II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 26 October 1999
on the State aid implemented by Spain in favour of the publicly owned shipyards

(notified under document number C(1999) 3864)

(Only the Spanish version is authentic)

(Text with EEA relevance)

(2000/131/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having regard to Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding [1], as prolonged by Regulation (EC) No 3094/95 [2];

Having regard to Council Regulation (EC) No 1013/97 of 2 June 1997 on aid to certain shipyards under restructuring [3],

Having called on interested parties to submit their comments pursuant to the provisions cited above [4] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter D/6715 dated 6 August 1997 the Commission approved restructuring aid for the publicly owned yards in Spain pursuant to Regulation (EC) No 1013/97. The aid was approved subject to a number of conditions, including the volume of aid, compliance with which the Commission monitors.

(2) The Spanish Government submitted a regular monitoring report on 15 September 1998, which was supplemented by information provided during a monitoring visit from 30 September to 2 October of the same year. By letter dated 22 October 1998 the Commission raised certain questions about the volume of tax credits granted to the yards. The Spanish authorities commented by letter dated 13 November 1998.

(3) By letter dated 15 February 1999 the Commission informed Spain of its decision to initiate the procedure laid down in Article 93(2) of the EC Treaty.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [5]. The Commission invited interested parties to submit their comments on the matter.

(5) The comment received were forwarded by the Commission to Spain, which was given the opportunity to make observations.

II. DETAILED DESCRIPTION OF THE AID

(6) Under its August 1997 Decision in State aid Case C 56/95 [6], the Commission State aids totalling a maximum of ESP 229,008 billion in support of the restructuring of the publicly owned yards in Spain. The package of approved aids included 'special' tax credits of up to ESP 58 billion in the period 1995 to 1999.

[1] OJ L 380, 31.12.1990, p. 27.
[2] OJ L 332, 30.12.1995, p. 1.
[3] OJ L 148, 6.6.1997, p. 1.
[4] OJ C 113, 24.4.1999, p. 14.
[5] See footnote 4.
[6] OJ C 354, 21.11.1997, p. 2.

(7) The reason for the inclusion of these special tax credits was as follows. When the restructuring plan was originally drawn up, the yards were still part of the INI group (Instituto Nacional de Industria) and able to reduce by 28 % after tax losses through INI, in accordance with generally applicable Spanish national legislation, offsetting losses against profits elsewhere in the group. The financial projections under the plan assumed that such tax credits would continue to be available despite the fact that as from 1 August 1995 the yards had formed part of the loss-making State holding company Agencia Industrial del Estado (AIE). Legislation was accordingly passed (Law 13/96 of 30 December [7]) allowing companies in such a position to continue, up until 31 December 1999, to receive from the State erquivalent amounts to what they would have been entitled under a tax consolidation system. On the basis of the forecast losses under the restructuring plan, it was estimated that these tax credits for the publicly owned shipyards would amount to 58 billion pesetas. The Commission considered that this was a specific measure in favour of the yards and thus constituted a State aid.

(8) On 1 September 1997, the yards were absorbed into Sociedad Estatal de Participaciones Industriales (SEPI), which like INI, is able to take advantage of general tax consolidation rules to offset losses against profits.

(9) The aid package was approved on the condition that the total sum, as well as the amounts per category of aid were maximum amounts. Such conditions were set to ensure that the aids were used for the purposes intended and to limit the distortive effect of the aid on the shipbuilding industry. According to the information available to the Commission within the context of its monitoring of the restructuring plan, the yards received in 1998 a special tax credit of ESP 148,451 billion, notwithdstanding the fact the yards also received a tax credit under general measures in 1998, corresponding to their losses in 1997, based on general Spanish tax consolidation rules, as a result of their integration SEPI.

(10) For this reason the Commission doubted whether the special tax credits of ESP 18,451 billion paid in 1998 were in accordance with its previous aid decision and compatible with the common market.

III. **COMMENTS FROM INTERESTED PARTIES**

(11) The Commission has received comments from a Member State (Denmark) and the Association of Danish Shipbuilders (Foreningen af Jernskibs- og Maskinbyggerier i Danmark).

