II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 3 July 2001

on State aid which Spain has implemented and is planning to implement for the restructuring of Babcock Wilcox España SA

(notified under document number C(2001) 1780)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/200/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to the Agreement on the European Economic Area, and in particular Article 66(1)(a) thereof,

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

Whereas:

I. PROCEDURE

(1) By letter of 12 March 1997, Spain notified the Commission of a capital injection of ESP 10 000 million (EUR 60,1 million) which the wholly state-owned holding company Sociedad Estatal de Participaciones Industriales ('SEPI') planned to make into its subsidiary Babcock Wilcox España SA ('BWE'). The notification also contained information about another increase of ESP 10 000 million (EUR 60,1 million) that TENEO, SEPI's predecessor, had made in BWE's capital in 1994.

(2) By letter of 2 June 1998, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the above measures.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [1]. The Commission invited interested parties to submit their comments on the capital injections.

(4) By letter of 16 June 1999, Spain notified the Commission of a further capital injection of ESP 41 000 million (EUR 246,4 million) into BWE.

(5) By letter of 23 July 1999, the Commission informed Spain that it had decided to extend the Article 88(2) procedure to include the new capital increase in the formal investigation.

(6) The Commission decision to extend the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the new measure.

(7) By letter of 25 April 2000, Spain notified the Commission of the arrangements that had been decided for privatising BWE.

(8) By letter of 7 July 2000, the Commission informed Spain that it had decided to extend the Article 88(2) procedure to the aid elements identified in the privatisation arrangements.

(9) The Commission decision to extend the procedure was published in the *Official Journal of the European Communities* [3]. The Commission invited interested parties to submit their comments on the aid involved in the privatisation arrangements.

[1] OJ C 249, 8.8.1998, p. 3.
[2] OJ C 280, 2.10.1999, p. 22.
[3] OJ C 232, 12.8.2000, p. 2.

(10) The Commission received comments from interested parties regarding the privatisation arrangements. It forwarded them to the Spanish authorities by letter of 4 October 2000, giving them the opportunity to react. Spain's comments were received by letter of 31 October 2000.

II. **BABCOCK WILCOX ESPAÑA SA**

(11) Established in 1918, BWE is an engineering and construction company in the capital goods sector; it is a wholly owned subsidiary of SEPI. BWE is based in the Basque Country; its head office is located in Bilbao and its production plants are in Galindo (Vizcaya) near Bilbao.

(12) In 1978, in the middle of Spain's transition to democracy, BWE suspended payments and was bought by the Spanish State with a workforce of 5 600. Under State ownership, BWE went through a steady restructuring process that drastically scaled down its activities in an orderly manner. BWE abandoned the production of rolling stock, hot-rolled steel, steel castings and large parts. As a result, its workforce fell from 5 600 in 1978 to 1 512 in 1993. Its turnover halved over the same period, falling to ESP 36 966 million (EUR 222,17 million) in 1993, with ordinary losses of ESP 519 million (EUR 3,12 million) and a net positive income of ESP 275 million (EUR 1,65 million).

(13) During the first half of the 1990s, the process of restructuring BWE slowed down and the company began to accumulate debts. The ensuing loss of competitiveness forced BWE to adopt further restructuring measures, the estimated costs of which were entered into the 1996 accounts. As a result, the moderate profits recorded by BWE during the early 1990s gave way to heavy losses. In 1996 BWE employed 1 516 workers and generated turnover of ESP 44 009 million (EUR 264,5 million) with final losses of ESP 29 030 million (EUR 174,47 million), after computing extraordinary costs of ESP 29 030 million (EUR 174,43 million). BWE exported 51 % of its production.

III. **THE AID MEASURES UNDER FORMAL INVESTIGATION**

a) **The 1994 and 1997 capital injections**

(14) The capital increase of ESP 10 000 million (EUR 60,1 million) notified in 1997 was intended to finance an early retirement scheme affecting 423 workers. This workforce reduction formed part of a broad restructuring programme aimed at restoring the viability of BWE, consolidating its competitive position in the marketplace and preparing it for privatisation. In this latter respect, the Spanish Government informed the Commission of its decision to privatise BWE, according to the plan for the modernisation of the Spanish public sector. The privatisation process started in the last quarter of 1997 with the selection by SEPI of an adviser and the dispatch of invitations to tender to all potential purchasers.

(15) Following the payment by SEPI of the notified capital increase in breach of the prohibition in Article 88(3) of the Treaty, the Commission decided to initiate the Article 88(2) procedure on 7 April 1998.

(16) The procedure was also opened in respect of another previous capital injection of ESP 10 000 million (EUR 60,1 million) into BWE in 1994 that the Commission had discovered in the financial statements transmitted with the notification.

b) **The 1999 capital injection**

(17) Following discussions with the companies that had expressed an interest in buying BWE, SEPI signed a Memorandum of Understanding with the Norwegian group Kvaerner on 2 April 1998. The subsequent negotiations with Kvaerner came to a standstill due to the serious financial difficulties experienced at the time by that group. Consequently, in November 1998 SEPI decided to close the negotiations with Kvaerner and reopened the privatisation process.

(18) In December 1998, SEPI shortlisted three other potential purchasers, to which it supplied the relevant information.

(19) By letter of 16 June 1999, the Spanish authorities notified a further capital injection into BWE of ESP 41 000 million (EUR 246,4 million). These funds were aimed at increasing BWE's capital, which had been eroded by losses, and financing a further workforce reduction of 500 people required by the three potential purchasers.

(20) On 8 July 1999 the Commission decided to extend the Article 88(2) procedure to include this new capital injection in the formal investigation.

(21) SEPI made two illegal partial payments of the notified capital increase in breach of the provisions of Article 88(3). On 3 June 1999 it injected ESP 10 250 million (EUR 61,60 million) into BWE, followed by a further ESP 14 025 million (EUR 84,29 million) on 28 September 2000. These payments brought the equity of BWE up to the minimum level required under Spanish commercial law for continuing in business.

c) **The privatisation arrangements**

(22) On 9 February 2000 SEPI signed a contract with Babcock Borsig AG for the sale of BWE.

(23) By letter of 25 April 2000, the Spanish authorities notified the arrangements for privatising BWE. Under those arrangements, SEPI is to sell to Babcock Borsig AG ('BB') at a price of EUR 45 million the shares in a new company to be created, NewCo, to which certain selected assets of BWE are to be transferred. BWE is also to transfer 650 workers to NewCo. Subsequently, BWE is to be liquidated. The contract was made conditional on, *inter alia*, authorisation by the Commission of the aid previously received by BWE, as well as of any transaction in the privatisation arrangements that could be regarded as constituting State aid.

(24) On 13 June 2000 the Commission decided to extend the Article 88(2) procedure for the second time in order to include in the formal investigation the following aid elements identified in the privatisation arrangements:

(a) cash injections into NewCo amounting to EUR 55 million;

(b) the payment to NewCo of EUR 100 million for the costs of adapting the activities transferred to it;

(c) the payment to NewCo of EUR 95 million for investments and training to be carried out according to the investment plan presented by BB;

(d) the coverage of any losses incurred under pre-existing contracts transferred to NewCo, at an estimated cost of ESP 8 000 million (EUR 48,1 million);

(e) the coverage of costs incurred through any claims against NewCo for any harm or economic damage resulting from events occurring prior to the sale in relation to environmental, labour, tax or social security issues and obligations arising from pension plans. The maximum liability to be borne by SEPI is limited to EUR 18 million. However, the Spanish authorities consider that there will not be any compensation payable under this heading;

(f) the coverage of the deficit in the liquidation of BWE, at an estimated cost of ESP 35 000 million (EUR 210,4 million), and

(g) any potential aid element involved in the decision to set the purchase price for the shares in NewCo at EUR 45 million, that figure being the book value of the selected assets transferred to it.

