II

*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION
## of 22 December 1999
## on the State aid implemented by Spain for Ramondín SA and Ramondín Cápsulas SA

*(notified under document number C(1999) 5203)*

**(Only the Spanish text is authentic)**

**(Text with EEA relevance)**

(2000/795/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having called on interested parties to submit their comments pursuant to the provision cited above [1] and having regard to their comments,

Whereas:

### I. PROCEDURE

(1) By letter dated 2 October 1997 (registered on 23 October 1997 under No SG A/38452), Mr Sanz Alonso, President of the Autonomous Community of Rioja, submitted a complaint against State aid allegedly granted to Ramondín SA ('Ramondín').

(2) In a letter dated 2 January 1998 (D/50003) the Commission informed the Spanish authorities of this complaint and requested them to present, within 15 working days, their observations and any information which would enable the Commission to determine whether aid within the meaning of Article 87(1) of the EC Treaty was involved.

(3) After receiving a reminder sent on 11 March 1998 (D/51136), the Spanish authorities replied in a letter dated 13 March 1998 (registered on that same date under No SG A/32119), presenting their observations and forwarding information supplied by the Basque regional authorities.

(4) By letter dated 18 June 1998 (D/52538) the Commission informed the authorities of the Autonomous Community of Rioja of the content of the reply received from the Spanish authorities. In a letter dated 17 July 1998 (D/53048) the Commission requested additional information from the Rioja authorities. The Rioja authorities supplemented their complaint, by means of letters dated 10 July 1998 (registered on 13 July 1998 under No SG A/35419) and 2 October 1998 (registered on 5 October 1998 under No SG A/37220).

[1] OJ C 194, 10.7.1999, p. 18.

(5) In the light of information published in the press (*El Correo*, 4 October 1998), the aid was entered on the register of unnotified aid under No NN 117/98.

(6) In the light of the observations and information presented by the Spanish authorities and the supplementary information presented by the Rioja authorities, the Commission sent a letter (D/54346) on 26 October 1998, inviting Spain to provide within 15 working days detailed information about Ramondín's investment at Laguardia, which, according to information published in the press, had meanwhile ceased to be a mere plan and had moved into the implementation stage, as well as information on the regional aid and tax concessions received by Ramondín. That same letter pointed out that when the Commission considers aid to have been granted or altered without due notification having been made, and after having allowed the Member State to express its opinion on the matter, the Commission is empowered to take an interim decision, pending the outcome of its examination of the aid, ordering the immediate suspension of payment of such aid and the transmission, within a time limit set by the Commission, of all documents, information and data necessary to determine whether such aid is compatible with the common market. The Commission therefore informed the Spanish Government that it might have to order suspension of payment of the aid in question pending a detailed investigation.

(7) The Spanish authorities replied to the Commission's letter of 26 October 1998 with letters dated 22 December 1998 (registered on 5 January 1999 under No SG A/30062) and 5 January 1999 (registered on 6 January 1999 under No SG A/30110).

(8) By letter dated 30 April 1999 (SG (99) D/2945) the Commission notified Spain that it had decided to initiate the procedure under Article 88(2) of the Treaty with regard to the tax aid granted to Ramondín [2]. In the same letter, it required Spain to provide certain specified items of information and to suspend payment of the tax aid already granted to Ramondín.

(9) By letter dated 27 May 1999 (registered on 10 June 1999 under No A/34343), the Spanish authorities provided information on the suspension required by the Commission in its letter of 30 April 1999.

(10) By letter dated 31 May 1999 (registered on 8 June 1999 under No A/34240), Ramondín requested a copy of the decision to initiate the procedure of which the Commission had notified Spain by its letter of 30 April 1999.

(11) By letter dated 15 June 1999 (D/52539) the Commission sent Ramondín a copy of its decision to initiate the procedure of which it had notified Spain by its letter of 30 April 1999.

(12) By letter dated 15 June 1999 (D/52543), replying to Spain's letter of 27 May 1999, the Commission requested Spain to describe in detail the measures it had taken to comply with the suspension required by the Commission in its letter of 30 April 1999.

(13) By letters dated 29 June 1999 (registered on 30 June 1999 under No A/34867) and 8 July 1999 (registered on 13 July 1999 under number A/35270), the Spanish authorities replied to the request for information made in the Commission's letter of 30 April 1999.

(14) By letter dated 5 July 1999 (registered on 19 July 1999 under No A/35494), the Álava Provincial Council, replying to the Commission's letter of 15 June 1999 (D/52543), provided details of the measures it had taken to comply with the suspension required by the Commission in its letter of 30 April 1999.

(15) By letters dated 30 July 1999 (registered on 4 August 1999 under No A/36070), 9 August 1999 (registered on 11 August 1999 under No A/36242) [3] and 10 August 1999 (registered on 11 August 1999 under No A/36243) [4], three interested parties submitted observations. By letter dated 26 August 1999 (D/63580), the observations were forwarded to Spain for comment; Spain did not respond.

[2] See footnote 1.
[3] These observations were transmitted by fax on 10 August 1999 and subsequently by post.
[4] These observations were transmitted by fax on 10 August 1999 and subsequently by post.

## II. COMPLAINT SUBMITTED BY THE AUTONOMOUS COMMUNITY OF RIOJA

(16) By letter of 2 October 1997, Mr Sanz Alonso, President of the Autonomous Community of Rioja, a region of Spain adjacent to the Province of Álava, submitted a complaint concerning the circumstances in which Ramondín, a manufacturer of metal capsules for wine bottles, had decided to move its industrial facilities from Logrono (Rioja) to Laguardia (Álava, Basque Country), five kilometres from its existing site.

(17) In his complaint, Mr Sanz Alonso alleged that Ramondín's decision was motivated by tax incentives and public aid for investment offered respectively by the Álava Provincial Council and the Autonomous Community of the Basque Country, and he requested the Commission to check the compatibility with the Treaty not of the regional (or provincial) tax system in force in the Basque Country but of the effects and impact of certain advantages granted under that system and of its combination with other aid granted to Ramondín under aid schemes authorised by the Commission.

## III. RAMONDÍN AND ITS INVESTMENT AT LAGUARDIA

(18) Ramondín is a company incorporated under Spanish law in 1933 and specialised in the manufacture of capsules for sealing bottles of still and sparkling wines and other quality beverages. Since 1971 it has been established at Logrono (Rioja), with three production centres (Logroño, Burdens and Mexico) and subsidiaries in the United States, Scotland, Chile, Australia and China. According to information contained in the investment plan submitted to the Basque regional authorities, Ramondín has nearly 40 % of the world market for tin capsules, with an output of 480 million capsules per year. Its competitors have the following market shares:

| Company | Market Share | Output (million capsules/year) |
|---|---|---|
| Pechiney | 30 % | 360 |
| Relvas | 10 % | 120 |
| Vatke | 6 % | 72 |
| Bouchage Métallique | 4 % | 48 |
| Rivercap | 4 % | 48 |
| Quibel | 3 % | 36 |
| Others | 3 % | 36 |
| Total | 60 % | 720 |

(19) In 1997 Ramondín employed 300 people and generated turnover of EUR 24 million, of which 70 % came from sales outside Spain. This, together with the fact that there are few suppliers on the world market, shows that there is intra-Community trade in the product concerned.

(20) On 15 December 1997 Ramondín set up a new company, Ramondín Cápsulas SA (Ramondín Cápsulas), which has been active since September 1999. It was intended that Ramondín Cápsulas would take over all the activities of Ramondín, which would cease being active from the end of 1999.

(21) According to the information provided by the Spanish authorities, Ramondín had initially planned to invest ESP 4 270 million in moving its existing assets from Rioja to Laguardia (Álava) and purchasing new fixed assets.

(22) Ramondín subsequently decided to channel the new investments through Ramondín Cápsulas, of which it holds 99,8 % of the capital.

(23) According to the Spanish authorities, Ramondín Cápsulas intends to invest ESP 1 950 million between 1998 and 2000 in order to set up a factory at Laguardia (Álava) equipped with three production lines, two of which will manufacture capsules for sealing bottles while the third will produce rolled lead sheet for electric batteries.

(24) The investment plan originally submitted to the Basque regional authorities forecast that 30 new jobs would be created and considered that the following costs were eligible:

*(in 1 000 ESP)*

| | 1998 | 1999 | 2000 | Total |
|---|---|---|---|---|
| Land and buildings | 438 666 | | | 438 666 |
| Plant | 932 000 | 214 000 | 170 000 | 1 316 000 |
| Eligible costs | 1 370 666 | 214 000 | 170 000 | 1 754 666 |

(25) With the investment, Ramondín expects to attain a turnover of ESP 5 000 million in 1999 and ESP 5 960 million (EUR 35,82 million) in 2001.

## IV. THE AID MEASURES, INITIATION OF THE PROCEDURE UNDER ARTICLE 88(2) OF THE TREATY, THE REQUIREMENT TO PROVIDE INFORMATION AND THE REQUIREMENT TO SUSPEND PAYMENT

(26) Ramondín and Ramondín Cápsulas have benefited from the following aid:

— an ESP 150 million grant awarded by the Basque Regional Government to Ramondín Cápsulas on 15 October 1998 within the framework of the Ekimen regional aid scheme ([5]). This grant was awarded in respect of an investment of ESP 1 754 million, which corresponds to an intensity of 8,55 % gge (gross). The maximum intensity of aid allowed in the Basque Country is 25 % nge ([6]),

— a tax credit equivalent to 45 % of the total amount of the ESP 3 857 million investment, granted by the Álava Provincial Council to Ramondín by Decision 738/97 adopted on 21 October 1997 under a tax provision in the Province's Finance Act ([7]),

([5]) Scheme approved by the Commission by letter SG (96) D/11028 of 13 December 1996 (State aid N 529/96). The Decree of the Basque Regional Government establishing the scheme (Decree No 289/1996 of 17 December 1996) was published in *Boletín Oficial del País Vasco* — Official Journal of the Basque Country No 246, 23.12.1996, p. 20138).

