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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 27 October 2010

on State aid No C 15/08 (ex N 318/07, N 319/07, N 544/07 and N 70/08) which Italy plans to implement for Cantiere Navale De Poli*(notified under document C(2010) 7253)***(Only the Italian text is authentic)****(Text with EEA relevance)***(2013/197/EU)*

THE EUROPEAN COMMISSION,

the delivery deadline by 8 months for vessel C 241, 6 months for vessel C 242, 9 months for vessel C 243 and 10 months for vessel C 244.

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

- (2) The notifications related to aid granted by Italy to De Poli under the Italian aid scheme N 59/2004, approved by the Commission on 19 May 2004 ⁽³⁾ on the basis of Council Regulation (EC) No 1177/2002 of 27 June 2002 concerning a temporary defensive mechanism to ship-building ⁽⁴⁾, as amended by Council Regulation (EC) No 502/2004 ⁽⁵⁾ (hereinafter the "Italian TDM scheme" and the "TDM Regulation" respectively).

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 provision(s) ⁽¹⁾ cited above and having regard to their comments,

- (3) By letters dated 31 July 2007, 31 August 2007, 7 September 2007, 12 November 2007 and 25 January 2008, Italy provided the Commission with additional information in relation to these notifications.

Whereas:

- (4) By letter dated 16 April 2008, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) ⁽⁶⁾ in respect of the notified extension requests. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁷⁾. Interested parties were invited to submit comments.

I. PROCEDURE

- (1) By letters dated 6 June 2007, 24 September 2007 and 6 February 2008, Italy notified requests for the extension of the three-year delivery limit for four chemical tankers (denominated as vessels C 241, C 242, C 243 and C 244) to be built by the Italian shipyard Cantiere Navale De Poli (hereinafter "De Poli" or "the shipyard") ⁽²⁾. In particular, Italy requested the extension of

⁽¹⁾ OJ C 208, 15.8.2008, p. 14.

⁽²⁾ The notifications were registered as N 319/07 for vessel C 243 (letter of 6 June 2007), N 318/07 for vessel C 244 (letter of 6 June 2007), N 544/07 for vessel C 242 (letter of 24 September 2007), and N 70/08 for vessel C 241 (letter of 6 February 2008).

⁽³⁾ OJ C 100, 26.4.2005, p. 27.

⁽⁴⁾ OJ L 172, 2.7.2002, p. 1.

⁽⁵⁾ OJ L 81, 19.3.2004, p. 6.

⁽⁶⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽⁷⁾ Idem 1.

- (5) Italy submitted comments on the decision to initiate the procedure by letter of 16 June 2008 (registered on 17 June 2008). The Commission received comments from De Poli by letter also dated 16 June 2008 (registered on 17 June 2008). Italy provided additional information by letter of 30 June 2008 (registered on the same date) and by letter of 29 October 2008 (registered on 3 November 2008).
- (6) By letter of 15 July 2008 (registered on 22 July 2008), Italy requested a second extension of the delivery deadline for two of the vessels, as follows: until 30 September 2008 for vessel C 242 and until 30 September 2008 for vessel C 244.
- (7) By letter of 20 January 2009 (registered on 22 January 2009), Italy requested a third extension of the delivery deadlines, namely until 31 December 2008 for vessel C 242 and until 28 February 2009 for vessel C 243. By letter of 14 April 2009 (registered on 15 April 2009), Italy requested a fourth extension of the delivery deadlines, namely until 30 June 2009 for vessel C 242, until 30 September 2009 for vessel C 243 and until 30 November 2009 for vessel C 244.
- (8) By letter of 8 May 2009 (registered on the same date) the Commission asked Italy to provide further information, with a reminder sent on 12 June 2009. Italy responded by letter dated 23 September 2009⁽⁸⁾ merely to inform the Commission that De Poli had been admitted to the collective insolvency procedure known as "concordato preventivo"⁽⁹⁾.
- (9) By letter of 28 January 2010 (registered on 1 February 2010), Italy formally withdrew the extension requests submitted with respect to vessels C 242 and C 243⁽¹⁰⁾.
- (10) By e-mail dated 2 March 2010, the Commission asked Italy to clarify the status of the notifications concerning vessels C 241 and C 244.
- (11) By e-mail of 10 June 2010 (registered on 17 June 2010), Italy informed the Commission that vessel C 241 had been completed on 31 August 2008 and delivered on

3 November 2008 and that the notification of the extension request for the delivery of this vessel was maintained.

- (12) By letter of 16 June 2010 (registered on 28 June 2010), Italy formally withdrew the extension requests for vessel C 244.

II. BACKGROUND

- (13) The following facts only concern vessel C 241, given the withdrawal by Italy of the extension requests for vessels C 242, C 243 and C 244.
- (14) De Poli is an Italian shipyard located in Pellestrina (Venice), which since the 1990s had specialised in the construction of chemical and product tankers. In 2007, the shipyard's workforce totalled 320 workers, including subcontractors, and its annual turnover was EUR 70 million. On 11 February 2010 the competent Italian court confirmed the arrangements for the collective insolvency procedure concerning the shipyard⁽¹¹⁾.
- (15) On 28 January 2005, De Poli concluded with Arcotur Srl a contract for the construction of vessel C 241. According to this contract, vessel C 241 was a chemical tanker with the following main technical characteristics: length overall 125 metres, moulded breadth 19 metres, deadweight tonnage approximately 7 300 tonnes and speed at 85 % of maximum continuous power 15 knots. The sales contract stipulated that the vessel C 241 was to be delivered to the purchaser Arcotur Srl by 31 December 2007 for a total sales price of EUR 30 million.
- (16) On 26 May 2006, the shipyard ordered from a supplier (hereinafter "the supplier") the gearbox for the vessel, an order, confirmed by the supplier, which was due to be delivered by 3 September 2007. According to the information submitted by De Poli, the gearbox for vessel C 241 was a made-to-measure model with unique characteristics, which differed in several technical aspects from the standard gearbox model produced by the same supplier.
- (17) On 6 July 2006, Arcoin SpA (formerly Arcotur Srl) and De Poli amended the contract signed on 28 January 2005 to make the following modifications to the technical specifications for the vessel: length overall 112 metres, moulded breadth 16,8 metres, and deadweight tonnage 5 300 tonnes, with a reduction in the price to EUR 23 million.

⁽⁸⁾ This letter was only received and registered by the Commission on 19 February 2010.

⁽⁹⁾ The Italian insolvency proceedings called "concordato preventivo", i.e. an arrangement with creditors, governed by bankruptcy law, involve the debtor submitting a plan for restructuring the debts to the creditors. The proposal is then examined by the court in the place where the company has its registered office. The court may allow the procedure by issuing an order to that effect, or it may dismiss the application and formally declare the operator bankrupt. Where the arrangement procedure is accepted, the debtor retains control of the company's assets and activities under the supervision of a receiver.

⁽¹⁰⁾ These withdrawals were re-confirmed by letter of 13 May 2010 (registered on 15 May 2010).

⁽¹¹⁾ The company had asked to be placed in "concordato preventivo" since early 2009 (for a short explanation of what "concordato preventivo" is, see footnote 9 above).

- (18) On 20 July 2006, Arcoin SpA transferred the contract for vessel C 241 to Elbana di Navigazione SpA.
- (19) On 3 September 2007, the date agreed for delivery, the gearbox ordered on 26 May 2006 was not ready. Indeed, by letter of 23 October 2007, the supplier informed De Poli that, due to a shortage of raw materials on the market and consequent late delivery by its subcontractors, the gearbox could not be delivered on time. The supplier confirmed on 18 January 2008 that the gearbox would instead be delivered in February 2008, i.e. six months later than the initial delivery deadline.
- (20) Italy therefore requested an extension to the delivery deadline for vessel C 241 until 31 August 2008, an extension of eight months from the contractual deadline for delivery of the vessel (31 December 2007).
- (21) Finally, on the basis of the information received, the Commission notes that vessel C 241 was delivered on 3 November 2008 ⁽¹²⁾.

III. THE AID

- (22) The TDM Regulation ⁽¹³⁾ laid down exceptional and temporary measures to assist EU shipyards in those segments that had at the time suffered serious adverse effects caused by unfair competition from South Korea ⁽¹⁴⁾.
- (23) The TDM Regulation provided that direct aid up to 6 % of the value of the shipbuilding contract before aid ⁽¹⁵⁾ for the building of specific categories of merchant vessels (container ships, chemical and product tankers and liquefied natural gas carriers ⁽¹⁶⁾) could be considered compatible with the internal market if the following conditions were met: there was competition for the same contract from a South Korean shipyard offering a lower price ⁽¹⁷⁾; the final contract was signed before the expiry of the TDM Regulation (31 March 2005) ⁽¹⁸⁾; and the ship was to be delivered within three years from the date of signing the final contract ⁽¹⁹⁾.
- (24) Article 2(4) of the TDM Regulation authorised the Commission to grant extensions to the three-year delivery limit when justified by "the technical complexity

of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in a working programme of a yard due to exceptional circumstances, unforeseeable and external to the company".

- (25) In May 2004 the Commission, on the basis of the TDM Regulation, approved the Italian TDM scheme which made available aid for shipbuilding ⁽²⁰⁾ on conditions corresponding to those in the TDM Regulation. In particular, the Italian TDM scheme provided that aid up to 6 % of the value of the contract before aid could be granted in respect of ships delivered within three years of the date of signing the final contract, and that an extension to this period could be allowed only when the Commission found it justified "by the technical complexity of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in a working programme of a yard due to exceptional circumstances, unforeseeable and external to the company" (paragraph 29 of the Italian scheme).
- (26) On 31 January 2005, De Poli applied to the Italian authorities for aid under the Italian scheme in relation to the construction of vessel C 241, for an amount of EUR 1,3 million.
- (27) On 25 January 2008, De Poli asked the Italian authorities for an extension to the delivery deadline for vessel C 241 from 31 December 2007 until 31 August 2008.
- (28) Italy confirmed that the aid has not been disbursed. It further noted that, following the Commission decision of 21 October 2008 ⁽²¹⁾, which did not find compatible the increase in the budget of the Italian TDM scheme by EUR 10 million, at present there are no funds available for providing this aid.

IV. THE DECISION TO INITIATE PROCEEDINGS

- (29) In the decision to initiate proceedings, the Commission doubted that the circumstances invoked by Italy and De Poli to justify the delay in the delivery of vessel C 241 (as well as vessels C 242, C 243 and C 244, no longer under assessment) qualified as "delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of the yard due to exceptional circumstances unforeseeable and external to the company" within the meaning of paragraph 29 of the Italian TDM scheme.

⁽¹²⁾ The date of completion of vessel C 241 which the Italian authorities note was 30 August 2008 is irrelevant, as the TDM Regulation and the Italian TDM scheme, refer solely to the delivery date.

⁽¹³⁾ See footnotes 4 and 5.

⁽¹⁴⁾ Recital 3 of the TDM Regulation.

⁽¹⁵⁾ Article 2(3) of the Regulation.

⁽¹⁶⁾ As defined in Article 1 of the Regulation.

⁽¹⁷⁾ Article 2(1) of the Regulation.

⁽¹⁸⁾ Articles 4 and 5 of the Regulation, as amended by Article 1 of Council Regulation (EC) No 502/2004 – see footnotes 4 and 5.

⁽¹⁹⁾ Article 2(4) of the Regulation.

⁽²⁰⁾ *Idem* 3.

⁽²¹⁾ Commission Decision of 21 October 2008 on state aid C 20/08 (ex N 62/08) which Italy is planning to implement through a modification of scheme N59/04 concerning a temporary defensive mechanism for shipbuilding, OJ L 17, 22.1.2010, p. 50 – currently under appeal (Cases T-584/08 and T-3/09).

- (30) Although the doubts expressed in the decision to initiate proceedings concerned four vessels (C 241, C 242, C 243 and C 244), they remain relevant for the assessment of vessel C 241 on its own.
- (31) In the decision, the Commission questioned first whether the contracts signed with Arcoin SpA were final contracts or whether they were a means for De Poli to have the contracts secured before the final deadline for shipbuilding contracts to be eligible for aid, with a view to later finding final buyers for the ships.
- (32) Second, the Commission questioned whether the transfer of the sales contracts between shipowners was in itself another cause of the delay in delivery.
- (33) Third, the Commission deemed that De Poli might have taken more orders than its actual production capacity enabled it to deliver, since over the period 2005-2008 the shipyard planned to build 18 vessels, half of which were to be constructed on its two main slipways and the other half to be constructed in a smaller infrastructure.
- (34) Finally, the Commission doubted that the alleged delays in the supply of essential parts were indeed unforeseeable as claimed by Italy or whether they might constitute normal commercial risks which a diligent shipyard should anticipate in its working programme. In particular, the Commission considered that De Poli might have increased the risk of delay by ordering some parts of the vessels too late.
- (37) On this point, De Poli contends that the practice of transferring sales contracts during the construction of vessels, or even after finalising the work, is not uncommon in the shipbuilding industry.
- (38) In relation to the scheduling of the work for vessel C 241, De Poli observes that, due to the technical complexity of shipbuilding projects, it is normal practice for work to begin several months after the conclusion of the sales contracts. The shipyard argues that it is common for a certain period of time to elapse between the signature of the contract and the actual start of the works, and this period of time is necessary for preparatory operations, such as drafting the technical project and carrying out negotiations with the various suppliers.
- (39) According to the initial working programme submitted by De Poli to the Italian authorities ⁽²²⁾, the construction of vessel C 241 was scheduled to begin in the first quarter of 2006, and delivery was foreseen for the second half of 2007. However, according to the revised working programme, work on vessel C 241 was scheduled to begin on 28 September 2006 on the "Scalo Sud" (one of the shipyard's two slipways).
- (40) According to De Poli, delivery of the gearbox is an essential stage in the building of a vessel – it is followed by assembly of the gearbox with the engine, the fixing of the propeller and completion of the hull. Various assembly and preparation/construction operations can only be performed after installing the gearbox. De Poli claims that it is not normal practice to order the delivery of parts such as the gearbox in advance, to avoid outlays on storage and advance payment, and emphasises that the supplier it contacted is the sector leader with proven experience, so there was no reason to suspect that the gearbox would not be delivered on time.

Comments of the Member State and arguments of the interested parties

- (35) As far as vessel C 241 is concerned, in its comments on the decision to initiate proceedings of 16 June 2008, Italy argues that De Poli had the capacity to deliver the vessel within 36 months from the date of signature of the sales contract. The only reason that delivery was delayed was because of the late delivery of the gearbox by the supplier, a factor which Italy qualifies as substantial, exceptional, unforeseeable and external to the company within the meaning of paragraph 29 of the Italian TDM scheme.
- (36) In its submission of the same date, De Poli argues that the fact that both the shipyard and Arcoin SpA belong to members of the De Poli family is not sufficient to doubt the authenticity of the contract initially signed on 28 January 2005. This argument is supported by the Italian authorities, which point out that, at the time when the contract for vessel C 241 was signed, there were no direct ownership links between the shipyard and Arcoin SpA (other than the fact that Arcoin SpA was held by members of the De Poli family, but not entirely the same ones as held stakes in De Poli).
- (41) De Poli insists that it had the capacity to deliver the 18 vessels ordered during the 2005-2008 period on time, since the total deadweight capacity relating to those orders amounted to 10 000 tonnes per year, whereas the shipyard's historical annual capacity was over 12 000 tonnes per year. Furthermore, it emphasised that 9 of the 18 vessels ordered over this period were small (of lengths overall of 20 metres and deadweight capacities of 25 tonnes), while only the other 9 vessels were of the same general size as vessel C 241. According to De Poli, this demonstrates that the shipyard had the capacity to deliver all the orders it took within the deadlines set and that it did not take on orders beyond its production capacity.
- ⁽²²⁾ A copy of this programme, together with the revised version, was submitted by Italy on 25 February 2008, in connection with notification N 70/08 for vessel C 241.

- (42) De Poli further notes that in the past the Commission had on several occasions – including for De Poli itself – approved requests for extensions to delivery deadlines arising from the late delivery of critical components.

VI. ASSESSMENT

- (43) As a preliminary point, in the light of the formal withdrawal by Italy of the notifications consisting of requests for extension to the delivery deadlines for vessels C 242, C 243 and C 244, and the fact that no monies were disbursed, the formal investigation procedure concerning the requests submitted by Italy in relation to the aforementioned three vessels has become devoid of purpose, and will be closed without any assessment being necessary.

- (44) The following assessment therefore relates only to vessel C 241 and any references to vessels C 242, C 243 and C 244 will be made only in so far as is relevant to this assessment.

Existence of state aid within the meaning of Article 107(1) of the TFEU

- (45) Under Article 107(1) TFEU, 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, in so far as it affects trade between the Member States, be incompatible with the internal market. Article 107(1) TFEU therefore establishes the cumulative conditions under which a state measure qualifies as state aid: the measure confers a selective advantage, involves state resources, generates competition-distorting effects and has a negative impact on trade between Member States.

- (46) There is no dispute that the measure which Italy plans to implement to support the construction of vessel C 241 by De Poli, consisting of a financial contribution of up to 6 % of the value of the contract before aid (approximately EUR 1,3 million), constitutes state aid within the meaning of Article 107(1) TFEU. The measure is financed by the Italian Government. The monies confer an advantage on De Poli in so far as they are designed to cover costs normally borne by the shipyard when building a ship. The measure is selective since it benefits De Poli alone, and to the extent that it enhances the position of De Poli vis-à-vis its European competitors, it has the potential to distort competition in the European shipbuilding market and affect trade between Member States.

Compatibility of the aid with the TFEU

- (47) Two aspects of the case under consideration prompted the Commission to have doubts as to the compatibility

of the aid to De Poli with the internal market. Paragraph 29 of the Italian TDM scheme stipulates that aid can only be granted concerning vessels delivered within three years of the date of signing the final contract and paragraph 33 that the final contracts must have been signed before the expiry of the TDM Regulation (i.e. 31 March 2005).

- (48) With respect to the second point, the Italian authorities have explained that the transfer of contracts between shipowners after the expiry of the TDM Regulation cannot be interpreted as indicating that the original contract for vessel C 241, signed on 28 January 2005, was not the "final contract" within the meaning of paragraph 29 of the Italian TDM scheme.

