking over troubled companies. After this transaction, Westinghouse Española SA changed its name to Cenemesa.

In December 1985 the transnational group Brown Boveri sold its 100 % shareholding in its Spanish subsidiary Brown Bovery de España, SA to Cenemesa for Pta 450 million. Later on, Brown Bovery de España, SA changed its name to Cademesa.

Finally, in December 1986 Cenemesa bought from diverse shareholders 50,1 % of the capital of Conelec. It should be noted that Conelec was the new corporate name given to General Eléctrica Española SA after its suspension of payments in 1984, and once its parent company — the transnational group General Electric — diluted its controlling stake by converting outstanding creditors' debts into capital.

As a result of the abovementioned transactions, by the end of 1986 the private company Arbobyl had directly or indirectly taken control of Cenemesa, Cademesa and Conelec.

Under the responsibility of its new ultimate shareholder, the CCC group presented several consecutive restructuring projects to the Spanish Ministry of Industry, with a view to obtaining public assistance for their implementation. In the meantime, the financial position of CCC did not cease deteriorating. Over the period 1986 to 1988, the group cumulated global losses of Pta 14 984 million, its turnover passing from Pta 17 475 million in 1986 to Pta 18 143 million in 1988.

II

Following a complaint from a competitor of CCC, by letter dated 3 April 1987 the Commission requested the Spanish authorities to be informed of any aid granted prior to that date to the companies of the CCC group. The Spanish authorities were also requested to inform the Commission of any potential commitment they might have made to grant future aid in respect of CCC. The Spanish authorities answered by letters dated 7 July and 6 October 1987. They informed the Commission that the Governments of several Autonomous Communities had granted limited aid to CCC, either prior to the accession of Spain to the Community or under schemes duly notified to the Commission after accession. The Spanish authorities also stated that the central Government had not granted any aid to the group after accession.

Almost a year after its complaint, the same competitor of CCC drew the Commission's attention to certain aid estimated at some Pta 25 000 million that the Spanish central Government and the Governments of several Autonomous Communities had allegedly granted towards costs of a major reduction in the workforce of CCC. Consequently, by letter dated 1 March 1988 the Commission requested the Spanish authorities to submit all relevant information on these alleged public interventions.

By telex of 25 May 1988 the Spanish authorities informed the Commission that, since their last communication of 6 October 1987, neither the central Government nor the Governments of the Autonomous Communities had granted any aid to CCC. The Spanish authorities also indicated that certain aid measures of a 'socio-labour' nature, whose particular terms had not even been defined yet, were at that time under study.

By letter of 26 December 1989 addressed to the Commission, the same complainant insisted upon the truthfulness of the interventions set out in its previous complaint.

Several days later, in the course of a meeting held on 3 January 1990 between representatives of the Spanish Ministry of Industry and members of the cabinet of the Commissioner responsible for competition policy, the former raised a specific case on which, according to their statements, they were seeking the Commission's advice. In particular, the Spanish representatives briefly described the main lines of certain negotiations that the Spanish central authorities were carrying out in connection with the CCC group. They indicated that, in the Spanish authorities' view, the implementation of the terms of those negotiations did not involve any State aid element. They also indicated that the Spanish authorities were willing to provide all necessary information. It should be remarked that the Spanish representatives did not provide any document of the facts orally described.

By letter dated 12 January 1990 the Commission requested the Spanish authorities to send it all relevant information.

First, the Spanish authorities provided information by letters dated 14 and 28 February, and 5 April 1990 (for a description of this information, see Section III of this Decision). It should also be noted that on 23 February 1990 a technical meeting took place between representatives of the Spanish authorities and of the Commission.

Later, in two meetings held on 10 and 28 May 1990, the Spanish Minister of Industry and the Commissioner responsible for competition policy discussed the CCC case. In the latter meeting, in view of the complexity of the case, both agreed that the Spanish authorities would be requested to provide further information to clarify certain still unclear points of the public interventions, in such a way as to allow their full assessment by the Commission. Both parties also agreed that the Commission would analyse the reply and, on its basis, it would decide on the course to be followed.

Unexpectedly and contrary to the abovementioned agreed procedure to pursue the assessment of the case, by a short letter dated 15 June 1990 the Spanish authorities invoked the Court of Justice's judgment of 11 December 1973 in Case 120/73 [1] and informed the Commission that they would implement the agreement for the settlement of the debts of the CCC group (see Section III of this Decision).

In response to the Spanish authorities' communication, by letter dated 20 June 1990 signed by the Commissioner responsible for competition policy, the Commission

[1] Lorenz v. Germany, [1973] ECR, p. 1471.

informed the Spanish Minister of Industry without delay that the Spanish Government should not confront the Commission with a *fait accompli* which was contrary to the agreed procedure to assess the interventions. By this letter, the Commission also requested further information, as both parties had previously agreed.

By letter dated 24 July 1990 the Spanish Minister of Industry refused to reply to the Commission's request for information. In his letter, the Spanish Minister acknowledged that he had agreed with the Commissioner that, before any position was taken, the Commission should request further information to enable it to carry out a full assessment of the interventions. However, he justified the implementation of the public interventions by reason of the urgency to put an end to the untenable situation experienced by the companies of the CCC group.

Faced with this situation, on 25 July 1990 the Commission decided to initiate the procedure provided for in Article 93 (2) of the EEC Treaty in respect of the interventions of the Spanish authorities in respect of Cenemesa, Conelec and Cademesa on the occasion of the sale of their assets to ABB. The Commission considered that these interventions appeared to involve State aid elements within the meaning of Article 92 (1), and that these aid elements did not qualify for any of the exemptions to incompatibility provided for in Article 92 (2) and (3).

On 11 December 1990 Spain introduced before the Court of Justice an application for annulment of the Commission's decision to initiate the procedure under Article 93 (2) (Case C-312/90, Kingdom of Spain v. Commission (1)).

III

As previously mentioned in Section II of this Decision, before the Commission decided on the initiation of the proceedings, the Spanish authorities had provided certain information by letters dated 14 and 28 February and 5 April 1990.

By their letter of 14 February 1990, the Spanish authorities informed the Commission that, in spite of the fact that the CCC group had failed to present an acceptable restructuring programme to the Spanish Ministry of Industry (see Section I of this Decision), on 27 December 1987 the Spanish central Government had granted a package of extraordinary aid intended to cover the costs of a reduction of 1 612 jobs in the group's global workforce. The legal basis for this aid award was the aid scheme established by Law 27/1984 of 26 July on conversion and reindustrialization. The Spanish authorities also stated that, although the aid had effectively been decided, they were conscious that labour measures could not by themselves ensure the viability of CCC. In their view, the active presence of a new shareholder capable of contributing both the financial resources and the technology transfer required to rescue the group was also necessary.

It should be remarked here that the abovementioned information was in glaring contradiction with the statement made by the Spanish authorities in their previous communication to the Commission by telex message of 25 May 1988 (see Section II above), which made known to it that, to that date, the Spanish authorities had not granted any aid to CCC and that certain aid measures, not yet defined, were still being studied.

The letter of 14 February 1990 also explained that, with a view to finding a new shareholder, the Spanish Ministry of Industry — even though the State was not the owner of the group — had since September 1988 made approaches to several multinational companies thought likely to be interested in buying CCC. The companies contacted were: Alsthom, ABB, Mitsubishi and Siemens. According to the information submitted, after negotiations, in August 1989 the Spanish authorities had finally accepted an offer from ABB to take control of the activities of CCC on the following terms:

— CCC would be wound up,

— all the group's assets would be sold: ABB would buy the 'industrial assets' for Pta 7 000 million, the remainder being adjudged free of labour charges to the public creditors,

— a labour restructuring plan to be negotiated with the trade unions would be implemented,

— the production capacity of the group would be reduced by closing down the factories at Erandio and Valladolid.

In connection with the labour restructuring plan, the Spanish authorities indicated that an agreement with the trade unions and ABB had been concluded, providing that:

— ABB should re-employ 2 915 out of the 5 102 workers of CCC,

— the State should put into effect the aid already approved in December 1987 to cover the costs of an early retirement scheme for 1 666 workers,

— a pension fund for redundancies should be created,

— a cut-back of 521 jobs non-eligible for the abovementioned early retirement scheme should be achieved by means of incentives financed by ABB.

(1) Not yet published.

The Spanish authorities explained that this deal with ABB would make it possible to attain the two objectives they pursued: to ensure the future viability of the industrial activities of the CCC group, and to maximize the recovery of debts by the public creditors concerned. In this respect, the Commission was informed that at 31 December 1989 the CCC group had outstanding debts to the State of Pta 35 910 million broken down as follows: Pta 19 020 million payable to the national social security agency: Pta 9 102 million payable to treasuries of Autonomous Communities; Pta 2 463 million payable to the central Treasury; and Pta 5 325 million payable to a State-owned bank (Banco de Crédito Industrial).