IV. **COMMENTS FROM INTERESTED PARTIES**

(25) The Commission received observations from third parties only with respect to the second extension of the Article 88(2) procedure.

(26) By letter of 12 September 2000, the Provincial Council of Vizcaya, the province of the Basque Country where BWE is located, drew the Commission's attention to the difficult conditions in which business activity is carried on in the Basque Country as a result of the terrorist violence. The Provincial Council of Vizcaya claimed that the prevailing climate was seriously threatening the industrial base and therefore called on the Commission to take a favourable view of aid aimed at maintaining jobs in those exceptional circumstances.

(27) By letter of 12 September 2000, Duro Felguera, a Spanish competitor of BWE located in Asturias, urged the Commission to prohibit the aid to BWE on the grounds that it created an undue advantage for the restructuring of one of the largest Spanish producers in the sector. Duro Felguera stressed in particular the serious harmful effects of aid intended to help the restructured company set up a commercial network.

V. **COMMENTS FROM SPAIN**

(28) Spain submitted its observations on the formal investigation by letters of 6 October 1998, 17 February 1999, 7 April 1999, 21 September 2000, 25 September 2000, 8 November 2000, 10 November 2000 and 30 January 2001.

a) **The 1994 capital injection**

(29) The Spanish authorities claimed that the 1994 capital injection should be regarded as existing aid within the meaning of Article 88(1) of the Treaty.

(30) According to the evidence submitted by the Spanish authorities, that capital injection was intended to offset the operating deficit of a separate fund used for administering the pension rights of workers in early retirement. The deficit in question related to 1 025 workers that had left the company over the period 1983 to 1987 under an early retirement scheme negotiated with the trade unions in 1983 and signed on 15 February 1984, almost two years before Spain's accession to the European Communities. The agreement was given prior authorisation on 14 February 1984 by the Spanish public holding company Instituto Nacional de Industria (INI), the predecessor of TENEO and SEPI, which took responsibility for financing the costs connected with this specific measure. For that purpose, the INI registered in its financial planning an initial contribution of ESP 12 000 million (EUR 72,12 million). At the time, BWE was virtually insolvent, showing a negative equity in its balance sheet.

(31) A separate fund, entrusted to an insurance company, was created on 14 January 1986 to administer the pension rights. The INI then contributed to the fund a sum of ESP 12 559 million (EUR 75,48 million) corresponding to the initial estimate made by the insurer of the costs of the early retirement scheme agreed in 1984. That estimate was based on the average circumstances of the workers that could join the scheme.

(32) Later in the year, the insurance company announced that the final calculation of the contribution necessary to operate the fund, based on the individual circumstances of the workers that had joined the scheme, gave a figure of ESP 19 661 million (EUR 118,16 million). On account of its financial priorities, the INI decided not to cover the deficit of ESP 7 102 million (EUR 41,68 million) at that time.

(33) In 1992 the INI was transformed into a public undertaking and renamed TENEO. In 1993 TENEO clarified a number of financial commitments entered into by its predecessor and therefore decided to cover the fund's deficit that INI had not yet paid. To that end, TENEO asked the insurance company to recalculate the deficit. The recalculation for the 1 025 workers covered by the early retirement scheme agreed in 1984 showed a deficit of ESP 10 860 million (EUR 65,27 million). The increase in the deficit was due to changes to the technical parameters for the operation of pension funds made by the relevant legislation. In particular, unlike the original calculation of the deficit in 1986, the recalculation made use of new mortality tables reflecting longer life expectancy in Spain and a lower technical interest in line with the decreasing trend in market rates.

(34) In order to cover the deficit, on 29 July 1994 TENEO paid BWE the ESP 10 000 million (EUR 60,1 million) capital injection under formal investigation and BWE simultaneously transferred the same amount to the pension fund.

b) **The restructuring**

(35) The notification of the 1997 capital injection included an extensive industrial restructuring programme for BWE. According to that programme, BWE has carried out a new strategic reorientation of its entire manufacturing and commercial activity that will lead to its privatisation.

(36) The strategic plan was based on a detailed analysis of the situation and prospects for the power generation market and of the outlook for BWE in that context. The strategic assessment of the future of BWE concluded that the company should concentrate on supply on a turnkey basis, positioning itself on the market as an integral supplier of complex systems essentially for the power equipment sector, and concentrate on markets outside the Community.

(37) On this basis, BWE decided to:

(a) consolidate its position as a turnkey plants supplier, promoting this activity and reducing its activities in other traditional areas of the company's business;

(b) refocus its entire manufacturing and commercial activity towards a new product mix in which the main activity would be supply on a turnkey basis;

(c) implement immediately a number of drastic measures and adopt a series of urgent policies in each area of the company's operations in order to adjust production capacity to the targets of the strategic plan, reduce costs and improve competitiveness.

(38) The restructuring measures involved a large reduction in production capacity (around 23 %) and a reduction in the workforce of 28 %. The workforce cutback was achieved by means of an early retirement scheme affecting 423 persons that were laid off between 1997 and 1999. Simultaneous measures to reduce personnel costs and increase productivity were implemented, including the freezing of wages, rigorous control of financial compensations, maintenance of the number of annual working days, application at every level of the principles of flexibility, internal mobility, multiskilling and retraining, introduction of work based on functional groups, etc. In addition, BWE adopted a new policy for the optimisation of procurement processes, developed a quality plan aimed at introducing total quality management (TQM) in the medium term, and set up a specific department for the financial management of contracts, with a view to reducing the financial burden associated with them. BWE also conducted an organic and functional reorganisation of management and of the company structure, which was streamlined and rationalised.

(39) The cost of the workforce reduction was ESP 11 651 million (EUR 70 million) and was partly covered by the10 000 million (EUR 60,1 million) capital injection.

(40) An essential element in the strategic plan for the restructuring of BWE was the privatisation of the company, to which the Spanish Government had committed itself when it notified the 1997 capital injection.

(41) In accordance with that commitment, the Spanish authorities proceeded to privatise BWE in the last quarter of 1997. However, the privatisation schedule was substantially delayed following the withdrawal of the initial candidate for the purchase, the Kvaerner group, when the purchase contract was about to be signed. In April 1998 SEPI had signed a Memorandum of Understanding with Kvaerner. Following negotiations,

the group then agreed to sign the purchase contract in July 1998. In July, Kvaerner asked for a postponement until September and then refused to sign. Kvaerner's financial difficulties did not become clear until April 1999, when the group announced a wide-ranging reorganisation that involved withdrawals from several markets. Faced with this setback, the Spanish authorities reopened without delay the privatisation process in November 1998.

(42) According to the Spanish authorities, the further capital increase of ESP 41 000 million (EUR 246,4 million) notified in 1999 constitutes an interim measure that SEPI had to implement to make the privatisation and restructuring of BWE possible. This measure was intended to restore BWE's equity, eroded by losses, to the minimum level required under national commercial law to continue operating and to finance a further workforce reduction of 500 workers required by the three potential purchasers shortlisted after the reopening of the privatisation process.