([6]) The maximum limit for regional aid in the Basque Country, in accordance with the Spanish regional aid map (OJ C 25, 31.1.1996, p. 3).

([7]) See the Sixth additional provision of Provincial law (Norma Foral) 22/1994 of 20 December 1994 (*Boletín Oficial del Territorio Histórico de Álava* — (Official Journal of the Province of Álava) (BOTHA) No 5, 13.1.1995), whose validity was extended until the end of 1996 by the fifth additional provision of Provincial Law 33/1995 of 20 December 1995 (BOTHA No 4, 10.1.1996) and until the end of 1997 by point 2.11 of the single derogating provision of Provincial Law 24/1996 24/1996 of 5 July 1996 (BOTHA No 90, 9.8.1996), and the seventh additional provision of Provincial Law 31/1996 of 18 December 1996 (BOTHA No 148, 30.12.1996). From 1 January 1998, the tax credit may be granted pursuant to the 11th additional provision of Provincial Law 33/1997 of 19 December 1997 (BOTHA No 150, 31.12.1997) and from 1 January 1999 pursuant to the seventh additional provision of Provincial Law 36/1998 of 17 December 1998 (BOTHA No 149, 30.12.1998).

— a reduction of 99 %, 75 %, 50 % and 25 % in the basis of assessment for corporation tax, applicable, respectively, for four consecutive years running from the first year in which the basis of assessment is positive. These reductions are available to newly established companies, on condition that they invest a minimum of ESP 80 million and create a minimum of 10 jobs ([8]). As a newly established company, Ramondín Cápsulas is eligible for these reductions.

(27) Ramondín and Álava Agencia de Desarrollo SA, a development agency controlled by the Álava provincial authorities, furthermore agreed on the sale of a 55 050 $m^2$ plot of land in the Casablanca industrial estate at Laguardia (Álava) to Ramondín at a price of ESP 2 500 per square metre.

(28) In view of the foregoing, the Commission informed Spain on 30 April 1999 that it had decided:

— require Spain to provide the necessary information for determining whether the investment aid granted to Ramondín under the Ekimen scheme complied with the decision authorising that scheme ('requirement to provide information on Ekimen'). In so far as it appeared to involve merely moving a factory five kilometres from its existing location, the Commission voiced doubts as to whether Ramondín's investment could be considered an 'initial investment' for the purposes of the guidelines on national regional aid ([9]),

— initiate the procedure under Article 88(2) of the Treaty in respect of two tax measures from which Ramondín had benefited, namely: (i) a tax credit equivalent to 45 % of the amount of the investment and (ii) a reduction in the basis of assessment for corporation tax available to newly established companies which invest at least ESP 80 million and create at least 10 jobs ('decision to initiate the procedure'),

— require Spain immediately to suspend payment of the tax aid referred to in the preceding indent ('requirement to suspend payment'),

— require Spain to provide information on the sale of a plot of land to Ramondín by Álava Agencia de Desarrollo SA, to enable the Commission to determine whether State aid was involved in that transaction ('requirement to provide information on the land sale').

## V. SPAIN'S REPLY TO THE DECISION TO INITIATE THE PROCEDURE UNDER ARTICLE 88(2) OF THE TREATY, THE REQUIREMENT TO PROVIDE INFORMATION AND THE REQUIREMENT TO SUSPEND PAYMENT

### V.1. Decision to initiate the procedure

(29) By letter dated 27 May 1999 Spain stated that the tax treatment afforded to Ramondín Cápsulas was the result of applying a general tax system; consequently, there had not been any award of State aid to the company, only the 'concrete application' of a tax credit and recognition that the company qualified for the abovementioned reduction in the basis of assessment for corporation tax.

### V.2. Requirement to suspend payment

(30) By letter dated 27 May 1999 Spain informed the Commission that there was no need to suspend payment of the tax credit since it did not take the form of a transfer of funds.

(31) In reply to the Commission's letter of 15 June 1999 (D/52543), in which it requested Spain to describe in detail the measures it had taken to comply with the requirement to suspend payment, Spain stated that Ramondín Cápsulas would benefit from the tax credits only when it began operating (in September 1999) and then only if its accounts showed a profit. Spain added that it would take the appropriate steps to suspend the tax credit when the conditions for applying it were met.

([8]) Article 26 of Provincial Law 24/1996 of 5 July 1996 on corporation tax.
([9]) OJ C 74, 10.3.1998, p. 9.

V.3. **Requirement to provide information on Ekimen**

(32) The Basque regional authorities confirmed that they had awarded a grant of EUR 0,9 million (ESP 150 million) to Ramondín Cápsulas. They also confirmed that Ramondín's investment consisted partly in moving its plant from Logrono to a new site at Laguardia (Álava), which meant that Ramondín Cápsulas was to take over the activities of Ramondín, and partly in increasing production capacity and creating a new production line for making lead sheet for car batteries. Only part of the new plant would therefore consist of old machinery and equipment reinstalled there. The figures updated to June 1999 and set out in the following table show that new investment accounts for 53.6 % of the new plant:

| Type of investment | New | Reinstalled |
|---|---|---|
| Land | 194 076 000 | |
| Buildings | 1 471 483 000 | |
| Plant | 935 637 000 | 2 250 000 000 |
| Total ESP | 2 601 196 000 | 2 250 000 000 |
| Total EUR | 15 633 502 | 13 522 772 |

(33) The Basque Regional Government confirmed that, for the purpose of calculating eligible costs, only part of the new investment was taken into account, giving an amount of EUR 10,54 million. The eligible costs correspond to the costs included in the standard taxable base used for calculating the net grant equivalent (nge), i.e. land, buildings and plant. The amount of the grant (EUR 0,9 million) represents 8,53 % (gross) of the eligible costs, which is well below the ceiling for regional aid (25 % nge).

V.4. **Requirement to provide information on the land sale**

(34) The Spanish authorities confirmed that the land purchased by Ramondín was owned by Álava Agenda de Desarrollo SA, a public enterprise belonging to the Álava Provincial Council.

(35) The Spanish authorities also submitted two valuations dated 16 and 21 June 1997, i.e. before the sale of the land to Ramondín, which took place in October 1997. They claimed that the two expert reports constituted two independent expert valuations for the purpose of complying with the Commission communication on State aid elements in sales of land and buildings by public authorities ([10]). The first valuation arrived at a price of ESP 2 900 per square metre for the whole of the industrial estate in which the plot acquired by Ramondín is located, while the second one estimated the price of a serviced plot at ESP 2 500 per square metre, specifying that it was a 'purely commercial or market valuation'.

VI. **COMMENTS FROM INTERESTED PARTIES**

(36) Comments were received from Ramondín, the Autonomous Community of Rioja and the Governing Council of Castile-Leon.

VI.1. **Ramondín**

(37) In its comments, Ramondín claimed, first of all, that it was not merely an interested third party but the recipient of the aid and it was therefore directly and individually affected by the final decision which the Commission was to adopt. It consequently asked to be given access to the file and the right to be heard before the final decision was adopted.

([10]) OJ C 209, 10.7.1997, p. 3.

(38) As far as the substance of the matter was concerned, Ramondín made the following statements:

— Ramondín was a company that was originally established in the Basque Country and moved its facilities to Logroño (Rioja) in 1971, among other things because of the advantages offered by the Logrono Municipal Council,

— In 1994 Ramondín created the company Manufacturas Ramondín SA with a view to setting up operations in Álava. At that time, Ramondín could have secured larger tax concessions than it obtained later. It decided in the end not to move its plant 'since at that time it had no reason to leave' its facilities at Logroño,

— in 1995 the Logroño Municipal Council decided to reclassify the industrial estate where Ramondín was based. This meant that the firms concerned had 20 years in which to leave the estate, which was thereafter to be classed as an urban area,

— following a series of unsuccessful contacts with the municipal authorities, the Municipal Council offered Ramondín a plot in the Cantabria II industrial estate, which had been created over 25 years earlier. The plot was located between two buildings whose 'dilapidated appearance' did not correspond to the modern image that Ramondín wanted to project,

— in the mean time, Ramondín had contacted the authorities of neighbouring areas, including Álava, with a view to finding a solution to the problem of its forced relocation. Ramondín accepted the option offered by Álava basically because of the land available in the Casablanca industrial estate at Laguardia,

— the 45 % tax credit was a general measure open to all businesses fulfilling the conditions laid down in the Law governing the grant of the credit. There were therefore no exceptions or any discretionary powers involved. The administration confined itself to verifying, by means of a 'prior check', that the conditions for the grant of the credit were fulfilled, after which the tax credit was granted automatically. It was therefore a 'regulated administrative act'. The fact that the tax provision in question required a minimum investment of ESP 2 500 million did not render it selective since this was justified by the aim of attracting large firms to the Province of Álava, which would generate more revenue than small firms. It was not a temporary measure since it was extended each year, proving that it was intended to be permanent. There was no parallelism between the Ekimen scheme and the tax credit, something that was demonstrated by the different geographic and material scope of the tax provisions and the rules governing the Ekimen scheme,

— the reduction in the tax base for newly established companies was also a general measure, since it was applied irrespective of the sector in which the beneficiary firm was operating. It was a measure that was not intended to encourage firms to relocate but pursued the legitimate objective of promoting the prosperity of a given geographic area,

— Ramondín's investment at Laguardia clearly constituted an 'initial investment' since it involved the creation of a new plant with new production lines or, alternatively, the expansion of an existing business.

