II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 21 January 1998
on tax concessions under § 52(8) of the German Income Tax Act

(notified under document number C(1998) 231)

(Only the German text is authentic)

(Text with EEA relevance)

(98/476/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having given the other Member States and interested parties notice to submit their comments, in accordance with Article 93(2) of the EC Treaty,

Whereas:

I

By Decision of 26 February 1997 the Commission initiated proceedings pursuant to Article 93(2) in respect of a provision in the German Annual Tax Act 1996 (Jahressteuergesetz 1996) ([1]) which amended § 52(8) of the Income Tax Act (Einkommensteuergesetz) so as to modify a scheme laid down in § 6b of the latter Act. The Commission informed Germany of its Decision by letter dated 25 March 1997 ([2]), and published the letter in the *Official Journal of the European Communities* on 6 June 1997 ([3]). Germany submitted its comments by letter of 13 May 1997. No observations were received from other Member States or interested parties.

The provision at issue introduces a special tax concession for the years 1996, 1997 and 1998 which is intended to strengthen the market in holdings in companies in the new German *Länder* and West Berlin, and thus to increase their equity capital. The concession can be summarised as follows.

Under German tax law, gains accruing from the sale of certain assets to natural persons resident in Germany (§ 1 of the Income Tax Act) or legal persons resident in Germany (§ 1 of the Corporation Tax Act (Körperschaftssteuergesetz)) are subject to income tax; the Corporation Tax Act (§ 8) states that legal persons are to be treated in accordance with the relevant provisions in the Income Tax Act.

§ 6b of the Income Tax Act allows natural and legal persons who sell certain movable and immovable assets or shares in companies (Kapitalgesellschaften) to offset up to 50 % of the taxable gain on the sale, and in some cases up to 100 %, against the cost of acquiring or producing certain assets in the year of sale or the following four

([1]) BGBl. 1995 I 1250; entered into force 1 January 1996.

([2]) SG(97) D/2381.
([3]) OJ C 172, 6. 6. 1997, p. 2.

years ([1]). A 100 % offset under § 6b of the Income Tax Act was *inter alia* already possible before the Annual Tax Act 1996, in relation to the cost of purchasing shares in a company acquired by a holding company within the meaning of the Holding Companies Act (Gesetz über Unternehmensbeteiligungsgesellschaften).

This inquiry concerning the aid rules is not concerned with the possibility that an advantage may thereby be conferred on holding companies, and this Decision does not prejudice any position the Commission may in future take with respect to any such advantage.

As amended with effect from 1 January 1996, § 52(8) of the Income Tax Act broadens the tax concession in § 6b for the financial years 1996, 1997 and 1998. Up to 100 % of the gain may now be offset against acquisition or production costs, provided that the gain in question is used to acquire shares in companies, that this is done on the occasion of an increase in capital or the setting up of a new company, and that the company:

— has its registered office and central administration in one of the new *Länder* or West Berlin ([2]), and at the time the shares are acquired has no more than 250 employees currently employed, or

— is a holding company (Beteiligungsgesellschaft) whose sole object under its own statutes is to acquire or to administer and sell temporary holdings in companies, and which at the time the holdings are acquired has its registered office and central administration in one of the new *Länder* or West Berlin and has no more than 250 employees currently employed.

According to Germany's estimates the measure will lead to a temporary loss in tax revenues of some DEM 150 million (approximately ECU 75 million). Several thousand companies in the new German *Länder* and West Berlin may benefit; and the scheme is not confined to particular industries. There is no rule to prevent combination of this measure with other State aid schemes.

II

The Commission was informed of the provision at issue by letter of 13 October 1995, belatedly, after the legislation had been enacted, and only at the Commission's own express request. The Annual Tax Act 1996 entered into force on 1 January 1996, before the Commission's authorisation had been granted. The Commission accordingly registered the scheme as an unnotified aid measure (NN 9/96). An administrative instruction issued by the Federal Ministry of Finance on 2 January 1996 postponed the application of the scheme pending authorisation by the Commission ([3]).

In the Decision initiating the proceedings the Commission took the view that § 52(8) of the Income Tax Act constituted a State aid measure caught by Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement. The Commission considered that there were two groups which benefited: taxpayers liable under the Income Tax Act, and companies in eastern Germany and Berlin with 250 employees or less.

The Commission was first of the opinion that a tax concession given to taxpayers selling certain assets, who could then offset the gain on the sale when they acquired other assets, was a general measure with no aid component because all taxpayers who invested gains in a certain way, irrespective of their size, business or location, would qualify for the concession.