- (49) The Commission acknowledges that the practice of transferring a contract to a third party appears to be a common one in the shipbuilding industry. For instance, in a previous decision⁽²³⁾ also concerning the extension of the three-year delivery limit for two ships, the Commission concluded that, despite the transfer of contracts, the first contract could be considered final, given that the product type remained the same and the new owner took over the rights and obligations from the previous owner. In that case the Commission thus concluded that the transfer of ownership had not in itself changed the nature of the contracts and therefore their eligibility for aid.

- (50) In the present case, the transfer of the contract between shipowners did not involve a change in the product type or the nature of the contract and the new owner essentially took on the same rights and obligations as the original contracting party. On this basis, the Commission holds that the original contract can be regarded as final, and thus eligible for aid under the Italian TDM scheme.

- (51) As for the doubts expressed in relation to the conditions for granting an extension to the three-year delivery deadline, the Italian TDM scheme stipulates that the Commission may grant an extension when justified by "the technical complexity of the individual shipbuilding project concerned or by delays resulting from unexpected disruptions of a substantial and defensible nature in the working programme of a yard due to exceptional circumstances, unforeseeable and external to the company".

- (52) The Commission must therefore assess whether Italy has satisfactorily demonstrated that the conditions for granting the exception stipulated in the Italian TDM scheme have been met in the case of the delays incurred in the delivery of vessel C 241.

⁽²³⁾ See Case C 33/2004, where, despite the transfer of contracts, the Commission considered that the first contract could be considered as the final contract.

- (53) Before assessing Italy's submissions, the Commission notes as a preliminary point that in the *Astilleros Zamacona* judgment of 16 March 2004 ⁽²⁴⁾, the Court of First Instance of the European Union ruled that the provision (concerning exceptional circumstances) establishing a system that is in derogation from the principles set out in the first subparagraph of that provision (the three-year limit) had to be given "a restrictive interpretation". According to the Court, the very wording "exceptional circumstances" in the provision shows that the Community legislature intended to reserve its application for very specific situations. The Court therefore held that it is for the Member State concerned to demonstrate that the alleged exceptional circumstances constituted a sufficient disruption as to affect the working programme of the yard and delay delivery of the vessel by establishing a causal link between the two events.
- (54) The Italian authorities contend that the delay in the delivery of vessel C 241 is due to the delay (6 months) in supplying the gearbox and the ensuing one-month delay in the assembly operations. The Commission notes that this is the only ground for delay invoked by Italy; in particular, the request for an extension does not refer to the new specifications deriving from the transfer of the contract.
- (55) According to established Commission practice ⁽²⁵⁾, the condition that the circumstances must be "exceptional" excludes common or at least normal events with which the shipyard should reasonably have reckoned in its working programme. Long delays in the delivery of critical parts could be considered exceptional, but minor delays are not necessarily viewed as exceptional in processes as long and complex as shipbuilding projects. Moreover, in the light of the restrictive interpretation to be given to the exception, the Commission assesses carefully whether indications exist that the shipyard concerned could have anticipated and avoided, or at least mitigated, these delays, looking for instance at the timing of orders in view of the relevant work programme. The condition that the event must be unforeseeable excludes any factor that the parties could reasonably have anticipated.
- (56) The Commission acknowledges that there may be a causal link between the late delivery of critical components for the production of the vessel and the request for extension of the delivery deadline ⁽²⁶⁾. However, in the specific circumstances of the present case, it is primarily the existence of the alleged exceptional and unforeseeable circumstances which the Commission doubts: the elements necessary to conclude that the delay invoked complies with the conditions laid down in paragraph 29 of the Italian TDM scheme do not appear to be present in this case.
- (57) As noted above, the Commission has, in the past, acknowledged that long delays in the delivery of critical parts could be considered exceptional. However, a request for extension must always be assessed in the specific circumstances of each case. To the extent that De Poli has encountered the same type of disruption on several occasions (not only has it been behind similar requests for extensions in the past ⁽²⁷⁾, the other three contracts which were signed on the same day as the contract for vessel C 241 were also the subject of repeated requests for extensions — see recitals 1, 6 and 7 above), the Commission concludes that such delays can no longer be considered to be genuinely exceptional. In so far as they occurred repeatedly, the disruptions resulting from such repeated delays cannot be viewed as entirely unforeseeable.
- (58) Indeed, it is in the light of these past disruptions that De Poli does not appear to have acted diligently in the planning of its production.
- (59) In the initial working programme, the production of vessel C 241 was scheduled to start in the first quarter of 2006 with delivery scheduled for the second half of 2007, a lead time of between 15 and 24 months.
- (60) In the revised working programme, however, production was only to start on 28 September 2006 and delivery of the vessel was to take place on 30 December 2007, that is just one month before the ultimate delivery deadline of 28 January 2008. This change in planning allowed for a lead time of only 15 months in all to produce the vessel according to the terms of the contract. According to the information provided by Italy, the planning of vessels of the same type or even of a smaller size to be produced on the same "Scalo Sud" (i.e. vessels C 229 and C 240) allowed for 22 months and 20 months respectively from the start of production to delivery.
- (61) In addition, the fact that production was only due to begin on 28 September 2006 and delivery of the vessel was planned for 30 December 2007, that is only one month before the ultimate delivery deadline of 28 January 2008, left no margin for any delays in the production process, when the shipyard had previous experience of delays occurring both in the supply of parts and in the production process itself, as evidenced by the other requests for extensions to deadlines made by De Poli.
- ⁽²⁴⁾ See Case T-72/98 *Astilleros Zamacona SA v Commission* ECR [2000] II-1683. This ruling refers to an identical provision that existed under former Council Regulation (EC) No 1540/98 concerning aid to shipbuilding carried over in the TDM Regulation.
- ⁽²⁵⁾ See for instance *Giacalone*, case N 69/08, paragraph 21.
- ⁽²⁶⁾ See for example cases N 586/03, N 587/03 and N 589/03, as well as cases N 68/08 and N 69/08.
- ⁽²⁷⁾ See cases N 586/03, N 587/2003 and N 589/03.

- (62) Furthermore, the fact that it was a period of high demand (Italy provided evidence concerning an increase of around 60 % in orders for diesel engines between 2003 and 2005) leads to the conclusion that it would have been reasonable to engage in some forward planning in the ordering and agreed delivery dates for critical parts such as the gearbox. The statement by De Poli that this is not normal practice is not sufficient, in particular given the high level of demand and previous experience of delays, to conclude that the behaviour of the shipyard was defensible, in that reasonable action was taken to avoid or mitigate delays.
- (63) Indeed, the Commission notes that the gearbox was ordered on 26 May 2006 for delivery in September 2007, leaving little, if any, margin for possible delays in view of the vessel's delivery deadline of 31 December 2007. De Poli itself emphasised that considerable work is required after delivery of the gearbox (see recital 39 above) and this would appear to confirm that a certain margin for delays in the delivery of critical parts should normally be factored into the production schedule of a shipyard.
- (64) As for the doubts expressed by the Commission in its decision to initiate the investigation procedure as to whether the fact that the contract was transferred to a new owner was in itself a cause of delay, the Commission notes in particular that the transfer of the contract between Arcoin SpA and Elbana di Navigazione SpA only took place on 20 July 2006, several months after work was originally scheduled to begin (first quarter of 2006). It cannot, therefore, be excluded in the present case that the transfer of contracts between shipowners was in itself a cause of delay in beginning production and of the ensuing late delivery of the vessel, especially bearing in mind that the transfer of the contract to another shipowner implied some modifications to the vessel's specifications.
- (65) To conclude, in the light of the restrictive interpretation which must be attributed to requests for exceptional extensions, Italy has not been able to substantiate coherently the reasons why the circumstances invoked could not have been avoided or why the adverse effects of those circumstances could not have been significantly limited by diligent planning and administration of orders by De Poli. The above considerations lead the Commission to conclude that the circumstances invoked in support of the extension request cannot be characterised as exceptional and unforeseeable such that the delay in delivering vessel C 241 was not unexpected or defensible within the meaning of paragraph 29 of the Italian TDM scheme.
- (66) In addition, Italy submitted a request for an eight-month extension to the delivery date of vessel C 241, from 31 December 2007 to 31 August 2008, but only provided some justification for seven of the eight months thereof.
- (67) In contrast to previous extension requests concerning vessels being built by De Poli⁽²⁸⁾, the length of the extension requested by Italy in the present case is longer than the delay invoked by the Italian authorities as the only reason for the request (the late delivery of the gearbox); the existence of a causal link between the delay which forms the basis for the extension request and the delay in the supply of critical parts cannot therefore be said to have been established.
- (68) De Poli only actually delivered the vessel on 3 November 2008. In other words, the delay was not only longer than that attributable to the factors invoked as grounds for an extension, but continued beyond the requested deadline. Italy has provided no explanations for this additional delay of more than two months in the delivery of the vessel and the Commission has received no extension request for the two months concerned.
- (69) Consequently, even if the initial delay had been justified and the extension requested had been granted by the Commission, construction of vessel C 241 would not have been eligible for aid under the Italian TDM scheme since even that extended deadline would not have been met.
- ## VII. CONCLUSION
- (70) As regards vessels C 242, C 243 and C 244, in the light of the formal withdrawal by Italy of the notifications consisting of requests for extension to the delivery deadlines and the fact that no monies were disbursed, the formal investigation procedure is devoid of purpose and shall be closed as such.
- (71) As regards vessel C-241, in the light of the above assessment, the conditions required for granting an extension to the three-year delivery limit have not been substantiated and, in any event, the actual delivery of the vessel took place beyond the deadline that would have resulted from granting the extension requested. The construction of vessel C 241 is therefore not eligible for aid under the Italian TDM scheme N 59/04, based on the TDM Regulation.
- (72) Given that the Italian authorities confirmed that the aid has not been paid out to De Poli, no recovery of incompatible aid will be necessary,
- (66) In addition, Italy submitted a request for an eight-month extension to the delivery date of vessel C 241, from

⁽²⁸⁾ See cases N 586/03, N 587/03 and N 589/03.

HAS ADOPTED THIS DECISION:

Article 1

The state aid which Italy is planning to implement for De Poli, namely the extension of the three-year delivery limit for vessel C 241 on the basis of the Italian scheme N 59/04, based on the TDM Regulation, is incompatible with the internal market.

The aid may accordingly not be implemented.

Article 2

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

Article 3

As regards vessels C 242, C 243 and C 244, in the light of the formal withdrawal by Italy of the notifications consisting of requests for extension of the delivery deadlines, the formal investigation procedure is devoid of purpose and shall be closed as such.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 27 October 2010.

For the Commission

Joaquín ALMUNIA
Vice-President

COMMISSION DECISION

of 27 June 2012

on the State aid SA.28356 (C 37/09, ex N 226/09) — Habidite Alonsotegi

(notified under document C(2012) 4194)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2013/198/EU)

THE EUROPEAN COMMISSION,

Having regard to Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof ⁽¹⁾,

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

Having regard to the Decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty, in respect of the aid C 37/09 (ex N 226/09) ⁽²⁾,

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

Whereas:

I. PROCEDURE

(1) On 15 April 2009 the Spanish authorities notified for legal certainty purposes two contracts, concluded on 15 December 2006, between BIZKAILUR S.A. (hereinafter "BIZKAILUR") and the Diputación Foral de Bizkaia (hereinafter "the Diputación"), on the one hand, and on the other hand, by the private undertakings Habidite Technologies País Vasco S.A. (hereinafter "Habidite"), Grupo Empresarial AFER S.L. (hereinafter "the AFER group") and the Habidite group.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽²⁾ Commission Decision C(2009)9310 final of 2 December 2009 (OJ C 61, 12.3.2010, p. 6).

(2) On 2 December 2009 the Commission opened a formal investigation procedure pursuant to Article 108(2) of the Treaty with regard to the notified contracts (hereinafter: "the opening Decision") ⁽³⁾. The opening Decision was published in the *Official Journal of the European Union* on 12 March 2010 ⁽⁴⁾.

(3) The Spanish authorities did not submit comments on the opening Decision. Habidite commented on the opening Decision by letter of 9 April 2010. These comments were transmitted to the Spanish authorities by letter of 15 April 2010, who replied by letter of 12 May 2010. No other third parties commented on the opening Decision.

(4) On 6 September 2010 Habidite requested access to the file documents originating from the Spanish authorities under Regulation (EC) 1049/2001 ⁽⁵⁾. The Commission consulted the Spanish authorities on this request on 10 September 2010. The Spanish authorities replied on 13 September that they did not object to granting access to the requested documents to Habidite. The requested documents were transmitted to Habidite on 7 October 2010.

(5) The Commission requested additional information from the Spanish authorities by letters of 28 June 2010 – to which the Spanish authorities replied on 26 July 2010, and 8 December 2010 – to which the Spanish authorities replied on 14 January 2011.

(6) Habidite submitted additional comments and information on: 27 July 2010 – to which the Spanish authorities replied on 3 November 2011; 6 April 2011 (registered on 13 April 2011) – to which the Spanish authorities replied on 30 May 2011 (registered on 6 June 2011); and 7 July 2011. The Commission services met on 3 February 2011 in Brussels with representatives of Habidite, at the latter's request.

⁽³⁾ See footnote 2.

⁽⁴⁾ See footnote 2.

⁽⁵⁾ Regulation No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 concerning public access to documents of the European Parliament, the Council and the Commission (OJ L 145, 31.5.2001, p. 43).

II. BACKGROUND OF THE CASE

The contracting parties

- (7) The two contracts which are the subject of this Decision were concluded on 15 December 2006 between BIZKAILUR and the Diputación, on the one side, and on the other side, Habidite, the AFER group and the Habidite group.
- (8) BIZKAILUR was a company 100 % owned by the Diputación whose social object was the purchase and adaptation of land for promoting industrial and social housing projects in the province of Bizkaia. As of June 2010 BIZKAILUR was merged, together with other public companies with similar scope of activity, into the current AZPIEGITURAK S.A.U., also 100 % owned by the Diputación, and which continues the same line of activities ⁽⁶⁾.
- (9) Habidite, together with other linked companies in the Habidite group, is part of the private AFER group, headquartered in Ortuella, Bizkaia ⁽⁷⁾. At the date of the notification, the AFER group comprised a total of 13 companies ⁽⁸⁾ active in the construction and adjacent sectors. All companies in the AFER group were at the time majority-owned and controlled by [...] ^(*). According to the Diputación and Habidite, neither Habidite nor the AFER group constituted firms in difficulty within the meaning of Points 9, 10 and 11 of the *Community Guidelines on state aid for rescuing and restructuring firms in difficulty* ⁽⁹⁾ (hereinafter "the R&R Guidelines") at the time when the two notified contracts were concluded.

The Habidite project

- (10) The notified contracts were concluded to support a new investment project to be carried out by Habidite: the establishment of a factory of construction modules (hereinafter "the Habidite factory") in Alonsotegi, a village in the Gran Bilbao administrative area (*comarca*). On the date when the notified contracts were concluded, the Gran Bilbao *comarca* was deemed to be a region assisted

under Article 107(3)(c) of the Treaty ⁽¹⁰⁾. The Habidite factory should have created 1 100 new jobs in this assisted area.

- (11) The new factory would have produced the so-called "Habidite modules", i.e. prefabricated construction modules to be used for the direct assembly of homes/buildings. The Habidite modules were to be produced with a line assembly technology similar to the one used in the car manufacturing industry, and thereafter be transported and directly assembled at their future location. The product was considered to be innovative, not only because of the singular production technology involved, but also due to savings in time and resources in the assembly of the final product (buildings and homes), and to the use of materials allowing energy savings. The company had applied for several patents in relation to this product ⁽¹¹⁾.
- (12) According to information provided by the Diputación, the costs of this investment project in Alonsotegi were estimated at the time of signature of the two notified contracts at EUR 55 million, as follows:

Land	EUR 4,8 million
Industrial building	EUR 22,5 million
Land adaptation (<i>urbanización</i>)	EUR 4,04 million
Installations	EUR 24,0 million
Total	EUR 55,34 million

- (13) The annual production of the projected Habidite factory was estimated to be of 3 500 houses during the initial years of the functioning of the factory, and 4 500 houses once full production capacity would have been reached.

Legal framework of social housing in the País Vasco

- (14) In order to understand the context in which the notified contracts were concluded on 15 December 2006, it is necessary to shortly describe the legal framework in which social housing is provided in the País Vasco (hereinafter "the Basque Country").

⁽⁶⁾ http://www.azpiegiturak.bizkaia.net/index.php?option=com_content&task=view&id=140&Itemid=185.

⁽⁷⁾ See <http://www.grupofer.com>.

⁽⁸⁾ Not including the newly-founded Habidite Technologies Alonsotegi S.A., in relation to whose set-up the notified contracts were concluded.

^(*) Confidential information.

⁽⁹⁾ OJ C 244, 1.10.2004, p. 2.

⁽¹⁰⁾ See Commission Decision of 17.5.2000 concerning State Aid N 773/99 Spain, approving the regional aid map for Spain for the period 2000-2006. This Decision is available at http://ec.europa.eu/eu_law/state_aids/comp-1999/n773-99.pdf.

⁽¹¹⁾ According to Habidite's Business Plan available at the time of conclusion of the notified contracts (not dated), a total of 56 patents were requested in relation to this product. The parties did not inform whether the requested patents were granted. Further information about the characteristics of the Habidite construction modules are available on the website of Habidite, at <http://www.habidite.com/descpcion.html>.

(15) Average real estate prices were higher in this autonomous community (*comunidad autónoma*) than in the rest of Spain before the beginning of the crisis in 2008, and continue to remain higher up to the date of this Decision. The Basque authorities seek to ensure access to housing to the more disadvantaged categories of citizens by providing social housing under the protected regime (*viviendas protegidas*) and under the semi-protected regime (*viviendas tasadas*). The nature of each of these two categories of social housing is explained below.

(16) The *Ley 2/2006 del suelo y de urbanismo* ⁽¹²⁾ (hereinafter "Regional Law 2/2006") established that:

(a) 40 % of the urban land qualified for construction shall be destined to protected (*viviendas protegidas*) and semi-protected regime houses (*viviendas tasadas*), in proportion of 20 % for each (Article 80.2. of the Regional Law 2/2006);

(b) from the extra-urban land qualified for construction, 55 % shall be reserved for protected regime housing (*viviendas protegidas*) and 20 % for semi-protected regime housing (*viviendas tasadas*) (Article 80.3. of the Regional Law 2/2006).

