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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 July 2001

on the State aid scheme implemented by Spain for firms in Vizcaya in the form of a tax credit amounting to 45 % of investments

(notified under document number C(2001) 1765)

(Only the Spanish version is authentic)

(Text with EEA relevance)

(2003/27/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, in accordance with the abovementioned Articles, called on interested parties to submit their comments ⁽¹⁾, and having regard to those comments,

Whereas:

Province of Vizcaya, since that territory enjoys the same tax autonomy as Álava. The Commission therefore sent a letter to the Spanish Permanent Representation on 15 March 1999 requesting information on the matter. By letters dated 13 April and 17 May 1999 from its Permanent Representation, Spain requested successive extensions of the deadline for replying. By letter of 25 May 1999 the Commission refused to grant a second extension under Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁴⁾. Finally, by letter of 2 June 1999 from its Permanent Representation, Spain provided information on the tax incentive in question.

(2) By letter SG(99) D/6871 dated 17 August 1999 the Commission informed Spain of its decision to initiate in respect of this aid the procedure laid down in Article 88(2) of the Treaty.

I. PROCEDURE

(1) As a result of the information received in response to the proceedings initiated following complaints about State aid granted to Daewoo Electronics Manufacturing España SA ⁽²⁾ and to Ramondín SA and Ramondín Cápsulas SA ⁽³⁾, the Commission learned of the existence of a scheme of non-notified tax aid for investments in Spain, in the Province of Álava, in the form of a 45 % tax credit. It also received informal information that similar measures existed in the

(3) By letter from the Permanent Representation dated 9 November 1999, registered on 12 November 1999, the Spanish authorities submitted their comments under the abovementioned procedure.

(4) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁵⁾. The Commission invited interested parties to submit their comments on the aid within one month of the date of publication.

⁽¹⁾ OJ C 351, 4.12.1999, p. 29.

⁽²⁾ Commission Decision 1999/718/EC (OJ L 292, 13.11.1999, p. 1).

⁽³⁾ Commission Decision 2000/795/EC (OJ L 318, 1.12.2000, p. 36).

⁽⁴⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁵⁾ OJ C 71, 11.3.2000, p. 8.

(5) Comments were received from: the Autonomous Community of Castile-Leon, on 3 January 2000; the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza) (hereinafter Confebask), on 4 January 2000, plus, outside the time limit, supplementary comments by letter dated 29 December 2000, registered on 3 January 2001; the Rioja Regional Government, on 5 January 2000; the Basque Economists Association (Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa), on 5 January 2000; the Basque Business Circle (Círculo de Empresarios Vascos), on 5 January 2000; the Bilbao Chamber of Commerce (Cámara de Comercio de Bilbao/Bilboko Erkataritza Ganbera), on 5 January 2000; and the Professional Association of Tax Advisers of the Autonomous Community of the Basque Country (Asociación Profesional de Asesores Fiscales de la Comunidad del País Vasco), on 7 January 2000. By letter dated 1 March 2000 (2000 D/50912), the Commission sent these comments to Spain, asking for observations; it received only a request for a 20-day extension of the deadline for replying.

(6) Provincial Law (Norma Foral) No 7/2000 of 19 July 2000 ⁽⁶⁾ repealed the fourth additional provision of Vizcaya Provincial Law No 7/1996 of 26 December 1996 ⁽⁷⁾, which formed the legal basis for the 45 % tax credit.

II. DETAILED DESCRIPTION OF THE AID

(7) According to the information at the Commission's disposal, which has not been questioned by the Spanish authorities or by third parties, the tax incentive in question entered into force on 1 January 1997 pursuant to the fourth additional provision of Provincial Law No 7/1996 of 26 December 1996 ⁽⁸⁾. Under that provision, the aid was payable in respect of certain investments made in 1997; it was subsequently extended for an indefinite period by the second provision of Provincial Law No 4/1998 of 2 April 1998 ⁽⁹⁾.

(8) As regards the 45 % tax credit in force since 1 January 1997, the fourth additional provision of Provincial Law No 7/1996 of 26 December 1996 reads as follows:

'Investments in new tangible fixed assets made after 1 January 1997 and exceeding ESP 2 500 million shall, by decision of the Vizcaya Provincial Council, give rise to a tax credit equal to 45 % of the amount of the investment, as determined by the latter, to be deducted from the amount of tax payable.

⁽⁶⁾ Boletín Oficial de Vizcaya 1.8.2000.

⁽⁷⁾ Boletín Oficial de Vizcaya 30.12.1996.

⁽⁸⁾ Norma Foral No 7/1996 de 26 de diciembre de 1996 (disposición adicional décima).

⁽⁹⁾ Norma Foral No 4/1998 de 2 de diciembre de 1998 (disposición adicional décima).

Any tax credit that is not used because it exceeds the final amount of tax payable may be carried over and used within five years following the year in which the decision is taken.

The date from which the time limit for using the tax credit starts to run may be postponed until the first year during the limitation period in which profits are made.

The decision referred to in the first paragraph shall lay down the time limits and restrictions applicable in each case.

Concessions granted under this provision may not be combined with any other tax concessions available in respect of the same investments.

The Vizcaya Provincial Council shall also determine the duration of the investment process, which may include investments made during the preparatory phase of the project giving rise to the investments.'

(9) It is clear from the above provisions, in short, that the aid is granted in respect of investments in new tangible fixed assets made after 1 January 1997, as well as investment expenditure ⁽¹⁰⁾ incurred during the preparatory phase of the project giving rise to the investments, where such investments exceed ESP 2 500 million.

(10) Since the scheme does not require the investment entitling firms to the aid to be located in Vizcaya, a firm resident there for tax purposes could obtain a tax credit equivalent to 45 % of the amount of investments made outside Vizcaya.

(11) The scheme is furthermore applicable to investments made in any sector and is not subject to any sectoral restriction such as those laid down in the Community sectoral rules applicable to the production, processing and marketing of the agricultural products in Article 1 to the Treaty, fisheries, coalmining, steelmaking, transport, shipbuilding, synthetic fibres and the motor industry.

(12) Furthermore, any firm may qualify for the 45 % tax credit in question irrespective of its economic and financial position, even if it is a firm in difficulty.

⁽¹⁰⁾ No precise definition is given of what the Spanish authorities understand by 'investments made during the preparatory phase' for the purposes of applying the tax aid in question.

- (13) Although the 45 % tax credit may not be combined with any other tax concessions that may be granted in respect of the same investment, combination with other, non-ax aid, including grants, subsidised loans, guarantees, equity purchases, etc., relating to the same investments is not ruled out.
- (14) In its decision initiating the said procedure, the Commission pointed out that as far as the application of the Community State aid rules is concerned, the tax nature of the measures in question is irrelevant, since Article 87 of the Treaty applies to aid measures 'in any form'. The Commission also emphasised, however, that, to be regarded as aid, the measures must meet all four of the criteria set out in Article 87 and explained below.
- (15) Firstly, the Commission pointed out, at that stage, that the tax credit confers on the recipients an advantage amounting to 45 % of the amount of the investments and relieves them of charges that are normally borne from their budgets through a partial reduction in their normal tax liability.
- (16) Secondly, the Commission provisionally considered that the 45 % tax credit involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure.
- (17) Thirdly, the Commission considered at that stage that the tax credit affects competition and trade between Member States. Since the recipients conduct business which may be the subject of intra-Community trade, the aid strengthens their position vis-à-vis competitors who are also involved in intra-Community trade and therefore affects such trade. Furthermore, the increase in recipient firms' net profit (profit after tax) improves their profitability. In this way they are more able to compete with firms which are not eligible for the aid.
- (18) Lastly, the Commission considered, at that stage, that the 45 % tax credit is specific or selective in that it favours certain firms, being available only to firms investing more than ESP 2 500 million (EUR 15 025 303). All other firms whose investments do not exceed the ESP 2 500 million threshold are excluded.
- (19) Furthermore, the Commission considered, at that stage, that the selective nature of the concession is also due to a discretionary power of the tax authorities: the Vizcaya provincial authorities have the power to determine, at their discretion, the duration of the investment process and that of the preparatory phase of the investment qualifying for the aid.
- (20) In short, the Commission considered, at that stage, that the 45 % tax credit is State aid within the meaning of Article 87(1) of the Treaty and Article 61(1) of the Agreement on the European Economic Area, since it meets the cumulative criteria of constituting an advantage, being granted by the State from state resources, affecting trade between Member States and distorting competition in favour of certain firms.
- (21) Since the tax incentive in question is not subject, among other requirements, to the condition that it does not exceed EUR 100 000 over a period of three years, the Commission considered, at that stage, that it cannot be regarded as subject to the *de minimis* rule ⁽¹⁾.
- (22) The Commission stated provisionally that state aid which is not governed by the *de minimis* rule is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(3) of the EEA Agreement. However, the Spanish authorities had not met that obligation, and the Commission therefore considered at that stage that the aid could be regarded as unlawful.
- (23) The Commission also found that the 45 % tax credit is aid conditional on investment ⁽¹²⁾. However, in the absence of a precise definition of the eligible expenditure, the Commission could not rule out at that stage the possibility that some of the investment expenditure qualifying for the 45 % tax credit might fall within the scope of the Community definition of initial investment ⁽¹³⁾.
- (24) As regards the investment expenditure falling within the scope of the Community definition, the Commission took the view at that stage that the 45 % tax credit wholly or partly constitutes investment aid and therefore has to be examined in the light of the Community rules on investment aid. On the other hand, any aid to defray investment expenditure which does not fall within the Community definition cannot be regarded as investment aid and has to be considered as aid for other purposes, for example operating aid.
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- ⁽¹⁾ See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2) and the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9).
- ⁽¹²⁾ See the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9).
- ⁽¹³⁾ See point 18 of the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9) or point 4.4 of the guidelines on national regional aid (OJ C 74, 10.3.1998, p. 9).

- (25) The 45 % tax credit, which is not restricted to a particular sector, may be granted to firms that are subject to Community sectoral rules. The Commission therefore questioned at that stage whether the aid was compatible where the recipient belongs to a sector subject to special Community rules.
- (26) The same applies where the 45 % tax credit is granted to firms in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty. Since the grant of the tax credit to such firms is not subject to the conditions laid down in those guidelines, the Commission doubted at that stage whether the aid was compatible with the common market when granted to firms in difficulty.
- (27) On the question of whether investment aid in Vizcaya qualifies for the derogation under Article 87(3)(c) of the Treaty, the Commission noted that, in its Decision of 26 July 1995 amending Spain's regional aid map, it found Vizcaya to be a region where investment aid in support of regional development could be deemed compatible with the common market under the Article 87(3)(c) derogation, provided that it did not exceed the ceiling of 25 % net grant equivalent (nge) in the case of large firms.
- (28) The Commission also pointed out at that stage that the ceilings in question apply only to certain eligible expenditure included in the standard base and complying with the Community definition of initial investment, which excludes inter alia replacement investments. It stressed that aid granted between 1 January and 31 December 1999 is subject to the above regional aid guidelines, so that investment aid not exceeding the ceilings is also subject to certain additional conditions laid down in those guidelines.
- (29) However, the Commission stated provisionally that the tax aid in the form of the 45 % tax credit was not limited to 25 % nge in the case of large firms and 30 % nge in the case of small and medium-sized firms, and also that the eligible expenditure might not correspond to the standard base. Under such circumstances, it could not rule out the possibility at that stage that the aid could rank as operating aid, since it was intended to reduce the recipient firms' current expenditure. The Commission therefore provisionally found that there were doubts as to the compatibility of the tax aid in question in the light of the rules on regional aid.
- (30) As regards the period after 1 September 1998, the Commission further took the view at that stage that the possibility of the investment for which aid is granted being covered by the multisectoral framework on regional aid for large investment projects (98/C 107/05) could not be ruled out. The tax aid in question is not subject to the notification requirement where large projects are concerned or to a possible reduction in aid intensity that might result from the Commission's assessment. The Commission therefore stated provisionally that there were doubts as to the compatibility of the tax aid where large projects were concerned.
- (31) To sum up, the Commission questioned at that stage the compatibility of the tax aid in question with the common market in the light of the derogation in Article 87(3)(c), which concerns 'aid to facilitate the development (...) of certain economic areas (...)'. Neither did it appear that the other derogations in Article 87(2) and (3) of the Treaty could apply. The tax credit cannot be regarded as aid having a social character under Article 87(2)(a), is not intended to make good the damage caused by natural disasters or exceptional occurrences under Article 87(2)(b) and is not subject to the provisions of Article 87(2)(c) concerning 'aid to facilitate the development of certain economic activities (...)'. Nor is it designed to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State under Article 87(3)(b). Lastly, it is not intended to promote culture or heritage conservation within the meaning of Article 87(3)(d).
- (32) As well as inviting them to submit their comments under the Article 88(2) procedure, the Commission also asked the Spanish authorities to supply all the information necessary for assessing the tax aid in the form of a 45 % tax credit in Vizcaya. The relevant information requested related in particular to: any tax aid in the form of a tax credit for investments available in any year during the period 1986 to 1994, copies of all decisions granting the aid during the period 1995 to 1997 and copies of the declarations made by the firms concerned to the Provincial Council in 1998 and 1999, on the official form, setting out, at least, the nature of the investment expenditure qualifying for the aid, the amount of the tax credit granted to each recipient, the aid actually paid to each recipient and any balance still outstanding, whether the recipient constitutes a firm in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, the details of any combination of aid (amount, eligible expenditure, where appropriate the aid

schemes applied, etc.), and precise and detailed definitions of what constitute 'investments' and 'investments made during the preparatory phase'.

III. COMMENTS OF THE SPANISH AUTHORITIES

(33) The Spanish authorities submitted their comments by letter from the Permanent Representation dated 9 November 1999. Essentially, they take the view that the tax credit does not constitute State aid within the meaning of Article 87 of the Treaty. In support of their view, they challenge the Commission's assumption that trade will be affected because the companies benefiting from the incentive carry out economic activities which may involve trade between Member States. In their opinion, it cannot be established, *pace* the Commission, that trade is affected generally, but only in specific cases, since there is a possibility that in some cases it will not be affected. In such cases, therefore, one of the prerequisites for classifying an official measure as State aid is missing.

(34) They also argue that the measure is not specific or selective in character. In their opinion, the opening of the measure to all sectors and to all taxpayers that meet the appropriate criteria removes any specific character. Furthermore, since there are five separate tax systems in Spain, one of which in Vizcaya, the tax rules applicable in that territory have the status of general measures for the taxpayers to whom they apply. The measure therefore has no regional specificity.

(35) As to specificity of substance, this does not exist, since the measure is open to all sectors and to all taxpayers. The Spanish authorities maintain that the requirement to invest ESP 2 500 million is not discriminatory, but an objective condition deriving from the need to ensure the effectiveness of the measure and thus achieve the proposed objective. However, even if the Commission were to consider that the measure was specific, it would be justified by the nature and general scheme of the system, as provided for in Commission notice (98/C 384/03) ⁽¹⁴⁾. The measure in question is justified by the nature of the tax system, since it forms part of the single tax system applicable in the territory of Vizcaya and derives from the exercise of the Provincial Council's powers to adopt measures in the tax field; it is also

justified by the general scheme of the tax system since its objective is to promote economic activity. It is furthermore logical that the incentive should be targeted at large investments since (i) it is large investments that will be of real benefit to Vizcaya in the long run, enabling the tax authorities to collect tax receipts that more than offset the tax expenditure incurred at the beginning of the investments and (ii) the investment threshold does not penalise small and medium-sized enterprises, which already benefit from many Community funding programmes.

(36) Furthermore, the Spanish authorities dispute that the measure in question is of a discretionary nature, since the incentive is granted automatically once the condition of investing a minimum of ESP 2 500 million is satisfied. The Vizcaya Provincial Council can thus check only that all the conditions are satisfied; it cannot alter or add any conditions. The Spanish authorities also stress that Spanish tax law does not allow arbitrary decisions to be taken when it comes to determining the essential features of taxpayers' tax liabilities.

(37) The Spanish authorities reject the view expressed by the Commission that the tax rules do not satisfy the conditions of the sectoral rules. In their opinion, the Commission ought to determine what the specific conditions are that are infringed by the said tax rules. As regards the application of the tax rules to firms in difficulty, they consider that the condition of investing at least ESP 2 500 million makes it extremely difficult for such firms to obtain the tax credit; it should be regarded more as a guarantee that firms in difficulty will not qualify for the incentive. The Spanish authorities consider that the application of the rules on regional aid is inappropriate, since in this specific case no State aid is involved.

(38) In view of the above arguments, the Spanish authorities consider that the Commission should terminate the procedure by a decision finding that the tax measures in question do not meet the criteria for being regarded as State aid.

(39) For the rest, the Spanish authorities do not consider it necessary to supply the information requested by the Commission concerning, in particular, decisions to grant the tax credit, since no State aid is involved. Consequently, they are not providing any of the information requested in the decision initiating the procedure.

⁽¹⁴⁾ Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

IV. OTHER COMMENTS RECEIVED BY THE COMMISSION

- (40) The Commission emphasises that the comments set out below are without prejudice to the question of whether the parties which submitted them can be considered interested parties within the meaning of Article 88(2) of the Treaty.

Comments by the Autonomous Community of Castile-Leon

- (41) The Autonomous Community of Castile-Leon points out first of all that the tax measures in question are part of a set of tax measures adopted by the Vizcaya Provincial Council that have been contested both in Spain and at Community level.
- (42) The Autonomous Community of Castile-Leon goes on to state that the tax measures in question constitute State aid, since they satisfy all four criteria laid down in Article 87 of the Treaty. In support of this contention it basically puts forward the same arguments as those given in the decision initiating the procedure.
- (43) For the rest, the Autonomous Community of Castile-Leon considers that the tax incentive cannot be regarded as compatible by virtue of the derogations in Article 87 of the Treaty. Furthermore, the obligation to notify laid down in Article 88(3) of the Treaty has not been complied with.
- (44) The Autonomous Community of Castile-Leon takes the view therefore that the tax measures in question should be regarded as State aid which is unlawful, since the notification procedure laid down in Article 88(3) has not been followed, and which is incompatible with the common market.

Comments from the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza (Confebask))

- (45) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by Vizcaya. As regards substance, Confebask's views are essentially as follows:

debt whose reduction involves a loss of tax revenue. If this argument were sound, any tax deduction would always involve a loss of revenue compared with the amount initially due. Confebask therefore requests the Commission to reconsider its position, since otherwise it could be argued that taxes were being unlawfully harmonised by establishing a normal amount in relation to which any losses of tax revenue would have to be determined;

- (b) the effect on trade: according to the Commission, where the recipients participate in intra-Community trade, the tax measures in question distort that trade. However, differences between tax systems always affect trade. To determine the extent to which trade is affected, the Commission should therefore analyse the entire tax system and not specific provisions. Confebask emphasises in this respect that, according to one study, the tax burden in the Basque Country is greater than in the rest of Spain. The Commission should explain why these specific measures and not other tax differences affect trade. In any event, even if such an effect did exist, the way to remove it would be through harmonisation, not State aid;
- (c) the selective character of the aid: in Confebask's opinion, the selective nature of the tax measures should be assessed in one of two ways — either as an enabling rule conferring power on the tax authority subsequently to grant a specific relief, or as a rule directly granting the tax relief without requiring subsequent specification. The Commission, however, is using one argument which fits the first category, and another which fits the second. Given that the two are mutually exclusive, the Commission should explain in which category the tax measures question fall, since otherwise it would be contradictory to try and use both.