But the Commission took the view in the decision initiating proceedings that the provision requiring that in order to qualify for the tax concession the taxpayer had to take a holding in a company with its registered office and central administration in the new *Länder* or West Berlin did constitute State aid for the purposes of Article 92(1). The Commission pointed out that according to the consistent case-law of the Court of Justice of the European Communities an assessment of whether a measure constituted State aid within the meaning of Article 92(1) had to be based on whether or not it had the effect of conferring benefit. The effect of the measure at issue here was to increase the profitability of holdings in companies with their registered office and central administration in the new *Länder* and West Berlin, as compared with holdings in companies with their registered office and central administration in western Germany or outside Germany altogether. In their letter of 13 October 1995 the German authorities had argued that the economic advantage conferred by this measure would be very small, indeed almost non-existent; but the Commission once again referred to the case-law of the Court of Justice of the European Communities, according to which the fact that the advantage conferred was small did not as such exclude the possibility that intra-Community trade might be affected.

The Commission accordingly doubted whether the measure was compatible with the common market. It was not linked to investment, and had accordingly to be regarded as operating aid; but it was the Commission's established practice that operating aid was permitted only on certain conditions, and only in areas assisted pursuant to Article 92(3)(a) of the EC Treaty. The scheme also applied in Berlin. Under the Commission Decision on

([1]) Constitution of reserves under § 6b(3) of the Income Tax Act.
([2]) § 1(2) of the Assisted Areas Act (Fördergebietsgesetz).
([3]) Bundessteuerblatt 1996, Teil I, No 1, p. 2.

the designation of assisted areas for the years 1997 to 1999 (aid measure N 613/96), East Berlin could qualify as an assisted area pursuant to Article 92(3)(c), but the Decision allowed it to be treated in the same way as the neighbouring areas assisted pursuant to Article 92(3)(a) for that period; on the other hand West Berlin was an assisted area pursuant to Article 92(3)(c), but it was not given the benefit of any similar transitional arrangement, so that it did not meet the conditions set out above regarding compatibility of operating aid.

The fact that the grant of aid was not linked to investment also meant that there was a substantial danger that the aid might have economic effects outside the assisted areas. The Commission further took the view that the scheme infringed the ban on discrimination imposed by the freedom of establishment provision in Article 52 of the EC Treaty, because one of the conditions for the concession was that the registered office and central administration of the company in which shares were purchased had to be located in the new *Länder* or West Berlin. Lastly, the scheme did not provide for compliance with the specific rules which governed aid to sensitive industries.

III

In its letter of 13 May 1997 Germany argued that the measure did not constitute State aid within the meaning of Article 92(1). The German position on the proceedings initiated can be summarised as follows.

Germany drew attention, first of all, to the structural deficiencies of the economy in eastern Germany, which continued to be serious, and especially to the low rates of capitalisation of east German companies, which this scheme was intended to improve. The German authorities considered that it was unlikely that any companies in sensitive industries would be assisted under the scheme, as holding companies provided venture capital primarily to companies whose centre of activities was in promising markets.

The tax concession was merely a deferral of taxation; there was no remission of tax, since even if the taxpayer did not sell the holding acquired for a long time, its value would at the very latest appear when the firm was being wound up, and the gains would be taxed at that stage.

There was a tax advantage only to the party providing the capital, but not to the party receiving it. The recipient was obtaining additional capital the cost of which was freely negotiable and determined by the market. A direct relationship between a tax concession to the recipient of the capital and the cost of that capital was not discernible, and certainly could not be quantified. The mere fact that a tax concession was being given for the purchase of shares in companies located in a defined area did not justify the conclusion that there was a State aid equivalent present. There would be a State aid equivalent only if capital provided under § 52(8) of the Income Tax Act was made cheaper to east German and Berlin companies than the other share capital available. Germany saw nothing to suggest that this was so; in its Decision the Commission had merely stated that this effect was possible, without setting out any precise evidence in support of that view. On the contrary, it was to be supposed that the advantages of the tax deferral would not be passed on to companies with their registered office and central administration in the new *Länder* or West Berlin, because those advantages were small, and would have no further attraction if they changed hands.

In Germany's view, therefore, the tax concession was a general measure not only as far as the provider of capital was concerned but also as far as the recipient was concerned; this was so especially as the advantage to the recipient arose only as a result of the tax concession given to the provider, and the tax concession given to the provider was a general measure in the Commission's opinion too.