VI.2. **Governing Council of Castile-Leon**

(39) In its comments, the Governing Council of Castile-Leon stated that Ramondín had moved its facilities from Rioja to Álava on account of the State aid offered by the Autonomous Community of the Basque Country and the authorities of the Province of Álava.

(40) The Governing Council of Castile-Leon also argued that the tax aid measures in question constituted State aid that was incompatible with the common market, for the following reasons:

— they were chargeable to the State, irrespective of the administrative entities that adopted them,

— they reduced the tax burden that Ramondín would normally have incurred,

— they directly affected competition and trade between Member States, as was clear from the information contained in Ramondín's investment plan and the analysis made by the Commission in its decision to initiate the procedure under Article 88(2) of the Treaty,

— they were selective advantages since they favoured a specific undertaking or the production of certain specific goods, because:

(i) the measures were applicable only by virtue of a link between the undertakings in question and a particular region of a Member State, as opposed to undertakings established in other regions;

(ii) the tax credit was a discretionary measure since (a) it was conditional on making an investment of at least ESP 2 500 million; and (b) the authority granting it could decide which investments exceeding that amount qualified for the tax credit, as well as on the limits and periods of application;

(iii) the reduction in the tax base was discriminatory since it was available only to newly established companies that fulfilled certain specific conditions relating to new investments.

(41) The Governing Council of Castile-Leon added that:

— the Commission itself had followed this line of reasoning when adopting Decisions 93/337/EEC ([11]) and 1999/718/EC ([12]),

— the allocation of taxation powers in Spain could in no way serve as a justification for evading the Community rules on State aid. Here the Governing Council of Castile-Leon referred to the Advocate-General's opinion in Joined Cases C-400/97, C-401/97 and C-402/97 ([13]),

— the Spanish courts had found that the tax aid measures in question constituted tax privileges that impaired and distorted competition, thereby distorting the allocation of resources.

(42) Lastly, the Governing Council of Castile-Leon stressed that the measures in question had been implemented, which was in breach of the notification obligation laid down in Article 88(3) of the Treaty and meant that they were null and void.

VI.3. **Regional Government of Rioja**

(43) The Regional Government of Rioja began by stating that Ramondín's decision to move its facilities from Rioja to Álava was motivated by the economic and tax incentives offered by the authorities of the Province of Álava. Ramondín explicitly acknowledged in the letter it addressed to the President of the Autonomous Community of Rioja on 5 March 1997 ([14]) that it intended to take advantage of those incentives. The town-planning constraints adduced by the Basque regional authorities as the reason for the move could not be taken into account since the land-use reclassification would not take effect until 2016 and would in any case not affect acquired rights. Neither could the price of land at Logroño be described as 'prohibitive', as the Basque authorities claimed.

(44) With regard more specifically to the tax aid, the Regional Government of Rioja made the following points:

— in accordance with the case-law of the Court of Justice of the European Communities and the approach repeatedly taken by the Commission in similar cases, the aid measures in question constituted State aid within the meaning of Article 87(1) of the Treaty, irrespective of the authority adopting them,

— the notion of State aid was a material concept, irrespective of the form taken by the State support; the tax incentives fulfilled that criterion,

— the tax incentives conferred an economic advantage on Ramondín: both the tax credit and the reduction in the tax base had the aim and effect of relieving Ramondín of part of the tax burden on its profits; that advantage was granted without any compensating benefits to the tax administration. A loss of tax revenue was equivalent to the use of State resources in the form of tax expenditure,

([11]) OJ L 134, 3.6.1993, p. 25.
([12]) OJ L 292, 13.11.1999, p. 1.
([13]) Not yet reported, but available in some (unofficial) language versions on the website of the Court of Justice of the European Communities (http://curia.eu.int/en/juris/index.htm).
([14]) In that letter, which was mentioned in the decision to initiate the procedure (see footnote 1), Ramondín's managing director informed the President of the autonomous Community of Rioja that Ramondín was likely to leave Rioja and set up operations at Laguardia owing to the economic and tax incentives offered by the province of Álava, unless Rioja was to offer to make an 'investment'.

— the tax aid in question affected competition and trade between Member States, in so far as Ramondín was carrying on an economic activity that was the subject of intra-Community trade; the world market in capsules, and particularly tin capsules, of which Ramondín had a 40 % share, was booming and the sector was highly competitive,

— the measures in question fulfilled the specificity criterion since the beneficiaries were identifiable and their competitive position was improved,

— as far as the tax credit was concerned, because it required a minimum investment of ESP 2 500 million the measure reserved the benefits of the 45 % tax credit for large investors. Furthermore, because the measure was included in the annual finance act, the investment had to be made during a specific period, something which gave the Basque authorities plenty of discretion with regard to individual projects; such discretion also enabled them to decide which part of the investments qualified for the tax credit and to lay down the periods and limitations applicable in each case,

— as far as the reduction in the tax base was concerned, the specific nature of the measure derived from the fact that only newly established companies that invested at least ESP 80 million and created at least 10 jobs were eligible,

— the two tax incentives in question were geographically specific in that they were available only to firms established or operating in Álava, placing the firms concerned in a more favourable position than those operating elsewhere in Spain,

— since the tax aid had been implemented in breach of Article 88(3) of the Treaty, it was null and void,

— the fact that the Commission had initiated the procedure under Article 88(2) of the Treaty in respect of six tax aid schemes in the Basque Country providing aid similar to that granted to Ramondín confirmed the above analysis.

(45) The Regional Government of Rioja also referred to the Basque regional authorities' argument that the aid granted to Ramondín was justified on the grounds of the allocation of taxation powers in Spain. The Regional Government of Rioja dismissed that argument and stressed that the same position was taken by the Advocate-General in the abovementioned Joined Cases C-400/97, C-401/97 and C-402/97 as well as by the Commission. According to the Regional Government of Rioja, the case-law of the Court of Justice made it perfectly clear that any measure involving a benefit restricted to firms investing in a particular area of a Member State conferred on those firms an advantage that was not justified by the general scheme or nature of the tax system in question.

(46) Lastly, the Regional Government of Rioja referred to a judgment of the Spanish Supreme Court annulling tax measures similar to those from which Ramondín had benefited, on the grounds that they created tax privileges which were detrimental to competition and distorted the allocation and free movement of capital and workers. The principles established in that judgment were applied in a judgment delivered by the High Court of the Basque Country, which annulled the 45 % tax credit introduced by the Province of Álava.

(47) Spain did not make any comment on the observations submitted by interested parties. With regard to Ramondín's request to be given access to the file and the right to be heard, the Commission points out that decisions on State aid are addressed to the Member State in question (see, for example, the judgment of the Court of Justice of 2 April 1998 in Case C-367/95 P ([15])). Furthermore, in accordance with Article 1(h) 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 ([16]) (now Article 88), the beneficiary of an aid measure is an 'interested party'. In this connection the Court of First Instance, confirming the approach taken by the Court of Justice, ruled as follows (judgment of 25 June 1998 in Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission*, paragraph 59 ([17])):

([15]) [1998] ECR I-1719.
([16]) OJ L 83, 27.3.1999, p. 1.
([17]) [1998] ECR II-2405.

'With more particular regard to the Commission's duty to inform interested parties, the Court of Justice has ruled that the publication of a notice in the *Official Journal of the European Communities* is an appropriate means of informing all the parties concerned that a procedure has been initiated (*Intermills* v *Commission*, cited above, recital 17), while also pointing out that "the sole aim of this communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action" (Case 70/72 *Commission* v *Germany* [1973] ECR 813, point 19). [...]'

The Commission consequently takes the view that Ramondín's rights as an 'interested party' have been fully safeguarded by publication of the decision to initiate the procedure and the invitation given in the notice to 'interested parties' to submit comments.

## VII. **ASSESSMENT OF THE AID**

### VII.1. **Aid granted under the Ekimen scheme**

(48) The non-repayable grant covering 8,55 % of investments was awarded to Ramondín Cápsulas under the abovementioned Ekimen scheme, a regional aid scheme authorised by the Commission. The Commission has found that this aid was covered by the general scheme and satisfied the conditions laid down in the decision approving it.

(49) It first has to be established whether the investment in question constitutes an 'initial investment' for the purposes of the guidelines on national regional aid ([18]). In view of the circumstances surrounding Ramondín's relocation of its facilities from Rioja to the Basque Country, the Commission had doubts as to whether the entire amount of Ramondín's investment could be considered an 'initial investment' for the purposes of the rules governing the assessment of regional aid ([19]).

(50) In those rules, 'initial investment' is defined as an 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 product or production process of an existing establishment ([20]).

(51) This was confirmed in the Commission's letter of 13 December 1996 approving the Ekimen scheme ([21]), which stipulated that the aid provided for by the scheme was to be used to finance initial investments or investments to enlarge or modernise existing establishments and that investments for replacement purposes were excluded from the scope of the scheme.

