II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 May 1993

concerning a scheme of tax concessions for investment in the Basque country

(Only the Spanish text is authentic)

(93/337/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having, in accordance with the above Article, given the interested parties notice to submit their observations,

Whereas :

I

By letters dated 11 October 1988, 1 February 1989, 25 January 1990, 20 April 1990 and 17 January 1991 from the office of the Permanent Representative of Spain, and in response to the Commission's requests, the Spanish authorities provided the Commission with information on the scheme of tax concessions for investment in the Basque country introduced by Provincial Laws 28/1988 (Álava), 8/1988 (Vizcaya) and 6/1988 (Guipúzcoa).

Before the scheme is described, it should be borne in mind that the tax relationship between the central government and the Basque country is governed by the economic agreement contained in Law 12/1981. Under the agreement, the competent institutions in each of the three Basque provinces may, under certain conditions, maintain, establish and regulate the tax system within their territory, except for customs duties, tax monopolies and the duty on alcohol, which remain the responsibility of the central government.

Under the powers conferred on them by the economic agreement, the competent institutions in the three Basque provinces established, in each province, a common scheme of tax concessions for investment which is described below.

The beneficiaries of the scheme are natural and legal persons carrying on activities in the Basque country in agriculture, livestock farming, fisheries, industry and commerce, with the exception of certain activities.

Only entities operating exclusively in the Basque country, i.e. those which have all their plants there, may apply for the concessions in respect of corporation tax, while only taxpayers who have their ordinary residence in the province in question and carry on an eligible activity entirely in the Basque country may apply for the concessions in respect of personal income tax. These conditions are laid down in the economic agreement.

The economic agreement was subsequently amended, with the result that since 1 January 1991 the Basque rules on corporation tax have applied to (i) entities which exclusively in the Basque country and had a turnover in the previous year exceeding Pta 300 million, (ii) entities with their tax domicile in the Basque country and with a turnover in the previous year not exceeding Pta 300 million, and (iii) entities with their tax domicile in the Basque country which carry out less than 75 % of their operations on the combined territory of the three provinces.

The concessions are :

(a) a rebate of 95 % on the tax on capital transfers and documented legal acts (ITPAJD) in respect of the instruments and contracts relating to eligible investment. Corporate transactions, bills of exchange and the documents which substitute them or are used for transfers are excluded from the scope of the rebate ;

(b) with regard to corporation tax (IS) :

a tax credit of 20 % in respect of investments located in the province in question, applicable to the balance of the tax due. The balance is obtained by setting off against the total amount of tax payable all possible deductions, including advance deductions, payments in instalments and payments on account. Interest payments, indirect taxes and grants received for the acquisition of the assets are excluded from the basis of calculation of the tax credit ;

(c) with regard to personal income tax (IRPF) :

a tax credit of 20 % in respect of investments, applicable to the balance of the tax due, as defined at (b). Granting of the tax credit is conditional on the value of the taxpayer's assets at the end of the investment process exceeding the value at the start of the process by an amount at least equivalent to 30 % of the eligible investment. Interest payments, indirect taxes and grants received for the acquisition of the assets are excluded from the basis of calculation of the tax credit ;

(d) with regard to both corporation tax and personal income tax :

— total freedom to depreciate the assets constituting the new investments,

— a supplementary tax credit up to 5 % of the investments depending on the employment generated : it amounts to Pta 400 000 per man-year added to the average workforce, but may not exceed 5 % of the investment,

— a supplementary tax credit of 20 % for investments of special technological interest carried out in accordance with Decrees 205/1988 and 207/1988 of the Basque Government.

Eligible investments must be new tangible fixed assets (not land) with a minimum depreciation period of five years that are not subject to the higher rate of VAT and are used for carrying on the abovementioned eligible activities. They must be located in the Basque country, must amount to more than Pta 8 million, must represent at least 25 % of the total book value of the firm's tangible fixed assets of a similar nature (inclusive of depreciation), must be financed from the firm's own resources in respect of at least 30 % of their amount and must result in an increase in the net book value of the tangible fixed assets. The investment process may not last longer than two years.

Decrees 205/1988 and 227/1988 define the investments of special technological interest which confer a right to the abovementioned supplementary tax credit. Decree 205/1988 concerns the agri-food industry and fisheries, with investments of special technological interest in these sectors being defined as those made in the acquisition of tangible fixed assets directly linked to the application of certain techniques such as biotechnology or automation. Decree 227/1988 concerns sectors other than the agri-food industry and fisheries, with investments of special technological interest in these sectors being defined as those made in certain activities such as advanced chemicals, the construction of advanced transportation equipment, electronics, industrial automation, telecommunications, information technology, new materials and energy.