— Confebask questions the approach whereby the tax measures are regarded as enabling rules, since the reduction is granted automatically and the authorities, accordingly, had no discretionary power either before 1997 or thereafter. The authorities are restricted to checking that the applicant satisfies the tests of eligibility. Moreover, if the tax measures are regarded as enabling rules which subsequently make it possible to grant the aid, it has to be concluded that the current procedure, in so far as it is the rules that are being questioned and not specific instances of their application, is meaningless. Similarly, according to the first paragraph of the Commission's letter to the Member States ⁽¹⁵⁾, a

- (a) the presumed reduction of the tax debt: the Commission is wrong to think that there is a tax

⁽¹⁵⁾ Commission letter to Member States SG(89) D/5521 of 27 April 1989.

general provision conferring relief is regarded as aid only if 'legislative machinery enabling it to be granted without further formality has been set up'. By contrast, because it is abstract, an enabling rule cannot be regarded as State aid and, hence, cannot be assessed for its effect on competition and trade between Member States;

- As for regarding the tax measures as rules granting aid directly, Confebask points out that, according to points 19, 20 and 17 of notice 98/C 384/03, a tax measure may be specific and, hence, may be State aid, if it is aimed solely at public undertakings, certain types of undertaking or undertakings in a given region. However, the tax measures in question have none of these characteristics, not even territorial specificity, since they apply to the whole territory for which the regional authorities that introduced them are competent. As to the specific character of the threshold of ESP 2 500 million, Confebask considers that the use of objective thresholds is normal practice in national and Community tax rules. Confebask also draws attention to the basis of various judgments of the Court of Justice and Commission decisions: hitherto, it has never been held that thresholds imply specificity. Moreover, the Commission itself acknowledges, in point 14 of the above notice, that the effect of promoting certain sectors does not necessarily mean that the measures are specific and, in point 207 of the 1998 Competition Report, that measures which have a cross-sectoral impact and are intended to favour the whole of the economy are general measures and do not involve State aid. In short, the tax measures in question are not specific, since they do not promote a particular sector or particular undertakings. On the contrary, they are open to all sectors and to all undertakings established in the territory for which the provincial authorities are competent;

- (d) illegality of the 45 % tax credit: while still disputing that the tax credit constitutes State aid, something that has to be proven in order to classify the measure as illegal, Confebask argues that the Commission's description of the tax credit as unlawful aid calls into question the principles of legitimate expectations, the ban on arbitrary decisions by institutions, legal certainty and

proportionality, since the Commission regarded the Basque tax arrangements as lawful in its Decision 93/337/EEC⁽¹⁶⁾. In any event, the Commission could change its position as regards future cases but not as regards past ones. Confebask furthermore regards the tax measures in question as existing aid. In 1983 there were already rules providing for concessions of the same type (deduction of 65 % of the tax payable where new investments were made). In 1984 a threshold of ESP 500 million was introduced as a qualifying condition for a tax credit amounting to 50 % of investments. According to the definition given in Article 1(a) of Regulation (EC) No 659/1999, 'existing aid' means 'all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty'. The aid under examination here is therefore legal for the purposes of Article 88(3) of the Treaty;

- (e) incompatibility with the common market: if the tax measures in question are regarded as enabling rules, Confebask considers that their compatibility cannot be assessed while the aid is not granted through an administrative decision. The procedure is meaningless and incapable by definition of yielding any results as to the compatibility of the aid. On the other hand, if the tax measures in question are regarded as rules granting aid directly, Confebask takes the view that the practice of the Commission and the Court requires that measures have to have sectoral specificity before the compatibility of the aid can be assessed. Furthermore, it would be necessary to establish the overall tax burden on firms and the reference tax burden. Lastly, this approach would lead to the absurd conclusion that any tax burden lower than the highest tax burden in all the Member States would constitute State aid. Confebask also rejects the Commission's argument that the said tax measures are incompatible since they do not contain specific provisions on sectoral or regional aid, or aid for large investment projects, etc.: tax measures may not and should not contain this type of provision. According to the Court of Justice⁽¹⁷⁾, the Commission should specify in its decisions what the adverse effects on competition are, determining the real effect of the measures examined. Incompatibility cannot be determined, therefore, in abstract situations specific to a tax

⁽¹⁶⁾ OJ L 134, 3.6.1993, p. 25.

⁽¹⁷⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103.

system, since in that case any differences between tax systems would necessarily become aid. This leads Confebask to repeat that there is no normal tax debt which has been reduced by the tax measures in question;

- (f) Confebask therefore asks the Commission to adopt a final decision terminating the procedure and finding that the tax measures in question comply with Community law.

- (46) Confebask's additional comments, communicated by letter dated 29 December 2000, registered on 3 January 2001, were not taken into account, as they reached the Commission after the deadline had expired⁽¹⁸⁾. Furthermore, Confebask did not apply for an extension of the time limit pursuant to Article 6(1) of Council Regulation (EC) No 659/1999.

Comments from the Rioja Regional Government

- (47) The Rioja Regional Government states that the tax measures constitute State aid, since they satisfy all four criteria set out in Article 87 of the Treaty. In support of this contention, it argues in particular that the purpose and effect of the 45 % tax credit is to relieve the recipient of part of the tax burden which would otherwise have been imposed on its profits. It therefore constitutes a financial advantage for recipient firms, which, because there are no quid pro quos for the authorities, involves a loss of tax revenue. This means that the recipients' business benefits, as they have a competitive advantage over all other firms. In addition to the specificity of substance, in the form of a minimum investment of ESP 2 500 million, the Rioja Regional Government states that the discretionary nature of the 45 % tax credit is due partly to the authorities' ability to determine firms eligible for aid, deadlines and maximum limits and partly to the fact that the granting of the tax credit is not automatic.
- (48) Moreover, the Rioja Regional Government considers that the tax measure cannot be justified on the grounds that there are five tax systems in Spain. It points out that, in the Opinion on Joined Cases C-400/97, C-401/97 and C-402/97, Advocate General Saggio considered that the nature of the competent authorities for tax matters in a territory does not justify discrimination in favour of firms established in that territory. Furthermore, the measures are not justified by

the nature or general scheme of the tax system in Vizcaya, since their purpose is to improve the competitiveness of recipient firms.

- (49) In short, the Rioja Regional Government considers that the tax incentive cannot be considered compatible with the common market by virtue of the derogations in Article 87 of the Treaty. Moreover, the Spanish authorities did not fulfil the obligation to notify the incentive under Article 88(3) of the Treaty.
- (50) The Rioja Regional Government therefore takes the view that the tax measures should be regarded as State aid which is unlawful, since the Article 88(3) notification procedure was not complied with, and incompatible with the common market.

Comments from the Basque Economists Association (Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa) and the Bilbao Chamber of Commerce (Cámara de Comercio de Bilbao/Bilboko Erkataritza Ganbera) (hereinafter 'the CVE and the CCB')

- (51) The CVE and the CCB consider that the tax system of each Basque province does not meet the specificity criterion in Article 87(1) of the Treaty merely because it applies only in part of a Member State. In support of this view, they argue that the Commission's usual practice of considering that there is specificity when a tax measure is applied to part of the Member State is appropriate where there is a single tax system. However, it is not relevant where there are various tax systems in the same Member State. The practice, furthermore, is contrary to the coherence of the Spanish tax system, which is multiple by nature. Each system is applied exclusively in one part of the territory. Thus, each one of the systems is not a regional system, but a unique system applicable to the territory concerned. Moreover, the losses of tax revenue which result from certain tax measures are not the subject of a transfer from the central government. On the contrary, they have to be offset, either by increasing the revenues from other taxes or by cutting public expenditure. In addition, the specific nature of the Spanish tax system should not be penalised through the application of Community law. For the rest, any distortions of competition resulting from the existence of five tax systems should be tackled through the Community rules on tax harmonisation.
- (52) Nonetheless, the CVE and the CCB do not rule out the possibility that, in the exercise of their tax autonomy, the Provincial Councils may adopt tax measures that are caught by Article 87(1) of the Treaty. However, in the present case, they take the view that the 45 % tax credit is not so caught, since it only meets the criterion of being granted from state resources. It does not distort competition, because its payment implies that the

⁽¹⁸⁾ The deadline for submitting comments was one month from the date of publication of the notice in the *Official Journal of the European Communities*, i.e. 26 February 2000.

recipient company has made profits. Moreover, its amount cannot be determined in advance, since, for example, if there were no profits, the aid would not be paid and if the profits were insufficient, it would be less than 45 %. The same applies as regards the effect on trade. This should be established in each specific case: it is not sufficient that trade might be affected. For the rest, the CVE and the CCB examine whether there is any specificity deriving from the threshold of ESP 2 500 million or the need to obtain the Provincial Council's approval in order to apply the tax credit. In this respect, they consider that the threshold does not involve specificity, since it is objective and non-discriminatory. As for the determination by the Provincial Council of (i) the investments qualifying for the 45 % tax credit; (ii) the deadlines and limitations applicable to the deduction; and (iii) the duration of the investment process, which may include investments made during the preparatory phase of the project giving rise to the investments, the CVE and the CCB take the view that this does not involve the exercise of a discretionary power, but is governed by rules and, ultimately, subject to judicial review.

purely administrative act of prior verification deriving from the need for legal certainty and sound administration of the tax system. The authorities cannot select the recipients or determine the amount of the 45 % tax credit or the time limit for its application.

- (53) The CVE and the CCB conclude that the 45 % tax credit, which is a general measure adopted under the tax powers of the Provinces in question, is not caught by Article 87 of the Treaty.

Comments from the Basque Business Circle (Círculo de Empresarios Vascos) and the Professional Association of Tax Advisers of the Autonomous Community of the Basque Country (Asociación Profesional de Asesores Fiscales de la Comunidad del País Vasco) (hereinafter 'the CEV and the APCPV')

- (54) Since these associations submitted similar or even identical comments, their views are summarised together.

- (55) The CEV and the APCPV reject the Commission's assessment that the 45 % tax credit has regional specificity. In their view, any provision, such as the 45 % tax credit, adopted by the Provincial Councils within the scope of their powers has the status of a general measure. The tax credit is also non-specific because of the threshold of ESP 2 500 million or the need to obtain the Provincial Council's approval in order to apply the credit. The threshold is an objective criterion which is, moreover, much used in the tax sphere and the Community rules on VAT or the taxation of SMEs. As to the Provincial Council's approval before the tax credit can be applied, this is a

- (56) As regards the issue of whether trade is affected, the CEV and the APCPV emphasise that this should be assessed on a case-by-case basis and not in a general way, as the Commission has done. For instance, there may be recipients which only produce for local markets. In such a case, the tax measure does not affect intra-Community trade. The same applies to its impact on competition. Moreover, where the recipients carry on their business on markets that have not yet been liberalised, the 45 % tax credit cannot distort competition. For the rest, the loss of tax revenues cannot be assessed if only a single measure is examined — in this case the 45 % tax credit — while ignoring the overall tax burden. In this respect, the CEV and the APCPV state that the overall tax burden in the Basque Country is greater than in the rest of Spain.

- (57) Furthermore, in its Decision of 10 May 1993 on Provincial Law No 8/1988 of 5 July 1988 the Commission did not call into question the aid measures concerned on the grounds that they required a minimum amount of investment. It therefore cannot challenge the 45 % tax credit without violating the legitimate expectations deriving from that Decision.

- (58) For the rest, the CEV and the APCPV consider that the Commission's objective in initiating the procedure against the 45 % tax credit is tax harmonisation. However, for this it is using Articles 87 and 88 of the Treaty, and for this reason there is a misuse of powers.

- (59) In view of the above, the CEV and the APCPV conclude that the 45 % tax credit is not caught by Article 87 of the Treaty.

V. TRANSMISSION OF THE THIRD PARTIES' COMMENTS TO SPAIN

- (60) By letter 2000(D/50 912) to the Spanish Permanent Representation, dated 1 March 2000, the Commission sent, pursuant to Article 6(2) of the aforesaid Regulation (EC) No 659/1999, the third parties' comments to Spain, inviting it to submit its observations within one month of the date of the letter. It received only a request for a 20-day extension of the deadline for replying. Consequently, Spain has not submitted any such observations.

VI. ASSESSMENT OF THE AID

VII. CLASSIFICATION AS STATE AID

(61) The Commission would point out that, for the purpose of applying the Community rules on State aid, the tax nature of the measures in question does not matter, since Article 87 of the Treaty applies to aid measures 'in any form'. Nevertheless, the Commission emphasises that, to be regarded as aid, the measures in question must satisfy every one of the four criteria set out in Article 87 and explained below.

(62) Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through different types of reduction in the firm's tax burden and, in particular, through an exemption from or reduction in tax liability. The 45 % tax credit meets this criterion, since it reduces the recipient firms' tax burden by an amount equivalent to 45 % of the amount of the eligible investment. In the absence of the tax credit, the recipient firm would have to pay its full final tax liability. The tax credit thus implies an exception to the common tax system applicable.

(63) Secondly, the Commission considers that the said tax credit involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure. This principle also applies to aid granted by regional or local bodies in the Member States ⁽¹⁹⁾. Furthermore, the intervention of the State can be effected both through tax provisions of a statutory, regulatory or administrative kind and through the practices of the tax authorities. In this specific case, State intervention is effected through the Vizcaya Provincial Council on the basis of a statutory provision.

(64) The argument put forward in certain comments by third parties, to the effect that it would be wrong to regard the 45 % tax credit as involving a loss of tax revenue compared to the normal amount (determined by the Commission) of the tax due, is a fallacious one. It has to be pointed out that the normal level of tax derives from the tax system in question and not from any Commission decision allegedly pursuing a hidden agenda of tax harmonisation. Furthermore, according to the second indent in point 9 of notice 98/C 384/03, to qualify as State aid, 'firstly, the measure must confer on

recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including: (...) a total or partial reduction in the amount of tax (such as exemption or a tax credit)'. This is the case with the relief in the form of the 45 % tax credit. The comment is therefore without foundation.

(65) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, according to a report on the external dependency of the Basque economy in the period 1990 to 1995 ⁽²⁰⁾, exports abroad went up ⁽²¹⁾, not only in absolute terms but, in particular, in relative terms as well, to the detriment of exports to the rest of Spain. The foreign market thus partly replaced the market which is the rest of Spain. Furthermore, according to another statistical report on the foreign trade of the Basque Country ⁽²²⁾ at 28,9 % the Basque economy's 'propensity to export' (ratio of exports to GDP) is greater than that of Germany and the other Member States, where it is about 20 %. According to this report, the Basque trade balance was clearly in surplus during the period 1993 to 1998. In particular, in 1998, for each ESP 100 of imports there were ESP 144 of exports. In short, the Basque economy is very open to the outside, and its production is very much geared to exporting. Given these characteristics of the Basque economy, it may be deduced that recipient firms are engaged in economic activities which are likely to include intra-Community trade. Consequently, aid strengthens their position vis-à-vis their competitors in intra-Community trade, thereby affecting such trade. Furthermore, the increase in recipient firms' net profit (profit after tax) improves their profitability. This enables them to compete with firms which are not eligible for the tax credit, either because they have not invested, or because their investments have not reached the threshold of ESP 2 500 million following the introduction of the tax credit.

(66) Since, in this case, the tax rules under examination are general and abstract in character, the Commission would point out that the analysis of their impact on trade can only be carried out at a general, abstract level; it is not possible to specify to what extent they affect a market, sector or specific product, as is stated in the

⁽¹⁹⁾ See Case 248/84 *Germany v Commission* [1987] ECR 4013.

⁽²⁰⁾ Patxi Garrido Espinosa and Victoria García Olea, '*La dependencia exterior vasca en el periodo 1990-1995*', Euskal Estatistika-Erakundea/Instituto Vasco de Estadística (EUSTAT), the statistical office of the Basque Government.

⁽²¹⁾ Exports abroad accounted for 28,5 % of total exports (including sales to the rest of Spain) in 1990, and for 40,8 % five years later in 1995.

⁽²²⁾ '*Estadística de Comercio Exterior para la Comunidad Autónoma de Euskadi en el año 1998*', prepared by EUSTAT.

abovementioned comments by third parties. This position has been confirmed on a number of occasions by ECJ case law ⁽²³⁾.

- (67) As regards the comment that the effect on trade should be assessed by the Commission on the basis of a comparison of all tax systems, the Commission would point out that the distortions of competition which are the subject of this procedure under Articles 87 and 88 of the Treaty are due to a derogating rule which favours certain firms vis-à-vis the other firms of the Member State; they are not possible distortions of competition which are due to differences between the tax systems of the Member States, which might, as appropriate, be caught by the provisions of Articles 93 to 97 of the Treaty.
- (68) As regards the specific character which State aid must have, the Commission takes the view that the 45 % tax credit is specific or selective in that it favours certain firms, since only firms which make investments exceeding the ESP 2 500 million (EUR 15 025 303) threshold are eligible. All other firms whose investments do not exceed that threshold are ineligible. The objective character of the threshold cited does not prevent it, as the Spanish authorities and some of the third-party comments claim, from being selective and excluding firms which do not satisfy the conditions in question.
- (69) The Commission is of the opinion, in the alternative, that the 45 % tax credit is specific on the grounds of the discretionary power of the tax authorities. The Vizcaya Provincial Council has a discretionary power to determine, in particular, the investments that are eligible for the 45 % tax credit, the duration of the investment process and that of the preparatory phase of the investment qualifying for the aid. It should be stressed

here that the Provincial Law introducing the notions of 'investment process' and 'preparatory phase of the investment' does not define those terms. Unlike the concept of 'investments in tangible fixed assets', which is defined in accounting rules ⁽²⁴⁾ and other provisions ⁽²⁵⁾, there is no precise and generally accepted definition of the 'investment process' or the 'preparatory phase'. In the absence of a precise definition, therefore, the regional authorities have some leeway in determining exactly what is meant by the 'investment process' or the investment in the 'preparatory phase' in the case of each recipient.

- (70) It should also be stressed that, while in Decision 93/337/EEC the Commission used only the criterion of territorial or sectoral specificity in order to demonstrate the specific or selective nature of the aid under the scheme in question, this does not mean that the aid could not have displayed other types of specificity in relation to other criteria. For an official measure to be classed as selective or specific, in relation to State aid, it is enough to identify a single feature. There is therefore no need for each Commission decision to examine exhaustively every specific feature that may be displayed by the official measures under consideration in order to demonstrate that they are selective. Consequently, the argument put forward in some third-party comments, to the effect that because the Commission did not mention the selective nature of the minimum investment threshold as a condition of eligibility for the aid, it did not deem it to be selective, cannot be accepted.
- (71) As regards the existence of tax measures in the form of tax credits for investments above a given threshold in other Member States, which the Commission did not consider selective in scope because of the threshold - according to certain comments by third parties, this leads to a legitimate expectation concerning all similar tax credits - the Commission would point out that the schemes mentioned in some of the third-party comments are very different from the 45 % tax credit. Furthermore, even supposing that certain schemes were similar and that the Commission had not reacted, it would not be justified in taking this misguided approach in the present case. It should be pointed out that, according to the case law of the Court of Justice, 'any breach by a Member State of an obligation under the Treaty in connection with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one distortion of competition on trade between Member States do not cancel one

⁽²³⁾ See Case C-75/97 (*'Maribel'*) *Belgium v Commission*, paragraphs 48 and 51; Case T-298/97 *Alzetta Mauro and others v Commission*, paragraphs 80 to 82; the Opinion of Advocate General Ruiz-Jarabo in Case C-310/99 *Italy v Commission*, paragraphs 54 and 55; and the Opinion of Advocate General Saggio in Case C-156/98 *Germany v Commission*, paragraph 31, which ran thus: it should be pointed out in this respect that, with regard to a general aid scheme, to be able to determine the effect of that scheme on trade, it is sufficient if, from an *ex ante* assessment, it can reasonably be considered that the said effect may come about. If the position of a firm (or, as in the present case, an indefinite number of firms) is reinforced by an aid scheme, this privilege may in principle affect competition between Member States.