(17) Houses under the semi-protected regime housing (*viviendas tasadas*) belong to an intermediary category between social protection housing and houses sold freely in the market. The prices for semi-protected houses (*viviendas tasadas*) are limited by Regional Law 2/2006 to maximum 1,7 of the maximum prices for equivalent houses sold in fully-protected regime (*viviendas protegidas*). The maximum prices for the latter category in the province of Bizkaia are established on the basis of the *Orden* (Order) of 1.8.2004 of the Housing and Social Affairs Department ⁽¹³⁾, which established an initial regulated price that was to be thereafter indexed annually on the basis of the *Índice de Precios al Consumo* (Consumption Price Index) (IPC) determined by the *Instituto Nacional de Estadística* (Spanish National Institute of Statistics).

(18) According to the Diputación, in 2006, when the notified contracts were concluded, the resulting maximum prices for protected housing (*viviendas protegidas*) were the following:

— EUR 1 351,86/sqm for municipalities listed in Annex I of the Order of 1.8.2004;

— EUR 1 307,94/sqm for municipalities listed in Annex II to the Order of 1.8.2004;

— EUR 1 181,54/sqm for other municipalities;

— EUR 472,40/sqm for the annexes (garage/box etc.).

The prices for the *viviendas tasadas* were topped to a maximum 1,7 of the above-indicated prices.

(19) The Diputación informs that, when BIZKAILUR concluded with Habidite the notified contracts, the former was acting within the framework of *Ley 7/1985 de 2 de abril del 1985 reguladora de las Bases del Régimen Local* (Law 7/1985) ⁽¹⁴⁾, which gives to the municipalities the autonomy to administrate matters of local interest, including the provision of social housing (Art. 25). Based on Article 109.2 of the *Real Decreto 1372/1986* (Royal Decree 1372/1986) and on Article 79 of Law 7/1985 (in its consolidated version), the municipalities transfer to BIZKAILUR, be it free of charge or against a price, assets which are necessary for carrying out social housing objectives. At the time when the notified contracts were concluded, on 15 December 2006, the social housing objectives were defined in a Plan adopted by the Diputación in 2004 on the provision of social housing in this province during the period 2004-2007 – the *Plan Foral de actuación en materia de vivienda 2004-2007* (hereinafter "the Plan Foral"). According to the Diputación, the Plan Foral foresaw that BIZKAILUR would have provided over the period 2004-2007 a total of 3 000 homes in protected regime.

The notified contracts

(20) Under the first contract - identified in the opening Decision as "Measure 1", hereinafter referred to as "the Land Contract" - the Diputación and BIZKAILUR undertake that the latter would have purchased and adapted for industrial use a surface totalling 101 430 sqm (81 600 sqm for the industrial plant, 5 300 sqm for offices and 14 300 sqm for industrial annexes) in the industrial area of Montealegre in Alonsotegi, within 24 months from the date of signature of the contract (Part Two, Article 1(ii) of the contract). BIZKAILUR would have transferred ownership of the adapted land surface to Habidite within 12 months from the date of signature of the contract (Part Two, Article 1(iii) of the contract), "free of any charge, expense or contribution", for a price equal to "the effective costs incurred by BIZKAILUR for its purchase" (Part Two, Article 1(vi) of the contract). This price would

⁽¹²⁾ BOPV (Official Journal of the Basque Country) No. 2006/138, p. 15396.

⁽¹³⁾ BOPV No. 2004/160, p. 15872.

⁽¹⁴⁾ BOE (*Boletín Oficial del Estado*) No. 80, 3.4.1985, p. 8945.

have been paid by Habidite within 7 years from the date of the transfer of ownership, in 4 equal instalments (of 25 % each), to be paid at the end the 4th, 5th, 6th and 7th year (Part Two, Article 1(vii) of the contract).

(21) Under the second contract – identified in the opening Decision as "Measure 2", hereinafter referred to as "the Houses Contract" – the Diputación, be it directly or through BIZKAILUR, would have purchased from Habidite a total of 1 500 homes, of which 750 with a surface of less than 75 sqm. The Diputación or BIZKAILUR would have ordered the 1 500 homes between May 2007 and end of June 2010, so as to allow the delivery of the total number of 1 500 homes by May 2011.

(22) The contracted homes would have been built on land placed at the disposal of Habidite by BIZKAILUR, and then sold under the semi-protected regime (as *viviendas tasadas*), be it directly by the Diputación or BIZKAILUR, be it by Habidite itself, in respecting the maximum pricing provisions applicable (see recitals (14) to (19)). When the contracted homes were to be sold by the Diputación or BIZKAILUR, Habidite would not have acquired property of the land on which the houses were to be built. In such cases, it task would have been exclusively to build the homes.

(23) The Contract also allowed, on an exceptional basis, that for some of the contracted homes, Habidite or the AFER group could also have acted as promoters (Article A(f) of the Houses Contract). In such exceptional cases, Habidite or AFER would have first received ownership of the land necessary for the construction of the homes, then would have carried out the construction works, and finally, would have sold themselves the houses under the semi-protected regime (as *viviendas tasadas*). In such cases, Habidite or AFER would have only retained the stipulated price for the homes, as indicated below, while the part of the price corresponding to the land would have been transferred to the Diputación and/or BIZKAILUR.

(24) According to Article A(e) of the Houses Contract, the price to be obtained by Habidite for the 1 500 homes was as follows:

(a) homes over 75 sqm: 83 % of the price applied by BIZKAILUR for the living surface, plus 100 % of the price obtained for the annexes (garage, storage box);

(b) homes under 75 sqm: 83,30 % of the price obtained by BIZKAILUR for the living surface, plus 100 % of the price obtained for the annexes (garage, storage box, etc.)

(25) BIZKAILUR would thus have retained the rest of 17 %, or 16,70 % respectively, of the price obtained for the houses (except for the annexes – garage, storage box, etc. – where the entire sale price would have been for Habidite).

(26) In an example provided by the Diputación, for a house of 75 sqm to be sold under the semi-protected regime in 2006, Habidite would have obtained: EUR 143 060,58 (83 % of 75 sqm × EUR 1,351 × 1,7), plus EUR 28 107,6 for the annexes (100 % of 35 sqm × EUR 472,4), from the total price of EUR 200 459,5 at which BIZKAILUR would have sold the home under the semi-protected regime (as *viviendas tasadas*).

(27) According to Article A(g) of the Houses Contract, on an exceptional basis, part of the 1 500 homes contracted from Habidite could have been sold by the Diputación or BIZKAILUR at market price, in which case Habidite would have obtained the same percentages of the sale price as stipulated at Article A(e) – as indicated in recital (24).

(28) The Diputación and BIZKAILUR did not carry out a public tender before concluding the Houses Contract with Habidite.

Suspension of the Habidite project

(29) The Habidite project was eventually *de facto* abandoned. According to the Diputación, the main reason was that BIZKAILUR would have incurred higher-than-initially-estimated costs for the purchase and adaptation to industrial use of the land plot where the Habidite factory would have been set.

(30) The Diputación had informed⁽¹⁵⁾ that from May 2007 until April 2008 BIZKAILUR had bought 205 487,73 sqm of land for this project, for which it had paid a total of EUR 4,7 million. According to the Diputación, the purchase of an additional 95 000 sqm was necessary, for which an additional cost of EUR 2,6 million was estimated. As to the costs for adapting the land for industrial use, in March 2009 they were estimated to be EUR 28,5 million.

⁽¹⁵⁾ Based on information submitted by the Diputación on 23 September 2009, prior to the opening of the formal investigation.

- (31) The ownership of the land already acquired by BIZKAILUR in view of this project has not been transferred to Habidite.

III. THE OPENING DECISION

- (32) In the opening Decision of 2 December 2009 ⁽¹⁶⁾, the Commission considered that both the Land Contract and the Houses Contract seemed to involve state aid within the meaning of Article 107(1) of the Treaty. Also, the aid did not appear to be compatible with the Treaty under any of the relevant state aid rules.

Existence of aid

- (33) In relation to the Land Contract, the Commission preliminarily concluded that the terms for the repayment of by the beneficiary of the land purchase and adaptation were similar to an interest-free loan, thus conferring to Habidite an advantage that it would not have been able to obtain on the market.

- (34) In relation to the Houses Contract, the opening Decision noted that the price to be paid by BIZKAILUR for the 1 500 houses did not seem to be market-conform, as the beneficiary had estimated in its own business plan that the average price to be obtained from BIZKAILUR would have been of EUR 2 012,19/sqm, whereas the average price estimated to be obtained on the market would have been EUR 1 762,6/sqm.

- (35) The Commission also noted a series of indications of an advantage to Habidite in the light of the judgment of the Court in *P&O Ferries* ⁽¹⁷⁾: a) the Houses Contract had not been concluded through public tender; b) the need for providing social housing was neither claimed nor demonstrated by the Diputación Foral de Bizkaia and BIZKAILUR; and c) the Houses Contract allowed for the possibility that part of the 1 500 homes purchased from Habidite be sold on the market. It also noted that that the purchase of a large part of the new factory's production in the first years of its functioning reduced the risks that are normally associated with a new investment project. Concerning the criterion of use of state resources and imputability to the State, the Decision pointed out in relation to potential aid involved in both contracts that BIZKAILUR is a company fully owned and controlled by the public authorities which performs tasks attributed by the State. With respect to selectivity, it was noted that the contracts clearly benefitted exclusively to Habidite and the AFER group. On distortion of competition and affectation of

intra-Union trade, it was underlined that Habidite operates in the construction sector, where competition is very intense, and where aid to one company might harm companies from other Member States.

Compatibility

- (36) In the opening Decision expressed doubts as regards the compatibility of the aid potentially involved in the notified contracts with the Treaty under the compatibility criteria laid down in the *Commission Guidelines on National Regional Aid for 2007-2013* ⁽¹⁸⁾, the *Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty* ⁽¹⁹⁾, and the *Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis* ⁽²⁰⁾.

IV. COMMENTS RECEIVED FROM THE SPANISH AUTHORITIES

- (37) The Spanish authorities did not comment on the opening Decision (see recital 6 above), but provided additional information in answer to requests addressed by the Commission following the opening Decision, and also replied to some of the arguments put forward by Habidite. These replies and additional information are summarised in recitals (48) to (54).

V. COMMENTS RECEIVED FROM THIRD PARTIES

- (38) As indicated in recitals (3) and (6), Habidite commented on the opening Decision on 9 April 2010, and provided additional information and comments on 27 July 2010, 6 April 2011 and 7 July 2011. With these submissions, Habidite on the one hand informed of relevant factual elements which were not known to the Commission at the time of the opening Decision, and on the other hand, brought forward arguments to contest the existence of aid in the notified contracts. These arguments and the additional factual information presented by Habidite are summarised recitals (39) to (47).

Factual elements

- (39) First, Habidite informed that a third contract was concluded on the same date with the Land and Houses Contracts (15 December 2006). With this third contract (hereinafter "the Training Aid Contract") the Diputación engaged to provide to Habidite training aid for the 1 100 new hires at the Habidite factory. In particular, the Diputación committed to cover training expenses for the

⁽¹⁶⁾ See footnote 2.

⁽¹⁷⁾ See Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Bizkaia) and Diputación Foral de Bizkaia v. Commission* [2003] ECR II-2957.

⁽¹⁸⁾ OJ C 54, 4.3.2006, p. 13.

⁽¹⁹⁾ OJ L 214, 9.8.2008, p. 3.

⁽²⁰⁾ OJ C 83 of 7.4.2009, p. 1.

1 100 employees, while Habidite committed on its side to preserve the 1 100 new jobs for at least 5 years. This contract was also *de facto* suspended due to the failure of the Habidite project (see recitals (29) to (31)).

- (40) Second, Habidite provided documentation showing that the Habidite project was granted, by Decision of the *Gobierno Vasco* (the Basque government) of 30 December 2008, a regional aid totalling EUR 6 million, in application of the block-exempted regional aid scheme XR 175/2007 ⁽²¹⁾.
- (41) Third, Habidite informed that, following the suspension of the Habidite project, it filed, by letters of 6 February 2009 and 17 September 2009, administrative complaints for non-compliance by the *Diputación* and *BIZKAILUR* with the obligations assumed under the three contracts. Habidite also informed that it intended to pursue its claims before the competent Spanish court.

Existence of aid and compatibility

- (42) Habidite argues that the Land and Houses Contracts do not fulfil the cumulative criteria for being qualified as involving state aid within the meaning of Article 107(1) of the Treaty.
- (43) In respect of the elements of the notion of state aid other than the advantage element Habidite has presented the following arguments, common to both notified contracts:
- (a) The two contracts do not involve a transfer of state resources because, to the extent that they involve market-conform operations, they do not involve a loss of public resources (according to the judgment of the Court in *PreussenElektra* ⁽²²⁾).
- (b) The selectivity criterion should not be assumed to be met by the Houses Contract only because the contract was not concluded following public tender. Under the *Real Decreto Legislativo* No. 781/1986 de 18 de abril, por el que se aprueba el texto refundido de las disposiciones legales vigentes en materia de Régimen Local ⁽²³⁾ and Article 31 of Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on public procurement ⁽²⁴⁾, such contracts can also be concluded directly, i.e. without public tender, when justified by the technical nature of the project or for protecting exclusivity rights.

- (c) The unique nature of the Habidite prefabricated modules, in terms of the product characteristics and assembly technology, exclude the possibility of distortion of competition or affectation of trade between the Member States. In cases N-09084 *Ristretto Group/Williams Scottsman* and N-04059 *TDR Capital/Agelco* the Spanish competition authority defined the relevant market as “production, sale and rental of modular houses”. According to this definition, the uniqueness of the Habidite modules implies that it does not have any direct competitors who might be harmed by the two contracts. Moreover, in the Commission’s Decision in case M2473 *Finnforest/Moelven Industrier* ⁽²⁵⁾ it was established that the market for modular buildings is local or regional, because transport costs exclude the feasibility of competition from larger distances. The Habidite prices were at any rate very competitive, given the technological characteristics of the product.

- (44) Habidite also put forward specific detailed arguments to contest that any of the two notified contracts would have conferred on it an advantage.

- (45) In respect of the Houses Contract, Habidite argues in essence that it could not have derived any advantage because the stipulated sales prices were not above, but actually below market levels. In particular:

- (a) The prices to be obtained by Habidite under the Houses Contract were by definition under market levels, considering that the houses would have been sold by *BIZKAILUR* at the regulated, below-market, levels of price established by law for houses to be sold under the semi-protected regime (*viviendas tasadas*) – see recitals (14) to (19).
- (b) The average price to be obtained by *BIZKAILUR* for the homes constructed by Habidite, of EUR 2 010,19/sqm, was comparable to the average prices that *BIZKAILUR* was paying at the time under similar contracts for the construction of homes to be sold under the protected and semi-protected regime. For example, according to Habidite, in 2007 *BIZKAILUR* paid for the construction of social houses in Lemoiz EUR 2 277/sqm, in Zierbana EUR 1 964/sqm, and in Areatza EUR 2 021/sqm. In 2007, the average price of houses sold as *viviendas tasadas* in four municipalities of Bizkaia was of EUR 1 808,69 EUR/sqm for houses of 84 sqm ⁽²⁶⁾.

⁽²¹⁾ Published in the Official Bulletin of the Basque Country No. 194 of 8.10.2007.

⁽²²⁾ Case C 379/1998 *PreussenElektra* [2001] ECR I-2099.

⁽²³⁾ B.O.E. 96 of 22.04.1986.

⁽²⁴⁾ OJ L 134, 30.4.2004, p. 114.

⁽²⁵⁾ OJ C 239, 25.3.2001, p. 9.

⁽²⁶⁾ See www.behargintza.net/home2/Bizkaiaimedia/Contenido_Noticia.asp?TNo_Codigo=0&Not-Codigo=1196&Tem_Codigo=7&Texto=plan%foral%20vivienda.

- (c) At any rate, Habidite would have obtained only 83 %, and respectively 83,30 % of this average price of EUR 2 010,19/sqm (for houses of less than 75 sqm) on the basis of the Houses Contract – see recitals (24) to (25). In this respect, the opening Decision had erroneously noted that EUR 2 010,19/sqm was the price to be obtained by Habidite itself under this contract.
- (d) The average price to be obtained by BIZKAILUR for the homes constructed by Habidite was well below price levels for equivalent housing sold freely on the market in the province. In 2007 the average price on the market in the province of Bizkaia was of EUR 2 921,9/sqm ⁽²⁷⁾.
- (46) In relation to the Land Contract, Habidite argues that it would not have derived any advantage because, according to its understanding, it would have had to repay to BIZKAILUR not only the actual costs incurred for the purchase and adaptation of the land, as stipulated in the contract, but also the financing costs incurred in relation to this operation.
- (47) Furthermore, Habidite contests the costs estimated by the Diputación for the purchase and adaptation of the land. According to the Land Contract, BIZKAILUR had to purchase only 101 403 sqm for this project, and not 205 000 sqm, as the Diputación indicated. Furthermore, the costs for adapting 254 785 sqm of land to industrial use, which the Diputación claims to be of EUR 28,5 million, were erroneous. These costs seemed to correspond rather to costs that were incurred by the Diputación for a different project, namely the construction of the Kadagua highway, segment Kastrexana Arbuio-Sodupe. Habidite also argues that the land purchased for the Habidite project has been used illegally for depositing waste, as established also by a national court ruling (judgment no 148/2010 of 1 September 2010 of the first instance court of Barakaldo.
- (48) In reply to the Commission's questions, the Diputación confirmed that the Habidite project was suspended and
- the contractual obligations assumed vis-à-vis Habidite under the Land and Houses Contracts had not been performed.
- (49) With respect to the Training Aid Contract (see recital (39) above), the Diputación draws attention to the fact that its commitment to provide training aid for the 1 100 employees of the Habidite factory was, according to Art.10 of the contract, conditional upon compliance with the relevant legislation, including therefore implicitly an eventual notification to the Commission or clearance under the applicable state aid rules. The Diputación confirms that the training aid in question was not disbursed.
- (50) When inquired about the relationship between the notified contracts and the regional aid granted in 2008 by the Basque government, and whether both sets of measures concern the same investment project, the Diputación does not exclude that the investment project might be the same one, but draws attention to the fact that this does not necessarily mean that the eligible investment costs taken into account in 2008 by the regional government for the EUR 6 million aid are the same eligible costs of the project as it stood in 2006, when the notified contracts were signed. On this subject, the Diputación refers to the information provided by the Basque government and by Habidite.
- (51) On the issue of the repayment due by Habidite under the Land Contract, and in particular, on Habidite's argument that it interpreted its repayment obligations to include the financing costs related to the land purchase and adaptation, the Diputación points to the actual wording in the Land Contract. Article 1(vi) of the Land contract reads as follows: "The price to be paid by [Habidite] is equivalent to the effective cost assumed by BIZKAILUR S.A. [...] for the purchase of the land described at [...]" (emphasis added).
- (52) Finally, according to the information available to the Diputación, Habidite and the AFER group as such did not qualify as firms in difficulty within the meaning of Points 9, 10 and 11 of the R&R Guidelines at the time when the two notified contracts were concluded.
- (53) In its turn, the Basque government provided information on the regional aid of EUR 6 million granted to Habidite on 30 December 2008, including the eligible expenditure

VI. ADDITIONAL INFORMATION AND REPLIES TO HABIDITE'S COMMENTS RECEIVED FROM THE SPANISH AUTHORITIES

⁽²⁷⁾ Information obtained by Habidite from the data published by the *Ministerio de Fomento* (Spanish Ministry of Development), available at www.fomento.gob.es/BE2/sedal/35101000.XLS.

that was taken into account for the granting of this aid. The categories of eligible expenditures are detailed in the Table below:

Total investment (EUR million)	90,42
R&D expenses	13,71
Eligible expenses , of which:	76,71
IT	2,85
Land	5,5
Buildings	34,76
Technical equipment	19,14
Machinery	11,94
Other installations	0,737
IT equipment	0,965
Excess land and buildings	3,9
Total eligible expenses	72,8
Aid granted	6

- (54) This aid has not been disbursed. Pursuant to Point 65 of the *Community Guidelines on National Regional Aid 2007-2013* ⁽²⁸⁾, the Spanish authorities submitted to the Commission on 19 February 2009 the information sheet for aid granted to non-notifiable large investment projects under an authorised regional aid scheme ⁽²⁹⁾.