(43) The delay in the privatisation process had weakened BWE's financial position and the state of its order books had deteriorated. At the end of 1998, BWE's balance sheet showed a negative equity of ESP 15 300 million (EUR 91,95 million) after a provision of ESP 16 509 million (EUR 99,22 million) for extra costs connected with past labour force reductions had been entered in the 1998 accounts. For its part, the cost of the new workforce reduction of 500 workers was estimated at ESP 24 500 million (EUR 147,25 million).

(44) Following negotiations with the shortlisted bidders, in February 2000 the Spanish authorities decided to sell BWE to Babcock Borsig AG (BB). On 9 February 2000 SEPI signed a contract with BB.

(45) As part of its purchase bid, BB presented to the Spanish authorities an Industrial Plan that supplemented the restructuring measures undertaken by BWE so far. According to this plan, the business transferred to NewCo would deepen the restructuring by concentrating on a narrower service and product portfolio and geographic focus, as well as reducing capacity still further ([4]).

(46) NewCo is to be integrated into the global strategy of Babcock Borsig Power GmbH (BBP), which is the subsidiary within the Babcock Borsig group active in the power generation and environmental equipment business. NewCo will operate under the name of Babcock Borsig Power España (BBPE). BBPE will act as the Regional Centre of Competence (RCC) for the markets in the Iberian Peninsula, Latin America and North Africa.

(47) The Industrial Plan is based on a market survey of demand from the abovementioned business regions and a detailed assessment of the competitive position of BWE/NewCo prior to the acquisition. NewCo/BBPE will have access to BBP's entire range of products and technology. To match the local market demand, NewCo/BBPE will no longer depend on licences from other companies as hitherto, but will be able to work with and rely on its own group's technology.

(48) The new product portfolio will focus on the construction and management of turnkey projects. The main products for the RCC in Spain will be:

[…] (*)

Most of these products will be handled on a turnkey basis, others in joint ventures or under cooperative agreements.

(49) BBP has worked out a five-year investment plan for the relaunch of the business transferred to NewCo. Its total budget amounts to EUR 135,5 million, broken down under four main headings: business relaunch, information technology, real estate and machinery, and venture capital investment ([5]).

(50) According to estimates of the market share attainable per product line in the regions covered by the RCC in Spain, NewCo is expected to generate annual turnover of EUR 250 million in a typical year, broken down as follows:

[…]

The overall export rate will be 20 %. With this turnover, NewCo/BBPE will employ 650 workers.

([4]) The capacity reduction is described in detail in recital 122.
(*) Business secret.
([5]) The Investment Plan is described in detail in recital 111.

(51) The five-year forecast of order intake and profits and losses for NewCo/BBPE is the following:

Table 1

(EUR million)

Year	1	2	3	4	5
Order intake	[...]	[...]	[...]	[...]	[...]
Sales	[...]	[...]	[...]	[...]	[...]
Changes in inventories	[...]	[...]	[...]	[...]	[...]
Income from operations	[...]	[...]	[...]	[...]	[...]
Costs of materials	[...]	[...]	[...]	[...]	[...]
Personnel costs	[...]	[...]	[...]	[...]	[...]
Depreciation	[...]	[...]	[...]	[...]	[...]
Other operating expenses	[...]	[...]	[...]	[...]	[...]
Operating expenses	[...]	[...]	[...]	[...]	[...]
EBIT (earnings before interest and taxes) BEFORE STATE MEASURES	[...]	[...]	[...]	[...]	[...]
EBITDA (earnings before interest, taxes, depreciation and amortisation) (operating cash flow) BEFORE STATE MEASURES	[...]	[...]	[...]	[...]	[...]

Table 1 shows the EBITDA that NewCo/BBPE is expected to generate before the payments for adaptation costs and training and investment, respectively of EUR 100 million and EUR 95 million, committed by SEPI under the privatisation arrangements.

(52) Table 2 below shows the operating cash flow that NewCo/BBPE is expected to generate before and after the abovementioned state measures:

Table 2

(EUR million)

Year	1	2	3	4	5
EBITDA (operating cash flow) BEFORE STATE MEASURES	[...]	[...]	[...]	[...]	[...]
Expenses in the Investment Plan [1]	[...]	[...]	[...]	[...]	[...]
(Payments by SEPI) [2]	*[...]*	*[...]*	*[...]*		
Application of payments from SEPI to results [3]	[...]	[...]	[...]	[...]	[...]
(Remainder entered in the balance sheet) [4]	*[...]*	*[...]*	*[...]*	*[...]*	*[...]*

(EUR million)

Year	1	2	3	4	5
EBITDA (operating cash flow) AFTER STATE MEASURES	[...]	[...]	[...]	[...]	[...]
Depreciation	[...]	[...]	[...]	[...]	[...]
EBIT (operating result) AFTER STATE MEASURES	[...]	[...]	[...]	[...]	[...]
Net financial income	[...]	[...]	[...]	[...]	[...]
EBT (earnings before tax) AFTER STATE MEASURES	[...]	[...]	[...]	[...]	[...]

(1) This reflects the items in the Investment Plan which are operating costs totalling EUR 16,5 million.
(2) This heading is shown here for comparison purposes only. The rows below reflect the actual application of the payments to results. The sum of the payments adds up to the EUR 195 million that SEPI has undertaken to pay under the privatisation arrangements, broken down as follows: EUR 95 million to assist the Investment Plan for NewCo totalling EUR 135,5 million (EUR 119 million off which is investment entered in the balance sheet and the remaining EUR 16,5 million is costs) and EUR 100 million for offsetting the negative cash flows over the first three years of operations.
(3) The payments for adaptation costs (coverage of negative cash flow) are applied directly in the profit and loss account whereas the investment grants are applied pro rata with the depreciation of the relevant assets.
(4) This heading is shown here for comparison purposes only.

VI. **ASSESSMENT OF THE AID**

a) **Summary of the measures**

(53) The funds involved in the measures covered by the formal investigation under Article 88(2) of the Treaty amount to a total of EUR 875,1 million.

Table 3 below summarises these measures, indicating their nature and value and the extent to which they have been implemented.

Table 3

Measures	Amount (EUR million)	Amount (ESP million)	Implementation
Capital injections	**366,6**	**61 000**	
1994	60,1	10 000	fully paid
1997	60,1	10 000	fully paid
1999	246,4	41 000	ESP 10 250 million paid on 3.6.1999 ESP 14 025 million paid on 28.9.2000 ESP 16 725 million pending
Privatisation arrangements (net of sale price)	**463,5**	**77 110**	

Measures	Amount (EUR million)	Amount (ESP million)	Implementation
Cash payments by SEPI	*155*	*25 790*	Not yet implemented
Investment grants	*95*	*15 807*	Not yet implemented
Price of the shares in NewCo	*(45)*	*(7 487)*	Not yet implemented
Net cash payments	205	34 110	
Coverage of liquidation deficit	210,4	35 000	Not yet implemented
Ultimate loss under contracts transferred (estimate)	48,1	8 000	Not yet implemented
(Potential claims) [1]]	(Max. 18)	(Max. 2 995)	Not yet implemented
Total	830,1	138 110	

[1] The maximum risk borne by the State has not been added in total because at present no payment is expected to be made under this heading.

b) **Aid within the meaning of Article 87(1) of the Treaty**

(54) The former owner of BWE in 1994, TENEO, and its subsequent and present shareholder, SEPI, are holding companies wholly owned by the Spanish State. Their financial resources are therefore state resources.