(52) Information provided by the Spanish authorities confirms that Ramondín decided to set up a new factory at Laguardia that would not operate in conjunction with the Logroño plant: on the contrary, the new factory at Laguardia was to replace the Logroño plant. Ramondín Cápsulas, the company newly created at Álava, thus took over all the industrial activities of Ramondín.

(53) The decision to move the factory involved, on the one hand, closing the Logroño plant and, on the other, opening the Laguardia factory. The move will also involve increasing production capacity, with the creation of new production lines, including a new line for producing lead sheet for car batteries.

(54) As mentioned in recital 32, the Basque regional authorities have confirmed that they awarded a grant of ESP 150 million (EUR 0,9 million) to Ramondín Cápsulas. Ramondín Cápsulas plans to create 30 new jobs in addition to the 300 jobs transferred from Logroño to the new site at Laguardia.

([18]) See footnote 9.
([19]) See the Commission's 1979 communication on regional aid systems (OJ C 31, 3.2.1979, p. 9), and in particular point 18(i) of the Annex for the definition of 'initial investment'. This definition is reproduced in point 4.4 of the guidelines on national regional aid.
([20]) See point 18(1) of the Annex mentioned in the above footnote.
([21]) See footnote 5.

(55) In the light of the information provided by the Spanish authorities, the Commission takes the view that the grant was awarded in accordance with the rules governing the Ekimen scheme, in particular Article 10 thereof, and within the absolute limit laid down by Article 12, i.e. ESP 5 million per new job created ([22]).

(56) The Spanish authorities also confirmed that Ramondín's investment consisted partly in moving its plant from Logroño to a new site at Laguardia (Álava) and partly in increasing production capacity and creating a new production line for making lead sheet for car batteries. Only part of the new plant was therefore to consist of old machinery and equipment reinstalled there. The figures updated to June 1999 and set out in the following table show that new investment accounts for 53,6 % of the new plant:

| Type of investment | New | Reinstalled |
|---|---|---|
| Land | 194 076 000 | |
| Buildings | 1 471 483 000 | |
| Plant | 935 637 000 | 2 250 000 000 |
| Total ESP | 2 601 196 000 | 2 250 000 000 |
| Total EUR | 15 633 502 | 13 522 772 |

(57) The Basque Regional Government confirmed that, for the purpose of calculating eligible costs, only part of the new investment was taken into account, giving an amount of ESP 1 754,666 million (EUR 10,54 million). The eligible costs correspond to the costs included in the standard taxable base used for calculating the net grant equivalent (nge), i.e. land, buildings and plant. The amount of the grant (EUR 0,9 million) represents 8,53 % (gross) of the eligible costs, which is well below the ceiling for regional aid (25 % nge).

(58) In view of the foregoing, the Commission finds that there is evidence for considering that the investment at Laguardia will involve 'the extension of an existing establishment' for the purposes of point 4.4 of the guidelines on national regional aid ([23]).

(59) The Commission consequently concludes that the non-refundable grant covering 8,55 % of eligible costs was awarded to Ramondín Cápsulas in accordance with the conditions governing the Ekimen regional aid scheme approved by the Commission.

### VII.2. **Sale of a plot of land to Ramondín by Álava Agencia de Desarrollo**

(60) In his complaint, the President of the Autonomous Community of Rioja alleged that Ramondín had purchased a plot of land at Laguardia on advantageous terms.

([22]) 'Article 10 — non-refundable grant
The aid to be granted in the form of non-refundable grants covering up to 25 % of eligible investments shall be awarded in accordance with the following conditions:
1. A grant of 10 % of investment costs deemed eligible shall be awarded as a general measure.
2. In the case of strategic projects and investment projects involving significant job creation which create at least 50 jobs and entail investments worth at least ESP 750 million, the above percentage shall be increased by 5 points.
3. Businesses whose project is carried out in a preferential interest area as provided for in Article 4 of this Decree shall receive an additional grant of 5 % of the investment costs deemed eligible.
4. The percentage may be further increased by up to 5 points according to the following criteria:
— the extent to which the project is integrated into the Basque Country's industrial base,
— whether the investment is in one of the Basque Country's strategic sectors,
— the number of jobs created by the project.'
'Article 12 — Limits, maximum amount and compatibility of the aid
The maximum non-refundable grant that may be awarded for an investment project shall be ESP 5 million per job created, except in the case of strategic projects. The maximum amount of the grant shall furthermore not exceed ESP 4 000 million […]'

([23]) See footnote 9.

(61) In their reply to the requirement to provide information on the land sale, the Spanish authorities submitted two valuations dated 16 and 21 June 1997, i.e. before the sale of the land by the public enterprise Álava Agencia de Desarrollo to Ramondín, which took place in October 1997.

(62) The first valuation arrived at a price of ESP 2 900 per square metre for the whole of the industrial estate in which the plot acquired by Ramondín is located, while the second one estimated the price of a serviced plot at ESP 2 500 per square metre, specifying that it was a 'purely commercial or market valuation'.

(63) In its communication on State aid elements in sales of land and buildings by public authorities ([24]), the Commission provides guidance to Member States by describing a simple procedure for handling sales of land and buildings in a way that automatically precludes the existence of State aid, namely sale through an unconditional bidding procedure. If public authorities intend not to use that procedure, an independent valuation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.

(64) On the basis of the abovementioned communication ([25]), the Commission takes the view that the valuations were carried out by two independent asset valuers prior to the sale negotiations and make it possible to establish the market value on the basis of generally accepted market indicators and valuation standards.

(65) The Commission finds that the price paid by Ramondín (ESP 2 500 per square metre) in October 1997 is within the range (ESP 2 500 to 2 900 per square metre) determined by two studies carried out by two independent valuers prior to the date of the sale. On that basis, the Commission concludes that the said price is the minimum purchase price that can be agreed without granting State aid.

(66) The Commission has therefore not found any evidence of State aid being involved in the sale by Álava Agencia de Desarrollo to Ramondín of a 55 050 $m^2$ plot of land in the Casablanca industrial estate at Laguardia (Álava) at a price of ESP 2 500 per square metre.

### VII.3. **Tax aid: tax credit equivalent to 45 % of the cost of investments and reduction in the tax base for newly established companies**

(67) It should first be recalled that tax relations between the Spanish State and the Basque Country are governed by the Economic Agreement established by Law 12/1981 of 13 May 1981, as subsequently amended by Law 38/1997 of 4 August 1997. Under the Economic Agreement, the Álava Provincial Council may, under certain conditions, maintain, establish and regulate the tax system within its territory, with the exception of taxes associated with customs, revenue-producing monopolies and alcohol, the regulation of which is the exclusive responsibility of the central government ([26]). Using the powers conferred on it by the Economic Agreement, the Álava Provincial Council established a system of tax aid within the framework of corporation tax. The beneficiaries of this aid are natural and legal persons carrying on an economic activity within the Province of Álava.

(68) The Commission further points out that tax incentives similar to those being assessed in this Decision (tax credit and reduction in the basis of assessment) were declared incompatible with the common market by Decision 1999/718/EC (Daewoo Electronics Manufacturing España SA), which was notified to the Spanish authorities by letter dated 15 March 1999 ([27]).

#### VII.3.1. *Tax credit*

(69) The tax credit granted to Ramondín is governed by the sixth additional provision of Provincial Law 22/1994 of 20 December 1994 on the implementation of the budget of the Province of Álava for 1995, which reads as follows:

([24]) See footnote 10.
([25]) See footnote 10.
([26]) See Article 6 of the Economic Agreement, as amended by Law 38/1997 of 4 August 1997.
([27]) See footnote 12.

'Investments in new tangible fixed assets carried out between 1 January 1995 and 31 December 1995 and exceeding ESP 2 500 million shall, by decision of the Álava Provincial Council, qualify for a tax credit equivalent to 45 % of the amount of the investment, as determined by the Álava Provincial Council, to be offset against the amount of personal tax liability.

Any tax credit not used up because it exceeds the amount of tax liability may be carried forward and used for up to nine years following that in which the decision of the Álava Provincial Council is taken.

The decision of the Álava Provincial Council shall lay down the timelimits and restrictions applicable in each individual case.

Benefits granted under this provision shall be incompatible with any other tax concessions for which the same investments may be eligible.

The Álava Provincial Council shall also decide on the duration of the investment process, which may include investments made during the preparatory phase of the project which generates the investments.'

(70) This measure was kept in force in 1996 by the finance act for that year (Provincial Law 33/1995), as amended by the new corporation tax act (Provincial Law 24/1996, which deleted the reference to the period of nine years in the second paragraph) and in 1997 by the finance act for that year (Provincial Law 31/1996). The tax credit equivalent to 45 % of the amount of investments was maintained, with amendments to the wording of the provisions, in 1998 and 1999 by Provincial Laws 33/1997 of 19 December 1997 and 36/1998 of 17 December 1998 respectively.

(71) The principle that State aid is incompatible with the common market and the exceptions provided for by Article 87 of the Treaty apply to aid 'in any form whatsoever' and, in particular, to certain tax measures.

(72) If it is to be classed as aid, a measure has to satisfy each of the four criteria mentioned in Article 87 and spelled out below.

(73) First, the measure must afford the beneficiaries an advantage that reduces the costs they normally have to bear in the course of their business. The advantage may be granted through different types of reduction in the company's tax burden and, in particular, through an exemption from or reduction in tax liability.

