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(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 July 2001

on the State aid C 35/2000 (ex NN 81/98) implemented by the Federal Republic of Germany for
Saalfelder Hebezeugbau GmbH, Germany

(notified under document number C(2001) 2347)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/85/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

the notification. By letter dated 27 August 1999, the Commission informed Germany that the withdrawal had not been accepted. Germany submitted additional information by letter dated 20 September 1999, registered as received on 22 September. On 8 November 1999 the Commission asked further questions which were answered by letters dated 13 December 1999, registered as received on 20 December 1999, and 12 January 2000, registered as received on 14 January 2000.

(2) By letter dated 17 July 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. Moreover, it issued an information injunction.

(3) 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.

(1) By letter dated 10 July 1998, registered as received on the same day, Germany notified the Commission of restructuring measures in favour of Saalfelder Hebezeugbau GmbH (SHB) in accordance with Article 88(3) of the EC Treaty. As part of the aid had already been paid out, the measures were registered under aid number NN 81/98. By letter dated 18 August 1998, the Commission requested additional information from Germany which was provided by letters dated 21 September 1998, registered as received on 22 September 1998, and 18 December 1998, registered as received on 4 January 1999. By letter dated 13 July 1999, registered as received on 19 July 1999, Germany informed the Commission of its intention to withdraw

(4) By letter dated 26 September 2000, registered as received on 3 October 2000, Germany replied to the opening of the procedure and the information injunction. Further questions were sent to it by letter dated 28 December 2000 and answered by letter dated 27 February 2001, registered as received on 3 March 2001. A meeting with the German authorities was held on 7 March 2001. Additional information was requested by letter dated 8 March 2001. Answers were received by letters dated 22 March 2001, registered as received on 23 March 2001, and 3 April 2001, registered as received on 5 April 2001.

⁽¹⁾ OJ C 27, 27.1.2001, p. 44.

⁽²⁾ OJ C 27, 27.1.2001, p. 44.

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

2. DESCRIPTION

2.1. The aid recipient

- (6) SHB is active in the field of crane technology, which represents 68 % of its turnover, and components for mechanical engineering and for transport, storage and transmission systems. In addition, it provides related customer services, including the supply of replacement parts.
- (7) In 1997 the company had 135 employees and a turnover of DEM 15 963 000. As it is not more than 25 %-owned by a large company satisfying the definition of a small or medium-sized enterprise (SME), it qualifies as an SME within the meaning of the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises. ⁽³⁾.

- (8) SHB is situated in Saalfeld, Thuringia, an assisted area under Article 87(3)(a) of the EC Treaty.

2.2. Background

- (9) At the time of the German Democratic Republic, SHB belonged to the State-owned corporation TAKRAF. In 1993, following an open, transparent and unconditional competitive tender, SHB was sold to the Gresse Gruppe, which comprised Gresse GmbH Kranbau Wittenberg and Barlebener Kranbau GmbH (BAKRA), and to three private investors. The purchase price was DEM [...] ^(*).
- (10) Before the restructuring SHB benefited from the following public financial measures amounting to DEM 4 723 784 between 1992 and 1997:

(in DEM)

No	Measure	Amount
1	Investment allowances	211 612
2	Grants to promote research and development	459 630
3	Employee integration grants	81 402
4	Short-time-working grants	792 503
5	Investment grants	1 265 016
6	ERP loan (development programme)	1 000 000
7	Loan from the Reconstruction Loan Corporation (SME programme)	500 000

⁽³⁾ OJ L 107, 30.4.1996, p. 4.

^(*) Business secret.

(in DEM)

No	Measure	Amount
8	Wage-cost subsidies	240 304
9	Grants to promote innovation	120 430
10	Grants for advertising	48 837
11	Trade fair attendance and sales promotion grants	4 050
	Total	4 723 784

- (11) *Measure 1:* investment allowances were granted between 1992 and 1997 under the two investment allowance laws of 1991 to 1992 ⁽⁴⁾ and 1993 to 1996 ⁽⁵⁾. Measures under these laws qualify as regional investment aid under Article 87(1) of the EC Treaty and have been approved by the Commission on the basis of the derogation in Article 87(3)(a). The allowances are covered by the relevant aid schemes and are therefore regarded as existing aid.

- (12) *Measure 2:* the company received grants amounting to DEM 459 630 between 1992 and 1997 under an approved aid scheme for promoting research and development activities of SMEs in the new *Länder* ⁽⁶⁾. The grants are covered by that scheme and are therefore regarded as existing aid.

- (13) *Measure 3:* in 1992 and 1994 to 1997 grants for the integration of elderly employees amounting to DEM 81 402 were provided on basis of Section 217 of the Social Security Code (*Sozialgesetzbuch: Drittes Buch — SGB III*). They are a general measure and so do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

- (14) *Measure 4:* in 1993, 1995 and 1996 short-time-working grants amounting to DEM 792 503 were provided on basis of the Labour Promotion Law (*Arbeitsförderungs-gesetz*). They are made available directly to individuals as compensation for reduced income and do not benefit the company. Therefore they do not fall within the scope of Article 87(1) of the EC Treaty.

- (15) *Measure 5:* between 1994 and 1997 investment grants amounting to DEM 1 265 016 were provided under the

⁽⁴⁾ Investitionszulagengesetz 1991 to 1992 (C 59/91, SG (92) D/8068 of 18.6.1992).

⁽⁵⁾ Investitionszulagengesetz 1993 to 1996 (N 561/92, SG (92) D/16623 of 24.11.1992).

⁽⁶⁾ Personalförderung Ost 'Zuschüsse zur Stützung des Forschungs- und Entwicklungspotentials in kleinen und mittleren Unternehmen im Beitrittsgebiet' (N 477/91, SG (91) D/22704 of 25.11.1991).

23rd outline plan for the joint Federal Government/Länder scheme for improving regional economic structures, a regional aid scheme approved by the Commission ⁽⁷⁾. This scheme had been approved by the Commission as a regional investment aid scheme on the basis of the derogation in Article 87(3)(a) of the EC Treaty. The grants are covered by the scheme and thus constitute existing aid.

(16) *Measure 6*: a loan amounting to DEM 1 000 000 was granted to the company in 1995 under the ERP development programme, an aid scheme approved by the Commission ⁽⁸⁾. It is covered by the scheme and thus constitutes existing aid. In 1997 it was converted into a private bank loan.

(17) *Measure 7*: a loan amounting to DEM 500 000 was granted to the company in 1995 under the SME programme of the Reconstruction Loan Corporation, an aid scheme approved by the Commission ⁽⁹⁾. It is covered by the scheme and thus constitutes existing aid. In 1997 it was converted into a private bank loan.

(18) *Measure 8*: between 1995 and 1997 the company received wage-cost subsidies amounting to DEM 240 304 on the basis of Section 249h of the Labour Promotion Law. The subsidies were granted with a view to promoting employment in the context of measures to improve the environment. According to a Commission decision, these measures do not constitute State aid within the meaning of Article 87(1) of the EC Treaty ⁽¹⁰⁾.

(19) *Measure 9*: in 1996 and 1997 the company received grants amounting to DEM 120 430 for the promotion of innovation activities under an aid scheme approved by the Commission ⁽¹¹⁾. The grants are covered by that programme and thus constitute existing aid.

(20) *Measures 10 and 11*: between 1994 and 1997 grants amounting to DEM 48 837 were provided to the

company for advertising measures. In 1996 an amount of DEM 4 050 was granted to promote attendance at trade fairs. These measures were granted in line with the Commission notice on the *de minimis* rule for State aid ⁽¹²⁾.

2.3. The restructuring

(21) In May 1997 BAKRA, a company 100 %-owned by the Gresse Gruppe, went bankrupt. As a consequence, the financial situation of the whole Gresse Gruppe was threatened. SHB also ran into difficulties. Turnover fell from DEM 19 278 502 in 1996 to DEM 15 962 850 in 1997. In 1996 SHB made a profit of DEM 2 103 000 whereas in 1997 losses amounted to DEM 1 486 595. The company was faced with financial difficulties due to the cancellation of credit insurance by suppliers, a loss of confidence on the part of buyers and the freezing of credit lines.

(22) Separation from the Gresse Gruppe was regarded as inevitable to secure the continuation of the company's business activities. The shares held by the Gresse Gruppe were therefore temporarily taken over by SHB. The contract was signed in April 1997 and the purchase price was DEM [...] ^(*).

2.3.1. The restructuring measures

(23) In 1997 a restructuring plan was drawn up consisting in a further exchange of shareholders and a restructuring of the firm's activities. The plan was modified in 1998. Germany submitted two restructuring plans dated May 1997 and March 1998.

(24) The restructuring of the company was based on a new company structure and the reorganisation of production facilities. Most of the measures were supposed to be implemented before the second half of 1998, the remaining measures in the first half of 1999.

(25) The financial aspects of the restructuring plan were as follows:

(in DEM)

	1998	1999	2000
Turnover	34 540 000	29 540 000	30 040 000
Material costs	15 854 050	15 682 700	15 345 900
Staff costs	8 727 000	8 877 000	9 027 000
Depreciation	1 000 000	1 000 000	1 000 000
Profit	109 866	569 698	1 194 981

⁽⁷⁾ 23. Rahmenplan der Gemeinschaftsaufgabe zur Verbesserung der regionalen Wirtschaftsstruktur: measures under this scheme qualify as regional investment aid under Article 87(1) and were approved by the Commission on the basis of the derogation in Article 87(3)(a) (N 157/94, SG (94) D/11038 of 1.8.1994).

⁽⁸⁾ N 563/C/94, SG(94) D/17293 of 1.12.1994.

⁽⁹⁾ NN 24/96, SG(96) D/3475 of 29.3.1996.

⁽¹⁰⁾ NN 117/92, SG(95) D/341 of 13.1.1995.

⁽¹¹⁾ Innovationsförderung 'Förderung der Entwicklung neuer Produkte und Verfahren in kleinen und mittleren Unternehmen in den neuen Bundesländern', (N 534/91, SG (92) D/3225 of 4.3.1992).

⁽¹²⁾ OJ C 213, 19.8.1992, p. 2. See also Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9).

- (26) In order to restore the viability of the company, turnover was supposed to increase in the following years while costs were supposed to fall. The best prospects for an increase in production were to be seen in components and services. Costs were supposed to fall following internal reorganisation.
- (27) A distribution network for sales of components was supposed to be set up and a new marketing concept in the field of services established in order to exploit the favourable prospects anticipated in these fields. Moreover, SHB intended to boost productivity by taking several internal measures. A new company structure should lead to increased transparency. A restructuring of the purchasing department should strengthen the position of the company so that it could obtain discounts and favourable payment terms. The reorganisation of internal auditing and control should enhance planning certainty.
- (28) The costs of restructuring the company amounted to an estimated DEM 3 827 000 plus a credit line (*Avalrahmen*) of DEM 4 000 000. The breakdown was as follows:

(in DEM)

Restructuring measures	Amount
Exchange of shareholders	1 110 000
Investment	
— buildings	860 000
— reorganisation of equipment and machinery	997 000
Loss cover 1997/liquidity	860 000
Total	3 827 000
Credit line (<i>Avalrahmen</i>)	4 000 000
Total	7 827 000

- (29) In order to stabilise the pattern of ownership, two new investors acquired the shares of two former shareholders for a price of DEM 585 000 as part of a management buy-out. The third investor already owning shares in the company acquired the shares held by SHB for DEM 525 000. The exchange of shareholders took place in July/August 1997. The costs of the exchange amounted to DEM 1 110 000. The company is now owned by three natural persons who are part of the management and do not hold shares in other companies.
- (30) An amount of DEM 860 000 was needed to finance part of the construction of an administrative building. The total cost of this new building amounted to DEM 1 810 000. The building was needed because the

company was forced to leave its old building owing to the construction of a main road by the Erfurt city authorities.