VII. ASSESSMENT

Measures not covered by this Decision

- (55) This Decision does not address (a) the Training Aid Contract concluded by the Diputación and Habidite on 15 December 2006 and (b) the regional aid of EUR 6 million granted to the Habidite group by the Basque government on 30 December 2008, for the reasons explained below.
- (56) With respect to the Training Aid Contract concluded by the Diputación and Habidite on the same date as the notified contracts (see recitals (39) and (49)), the Commission notes that this measure has not been notified by the Spanish authorities, and was not covered by the opening Decision. According to an established

practice ⁽³⁰⁾, state aid is considered to be granted at the moment when there is a legally-binding, non-conditional commitment for its disbursement. Article 10 in the Training Aid Contract (see recital (49)) makes the commitment to disburse the training aid conditional upon compliance with the relevant legislation, including Union's state aid rules. It follows that the commitment to disburse training aid stipulated by this contract cannot be qualified as being non-conditional at the moment of conclusion of the contract. Furthermore, the Spanish authorities confirmed that the training aid foreseen by this contract has not been disbursed. At any rate, as the Habidite project in Alonsotegi did not materialise, this aid is unlikely to be disbursed in the future.

- (57) This Decision does not address either the regional aid of EUR 6 million granted by the Basque government to Habidite on 30 December 2008 (see recitals (40) and (50)). However, it should be pointed out that the two notified contracts covered by this Decision as well as the regional aid granted in 2008 all refer to the same investment project, i.e. the setup of a Habidite modules factory in Alonsotegi. This assertion was not specifically contested by the Basque government or the Diputación (see in this sense recital (50)).
- (58) Pursuant to Point 66 of the *Community Guidelines on National Regional Aid 2007-2013* ⁽³¹⁾, the Spanish authorities must ensure compliance with the provisions on cumulation of aid applicable to the 2008 regional aid grant.
- (59) In addition, it must be recalled that, according to information provided by the Diputación (see recital (30)), the purchase of the land necessary for this investment project has started in May 2007, and several plots of land were successively purchased to this end until April 2008. Therefore the project has already started to be implemented in May 2007. Pursuant to Point 38 of the *Community Guidelines on National Regional Aid 2007-2013* ⁽³²⁾, in order to ensure that regional aid produces an incentive effect on the investment, aid may only be granted under aid schemes if the beneficiary has submitted an application for aid and the competent authorities have subsequently confirmed in writing, before the start of the work on the project, that it meets in principle the conditions of eligibility laid down in the scheme.

Applicable law

- (60) Prior to assessing existence of aid and its compatibility with the Treaty the Commission must determine the applicable state aid rules *rationae temporis*.

⁽²⁸⁾ OJ C 54, 4.3.2006, p. 13.

⁽²⁹⁾ Case MF 12/2009 Habidite - Spain, pending at the date of the current Decision.

⁽³⁰⁾ See for example Commission Decision on State aid C 19/2006 *Javor Pivka Lesna Industrija d.d.*, OJ L 29, 2.2.2008, p. 16.

⁽³¹⁾ See footnote 18.

⁽³²⁾ See footnote 18.

(61) The Land and Houses Contracts were signed on 15 December 2006, but they were notified to the Commission for review only in April 2009. As already indicated in recital (56) above, according to an established practice⁽³³⁾, state aid is considered to be granted at the moment when there is a legally-binding, non-conditional commitment for its disbursement. In the case of the two notified contracts, such a legally-binding, non-conditional commitment was taken on 15 December 2006, when the Diputación and BIZKAILUR signed the two notified contracts. Therefore any aid involved in the two contracts is unlawful, since it was granted in breach of the notification obligation stipulated at Article 108(3) of the Treaty.

(62) According to the *CELFI/SIDE* jurisprudence⁽³⁴⁾, any posterior notification or declaration of compatibility does not remove the unlawful character of aid granted in breach of the notification or stand-still obligation. As indicated in the *Commission notice on the determination of the applicable rules for the assessment of unlawful State aid*⁽³⁵⁾, the rules applicable to unlawful aid are those that were in force at the moment when the aid was granted – in the present case, on 15 December 2006. These principles are also confirmed by Points 63 and 105 of the *Community Guidelines on National Regional Aid 2007-2013*⁽³⁶⁾. The Commission shall therefore rely on the state aid rules in force on 15 December 2006, when the two notified contracts were signed, for assessing both existence of aid and compatibility.

VII.1. Existence of aid

(63) In order to ascertain whether the measures under scrutiny involve State aid, the Commission has to assess whether they fulfil the cumulative conditions of Article 107(1) of the Treaty. That provision states that "[s]ave as otherwise provided in the Treaties, any aid granted by 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, in so far as it affects trade between Member States, be incompatible with the internal market". These cumulative criteria shall be examined in turn for each of the two notified contracts below.

VII.1.1 Measure 1: Land Contract

Use of state resources and State imputability

(64) One of the criteria for determining whether a given measure involves state aid within the meaning of

Article 107(1) of the Treaty is that State resources should be put at use, be it through disbursement of state resources or as revenue forgone by the State. Furthermore, according to an established jurisprudence⁽³⁷⁾, the resources of public or private undertakings on which the public authorities can exercise, be it directly or indirectly, a controlling influence, also qualify as State resources, to the extent that these resources remain under public control and therefore available to the competent public authorities. On this aspect, the Commission notes the following in recitals (65) and (66).

(65) First, the Land Contract was concluded by the Diputación and BIZKAILUR together. The contract contains several clear indications that, within the framework of this contract, BIZKAILUR was acting as 'the arm' of the Diputación. The Land Contract was signed, on behalf of the Diputación and BIZKAILUR, by the *Diputado General* (Chairman) of the Diputación. Point 2 of the Preamble to the Land Contract stipulates that the Diputación, as 100 % owner of BIZKAILUR, pursues, among its public policy objectives, the promotion of new and innovative investment projects, job creation, and the facilitation of access to social housing for the citizens of the province of Bizkaia. Point 5 of the Preamble to the Land Contract stipulates that the contract is concluded in order to pursue, either directly or through public companies such as BIZKAILUR, the achievement of the economic and social policy objectives mentioned at Point 2 of the Preamble.

(66) Second, the resources to be deployed by BIZKAILUR for performing its obligations to purchase and adapt to industrial use the land for the setup of the Habidite factory in Alonsotegi were under the control of the Diputación. As of 1999 onwards BIZKAILUR had been 100 % owned and controlled by the Diputación⁽³⁸⁾. The following "organic" and "structural" indicators established by the *Stardust Marine* jurisprudence⁽³⁹⁾ for determining whether BIZKAILUR's actions within the ambit of the Land Contract were imputable to the State are met:

(a) the scope of BIZKAILUR's actions within the framework of the Land Contract were defined by the Diputación;

(b) for the purposes of this contract, BIZKAILUR was explicitly acting on behalf of the Diputación;

⁽³³⁾ See for example Commission Decision on State aid C 19/2006 *Javor Pivka Lesna Industrija d.d.*, OJ L 29, 2.2.2008, p. 16.

⁽³⁴⁾ Case C-199/06 *CELFI/SIDE* [2008] ECR I-469.

⁽³⁵⁾ OJ C 119, 22.5.2002, p. 22.

⁽³⁶⁾ See footnote 18.

⁽³⁷⁾ See e.g. Case C-278/00 *Greece v. Commission* [2004] ECR I-3997 para. 50, C-482/99 *France v. Commission* [2002] ECR I-4397 and Joined Cases C-328/99 and C-399/00 *Italy v. Commission (SIM 2 Multimedia)* [2003] ECR I-4035, para. 33.

⁽³⁸⁾ See http://www.azpiegiturak.bizkaia.net/index.php?option=com_content&task=view&id=397&Itemid=492

⁽³⁹⁾ Case C-482/99 *France v. Commission* [2002] ECR I-4397.

(c) the specific nature of BIZKAILUR's activities, which were targeted exclusively at attaining public policy objectives, show that this undertaking was not a regular market operator competing on market terms.

(67) In the light of the indicators in recitals (65) and (66), the criterion of use of State resources and imputability to the State is found to be met in the case of the Land Contract.

Selective advantage

(68) The Commission examined the terms and conditions for the repayment of the land to be facilitated by the Diputación and BIZKAILUR for the Habidite project in Alonsotegi, as established in Part Two, Article 1, recitals (vi) and (vii) of the Land Contract (see also recital (20) above), and on this basis observes the following in recitals (69) to (83).

(69) Under Part Two, Article 1(vi) of the Land Contract, the price to be paid by Habidite for the land purchased and adapted for industrial use by BIZKAILUR was the "effective cost assumed by BIZKAILUR [...] for the purchase of the land [...]". Habidite argued (see recital (46)) that, in its interpretation, this would have also included financing costs. Yet such an interpretation cannot be accepted. The reference to the "effective costs incurred for the purchase of the land" is sufficiently clear so as not to require further interpretation: it covers only the price effectively paid by BIZKAILUR for purchasing the land.

(70) It must therefore be concluded that, first, this wording clearly excludes the effective costs incurred by BIZKAILUR for adapting the land to industrial use.

(71) Second, the repayment facilities stipulated in Part Two, Article 1(vii) of the Land Contract, i.e. four years of "grace period", fractioning of the successive four yearly repayment instalments as 25 % of the price effectively paid by BIZKAILUR for the land purchase, are in practice equivalent to an interest-free loan. The wording of Article 1(vii) of the Land Contract cannot be interpreted to also include the financing costs for an equivalent loan, i.e. the interests that would have been charged to Habidite for a similar loan by a market creditor. Indeed, it is doubtful that a private operator in a situation similar to BIZKAILUR would have accepted not to charge to Habidite the costs for the adaptation of the land, and furthermore, that it would have agreed to a "grace period" of 4 years for the repayment of the price paid for the land purchase, and

a full repayment within 7 years from the date of transfer of ownership over the land to Habidite, without charging any interest for this financing.

(72) In the light of the findings in recitals (69) to (71) it must be concluded that Habidite would have derived from the Land Contract an advantage that could not have been obtained in normal market conditions. The advantage consists of the following two components:

(a) the interests forgone for a loan amounting to the total costs incurred by BIZKAILUR for the purchase of the land according to this contract - a loan with a duration of 7 years, a grace period of 4 years and 4 equal annual repayment instalments (of 25 % of the reimbursed sum each); and

(b) the costs that BIZKAILUR would have incurred for the adaptation to industrial use of the parcel of land totalling at least 101 403 sqm necessary for this project, as stipulated in Article 1(ii) of the Land Contract (i.e. at least 81 600 sqm for the factory, 5 300 sqm for offices and annexes, and 14 300 sqm for industrial use).

(73) With respect to the first component, i.e. the interests forgone in respect of the repayment of the price for the land purchase, the Commission estimates that those would have amounted to a net grant equivalent (NGE) of 13,21 % of the price paid for the land purchase by BIZKAILUR. This NGE was calculated as indicated in recitals (74) to (77).

(74) In a first step, the interest rate applicable to a similar loan was identified on the basis of the reference rate applicable in Spain in December 2006, of 4,36 %, as reported in the *Commission's Reference Rate Communication* ⁽⁴⁰⁾.

(75) In a second step, based on the *Commission notice on the method for setting the reference and discount rates of 1997* ⁽⁴¹⁾ (hereinafter "the 1997 Commission Notice" - which was in force at the time when the Land Contract was concluded) no top-up needs to be added to this reference rate so as to reflect the credit risk profile of Habidite. Under the 1997 Commission Notice, reference rates were considered to reflect the average level of interest rates charged in the various Member States on medium- and long-term loans (five to ten years) backed

⁽⁴⁰⁾ http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html.

⁽⁴¹⁾ OJ C 273, 9.9.1997, p. 3.

by normal security. This general principle was not specifically modified by the *Commission Regulation (EC) No 794/2004* ⁽⁴²⁾. In the absence of direct information on the credit risk rating of Habidite or the AFER group at the time, the Commission considers that it can be assumed that Habidite qualified at the time as a normal company with normal collateralisation. Indeed, both the Diputación and Habidite agreed in considering that Habidite and the AFER group did not qualify as firms in difficulty within the meaning of Points 9, 10 and 11 of the R&R Guidelines at the time (see recital (52) above).

(76) In a third step, the gross grant equivalent of the aid involved in this repayment arrangement was adjusted to take into account the corporate tax that should have been paid by the recipient, which at the time in Spain was of 35 %.

(77) Based on the elements in recitals (74) to (76), the resulting NGE for this subsidised loan is indicated in the Table below:

Loan amount	100 %
Duration of loan	7 years
Grace period for repayment	4 years
Reference rate	4,36 %
Margin/top-up	0
Total interest rate applicable	4,36 %
Gross grant equivalent of the aid	20,33 %
Corporate tax	35 %
Net grant equivalent (after tax)	13,21 %

(78) The Commission also notes that the effective cost for the acquisition of the land for this project, which is the basis

on which NGE should be applied in order to determine the aid amount, is disputed between the parties. As indicated at recital (30) above, the Diputación claims that until September 2009 BIZKAILUR had paid EUR 4,7 million to purchase 205 000 sqm of land, and it estimated that another EUR 2,6 million would have been needed to purchase the remaining 95 000 sqm necessary for this project. Habidite, on the other hand, claims that BIZKAILUR did not have to purchase such a large surface for this project, as the Land Contract stipulated a total of only 101 403 sqm (see recital (47) above).

(79) In relation to this dispute, the Commission notes first that, according to the specific wording of Article 1(ii) of the Land Contract, the surface for the project should have been of “at least” 101 403 sqm in total. Second, the Commission cannot take an informed view on this subject based on the information provided by the parties in the course of the formal investigation procedure. However, as the aid in the Land Contract has not been disbursed, and there is no need to order recovery, the issue of the exact price that should have been reimbursed by Habidite for the land purchase can be left open. For the purposes of this Decision it is sufficient to define the aid element arising from the repayment terms established in the Land Contract.

(80) This aid component is thereby defined as 13,21 % of the costs to be reimbursed to BIZKAILUR for the purchase of the land necessary for the Habidite project, under the terms of Part Two, Article 1(ii) of the Land Contract. The amount thus determined corresponds to the interests forgone by BIZKAILUR, and which would have been charged by a market operator, for a loan with a duration of 7 years, a grace period of 4 years, and for 4 equal annual repayment instalments (of 25 % of the reimbursed sum each). The basis for calculating this aid component is the effective cost that should have been incurred by BIZKAILUR for the purchase of the land stipulated in Part Two, Article 1(ii) of the Land Contract.

(81) Similar considerations must be made in respect to the other aid component in the Land Contract, i.e. the costs for adapting the land for industrial use – which, according to the Land Contract did not have to be repaid to BIZKAILUR (see in this sense recitals (69) and (70)). Here again, the parties disagree on the amounts. According to the Diputación, in March 2009 these costs were estimated at EUR 28,5 million (see recital (30)). Habidite, however, considers that this estimate is inflated (see recital (47)), partly because BIZKAILUR purchased more land than what was required under the Land Contract for this project, and partly because it has used the part of the land already purchased for the project for other purposes, e.g. waste deposits.

⁽⁴²⁾ *Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty* (OJ L 140, 30.4.2004, p. 1). Indeed, the methodology for calculating reference and recovery rates was modified only in 2008, by introducing the top-ups/margins to be added to the reference rate so as to reflect the beneficiary's risk profile and level of collateralisation – see Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14 of 19.1.2008, p. 6).

- (82) Once again, considering that the aid has not been disbursed, and there is no need for recovery, it is sufficient for the purposes of this Decision to define this aid component in the Land Contract: it consists of the total costs that would have been incurred by BIZKAILUR for adapting to industrial use the parcel for the project – under the terms of Part Two, Article 1(iii) of the Land Contract-, costs which, according to the wording of Part Two, Article 1(vi) of the Land Contract, did not have to be reimbursed by Habidite to BIZKAILUR.
- (83) The Commission also concludes that the advantage identified at recitals (68) to (77), consisting of two components, as identified at recitals (80) and (82), must be considered selective, insofar as it would have been conferred, on the basis of the Land Contract, to one specific beneficiary, namely Habidite and the AFER group to which it belongs.