In conclusion, the Commission had failed both to show who was to benefit under the alleged aid scheme and to quantify the aid. In the alternative, the advantage to companies in the new *Länder* and West Berlin was extremely limited, if it was measurable at all, so that the *de minimis* rule ought to be applied [1].

IV

The broadened tax concession under § 52(8) of the Income Tax Act constitutes State aid, within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement, to companies with no more than 250 employees, and having their registered office and central administration in the new *Länder* or West Berlin in which a holding be acquired, either directly or through a holding company, on the occasion of an increase in capital or the setting up of a new company, in order to qualify for the tax concession on gains accruing on the sale of certain assets or shares in companies. However, the concession is a general measure, and does not comprise any aid component, in so far as it benefits persons subject to income tax who sell certain assets and can offset the taxable gains so arising when they acquire other assets. The Commission has arrived at this conclusion on the following grounds.

[1] OJ C 68, 6. 3. 1996, p. 9.

First, the measure is 'aid granted by a Member State or through State resources' within the meaning of Article 92(1) of the EC Treaty. In order to assess whether a State measure constituted aid, the Court of Justice of the European Communities held in SFEI that it had to be established 'whether the recipient undertaking receives an advantage which it would not have received under normal market conditions' in the absence of the State measure at issue ([1]).

§ 52(8) of the Income Tax Act offers a tax concession to natural or legal persons ('share purchasers') who realise a gain on the sale of an asset, in that it allows them to offset up to 100 % of the gain on that sale against the cost of acquiring shares in certain companies and on certain conditions, so that there is a tax payment they need not make. An advantage is thereby conferred on these persons as compared with the treatment for which they would qualify under the ordinary tax rules, which provide for a reduction of up to 50 % in taxable profits if they reinvest the gain anywhere in the Federal Republic of Germany. The 100 % tax offset is permissible only if the taxpayer acquires shares in certain companies and the acquisition takes place on the occasion of a capital increase or the setting up of a new company. The scheme thus requires taxpayers to acquire shares in such a way as to increase the capital of a company or to set up a new company; thus the tax measure has the consequence, and indeed the stated aim, of promoting demand for investment capital in certain companies, and consequently increasing or launching the equity capitalisation of these firms.

As a result of the increased demand for holdings in companies with their registered office and central administration in the new *Länder* or West Berlin ('share sellers') which arises as a result of the State measures, the financial investment behaviour of share purchasers as a whole will be affected, other things being equal, to the extent that they will now acquire holdings on terms more favourable to the share seller than they would have been without the introduction of § 52(8) of the Income Tax Act, holdings which in the absence of the tax concession they would not have acquired at all or would have acquired on terms less advantageous to the share seller. It is true, as Germany points out, that the share seller receives capital the costs of which are freely negotiable and in line with market conditions, but the measure affects the market, with the consequence that capital provided in the framework of § 52(8) becomes more attractive as compared with similar capital otherwise available to companies with their registered office and central administration outside the new *Länder* and Berlin.

The change in the financial investment behaviour and an increase in the equity of the companies concerned is in fact the declared intention of the German legislature; but in their comments the German authorities contend that the scheme has no measurable effect on the east German and Berlin companies in which the holdings are to be taken.

The tax scheme confers a direct advantage on certain natural and legal persons, who are the direct beneficiaries, to encourage them to acquire certain assets from certain firms, who are the indirect beneficiaries. The economic advantage conferred is the greater demand for shares in the indirect beneficiary companies as compared with the legal situation which existed before § 52(8) entered into force; investors, the direct beneficiaries, will consequently be prepared to acquire holdings in east German and Berlin companies on terms more favourable to those companies than the terms which would have been obtained if the measure had not been introduced. As a result, the volume of holdings in those companies will rise, or the terms of the acquisition of the holding (price as compared with nominal value, duration of holding, return on holding, etc.) will be shifted in favour of those companies, or both.

The measure is accordingly likely to confer an economic advantage on the indirect beneficiaries under § 52(8) of the Income Tax Act, which have their registered office and central administration in the new *Länder* or West Berlin, an advantage they would not have enjoyed without it; and it does not require anything in return.

In its comments Germany contends that the measure is merely a deferral and in no way a remission of tax. It should be pointed out, first of all, that under § 222 of the German Tax Code (Abgabenordnung) there is deferral of tax only where the due date of a tax claim which has already arisen is postponed; here, however, a tax claim under § 6b of the Income Tax Act is extinguished, and a fresh claim may possibly arise on a further disposal. In addition, it is irrelevant whether the tax concession can be deemed to be a tax deferral in economic terms, since there would be an indirect economic advantage to the share seller even in the case of a tax deferral (see Commission Decision 93/349/EEC in the British Aerospace and Rover case ([2])).

