COMMISSION DECISION

of 21 November 2001

on the tax-free provisions introduced by France for setting up establishments abroad

(Notified under document number C(2001) 3451)

(Only the French text is authentic)

(Text with EEA relevance)

(2002/347/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4(c) thereof,

Having regard to Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for aid to the steel industry (hereinafter the steel aid code) ([1]), and in particular Article 6(5) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ([2]) and having regard to those comments,

Whereas:

1. **PROCEDURE**

(1) In connection with the procedure initiated under Article 6(5) of Decision No 2496/96/ECSC with regard to Article 34 of Spanish Law No 43/1995 ([3]), an intervening party drew the Commission's attention to the tax provisions on the setting-up by French firms of establishments abroad contained in Articles 39gA and D of the French General Tax Code (CGI).

(2) By letters of 3 May and 14 June 2000 the Commission invited France to inform it whether any ECSC firms had benefited under the provisions and to send it all relevant information enabling it to assess the measures under Article 4(c) of the ECSC Treaty.

(3) By letter of 28 November 2000 the Commission informed France of its decision to initiate the procedure provided for in Article 6(5) of Decision No 2496/96/ECSC in respect of the aid.

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

(5) The Commission received comments from the UK authorities which it forwarded to France for further comment.

2. **DETAILED DESCRIPTION OF THE AID**

(6) Articles 39gA and D of the CGI enable a firm temporarily to deduct from its tax base either the losses incurred by its subsidiaries or certain establishments located abroad, which losses in the case of commercial or service investments are restricted to the amount of the investment and subject to a possible ceiling or, in the case of industrial or agricultural investments, part of the investments made by those subsidiaries and establishments.

(7) In the case of commercial investments, the foreign operation's business must be the marketing abroad of goods produced principally by the French firm in France; eligibility is automatic. In the case of agricultural, industrial or service investments, the firm must obtain approval.

(8) All countries fall within the scope of the scheme except, in the case of industrial or agricultural establishments, Member States of the European Union.

(9) For Article 39g to apply, the parent company merely needs to hold 10 % of the subsidiary's capital in the case of an industrial or agricultural establishment, or one third in the case of a commercial or service establishment.

([1]) OJ L 338, 28.12.1996, p. 42.
([2]) OJ C 160, 2.6.2001, p. 12.
([3]) OJ C 329, 31.10.1997, p. 4.
([4]) See footnote 2.

(10) The losses or investments are expressed as provisions, but have to be reincorporated once the foreign subsidiary or establishment becomes profitable again or, in any event, after 10 years.

(11) The amount of the provision is equivalent to half the capital injected by the parent into its subsidiary in the case of an industrial or agricultural establishment, whilst in the case of commercial or service establishments it varies according to the losses incurred by the subsidiary but must not exceed the capital injection. In addition, in the case of service establishments, the amount of the investment giving entitlement to the provision is limited to FRF 20 million. Banking, financial, insurance and real estate establishments are not eligible.

(12) When it initiated the procedure, the Commission took the view that the scheme constituted State aid that was not compatible with the ECSC Treaty.

3. COMMENTS FROM INTERESTED PARTIES

(13) By letter of 26 June 2001 the United Kingdom authorities stated that they shared the Commission's reservations regarding the compatibility of the aid with the steel aid code.

4. COMMENTS FROM FRANCE

(14) By letter of 25 January 2001 the French authorities maintained that the scheme of provisions forming the subject of the procedure did not appear to constitute State aid for the following reasons:

(15) First, the provisioning system had not systematically given the firms concerned a financial advantage throughout the period concerned. According to the French authorities, unlike deferred taxation, the provision in the present case that was deducted when it was made allowed the firm to benefit from an advantage corresponding to the rate of corporation tax applicable in the year in question. When, however, the provision is reincorporated, tax must be paid corresponding to the rate applicable in the year of reintegration. The difference in the rates having reached more than eight points in the period 1993-1998, the firms concerned did not therefore benefit from any financial advantage in the period in question.