(55) The Commission uses the market economy private investor principle as a benchmark to determine whether any public funds granted to public undertakings involve elements of State aid within the meaning of Article 87(1) of the Treaty and, if so, to quantify them.

The provision of public funds to companies in the form of capital injections may involve elements of State aid if those funds are provided in circumstances that would not be acceptable to a private investor operating under normal market conditions. This is the case, among other things, where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested. The Commission set out this position in its communication of 13 November 1993 [6] on the application of Articles 92 and 93 of the Treaty and Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector [7], in which it reminded Member States of the principles it uses in determining whether aid is involved in such state measures.

The Court of Justice of the European Communities has upheld these principles repeatedly. In order to determine whether a capital injection is State aid, the Court has held that it is necessary to examine whether the company in question could have obtained the finance on the capital market. Where the evidence suggests that the beneficiary could not have survived without public funds because it could not have raised the capital required on the open market from a private investor, it is right to conclude that the payment constitutes State aid.

(56) The information in the Commission's possession shows that the publicly owned holding companies TENEO and SEPI decided to make the relevant public funds available to BWE without regard for any prospects of adequate return and that BWE would have been unable to raise these funds on the capital market.

(57) The 1994 capital injection was made to finance supplementary costs stemming from a workforce reduction agreed in 1984 that BWE could not bear on its own because of its delicate financial position. A private investor would not have made these funds available to BWE in the absence of drastic restructuring measures capable of restoring its viability. At that time, such measures had not yet been determined. The decision on how to restructure BWE was only adopted by its ultimate shareholder, the Spanish State, late in 1997 when it presented to the Commission a restructuring programme involving as a key element the privatisation of the company.

(58) The subsequent capital injections made in 1997 and 1999, as well as the funds committed under the privatisation arrangements, were decided to assist the restructuring of BWE and facilitate its privatisation. These new measures also deviated from the market investor principle because the Spanish State could not expect any normal return from its new investments in BWE. A private investor operating under normal market conditions would not have contributed money to a business

[6] OJ C 307, 13.11.1993, p. 3.
[7] OJ L 195, 29.7.1980, p. 35.

intended for sale that, in view of its extreme financial difficulties, was on the verge of bankruptcy and that, consequently, was likely to be priced at a negative value by the market. In these circumstances, a private investor would have let BWE go into bankruptcy.

(59) In spite of this, on account of the special circumstances surrounding BWE and with a view to facilitating its sale and restructuring outside bankruptcy proceedings, TENEO, SEPI and its ultimate shareholder, the Spanish State, decided to provide funds to assist its restructuring and make the privatisation possible. In the absence of these funds, BWE would have had to bear all the restructuring costs on its own and, in view of its insolvency, would have gone bankrupt.

(60) In order to determine the aid element involved in the privatisation arrangements, the Commission notes that the only return that could be expected from the cash payments committed by the Spanish State was the offer presented by the purchaser of NewCo for its share capital. Both the cash payments by the Spanish State and the price to be paid by the buyer are thus interrelated. Babcock Borsig would not have undertaken to pay EUR 45 million for the shares in NewCo if the Spanish State had not committed itself to providing cash payments to NewCo of EUR 250 million. Consequently, the price of EUR 45 million for the shares in NewCo has to be deducted from the higher cash payments that the Spanish State will make to NewCo after its creation in order to determine the net aid involved in the privatisation arrangements.

(61) Finally, it is to be noted that the Commission cannot find any further aid element in the setting of a nominal price of EUR 45 million for the shares in NewCo. The net price of minus EUR 463,5 million for the ongoing business of BWE was set in a tender process where no other party was willing to offer the Spanish State better conditions in net terms. All other bids for the business of BWE were costlier for the Spanish State.

(62) Therefore, the aid that Spain has implemented and is planning to implement for BWE amounts to a total of EUR 830,1 million.

(63) Competition is strong in the power generation and environmental equipment sector, notably in the turnkey project segment, where companies compete worldwide for large orders. BWE was the largest producer in Spain in this sector and exported around 50 % of its production in competition with other Community producers. For its part, NewCo, integrated into the Babcock Borsig group, will continue being a leading producer in Spain and will also compete in foreign markets where it plans to export around 20 % of its turnover.

(64) Accordingly, the net state assistance under assessment, amounting to EUR 830,1 million, constitutes aid within the meaning of Article 87(1) of the Treaty.

c) **The legal status of the 1994 capital injection**

(65) The information supplied by the Spanish authorities demonstrates that the 1994 capital injection constitutes a supplementary payment to honour a commitment entered into by the INI in 1984, almost two years before the entry into force of the Treaty in Spain, and only partially paid in 1986.

(66) Accordingly, the 1994 capital injection constitutes existing aid within the meaning of Article 88(1) of the Treaty.

d) **The restructuring of BWE: a single prolonged process**

(67) The Commission is assessing in this case a series of state measures implemented over several years. It is therefore necessary to determine whether the Commission is faced with a sequence of independent and separate restructuring measures or, instead, with a single prolonged restructuring process. In other words, the Commission must consider whether to split the assessment or to assess the state measures globally.

(68) This case originates in the notification by the Spanish authorities in 1997 of an increase in BWE's capital that was accompanied by an extensive industrial restructuring programme. Under that programme, BWE was to carry out a new strategic reorientation of its entire manufacturing and commercial activity to concentrate on the supply of turnkey systems and reduce its activities in the company's other traditional areas of business. A series of drastic measures to adjust production capacity to the targets of the strategic plan and to improve competitiveness were proposed. In addition, as an essential element in the strategic plan the Commission was informed of the Spanish Government's formal decision to privatise BWE in accordance with the Plan for the Modernisation of the Spanish Public Sector.

(69) In accordance with the notification, the Spanish authorities proceeded to privatise BWE by means of an international tender. At the same time, BWE implemented a reorientation of its activity and reduced its capacity. However, the privatisation was substantially delayed following the unexpected withdrawal of the bidder initially selected by the Spanish authorities. Faced with this setback, the Spanish authorities reopened the privatisation process without delay.

(70) The 1999 capital increase constitutes an interim measure, only partly paid out to the extent necessary to restore BWE's equity to the minimum legally required, that has allowed BWE to continue operating during the period necessary to find another purchaser and complete the privatisation.

(71) For their part, the aid elements identified in the privatisation arrangements constitute the additional assistance required to privatise BWE and complete its restructuring according to the original plan notified in 1997. It is to be noted that the restructuring plan presented by BWE is in line with and constitutes the continuation of the preliminary industrial measures implemented by SEPI since 1997. After its purchase by Babcock Borsig, NewCo will concentrate on a narrower product and service portfolio and geographic focus, as well as reducing capacity still further.

(72) Accordingly, the Commission finds that the 1997 and 1999 capital increases and the privatisation arrangements are in line with the concept of industrial restructuring notified in 1997 and form part of a single restructuring process that has lasted longer than originally expected for reasons beyond the Spanish authorities' control. Therefore, the compatibility of the abovementioned State measures that have assisted the same restructuring process must be assessed globally.