Distortion of competition

- (84) As indicated in recital (43), Habidite argues that the notified contracts do not distort competition, because: (a) the relevant market is restricted to “production, sale and rental of prefabricated modules”, and (b) the unique characteristics of the Habidite prefabricated modules imply that the company has no competitors.
- (85) The Commission cannot accept the arguments put forward by Habidite. Even if the Habidite prefabricated modules could be considered a singular product because of their characteristics, in the present case, the relevant product market must be defined in a broader sense, as being the market for the construction and sale of houses in general – including both houses sold on the free market, and houses sold on the regulated segment of the market (social housing).
- (86) As Habidite itself argues, the prices of the houses to be sold to BIZKAILUR can be benchmarked against the prices of houses sold on the free market, or of those eventually sold in protected or semi-protected regime. The fact that BIZKAILUR also contracted with constructors other than Habidite other houses to be sold under the semi-protected regime, demonstrates that other constructors were at the time indeed in competition with Habidite for providing to BIZKAILUR houses to be sold in protected and semi-protected regime.
- (87) Furthermore, in the Business Plan submitted to the Basque government in support of its application for the 2008 regional aid (dated November 2008, at pp. 10-12), Habidite indicated itself that it would have been in

competition with constructors of traditional houses on several Spanish regional markets on which it intended to sell its products (including in particular the Basque Country, Navarra, Cantabria, La Rioja, Madrid and Catalonia, but also other Spanish *comunidades autónomas* to a lesser extent). It estimated its overall resulting market share on the Spanish market (free market plus social housing projects) to increase from 0,4 % in 2011 to 1 % for the period 2012-2016. For the year 2011, for example, Habidite estimated that the total number of houses to be sold on the entire Spanish market would have been of approximately 320 000 houses, of which, with a production of 1 403 houses in 2011, it would have covered a market share of 0,4 %. Regarding the market in the Basque Country in particular, Habidite estimated a market share of 0,5 % in 2011 and up to 2,8 % as of 2014 onwards, assuming that the total yearly demand for housing in this region would have been of 8 000 houses for the period 2011-2016.

- (88) According to an established jurisprudence, aid is to be considered as distorting competition insofar as it strengthens the financial position and opportunities of the recipient company with respect to those of competitors not receiving aid⁽⁴³⁾. In the light of this principle and the above considerations, it must be concluded that the aid given to Habidite and the AFER group through the Land Contract would have had distortive effects on competition, because it would have allowed Habidite to reduce investment costs that normally are borne by the company itself, and thereby to derive a competitive edge vis-à-vis actual and potential competitors.

Affectation of intra-EU trade

- (89) Similar to the discussion in recitals (84) to (87), the argument made by Habidite that the relevant geographic market is only local or regional when it comes to prefabricated houses in particular, because of the costs associated with the transportation of the prefabricates, cannot be accepted. Due to the geographic vicinity of the Basque Country to other Member States and its closeness to the sea, the additional transportation costs would probably not be decisive for eliminating potential competitors of Habidite in this *comunidad autónoma*. Conversely, transportation costs might not represent an obstacle for Habidite to compete for the construction of homes in close Member States.
- (90) According to the same line of jurisprudence as cited in recital (88), when state aid strengthens the financial position of a company compared with others competing in intra-Union trade, the latter must be

⁽⁴³⁾ See e.g. Case 730/79 *Phillip Morris Holland v. Commission* [1980] ECR 2671, para. 11 and Case C-259/85 *France v. Commission* [1987] ECR 4393, para. 24.

regarded as impaired by the aid. Aid may be of such kind as to affect intra-Union trade even if the recipient undertaking does not participate itself in cross-border activities ⁽⁴⁴⁾.

- (91) On the basis of the considerations at recitals (89) and (90), the Commission concludes that the aid involved in the Land Contract would have been likely to affect trade between the Member States.

VII.1.2 Measure 2: Houses Contract

- (92) The considerations made at recitals (64) to (67), (84) to (88) and (89) to (90) on the criteria of use of State resources and imputability of the State, distortion of competition and affectation of intra-Union trade in the definition of state aid are also applicable, *mutatis mutandis*, to the Houses Contract. Consequently, in recitals (93) to (96), only the criterion of selective advantage shall be examined.

Selective advantage

- (93) As explained in recital (45), Habidite argues that the Houses Contract did not convey to it any advantage, because, in essence, the prices to be paid by BIZKAILUR for the 1 500 homes to be constructed by Habidite under this contract were actually below market levels.
- (94) In particular, Habidite first argues that the 1 500 houses which were to be delivered by Habidite under this contract would have been sold by BIZKAILUR under the semi-protected regime (as *viviendas tasadas*), at a maximum price limited by the applicable regional law to 1,7 of the price established by the Basque government's Order of 1.8.2004, as successively indexed on the basis of the Consumption Price Index (IPC) determined by the Spanish National Institute of Statistics (see in this sense recitals (17) and (18)). The average price to be thus obtained by BIZKAILUR for the 1 500 houses was of EUR 2 010,19/sqm, which is below the average price for houses sold freely on the market in the province of Bizkaia in 2007, of EUR 2 921,9/sqm. Furthermore, Habidite would have obtained only 83 %, and respectively 83,30 % (in the case of the 750 houses under 75 sqm) of the EUR 2 010,19/sqm which were obtained by BIZKAILUR itself from the sale of these houses under the semi-protected regime.

- (95) Second, Habidite argues that the price that it would have obtained from BIZKAILUR under the Houses Contract for the 1 500 houses was comparable to the prices obtained by other construction companies which had concluded similar contracts with BIZKAILUR in that period (examples are indicated in recital (45)).

- (96) Finally, Habidite also argued that, under Legislative Decree 78/1986 and Article 31 of Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on public procurement ⁽⁴⁵⁾, such contracts can also be concluded directly, i.e. without public tender, when justified by the technical nature of the project or for protecting exclusivity rights.

- (97) Having assessed the information and arguments provided by Habidite, the Commission has the following observations to make in recitals (98) to (107).

- (98) First, it should be noted that the information concerning average prices obtained by other construction companies which had concluded similar contracts with BIZKAILUR relies exclusively on press publications. The Commission did not receive direct information on this aspect from the Diputación – for example, in the form of copies of similar contracts concluded by BIZKAILUR with other construction companies. At any rate, the price estimates provided by both Habidite and the Diputación refer to the years 2006 and 2007, whereas, according to Article A(c) in the Houses Contract and to the Business Plan of Habidite as made publicly-available in 2009, the 1 500 houses would have been delivered to BIZKAILUR over the period 2009-2011.

- (99) Even if it were to be accepted that the prices to be obtained by Habidite from BIZKAILUR for the 1 500 houses on the basis of this contract were comparable with those obtained by other construction companies from BIZKAILUR on the basis of similar contracts, and were at any rate under the prices observable on the free market for such houses, this argument is not sufficient to enable the Commission to conclude that Habidite did not derive an advantage from this contract. As also noted in the opening Decision ⁽⁴⁶⁾, the advantage derived by Habidite from this contract consists mainly in the fact that the contract secured the sale of an important part of its initial production, thus considerably reducing the risks inherently associated with a new investment project, which are by definition even higher at the launch of a new product, such as the Habidite modules were.

⁽⁴⁴⁾ See, e.g., Case C 102/87 *France v Commission (SEB)* [1988] ECR-4067, and Case C-310/99 *Italian Republic v. Commission* [2002] ECR I-289, at para. 85.

⁽⁴⁵⁾ OJ L 134, 30.4.2004, p. 114.

⁽⁴⁶⁾ See recital 32 of the opening Decision.

- (100) It is commonly known that competition on the Spanish construction market was at the time, and continues to be, very intense. The fact that BIZKAILUR contracted 1 500 homes from Habidite should confer from this perspective a not-so-negligible advantage to Habidite vis-à-vis its competitors, even if only demand for the construction of houses to be sold under the protected and semi-protected regime were to be considered.
- (101) The fact that, as the Diputación informs, according to the Plan Foral (see recital (19)) BIZKAILUR was supposed to provide a total of 3 000 houses to be sold under the protected regime over the period 2004-2007, is a good indication that the number of houses contracted from Habidite was not negligible at all. It is true that the Plan Foral covers the period 2004 to 2007, whereas the 1 500 homes contracted with BIZKAILUR by Habidite were foreseen to be delivered over the period 2009 to 2011 (according to the company's Business Plan in the version made public in 2009). It is nevertheless an indication of the total number of houses that BIZKAILUR was intending to sell under the protected regime at the time when the Houses Contract was concluded.
- (102) This element needs to be assessed in light of the ratio of houses contracted by the Diputación and BIZKAILUR from the estimated total output of Habidite for the relevant period. According to the Business Plan made public in 2009, Habidite estimated that in 2009 its entire production of 433 houses would have been purchased exclusively by BIZKAILUR. In 2010, BIZKAILUR would have purchased 670 houses, whereas the total production of Habidite would have been of 1 113 houses. In 2011, BIZKAILUR would have purchased 342 houses, whereas the total production of Habidite would have been of 3 151 houses. This is an indication that, at the time when the Houses Contract was concluded, Habidite itself estimated that the Diputación and BIZKAILUR would have purchased a notable part of the production during the first 2 productive years of the Habidite factory in Alonsotegi (2009 and 2010). This supports the conclusion that, indeed, the Houses Contract considerably reduced the risks inherently associated with a new investment project, and particular with the launch of a new product on the market (the Habidite modules).
- (103) A further indication that Habidite would have been alleviated through this contract of a considerable part of the risk associated with selling its product on the market stems from Habidite's own Business Plan (dated November 2008) as submitted in view of obtaining the 2008 regional aid. In this Business Plan, Habidite estimated the total demand for houses to be sold on the regulated market in the entire Basque Country for the years 2011-2016 at approximately 8 000 houses per year. The same Business Plan mentions that Habidite intended to sell with priority on the regulated segment of the market (social housing), both in the Basque Country and in other regions of Spain. In particular, in 2011 Habidite foresaw that it would have sold on the regulated market in Spain a total of 289 houses, from a total production of 1 403 houses in the same year. This shows that, after the end of the Houses Contract (as the 1 500 houses ordered by the Diputación and BIZKAILUR were to be delivered by May 2011 at the latest), the share of houses Habidite was hoping to sell on the regulated market from its total annual production, i.e. 289 houses from a total production of 1 403 houses, compared much lower than the same ratio in the first three years of functioning of the Habidite plant in Alonsotegi, which were covered by the Houses Contract.
- (104) Another relevant aspect is the actual demand for social housing in the province of Bizkaia that was covered by BIZKAILUR through the Houses Contract. Neither the Diputación nor Habidite produced specific evidence regarding the actual demand for social housing that was to be covered by BIZKAILUR by means of the Houses Contract concluded with Habidite on the given terms. As already mentioned in recital (98), the 1 500 houses stipulated by this contract were estimated to be delivered during the period 2009-2011. Moreover, the Diputación did not argue that the contract was concluded with a view to providing a service of general economic interest such as social housing. Also to be noted that the Houses Contract was not concluded following a public tender - whereas, according to the information provided by Habidite itself when referring to similar contracts concluded by BIZKAILUR with other construction companies, it seems that BIZKAILUR should have normally tendered such a contract.
- (105) From this perspective, the argument made by Habidite (see recital (96)) that the special technical nature of this project allowed for direct contracting, without a public tender, cannot be accepted. First, the provisions invoked by Habidite do not address situations such as the present one, where the special nature of the project consisted in introducing a new product on the market. The object of the Houses Contract was the purchase of houses to be then sold under the semi-protected regime for the disadvantaged citizens. The technology used for building such houses is irrelevant, and homes constructed with prefabricated modules were in direct competition with homes constructed through traditional methods. Second, in a report of January 2009⁽⁴⁷⁾, the *Tribunal Vasco de Cuentas Públicas* (the Basque Court of Auditors) expressed doubts on the legality of the Land and Houses Contracts in a context where it drew attention to public contracts concluded in breach of the principles of transparency and competitive tendering.
- ⁽⁴⁷⁾ See <http://legislacion.derecho.com/acuerdo-11-junio-2009-tribunal-vasco-de-cuentas-publicas-2231134>.

(106) According to the *P&O Ferries* jurisprudence⁽⁴⁸⁾, the mere fact that a public authority purchases good on market pricing terms is not sufficient in itself in order to conclude that the transaction is market-conform, if the State did not have an actual need for those good, particularly where such goods were contracted without a public tender. In the present case, the absence of information concerning the actual demand for BIZKAILUR to sell the 1 500 contracted houses under the semi-protected regime over the period 2009-2011, coupled with the absence of a public tender, are indications that the transaction was not concluded on market terms.

(107) In the light of the considerations made at recitals (97) to (106), the Commission concludes that the Houses Contract cannot be considered to be a normal market operation. Instead, the contract does confer an advantage to Habidite and the AFER group, by alleviating it of the risk of having to sell its output on market terms, in direct competition with other constructors. The aid element is hereby defined as the profit that would have been obtained by Habidite from the sale of the 1 500 homes to the Diputación and BIZKAILUR under the terms of the Houses Contract, namely, the difference between the price to be obtained from BIZKAILUR from the sale of the 1 500 houses under the pricing terms stipulated by Article A(e) of the Houses Contract the Houses Contract and Habidite's production costs for the 1 500 houses. The advantage is selective, being conferred under the Houses Contract specifically to Habidite and the AFER group.

VII.1.3 Preliminary conclusions

(108) On the basis of the considerations made at recitals (64) to (90) and (92) to (106) – and without prejudice to any further findings with regard to the compatibility with EU public procurement law – it must be concluded that both the Land Contract and the Houses Contract involve state aid within the meaning of Article 107(1) of the Treaty.

(109) In the case of the Land Contract, the state aid involved has two components:

(a) The interests forgone for a loan totalling the costs incurred by BIZKAILUR for the purchase of the land for the Habidite project, which would have been granted interest-free for a period of 7 years, with a grace period of 4 years. These forgone interests amount to an NGE of 13,41 % of the land purchase costs undertaken by BIZKAILUR on the basis of Part Two, Article 1(ii) of the Land Contract.

(b) The total costs that BIZKAILUR would have incurred for the adaptation to industrial use of the mentioned parcel of land, totalling at least 101 430 sqm, as stipulated in Part Two, Article 1(iii) of the Land Contract.

(110) In the case of the Houses Contract, the aid element consists of the profit that would have been obtained by Habidite from the sale of the 1 500 houses under this contract, namely, the difference between the price stipulated by Article A(e) of the Houses Contract for the 1 500 houses and the production costs incurred by Habidite in the production of the 1 500 houses.

VII.2. Compatibility

(111) In the opening Decision of 2 December 2009, the Commission doubted that the aid involved in the Land and Houses Contracts could have been considered compatible with the Treaty under the relevant rules applicable at the time of the assessment – referring in particular to the original *Temporary Framework*⁽⁴⁹⁾, the 2004 *R&R Guidelines*, the *Community Guidelines on National Regional Aid 2007-2013*⁽⁵⁰⁾ and the 2008 *General Block Exemption Regulation*⁽⁵¹⁾.

(112) However, as indicated at recitals (60) to (62), the aid granted through the Land and Houses Contracts was unlawfully granted (i.e. prior to notification to the Commission) on 15 December 2006. Its compatibility must therefore be assessed on the basis of the state aid rules in force at the time when it was granted.

(113) Under this temporal perspective, the compatibility of the aid granted under the Land and Houses Contracts cannot be examined under the special rules applying in relation to the crisis, which were adopted and came into force later on.

(114) Also, according to the Diputación, Habidite and the AFER group did not qualify on 15 December 2006 as firms in difficulty within the meaning of Points 9, 10 and 11 of the 2004 *R&R Guidelines*. Therefore the latter were not eligible for rescue or restructuring aid at the time when the Land and Houses Contracts were concluded.

⁽⁴⁸⁾ See Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizkaya) S.A. and Diputación Foral de Vizcaya v. Commission* [2003] ECR II-2957, recitals 109-139 in particular. The judgment was upheld regarding this part of the assessment by the ruling of the ECJ of 1 June 2006 on the appeal.

⁽⁴⁹⁾ *Temporary Community Framework for state aid measures to support access to finance in the context of the current economic and financial crisis* (OJ C 83, 7.4.2009, p. 1).

⁽⁵⁰⁾ OJ C 54, 4.3.2006, p. 13.

⁽⁵¹⁾ *Commission Regulation No. 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty* (OJ L 214 of 9.8.2008, p. 3).

(115) The Land and Houses Contracts were concluded on 15 December 2006 to support a new investment project in Alonsotegi, a village situated within the Gran Bilbao *comarca*, which was at the time an assisted region under Article 107(3)(c) of the Treaty⁽⁵²⁾. It therefore needs to be examined whether the aid granted under the Land and Houses Contract may have been compatible with the Treaty under the rules applicable to regional aid on 15 December 2006, namely: the 1998 *Guidelines on National Regional Aid*⁽⁵³⁾ (hereinafter "the 1998 Guidelines") and the 2002 *Multisectoral Framework on regional aid to large investment projects*⁽⁵⁴⁾ (hereinafter "the 2002 Framework"), and against the background of Article 107(3)(c) of the Treaty.

Compatibility of the Land Contract aid under the 1998 Guidelines and 2002 Framework

(116) In order to be found compatible with the internal market, regional investment aid must respect a series of standard compatibility criteria, which at the time when the Land Contract was concluded, on 15 December 2006, were laid down in the 1998 Guidelines. In particular, the aid had to be able to contribute to regional development and to support an initial investment project on which works have started only after the aid beneficiary introduced an application for aid (incentive effect), the investment project should have been financed by the beneficiary at least up to 25 %, and the investment project should have been maintained within the assisted region where it was located for at least five years. In addition, the eligible expenditure to be taken into account for the granting of the aid had to be limited to certain eligible costs, and the aid should not be combined with other aid so as to exceed the applicable regional aid ceiling.

(117) Under Point 2 of the 1998 Guidelines, *ad hoc* regional aid granted to a single firm or benefitting one single sector of activity was, as a general rule, not to be found compatible with the Treaty, as its distortive effects would in principle exceed its positive effects on regional development. Furthermore, *ad hoc* aid to firms in difficulty was prohibited.

(118) The aid granted to Habidite under the Land Contract was not notified by the Spanish authorities as being granted under an authorised regional aid scheme. This aid qualifies rather as an *ad hoc* measure benefitting only Habidite and the AFER group, and implicitly, only of benefit to the construction sector.