- (31) In this connection, the company received DEM 950 000 from the city of Erfurt as compensation for the old building. This payment does not constitute State aid as it is compensation for damages caused to the company. As proof, Germany has submitted a report by an independent consultant confirming this figure and the fact that the compensation was paid at market conditions. The costs covered by this payment of DEM 950 000 were not included in the restructuring plan since they do not constitute a restructuring measure.
- (32) In addition, the restructuring plan included the purchase and modernisation of equipment and machinery with a view to rationalising production and reducing costs. Lastly, computer software and hardware were also to be renewed. The costs of these investments were put at DEM 997 000.
- (33) An amount of DEM 860 000 was intended to cover losses from 1997 and to provide the company with liquidity.
- (34) In order to safeguard the company's ability to pay, a credit line of DEM 4 000 000 was made available.

2.3.2 Financial commitments

- (35) Financing for the restructuring measures was to come from the following sources:

(in DEM)

Financial measures	Amount
Own resources	216 000
Two loans from the Equity Loan Scheme	228 000
Loan from the Equity Fund for Eastern Germany	900 000
Direct investment grants (joint scheme)	557 000
Two loans from the Consolidation Fund	1 926 000
Total	3 827 000
Credit line	4 000 000
— guarantee covering 80 % of credit line	3 200 000
— non-guaranteed part of credit line	800 000
Total	7 827 000

(36) An amount of DEM 216 000 was financed out of own resources.

Individual notification of the two loans from the Consolidation Fund is therefore necessary.

(37) Two loans amounting to DEM 228 000 were granted under the Equity Loan Scheme *Eigenkapitalhilfeprogramm*. A loan of DEM 900 000 was granted by the Reconstruction Loan Corporation *Kreditanstalt für Wiederaufbau* from the Equity Fund for Eastern Germany *Beteiligungsfonds Ost*.

2.4. Market analysis

(38) The company received investment grants totalling DEM 557 000 from the *Land* of Thuringia.

(45) SHB is active in the field of crane technology and components for mechanical engineering and for transport storage and transmission systems. In addition, it provides related customer services, including the supply of replacement parts. It operates in the market for special cranes. This market is worldwide and thus extends across Member States.

(39) A credit line of DEM 4 000 000 was made available to the company by a private bank. The Thuringia Development Bank granted an 80 % deficiency guarantee (*Ausfallbürgschaft*) in respect of this credit line in October 1997.

(46) The general crane market is fiercely competitive. According to information from the Federal Statistical Office, the turnover in the German market for lifting and conveyance systems increased significantly from DEM 20 500 million in 1998 to DEM 21 900 million in 1999, i.e. by around 6,83 %. There are grounds for believing that there may be excess capacity in the sector ⁽¹³⁾.

(40) Two loans of DEM 1 575 000 net (DEM 1 615 000 gross) and DEM 351 000 were granted to the company by the Thuringia Development Bank from the Thuringia Consolidation Fund in April 1998.

(47) No precise data are available for the niche market in special cranes. However, according to the information available to the Commission, there is no indication of any excess capacity in the market.

(41) Germany had notified the two loans from the Consolidation Fund by letter dated 10 July 1998. This aid scheme requires individual notification of aid to the Commission if any rescue and restructuring aid in excess of EUR 1 000 000 has already been granted to the company. The individual notification of the two loans was justified on the grounds that the guarantee of the Thuringia Development Bank covering 80 % of the credit line of DEM 4 000 000 had been granted to the company when it was already in difficulty.

3. OPENING OF THE PROCEDURE

(42) However, by letter dated 13 July 1999, Germany withdrew the notification. It claimed that the deficiency guarantee granted in October 1997 was not restructuring aid because the company had not been in difficulty at the time.

(48) The Commission initiated the formal investigation procedure in respect of two loans granted by the Thuringia Development Bank out of the Thuringia Consolidation Fund, an aid scheme for companies in difficulty approved by the Commission. In order for the loans to be covered by this scheme, under which they had allegedly been granted, the conditions of the Community guidelines for rescuing and restructuring firms in difficulty (1994 guidelines) ⁽¹⁴⁾ must be fulfilled. When opening the procedure, the Commission had doubts that these conditions had been satisfied: no detailed restructuring plan had been submitted, there was no indication that the financial forecasts would be met and the investor contribution could not be regarded as being significant.

(43) Germany asserted that SHB ran into difficulties only at the end of 1997 and the beginning of 1998. At the time that the guarantee was granted, SHB was a company with no liquidity problems and able to meet its payment obligations.

(49) In addition, Germany claimed that a number of measures had been granted under approved aid schemes. On the basis of the information available, however, the Commission was unable to ascertain whether the loans of DEM 228 000 under the Equity Loan Scheme and DEM 900 000 under the Equity Fund for Eastern Germany were covered by the relevant schemes, under which they had allegedly been granted. No information had been provided either on the terms

(44) The Commission cannot accept this view. The firm's annual report for 1997 States that the opening of the bankruptcy proceedings in respect of BAKRA on 4 March 1997 caused liquidity problems for the Gresse Gruppe as well as for SHB. According to this report, the company faced financial difficulties due to the cancellation of credit insurance by suppliers, a loss of confidence on the part of buyers and a freezing of credit lines. This is also mentioned in the first restructuring plan dating from May 1997. According to the Commission, SHB therefore already had liquidity problems at the time that the guarantee was granted and has to be regarded as a company in difficulty.

⁽¹³⁾ See page 57, 'Statistisches Handbuch für den Maschinenbau', 1997 edition, prepared by the Verband Deutscher Maschinen- und Anlagenbau e.V.

⁽¹⁴⁾ OJ C 368, 23.12.1994, p. 12.

of the loans or on the exact identity of the schemes. The Commission issued an information injunction to determine whether these loans complied with the schemes under which they had allegedly been granted.

4. COMMENTS FROM GERMANY

- (50) In its reply to the decision to open the procedure, Germany claimed that the condition for restoring the viability of the company was met. Although the turnover forecasts laid down in the restructuring plan would not be fully met, the results in 1998 and 1999 were better than originally envisaged. In addition, Germany submitted a detailed restructuring plan.
- (51) Germany restated its view that the company was not in difficulty in October 1997, when the 80 % deficiency guarantee for a credit line was granted. It thus claimed that notification of the two loans from the Thuringia Consolidation Fund was not necessary.

5. ASSESSMENT OF THE AID

5.1. Aid within the meaning of Article 87(1) of the EC Treaty

- (52) SHB has received financial assistance deriving from public resources which a company in difficulty would not have received from a private investor, conferring on it advantages vis-à-vis its competitors. As the relevant product market is worldwide, such assistance affects trade between Member States. These financial measures thus constitute State aid within the meaning of Article 87(1) of the EC Treaty and the Commission must assess their compatibility with the common market.

5.2. Compliance with existing aid schemes

5.2.1. Loans from the Equity Loan Scheme (Eigenkapitalhilfeprogramm)

- (53) Two loans of DEM 160 000 and DEM 68 000 were allegedly granted under the Equity Loan Scheme, an aid scheme approved by the Commission⁽¹⁵⁾. As the Commission did not possess enough information to assess whether these loans are covered by that aid scheme, it issued an information injunction.

- (54) The scheme provides loans to individuals starting up or consolidating a business activity. In the case of a company in difficulty, the conditions set out in the 1994 guidelines⁽¹⁶⁾ have to be met.

- (55) The loans were granted in 1998 to two individuals to enable them to acquire shares in the context of a management buy-out. As the company was in difficulty at the time the aid was granted, the conditions set out in the aforementioned guidelines have to be met. As pointed out below, these conditions are met. The other conditions laid down in the scheme are also met. The loans are thus covered by the aid scheme under which they were allegedly granted and therefore constitute existing aid, which does not need to be re-assessed in the present procedure. However, they will be taken into account in calculating the proportionality of the aid.

5.2.2. Loans from the Equity Fund for Eastern Germany (Beteiligungsfonds Ost)

- (56) A loan of DEM 900 000 was granted by the Reconstruction Loan Corporation (KfW) from the Equity Fund for Eastern Germany, an aid scheme authorised by the Commission⁽¹⁷⁾. As the Commission did not possess enough information to assess whether the loan is covered by the relevant aid scheme, it issued an information injunction.
- (57) The scheme provides loans for strengthening the equity capital base of companies in the new *Länder*. In the case of a company in difficulty, the conditions set out in the 1994 guidelines have to be met.
- (58) The loan was granted to a shareholder of the company in December 1997. An amount of DEM 315 000 was used to purchase additional shares, while the remaining DEM 585 000 was injected into the company as capital.

- (59) As the company was in difficulty at the time the aid was granted, the conditions set out in the 1994 guidelines have to be met. As pointed out below, these conditions are met. The loan also meets the other conditions set out in the programme. It is thus covered by the aid scheme under which it was allegedly granted.

⁽¹⁵⁾ N 519/95, SG (95) D/11491 of 14.9.1995.

⁽¹⁶⁾ See footnote 14.

⁽¹⁷⁾ N 646/A/95, SG(95) D/12827 of 18.10.1995.

It therefore constitutes existing aid, which does not need to be re-assessed in the present procedure. However, it will be taken into account in calculating the proportionality of the aid.

5.2.3. *Investment grants*

- (60) Investment grants amounting to DEM 557 000 were granted to the company under the 26th outline plan for the joint Federal Government/Länder scheme for improving regional economic structures, a regional aid scheme approved by the Commission ⁽¹⁸⁾. The grants comply with the conditions set out in the scheme under which they have been allegedly granted and are therefore covered by the scheme. They thus constitute existing aid, which does not need to be reassessed. However, they will be taken into account in calculating the proportionality of the aid.

5.2.4. *80 % guarantee from the Thuringia Development Bank (Thüringer Aufbaubank)*

- (61) A guarantee covering 80 % of a credit line of DEM 4 000 000 was granted by the Thuringia Development Bank under an aid scheme approved by the Commission ⁽¹⁹⁾. The scheme stipulates that, if the guarantee is granted to a company in difficulty, the conditions set out in the 1994 guidelines have to be met. As pointed out below, these conditions are met. As the other conditions laid down in the scheme are also met, the guarantee is covered by the aid scheme, under which it was allegedly granted. It therefore constitutes existing aid, which does not need to be re-assessed. However, it will be taken into account in calculating the proportionality of the aid.

5.2.5. *Loans from the Thuringia Consolidation Fund (Thüringer Konsolidierungsfonds)*

- (62) Two loans of DEM 1 615 000 gross (DEM 1 575 000 net) and DEM 351 000 were granted to the company under the Thuringia Consolidation Fund, an aid scheme for companies in difficulty approved by the Commission in April 1998 ⁽²⁰⁾.

⁽¹⁸⁾ 26. Rahmenplan der Gemeinschaftsaufgabe zur Verbesserung der regionalen Wirtschaftsstruktur: Measures under this scheme qualify as regional investment aid under Article 87(1) of the EC Treaty and were approved by the Commission on the basis of the derogation in Article 87(3)(a) of the EC Treaty (N 123/97, SG (97) D/7104 of 18.8.1997).

⁽¹⁹⁾ Bürgschaftsrichtlinie der Thüringer Aufbaubank (N 117/96, SG (96) D/11696 of 27.12.1996).

⁽²⁰⁾ Thüringer Konsolidierungsfonds für Unternehmen in Schwierigkeiten (NN 74/95, SG (96) D/1946 of 6.2.1996).

- (63) The aid scheme provides for measures for restructuring companies in difficulty. The conditions of the aid scheme are the same as those set out in the 1994 guidelines. The Commission had doubts as to whether these conditions were met and initiated the formal investigation procedure.

- (64) The first loan was for DEM 1 615 000 gross, which amounts to DEM 1 575 000 net. A handling fee of DEM 40 000 was deducted from the loan, DEM 578 000 was used to provide the company with liquidity and DEM 997 000 was for investments in machinery and equipment.