(12) The Association of the Danish Shipbuilders commented that the tax credits concerned constituted illegal aid that should be repaid given the serious market situation and the major loss of employment in the sector.

(13) These views were echoed by the Danish authorities, which referred to the difficult global market situation and the problems of yard closures and workforce reductions in Denmark since 1992. They emphasised that the Spanish yards are in direct competition with Danish yards and have obtained a competitive advantage through the State aids that have been granted.

IV. **COMMENTS FROM SPAIN**

(14) Spain submitted its comments by letters dated 6 April 1999 and 18 August 1999 (the latter providing supplementary observations essentially reiterating the substance of the previous letter).

(15) The Spanish authorities considered that the decision to initiate the procedure was imprecise as to the nature of the supposed infringement that it refers to. In their view the text suggests that there have been two infringements: firstly, non-compliance with the Commission Decision authorising the aid package; and secondly, the granting of aid in the form of special tax credits, which may be incompatible with the common market.

(16) They maintain that this conclusion is not substantiated and causes confusion when it comes to presenting observations. They consider that it is unclear what non-compliance is referred to, as this supposed infringement appears to be distinct from the problem of special tax credits. Since there is no reference to any other infringement related to the latter issue, they assume that the Commission has doubts about the compatibility the special tax credits amounting to ESP 18,451 billion. Given that this type of aid was authorised, the Commission's concern must be that the amount approved has supposedly been exceeded by this figure.

(17) The Spanish authorities point out that the years have received aid matching the exact amount authorised. It is therefore erroneous to suggest that more aid has been granted than was approved and that there has been any infringement of the Decision.

(18) In their view, the Commission's doubts are based on a false premise, by totalling amounts that cannot be added together. There is a fundamental difference in nature between State aid and tax credits under general measures. In effect, aid in the form of 'tax credits' as laid down in the Commission's August 1997 [8] Decision approving the restructuring aid package is public aid since these amounts are not justified under the general tax system in Spain. However tax credits derived from the financial consolidation of the SEPI group are automatic operations derived from the applicable general legislation, which are not considered State aid under Community law.

[7] BOE 315, 31 December 1996, p. 38974.

[8] See footnote 6.

(19) Had the Commission not made the addition, it could not have concluded that the aid granted was excessive. Therefore, according to the Spanish authorities, it seems that if the shipyards had not been integrated into SEPI's financial consolidation regime, the Commission would not have considered that more aid had been granted than was authorised.

(20) Spain disputes a conclusion which in essence declares that certain amounts that may be received legally and that do not amount to aid in any way, may be considered the cause of an infringement. The incorporation of the shipyards into a legal tax system cannot be the cause of a supposed infringement when the aid has not been excessive in a global sense or in a specific sense.

(21) According to the Spanish argumentation, one of the consequences deriving from the Commission's interpretation (if correct) is that from the moment the shipyards were integrated into SEPI, the Commission Decision authorising aid to the shipyards should have been considered substantially modified as regards as aid in the form of tax credits.

(22) The Spanish authorities further argue that, indeed, the Commission appears to recognise that the new tax credits under the SEPI tax system are general measures, which are not considered aid and which do not give rise to any legal infringement of the Decision. Although these tax credits have begun to take effect since 1998, for the 1997 fiscal year, the Commission is now saying in practice that the original Decision, authorising ESP 58 billion of special tax credits, should be considered modified as from the moment when the shipyards returned to a regime of financial consolidation.

(23) According to the Spanish authorities, this interpretation has no foundation, particularly since nowhere in the August 1997 Decision does it state that this aid of ESP 58 billion is subject to the condition that the shipyards are not integrated into a new regime of financial consolidation in the future.

(24) Furthermore, if the integration of the shipyards into SEPI affected the aid limit, the Commission should have alerted the Spanish authorities and taken steps to modify its decision. In the absence of such action, there is no way that a de facto change is possible, since a change of this nature, under the principles of legal security, would require a formal modification of the act fixing the aid limit. In the absence of such a modification, the new facts (i.e. the disappearance of AIE, the incorporation of the shipyards into SEPI and the application of certain taxation norms) do not constitute elements that give rise to the authorised limits being exceeded.

