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Legislation

Contents

I Acts whose publication is obligatory

.....

II Acts whose publication is not obligatory

Commission

2002/935/EC:

- ★ **Commission Decision of 14 May 2002 on the State aid granted to Grupo de Empresas Álvarez** (notified under document number C(2002) 1805) ⁽¹⁾ 1

2002/936/EC:

- ★ **Commission Decision of 19 June 2002 on State aid which Spain is planning to grant to BBE and BBG for the construction of a power and heat supply station (Bahía de Bizcaia Electricidad – BBE) and a regasification plant (Bahía de Bizcaia Gas – BBG) in the port of Bilbao** (notified under document number C(2002) 2146) ⁽¹⁾ ... 10

2002/937/EC:

- ★ **Commission Decision of 10 July 2002 on the aid scheme implemented by Finland for Åland Islands captive insurance companies** (notified under document number C(2002) 2410) ⁽¹⁾ 22

2002/938/ECSC:

- ★ **Commission Decision of 17 July 2002 on the State aid which Italy is planning to implement for Acciaierie di Sicilia SpA** (notified under document number C(2002) 2594) ⁽¹⁾ 30

⁽¹⁾ Text with EEA relevance

Contents (continued)

2002/939/EC:

★ Commission Decision of 2 October 2002 amending Decision 2002/195/EC on the aid scheme introduced by Law No 81 of the Region of Sicily of 7 November 1995 (<i>notified under document number C(2002) 3579</i>)	32
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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 May 2002

on the State aid granted to Grupo de Empresas Álvarez

(notified under document number C(2002) 1805)

(Only Spanish text is authentic)

(Text with EEA relevance)

(2002/935/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments ⁽¹⁾ pursuant to Article 88(2) of the EC Treaty and Article 6(1) of Council Regulation (EC) No 659/1999 ⁽²⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 15 July 1997 the Commission adopted Decision 98/364/EC on the State aid granted to Grupo de Empresas Álvarez (GEA) ⁽³⁾ (hereinafter the Decision), notified under number C(1997)2615, authorising restructuring aid for GEA, a Spanish manufacturer of porcelain and china in Vigo (Galicia).

(2) The positive assessment was made on the basis of a restructuring plan that provided for drastic capacity

reductions plus an undertaking from the Spanish authorities to refrain from granting further State aid to GEA, including its wholly-owned subsidiary Vidrios Automáticos del Norte (Vanosa). The last recital of the decision reads as follows:

'The Spanish authorities will be informed accordingly that any new State aid in favour of this company will be considered incompatible with the common market and at odds with the undertaking given and it will consequently have repercussions on the aid being approved by this Decision.'

(3) Article 1(1) of the Decision states that a number of measures constitute unlawful State aid. The measures:

'[...] comply, however, with the Community guidelines on State aid for rescuing and restructuring firms in difficulty and are therefore compatible with the common market under Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement, on condition that the Spanish authorities refrain, as they undertook in their letter of 22 May 1997, from granting any new aid to the company in the future and that they fully implement the agreed restructuring plan.'

(4) The Decision also required the Spanish authorities to submit a series of reports to the Commission to enable the latter to check compliance with the restructuring plan and that the Spanish authorities were refraining from granting further aid to the firm.

⁽¹⁾ OJ C 336, 30.11.2001, p. 6.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ OJ L 164, 9.6.1998, p. 30.

(5) By letter dated 21 May 1999 the Commission acknowledged receipt of the second report on the implementation of the restructuring plan and informed Spain that 'on the basis of the information, figures and justifications contained in the report, the Commission had not intended to reopen [this file] since the basic lines of the decision are being complied with'. The letter also indicated: 'Nevertheless, in particular taking into account that GEA continues to be loss making, I would like to remind you of your authorities' commitment not to grant any additional State aid to that firm anymore.'

(6) The report did not contain any indication of the fact that, as will be shown below, GEA and Vanosa had systematically been failing to pay taxes and social security contributions since 1997.

(7) Following allegations made by a competitor (hereinafter Complainant 1) that Spain had waived claims for a total amount of ESP 17 billion, and in view of the fact that Spain had not submitted the reports for 1999 in time, the Commission informed Spain on 24 September 2000 that it had serious doubts as to whether its Decision of 15 July 1997 was being complied with.

(8) By letters of 5 October, 7 November and 14 November 2000 Spain sent the requested report and informed the Commission that GEA had not received any fresh aid. It also certified that Spain had not waived a claim for ESP 17 billion.

(9) By letter dated 9 April 2001 the Commission received a new complaint (hereinafter Complainant 2).

(10) By letter dated 3 May 2001 a further request for information was sent to Spain.

(11) By letters dated 15 May, 16 May, 31 May and 12 June 2001 Complainant 1 submitted further allegations.

(12) By letter received on 29 June 2001, Complainant 2 submitted evidence supporting their allegations that GEA and its subsidiary Vanosa had not paid social security contributions between 1997 and at least January 2001.

(13) By letter received on 5 July 2001 Spain partially confirmed the information given by Complainant 2.

(14) On 19 September 2001 the Commission decided to initiate proceedings under Article 88(2) of the Treaty in respect of the aid. Spain was informed by letter on the same day. After asking for more time to reply, Spain replied by letter that reached the Commission on 4 December 2001.

(15) The publication of that letter in the *Official Journal of the European Communities* did not give rise to any comments from third parties.

II. DESCRIPTION

II.1 The complaints

(16) According to the complainants, GEA and other related companies failed to pay taxes and social security contributions between 1997 and at least January 2001.

(17) Complainant 1 also raises concerns over the pricing policy applied by the firm: GEA and its related companies are distorting competition on the relevant market by selling their products at prices that are so low they can be explained only by the presence of State aid.

(18) Complainant 2 submitted several certificates issued by the Tesorería General de la Seguridad Social showing the months during which GEA and one of its related companies had not paid any social security contributions since (at least as regards GEA) 1992. Moreover, Complainant 2 stated that the public creditors had agreed to waive 98 % of its claims on Vanosa under a creditor's agreement.

II.2 The aid recipient

(19) GEA manufactures and sells tableware made of porcelain, earthenware and glass; it also produces bottles. GEA was in the past one of the largest Spanish tableware manufacturers. In the period 1993 to 1997, GEA's market share amounted to an average of 11,6 % on the Spanish market and 0,64 % on the EU market. At the time, GEA had a workforce of 1 029 persons and an annual turnover of some ESP 2 500 million in 1995 and 1996.

(20) On 2 November 1997 GEA and Vanosa filed for bankruptcy with total liabilities of ESP 2 994 million. According to the latest report sent by Spain, the workforce was reduced to 715 in 1998, with operating losses amounting to ESP 2 151 million.

- (21) The group is located in Vigo, in the province of Pontevedra, Galicia, a Spanish region where the shipping, fishing and car industries are dominant and which, owing to the problems these industries are facing, is experiencing a serious economic crisis and high unemployment. The region is classified as an Objective 1 zone and is eligible for regional aid under Article 87(3)(a). Until June 1991, GEA was wholly owned by INI, a Spanish public holding, at which time INI decided to privatise the enterprise.
- (22) GEA is the sole owner of Vanosa, a subsidiary it set up in 1993. Vanosa is present in the glass packaging sector. In 1999, Vanosa achieved a turnover of ESP 1 293 million, of which 5 % in the other Member States, and incurred losses of ESP 119 million. Vanosa employed 116 workers in 1999. It is located in the same assisted area as GEA.

II.3 The market

- (23) There is a brisk trade in tableware between Spain and other Member States. According to the information provided by Eurostat, between January and October 1995 Spain exported 8 546 tonnes of tableware products worth EUR 326 million and, between January and September 1995, imported 7 844 tonnes worth EUR 433 million. Spain's share of the overall intra-Community trade in tableware goods stands at roughly 3 %. Although GEA is not one of the EU's major producers of tableware, it is present in this market.
- (24) Moreover, there is also considerable overcapacity in the porcelain industry. Production and consumption registered continuing growth between 1984 and 1991, but contracted during 1992/1993. The recovery expected for 1994 did not happen. The trade balance in the last years was positive, but the share of imports increased markedly, in particular for household china. Growth in exports is not sufficient to offset the increasing competition in the sector. On the contrary, strong competition and overcapacities are reinforced due to new market entrants from south-east Asia and

the eastern European countries, in particular the Czech Republic and Hungary, which all benefit from preferential trading arrangements with the European Union. In 1999, Spain imported porcelain tableware from other Member States worth EUR 11 902 000 (EUR 10 773 000 in 2000), whilst intra-Community sales reached EUR 374 399 000 (EUR 372 030 000 in 2000).

- (25) The information at the Commission's disposal confirms that at least 20 % of the sales in Spain of china and porcelain for the hotel/restaurant industry are imported products. The remaining 80 % are broken down as follows:

Firm	Market share
CIM	19 %
Porvasal	16 %
GEA	5 %
Bidasoa	24 %
Capeans	7 %
Porcelanas Principado	9 %

- (26) Consequently, GEA's products are in direct competition with the products from Spanish and EU manufacturers.
- (27) Vanosa, for its part, operates in the market for glass packaging.
- (28) With a market share of 13 %, the container glass industry takes third place in the packaging sector, after plastics with 35 % and paperboard with 32 %. The period 1996 to 1998 was affected by a fall in prices. The rapid downward trend in prices continued as a result of competition from other packaging products (PET, cardboard and cans) and the collapse of the Russian market.

- (29) The production of the container glass industry in Europe is as follows:

Container glass industry in Europe

Country	1998 production (in 1 000 tonnes)	Share in %
Germany	4 323	24,4
France	3 785	21,3
Italy	3 047	17,2
United Kingdom	1 852	10,5
Spain	1 816	10,2
Belgium+Denmark+ Ireland+Netherlands	1 501	8,5
Portugal	763	4,3
Austria	306	1,7
Norway+Sweden+Finland	246	1,4
Greece	95	0,5
Community total	17 734	100

Source: FEVE Fédération Européenne du Verre d'Emballage.

- (30) Intra-Community trade in the container glass sector is as follows:

EUR 15 (final results) (in tonnes)

Glass types	Container glass	Flat glass (unworked)	Tableware	Reinforcement fibres	Other (including special glass)	Total
Production	17 649 815	7 499 570	1 071 837	550 249	1 319 281	28 090 752
Apparent Consumption	17 389 493	7 676 306	1 011 837	678 096	1 231 465	27 987 197
Exports Extra-EU	712 479	712 013	403 604	169 404	452 267	2 449 767
Imports Extra-EU	452 157	888 749	343 604	297 251	364 451	2 346 212
Exports Intra-EU	2 160 298	2 696 283	488 974	834 457	1 546 548	7 726 560
Imports Intra-EU	2 430 098	2 358 468	1 438 862	775 317	1 602 601	8 605 346
Exports/Imports	1,58 %	0,80 %	1,18 %	0,57 %	1,24 %	1,04 %
Import penetration	2,56 %	11,85 %	32,06 %	54,0 %	27,63 %	8,35 %
Intra-EU Imports/ Products	13,77 %	31,45 %	134,24 %	140,90 %	121,48 %	30,63 %

Source: Eurostat Combined Nomenclature — CPIV.