- (65) The second loan was for DEM 315 000. The company used it to help two individuals acquire shares in the context of a management buy-out. This measure is part of the financial restructuring of the company and will strengthen its capital base.

- (66) In order for the two loans to be covered by the scheme, under which they were allegedly granted, the conditions of the 1994 guidelines have to be met.

5.3. **Compliance with the 1994 guidelines**

- (67) Since, according to the information available, the aid was granted before 30 April 2000, the 1994 guidelines ⁽²¹⁾ are applicable ⁽²²⁾.

Restoration of long-term viability

- (68) The granting of restructuring aid requires a realistic, coherent and far-reaching restructuring plan capable of restoring the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions.

⁽²¹⁾ See footnote 14.

⁽²²⁾ Section 7.5 of the 1999 Guidelines on State aid for rescuing and restructuring firms in difficulty states that 'the Commission will examine the compatibility with the common market of any rescuing and restructuring aid granted without its authorisation (...) on the basis of the Guidelines in force at the time the aid is granted (...)' (OJ C 288, 9.10.1999).

- (69) Germany submitted two restructuring plans dated May 1997 and March 1998. As explained in Section 2.3.1, these two plans taken together constitute a coherent restructuring plan capable of restoring the company's viability. The restructuring was to last two years, this being a reasonable timescale.

- (70) The latest financial data confirm this assessment:

(in DEM)

	1998	1999	2000 (*)
Turnover	26 664 000	29 974 000	29 467 000
Profit	331 000	1 444 000	269 000

(*) Provisional.

- (71) The strong increase in profits in 1999 is attributable mainly to extraordinary income. However, an examination of the data provided by Germany shows that SHB was able to reduce its losses significantly and to resolve the problems facing it. The figures show a continuing positive development. Provisional turnover in 2000 is only just short of the turnover of DEM 30 040 000 aimed at in the restructuring plan.

- (72) In view of this development and the qualitative aspects of the restructuring, the Commission concludes that the condition of restoring viability is met.

Avoidance of undue distortions of competition

- (73) The restructuring plan must contain measures for offsetting as far as possible adverse effects on competitors. Otherwise, the aid granted in support of the restructuring would be contrary to the common interest and ineligible for exemption pursuant to Article 87(3) of the EC Treaty.

- (74) Where, therefore, an assessment of demand and supply shows that there is a structural excess of production capacity in a relevant market in the EU, the restructuring plan must make a contribution, proportionate to the aid received, to the restructuring of the relevant sector by irreversibly reducing or closing capacity.

- (75) To assess the consequences of maintaining SHB in the market and the effect on competitors, the output of the

company, the fact that the aid is granted in an assisted area under Article 87(3)(a) of the EC Treaty and the company's status as an SME must be taken into consideration.

- (76) According to the information available to the Commission, there is no excess of capacity in the niche market for special cranes, in which SHB is active. Moreover, SHB is not expanding its capacity.

- (77) According to the information submitted by Germany, the company accounted for 2 % of total output on the European market for special cranes.

- (78) Since SHB is an SME situated in an assisted area pursuant to Article 87(3)(a) of the EC Treaty and since its production is limited, the Commission comes to the conclusion that there is no undue distortion of competition and competitors are not adversely affected.

Aid in proportion to the restructuring costs and benefits

- (79) The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's viewpoint. Therefore, the investors must make a contribution to the restructuring plan from their own resources. Moreover, the form in which the aid is granted must be such as to avoid providing the company with surplus cash which would be used for aggressive, market-distorting activities not linked to the restructuring process.

- (80) The costs of restructuring SHB totalled DEM 7 827 000.

- (81) Of this amount, DEM 216 000 was brought in directly by the investors and can be regarded as a private investor contribution.

- (82) Germany claims that the loans granted under the Equity Loan Scheme are to be regarded as a private investor contribution. However, it has to be noted that, even though the loans are provided by a private bank, they are refinanced by a public bank (*Deutsche Ausgleichsbank*) under an approved aid scheme. The scheme provides low-interest loans to individuals wishing to acquire the shares of a company. Aid is granted in form of a subsidised interest rate.

(83) The 1994 guidelines state that aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing.

(84) The two loans of DEM 160 000 and DEM 68 000 were granted in January 1998 for a period of 20 years. The loans are to be paid back in equal instalments between 2008 and 2017. The interest rate on the loans is 7 %. However, part of the interest is paid by the Deutsche Ausgleichsbank from the ERP Special Fund (ERP-Sondervermögen). The interest rate to be paid by the investors is thus reduced as follows: 0 % in 1998 and 1999, 3 % in 2000, 4 % in 2001 and 5 % from 2002 to 2017. The risk is covered by the private bank.

(85) As the interest rate is subsidised by the State, market conditions are not present. The reference interest rate at the time the loans were granted was 5,94 %. Since the company was in difficulty, it is assumed that no bank would have granted an equivalent loan under market conditions at this interest rate but would have charged a premium on the interest rate in order to take into account of the increased risk. The interest rate at which the loans were granted to the investors is therefore well below the interest rate which the investors would have had to pay for loans under market conditions. Consequently, the Commission considers that the two loans cannot be regarded as external financing and cannot be taken into account in calculating the private investor contribution.

(86) In addition, Germany considers that the loan of DEM 900 000 granted under the Equity Fund for Eastern Germany, an approved aid scheme, is not to be regarded as a private investor contribution. The loan is provided by a private bank but refinanced by the Reconstruction Loan Corporation, a public bank. It was granted in December 1997 for a period of 10 years at an interest rate of 6,65 %. It is to be paid back in one instalment in 2007. The contract stipulates that the private bank is liable for 50 % of the loan, i.e. DEM 450 000. The recipient of the loan provided the following securities: a personal guarantee, transfer of his rights as a shareholder of the company and a deposit of DEM 450 000 at the private bank.

(87) The part of the loan for which the private bank is liable is secured by a deposit of DEM 450 000. Moreover, the reference interest rate at the time the loan was granted was 5,54 %, so that the loan was granted at an interest rate above the reference interest rate. Although the company is in difficulty, no premium has been charged since the private bank bears no additional risk on

account of the securities provided. This part of the loan amounting to DEM 450 000 can therefore be regarded as being financed under market conditions and can be taken into account in calculating the private investor contribution.

(88) A credit line of DEM 4 000 000 was made available to the company by a private bank. Of this credit line, 80 % is covered by the State's deficiency guarantee. The bank bears the risk of the remaining 20 %. The company offers a second mortgage on the company's land amounting to DEM 4 000 000 as collateral for the credit line. The 20 % of the credit line not covered by a guarantee, i.e. DEM 800 000, can therefore be regarded as financing under market conditions and can be taken into consideration in calculating the private investor contribution.

(89) In total, the private investor contribution amounts to DEM 1 466 000. This represents 18,7 % of the total restructuring costs of DEM 7 827 000. In view of the company's status as an SME and the problems SMEs have in finding financing, the investor contribution to the restructuring can be regarded as significant within the meaning of the 1994 guidelines.

Full implementation of the restructuring plan

(90) The Commission notes that the restructuring plan has to be fully implemented. It requests Germany to submit annual reports for the period covered by the restructuring.

6. CONCLUSION

(91) The Commission finds that the Federal Republic of Germany has unlawfully implemented aid measures amounting to DEM 1 966 000 in breach of Article 88(3) of the EC Treaty. However, these measures, although unlawfully implemented, meet the criteria laid down in the 1994 guidelines and are therefore compatible with the common market pursuant to Article 87(3)(c),

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Saalfelder Hebezeugbau, amounting to DEM 1 966 000, is compatible with the common market within the meaning of Article 87(1) of the EC Treaty.

Article 2

Done at Brussels, 18 July 2001.

Germany is hereby requested to submit by the end of 2001
annual reports covering the years 1998 to 2000.

*Article 3**For the Commission*

Mario MONTI

This Decision is addressed to the Federal Republic of Germany.

Member of the Commission

COMMISSION DECISION

of 20 December 2001

on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Vizcaya (Spain)

(notified under document number C(2001) 4478)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/86/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:

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 Vizcaya Provincial Council) under the abovementioned procedure.

(4) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit their comments on the 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 Rioja branch of the General Union of Workers ('UGT') on 2 March 2001 and from the General Assembly of Vizcaya on 5 March 2001. By letter dated 2 July 2001 (D/52703), 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 Vizcaya Provincial Council) on the observations of interested third parties under the abovementioned procedure.

1. PROCEDURE

(1) As a result of a complaint submitted by certain organisations in the neighbouring autonomous community of Rioja against the urgent, transitional tax measures adopted in 1993 by the three Basque provincial councils, the Commission learned of the existence of State aid in Vizcaya in the form of an exemption from corporation tax for newly established firms. The Commission also received another complaint, from a competitor, about the 10-year exemption from corporation tax (the same tax measure as in Vizcaya) enjoyed by *Depósitos Tubos Reunidos Lentz TR Lentz, SA* ('Detursa'), located in Lantarón (Álava).

(2) By letter dated 28 November 2000 (SG(2000) D/108806), 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.

(3) By letter from the Permanent Representation dated 14 December 2000, registered on 19 December 2000, the

2. DETAILED DESCRIPTION OF THE AID

(6) The Commission notes that this tax aid scheme was introduced by Article 14 of Provincial Law No 5 of

⁽¹⁾ OJ C 37, 3.2.2001, p. 38.

⁽²⁾ See footnote 1.

24 June 1993 on urgent tax measures to assist investment and stimulate economic activity ⁽³⁾. The text of the Article reads as follows ⁽⁴⁾:

'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 temporary exemption 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 stimulate the economy through enterprise and investment incentives for firms.

(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 was concerned, the tax nature of the measures in question was irrelevant, since Article 87 of the Treaty applied to aid measures 'in any

⁽³⁾ Boletín Oficial de Vizcaya No 154, 7.7.1993.

⁽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).

form'. It 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.

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

(13) It noted that, firstly, the exemption from corporation tax conferred on recipients an advantage, which relieved them of charges that are normally borne from their budgets.

(19) The Commission affirmed that State aid that was not governed by the *de minimis* rule was 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 exemption involved a loss of tax revenue and was 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 did not have the character of investment or job-creation aid.

(15) Thirdly, the exemption affected competition and trade between Member States. Since the recipients conducted businesses, which might generate trade between Member States, the aid strengthened their position vis-à-vis competitors in that trade. It is clear therefore that the aid affects trade. Furthermore, the increase in recipient firms' net profit (profit after tax) improves their profitability. In this way they were more able to compete with firms which were not eligible for the aid.

(21) On the contrary, the Commission considered that the tax aid had the character of operating aid, since its purpose was 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 was specific or selective, in that it favoured certain firms. The eligibility requirements expressly ruled out any firm that had been set up before the date of entry into force of the said Provincial Law (mid-1993), that had created fewer than 10 jobs, whose investment was less than ESP 80 million (EUR 480 810) and whose paid-up capital did not exceed ESP 20 million (EUR 120 202). In addition, the Commission considered that the tax aid was not justified by the nature or general scheme of the tax system.

(22) The Commission pointed out that regional operating aid was in principle prohibited. It might nevertheless be granted in exceptional circumstances in regions that met certain conditions. But this was 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, at that stage, the Commission considered that the exemption from corporation tax was State aid within the meaning of Article 87(1) of the Treaty, since it met 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 was not restricted to a particular sector, might be granted to firms that are subject to Community sectoral rules. The Commission therefore questioned whether the aid was compatible where the recipient belonged to a sector that was subject to special Community rules.