(25) The Spanish authorities note that the text of the opening of the procedure states that if it had been known that the shipyards were to be incorporated into SEPI, 'the amount of aid … would have been reduced appropriately'. However they maintain that this argument is not valid for demonstrating that the aid was excessive. Rather, it implies that there was no such excess. If instead of authorising ESP 58 billion, a smaller amount had been authorised, then there would have been an excess, but as the authorisation was for ESP 58 billion, there was no excess.

(26) Furthermore, the Spanish authorities argue that if the Decision had been modified to take account of the shipyards' integration into SEPI, this change could only impact on the aid amounts for tax credits after the month of September 1997, when the integration took place. They maintain that the amount of aid up to this date was within the authorised limit, emphasising that Decision fixed only global amounts per heading, valid over the entire period of the restructuring.

(27) Spain has never considered that aid should be added to measures that do not constitute aid; or that the incorporation of the shipyards into SEPI would have the immediate effect of substantially modifying the 1997 Decision, in particular, the immediate and substantial reduction of the aid of ESP 58 billion. The 1997 Decision reflected a global and combined package of assistance to publicly owned shipyards, divided into separate categories but in any case being accounted for jointly.

(28) The Spanish authorities recalled that up until 1997, they had estimated that the amount of this aid in the form of special tax credits would reach ESP 48 billion. However, in the final negotiations prior to the Commission's Decision approving the aid, various figures in the restructuring plan were revised in order to take into account the delays in its approval and implementation. Additional aid was agreed on top of that initially proposed, including, as part of the overall package, an increased figure for special tax credits of ESP 58 billion. The increase was justified by the delays in approval and implementation of the restructuring plan, which resulted in greater losses than foreseen (and a shorter time available in which to disburse the aid). Therefore, had it been known that the shipyards were to be integrated into SEPI and that this would mean a loss or reduction in aids, their inclusion in another chapter would have been negotiated.

(29) Finally, the Spanish authorities that when complex cases such as this are being negotiated, the overall aid under negotiation is the main focus of discussion.

(30) Having made these observations, the Spanish authorities presented data seeking to demonstrate that the special tax credits granted were within the limits.

(31) They explained that this aid was directly related to the years 1995, 1996 and 1997, mainly because significant losses were forecast for those three years. It was calculated as 28 % of net results before tax, which amounted to ESP 57,963 billion, i.e. the ESP 58 billion finally approved as aid. The following table shows the basis for this calculation.

(ESP million)

	1995	1996	1997	1998	TOTAL [1]
Net result before tax	(90 463)	(90 458)	(27 422)	834	
Taxes (28%)		50 299	7 664	(248)	57 963
Net result after tax	(90 463)	(40 159)	(19 758)	586	

[1] The 1998 tax is not taken into account as positive results were expected.

(32) According to the Spanish authorities, the forecast was carried out at the beginning of 1997, based on 1995 results and estimated results for the following period. The deductions were calculated as 28 % of forecast losses. No request was made for an estimation of possible changes in assessment bases and the tax credit that could result.

(33) With regard to this aspect, the Spanish authorities consider that if the aid was calculated as 28 % of losses before tax this is how it should be applied. It could not be applied any other way since the shipyards did not belong to any other financial consolidation group; and therefore neither the AIE nor any other public body could provide fiscal compensation for the taxable assessment bases. For Spain, the fact that the shipyards were integrated into SEPI has no practical relevance, since during the period when the shipyards were under AIE control, their real losses justified granting consistent aid amounting to 28 % of net results before tax, up to the approved limit. It owuld be wrong for the Commission to conclude that the yards were only entitled to a smaller amount of aid when the actual losses were much greater than originally foreseen.

