II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 July 2001

on the State aid scheme implemented by Spain for firms in Álava in the form of a tax credit amounting to 45 % of investments

(notified under document number C(2001) 1759)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/820/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 regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having, in accordance with the abovementioned Articles [1], called on interested parties to submit their comments, and having regard to those comments,

Whereas:

I. PROCEDURE

(1) As a result of the information received in response to the proceedings initiated following complaints about State aid granted to Daewoo Electronics Manufacturing España SA [2], Ramondín SA and Ramondín Cápsulas SA [3], the Commission learned of the existence of a scheme of non-notified tax aid for investments in Spain, in the Province of Álava, in the form of a 45 % tax credit. The scheme was entered in the register of non-notified aid on 13 November 1998, under the number NN 129/98.

(2) By letter dated 17 August 1999, SG(99) D/6873, the Commission informed the Kingdom of Spain of its decision to initiate in respect of this aid the procedure laid down in Article 88(2) of the Treaty.

(3) By letter from the Permanent Representation dated 9 November 1999, registered on 12 November 1999, the Spanish authorities submitted their comments under the abovementioned procedure.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [4]. The Commission invited interested parties to submit their comments on the aid within one month of the date of publication.

---

[1] OJ C 71, 11.3.2000, p. 8.
[2] Commission Decision 1999/718/EC, OJ L 292, 13.11.1999, p. 1.
[3] Commission Decision 2000/795/EC, OJ L 318, 16.12.2000, p. 36.
[4] See footnote 1.

(5) Comments were received from: the Autonomous Community of Castile-Leon, on 31 March 2000; the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza) (hereinafter Confebask), on 13 April 2000, plus, outside the time limit, supplementary comments by letter dated 29 December 2000, registered on 3 January 2001; and from the Rioja Regional Government, outside the time limit, by fax on 19 April 2000, registered on 25 April 2000. By letter dated 18 May 2000, D/53023, the Commission sent these comments to Spain, asking for observations, but did not receive any.

(6) By letter from the Permanent Representation dated 22 June 2000, the Spanish authorities informed the Commission that, since the seventh additional provision of Provincial Law No 36/1998 of 17 December 1998, which formed the legal basis for the 45 % tax credit in 1999, had not been extended, the new tax credits had ceased to be applicable as from 1 January 2000.

II. DETAILED DESCRIPTION OF THE AID

(7) According to the information at the Commission's disposal, which has not been questioned by the Spanish authorities or by third parties, the tax aid in question entered into force on 1 January 1995, pursuant to the sixth additional provision of Provincial Law ([5]) No 22/1994 of 20 December 1994 ([6]), for a period of one year. These measures were subsequently extended under the fifth additional provision of Provincial Law ([7]) No 33/1995 of 20 December 1995 until the end of 1996, and under the seventh additional provision of Provincial Law ([8]) No 31/1996 of 18 December 1996 until the end of 1997. In addition, they were amended under point 2.11 of the derogating provision in Provincial Law No 24/1996 of 5 July 1996 on corporation tax ([9]). Under the eleventh additional provision of Provincial Law No 33/1997 of 19 December 1997 ([10]), the provincial authorities introduced new incentives for 1998, similar in large part to the above aid. Under the seventh additional provision of Provincial Law No 36/1998 of 17 December 1998 ([11]), the provincial authorities introduced further new incentives exclusively for 1999, which were also largely similar to the tax aid for the previous year.

(8) As regards the 45 % tax credit in force from 1 January to 31 December 1995, the sixth additional provision of Provincial Law No 22/1994 of 20 December 1994 reads as follows:

> '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 time limits 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.'

(9) As regards the legal basis for the 45 % tax credit in force from 1 January 1996 to 31 December 1997, the amendment to the above text consisted in deleting the reference to nine years in the second paragraph. Thus, non-deduction on account of insufficient liability could be applied indefinitely.

(10) As regards the legal basis of the tax credit in force from 1 January to 31 December 1998, the eleventh additional provision of Provincial Law No 33/1997 of 19 December 1997 reads as follows:

> '1. For 1998 only, investments initiated as from 1 January 1998 which exceed ESP 2 500 million will be eligible for the tax credit of 45 % of the investment. The tax credit shall apply to net personal liability.