(18) Since the maximum amount of tax aid in question was 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 could not be regarded as aid having a social character under Article 87(2)(a), was not intended to make good the damage caused by natural disasters or exceptional occurrences under Article 87(2)(b) and was 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 was 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 did not fall within the scope of Article 87(3)(c), which concerned 'aid to facilitate the development of certain economic activities...', since it was not specific in any way to the activities of the recipient firms. Lastly, it was not intended to promote culture or heritage conservation within the meaning of Article 87(3)(d).
- (25) Under the Article 88(2) procedure, the Commission asked the Spanish authorities to submit their comments and to supply all the information necessary for assessing the exemption of certain newly established firms in Vizcaya 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 Vizcaya 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. It is clear from the letter, they argue, 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)). By letter from the Permanent Representation dated 30 September 1994 the Spanish authorities informed the Commission that, in their opinion, the tax measure did not constitute State aid prohibited by Article 92 of the Treaty, since it was a measure of a general nature. By letter to the Permanent Representation dated 19 January 1996, the Commission asked for information about the possible recipients of the measure. Later, by letter dated 6 February 1996, the Tax Coordination Authority ⁽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 No 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 Vizcaya 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-84/82, *Germany v Commission*, [1984] ECR 457, 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 European Parliament and the Council, (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 No 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.

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.

(29) Thirdly, the Spanish authorities contend that Provincial Law No 18/1993 was never amended. It therefore satisfies the non-amendment condition imposed by 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⁾ that must be satisfied before 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 No 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 the Law and did not regard it then 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

(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 No 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

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

⁽¹³⁾ 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).

⁽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'.

addition, Provincial Law No 18/1993 does not strengthen, nor could it, the position of any firm. As the firms, which have 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 No 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 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 ⁽¹⁸⁾ because it does not satisfy the requirements in the guidelines on national regional aid. 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

⁽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 Vizcaya y Diputación Foral de Vizcaya*.

nature or general scheme of the tax system in Vizcaya, since its purpose is to improve the competitiveness of recipient firms. The Rioja Regional Government also 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 ⁽²¹⁾ has also taken this line.

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.

- (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 of the Basque Business Confederation (*Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza* ('Confebask'))

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

- (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 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.

- (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 Vizcaya 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

⁽²⁰⁾ See its judgment of 7 February 1998.

⁽²¹⁾ See the judgments 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'.

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 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 (10 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 Vizcaya'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 the letter of 22 May 1994, reference 4555, 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

⁽²³⁾ OJ L 134, 3.6.1993, p. 25.

⁽²⁴⁾ See Case C-223/85, *RSV v Commission*, [1987] ECR 4617.

⁽²⁵⁾ See Case C-198/1991, *William Cook v Commission*, [1993] ECR I-2487.

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 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 of the Rioja branch of the General Union of Workers ('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 Vizcaya 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 neighbouring 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 of the General Assembly of Vizcaya

- (55) Basically, the General Assembly of Vizcaya takes the view that the decision to initiate the procedure is void, since it only refers to new aid, whereas the present case concerns existing aid. They also argue that the measure contains no elements of State aid. The tax measure is compatible with the common market, since it is not operating aid but investment aid, whose compatibility is justified by the nature and general scheme of the tax system. In support of these conclusions, the General Assembly repeats the arguments of the Vizcaya Provincial Government summarised in the section 'Comments of the Spanish authorities'.
- (56) As regards invoking the nature or general scheme of the tax system as a possible justification for the measure's compatibility, the General Assembly of Vizcaya questions the Commission's view that the objective of promoting the formation of new companies is unconnected with the tax system. Not only is promoting the formation of viable new companies an objective recognised by the Treaty, but it creates new taxpayers for the tax system. However, increasing the number of taxpayers is a primary, intrinsic objective of the tax system. For instance, the purpose and effect of reducing indirect taxes such as VAT is to expose the black economy in order to incorporate it within the tax system. As for direct taxation, the purpose of cutting

⁽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 No 28/1988 (Álava), No 8/1988 (Vizcaya) and No 6/1988 (Guipúzcoa); Commission Decision 1999/718/EC (Daewoo) (see footnote 5) and Commission Decision 2000/795/EC (Ramondín SA and Ramondín Cápsulas SA), (OJ L 318, 16.12.2000, p. 36).

high marginal rates of, for example, income tax is to reduce their disincentive effect, promote economic activity and hence increase tax revenue. In this particular case, the General Assembly of Vizcaya also states that because the tax exemption is aimed at the formation of new companies, it promotes the creation of new taxpayers. Thus, since the measure will make it possible to form new companies, tax revenue will increase, thereby fulfilling the basic objective of any tax system.

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

- (57) By letter from the Permanent Representation dated 17 September 2001, the Spanish authorities submitted their comments (prepared by the Vizcaya Provincial Council) on the observations of interested third parties, which were sent to them in accordance with Article 6(2) of Regulation (EEC) No 659/1999. Basically, the Vizcaya 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.
- (58) The Vizcaya 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 OF THE AID

6.1. State aid

- (59) 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 measure should satisfy all four of the criteria set out in Article 87 and explained below.
- (60) 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. 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.
- (61) 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 Vizcaya Provincial Council on the basis of a statutory provision.
- (62) 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

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

⁽²⁹⁾ See Case C-248/84, *Germany v Commission*, [1987] ECR 4013.

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)⁽³⁰⁾. 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 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.

improves their profitability. This enables them to compete with firms which are not eligible for the tax aid.

- (63) 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 was 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 the Community. It is clear therefore that the aid affects trade. Furthermore, the increase in recipient firms' net profit (profit after tax)

- (64) 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 parties do, for providing only a general assessment while at the same time refusing to supply the information requested.

- (65) 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

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

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

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

⁽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).

⁽³⁴⁾ See Case C-75/97, *Belgium v Commission* ('Maribel'), [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, 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'.

⁽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.

substitute for an assessment based on the State aid rules. The criteria established in part B ⁽³⁶⁾ 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 transparency. On the other hand, as explained above, it does distort competition and affect trade.

according to the fourth report on enterprises in Europe ⁽³⁷⁾, the number of firms in the European Community in 1992 which had fewer than ten employees, or no employees at all, was 14 629 000, or 92,72 % of the total ⁽³⁸⁾. In Spain's case, the percentage in 1991 was even higher, at about 95,11 % ⁽³⁹⁾. Furthermore, according to the fifth report on enterprises in Europe ⁽⁴⁰⁾, the number of firms in the European Community in 1995 which had fewer than ten employees, or no employees at all, was 16 767 000, or 92,89 % ⁽⁴¹⁾ of the total. In Spain's case, the percentage was higher still, at about 95 % ⁽⁴²⁾. 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 % ⁽⁴³⁾. The main conclusion, therefore, is that one of the conditions of eligibility alone rules out the majority of firms.

(66) 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.

(68) 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 exemption 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.

(67) 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,

(69) For the rest, the objective character of the thresholds cited does not, as some 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 ⁽⁴⁴⁾, 'the fact that the aid is not aimed at one or more specific recipients defined in

⁽³⁶⁾ Part B of the said Code of Conduct 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'.

⁽³⁷⁾ *Enterprises in Europe*, Fourth report, Eurostat.

⁽³⁸⁾ Data taken from the table on page 27 of the report.

⁽³⁹⁾ Data taken from the table on page 152 of the report.

⁽⁴⁰⁾ *Enterprises in Europe*, Fifth report, Eurostat.

⁽⁴¹⁾ Data taken from the table on page 31 of the report.

⁽⁴²⁾ Data taken from the table on page 224 of the report.

⁽⁴³⁾ Data taken from the table on page 73 of the report.

⁽⁴⁴⁾ See Case T-55/99, *Confederación Española de Transporte de Mercancías (CETM) v Commission*, [2000] ECR II-3207, paragraph 40.

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'.

examined from a State aid perspective, since, as the case-law states ⁽⁴⁶⁾: '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'.

(70) 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 ⁽⁴⁵⁾. In this particular case, the General Assembly of Vizcaya states that, basically, because it promotes the formation of new companies the tax exemption will mean an increase in the number of taxpayers and hence in tax revenue. However, to support this thesis, it has contented itself with a set of abstract, general statements without providing a detailed study of how, in this specific case, the loss of revenue resulting from the 10-year exemption would be balanced by the possible subsequent increase in revenue. In the absence of a detailed analysis it is risky to assume that the balance will always be positive. Moreover, the General Assembly of Vizcaya does not explain why, if the objective was to increase the number of taxpayers, the aid is only granted to a minimum number of new firms, perhaps less than 5 %. Apart from this, the measure's temporary nature shows that its objectives, rather than being intrinsic to the tax system, which would give them a certain permanence, are short-term and unconnected with it. In the circumstances, the Commission must reject the comments of the General Assembly of Vizcaya, since the latter has not managed to show that the tax exemption has the objective, inherent in the tax system, of increasing tax revenue. The Commission notes however that, according to the provincial law introducing the tax holiday, the declared objective was to stimulate Vizcaya'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

(71) 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 ⁽⁴⁷⁾ 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. 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

⁽⁴⁶⁾ See paragraph 53 of the judgment cited in footnote 44.

⁽⁴⁷⁾ 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 paragraph 27 of the opinion of Advocate-General Ruiz-Jarabo in Case C-6/97.

another out but accumulate and the damaging consequences to the common market are increased' ⁽⁴⁸⁾.

(72) 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 are 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 10, 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.

(73) 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.

(74) 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. New aid

(75) 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) ⁽⁴⁹⁾, 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.

(76) The Commission also considers that the tax exemption does not satisfy the conditions in Article 1(b)(v) ⁽⁵⁰⁾. 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 ⁽⁵¹⁾, 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/EC concluding the procedure, the Commission considered that the 1996 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

⁽⁴⁹⁾ Subparagraphs (i) to (iv) of Article 1(b) of Regulation No 659/1999 read as follows:

'(b) 'existing aid' shall mean:

- (i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden, 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 which have been 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;.

⁽⁵⁰⁾ 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'.

⁽⁵¹⁾ Decision to initiate the formal investigation procedure in Article 93(2) in respect of certain aid granted to Demesa, Vizcaya (OJ C 103, 4.4.1998, p. 3).

⁽⁴⁸⁾ See Case C-78/76, *Steinike & Weinlig v Federal Republic of Germany*, [1977] ECR 595, 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.

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/EC, were adopted not 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 Vizcaya 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.

existing aid. The Commission considers, however, that it may be regarded as new aid within the meaning of Article 1(c) of the same Regulation ⁽⁵²⁾, ⁽⁵³⁾.

6.3. Illegality

(77) Furthermore, regarding the Spanish authorities' claim that if the Commission considered 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 proceeding in respect of other similar State aid measures in the form of a reduction of taxable income for certain new firms in Vizcaya (C-52/99) on 29 September 1999. In its final decision of 12 July 2001 it concluded that the said aid was incompatible.

(78) 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

(79) Since the scheme does not contain a commitment from the Spanish authorities to grant the aid in accordance with the conditions for *de minimis* aid ⁽⁵⁴⁾, 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 proceedings, 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.

(80) 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 illegal.

(81) 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

⁽⁵²⁾ 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'.

⁽⁵³⁾ Letter to the Spanish Permanent Representation, reference D/10687, dated 19 January 1996.

⁽⁵⁴⁾ 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, dated 12 January 2001, on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (see footnote 6).

notified, a decision could never be taken by the Commission as to its compatibility with the common market⁽⁵⁵⁾. As to the alleged approval by the Commission of the 'Basque tax system', which according 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⁽⁵⁶⁾ introduced by Álava, Guipúzcoa y Vizcaya respectively in 1988 and, second, that in that Decision those measures were regarded as State aid. Article 1(4) of the Decision⁽⁵⁷⁾ 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⁽⁵⁸⁾.

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 parties do, for providing only a general assessment while at the same time refusing to supply the information requested.