(34) According to the figures the Spanish authorities presented in their observations, the losses amounted to ESP 90,463 billion in 1995, ESP 97,056 billion in 1996 and ESP 19,883 billion up to September 1997, the month in which the shipyards were incorporated into SEPI. The total losses for this period therefore amounted to ESP 207,402 billion and the 28 % aid generated was 58,073 billion. However the actual amount of aid paid was in fact slightly less than would have been due by applying the deduction of 28 % for the period in question. According to the Spanish authorities, payment of the aid was effected in two tranches: ESP 39,549 billion in March 1997 and ESP 18,451 billion in July 1998. The timing of these payments was late because of budgetary constraints, which explains the apparent inconsistency between entitlements and payments, particularly as regards the 1998 payment which does not correspond to the 1997 results. If the basis for calculating the entitlements had been general tax consolidation rules, the yards would have been able to receive interest due to the late payments. However no such interest payments were made, confirming that the method of calculation used was 28 % of net losses before tax.

(35) In conclusion, the Spanish authorities therefore consider that the aid figure under the heading of tax credits is within the amount laid down in the Commission's decision, with the overall amount of aid authorised also being respected.

(36) As regards observations on the comments from third parties under the procedure, Spain submitted its views by letter dated 18 June 1999. It shared the concerns expressed about the overall market situation, and considered that the problems facing Danish yards were similar to those encountered by Spanish yards against unfair competition practices from the Far East. It denied any suggestion that its yards had received any illegal aids.

V. **ASSESSMENT**

(37) The Commission notes that the aid it approved as being in compliance with the provisions of the Regulation (EC) No 1013/97 was considered compatible with the common market as it complied with former Article 92(3)(e) of the EC Treaty. However, this applies only provided that the conditions laid down in the Commission Decision approving the aid in accordance with the Regulation are respected. Should the conditions for approving the aid not be complied with, the aid falls under the general prohibition of Article 87(1) of the EC Treaty and may therefore be considered incompatible with the common market, unless it can be declared compatible for other reasons.

(38) Regulation (EC) No 1013/97 contained a derogation from the normal rules on aid to shipbuilding (applicable to other Community yards) for the publicly owned shipyards in Spain in order to create the possibility for these yards to undergo further comprehensive restructuring and to become competitive. According to Article 1(4) of the Regulation, a package of aids, which would otherwise have been incompatible with the shipbuilding aid directive, may be considered compatible with the common market subject to certain conditions. One of

the conditions laid down in this provision is that the overall aid package is a maximum. Moreover for each category of aid approved, including the special tax credits, the amount approved is expressly stated to be a maximum by the use of the words 'up to'. This is reflected in the Commission's August 1997 Decision, which makes it clear that the basis for approving the otherwise incompatible aid, including the special tax credits is Article 1(4) of Regulation (EC) No 1013/97.

(39) Against this background, the Commission finds it very difficult to undertand why the Spanish authorities should claim that the reasons for initiating the Article 88(2) procedure are unclear. The facts of the case, which are not in any way disputed by the Spanish authorities, are that in 1998 the yards received aid totalling ESP 18,451 billion as special tax credits, notwithstanding the fact that the yards also benefited from tax credits under general measures. In opening the procedure, the Commission was therefore concerned about the compatibility of the 1998 payment (in whole or in part) on the grounds that this resulted in the yards receiving the full amount of approved special tax credits when this was supposed to be a maximum. If the yards were also receiving tax credits under general measures (the previous absence of which was the sole reason for the special tax credits in the first place), the justification for paying the maximum amount of aid seemed questionable and a possible infringement of the Commission's Decision. The Commission's doubts in this respect have been fully confirmed by the procedure, as will be explained below.

(40) The three main arguments presented by Spain can be summarised as follows:

— the various aid measures approved (including the special tax credits) were negotiated as a package and should be treated as such. In the case of both the overall package and the specific provision for tax credits the total amounts finally approved (which were increased from those originally envisaged due to delays in approval of the plan) have not been exceeded, despite the fact that actual losses have been greater than foressen,

— the Decision did not prohibit the yards from getting tax credits under general measures in addition to special tax credits, nor was it subsequently modified to that effect following the yards' integration into SEPI. It is wrong to add special and general tax credits together. These are different concepts and general measure tax credits based on reintegration in SEPI do not constitute State aids,

— the amount of ESP 58 billion special tax credits approved was based on a forecast of net accounting results before tax in the period 1995 to 1998. On this basis the approved amount has not been exceeded.