(73) It is to be noted that the first extension of the procedure to cover the 1999 capital injection expressly referred to this overall assessment. In particular, in recital 12 of that decision the Commission stated:

'This new aid appears at this stage incompatible with the common market. Even though the new capital injection will be used to finance measures designed to adapt BWE's labour force to levels commensurate with reasonable prospects for its future reduced market presence, such measures alone do not appear capable of restoring its long-term viability. Viability can only be ensured if complementary measures in the commercial, industrial and technological fields are taken. These measures are in the present case dependent upon the restructuring programme that the purchaser of BWE will put into place after the sale of the company by the State. Consequently, the ultimate compatibility of this new capital injection, as well as of the aid already covered by the initial opening of the procedure, will be assessed in the light of the characteristics of the restructuring programme that the purchaser of BWE will implement.'

(74) Furthermore, in the second extension of the procedure in 2000 to cover the privatisation arrangements, the Commission reiterated its view that the measures had to be assessed globally. In particular, in the last recital of the decision the Commission stated:

'Spain is reminded that one of the essential elements in assessing the ultimate compatibility of this aid as well as of the previous aid covered by the procedure is the restructuring programme for BWE's activities that the purchaser will implement. Consequently, Spain is requested to submit to the Commission the final terms of the restructuring programme that is still under negotiation.'

e) **The relevant assessment framework**

(75) The aid under assessment is intended to assist the restructuring of a company in difficulty. Its compatibility must therefore be assessed in the light of the principles set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

(76) In October 1999 the Commission published new rescuing and restructuring aid guidelines [8] replacing the 1994 version [9].

(77) Some of the state measures under assessment were adopted before the new guidelines were published. It is therefore necessary to establish at this point which version applies in respect of each of the measures.

The original decision initiating the Article 88(2) procedure in respect of the 1994 and 1997 capital injections and the first decision extending the procedure to cover the 1999 capital injection were adopted under the 1994 guidelines. The decision extending the procedure for a second time to cover the privatisation arrangements was adopted under the 1999 guidelines, since that version was already in force when the privatisation arrangements were notified.

(78) Nevertheless, section 7.5, point 101, of the 1999 guidelines states that:

'The Commission will examine the compatibility with the common market of any rescue and restructuring aid granted without its authorisation and therefore in breach of Article 88(3) EC of the Treaty:

(a) on the basis of these guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Communities*;

(b) on the basis of the guidelines in force at the time the aid is granted in all other cases.'

(79) In the case of BWE, 34 % (ESP 14 025 million) of the 1999 capital injection was illegally paid on 28 September 2000, that is to say almost a year after the entry into force of the 1999 guidelines on 9 October 1999. Given that, as found in the previous section, all the state measures in this case constitute aid for a single prolonged restructuring process, the partial payment of the 1999 capital injection after the publication of the 1999 guidelines means that the whole series of state measures must be assessed under those new guidelines.

[8] OJ C 288, 9.10.1999, p. 2.
[9] OJ C 368, 23.12.1994, p. 12. Guidelines extended by notices published in OJ C 74, 10.3.1998, p. 31 and OJ C 67, 10.3.1999, p. 11.

(80) Accordingly, the compatibility of the 1997 and 1999 capital increases as well as of the aid elements identified in the privatisation arrangements must be assessed under the 1999 guidelines on State aid for rescuing and restructuring firms in difficulty.

(81) Although the basic compatibility criteria for restructuring aid are the same in both the 1994 and 1999 guidelines, the 1999 version incorporates two new additional principles that represent a tightening of Commission policy in this field. These new principles are: the 'one time, last time' condition and the ban on restructuring aid for newly created companies.

(82) As the 1999 capital increase is combined with previous restructuring aid granted in 1997, and the privatisation arrangements provide for the creation of NewCo and the grant of further restructuring aid to the company, it is necessary at this point to examine to what extent the above new principles apply in this case.

f) **The 'one time, last time' condition**

(83) Section 3.2.3, point 48, of the 1999 guidelines states that:

'Where less than 10 years have elapsed since the restructuring period came to an end or implementation of the plan has been halted, the Commission will normally allow further restructuring aid only in exceptional and unforeseeable circumstances for which the company is not responsible.'

(84) As previously established in section (d) above, the measures decided by the Spanish authorities since 1997 form part of a single prolonged restructuring process. Consequently, the restructuring to which the above condition refers has not yet come to an end and the 'one time, last time' condition does not apply in the case of BWE.

g) **The ban on aid to a new company**

(85) The privatisation arrangements involve the creation of NewCo, the transfer to it of BWE's assets connected with its ongoing business and the grant to NewCo of substantial restructuring aid. It is therefore necessary to examine to what extent the abovementioned prohibition applies in this case.

(86) The ban on aid to a newly created company was introduced in the 1999 guidelines, point 7 of which provides that:

'For the purposes of these guidelines, a newly created firm is not eligible for rescue or restructuring aid, even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets.'

(87) The Commission considers that the above prohibition does not apply in the present case because the State measures under assessment and the proposed restructuring constitute elements of a single operation to be assessed as a whole. The 1997 and 1999 capital increases as well as the privatisation arrangements are in line with the concept of industrial restructuring notified in 1997 and form part of a single restructuring process. On the other hand, the aid elements identified in the privatisation arrangements constitute the additional assistance required to privatise BWE and complete its restructuring according to the original plan notified in 1997.

(88) Furthermore, the ban on aid to a newly created company did not appear in the guidelines in force when the Commission adopted in 1998 the original decision initiating the Article 88(2) procedure, nor in 1999 when it extended the procedure for the first time.

(89) The Commission furthermore took this view in the preparatory instruments prior to this Decision.

(90) In the first extension of the Article 88(2) procedure, the Commission stated that the compatibility of the aid granted for restructuring BWE would be assessed globally in the light of the characteristics of the restructuring programme that the purchaser had to present ([10]).

(91) In the second extension of the Article 88(2) procedure the Commission decided to consider that BWE and NewCo formed a single entity the purposes of assessing the state aid.

The Commission took this position on account of the very specific factual and procedural circumstances of this case.

(92) In particular, in the second extension, in spite of the fact that the guidelines including the ban on aid to a new company were already in force, the Commission reiterated its position that the compatibility of the aid proposed under the privatisation arrangements, including the restructuring aid to NewCo, was to be assessed together with the aid previously granted, taking into account the characteristics of the restructuring programme that the purchaser of the ongoing business of BWE had presented ([11]).

(93) In addition, the Commission also considered that any compensation for the potential undue effects of the aid received in the past by BWE or proposed under the privatisation arrangements was to be the responsibility of the ongoing business of BWE. In particular, in recital 16 of its decision, the Commission stated:

'The Commission must also note at this point of the assessment that the artificial transfer to NewCo of the ongoing activities of BWE, which will remain as a shell company with its outstanding debts for liquidation purposes only, should not be used by the Spanish authorities to circumvent and escape the full application of the State aid rules. Consequently, NewCo will be

([10]) See recital 73.
([11]) See recital 74.

considered to be liable for any recovery order the Commission might decide in respect of aid covered by the original Article 88(2) procedure and its first extension which identified BWE at that moment as its beneficiary. The assessment of the compatibility of this aid cannot be detached from that of the new aid measures, all of them having been designed to assist the ongoing business to be transferred to NewCo.'

h) **Compliance with the general conditions for the authorisation of restructuring aid**

(94) The Commission considers that restructuring aid contributes to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest within the meaning of Article 87(3)(c) of the Treaty where it fulfils the compatibility conditions set out in the guidelines on state aid for rescuing and restructuring firms in difficulty. In particular, the Commission may authorise restructuring aid only if the following strict criteria are met:

(i) restoration of viability;

(ii) aid limited to the minimum;

(iii) avoidance of undue distortions of competition, and

(iv) significant contribution from the beneficiary.

i) *Restoration of viability*

(95) According to the 1999 guidelines [12], the aid must be linked to the implementation by the beneficiary of a restructuring plan based on realistic assumptions and capable of restoring viability within a reasonable timescale.