6.4. Compatibility with the common market

- (82) First of all, 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

- (83) As the scheme in question covers only the NUTS⁽⁵⁹⁾ level 3 territory of Vizcaya, 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 Vizcaya has never been eligible for the Article 87(3)(a) derogation, since the per capita GDP⁽⁶⁰⁾ of the NUTS level 2 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⁽⁶¹⁾⁽⁶²⁾ 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. The Commission notes however that, according to the

⁽⁵⁵⁾ Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen and others v Commission*, [1999] ECR II-3663, paragraph 300.

⁽⁵⁶⁾ 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.

⁽⁵⁷⁾ 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'.

⁽⁵⁸⁾ See footnote 23.

⁽⁵⁹⁾ Nomenclature of territorial units for statistics.

⁽⁶⁰⁾ Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).

⁽⁶¹⁾ 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.

⁽⁶²⁾ See point 3.5 of the guidelines on national regional aid (footnote 17).

regional aid map ⁽⁶³⁾, Vizcaya was a region in which State aid could be considered partly compatible ⁽⁶⁴⁾ up to 26 September 1995 ⁽⁶⁵⁾, and thereafter fully compatible, with the common market under the regional derogation in Article 87(3)(c) of the Treaty ⁽⁶⁶⁾.

(84) State aid in the form of an exemption from corporation tax promotes the formation in Vizcaya 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.

(85) On the contrary, since it partly reduces the tax paid by the recipient firms on their profits, 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.

(86) 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 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 ⁽⁶⁷⁾ nor a region of low population density ⁽⁶⁸⁾. 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.

(87) 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.

(88) 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.

(89) 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,

⁽⁶³⁾ 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.

⁽⁶⁴⁾ The only parts of Vizcaya 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 'Duranguesado' and 'Encartaciones' areas. The other parts of Vizcaya did not meet the necessary criteria.

⁽⁶⁵⁾ Date of entry into force of the amendment to the earlier map adopted in 1988.

⁽⁶⁶⁾ OJ C 25, 31.1.1996, p. 3.

⁽⁶⁷⁾ It is not in the list of outermost regions in Article 299 of the Treaty.

⁽⁶⁸⁾ See point 3.10.4 of the guidelines on national regional aid (footnote 17).

fisheries, coalmining, steelmaking, shipbuilding, synthetic fibres and the motor industry⁽⁶⁹⁾. 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 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.

- (90) 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.
- (91) 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 illegal 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

- (92) 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.

- (93) It should be noted first of all 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.
- (94) 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⁽⁷⁰⁾, 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.
- (95) To be sure, the case-law⁽⁷¹⁾ 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

⁽⁶⁹⁾ For the sectoral rules currently in force see, in addition to the *Official Journal of the European Union*, the website of the Directorate-General for Competition: http://europa.eu.int/comm/competition/state_aid/legislation/

⁽⁷⁰⁾ See Case C-5/89, *Commission v Germany*, [1990] ECR I-3437, paragraph 14; Case C-169/95, *Commission v Spain*, [1997] ECR I-135, paragraph 51; Case C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, [1997] ECR I-1591, paragraph 25.

⁽⁷¹⁾ See paragraph 16 of the judgment, dated 20 September 1990, cited in footnote 70, and Case C-183/91, *Commission v Greece*, [1993] ECR I-3131, paragraph 18.

to adopt decisions on unlawful aid, as in the present case, within two months ⁽⁷²⁾ (by virtue of Article 4(5)) or within 18 months ⁽⁷³⁾ (by virtue of Article 7(6)). It should also be pointed out that in its letter of 25 May 1994 to the Spanish Permanent Representation, a copy of 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 *Official Journal of the European Communities* 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 authorities since 1994, the Commission has never described the tax exemption, either directly or indirectly, as compatible with the common market.

(96) 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.

(97) As to the precedent of RSV ⁽⁷⁴⁾, cited by third parties in support of the legitimate expectation fostered by 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.

(98) 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 ⁽⁷⁵⁾ and, in 1997, about aid to Ramondín ⁽⁷⁶⁾, in respect of the tax holidays ⁽⁷⁷⁾ introduced in Álava in 1996 and enjoyed, in addition to other aid, by those firms. Since, in both cases, the 1996 tax holidays were regarded as illegal 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.

(99) 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 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

⁽⁷²⁾ Decision to raise no objection or to initiate the formal investigation procedure.

⁽⁷³⁾ Decision to terminate the formal investigation procedure.

⁽⁷⁴⁾ See footnote 24.

⁽⁷⁵⁾ State aid case on aid to Demesa (see footnote 51); final Decision 1999/718/EC (see footnote 5).

⁽⁷⁶⁾ State aid case 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).

⁽⁷⁷⁾ 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).

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' ⁽⁷⁸⁾.

(100) 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 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 ⁽⁷⁹⁾.

(101) 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

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

- (a) Spain has unlawfully put into effect, in Vizcaya, 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 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 illegally,

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 Vizcaya, 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 implementation 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.

⁽⁷⁸⁾ See paragraph 300 of the judgment cited in footnote 55.

⁽⁷⁹⁾ Commission letter to Member States (SG(91) D/4577) of 4 March 1991. See also Case C-142/87, *Belgium v Commission*, [1990] ECR I-959.

Article 4

Done at Brussels, 20 December 2001.

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.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 13 November 2002

concerning the aid granted to fishermen following the suspension of fishing in the Tyrrhenian Sea and the Ionian Sea in 2000

(notified under document number C(2002) 4362)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2003/87/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 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, and in particular Article 14 thereof ⁽¹⁾,

Having called on interested parties to submit their comments pursuant to the first subparagraph of Article 88(2) and having regard to their comments,

Whereas:

I

PROCEDURE

(1) By letter dated 26 September 2000, registered as received on 28 September 2000, the Italian Permanent Representation to the European Union forwarded to the Commission a draft Decree-Law introducing a number of emergency measures in the transport and fisheries sectors, including in Article 5 an accompanying social measure in favour of fishermen in the maritime regions from Imperia to Reggio Calabria and from Crotona to Gallipoli, excluding those covered by the maritime districts of Castro, Tricase, Santa Maria di Leuca and Otranto, as a result of the 'technical suspension' of fishing in the Tyrrhenian Sea and the Ionian Sea in summer 2000. This was registered as notified aid under the number N 159D/2000.

(2) Subsequently, by letter dated 2 October 2000, the Italian authorities forwarded the text of the Decree-Law (No 265 of 26 September 2000), published in the Italian Official Gazette of 27 September 2000. The

Italian authorities were asked on four occasions, in letters dated 23 November 2000 and 20 February, 30 May and 5 July 2001, to provide supplementary information, to which they did by letters dated 5 February, 2 May, 31 May and 24 July 2001. The information presented included, in the letter of 5 February 2001, Law No 343 of 23 November 2000 (converting Decree-Law No 265 into law), Decrees of the Minister for Agriculture and Forestry of 30 June, 19 July and 3 August 2000 and containing various implementing provisions for the technical suspensions.

(3) The Decree of 3 August 2000, containing the practical arrangements for the compensation, took immediate effect. Furthermore, since there was no provision requiring prior approval by the Commission for the Law and the implementing provisions to enter into force, the measures could be implemented directly. For that reason, the matter was transferred on 9 February 2001 to the register of non-notified aids, under the number NN 15/2001.

(4) By letter C(2001) 3463 final of 13 November 2001 the Commission informed the Italian Government of the decision to initiate the formal investigation procedure provided for in Article 88(3) of the EC Treaty in respect of the measure concerned. The Italian authorities presented their comments by letter of 20 December 2001.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* on 29 January 2002 ⁽²⁾. The Commission called on interested parties to submit their comments on the measures concerned and received a joint letter from Federcoopesca, Lega Pesca and AGCI Pesca on 27 February 2002. This letter was forwarded to the Italian authorities in accordance with Article 6(2) of Regulation (EC) No 659/1999.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ C 25, 29.1.2002, p. 9.

II

type adopted for subsequent years will be examined in the light of the Guidelines currently in force.

DESCRIPTION OF THE MEASURE

- (6) In accordance with Article 5 of Law No 343 of 23 November 2000 an accompanying social measure was introduced in favour of vessels affected by the suspension of fishing to cover the minimum legal wage for crew members and the social costs payable by shipowners in respect of crews. As specified in the above Law, the aim of the suspension was to encourage an increase in fish stock biomass.
- (7) The measure concerns vessels practising pelagic trawling (*la pesca pelagica a strascico* and/or *volante*). Fishing was suspended from 2 September to 1 October 2000 in the Tyrrhenian Sea (vessels belonging to maritime districts from Imperia to Reggio Calabria) and from 3 July to 1 August 2000 in the Ionian Sea (vessels belonging to maritime districts from Crotone to Gallipoli, not including those belonging to the maritime areas of Castro, Tricase, Santa Maria di Leuca and Otranto).
- (8) Suspension is mandatory in the maritime districts where the head of the district has taken a decision to that effect, after consulting the Advisory Committee for Sea Fisheries. In districts where suspension is not mandatory, shipowners who so wish may apply the suspension measure and qualify for the accompanying social measure.
- (9) The budget allocation for this measure was EUR 1,5 million.
- (10) The aid measure was examined in the light of the Guidelines for the examination of State aid to fisheries and aquaculture (hereafter called the Guidelines) adopted in 1997 ⁽³⁾ in force on the date on which the aid measure was introduced. This arises from point 3.4 of the currently applicable Guidelines ⁽⁴⁾ under which 'unlawful aid' within the meaning of Article 1(f) of Regulation (EC) No 659/1999, i.e. new aid implemented in breach of Article 8(3) of the EC Treaty, is appraised in accordance with the Guidelines prevailing at the time when the aid is granted. However, measures of the same
- (11) The Commission considered that the measure had the effect of reducing the production costs which the undertakings concerned would normally have to bear and had the character of an operating aid. According to the general principles set out in point 1.2 of the Guidelines, this type of aid, in the fisheries and aquaculture sector, is incompatible with the common market save in properly justified circumstances.
- (12) In accordance with the first paragraph of point 2.2.2 of the Guidelines, aid for the temporary laying-up of fishing vessels (cessation of fishing) may be deemed compatible with the common market if it is intended to offset part of the loss of income associated with a temporary cessation measure introduced as a result of unforeseen and non-recurring circumstances attributable to biological causes.
- (13) The suspensions in question do not appear to have been introduced as a result of unforeseen circumstances. The information provided by the Italian authorities did not show that there had been an occurrence such as, for example, a natural disaster or other exceptional event justifying the suspension of fishing. Furthermore, the information did not reveal a sudden and unforeseen collapse in fish stocks requiring the adoption of specific stock recovery measures such as the temporary suspension of fishing. In addition, Italy had implemented compensation measures in previous years under similar temporary suspension measures. The Commission did not raise any objections in 1999 to measures examined under the number N 419/99 covered by letter SG(99) D/7551 of 17 September 1999 to the Italian Government; in 1998 to measures under the number NN 101/98 covered by letter SG(99) D/1581 of 23 June 1999; and in 1997 to measures under the number NN 99/97 covered by letter SG(97) D/6770 of 6 August 1997. It can be deduced therefore that the compensation measure adopted for 2000 was not non-recurring. The measure could not therefore be deemed compatible with the common market in accordance with the first paragraph of point 2.2.2 of the Guidelines.
- (14) Furthermore, in accordance with the second paragraph of point 2.2.2 of the Guidelines, the Commission can regard an aid scheme for the temporary cessation of fishing to be compatible with the common market after conducting a specific examination of the measure (on a case-by-case basis). The Commission would therefore have been able to consider the conditions of

⁽³⁾ OJ C 100, 27.3.1997, p. 12.