⁽²⁴⁾ For example, the 'Plan General de Contabilidad'.

⁽²⁵⁾ For example, the 'Ley de Sociedades Anónimas'.

another out but accumulate and the damaging consequences to the common market are increased' ⁽²⁶⁾.

regional authorities with powers in the tax field demonstrate, contrary to what the Spanish authorities claim in their comments, that it is consistent with the nature of the tax system.

(72) Concerning the question raised in some of the third-party comments about whether the Provincial Law in question has the character of an enabling rule or a rule granting aid directly, the Commission would point out that, in this case, the rules which introduced the 45 % tax credit have the character of an aid scheme. In support of this assessment, it is sufficient to point out that under Article 1(d) of Regulation (EC) No 659/1999 an aid scheme is defined as 'a system on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner (...)'. However, this character of an aid scheme does not predetermine, as certain third-party comments claim, whether there is any discretionary power in the execution of the scheme or not. Discretionary power in regard to the granting of the aid will depend on the specific characteristics of the scheme.

(73) As regards invoking the nature or general scheme of the tax system as justification for the 45 % tax credit, as the Spanish authorities seek to do, the Commission emphasises that what matters is determining whether the tax measures involved meet the objectives inherent in the tax system itself, or whether, on the contrary, they pursue other, possibly legitimate, objectives outside the tax system. In the case at issue, the 45 % tax credit does not fulfil the internal objectives of the Spanish tax system, which, apart from the principal objective inherent in any tax system of collecting revenue for financing public expenditure, is founded on the principles of equality and progressiveness ⁽²⁷⁾. In this regard the 45 % tax credit can be said to discriminate ⁽²⁸⁾ in favour of large economic units at the expense of other smaller and less powerful units, without such discrimination being justified by the internal logic of the tax system. In short, because it does not comply with the internal principles inherent in the tax system, the 45 % tax credit cannot be justified by the nature or general scheme of that system. Neither does the fact that the tax credit was introduced by the

(74) Moreover, the Spanish authorities state in their comments that the aim of the 45 % tax credit is to promote economic activity, and that it therefore fulfils the industrial policy objectives pursued by the Basque Government. According to the Basque Government document entitled *Industrial Policy: General Framework of Activities 1996 to 1999* (*Política Industrial. Marco General de Actividades 1996 to 1999*), 'tax policies are essential for boosting economic development and, similarly, for promoting industrial projects based on the industrial development of the Basque Country' (page 131), and in the chapter 'Tax policy instruments' one reads: 'the tax autonomy which we have [in the Basque Country] enables us to search for imaginative made-to-measure tax solutions, e.g. for priority projects or even tax incentives for large firms' (page 133). The 45 % tax credit in question, therefore, is part of an industrial policy whose objectives are not inherent in the tax system.

(75) In short, the Commission finds that, as the Spanish authorities have pointed out, the 45 % tax credit pursues an economic policy objective which is not inherent in the tax system. It is therefore not justified by the nature or general scheme of the system.

(76) As to the argument put forward in certain third-party comments concerning the existence of a higher overall tax burden in the Basque Country, the Commission repeats that this is not relevant in the case at issue, since the procedure was initiated in respect of a specific measure and not the whole the tax system of each of the three Basque provinces.

(77) To sum up, the Commission finds that the 45 % tax credit in question is State aid under Article 87(1) of the Treaty and Article 61(1) of the EEA Agreement, since it involves aid granted by a State, from state resources, which favours certain undertakings, distorts competition and affects trade between Member States.

⁽²⁶⁾ See Case C-78/76 *Steinike & Weinlig v Federal Republic of Germany*, paragraph 24. On the other hand, Case C-313/90 *Comité International de la rayonne et des fibres synthétiques and others v Commission*, paragraph 45, states that neither the principle of equal treatment nor that of the protection of legitimate expectations may be relied upon in order to justify the repetition of an incorrect interpretation of a measure.

⁽²⁷⁾ Article 31 of the Spanish Constitution.

⁽²⁸⁾ See the sixth paragraph of judgment 411/99 of 17 May 1999 of the High Court of the Basque Country (*Tribunal Superior de Justicia del País Vasco*) in Case 907/98 *Administración del Estado v Juntas Generales de Álava*.

VIII. THE UNLAWFUL NATURE OF THE 45 % TAX CREDIT

(78) Given that the said scheme does not comprise a commitment from the Spanish authorities to grant the

aid in accordance with the conditions for *de minimis* aid ⁽²⁹⁾, the Commission considers that the aid cannot be regarded as subject to those rules. It should be stressed in this respect that the Spanish authorities never maintained, in the procedure, that the aid in question should be classed as *de minimis* aid, either in full or in part. Moreover, it could not comply with the *de minimis* rules, since in particular there is no guarantee that the ceiling of EUR 100 000 would not be exceeded. The incentive does not qualify as existing aid, either, since it does not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999.

Commission considers that the aid should be regarded as unlawful. The Commission regrets this failure by the Spanish authorities to fulfil their obligation to notify the aid in advance.

(79) The claim made by some third parties that the 45 % tax credit constitutes existing aid must be rejected. In support of that argument, some third-party comments mention the existence of two tax credits prior to the introduction of the 45 % tax credit. However, scrutiny of those two schemes reveals that they differed substantially from the 45 % tax credit under examination. The first scheme did not specify any threshold and the second one established a threshold of ESP 500 million, which is much lower than the ESP 2 500 million threshold in the case at issue. In Article 1(c) of Regulation (EC) No 659/1999, new aid is defined as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. The tax credit in question, which involves substantial changes with respect to those schemes, is therefore to be classed as new aid and, in accordance with Article 2(1) of the Regulation, should be notified, save as otherwise provided in regulations adopted pursuant to Article 89 of the Treaty ⁽³⁰⁾. In any case, even the two earlier schemes did not qualify as existing aid since they were apparently not in force on 1 January 1986, when Spain acceded to the European Union. They therefore did not meet the aforesaid criterion laid down in Article 1(b)(i) of Regulation (EC) No 659/1999 of having been put into effect before, and being still applicable after, the date of accession.

(81) As regards the argument in some of the third-party comments that basically there is a violation of legitimate expectations and legal certainty, the Commission feels bound to reject this, since firstly the 45 % tax credit is not existing aid and, secondly, as it was not notified under Article 88(3) of the Treaty, the Commission was not able to determine whether it is compatible with the common market. Neither can it be accepted that there is a legitimate expectation of the 45 % tax credit being compatible with the common market on the grounds that, as claimed in some of the third-party comments, the Basque tax system was already deemed compatible by Commission Decision 93/337/EEC concerning a scheme of tax concessions for investment. In that Decision the Commission in fact found that the tax measures concerned were to be classed as State aid and, as such, were subject to the Community rules on State aid (rules on regional aid or aid for SMEs, rules on combination of aid and sectoral rules). Therefore, if as claimed in some third-party comments the 45 % tax credit was a measure similar to the scheme examined in the 1993 Decision, it should, in the first place, have been notified as it is new State aid and, secondly, comply in particular with the rules on regional aid or aid for SMEs, the rules on combination of aid and the sectoral rules. In these circumstances, the recipients cannot rely on any legitimate expectations or legal certainty as regards the State aid nature of the 45 % tax credit.

(80) The Commission would point out that State aid which is not covered by the *de minimis* rule and is not existing aid is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(3) of the EEA Agreement. However, the Spanish authorities have not fulfilled this obligation, which is why the

In short, as regards the principles of legitimate expectations and legal certainty invoked in the third-party comments, the Commission gave no specific assurances either to the Spanish authorities or to third parties, who could not therefore harbour any legitimate expectations with regard to the legality or compatibility of the aid in question. It should be pointed out in this connection that 'it is settled case-law that the right to protection of legitimate expectations may be claimed by any individual who finds himself in a position in which it is shown that the Community administration gave rise to justified hopes on his part (...). However, no one may plead infringement of the principle of the protection of legitimate expectations in the absence of specific assurances given to him by the administration' ⁽³¹⁾. This is why the argument that legitimate expectations or legal certainty have been violated is without foundation in this case.

⁽²⁹⁾ The result of the assessment of the aid is the same, whether that assessment is based on the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9) or on Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

⁽³⁰⁾ At no time during the period of validity of the scheme in question was any such exemption regulation in force.

⁽³¹⁾ Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and others v Commission* [1999] ECR II-3663, paragraph 300.

- (82) In this context, moreover, the Commission recalls that in its Decision 93/337/EEC it already deemed certain tax credits introduced in 1988 by the Provinces of Álava, Guipúzcoa and Vizcaya to be State aid.

Article 87(3)(a) derogation, since the per capita GDP ⁽³²⁾ of the NUTS ⁽³³⁾ II region of the Basque Country, of which it forms part, has always been higher than 75 % of the Community average. According to the rules on regional aid ⁽³⁴⁾, ⁽³⁵⁾ the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty are met only if the region, at NUTS level 2, has a per capita GDP of not more than 75 % of the Community average.

IX. ASSESSMENT OF COMPATIBILITY WITH THE COMMON MARKET

- (83) As a preliminary, the Commission would repeat that the 45 % tax credit has to be classed as an aid scheme. Given the general, abstract nature of an aid scheme, the Commission does not know the circumstances of existing or possible future recipient firms and is not, therefore, able to examine the exact repercussions on competition for specific firms. In this context it is sufficient to ascertain that potential recipients could benefit from aid that is not consistent with the Community directives, guidelines and frameworks applicable on this subject. Moreover, the Commission would emphasise that, in its decision initiating the procedure, it asked for all relevant information relating to the aid and the particular circumstances of each recipient. However, the Spanish authorities have not provided any such information. This is why it is contradictory to criticise the Commission, as certain third-party comments do, for providing only a general assessment while at the same time refusing to supply the detailed data requested.

- (86) As regards the admissibility of Vizcaya for the derogation in Article 87(3)(c), the Commission would point out that, during the period from 1 January 1997 to 18 March 2000, two successive regional aid maps were in force. The first one, adopted by its Decision of 26 July 1995 ⁽³⁶⁾, applied from 26 September 1995 until 31 December 1999 and provided that the whole of Vizcaya was a region in which investment aid for regional development could be regarded as compatible with the common market under the derogation in Article 87(3)(c), provided that it did not exceed the ceiling of 25 % nge in the case of large firms. As regards the subsequent period, the Commission would point out that, in its Decision of 11 April 2000, it approved the Spanish regional aid map for the period 2000 to 2006. According to this map, Vizcaya continues to be a region in which regional development aid may be considered compatible with the common market in accordance with the derogation in Article 87(3)(c) of the Treaty, provided that it does not exceed the ceiling of 20 % nge in the case of large firms, instead of 25 % nge under the previous map.

- (84) The State aid in the form of a 45 % tax credit has the effect of encouraging large investments costing more than ESP 2 500 million. According to Annex I to the guidelines on national regional aid (98/C 74/06), 'tax aid may be considered to be aid connected with an investment where it is based on an amount invested in the region. In addition, any tax aid may be connected with an investment if one sets a ceiling expressed as a percentage of the amount invested in the region'. In the case in point, the 45 % tax credit fulfils these conditions, at least partly, since it is based on investment expenditure and its amount does not exceed 45 % of the investment. The Commission accordingly takes the view that the 45 % tax credit should be classed as investment aid to the extent that it fulfils the above criteria. It must therefore be examined in the light of the Community rules on investment aid.

- (87) The Commission would also point out that, in the case of SMEs ⁽³⁷⁾, the intensity of investment aid may, in accordance with the SME guidelines ⁽³⁸⁾, be 10

⁽³²⁾ Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).

⁽³³⁾ Nomenclature of Territorial Units for Statistics.

⁽³⁴⁾ The references to the regional rules are, in some of the subsequent recitals, to the guidelines on national regional aid (98/C 74/06) or to the earlier rules. In any event, the result of the assessment is the same in all cases.

⁽³⁵⁾ See point 1 of the Commission communication to the Member States on the method for the application of Article 87(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2) and point 3.5 of the guidelines on national regional aid (98/C 74/06).

⁽³⁶⁾ OJ C 25, 31.1.1996, p. 3.

⁽³⁷⁾ For the purposes of the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2) or the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ L 107, 30.4.1996, p. 4).

⁽³⁸⁾ Community guidelines on State aid for small and medium-sized enterprises (92/C 213/02) (OJ C 213, 19.8.1992, p. 2) or Community guidelines on State aid for small and medium-sized enterprises (96/C 213/04) (OJ C 213, 23.7.1996, p. 4).

- (85) If State aid for investment is to qualify for one of the regional derogations in Article 87(3)(a) or (c) of the Treaty, the region in which the scheme is applied must have been recognised as eligible for one of those derogations on the regional aid map. As regards the admissibility of Vizcaya, the Commission would point out that the territory has never been eligible for the

percentage points higher than the regional ceiling for large firms, provided that the total does not exceed 30 % nge.

(88) It should also be stressed that, to be eligible for investment aid, investments in tangible assets must correspond, in particular, to the Community definitions of initial investment and the standard base⁽³⁹⁾. Conversely, all other investment expenditure that does not correspond to those definitions, such as replacement investments or expenditure on items other than land, buildings or plant/machinery, is not deemed eligible. Although there is no doubt that the 45 % tax credit is aid granted subject to the carrying-out of a tangible investment⁽⁴⁰⁾ in new tangible fixed assets, it does not exclude replacement investments⁽⁴¹⁾ or expenditure related to the 'investment process' and 'investments made during the preparatory phase'. In the absence of a precise definition of those terms, the possibility cannot be ruled out that the 45 % tax credit could be applied not only to expenditure included in the standard base but also to expenditure linked to replacement investments or other items of expenditure lying outside the standard base. The Commission consequently takes the view that the aid may be applied to initial investment but also to other items of expenditure that cannot be deemed compatible with the relevant Community rules, such as replacement investments.

(89) The Commission notes that, since the entry into force of the guidelines on national regional aid (98/C 74/06), aid that may qualify for the derogation in Article

87(3)(c) of the Treaty in Vizcaya must not only comply with the abovementioned Community definitions of initial investment and the standard base and observe the applicable ceilings; it must also satisfy other requirements. In the case in point, the aid must be subject to certain conditions: the recipient's contribution to the investment must be at least 25 % (point 4.2); the application for aid must be submitted before the investment projects begin to be implemented (point 4.2); the investment must be maintained for a minimum period of five years (point 4.10); and the respective aid intensity ceilings must be complied with where different types of aid are combined (points 4.18 to 4.21).

(90) In this specific case, the Commission points out that the tax aid in the form of a 45 % tax credit is not limited (during the period from 1 January 1997 to 31 December 1999) to 25 % nge in the case of large firms or to 30 % nge in the case of SMEs. Neither, as regards the period after 1 January 2000, is it limited to 20 % nge in the case of large firms or to 30 % in the case of SMEs. Furthermore, the costs that may be accepted for aid may not fully correspond to those included in the standard base since replacement investments are not excluded and other items of expenditure may be accepted. In these circumstances, the Commission finds that a tax credit amounting to 45 % of investments which does not comply with the Community rules on regional aid cannot be deemed compatible with the common market under the regional derogation in Article 87(3)(c) of the Treaty.

⁽³⁹⁾ See the Annex to the Council resolution of 20 October 1971 (OJ C 111, 4.11.1971, p. 1), point 5(c); the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9), point 18; the Community guidelines on State aid for small and medium-sized enterprises, point 4.2.1; or the guidelines on national regional aid (98/C 74/06) (OJ C 74, 10.3.1998, p. 9), point 4.4 ('initial investment means an investment in fixed capital relating to the setting-up of a new establishment, the extension of an existing establishment, or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment (through rationalisation, diversification or modernisation)'), point 4.5 ('aid for initial investment is calculated as a percentage of the investment's value. This value is established on the basis of a uniform set of items of expenditure (standard base) corresponding to the following elements of the investment: land, buildings and plant/machinery') and footnote 23 ('in the transport sector, expenditure on the purchase of transport equipment (movable assets) cannot be included in the uniform set of items of expenditure (standard base). Such expenditure, therefore, is not eligible for aid for initial investment').

⁽⁴⁰⁾ See the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9).

⁽⁴¹⁾ Footnote 21 in the guidelines on national regional aid (98/C 74/06) states that 'replacement investment is thus excluded from the concept. Aid for this type of investment falls within the category of operating aid, to which the rules described at points 4.15 to 4.17 apply'.

(91) The aid for investment expenditure⁽⁴²⁾ that does not correspond to the Community definition cannot be regarded as investment aid. In accordance with Annex I to the regional aid guidelines (98/C 74/06), any tax aid may be classed as investment aid where its amount is subject to a ceiling expressed as a percentage of investment expenditure in accordance with the Community rules. However, in the case in point, the amount of the aid represents a percentage of investment expenditure that does not comply with the Community rules. That is why, under those rules, the aid cannot be regarded as investment aid. On the contrary, the aid may finance expenditure of a periodic and necessary nature such as that linked to replacement investments. Such current or periodic expenditure is the type of expenditure that has to be incurred by a firm as part of its day-to-day operations or its normal activities. Aid for

⁽⁴²⁾ It should be stressed that neither the Spanish authorities nor the third parties which submitted comments denied the existence of this type of investment expenditure.

this type of investment therefore has to be classed as operating aid and as such is subject to specific rules.

(92) In this respect, the Commission would point out that, in accordance with the Commission's 1988 communication ⁽⁴³⁾ and the regional aid guidelines (98/C 74/06), regional aid which is classed as operating aid is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty, provided that it meets certain conditions laid down in point 6 of the communication and points 4.15 to 4.17 of the guidelines, in the outermost regions or in regions of low population density if it is intended to offset additional transport costs. However, the NUTS level 3 territory of Vizcaya is not eligible for the derogation in Article 87(3)(a) of the Treaty, and the grant of the said operating aid does not meet the conditions described. The NUTS level 3 territory of Vizcaya is not an outermost region ⁽⁴⁴⁾ nor a region of low population density ⁽⁴⁵⁾. This is the reason why the operating aid elements in the 45 % tax credit are prohibited, in particular because they are not granted in a region that is eligible for the derogation in Article 87(3)(a) of the Treaty, in an outermost region or a region of low population density. The aid is therefore incompatible in this case.

(93) The Commission therefore considers that the tax incentive scheme in question cannot be regarded as compatible with the common market under the regional derogations in Article 87(3)(a) and (c) of the Treaty, since it does not comply with the rules on regional aid.

(94) As far as investments made by SMEs outside Vizcaya are concerned, the Commission would point out that, in such cases, the corresponding aid cannot be regarded as regional aid and therefore does not qualify for the regional derogation in Article 87(3)(c) of the Treaty. The same applies where such investments are made by large firms. On the other hand, in accordance with the Community guidelines on State aid for small and medium-sized enterprises (96/C 213/04), where the recipient is an SME, the other derogation in Article 87(3)(c), for aid to facilitate the development of certain economic activities, may apply. In addition to requiring compliance with the definition of initial investment and the rules on eligible expenditure forming part of the

standard base, the above guidelines state that the exception will apply to aid for tangible investments up to a ceiling of 15 % gross grant equivalent (gge) in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. The Commission notes that the tax aid in the form of a 45 % tax credit is not limited to 15 % gge in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. Neither are the eligible investments fully in line with the definition of initial investment given in point 4.2.1 of the guidelines, nor are the costs that may be accepted compatible with those forming part of the standard base also laid down in point 4.2.1, since the scheme does not rule out replacement investments or expenditure items other than those covered by the standard base. The Commission accordingly finds that the tax aid under examination cannot be deemed compatible with the common market under the derogation in Article 87(3)(c) of the Treaty for aid to facilitate the development of certain economic activities.