As Germany has argued in its comments, however, it would be difficult here to demonstrate a specific advantage in each individual case, or to quantify the State aid component. Nevertheless, as has already been explained, it can safely be said that an economic advantage is indeed being conferred in the typical case. When the matter is examined *ex ante*, the economic advantage conferred cannot be determined with certainty for each holding acquired, because the measure hinges on the business conduct of a private financial investor who takes investment decisions on the basis of financial investment

([1]) Case C-39/94 SFEI and Others v. La Poste and Others [1996] ECR I-3547, paragaph 60.

([2]) OJ L 143, 15. 6. 1993, p. 7.

conditions which have been deliberately modified by State intervention. It cannot be abstractly shown that the behaviour of an individual share purchaser has been changed by the State measure. The advantage cannot be quantified with certainty *ex ante*, and indeed will not always be quantifiable *ex post* either.

It should be noted that in assessing whether a measure constitutes State aid the Commission need not refer to each individual case. The Court of Justice of the European Communties held in Case 248/84 Germany v. Commission that in the case of an aid programme the Commission could confine itself to examining the characteristics of the programme in question in order to determine whether by its nature the scheme was caught by Article 92(1) ([1]). In order to come to the conclusion that there was no State aid, then, the Commission would have to be able to show that there was no case in which an economic advantage was conferred and hence State aid granted. It must be concluded that by its nature the scheme has the effect of conferring an economic advantage on an ascertainable class of companies, namely those with no more than 250 employees and their registered office and central administration in the new *Länder* or West Berlin.

In order to calculate the economic advantage in individual cases a comparison would have to be made between the terms on which a company in eastern Germany or Berlin with 250 employees or less could secure an investment with or without the tax concession, other things being equal.

Under this measure an economic advantage is to be granted through State resources. The scheme does cause a reduction in tax revenue, because the gain on the disposal of the asset is not taxed, and this for an indeterminate period. The tax advantage granted through State resources is passed on in part to the beneficiary of aid under a legal provision which seeks to guide the investment behaviour of private investors.

As the Court of Justice has held in similar circumstances, for example in Van der Kooy ([2]), the State is using a legislative provision to cause the share purchaser to pass on the tax advantage to specific firms. The measure thus has the same effect as the parafiscal charges financed by some industries which are used by a body administering the resources thus assembled to subsidise projects to be carried out by particular firms. The Court of Justice has consistently held, for example in Compagnie commerciale de l'Ouest ([3]), that depending on the use to which the revenue from these parafiscal charges is put, they may constitute State aid, as the advantage conferred on particular companies is attributable to State action even if the measure is not financed directly out of State resources, because the parafiscal charge is levied on a compulsory basis.

In the present case the economic advantage is passed on not by an official or private body administering the revenue which was set up to pass on the benefit, but instead by State guidance of the investment behaviour of private share purchasers. Because of the influence brought to bear, the economic effect of this State guidance is comparable. It follows that the passing on of the advantage to particular companies is caused by the State, through the relevant legislative provision.

The measure does favour certain undertakings: it is confined to a particular region — the company must have its registered office and central administration in the new *Länder* or West Berlin — and to companies of a specified size — the company must have no more than 250 employees. It is admittedly not possible to identify these companies individually in advance, but a category of advantaged companies can be determined which is sufficiently well-defined to allow it to be said that these are the companies on which the advantage is conferred. The scheme is therefore sufficiently specific to distinguish it from general measures that confer an advantage on all businesses in a Member State, and which consequently fall outside the scope of Article 92(1) of the EC Treaty.

Lastly, the scheme threatens to distort competition, since it favours undertakings with their registered office and central administration in the relevant region as compared with those in the rest of Germany and in other Member States. The German authorities' view that the aid intensity involved is very small, indeed close to zero, changes nothing; as the Court of Justice of the European Communities held in the Tubemeuse case, an effect on trade between Member States cannot be ruled out on the sole ground that the aid is small ([4]). Nor have the German authorities undertaken to comply with the *de minimis* notice.