Irrespective of their size and of how they are financed, the investments which firms make in R&D programmes involving new industrial processes, new products or new technologies confer an entitlement to the deductions listed above.

The aid available under this scheme cannot be combined with other existing tax advantages intended for the same investments, except for the job-creation deduction provided for in the Central Government Finance Law, with the exercise of activities covered by the industrial conversion process adopted in Law 27/1984, with the consolidated budgetization arrangements, or with the computation of income under a special arrangement ('estimación objetiva singular').

The system came into force in July 1988. In the provisions of Guipúzcoa and Vizcaya, it applies to investments made since 1 January 1988.

The tax credits in respect of corporation tax and personal income tax will apply during the financial year in which the new investments start to function and for not more than the following four financial years. This time limit may, however, be extended, in respect of business start-ups or investments regarded as being of special technological interest under Decrees 205/1988 and 227/1988,

until the first financial year in which, within the prescribed period, positive results are obtained. If, during the period of validity of the aid, the beneficiary ceases to operate exclusively in the Basque country, any grant of aid will be revoked as from the corresponding tax period.

Rebates of tax on capital transfers and documented legal acts will apply for five years from the day following that on which they were granted.

Since the scheme is caught by Article 92 (1) of the EEC Treaty and contains provisions contrary to Article 52, the Commission has decided to initiate the procedure provided for by Article 93 (2).

By letter dated 30 May 1991, it formally invited the Spanish Government to submit its observations. Notice was also given to the other Member States and to interested third parties to submit their observations [1].

II

Under the procedure, the Spanish Government submitted its observations by letter dated 15 July 1991. Another Member State, the Basque Government, the Basque Parliament, the governments of two Basque provinces, three Basque chambers of commerce and four Basque trade associations submitted their observations within the time limit. These were communicated to the Spanish Government by letter dated 19 September 1991.

III

The aid granted by Spain under this scheme is covered by Article 92 (1) of the EEC Treaty.

Only certain firms are eligible for the concessions in respect of corporation tax and personal income tax, given that these are limited respectively to firms operating exclusively in the Basque country and to taxpayers who, having their ordinary residence in the province in question, exercise the eligible activity exclusively in the Basque country. The new Basque rules on corporation tax, introduced by the amendment to the economic agreement, apply only to certain firms.

A further reason why the aid applies to certain firms only is that the following activities are not eligible : wholesaling, food services, hire of machinery, measuring apparatus, transport equipment, personal services, and recreational and cultural services.

The fact that the beneficiary firms are not specifically identified does not mean that the scheme is not caught by Article 92 since, as in any aid scheme, the firms are identifiable. They have to meet the conditions described above.

The firms to which the Basque aid scheme applies received preferential treatment in that their investments cost them less. Through the application on Basque territory of the various measures concerned, the investments which the firms make in that territory receive preferential tax treatment.

The scheme is likely to distort competition since it strengthens the financial position and scope for action of the beneficiary firms in relation to competitors who do not qualify. Where this occurs in intra-Community trade, the latter is affected by the aid.

In particular, the scheme distorts competition and affects trade between Member States since the beneficiary firms export some of their production to other Member States ; similarly, where such firms do not engage in exports, national production receives preferential treatment since the opportunities for firms established in other Member States to export their products to the Spanish market are reduced [2].

The fact that tax concessions are involved does not exclude the aid from the scope of Article 92 since that Article applies to aid 'in any form whatsoever'.

In view of the above, the Basque scheme of tax concessions for investment is caught by Article 92 (1) of the EEC Treaty.

IV

The concessions in respect of corporation tax and personal income tax are limited respectively to entities operating exclusively in the Basque country and to taxpayers who, having their ordinary residence in the province in question, carry on the eligible activity exclusively in the Basque country.

As a result, the tax arrangements for this aid conflict with the freedom of establishment provided for in Article 52 of the EEC Treaty. A firm in another Member State wishing to set up a branch, agency or establishment in the Basque country while continuing to carry on its activity in that Member State would not be eligible for the aid ; similarly, a Spanish firm established in the Basque country could not extend its activity to another Member State by setting up an establishment there if it wished to remain eligible for the aid in question.