(41) So far as the first argument is concerned, it is perfectly true that there were delays in approving the plan. This is not however relevant for the Commission's assessment since additional aids were provided for to take account of the delay (including an increase in the maximum for tax credits from ESP 48 billion to ESP 58 billion). More importantly, the Commission notes that although the total amount of aid was a package, a maximum for each type of aid was claerly specified to ensure that the aid was used for the purposes intended and was not simply used as an operating aid to enable the yards to continue in business as before without proper restructuring. This is fully in line with Commission policy in such cases. It has also been consistent Commission practice not to allow transferability of aids from one category to another. Moreover this would in any case require a qualified majority of Member States in the Council to agree to an amendment to Regulation (EC) No 1013/97 providing the legal basis for the aids to be approved in the first place.

(42) The Commission also agrees that the maximum overall amount of aid approved, including the maximum sum allocated for tax credits, appears not to have been exceeded. However all the figures were maximal; they were not automatic entitlements. It has been consistent Commission policy that aid must not be granted if the need for it is not clearly established. it cannot be used in cases where other means would be sufficient to achieve the same end without aid. Moreover aid may only be considered compatible with the common market if it is kept to the minimum necessary to achieve its objectives. It cannot simply be used to improve the situation of the recipient undertaking. Such an approach, which was confirmed by the Court of Justice judgement of 17 September 1980 in Case 730/79, *Philip Morris BV Commission* [9], is even more imperative in cases such as this where the aid is being granted by way of derogation from the strict rules that normally apply to the shipbuilding sector.

(43) Linked to their argument that the aids approved should be seen as a package, the Spanish authorities argue that had it been known prior to the 1997 Commission Decision that integration into SEPI would follow (and the volume of approved special tax credits reduced accordingly) they would simply have proposed additional aid to make up the difference. It is difficult for the Commission to see how such an approach could have been reconciled with the need to keep the aid to the strict minimum necessary (which already included loss

[9] Rec. 1980, p. 2671, paragraph 17.

compensation as well as tax credits to reduce losses sufficient to enable a return to viability at the end of the restructuring). It is unclear what purpose the 'new' aid could justifiably have served and it would probably have impacted on the necessary counterpart measures imposed to minimise the possible distortion to competition.

(44) As regards Spain's second argument, the Commission acknowledges that tax credits under nationally applicable general measures would not constitute State aid provided that they apply without distinction to all firms and to the production of all goods. The Commission is not in any way seeking to challenge Spain's right to apply such general measures to the publicly owned shipyards following their integration into a group (SEPI) able to benefit from Spanish tax consolidation rules. Notwithstanding this, however, the granting of such credits, in addition to the special tax credits approved under the previous decision, has resulted in the yards receiving greater public financial support than was foreseen when the aid was approved. The justification for approving the special tax credits was that general tax credits would not be available to the yards. Examining the availability of general tax credits granted is thus highly relevant for determining whether all the special tax credits can be justified. It is not a question of adding together measures that should not be added together, but an appropriate basis for assessing whether any infringement of the Commission's Decision in respect of special tax credits is involved.

(45) In that context, the Commission would underline, as noted above, that the amount of tax credits approved by the Council and the Commission as aid was expressly stated to be a maximum, not an automatic entitlement. As was made clear in the Commission's proposals to the Council (points 3.9, 5.21 and 5.22 of Annex 3 to COM(97) 132 final), it was assumed that no tax credits under general measures would be possible. It was clearly not the intention to allow the yards to obtain special tax credits as well as credits under general measures. Had it been known that such a possibility could arise, the volume of aid proved at the time under this head would have been reduced accordingly.

(46) Spain criticises the Commission for not drawing attention to the implications of the integration of the yards into SEPI. However the onus is on the Member State to whom a Decision is addressed to ensure that it is fully respected. The Commission did not consider it necessary or appropriate to amend the previous Decision, since the terms and conditions of the original Decision were perfectly clear. Moreover since the full amount of special tax credits had not been paid at the time of the yards' absorption into SEPI, there were no grounds for the Commission not to assume that following this event, and the resulting provision of tax credits under general tax consolidation rules, the maximum approved amount of special tax credits would not be needed. As soon as the Commission became aware of the possible breach of the Decision (after receipt of the September 1998 monitoring report confirming the July 1998 aid payment and of the final 1997 accounts confirming the tax credits under general rules), it began the preliminary investigation which led to the opening of the Article 88(2) procedure.