(96) The purchaser selected by the Spanish authorities to take over the business of BWE is one of the leading engineering and capital goods supplier firms in the world. Babcock Borsig AG (BB) has annual sales of about EUR 7 500 million and employs more than 44 000 people. Its shareholders provide this group with a sound financial base. Preussag AG, one of the largest industrial and services groups in Germany, owns 33 % of BB's capital. A further 10 % shareholding is in the hands of Westdeutsche Landesbank, which also owns 30 % of Preussag. The power generation and environmental equipment business is developed within the Babcock Borsig group by its subsidiary Babcock Borsig Power GmbH (BBP). Following the acquisition of its former competitors, Steinmüller (Germany), Austrian Energy (Austria) and the NEM group (the Netherlands), BBP has become the fifth largest supplier of generation and environmental equipment in the world after ABB, General Electric, Siemens/Westinghouse and MHI. Its annual sales amount to around EUR 2 500 million and it employs around 10 000 people.

(97) Following its purchase by BB, NewCo, renamed Babcock Borsig Power España (BBPE) and backed by the financial and technological strength of its parent group, will progressively regain customer confidence. According to the Industrial and Business Plan prepared by BB [13], NewCo's order book will grow from EUR 150 million during the first year to a level in a typical year of EUR 250 million from the third year after privatisation. Sales will also gradually develop over the restructuring period from EUR 65 million during the first year to reach the target volume of EUR 250 million four years after privatisation. This will allow NewCo/BBPE to break even from the third year of operations and restore its financial ratios within a reasonable timescale.

(98) NewCo's restructuring plan is based on a thorough assessment of its positioning in the sector in which it will operate. Its forecasts are based on realistic assumptions and are reasonably attainable. They are based on a drastic and immediate scaling-down of the existing business of BWE that will substantially reduce production capacity and consequently former fixed costs. Another essential target in the short term is commercial. To become viable, NewCo/BBPE must stabilise the moderate and diminishing position that BWE has in the Spanish market (8 %) and continue to develop its presence in South America and North Africa. The integration of NewCo within BB does not appear an expansionary project since it will redistribute production within the Babcock Borsig Power group that will now serve Spain through NewCo, freeing production capacity to serve other non-European markets. The industrial concept designed by BB for NewCo/BBPE aims at providing NewCo with the technology offered by its parent group in order to address the new heat recovery steam generators segment and to achieve an attractive positioning in this market which is currently emerging in Spain.

(99) Apart from technological support, the parent group will provide NewCo/BBPE with the financial means required to face up to the difficulties inherent in its restructuring and become viable. In particular, BB has undertaken in the privatisation arrangements to make any cash contributions that may be necessary for NewCo to maintain, at all times, over a five-year period the level of equity required for developing the restructuring programme. The arrangements provide that the minimum equity level to be maintained in NewCo/BBPE shall be EUR 20 million.

(100) The Commission accordingly takes the view that the restructuring plan for BWE/NewCo satisfies the viability criterion.

[12] See recital 31 to 34.

[13] See recital 51 and 52.

ii) *Aid limited to the minimum*

(101) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken ([14]).

(102) The open, transparent and unconditional tender procedure followed by the Spanish authorities for selling BWE has ensured that the aid proposed under the privatisation arrangements is the minimum cost that could be incurred by the Spanish State for restructuring BWE. The information submitted by the Spanish authorities concerning the tender process demonstrates that all companies that might have had an interest in buying BWE were given the opportunity to bid and that BWE was sold to the highest bidder.

(103) The Commission has also verified that the 1997 and 1999 capital injections prior to the privatisation arrangements have covered or will cover no more costs than those related to a series of drastic cutbacks in the BWE workforce without which viability would not be restored.

(104) It should lastly be noted in this respect that a large proportion of the aid under examination in this case is intended to cover the social costs of restructuring. Of the EUR 748,56 million that the Spanish State will spend from 1997 to assist the restructuring, EUR 306,5 million (40,9 %) has basically financed early retirement schemes ([15]).

(105) As set out in the 1999 guidelines ([16]), the Commission has a positive approach to aid covering the social costs of restructuring because it brings economic benefits above and beyond the interests of the firm concerned, in particular in respect of the workers affected by the restructuring measures. This aid should be disregarded for the purposes of determining the extent of any measures that should be adopted for avoiding undue distortions of competition ([17]).

iii) *Avoidance of undue distortions of competition*

(106) When assessing the potential compatibility of restructuring aid, the Commission must carefully examine whether it is liable to produce adverse effects on competitors ([18]).

This examination must consider any potential inadmissible effects of the aid measures both individually and in overall terms. Where appropriate, the Commission may impose measures to mitigate as far as possible potential undue effects of the aid on competitors.

Effects of the individual aid measures

(107) The sale of NewCo to the highest bidder in an open, transparent and unconditional tender procedure has ensured that the aid granted in that framework is limited to the minimum required to make the privatisation and restructuring possible. However, such a procedure does not ensure that the aid does not assist measures with undue effects when examined individually.

(108) Apart from the capital injections into BWE totalling EUR 366,6 million (44,2 % of the overall aid under assessment) ([19]) that have basically covered or will cover the social costs of the restructuring, the Spanish authorities intend to spend EUR 258,5 million (31,1 %) to cover the liquidation deficit of BWE and contingencies related to past contracts. Such aid, intended to offset the past financial burden of BWE, will be paid either to BWE in liquidation, which will be a shell company without operations, or to NewCo on provision of proof of losses originating in past contracts. In these circumstances, this individual aid measure does not appear liable to produce undue collateral effects on competitors.

(109) In addition, grants of EUR 110 million (13,3 %) will be paid to NewCo to partly finance the working capital required to start operations (EUR 10 million) and to offset its negative operating cash flow during the first three years of operations (EUR 100 million).

In order to prevent this aid measure having undue effects, its effective payment should not exceed the level of negative operating cash flows actually recorded by NewCo. Consequently, the Commission considers it necessary to make payment of this aid conditional on the provision by NewCo of proof that the anticipated negative cash flows have been actually recorded.

(110) Lastly, the privatisation arrangements provide that the Spanish authorities are to pay EUR 95 million (11,4 %) in grants to assist investments to be made by NewCo.

([14]) See points 40 and 41 of the 1999 guidelines.
([15]) See Table 7 in recital 128.
([16]) See points 56 to 63 of the 1999 guidelines.
([17]) See point 62 of the 1999 guidelines.
([18]) See points 35 to 39 of the 1999 guidelines.
([19]) See Table 3 in recital 53.