(74) The 45 % tax credit in question undoubtedly fulfils this criterion since, thanks to the credit, Ramondín enjoys a reduction in its tax burden equivalent to 45 % of the amount of the investment as determined by the Álava Provincial Council. The tax credit can, however, be used without any timelimit, starting in the first year in which the company makes a profit.

(75) Second, the advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to the use of State resources in the form of tax expenditure ([28]). This principle also applies to aid granted by regional or local bodies of Member States (see the judgment of the Court of Justice of 14 October 1987 in Case 248/84 *Germany* v *Commission* ([29]). The State aid may furthermore be granted via tax measures laid down by law, regulation or administrative practice or via decisions taken by the tax administration.

(76) The tax credit granted to Ramondín derives from the combined effect of a budgetary measure and an individual decision (Decision No 738/1997 of 21 October 1997), both taken by a public authority, the Álava Provincial Council.

(77) Third, the measure must affect competition and trade between Member States. This criterion presupposes that the beneficiary of the measure carries on an economic activity, irrespective of its legal status or method of financing. The Court of Justice has repeatedly ruled, for the purposes of interpreting this condition, that intra-Community trade is to be deemed to be affected from the moment the beneficiary firm carries on an economic activity which is the subject of trade between Member States.

([28]) With regard to the concept of 'tax expenditure', see 'Tax expenditures. Recent experiences', OECD, Paris, 1996; see also Stanley S. Surrey, Tax incentives as a device for implementing government policy: A comparison with direct government expenditures, *Harvard Law Review*, Volume 83, No 4, pages 705 to 738.

([29]) [1987] ECR 4013.

(78) It has already been seen that Ramondín carries on an economic activity which is the subject of trade between Member States in a sector that is highly competitive.

(79) Fourth, the measure must be specific or selective in the sense that it favours 'certain undertakings or the production of certain goods'. The advantage may be selective because it is granted either as an exception to general tax arrangements established by law, regulation or administrative practice, or at the discretion of the tax administration. In the present case, the advantage is selective chiefly on account of the discretion enjoyed by the administration in granting it.

(80) With regard to this condition, the Court of Justice held in *Kimberly Clark Sopalin* (judgment of 26 September 1996 in Case C-241/94 *France* v *Commission* ([30])) that, where the entity granting an advantage enjoys a degree of latitude which enables it to vary its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the timelimits and other conditions under which it is provided, as well as to decide on whether or not to renew the measures concerned from one year to the next, the conditions in which such assistance is granted are liable to place certain firms in a more favourable situation than others and thus to meet the conditions for classification as aid for the purposes of Article 87(1) of the Treaty.

(81) When it adopted Decision No 738/1997, the Álava Provincial Council enjoyed, pursuant to the abovementioned provisions, discretionary powers for determining which investments in tangible fixed assets amounting to more than ESP 2 500 million qualified for the tax credit, deciding to which part of the investments the 45 % reduction could be applied, and establishing the timelimits and maximum ceilings applicable in each case.

(82) The text of Decision No 738/1997 granting the tax credit to Ramondín indicates that the credit corresponds to 45 % of an ESP 3 857 million investment. The investments concerned are the following:

| Type of investment | Amount |
|---|---|
| Land | 137 000 000 |
| Buildings | 471 000 000 |
| Plant | 3 249 000 000 |
| Total ESP | 3 857 000 000 |
| Total EUR | 23 181 036 |

According to the information supplied by the Spanish authorities, the above investments are not the same as those which were taken into consideration for the purpose of granting aid to Ramondín Cápsulas under the Ekimen scheme. The Decision stipulates that there is no timelimit on the use of the tax credit; it is therefore impossible to calculate precisely its intensity in advance. On the basis of the profit forecasts set out in Ramondín's business plan, the aid intensity of the tax cxedit is 34,7 % nge, which is well above the regional ceiling of 25 % nge. In any event, the Álava Provincial Council reserves the right to determine the amount of the tax credit for each year, depending on the investments made.

(83) Furthermore, the text of Decision No 738/1997 adopted by the Álava Provincial Council on 21 October 1997 provides as follows as far as Ramondín's investment is concerned:

([30]) [1996] ECR I-4551.

'[...] the tax credits in respect of the investment may be applied in practice [...] under the following conditions:

| | |
|---|---|
| — Time-limit: | None |
| — Maximum amount to which the tax credit may be applied: | 100 % of the net tax liability |
| — Percentage | 45 % of the investment to be made |

[...]'

(84) The expression 'applying in practice [concretar] the tax credits', in the context of a provision enabling the authority:

— 'determine' the amount to which the 45 % credit may be applied and the duration of the investment process, which can include investments made during the project preparation phase, and

— 'lay down' the timelimits and other restrictions applicable in each individual case,

can be interpreted only as an act adopted by virtue of a discretionary power and aimed at 'applying in practice' the tax credit.

(85) It is also worth mentioning, for guidance, judgment 76/99 delivered by the High Court of the Basque Country on 29 January 1999 in Case 908/98 *Administration of the State* v *General Council of Guipúzcoa* ([31]), which annulled a measure allowing the authorities of the Province of Guipúzcoa to grant a 45 % tax credit. The wording of that measure is similar to that of the provision granting the tax credit covered by the present Decision. In the grounds of its judgment, the High Court of the Basque Country made the following point with regard to the legal provision enabling tax credits to be granted:

'[the measure) provides for a tax credit corresponding to 45 % of the amount of the investment as determined by the Provincial Council, the benefit of which is decided, in terms of both the amount and the possible recipients, by the tax administration itself, in violation of the principle laid down in Article 7 of the General Tax Law, according to which the exercise of regulatory powers and the adoption of administrative acts in the tax field constitute a regulated activity, and in breach of the principle of legal certainty enshrined in Article 9 of the Spanish Constitution.'

(86) Lastly, the Commission's analysis finds further confirmation in the Basque Regional Government's document 'Politica Industrial. Marco General de Actuación 1996-1999' [Industrial policy: General implementing framework 1996-99], which states:

'[...] taxation policies are essential for boosting economic growth and also for assisting industrial projects that contribute to the industrial development of the [Basque] Country' [page 131].

(87) The same document states, in the chapter entitled 'Taxation policy instruments':

'[...] the independent taxation powers we enjoy [in the Basque Country] can also prompt us to seek imaginative forms of "tailor-made" tax treatment, for example for priority projects, or to grant tax incentives to large firms' [page 133].

(88) Secondly, although the discretionary nature of the tax credit is sufficient for it to be classed as a specific measure, and therefore as State aid, the Commission considers that the minimum investment required (ESP 2 500 million) to qualify for the credit is high enough to restrict its application in practice to investments which involve the raising of large amounts of capital, and that it is not justified by the nature or general scheme of the tax system to which an exception is made. In this case, Spain did not give any justification, in line with the logic of the tax system, for the fact that only large firms are eligible for the tax credit.

([31]) Not yet reported.

(89) The recipient of the aid argued that the fact that the tax measure in question established a threshold of ESP 2 500 million did not make it selective, since that limit was justified by the aim of attracting large firms to Álava, which would generate more revenue than small businesses. This calls for certain comments.

(90) The Commission takes the view that not all differences in treatment between groups of economic operators constitute State aid. Looking at tax and social security systems, as well as the other rules affecting the costs incurred by businesses, it is clear that the legal provisions governing these measures in each Member State do not merely establish uniform rules: on the contrary, they contain rules that depart from the ordinary rules and apply in particular to certain categories of firms. This makes it necessary to draw a distinction between:

— differentiated treatment that does not constitute an exception ([32]) to the ordinary rules but results rather from the application, to specific situations, of the same principles as those underlying the ordinary rules, and

— differentiated treatment which, favouring certain undertakings, departs from the internal logic of the ordinary rules.

(91) The Court of Justice already established this distinction in its judgment of 2 July 1974 in Case 173/73 *Italy* v *Commission* ([33]):

> 'It must be concluded that the partial reduction of social charges pertaining to family allowances devolving upon employers in the textile sector is a measure intended partially to exempt undertakings of a particular industrial sector from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system' (paragraph 33).

(92) This interpretation given by the Court of Justice makes it possible to conclude, conversely, that differentiated treatment of certain economic operators which was justified on the basis of the nature or general scheme of the system would not have to comply with Articles 87, 88 and 89 of the Treaty.

(93) In this connection, the Commission takes the view that the 'nature or general scheme of the system' cannot merely consist in the attainment of an objective which the authority wishes to achieve through the differentiated treatment of a group of economic operators, since in that case it would be sufficient to refer to a particular economic policy objective in order to evade the rules of Articles 87, 88 and 89 of the Treaty. In other words, the justification for differentiated treatment on the basis of the nature or general scheme of the system cannot be provided by referring to external objectives, but must be established by demonstrating the consistency of the measures in question with the internal logic of the system.

(94) Advocate-General Ruiz-Jarabo Colomer thus made the following points in his opinion of 17 September 1998 in Case C-6/97 *Italy* v *Commission* ([34]):

> '[...] it can sometimes prove difficult to draw the dividing line between measures that may constitute public subsidies, on the one hand, and those which belong to the general scheme of a State's tax system, on the other. Any system of tax relief has the effect of exempting a sector or group of taxpayers from the generally applicable tax rules. Such exemptions (18) are often geared to objectives that differ from what could be described as the primary taxation requirements (19); they pursue social, industrial or regional development or other similar objectives. From the standpoint of their function, they resemble in that respect direct aid measures granted by States and should normally be treated as such for the purposes of Article 92 of the Treaty. In that case, it will be for the State establishing them to demonstrate, on the contrary, that they constitute what are frequently referred to as "measures of a general nature" and that, as such, they fall outside the scope of Article 92. To that end, the State in question must specify which internal logic of the system the measures follow, something which should of course rule out any intention of improving conditions for a particular sector in comparison with its foreign competitors [...]' (paragraph 27).