By letter of 28 February 1990 the Spanish authorities specified that the Pta 7 000 million to be paid by ABB more than doubled the offers made by the other multinational companies to which CCC had been offered. The Spanish authorities, however, did not provide any other detail of the bids apparently rejected. They also clarified that the remaining assets not taken over by ABB would be sold off and the proceeds would be paid to the public creditors. According to their estimates, such sale would bring in about Pta 7 000 million. On the other hand, they explained that the trade unions had accepted the terms of the deal with ABB because the early retired workers would benefit from the aid already approved in 1987 by the Spanish central Government under Law 27/1984. They also stated that the cost for the State of the aid under this Law would be Pta 15 019 million, which would be paid over the period 1990 to 2000.

The Spanish authorities stressed that this aid was social and would be paid directly to the workers without passing through the companies accounts. They also stated that the general fiscal legislation would apply to the transactions pursuant to the deal with ABB. It should finally be remarked that, contrary to the information transmitted in the previous communication, the Spanish authorities indicated that only the factory of Erandio would be closed down.

By letter dated 5 April 1990 the Spanish authorities transmitted to the Commission a copy of a draft document titled 'Agreement for the liquidation and attribution of the assets of CCC as repayment for their debts to public creditors'. The signatories of the draft settlement were CCC, ABB and the State. Under its terms, ABB and the Spanish State assumed the following obligations:

— the different public creditors of CCC would:

  — waive their claims against CCC for Pta 35 910 million,

  — renounce unilaterally the mortgage and seizure rights they had upon CCC assets,

if ABB

  — acquired certain selected fixed assets of CCC free of charges, as well as their current assets and liabilities for Pta 7 000 million,

  — re-employed 2 915 members of CCC's labour force,

  — transferred technology to the industrial activities of the factories,

  — invested Pta 5 600 million over the next four years according to the industrial plan that ABB had presented to the Spanish authorities.

This draft settlement agreement also established that ABB should retain ownership of the assets acquired for a period not shorter than three years. On the other hand, one of the clauses of this document, drafted in an obscure wording, seemed to indicate that the Pta 7 000 million to be paid by ABB for the selected assets would not go to the public creditors but would be destined instead to cover liabilities relating to the workforce.

By contrast with the previous letter from the Spanish authorities, this communication indicated once again that two factories of CCC, in particular Erandio and Valladolid, would be closed down upon completion of the settlement agreement.

It should finally be remarked that certain parts of the draft settlement agreement seemed to indicate that the interests of the companies of the CCC group would be represented by an operating subsidiary of ABB created to this end.

IV

The Commission's decision to initiate the procedure under Article 93 (2) was notified to the Spanish Government by letter of 3 August 1990. This letter invited the Spanish Government to submit its observations, as well as to provide the Commission with complete information to enable it to fully assess the eventual compatibility of the aid elements involved in the Spanish authorities' interventions.

In particular, the Commission reiterated its request to the Spanish Government to answer the questions previously put by letter of 20 June 1990. These questions were intended to ascertain certain essential elements of the public interventions, in respect of which, either the Spanish authorities had not submitted any information, or the details provided until that moment were insufficient to properly judge the interventions.

Among these questions, the Commission requested the following: information about any aid granted or envisaged by the autonomous or local authorities; copies of the correspondence with the bidders for CCC as well as of the memorandum of understanding with ABB; the identity, controlling and ownership interests, and role played by the companies negotiating the purchase of CCC; commitments of any kind made by the parties involved in the negotiations, namely the State, the owners, purchasers, trade unions; the future restructuring and industrial plans of the purchasers, with an indication of present production capacity of the CCC plants and forecast for the next five years, etc. It should be noted that, as for any case of aid to companies in difficulties, this last element was of crucial importance to judge the ultimate compatibility with the common market of the public interventions.

The other Member States and third interested parties were informed of the Commission decision by the publication in the *Official Journal of the European Communities* of 31 October 1990 of the text of the letter sent to the Spanish Government.

The Spanish Government submitted its observations by letter dated 4 October 1990. First of all, the Spanish Government stated that its communication was only made in fulfilment of the general duty of collaboration with Community institutions, because it did not accept the legality of the initiation of the procedure. The Spanish Government questioned its legality by claiming that the interventions had been duly notified and that the Commission had not taken any decision within two months from the last submission of information.

The observations of the Spanish Government also indicated that the different public interventions involved in this case should be regarded as a single operation consisting of an extrajudicial agreement under which assets of a debtor company were sold to pay off its debts, the only peculiarity of this agreement being that, given the involvement of public institutions, Spanish legislation required the fulfilment of certain special procedural requirements, namely the issue of a judgment by the Spanish State Council and approval through Royal Decree.

Concerning the additional information requested by the Commission, the Spanish Government stressed that, either it had already been sent to the Commission or it was irrelevant to the assessment of the case. Notwithstanding this, the Spanish Government did submit some additional details.

The Spanish communication contained in particular a copy of Royal Decree No 810/1990 of 15 June by which the Spanish Government had authorized the settlement agreement between CCC, ABB and the State, and a copy of the agreement actually signed by these parties on 3 July 1990. It also contained a copy of certain documents which had been requested but which the Commission had not previously received, such as the text of the agreement signed on 29 December 1989 by ABB, the trade unions and the State, concerning the distribution amongst them of the costs of the labour force restructuring of CCC, and a copy of a document titled 'Industrial plan' presented by ABB to the Spanish authorities.

This information clarified certain essential points of the public interventions that were obscure and ambiguous before the opening of the procedure under Article 93 (2).

In this respect, the new information indicated that the interventions of all the parties involved in the sale of the assets of CCC responded to a previously agreed strategy between the Spanish authorities and ABB aimed at rescuing the industrial activities of those companies, while also attempting to cut the legal bonds between the purchasers of the assets and CCC in order to avoid, on paper, any potential liability that might arise in future. This strategy was put into practice according to the following historical sequence:

1. *ABB creates Esene Uno SA to carry out the negotiations and take control of CCC for the purpose of the transaction*

   Contrary to the information previously submitted, the Spanish Government indicated that, from amongst the companies contacted to which CCC was offered, only ABB has presented a firm offer, since all the other potential bidders had withdrawn from the negotiations.

   Further to the acceptance by the Spanish Government in August 1989 of ABB's offer to take control of CCC's industrial activities, ABB created a wholly-owned operating subsidiary called Esene Uno SA. That subsidiary was subsequently empowered by CCC to represent these companies in the negotiations to formalize and implement the compromise settlement (see point 3 below). According to the Spanish authorities, Esene Uno SA held an option to purchase CCC shares for the token price of Pta 1.

   It should be remarked here that, in any case, even if the shares of CCC had not been bought by ABB, this latter group effectively controlled CCC through its subsidiary Esene Uno, this latter company being the representative of the interests of both CCC and ABB in the negotiations with the Spanish authorities.

   It is also important to remark the unusual character of the abovementioned situation, which clearly demonstrates the intentional character of the strategy

conceived between the Spanish authorities and ABB: the interests of CCC in the course of the negotiations to sell their industrial assets were ultimately represented by a subsidiary of ABB, that is to say of the company that was supposed to buy them. This ultimate non-separation of personality between seller and buyer is even more patent in respect of the aid for the labour restructuring (see point 2 below) and shows the degree of participation of ABB in this operation.

2. *Agreement with the trade unions*

One of the main factors endangering the viability of the industrial activities of CCC was the fact that their respective companies were overstaffed. In order to tackle this problem, Esene Uno on behalf of ABB and the Spanish central authorities, exclusively and without the intervention of CCC, initiated negotiations with the trade unions to make possible a major reduction in CCC's workforce. As a result, on 29 December 1989 they signed an agreement on the following terms:

— the workers of CCC would not oppose ABB's plans to take control of CCC industrial activities,

if ABB

— re-employed 2 915 workers out of a total of 5 102 representing CCC's global labour force,

— financed the compensation for dismissal of 521 workers not eligible for aid under the aid scheme of Law 27/1984 (in Section III of this Decision, see letter of 14 February 1990 from the Spanish authorities),

— co-participated with the State in the financing of a pension fund for CCC's redundancies,

and if the State

— implemented the Government decision of 27 December 1987 (see Section III of this Decision) financing early retirement costs of 1 666 workers,

— guaranteed full unemployment benefits during two years for the 521 additional workers to be dismissed by means of incentives, whatever their rights to enjoy these benefits were under the Spanish general legislation, and

— co-financed the abovementioned pension fund for redundancies.

It should finally be stressed once more that CCC did not participate in the negotiations to reduce the workforce level of the industrial plants in question.

3. *Compromise settlement*

Once the labour problem was solved, there was still another factor endangering the viability of CCC. The group was technically in bankruptcy, should it have had to pay its outstanding liabilities. In this respect, the Spanish authorities stated that, at 31 December 1988, the consolidated financial position of the group showed a negative net worth of Pta 19 161 million, the State being its principal creditor with the aforementioned claim of Pta 35 910 million. These debts had been secured by means of mortgages or 'anotación preventiva de embargo' of the assets of CCC in favour of the State.

In order to put an end to this problem, on 3 July 1990 Esene Uno SA (fictive subsidiary of ABB), on behalf of CCC, ABB and the State, signed a compromise to settle CCC's debts on the terms mentioned in Section III of this Decision.