(16) Secondly, the scheme is a component of the system of territoriality of corporation tax applicable under French law. As losses incurred abroad during the start-up phase of their establishments cannot be deducted from profits taxable in France, the scheme simply places firms setting up establishments abroad in a comparable position to that of firms setting up a new establishment in France or foreign firms whose total losses are taken into account in order to calculate the tax.

(17) Thirdly, all businesses in French territory are eligible for this scheme since the setting-up of a subsidiary has a direct impact on the parent's volume of business. The fact that the financial and real estate sectors are excluded is due to the fact that their establishments abroad are set up differently from the economic structure of the scheme; an increase in the financial or market value of a firm's assets due to its location is not regarded as a relevant criterion of economic impact. As regards the approval needed for industrial or service investments to qualify for the scheme, according to the French authorities, the legal text does not give the Ministry of Economic and Financial Affairs any discretionary powers: it allows it to carry out a prior check, in the case of major projects, of the merits of applying the measure, as the courts may be required to check the legality of decisions relating to approval.

(18) Furthermore, from a procedural standpoint, the French authorities consider that the Commission should have applied the procedure in force for existing aid since the Commission has already decided on two occasions that the scheme did not involve State aid.

(19) Finally, the French authorities informed the Commission that Articles 39gA and D of the CDI were not applied to any ECSC steel undertakings.

5. ASSESSMENT OF THE AID

(20) Under Article 4(c) of the ECSC Treaty, subsidies or aids granted by States are recognised as incompatible with the common market and must accordingly be abolished and prohibited. Decision No 2496/96/ECSC (the steel aid code) lists the only cases which may be exempted, under certain conditions, from this general prohibition.

(21) In line with the caselaw of the Court of Justice of the European Communities (judgment of 23 February 1961 in Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority) ([5]) and the approach taken by the Commission (see point 10 of the Commission

([5]) [1961] ECR 3.

notice on the application of the State aid rules to measures relating to direct business taxation ([6])), under Community law the concept of aid covers not only positive assistance from the State but also any measure that relieves an undertaking of a burden which it would otherwise have to bear, regardless of whether or not it is directly applied by the recipient companies. Accordingly, non-repayable grants, preferential loans from the State and credits against income or corporation tax are all measures which must be regarded as State aid.

(22) In the present case, the firms entitled to defer tax improve their cash flow as they are able for a certain time (up to 10 years) to benefit from funds free of charge which they would not have enjoyed had they had to pay the appropriate tax immediately. The fact that the tax rate in force when the provision is reincorporated may be higher than when the provision was constituted (see recital 15) does not cancel out the improvement in cash flow. Furthermore, when the provision was made, the recipient firms could not have been certain of the rate in force when the provision was reincorporated. Nevertheless, this element may constitute a factor in the calculation of the specific advantage enjoyed if the aid has to be recovered.

(23) As to the specificity of the measure, it is pointed out that according to both the Commission's approach (see points 13, 16 and 18 of the notice referred to above in recital 21 of this Decision) and the caselaw of the Court of Justice (see the Judgments of 10 December 1969 in Joined Cases 6 and 11/69 Commission v France ([7]) and of 7 June 1988 in Case 57/86 Greece v Commission ([8])), a measure is specific and therefore must be regarded as State aid instead of a general measure where, although *prima facie* it might be seen as general in form, in practice it supports a particular group of companies.

(24) In the present case, the Commission had concluded when it initiated the procedure that, as regards the commercial establishments, only certain firms producing in France were eligible for the measure, which ruled out the following in particular:

— firms producing in France but not exporting,

— firms with establishments abroad whose main business is not marketing goods produced in France,

— firms producing in France and exporting but without any establishments abroad,

— firms engaged solely in trading.

(25) In its comments on the initiation of the procedure (see rectical 17), France did not dispute this finding and even confirmed it by acknowledging that, to qualify for the scheme, an establishment must have a direct effect on the volume of business of the parent company.