On the basis of these considerations, then, the Commission concludes that the broadened tax concession under § 52(8) of the Income Tax Act constitutes State aid, within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement, given to companies having their registered office and central administration in the new *Länder* or West Berlin, in which a holding is to be acquired, either directly or through a holding company, on the occasion of an increase in capital or the setting up

([1]) [1987] ECR 4013, paragraph 18.
([2]) Joined Cases 67/85, 68/85 and 70/85 Van der Kooy and Others v. Commission [1988] ECR 219.
([3]) Joined Cases C-78/90 to C-83/90 Compagnie commerciale de l'Ouest and Others v. Receveur des douanes de La Pallice Port [1992] I-1847, paragraph 35.
([4]) Case C-142/87 Belgium v. Commission [1990] ECR I-959.

of a new company, in order to qualify for the tax concession on gains accruing on the disposal of certain assets or shares in companies.

V

The aid scheme at issue has the effect of favouring the acquisition, on the occasion of a capital increase or the setting up of a new company, of holdings in companies with up to 250 employees which have their registered office and central administration in the new *Länder* and West Berlin at a price that is more advantageous to the share seller or on terms more advantageous to the share seller than would have been obtained if the provision had not been introduced. The scheme consequently favours the strengthening of those firms' equity base.

The aid scheme is not 'conditional on initial investment' within the meaning of the Commission communication on regional aid systems [1], but instead has an ongoing character, being designed to overcome specific structural disadvantages, as the German authorities have expressly confirmed. In accordance with the judgment of the Court of Justice of the European Communties in Siemens v. Commission [2], therefore, it must be treated as operating aid.

It is the Commission's established practice to allow operating aid only in exceptional cases, on certain conditions, and in areas within the scope of Article 92(3)(a) of the EC Treaty, that is to say in 'areas where the standard of living is abnormally low or where there is serious underemployment' (see point 6 of the Commission's 1988 communication on the method for the application of Article 92(3)(a) and (c) to regional aid) [3].

The five eastern *Länder* (Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia) are areas assisted pursuant to Article 92(3)(a); a Commission Decision of 18 December 1996 classed them as such until the end of 1999 (State aid measures N 464/93 [4], in respect of the period up to 1996, and N 613/96 [5], in respect of the period 1997 to 1999). Until the end of 1996 the Commission also accepted that East Berlin could be assisted pursuant to Article 92(3)(a) (State aid measure N 464/93), and as a transitional arrangement for the period 1997 to 1999 the Commission has decided that East Berlin can be treated in the same way as an area assisted pursuant to Article 92(3)(a), in view of its special geographic position, the fact that it was considered an Article 92(3)(a) area in the period 1994 to 1996, and the history of the city of Berlin; this puts it on the same footing as the five new *Länder* (State aid measure N 613/96).

However, the aid to these areas cannot be considered compatible with the common market pursuant to Article 92(3)(a) of the EC Treaty, for the following reasons:

— The Commission's 1988 communication, referred to above, states that operating aid will be allowed in Article 92(3)(a) regions only in exceptional cases, if the aid is 'designed to promote a durable and balanced development of economic activity'. In addition, it has been the Commission's constant practice to require that the aid should be granted for a predetermined period only, and should fall over time.

  The effect of the scheme at issue here is to strengthen the equity base of the recipient firms; the scheme does not ensure that the capital provided to the recipient companies will be used for the economic development of the recipient companies in the Article 92(3)(a) regions, and that it will not in reality benefit companies whose economic activities lie outside an assisted area. On the basis of an examination of the scheme it cannot be ruled out that companies which belong to large companies, or which are independent companies outside the assisted areas, may benefit from the scheme without any real contribution being made to the economic development of companies in the assisted area and thus to the assisted area itself [6]. Thus the scheme cannot be classed under the exemption for regional aid provided for in Article 92(3) of the Treaty. Lastly, there is no provision for the scheme to be run down over time.

— There is nothing to prevent the scheme from being applied to companies in sensitive industries for which specific State aid rules have been laid down (rules of this kind currently exist in the synthetic fibres industry, the motor industry, shipbuilding, transport, agriculture, fisheries, the ECSC sectors and non-ECSC steel). But the Commission's 1988 communication, referred to above, states that aid is not to 'give rise to a sectoral overcapacity', something that typically exists in these sensitive industries.

[1] OJ C 31, 3. 2. 1979, p. 9.
[2] Case C-278/95 [1997] ECR I-2507, paragraph 55.
[3] OJ C 212, 12. 8. 1998, p. 2.
[4] OJ C 373, 29. 12. 1994, p. 3.
[5] OJ C 288, 23. 9. 1997, p. 5.
[6] See Commission Decision 98/194/EC of 1 October 1997 concerning the extension of the 8 % investment premium, [1986] ECR 273 State aid measure C 28/96 (OJ L 73, 12. 3. 1998, p. 38).