It should be remarked here that the text of the agreement actually signed — transmitted by the Spanish Government after the initiation of the procedure — made it clear for the first time that the Pta 7 000 million offered by ABB for the selected assets were not received by the State/public creditors but by CCC. This amount apparently represented the maximum amount that ABB was willing to contribute to finance its commitments under the agreement signed with the trade unions (i.e. reduction of 521 jobs by incentives, co-participation in the pension fund). Therefore, this Pta 7 000 million received by CCC will be used, at least partially, to pay to the workers the commitments assumed by ABB under the agreement with the trade unions (see point 2 above).

The text of the agreement also clarified that the selected assets of CCC (formed by all the fixed assets with the exception of certain marginal pieces of land and buildings) were bought by more than 20 different subsidiaries of ABB in Spain that were newly created to this end, in particular: ABB Energía, SA, ABB Generación, SA, ABB Metrón, SA, ABB Industria, SA, ABB Motores, SA, ABB Nortem, SA, ABB Sabadell, SA, ABB Galindo, SA, ABB Trafodis, SA, ABB Subestaciones, SA, ABB Trafo, SA, ABB Trafonor, SA, ABB Trafosur, SA, ABB Tracción, SA, ABB Service, SA, ABB Imasde, SA, ABB Uno, SA, ABB Dos, SA, ABB Tres, SA, ABB Cuatro, SA, ABB Cinco, SA, ABB Seis, SA and ABB Siete, SA.

After the settlement agreement, the CCC group would just retain ownership of the marginal pieces of land and buildings not selected by ABB. It should be noted in this respect that the text of the agreement

provided that the assets not selected by ABB would however be sold off progressively under supervision of Esene Uno. This fact proves once more the ultimate effective control of CCC by ABB. The proceeds of this sale would eventually go to the State/public creditors.

After all these transactions, CCC would finally be left as empty companies for winding-up purposes.

4. *Industrial plan*

As previously indicated, the observations of the Spanish Government also contained a copy of the text of a so-called 'industrial plan' presented by ABB and accepted by the Spanish authorities. In addition to a description of the abovementioned strategy to take control of the industrial activities of CCC, this plan also provided for the first time information on certain industrial actions to be undertaken in future by ABB. In particular, it stated that the subsidiaries of ABB that bought the assets of CCC committed themselves to invest Pta 5 600 million over the next four years. Apart from this figure, the text of the so-called industrial plan only established in general terms a certain number of objectives to be attained with the investments (see Royal Decree No 810/1990, *Boletín Oficial del Estado* No 148 of 21 June 1990).

In spite of the fact that they were previously requested by the Commission, the text of the so-called industrial plan and the Spanish observations did not contain any explanation of the precise nature of the investments of Pta 5 600 million, nor any quantification of their concrete future effects upon production capacity, real output, and financial and operating indicators of the factories.

In view of the fact that the Spanish authorities had only partially replied to the questions put by the Commission's letter of 20 June 1990, by letter dated 6 November 1990 the Commission requested the Spanish authorities to complete their reply and to furnish additional explanations regarding the observations submitted. Notably, the Spanish authorities had not yet provided the following information which had been requested: copies of all the purchase bids presented for CCC, as well as of the correspondence with the bidders; copies of the correspondence with the buyers in the course of the negotiations; the annexes to the settlement agreement; future detailed restructuring and industrial plans of the purchasers, etc. In the same letter the Commission pointed out that until that moment the Spanish authorities had not advanced any justification that could be used by the Commission in judging the ultimate compatibility of the aid involved in the public interventions. In this respect, the Commission stressed that the submission of detailed restructuring programmes for the industrial activities of CCC was an essential requirement in carrying out that assessment.

It should be noted that the Commission can in no way carry out its assessment on the compatibility of aid for the rescue and restructuring of industrial activities, if it is not provided by the Member State concerned with detailed and quantified information on the restructuring measures proposed and on their effects. In the absence of this information, which the Spanish authorities failed to provide, the Commission is unable to determine the necessity and proportionality of the aid, as well as its distortive effects on competition conditions.

The Spanish authorities replied by letter of 28 December 1990 stating that, in their opinion, they had answered in full all the questions put by the Commission and consequently their previous reply should be considered as complete. They also reiterated that the interventions of the public authorities in connection with CCC did not involve any State aid element.

Concerning the settlement agreement, the Spanish authorities indicated that it was a complex operation of mutual concessions under which the public entities, as any private creditor would have done, had intended to get the maximum recovery of their claims. Accordingly, they concluded, the settlement agreement should not be considered as a waiving of debts. The Spanish authorities pointed out in addition that the compromise settlement constituted a general measure of uniform application in Spain, not intended to aid certain enterprises and, consequently, it should fall outside the scope of application of Article 92 (1). They also stressed that commercial practice recommended the adoption of extrajudicial settlements in order to prevent judicial bankruptcy proceedings that would entail the liquidation of assets and the end of the business operations of the insolvent debtor.

The Spanish authorities also drew the Commission's attention to the similarities between the procedure used to sell CCC assets and the provisions of French Law 85/98 of 25 January on judicial bankruptcy proceedings. Article 1 of that Law provides that such proceedings are intended to safeguard companies, their operations and employment, and to liquidate their liabilities. In the Spanish authorities' view, these objectives coincide with those they had pursued under the settlement agreement for CCC debts. In this respect, they also indicated that the Commission, in its formal decision in the State-aid case concerning the French company MFL, had not considered that the assistance granted to redundancies produced as a result of the sale of the assets of this company under judicial bankrupcy proceedings constituted aid to the buyers of its assets. The Spanish authorities finally indicated that, in addition, the Commission had not considered the capital gains generated by the sale of the assets under judicial bankrupcy proceedings in both the abovementioned MFL case and the case Isoroy-Pinault as constituting aid. Accordingly, the Spanish authorities arrived at the conclusion that it would not be juridically admissible to receive different treatment to that accorded to the

abovementioned French cases for apparent differences of legal form between the settlement agreement for CCC and the proceedings under French Law 85/98.

Concerning the restructuring programmes for the industrial activities of CCC, the Spanish authorities indicated that they had already provided the Commission with all the information available to them about the future investments of ABB. They stated that, even though the agreement with ABB did not contain any commitment regarding future levels of production capacity, the reduction in labour force from 5 102 to 2 915 people implicitly demonstrated that a substantial adjustment in production capacity would take place. In their opinion, another factor implying capacity reductions was the closing-down of the factory of Erandio, which, according to their estimates, manufactured about 30 % of the Spanish production of alternators. The Spanish authorities also indicated that the sole condition imposed on ABB was the implementation of the industrial measures as laid down in the text of the settlement agreement.

It should finally be mentioned that, amongst the documents transmitted to the Commission in the letter of 28 December 1990, the Spanish authorities enclosed a copy of a letter dated 20 July 1989 from ABB to the Spanish Ministry for Industry. By this letter ABB confirmed the terms under which this group would be willing to buy the assets linked to the industrial activities of CCC. Among these conditions, ABB required that: the State should cover the indemnities, pension funds and complementary social obligations related to redundancies; in the meantime, the public creditors of CCC should not foreclose the charges and seizure rights they had over CCC assets; lastly, the public creditors should ultimately waive their rights to claim the outstanding debts both *vis-à-vis* CCC and the subsidiaries that ABB would create to buy those assets. This letter contained in addition the accounting book values at 22 June 1989 of the assets of CCC. According to this document, the assets that ABB bought from CCC for Pta 7 000 million had an accounting value of Pta 19 143 million. For its part the non-selected assets that would be kept by CCC for subsequent sale in favour of public creditors had an accounting value of Pta 4 874 million, and their market value was estimated by ABB at Pta 6 964 million. This document also indicated that the factory of Erandio, as stated by the Spanish authorities, would be closed down but it also showed, nevertheless, that the whole machinery and equipment of this factory had apparently been taken over by ABB.

In reply to specific questions put by the Commission, the Spanish authorities stated that ABB would not benefit from any special fiscal treatment for the transactions arising out of buying CCC's assets. On the other hand, in respect of a clause included in the settlement agreement providing that the buyers of CCC's assets could not be affected by any incidence related to past outstanding debts, they indicated that in the event of an eventual recovery order from the Commission, Community law would apply, since conventional agreements such as the extrajudicial agreement under discussion cannot prevent its application.

In connection with the Commission's remarks concerning the application of the EEC Treaty exemptions, the Spanish authorities indicated that the compatibility of the alleged aid at issue could ultimately be founded on the provisions of Article 92 (3) (a) and (c) of the EEC Treaty. In this respect, they emphasized that the reduction in CCC's labour force will mainly take place in the factories located in Andalusia and the Basque country, the former being one of the less developed regions of Spain, and the latter seriously affected by a process of industrial decline. Furthermore, they stressed that the majority of CCC's factories are located in areas qualifying for regional aid: the factories of Córdoba and Valladolid in regions eligible under Article 92 (3) (a), and those of Trápaga, Galindo and Reinosa under Article 92 (3) (c). In the Spanish authorities' view, these circumstances, together with the principles of economic and social cohesion established in Article 130a of the EEC Treaty and in Protocol No 12 of the Act of Accession of Spain and Portugal, pointed to the possibility of the application of the abovementioned exceptions to incompatibility.