- (31) According to Asociación Nacional de Empresas de Fabricación Automática de Envases de Vidrio (the Spanish glass container association), in 1999 container glass imports onto the Spanish market accounted for 8 % of production. France absorbed 98 % of exports. Imports accounted for 12 % of total consumption in the same year. Portugal accounted for 50 % of imports.

III. SPAIN'S RESPONSE TO THE INITIATION OF PROCEEDINGS

- (32) By letter received on 4 December 2001 Spain answered the Commission's letter of 19 September 2001 with the information set out below in recitals 33 to 37.
- (33) No new aid was granted to GEA/Vanosa after the 1997 decision.
- (34) GEA/Vanosa systematically failed to comply with their tax and social security obligations over a period of three years following the adoption of the 1997 decision.
- (35) On 14 April 1998 the tax authorities granted GEA/Vanosa a partial waiver and accepted a payment rescheduling; the waiver was subject to the firms complying both with the rescheduling terms and with their current tax obligations; on 7 February 2001, almost three years after the granting of the waiver, the tax authorities decided to cancel the waiver and the payment rescheduling on the ground that the firm 'had failed to respect its payment obligations'.
- (36) On 6 November 1998 the tax authorities granted Vanosa a partial waiver and accepted a payment rescheduling; the waiver was subject to Vanosa complying both with the rescheduling terms and with its current tax obligations; on 7 February 2001, more than two years after the granting of the waiver, the tax authorities decided to cancel the waiver and the payment rescheduling on the ground that the company 'had failed to respect its payment obligations'.
- (37) The social security and the tax administrations and made every effort to recover the unpaid amounts by ordering the seizure of GEA and Vanosa's real estate; however, a substantial part of the property was mortgaged to private banks.

IV. ASSESSMENT OF THE MEASURES

IV.1. Existence of State aid within the meaning of Article 87(1)

- (38) Article 87(1) of the Treaty establishes the principle that, save as otherwise provided in the Treaty, any aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.
- (39) As indicated in recitals 23 to 31, the products marketed by GEA are traded between the Member States and there is competition between manufacturers. Moreover, GEA is one of Spain's main manufacturers in the sector concerned. Thus any financial support granted by the State to GEA and Vanosa is liable to affect trade and distort competition on the market where their competitors are concerned.
- (40) As stated above in recitals 23 to 31, Vanosa operates in the market for packaging, which is suffering from structural problems. Any aid to Vanosa was thus liable to affect its position on the market in relation to its competitors in the EU.
- (41) According to the information submitted by Spain, GEA/Vanosa systematically failed to pay social security contributions from the adoption of the 1997 decision until at least January 2001, as follows:

GEA	EUR 16,15 million
Vanosa	EUR 3,36 million

- (42) As regards the taxes, no information was submitted on the unpaid taxes despite the fact that the Commission made a specific request. However, according to the documents provided by the Spanish authorities, GEA/Vanosa systematically failed to meet their tax obligations. The amount accumulated over three years must be substantial.
- (43) As regards the social security contributions, it is apparent from the available information that GEA and Vanosa were able for several years to continue trading without meeting their social security obligations.

- (44) The Spanish authorities stated in their letter of 5 July 2001 that the public creditor's behaviour complied with the national laws in force and did not discriminate in favour of the two firms. They also stated that proceedings had been initiated to seize a number of assets. However, they did not state whether other legal means under Spanish law had been applied to stop the continuous and systematic non-payment of social security contributions, such as the separate forced collection procedures which can be adopted with regard to post-suspension debts.
- (45) In line with Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to firms in the Magefesa group and their successors ⁽⁴⁾, upheld by the Court of Justice in its ruling in *Magfesa* ⁽⁵⁾, the persistent and systematic non-payment of social security contributions and of an unknown but substantial amount of taxes, between at least January 1997 and January 2001, constitutes a transfer of public resources to GEA and Vanosa. Such transfer gives them a competitive advantage since — unlike their competitors, — they are not obliged to defray these costs as would ordinarily be the case. The transfer therefore constitutes aid under Article 87(1) of the Treaty.
- (46) The mere fact that the national legislative provisions relied on by the Spanish Government are applicable to any enterprise subject to a court-supervised recovery scheme, or which has contracted debts to social security and the Treasury, is not sufficient for the measures taken by Spain to avoid being categorised as aid under Article 87 of the Treaty.
- (47) The advantage resulting from the persistent and systematic failure to pay taxes and from the persistent and systematic non-payment of social security contributions between at least January 1997 and January 2001 arises from Spain's failing to take measures available under Spanish law (separate forced collection procedures) to prevent firms from continuing to operate without fulfilling their tax and social security obligations.
- (48) The fact that neither the Treasury nor the social security authorities have formally cancelled the debts does not detract from the fact that the firms have been able to operate without meeting their tax and social security obligations. Over the same period, their competitors have not benefited from such financial advantages.
- (49) The Court confirmed in *Magfesa* that a State aid element may arise, under certain circumstances, as a result of certain measures being taken by the State in the context of insolvency procedures. In the context of a suspension of payments procedure, the State does not act as a public investor. Therefore its conduct cannot be compared to the conduct of a private investor laying out capital with a view to realising a profit in the relatively short term. The Commission must rather examine whether the State has acted as a diligent private creditor trying to maximise the chances of recovering its credit. As the Court held in *Tubacex* ⁽⁶⁾, a good test is to compare the behaviour of the State with the behaviour of a private creditor. This was upheld by the Court in *DMT* ⁽⁷⁾ with the ruling that a public creditor must be compared with a hypothetical private creditor which, so far as possible, is in the same position vis-à-vis its debtor as the ONSS (the public creditor) and is seeking to recover the sums owed to it.
- (50) The question arises whether the public creditors, in allowing such persistent non-payment of taxes and social security contributions, behaved in the way they did with a view to maximising their chances of recovering unpaid taxes and social security contributions. The Spanish authorities have not stated or suggested that such was the case. On the contrary, the continued operation of the firms concerned has resulted in a considerable increase in the taxes and social security contributions remaining unpaid, which constitutes a fundamental and substantial deviation from the restructuring plan on which the 1997 decision was based.
- (51) The persistent non-payment automatically reduces the company's assets during the suspension of payment period since the debts resulting from the administration of the assets, such as taxes and social security contributions, have to be paid first, taking priority over debts towards other creditors. Given the size of the public claims, it follows that, after the declaration of the statutory suspension of payments on 19 November 1997 (GEA) and on 14 November 1997 (Vanosa), their continued operation without meeting their tax and social security obligations further damaged the interests of the Treasury and the social security department. According to the information submitted by Spain, GEA is still under statutory suspension of payments whereas Vanosa's suspension of payments was lifted in July 2000. Despite that, the debts arising from the persistent non-payment were still unpaid in July 2001.
- (52) The fact that large amounts of social security contributions and an unknown amount of taxes remained effectively unpaid between at least January 1997 and January 2001 shows that GEA's and Vanosa's continued operation has supported economic activities which would otherwise have been unsustainable under normal market conditions.
- (53) Consequently, nothing in the State's behaviour suggests that it acted as a private creditor trying to recover at

⁽⁴⁾ OJ L 198, 30.7.1999, p. 15.

⁽⁵⁾ Case C-480/98 *Spain v Commission* [2000] ECR I-8717.

⁽⁶⁾ ECR [1999] I-2459.

⁽⁷⁾ ECR [1999] I-3913.

least a marginal amount of unpaid taxes and social contributions. Under the circumstances, and bearing in mind that the original restructuring plan was not being complied with, it is very doubtful that a reasonable creditor would have accepted such high exposure.

(54) The Commission has not been informed of the total amount of tax owed to the Treasury by GEA and Vanosa. In line with Decision 1999/509/EC adopted following the Magefesa case, it is the Spanish Government's responsibility to supply this information.

(55) It must accordingly be concluded that the persistent non-payment of taxes and social security contributions by GEA and Vanosa after the declaration of suspension of payments constitutes aid under Article 87(1) of the Treaty.

IV.2 Compatibility of the aid

(56) The Commission notes that Spain has not invoked any of the exceptions provided for by the Treaty, the latter's position being that the case does not involve State aid.

(57) The Commission considers that the measure in question does not qualify for exemption under Article 87(2) as it is not aid having a social character granted to individual consumers, aid to make good the damage caused by natural disasters or aid to compensate for the economic disadvantages caused by the division of Germany.

(58) The exceptions in Article 87(3)(b) and (d) do not apply either as the aid is not designed to promote the execution of an important project of common European interest or to promote cultural and heritage conservation.

(59) The other exceptions provided for in Article 87(3)(a) and (c) are not applicable in this case.

(60) From the information in its possession, the Commission must conclude that the measure in question constitutes operating aid for GEA and Vanosa. Such aid is incompatible with the common market as it is designed to relieve GEA and Vanosa of the costs they would have had to bear on their own under the normal conditions of their day-to-day operation or activities.

(61) Nonetheless, such aid may be granted exceptionally to firms in regions qualifying for exemption under Article 87(3)(a) provided that it is justified in terms of its contribution to regional development and its nature and that its level is proportional to the handicaps it seeks to alleviate.

(62) The Commission notes that Vigo is located in an Article 87(3)(a) region. However, the Commission considers that the measures in question do not fulfil the conditions for operating aid laid down in the guidelines on national regional aid (cf. paragraphs 4.15 to 4.17 of the guidelines). In particular, the Commission notes that the aid in question is not degressive.

(63) The Commission therefore concludes that the aid does not qualify for exemption under Article 87(3)(a).

(64) The question arises whether the aid aims at restoring the long-term viability of an undertaking in difficulty. In order to assess the funding granted to firms in difficulties the Commission has issued specific guidelines on rescue and restructuring aid ⁽⁸⁾ which are applicable to the measures under scrutiny.

(65) The Commission notes that the aid was granted whilst the aid recipient was implementing the restructuring plan that formed the basis of the 1997 positive decision.

(66) In accordance with the restructuring guidelines, the restructuring plan, the duration of which must be as short as possible, should restore the long-term viability of the firm within a reasonable time and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan, monitored by the Member State concerned.

⁽⁸⁾ OJ C 288, 9.10.1999.

- (67) In addition to the compensatory measures, the Commission may impose any conditions and obligations it considers necessary in order to ensure that the aid does not distort competition to an extent contrary to the common interest. For example, it may require the Member State, as occurred in the present case, to refrain from granting other types of aid to the recipient firm during the restructuring period.
- (68) By letter dated 21 May 1999 the Commission acknowledged receipt of the second report on the implementation of the restructuring plan and informed Spain that 'on the basis of the information, figures and justifications contained in the report, the Commission does not intend to reopen [this file] since the basic lines of the decision are being complied with'. As stated above, the letter added:
- 'Nevertheless, in particular taking into account that GEA continues to be loss making, I would like to remind you of your authorities' commitment not to grant any additional State aid to that firm anymore.'
- (72) Moreover, in order to prevent firms from being unfairly assisted, restructuring aid should be granted once only. If the firm concerned has in the past already received restructuring aid, and where less than 10 years has elapsed since the restructuring period came to an end, the Commission will normally allow further restructuring aid only in exceptional and unforeseeable circumstances for which the firm is not responsible. An unforeseeable circumstance is one that could not be anticipated when the restructuring plan was drawn up. Spain has not suggested that this was the case nor has it submitted any evidence supporting such a claim.
- (73) Under the circumstances, the Commission concludes that the new aid does not meet the conditions for authorisation set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- (74) In view of the foregoing, the Commission considers that the aid is not compatible with the common market.