(111) Table 4 below shows the five-year Investment Plan amounting to EUR 135,5 million that BB has undertaken to carry out under the privatisation contract, as finally agreed between the parties, broken down by investment objective:

Table 4

Objective	Budget (EUR million)
I. **Business relaunch** (all items under this heading are expenses except those marked with *, which will be entered in NewCo's balance sheet)	23,5
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
II. **Information technology**	19,5
[...]	[...]
[...]	[...]
[...]	[...]
III. **Real estate and machinery**	43,5
[...]	[...]
[...]	[...]
[...]	[...]
IV. **Other investments**	32,5
[...]	[...]
Total	135,5

(112) A detailed assessment of the Investment Plan indicates that the assisted expenditure under the 'Business relaunch', 'Information technology' and 'Real estate and machinery' headings is basically intended to restructure NewCo's industrial base. However, the EUR 32,5 million expenditure under the 'Other investments' heading includes financial investments that NewCo intends to make in equity to create joint ventures through which it intends to conclude the project contracts that will form its future turnover.

(113) In the capital goods sector, the turnkey project business is one of the most dynamic subsectors and one in which NewCo intends to generate 32 % of its expected turnover. For administering these projects, contractors normally create joint ventures that carry out multiple functions over the various phases of the project: negotiations with potential customers, bidding, placing of orders, financing of the construction, guarantee period, and in some cases, depending on the order type, the maintenance and operation of the project which is the object of the contract. These joint ventures, which may take different corporate forms (temporary consortia, commercial interest groupings, etc.), are normally established and controlled by the project's main contractor and may count on the participation of suppliers and subcontractors.

(114) Unlike the other aided items in the Investment Plan, the expenditure of NewCo in equity of joint ventures is a disbursement very close to the market. The joint ventures in question form part of the commercial policy of the company and are designed to acquire business and administer the projects won. Aid granted by the Spanish State to finance these investments would give NewCo an undue commercial advantage over its competitors since this aid could easily be used by NewCo to undercut bids made by its competitors and exclude competition.

(115) Accordingly, the Commission cannot authorise the aid proposed under the privatisation contract for investments in venture capital in view of the very high risk that it would create a serious distortion of competition.

(116) The privatisation contract provides that grants amounting to EUR 95 million will be awarded in respect of the EUR 135,5 million investments scheduled in the Investment Plan. However, this commitment is made globally and the amount of aid corresponding to each of the items in the investment plan is not specified.

The Commission must therefore proceed to calculate the aid corresponding to the investments in venture capital on the basis of the following assumptions.

(117) In this case, the aid to a specific investment item in the Plan cannot be calculated in proportion to its budget. Such an approach would implicitly assume that the total aid is distributed evenly amongst all the items; it would, however, penalise certain items included in the Investment Plan, like training expenditure, for which the Commission normally allows comparatively higher aid intensities than for investments.

(118) Under Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid ([20]), the exempted intensity for aid for general training under schemes for large firms established in areas eligible for regional aid pursuant to Article 82(3)(c), such as the Basque Country, is 55 %. The 'Business relaunch' heading of the Investment Plan includes general training measures totalling EUR […] million in the fields of Technology implementation, Project management, Certification and Language. Training constitutes a decisive element for the success of the restructuring in view of the special needs for improvement and updating of the skills of BWE's workforce. The Commission therefore considers it reasonable in this case to accept the financing of the costs of the abovementioned general training measures for the 650 workers that NewCo will re-employ at 100 % in gross terms for the purposes of calculating the incompatible aid.

(119) The Investment Plan also provides for expenditure of EUR […] million on measures aimed at regaining customer confidence. These include information sessions and workshops with workers, management, suppliers and subcontractors in which the Babcock Borsig group, its products and technology will be presented. They also include an advertising campaign in the specialised press presenting the new company and its projects. The Commission considers that these measures constitute a prerequisite for the success of the restructuring and can, therefore, also accept that they are eligible for aid at 100 % in gross terms without producing undue effects on competition.

(120) The remaining measures in the Investment Plan totalling EUR […] million (= […] − […]) constitute normal investments that will be entered in NewCo's balance sheet. Consequently, the Commission considers that the remaining proposed aid of EUR 78,5 million (= […] − […]) should be distributed evenly amongst them in order to calculate the aid corresponding to the EUR 32,5 million investment in joint ventures.

(121) On the above assumptions, the incompatible aid to venture capital amounts to EUR 21,44 million, which the Spanish authorities should refrain from paying to NewCo.

([20]) OJ L 10, 13.1.2001, p. 20.

Overall effect of the assisted restructuring

(122) Table 5 below summarises the evolution of BWE/NewCo's capacity over the restructuring process assisted by the Spanish State:

Table 5

	As of 31.12.1996	After 1997 workforce reduction	Reduction compared with 31.12.1996	NewCo after completion of restructuring	Reduction compared with 31.12.1996
Direct workers	[...]	[...]		[...]	
Direct employees	[...]	[...]		[...]	
Total direct jobs	[...]	[...]		[...]	
Workshop capacity	[...]	[...]	[...] %	[...]	[...] %
Engineering capacity	[...]	[...]	[...] %	[...]	[...] %
Total capacity (hours)	[...]	[...]	[...] %	[...]	[...] %
Indirect jobs (workers + structure + engineers)	[...]	[...]		[...]	
Total jobs	[...]	[...]	[...] %	[...]	[...] %

(123) The workforce reduction and the accompanying industrial measures implemented at BWE in 1997 produced a substantial reduction in its capacity. When compared with the situation as of the end of 1996, these measures reduced its workforce by 27 % and its production capacity by 31 %. For its part, the industrial concept that BB will implement within NewCo will involve a further reduction in BWE's workforce and capacity by 41 % and 20 % respectively.

In overall terms, after completion of its Industrial Plan, NewCo will be 57 % smaller than BWE in terms of employment and 45 % smaller in terms of production capacity.

(124) The above figures reflect the elimination of idle capacity and the abandonment of loss-making activities in the following fields: desalination, water treatment, equipment for the steel sector, piping, gearing, cranes, valve components, high-pressure vessels, heat exchangers, pyro-tubular boilers, medium and low pressure liquid and gas containers, metal structures, light boilers, airport equipment, etc. As a result, a workshop area of 49 700 m^2 will be abandoned and the relevant machinery and equipment will be either scrapped or sold.

(125) NewCo's market presence will also be lower than that of BWE before restructuring. Table 6 below shows the evolution of BWE's workforce and sales and the forecast turnover of NewCo over its five-year Industrial Plan:

Table 6

Year	1994	1995	1996	1997	1998	1999	1	2	3	4	5
Income (EUR million)	332	384	300	201	189	152	100	[...]	[...]	[...]	250
Workforce	1 520	1 503	1 516	1 329	1 187	1 119	650	650	650	650	650

(126) Accordingly, the Commission finds that the proposed restructuring of BWE/NewCo involves a substantial reduction of capacity and a limitation of market presence that will mitigate the adverse effects of the aid on competitors. The Commission therefore considers that there is no need to impose further specific measures in this respect.

iv) *Significant contribution from the beneficiary*

(127) Lastly, in accordance with the rescue and restructuring aid guidelines, the aid beneficiary and its purchaser are expected to make a significant contribution to the restructuring plan from their own resources ([21]).

(128) Table 7 below shows the cost of the restructuring measures that have been or will be necessary to restore BWE's business viability. It also shows the respective contributions that both the Spanish State/SEPI and Babcock Borsig/NewCo will make to finance these measures.