([32]) Opinion of Advocate-General Darmon in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 58.
([33]) [1974] ECR 709.
([34]) Not yet reported, but available in some (unofficial) language versions on the website of the Court of Justice (see footnote 13).

(95) Advocate-General La Pergola followed the same line of reasoning in his opinion of 12 November 1998 in Case C-75/97 *Belgium* v *Commission* ([35]):

> '[...] In other words, can the derogations or amendments introduced by the disputed measures into the general social security system, which they leave in place, be said to be objectively justified by the economy and the nature of such an arrangement under the ordinary law, having regard to its internal logic, or do they serve the sole purpose of arbitrarily benefiting certain undertakings or specific sector (9)? It should be held, in my opinion, that a measure is general when it is aimed at achieving equality between businesses. The general principle of equality of treatment is recalled in the provision in Article 92(1) of the Treaty specifically prohibiting measures whereby the State favours certain undertakings or the production of certain goods at the expense of others within the same category of undertaking, to which the provisions adopted should be capable of being applied. Such measures remain subject to the rules on aid because, by operating discrimination that is unjustified and hence expressly prohibited by the Treaty, they do not comply with but contradict the criterion of general measures, which the applicant asks us to take into account.' (paragraph 8).

(96) The Court of Justice upheld that argument in the judgment it delivered in the same Case on 17 June 1999 ([36]):

> 'So, the Maribel *bis/ter* scheme, which pursues an employment policy by means affording a direct advantage only in relation to the competitive situation of the undertakings concerned, belonging to certain sectors of economic activity, is not justified by the nature or scheme of the social security system in force in Belgium' (paragraph 39).

(97) Given the high threshold of ESP 2 500 million, only large investors can qualify for the tax credit. In view of the foregoing, it must be concluded that this difference in tax treatment pursues an objective that is foreign to the internal logic of the tax system and therefore cannot be justified on the basis of the nature or general scheme of that system. Such difference in treatment makes the tax credit a specific measure and, along with the other features identified earlier, means that it must be classed as aid for the purposes of Article 87(1) of the Treaty.

(98) Thirdly, the Commission takes the view that the temporary (annual) nature of the measure in fact allows the authorities discretion to grant the tax credit to certain firms only, namely those initiating their investment processes during the period covered by the measure. The Commission notes that the measure does not appear in general tax legislation, only in the annual finance acts, which confirms its temporary nature and enables it to be used for specific projects.

(99) The tax credit was initially introduced for the 1995 financial year. The fact that in subsequent years the same provision was not maintained in its original wording, to the extent that, for example, from the 1996 financial year onwards firms qualifying for the tax credit have been able to use it for an unlimited period, gives the Commission grounds for considering that the Álava Provincial Council has wide discretionary powers for deciding which investments are eligible for the credit, since it can introduce the tax credit for one year, subsequently amend the measure and even abolish it, if necessary, the following year.

(100) The Commission also takes the view that the temporary (annual) nature of the measure rules out from the start the possibility of considering that it is compatible with the 'nature or general scheme' of the tax system. Its temporary nature also demonstrates that the aim pursued is not in line with the requirements inherent in any tax system and that the tax credit is being used as an industrial policy instrument to facilitate certain large investments that the administration considers it desirable to promote.

([35]) Not yet reported, but available in some (unofficial) language versions on the website of the Court of Justice (see footnote 13).
([36]) Not yet reported, but available in an unofficial version on the website of the Court of Justice (see footnote 13).

(101) With regard to the latter point, the Commission refers, also for guidance, to Judgment 411/99 delivered by the High Court of the Basque Country on 17 May 1999 in Case 907/98 *Administration of the State* v *General Council* [37], which annulled the tax credit established by the Álava Provincial Council for the 1998 financial year. In this judgment, the High Court held that:

> 'The General Council and Provincial Council of Álava, defendant and co-defendant respectively, have not provided any justification with regard to compliance with the principle of proportionality in the achievement of the objectives pursued by means of these measures [the tax credit]. Those authorities have merely referred to the temporary and exceptional nature of the measure [...].'

(102) Fourthly, the Commission underlines the close similarities between this measure and the Ekimen scheme, both in terms of the objectives pursued (the financing of new investments in both cases) and as regards their geographical scope (regional in the case of Ekimen, provincial in the case of the tax credit); Ekimen was, however, regarded as a regional aid scheme by the Spanish authorities and was notified as such. The only difference between the two, which is that the Ekimen scheme supports only industrial investments, is more of a formal distinction, since the minimum investment (ESP 2 500 million) required to qualify for the tax credit effectively limits the possible beneficiaries to industrial firms.

(103) The apparent differences between the Ekimen scheme and the tax credit cannot detract from the reality of the situation, which is as follows: the different administrations (responsible for taxation and industrial development) involved in promoting new industrial initiatives in the Basque Country coordinate their action; the objective pursued by both instruments is the same, namely to encourage investments; the tax credit was introduced at the same time as the Garapen scheme, which was similar to and predated the Ekimen scheme; and, lastly, since the same tax credit exists in the three Provinces that go to make up the Basque Country, the geographical scope of the two instruments is the same.

(104) Consequently, and in line with Decision 1999/718/EC [38], the tax credit granted to Ramondín, corresponding to 45 % of the amount of the investment as determined by the Álava Provincial Council, constitutes state aid within the meaning of Article 87(1) of the Treaty.

(105) In its letter to Member States SG(89) D/5521 of 29 April 1989 the Commission stated that it 'considers that a Member State has failed to fulfil its obligation to notify it where the process of putting aid into effect has been initiated. By "putting into effect" it means not the action of granting aid to the recipient but rather the prior action of instituting or implementing the aid at a legislative level according to the constitutional rules of the Member State concerned. Aid is therefore deemed to have been put into effect as soon as the legislative machinery enabling it to be granted without further formality has been set up' [39]. This is the case with this measure, which has been carried out unlawfully in breach of the provisions of Article 88(3) of the Treaty.

VII.3.2. **Reduction in the tax base for newly-established companies**

(106) The reduction in the tax base for newly-established companies granted to Ramondín Cápsulas is laid down in Article 26 of Provincial Law 24/1996 of 5 July 1996 on corporation tax, which reads as follows [40]:

> '1. Companies starting their business activity shall be entitled to a reduction of 99 %, 75 %, 50 % and 25 % respectively in the positive basis of assessment deriving from their economic activity, before this is offset by any negative bases of assessment arising in previous periods, for the four consecutive tax periods running from the first period in which, within four years of starting their business activity, they generate a positive basis of assessment.
>
> [...].
>
> 2. To qualify for this reduction, businesses shall fulfil the following conditions:

[37] Not yet reported.
[38] See footnote 12.
[39] See '*Competition law in the European Communities*, Volume II A: Rules applicable to State aid', p. 70.
[40] Only the provisions which are relevant for the purposes of assessing the aid are quoted here.

(a) They must start their business acitivity with a minimum paid-up capital of ESP 20 million;

(b) [...];

(c) [...];

(d) the new activity must not have been carried on previously, either directly or indirectly, under different ownership;

(e) the new business activity must be performed on premises or in an establishment where no other activity is carried on by any natural or legal person;

(f) they must during the first two years of their activity invest at least ESP 80 million in tangible fixed assets, all of which assets must be assigned to the activity and must not be hired out or transferred for use by third parties. For the purposes of this requirement, goods acquired by leasing shall also be deemed to be investments in tangible fixed assets, provided that the business undertakes to exercise the purchase option;

(g) they must create at least 10 jobs within six months of starting their business activity and must maintain the annual average workforce at that level from that point and until the year in which their entitlement to the reduction in the basis of assessment expires;

(h) [...];

(i) they must have a business plan covering a period of at least five years.

3. [...].

4. The minimum amount of investment referred to in subparagraph (f) and the minimum number of jobs created referred to in subparagraph (g) of paragraph 2 above shall be incompatible with any other tax concession established for the same investment or job creation.

5. The reduction provided for in this Article shall be requested by means of an application lodged with the tax administration, which, after checking that the initial requirements are satisfied, will where appropriate notify the applicant company of its provisional authorisation, to be formally adopted by decision of the Álava Provincial Council.

[...].'

(107) If it is to be classed as aid, the reduction in the tax base has to satisfy each of the four criteria mentioned in Article 87 and spelled out below.

(108) First, the reduction in the tax base affords Ramondín Cápsulas an advantage that reduces the costs it would normally have to bear in the course of its business.

(109) Second, the reduction in the tax base involves a loss of tax revenue equivalent to the use of State resources in the form of tax expenditure ([41]).

(110) Third, the reduction in the tax base affects competition and trade between Member States since Ramondín Cápsulas carries on an economic activity which is the subject of trade between the Member States, in a sector that is highly competitive.