V. CONCLUSIONS

- (69) However, the report did not contain any indication of the fact that GEA and Vanosa had been systematically failing to pay taxes and social security contributions since 1997.
- (70) Spain did not suggest at any point in the procedure that the aid was a measure adopted under the approved restructuring plan nor did the reports on the implementation of the restructuring plan indicate the existence of the new aid or *a fortiori* that the measure was an additional action needed to implement the restructuring plan correctly. Moreover, the State granted the partial waiver to GEA and Vanosa provided they complied both with the rescheduling terms and with their current tax obligations. However, it was only on 7 February 2001, almost three years after the granting of the waiver, that the tax authorities decided to cancel the waiver and the payment rescheduling on the grounds that the company 'failed entirely to meet its payment obligations'.
- (71) Thus persistent and systematic non-payment of taxes and social security contributions eventually thus led to the cancellation of one of the measures (the waiver) that were crucial to the proper implementation of the restructuring plan. Such systematic failure, permitted by the State, which did not use all the available legal means to stop it, can therefore hardly be regarded as a measure adopted within the framework of the existing restructuring plan.
- (75) The aid in the form of the persistent non-payment of taxes and social security contributions by Grupo de Empresas Alvarez SA and Vanosa following the suspension of payments in November 1997 until January 2001 is incompatible with the common market.
- (76) The Commission concludes that Spain unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty.
- (77) Article 14 of Council Regulation (EC) No 659/1999 stipulates that any unlawful aid which the Commission has deemed to be incompatible with the common market must be the subject of a decision requiring that it be recovered from the beneficiary.
- (78) In order to restore the economic conditions with which the firm would have had to contend if it had not been granted the incompatible aid, the Spanish authorities must take all the necessary steps to withdraw the benefits deriving from the aid and recover them from the beneficiary, in accordance with the Court of Justice Judgment in *España v Commission* ⁽⁹⁾, although the recovery order addressed to Spain does not include interest arising between the date the aid was granted and when it was recovered.

⁽⁹⁾ Case C-480/98, [2000] ECR I-8717.

(79) The aid must be recovered in accordance with the procedures laid down in national law,

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The aid in the form of the persistent non-payment of taxes and social security contributions by Grupo de Empresas Alvarez SA and Vanosa between the dates on which payments were suspended (19 November 1997 for GEA and 14 November 1997 for Vanosa) and January 2001 is incompatible with the common market.

Article 2

1. Spain shall take all the necessary steps to recover from the recipient the aid referred to in Article 1 and unlawfully already made available to the recipient.

Article 3

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

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 14 May 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 19 June 2002

on State aid which Spain is planning to grant to BBE and BBG for the construction of a power and heat supply station (Bahía de Bizcaia Electricidad – BBE) and a regasification plant (Bahía de Bizcaia Gas – BBG) in the port of Bilbao

(notified under document number C(2002) 2146)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/936/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 called on interested parties to submit their comments pursuant to the said Article ⁽¹⁾ and having regard to their comments,

Whereas:

(4) By letter dated 14 September 2001, registered on the same day, BBE and BBG sent their comments to the Commission.

(5) By letter dated 25 October 2001, registered on 30 October 2001, the Spanish authorities sent their comments to the Commission.

(6) By letter dated 19 December 2001, the Commission asked the Spanish authorities for additional information. This was sent by letter dated 1 February 2002, registered on 4 February 2002.

1. PROCEDURE

(1) By letter dated 26 January 2001, registered on 29 January 2001, the Spanish Permanent Representation notified, pursuant to Article 88(3) of the Treaty and in accordance with the multisectoral framework on regional aid for large investment projects ⁽²⁾ (the multisectoral framework or the framework), the proposed aid for the construction of a combined cycle thermal power station and a regasification plant in Bilbao. By letter dated 30 March 2001, registered on 4 April 2001, Spain sent additional information to the Commission.

(2) By letter dated 6 June 2001, the Commission informed Spain of its decision to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the proposed aid.

(3) The Commission Decision to initiate 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.

2. DETAILED DESCRIPTION OF THE AID

(7) The notification covers two projects: a combined cycle thermal power station (Bahía de Bizcaia Electricidad), and a regasification plant (Bahía de Bizcaia Gas). The two facilities will be built near the port of Bilbao (Basque Country, Spain). The authority granting the aid is the Basque Government (an autonomous authority). According to the information provided by the Spanish authorities, the proposal is not part of any current regional aid scheme authorised by the Commission. Furthermore, it should be pointed out that the Bizcaia Provincial Council (Diputación Foral de Bizcaia) was intending to grant a tax credit of 45 % of the basis of assessment, amounting to ESP 54 149 million (EUR 325 442 040) for the BBE project and ESP 43 486 million (EUR 261 360 000) for the BBG project. However, the Spanish authorities informed the Commission, by letter dated 23 May 2000, registered on 24 May 2000, that both undertakings had refused the said tax concessions.

(8) The recipient undertakings for the projects are, respectively, the recently formed companies BBE and BBG, of whose capital BP-Amoco, Repsol, Iberdrola and EVE (*Ente Vasco de la Energía*, a public sector undertaking owned by the Basque Government) each hold 25 %. All the shareholders in the new firms can be considered to be large firms.

⁽¹⁾ OJ C 231, 17.8.2001, p. 2.

⁽²⁾ OJ C 107, 7.4.1998, p. 7.

⁽³⁾ See footnote 1.

A. Combined cycle thermal power station (BBE)

- (9) This investment is for the construction of a combined cycle thermal power station of 800 MW, which will use as fuel natural gas supplied by BBG (see recitals 15 to 21), and will produce electricity for the Spanish market (pool).
- (10) The investment project will begin in September 2000. The station should be operational in March 2003.
- (11) The total investment will be EUR 300 035 000 over the period 2000—2003, which represents a total of EUR 282 547 000 discounted to 31 December 2000 ⁽⁴⁾.
- (12) According to the Spanish authorities, the investment will create 33 direct jobs, broken down as follows: two managerial posts (one plant manager and one secretary), 16 operational posts (one manager of operations, five supervisors and ten operatives), 12 maintenance posts (one maintenance manager, nine skilled workers and two operatives) and three engineering posts (one engineering manager and two technicians). There will be a further 13 direct jobs common to both the BBE and BBG projects and assigned on a 50:50 basis between them: two managerial posts (one general manager and one secretary), five administrative posts (one administrative manager and four administrative staff) and six general engineering posts (one engineering manager and five technicians). The total number of direct jobs which the Spanish authorities expect to be created is therefore 39,5 (33 + 6,5).
- (13) The Spanish authorities also anticipate the creation of 23,2 indirect jobs, broken down as follows: security (9,7), cleaning (2,0), unskilled workers (2,0), warranty engineering work on main components (0,2), maintenance of main components (0,7), operational maintenance (subcontractors) (2,6), canteen and services (4,0) and administration (2). This calculation is based on an estimated average of 1 800 working hours per year.
- (14) The aid to the BBE project is to take the form of a non-repayable grant totalling a nominal EUR 30 004 000 gross, payable in several instalments between 2000 and 2003. Payment is conditional on completion of the investment, after inspection by the Basque Government. The total amount of aid discounted to 31 December 2000 works out at EUR 28 255 000, giving an aid intensity of 7,49 % gge and 7,57 % nge.

B. Regasification plant (BBG)

- (15) This investment involves the construction of a liquefied natural gas (LNG) regasification plant. The plant will take delivery of, store and vaporise the LNG. It will produce a total of some 3 000 million Nm³ of natural gas per year, or 9,6 million Nm³ per day. Around 40 % of output is earmarked for the BBE power station. The LNG is to be imported mainly from Trinidad and Tobago and Nigeria and shipped to the plant by two methane carriers which will make the journey regularly.
- (16) The investment project began in September 2000. The plant is scheduled to be put into operation in June 2003.
- (17) The investment will cost a total of EUR 232 116 000 over the period 2000-2003, or a total of EUR 217 392 000 discounted to 31 December 2000 ⁽⁵⁾.
- (18) According to the Spanish authorities, the investment will create 33 direct jobs, broken down as follows: two managerial posts (one plant manager and one secretary), 16 operational posts (one manager of operations, five supervisors and ten operatives), 12 maintenance posts (one maintenance manager, nine skilled workers and two operatives) and three engineering posts (one engineering manager and two technicians). In addition, half the jobs common to both the BBE and BBG projects and assigned to the BBG project must also be counted (see recital 12). The total number of direct jobs which the Spanish authorities expect to be created is therefore 39,5 (33 + 6,5).
- (19) The Spanish authorities also anticipate the creation of 84,05 indirect jobs, broken down as follows: gas transport (50), port services (5,6), mechanical maintenance (3), insulation (1), instrumentation (1), electrical maintenance (2), civil engineering (0,75), painting (2), analysis of plant components (1), security (9,7), cleaning (2,0), unskilled workers (2) and canteen and services (4). This calculation is based on an estimated average of 1 800 working hours per year.
- (20) The aid to the BBG project is to take the form of a non-repayable grant totalling a nominal EUR 23 212 000 gross, payable in several instalments between 2000 and 2003. Payment is conditional on completion of the investment, after inspection by the

⁽⁴⁾ In the text below, reference and discount rate: 5,7 %; tax rate: 32,5 %. Straight-line depreciation over a period of 20 years.

⁽⁵⁾ In the text below, reference and discount rate: 5,7 %; tax rate: 32,5 %. Straight-line depreciation over a period of 20 years.

Basque Government. This gives a total amount of aid discounted to 31 December 2000 of EUR 21 740 000, giving an aid intensity of 9,53 % gge and 7,61 % nge.

- (21) For a more detailed description of the two projects, please consult the decision to initiate the procedure.

3. REASONS FOR INITIATING THE PROCEDURE

- (22) In its decision to initiate the procedure, the Commission expressed doubts over various aspects of the aid project:

- (a) justification for the project from the standpoint of regional development, given that the aid in question is *ad hoc* aid;
- (b) the situation of the electricity market (relevant product market) in Spain (relevant geographic market) for the BBE project, and specifically whether or not it is in decline;
- (c) the justification of certain eligible costs, and in particular the classification of intangible assets as eligible expenditure and the justification for including certain costs under the heading 'buildings';
- (d) the justification for certain jobs presented by the Spanish authorities as indirect jobs created by the project. In particular, the Spanish authorities are requested to explain or justify certain jobs which appear in both projects (security, cleaning, canteen and services), 50 indirect jobs for the transport of gas (BBG) and two indirect jobs in administration (BBE).

- (23) Should the Commission's doubts prove well-founded, the maximum intensities allowed by the multisectoral framework ⁽⁶⁾ for these projects will have to be reviewed.