(95) Furthermore, the scope of the regional aid guidelines (98/C 74/06) excludes the production, processing and marketing of the agricultural products listed in Annex I to the Treaty, fisheries and the coal industry. Transport, steelmaking, shipbuilding, synthetic fibres and the motor industry are subject to special rules over and above those set out in the abovementioned guidelines, while specific rules apply to investments covered by the multisectoral framework on regional aid for large investment projects (98/C 107/05). Those rules must therefore be taken into account in assessing the compatibility of the aid in question where the recipient company belongs to one of those sectors or where the investment falls within the scope of the multisectoral framework.

(96) The derogation in Article 87(3)(c) of the Treaty has to be examined to see whether it might not apply, in the above cases, for other purposes as well as the development of certain economic activities. It should be noted in this respect that the aim of the 45 % tax credit is not to develop an economic activity within the meaning of Article 87(3)(c) of the Treaty, such as the development of measures to assist small and medium-sized enterprises, research and development, environmental protection, job creation or training in accordance with the appropriate Community rules. Consequently, the tax incentive in question cannot qualify for the derogation in Article 87(3)(c) of the Treaty in respect of the said purposes.

⁽⁴³⁾ Commission communication to the Member States on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2).

⁽⁴⁴⁾ It is not in the list of outermost regions in Article 299 of the Treaty.

⁽⁴⁵⁾ According to point 3.10.4 of the guidelines on national regional aid (98/C 74/06).

(97) Similarly, the 45 % tax credit, which is not subject to any sectoral limitation, may be granted without any restriction to undertakings in sensitive sectors subject to

specific Community rules, such as those applicable to the production, processing and marketing of the agricultural products in Annex I to the Treaty, fisheries, coalmining, steelmaking, shipbuilding, synthetic fibres and the motor industry ⁽⁴⁶⁾. In the circumstances, the Commission considers that the tax incentive in the form of a 45 % tax credit cannot comply with the said sectoral rules. In this particular case, the 45 % tax credit does not meet the condition that it should not promote new production capacity so as not to exacerbate the overcapacity problems from which these sectors traditionally suffer. Therefore, where the recipient belongs to one of the abovementioned sectors, the Commission considers that, since it is not subject to the sectoral rules mentioned, the aid is incompatible with the common market and the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities does not apply.

firm in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (1999/C 288/02) ⁽⁴⁸⁾, despite the Spanish authorities' claim that the tax credit, as it has been designed, is unlikely to be applied to firms in difficulty. The Commission would point out in this connection that the grant of the tax aid in question is not subject to the conditions ⁽⁴⁹⁾ laid down in those guidelines. As stated in point 20 of the abovementioned rescue and restructuring aid guidelines (1999/C 288/02), 'the Commission considers that aid for rescue and restructuring may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest if the conditions set out in these guidelines are met.' If those conditions are not met, the aid is incompatible with the common market where it is intended for firms in difficulty. The Commission therefore finds that the tax aid in question, where granted to firms in difficulty, is not compatible with the common market under the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities.

- (98) As far as the period after 1 September 1998 is concerned, the Commission further takes the view that the aided investment may possibly fall within the scope of the multisectoral framework on regional aid for large investment projects (98/C 107/05) ⁽⁴⁷⁾. All investment projects costing at least EUR 50 million (EUR 15 million in the case of the textile and clothing sector), with an aid intensity of at least 50 % of the regional aid ceiling and involving aid per job of at least EUR 40 000 (EUR 30 000 in the case of the textile and clothing sector), as well as investment projects for which the total aid is at least EUR 50 million, are subject to the conditions laid down in that framework. Each such investment project must be notified in advance, in accordance with Article 88(3) of the Treaty, to enable the Commission to determine the maximum aid intensity that is compatible with the common market. However, the tax aid in question is not subject either to prior notification in the case of the abovementioned large projects or to possible reduction in intensity following the Commission's assessment. The Commission therefore finds that the tax aid under examination is not compatible with the common market under the derogation in Article 87(3)(c) of the Treaty, since the derogation in Article 87(3)(a) does not apply in Vizcaya.

Application of the other exceptions

- (100) The aid in question, which cannot qualify for the derogations in Article 87(3)(a) and (c) of the Treaty, cannot qualify either for other derogations in Article 87(2) and (3). It cannot be regarded as aid of a social nature under Article 87(2)(a); it is not intended to make good the damage caused by natural disasters or exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Nor does it qualify for the derogation in Article 87(3)(d) as its purpose is not to promote culture or heritage conservation.

Summary

- (99) Since the tax aid in question is granted irrespective of the economic and financial position of the recipient firms, the Commission considers that there is no way of ruling out the possibility that the recipient may be a

- (101) The Commission finds that the State aid in question in the form of a 45 % tax credit does not qualify for the derogation in Article 87(3)(a) of the Treaty, since

⁽⁴⁶⁾ For the sectoral rules currently in force see, in addition to the *Official Journal of the European Communities*, the website of the Directorate-General for Competition http://europa.eu.int/comm/competition/state_aid/legislation/.

⁽⁴⁷⁾ OJ C 107, 7.4.1998, p. 7.

⁽⁴⁸⁾ OJ C 288, 9.10.1999, p. 2. These guidelines have since 1999 replaced a previous version (94/C 368/05) of the same guidelines (OJ C 368, 23.12.1994, p. 12).

⁽⁴⁹⁾ Among other things, that the aid is conditional on implementation of a restructuring plan which enables the long-term viability of the firm to be restored.

Vizcaya is not eligible for assistance under that provision, or for the derogation in Article 87(3)(c) for 'aid to facilitate the development (...) of certain economic areas', since it does not comply with the Community rules on regional aid. Neither does it qualify for the derogation in Article 87(3)(c) for 'aid to facilitate the development of certain economic activities', since, on the one hand, it does not comply with the Community rules applicable to SMEs in this context and, on the other hand, as far as large firms are concerned, it does not relate to certain activities. The aid cannot qualify either for other derogations in Article 87(2) and (3). It cannot be regarded as aid of a social nature under Article 87(2)(a); it is not intended to make good the damage caused by natural disasters or exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Nor does it qualify for the derogation in Article 87(3)(d) as its purpose is not to promote culture or heritage conservation. The aid is therefore incompatible with the common market.

- (102) Since any tax credit that is not used because it exceeds the final amount of tax payable may be carried over and used for several years following adoption of the decision granting the tax credit ⁽⁵⁰⁾, there could still be some tax aid left to pay. However, this aid is unlawful and incompatible. The Spanish authorities should therefore cancel the payment of any balance from the 45 % tax credit which could still be due to certain recipients.

- (103) As regards incompatible aid already paid, it should be pointed out that, in accordance with the above arguments, the recipients may not rely on general principles of Community law such as legitimate expectations or legal certainty. Consequently, there is nothing to prevent the application of Article 14(1) of Regulation (EC) No 659/1999, according to which 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover

the aid from the beneficiary'. In this case, therefore, the Spanish authorities should take all necessary measures to recover the aid already paid in order to restore the economic situation which the recipient firms would be in without the unlawful grant of the aid. The aid should be recovered in accordance with the procedures and provisions of Spanish law and should include all interest due, calculated from the date the aid was granted until the date of actual repayment on the basis of the reference rate used at that date to calculate the net grant equivalent of regional aid in Spain ⁽⁵¹⁾.

- (104) The State aid in question does not qualify for the derogation in Article 87(3)(a) of the Treaty or for the derogation in Article 87(3)(c) for 'aid to facilitate the development (...) of certain economic areas', since it does not comply with the Community rules on regional aid. Neither does it qualify for the derogation in Article 87(3)(c) for 'aid to facilitate the development of certain economic activities', since, on the one hand, it does not comply with the Community rules applicable to SMEs in this context and, on the other hand, as far as large firms are concerned, it does not relate to certain activities. The aid cannot qualify either for other derogations in Article 87(2) and (3). It cannot be regarded as aid of a social nature under Article 87(2)(a); it is not intended to make good the damage caused by natural disasters or exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Nor does it qualify for the derogation in Article 87(3)(d) as its purpose is not to promote culture or heritage conservation. The aid is therefore incompatible with the common market.

- (105) This decision relates to the scheme and should be implemented immediately, including the recovery of any individual aid granted under that scheme. The Commission would also point out that, as usual, this Decision is without prejudice to whether individual aid may be regarded, in full or in part, as compatible with the common market on its own merits, either in a subsequent Commission decision or under exempting regulations.

⁽⁵⁰⁾ In the case of tax credits granted under Provincial Law No 22/1994 of 20 December 1994, the period in which they may be used is limited to nine years. Tax credits granted under subsequent provincial laws are no longer subject to any such limitation.

⁽⁵¹⁾ Commission letter to Member States SG(91) D/4577 of 4 March 1991. See also Case 142/87 *Belgium v Commission* [1990] ECR I-950.

X. CONCLUSIONS

(106) In view of the above, the Commission concludes that:

- Spain has unlawfully put into effect, in Vizcaya, the 45 % tax credit for investments, thereby infringing Article 88(3) of the Treaty,
- the 45 % tax credit for investments is incompatible with the common market,
- the Spanish authorities must cancel the payment of any balance of the tax credit which could still be due to certain recipients. As regards the incompatible aid already paid, the Spanish authorities must take all necessary measures to recover it, so as to restore the economic situation which the recipient firms would be in without the unlawful grant of the aid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a 45 % tax credit for investments, unlawfully put into effect by Spain in the Province of Vizcaya, in breach of Article 88(3) of the Treaty, through the fourth additional provision of Provincial Law No 7/1996 of 26 December 1996, extended indefinitely by the second provision of Provincial Law No 4/1998 of 2 April 1998 ⁽⁵²⁾ is incompatible with the common market.

Article 2

Spain shall abolish the aid scheme referred to in Article 1 in so far as it is continuing to produce effects.

Article 3

1. Spain shall take all necessary measures to recover from the recipients the aid referred to in Article 1 which has been unlawfully made available to them.

Spain shall cancel all payment of outstanding aid.

2. Recovery shall be effected without delay in accordance with the procedures of national law, provided these allow the immediate and effective implementation of this Decision. The sums to be recovered shall bear interest from the date on which they were available to the recipients until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

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

Article 5

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 11 July 2001.

For the Commission

Mario MONTI

Member of the Commission

⁽⁵²⁾ Norma Foral No 4/1998 de 2 de abril de 1998 (disposición segunda).

COMMISSION DECISION**of 20 December 2001****on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Álava (Spain)***(notified under document number C(2001) 4475)***(Only the Spanish text is authentic)****(Text with EEA relevance)****(2003/28/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, in accordance with the abovementioned Articles ⁽¹⁾, called on interested parties to submit their comments, and having regard to those comments,

Whereas:

(3) By letter from the Permanent Representation dated 14 December 2000, registered on 19 December 2000, the Spanish authorities asked that the time limit for submitting their comments be extended. By letter from the Permanent Representation dated 5 February 2001, registered on 8 February 2001, the Spanish authorities submitted their comments (prepared by the Álava Provincial Council) under the abovementioned procedure.

(4) The Commission 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 aid within one month of the date of publication of the Decision.

(5) Comments were received from: the Rioja Regional Government on 1 March 2001; from the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza (Confebask)) on 2 March 2001; from the Unión General de Trabajadores de la Rioja on 2 March 2001, and from Schütz Ibérica, S.L. by letter dated 2 July 2001 (D/52 703). The Commission sent these comments to Spain, asking for observations. By letter from the Permanent Representation dated 26 July 2001, the Spanish authorities asked that the time limit for submitting their comments be extended. By letter from the Permanent Representation dated 17 September 2001, the Spanish authorities submitted their comments (prepared by the Álava Provincial Council) on the observations of interested third parties under the abovementioned procedure.

1. PROCEDURE

(1) As a result of two complaints, the first submitted by certain organisations in the border autonomous community of Rioja against the urgent transitional tax measures adopted in 1993 by the three Basque provincial councils, and the second by a competitor against the 10 year exemption from corporation tax enjoyed by Depósitos Tubos Reunidos Lentz TR Lentz, SA (Detursa), located in Lantarón (Álava), the Commission learned of the existence of State aid in Álava in the form of an exemption from corporation tax for newly established firms.

2. DETAILED DESCRIPTION OF THE AID

(2) By letter dated 28 November 2000, SG(2000) D/108 806, the Commission informed the Kingdom of Spain of its decision to initiate in respect of this aid the procedure laid down in Article 88(2) of the Treaty.

(6) The Commission notes that this tax aid scheme was introduced by Article 14 of Provincial Law 18/1993 of 5 July 1993 on urgent tax measures to assist investment

⁽¹⁾ OJ C 37, 3.2.2001, p. 38.

⁽²⁾ See footnote 1.

and stimulate economic activity ⁽³⁾. The text of the Article ⁽⁴⁾ reads as follows:

stimulate the economy through enterprise and investment incentives for firms.

1. Companies formed between the entry into force of this Provincial Law and 31 December 1994 shall be exempt from corporation tax for a period of 10 tax years starting from, and including, the one in which they are formed, provided that the conditions laid down in the following paragraph are met.

2. The conditions of eligibility for the exemption established in this Article are that:

(a) they are formed with a minimum paid-up capital of ESP 20 million;

[...]

(f) between the date of incorporation and 31 December 1995 they invest at least ESP 80 million, all such investments being in assets assigned to the business which are not leased or sold to third parties for their use;

(g) they create at least 10 jobs in the six months following start-up, and the annual average workforce is kept at that figure during the exemption period;

[...]

(i) they must have a business plan covering a period of at least five years. [...].

[...]

6. The provisions of this Article shall be incompatible with any other tax concession.

7. The transitional exemption scheme shall be requested from the Treasury Department of the Provincial Council [...], which, after checking that the requirements set out at the beginning have been met, shall communicate to the applicant company, as appropriate, its provisional authorisation, which shall be adopted with the approval of the councillors.'

(7) The Commission notes that, according to the preamble to the Provincial Law, the purpose of the aid is to

(8) The Commission also notes that the tax aid relates to the positive taxable income for corporation tax resulting from the conduct of the business, less the set-off for any losses from previous tax years. In this case, the recipients are companies which have started their commercial activities since the date of entry into force of the said provincial laws, have invested in tangible fixed assets a minimum of ESP 80 million (EUR 480 810) and have generated at least 10 jobs. In addition, recipient companies should, in particular, have a business strategy covering a minimum period of five years and should start their activity with a minimum paid-up capital of ESP 20 million (EUR 120 202).

(9) The Commission emphasises that the aid consists of an exemption from corporation tax during a period of 10 tax years, starting from, and including, the year in which the companies are formed.

(10) The Commission finds that the tax aid is not intended for firms, which carry out certain activities or belong to certain sectors, since any activity or sector may be eligible. Nor is it intended for a particular category of firm, such as SMEs, since any firm may qualify, if it satisfies the abovementioned conditions.

(11) As far as combination with other aid is concerned, it is stated that the tax aid in question may not be combined with any other tax concessions that may be granted in respect of the minimum investment or the minimum creation of jobs. Nevertheless, combination with other, non-tax aid, including grants, subsidised loans, guarantees, equity purchases, etc., relating to the same investments is not ruled out. Nor is possible combination with other tax concessions whose operative event, i.e. the circumstance triggering each concession, is different. Such would be the case, for example, with tax incentives in the form of a tax credit ⁽⁵⁾.

(12) In its decision initiating the procedure, the Commission pointed out that as far as the application of the Community State aid rules is concerned, the tax nature of the measures in question is irrelevant, since Article 87 of the Treaty applies to aid measures 'in any form'. The Commission also emphasised, however, that, to be

⁽³⁾ Boletín Oficial del Territorio Histórico de Álava No 79, 16.7.1993.

⁽⁴⁾ Only the parts of relevance to the assessment of the aid are cited.

⁽⁵⁾ See Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa), (OJ L 292, 13.11.1999, p. 1).

regarded as aid, the measures must meet all four of the criteria set out in Article 87 and explained below.

comply with the ceiling laid down for *de minimis* aid ⁽⁶⁾, the Commission considered that the aid cannot be regarded as *de minimis* aid ⁽⁷⁾.

(13) Firstly, it stated provisionally that the exemption from corporation tax confers on recipients an advantage, which relieves them of charges that are normally borne from their budgets.

(19) The Commission affirmed that State aid, which is not governed by the *de minimis* rule, is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considered that the aid could be regarded as unlawful.

(14) Secondly, the Commission considered that the said exemption from corporation tax involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure.

(20) The Commission found that, although the granting of the aid was conditional on a minimum investment and the creation of a minimum number of jobs, the tax arrangements did not ensure compliance with the Community rules on regional aid. The Commission therefore thought that the aid does not have the character of investment or job-creation aid.

(15) Thirdly, the Commission considered that the exemption from corporation tax affects competition and trade between Member States. Since the recipients conduct business, which may be the subject of intra-Community trade, the aid strengthens their position vis-à-vis competitors in intra-Community trade. It is clear therefore that the aid affects trade. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). In this way they are more able to compete with firms which are not eligible for the aid.

(21) On the contrary, the Commission considered that the tax aid has the character of operating aid, since its purpose is to relieve a firm of the costs incurred through its normal business or its everyday management.

(16) Lastly, the Commission considered that the exemption from corporation tax is specific or selective in that it favours certain firms. The eligibility requirements expressly rule out any firm that was set up before the date of entry into force of the said Provincial Law (mid-1993), that has created fewer than 10 jobs, whose investment is less than ESP 80 million (EUR 480 810) and whose paid-up capital does not exceed ESP 20 million (EUR 120 202). In addition, the Commission considered that the tax aid is not justified by the nature or general scheme of the tax system.

(22) The Commission pointed out that regional operating aid is in principle prohibited. It may nevertheless be granted in exceptional circumstances in regions, which meet certain conditions. But this is not the case here. The Commission therefore found that, in the light of the regional aid rules, there were doubts as to the compatibility of the tax aid.

(17) In short, the Commission considered, at that stage, that the exemption from corporation tax is State aid within the meaning of Article 87(1) of the Treaty, since it meets the cumulative criteria of constituting an advantage, being granted by the State from State resources, affecting trade between Member States and distorting competition in favour of certain firms.

(23) The exemption from corporation tax, which is not restricted to a particular sector, may be granted to firms that are subject to Community sectoral rules. The Commission therefore questioned whether the aid is compatible where the recipient belongs to a sector that is subject to special Community rules.

(18) Since the maximum amount of tax aid in question is not subject, in particular, to the requirement that it

⁽⁶⁾ See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (SMEs) (OJ C 213, 19.8.1992, p. 2) and Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

⁽⁷⁾ See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (see footnote 6) and the Commission notice on the *de minimis* rule for State aid (see footnote 6).

(24) Furthermore, the Commission doubted the compatibility of the tax aid with the common market in the light of the derogations in Article 87(2) and (3) of the Treaty. The aid cannot be regarded as aid having a social character under Article 87(2)(a), is not intended to make good the damage caused by natural disasters or exceptional occurrences under Article 87(2)(b) and is not subject to the provisions of Article 87(2)(c) concerning certain areas of the Federal Republic of Germany. As regards the derogations in Article 87(3) other than those in subparagraphs (a) and (c), which have already been discussed, the Commission considered that the aid is not designed to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State under Article 87(3)(b). The aid does not fall within the scope of Article 87(3)(c), which concerns 'aid to facilitate the development of certain economic activities...', since it is not specific in any way to the activities of the recipient firms. Lastly, it is not intended to promote culture or heritage conservation within the meaning of Article 87(3)(d).