(26) Similarly, as regards industrial (or agricultural) investments or service establishments, the Commission had found when it initiated the procedure that only firms receiving the approval of the Ministry of Economic and Financial Affairs (which is given after obtaining the opinion of the Ministry of Industrial and Scientific Development in the case of industrial investments) may benefit under the measure. The Commission referred in this connection to its practice ([9]) and case law ([10]) according to which treating economic agents on a discretionary basis may mean that the individual application of a measure takes on the features of a selective measure.

(27) In the present case, the French authorities have not notified any provision, apart from the submission of administrative acts for a general review of legality by the courts, which might limit the discretionary power of the Minister for Economic and Financial Affairs. The Commission must therefore conclude that the administration has a margin of discretion.

(28) As regards the argument that the scheme is part of the system of territoriality of corporation tax (see recital 16), the Commission considers that the territoriality of French corporation tax does not justify the fact that some firms are automatically ineligible, in particular the commercial establishments of traders. The same applies

([6]) OJ C 384, 10.12.1998, p. 3.
([7]) [1969] ERC 523.
([8]) [1988] ERC 2855.
([9]) Points 21 and 22 of the abovementioned Commission notice (see footnote 6).
([10]) Case C-241/94 France v Commission [1996] ECR I-4551, points 23 and 24 and Case C-200/97 Ecotrade v Altiforni e Ferriere di Serrola [1998] ECR I-7907, point 40.

to the discretionary nature of the approval needed for industrial (or agricultural) investments and non-commercial services to be eligible.

(29) As regards the procedural aspects, the Commission must point out that the ECSC Treaty, unlike the EC Treaty, makes no provision for the concept of existing aid. Article 4(c) of the ECSC Treaty provides that subsidies or aids granted by Member States are recognised as incompatible with the common market for coal and steel and will accordingly be abolished and prohibited within the Community. The Commission is of course aware that on two occasions, in 1973 and 1992, it concluded that the measures in question did not constitute aid under the EC Treaty.

(30) Lastly, the fact that the French authorities state that no ECSC steel undertaking qualified for the scheme (see recital 19) in January 2001 does not rule out the possibility that ECSC undertakings or their subsidiaries benefited in the past or may benefit in the future.

6. **CONCLUSION**

(31) The scheme in question is not generally applicable and can lead to State aid being granted to certain firms. It therefore constitutes State aid within the meaning of the Community rules and, to the extent that it benefits ECSC steel undertakings, it is contrary to Article 4(c) of the ECSC Treaty. Furthermore, none of the exceptions in the steel aid code are applicable in the case in point.

(32) As to recovery of the aid, if the Commission finds that State aid which is incompatible with the common market has been granted, it generally requires the Member State to recover it. However, it will not require recovery of the aid if this is contrary to a general principle of Community law.

(33) The Commission notes that on two occasions ([11]) it decided under the EC Treaty that the scheme did not constitute State aid. Under the circumstances, the Commission considers that even the most cautious and well informed steel firms could not have predicted that the tax provisions under examination would be classified as State aid contrary to Article 4 of the ECSC Treaty and that they could rightly claim legitimate expectation. The Commission accordingly considers it appropriate not to order the recovery of the aid in question granted prior to the adoption of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

All aid granted by France under Articles 39gA and D of the General Tax Code (CGI) to ECSC steel firms taxable in France is incompatible with the common market for coal and steel.

Article 2

France shall forthwith take the necessary steps to ensure that ECSC steel firms taxable in France are not eligible for the aid referred to in Article 1.

Article 3

France shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply herewith.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 21 November 2001.

For the Commission

Mario MONTI

Member of the Commission

([11]) Commission Decision 73/263/EEC of 25 July 1973 on the tax concessions granted, pursuant to Article 34 of French Law No 65-566 of 12 July 1965 and to the circular of 24 March 1967, to French undertakings setting up businesses abroad (OJ L 253, 10.9.1973) and Decision of 30 September 1992 (OJ C 3, 7.1.1993. See aid NN 96/92, p. 5).