(119) However, under the same Point 2 of the 1998 Guidelines, such *ad hoc* aid benefiting one single sector and firm may exceptionally be declared compatible with the Treaty, if it can be demonstrated that it has a significant contribution to regional development, exceeding its distorting effects on intra-Union trade and competition. Although the Spanish authorities have not put forward arguments on this aspect, the Commission shall nevertheless examine of its own motion if the conditions for such derogation are met in the case of the aid granted through the Land Contract on the basis of information in its possession.

(120) The Land Contract was clearly intended to support a new investment project, i.e. the new Habidite factory in Alonsotegi. The project was estimated at the time to create 1 100 direct new jobs in an assisted area, and very likely also a non-negligible number of indirect jobs in the same region. This element should also be corroborated with the fact that, under the parallel Houses Contract, the new investment project would have also contributed to the achievement of regional policy objectives, namely the provision of social housing for disadvantaged citizens in the province of Bizkaia. Furthermore, neither Habidite nor the AFER group qualified as firms in difficulty within the meaning of Points 9, 10 and 11 of the R&R Guidelines at the time when the Land and Houses Contracts were signed (see recital (9)). The Commission therefore concludes that the conditions for the exception foreseen in the last paragraph of Point 2 in the 1998 Guidelines are met in the case of the Land Contract.

(121) Under Point 4.4. of the 1998 Guidelines, the notion of regional aid covers only aid for initial investment, which is defined as investment in fixed capital relating to the setting up of a new establishment, the extension of an existing establishment, or the starting up of an activity involving a fundamental change in the production process of an existing establishment. The aid granted under the Land Contract complies with this definition, because the aid was granted in support of the establishment of a new investment project in Alonsotegi.

(122) Under Point 4.5. of the 1998 Guidelines, aid for initial investment should be destined to cover exclusively eligible investment costs, and consequently, the maximum amount of regional aid is defined as a percentage of the eligible investment costs. According to Points 4.5. and 4.6. of the 1998 Guidelines, the category of 'eligible costs' of a new investment project comprises land, buildings and plant/machinery, and also some categories of intangible investments (patents, licenses, know-how) up to a limit of 25 % of the standard base in the case of large firms.

⁽⁵²⁾ See Commission Decision of 17.5.2000 in state aid case N 773/99 Spain – regional map for 2000-2006, text available at http://ec.europa.eu/eu_law/state_aids/comp-1999/n773-99.pdf.

⁽⁵³⁾ OJ C 74, 10.3.1998, p. 9.

⁽⁵⁴⁾ OJ C 70, 19.3.2002, p. 8.

(123) Therefore the eligible costs of the Habidite project in Alonsotegi, as of 15 December 2006, should be first determined.

(124) As the aid involved in the Land Contract was not granted on the basis of a prior application for aid, the beneficiary did not submit at the time the information that is pertinent for the identification of the eligible expenditure in a new investment project in regional aid cases. The information available to the Diputación on the subject of the eligible expenditure was indicated at recital (12) above, as follows:

Land	EUR 4,8 million
Industrial building	EUR 22,5 million
Land adaptation (<i>urbanización</i>)	EUR 4,04 million
Installations	EUR 24,0 million
Total	EUR 55,34 million

(125) The categories of expenditure thereby indicated can indeed be considered as 'eligible expenditure' within the meaning of Point 4.5. of the 1998 Guidelines. Furthermore, as the aid involved in the Land Contract was linked directly to the purchase and adaptation to industrial use of the land for the new investment project, it also satisfies this requirement stemming from Point 4.5 of the 1998 Guidelines.

(126) Under Point 4.10. of the 1998 Guidelines, aid for initial investment should be made conditional on the maintenance of the investment in question for a minimum period of 5 years. While this condition is not specifically imposed on Habidite in the context of the Land Contract, it must nevertheless be noted that, in the context of the parallel Training Aid Contract (described at recital (39) above), also concluded on 15 December 2006 and in relation to the same investment project, Habidite had committed to maintain 1 100 jobs for a period of at least 5 years. The Commission therefore concludes that Point 4.10. of the 1998 Guidelines is also satisfied.

(127) In the absence of information regarding the estimated wage costs for the 1.100 employees of the Habidite factory in Alonsotegi, the Commission cannot perform a meaningful assessment of the eventual compatibility of the aid granted under the Land contract with Points 4.11. to 4.17. of the 1998 Guidelines on job creation. However, as long as the aid in the Land Contract would have been linked to the purchase of the land,

which is an eligible expenditure, an assessment under Points 4.11. to 4.17. of the 1998 Guidelines is not necessary.

(128) Before the Land Contract was signed, the Habidite investment project had not previously received any other investment aid that should be taken into account for the purposes of assessing cumulative effects under Point 4.18. of the 1998 Guidelines.

(129) Point 4.2. of the 1998 Guidelines establishes that aid schemes must lay down that an application for aid must be submitted before work has started on the investment project. The purpose of this provision is to guarantee that regional aid is granted only where it has a verifiable incentive effect: should the works on a given project have started before the application for aid, the regional aid subsequently granted would evidently not have incentive effect, meaning, the project would have been likely carried out even in the absence of the aid.

(130) In relation to this point, it should be noted first that the Land Contract was an *ad hoc* measure, and not an aid granted under an approved scheme. Nonetheless, incentive effect is a general compatibility criterion under Article 107(3)(c) of the Treaty, which must at any rate be verified for the Land Contract. Although the Diputación did not claim incentive effect in relation to this measure, the Commission should nevertheless examine of its own motion compliance with this essential compatibility condition.

(131) The Commission considers that the incentive effect condition is met in the case of the aid involved in the Land Contract, for the following reasons. First, although the aid was not notified before the date of its granting (15 December 2006), the works related to the project had not started prior to the granting of the aid. Indeed, according to information provided by the Diputación, the purchase of the land necessary for the project, which can be considered the start of the work on this investment project, started only in May 2007, therefore at a date posterior to the signature of the Land Contract on 15 December 2006. Second, the fact that the Habidite project was not carried out after the suspension of the Land and Houses Contracts can be seen as a demonstration of the fact that the aid had incentive effect: the project was not carried out in the absence of the aid.

(132) Point 4.2. of the 1998 Guidelines also required that the beneficiary of the aid should have provided itself an aid-free own financial contribution to the project of at least 25 % of the eligible costs. This condition is also evidently complied with in the case of the aid involved in the Land Contract. The eligible costs declared by the Diputación

for this project totalled EUR 55 million, and therefore Habidite should have financed from own resources at least 25 % of this amount, meaning at least EUR 13,75 million. The Commission considers that the aid element in the Land Contract, as identified in recital (109) above, could not have exceeded 75 % of the eligible costs, i.e. EUR 41,25 million, not even in a scenario where the total aid amount would have been considerably increased by accepting that the aid consisted of EUR 28,2 million of effective costs for the adaptation of the land to industrial use, plus EUR 0,98 million (i.e. 13,41 % of a total of EUR 7,3 million of costs for the land purchase, as estimated by the Diputación).

- (133) Based on the considerations at recitals (116) to (132), the Commission concludes that the aid involved in the Land Contract satisfied the compatibility conditions of the 1998 Guidelines.
- (134) The information on eligible investment costs indicated in recitals (12) and (124) also shows that the Habidite investment project qualified in December 2006 as a large investment project within the meaning of the 2002 Framework – the total eligible costs for this project exceeded EUR 50 million. Therefore the compatibility of the aid involved in the Land Contract must also be examined from the perspective of its compliance with the conditions of the 2002 Framework.
- (135) The maximum aid intensity applicable in the Grand Bilbao *comarca* in December 2006, expressed as NGE, was of 20 %. Based on Point 21 of the 2002 Framework, and taking into account the eligible expenditure for the Habidite project as of 2006 as indicated in recital (12), the maximum aid intensity permissible for this project should have been scaled down as follows:

Eligible expenditure	Adjusted aid ceiling
Up to EUR 50 million	EUR 10 million (20 % - the regional ceiling - of EUR 50 million)
Between EUR 50 million and EUR 100 million	EUR 0,5 million (10 % - half of the regional ceiling - of EUR 5 million)
Part exceeding EUR 100 million	—
Total	EUR 10,5 million

- (136) It follows that the aid involved in the Land Contract would have been compatible only up to the total amount of EUR 10,5 million, and incompatible for the part eventually exceeding EUR 10,5 million. Indeed, as indicated in recitals (78) to (82) and (109), the amount of aid involved in the Land Contract cannot be precisely quantified, given the dispute on the effective costs that should have been incurred by BIZKAILUR for performing its contractual obligations of purchasing and adapting to industrial use the land plot for the setup of the Habidite plant in Alonsotegi – a dispute on which the Commission is not in the position to take an informed final position.
- (137) The first aid component would have represented 13,21 % of the effective costs incurred by BIZKAILUR for the purchase of the land. The Diputación claims that these effective costs would have amounted to a total of EUR 7,3 million, but Habidite considers this estimate to be excessive. It is also noted that, according to the information provided by the Diputación itself (see recital (12)), the costs for purchasing the land were, at a given moment, estimated at EUR 4,8 million. Finally, the costs estimated in November 2008 for the purchase of the land, as reported in Habidite's Business Plan submitted in its application for the 2008 regional aid, were of EUR 5,5 million.
- (138) As to the second aid element, namely the totality of the effective costs incurred by BIZKAILUR for the adaptation to industrial use of the land plot in question, the Diputación estimated them at EUR 28,5 million in March 2009, but also informed that at a given moment these costs were estimated at only EUR 4,04 million (see recital (12)).
- (139) To conclude, on the basis of the existent information, it cannot be excluded in full certainty that the aid involved in the Land Contract would not have exceeded the permissible amount for this project of EUR 10,5 million.

- (140) Point 24 of the 2002 Framework establishes additional compatibility conditions for measures where the aid amount exceeds the maximum aid allowable for an investment of EUR 100 million in the same assisted region. In our case, based on Point 21 of the 2002 Framework, the maximum aid allowable for an investment of EUR 100 million in the Gran Bilbao *comarca* in December 2006 was of EUR 15 million (composed of EUR 10 million, representing 20 % of the first EUR 50 million, plus EUR 5 million, representing 10 % of the next EUR 50 million).

(141) As already explained at recitals (78) to (82), the total aid amount involved in the Land Contract cannot be precisely quantified on the basis of the information available. However, the Commission cannot exclude that the aid amount might have exceeded the ceiling of EUR 15 million. Under these circumstances, the Commission verified if the two additional conditions for the approval of such aid were complied with in the case of the Land Contract.

(142) The first condition is that the beneficiary of aid should not have exceeded 25 % of the sales of the product concerned before or after the investment. The second condition is that the capacity created by the investment project should not exceed 5 % of the market concerned. According to Point 24 of the 2002 Framework, the burden of proving that these conditions are met lies with the Member State concerned. In the case at hand, the Spanish authorities did not provide information allowing the Commission to verify if any of these two additional conditions were met.

(143) However, based on the market rate estimates provided by Habidite in November 2008 for obtaining the 2008 regional aid (see recital (87)), the company estimated its own share on the overall Spanish house construction market (free market and the social housing segment included) to be of [0,1-1,0]% in 2011, i.e. after the addition of the new production capacity by this investment project, and rising to [0,5-1,5]% from 2012 onwards. If only the Basque market were to be considered, the share of Habidite in 2011 on the free segment of the construction market would have been of [0,1-1,0]%, rising up to [2,0-3,0]% as of 2014 onwards.

(144) Given these estimates, which are not called into question by any other information available to the Commission, it can be assumed that Habidite would not have exceeded the market share and capacity ceilings laid down in Point 24 of the 2002 Framework in December 2006 in respect of the investment supported by the Land Contract.

(145) To conclude, the compatibility conditions of the 2002 Framework would have also been satisfied by the part of the aid involved in the Land Contract not exceeding the permissible amount of maximum EUR 10,5 million. The amount of aid eventually exceeding this ceiling would not have been compatible with the Treaty as not satisfying the compatibility conditions of the 1998 Guidelines and the 2002 Framework.

(146) As the aid has not been disbursed and recovery is not necessary, these conclusions on the compatibility of the

aid involved in the Land Contract are sufficient for the purposes of this Decision.

(147) The Commission draws the competent Spanish authorities' attention to the fact that the aid involved in the Land Contract must be taken into account, for examining compliance with the rules on aid cumulation, for the 2008 regional aid granted by the Basque government for the same project. This is furthermore necessary considering that both the aid in the Land Contract and the 2008 regional aid covered eligible expenses related to the purchase and adaptation of the same land plot. It is again noted that works on this investment project started in May 2007, whereas the application for the 2008 regional aid was submitted in 2008.

Compatibility of the Houses Contract aid under the 1998 Guidelines and 2002 Framework

(148) As indicated in recitals (93) to (107), the aid involved in the Houses Contract reduces the risks associated with the initial investment by securing sale of an important part of the initial production of the new plant, and also confers an advantage to Habidite by reference to other competitors from the fact of securing without a public tender a contract for the supply to public authorities of 1 500 homes to be sold under the semi-protected regime. The aid involved in the Houses contract was defined as the profit that Habidite would have derived from the purchase of the 1 500 houses by the Diputación and BIZKAILUR, namely the difference between the price at which the latter would have sold the houses and Habidite's own costs for producing those houses.

(149) Under the 1998 Guidelines, regional aid is linked to eligible costs. While it is true that Point 4.2. of the 1998 Guidelines does not limit the forms in which investment aid can be granted, it is also clear from Point 4.5. of the 1998 Guidelines and from the entire content of these Guidelines that investment aid must support eligible investment costs. Under Point 4.5. of the 1998 Guidelines, only costs for buying assets such as land, buildings and plant/machinery can be taken into account for the purpose of granting regional aid. Under Point 4.6. of the 1998 Guidelines, other costs, such as those for the acquisition of patents, licenses and know-how, can also be supported through regional aid.

(150) However, given its nature, the aid granted through the Houses Contract does not support such eligible expenses. Rather, the nature of this aid is to reduce the beneficiary's current operating expenses. Under Point 4.15. of the 1998 Guidelines, operating aid was as a general rule

prohibited, and only exceptionally allowed in regions assisted under Article 107(a) of the Treaty. Yet the Habidite project was to be carried out in a region assisted under Article 107(3)(c) of the Treaty, and not under Article 107(3)(a) of the Treaty.

- (151) The Commission therefore concludes that the aid involved in the Houses Contract qualified as operating aid, which pursuant to Point 4.15. of the 1998 Guidelines would not have been compatible with the Treaty.

VIII. CONCLUSION

- (152) In the light of the above assessment at recitals (63) to (151) – and without prejudice to any further findings with regard to the compatibility with EU public procurement legislation – the Commission concludes that the Land Contract and the Houses Contract involve state aid within the meaning of Article 107(1) of the Treaty.

- (153) In the case of the Land Contract, the aid has two components:

(a) The interests forgone for a loan totalling the costs incurred by BIZKAILUR for the purchase of the land for the Habidite project, which would have been granted interest-free for a period of 7 years, with a grace period of 4 years. These forgone interests amount to an NGE of 13,41 % of the land purchase costs undertaken by BIZKAILUR on the basis of Part Two, Article 1(ii) of the Land Contract.

(b) The total costs that BIZKAILUR would have incurred for the adaptation to industrial use of the mentioned parcel of land, totalling at least 101 430 sqm, as stipulated in Part Two, Article 1(iii) of the Land Contract.

- (154) In the case of the Houses Contract, the aid element consists of the profit that would have been derived by Habidite and the AFER group from the sale of the 1 500 houses contracted by the Diputación and BIZKAILUR, meaning the difference between the price at which the latter would have sold the houses based on the provisions of the Houses Contract and the costs incurred by Habidite for constructing them.

- (155) The information available does not enable the exact quantification of the aid amounts involved in the Land and Houses Contracts. However, the quantification of the aid is not necessary for the purposes of this Decision: the aid has not been disbursed, and it needs not be recovered.

- (156) It is also underlined that the Land and Houses Contract involve unlawful aid. The aid involved in both contracts was granted on 15 December 2006, in breach of the Treaty obligation of prior notification. In the light of the *CELFI/SIDE* jurisprudence⁽⁵⁵⁾, the posterior notification of the two contracts and the finding of partial compatibility of the aid involved in the Land Contract up to the permissible amount of EUR 10.5 million do not remove the unlawful character of the aid. The Commission requires the competent Spanish authorities to draw all the necessary legal consequences from the unlawful character of the aid involved in the Land and Houses Contract.

- (157) The aid granted through the Land Contracts is compatible with the Treaty under the 1998 Guidelines and the 2002 Framework up to the permissible amount of EUR 10,5 million. The part of the aid granted under the Land Contracts eventually exceeding this permissible amount is incompatible with the Treaty.

- (158) The aid granted through the Houses Contract constitutes operating aid, which is incompatible with the Treaty in its entirety under Point 4.15. of the 1998 Guidelines.

- (159) The findings in the present Decision on existence of aid in the Land Contract are of relevance for the 2008 regional aid granted to the same investment project by the Basque government. It is noted that works for this investment project have started in May 2007, therefore prior to the application for the 2008 regional aid.

- (160) The beneficiaries of the aid granted through the Land and Houses Contracts are Habidite Technologies País Vasco S.A. and the AFER group, which are both contracting parties in the Land and Houses Contracts, and are linked within the meaning of Article 3(2) and 3(3) of the Annex to the *Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises* ⁽⁵⁶⁾,

HAS ADOPTED THIS DECISION:

Article 1

The two contracts notified by the Kingdom of Spain on 15 April 2009, concluded on 15 December 2006 between the Diputación Foral de Bizkaia and BIZKAILUR S.A., on the one hand, and Habidite Technologies País Vasco S.A. and the AFER group on the other hand, involve state aid within the meaning of Article 107(1) of the Treaty.

⁽⁵⁵⁾ See footnote 33.

⁽⁵⁶⁾ OJ L 124, 20.5.2003, p. 36.

Article 2

The aid involved in the notified contracts is unlawful, as it was granted in breach of the prior notification obligation stemming from Article 108(3) of the Treaty.

Article 3

The aid involved in the Land Contract comprises:

- (a) The interests forgone by the Diputación and BIZKAILUR for a loan totalling the effective costs for the purchase of the land, to be reimbursed after a grace period of four years in four equal annual instalments of 25 % each, interest-free. The NGE of such an interest-free loan would have been of 13,41 % of the effective costs incurred by BIZKAILUR for the purchase of the land for this project on the basis of Part Two, Article 1(ii) of the Land Contract.
- (b) The total effective costs that BIZKAILUR would have incurred for the adaptation to industrial use of the land to be purchased for this project, totalling at least 101 430 sqm, as stipulated in Part Two, Article 1(iii) of the Land Contract.