— Lastly, there is nothing to prevent the scheme from being applied to firms in difficulty, within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty [1], even if the general design of the scheme does make this unlikely. The scheme would not be compatible with the conditions for the grant of aid to firms in difficulty which are laid down in those guidelines.

As regards the application of the aid scheme to companies with their registered office and central administration in West Berlin, it should be noted that on the basis of the abovementioned decisions West Berlin was until 1996 only in part, and for the period 1997 to 1999 in its entirety, an assisted area pursuant to Article 92(3)(c). This means that the scheme also applies to companies outside areas assisted pursuant to Article 92(3)(a), that is to say in unassisted areas and areas assisted pursuant to Article 92(3)(c). According to the Commission's established practice, already referred to, operating aid outside areas assisted pursuant to Article 92(3)(a) cannot be declared compatible with the common market, irrespective of whether it is granted to companies in sensitive industries or to companies in difficulty.

The scheme consequently cannot be considered compatible with the common market under the exemption clauses in Article 92(3)(a) and (c). Nor is it intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, or to promote culture and heritage conservation within the meaning of Article 92(3). Nor is it compatible with the common market pursuant to Article 92(2): in particular, the Commission has no information to suggest that the scheme is required in order to compensate for the economic disadvantages caused by the division of Germany within the meaning of Article 92(3)(c).

The scheme further makes it a condition for the tax concession that the firm in which the holding is taken should have its registered office and central administration in the new *Länder* or West Berlin. This provision is in contradiction with the ban on discrimination in Article 52 of the EC Treaty on the right of establishment.

Article 52 *et seq.* provide for the removal of restrictions on establishment. Articles 52 to 58 also guarantee the freedom to carry on a business through a branch or subsidiary. For the purposes of Article 58, the nationality of a firm is to be determined by reference to the Member State in accordance with whose law it is formed and to its registered office and central administration, as the Court of Justice of the European Communities held in Case 270/83 Commission v. France [2]. The ban on discrimination applies not only to direct discrimination but also to measures having equivalent effect. Article 54(3)(h) of the EC Treaty provides that the Commission is to satisfy itself 'that the conditions of establishment are not distorted by aids granted by Member States'. In application of this provision, the Council provided in its 1962 General Programme for the abolition of restrictions on freedom of establishment that rules and practices that eliminated or restricted the exercise by foreigners, but not of domestic nationals, of the rights normally associated with a self-employed activity, or made it subject to conditions, were to be done away with [3]. These rules or practices include direct or indirect State aid measures.

By banning restrictions on the right of establishment, Article 52 *et seq.* seek to ensure that those companies are treated in the same way as companies with their registered offices in the host Member State. But the aid under the scheme at issue is available only to companies that have their registered office and central administration in the new *Länder* and West Berlin. In order to qualify, companies with their registered offices and central administration outside that region would have to transfer their registered office and central administration there. The scheme thus favours east German and Berlin companies as compared with companies with their registered offices outside Germany, and consequently infringes the ban on discrimination in Articles 52 *et seq.*

On the ground that the application of the scheme was postponed by the Ministry of Finance's administrative instruction of 2 January 1996, Germany objects that it has not yet been applied and that no aid has been paid under it. If the scheme has in fact already been applied, Germany will have to take the necessary steps to recover aid already paid out,

HAS ADOPTED THIS DECISION:

Article 1

1. The tax concession provided for in § 52(8) of the Income Tax Act constitutes State aid to companies with no more than 250 employees and having their registered office and central administration in the new *Länder* or West Berlin and is incompatible with the common market pusuant to Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

[1] OJ C 368, 23. 12. 1994, p. 12.

[2] [1986] ECR 273.

[3] OJ 2, 15. 1. 1962, p. 36/62.

2. Germany is called on to repeal § 52(8) of the Income Tax Act.

Article 2

1. Any aid already paid under the scheme referred to in Article 1(1) is unlawful, having been granted before the Commission Decision.

2. Germany shall ensure that any aid unlawfully granted is repaid.

The aid shall be recovered in accordance with the procedures and provisions of national law, and in particular the national rules on default interest, with interest running from the date of the grant of the unlawful aid, and the rate applied being the reference interest rate used in Germany at the time the aid was granted for calculating the grant equivalent of regional aid.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 21 January 1998.

For the Commission

Karel VAN MIERT

Member of the Commission