Following subsequent contacts with the Spanish authorities, by letters dated 12 June, 8 July, 16 and 23 November 1992, 27 January and 10 February 1993, ABB forwarded to the Commission detailed information on the restructuring programme for the former businesses of CCC currently owned by several of its subsidiaries in Spain (see Section VIII of this Decision).

V

The Spanish authorities have claimed within the framework of the procedure under Article 93 (2) that the public interventions that took place on the occasion of the sale of the assets of CCC, and in particular the terms of the agreement for settling the outstanding debts of those companies, should be considered as normal cases of the application of general measures of uniform application in Spain, and consequently, not falling within the scope of application of Article 92 (1).

Contrary to this standpoint, the Commission considers that both the waiving of debts, as well as the extraordinary assumption of labour restructuring costs are liable to contain State aid elements within the meaning of Article 92 (1).

The public interventions in question deviate from the normal behaviour of both private (see reasoning in Section VI below) and public creditors in circumstances similar to those present in the CCC case. Furthermore, they do not fall within the framework of general measures of uniform application in Spain.

Concerning the waiving of debts, it should be remarked that, under Spanish law, State institutions are not in principle allowed to waive or scale down debts in respect of debtor companies. In fact, Article 39 of the Spanish General Budgetary Law, as amended by Law No 37 of 29 September 1988, provides that: 'The State is not allowed to waive fiscal claims under judicial or extra-judicial agreements, nor is it allowed to refer these questions to arbitration, unless it is approved by the Government after advice of the State Council'. Consequently, public creditors in Spain are in principle obliged to go as far as requesting the compulsory declaration of bankruptcy of a debtor in claiming outstanding debts, as in principle any private creditor would do. In order to facilitate the recovery of these debts, the Spanish general legislation even provides special claim proceedings for public institutions where they are ranked as preferential creditors. By contrast with this generally applied course of action, the Spanish authorities have expressly stated to the Commission that they intentionally avoided claiming CCC's outstanding debts in order not to force CCC to go bankrupt.

Furthermore, it should be remarked at all events that, by opting for the settlement agreement in the terms bargained with ABB, the public creditors have renounced recovery of a higher proportion of debts than that actually recovered (see Section VI below).

These facts clearly reveal the extraordinary character of the intervention, as well as the deliberate intention to rescue the industrial activities of CCC by assuming part of the costs of their restructuring.

It should also be noted that, contrary to the position of the Spanish authorities, the abovementioned article of the Spanish General Budgetary Law does not create any new category of receivership/bankruptcy proceedings; it just empowers the State to waive fiscal claims in extra-ordinary situations, provided that certain procedural steps are respected in view of the extraordinary character of such behaviour which might be contrary to the public interest. This means that if the Spanish State waives fiscal claims after receipt of advice from the State Council, it is in principle acting legally under the Spanish legislation (it is obvious that a State must in principle act according to the principles contained in its own legislation). Nevertheless, from the viewpoint of Community law, any waiver of debts by a Member State, under the conditions described above, may constitute an aid under Article 92 (1), since it is not in line with the behaviour of a private creditor operating under normal market economy conditions.

It should finally be mentioned that in any case the abovementioned Article 39 does not give any power to the State to waive credits from a State-owned bank, nor to waive debts to the national social security agency (Pta 5 325 million and Pta 19 020 million respectively in the CCC case; see Section III of this Decision).

As regards the assumption of labour-restructuring costs, it is obvious that the State, as creditor of the companies, was not in principle bound to pay any of their labour restructuring measures. On the other hand, this intervention was decided under Law 27/1984 which constitutes an aid scheme recognized by the Spanish authorities.

Judged in global terms, the abnormal behaviour of the State, contrary to that of a private creditor, is even more evident, since the State did not only renounce its claim to debts but even went as far as to take on the financing of labour restructuring costs to keep the industrial activities in operation.

In conclusion, the public interventions under assessment have involved a financial cost for the State and cannot be considered to be general measures. In fact, as will be explained in Section VI of this Decision, both the waiver of outstanding debts under the settlement agreement, which is ultimately based on the principle of contractual freedom entrusted in the Spanish Civil Code, as well as the assumption of labour restructuring costs under a recognized aid scheme, have saved the industrial activities of CCC from dissappearing and have intentionally allowed them to continue in operation under control of ABB.

VI

In its examination of the interventions of the Spanish authorities, the Commission has checked to what extent these public interventions contain aid elements within the meaning of Article 92 (1) of the EEC Treaty.

In its decision of 25 July 1990 to initiate the investigation procedure under Article 93 (2), the Commission considered that the following interventions were liable to contain State-aid elements:

(a) *The waiver of debts of Pta 35 910 million*

From the viewpoint of a rational market private investor, waiver of debts in favour of a debtor can only make sense if, compared to other alternative options, this action provides the creditor with the highest proportion of recovery of his claims.

Taking into consideration that the position of the public authorities *vis-à-vis* the CCC group was that of preferential creditors with their claims secured by mortgages on and 'anotación preventiva de embargo' of companies' fixed assets (see Section IV.3), even though the CCC group was insolvent, the public authorities could at least have recovered an amount

equivalent to the proceeds from the piecemeal sale of those pledged assets, net of realization costs, if they had foreclosed their rights and charges against them.

Under the terms of the settlement agreement (see sections III and IV.3), the public creditors of CCC have waived debts of Pta 35 910 million and will receive the proceeds of sale of the assets that were not selected by ABB. These assets, whose written-down accounting value at 22 June 1989 was Pta 4 874 million, would bring in Pta 7 000 million according to an *a priori* estimate of the Spanish authorities. However, by contrast with this recovery procedure and despite the abovementioned securities and rights held over the remaining assets, the public creditors will not obtain any monies in respect of the assets selected by ABB whose written-down accounting value at 22 June 1989 was Pta 19 143 million.

This fact demonstrates that, contrary to the contentions of the Spanish authorities, the behaviour of the public creditors under the settlement agreement, with nil recovery in connection with the assets selected by ABB — and an extraordinary assumption of labour restructuring costs (see (b) below) — does not seem to respond to the aim of the State of maximizing the recovery of its claims, as any private creditor would have done in similar circumstances — setting aside all social, regional policy and sectoral considerations — but to the conscious intention of the public authorities of rescuing the industrial activities of CCC by preventing their bankruptcy. It should be noted in this respect that the Spanish authorities have confirmed in their observations that CCC would have gone bankrupt and their industrial activities would probably have disappeared, had the public creditors foreclosed the charges over the companies' assets (see section IV.2).

In the light of the foregoing considerations, the Commission must conclude that the waiver by the public creditors of outstanding debts of CCC of Pta 35 910 million minus the proceeds that the State obtains from the sale of the assets not selected by ABB, constitutes an aid to the ongoing industrial activities of CCC. By renouncing collection of an amount equivalent to the abovementioned net waiver, the public authorities who signed the settlement agreement have saved the industrial activities of CCC from disappearance, making it possible for them to continue operating as a going concern under the control of ABB. In this respect, it should be noted that these industrial activities are currently carried out by the subsidiaries of ABB mentioned in section IV.3. With the aid of the Spanish authorities, these companies have deliberately succeeded the CCC group in ownership of its industrial assets without having to bear the burden of its cumulated liabilities.

The aid character of the intervention in favour of the relevant subsidiaries of ABB is clearly evidenced by the fact that the debts waived were secured by mortgages on and 'anotación preventiva de embargo' of CCC's fixed assets. In these circumstances, if the State had not waived the debts of CCC and had not simultaneously renounced its rights over the assets pledged as securities for repayment, the relevant subsidiaries of ABB would have been obliged in those circumstances to honour those debts as owners of the pledged assets.

(b) *The coverage of costs connected with a labour restructuring programme with an estimated extraordinary cost for the State of Pta 15 000 to 30 000 million*

Once the trade unions, ABB and the State agreed in December 1989 after long negotiations that ABB would re-employ 2 915 out of the total 5 102 workers of the CCC group (see section III of this Decision), ABB and the State continued negotiating to decide how to share between them the costs of financing the labour force reduction of 2 187 people implicit in the agreement. The compromise they finally reached provided that ABB would pay at most Pta 7 000 million of those costs, the State covering the remainder under the provisions of the aid scheme established by Law 27/1984.

The undertaking of ABB under the abovementioned arrangement was set out in one of the clauses of the settlement agreement signed on 3 July 1990 according to which ABB paid Pta 7 000 million (including VAT) to CCC for the assets the former group had selected. Pursuant to the wording of the clause, CCC agreed to use this amount to finance the undertakings that ABB had accepted under the agreement with the trade unions. In practice, this meant that the Pta 7 000 million would be used in part to pay redundancy costs related to the 521 workers that did not qualify for the aid envisaged under the aid scheme in Law 27/1984.