Article 4

The aid involved in the Houses Contract consists of the profit that would have been derived by Habidite and the AFER group from the sale of the 1 500 houses ordered by the Diputación Foral de Bizkaia and BIZKAILUR S.A. under this contract. This

profit is defined as the difference between the price obtained by Habidite from BIZKAILUR on the basis of Article A(e) of this contract and Habidite's own costs for the construction of the 1 500 houses.

Article 5

The aid involved in the Land contract is compatible with the Treaty under the 1998 Guidelines on National Regional Aid and the 2002 Multisectoral Framework on regional aid to large investment projects up to the permissible amount of EUR 10,5 million. Aid exceeding this ceiling is incompatible with the Treaty.

Article 6

The aid involved in the Houses Contract is incompatible with the Treaty under Point 4.15. of the 1998 Guidelines on National Regional Aid, since it constitutes operating aid.

Article 7

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 27 June 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

COMMISSION DECISION

of 25 July 2012

on State aid case SA.29064 (11/C, ex 11/NN) — Differentiated air travel tax rates implemented by Ireland

(notified under document C(2012) 5037)

(Only the English text is authentic)

(Text with EEA relevance)

(2013/199/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(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 those provisions⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) In 2009, the Commission received a State aid complaint from an airline operator (hereafter "complainant") regarding several aspects of the air travel tax implemented by Ireland including the differentiated tax rates applicable to flights with destinations located no more than 300 km from Dublin airport, which allegedly favoured Aer Arann.
- (2) By letter dated 13 July 2011, the Commission informed Ireland that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the differentiated tax rates applied under the Irish air travel tax. The Commission asked the Irish authorities to forward a copy of the decision to the beneficiaries.
- (3) On 9 August 2011 and 5 September 2011, the airline operator Ryanair Ltd. (hereafter "Ryanair") submitted letters regarding the Commission's decision to initiate the proceedings. The Commission responded to those letters on 5 October 2011. On 17 October 2011, Ryanair submitted another letter.

- (4) Following an extension of the deadline to reply, the Irish authorities submitted their observations on the Commission's decision on 15 September 2011.
- (5) On 18 October 2011, the Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their observations on the measure.
- (6) On 17 November 2011, Ryanair submitted its response to that invitation. By letter of 28 November 2011, the Commission asked Ryanair whether any information in Ryanair's submission was confidential and could not be disclosed to the Irish authorities. By letter of 30 November 2011, Ryanair confirmed that the submission of 17 November 2011 could be forwarded to the Irish authorities.
- (7) By letter of 12 December 2011, the Commission forwarded Ryanair's comments to the Irish authorities, which provided their comments thereon on 13 January 2012.

2. DESCRIPTION OF THE MEASURE

- (8) As of 30 March 2009, the Irish authorities introduced an excise duty on air passenger transport. The national legal basis for the tax is section 55 of the Finance (No. 2) Act 2008, which introduces an excise duty referred to as the "air travel tax" which the airline operators are liable to pay in respect of "every departure of a passenger on an aircraft from an airport" located in Ireland ⁽³⁾. The tax becomes due at the time a passenger departs from an airport on an aircraft capable of carrying more than 20 passengers and not used for State or military purposes. While the tax *in fine* is intended to be passed on to the passengers via the ticket price, it is the airline operators that are accountable for it and liable to pay it ⁽⁴⁾.

⁽²⁾ See footnote 1.

⁽³⁾ Aircraft that are capable of carrying less than 20 passengers and aircraft used for State or military purposes are excluded from the scope of the tax. The same applies to departures from airports with less than 10 000 passengers per year.

⁽⁴⁾ Every airline operator liable to pay the tax must register with the Revenue service and must, within 20 days or such other period that the Revenue service may determine, furnish the Revenue service with a return showing the number of departures by passengers during the previous month.

⁽¹⁾ OJ C 306, 18.10.2011, p. 10.

- (9) At the time of its introduction, the tax was levied on the basis of the distance between the airport where the flight began and the airport where the flight ended, at the rate of (i) EUR 2 in the case of a flight from an airport to a destination located no more than 300 km from Dublin airport and (ii) EUR 10 in any other case.
- (10) Following an investigation by the Commission regarding a possible infringement of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community⁽⁵⁾ and Article 56 of the Treaty on the freedom to provide services, the rates were changed as of 1 March 2011 so that a single tax rate of EUR 3 is applicable to all departures, regardless of the distance travelled⁽⁶⁾.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (11) The Commission initiated the formal procedure regarding the lower tax rate, which was applicable for certain routes during the period 30 March 2009 until 1 March 2011, because it considered that it appeared to constitute State aid and had doubts regarding its compatibility with the internal market.
- (12) In its assessment of whether the measure was selective, in line with established case-law⁽⁷⁾, the Commission first identified the relevant tax system of reference, and thereafter analysed whether the measure constituted a derogation from that system and, if so, whether Ireland had demonstrated that the derogation was in the nature and logic of the tax system.
- (13) It concluded that, in the case at hand, the system of reference is the taxation of air passengers departing from an airport situated in Ireland.
- (14) The Commission noted that the air travel tax system provided for one general or normal rate applicable to nearly all flights and a reduced rate for flights to a destination located no more than 300 km from Dublin airport. It found that the normal rate constituted the

reference system, while the reduced rate, that was applicable to a well delimited category of flights, appeared to be an exception from the reference system.

- (15) The Commission had doubts whether the reduced rate was justified on the basis of the distance between the starting point and the final destination of the journey.
- (16) First, it was not applicable on the basis of the actual length of the journey, but on the basis of the distance between Dublin airport and the destination.
- (17) Second, the structure and objective nature of the tax did not seem to relate to the distance of the flight, but to the fact of departing from an Irish airport. The connection with the fiscal authority, the taxable event (the departure from an Irish airport) and the negative externalities for the Irish society (noise and air pollution) were precisely the same for all passengers departing from an Irish airport regardless of the destination of the flight and the distance travelled. The concerned airline operators were in the same as each other legal and factual situation with regard to that objective.
- (18) Third, the tax system was not characterised by an articulated differentiation in the tax level in relation to the flights' distance, but it fixed only two rates: one for very short distance flights and the other for all other flights. That criterion seemed to favour flights within Ireland and to certain western parts of the United Kingdom and, consequently, discriminated between national and intra-Union flights. In the case at hand, the Irish authorities argued that a higher charge on the destinations for which the lower rate applied would be disproportional in relation to the price. The Commission found that the price of tickets for domestic destinations is not necessarily lower than that of flights to other destinations in the Union. The lower tax rate did thus not appear to be justified by the nature and logic of the air travel tax system and therefore seemed to be a selective measure.
- (19) Since all other criteria in Article 107(1) of the Treaty also seemed to be fulfilled, the measure appeared to constitute State aid to the airline operators that had operated the routes benefitting from the reduced rate.

⁽⁵⁾ OJ L 293, 31.10.2008, p. 3.

⁽⁶⁾ In the context of the infringement procedure, the Commission provided its formal notice by letter of 18 March 2010, in which it took the position that Ireland by the differentiation in air travel tax rates failed to fulfil its obligations under Regulation (EC) No 1008/2008 and Article 56 of the Treaty. Following the letter of formal notice, the Irish authorities amended the tax system.

⁽⁷⁾ See for example the judgments in Case C-88/2003 *Portugal v Commission* [2006] ECR I-7115, paragraph 56, and in Case C-487/2006 *P British Aggregates v Commission* [2008] ECR I-10505, paragraphs 81-83.

- (20) The aid did not appear to fall within the scope of any guidelines for compatibility of State aid issued by the Commission. As it appeared to constitute an operating aid that discriminated between flights within the Union, it could not be considered to be compatible directly under Article 107(3)(c) of the Treaty. Furthermore, the aid did not fall within any other exemption specified in Article 107(2) or (3) of the Treaty.

- (21) Consequently, the Commission had doubts as to the compatibility of the aid measure with the internal market and, in accordance with Article 4(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁸⁾, it decided to open the formal investigation procedure, thereby inviting Ireland and other interested parties to submit their comments.

4. COMMENTS FROM INTERESTED PARTIES

- (22) In response to the notice in the Official Journal ⁽⁹⁾, the Commission received comments from the Irish authorities and from Ryanair.

4.1. Comments from the Irish authorities

4.1.1. *The tax is a tax on consumers*

- (23) The Irish authorities state that the nature of the air travel tax is essentially a customer tax. For ease of application, the Irish authorities obliged each airline to pay to the Revenue service the relevant amount per passenger departing from an Irish airport and carried by that airline. The airline operators are, however, allowed to pass on the tax and collect it from their passengers.
- (24) Moreover, the air travel tax is normally listed in the ticket price and/or in the general terms and conditions of operators as a tax or levy, in conjunction with other charges and taxes. Accordingly, the tax does not confer a benefit on any airline operators since it is merely another levy, tax or charge which is effectively charged to the consumer.

4.1.2. *Absence of benefit to particular operators*

- (25) The Irish authorities state that the conferring of a benefit on particular operators is a prerequisite for the air travel tax to fall within the definition of Article 107(1) of the Treaty. According to the Irish authorities in a situation where the air travel tax is essentially a consumer tax, whether applied at EUR 10 or EUR 2, it might be difficult to see how the tax confers a benefit on particular operators.
- (26) There is no dispute that all operators, whether they are obliged to charge the EUR 10 or the EUR 2 tax rate, are placed on an equal footing. The question that arises is whether an advantage is conferred on the airline operators who only have to charge the EUR 2 tax rate collectively. According to the Irish authorities, the only

realistic scenario in which the air travel tax could constitute aid is if the airlines operating routes to destinations no more than 300 km from Dublin airport were obliged to collect the air travel tax at EUR 10, but were allowed to retain the difference between the EUR 10 rate and the EUR 2 rate. It was, however, not the case. In that regard, it is important to point out that the Irish authorities, in designing the tax in question, did not have in mind any particular operator or business model.

4.1.3. *There is no advantage to Irish airline operators*

- (27) First, it should be noted that Ireland no longer has national air carriers *per se*, given that the State divested its interest in Aer Lingus, which was originally the national State airline operator, into a minority shareholding.
- (28) If the tax had any effect on Irish airline operators, that effect would have been very different for each of those airline operators. The Irish authorities point out that the intra-Union routes that were subject to the higher rate of EUR 10 were operated by predominantly the same Irish airlines. In the relevant period, the three airline operators held about [93-97] (*) % of the market for flights to which the lower rate applied, but they also predominated in the intra-Union air travel market, holding [82-87] (*) % of all such intra-Union flights.
- (29) In particular, the Irish authorities argue that any disadvantage claimed by Ryanair is clearly unsustainable, since Ryanair accounts for approximately [56-63] (*) % of the passengers carried on the routes to which the lower rate was applicable (see Table 1).

Table 1

Market shares of Irish airline operators on routes departing from Irish airports

Market shares		
	No more than 300 km	More than 300 km ⁽¹⁾
Ryanair	[56-63] (*) %	[42-47] (*) %
Aer Lingus	[16-23] (*) %	[35-40] (*) %
Aer Arann	[10-17] (*) %	[0,5-2,5] (*) %
TOTAL	[93-97] (*) %	[82-85] (*) %

⁽¹⁾ Exclusively within the Union.

Source: Information provided by Ireland based on figures provided by the three Irish airline operators and data extracted from the Central Statistics Office.

⁽⁸⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁹⁾ See footnote 1.

(*) Due to a business secret, a range is used.

(30) Table 1 shows that the only operator which might conceivably be classified as a national operator by virtue of the State's minority interest (Aer Lingus) had a much greater share of flights to which the higher rate applied ([35-40] (*) %) than of flights to which the lower rate applied ([16-23] (*) %). Therefore, if the lower tax rate had had any effect on airlines, Aer Lingus would have been significantly disadvantaged.

(31) As for Aer Arann, which the complainant also claims benefits from the alleged aid, the Irish authorities note that, between 2007 and 2010, it experienced a significant reduction in both turnover and passenger numbers. Following the introduction of the tax, Aer Arann reported losses of EUR 18 million. It therefore appears that the airline was at its most profitable before the introduction of the tax. The Irish authorities also point out that there was only one domestic route on which the complainant and Aer Arann competed and that, on that route, close to [37-42] (*) % of the flights were operated by the complainant. For flights to destinations abroad benefiting from the lower rate (western United Kingdom), the complainant operated more than [37-42] (*) % of the scheduled flights, while Aer Arann and Aer Lingus had smaller shares.

(32) Moreover, non-Irish airline operators have always been free to operate flights to which the lower tax rate applied. There was no discretion for the State in this context. The Irish authorities argue that, if there was an advantage in operating flights to which the lower tax rate applied, foreign (non-Irish) operators would have chosen to operate such flights. The absence of foreign airlines operating such flights suggests that there was no advantage stemming from the lower rate.

4.1.4. *The lower rate was introduced in order to avoid applying a tax rate which was disproportionate in relation to the ticket price*

(33) The Irish authorities stress that the purpose of the differentiation in rates was to introduce an element of proportionality in the level of the tax relating to distance, since prices are normally lower for closer destinations. While it is accepted that there is not a perfect correlation between distance and price, it was felt that the correlation was sufficient to justify splitting the tax into two tiers. The Irish authorities consider that a mechanism providing a more precise differentiation on the basis of distance would have rendered the system extraordinarily complicated and administratively burdensome.

4.1.5. *No distortion of competition*

(34) The Irish authorities argue that the lower tax rate did not result in any distortion of competition and had no effect on trade. First, since the tax was a consumer tax in

nature, it had no perceptible effect on airline operators. Second, the differentiated tax rates did not distinguish the Irish market from that of other Member States. Of the flights to which the lower rate applied, the vast majority were non-domestic (68 % compared to 32 % for purely domestic flights). Third, the airline operators are active on a market which is open for competition, which means that the market was open for new entrants to which the lower tax rate applied on the same conditions as for other airline operators. If the lower tax rate had conferred a benefit on certain operators, non-Irish airlines would presumably have chosen to operate routes to which the lower rate applied. The absence of new entrants indicates that the lower rate did not confer an advantage on certain airline operators.

4.1.6. *Any aid would be de minimis aid or have a negligible effect on the airline operators involved*

(35) The Irish authorities claim that, even if the lower tax rate was to be regarded as State aid within the meaning of Article 107(1) of the Treaty, it should be declared to be compatible with the internal market, since it would either be *de minimis* aid or would anyway have a negligible effect on the airline operators involved.

4.2. Comments from third parties

4.2.1. Ryanair

(36) With respect to the State aid nature of the lower tax rate, Ryanair agrees with the preliminary view which the Commission expressed in its decision of 13 May 2011 that the lower tax rate conferred an advantage on certain airline operators and constitutes State aid within the meaning of Article 107(1) of the Treaty. However, Ryanair disagrees with the Commission's view that (i) the higher rate of EUR 10 is to be considered as the "normal" rate, and that (ii) Ryanair obtained an advantage through the measure.

(37) With respect to the establishment of the "normal" or "standard" rate under the tax system, Ryanair claims that the Commission's view that the higher rate of EUR 10 is the normal rate and that all operators to which the lower rate of EUR 2 applied obtained an advantage, is arbitrary. According to Ryanair, there is no reason why the higher rate, and not the lower, should be seen as the normal rate. Moreover, since the two-tier rate has been replaced by a single rate, the new rate is likely to be a blend between the initial rates. Therefore, the new rate would be the reasonable benchmark to assess any potential harm or benefits arising from the two-tier system.

(38) Ryanair further claims that the two-tier air travel tax did not confer an advantage on Ryanair. When examining a measure that may constitute State aid, the Commission

must take into consideration its overall effects on the potential beneficiary and, in particular, deduct any specific charges that burden the advantage conferred by the alleged aid. During the period when the two-tier tax system applied, Ryanair paid the taxes specified in Table 2.

Table 2

Passengers carried and tax paid during the period 30 March 2009 until 1 March 2011

Destination category from Dublin airport	Passengers subject to tax	Tax paid	Share
No more than 300 km within the State (EUR 2 rate)	[...] (*)	EUR [...] (*)	[0,5-2,5] (*) %
No more than 300 km outside the State (EUR 2 rate)	[...] (*)	EUR [...] (*)	[1,5-4,5] (*) %
More than 300 km within the EU	[...] (*)	EUR [...] (*)	[93-98] (*) %
More than 300 km outside the EU	[...] (*)	EUR [...] (*)	[0,3-2,5] (*) %
TOTAL	[...] (*)	EUR [...] (*)	100 %

- (39) Since Ryanair considers that the new single rate of EUR 3 should be considered as the normal rate, Ryanair should, during the period from 30 March 2009 until 1 March 2011, have been liable to pay an amount of EUR [...] (*)⁽¹⁰⁾ in air travel tax. This is EUR [...] (*) less than the amount actually paid (see Table 2). Ryanair thus argues that it did not enjoy any benefit from the lower tax, but rather suffered a disadvantage.

4.3. Observations by Ireland on the third party comments

- (40) On 13 January 2012, the Irish authorities provided their views on Ryanair's comments: *First*, they disagree with Ryanair's description of the tax, since the tax in their view is a consumer tax in essence and the lower tax rate did not confer an advantage on the airlines. *Second*, they fail to see how Ryanair could be the party most directly and negatively affected by the lower rate, in particular since it accounts for [56-63] (*) % of the passengers carried on flights subject to the lower rate. *Third*, there is no basis for the claim that the lower tax rate was designed to support Aer Arann. The Irish authorities did not have any particular operator in mind when designing the air travel tax. *Fourth*, there is no logic in Ryanair's argument that the higher rate of EUR 10 is not to be considered as the normal rate of the air travel tax. Under the two-tier tax system, the

higher rate applied to between 85 and 90 % of all departures. The Irish authorities reiterated that they had allowed for a derogation from the standard rate of EUR 10 in order to introduce an element of proportionality in the level of the tax relating to the distance.

5. ASSESSMENT

5.1. Existence of State aid under Article 107(1) of the Treaty

- (41) By virtue of Article 107(1) of the 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, in so far as it affects trade between Member States, be incompatible with the internal market."