(25) As well as asking the Spanish authorities for their comments under the Article 88(2) procedure, the Commission requested them to supply all the information necessary for assessing the exemption of certain newly established firms in Álava from corporation tax.

3. COMMENTS OF THE SPANISH AUTHORITIES

(26) By letter from the Permanent Representation dated 5 February 2001, the Spanish authorities submitted their comments (prepared by the Álava Provincial Council). The Spanish authorities consider, essentially, that the decision to initiate in respect of the exemption from corporation tax the procedure laid down in Article 88(2) of the Treaty is automatically null and void, since it is based on a *de facto* wrong description of Provincial Law No 18/1993 as a new aid rather than an existing aid and was therefore adopted in breach of the procedure legally provided for in the Treaty.

(27) The Spanish authorities emphasise, firstly, that the tax measure did not constitute an aid when it came into force. As evidence of this they claim that the Commission has known of the existence of the said Provincial Law for many years, since by letter dated 25 May 1994 it informed the Spanish Permanent Representation of a complaint that referred to that Law.

They argue that it is clear from the letter that the Commission did not in any way think that the measure put into effect was a State aid, nor that it was appropriate to initiate the procedure provided for in Article 93(2) (currently Article 88(2)) of the Treaty. By letter from the Permanent Representation dated 30 September 1994 the Spanish authorities informed the Commission that, in their opinion, the tax measures did not constitute State aid prohibited by Article 92 of the Treaty, since they were measures of a general nature. Furthermore, by letter to the Permanent Representation dated 19 January 1996, the Commission asked for information about the possible recipients of the measures. Later, by letter dated 6 February 1996, the Tax Coordination Authority (*Órgano de coordinación fiscal*)⁽⁸⁾ informed the Commission that: 'the Basque tax provisions are general in character and are not covered by the concept of State aid'. For the rest, the Spanish authorities state that, if the Commission had entertained the slightest suspicion that the provincial law in question constituted State aid within the meaning of Article 87 of the Treaty, it would have been obliged (in accordance with the case-law of the Court of Justice⁽⁹⁾) to initiate the Article 88(2) procedure immediately.

(28) Secondly, the Spanish authorities consider that the fact that the Commission, in November 2000, described Provincial Law 18/1993 as State aid is the result of a development in Community State aid policy (as is also indicated by the decision to initiate the procedure, taking the notice as the basis of examination). By adopting, on 1 December 1997, a resolution on a code of conduct for business taxation⁽¹⁰⁾ (the 'Code of Conduct'), the Council acknowledged the possibility that the criteria used by the Commission to examine current tax arrangements — and not only current arrangements — in the context of applying the Community State aid rules could subsequently change. For its part, the Commission, in its 'First annual report on the implementation of the Code of Conduct for business taxation and fiscal State aid'⁽¹¹⁾, expressly recognises that its aim in publishing guidelines is 'to clarify the

⁽⁸⁾ As alleged evidence of this letter, the Álava Provincial Council attached to its comments a copy of a document bearing the letterhead of the Department of Finance and Public Administration of the Basque Government and not of the Tax Coordination Authority; it was not dated or signed. The document was never registered in the Commission.

⁽⁹⁾ See Case C-82/84 *Germany v Commission*, [1984] ECR 1451, paragraph 12.

⁽¹⁰⁾ Annex 1 to the Conclusions of the ECOFIN Council of 1 December 1997, (OJ C 2, 6.1.1998, p. 1).

⁽¹¹⁾ Communication from the Commission to the Council and the European Parliament, COM(1998)595 final, 25.11.1998.

application of State aid rules to measures relating to direct business taxation' ⁽¹²⁾. Subsequently, the Commission adopted the notice on the application of the State aid rules to measures relating to direct business taxation ⁽¹³⁾. As stated in the decision to initiate the procedure, the Commission examines tax aid schemes, including Provincial Law 18/1993, on the basis of the guidelines referred to in point 37 of the notice. Further, in accordance with point 36, 'Article 93(1) states that the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States'. The notice itself makes clear, however, that all current tax schemes in the Member States that predate the notice may only be examined by the Commission under the procedure provided for in Article 88(1) of the Treaty (constant review), which thus prevents the 'aid' from being considered illegal. The schemes, therefore, are tax measures applied in the Member States, hence the term 'current', which prior to that date (December 1997) had not been regarded as State aid.

(29) Thirdly, the Spanish authorities contend that Provincial Law 18/1993 was never amended. It therefore satisfies the non-amendment test in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁴⁾, whereby an aid measure can be regarded as an existing aid.

(30) In short, the Spanish authorities consider that, even though, according to the Commission, Provincial Law 18/1993 should be regarded as State aid, it is an existing aid scheme. It has been shown that the Commission was informed, in 1994 or even earlier, of the application of Provincial Law 18/1993 and did not regard it as a State aid; that a change in State aid policy has occurred, since reference is made to existing tax measures in the Member States; and that the said Law has not been amended in any way since it came into force. However, Article 88(1) lays down the compulsory procedure which has to be followed in the case of existing aid: constant review in cooperation with Member States, and not the procedure provided for in Article 88(2). The Regulation also lays down the procedure that should be followed in the case of existing aid schemes: cooperation pursuant to Article 93(1) (currently Article 88(1) of the Treaty) and the proposal of appropriate measures. The Commission, therefore, should annul its decision to initiate the

procedure and, if it considers, after a preliminary examination, that the Provincial law does constitute State aid for the purposes of Article 87 of the Treaty, should propose to the Member State in question the measures required in this case by the progressive development or the functioning of the common market.

(31) As to the character of the tax measure in question, the Spanish authorities consider that, since it is not caught by the selectivity requirement laid down in Article 87(1), it cannot be regarded as State aid. It is not selective, in particular since it is applied irrespective of the sector of the economy in which the firms operate and since its purpose, which is to promote the economy as a whole, is not selective as the Commission maintains: the objective, non-discriminatory implementing criteria which it lays down do not transform the firms that meet them into 'certain undertakings' within the meaning of Article 87 of the Treaty. In support of their conclusion, the Spanish authorities stress in particular that the measure in question, designed as its name suggests to 'promote economic activity', pursues a legitimate economic objective using all the instruments available to a State. In addition, they consider that the non-application of the tax concession either to existing firms or new firms created after 31 December 1994 does not mean that it is selective, since, firstly, the purpose is to promote new activities and, secondly, firms created after that date are not disadvantaged compared with the recipients of the aid. As to the quantitative conditions concerning investment, job-creation and capital, the Spanish authorities consider that these do not mean that the measure is selective, since the conditions, as a result of their horizontal and objective nature, are not discriminatory. As the selectivity requirement is not met, the Spanish authorities conclude that the measure cannot be regarded as State aid, but as a measure of a general nature.

(32) For the rest, the Spanish authorities consider that another reason why the tax measure in question cannot be regarded as State aid is that it does not distort competition and does not affect trade between Member States. They point out that, under the Code of Conduct, Provincial Law 18/1993 has already been examined ⁽¹⁵⁾, and it was concluded that there was no effect on the location of business in the Community. In addition, Provincial Law 18/1993 does not strengthen, nor could it, the position of any firm. As the firms, which have

⁽¹²⁾ Point 14 of the communication mentioned in the above footnote.

⁽¹³⁾ OJ C 384, 10.12.1998, p. 3.

⁽¹⁴⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹⁵⁾ Report by the 'Code of Conduct Group', submitted to the ECOFIN Council of 29 November 1999, point D009: 'Basque Country — Start-up aid'.

recently been set up, do not have a well-defined position on the market, it is not easy to see how they could be strengthened.

- (33) Finally, the Spanish authorities reject the description of the tax measure introduced by Provincial Law 18/1993 as operating aid, since such a description, by definition, can only be given to firms that already exist but not, under any circumstances, to new ones. On the contrary, they consider that the measure, in view of the minimum investment and minimum job-creation levels on which it is conditional, is intended to promote initial investment within the meaning of the Commission communication of 1979 ⁽¹⁶⁾. In this connection, the Spanish authorities point out that where, in the guidelines on national regional aid ⁽¹⁷⁾, it says that tax aid 'may' be regarded as investment aid when it is based on investment, this does not mean that it is only in this case that it 'should' be regarded as investment aid.

4. OTHER COMMENTS RECEIVED BY THE COMMISSION

- (34) The Commission emphasises that the comments set out below are without prejudice to the question of whether the parties, which submitted them, can be considered interested parties within the meaning of Article 88(2) of the Treaty.

4.1. Comments of the Rioja Regional Government

- (35) The Rioja Regional Government states that the tax measure constitutes State aid, since it satisfies all four criteria set out in Article 87 of the Treaty. In support of this contention it argues that the term 'State' in Article 87 of the Treaty includes any public body irrespective of the extent of its territorial scope and hence, *inter alia*, the provincial governments. It also states that the description 'aid' does not depend on the form of the measure. It points out that the concept of aid in Article 87 is broader than that of subsidy and may therefore include tax measures. It also points out that the tax

measure in question affords the recipients an advantage, since the purpose and the effect of the exemption from corporation tax for 10 consecutive tax years is to relieve the recipient of part of the tax burden which would have been imposed on its profits. Moreover, since the recipient firms are engaged in economic activities, which are likely to include intra-Community trade, the tax measure distorts competition and affects that trade. According to the Rioja Regional Government, the tax measure is specific in scope not only on account of the minimum share capital of ESP 20 million (EUR 120 202), the minimum investment of ESP 80 million (EUR 480 810) and the minimum of 10 jobs created, but because (a) existing firms are not eligible and (b) eligibility is restricted to firms in certain regions of the Member State.

- (36) The Rioja Regional Government also points out that, under Article 88(3) of the Treaty, State aid should be notified to the Commission. Aid, it says, cannot be put into effect before the Commission has ruled on its compatibility with the common market.

- (37) The Rioja Regional Government also considers that the tax measure cannot be regarded as investment aid, because it does not satisfy the requirements in the guidelines on national regional aid ⁽¹⁸⁾. Despite the minimum investment and job-creation requirements, the aid does not depend on the size of the investment or the number of jobs created. Instead, the tax measure has the character of operating aid, since it relieves the recipient of some of the expenditure, which it would have incurred as part of its day-to-day operations. This operating aid, moreover, does not qualify for any of the exceptions provided for in Article 87(2) and (3) of the Treaty.

- (38) The Rioja Regional Government considers that the tax measure cannot be justified on the grounds that there are five tax systems in Spain. Advocate-General Saggio ⁽¹⁹⁾ considered in this respect that the fact that authorities within a territory hold tax powers does not justify any discrimination in favour of firms established in that territory. Nor is the measure justified by the nature or general scheme of the tax system in Álava, since its purpose is to improve the competitiveness of recipient firms. The Rioja Regional Government also

⁽¹⁶⁾ OJ C 31, 3.2.1979, p. 9. According to the communication, 'aids linked to initial investment' means aids linked and fixed directly in relation to initial investment or jobs created.

⁽¹⁷⁾ OJ C 74, 10.3.1998, p. 9. See footnote 46 in Annex I of the guidelines: 'Tax aid may be considered to be aid connected with an investment where it is based on an amount invested in the region'.

⁽¹⁸⁾ See previous footnote.

⁽¹⁹⁾ Opinion of Advocate-General Saggio in Joined Cases C-400/97, C-401/97 and C-402/97, *Administración General del Estado v Juntas Generales de Guipúzcoa y Diputación Foral de Guipúzcoa*.

argues that the Spanish Supreme Court has held ⁽²⁰⁾ that other similar tax measures distorted competition and affected the free movement of capital and labour. The High Court of the Basque Country (Tribunal Superior de Justicia del País Vasco) ⁽²¹⁾ has also taken this line.

- (39) The Rioja Regional Government believes, therefore, that the tax measures should be regarded as State aid, which, because the notification procedure provided for in Article 88(3) of the Treaty has not been followed, is unlawful and incompatible with the common market.

**4.2. Comments from the Basque Business
Confederation (Confederación Empresarial
Vasca/Euskal Entrepresarien Konfederakuntza
(Confebask))**

- (40) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by Álava.

- (41) Concerning the presumed reduction of the tax debt, Confebask considers that the Commission is wrong to think that there is a tax debt whose reduction involves a loss of tax revenue. If this argument were sound, any tax deduction would always involve a loss of revenue compared with the amount that would initially be due. Confebask therefore asks the Commission to reconsider its position, since not to do so would be tantamount to unlawfully harmonising the tax burden by fixing a reference amount for determining possible losses of tax revenue.

- (42) As regards the effect on trade, Confebask states that, in the Commission's view, the tax measure distorts trade because the recipients are involved in that trade. However, any trade will always be affected by any differences that there are between the various tax systems. Thus, to see whether the tax measures do affect trade, the Commission ought to analyse the tax system as a whole and not specific provisions in it. Confebask emphasises in this respect that, according to one study, the tax burden in the Basque Country is greater than in the rest of Spain. The Commission should explain why this specific measure affects trade and others do not. In any event, even if such an effect did exist, the way to remove it would be through harmonisation, not State aid.

- (43) Regarding the selective nature of the tax measure, Confebask states that the Commission considers the measure to be an instrument for the direct granting of aid. It points out in this respect that, according to points 17, 19 and 20 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, a tax measure may be specific and, hence, may be State aid, if it is aimed solely at public undertakings, certain types of undertaking or undertakings in a given region. However, the tax measure in question has none of these characteristics, not even territorial specificity, since it applies to the whole territory for which the provincial authorities that introduced it are competent. As to the specific character of the thresholds, share capital of ESP 20 million, investment of ESP 80 million, and 10 jobs created, Confebask considers that the use of thresholds is normal practice in national and Community tax rules. Confebask also draws attention to the basis of various judgements of the Court of Justice and Commission decisions: hitherto, it has never been held that thresholds imply specificity. Moreover, the Commission itself acknowledges, in point 14 of the above notice, that the effect of promoting certain sectors does not necessarily mean that the measures are specific.

- (44) As to the fact that the tax measure in question applies only to part of the territory of a Member State, which the Commission sees as evidence of specificity, Confebask points out that similar measures were introduced for the rest of that territory by the Finance Act 1994 ⁽²²⁾. These measures consisted in a reduction of 95 % in corporation tax liability for 1994, 1995 and 1996 for newly established firms which invested at least ESP 15 million (EUR 90 152) and had a workforce of between three and 20 persons. The measures were designed, moreover, to promote the formation of new companies. Consequently, the effect on competition of the exemption from corporation tax in Álava is neutralised, since the neighbouring Basque historic territories also give tax concessions to newly established firms. Further, if the tax measures in question did affect competition, this would be on account of the central government's measures, for which the number of recipients could be greater.

- (45) Confebask also stresses that there are similar measures in other Member States, but the Commission has not initiated any procedure with regard to them, nor have they been classified as harmful measures by the Code of

⁽²⁰⁾ See its judgement of 7 February 1998.

⁽²¹⁾ See the judgements of 30 September and 7 October 1999 concerning the 'tax holidays' in the form of reductions of taxable income of 99 %, 75 %, 50 % and 25 %.

⁽²²⁾ 'Law No 22 of 29 December 1993, on tax measures and the reform of the legal system of the public service and unemployment protection'.

Conduct Group (Primarolo Group). In France, since 1994, new firms have been eligible for corporation tax exemptions and reductions for a period of five years (ten years in some regions), and in Corsica for even more favourable arrangements. In Luxembourg, there is a 25 % reduction of corporation tax for a period of eight years. In Italy, the exemption from the IRPEG and the ILOR in the Mezzogiorno is for 10 years. Lastly, in Portugal there is a 25 % reduction of corporation tax for a period of from seven to 10 years. Everything shows, therefore, that Álava's exemption from corporation tax is not an exceptional system, which gives rise to any specificity. On the contrary, it is a system widely used in the Member States. In view of the above, Confebask concludes that the tax measures in question are not State aid but general measures.

- (46) Confebask argues that the Commission's description of the tax reduction as unlawful aid calls into question the principles of legitimate expectations, the ban on arbitrary decisions by institutions, legal certainty and proportionality. The Basque tax system was already deemed compatible by Commission Decision 93/337/EEC ⁽²³⁾. In any event, the Commission may change its position, during the 'constant review', as regards future cases but not past ones.

- (47) According to Confebask, since a legitimate expectation has been aroused, in particular by letter reference 4555 of 22 May 1994, which the Commission sent to the Spanish Permanent Representation in order to obtain information, the measure cannot be the subject of a recovery. The letter shows, firstly, that the Commission learned of the measure back in 1994 and, secondly, that the complainant described it as State aid. The Commission, however, did not initiate the procedure but apparently agreed with the reply from the Spanish authorities, who denied that the measure was State aid. The situation described, recalls the earlier one examined by the Court of Justice in RSV ⁽²⁴⁾. In that case, the Court held that the period of 26 months between the decision to initiate the procedure and the final decision had established, on the part of the beneficiary, a legitimate expectation of such a nature as to prevent the Commission from ordering the Dutch authorities to order the refund of the aid. Confebask considers that, if a period of 26 months between the initiation of the procedure and its conclusion establishes a legitimate

expectation which prevents the recovery of the aid being ordered, a situation in which the Commission does not even initiate the procedure for six years and six months, so that no position is adopted concerning the possible existence of aid that is incompatible with the common market, is even clearer still. In short, the undertakings and authorities informed of the questions raised by the Commission, which did not react to the reply provided by the Spanish authorities, would be entitled to think that the system of exemption from corporation tax gave no cause for complaint as far as the State aid rules were concerned. Confebask also mentions other factors that prevented an experienced economic operator from noticing any irregularity in its acceptance of the tax concession in question. As early as 1993, the common tax law (i.e. the legislation applicable in the rest of Spain) contained systems for exempting newly established firms from corporation tax. Basically, these systems are no different from those in the Basque legislation cited in these pleadings. In the circumstances, no recipient firm could foresee that several years after being informed of these rules, which are similar to those applicable in the rest of the common territory, the Commission, relying on Community law, would demand the recovery of the aid. As already explained, such recovery would involve recalculating the tax debt for tax periods that were closed years ago, which would be a manifest assault on legal certainty.

- (48) As regards the assessment of compatibility with the common market, Confebask notes that, according to the decisions of the Court of Justice ⁽²⁵⁾, where the Commission initiates proceedings it must have serious doubts as to the compatibility of the aid. As no reaction was forthcoming for several years, it must be concluded that the Commission did not harbour any doubts.

- (49) On the other hand, if the tax measure in question is regarded as a rule granting aid directly, Confebask takes the view that the practice of the Commission and the Court requires that the measure has to be sectorally specific before its compatibility can be assessed. The overall tax burden on firms and the reference tax burden would also have to be established. Lastly, this approach would lead to the absurd conclusion that any tax burden lower than the highest tax burden in all the Member States would constitute State aid. Confebask also challenges the Commission's argument that the tax measure is incompatible with the common market, since it does not contain specific provisions on sectoral

⁽²³⁾ OJ L 134, 3.6.1993, p. 25.

⁽²⁴⁾ Judgment of the Court of Justice of the European Communities of 24 November 1987, in Case C-223/85, *RSV v Commission*, [1987] ECR 4617.

⁽²⁵⁾ See Judgment of the Court of Justice of the European Communities of 19 May 1993, in Case C-198/1991, *William Cook plc v Commission*, [1993] ECR I-2487.

or regional aid, or aid for large investment projects, etc.: tax measures may not and should not contain this type of provision. According to the Court of Justice ⁽²⁶⁾, the Commission should specify in its decisions what the adverse effects on competition are, determining the real effect of the measures examined. Incompatibility cannot be determined, therefore, in abstract situations specific to a tax system, since in that case any differences between tax systems would necessarily become aid. This leads Confebask to repeat that there is no normal tax debt which has been reduced by the tax measure in question.