For its part, in order to make possible the dismissal of the 1 666 remaining workers without further costs for ABB, the State agreed to implement the aid already approved by the Spanish Government in December 1987 under the aid scheme in Law 27/1984 (see section III of this Decision). By this intervention the State is financing the costs related to the early

retirement of the abovementioned 1 666 workers of CCC. It should be noted that the aid scheme under Law 27/1984 established the possibility of early retirement with extraordinary benefits for workers older than 55 years of companies subject to restructuring under the said Law. The Spanish authorities have stated that the budget allocated by the central Government under Law 27/1984 for the 1 666 workers of CCC in question is Pta 15 019 million.

The above information proves that the public intervention now under discussion has played a key role in the rescue of the industrial activities of CCC, since it has made it possible to reach an agreement with the workers to avoid litigation that would have forced CCC into judicial bankruptcy proceedings (it should be noted that CCC was unable by itself to finance severance compensation in respect of redundancies), and has in practice allowed ABB to pursue the industrial activities with a substantially reduced workforce. As the Spanish authorities have recognized (see section III of this Decision), in the absence of the early retirement scheme, the workers of CCC would not have accepted the terms of the agreement with ABB, because this latter group was not willing to accept labour restructuring costs in excess of the Pta 7 000 million it effectively paid to dismiss 521 workers.

It should be stressed once more that the agreement with the workers was negotiated and concluded by the State and ABB without the participation of CCC. This shows the degree of involvement of ABB in this operation.

At all events, the Pta 15 019 million does not however represent the value of the aid from which both the continuing activities of CCC and ABB have benefited under the early retirement scheme put into practice to reduce the workforce by 1 666 people.

The abovementioned figure actually represents, at the same time, the cost for the State of the early retirement scheme and the money received by the workers under this intervention. This side of the intervention, in respect of the workers, does not reveal any aid element within the meaning of Article 92 (1) which concerns aid to certain undertakings or to the production of certain goods.

In order to establish the aid effectively received by the industrial activities in question, it is necessary to consider the following. In normal circumstances and if the abovementioned 1 666 workers would have been dismissed, they should have been paid, at least, the minimum severance pay to which they were entitled under the Spanish general legislation. In this respect, Article 51 (10) of Law 8/1980 of 10 March ('Estatuto de los Trabajadores') provides that any worker made redundant for technological or economic reasons or for act of God is entitled to receive an indemnity equivalent to 20 days of salary per year of seniority, with a maximum of 12 months.

Consequently, the coverage by the State of the costs related to the early retirement of the 1 666 workers of CCC older than 55 years involves an aid element equivalent to the total value of the abovementioned minimum legal indemnities payable to these workers on dismissal in the absence of the State intervention at issue.

As regards the identification of the beneficiary of the aid quantified above, it is obvious that the apparent beneficiary is the ongoing industrial activities of CCC currently under the control and ownership of ABB. The competitive position of these industrial activities has been largely reinforced after having been relieved of a substantial financial burden in terms of redundant workers. On the other hand, on the basis of the information available, the Commission notes that the public intervention in question was designed and agreed in advance between the State and ABB, without the participation of CCC, to facilitate the take-over by ABB of the industrial activities aided by the State.

Accordingly, the Commission must conclude that the coverage by the State of the costs relating to the early retirement of the 1 666 workers of CCC older than 55 years involved an aid element to ABB equivalent to the total minimum legal indemnities these workers should have received for being dismissed in the absence of the State intervention.

It should be remarked that, in the absence of State intervention and if the bankruptcy of CCC was to be prevented, only ABB could have paid this compensation to the 1 666 workers of CCC since CCC was insolvent. It should also be recalled that, as previously explained, ABB actually agreed and did pay even higher severance pay to the 521 workers of CCC younger than 55 years and consequently not eligible for aid from the State under the aid scheme established by Law 27/1984. It should finally be noted once more that the present aid element is the consequence of an agreement with the workers signed by the State and ABB without the participation of CCC and under which both parties decided to share between them the costs of reducing the workforce of the industrial plants that ABB is currently operating.

(c) *Other potential State aid elements involved in the terms of the disposal of CCC's assets (i.e. reduced sale price; fiscal advantages; commitments to place public orders)*

In their communications to the Commission, the Spanish authorities have officially stated that the national general tax regulations will apply to the transactions involved in the sale of CCC's assets and that the buyers of those assets will not benefit from fiscal reductions or exemptions.

On the other hand, the Spanish authorities have also stated that the State did not agree with ABB on commitments or engagements other than those established in the settlement agreement. In this respect, the Commission has verified that the text of this agreement does not contain any commitment regarding the placing of future public orders with ABB companies.

Finally, from the information submitted by the Spanish authorities, it appears clearly established that the sale of CCC's assets took place between privately-owned companies — CCC and ABB — since those assets were never owned by the State. Therefore, an aid through a reduced sale price of assets belonging to the State is not in principle possible in this case. Furthermore, even if the price finally fixed for the transfer of ownership of the assets of CCC between the private groups concerned might have been altered as a result of any of the aid measures granted by the State to the economic agents intervening in that transaction — identified in (a) and (b) of this section — this price change would not constitute a new aid element but the logical consequence of the previously identified aid elements.

As regards the observations of the Spanish authorities in respect of the similarities between the present State-aid case and the characteristics of two other cases assessed by the Commission in the past regarding the French companies MFL and Isoroy-Pinault, it should be noted that, in the CCC case, the Commission has established that the Spanish authorities have exercised their discretion to waive the debts of those companies in their special case; whereas in the MFL of Isoroy-Pinault cases the Commission did not know of any decision of the French authorities to waive any debt. In these circumstances, the Commission could not object to any intervention of the French Government of that nature in favour of those companies.

On the other hand, the Commission cannot accept either the similarities of the aid paid to the workers in the MFL case with that paid to the workers of CCC. In the MFL case the aid was decided by the French Government once the judge in charge of the receivership proceedings had accepted the take-over offer of the selected bidders which excluded a certain number of workers. At all events, the buyer was not in principle obliged to and did not in fact negotiate with the workers of MFL any kind of compensation because it merely submitted an offer to the judge. Consequently, the aid to the workers in the MFL case did not relieve the buyer of any direct or indirect obligation in respect of the workers. By contrast, in the CCC case the aid to the workers had been decided by the State as long ago as 1987, with the purpose of facilitating the take-over of the company, as the Spanish authorities have explicitly recognized. Furthermore, ABB — and not CCC — did actually negotiate and agree to severance pay for the workers not eligible for aid under the aid scheme in Law 27/1984, and would have likewise had to compensate the workers subject to early retirement at the expense of the State to get their approval to the transaction outside bankruptcy proceedings, if the State had not intervened. In these circumstances, the public intervention in respect of the workers of CCC has clearly been implemented in order to allow the continuation of the industrial activities of CCC by ABB with a substantially reduced workforce. On the other hand, the intervention in question has relieved this latter group of the costs it would have been forced to bear to get this reduction in view of its obligation to negotiate with the workers to get their approval to its planned take-over outside bankruptcy proceedings. It should be recalled in this respect that the take-over implied the transfer of all the industrial assets of CCC to other companies. In the light of the foregoing considerations, the ultimate beneficiary of the intervention is ABB.

Finally, by contrast with the French cases where the companies were in the hands of judicial administrators and where their assets were sold by a judge in favour of the creditors according to the provisions of the French bankruptcy law, the companies of the CCC group were not subject to the corresponding Spanish bankruptcy law, because the Spanish authorities preferred not to force CCC into receivership proceedings, and their assets were sold according to a private agreement between CCC and ABB under which the State did not recover any money in respect of the assets selected by ABB, as the Spanish authorities have recognized in their observations to the Commission.

Consequently, the Commission cannot accept the alleged parallelism between the abovementioned French cases and the CCC case.

Accordingly, after detailed examination of the information and observations submitted, the Commission must conclude that the interventions of the Spanish authorities on the occasion of the sale of the assets of the CCC group contain two aid elements, within the

meaning of Article 92 (1), to the subsidiaries of ABB that presently carry on the ongoing industrial activities of CCC and own their assets, whose respective value may be estimated to be:

— the waiver of claims of Pta 35 910 million minus the proceeds that the public creditors of CCC obtain from the sale of the assets not selected by ABB, and

— the value of the minimum legal severance pay to which the 1 666 workers of CCC who were subject to early retirement at the expense of the State were entitled; according to the provisions of Article 51 (10) of Law 8/1980 ('Estatuto de los Trabajadores'), the minimum legal indemnity per worker is 20 days of salary per year of seniority in the post with a maximum of 12 months.

The abovementioned aid elements affect trade between Member States and distort or threaten to distort competition in the common market within the meaning of Article 92 (1).

In fact, where the State strengthens or helps to maintain the market position of certain enterprises or economic activities compared with that of others competing with them in the Community, it must be deemed to affect those other enterprises or economic activities.

In this respect, it should be noted that intra-Community competition and trade within the electrical equipment sector is particularly intense. In the early 1980s the power equipment industry faced a collapse in world demand, which led to an escalation of competition and severe overcapacity. This put strong pressure on prices and margins. Although there have since been some cuts in capacity, competition has not been weakened but rather reinforced by the progressive construction of the single market. Reduced trade barriers, more open procurement practices and a move to common standards are forcing companies to pay more attention to their competitors. As a result, the industry is going through a restructuring phase to focus on profitable business lines and to rationalize employment. In this context, the sector is also experiencing a process of mergers and acquisitions in order not only to achieve economies of scale but also to build up positions on foreign markets.