⁽⁴⁾ OJ C 19, 20.1.2001, p. 7.

compatibility to have been met if the temporary suspension had taken place in circumstances similar to those described in Article 16(1) of Council Regulation (EC) No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector ⁽⁵⁾, i.e. in the event of unforeseen circumstances, particularly those attributable to biological factors (subparagraph (a)) or where a plan is introduced for the recovery of a resource threatened with exhaustion (subparagraph (c)) or, as regards measures to assist fishermen, in Article 12(6) of that Regulation, under which accompanying social measures can be introduced in the framework of plans for the protection of fish stocks. The temporary suspension measure under consideration does not appear to correspond to any of these cases, given that the ground of an unforeseen event has now been excluded and, secondly, that the Italian authorities have not provided any information from which it can be deduced that the temporary suspension formed part of a stock recovery or protection plan giving details, for example, of the species concerned, the expected impact on the biomass and the expected benefits for fishing. The Italian authorities simply provided four bibliographical references without giving details of the arguments contained in them, which could have provided a justification for the suspension in question when this had been expressly requested by the Commission (letter of 5 July 2001).

III

COMMENTS FROM ITALY

(15) The Commission observed also that the documents sent by the Italian authorities included a note from the Institute for economic research on fisheries and aquaculture in Salerno (Istituto ricerche economiche per la pesca e l'acquacoltura di Salerno (IREPA) in which it states that the aim of the mandatory suspension of fishing [...] was to reduce the effort of a fleet which is oversized in relation to the available fish stocks. According to the third paragraph of point 2.2.2. of the Guidelines, aid to restrict fishing activities which is introduced for the purpose of helping to achieve the target reductions in fishing effort under the multiannual guidance programmes for Community fishing fleets is incompatible with the common market. In addition, Article 16(4) of Regulation (EC) No 2792/1999 provides that the Member States may not grant compensation to fishermen or shipowners for the temporary cessation of fishing if the grounds are a seasonal suspension of activity as part of the ongoing management of fisheries.

(16) In the light of these factors the Commission considered that at the preliminary assessment stage provided for in Article 6 of Regulation (EC) No 659/1999 there were serious doubts about the compatibility of the aid with the Guidelines for the examination of State aid to fisheries and aquaculture, and consequently with the EC Treaty.

(17) The Italian authorities set out in their comments the various stages of the case and refer to Regulation (EC) No 2792/1999 on the temporary cessation of fishing which considers temporary cessation in: Article 7 on the adjustment of fishing effort; Article 12(6), under which Member States may introduce social accompanying measures to facilitate temporary cessation of fishing activities in the framework of plans for the protection of aquatic resources; and in Article 16(1), which provides that Member States may grant compensation to fishermen and owners of vessels for the temporary cessation of fishing. The Italian authorities maintain, on the basis of these Articles, that in the case under consideration, where provision is made for compensation for fishermen and not for shipowners, reference should be made to Article 12(6).

(18) Temporary suspension in this case was not mandatory. It became mandatory in a certain maritime district only following the implementation of a mechanism for participation involving the local advisory committee. The measure was adopted in 15 districts: 594 vessels out of a total of 1 485 took part, with an average crew of two to three seamen. Total expenditure amounted to ITL 2 937 781 500 (EUR 1,5 million).

(19) According to the Italian authorities, Regulation (EC) No 2792/1999 makes no provision, for the purpose of applying Article 12(6), for a prior technical examination by the Commission or the Scientific, Technical and Economic Committee for Fisheries ⁽⁶⁾. Furthermore, under the Guidelines then applicable (those adopted in 1997) this examination must be carried out only for the purpose of implementing Articles 7 and 16. Point 2.2.8 of the Guidelines provide also that aid may be granted by the Member States to encourage or facilitate the implementation of technical measures to conserve resources subject to a case-by-case examination. Point 2.10.3 of the Guidelines provides in addition that the Member States may grant direct aid to workers in the sector.

(20) The Italian authorities state that the measure did not confer any benefits on the undertakings. Its sole aim

⁽⁵⁾ OJ L 337, 30.12.1999, p. 10.

⁽⁶⁾ This Committee, to be consulted for the purpose of implementing the compensation provided for in Article 16(1) as part of a stock recovery plan, was set up by Article 16 of Council Regulation (EEC) No 3760/92 establishing a Community system for fisheries and aquaculture (OJ L 389, 31.12.1992, p. 1).

was to assure seamen of the minimum legal wage and to cover the relevant social costs and in this way avoid dismissals. Proof that no benefits were conferred on the undertakings is deemed to have been provided by the fact that the majority of potential recipients failed to participate in the measure, which instead of reducing production costs increased them since during the suspension period the undertakings had to bear the fixed costs without receiving any income.

resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

- (21) The Italian authorities consider that in this instance the measure could have been assessed in the light of points 2.2.8 and 2.10.3 of the Guidelines, as was done in preceding years for measures of this type. They agree that it is not possible for Article 16 to be applied but consider the measure compatible with Article 12.

- (27) The purpose of this measure is to ensure the minimum legal wage for seamen and to meet the social costs payable by shipowners in respect of their crews. As wages are a burden on undertakings, the effect of meeting them together with the relevant social contributions for a given period is to reduce the costs that have to be met by the fisheries undertakings in question.

IV

COMMENTS FROM INTERESTED PARTIES

- (22) Federcoopescas, Lega Pesca and AGCI Pesca are three organisations representing Italian fishermen. In their letter they claim that they fail to understand the bases on which the Commission's comments are founded since it is clearly explained in the Law introducing the measure that it is based on the need to promote fishing without conferring advantages on the undertakings and without prejudicing crews.
- (23) In the absence of this aid measure crews would have received no income. Shipowners would have been lawfully entitled to dismiss fishermen without notice, as provided for under Italian law, if the payment of costs had not been assured by the State. In addition, shipowners are not obliged to re-employ those dismissed when fishing is resumed.
- (24) The organisations say that this measure is therefore a purely social one and fully in line with Article 12(6) of Regulation (EC) No 2792/1999. They add that this Article does not state that an aid measure adopted under it may not be a recurring one. The kind of temporary suspension implemented is the same as in previous years.
- (25) These comments were forwarded to the Italian authorities, which stated that they were in agreement with them.

- (28) Meeting the wages and social costs could be considered at first sight not to constitute an aid to the undertakings since the object is to cover the wages and social payments for crews during the temporary suspension period, with the undertakings concerned deriving no clear benefit. In actual fact, the measure, whose aim is to maintain in force the employment contract between shipowners and crew members, benefited the former, who were a party to the contract, relieving them of their contractual obligations during the temporary suspension period. The fact that the majority of shipowners did not suspend fishing in order to benefit from the arrangements does not in any way show that the measure did not confer benefits on those undertakings. Indeed the contrary is true, since a considerable number of them (594 out of 1 485) benefited and the decision was taken by the shipowners themselves to suspend fishing temporarily, either through local advisory committees in circumstances where suspension had become mandatory for all fishermen in a specific maritime district, or optionally in districts where it was not mandatory. Undertakings which took part in the temporary suspension most certainly benefited. The measure therefore constitutes an aid to the fishery undertakings concerned.

V

ASSESSMENT OF THE MEASURE

A. Existence of State aid

- (26) In accordance with Article 87(1) of the EC Treaty, any aid granted by a Member State or through State

- (29) Financing for the measure came from State resources. Furthermore, since the products of the beneficiary undertakings were sold on the Community market, the measures introduced by Italy strengthened their position both on the Italian market in relation to undertakings from other Member States intending to place their products (fishery products and other competing foodstuffs) on that market, and on the markets of other Member States in relation to undertakings operating on those markets (also for fishery products and other competing foodstuffs). The measure in question favours

those undertakings and distorts or threatens to distort competition and may affect trade between Member States.

- (30) For these reasons it constitutes State aid within the meaning of Article 87(1) of the EC Treaty which in principle is prohibited under that Article. It may be considered compatible with the common market only if it falls within the scope of one of the derogations provided for in the EC Treaty. As it is a measure favouring the fishery undertakings, it must be assessed in the light of the Guidelines for the examination of State aid to fisheries and aquaculture.

B. Compatibility of the measure with the second paragraph of point 2.2.2 of the Guidelines and with Article 12(6) of Regulation (EC) No 2792/1999

- (31) In its decision initiating the procedure, the Commission said it was unable to accept these provisions as a basis since the Italian authorities had failed to provide information showing that the temporary suspension was part of a plan to protect resources. The Italian authorities challenge this position and claim that the measure is compatible with the common market since it is an accompanying social measure of the kind provided for in Article 12(6) of Regulation (EC) No 2792/1999. According to the Italian authorities, the Commission cannot reject this argument on the grounds that the Scientific, Technical and Economic Committee for Fisheries was not consulted since consultation is not mandatory.
- (32) It is true that consulting the Scientific, Technical and Economic Committee for Fisheries is not mandatory. However, the Commission had not intended to seek the Committee's opinion. On the other hand, since Article 12(6) of the above Regulation provides that Member States may introduce social measures to accompany the implementation of plans to protect resources, the Commission considers that it must conduct a minimum check to determine whether an effective plan to protect resources exists and on the relevance of the plan to the goals sought. A plan of this kind would have referred, for example, to the species covered, the impact on biomass, the benefits for fishing, etc.
- (33) In the case under consideration the Commission finds that no such plan exists. The Italian authorities simply provided four bibliographical references without giving details of the arguments contained in them which could justify the technical suspension in question, although they were expressly called upon to do so by the Commission (in its letter of 5 July 2001). This matter was also referred to in the letter informing the Italian authorities of the initiation of the formal investigation procedure and in their reply those authorities failed to provide particulars which would indicate that there was indeed a plan to protect resources. The Commission considers therefore that the measure examined here cannot be justified under the second paragraph of point 2.2.2. of the Guidelines and of Article 12(6) of Regulation (EC) No 2792/1999.

C. Compatibility of the measure with point 2.2.8 of the Guidelines

- (34) In accordance with point 2.2.8 of the Guidelines, national aid may be considered compatible with the common market, subject to a case-by-case examination, if it is intended to encourage or facilitate the implementation of measures to improve the conservation and management of stocks, by limiting catches through technical measures which are more stringent than the minimum requirements contained in Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources ⁽⁷⁾ (Regulation replaced by Regulation (EC) No 894/97 ⁽⁸⁾ and later by Regulation (EC) No 850/98 ⁽⁹⁾). The Italian authorities consider that the measure implemented can be considered compatible under point 2.2.8.
- (35) These Regulations laid down a number of technical measures for the conservation and management of resources, i.e. establishing, in relation to fishing areas, requirements concerning fishing gear (types of gear, sizes, mesh types, prohibition periods) and the species taken (minimum sizes, prohibition periods).
- (36) Let us assume then, in the first analysis, although on a different scale, that a general measure prohibiting fishing in a given period and a given area can be considered to constitute a technical measure of this kind since it is intended to limit catches through measures which are more stringent than the minimum requirements under those rules. In that case the accompanying social measure implemented by the Italian authorities could be considered compatible on the basis of point 2.2.8 of the Guidelines.
- (37) However, point 2.2.8 provides that the Commission must examine the proposed measure on a case-by-case basis as the measure must not go beyond what is strictly necessary in order to attain the conservation goal pursued. The compatibility of the measure with the common market is not automatic therefore. The measure must be justified in its goals and as regards its impact on the fishing carried out by the fishermen concerned.

⁽⁷⁾ OJ L 288, 11.10.1986, p. 1.

⁽⁸⁾ OJ L 132, 23.5.1997, p. 1.

⁽⁹⁾ OJ L 125, 27.4.1998, p. 1.

(38) In the case under consideration, as Italy states in its comments, a similar aid scheme was approved by the Commission for 1998 and 1999 on the basis of point 2.2.8. However, apart from the general ground of increasing stock biomass, the Italian Government has not provided a specific justification in support of the measure. Consequently, while accepting that the measure imposing a general prohibition on fishing constitutes a technical measure within the meaning of Regulation (EEC) No 3094/86 or Regulation (EC) No 850/98, the Commission considers that information is not available to it that would allow it to consider it, for a further year, to be compatible with the common market.