- (50) Confebask therefore asks the Commission to terminate the procedure and state that the tax measures in question comply with Community law.

4.3. Comments from the Unión General de Trabajadores de la Rioja (UGT)

- (51) The UGT's first point is that the labour force in Rioja is feeling the effects of the tax aid through the resultant migration of firms. This effect on the region's labour force is increased by the fact that Rioja adjoins the Basque Country.
- (52) The Álava measure in question, which is identical to the measures introduced by the other Basque historic territories, means that the Basque Country is becoming a tax haven in order to capture business from the whole of the EU, and in particular from the border region of Rioja. The measures therefore distort competition, since the decision to locate a firm is not the result of the free play of market forces but of the tax concessions created by a fiscal policy with objectives unconnected with the tax system. They also constitute an obstacle to the desirable tax harmonisation of the Community.
- (53) Furthermore, the UGT considers that the tax measure has the character of a State aid. It notes that the Commission ⁽²⁷⁾ has already regarded other tax measures of the Basque historic territories as State aid that is incompatible with the common market. It also

notes that, in his Opinion of 1 July 1999, which dealt with preferential rulings on tax measures similar to those of the Basque historic territories, Advocate-General Saggio also considered that such measures constituted State aid in breach of the Treaty.

- (54) For the rest, the UGT supports the Commission's assessment that the tax measure is State aid that is unlawful and incompatible. It believes, therefore, that the measure should be regarded as State aid, which, because the notification procedure provided for in Article 88(3) of the Treaty has not been followed, is unlawful and incompatible with the common market. The Commission should also require the recipients to repay aid that has been paid unduly.

4.4. Comments from Schütz Ibérica, S.L. (Schütz)

- (55) Schütz begins by saying that its competitors include Depósitos Tubos Reunidos Lentz, TR Lentz, SA, established in Álava (Detursa). It claims that Detursa has been exempt from corporation tax since 1996, which means that it will continue to be exempt until 2006. It notes that the provincial authorities of the Historic Territory of Álava sent a certificate on 1 March 2000 stating that Detursa qualifies for the exemption under Provincial Law No 18/1993 of 5 July.
- (56) Schütz considers that it is harmed by the exemption for which Detursa is eligible. The exemption improves Detursa's competitive situation on the market, e.g. as regards advertising campaigns, the economic and social conditions of its workers, research and development, industrial promotion and electronic commerce. Schütz states in this respect that, although Detursa has not made a profit enabling it to receive the aid, it obtains advantages from the grant of the exemption in any event by acting in the knowledge that it is free from paying the tax for 10 years.
- (57) Similarly, Schütz supports the Commission's assessment that the measure is State aid that is unlawful and incompatible. It points out that the measure is not justified by the nature or the general scheme of the tax system, since it is designed to promote the formation of new companies which will have competitive advantages over other firms that, like Schütz, do not enjoy such advantages. For the rest, Schütz considers that the tax exemption has the character of operating aid, since it relieves Detursa of the costs that should be incurred through its normal operation.

⁽²⁶⁾ Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v Commission*, [1994] ECR I-4103.

⁽²⁷⁾ Decision of 10 May 1993 on Provincial Laws 28/1988 (Álava), 8/1988 (Vizcaya) and 6/1988 (Guipúzcoa); Commission Decision 1999/718/EC (Daewoo) (see footnote 5) and Decision 2000/795/EC (Ramondín SA and Ramondín Cápsulas SA) (OJ L 318, 16.12.2000, p. 36).

5. COMMENTS OF SPAIN ON THE OBSERVATIONS OF OTHER INTERESTED PARTIES

- (58) By letter from the Permanent Representation dated 17 September 2001, the Spanish authorities submitted their comments (prepared by the Álava Provincial Council) on the observations of interested third parties, which were sent to them in accordance with Article 6(2) of Regulation (EC) No 659/1999. Basically, the Álava Provincial Council considers that none of the comments calls into question its original observations ⁽²⁸⁾. It states that the Commission will not find any information in these comments that will help it to determine whether the measure is an existing aid or a new one.
- (59) The Álava Provincial Council also uses the reply to the observations of other interested parties to submit further comments of its own in addition to those which it had made on 5 February 2001 in the said letter from the Spanish Permanent Representation, under Article 6(1) of Regulation (EC) No 659/1999. However, the period of one month from the date of the letter (28 November 2000) in which the Commission notified the Spanish authorities of its decision to initiate the procedure and invited them to submit comments under the said Article, expired on 29 December 2001. These additional comments should not be taken into account, therefore. The Commission would point out in this respect that the possibility given to the authorities of the Member State in question to submit comments on the observations of interested third parties, pursuant to Article 6(2), definitely does not mean that they can have an additional period in which to present comments under the said Article 6(1).

6. ASSESSMENT

6.1. Character of a State aid

- (60) The Commission would point out that, for the purpose of applying the Community rules on State aid, the tax nature of the measure in question is not important, since Article 87 of the Treaty applies to aid measures 'in any form'. Nevertheless, the Commission emphasises that, to be regarded as aid, the measure should satisfy all four of the criteria set out in Article 87 and explained below.

- (61) Firstly, it must confer on recipients an advantage, which relieves them of charges that are normally borne from their budgets. The advantage may be provided through different types of reduction in the firm's tax burden. The exemption from corporation tax meets this criterion, since it removes the tax burden on the recipient firms. If there were no exemption, the recipient firm would have to pay full corporation tax for 10 years. The exemption from corporation tax thus implies an exception to the common tax system applicable.

- (62) Secondly, the Commission considers that the exemption from corporation tax involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure. This criterion is also applied to aid granted by regional and local bodies in the Member States ⁽²⁹⁾. Furthermore, the intervention of the State can be effected both through tax provisions of a statutory, regulatory or administrative kind and through the practices of the tax authorities. In this specific case, State intervention is effected through the Álava Provincial Council on the basis of a statutory provision.

- (63) According to the above claim put forward by certain third parties, the Commission is wrong to think that the exemption from corporation tax involves a loss of tax revenue. To determine the amount of revenue lost, so runs this argument, the Commission should fix a normal level or amount of tax. It should be noted here, however, that the normal level of tax is derived from the tax system in question and not from a Commission decision. Furthermore, according to the second indent in point 9 of the notice on the application of the State aid rules to measures relating to direct business taxation, to qualify as State aid, 'firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets'. The advantage may be provided through a reduction in the firm's tax burden in various ways, including: '[...] a total or partial reduction in the amount of tax (such as exemption or a tax credit)'. It should be noted in this respect that, as the Court of Justice has held ⁽³⁰⁾ 'a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the

⁽²⁸⁾ See section III: 'Comments of the Spanish authorities'.

⁽²⁹⁾ See Judgment of the Court of Justice of 14 October 1987, in Case C-248/84, *Germany v Commission*, [1987] ECR 4013.

⁽³⁰⁾ Case C-387/92, *Banco de Crédito Industrial, now Banco Exterior de España SA v Ayuntamiento de Valencia*, [1994] ECR I-877, paragraph 14.

persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 92(1) of the Treaty'. This is the case with the tax advantage that an exemption from corporation tax confers. The argument, therefore, is not convincing.

- (64) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, according to a report ⁽³¹⁾ on the external dependency of the Basque economy in the period 1990 to 1995, exports went up ⁽³²⁾, not only in absolute terms but, in particular, in relative terms as well, to the detriment of sales to the rest of the country. The external market has therefore partially replaced the Spanish market. Furthermore, according to another statistical report ⁽³³⁾ on the foreign trade of the Basque Country, at 28,9 % the Basque economy's 'propensity to export' (ratio of exports to GDP) is greater than that of Germany and the other Member States, where it is about 20 %. According to this report, during the period 1993 to 1998 the Basque trade balance was clearly in surplus. In particular, in 1998, for each ESP 100 of imports there were ESP 144 of exports. In short, the Basque economy is very open to the outside, and its production is very much geared to exporting. Given these characteristics of the Basque economy, it is clear that the recipient firms are engaged in economic activities, which are likely to include intra-Community trade. Consequently, aid strengthens their position vis-à-vis their competitors in the Community. It is clear therefore that the aid affects trade. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). This enables them to compete with firms, which are not eligible for the tax aid.

- (65) Since the tax rules under investigation are general and abstract in character, the Commission would point out that the analysis of their impact on trade can only be carried out at a general, abstract level and their impact on a market, sector or specific product cannot be established, contrary to the claim made by certain third parties. This position has been confirmed by a number

of decisions of the Court of Justice ⁽³⁴⁾. Moreover, the Commission would emphasise that, in its decision initiating the procedure, it asked the Spanish authorities for all relevant information that would allow it to assess the aid. The request was clearly intended to enable the Commission to obtain a general idea of the actual effects of the scheme and not to gather data sufficient for carrying out individual appraisals. However, the Spanish authorities have not provided any information ⁽³⁵⁾ on the instances where the tax holiday was applied. This is why it is contradictory to criticise the Commission, as certain third-party comments do, for providing only a general assessment while at the same time refusing to supply the information requested.

- (66) Although assessment of the scheme did not require it to do so, the Commission, by way of illustration, examined the specific case of Detursa, the only recipient firm identified (thanks to the complaint submitted by Schütz Ibérica S.L., since the Spanish authorities did not provide the information requested by the Commission concerning the recipients of the tax exemption). According to the information available to the Commission ⁽³⁶⁾, this firm is a subsidiary of the Sotralentz group, whose registered office is at Drulingen in France. The Sotralentz group has two factories, one belonging to the Spanish subsidiary at Comuni3n, lava, and the other to the subsidiary at Peterlee in the United Kingdom, which make plastic products, and in particular industrial packaging. On this market, Sotralentz and hence its subsidiary Detursa compete with the German groups Schütz (including its Spanish subsidiary Schütz Ibérica S.L., with two plants in Germany and subsidiaries in France, Italy, the United Kingdom, Norway and Poland) and Werit, the Italian

⁽³⁴⁾ See Case C-75/97, (Maribel) *Belgium v Commission*, [1999] ECR I-3691, paragraphs 48 and 51; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, *Alzetta Mauro and others*, [2000] ECR II-2319, paragraphs 80, 81 and 82; the Opinion of Advocate-General Ruiz-Jarabo in Case C-310/99, *Italy v Commission*, paragraphs 54 and 55 (17 May 2001), and the Opinion of Advocate-General Saggio in Case C-156/98, *Germany v Commission*, paragraph 31 (27 January 2000), which ran thus: 'It should be pointed out in this respect that, with regard to a general aid scheme, to be able to determine the effect of that scheme on trade, it is sufficient if, from an *ex ante* assessment, it can reasonably be considered that the said effect may come about. If the position of a firm (or, as in the present case, an indefinite number of firms) is reinforced by an aid scheme, this privilege may in principle affect competition between Member States'.

⁽³⁵⁾ With regard to the complaint submitted by Schütz Ibérica SA, the Spanish authorities informed the Commission that no aid had been paid to Detursa at that date.

⁽³⁶⁾ See in particular Sotralentz's website <http://www.sotralentz.com> and the article 'La guerre du nucléaire du conteneur de 1 000 litres' (Nuclear war' in the 1 000 litre container sector), 15 May 2000, in 'Emballages magazine': (<http://www.emballagesmagazine.com/site/index.cfm>).

⁽³¹⁾ Patxi Garrido Espinosa and M^a Victoria Garcia Olea, 'La dependencia exterior vasca en el periodo 1990—1995', Eustat.

⁽³²⁾ In 1990 exports accounted for 28,5 % of total sales, including those to the rest of Spain, but for 40,8 % only five years later.

⁽³³⁾ 'Estadística de Comercio Exterior para la Comunidad Autónoma de Euskadi en el año 1998', prepared by Eustat (Euskal Estatistika-Erakundea/Instituto Vasco de Estadística).

group Mamor and the Finnish group Van Leer. Competition on the IBC (Intermediate Bulk Container) market is clearly cut-throat, as production capacity far exceeds demand. In industrial packaging, competition is worldwide rather than just European: Sotralentz has granted a licence to the Greif Bros Corporation group in the United States of America, and the Schütz group has five factories on the other side of the Atlantic. The Commission therefore thinks that granting Detursa State aid may affect trade between Member States and distort competition, strengthening Detursa's position vis-à-vis competitors like Schütz Ibérica S.L.

transparency. On the other hand, as explained above, it does distort competition and affect trade.

- (67) As regards the Spanish authorities' argument that the tax measure in question neither distorts competition nor affects trade between Member States since the report by the Code of Conduct group concluded that it did not affect the location of business activities in the Community, the Commission considers that an analysis which draws on the Code of Conduct cannot be a substitute for an assessment based on the State aid rules. The criteria established in part B ⁽³⁷⁾ of the Code of Conduct for determining whether a tax measure is 'harmful' are not the same as those for deciding whether a measure distorts competition or affects trade. It is possible, therefore, that a measure will not be considered harmful, because the criteria in B do not apply, even though it may distort and affect trade. In this specific case, the tax holiday is not caught by the criteria in B, since it is not granted exclusively to non-residents or in respect of transactions carried out by non-residents; it is not completely separate from the national economy; it is not granted even without any real economic activity and substantial economic presence within the Member State; it is not applied to profits determined in respect of activities within a multinational group of companies in accordance with internationally accepted principles and does not lack

- (68) As regards the comment from certain third parties that the effect on trade should be assessed by the Commission on the basis of a comparison of all tax systems, the Commission would point out that the subject of the proceeding initiated under Articles 87 and 88 of the Treaty is the distortions of competition that may result from a rule favouring certain firms (in this case certain newly established firms) and not those that are due to differences between the tax systems of the Member States, which would in any event be caught by the provisions of Articles 93 to 97 of the Treaty.

- (69) As regards the specific character which State aid must have, the Commission takes the view that the exemption from corporation tax is specific or selective in that it favours certain firms. The eligibility requirements expressly rule out any firm set up before the date of entry into force of the said Provincial Law (mid-1996) that has created fewer than 10 jobs, whose investment is less than ESP 80 million (EUR 480 810) and whose capital does not exceed ESP 20 million (EUR 120 202). The Commission would point out that, according to the Fourth Report on Enterprise in Europe ⁽³⁸⁾, the number of firms in the European Community in 1992 which had fewer than 10 employees, or no employees at all, was 14 629 000, or 92,72 % of the total ⁽³⁹⁾. In Spain's case, the percentage in 1991 was even higher, at about 95,11 % ⁽⁴⁰⁾. Furthermore, according to the Fifth Report on Enterprises in Europe ⁽⁴¹⁾, the number of firms in the European Community in 1995 which had fewer than 10 employees, or no employees at all, was 16 767 000, or 92,89 % ⁽⁴²⁾ of the total. In Spain's case, the percentage was higher still, at about 95 % ⁽⁴³⁾. It is likely that these percentages are even higher in the case of new firms, since a firm usually starts with a workforce that will expand as the firm consolidates and reaches its cruising speed. This is the case in Spain, where in 1995 the percentage was even higher, at about 98 % ⁽⁴⁴⁾. The main conclusion, therefore, is that one of

⁽³⁷⁾ Section B of the Code of Conduct for Business taxation reads: '[...] When assessing whether such measures are harmful, account should be taken of, *inter alia*: (1) whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or (2) whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or (3) whether advantages are granted without any real economic activity or substantial economic presence within the Member State offering such tax advantages, or (4) whether the basis of profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably those agreed upon within the OECD, or (5) whether the tax measures lack transparency, including where statutory rules are relaxed at administrative level in a non-transparent way'.

⁽³⁸⁾ Enterprises in Europe, Fourth Report, Eurostat.

⁽³⁹⁾ Data taken from the table on page 27 of the report.

⁽⁴⁰⁾ Data taken from the table on page 152 of the report.

⁽⁴¹⁾ Enterprises in Europe, Fifth Report, Eurostat.

⁽⁴²⁾ Data taken from the table on page 31 of the report.

⁽⁴³⁾ Data taken from the table on page 224 of the report.

⁽⁴⁴⁾ Data taken from the table on page 73 of the report.

the conditions of eligibility alone rules out the majority of firms.

- (70) The Commission would also point out that the fact that the tax exemption is specific in scope does not mean that it has no other selective features, such as regional specificity. However, once it has been shown that the tax reduction favours certain firms on account of this specificity of scope, the Commission considers that it is not necessary to analyse in detail all the other specific features. In this particular case, therefore, it will not examine any regional specificity the measure may have.

- (71) For the rest, the objective character of the thresholds cited does not, as some of the third-party comments claim, prevent them from being selective and excluding firms which do not satisfy the conditions in question. According to the case law ⁽⁴⁵⁾, 'the fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria pursuant to which it may be granted, [...] cannot suffice to call in question the selective nature of the measure and, accordingly, its classification as State aid within the meaning of Article 92(1) of the Treaty. [...] It does not, however, preclude that public measure from having to be regarded as a system of aid constituting a selective, and therefore specific, measure if, owing to the criteria governing its application, it procures an advantage for certain undertakings or the production of certain goods, to the exclusion of others'.

- (72) As regards invoking the nature or general scheme of the tax system as a possible justification for the exemption from corporation tax, the Commission emphasises that what matters is to know whether the tax measures involved meet the objectives inherent in the tax system itself, or whether, on the contrary, they pursue other, possibly legitimate objectives outside the tax system. Furthermore, it is up to the Member State concerned to establish that the tax measures in question follow the internal logic of the tax system ⁽⁴⁶⁾. In this particular case, the Spanish authorities did not supply any information on the internal logic of the tax system, which the tax measure is supposed to follow. The Commission notes however that, according to the

provincial law introducing the tax holiday, the declared objective was to stimulate Álava's economy, which was then in serious crisis. The objective is not determined therefore by primary tax concerns, but by economic policy considerations unconnected with the tax system. This extraneous quality is reinforced by the temporary nature of the tax measure. As regards the possibly legitimate nature of the objectives pursued, the Commission does not question this, although it would point out that it is not sufficient for a public measure to avoid being examined from a State aid perspective, since, as the case-law states ⁽⁴⁷⁾: 'If that argument were followed, it would be sufficient for the public authorities to invoke the legitimacy of the objectives which the adoption of an aid measure sought to attain for that measure to be regarded as a general measure outside the scope of Article 92(1) of the Treaty. That provision does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects'.

- (73) As to the existence of exemptions from corporation tax in other Member States and the fact that the Commission did not regard them as State aid because they were aimed at new firms, a point that, according to certain third parties, gives rise to legitimate expectations concerning tax aid for newly established firms, the Commission would point out that the preliminary results of the investigation of this question cast doubt on this line of argument. The tax holidays of these Member States were deemed to be State aid schemes ⁽⁴⁸⁾ notified under Article 88(3) of the Treaty and compatible with the common market. Furthermore, even supposing that the Commission had not reacted, it would not be legitimate to take this misguided approach in the present case. According to the case-law of the Court of Justice, 'any breach by a Member State of an obligation under the Treaty in connection with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one

⁽⁴⁷⁾ See paragraph 53 of the judgment cited in footnote 45.