(111) Fourth, the measure must be specific or selective in the sense that it favours 'certain undertakings or the production of certain goods'. In the present case, the reduction in the tax base is selective chiefly because only newly-established companies can qualify for it. Article 26 of Provincial Law 24/1996 makes it possible to afford newly-established companies more favourable tax treatment than that applied to other businesses already present on the market. This circumstance is sufficient to demonstrate the specific nature of the measure, on the basis of which the Commission classifies the reduction in the tax base granted to newly-established companies as State aid within the meaning of Article 87(1) of the Treaty. The specific nature of the measure is strengthened by the fact that only businesses investing ESP 80 million and creating 10 jobs qualify for the reduction in the tax base.

([41]) See footnote 28.

(112) The specific nature of the measure is also strengthened by its purpose, as set out in Provincial Law 24/1996 establishing it. After listing the general objectives of the tax system, the preamble to that instrument enumerates another set of objectives that have more to do with industrial policy, among which it specifically mentions the aim of 'stimulating the creation of new business initiatives', an objective pursued in the instrument by measures aimed at the specific category of newly established companies (see point (g) of the preamble), which are granted a reduction in the tax base during the first four years of operation in which they make a profit. This stated objective, which confirms that the measure constitutes start-up aid for newly established companies, does not enable it to be considered compatible with the nature or general scheme of the tax system in question. Neither have the regional authorities indicated or demonstrated ([42]), in their reply to the Commission's letter informing them that it had decided to initiate the procedure, that the selective nature of the measure is justified by the 'nature or general scheme' of the tax system concerned.

(113) In line with Decision 1999/718/EC ([43]), the Commission concludes that the measure in question clearly constitutes operating aid. Since any profits will be generated in the future and are essentially uncertain, it is not possible to calculate precisely the aid intensity involved in the reduction in the tax base.

(114) In its letter to Member States SG(89) D/5521 of 29 April 1989 the Commission stated that it 'considers that a Member State has failed to fulfil its obligation to notify it where the process of putting aid into effect has been initiated. By "putting into effect" it means not the action of granting aid to the recipient but rather the prior action of instituting or implementing the aid at a legislative level according to the constitutional rules of the Member State concerned. Aid is therefore deemed to have been put into effect as soon as the legislative machinery enabling it to be granted without further formality has been set up' ([44]). This is the case with this measure, which has been carried out unlawfully in breach of the provisions of Article 88(3) of the Treaty.

(115) As regards the nature of the aid granted to Ramondín and Ramondín Cápsulas in the light of Community law, with the exception of that granted by the Basque authorities in accordance with the conditions governing the Ekimen scheme, the aid was not granted under schemes approved by the Commission but pursuant to national measures that had not been approved by the Commission and should have been notified to it at the planning stage in accordance with Article 88(3) of the Treaty. This aid is consequently illegal under Community law.

(116) Article 87(1) of the Treaty provides that aid meeting the criteria laid down therein shall normally be incompatible with the common market.

(117) In this particular case the exceptions provided for in Article 87(2) of the Treaty are not applicable since the aid does not pursue the objectives listed in that provision. Nor indeed have the Spanish authorities attempted to rely on those exceptions.

### VII.4. **Compatibility of the aid**

(118) Article 87(3) of the Treaty lists the types of aid that may be considered to be compatible with the common market. Compatibility must be determined with reference to the Community as a whole, and not with reference to one Member State or region thereof taken individually. To ensure that the common market functions normally and given the principle established in Article 3(g) of the Treaty, the exceptions listed in Article 87(3) should be construed strictly when it comes to examining any aid scheme or individual aid measure. In particular, the exceptions may be relied on only where it can be demonstrated that, without the aid, market forces would not be sufficient on their own to induce the beneficiaries to act in such a way that would enable one of the objectives mentioned in the exceptions to be achieved.

([42]) See the judgment referred to in footnote 33. See also points 90 to 96 of this Decision.
([43]) See footnote 12.
([44]) See footnote 39.

(119) Under Article 87(3)(a), an exception may be made in the case of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. The municipality of Laguardia is not located in an area qualifying for regional aid under Article 87(3)(a) of the Treaty.

(120) As regards the exceptions provided for in Article 87(3)(b) and (d), the aid 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, nor does it display the features of projects of that kind. Nor is it intended to promote culture or heritage conservation.

(121) As far as the exception provided for in Article 87(3)(c) of the Treaty is concerned, Laguardia is located in an area which qualifies for regional aid in accordance with that provision. The maximum aid intensity allowed in the Basque Country is 25 % nge ([45]). To assess the compatibility of the aid measures concerned, a distinction has to be drawn between investment aid (the tax credit) and operating aid (the reduction in the tax base).

VII.4.1. *Investment aid (tax credit)*

(122) The tax credit was not awarded under a regional aid scheme approved by the Commission, but granted by means of individual decisions taken by the competent authorities. In such cases, the impact of the aid has to be examined in the context of the Community as a whole. The Court of Justice confirmed this interpretation in *Hytasa* (judgment of 14 September 1994 in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* ([46])) and *Pyrsa* (judgment of 14 January 1997 in Case C-169/95 *Spain* v *Commission* ([47])).

(123) An individual aid measure may be classed as regional aid compatible with the common market where it effectively contributes to the long-term development of the area and does not have effects that are detrimental to the common interest and competitive conditions in the Community. The aid can accordingly be considered to be compatible with the common market where it does not adversely affect trading conditions to an extent contrary to the common interest.

(124) The tax credit can be treated in the same way as investment aid in so far as, in the case in point, it is granted in respect of a productive investment (initial investment) in an assisted area. The eligible investments are investments in new tangible fixed assets, i.e. land, machinery and equipment, plant and buildings in a municipality located in an assisted area within the meaning of Article 87(3)(c) of the Treaty. Furthermore, the tax credit is calculated as a percentage of the amount of the investment, which is standard practice for investment aid.

(125) The figures updated to June 1999 and set out in the following table show that new investment accounts for 53,6 % of the new plant:

| Type of investment | New | Reinstalled |
|---|---|---|
| Land | 194 076 000 | |
| Buildings | 1 471 483 000 | |
| Plant | 935 637 000 | 2 250 000 000 |
| Total ESP | 2 601 196 000 | 2 250 000 000 |
| Total EUR | 15 633 502 | 13 522 772 |

([45]) See footnote 6.
([46]) [1994] ECR I-4103.
([47]) [1997] ECR I-135.

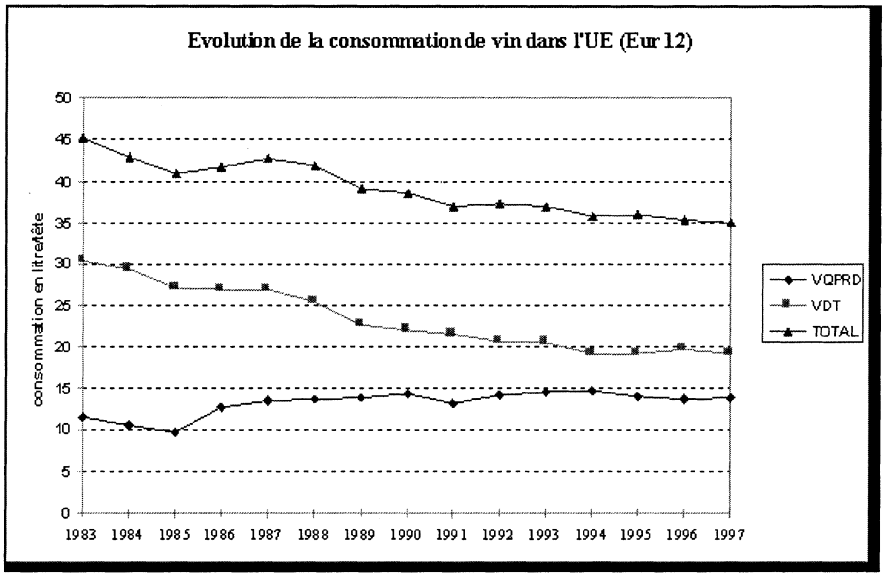
(126) As far as the Community interest is concerned, the outlook for the tin capsules market segment is promising given environmental requirements and trends in the consumption of quality wines.

(127) The material traditionally used to make capsules for sealing bottles of quality wine was, until 1993, lead. In that year, the United States introduced a ban on the use of lead in capsules for quality wines because of the risk of the wine being contaminated when the contents of the bottle are poured.

(128) European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste ([48]) reduced considerably the concentrations of lead allowed in packaging. Capsules for sealing bottles of wine are regarded as packaging for the purposes of the Directive.

(129) As a result of these legislative changes introduced in the first half of the 1990s, tin capsules as a substitute for lead capsules, which have been banned ever since, enjoy considerable growth prospects in a world market amounting to some 1 200 million units per year.

(130) Wine quality appears to be one of the key factors determining trends in wine consumption in the Community. Consumption of 'table wines' is falling sharply while that of 'quality wines' is rising. This general observation should be qualified, however: in the 'table wines' category, wines with a clear identification of origin (vins de pays, Landwein, indicazione geografica tipica, vins de cépage) are enjoying a revival of interest and their consumption is on the increase. Furthermore, the growth in the market shares of 'quality wines' is also reflected in an increase in the quantities produced: between the wine-growing years 1992/93 and 1994/95, their share of output rose from 30 % to 35 %. Part of this increase is due to the reclassification of former 'table wines' as 'quality wines' ([49]):




Key: Evolution of wine consumption in the EU (EU-12)

Consumption in litres per capita

VQPRD: Quality wines produced in specific regions.

VDT: Table wines.