4. COMMENTS FROM INTERESTED PARTIES

- (24) BBE and BBG, the beneficiaries of the aid, have jointly submitted comments to the Commission. The comments

from BBE/BBG are identical to those of the Spanish authorities which are examined below, although they were submitted before the latter. Consequently, reference will be made below solely to the comments of the Spanish authorities although it is understood that such references also apply to the comments made by BBE/BBG.

5. COMMENTS FROM SPAIN

Regarding the justification of the project from a regional point of view.

- (25) The Spanish authorities feel that this project is of strategic importance with regard to the energy policy of the Basque Country, since it will help guarantee electricity and natural gas supplies to the region.

- (26) As regards electricity, the Spanish authorities have indicated that the electricity produced in the region satisfies only 20 % of demand. The project will also help to reduce the cost of transport of electricity and gas and the loss of energy en route.

- (27) With regard to gas, the Spanish authorities emphasise that the Basque Country is far from the main entry points for gas, even though practically all the gas consumed in the Basque Country is imported. They also point out that the demand forecasts for gas in the Basque Country show a constant increase.

- (28) Furthermore, the Spanish authorities feel that the regional impact of the two projects should be considered jointly, as they are so closely linked, in that the electricity plant would not have been built without the regasification plant and vice versa. In this connection, the Spanish authorities indicate that the electricity plant will consume only 40 % of the gas production of the regasification plant, while the remaining 60 % is destined for the market, thereby helping to improve the supply of gas to the Basque Country.

- (29) The Spanish authorities have submitted a study on the effect of the project on GNP and employment in the region. According to this study, which was carried out by the University of Deusto (University-firm collaboration — Deiker), the contribution of these projects to the GNP of the region would be 0,188 % (BBE) and 0,202 % (BBG), and the projects would help create 39,5 direct jobs, 23,2 indirect jobs and 452,6 spin-off jobs (BBE), and 39,5 direct jobs, 34,05 indirect jobs and 552 spin-off jobs (BBG), i.e., 515,3 jobs from the BBE project and 625,55 jobs from the BBG project.

⁽⁶⁾ The maximum allowable intensity for a large investment project under the multisectoral framework is calculated according to the formula set out in point 3,10 of the framework. It is obtained by multiplying the regional ceiling (R) by the coefficients resulting from the competition factor (T), the capital-labour factor (I) and the regional impact factor (M) ($R \times T \times I \times M$, where the result may not exceed R).

- (30) Finally, the Spanish authorities allude to the construction, as part of this project, of two liquid natural gas transport ships, each at a cost of EUR 210 350 000, which would create 1 000 jobs for one year.

Regarding the situation of the electricity market in Spain

- (31) The Spanish authorities do not share the Commission's view that the electricity market in Spain is in decline. The data on consumption in the period 1995-2000 shows that the market turnover is positive, as illustrated by the table below:

Apparent consumption (*)

Year	Production (GWh)	Imports (GWh)	Exports (GWh)	Consumption (GWw)	Variation (%)
1995	169 094	7 633	3 147	173 581	—
1996	176 510	6 750	5 691	177 569	2,3
1997	189 381	4 597	7 670	186 308	4,9
1998	196 046	8 694	5 562	199 448	7,1
1999	208 258	11 951	6 233	213 976	7,3
2000	223 944	12 265	7 833	228 376	6,7

(*) Source: Spanish Electric Industry Association, UNESA. The differences between apparent consumption and net national consumption are due to self-supply, pumping and losses in transport and distribution.

- (32) Furthermore, according to the provisional data in the 2001 Red Eléctrica de España (Spanish electricity grid) report, there was a 5,4 % increase in demand in 2001 (first 10 months) by comparison with the previous year.
- (33) As regards the evolution of the market in terms of value, the available data also shows, according to the Spanish authorities, that the electricity market is not in decline, as illustrated by the table below:

Value of electricity sold (million ESP) (*)

Year	Basic	Discount	Total	Variation (%)
1995	2 198 876	87 671	2 111 259	—
1996	2 225 438	88 314	2 170 124	2,8
1997	2 262 476	82 414	2 180 062	0,5
1998	2 178 514	71 577	2 106 937	-3,3
1999	2 161 676	60 356	2 101 323	-0,27
2000	2 249 889	58 592	2 191 297	4,28

(*) Source: UNESA.

- (34) The Spanish authorities emphasise in this regard that the decrease in 1997, 1998 and 1999 was due more to the dropping of prices set by the government following the progressive opening up of the electricity market than to a drop in demand.

- (35) Furthermore, the Spanish authorities point out that the project will be profitable because of the reasonable price forecasts and the situation of the electricity market. The firms calculate that at a rate of EUR 0,03/Kwh, the project could produce an internal rate of return of between 8,5 % and 10,5 %. They also point to the existence of several similar projects in Spain, undertaken by Spanish and foreign firms.
- (36) The Spanish authorities also point out that the Spanish electricity market is far from a situation of excess capacity. On the contrary, they estimate that in the absence of new investment, the current generation capability may not be sufficient to satisfy growing demand. Current demand is only being met because coal plants have been brought into service, since hydroelectric plants are too climate-dependent. The Spanish authorities consequently emphasise the need to avoid supply problems like the ones which occurred in California.

Regarding the situation of the market in gas

- (37) The Spanish authorities consider that the market in gas is in expansion. Volume has indeed increased by 12,1 % between 1997 and 2000 ⁽⁷⁾. Value has also increased, as the table below shows:

Value of consumption of natural gas by type of user (*)

(ESP million)

	1993	1994	1995	1996	1997	1998	1999
Domestic – commercial	97 103	102 187	131 743	160 087	171 095	209 358	240 677
Industrial	72 962	91 737	120 194	141 560	183 106	188 078	217 251
Electric plants	615	1 038	1 397	3 859	35 800	11 169	12 355
Total	170 680	194 962	253 334	305 506	390 001	408 605	470 283

(*) Source: BBG.

- (38) The Spanish authorities also note that the estimates for the following years indicate a continuing increase in the demand for natural gas and, in particular, an increase in the demand for natural gas used for the generation of electricity.

Regarding eligible investments

- (39) The Spanish authorities accept the Commission's view on the inappropriateness of classifying part of the costs as 'intangible assets'. Consequently, eligible investments have been modified as follows:

⁽⁷⁾ Source: Eurogas.

BBG project

(EUR 1 000)

	2000	2001	2002	2003	Total
Buildings	12 704	25 983	16 000	3 336	58 023
Equipment	29 014	81 745	46 908	7 272	164 939
Furniture			60	282	342
Spare parts			433	2 145	2 578
Construction fee	175	1 050	1 050	525	2 800
Construction insurance	307	307			614
Construction taxes	2 820				2 820
Total	45 020	109 085	64 451	13 560	232 116

BBE project

(EUR 1 000)

	2000	2001	2002	2003	Total
Buildings	7 563	17 702	9 355	1 391	36 012
Equipment	51 157	131 919	50 051	9 584	242 710
Furniture			517		517
Spare parts			9 454		9 454
Construction fee	98	591	591		1 280
Construction insurance	724	724			1 448
Water supply	10	41	41		92
Electricity substation	501	2 003	2 003		4 507
Construction taxes	4 015				4 015
Total	64 068	152 980	72 012	10 975	300 035

(40) The Spanish authorities explain the various headings as follows:

- buildings: control building, workshops, warehouses and office buildings. Also covers earth moving (levelling) and civil engineering (installations necessary for the operation of the plants),
- equipment: also covers machine assembly,
- furniture: furniture and other equipment for offices and industrial buildings which cannot be considered industrial equipment,

— spare parts: selected spare parts of strategic importance which must be available at the production centre, required by the suppliers of the equipment to guarantee the operation of the plants,

— water supply: since the plant sites have no source of drinking water, construction of a new 7 km pipeline to provide drinking water, mainly for the electricity plant,

— electricity substation: part of the necessary infrastructure for the electricity plant. Its purpose is

to bring the generation voltage (15,4 kW) up to the transport voltage (400 kW),

6. ASSESSMENT OF THE AID

- construction fee: this is the fee for occupation of the publicly owned seafront which must be paid to the Bilbao Port Authority, for the period of construction and operation of the plants,
- construction insurance: covers possible damage to equipment during transport and assembly, plus civil liability,
- construction taxes: local taxes on construction, installations and works.

Regarding the indirect jobs

- (41) The Spanish authorities say that there is no duplication of indirect jobs between the two projects, since the cleaning staff (2), unskilled workers (2), security (9,7) and canteen staff (4) are actually assigned to each of the two projects.
- (42) As regards the jobs defined as 'administration' (BBE), these posts are a consequence of the administrative work generated by the other indirect jobs.
- (43) Finally, the Spanish authorities have agreed not to count as indirect jobs the 50 jobs for the BBG project relating to transport activities (crews for the two methane carriers which supply the gas plant).
- (44) Consequently, the Spanish authorities now consider the number of indirect jobs as 23,2 for the BBE project and 34,05 for the BBG project. They confirm the number of direct jobs (39,5 jobs for each of the two projects), which was not called into question in the decision to initiate the procedure.

Regarding the maximum allowable intensity

- (45) In view of the above, the Spanish authorities conclude that the intensities envisaged by the Basque Government are in line with the limits laid down in the multisectoral framework, taking into account the value attributed to the various parameters provided for in the framework.
- (46) The maximum allowable intensity for the BBE project ($R \times T \times I \times M$) is therefore $20 \times 1 \times 0,6 \times 1,1 = 13,2$ % nge, and for the BBG project $20 \times 1 \times 0,6 \times 1,2 = 14,4$ % nge.

- (47) The grants provided by the Spanish authorities give an advantage to both the beneficiaries, by freeing them from part of the cost of investment they would otherwise bear. As these are two individual projects, it is evident that this advantage is of a selective nature in relation to other firms which would like to make such investments. Moreover, the measures in question could affect intra-Community trade, with particular regard to the progressive opening up of the electricity and gas markets. Finally, the grants are awarded directly by the Basque Government and, as a consequence, should be considered as coming from state resources. They must therefore be considered State aid within the meaning of Article 87(1) of the Treaty.

- (48) Furthermore, the notification submitted by the Spanish authorities provides for a nominal grant of EUR 30 million for the BBE project and EUR 23 200 000 for the BBG project, which is a total of EUR 53 200 000. In these circumstances, in accordance with point 2.1 (ii) of the multisectoral framework, this project falls within the scope of the latter. Moreover, in accordance with the second paragraph of point 7.2 of the multisectoral framework, and taking account the envisaged synergy between the two projects (the two projects would not have been carried out independently of each other, BBE using 40 % of BBG production capacity), the two projects should be considered, as the Spanish authorities have requested, as a single project for the purposes of the application of the multisectoral framework.

- (49) As indicated in recital 22, the Commission expressed doubts over the project. The questions arising from these doubts are examined below.

As regards the regional justification of the project

- (50) As indicated in the decision to initiate the procedure, the Commission has established that the project does not fall within the scope of a Commission-approved aid scheme, and is consequently an ad hoc aid measure. The Spanish authorities have not contested this. The Commission must therefore check, in accordance with the second paragraph of point 2 of the Guidelines on national regional aid ⁽⁸⁾ whether the advantages for the region offset the distortions of competition which the ad hoc aid can cause. The Commission would also point

⁽⁸⁾ OJ C 74, 10.3.1998, p. 9.

out that the whole of the Basque Country is an assisted area, in accordance with Article 87(3)(c) of the Treaty.

be regarded as compensating to a certain extent for the distortion of competition which may result from the aid.