D. Compatibility of the measure with point 2.10.3 of the Guidelines

- (39) In accordance with the first paragraph of point 2.10.3 of the Guidelines, direct aid to workers in the fisheries and aquaculture sector may be considered compatible with the common market if it is granted as part of socioeconomic back-up measures designed to resolve difficulties linked to the adjustment or reduction of capacity (e.g. aid for training, or in connection with retraining, etc.).
- (40) The measure in question was not adopted to resolve difficulties linked to the adjustment or reduction of capacity. Consequently the first paragraph of the above point does not apply.
- (41) The second paragraph, concerning aid for early retirement, is also excluded.
- (42) That leaves the third paragraph under which the Commission examines the other socioeconomic measures on a case-by-case basis.
- (43) On the basis of the comments of the Italian fishermen's organisations, which are shared by the Italian authorities, the Commission notes that the measure concerned determines whether the existing labour contracts will be maintained. The arrangements prevent the seamen from being dismissed: even though it is likely that the same seamen will be re-employed at the end of the temporary suspension period, there is no guarantee that this will be so. The aid can be compared with temporary unemployment benefit enabling the seamen to retain their jobs and entitlement to social cover. Since it is equivalent to the minimum legal wage, there is no danger of over-compensation in relation to

the wages that would have been paid if fishing had continued during the same period.

- (44) Regarding subsequent years, in order to be considered compatible with the common market the aid must be adopted as part of a plan to protect resources in accordance with point 2.2.2 of the Guidelines now in force. A plan of this kind has not been drawn up for 2000. As an exception, however, on the basis of the third paragraph of point 2.10.3 of the 1997 Guidelines, the Commission considers that the measure may be considered compatible with the common market.

VI

CONCLUSIONS

- (45) The State aid introduced by Italy in Article 5 of Order No 265 of 26 September 2000, converted into Law No 343 of 23 November 2000, is compatible with the common market.
- (46) The Commission finds that Italy has implemented the aid measure concerned in breach of Article 88(3) of the Treaty. However, this aid is compatible with the common market under the third paragraph of point 2.10.3 of the 1997 Guidelines,

HAS ADOPTED THIS DECISION:

Article 1

The aid measures implemented by Italy in favour of fishermen, introduced by Article 5 of Decree-Law No 265 of 26 September 2000, converted into Law No 343 of 23 November 2000, are compatible with the common market.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 13 November 2002.

For the Commission

Franz FISCHLER

Member of the Commission

COMMISSION DECISION**of 13 November 2002****concerning the aid granted to fishermen and shellfish producers as a result of the pollution caused by mucilage and the suspension of fishing for technical reasons in the Adriatic Sea in 2000***(notified under document number C(2002) 4365)***(Only the Italian text is authentic)****(Text with EEA relevance)****(2003/88/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 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty, and in particular Article 14 thereof ⁽¹⁾,

Having called on interested parties to submit their comments pursuant to the first subparagraph of Article 88(2) and having regard to their comments,

Whereas:

I

PROCEDURE

- (1) By letter dated 26 September 2000, received on 28 September 2000, the Italian Permanent Representation to the European Union forwarded to the Commission the text of a draft Order introducing a number of emergency measures in the transport and fisheries sectors to provide support for these sectors, including in Article 4, paragraphs 1 to 4 and 6 to 10, compensation measures for fishermen and shellfish producers in the Adriatic. The measures were recorded as notified aid under the number N 159C/2000.
- (2) Subsequently, by letter dated 2 October 2000, the Italian authorities forwarded the text of the Order (No 265 of 26 September 2000), published in the Italian Official Gazette of 27 September 2000. The Italian authorities were asked on four occasions to provide supplementary information in letters dated 23 November 2000, 20 February, 30 May and 5 July 2001,

to which they replied by letters dated 5 February, 2 May, 31 May and 24 July 2001. The information presented included, in the letter of 5 February 2001, Law No 343 of 23 November 2000 (converting Order No 265 into law), published in the Official Gazette of 25 November 2000, together with three Orders of the Minister for Agriculture and Forestry of 19 July, 3 August and 22 December 2000 respectively containing the implementing provisions.

- (3) The Orders of 3 August and 22 December 2000, which contain the practical arrangements for the compensation, took immediate effect. Furthermore, since there was no provision requiring prior approval by the Commission for the Law and the implementing provisions to enter into force, the measures could be implemented directly. For that reason, the matter was transferred on 9 February 2001 to the register of unnotified aids under the number NN 12/2001.
- (4) By letter C(2001) 3465 final of 13 November 2001 the Commission informed Italy that while it regarded the compensation for fishermen for the suspension of fishing activities between 19 June and 19 July 2000 to be compatible with the common market, a decision had been taken to initiate the formal investigation procedure provided for in Article 88(2) of the EC Treaty in respect of the compensation for fishermen for the suspension of fishing activities after 19 July 2000 together with that for shellfish producers. Italy presented its comments by letter of 20 December 2001, and in a further letter of 20 February 2002.
- (5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* on 29 January 2002 ⁽²⁾. The Commission called on interested parties to submit their comments on the measures concerned and received a joint letter from the three organisations Federcoopesca, Lega Pesca and AGCI Pesca on 27 February 2002. This letter was forwarded to the Italian authorities in accordance with Article 6(2) of Regulation (EC) No 659/1999.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1.

⁽²⁾ OJ C 25, 29.1.2002, p. 12.

II

DESCRIPTION OF THE MEASURES

- (6) The measures apply in the Adriatic Sea, in the maritime region from Trieste to Brindisi, including in the maritime districts of Castro, Tricase, Santa Maria di Leuca and Otranto located on the Adriatic side of the maritime region of Gallipoli.

2.1. Measures in favour of fishermen

- (7) Two types of measures covering two periods were considered: the period from 19 June to 19 July 2000 and a 44-day period starting on 20 July 2000.

2.1.1. Period from 19 June to 19 July 2000

- (8) Owners of fishing vessels, other than those capable of deep-sea fishing, which had to suspend fishing activities as a result of the presence of mucilage qualified for the measure. The compensation was equivalent to their loss of income during the period they were laid up based on their income during the same period the previous year, and ranged from a maximum of ITL 7,5 million (EUR 3 873) for vessels of under 10 grt to ITL 20 million (EUR 10 329) for those over 10 grt. The Commission considered this measure compatible with the common market.

2.1.2. Period after 19 July 2000

- (9) The basic provisions on compensation for this period, in respect of which the formal investigation procedure was initiated, are contained in Article 4(1) of Law No 343 of 23 November 2000. Their aim was to compensate various categories of fishermen following the temporary suspension of fishing starting on 20 July 2000 as a result of the presence of mucilage. According to the Italian authorities, the suspension was intended also to encourage the increase in fish stock biomass in the Adriatic Sea.
- (10) The Orders of the Minister for Agriculture and Forestry of 19 July and 3 August 2000 contained additional provisions. That of 19 July 2000 provided that the measure applied to vessels practising pelagic trawling (pesca allo strascico e/o volante), which were required to suspend fishing, and as appropriate on a voluntary basis to vessels using static gears and/or seiners (sistemi da posta e/o circuizione). This measure did not apply to vessels practising deep-sea fishing. Its cost, covering both shipowners and crews, was EUR 28,4 million.

- (11) Shipowners received compensation calculated on the basis of the tonnage of their vessel and of the social contributions payable by them.

- (12) The compensation, for each day's suspension, in relation to the tonnage of the vessel was as follows:

Class of vessel (in grt)	Compensation amount (in EUR)
0 < 25	$4,52 \times \text{grt} + 20$
25 < 50	$4,30 \times \text{grt} + 25$
50 < 70	$3,50 \times \text{grt} + 65$
70 < 100	$3,12 \times \text{grt} + 88$
100 < 200	$2,74 \times \text{grt} + 120$
200 and over	$2,36 \times \text{grt} + 177$

Class of vessel (in grt)	Compensation amount (in EUR)
0 < 10	$5,2 \times \text{grt} + 20$
10 < 25	$4,3 \times \text{grt} + 30$
25 < 50	$3,2 \times \text{grt} + 55$
50 < 100	$2,5 \times \text{grt} + 90$
100 < 250	$2,0 \times \text{grt} + 140$
250 and over	$1,5 \times \text{grt} + 265$

- (13) Payments were made for a maximum of 30 days.
- (14) However, social contributions could be covered for up to 44 days.
- (15) The crew of the laid-up vessels qualified for compensation equivalent to the minimum legal wage for a maximum of 44 days.

2.2. Measures in favour of shellfish producers

- (16) The basic provisions on compensation for shellfish producers are set out in Article 4(6) of Law No 343 of 23 November 2000 and were intended to compensate producers (rearing or harvesting shellfish) for income losses sustained as a result of the presence of mucilage in the Adriatic. The implementing provisions are contained in Article 1 of the Order of the Minister for Agriculture and Fisheries of 22 December 2000.

- (17) The compensation is equivalent to not more than 30 % of the loss sustained in relation to turnover for the preceding year. The budget allocation for the measure is ITL 1 500 million (EUR 774 685) and the total number of beneficiary undertakings is 34.
- (18) Shellfish producers who have already received compensation from other sources are ineligible for the measure. The Commission points out in this connection that it considered compatible with the common market compensation measures implemented in favour of shellfish producers in the Region of Friuli-Venezia Giulia following a similar occurrence of mucilage in 2000 (decision notified to the Italian Government by letter SG(2001) D/289 817 of 17 July 2001).

2.3. Grounds for initiating the procedure

2.3.1. Measures in favour of fishermen

- (19) In view of the reasons put forward by the Italian authorities for adopting the measures under consideration, they have been examined in the light of Article 87(2)(b) of the EC Treaty and of the Guidelines for the examination of State aid to fisheries and aquaculture (hereafter called the Guidelines) adopted in 1973 ⁽³⁾ in force on the date on which the aid measures were introduced.
- (20) As in the case of the period before 19 July 2000, the Italian authorities relied on the presence of mucilage to justify adoption of the measure. However, the information furnished did not show that the suspension of fishing during the subsequent period was due to the presence of mucilage. The Commission, therefore, considered that the compensation could not be permitted under Article 87(2)(b) of the EC Treaty, which states that aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the common market.
- (21) A further reason put forward by Italy to justify the suspension of fishing during the period concerned was to encourage an increase in fish stock biomass.
- (22) According to the first paragraph of point 2.2.2 of the Guidelines, aid for the temporary suspension of fishing may be deemed compatible with the common market if it is intended to offset part of the loss of income associated with a temporary cessation measure introduced as a result of unforeseen and non-recurring circumstances attributable to biological causes.
- (23) However, the temporary suspension extended by the Italian authorities to include the period after 19 July 2000 did not appear to constitute an occurrence of this kind. It did not take place as a result of an unexpected event comparable with a natural disaster and it was not motivated by the scientific reports provided or other scientific reports indicating that there had been an unforeseen and unforeseeable reduction in fish stocks requiring the adoption of specific stock recovery measures, including, for example, temporary suspension of fishing. The Commission notes that in previous years Italy granted compensation under similar temporary suspension measures. The Commission did not raise any objections: in 1999 to measures with the number N 419/99 covered by letter SG(99) D/7551 of 17 September 1999 to the Italian Government; in 1998 to measures with the number NN 101/98 covered by letter SG(99) D/1581 of 23 June 1999; and in 1997 to measures with the number NN 99/97 covered by letter SG(97) D/6770 of 6 August 1997. From what is known, these measures applied also to fishing in the Adriatic. The compensation measure adopted for 2000 does not appear to have been introduced as a result of non-recurring circumstances and consequently could not be deemed compatible in the light of the first paragraph of point 2.2.2 of the Guidelines.
- (24) Furthermore, under the second paragraph of point 2.2.2 of the Guidelines, the Commission can regard an aid scheme for the temporary cessation of fishing to be compatible with the common market after conducting a specific examination of the measure (on a 'case-by-case basis'). The Commission would therefore have been able to consider the conditions of compatibility to have been met if the temporary suspension had taken place in circumstances similar to those described in Article 16(1) of Council Regulation (EC) No 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector ⁽⁴⁾, i.e. in the event of unforeseen circumstances, particularly those attributable to biological factors (subparagraph (a)) or where a plan is introduced for the recovery of a resource threatened with exhaustion (subparagraph (c)) or, as regards in particular measures to assist fishermen, in Article 12(6) of that Regulation, under which accompanying social measures can be introduced in the framework of plans for the protection of fish stocks. The temporary suspension under consideration did not correspond to any of these cases.
- (25) In view of all these factors and the preliminary assessment provided for in Article 6 of Regulation (EC) No 659/1999, the Commission considered that there

⁽³⁾ OJ C 100, 27.3.1997, p. 12.