([48]) OJ L 365, 31.12.1994, p. 10.
([49]) European Commission Directorate-General for Agriculture, CAP 2000. Working documents. Situation and outlook: Wine Sector, June 1998, p. 37.

(131) Demand from the battery industry will continue to underpin lead consumption in the Community, largely as a result of rising demand for lead acid batteries for the automobile industry. In 1994 lead consumption in the battery industry had risen by nearly 14 % from the 1991 level, accounting for some 70 % of total refined-lead demand ([50]). The battery industry is the only lead end-use that is less influenced by environmental constraints owing to the lack of competition from other metals:

*(1 000 tonnes)*

| | 1990 | 1991 | 1992 | 1993 | 1994 | Share 1994 % |
|---|---|---|---|---|---|---|
| Batteries | 2 545 | 2 566 | 2 591 | 2 610 | 2 924 | 68 |

(132) This upward trend is also reflected in the results of battery manufacturers. The Varta group points in its 1998 annual report to an increase in domestic demand in the western European countries; both the north American and European markets have benefited from steady growth in demand for car batteries ([51]).

(133) The industry is made up of a large number of small refineries. There are around 30 smelters/secondary refining plants in the Community, accounting for an output of between 5 000 and 65 000 tonnes per operator. The number of operators is decreasing as the large multinationals and main producer groups establish their own operations. Ramondín's output forecasts (500 tonnes at the outset, rising to 1 600 tonnes in 2001) show that it is a marginal producer. Furthermore, Ramondín intends to operate on a subcontract basis (job processing).

(134) In view of the foregoing, and provided that the ceiling of 25 % nge is observed, the Commission takes the view that the grant of a tax credit to Ramondín will not adversely affect trading conditions to an extent contrary to the common interest and can consequently be regarded as aid which is compatible with the common market. On the other hand, the total amount of any advantage conferred by means of the tax credit in excess of the 25 % nge ceiling will not qualify for exemption under Article 87(3)(c) of the Treaty since, as stressed in the guidelines on national regional aid, any aid over and above that limit would no longer guarantee the equilibrium between the resulting distortions of competition and the advantages of the aid in terms of regional development and would therefore have to be regarded as incompatible with the common market. The maximum amount of aid (expressed in terms of nge ([52])) to be deemed compatible under this Decision must be calculated in such a way as to comply with the rules on cumulation of aid ([53]).

(135) In order to check that application of the tax credit complies with the regional aid ceiling, including the rules on cumulation of aid ([54]), Spain must submit annual reports over the entire period in which the tax credit is in force.

### VII.5. **Operating aid: reduction in the tax base**

(136) The Commission points out that tax aid may be considered to be investment aid where the investment constitutes the tax base ([55]). However, in this case, the reduction in the tax base does not fulfil that condition and consequently cannot be classed as investment aid. Neither can it be regarded as employment aid linked to the investment since it is not dependent on the number of jobs created. The minimum investment of ESP 80 million and the minimum creation of 10 jobs, both required by the instrument introducing this tax concession, do not cause the reduction in the tax base granted to Ramondín Cápsulas to be classed as investment aid, since the minimum investment and job creation requirements are not calculated according to a specific investment but constitute thresholds above which certain firms qualify for the tax concession. Even if Ramondín Cápsulas had created 1 000 jobs, the amount of the advantage conferred by means of the reduction in the tax base would have been the same. Consequently, the minimum investment and job creation requirements cannot be regarded as *quid pro quo*, calculated on the basis of the amount of the investment.

([50]) *Panorama of EU Industry* 1997, pp. 11 to 23.
([51]) 1998 Management report group and Varta AG, p. 9 (http://194.172.32.120/company/10years.html)
([52]) For the method of calculating the net grant equivalent, see Annex 1 to the guidelines on national regional aid, referred to in footnote 9.
([53]) In accordance with point 4.18 of the guidelines on national regional aid; referred to in footnote 9, the aid intensity ceilin apply to the total aid (i) where assistance is granted concurrently under several regional schemes, and (ii) whether the aid comes from local, regional, national or Community sources.
([54]) See footnote 53.
([55]) See footnote 46 in Annex I to the guidelines on national regional aid, referred to in footnote 9.

(137) On the other hand, the Commission considers that the reduction in the tax base is to be classed as operating aid. Its aim is to relieve Ramondín Cápsulas of the costs which it would itself normally have had to bear in the course of its day-to-day management or its usual activities. Thanks to this reduction in its current expenses, the profitability of Ramondín Cápsulas will be improved as a result of the increase in its net profit (profits after tax).

(138) As the Commission explained in points 4.15 to 4.17 of the guidelines on national regional aid ([56]), regional aid aimed at reducing a firm's current expenses (operating aid) is normally incompatible with the common market. However, this type of aid may exceptionally be allowed in the regions which are eligible for the exception laid down in Article 87(3)(a) of the Treaty, where justified by its contribution to regional development and its nature and where the amount of the aid is in proportion to the handicaps it is intended to alleviate. The Commission notes that the Basque Country is not one of the areas covered by Article 87(3)(a) of the Treaty.

(139) It consequently has to be concluded that, since the operating aid in question does not qualify for any of the exceptions provided for in the Treaty, it is incompatible with the common market.

(140) This Decision relates only to those tax measures explicitly examined herein and does not assess the other measures provided for by the specific tax arrangements adopted in the Province of Álava. The Commission reserves the right to examine any such measures that might constitute aid, either as general schemes, or in so far as they might be applied to Ramondín.

## VIII. **CONCLUSIONS**

(141) As regards the questions in respect of which the Commission required Spain to provide information, the Commission finds that:

— the non-repayable grant covering 8,55 % of eligible costs was awarded to Ramondín Cápsulas in accordance with the conditions governing the Ekimen regional aid scheme approved by the Commission,

— no State aid was involved in the sale by Álava Agencia de Desarrollo to Ramondín of a 55 050 m$^2$ plot of land in the Casablanca industrial estate at Laguardia (Álava) at a price of ESP 2 500 per square metre.

(142) As regards the measures covered by the decision to initiate the procedure under Article 88(2) of the Treaty, the Commission finds that Spain has acted illegally and in breach of Article 88(3) of the Treaty in implementing the following aid:

(a) the reduction in the tax base for newly established companies provided for by Article 26 of Provincial Law 24/1996 of 5 July 1996, granted to Ramondín Cápsulas;

(b) the grant to Ramondín of a tax credit corresponding to 45 % of the cost of the investment as determined by the Álava Provincial Council in Decision No 738/1997 of 21 October 1997.

The aid referred to in (a) and the part of the aid referred to in (b) above which, in accordance with the rules on the cumulation of aid, exceeds the ceiling of 25 % nge for regional aid in the Basque Country has to be deemed incompatible with the common market.

Consequently, in order to reestablish the economic conditions with which the company would have had to contend if it had not been granted incompatible aid, the Spanish Government must take all the necessary steps to withdraw the benefits deriving from the aid and where appropriate recover it from the beneficiaries.

([56]) See footnote 9.

The aid must be recovered in accordance with the procedures and provisions laid down in Spanish law, and must include the interest which has accrued between the date on which the aid was granted and the date on which it is actually repaid, calculated at a rate equal to the percentage value on that date of the reference rate used to calculate the net grant equivalent of regional aid in Spain ([57]).

The part of the aid referred to in paragraph (b) which, provided that the rules on the cumulation of aid are observed, does not exceed the ceiling of 25 % nge for regional aid in the Basque Country has to be deemed compatible with the common market. In order to check that application of the tax credit complies with the regional aid ceiling, including the rules on cumulation of aid ([58]), Spain must submit annual reports over the entire period in which the tax credit is in force,

HAS ADOPTED THIS DECISION:

*Article 1*

1. The State aid which Spain has implemented in the form of the grant to Ramondín SA of a tax credit corresponding to 45 % of the cost of the investment as determined by the Álava Provincial Council in Decision No 738/1997 of 21 October 1997 is compatible with the common market as regards the part of the aid which, in accordance with the rules on the cumulation of aid, does not exceed the ceiling of 25 % nge for regional aid in the Basque Country.

2. Spain shall submit annual reports over the entire period in which the tax credit is in force in order to enable the Commission to check that the aid to Ramondín SA is granted in accordance with the rules on cumulation of aid and does not exceed the ceiling of 25 % nge for regional aid in the Basque Country.

*Article 2*

The following State aid implemented by Spain is incompatible with the common market:

(a) the grant to Ramondín Cápsulas SA of the reduction in the tax base for newly established businesses provided for by Article 26 of Provincial Law 24/1996 of 5 July 1996;

(b) the grant to Ramondín SA of a tax credit corresponding to 45 % of the cost of the investment as determined by the Álava Provincial Council in Decision No 738/1997 of 21 October 1997, as regards the part of the aid which, in accordance with the rules on the cumulation of aid, exceeds the ceiling of 25 % nge for regional aid in the Basque Country.

*Article 3*

1. Spain shall take all necessary measures to withdraw the benefits deriving from, and where appropriate recover from the beneficiaries, the aid referred to in Article 2 and unlawfully made available to the beneficiaries.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

*Article 4*

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

([57]) Commission letter to Member States SG(91) D/4577 of 4 March 1991. See also the judgment of the Court of Justice of 21 March 1990 in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959.
([58]) See footnote 53.

*Article 5*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 22 December 1999.

*For the Commission*
Mario MONTI
*Member of the Commission*