(51) The Commission notes in this regard that, in this case, the provisions of the second paragraph of point 2 of the guidelines on national regional aid have already been largely taken into account through the application to this project of the multisectoral framework on regional aid for large investment projects, which apply to ad hoc aid in accordance with point 3.1 of that instrument and the footnote on page 7. Indeed, in Section 1 of the framework, entitled 'Need for and scope of the measure', point 1.1 provides that '[...] it is important to strike an appropriate balance between three core objectives of EU policy, namely undistorted competition in the internal market, economic and social cohesion and industrial competitiveness', and point 1.2 that '[...] The Commission is therefore introducing this framework [...] with the aim of limiting aid for large-scale projects to a level which avoids as much as possible adverse effects on competition but which at the same time maintains the attraction of the assisted area. [...]'. Nevertheless, in view of the wording of the second paragraph of point 2 of the Guidelines on national regional aid, the Commission considers that a brief analysis is required in addition to that which is provided for by the multisectoral framework.

(55) The BBE project, on the other hand, is a major project which, according to the University of Deusto study carried out by the Spanish authorities, could alone represent 0,188 % of the GNP of the region.

(56) The Commission therefore concluded that, on this point, the doubts it had expressed in its decision to initiate the procedure regarding the justification of the project from a regional development point of view had been resolved, except for the application of the multisectoral framework, which is examined below. Furthermore, the Commission notes that the total current capacity of the Spanish electricity system may sometimes be insufficient at peak times to satisfy demand, as was patently obvious in December 2001, when there were power cuts in Spain, and that the need for new investment in electricity plants to avoid such cuts has been unanimously recognised by all those involved in the Spanish electricity system.

Regarding the situation of the electricity market in Spain

(52) In this regard, the Spanish authorities have indicated firstly that this project will help to improve the Basque Country's level of self-sufficiency in electricity. However, the Commission considers that the objective of self-sufficiency in a particular region, while a legitimate aim, does not in itself meet the requirements of the second paragraph of point 2 of the Guidelines on national regional aid.

(57) In its decision to institute proceedings, the Commission expressed doubts over the possibility that the Spanish electricity market (the relevant geographic market for the BBE project) was in decline, in the light of the available data on the evolution of the market in value terms.

(53) On the other hand, an important point to remember is that the project will help to improve the production and distribution of energy in areas which are currently lacking in this respect.

(58) The data submitted by the Spanish authorities on the evolution of the electricity market in Spain in value terms (see table in recital 33) shows that there was a decrease in the value of electricity consumption in 1997 (increase of only 0,5 % compared with the previous year in which there was an increase of 2,8 %), 1998 (net decrease of 3,3 %) and 1999 (net decrease of 0,27 %). On the other hand, there was an increase of 4,28 % in 2000.

(54) As the Spanish authorities have indicated, the Commission considers that the BBG project will make a decisive contribution to the improvement of the distribution system in the region, in view of the fact that the Basque Country is far from the main entry points for gas in the Iberian Peninsula. It is to be hoped, therefore, that by bringing the point of entry of the gas closer to the consumer, distribution of natural gas in the region will increase and the cost of transport will decrease substantially. The Commission notes in particular in this regard that 60 % of the regasification plant's production is intended for the market. Consequently, the contribution made by the BBG project to the development of the Basque Country can

(59) In the light of these figures, the Commission notes that the apparent consumption of electricity in Spain increases on average by 0,7 % per year, which is more than 10 % lower than the annual average growth rate for the manufacturing sector of the EEA as a whole. Moreover, the increase in 2000 (+ 4,28 %) relates to a single year and the data available to the Commission shows no such increase for 2001. This shows that there is no sharp upward trend within the meaning of point

7,8 of the multisectoral framework. The Spanish electricity market must therefore be considered as being in decline within the meaning of point 7,8 of the framework ⁽⁹⁾.

- (60) Consequently, the Commission concludes that the doubts which it expressed in its decision to initiate the procedure regarding the situation of the Spanish electricity market were well-founded.

Regarding the justification of certain eligible expenditure

- (61) In its decision to initiate the procedure, the Commission expressed doubts regarding the justification of certain eligible expenditure and, in particular, the classification of 'intangible assets' as eligible expenditure and the inclusion of certain expenditure under the heading 'buildings'.
- (62) The Spanish authorities have submitted a new breakdown of eligible expenditure (see recitals 39 and 40), including explanations of the various sections.
- (63) The Spanish authorities quote a total figure of EUR 232 116 000 for the BBG project.
- (64) The Commission notes firstly that the Spanish authorities have removed the 'intangible assets' section, which the Commission had questioned in its decision to initiate the procedure on the grounds that it did not appear to correspond to the definition of such assets as set out in point 4.6 of the Guidelines on national regional aid. The Spanish authorities have explained that the costs included under this heading are actually engineering costs which they have, therefore, included under the heading 'buildings'. The Commission feels that engineering costs form an integral part of construction costs for buildings and can therefore accept the amended section on buildings.
- (65) The Commission also considers that the 'equipment', 'furniture' and 'construction taxes' sections constitute eligible expenditure within the meaning of point 4.5 of the Guidelines on national regional aid.

- (66) However, the Commission is still sceptical that the 'spare parts', 'construction fee' and 'construction insurance' sections constitute eligible expenditure within the meaning of point 4.5 of the Guidelines on national regional aid. Such costs would seem rather to be operating costs. According to the explanations provided by the Spanish authorities, the spare parts are items which must be available to allow the plant to operate (so after construction of the plant), and the construction fee is to be paid to the Bilbao Port Authority both during the construction and operation of the plant. As regards construction insurance, it has not been demonstrated that it should be classified as a fixed asset.

- (67) The Commission therefore considers that the total eligible expenditure figure for the BBG project is EUR 226 124 000, which represents a total of EUR 212 038 000 discounted to 31 December 2000.

- (68) As regards the BBE project, the Spanish authorities quote a total figure of EUR 300 038 000.

- (69) As with the BBG project, the Commission notes that the Spanish authorities have removed the 'intangible assets' section, which the Commission had questioned in its decision to initiate the procedure on the grounds that it did not appear to correspond to the definition of such assets as set out in point 4.6 of the Guidelines on national regional aid. The Spanish authorities explained that the costs included under this heading are actually engineering costs which they have, therefore, included under the heading 'buildings'. The Commission feels that engineering costs form an integral part of construction costs for buildings and can therefore accept the amended section on buildings.

- (70) The Commission also considers that the 'equipment', 'furniture' and 'construction taxes' sections constitute eligible expenditure within the meaning of point 4.5 of the Guidelines on national regional aid.

- (71) However, for the reasons set out in recital 66, the Commission considers that the 'spare parts', 'construction fee' and 'construction insurance' sections are not justified.

- (72) The Commission therefore considers that the total eligible expenditure figure for the BBE project is EUR 287 853 000, which represents a total of EUR 271 490 000 discounted to 31 December 2000.

⁽⁹⁾ The Commission considers that it cannot base its deliberations on the volume figures communicated by the Spanish authorities, since these do not allow a comparison with manufacturing industry as a whole, as required by point 7.8 of the multisectoral framework.

Justification of certain indirect jobs

(73) In its decision to initiate the procedure, the Commission expressed doubts about the justification for certain indirect jobs provided for by the Spanish authorities. In particular, the Commission had established that certain jobs appeared in both projects (jobs relating to security, cleaning, unskilled workers and canteen and other staff). Nor did the Commission consider justified the jobs pertaining to the transport of gas (crews of methane carriers). Finally, the Commission considered that the two jobs for the BBE project relating to 'administration' were not justified.

(74) Firstly, the Commission notes that the Spanish authorities have withdrawn the 50 indirect jobs relating to the transport of gas (BBG project).

(75) The Commission also notes that the Spanish authorities have confirmed that jobs relating to security (9,7 jobs), cleaning (2 jobs), unskilled workers (2 jobs) and cafeteria and other services (4 jobs) are in fact assigned to each project and that there is no duplication. The Commission therefore accepts these jobs.

(76) However, the Commission considers that the jobs relating to administration have not been sufficiently justified by the Spanish authorities. The latter have said only that the jobs are the consequence of the administrative work generated by the other indirect jobs. The Commission is at a loss to see what connection there is between these jobs and the other indirect jobs, nor why the indirect jobs generate this administrative work only for the BBE project and not the BBG project.

(77) In view of the above, the Commission considers that the number of indirect jobs is 21,2 for the BBE project and 34,05 for the BBG project.

Assessment of the maximum allowable intensity

(78) In accordance with point 3.1 of the multisectoral framework, the Commission will determine, using the formula set out in point 3.10 of the framework, the maximum allowable intensity for a notified project. This formula is obtained by multiplying the coefficients

resulting from the competition factor (T), the capital-labour factor (I) and the regional impact factor (M) ($R \times T \times I \times M$, where the result may not exceed R, in accordance with the note in point 3.10).

Maximum regional aid ceiling (R)

(79) According to point 3.1 of the multisectoral framework, the regional aid ceiling is the maximum aid intensity which a large company could obtain in the assisted area concerned within the context of the authorised regional aid system valid at the moment of notification (unless it is ad hoc aid in which case the aid ceiling fixed for the region concerned will be applied). In accordance with the Spanish regional aid map, the maximum aid intensity for the Basque Country, all of which is considered an assisted area under Article 87(c) of the Treaty, is 20 % nge.

The 'competition' factor (T)

(80) As regards the BBE project, as indicated in recital 60, the Commission has concluded that the doubts which it expressed in its decision to initiate the procedure regarding the situation of the Spanish electricity market were well-founded, and considers that this market is in decline within the meaning of point 7.8 of the multisectoral framework. Consequently, a value of 0,75 should be attributed to factor (T).

(81) As regards the BBG project, the Commission had already concluded in its decision to initiate the procedure that the Spanish gas market was neither in a situation of structural overcapacity or decline. Consequently, the value to be attributed to factor (T) is 1,00.

The 'capital-labour' factor (I)

(82) In accordance with recital 72, the total eligible expenditure figure for the BBE project is EUR 287 853 000. The number of direct jobs envisaged by the Spanish authorities is 39,5. The capital-labour factor is therefore 7,297. In these circumstances, a value of 0,6 should be attributed to factor (I), in accordance with point 3.10.2 of the multisectoral framework.

(83) As regards the BBG project, the total eligible expenditure figure for the BBE project is EUR 226 124 000. The number of direct jobs envisaged by the Spanish authorities is 39,5. The capital-labour factor

is therefore 5,725. In these circumstances, a value of 0,6 should be attributed to factor (I), in accordance with point 3.10.2 of the multisectoral framework.

net grant equivalent, the maximum allowable intensity under point 3.1 of the multisectoral framework, as calculated in recital 86.

The 'regional impact' factor (M)

(84) As regards the BBE project, the Commission estimated in recital 77 that this project will result in 21.2 indirect jobs. Taking into account the number of direct jobs (39,5), this gives an average of rate of indirect job creation of 54 % of the figure for direct jobs created by the recipient of the aid. Consequently, the value to be attributed to factor (M) is 1.1 in accordance with point 3.10.3(ii) of the multisectoral framework.