Intra-Community trade in electrical engineering products (NACE code 34 excluding electronics) has grown substantially during the 1980s. It doubled between 1982 and 1988 to reach ECU 26 000 million, which is to be compared with extra-Community exports of ECU 20 000 million in 1988. In global terms, electrical engineering accounted for 5 % of total intra-Community trade in 1988 (compared with 3,9 % in 1982) and is the seventh largest sector. On the other hand, the segments of the market corresponding to the basic product range of the former facilities of CCC — currently owned by ABB — also show substantial intra-Community trade flows. Intra-Community exports of electric motors and generators (NIMEXE statistics, code 8501 and 8504) amounted to ECU 2 519 million in 1988. As regards thigh-tension switchgear, intra-Community trade amounted to ECU 262 million in 1989. For its part, intra-Community trade in power transformers in 1988 amounted to ECU 249 million. This last segment of the market particularly shows a broad surplus over demand and is therefore unable to keep all manufacturers fully occupied. The battle to win markets is therefore very tough, and will continue to be so during the coming years (see *Panorama of the EC Industry 1991 to 1992*, Chapter 11, Office for Official Publications of the European Communities, 1991).

The Commission must stress that even though, apparently, the CCC group has not significantly participated in the Spanish export market, their industrial facilities have occupied and will continue to occupy under ABB ownership a very substantial position in the Spanish market with about 50 % of both the national sectoral employment and production capacity, as the Spanish authorities have recognized in their communications. Therefore, any aid granted to these facilities strengthens their competitive position and enables them to retain an artificially high market share in Spain to the detriment of other non-aided Community competitors that try to penetrate the Spanish market (see Court of Justice's judgment of 13 July 1988 in Case 102/87 [1]).

It should finally be remarked that the ABB group, which presently owns the former facilities of CCC, is the largest world producer in the electrical engineering sector with consolidated sales in 1989 of some ECU 12 000 million, that is to say, almost twice as much as the next largest producer in the sector.

As regards the distorted effects of the aid elements under assessment, it should finally be noted that, in the course of its enquiry the Commission discovered that, by resolution of 20 December 1988, confirmed in plenary session of 13 April 1989 (made public by publication in the ICE Bulletins 10 to 16 July 1989 and 12 to 18 June 1989 respectively) the Tribunal de Defensa de la Competencia (Court for the Defence of Competition) ruled that both the aid for the social restructuring of the CCC group and the absence of recovery of its outstanding debts could create distortions of competition in the Spanish electrical equipment industry. For this reason, the Tribunal recommended that, in the case that that aid was finally granted for social or industrial reasons, the Spanish Government should limit its level to the minimum indispensable in order to minimize its

[1] France v. Commission [1988] ECR, p. 4067.

effects upon other competitors, taking into consideration not only the national but also the international context.

As regards the companies identified as beneficiaries of the aid elements — the ABB subsidiaries that bought the assets of CCC — the Commission must state that it is aware and has taken into account in this Decision that the Spanish authorities and ABB had agreed by contract that those companies should not be affected by past debts of CCC. In order to prevent this from happening, both parties agreed that the ABB subsidiaries would take over the assets of CCC, declaring in the settlement agreement that the measures covered should in no way be considered as a succession of undertakings.

Despite the abovementioned fact, the Commission must conclude that, in contrast to other State aid cases (see Commission Decision 89/661/EEC of 31 May 1989, Alfa Romeo in respect of Fiat), the beneficiary of the aid elements in the CCC case, the relevant subsidiaries of ABB, was not a third economic operator having no part in the events that took place before its subsidiaries bought the assets, but an active party previously negotiating with the State terms and conditions which the Commission has established contain State aid elements.

As has been described in the relevant sections of this Decision, there is undoubtedly a link between the public interventions and the final acceptance by ABB to take control of CCC. This is apparent in respect both of the waiver of debts and the withdrawal of the securities guaranteeing those debts, as well as in respect of the extraordinary assumption of social restructuring costs that was negotiated by the State and ABB after the acceptance of the takeover plans by ABB.

Again, the Commission has established that the economic activities linked to the assets of CCC have been aided by the State, since the State, under the abovementioned take-over terms and conditions agreed with ABB, has not only renounced recovery of the money but has also spent substantial extraordinary sums to prevent those economic activities from disappearing. Moreover, the particular circumstances of the case show that the whole operation constitutes a deliberate plan to allow ABB to continue the exploitation of the productive activities of CCC, while at the same time not having to bear a substantial part of the financial obligations ABB would have had to bear in order to take control of those activities before they went bankrupt.

VII

As regards the legal status under Community law of the aforementioned aid elements to the relevant subsidiaries of ABB (see list in section IV.3), both the waiver of debts which gave rise to the first aid element and the coverage of social restructuring costs which is the basis of the second, are illegal, since they were approved by the Spanish Government in breach of the provisions of Article 93 (3) of the EEC Treaty.

The approval in December 1987 of the aid to CCC workers provided for in the aid scheme set out in Law 27/1984 was possible only as a result of the illegal prolongation of the period of validity of certain chapters of this aid scheme for an additional year until the end of 1987. This prolongation was approved by the Spanish Government on 24 December 1986 in breach of its obligation under Article 93 (3) to notify and request previous authorization from the Commission. Accordingly, the prolongation of the aid scheme in question and the granting thereunder of the assistance in question without prior notification to the Commission are illegal under Community law.

As regards the waiver of debts, the Spanish authorities have admitted in the information transmitted to the Commission that, in August 1989 they had formally accepted an offer from ABB to take control of the industrial activities of the private group CCC (see section III of this Decision). This offer, according to the terms of the letter of ABB to the Spanish Ministry of Industry of 20 July 1989 (see section IV) was valid only if the State accepted waiver of all the outstanding debts of the companies. This shows that the Spanish authorities had firmly committed this aid to ABB in August 1989 without notifying it to the Commission.

As regards the legal procedure followed under Spanish law for the implementation of the aid, it should be noted that following the resolution of the Spanish Parliament of 22 March 1988, the Spanish Government initiated the administrative procedure by submitting its plans to grant the aid in question to the 'Comisión Delegada del Gobierno para Asuntos Económicos' which granted the aid in July 1989. The Spanish State Council was also consulted. This was not notified in advance to the Commission under Article 93 (3) in spite of the precise principles on illegality and notification of aid made known to the Member States by the Commission.

In fact, in its letter to the Member States of 27 April 1989 reminding Member States of their obligations under Article 93 (3), the Commission pointed out that a Member State fails to fulfil its obligation to notify where the process of putting aid into effect has been initiated. 'Putting into effect' means not the payment of the aid to the recipient, but the prior action of instituting or

implementing the aid at a legislative level according to the constitutional rules of the Member State concerned. Aid is therefore deemed to have been put into effect as soon as the legislative machinery enabling it to be granted has been set up.

In the present case, it is clear that the aid had already been granted without previous notification to the Commission under Article 93 (3) well before the Spanish authorities provided the initial information in their letters of February and April 1990. By that time, the aid had been firmly committed through a series of decisions by different national administrative bodies which were never notified to the Commission.

It should finally be noted that the abovementioned decision of December 1987 to grant aid under Law 27/1984 created rights in favour of the workers of the companies concerned and obligations on the public side.

The Spanish authorities, who deny the aid character of the interventions, cannot ignore that on 22 December 1988 the Tribunal de Defensa de la Competencia had already ruled that both the social measures under Law 27/1984 as well as the waiver of debts (particularly those concerning social security contributions) would constitute aid distorting competition. In spite of all this, the aid plans were not notified to the Commission.

The Commission must therefore conclude that the aid elements to the subsidiaries of ABB identified in section VI of this Decision are illegal, since the Spanish Government failed to comply with the provisions of Article 93 (3).

The situation created by this breach of Treaty provisions is particularly serious since the public interventions giving rise to the aid elements have already been implemented. In this respect, it has to be recalled that, in view of the imperative character of the rules of procedure as laid down in Article 93 (3) which are also of importance as regards public policy — the direct effect of which the Court of Justice has recognized in its judgment of 19 June 1973 in Case 77/72 [1] — the illegality of the aid elements at issue here cannot be remedied *a posteriori*.

Notwithstanding this, it should be noted that the Commission is obliged to carry out its due procedures in relation to Article 93 (2) as recognized in the judgment of the Court of Justice of 14 February 1990 in Case C-301/87 [2].

VIII

Article 92 (1) of the EEC Treaty provides that aid meeting the criteria laid down therein is in principle incompatible with the common market.

The exceptions provided for in Article 92 (2) are not applicable in this case because of the nature of the aid elements which are not directed towards the attainment of such objectives.