([5]) Norma Foral 22/1994 de 20 de diciembre de 1994 (disposición adicional sexta).
([6]) Boletín del territorio Histórico de Álava, 13.1.1995.
([7]) Norma Foral 33/1995 de 20 de diciembre de 1995 (disposición adicional sexta).
([8]) Norma Foral 31/1996 de 18 de diciembre de 1996 (disposición adicional séptima).
([9]) Norma Foral 24/1996 de 5 de julio 1996 (disposición derogatoria punto 2.11).
([10]) Norma Foral 33/1997 de 19 de diciembre de 1997 (disposición adicional undécima).
([11]) Norma Foral 36/1998 de 17 de diciembre de 1998 (disposición adicional séptima).

2. Any tax credit not used up because it exceeds the amount of tax liability may be carried forward to subsequent years.

3. The investment process shall include those investments made during the preparatory phase of the project which generates the investments and with a necessary, direct link to that process.

4. The application of the tax credit to which this general provision refers shall be notified by the taxpayer to the Álava Provincial Council, using the form approved for that purpose by the Provincial Commission for Tax, Finance and Budgets.

5. Concessions granted under this provision may not be combined with any other tax concessions available in respect of the same investments.'

(11) As regards the 45 % tax credit in force from 1 January to 31 December 1999, the eleventh additional provision of Provincial Law No 36/1998 of 17 December 1998 reads as follows:

'1. For 1999 only, investments initiated as from 1 January 1999 which exceed ESP 2 500 million will be eligible for the tax credit of 45 % of the investment. The tax credit shall apply to net personal liability.

2. Any grants received by the taxpayer shall not be included in the figure of ESP 2 500 million referred to in the previous paragraph.

3. Any grants received by the taxpayer shall not be included in the base to which the tax credit applies.

4. Any tax credit not used up because it exceeds the amount of tax liability may be carried forward to subsequent years.

5. The investment process shall include those investments made during the preparatory phase of the project which generates the investments and with a necessary, direct link to that process.

6. The application of the tax credit to which this general provision refers shall be notified by the taxpayer to the Álava Provincial Council, using the form approved for that purpose by the Provincial Commission for Tax, Finance and Budgets.

7. Concessions granted under this provision may not be combined with any other tax concessions available in respect of the same investments.'

(12) In short, it is clear from the above provisions that the aid is granted in respect of, firstly, investments in new tangible fixed assets made during the period from 1 January 1995 to 31 December 1997, and then the investment process from 1 January 1998 to 31 December 1999, and secondly the investment expenditure incurred in the preparatory stage [12] of the project which generates the investments, provided that they exceed ESP 2 500 million and were initiated between 1 January 1995 and 31 December 1999.

(13) In addition, between 1 January and 31 December 1999, any grants received by the beneficiary are not taken into account either when establishing whether the investment exceeds the threshold of ESP 2 500 million or when determining the taxable income to which the tax credit of 45 % applies.

(14) Since the scheme does not require the investment entitling firms to the aid to be located in Álava, a firm resident there for tax purposes could obtain a tax credit equivalent to 45 % of the amount of investments made outside Álava.

(15) The scheme is furthermore applicable to investments made in any sector and is not subject to any sectoral restriction such as those laid down in the Community sectoral rules applicable to the production, processing and marketing of the agricultural products in Article I to the Treaty, fisheries, coalmining, steelmaking, transport, shipbuilding, synthetic fibres and the motor industry.

(16) Furthermore, any firm may qualify for the 45 % tax credit in question irrespective of its economic and financial position, even if it is a firm in difficulty.

(17) Although the 45 % tax credit may not be combined with any other tax concessions that may be granted in respect of the same investment, combination with other, non-tax aid, including grants, subsidised loans, guarantees, equity purchases, etc., relating to the same investments is not ruled out.

---

[12] No precise definition has been supplied of what the Spanish authorities understand by 'investments made during the preparatory phase' for the purposes of applying the tax aid in question.

(18) In its decision initiating the procedure, the Commission pointed out that as far as the application of the Community State aid rules is concerned, the tax nature of the measures in question is irrelevant, since Article 87 of the Treaty applies to aid measures 'in any form'. The Commission also emphasised, however, that, to be regarded as aid, the measures must meet all four of the criteria set out in Article 87 and explained below.

(19) Firstly, the Commission pointed out that the tax credit confers on the recipients an advantage amounting to 45 % of the amount of the investments and relieves them of charges that are normally borne from their budgets through a partial reduction in their net tax liability.

(20) Secondly, the Commission considered provisionally that the said tax credit involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure.

(21) Thirdly, the Commission considered that the tax credit affects competition and trade between Member States. Since the recipients conduct business which may be the subject of intra-Community trade, the aid strengthens their position vis-à-vis competitors who are also involved in intra-Community trade and therefore affects such trade. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). In this way they are more able to compete with firms which are not eligible for the aid.