(85) Regarding the BBG project, the Commission estimated in recital 77 that this project will 34,05 indirect jobs. Taking into account the number of direct jobs (39,5), this gives an average of rate of indirect job creation of 86 % of the figure for direct jobs created by the recipient of the aid. Consequently, the value to be attributed to factor (M) is 1,1 in accordance with point 3.10.3(ii) of the multisectoral framework.

Maximum allowable intensity

(86) In view of the above, the maximum allowable intensity for each of the two projects ($R \times T \times I \times M$) is $20 \times 0,75 \times 0,6 \times 1,1 = 9,9$ % nge for the BBE project, and $20 \times 1 \times 0,6 \times 1,1 = 13,2$ % nge for the BBG project, both of which are well below 20 % nge.

(87) For the BBE project, as indicated in recital 72, the amount of eligible expenditure is EUR 287 853 000, which represents a total of EUR 271 490 000 discounted to 31 December 2000. Since the nominal amount of the aid is EUR 30 004 000, with a reference and discount rate of 5,7 % and a tax rate of 32,5 %, the intensity for the BBE project is 7,88 % nge.

(88) As regards the BBG project, as indicated in recital 67, the amount of eligible expenditure is EUR 226 124 000, which represents a total of EUR 212 038 000 discounted to 31 December 2000. Since the nominal amount of the aid is EUR 23 212 000, with a reference and discount rate of 5,7 % and a tax rate of 32,5 %, the intensity for the BBG project is 7,80 % nge.

(89) The Commission therefore finds that the subsidies envisaged by the Spanish authorities do not exceed, in

7. EX-POST MONITORING

(90) The Spanish authorities have agreed to incorporate a reimbursement clause in the contract with the beneficiaries in the event of failure to complete the contract.

(91) The Spanish authorities have also undertaken to send the Commission a copy of the contract with the beneficiaries regarding the aid.

(92) Finally, the Spanish authorities have undertaken to send the Commission an annual report on the project, containing in particular information on subsidies already paid, intermediate reports on the implementation of the aid contract and a final report outlining progress towards objectives (timetable, investments and fulfilment of specific conditions in the contract drawn up by the granting authority) and detailing progress.

(93) These undertakings are in line with point 6 of the multisectoral framework.

8. CONCLUSIONS

(94) The Commission reminded the Spanish authorities of the need to respect the rules on the cumulation of aid for identical purposes granted under schemes approved by one or more authorities (at central, regional or local level). Subject to observance of these rules, the Commission concludes that the aid envisaged for the two projects may be granted. In this regard, the Commission has noted that the Spanish authorities indicated by letter dated 23 May 2000 that both undertakings had waived the opportunity to benefit from a tax credit of 45 % on the basis of assessment totalling ESP 54 149 million (EUR 325 442 040) for the BBE project and ESP 43 486 million (EUR 261 360 000) for the BBG project.

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Spain plans to grant to BBE and BBG, totalling EUR 30 004 000 and EUR 23 212 000 respectively, is

compatible with the common market within the meaning of Article 87(3)(c) of the Treaty.

Article 3

This Decision is addressed to the Kingdom of Spain.

The granting of such aid is therefore authorised.

Article 2

Done at Brussels, 19 June 2002.

The Spanish authorities shall take the necessary steps to ensure that should other regional aid be granted to these projects, the total should not exceed 9,9 % for the BBE project and 13,2 % for the BBG project.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 10 July 2002****on the aid scheme implemented by Finland for Åland Islands captive insurance companies***(notified under document number C(2002) 2410)***(Only the Finnish and Swedish texts are authentic)****(Text with EEA relevance)***(2002/937/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

were received by letter EUEC206-94 dated 9 August 2001.

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

- (3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit their comments on the measure.

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

- (4) The Commission received no comments from interested parties.

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

II. DETAILED DESCRIPTION OF THE AID

Whereas:

1. Provisions of the scheme**I. PROCEDURE**

- (1) By letter EUEC020-284 dated 15 July 1998 (registered under number SG A/38452), the Finnish authorities notified to the Commission an aid scheme for so-called captive insurance companies in the County of Åland. Since the measure had already entered into force in 1993, Finland's notification was late and could not be deemed valid under Article 88(3) of the EC Treaty. By letters dated 15 October 1998, 5 February 1999 and 2 June 1999, Finland provided the Commission with additional information. On 13 July 2000 the Commission sent a further letter (D/53912) to the Finnish authorities asking for confirmation that the State aid measure in question had never been applied. The Finnish authorities replied by letter EUEC096-217 of 25 August 2000 (A/37109), confirming that the measure had indeed not been applied since its entry into force.
- (2) By letter dated 11 July 2001 (SG 2001 D/289763), the Commission informed Finland that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. Comments from Finland

- (5) The aid measure in question was introduced in Finland by the County of Åland for implementation on the latter's territory. An amendment to the Åland Local Government Taxation Law entered into force on 9 December 1993 (ÅFS 109/93). Under that amendment, captive insurance companies meeting certain criteria could benefit from lower taxation that would normally apply to companies and collective advantages. At the time the amendment was adopted, the tax advantage was equal to 10 percentage points. Captive insurance companies paid a lower overall rate of corporation tax than the standard rate of 25 % applicable at that time.
- (6) The net advantage enjoyed by captive insurance companies in Åland Islands changed in 1996 and 1998 as a result of the decision by the relevant authorities to amend the standard rate of corporation tax.
- (7) These changes and their subsequent adjustments are the subject of the present decision.

⁽¹⁾ OJ L 309, 1.11.2001, p. 4.

⁽²⁾ See footnote 1.

2. Conditions

- (8) Originally, in accordance with the amendment of 9 December 1993, captive insurance companies in the Åland Islands qualified for the tax advantage only if the following conditions were met:
- (a) all of the company's shares or participatory rights had to be owned by one and the same foreign owner;
 - (b) only the company's owner or subsidiary could be insured by the company; and
 - (c) the day-to-day running of the company had to be carried out by a limited company (aktiebolag) which conducted operations subject to notification or licensing in the County of Åland.

3. Amendments to the original measure which are relevant to this State aid procedure

- (9) The measure was amended for the first time in 1995 (ÅFS 82/95) with a view to extending its scope to include captive insurance companies with domestic owners, which had previously been excluded from the scope of the measure.
- (10) In 1996 corporation tax in Finland was increased to 28 %. The level of the advantage previously granted to captive insurance companies was thus increased (second amendment) from 10 to 11,2 percentage points (ÅFS 40/96).
- (11) In accordance with the third amendment in 1998 (ÅFS 17/98), the level of the advantage was reduced to 10 percentage points. This thus changed the rate of corporation tax payable by captive companies in the Åland Islands to 18 %. There have since been no further amendments to the measure.

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

- (12) In considering the information regarding the 1995, 1996 and 1998 amendments and submitted by Finland in the context of the preliminary assessment provided for in Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽³⁾, the Commission took the view that the measure might

constitute non-notified state aid. Its doubts arose mainly from the fact that the amendments made after Finland's accession to the European Union were notifiable under Article 88(3) of the EC Treaty.

- (13) Since the measure appeared to constitute operating aid, the Commission had doubts as to its compatibility with the common market. According to the Commission's standard practice, such aid cannot be regarded as facilitating the development of certain economic activities or of certain economic areas.
- (14) Accordingly, the Commission initiated the procedure under Article 88(2) of the EC Treaty.

IV. COMMENTS FROM FINLAND

1. Background

- (15) Comments from Finland were submitted by letter EUEC206-94 dated 8 August 2001 (registered as received on 13 August 2001 under number SG (2001) A/9179).
- (16) Finland stressed that the autonomous status of the Åland Islands is laid down in the constitution and is recognised under international law, as evidenced by the fact that the matter is specifically dealt with by Protocol 2 to the Accession Treaty.
- (17) Under Section 18(5) of Law No 1144/1991 on self-government for the Åland Islands, the latter are empowered to legislate in areas concerning their entitlement to levy supplementary income tax, miscellaneous additional income tax, business and entertainment taxes and concerning the bases of assessment in areas where taxation falls within the remit of the County and its local authorities.
- (18) The tax measure for the Åland Islands was adopted as part of local taxation and incorporated in Section 4a of the Åland Local Government Taxation Law (ÅFS 37/93).
- (19) According to the Finnish authorities, the Åland Islands' economy is based on a small number of sectors. The County's insular nature gives rise to structural problems affecting the competitiveness of its businesses. Insurance and financial services are sectors well suited to the Åland Islands since the disadvantages of being an island region do not have the same impact in these sectors.
- (20) The Finnish authorities stressed that in 1993, when the measure entered into force, the Åland Island's economy was depressed and unemployment was high.

⁽³⁾ OJ C 83, 27.3.1999, p. 1

- (21) According to the Finnish authorities, the 1995 amendment, which broadened the scope of the measure to include non-foreign owners, was of minor importance, its consequences were at national level, and it did not involve any change to the tax measure's status as existing aid (assuming that the Commission considers it to constitute State aid within the meaning of Article 87(1) of the EC Treaty).
- (22) Finally, the Finnish authorities described in detail the adjustments to the original amendment that were made in 1996, when the tax reduction was increased to 11,2 percentage points, and in 1998, when it was restored to 10 percentage points.
- (23) Amendments to general corporation tax introduced after 1998 have indirectly affected the tax payable by captive insurance companies. On the basis of the tax measure in question, such a company is liable to corporation tax of 19,3975 % in the 2001 tax year.

2. Appraisal by the Finnish authorities of the measure's status as aid

- (24) Finland stresses that the Åland Islands must be regarded as a separate jurisdiction for the relevant areas since legislative powers lie exclusively with the Åland Parliament.
- (25) Firstly, Finland argues that the lower rate of tax for captive insurance companies does not distort or threaten to distort competition by favouring certain undertakings or certain sectors and does not affect trade between Member States. The measure does not affect competition between insurance companies since companies that receive the tax advantage can insure only their owners or their subsidiaries. According to the Finnish authorities, competition on the insurance market is not affected since a captive insurance company will normally re-insure itself on that market.
- (26) The Finnish authorities claim that any natural or legal person, irrespective of the sector of activity concerned, can qualify for the tax reduction through ownership of a captive insurance company through which they insure their own risks. The reduced rate of tax applies only if a captive insurance company, under the regulations applicable to companies, insures its owners or its subsidiaries. The measure applicable to such companies thus merely constitutes a business taxation measure.
- (27) Eligibility for the tax advantage requires that there be a close link between the captive insurance company and

its owners and that they must therefore be considered a single unit. Finland argues that, since the financial benefit of the tax measure accrues to the owners of a captive insurance company and since they may operate in any sector whatsoever, the tax measure must be considered a general measure and not a measure affecting trade between Member States.

- (28) According to Finland, the measure applied in the Åland Islands cannot be considered selective since it does not impose any requirements as to the sector in which the owners operate.
- (29) It also claims that the measure is not selective from a regional standpoint either since the Åland Islands are autonomous and constitute a separate jurisdiction in relation to the rest of Finland.