Table 7

Measures	Cost (EUR million)	Spanish State	NewCo/BB
Workforce reductions	306,5	306,5	
Initial funds	55	10	45
Negative cash flows	102	100	2
Investments	135,5	95 – 21,44 = 73,56	40,5 + 21,44 = 61,94
Liquidation costs	210,4	210,4	
Contracts	48,1	48,1	
Technology	40,4		40,4
Central services	17,3		17,3
Creation of the Regional Competence Centre	20		20
Total	935,2	748,56	186,64 (19,96 %)

(129) The first row of Table 7 represents the costs of the workforce reductions financed by the 1997 and 1999 capital injections totalling ESP 51 000 million (EUR 306,5 million).

(130) NewCo requires initial funds of EUR 55 million. Under the privatisation arrangements, BB will pay EUR 45 million for the shares in NewCo. The Spanish State will supplement this amount with a further EUR 10 million that it will make over to NewCo as initial funds ([22]).

(131) NewCo will record a total negative cash flow of EUR 102 million during the first three years of operations that will be covered by the Spanish State by means of EUR 100 million in grants committed by SEPI under the privatisation arrangements.

(132) The Industrial Plan for NewCo provides for a minimum of EUR 135,5 million in investments, of which EUR 95 million would be financed by grants from the Spanish State and EUR 40,5 million by Babcock Borsig. However, the present Decision prohibits the grant of EUR 21,44 million corresponding to the aid to investments in venture capital. This amount should therefore be deducted from the state contribution and added to the costs that BB will necessarily have to finance. It is to be noted that the investments in this field are of vital importance for NewCo since it is the channel through which it intends to generate its future turnover in its target market segment of turnkey projects.

([21]) See point 40 of the 1999 guidelines.
([22]) See recital 60.

(133) The Spanish State will wholly finance any deficit in the liquidation of BWE after the transfer to NewCo of the selected assets and 650 workers. The estimated deficit excluding the dismissal of the remaining workers already computed above is EUR 210,4 million.

(134) The Spanish State will also finance any final loss under the contracts transferred to NewCo, at an initially estimated cost of EUR 48 million ([23]).

(135) Under the heading of technology, the table reflects the estimated value in terms of licences and royalties of the transfer of technology which, according to the privatisation arrangements, Babcock Borsig will have to make available to NewCo freely, at least during the first five years of operations, and which will replace contracts with other groups that have hitherto provided the technological knowhow for BWE's production ([24]).

(136) In addition, during the same five-year period the central headquarters of BB in Germany will provide free services to NewCo, at an estimated cost to itself of EUR 17,3 million. Lastly, the creation of the Regional Competence Centre in Spain will require investments in NewCo of EUR 20 million in addition to those originally committed under the Investment Plan.

(137) The above commitments mean that, in overall terms, the restructuring of BWE's activities has already required or will require funds totalling EUR 935,2 million to be invested in BWE/NewCo, of which EUR 748,56 million have been or will be borne by the Spanish State and EUR 186,64 million by Babcock Borsig/NewCo. In short, Babcock Borsig will bear 19,96 % of the costs of restructuring BWE/NewCo.

(138) On top of this, Babcock Borsig has undertaken under the privatisation arrangements to make any contribution in cash that may be necessary for NewCo to maintain at all times the level of equity required for the development of the Industrial Plan, it being understood that the minimum level of NewCo's equity will be EUR 20 million, which equals its share capital.

(139) The Commission therefore takes the view that NewCo and its purchaser, BB, have assumed the risk of the restructuring and will make a significant contribution to it from their own resources.

([23]) The table does not include any cost linked to contingencies in the environmental, labour, tax and social fields, which have been limited to EUR 18 million because no disbursements are expected to be made under this heading.

([24]) The estimate corresponds to the usual market price of 5 % of the expected turnover during the first five years of operations.

VII. **CONCLUSION**

(140) Accordingly, in view of the foregoing considerations, the Commission finds that Spain should refrain from paying NewCo a grant of EUR 21,4 million corresponding to the aid for investment in venture capital as this aid would distort competition and trade to an extent contrary to the common interest,

HAS ADOPTED THIS DECISION:

Article 1

The ESP 10 000 million (EUR 60,1 million) increase in the capital of Babcock Wilcox España SA carried out by TENEO in 1994 constitutes existing aid within the meaning of Article 88(1) of the Treaty.

Article 2

The increases in the capital of Babcock Wilcox España SA of ESP 10 000 million (EUR 60,1 million) and ESP 41 000 million (EUR 246,4 million) decided by SEPI in 1997 and 1999 respectively constitute aid within the meaning of Article 87(1) of the Treaty. Both increases were unlawfully granted in breach of Article 88(3)(c) of the Treaty, except for a sum of ESP 16 725 million (EUR 100,52 million) of the latter increase which has not yet been disbursed.

The said aid nevertheless meets the conditions for exemption under Article 87(3)(c) of the Treaty, as set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty, and is therefore compatible with the common market.

Article 3

The measures which Spain proposes to implement under the arrangements for privatising Babcock Wilcox España SA, consisting of:

(a) cash injections into NewCo amounting to EUR 55 million;

(b) the payment to NewCo of EUR 100 million for the costs of adapting the activities transferred to it;

(c) the payment to NewCo of EUR 95 million for investments and training to be carried out according to the Investment Plan presented by Babcock Borsig;

(d) the coverage of any ultimate loss under contracts transferred to NewCo, at an estimated cost of ESP 8 000 million (EUR 48,1 million);

(e) the coverage up to a maximum of EUR 18 million of any cost incurred through claims against NewCo for any harm or economic damage resulting from events occurring prior to the sale in relation to environmental, labour, tax and social security issues and obligations arising from pension plans, and

(f) the coverage of the deficit in the liquidation of Babcock Wilcox España SA, at an estimated cost of ESP 35 000 million (EUR 210,4 million),

constitute aid within the meaning of Article 87(1) of the Treaty.

The aid measures under points (a), (d), (e) and (f), the aid measure under point (b) up to the limit of the effective negative cash flows actually recorded by NewCo during the first three years of operations, and the aid measure under point (c) up to a maximum amount of EUR 73,56 million meet the conditions for exemption under Article 87(3)(c) of the Treaty, as set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty, and are therefore compatible with the common market.

Article 4

The aid amounting to EUR 100 million, referred to in Article 3(b), for the costs of adapting the activities transferred to NewCo shall be paid only on submission by the beneficiary of proof that negative operating cash flows have actually been recorded at the end of each of the first three years of operations.

Article 5

The aid proposed under the privatisation arrangements for investments by NewCo in venture capital, amounting to EUR 21,44 million, does not meet any of the conditions for exemption under Article 87(2) or (3) of the Treaty. It is therefore incompatible with the common market.

Accordingly, this aid may not be implemented and Spain shall refrain from paying the said amount.

Article 6

The Industrial Plan presented to the Commission must fully be implemented.

Spain shall submit to the Commission annual reports giving all the information the Commission needs in order to be able to monitor the implementation of the Industrial Plan in accordance with point 45 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty. The first of these reports shall be submitted not later than six months after the date of this Decision.

Article 7

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

Article 8

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 3 July 2001.

For the Commission

Mario MONTI

Member of the Commission