(47) As regards Spain's third main argument, the method of calculation for estimating the amount of aid needed in the form of special tax credits, the Commission does not dispute that the estimates submitted at the time by the Spanish authorities were based on net results before tax. The Commission accepted these estimates as such, precisely because the amount approved was a maximum. In fact, as explained below, under spanish tax law (including the specific law passed to allow the yards to get special tax credits) the basis for determining tax credit entitlements is not the before tax accounting results, but the amount of the tax base. However the fact that the amount was stated to be a maximum meant that it was not necessary at the time to scrutinise in detail the method used to calculate the tax credits. What matters for the purposes of controlling the aids, (and ultimately the effect on competition) is the amount of actual losses which could be used in practice for tax credit purposes.

(48) In that context it should be noted that Law 13/96, enabling the yards to benefit from special tax credits, states that companies that before 31 December 1994 were classified within a group capable of making a consolidated tax declaration and therefore with a right to compensation for losses from profits generated by other companies in the same group, and have lost the right to such possibilities, shall receive from the State the same amount of company tax that would have been due to them had they remained in a tax consolidation system, in accordance with current legislation. Article 27 of Law 43/95 of 27 December on company tax law ([10]) makes it clear that the amount to be paid shall be calculated on the taxable base, which Article 10 of the same law defines as the accounting result, corrected by permanent differences (i.e. non-eligible items) and temporary differences (for example restructuring provisions not allowed for when costs generated but only when paid subsequently). It is evident from the audited accounts for the separate yards that the special tax credits corresponding to 1995 and 1996 losses were determined on this basis and not on the net results before tax. It is also clear from the 1997 accounts that the tax credit granted under general tax consolidation rules was calculated on exactly the same basis.

([10]) BOE 310 of 28 December 1995, p. 37072.

(49) The Spanish calculation of the amount of aid justified does not therefore correspond to the actual taxable results. Nor does it explain why any payment in 1998 on the basis of Law 13/96 was justified given the SEPI-generated general tax credit in 1998 which, in accordance with Spanish fiscal law does not correspond to the results in the last four months of 1997. (i.e. the period as from the yard's integration into SEPI), but to the full year. The Spanish claim that the aid was justified by the worse than expected results is also debatable. Even on the basis of their own figures actual net results before tax in 1995 and 1996 were not significantly different from those foreseen under the plan. Losses in 1997 (and 1998) were indeed higher, but as indicated above (and confirmed below) these were fully covered by general tax credits.

(50) The Commission has made an analysis on the basis of the taxable base according to the published audited accounts, and calculated what tax credits the yards were entitled to receive in the period 1995 to 1997 on the basis of each yard being taxed separately. On this basis it is estimated that the entitlement was as follows (payments would normally be made in the year following entitlement):

(ESP million)

	1995	1996	1997
Result before tax (per accounts)	(99 100)	(103 034)	(41 398)
Add permament differences	9 239	6 663	6 048
Add temporary differences	42 376	(17 416)	(7 728)
Taxable result	(47 485)	(113 787)	(43 078)
Credit at 28 %	13 296	31 860	12 062

The total entitlement for the three years in thus ESP 52,218 billion, of which ESP 45,156 billion corresponds to 1995 and 1996 combined. However account needs to be taken of certain pre-1995 temporary differences amounting to ESP 5,607 billion, thereby reducing the relevant figure for 1995 to 1996 ESP 39,549 billion.