3. Appraisal by the Finnish authorities of the compatibility issue

- (30) As far as compatibility is concerned, if the Commission were to regard the measure as aid, Finland takes the view that the derogations provided for in Article 87(3)(c) of the EC Treaty preclude the measure from being deemed to be incompatible State aid, at least in the case of captive insurance companies with their registered office outside Mariehamn, which since 1 January 1998 have not been eligible for the derogation for regional aid provided for in Article 87(3)(c). According to Finland, the Commission must bear in mind that the Åland Islands are a group of islands and need to diversify their economy.
- (31) Finland further claims that account should be taken of Article 158 of the EC Treaty, which underlines the need for the Community to reduce disparities between the levels of development of the various regions and the backwardness of the least-favoured regions or islands. The same applies to the Declaration on island regions appended to the Amsterdam Treaty. Account should also be taken of point G of the Council Resolution of 1 December 1997 on a code of conduct for business taxation ⁽⁴⁾, which states that particular attention will be paid to special features and constraints in the case of the outermost regions and small islands. The Åland Islands consist of countless small islands with ill-balanced business activities that are restricted by the fact that the region forms an archipelago. The lower rate of tax for captive insurance companies in the Åland Islands promotes business development there.
- (32) On the basis of the arguments set out above, Finland considers that the tax measure applied to captive insurance companies in the Åland Islands does not

⁽⁴⁾ OJ C 2, 6.1.1998, p. 2.

constitute State aid and, if it were to be regarded as constituting State aid, would not be incompatible with the common market.

through a reduction in the firm's tax burden in various ways, including a reduction in the amount of tax.

- (33) Finally, Finland points out that, since the tax measure has not yet been applied to any actual case, the question of recovery will not arise if the Commission decides that the measure constitutes incompatible State aid.

- (38) The exemption from the obligation to pay the full amount of corporation tax applicable to captive insurance companies in the Åland Islands fulfils this criterion, both for captive insurance companies themselves and for the groups of companies to which they belong.

V. ASSESSMENT OF THE AID

1. Applicability of Article 87(1) of the EC Treaty

- (34) Under Article 87(1) of the EC Treaty, aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

- (35) To be termed as prohibited aid under Article 87(1) of the EC Treaty, a measure must fulfil the following four criteria:

- (a) the measure must confer on the beneficiaries an advantage that relieves them of charges they normally incur in the course of their business;
- (b) the advantage must be granted from state resources;
- (c) the measure must affect competition and trade between Member States;
- (d) the measure must be specific or selective in that it favours 'certain undertakings or the production of certain goods'.

The Commission has accordingly examined the measure in the light of the conditions laid down in Article 87(1).

- (36) Firstly, as regards the criterion that 'the measure must afford the beneficiaries an advantage', a lower rate of taxation confers an advantage on a company by enabling it to retain a greater proportion of its profits either for distribution to its members or shareholders or for reinvestment and therefore confers an advantage on eligible companies.

- (37) According to point 9 of the Commission notice on the application of the State aid rules to measures relating to business taxation ⁽⁵⁾, the tax advantage may be provided

- (39) Secondly, as regard the criterion of a measure being 'granted by a Member State or through state resources in any form whatsoever', the granting of a tax reduction involves a loss of tax revenue which, according to point 10 of the Commission Notice, is equivalent to consumption of State resources in the form of fiscal (tax) expenditure ⁽⁶⁾. As the Court of Justice has ruled, this principle also applies to aid granted by regional and local bodies in the Member States ⁽⁷⁾.

- (40) In the present case, the tax relief is granted by the Åland Islands authorities. The state resources criterion can therefore be regarded as fulfilled.

- (41) Thirdly, as regards the criterion to the effect that 'the aid distorts or threatens to distort competition', the Court of Justice has repeatedly ruled that intra-Community trade is to be deemed to be affected from the moment the beneficiary firm carries out an economic activity which is the subject of trade between Member States.

- (42) The Finnish authorities claim that the lower rate of tax applicable to captive insurance companies in the Åland Islands does not distort competition since beneficiaries insure their owners or their subsidiaries and therefore are not in competition with each other. Moreover, Finland argues that, since captive insurance companies are active on the reinsurance market, no distortion of trade exists.

- (43) In this context, the Commission takes the view that the effect of the aid on trade between Member States is independent of any purpose for which the aid is granted ⁽⁸⁾.

⁽⁶⁾ With regard to the concept of 'tax expenditure', see 'Tax expenditures. Recent experiences', OECD, Paris, 1996; see also Stanley S. Surrey, 'Tax incentives as a device for implementing government policy: A comparison with direct government expenditures', Harvard Law Review, Volume 83, No 4, pages 705 to 738.

⁽⁷⁾ See Case 248/84 Germany v Commission [1987] ECR 4013.

⁽⁸⁾ See Case 173/73 Italy v Commission [1976] ECR, 709 at paragraph 13.

⁽⁵⁾ OJ C 384, 10.12.1998, p. 3.

- (44) According to the Finnish authorities, competition on the insurance market is not affected since a captive insurance company normally reinsures itself on that market. The Commission considers the insurance market to be an open market, and insurance is therefore subject to intra-Community trade.
- (45) The Commission takes the view that captive insurance companies are offsetting the risks on the insurance market through internal reinsurance. In that respect, reinsurance of subsidiaries does not constitute a separate insurance market since subsidiaries can normally be insured by other companies operating on the open market. The fact that the insurer is a captive insurance company is thus irrelevant.
- (46) Competition between Member States is affected because the measure favours the establishment of captive insurance companies in the County of Åland and of the groups to which they belong, which operate within sectors in which there is trade between Member States.
- (47) The fact that the insurer is a captive insurance company does not prevent trade between Member States from being affected, irrespective of whether one is talking of the company itself or the group to which it belongs.
- (48) Fourthly, as regards the criterion that the aid should favour 'certain undertakings or the production of certain goods', the Finnish authorities claim that, since the financial benefit of the tax measure accrues to the owners of a captive insurance company and since there are no requirements as to the sector where the owners operate, the tax measure must be regarded as a general measure.
- (49) In considering the benefits of the tax measure in question, a measure may be selective because it is granted either as an exception to general tax arrangements established by law, regulation or administrative practice or at the discretion of the tax administration.
- (50) In the present case, the Commission considers that the measure is specific or selective in that it favours only captive insurance companies as the prime beneficiaries of the tax relief in cases where the necessary conditions are met.
- (51) The measure debars insurance companies which normally insure non-affiliated companies from operating on exactly the same market and on the same conditions as captive insurance companies. It lays down conditions that can hardly be met by other companies whose activity is to insure non-affiliated related companies.
- (52) The selectivity criterion is further met by the fact the conditions under which the measure applies implicitly require a certain economic strength and therefore could apply only to sufficiently large companies. It thus excludes other (owner) insurance companies operating in different sectors from qualifying for the tax relief. Indeed, the formation of a captive company implies that the group with which insurance contracts will be concluded is large enough to generate a turnover that will allow it to cover the fixed costs and obtain a profit. For example, one can hardly imagine that a group in the textile sector comprising three companies with ten employees each could afford to set up a captive insurance company. There can hardly be any doubt that the fixed costs in question would not be offset by the volume of premiums paid by the group's three companies. For these reasons, the measure is designed mainly for groups of companies which are large enough to afford to set up a captive insurance company.
- (53) The Commission considers that the measure implemented by the County of Åland constitutes operating aid within the meaning of Article 87(1) of the EC Treaty. It therefore has to determine if such an aid can be deemed compatible with the common market on the basis of the derogations provided for in Article 87(2) and (3) of the EC Treaty.
- 2. Assessment of whether the measure constitutes illegal aid**
- (54) The measure was put into effect for the first time in 1993, when Finland was not yet a member of the European Union. According to Article 1(b)(i) of Council Regulation (EC) No 659/99, such a scheme may be regarded as existing aid. However, as indicated above, two amendments were made to it in 1995 and 1996.
- (55) The first one in 1995 involved widening the scope of recipients to cover companies with their registered office in the Åland Islands, which were originally excluded from the scheme. As it extended the existing scheme, it should, under Article 88(3) of the EC Treaty, have been notified to the Commission. However, it could not affect the situation of companies not having their registered office in the County of Åland, which remained unchanged. Thus, this first amendment

constituted a separate event that did not alter the original existing scheme, which was applicable solely to companies which did not have their registered office in the County of Åland. In 1995, only the application of the scheme to companies with their registered office in the County of Åland was to be regarded as illegal aid.

fact that the amendments to the original 1993 scheme should have been notified twice, in 1995 and 1996.

3. Compatibility of the aid measure with the EC Treaty

- (56) The second amendment was made in 1996 and involved increasing the reduction on corporation tax for companies with or without a registered office in the Åland Islands from 10 to 11.2 percentage points. There is no doubt that this amendment increased the advantage granted under the scheme and therefore constituted an event which should, under Article 88(3) of the EC Treaty, have been notified to the Commission. As with the 1995 amendment, the issue of whether it constitutes a separate act has to be addressed. Unlike the 1995 amendment, the 1996 amendment did not apply to only some of the recipients as previously and did not constitute an exemption from another type of tax than the one with which the scheme was concerned, i.e. corporation tax. The Commission takes the view that such an amendment cannot be deemed to be separate from the original scheme for captive insurance companies applicable from 1993. The result of the 1996 amendment was to increase the advantage enjoyed by recipients to an extent which is impossible to determine. Increasing a tax reduction, even by only one percentage point, may have a indeterminable multiplier effect. This is because the increased tax reduction leads to increased competitiveness on the part of the recipient company. This additional distortion cannot be quantified, and it is therefore not possible to view this amendment separately from the rest of the scheme.
- (57) For these reasons, the 1996 amendment cannot be deemed to constitute a separate act since it altered the effects of the scheme, turning it into a new scheme which should, under Article 88(3) of the EC Treaty, have been notified to the Commission.
- (58) From that date, the scheme for captive insurance companies became illegal aid. The fact that the scheme was amended again in 1998 and restored to the form it had taken in 1993 (with the advantage limited to 10 percentage points) does not mean that its status as existing aid can be deemed to have been restored. Failure to notify the second amendment clearly rendered the measure illegal, and amending a scheme, even to make it more like a previous aid scheme, cannot restore its status as existing aid. The fact that no company has hitherto benefited from the scheme does not alter the
- (59) Measures caught by Article 87(1) of the EC Treaty are generally incompatible with the common market unless they qualify for one of the derogations in Article 87(2) or (3). Derogations are applicable only if it can be shown that, without the aid, market forces would not have been enough to induce the recipients to act in such a way that one of the aims of the derogation could be achieved.
- (60) In this case, the derogations in Article 87(2) of the EC Treaty are not applicable because the aid is not designed to achieve any of the aims listed in the relevant provisions.
- (61) Under Article 87(3)(a), aid is deemed compatible with the common market where it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Since the Commission does not consider the County of Åland to constitute such an area, this provision does not apply.
- (62) As regards the derogations provided for in Article 87(3)(b) and (d), the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Finland, nor is it intended to promote culture or heritage conservation.
- (63) Lastly, it is necessary to examine whether the aid qualifies for the derogation in Article 87(3)(c), which states that aid may be considered compatible with the common market where it facilitates the development of certain economic activities or of certain economic areas and does not adversely affect trading conditions to an extent contrary to the common interest.
- (64) In the case of captive insurance companies with their registered office outside Mariehamn, which since 1 January 1998 have not been eligible to benefit from the derogation for regional aid provided for in Article 87(3)(c), Finland claims that the derogations contained

in that Article prevent the tax measure from constituting incompatible State aid.

which those companies would normally have to bear in the course of pursuing their day-to-day business activities.