⁽⁴⁸⁾ See France: tax aid scheme for 'enterprise areas' N 155/86, approved by Commission decision of 21 January 1987, Seventeenth Competition Report, point 245; Regional Planning Act aid scheme N 493/95, approved by Commission decision of 29 November 1995, OJ C 53, 22.2.1996; Italy: aid scheme pursuant to Law No 64 of 1 March 1986 on special assistance for the Mezzogiorno, approved by Commission decision of 2 March 1988 (OJ L 143, 10.6.1988); Luxembourg: Regional Planning Act aid scheme N 607/92, approved by Commission decision of 9 December 1992 (OJ C 39, 13.2.1993); regional aid map assistance scheme N 72/96, approved by Commission decision of 20 September 1996, OJ C 51, 21.2.1997; regional aid scheme for economic development N 793/B/99, approved by Commission decision of 19 July 2000 (OJ C 278, 30.9.2000).

⁽⁴⁵⁾ See Judgment of the Court of First Instance in Case T-55/99, *Confederación Española de Transporte de Mercancías (CETM) v Commission*, [2000] ECR II-3207, paragraph 40.

⁽⁴⁶⁾ See paragraph 27 of the Opinion of Advocate-General Ruiz-Jarabo in Case C-6/97.

distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the common market are increased' ⁽⁴⁹⁾.

(74) As regards the third-party comments that there are other tax measures in Spain which the Commission has not regarded as State aid because they are aimed at new firms, it should be emphasised that the characteristics of these measures is very different from those of the tax holidays in question. A scheme where, to be eligible, it is necessary to create three jobs cannot be compared with one that requires ten, nor is one where the aid consists of a 95 % reduction of taxable income for three years comparable with a 10 year exemption. Furthermore, the Commission considers that the decisions adopted on the said tax holidays cannot prejudice those which, as appropriate, it has to adopt on the other tax measures cited.

(75) As to the argument put forward in certain third-party comments concerning the existence of a higher overall tax burden in the Basque Country, the Commission repeats that this is not relevant in the case at issue, since the procedure was initiated in respect of a specific measure and not the whole tax system of each of the three Basque historic territories.

(76) In short, the Commission considers that the exemption from corporation tax is State aid within the meaning of Article 87(1) of the Treaty, since it confers an advantage, is granted by the State from state resources, affects trade between Member States and distorts competition in favour of certain firms.

6.2. The exemption from corporation tax as new aid

(77) The Commission considers that the aid does not have the character of an existing aid, since it does not meet

the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999. It does not satisfy criteria (i) to (iv) ⁽⁵⁰⁾ since it was not introduced before Spain's accession on 1 January 1986; was never authorised by the Commission or the Council; cannot be regarded as having been authorised, since it was never notified; and was granted at least 10 years ago.

(78) The Commission also considers that the tax exemption does not satisfy the conditions in Article 1(b)(v) ⁽⁵¹⁾. Neither in its correspondence nor in any other document has the Commission ever stated directly or indirectly that it considers the tax measure in question is not aid. On the contrary, in Decision 98/C 103/03 of 18 November 1997 ⁽⁵²⁾, it took the view that the new tax holiday that Álava introduced in 1996, and for which, in addition to other aid, Demesa was eligible, could contain aid elements that might be incompatible. Subsequently, in Decision 1999/718/EEC concluding the procedure, the Commission considered that the tax holiday was State aid that was incompatible with the common market. The Commission has followed the same approach of considering tax holidays as State aid with regard to other tax measures introduced by other Member States, such as France (decision of 21 January 1987 in case N 155/86 and of 29 November 1995 in case N 493/95), Italy (decision of 2 March 1988) and Luxembourg (decision of 9 December 1992 in case N 607/92 and of 20 September in case N 72/96). Since all these decisions, except 1999/718/EEC, were adopted not

⁽⁵⁰⁾ Article 1(b) (i) to (iv) of Regulation No 659/1999 read as follows:

'(b) 'existing aid' shall mean:

- (i) all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;
- (ii) authorised aid, that is to say, aid schemes and individual aid authorised by the Commission or by the Council;
- (iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;
- (iv) aid which is deemed to be existing aid pursuant to Article 15.'

⁽⁵¹⁾ Article 1(b)(v) of Regulation (EC) No 659/1999 reads as follows:

'(b) "existing aid" shall mean:

(...)

- (v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation.'

⁽⁵²⁾ Decision to initiate the formal investigation procedure in Article 93(2) in respect of certain aid granted to Demesa, Álava (OJ C 103, 4.4.1998, p. 3).

⁽⁴⁹⁾ See Case C-78/76, *Steinike & Weinlig v Federal Republic of Germany*, [1977] ECR 141, paragraph 24. On the other hand, Case C-313/90, *Comité International de la rayonne et des fibres synthétiques and others v Commission*, [1993] ECR I-1125, paragraph 45, states that 'neither the principle of equal treatment nor that of the protection of legitimate expectations may be relied upon in order to justify the repetition of an incorrect interpretation of a measure'.

only before 10 December 1998 (date of publication of the Commission notice on the application of the State aid rules to measures relating to direct business taxation) but even before 1 December 1997 (date of the resolution on a code of conduct for business taxation), the Commission would emphasise that the decision to consider the tax holiday introduced in 1993 as State aid is not due, as the Álava Provincial Council claims in its comments, to the Commission changing the criterion when examining current tax schemes in the light of the notice or of the Code of Conduct.

may be regarded as new aid within the meaning of Article 1(c) of the same Regulation ⁽⁵³⁾ ⁽⁵⁴⁾.

6.3. Unlawful nature of the exemption from corporation tax

(79) Furthermore, regarding the Spanish authorities' claim that if the Commission considered that the tax holiday was State aid it should have initiated the procedure immediately, on the basis of paragraph 12 in Case C-84/82 (see footnote 9), the Commission would point out that this precedent is not relevant, since it applies only to notified aid schemes. The Commission emphasises that under Article 13(2) of Regulation (EC) No 659/1999 it is not subject, where illegal aid is concerned, to the time limits applicable in the case of notified aid schemes. It also points out that, by letter to the Permanent Representation dated 19 January 1996, it asked for information about the possible recipients of the measure. By fax dated 16 February, confirmed by letter dated 19 February 1996, the Spanish Permanent Representation requested a 15-day extension of the deadline for replying. By letter dated 21 March 1996, the Spanish Permanent Representation requested a further extension of 30 days. Despite these requests, which indicated that a reply might be forthcoming, the Spanish authorities did not answer the Commission's request for information. The Commission would also point out that it initiated a procedure in respect of other similar State aid measures in the form of a reduction of taxable income for certain new firms in Álava (C 49/99) on 29 September 1999. In its final decision of 12 July 2001 it concluded that the said aid was incompatible.

(81) Since the scheme does not require a commitment from the Spanish authorities to grant the aid in accordance with the conditions for *de minimis* aid ⁽⁵⁵⁾, the Commission considers that the aid cannot be regarded as subject to those rules. It should be stressed in this respect that the Spanish authorities never maintained, in the procedure, that the aid in question should be classed as *de minimis* aid, either in full or in part. Nor can the aid comply with the *de minimis* rules, since there is no guarantee that the *de minimis* threshold will not be exceeded.

(82) The Commission affirms that State aid that is not governed by the *de minimis* rule is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considers that the aid should be regarded as unlawful.

(83) As regards the argument put forward by certain third parties that the tax measure cannot be classified as illegal on account of the legitimate expectations created by the Commission's approval of the Basque tax system, this can only be rejected, since, firstly, under Article 1(f) of Regulation (EC) No 659/1999, an aid is illegal if, as in the present case, it has not been notified under Article 88(3) of the Treaty. Secondly, since it was not notified, a decision could never be taken by the Commission as to its compatibility with the common market ⁽⁵⁶⁾. As to the alleged approval by the Commission of the 'Basque tax system', which according

(80) In short, because it does not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999, the tax measure in question cannot be regarded as existing aid. The Commission considers, however, that it

⁽⁵³⁾ In Article 1(c) of Regulation (EC) No 659/1999, new aid is defined as '(c) "new aid": all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

⁽⁵⁴⁾ Letter to the Spanish Permanent Representation, D/10687, dated 19 January 1996.

⁽⁵⁵⁾ The assessment of the aid is the same whether it is based on the Community guidelines on State aid for small and medium-sized enterprises (SMEs), the Commission notice on the *de minimis* rule for State aid or Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (see footnote 6).

⁽⁵⁶⁾ Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen and others v Commission*, [1999] ECR II-3663, paragraph 300.

to the comments of interested third parties, is the result of Decision 93/337/EEC, the Commission would point out, first, that the Decision did not refer to any 'Basque tax system' but to a series of specific tax measures⁽⁵⁷⁾ introduced by Álava, Guipúzcoa and Vizcaya respectively in 1988 and, second, that in that Decision those measures were regarded as State aid. Article 1(4) of the Decision⁽⁵⁸⁾ provided, moreover, that the granting of the aid should be subject to a series of conditions, such as observance of the ceilings for regional aid, the rules applicable to SMEs and the provisions on the combination of aid. It was not a question therefore of approving the Basque tax system but of describing as State aid certain tax measures and imposing conditions for the granting of that aid. Consequently, the decision did not prejudice in any way any positive decision that the Commission might take concerning any other new tax measure that might be introduced in the Basque Country. In short, contrary to what is claimed in the third-party comments, there never was any Commission decision that approved the 'Basque tax system' in the abstract and, hence, any new tax measure such as the tax exemption in question, or at least deprived that system of its illegal character⁽⁵⁹⁾.

6.4. Compatibility with the common market

- (84) As a preliminary, the Commission would repeat that the exemption from corporation tax has to be classed as an aid scheme. Given the general, abstract nature of an aid scheme, the Commission is not obliged to examine the situation of each potential recipient individually. In any event, it does not know the circumstances of existing or prospective recipients and is not, therefore, able to examine the exact repercussions on the competitiveness of specific firms. It is sufficient to ascertain that potential recipients could benefit from aid that is not consistent with the Community directives, guidelines and frameworks. Moreover, the Commission would again stress that, in its decision initiating the procedure, it asked the Spanish authorities for all relevant

information that would allow it to assess the aid. The request was clearly intended to enable the Commission to obtain a general idea of the actual effects of the scheme and not to gather data sufficient for carrying out individual appraisals. However, the Spanish authorities have not provided any information on the instances where the tax holiday was applied. This is why it is contradictory to criticise the Commission, as certain third-party comments do, for providing only a general assessment while at the same time refusing to supply the information requested.

- (85) As the scheme in question covers only the NUTS⁽⁶⁰⁾ III territory of Álava, it is necessary to examine whether aid in this historic territory can qualify for the regional derogations in Article 87(3)(a) or (c). The Commission would point out in this respect that Álava has never been eligible for the Article 87(3)(a) derogation, since the per capita GDP⁽⁶¹⁾ of the NUTS II region of the Basque Country, of which it forms part, has always been higher than 75 % of the Community average. According to the rules on regional aid⁽⁶²⁾ ⁽⁶³⁾, the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty are met only if the region, at NUTS II, has a per capita GDP of not more than 75 % of the Community average. The Commission notes however that, according to the regional aid map⁽⁶⁴⁾ Álava was a region in which State aid could be considered partly compatible⁽⁶⁵⁾ up to 26 September 1995⁽⁶⁶⁾, and thereafter fully compatible, with the common market

⁽⁵⁷⁾ The measures consisted basically in 95 % relief of the tax on capital transfers and documented legal acts, a 20 % tax credit in respect of investments, complete freedom as to the depreciation of assets constituting new investments, an increase in the tax credit up to 5 % of the investment, depending on the employment created, and an increase in the tax credit up to 20 % of the investment in the case of investments of special technological interest.

⁽⁵⁸⁾ See Article 1(4) of Decision 93/337/EEC: 'Within two months of the notification of this decision, the Spanish authorities shall ensure that the aid is granted within the national regional aid areas and ceilings or in accordance with the conditions laid down in the Community guidelines on State aid for small and medium-sized enterprises, in compliance with the Community rules on the cumulation of aid for different purposes and with the limits laid down for certain sectors of activity in industry, agriculture and fisheries'.

⁽⁵⁹⁾ See footnote 23.

⁽⁶⁰⁾ Nomenclature of territorial units for statistics.

⁽⁶¹⁾ Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).

⁽⁶²⁾ The references to the regional rules are confined, in the following recitals, to the guidelines on national regional aid (see footnote 17). Where the aid was granted before the guidelines came into force, the Commission's assessment is based on the rules current at the time it was granted. Nevertheless, since the relevant parts of the said rules have not changed, it is sufficient to refer to the latest text in this case.

⁽⁶³⁾ See point 3.5 of the guidelines on national regional aid (see footnote 17).

⁽⁶⁴⁾ The successive regional aid maps that have applied since Spain's accession were the one adopted in 1988 in Commission Decision 88/C 351/04, the amended map (see communication 96/C 25/03) in the decision of 26 July 1995, and the map for 2000 to 2006 adopted in the decision of 11 April 2000.

⁽⁶⁵⁾ The only parts of Álava where the aid could be covered by the regional derogation in Article 87(3)(c) of the Treaty were the Nervion Valley industrial zone and the areas in the Pyrenees. The other parts of Álava did not meet the necessary criteria.

⁽⁶⁶⁾ Date of entry into force of the amendment to the earlier map adopted in 1988.

under the regional derogation in Article 87(3)(c) of the Treaty ⁽⁶⁷⁾.

(86) State aid in the form of an exemption from corporation tax promotes the formation in Álava of new firms whose initial investments and numbers of employees exceed certain thresholds. However, despite this minimum investment and the creation of a minimum number of jobs, the tax aid in question does not qualify as investment or employment aid. The basis for the aid is not the size of the investment, the number of jobs created, or the corresponding wage costs, but taxable income. Furthermore, the amount of aid is not a function of an investment ceiling, the number of jobs, or the corresponding wage costs, but of taxable income. According to Annex I to the guidelines on national regional aid, 'tax aid may be considered to be aid connected with an investment where it is based on an amount invested in the region. In addition, any tax aid may be connected with an investment if one sets a ceiling expressed as a percentage of the amount invested in the region'. It follows that aid, which, as in the present case, does not meet these criteria, cannot be regarded as investment aid.

(87) On the contrary, since it partly reduces the profits tax paid by the recipient firms, the aid qualifies as operating aid. Corporation tax is a tax burden which companies subject to it have to pay regularly and inevitably as part of their everyday management. It is therefore appropriate to examine the tax aid in the light of any derogations that may apply to the operating aid in question.

(88) The Commission would point out that, under the guidelines on national regional aid, regional aid, which has the character of operating aid, is in principle prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty, subject to certain conditions laid down in points 4.15 to 4.17 of the guidelines, in the outermost regions or in regions of low population density if it is intended to offset additional transport costs. However, the NUTS III territory of Álava is not eligible for the derogation in Article 87(3)(a) of the Treaty, and the grant of the said operating aid does not meet the conditions described. The NUTS III territory of Álava is neither an outermost

region ⁽⁶⁸⁾ nor a region of low population density ⁽⁶⁹⁾. This is the reason why the operating aid elements in the exemption from corporation tax are prohibited, in particular because they are not granted in a region that is eligible for the derogation in Article 87(3)(a) of the Treaty, in an outermost region or a region of low population density. The aid is therefore incompatible in this case.

(89) The Commission therefore considers that the tax aid scheme cannot be regarded as compatible with the common market under the regional derogations in Article 87(3)(a) and (c) of the Treaty, since it does not comply with the rules on regional aid.

(90) The derogation in Article 87(3)(c) of the Treaty has to be examined to see whether it might not apply, in the above cases, for purposes other than the development of certain economic activities. The Commission notes in this respect that the exemption from corporation tax is not intended to develop an economic activity within the meaning of Article 87(3)(c) of the Treaty, such as the development of measures to assist small and medium-sized enterprises, research and development, environmental protection, job creation or training in accordance with the appropriate Community rules. Consequently, the tax aid cannot qualify for the derogation in Article 87(3)(c) of the Treaty in respect of the said purposes.

(91) The exemption from corporation tax is not subject to any sectoral limitation and may therefore be granted without any restriction to firms in sensitive sectors subject to specific Community rules, such as those applicable to the production, processing and marketing of the agricultural products in Annex I to the Treaty, fisheries, coalmining, steelmaking, shipbuilding, synthetic fibres and the motor industry ⁽⁷⁰⁾. The Commission considers that, as a result, the exemption from corporation tax cannot comply with the said sectoral rules. In this particular case, the aid does not meet the condition that it should not promote new production capacity so as not to exacerbate the overcapacity problems from which these sectors

⁽⁶⁷⁾ OJ C 25, 31.1.1996, p. 3.

⁽⁶⁸⁾ It is not in the list of outermost regions in Article 299 of the Treaty.

⁽⁶⁹⁾ See point 3.10.4 of the guidelines on national regional aid (see footnote 17).

⁽⁷⁰⁾ For the sectoral rules currently in force see, in addition to the *Official Journal of the European Communities*, the website of the Directorate-General for Competition: http://europa.eu.int/comm/competition/state_aid/legislation/.

traditionally suffer. Therefore, where the recipient belongs to one of the abovementioned sectors, the Commission considers that, since it is not subject to the sectoral rules mentioned, the aid is incompatible with the common market and the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities does not apply.

- (92) The aid in question, which cannot qualify for the derogations in Article 87(3)(a) and (c) of the Treaty, cannot qualify either for other derogations in Article 87(2) and (3). It cannot be regarded as aid of a social nature under Article 87(2)(a), nor is it intended to make good the damage caused by natural disasters or exceptional occurrences in accordance with Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b) of the Treaty. Nor does it qualify for the derogation in Article 87(3)(d), as its purpose is not to promote culture or heritage conservation. The aid is therefore incompatible with the common market.
- (93) Since the exemption from corporation tax covers several tax years, there could still be some tax aid left to pay, but as this aid is unlawful and incompatible, the Spanish authorities should cancel the payment of any balance from the exemption from corporation tax which could still be due to certain recipients

6.5. Recovery of aid already paid

- (94) According to certain of Confebask's comments (see above), the aid should not be repaid on account of the legitimate expectations arising, first, from the fact that for many years the Commission did not describe the measures in question as State aid and, second, from the existence of other tax holidays in the rest of the Member State, which were not called into question by the Commission.
- (95) As a preliminary, it should be noted that Confebask is not arguing that the Basque firms it represents did not realise that the exemption from corporation tax granted on certain conditions to newly established firms did not confer an advantage. The Commission considers therefore that those firms were aware of the advantage conferred by the exemption.

- (96) It should also be pointed out that the tax exemption was not put into effect in accordance with the procedure provided for in Article 88(3) of the Treaty. According to established case law⁽⁷¹⁾, however, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent economic operator should normally be able to make sure that this procedure has been complied with. In the case in point, Confebask, which attached copies of the correspondence between the Commission and the Spanish authorities to its comments, cannot claim it was unaware that the measures were illegal.

- (97) To be sure, the case-law⁽⁷²⁾ does not rule out the possibility that recipients of illegal aid may invoke exceptional circumstances, which may reasonably have sustained their legitimate expectation that the aid was valid, in order to oppose repayment, but in this case none of the circumstances put forward in the comments of interested third parties may be taken into account. As regards the possible legitimate expectation created by the Commission not describing the measures in question as State aid for a long period, the Commission would point out firstly that, under Article 13(2) of Regulation (EC) No 659/1999, in cases of possible unlawful aid it is not bound by the time limits applicable to notified aid. Consequently, it is not obliged to adopt decisions on unlawful aid, as in the present case, within two months⁽⁷³⁾ (in accordance with Article 4(5)) or within 18 months⁽⁷⁴⁾ (under Article 7(6)). It should also be pointed out that in its letter of 25 May 1994 to the Spanish Permanent Representation, which Confebask attached to its comments, the Commission drew the Spanish Government's attention to the letter to Member States of 3 November 1983 concerning the obligations arising from Article 93(3) of the Treaty and to the communication published in OJ C 318 of 24 November 1983, in which it repeated that any aid granted unlawfully could be the subject of a request for repayment. Consequently, in the first letter which it sent to the Spanish Permanent Representation following the complaint lodged in 1994, the Commission warned the Spanish authorities that the tax exemption might have the character not only of an aid but also of an illegal aid and that, if appropriate, it might have to be repaid. Moreover, in its correspondence with the Spanish

⁽⁷¹⁾ See Case C-5/89, *Germany v Commission*, [1990] ECR I-3437, paragraph 14; Case C-169/95, *Spain v Commission*, [1997] ECR I-135, paragraph 51; Case C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, [1997] ECR I-1591, paragraph 25.