Selectivity

- (42) In order to be caught by Article 107(1) of the Treaty, a measure must thus be selective⁽¹¹⁾. In establishing whether a measure is selective, the Commission needs to assess whether the measure favours 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation⁽¹²⁾. According to established case-law⁽¹³⁾, a fiscal measure is *prima facie* selective if it constitutes a departure from the normal application of the general tax framework.
- (43) First, the Commission therefore has to identify the relevant tax system of reference. As regards taxation, the Commission notes that, in principle, the definition of the system of taxation falls within the exclusive competence of the Member States. In designing their taxation system, the Irish authorities chose to define the taxable event of the air travel tax as the departure of a passenger on an aircraft from an airport situated in Ireland. The system of reference is therefore the taxation of air passengers departing on an aircraft from an airport in Ireland. The objective of that system is to raise revenue for the State budget. The conclusion that the system of reference is the taxation of air passengers departing from an airport situated in Ireland was confirmed by the Irish authorities in their reply to the observations of the third party.

⁽¹¹⁾ See Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 94.

⁽¹²⁾ See for example Cases C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41, C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68, and C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40, C-88/03 *Portugal* [2006] ECR I-7115, paragraph 54, and C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* [2009] ECR I10821, paragraph 61.

⁽¹³⁾ See for example the judgments in Case T-210/02 *RENV British Aggregates Association v Commission*, [2006] ECR II-2789, paragraph 107, and Cases C-88/03 *Portugal*, paragraph 56, and C-487/06 *P British Aggregates* [2008], paragraphs 81-83.

⁽¹⁰⁾ EUR 3 multiplied by [...] (*) passengers

- (44) Second, in line with established case-law⁽¹⁴⁾, the Commission has to determine whether the tax measure in question constitutes a derogation from the identified reference system.
- (45) Ryanair argues that the lower rate of EUR 2, or alternatively the single rate of EUR 3 which was introduced on 1 March 2011, should be regarded as the normal rate of the air travel tax system. However, apart from certain destinations in the western United Kingdom, the lower rate only applied to domestic destinations and, according to the Irish authorities, only to some 10-15 % of all flights which were subject to the tax. It can thus not be regarded as the normal tax rate. As for the rate of EUR 3, it was not in force at the time to which this Decision relates and can therefore not be regarded as the normal rate of the air travel tax system at that time. Therefore, the Commission finds that the higher rate of EUR 10 was the normal rate of the reference system, while the reduced rate of EUR 2, which was applicable to a well delimited category of flights, was an exception from the reference system.
- (46) Third, the Commission must examine whether such exceptions are justified by "the nature or general scheme of the system"⁽¹⁵⁾ in the Member State. If that is the case, the measure is not considered to confer a selective advantage and does thus not constitute State aid within the meaning of Article 107(1) of the Treaty. In that context, it should be noted that, according to case-law⁽¹⁶⁾, it is the basic and guiding principles of the reference system which are relevant, not those of the particular measure in question.
- (47) According to the Irish authorities the lower rate was introduced in order to add an element of proportionality in the level of the tax relating to the distance of the flight. The Commission finds that reasoning is not related to the basic and guiding principles of the tax system itself, but rather to those of the derogation itself. The structure and objective nature of the tax was not related to the distance of the flight, but to the fact of departing from an Irish airport. The connection with the fiscal authority, the taxable event (departure from an Irish airport) and the negative externalities for the Irish society of passengers departing from an Irish airport (for example, noise and pollution) was precisely the same regardless of the destination of the flight and the distance travelled. The concerned airline operators were therefore in the same as each other legal and factual situation with regard to that objective.
- (48) Furthermore, the tax system is not characterised by an articulated differentiation in the tax level in relation to the actual length of the flights. First, the tax rate was not applicable on the basis of the actual length of the flight, but on the basis of the distance between Dublin airport and the destination, regardless of where the actual departure took place. Second, the tax system fixes only two rates: one for very short distance flights from Dublin airport and the other for all other flights.
- (49) Moreover, even if the reason for the derogation was in the nature and logic of the principles of the air travel tax system, the Court has stated that a benefit must be consistent not only with the inherent characteristics of the tax system in question but also as regards the manner in which it is implemented⁽¹⁷⁾. As mentioned in recital 47, the tax system did not *de facto* ensure proportionate rates in relation to the actual length of the flights, since the applicable rate was fixed on the basis of the distance between Dublin airport and the destination, regardless of where the actual departure took place and since only two rates were applicable: one for very short distance flights from Dublin airport and the other for all other flights. The price of tickets to domestic destinations is not necessarily lower than that of flights to other destinations in the Union. The measure could thus not achieve its objective of ensuring proportionality of taxation in relation to the flight distance. In this case, neither the Irish authorities nor any third party has argued that the effect of the derogation was that the tax level *de facto* was proportional to distance. On the contrary, the Irish authorities recognise that there was no perfect correlation between distance and rate of the tax.
- (50) Therefore, the Commission sees no reason for changing its preliminary view that the lower rate was not in the logic and general scheme of the air travel tax system. Accordingly the Commission considers that the measure is selective and not justified by the nature and the logic of the system.

Advantage

- (51) Expenditure for taxes constitutes costs which are normally borne by an undertaking.

⁽¹⁴⁾ See footnote 12 above.

⁽¹⁵⁾ See for example Case C-173/73 *Italy v Commission* [1974] ECR-709, as well as point 13 *et seq.* of 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.

⁽¹⁶⁾ See for example judgements in joined Cases C-78/08 to C-80/08 *Amministrazione delle finanze Agenzia delle Entrate v Paint Graphos scrl Adige Carni srl, in liquidation, v Ministero dell'Economia e delle Finanze, Agenzia delle Entrate and Ministero delle Finanze v Michele Franchetto*, not reported, in particular paragraph 69, as well as in Case T-210/02, paragraph 107.

⁽¹⁷⁾ See for example judgment in Joined Cases C78-C80/08, paragraph 73.

- (52) The application of the air travel tax can affect the revenues of the airlines which have to pay that tax, by increasing the prices of the tickets they are capable of offering to their customers or reducing the margin on each ticket they sell, where the airlines decide not to pass the tax on to the customers. In this respect, the Court has stated that *"since airport taxes directly and automatically influence the price of the journey, differences in the taxes to be paid by passengers will automatically be reflected in the transport costs, and thus, [...], access to domestic flights will be favoured over access to intra-Community flights"* ⁽¹⁸⁾.
- (53) A reduced rate for a certain type of flights therefore has a smaller effect than the normal rate on the airline operators offering that type of flights. Those airline operators are relieved from a cost they would normally have to bear, and therefore have a smaller cost to pass on to their customers or to assume themselves.
- (54) Accordingly, the Commission finds that the lower tax rate provided an advantage to airline operators serving the routes to which that rate applied. The lower cost that they had to pass on to their customers or to assume directly represented financial resources that those airline operators could economise and therefore improved their economic situation vis-à-vis other airline operators competing in the air transport market. The advantage corresponds to the difference between the lower rate of EUR 2 and the normal tax rate of EUR 10 during the period between 30 March 2009 and 1 March 2011. The Commission notes that the flights to which the lower rate applied were mainly operated by airline operators with a strong connection with Ireland (Aer Lingus, Aer Arann and Ryanair were set up in Ireland and still have their headquarters there). Therefore, de facto the reduced rate provided an advantage to Irish airline operators compared to other Union operators.
- (55) The Commission cannot accept Ryanair's argument that the advantage was limited to the difference between the lower rate and the rate of EUR 3 which was introduced on 1 March 2011. Such a rate did not apply at the same time as the lower rate and if an advantage is defined in a system with one lower tax rate and one high, applying a benchmark that is set somewhere in between those rates does not catch the entire advantage which has been granted.
- (56) Ryanair furthermore argues that it has benefitted less from the lower tax rate than, for example, Aer Arann, since the majority of its flights are for destinations to which the higher rate applied. However, the advantage stemming from the application of the lower tax rate of EUR 2 is the difference between that rate and the standard rate of EUR 10. In applying the lower rate to certain flights, Ryanair has, like all other airlines operating flights to which that rate applied, enjoyed an advantage corresponding to the difference between the two rates.
- (57) The Irish authorities argue that the tax was intended to be passed on to the passengers and, therefore, no advantage existed at the level of the airline operators. In that context, the Commission notes that a reduction from the normal rate of a given tax can confer a selective advantage on the airline operator which is liable to pay the reduced rate even in situations where there is a legal requirement to pass the tax in question on to the customers ⁽¹⁹⁾. The Commission further notes that, in the case at hand, there was no mechanism which ensured that the tax was actually passed on, but it was left to the airline operator to decide on whether and how the tax would be passed on to the passengers. In its complaint, the complainant actually argued the contrary, namely that it could not pass the cost of the tax on to its customers since doing that would have had a disproportionate effect on its ticket prices. The Commission therefore does not agree with the Irish authorities that there was no advantage at the level of the airline operators: those which could use the lower tax rate for certain flights had a lower cost to pass on to their customers than others. It is also in line with the Commission's practice with respect to aid measures stemming from an excise duty ⁽²⁰⁾, according to which reliefs from such duties have been found to provide an advantage to the airline operator which is obliged to pay the tax, regardless of the fact that that entity may choose to pass the cost on to its customers.
- (58) Accordingly, the Commission finds that the lower tax rate provided an advantage to certain airline operators. The advantage corresponds to the difference between the lower rate of EUR 2 and the normal tax rate of EUR 10 during the period between 30 March 2009 and 1 March 2011. The flights to which the lower rate applied were mainly operated by airlines with a strong connection with Ireland (Aer Lingus, Aer Arann and Ryanair). Therefore, the reduced rate provided an advantage to Irish airline operators compared to other Union operators.

⁽¹⁸⁾ See for example Case C-92/01 *Georgios Stylianakis v Elliniko Dimosio* [2003] ECR I-1291, paragraph 28, and Case C-70/99 *Commission v Portugal* [2001] ECR I-4845, paragraph 20.

⁽¹⁹⁾ See for example Case C-143/99, in particular paragraphs 5, 54 and 55.

⁽²⁰⁾ See Commission Decision C(2007) 754 on State aid case N 892/2006 – FI – Amendment to differentiated energy tax scheme, OJ C 109, 15.5.2007, p. 1; Commission Decision C(2007) 2416/2 on case N 775/2006 – DE – Reduced tax rates for the manufacturing industry, agriculture and forestry, etc., OJ C 152, 6.7.2007, p. 3; Commission Decision C(2005) 1815/3 on case N 190/A/2005 – UK – Modification of the climate change levy, OJ C 146, 22.6.2006, p. 8; and Commission Decision C(2009) 8093/2 on case N 327/2008 – DK – NO_x tax reductions for large polluters and companies reducing pollution and tax reductions for biogas and biomass, OJ C 166, 25.6.2010, p. 1.

State resources and imputability

- (59) The fact that the Irish authorities allowed a lower tax rate than the normal one to be applied resulted in a loss of tax revenue for the State and was thus financed from State resources. Since the lower rate had been decided upon by the national authorities, the measure is imputable to the State.

Effect on competition and trade between Member States

- (60) In comparison with their competitors, the airline operators benefiting from the lower rate were relieved from costs which they should otherwise have borne or passed on to their customers. Therefore, the lower rate of the air travel tax improved their economic situation vis-à-vis other undertakings competing in the air transport market thereby distorting or risking to distort competition.
- (61) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid ⁽²¹⁾. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ⁽²²⁾. The air transport sector is characterised by intense competition between operators from different Member States, in particular since the entry into force of the third stage of liberalisation of air transport ("third package") on 1 January 1993, namely Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers ⁽²³⁾, Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes ⁽²⁴⁾ and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services ⁽²⁵⁾. The reduced rate was therefore capable of affecting trade between Member States since it strengthened the position of some airline operators competing in a market which is fully liberalised at Union level.
- (62) Since all the criteria in Article 107(1) of the Treaty are fulfilled, the measure constitutes State aid to all airline operators that operated flights benefitting from the reduced rate.

5.2. Legality

- (63) By failing to notify the measure before its implementation, the Irish authorities did not fulfil their obligations

under Article 108(3) of the Treaty. The aid measure thus constitutes unlawful State aid.

5.3. Compatibility of the aid with the Treaty

- (64) According to Article 107(3)(c) of the Treaty, aid may be considered to be compatible with the internal market if it aims at facilitating the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. As the aid constituted operating aid, reducing certain airline operators' current expenditure, it is, according to the case-law of the Court, in principle incompatible with the internal market ⁽²⁶⁾. The aid does not fall within the scope of any guidelines for compatibility of State aid issued by the Commission in this context. In particular, it is not covered by the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ⁽²⁷⁾, since it is not linked to the start-up of certain routes. The Irish authorities have not argued or provided any information to show that the aid could be considered to be compatible pursuant to the Community guidelines on State aid for environmental protection ⁽²⁸⁾. On the contrary, they have made clear that the objective of the tax is to raise revenue and not to protect the environment. The fact that the tax in question lacks any clear or proportional link to the reduction of energy use, of pollution or gas emissions, of noise levels, etc., supports that reasoning. Therefore, the Commission does not find the aid compatible with the internal market under Article 107(3)(c) of the Treaty.
- (65) The aid in question does not fall within any other exemption specified in Article 107(2) or (3) of the Treaty.
- (66) Furthermore, even if the aid was compatible with any of the exceptions specified in under Article 107(2) or (3) of the Treaty, which is not the case, the Court has stated that the procedure under Articles 107 and 108 of the Treaty must never produce a result which is contrary to specific provisions of the Treaty. The Court has also held that those aspects of aid which contravene specific provisions of the Treaty other than Articles 107 and 108 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately ⁽²⁹⁾. In this particular case, as described in recital 10, the differentiated rates were subject to an investigation by

⁽²¹⁾ See in particular, Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11, Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21, and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 44.

⁽²²⁾ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

⁽²³⁾ OJ L 240, 24.8.1992, p. 1.

⁽²⁴⁾ OJ L 240, 24.8.1992, p. 8.

⁽²⁵⁾ OJ L 240, 24.8.1992, p. 15.

⁽²⁶⁾ Case T-459/93 *Siemens SA v Commission*, ECR [1995] II-1675, paragraph 48. See also judgment in Case T-396/08 *Freistaat Sachsen et Land Sachsen-Anhalt v Commission* [2010] ECR (appealed), paragraphs 46-48, Case C-156/98 *Germany v Commission* [1980] ECR I-6857, paragraph 30 and case-law cited therein.

⁽²⁷⁾ OJ C 312, 9.12.2005, p. 1.

⁽²⁸⁾ OJ C 82, 1.4.2008, p. 1.

⁽²⁹⁾ See for example judgments in Cases C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 41, and T-156/98 *RJB Mining v Commission* [2001] ECR II-337, paragraph 112, and case-law cited therein.

the Commission, which found that they were in breach of Regulation (EC) No 1008/2008 and Article 56 of the Treaty on the freedom to provide services, since the differentiation imposed more onerous conditions on the operation of intra-Union air services than those imposed on domestic services. The Court has explicitly stated in cases concerning airport taxes that the Treaty provisions on freedom to provide services are also applicable to the transport sector ⁽³⁰⁾. In this case, the State aid stems from the differentiation in tax rates itself. As the tax and the aid constitute two elements of the one and same fiscal measure, they are inseparable ⁽³¹⁾ and therefore the State aid cannot be granted without being in breach of the principle of the freedom to provide services. Consequently, the aid cannot be declared compatible with the Treaty in any case because it would inevitably infringe the provisions of Regulation (EC) No 1008/2008 and Article 56 of the Treaty.

- (67) Consequently, the Commission concludes that the aid cannot be considered as compatible with the Treaty.

6. CONCLUSION

- (68) The Commission finds that the lower rate of the air travel tax for flights to a destination located no more than 300 km from Dublin airport provided for by Section 55(2) of the Finance (No. 2) Act, and in particular Article 2(b) thereof, for the period from 30 March 2009 until 1 March 2011 constitutes State aid within the meaning of Article 107(1) of the Treaty. Ireland unlawfully implemented that State aid in breach of Article 108(3) of the Treaty.

- (69) The State aid is not in compliance with any derogation as provided for by Article 107(2) and (3) of the Treaty. Since no other reasons for compatibility can be envisaged for the measure at hand, it is incompatible with the internal market.

- (70) The State aid amounts to the difference between the lower rate of the air travel tax and the standard rate of EUR 10 (that is to say, EUR 8 per passenger) levied on each passenger. This concerns all flights operated by aircraft capable of carrying more than 20 passengers and not used for State or military purposes, departing from an airport with more than 10 000 passengers per year to a destination located no more than 300 km from Dublin airport. The beneficiaries are Ryanair, Aer Lingus, Aer Arann and other air carriers to be identified by Ireland.

- (71) In accordance with Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission must require that the Member State concerned to take all necessary measures to recover the aid from the beneficiaries. Ireland should therefore be required to recover the incompatible aid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a lower air travel tax rate applicable to all flights operated by aircraft capable of carrying more than 20 passengers and not used for State or military purposes, departing from an airport with more than 10 000 passengers per year to a destination located no more than 300 km from Dublin airport between 30 March 2009 and 1 March 2011, in application of section 55 of the Finance (No. 2) Act 2008, unlawfully put into effect by Ireland in breach of Article 108(3) of the Treaty, is incompatible with the internal market.

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if it fulfils the conditions laid down by a regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ⁽³²⁾.

Article 3

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a Regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 or by a Commission decision approving an aid scheme is compatible with the internal market, up to the maximum aid intensities applicable to that type of aid.

Article 4

1. Ireland shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽³³⁾.

⁽³⁰⁾ See Cases C-92/01 *Georgios Stylianakis v Elliniko Dimosio*, paragraph 23, and C-70/99 *Commission v Portugal* [2001] ECR I-4845, paragraph 27 and 28, as well as Case C-49/89 *Corsica Ferries France v Direction Générale des Douanes Françaises* [1989] ECR 4441, paragraph 10.

⁽³¹⁾ Case C-526/04, *Laboratoires Boiron v ACOSS* [2006] ECR I-7529, paragraph 45.

⁽³²⁾ OJ L 142, 14.5.1998, p. 1.

⁽³³⁾ OJ L 140, 30.4.2004, p. 1

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

2. Ireland shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 6

1. Within two months following the notification of this Decision, Ireland shall submit the following information:

- (a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;
- (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;
- (c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Ireland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to Ireland.

Done at Brussels, 25 July 2012.

For the Commission

Joaquín ALMUNIA

Vice-President

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