(65) Finland also claims that Article 158 of the EC Treaty and the Declaration on island regions appended to the Amsterdam Treaty must be taken into account.

(71) Accordingly, the Commission takes the view that the aid measure in question constitutes operating aid.

(66) As regards Article 158 of the EC Treaty, the Commission takes the view that the Community should develop and pursue its actions aimed at strengthening economic and social cohesion in order to promote harmonious development at all levels.

(72) Operating aid is in principle prohibited. At present, the Commission authorises it only in exceptional cases and subject to certain conditions, for example in respect of certain types of environmental aid ⁽¹⁰⁾ and in regions, including outermost regions, covered by the derogation in Article 87(3)(a), provided that the aid is duly justified and its level is proportional to the handicaps it is intended to offset ⁽¹¹⁾.

(67) In the present case, the Commission finds that the measure is restricted to captive insurance companies and, by its very nature, is not covered by the derogation provided for in Article 87(3)(c) of the EC Treaty, under which aid may be found compatible with the common market if it 'facilitates the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

(73) Where a derogation is granted on the basis of regional criteria, the Commission must ensure in particular that the measures in question are targeted at genuine regional handicaps. It considers that there are no genuine regional handicaps since their additional costs e.g. the transport costs for insurance activities, have little impact.

(68) In any case, an assessment in the light of Article 158 of the EC Treaty does not rule out an assessment under Article 87(3)(c) since the latter is aimed at safeguarding an overall harmonious development in line with Article 158 of the EC Treaty.

(74) The measure constitutes operating aid and does not lead to any significant improvement in regional development terms since its positive effects will cease as soon as it is withdrawn and are therefore limited in time. As the measure is specifically aimed at captive insurance companies, the Commission does not consider that it offsets any genuine regional handicaps in the Åland Islands in the form of additional costs. Moreover, in view of the nature of the economic activity in question, the scheme does not promote economic development in the region to any significant extent.

(69) The Finnish authorities further argue that account should also be taken of point G of the Council Resolution of 1 December 1997 on a code of conduct for business taxation ⁽⁹⁾, which states that particular attention will be paid to special features and constraints in the case of the outermost regions and small islands. In this respect, it should be borne in mind that the criteria applied in the context of the code of conduct for business taxation in assessing the harmful character of a measure are not relevant as regards the compatibility of the measure with the common market.

(75) The Commission takes the view that, since the operating aid in the present case is not covered by any of the derogations set out in Article 87(3)(a), (b) or (c) of the EC Treaty, it must be deemed incompatible with the common market within the meaning of Article 87(1) of the EC Treaty.

(70) The Commission considers that, in order to assess whether the aid measure in question is compatible with the common market, a distinction must be made between investment aid and operating aid. The rules applicable to capital insurance companies in the Åland Islands are not related to investment or the creation of employment and constitute an exemption from costs

(76) In connection with the initiation of the formal procedure, the Finnish authorities and interested parties were invited to give their comments on possible legitimate expectations of such a nature that would pose

4. Recovery of aid

⁽⁹⁾ See footnote 4.

⁽¹⁰⁾ Community guidelines on State aid for environmental protection (OJ C 72, 10.3.1994, p. 3).

⁽¹¹⁾ Guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).

an obstacle to the recovery of the aid in the event of the aid being regarded as illegal and incompatible with the common market. As no aid has been granted to companies since the scheme entered into force, the issue of recovery does not arise.

109/93 with subsequent amendments) is incompatible with the common market.

Article 2

Finland shall withdraw the scheme referred to in Article 1.

Article 3

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

Article 4

This Decision is addressed to the Republic of Finland.

HAS ADOPTED THIS DECISION:

Done at Brussels, 10 July 2002.

Article 1

The State aid which Finland has implemented for so-called captive insurance companies in the County of Åland (ÅFS

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 17 July 2002****on the State aid which Italy is planning to implement for Acciaierie di Sicilia SpA***(notified under document number C(2002) 2594)***(Only the Italian text is authentic)****(Text with EEA relevance)***(2002/938/ECSC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4(c) thereof,

Having regard to Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry ⁽¹⁾, and in particular Article 6(5) thereof,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽²⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letter dated 20 December 2001, registered as received on 21 December, Italy notified the Commission of its intention to grant aid to four projects to be carried out by Acciaierie di Sicilia SpA.
- (2) By letter dated 15 February 2002, the Commission informed Italy that it had decided to initiate the procedure under Article 6(5) of Decision No 2496/96/ECSC (the Steel Aid Code) in respect of the aid.
- (3) The Commission decision to initiate 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.
- (4) By letter dated 12 April 2002, Italy withdrew its aid notification for all the planned projects except one

(acquisition of an installation for the purification of smoke from an electric furnace), which is the subject of this decision. It also informed the Commission that, in view of the deadline of 22 July for the payment of the aid imposed by the Steel Aid Code, only the first instalment of the aid would be paid.

- (5) By letter dated 17 April 2002, the United Kingdom Steel Association submitted comments on the aid. The Commission forwarded them to Italy, which was given the opportunity to react. Its comments were received by letter dated 16 May.

II. DETAILED DESCRIPTION OF THE AID

- (6) Acciaierie di Sicilia is a steel producer belonging to the Alfa Acciai group. It was set up in May 1998 and remained inactive until March 1999, when it acquired the production plant of Acciaierie Megara, which had been closed since 1996. It reopened the rolling mill in April 1999 and the steel plant in October of that year.
- (7) The aid is granted by the Ministry of Production Activities under Law No 488/92 on aid in depressed areas. The aid was approved on 9 April 2001, subject to authorisation by the Commission.
- (8) Following the partial withdrawal of the notification mentioned above (see recital 4), the aid concerns only one project. Granted under Law No 488/92, it is calculated on the basis of a percentage expressed as a net grant equivalent (nge) within the limits of the maximum aid approved by the Commission for the aid scheme in question, according to the size of the firm and the location of the production unit. In the case of Acciaierie di Sicilia, the percentage approved by Italy was 17,5 % nge. This corresponds to EUR 680 000 to be paid in three instalments. However, only one instalment will be paid. Therefore, the actual aid will amount to EUR 220 000.

⁽¹⁾ OJ L 338, 28.12.1996, p. 42.

⁽²⁾ OJ C 70, 19.3.2002, p. 4.

⁽³⁾ See footnote 2.

- (9) The aid is intended for the acquisition of an installation for the purification of smoke coming from an electric furnace which currently has an installation for primary purification, i.e. it purifies the smoke produced during the melting process when the furnace is covered but not the smoke that escapes when the furnace is uncovered for loading and unloading. The limits for dust emissions imposed by the Region of Sicily in 1992, with which the current installation already complies, are 25 mg/m³. With the new installation, emissions will be reduced by 40 %, to 15 mg/m³. No cost savings are generated by the investment. The eligible costs amount to EUR 2 400 030 and relate to plant and equipment.

III. COMMENTS BY INTERESTED PARTIES

- (10) The United Kingdom Steel Association has stated that this investment could be considered as a genuine environmental investment. However, it felt that Italy should demonstrate at what point the environmental rules became effective relative to the date when the plant started operations.

IV. COMMENTS BY ITALY

- (11) Since the doubts raised by the Commission stemmed mainly from the lack of information contained in the notification, the Italian authorities simply provided the missing information.

V. ASSESSMENT

- (12) Acciaierie di Sicilia SpA produces steel products included in Annex I to the ECSC Treaty. It is therefore an undertaking within the meaning of Article 80 of that Treaty to which the Steel Aid Code applies.
- (13) Under Article 3 of the Steel Aid Code, steel companies may receive aid for environmental investments. The criteria for assessing whether such aid is compatible with the common market are set out in the Annex to the Steel Aid Code and in the Community guidelines on State aid for environmental protection ⁽⁴⁾ (hereinafter referred to as 'the 1994 environmental guidelines').
- (14) According to the 1994 environmental guidelines, aid for investment in plant and equipment intended to reduce

or eliminate pollution which will allow the firm to improve significantly on mandatory standards may be authorised up to a maximum of 30 % gross of the eligible costs (point 3.2.B, first paragraph).

- (15) According to the Annex to the Steel Aid Code, for firms that significantly improve on environmental protection, any advantage from the significant improvements in terms of lower production costs must be deducted from eligible expenditure.
- (16) In this case, the Commission notes that the new installation will allow for significantly higher levels of environmental protection but will not reduce production costs. It also notes that the intensity of the proposed aid (9,2 %) is below the maximum laid down in point 3.2.B of the 1994 environmental guidelines (30 %).

VI. CONCLUSION

- (17) In view of the foregoing, the State aid that Italy intends to grant to Acciaierie di Sicilia SpA under Law No 448/92 amounting to EUR 220 000 is compatible with the common market. With regard to the rest of the notified aid, in view of the withdrawal of the notification (see recital 4 above), the procedure initiated on 15 February 2002 is closed,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 220 000 for the purchase of a smoke purification plant for an electric furnace which Italy is planning to implement under Law No 488/92 for Acciaierie di Sicilia SpA is compatible with the common market.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 17 July 2002.

For the Commission

Mario MONTI

Member of the Commission

⁽⁴⁾ OJ C 72, 10.3.1994, p. 3.

COMMISSION DECISION**of 2 October 2002****amending Decision 2002/195/EC on the aid scheme introduced by Law No 81 of the Region of Sicily of 7 November 1995***(notified under document number C(2002) 3579)***(Only the Italian text is authentic)***(2002/939/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾,

Whereas:

- (1) In Article 1 of Decision 2002/195/EC ⁽²⁾, the Commission declared the aid which Italy was planning to grant on the basis of Articles 4 and 8 of Law No 81 of the Region of Sicily of 7 November 1995 for the production, processing and marketing of the products listed in Annex I to the Treaty, not including the fisheries and aquaculture sector, incompatible with the common market. With regard to the fisheries and aquaculture sector, in Article 3 of that Decision the Commission asked Italy to provide it with the list and the description of the aid measures to be refinanced under Article 9 of Regional Law No 81 of 8 November 1995, as well as the precise terms on which this aid was to be granted.
- (2) After Italy had been notified of the Decision, it informed the Commission that the latter had already adopted a decision on the aid scheme for the fisheries and aquaculture sector, which was notified by Commission

letter SG(97) 6787 of 7 June 1997 and closed the procedure concerning the aid introduced for that sector by Article 9 of Law No 81 of the Region of Sicily.

- (3) The Commission agrees that the procedure relating to the application of that aid scheme to the fisheries sector actually was closed, and that Italy was notified of the closure by the abovementioned letter of 7 June 1997,

HAS ADOPTED THIS DECISION:

Article 1

Article 3 of Decision 2002/195/EC is hereby deleted.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 2 October 2002.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ L 64, 7.3.2002, p. 27.