⁽⁷²⁾ See paragraph 16 of the judgment cited in footnote 71, and Case C-183/91, *Commission v Greece*, [1993] ECR I-3131, paragraph 18.

⁽⁷³⁾ Decision to raise no objection or to initiate the formal investigation procedure.

⁽⁷⁴⁾ Decision to terminate the formal investigation procedure.

authorities since 1994, the Commission has never described the tax exemption, either directly or indirectly, as compatible with the common market.

(98) As regards the legitimate expectation arising from the existence of other tax holidays in the rest of Spain, it should be noted, as already explained, that the measure has very different characteristics. In the circumstances, it is difficult to justify similar treatment for measures that are very disparate. It should also be noted that, in the case of the other tax holidays, the Commission was unable to rule as to their compatibility, either because they had not been notified or because no complaint had been made against them. Nor has it ever given an opinion, either directly or indirectly, on these measures.

(99) As to the precedent of RSV ⁽⁷⁵⁾, cited by third parties in support of a legitimate expectation arising out of the long period that elapsed between the Commission's first letter, of 25 May 1994, and the decision to initiate the procedure in respect of the tax exemption, it is important to stress the particular circumstances of that case. In RSV, the aid was formally notified to the Commission, albeit late. It was also related to additional costs associated with a transaction for which aid had already been authorised by the Commission. It concerned a sector that had been receiving aid authorised by the Commission for several years. An exhaustive investigation was not necessary, therefore, in order to determine whether the aid was compatible. In the present case, however, the aid was not notified, is not linked to aid that has been authorised by the Commission, and does not concern a sector that has received aid before. The Commission therefore considers that the RSV decision is not relevant in this case.

(100) The length of time that elapsed is largely due to the lack of cooperation on the part of the Spanish authorities. By letter to the Permanent Representation dated 19 January 1996, the Commission requested information about the possible recipients of the measures. By fax dated 16 February, confirmed by letter dated 19 February 1996, the Spanish Permanent Representation requested a 15-day extension of the deadline for replying. By letter dated 21 March 1996, the Spanish Permanent Representation requested a further extension of 30 days. Despite these requests, which would suggest that a reply might be forthcoming, the Spanish authorities did not answer the Commission's request for

information. The Commission also notes that during this period the Spanish authorities were informed of the procedures it had initiated, following the complaints lodged in 1996 about aid to Demesa ⁽⁷⁶⁾ and, in 1997, about aid to Ramondín ⁽⁷⁷⁾, in respect of the tax holidays ⁽⁷⁸⁾ introduced in Álava in 1996 and enjoyed, in addition to other aid, by those firms. As both files concluded that the 1996 tax holidays were unlawful and incompatible State aid, the information which the Spanish authorities received in this connection, far from arousing any legitimate expectation as to the compatibility of the tax exemption, indicated that it might be incompatible.

(101) In the circumstances, the Commission considers that it did not give any reason to hope that the tax exemption might be compatible. Thus the recipients cannot plead any legitimate expectations or legal certainty where this exemption is concerned. It should be pointed out in this connection that 'it is settled case-law that the right to protection of legitimate expectations may be claimed by any individual who finds himself in a position in which it is shown that the Community administration gave rise to justified hopes on his part [...]. However, no one may plead infringement of the principle of the protection of legitimate expectations in the absence of specific assurances given to him by the administration' ⁽⁷⁹⁾.

(102) In short, in view of the arguments set out above, the Commission considers that the recipients may not rely on general principles of Community law such as legitimate expectations or legal certainty as regards incompatible aid already paid. Consequently, there is nothing to prevent the application of Article 14(1) of Regulation (EC) No 659/1999, according to which 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'. In this case, therefore, the

⁽⁷⁵⁾ See footnote 24.

⁽⁷⁶⁾ State aid file on aid to Demesa (see footnote 52); final Decision 1999/718/EC (see footnote 5).

⁽⁷⁷⁾ State aid file on aid to Ramondín: Decision to initiate the procedure, 30 March 1999 (OJ C 194, 10.7.1999, p. 18); final Decision 2000/795/EC (see footnote 27).

⁽⁷⁸⁾ State aid cases C 49/99, C 50/99 and C 52/99 relating respectively to the tax aid schemes (tax holidays) introduced by Article 26 of the following provincial laws: Provincial Law No 24 of 5 July 1996 (Álava), Provincial Law No 7 of 4 July 1996 (Guipúzcoa) and Provincial Law No 3 of 26 June 1996 (Vizcaya).

⁽⁷⁹⁾ See paragraph 300 of the judgment cited in footnote 56.

Spanish authorities should take all necessary measures to recover the aid already paid in order to restore the economic situation which the recipient firms would be in without the unlawful grant of that aid. The aid should be recovered in accordance with the procedures and provisions of Spanish law and should include all interest due, calculated from the date the aid was granted until the date of actual repayment on the basis of the reference rate used at that date to calculate the net grant equivalent of regional aid in Spain ⁽⁸⁰⁾.

- (103) This decision relates to the scheme and should be implemented immediately, including the recovery of any individual aid granted under that scheme. The Commission would also point out that, as usual, this Decision is without prejudice to whether individual aid may be regarded, in full or in part, as compatible with the common market on its own merits, either in a subsequent Commission decision or under exempting regulations.

7. CONCLUSIONS

- (104) In view of the above, the Commission, concludes that:

- (a) Spain has unlawfully put into effect, in Álava, an exemption from corporation tax for certain newly established firms, in breach of Article 88(3) of the Treaty;
- (b) the exemption from corporation tax in question is incompatible with the common market;
- (c) the Spanish authorities should cancel the payment of any aid balance, which could still be due to certain recipients. As regards the incompatible aid already paid, the Spanish authorities should take all necessary measures to recover it, so as to restore the economic situation which the recipient firms would be in if the aid had not been granted unlawfully.

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of an exemption from corporation tax, unlawfully put into effect by Spain in the Historic Territory of Álava, in breach of Article 88(3) of the Treaty, through Article 14 of Provincial Law No 18 of 5 July 1993, is incompatible with the common market.

Article 2

Spain shall abolish the aid scheme referred to in Article 1, if it is still in force.

Article 3

1. Spain shall take all necessary measures to recover from the recipients the aid referred to in Article 1, which has been unlawfully made available to them. Spain shall cancel all payment of outstanding aid.

2. Recovery shall be effected without delay in accordance with the procedures of national law, provided these allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it became available to the recipients until the date of its effective recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

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

Article 5

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 20 December 2001.

For the Commission

Mario MONTI

Member of the Commission

⁽⁸⁰⁾ Commission letter to Member States SG(91) D/4577, 4 March 1991. See also Case C-142/87, *Belgium v Commission*, [1990] ECR I-959.

COMMISSION DECISION

of 17 July 2002

authorising the United Kingdom to grant aid to eight coal production units for 2001 and for the period from 1 January 2002 to 23 July 2002

*(notified under document number C(2002) 2609)***(Only the English text is authentic)****(Text with EEA relevance)**

(2003/29/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry ⁽¹⁾, and in particular Article 9(4) thereof,

Whereas:

therefore take a decision on these measures pursuant to Article 9(4) of that Decision. The Commission's approval is subject to compliance with the general objectives and criteria laid down in Article 2 and the specific criteria set out in Article 3 of Decision No 3632/93/ECSC and, more generally, to the aid's being compatible with the proper functioning of the common market. In addition, in its assessment the Commission is required to check, in accordance with Article 9(6) of that Decision, whether the measures notified are in conformity with the plan for modernisation, rationalisation and restructuring of the United Kingdom coal industry approved by the Commission by Decision 2001/114/ECSC ⁽²⁾ and Decision 2001/597/ECSC ⁽³⁾ (hereinafter referred to as 'the restructuring plan').

I

- (1) By letter of 28 May 2002, the United Kingdom notified the Commission, in accordance with Article 9(1) of Decision No 3632/93/ECSC, of financial aid which it intends to grant to the coal industry for 2001 and for the period from 1 January 2002 to 23 July 2002.
- (2) The United Kingdom also notified the Commission by letter of 5 June 2002, in accordance with Article 9(1) of Decision No 3632/93/ECSC, of financial aid which it intends to grant to the coal industry for 2001.
- (3) In the light of the information submitted by the United Kingdom, the Commission is required to take a decision on operating aid amounting to GBP 5 588 000 to cover the operating losses of five production units for the period from 1 January 2001 to 31 December 2001. It is also required to take a decision on operating aid amounting to GBP 326 500 to cover the operating losses of three production units for the period from 1 January 2002 to 23 July 2002. Consequently, the total operating aid on which the Commission is required to take a decision amounts to GBP 5 914 500 .
- (4) The financial measures are covered by Article 1 of Decision No 3632/93/ECSC. The Commission must

II

- (5) The sum of GBP 5 914 500 which the United Kingdom is proposing to grant to the coal industry under Article 3 of Decision No 3632/93/ECSC is intended to cover the difference between the production cost and the selling price of coal freely agreed between the contracting parties in the light of the conditions prevailing on the world market for coal of similar quality from third countries.
- (6) The aid proposed for the period from 1 January 2001 to 31 December 2001 is intended for the following units:
 - (a) GBP 3 819 000 for the Tower Colliery production unit of Tower Colliery Ltd;
 - (b) GBP 387 000 for the Scotland production unit of Hall Construction Services Ltd;
 - (c) GBP 521 000 for the New Albion OCCS production unit of Hall Construction Services Ltd;
 - (d) GBP 184 000 for the Nantyglo OCCS production unit of F. Parnell Ltd;
 - (e) GBP 677 000 for the Elwyn Mining Complex production unit of Merthyr Mining Co. Ltd;

⁽¹⁾ OJ L 329, 30.12.1993, p. 12.

⁽²⁾ OJ L 43, 14.2.2001, p. 27.

⁽³⁾ OJ L 210, 3.8.2001, p. 32.

- (7) By Decision 2001/597/ECSC, the Commission has already authorised the United Kingdom to grant operating aid pursuant to Article 3 of Decision No 3632/93/ECSC to Tower Colliery, amounting to GBP 3 589 000 for the period from 17 April 2000 to 31 December 2000. The Commission was of the opinion that the aid which the United Kingdom proposed to grant was intended to improve the economic viability of this production unit by reducing its production costs, in accordance with Article 3(2) of Decision No 3632/93/ECSC. Under the restructuring plan, the aid should help to make the mine viable, enabling it to continue its activities beyond 2002 without the need for public subsidy.
- (8) The information transmitted by the United Kingdom in its letter of 28 May 2002 confirms the analysis and conclusions set out in Decision 2001/597/ECSC. The reduction in the production costs of Tower Colliery will make it possible to achieve economic viability of that mine in 2002. Production costs in 2002 should be GBP [...] (*) per GJ (⁴).
- (9) The aid proposed should also enable the Scotland, New Albion OCCS, Nantyglo OCCS and Elwyn Mining Complex production units to improve their economic viability by reducing their production costs. According to estimates, production costs for these mines should be GBP [...] per GJ, GBP [...] per GJ, GBP [...] per GJ and GBP [...] per GJ respectively in 2002, which is below the level of GBP 1,15 per GJ considered to be the economic viability threshold for the United Kingdom coal industry.
- (10) Moreover, according to estimates made for the period up to 2004, the above production units should continue to improve their economic viability. Consequently, production costs should remain below the level of GBP 1,15 per GJ.
- (11) The aid proposed for the period from 1 January 2002 to 23 July 2002 is intended for the following units:
- (a) GBP 151 000 for the Blaentillery No 2 production unit of Blaentillery Mining Ltd;
 - (b) GBP 131 000 for the Eckington Colliery production unit of Moorside Mining Co. Ltd;
 - (c) GBP 44 500 for the Nant-hir No 2 production unit of M. & W.A. (Anthracite) Ltd.
- (12) By Decisions 2001/597/ECSC and 2001/807/ECSC (⁵), the Commission has already authorised the United Kingdom to grant Blaentillery No 2 operating aid pursuant to Article 3 of Decision No 3632/93/ECSC, amounting to GBP 113 000 and GBP 217 000 for the period from 17 April 2000 to 31 December 2000 and the whole of 2001, respectively. By Decisions 2001/597/ECSC and 2001/807/ECSC, the Commission has already authorised the United Kingdom to grant Eckington Colliery operating aid pursuant to Article 3 of Decision No 3632/93/ECSC, amounting to GBP 88 000 and GBP 286 000 for the period from 17 April 2000 to 31 December 2000 and the whole of 2001, respectively. Finally, by Decision 2002/786/ECSC (⁶), the Commission has already authorised the United Kingdom to grant Nant-hir No 2 operating aid pursuant to Article 3 of Decision No 3632/93/ECSC amounting to GBP 44 000 for 2001.
- (13) In accordance with Article 3(2) of Decision No 3632/93/ECSC, the Commission was of the opinion that the aid which the United Kingdom proposed to grant was intended to improve the economic viability of the production units concerned by reducing their production costs. Under the restructuring plan, the aid should help to make the three production units viable, enabling them to continue their activities without the need for public subsidy. In view of certain temporary operating problems, it was expected that the average production cost of Blaentillery No 2 in 2002 would be above the GBP 1,15 per GJ viability threshold. However, these temporary problems should be solved in the course of 2002, gradually bringing production costs down to GBP 1,15 per GJ by the end of 2002. The Commission therefore considered that the average level of production costs at Blaentillery No 2 for the whole of 2002 would not be such as to undermine the economic viability of this production unit.
- (14) The information transmitted by the United Kingdom in its letter of 28 May 2002 confirms the analysis and conclusions set out in Decisions 2001/597/ECSC, 2001/807/ECSC and 2002/2016/ECSC. The development of production costs at Eckington Colliery and Nant-hir No 2 will enable these mines to achieve economic viability in 2002. The United Kingdom has also confirmed that the production costs of Blaentillery No 2 should gradually fall to GBP [...] per GJ at the end of 2002.
- (15) Moreover, according to estimates made for the period up to 2004, the above production units should continue to improve their economic viability. Consequently, production costs should remain below the level of GBP 1,15 per GJ.

(*) Confidential information.

(⁴) 1 tonne coal equivalent (tce) = 29,302 gigajoules (GJ).

(⁵) OJ L 305, 22.11.2001, p. 27.

(⁶) OJ L 282, 19.10.2002, p. 66.

III

IV

- (16) In accordance with Article 3(2) of Decision No 3632/93/ECSC, the aid which the United Kingdom proposes to grant is intended to improve the economic viability of the production units concerned by reducing their production costs.
- (17) In accordance with the first indent of Article 3(1) of Decision No 3632/93/ECSC, the aid per tonne as notified does not exceed, for each production unit, the difference between production costs and foreseeable revenue for 2001 and the period from 1 January 2002 to 23 July 2002, respectively.
- (18) The modernisation, rationalisation and restructuring measures carried out at each production unit, and more specifically the temporary nature of the financial aid necessary for such measures, will moreover allow the aid to be degressive, in accordance with the first indent of Article 2(1) of Decision No 3632/93/ECSC.
- (19) At the request of the United Kingdom authorities, an independent expert has compiled technical reports examining the potential of the modernisation, rationalisation and restructuring measures planned for the various production units to achieve the objective of economic viability. In drawing up his report, the expert took account of the geological and technical operating conditions and the quality of the coal produced by the production units. The reports conclude that the various measures envisaged were consistent and realistic in terms of attaining economic viability.
- (20) An auditor has certified, for each production unit, that the financial data notified by the United Kingdom are an accurate reflection of the accounts of the company. The auditor has also stated that the forecasts were drawn up using the same accounting standards as were in use before the period covered by the aid.
- (21) The Commission notes that the aid notified on 28 May 2002, when added to the amounts of aid already authorised by the Commission under the restructuring plan for the United Kingdom coal industry, remains below the ceiling of GBP 170 000 000 laid down by that restructuring plan.
- (22) In view of the above and on the basis of the information provided by the United Kingdom, the aid proposed for 2001 and the aid proposed for the period from 1 January 2002 to 23 July 2002 for the eight production units referred to in recitals 6 and 11 are compatible with Decision No 3632/93/ECSC, and in particular with Articles 2 and 3 thereof.
- (23) The United Kingdom is required to ensure that the aid does not cause any distortion of competition and does not discriminate between coal producers, buyers or consumers in the Community.
- (24) In accordance with the third indent of Article 3(1) of Decision No 3632/93/ECSC and with the provisions of Decision 2001/114/ECSC, the United Kingdom will take all measures necessary to ensure that the amount of the aid granted to each production unit does not cause delivered prices for Community coal to be lower than those for coal of a similar quality from third countries.
- (25) Moreover, in accordance with Article 2(2) of Decision No 3632/93/ECSC, the aid must be entered in the United Kingdom's national, regional or local public budgets or comply with strictly equivalent mechanisms.
- (26) In the context of Member States' obligations under Article 9(2) and (3) of Decision No 3632/93/ECSC, the Commission has to check that the aid authorised is used only for the purposes stipulated in Article 3 of that Decision. At the latest by 30 September of each year, the United Kingdom shall notify the amount of aid actually paid for the previous year and declare any changes made to the amounts originally notified. Any information required to ascertain that the criteria laid down in Article 3 of the Decision have been complied with shall be provided together with this annual statement.
- (27) The United Kingdom is required to justify any departures from the restructuring plan and from the economic and financial forecasts notified to the Commission on 28 May 2002. In particular, should it turn out that the conditions laid down in Article 3(2) of Decision No 3632/93/ECSC cannot be met, the United Kingdom will be responsible for proposing to the Commission which corrective measures ought to be taken,
- HAS ADOPTED THIS DECISION:
- Article 1*
- The United Kingdom is authorised, subject to the conditions set out in Article 3 of Decision No 3632/93/ECSC, to grant operating aid of GBP 5 588 000 to the Tower Colliery, Scotland, New Albion OCCS, Nantyglo OCCS and Elwyn Mining Complex production units for 2001.

The United Kingdom is also authorised, subject to the conditions set out in Article 3 of Decision No 3632/93/ECSC, to grant operating aid of GBP 326 500 to the Blaentillery No 2, Eckington Colliery and Nant-hir No 2 production units for the period from 1 January 2002 to 23 July 2002.

Article 2

The United Kingdom shall ensure that the authorised aid is used only for the purposes declared in its notification of 28 May 2002 and that any expenditure on items covered by this Decision which is cancelled, overestimated or misused is reimbursed.

Article 3

In addition to the obligations laid down in Article 9(2) and (3) of Decision No 3632/93/ECSC, the United Kingdom shall, by 30 September 2002 at the latest, communicate the amount of aid actually paid for 2001.

In addition to the obligations laid down in Article 9(2) and (3) of Decision No 3632/93/ECSC, the United Kingdom shall, by 30 September 2003 at the latest, communicate the amount of aid actually paid for the period from 1 January 2002 to 23 July 2002.

Article 4

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 17 July 2002.

For the Commission

Loyola DE PALACIO

Vice President