Article 92 (3) of the EEC Treaty lists aid which may be compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community as a whole and not in that of a single Member State. In order to ensure the proper functioning of the common market, and having regard to the principle embodied in Article 3 (f), the exceptions provided for in Article 92 (3) must be construed narrowly when any aid scheme or individual aid award is scrutinized. In particular, they may be invoked only when the Commission is satisfied that, without the aid, market forces alone would be insufficient to guide recipients towards patterns of behaviour that would serve one of the objectives of the said exceptions.

Applying the exceptions to cases which do not contribute to such objectives or where the aid is not necessary for those purposes would amount to conferring advantages on the industries or firms of certain Member States, whose financial position would be artificially strengthened, and to affecting trade between Member States and distorting competition without any justification based on the common interest referred to in Article 92 (3) of the EEC Treaty.

With regard to the applicability of the exceptions provided for in Articles 92 (3) (a) and (c) for aid that promotes or facilitates the development of certain areas, it should be noted that, as stated by the Spanish authorities, the former industrial plants of CCC at Córdoba and Valladolid are situated in assisted areas qualifying for the granting of regional aid pursuant to Article 92 (3) (a), the plants at Trápaga, Galindo and Reinosa are situated in assisted areas pursuant to Article 93 (3) (c) and the plants at Sabadell and Madrid in non-assisted areas.

Consequently, the areas where the plants of Trápaga, Galindo, Reinosa, Sabadell and Madrid are located do not present a standard of living abnormally low or serious under-employment within the meaning of Article 92 (3) (a), for which reason, the exception to incompatibility provided for in this Article is not applicable to aid

(1) Capolongo v. Azienda Agricola Maya, [1973] ECR, p. 611.
(2) France v. Commission, [1990] ECR, p. I-307.

granted in their respect. For its part, even though the plants of Córdoba and Valladolid are located in Article 92 (3) (a) areas, and the remaining plants, except Madrid and Sabadell, in Article 92 (3) (c) areas, neither of these two exceptions on regional grounds is applicable to the aid elements under assessment, because aid destined to rescue and restructure companies in difficulties, as in the case under discussion, can only benefit from these exceptions when granted under restricted and controlled conditions (see Eighth Report on Competition Policy, point 228) that qualify for the application of the Article 92 (3) (c) exception on sectoral grounds (see below). In particular, the assistance must, *inter alia*, be strictly linked to the implementation by the beneficiaries of restructuring measures which lead to their being truly viable, without having unacceptable effects on competition conditions within the Community.

Moreover, in addition to the abovementioned reasons for the inapplicability of the Article 92 (3) (a) and (c) exceptions to incompatibility on regional grounds, it should also be noted that the aid measures in question do not concern the application of the regional aid schemes available in the corresponding areas, but rather take the form of *ad hoc* interventions of the Spanish Government to enable the industrial activities of CCC to continue in operation.

As to the exceptions provided for in Article 92 (3) (b), the facts of the case can provide no grounds whatsoever for considering that the aid in question was intended to promote a project of common European interest or to remedy a serious disturbance in the Spanish economy. Furthermore, the Spanish authorities have not presented such arguments to justify the compatibility of the aid in question.

As regards the exception provided for in Article 92 (3) (c) for aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, it should firstly be noted that the public assistance granted on the occasion of the sale of the assets of CCC falls under the category of aid to rescue and restructure companies in difficulties, as both the financial position and the financial record of the group had always been precarious. Moreover, as the Spanish authorities have recognized, the CCC group was on the verge of bankruptcy when the public interventions were effected.

Aid to firms in difficulties carries the greatest risk of transferring unemployment and industrial problems from one Member State to another; it acts as a means of preserving the status quo by preventing forces at work in the market economy from their normal consequences in terms of disappearance of uncompetitive firms in their process of adaptation to changing competitive conditions. For this reason, the Commission takes a strict approach in assessing the compatibility of aid for rescuing and restructuring firms in difficulty. In particular, the Commission requires that such public interventions be strictly conditional on the implementation of a sound restructuring or conversion programme capable of restoring the long-term viability of the beneficiary, which must also contain a compensatory justification for the aid in the form of a contribution by the beneficiary, over and above the normal play of market forces altered by the aid, to the achievement of Community objectives as established in Article 92 (3) of the EEC Treaty. In practice this means that the Commission must carefully monitor if the characteristics of the restructuring programmes for the activities of companies in difficulties rescued by the State are acceptable in the light of the common interest.

In the CCC case, the Commission is obliged to monitor the characteristics of the restructuring programmes that the buyers of the assets of CCC could potentially have drawn up for these industrial facilities, since the companies of the CCC group are no longer responsible for their industrial operations.

It should be noted in this respect that Article 92 (1) of the EEC Treaty is intended to prevent distortions of competition created by State aid 'that favour certain undertakings or the production of certain goods', in the latter case regardless of the legal entity that performs that production.

Preventing the Commission from checking aid plans for rescuing and restructuring industrial activities where the industrial facilities linked to those activities are transferred by the economic agents concerned to another legal entity would amount to depriving Articles 92, 93 and 94 of their content in certain situations, creating a loophole to avoid EEC Treaty provisions. This would be the case if companies were allowed to avoid the monitoring of the Commission in the restructuring of their industrial activities by transferring assets to another legal entity. On these occasions, the EEC Treaty principle of ensuring that competition in the common market is not distorted to an extent contrary to the common interest, which is embodied in Articles 3 (f) and 92 and whose application is entrusted to the Commission, must prevail

over any legal form or cover that could prevent it from being effectively applied.

In the case at issue, the Spanish authorities did not initially provide the Commission with the evidence that the aid elements involved in their interventions were linked to an acceptable restructuring programme for the industrial facilities purchased by the ABB subsidiaries (see Section IV).

The Commission has subsequently maintained contacts with the Spanish authorities in April, May and July 1991, and March 1992, with the view to obtaining both detailed information that made it possible to quantify precisely the identified aid elements to ABB, and a precise description of the future restructuring measures envisaged by ABB for the former industrial facilities of CCC.

Unfortunately, despite these contacts, the Commission's attempts to pursue the discussions further along the abovementioned proposed lines produced no results, in view of the Spanish authorities' insistence that the public interventions under assessment did not involve State aid elements.

In these circumstances, the Commission was obliged to continue the assessment of the case without the effective cooperation of the Spanish authorities in connection with the abovementioned essential discussion points proposed to the Spanish authorities. It should also be noted that at the same time the Commission presented its observations to the Court of Justice within the framework of the proceedings initiated as a result of the application introduced by the Spanish Government for annulment of the Commission's decision of 25 July 1990 to initiate the procedure under Article 93 (2).

By letter dated 12 June 1992, a law firm acting on behalf of ABB Asea-Brown Boveri Ltd (Zurich/Switzerland) requested the opportunity to present observations to the Commission on the decision that the Commission was discussing.

By letter dated 8 July 1992, ABB presented its initial observations.

By letter dated 16 November 1992, ABB submitted to the Commission a document titled 'Report on the fairness of the price paid by the subsidiaries of ABB for the acquisition, on 3 July 1990, of certain assets of CCC in Spain'. This report, drawn up by Price Waterhouse, concluded that the price paid by ABB for the CCC net assets was in excess of the estimation of the higher end of a fair market valuation range.

By letter dated 23 November 1992, ABB submitted information on the restructuring programme carried out with respect to the businesses formerly owned by CCC. ABB submitted additional information by letters dated 27 January 1993 and 10 February 1993.

ABB submitted this information 'with the explicit caveat that ABB does not accept the allegation that any State aid was granted in the context of acquisition of CCC assets, and that ABB supports the position of the Spanish Government that the Commission is not entitled to carry out the current investigation'.

This information shows that ABB has carried out a very tight restructuring programme after having acquired certain assets formerly owned by the CCC companies. As part of the restructuring programme, ABB has reduced production capacity and rationalized production, transferred technology and carried out an extensive investment programme.

It should be noted that ABB confirmed that 'there were substantial overcapacities in the heavy electrical equipment sector prior to the acquisition of the CCC assets and the restructuring carried out by ABB'. According to ABB, 'these overcapacities were all the more burdensome for the sector since after the accession of Spain to the EEC, imports into the Spanish market became more important. This exercised additional competitive pressure on the business'.

The reduction in the former production capacity has been carried out in different ways: closure of an entire factory; reduction of parallel production lines from two or three lines per product to only one line per product; reduction of production areas, by closing factory buildings; reduction of production equipment by scrapping and disposal of machinery and installations; reduction of personnel.

The Erandio plant has been closed entirely. Outdated equipment of the Erandio plant has been scrapped. Part of the equipment, in particular more recent production machines, have been transferred to the Galindo plant, in order to replace old machines there, which, in turn, have been scrapped. In very few instances, the machines from Erandio have been used to complement the existing Galindo equipment, so as to have the required minimum facilities available which are needed for a viable production of the new production programme.

In addition, the production of industrial motors, of traction equipment and of transformers in the Sabadell plant has been phased out.

An important part of the remaining machinery and equipment acquired from the CCC companies has been removed, scrapped or destroyed, in order to reduce production capacity to a level which allows a profitable production.