⁽⁴⁾ OJ L 337, 30.12.1999, p. 10.

are serious doubts about the compatibility of the measures with the Guidelines for the examination of State aid to fisheries and aquaculture.

2.3.2. Measures in favour of shellfish producers

- (26) The aim of the measures was to compensate producers (rearing or harvesting shellfish) for the loss of income sustained as a result of the presence of mucilage.
- (27) The Commission recognised that the purpose of the compensation was to make good the losses sustained as a result of a natural disaster, the presence of mucilage, and consequently that it could be deemed compatible with the common market. It could not be concluded with certainty from the information provided by the Italian authorities that excessive compensation had been awarded. Evidence was not provided that 30 % of the turnover for the preceding year did not exceed the amount of damage sustained by producers as a result of the mucilage. Doubt remained therefore regarding the compatibility of the measure with Article 87(2)(b) of the EC Treaty.

III

COMMENTS FROM ITALY

- (28) The Italian authorities set out in their comments the various stages of the case and refer to Article 16(1) of Regulation (EC) No 2792/1999 on the temporary cessation of fishing in the event of unforeseen circumstances, particularly where they are attributable to biological causes. Italy takes the view that the presence of mucilage constitutes an exceptional and unforeseen occurrence.
- (29) Italy challenges the position of the Commission dividing the suspension period in two, i.e. the periods before and after 19 July 2000, and considers this to be an arbitrary choice. As far as Italy is concerned the date of 19 July does not refer to the presence of the mucilage but is simply that of the meeting at which the decision was taken to switch from the voluntary to the mandatory cessation of fishing. According to the preliminary information provided by fishermen the Italian administration called on scientific institutions to monitor the development of the mucilage and, for procedural reasons, the reports of the institutes could not be taken into consideration by the Central Advisory Committee for Sea Fisheries, leading to a decision on suspension before 19 July.
- (30) Secondly, while the subsequent scientific reports indicated that the mucilage problem was declining on

19 July, it is nevertheless true that on that date it was causing immediate damage to fishermen and its later disappearance could not be predicted. In the light of the scientific reports furnished subsequently it would have been possible to shorten the suspension period but in practice account had to be taken of the uncertainty of the situation.

- (31) By letter of 20 February 2002 the Italian authorities forwarded a summary scientific report from the Fano marine biology and fisheries laboratory. According to this report, the mucilage problem had reached a climax in July and would taper off in August, disappearing altogether in September. In August the mucilage accumulations dispersed first towards the central area and later towards the south of the Adriatic Sea, enabling fishing to return to normal in September. The situation varied, however, across the area and over time.
- (32) As regards the compensation for shellfish producers, Italy states that 30 % of the losses sustained corresponded to the loss calculated in relation to turnover for the preceding year. Applications for compensation were received from 34 undertakings.

IV

COMMENTS FROM INTERESTED PARTIES

- (33) Federcoopesca, Lega Pesca and AGCI Pesca are three organisations representing Italian fishermen. In their letter they claim that they fail to understand the bases on which the Commission's comments are founded: the text of the Law introducing the measure explains clearly that it is based on the need to tackle the impossibility of fishing on account of the exceptional presence of mucilage.
- (34) Without the aid measure crews would have received no income. Shipowners would have been lawfully entitled to pay fishermen off without notice, as provided for under Italian law, if the payment of costs had not been assured by the State. In addition, shipowners were not obliged to re-employ the same members of crews.
- (35) The organisations say that the mucilage began to appear in March 2000 and worsened in May. Because of the difficulty of carrying on their activities, the fishermen turned to the Italian authorities for action to be taken.

- (36) The organisations say that the measures adopted by the authorities were fully in line with Article 16(1) of Regulation (EC) No 2792/1999.
- (37) Regarding the compensation for shellfish producers, the 30 % threshold for damage was reached because Law No 72/92, which authorises this type of compensation, applies only where the loss sustained reaches not less than 35 % of turnover. There was no over-compensation therefore.
- (38) These comments were forwarded to the Italian authorities, which agreed with them.
- (41) With regard to shellfish farming, the aim of the measure was to compensate for the damage sustained by producers as a result of the appearance of the mucilage. The payments received by the undertakings constituted a financial benefit and, for that reason, an aid.
- (42) In addition, these measures were funded from national resources and the products of the undertakings are sold on the Community market. The undertakings were strengthened therefore by the measures, both on the Italian market in relation to undertakings of other Member States intending to present their own products on that market (fishery products or other competing foodstuffs), and on the markets of other Member States in relation to undertakings operating on those markets (again for fishery products and other competing foodstuffs). In view of this, the measure, by conferring a benefit on Italian undertakings, distorted or threatened to distort competition and could affect trade between Member States.

v

ASSESSMENT OF THE MEASURES

A. Existence of State aid

- (39) In accordance with Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.
- (40) With regard to fishing, the aim of the measures was to offset the losses sustained by shipowners as a result of the temporary suspension of activities and to ensure that crews received the minimum contract wage and that the social contributions payable by shipowners in respect of crews were covered. The compensation received by shipowners was a financial benefit and consequently an aid. As wages are a burden on undertakings, the effect of meeting them together with the relevant social contributions is to reduce the costs that have to be met by the fisheries undertakings in question. Meeting the wages and social costs could be considered at first sight not to constitute an aid to the undertakings since the aim is to cover the wages and social payments for crews during the temporary suspension period with the undertakings concerned deriving no clear benefit. That having been said, this measure, which was designed to maintain in force the employment contract between shipowners and crew members, benefited the former who were a party to the contract relieving them of their contractual obligations for the duration of the temporary suspension. The measure is therefore an aid to the fisheries undertakings concerned.

- (43) For the above reasons the measures constitute State aid within the meaning of Article 87(1) of the EC Treaty and are in principle prohibited under that Article 87(1). They may be considered compatible with the common market only if they fall within the scope of one of the derogations provided for in the EC Treaty.

B. Evaluation of the compatibility of the measures in the light of Article 87(2)(b) of the EC Treaty

Measures in favour of fishing

- (44) In its letter notifying Italy of the initiation of the formal investigation procedure in respect of the measures concerned, the Commission said it considered the compensation awarded for the temporary suspension of fishing between 19 June and 19 July 2000 compatible with the common market since it had been awarded as a result of the presence of mucilage, which was recognised to be a natural disaster within the meaning of Article 87(2)(b) of the Treaty. The formal investigation procedure was initiated in respect of the aid awarded for the period after 19 July 2000 because it was not clear from the information provided by the Italian authorities that the decision to suspend fishing in that period was indeed due to the presence of the mucilage.
- (45) The information provided by the Italian authorities in response to the initiation of the formal investigation procedure provided additional particulars which showed that the temporary suspension, adopted by Order of 19 July 2000 and applicable from 20 July to 1 September, was due to the presence of mucilage. As the authorities affirm, it is true that the duration of the suspension could theoretically have been shortened since the situation gradually returned to normal during August

but in practice this could not have been known in advance, given the unforeseeable development of the situation over time. In the light of these considerations the Commission is able to deem the suspension after 19 July, like that between 19 June and 19 July, to be due to the presence of mucilage, recognised as a natural disaster in accordance with Article 87(2)(b) of the Treaty.

- (46) The compensation awarded as a result of the suspension will therefore be considered compatible with the common market in accordance with Article 87(2)(b) of the EC Treaty if it corresponds to the damage actually sustained by the beneficiaries, i.e. it does not constitute over-compensation.
- (47) The Commission notes that the crews received payment equivalent to the minimum legal wage; there has not therefore been over-compensation.
- (48) The compensation introduced for shipowners is equivalent to the maximum contribution provided for in Article 14 and in Annex III to Council Regulation (EC) No 2468/98 of 3 November 1998 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector ⁽⁵⁾. This Regulation cannot directly constitute a reference for the setting of the amount of the compensation provided for under the aid measure concerned as it was repealed and replaced by Regulation (EC) No 2792/1999. Since the latter Regulation, like Regulation (EC) No 2468/98, provides for the financing of temporary suspensions under the financial instrument for fisheries guidance (FIFG) but fails to specify the amount of the contribution (which is at the discretion of the Member State subject to the rules governing State aid; only the breakdown of the financing between the Member State and the FIFG is fixed), the Commission may consider the reference to the maximum amounts set out in Regulation (EC) No 2468/98 to be admissible. In the light of these considerations the Commission considers that the compensation awarded to shipowners on the basis of those amounts is compatible with the common market.

Measures in favour of shellfish producers

- (49) The formal investigation procedure was initiated because the Commission was unable, on the basis of the information furnished, to verify whether the compensation paid was within the limits of the damage sustained, i.e. that there was no over-compensation.

- (50) In their comments on the initiation of the procedure the Italian authorities stated that the payments had been calculated on the basis of the turnover for the preceding year (1999). They also explained that they had not been able to refer to the year before that (1998) because in that year fishing in the Adriatic had been suspended from May to August on account of the events in Kosovo. This suspension was accompanied by compensation measures held to be compatible by the Commission in letter SG(2000) D/104 064 of 8 June 2000 to the Italian authorities. The latter had indicated, however, that production and turnover for 1999 were the same as for 1997. In these circumstances the Commission considers that the compensation for damage sustained during 2000, although calculated on the basis of one year only while three years are as a rule required in order to exclude the effects of peaks in production, has been fixed on an admissible basis in this particular case.
- (51) The Commission considers also that in accordance with the Law of 5 February 1992 permitting loans to be made available for payments of this kind, these are granted only if the damage suffered is equivalent to at least 35 % of turnover. On the basis of the above and in accordance with Commission practice, which provides that aid to compensate for damage caused by a natural disaster may be considered compatible with the common market only if it represents not less than 30 % of normal production, the payments made in the case under consideration may be considered compatible with the common market. Furthermore, since the compensation for each undertaking will be not more than 30 % of turnover for the preceding year, there is no threat of over-compensation.
- (52) The compensation, having been paid as a result of the presence of mucilage, is thus compatible with the common market in accordance with Article 87(2)(b) of the Treaty.

VI

CONCLUSIONS

- (53) The Commission finds that Italy has unlawfully implemented aid introduced for fishermen for the period after 19 July 2000 and for shellfish producers by Order No 265 of 26 September 2000, converted into law No 343 of 23 November 2000, contrary to Article 88(3) of the Treaty.

⁽⁵⁾ OJ L 312, 20.11.1998, p. 19.

(54) However, the State aid measures under consideration are compatible with the common market within the meaning of Article 87(2)(b) of the Treaty,

period after 19 July 2000 and in favour of shellfish producers in the Adriatic also in 2000, are compatible with the common market.

Article 2

HAS ADOPTED THIS DECISION:

This Decision is addressed to the Italian Republic.

Article 1

Done at Brussels, 13 November 2002.

Th aid measures introduced by Article 4, paragraphs 1 to 4 and 6 to 10, of Order No 265 of 26 September 2000, converted into Law No 343 of 23 November 2000, which Italy implemented in favour of fishermen in the Adriatic in the

For the Commission

Franz FISCHLER

Member of the Commission