(22) Lastly, the Commission considered that the 45 % tax credit is specific or selective in that it favours certain firms, since only firms which make investments exceeding the ESP 2 500 million (ECU 15 025 303) threshold are eligible. All other firms whose investments do not exceed that threshold are ineligible.

(23) Furthermore, the Commission considered that the selective nature of the concession is also due to a discretionary power of the tax authorities: the Álava Provincial Council has a discretionary power to determine, in particular, the investments that are eligible for the 45 % tax credit and the duration of the investment process and of the preparatory phase of the investments qualifying for the aid.

(24) In short, the Commission considered that the 45 % tax credit is State aid within the meaning of Article 87(1) of the Treaty and Article 61(1) of the Agreement on the European Economic Area, since it meets the cumulative criteria of constituting an advantage, being granted by the State from State resources, affecting trade between Member States and distorting competition in favour of certain firms.

(25) Since the tax incentive in question is not subject, among other requirements, to the condition that it does not exceed EUR 100 000 over a period of three years, the Commission considered, at that stage, that it cannot be regarded as subject to the *de minimis* rule ([13]).

(26) The Commission stated that State aid which is not governed by the *de minimis* rule is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(3) of the EEA Agreement. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considered provisionally that the aid could be regarded as unlawful.

(27) The Commission also found that the 45 % tax credit is aid conditional on investment ([14]). However, in the absence of a precise definition of the eligible expenditure, the Commission could not rule out at that stage the possibility that some of the investment expenditure qualifying for the 45 % tax credit might fall within the scope of the Community definition of initial investment ([15]).

(28) As regards the investment expenditure falling within the scope of the Community definition, the Commission took the view at that stage that the 45 % tax credit wholly or partly constitutes investment aid. It must therefore be examined in the light of the Community rules on investment aid. On the other hand, any aid to defray investment expenditure which does not fall within the Community definition cannot be regarded as investment aid and has to be considered as aid for other purposes, for example operating aid.

(29) The 45 % tax credit, which is not restricted to a particular sector, may be granted to firms that are subject to Community sectoral rules. The Commission therefore questioned at that stage whether the aid was compatible where the recipient belongs to a sector subject to special Community rules.

([13]) See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2) and the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9).

([14]) See the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9).

([15]) See point 18 of the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9) or point 4.4 of the guidelines on national regional aid (98/C 74/06).

(30) The same applies where the 45 % tax credit is granted to firms in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty. However, the grant of the tax aid in question is not subject to the conditions laid down in those guidelines. Since it does not meet the said conditions, the aid gave rise at that stage to doubts as to its compatibility with the common market where it is intended for firms in difficulty.

(31) As regards the application of the derogation in Article 87(3)(c) of the Treaty to the aid for investment in Álava, the Commission pointed out that, during the period 1995 to 1999, two successive regional aid maps were in force. Firstly, the map approved in 1998 by Commission Decision 88/C 351/04 provided that only certain areas of Álava (subject to 20 % and 30 % ceilings) could apply for aid and that the rest of the territory was not eligible for the derogation in Article 87(3)(c) of the Treaty. Secondly, the map approved by the Commission Decision of 26 July 1995 provided that from that date the whole of Álava could qualify for aid (subject to a ceiling of 25 % nge).

(32) The Commission also pointed out provisionally that the ceilings in question apply only to certain eligible expenditure included in the standard base and complying with the Community definition of initial investment, which excludes *inter alia* replacement investments. It stressed that aid granted between 1 January and 31 December 1999 is subject to the above regional aid guidelines, so that investment aid not exceeding the ceilings is also subject to certain additional conditions laid down in those guidelines.

(33) However, the Commission observed, at this preliminary stage, that the 45 % tax credit was not limited (in the period from 1 January to 26 July 1995) to the industrial zone of the Nervión valley and the areas in the Pyrenees (which were the only areas eligible for aid under the regional aid map current at the time) and was not subject to the 30 %, 25 % and 20 % nge ceilings, depending on the area and the period in question, in the case of large firms, nor to the 30 % nge ceiling in the case of SMEs located in the eligible areas. Outside these areas, the aid was not limited to 15 % gge in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. The Commission also found that the eligible expenditure could not be adapted to that in the said standard base. Accordingly, it could not rule out the possibility that the aid could rank as operating aid, since it was intended to reduce the recipient firms' current expenditure. It therefore took the view that there were doubts about the compatibility of the tax incentives with the rules on regional aid.