As part of the restructuring programme, ABB has reorganized the previous production pattern. This has involved, in particular, the concentration of activities, so that no more than one company engages in activities for a specific product. ABB has also reduced the number of

previously existing production lines, and concentrated the production of the different goods in one production line, eliminating parallel efforts and activities.

The results of the various measures taken are evident when looking at the production capacity figures before and after the restructuring. The information on reductions in production capacity submitted by ABB is summarized in the following tables (1):

(1) For the sake of confidentiality, the references to absolute figures of production capacity will be omitted in the publication in the *Official Journal of the European Communities.*

TABLE A

Business line	Capacity before acquisition		Capacity after restructuring	
	Direct hours	MW	Direct hours	MW
Power generation	(. . .)	(. . .)	(. . .)	(. . .)
Industrial motors	(. . .)	(. . .)	(. . .)	(. . .)
Traction (including motors)	(. . .)	(. . .)	(. . .)	(. . .)
Transformers (1)	(. . .)	(. . .)	(. . .)	(. . .)
(HV switchgear) (2)	(. . .)	(. . .)	(. . .)	(. . .)

(1) Instead of MW, the figures for transformers are in MVA.

(2) The assessment excludes from the analysis the production of HV switchgear because the restructuring programme implemented has produced a change in local content and product integration that has rendered the comparison impossible.

TABLE B

Reduction in capacity

Business line	Direct hours	% (decrease)	MW	% (decrease)
Power generation	(. . .)	— 63,4	(. . .)	— 63,3
Industrial motors	(. . .)	— 60,7	(. . .)	— 60
Traction (including motors)	(. . .)	— 42,4	(. . .)	— 36,3
Transformers	(. . .)	— 51,7	(. . .)	— 53,3
		— 51,5 (average)		— 55,7 (average) (1)

(1) It should be noted that the calculation of the global average in MW is biased because the capacity of transformers is given in MVA.

The information can also be compared with the data submitted on total demand and production capacity in Spain.

TABLE C

Business line MW	Market demand	Total capacity Spain 1990	Capacity CCC 1990	Capacity CCC after restructuring
Power generation	2 000	4 107	(. . .)	(. . .)
Industrial motors	450	880	(. . .)	(. . .)
Traction (including motors)	700	518	(. . .)	(. . .)
Transformers	3 500	7 500	(. . .)	(. . .)

As an important part of the restructuring programme, ABB has taken many steps in order to rationalize production, in order to make it more productive and viable.

The rationalization measures include: the introduction of a new 'process-flow' layout of the factories; introducing new planning methods, like just-in-time supplies, and no intermediate stocks; improvement of production quality; reduction of factory space; improvement of service.

The above measures are only part of a complex rationalization programme not yet completed. However, they have already produced important results: labour productivity has been increased by over (. . .) %; factory through-put time has been reduced by (. . .) %; factory inventory has been reduced by (. . .) %; the failure rate in testing has been reduced from a previous level of (. . .) % failures, to a present level of (. . .) % failures only; on-time deliveries have been increased from (. . .) to (. . .) %; factory space has been reduced by (. . .) % (1).

As regards technology transfer, the total value of the technology transfer to the businesses which are being restructured using the assets acquired from CCC has an arm's-length value in excess of US$ 250 million.

As regards the investment programme, whereas the original plan, and the commitment which formed part of the transaction under which ABB acquired certain assets from CCC, envisaged investment of some Pta 5 600 million, the revised investment plan which is currently being implemented provides for a total of Pta 10 523 million of investment.

The information sent to the Commission by ABB was submitted to the Spanish authorities for comment by letters dated 18 December 1992 and 9 March 1993.

By letters dated 18 January and 20 April 1993, the Spanish authorities, while reaffirming that, in their view, the interventions covered by the investigation do not contain State aid elements, also informed the Commission that they endorsed the restructuring programme presented by ABB, with a view to benefiting from the potential application of the exception to incompatibility provided for in Article 92 (3) (c) of the EEC Treaty.

In the light of the information submitted by ABB and of its endorsement by the Spanish authorities, the Commission has arrived at the following conclusions:

As regards the report on the fairness of the price paid by ABB for certain assets of CCC, the Commission must however observe that the fact that ABB bought CCC for a fair market value, as the report in question intends to demonstrate, is not a sufficient reason to conclude that the interventions of the Spanish authorities in the rescue of the businesses of CCC did not involve State aid elements at all.

The fact that a buyer pays a reasonable price for a company — that is to say a price based on reasonable expectations of recoupment of the investment at reasonable return rates and within a reasonable period — only demonstrates that he has behaved as a reasonable market economy private investor. But this behaviour of the buyer does not exclude the possibility that the State, for its part, grants an aid, if it does not act as a market economy private investor in respect of the participants in the acquisition (buyer and seller). In particular, in the CCC case, the State did not act as a market economy private creditor would have done in the same position and circumstances (see section VI of this Decision).

In the case at issue, it should be noted once more that the existence of aid in favour of ABB seems clearly substantiated by the fact that the State, in spite of the securities held, did not recover any monies in respect of the assets bought by ABB, and that ABB actively participated in the negotiations that took place before and after the acquisition, on condition that the State assumed substantial restructuring costs for which, as creditor of the companies, it was not at all responsible.

However, even if the interventions of the Spanish authorities have contained aid within the meaning of Article 92 (1), the aid may be declared compatible by the Commission under Article 92 (3) (c) if, as previously explained, it is linked to a restructuring programme for the aided activities which might be judged as acceptable from the Community point of view.

Consequently, as the Commission repeatedly indicated to the Spanish authorities, the analysis of the case must be focused on the existence of sufficient compensation for the distortion of compentation caused by the aid.

In view of the fact that the aid in question was granted for the rescue and restructuring of businesses in difficulties, the Commission must verify that the aid is linked to the implementation by the beneficiaries of restructuring programmes that return them to viability, without having adverse effects on competition conditions form the Community point of view. In this latter respect, the Commission normally expects that the beneficiaries close down unprofitable production lines and/or reduce production capacities.

(1) For the sake of confidentiality, the figures will be omitted in the publication in the *Official Journal of the European Communities.*

In this respect, following the intervention of ABB in the course of the procedure, the Commission has for the first time obtained detailed information on the restructuring measures implemented by ABB.

This information indicates that the restructuring programme that ABB will apply for the aided businesses will reduce production capacity in all business lines with an average reduction of 51,5 % in terms of direct hours or 55,7 % in MW (see Table B). This action has removed excess capacity in the Spanish market, eliminating competitive tensions in this sector at Community level. It also makes it possible for competitors to gain market shares in the relevant segments.

Moreover, the restructuring appears to be intended to create productive, profitable and viable activities integrated in the structure of the ABB group in Spain. To this end ABB has contributed substantial funds and know-how to put them back on a viable footing.

The Commission must also take into consideration that the restructuring programme implemented will secure jobs in areas with specific problems of underdevelopment and industrial decline. It should be noted in this respect that 63 % of the workforce of CCC was located in regional assisted areas (20 % in Article 92 (3) (a) regions).

In view of the foregoing considerations, the Commission therefore concludes that the former industrial activities of CCC, currently under ABB's ownership and responsibility, will be restructured according to a plan which may be considered satisfactory from the Community point of view.

Consequently, the State aid elements involved in the interventions of the Spanish authorities on the occasion of the sale by CCC of certain selected assets to ABB subsidiaries may benefit from the exception to incompatibility provided for in Article 92 (3) (c) of the EEC Treaty, as they do not appear to distort competition within Community to an extent contrary to the common interest,

HAS ADOPTED THIS DECISION:

Article 1

The interventions of the Spanish authorities consisting of:

— the waiver of claims by public creditors of Cenemesa/Cademesa/Conelec (CCC) of Pta 35 910 million minus the proceeds they obtain from the sale of certain assets,

and

— the application of the aid scheme established by Law 27/1984 of 26 July on conversion and reindustrialization to finance an early retirment scheme for workers of CCC,

decided on the occasion of the sale by CCC of certain selected assets to the following subsidiaries of Asea-Brown-Boveri (ABB): ABB Energía, SA, ABB Generación, SA, ABB Metrón, SA, ABB Industria, SA, ABB Motores, SA, ABB Nortem, SA, ABB Sabadell, SA, ABB Galindo, SA, ABB Trafodis, SA, ABB Subestaciones, SA, ABB Trafo, SA, ABB Trafonor, SA, ABB Trafosur, SA, ABB Tracción, SA, ABB Service, SA, ABB Imasde, SA, ABB Uno, SA, ABB Dos, SA, ABB Tres, SA, ABB Cuatro, SA, ABB Cinco, SA, ABB Seis, SA and ABB Siete, SA, constitue State aid within the meaning of Article 92 (1) of the EEC Treaty.

The aid in question is illegal under Community law, since it was awarded by the Spanish Government in breach of the provisions of Article 93 (3) of the EEC Treaty.

However, such aid may be considered to be compatible with the common market pursuant to Article 92 (3) (c).

Article 2

Spain shall submit annual reports to the Commission on the implementation of the restructuring programme for the businesses formerly run by CCC and presently run by ABB until 1995.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 22 July 1993.

For the Commission

Karel VAN MIERT

Vice-President