[1] OJ No C 189, 20. 7. 1991, p. 3.

[2] See also the judgment of the Court of Justice of 13 July 1988 in Case 102/87, France v. Commission [1988] ECR 4067.

The new Basque rules on corporation tax, laid down in the abovementioned amendment to the economic agreement, which also applies to certain firms only, do not invalidate this point since the freedom of establishment enjoyed by Community firms may not be restricted by their possible inability to qualify for tax concessions on account of the location of their tax domicile or the territorial distribution of their operations.

Consequently, the Commission finds that the tax arrangements applied in the territory of the Basque country include aid, such as that in respect of corporation tax and personal income tax, which is contrary to Article 52 of the EEC Treaty and must therefore be abolished.

However, given the special features of this case and the historical nature of the tax relationship between the central government and the Basque country, provision should be made for a transitional period, to run until the end of 1993, during which the above distortions can be brought to an end, thereby making the tax arrangements in question consistent with Community law.

V

Leaving aside the arguments developed in Section IV, the aid can, in any event, be compatible with the common market only if it qualifies for the derogations provided for in Article 92 of the EEC Treaty.

Given the nature and objectives of the scheme, the derogations provided for in Article 92 (2) do not apply in this particular case.

Pursuant to Article 92 (3) (a), aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the common market. The Commission takes the view that this derogation applies to NUTS [1] level II regions whose per capita gross domestic product (GDP), measured in terms of purchasing power standards (PPS), does not exceed 75 % of the Community average [2]. The fact is that the Basque country is a NUTS level II region whose per capita GDP, measured in terms of PPS, does, however, exceed the 75 % threshold, being equal to 89 % of the Community average (average figure for the years 1986 to 1990). Consequently, the derogation in Article 92 (3) (a) does not apply in this particular case.

As regards the derogations referred to in Article 92 (3) (b), it is plain that the scheme in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the Spanish economy. The Spanish Government, moreover, has not relied on such arguments to justify the scheme.

Pursuant to Article 92 (3) (c), aid to facilitate 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, may be considered to be compatible with the common market.

Since the aid in question relates to investment, this derogation can apply only if the scheme is confined to the areas and ceilings for national regional aid or meets the conditions laid down in the Community guidelines on State aid for small and medium-sized enterprises (SMEs) [3]. At present this is not the case, if only because the scheme covers the entire Basque country and the Commission has not authorized regional aid to be granted throughout that territory and because the conditions set out in the guidelines on aid to SMEs have not been met. In addition, for this derogation to apply, the granting of aid would have to meet the Community rules on the cumulation of aid for different purposes and comply with the limits laid down in certain sectors of activity in industry, agriculture and fisheries,

HAS ADOPTED THIS DECISION:

Article 1

1. The tax concessions for investments in the Basque country introduced by Provincial Laws 28/1988 (Álava), 8/1988 (Vizcaya) and 6/1988 (Guipúzcoa) and by Decrees 205/1988 and 227/1988 of the Basque Government are, as regards the measures relating to corporation tax and personal income tax, incompatible with the common market for the purposes of Article 92 (1) of the EEC Treaty since they are granted in accordance with procedures which infringe Article 52 of the Treaty.

2. Spain shall modify the tax arrangements referred to in paragraph 1 so as to eliminate the distortions with regard to Article 52 of the EEC Treaty not later than 31 December 1993. After that date, no aid may be granted while those distortions have not been completely abolished.

3. Should Spain fail to fulfil the obligations arising out of paragraph 2, any aid granted after 31 December 1993 shall be incompatible with the common market and shall be discontinued, with the sums paid over being recovered.

4. Within two months of the notification of this decision, the Spanish authorities shall ensure that the aid is granted within the national regional aid areas and ceilings

[1] Nomenclature of territorial units for statistics.
[2] OJ No C 212, 12. 8. 1988, p. 2 and OJ No C 163, 4. 7. 1990, p. 6.
[3] OJ No C 213, 19. 8. 1992, p. 2.

or in accordance with the conditions laid down in the Community guidelines on State aid for small and medium-sized enterprises, in compliance with the Community rules on the cumulation of aid for different purposes and with the limits laid down for certain sectors of activity in industry, agriculture and fisheries.

Article 2

Spain shall inform the Commission, not later than 31 January 1994, of the measures taken to comply with this decision.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 10 May 1993.

For the Commission

Karel VAN MIERT

Member of the Commission