(51) The total of special and general tax credits actually paid amounted to ESP 70,062 billion, comprising ESP 58 billion in special tax credits plus the above 1997 tax credit paid in 1998 under general measures. As acknowledged above, the latter general tax credit, which, in accordance with Spanish fiscal law does not correspond to the results in the last four months of 1997 (i.e. the period as from the yards' integration into SEPI), but to the full year, does not constitute aid. The only question that therefore needs to be examined is whether the tax credits due for 1995 and 1996 were covered by aid in the form of special tax credits and if so to what extent the ESP 58 billion paid up to 1998 can be justified on this basis. As noted above, the payments actually received were ESP 39,549 billion in March 1997 and ESP 18,451 billion in July 1998. The 1997 payment corresponds exactly to the 1995/1996 entitlement. There is no apparent justification under the applicable tax laws for the 1998 payment since the 1997 entitlement was covered in full by a tax credit under general measures.

(52) There remains the possibility that the yards might have been owed interest due to late payments of the 1995 and 1996 tax credit entitlements. This has been alluded to by the Spanish authorities in presenting their figures, but in a negative sense, stating that no such interest payments were made because the basis of determining the credits due was not normal tax consolidation rules (which provide for such payments). As noted above, the Commission does not accept the Spanish figures. Nor does it accept that the credits were not calculated in accordance with general tax consolidation rules. On the basis of the information available the Commission is unable to judge whether the yards were legally entitled to such interest payments in the event that tax credits were paid late. However even if that were so, and even if it were accepted that the 1995/1996 entitlement was paid late (which may not be the case since data provided by the Spanish authorities prior to the Commission Decision, supported by data submitted by the yards within the framework of the monitoring, appear to suggest that there may have in fact been an anticipated payment in 1996), interest due, if any, would not be such as to explain the payment of ESP 18,451 billion in 1998.

(53) It must therefore be concluded that the yards received their full entitlement to tax credits on the basis of the special tax credits paid in 1997 (corresponding to the results in 1995/1996) and the general tax credit paid in 1998 (corresponding to the 1997 results), despite the greater than foreseen losses. The 1998 payment of special tax credits must be considered a breach of the Commission's Decision since it cannot be justified as a special tax credit. The ESP 18,451 billion seems to have served an altogether different purpose, being used effecitvely as an operating aid to enable the yards further to reduce their losses. Under Article 4 of Council directive 90/684/EEC, which applied during the period in question, all operating aid was subject to a common maximum aid ceiling. As far as the Commission is aware the public yards have always received contract-related aid up to this maximum ceiling, leaving no headroom for any additional aid.

(54) Therefore, the Commission concludes that the payament of ESP 18,451 billion in 1998 was no longer compatible with Article 87(3)(e) of the EC-Treaty. As no other basis of compatibility exists or has indeed been invoked by Spain, this aid is incompatible with the common market pursuant to Article 87(1) of the EC-Treaty.

(55) The Commission notes that aid which is incompatible with the common market shall be recovered. The aim of recovery of aid is to seek to re-create the status quo *ex ante* by annulling the negative effect on competition caused by the illegal aid.

(56) The Commission stresses that the sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery. The recovery shall be effected in accordance with the procedures of national law and the interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aids.

VI. **CONCLUSIONS**

(57) The Commission concludes that the publicly owned yards in Spain received aid in the form of special tax credits of ESP 18,451 billion that cannot legally be justified. The overall limit on such aid payment has not been exceeded, but was a maximum. Within that maximum the aid was to correspond only to taxable losses and was on the assumption that the yards were unable to benefit from tax credits under Spain's general tax consolidation system. This was as an essential condition for approval of the aid and thereby for the compatibility of the aid with the common market pursuant to Article 87(3)(e) of the EC Treaty.

(58) Since it is the opinion of the Commission that ESP 18,451 billion is no longer compatible with Article 87(3)(e) of the EC Treaty and thereby incompatible with the common market pursuant to Article 87(1) of the EC Treaty, this sum shall be recovered. The sum to be recovered shall bear interest from the date on which the aid was made available to the recipient until actual recovery,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted by Spain in favour of its publicly owned shipyards amount to EUR 110 892 743,38 (ESP 18,451 billion), is incompatible with the common market.

Article 2

1. Spain shall take the necessary measures to recover from the recipient the aid referred to in article 1.

2. Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall bear interest from the date on which it was made available to the recipient until recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aids.

Article 3

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

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 26 October 1999.

For the Commission

Mario MONTI

Member of the Commission