(34) As regards the period after 1 September 1998, the Commission considered that the possibility that investment for which aid was granted was covered by the multisectoral framework on regional aid for large investment projects (98/C 107/05) could not be ruled out. However, the tax aid in question was not subject to the notification requirement where large projects are concerned or to a possible reduction in aid intensity that might result from the Commission's assessment. The Commission therefore stated provisionally that there were doubts as to the compatibility of the tax aid where large projects were concerned.

(35) To sum up, the Commission questioned the compatibility of the tax aid with the common market in the light of the derogation in Article 87(3)(c), which concerns 'aid to facilitate the development (...) of certain economic areas (...)'. Neither did it appear that the other derogations in Article 87(2) and (3) of the Treaty could apply. The tax credit could not be regarded as aid having a social character under Article 87(2)(a), was not intended to make good the damage caused by natural disasters or exceptional occurrences under Article 87(2)(b) and is not subject to the provisions of Article 87(2)(c) concerning 'aid to facilitate the development of certain economic activities (...)'. Furthermore, its object was not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Finally, it was not intended to promote culture and heritage conservation within the meaning of Article 87(3)(d).

(36) As well as inviting them to submit their comments under the Article 88(2) procedure, the Commission also asked the Spanish authorities to supply all the information necessary for assessing the 45 % tax credit in Álava. This information related in particular to: any tax credit for investments available in any year during the period 1986 to 1994, copies of all decisions granting the aid during the period 1995 to 1997 and copies of the declarations made by the firms concerned to the Provincial Council in 1998 and 1999, on the official form, setting out, at least, the nature of the investment expenditure qualifying for the aid, the amount of the tax credit granted to each recipient, the aid actually paid to each recipient and any balance still outstanding, whether the recipient constituted a firm in difficulty within the meaning of the Community guidelines on State aid for

rescuing and restructuring firms in difficulty, the details of any combination of aid (amount, eligible expenditure, where appropriate the aid schemes applied, etc.), and precise and detailed definitions of what constituted 'investments' and 'investments made during the preparatory phase'.

III. COMMENTS OF THE SPANISH AUTHORITIES

(37) The Spanish authorities submitted their comments by letter from the Permanent Representation dated 9 November 1999. Essentially, they take the view that the tax credit does not constitute State aid within the meaning of Article 87 of the Treaty. In support of their view, they challenge the Commission's assumption that trade will be affected because the companies benefiting from the incentive carry out economic activities which may involve trade between Member States. In their opinion, it cannot be established, *pace* the Commission, that trade is affected generally, but only in specific cases, since there is a possibility that in some cases it will not be affected. In such cases, therefore, one of the prerequisites for classifying an official measure as State aid is missing.

(38) They also argue that the measure is not specific or selective in character. In their opinion, the opening of the measure to all sectors and to all taxpayers that meet the appropriate criteria removes any specific character. Furthermore, since there are five separate tax systems in Spain, one of which in Álava, the tax rules applicable in that territory have the status of general measures for the taxpayers to whom they apply. The measure therefore has no regional specificity.

(39) As to specificity of scope, this does not exist, since the measure is open to all sectors and to all taxpayers. The Spanish authorities maintain that the requirement to invest ESP 2 500 million is not discriminatory, but an objective condition deriving from the need to ensure the effectiveness of the measure and thus achieve the proposed objective. However, even if the Commission were to consider that the measure was specific, it would be justified by the nature and general scheme of the system, as provided for in Commission notice 98/C 384/03 ([16]). The measure in question is justified by the nature of the tax system, since it forms part of the single tax system applicable in the territory of Álava and derives from the exercise of the Provincial Council's powers to adopt measures in the tax field; it is also justified by the general scheme of the tax system, since its objective is to promote economic activity. Moreover, it seems logical that the incentives should be targeted at large investments, since, firstly, it is these that will actually benefit Álava in the long term, enabling the tax authorities to collect tax revenues in excess of the fiscal expenditure borne at the start of the investment projects, and, secondly, the minimum investment threshold does not harm small and medium-sized firms, as they already benefit from many Community financing programmes.

(40) In addition, the Spanish authorities dispute that the relevant measures between 1995 and 1997 are discretionary, arguing that the aid is granted automatically once the condition of investing a minimum of ESP 2 500 million is satisfied. The Provincial Council can thus check only that all the conditions are satisfied; it cannot alter or add any conditions. The Spanish authorities also stress that Spanish tax law does not allow arbitrary decisions when it comes to determining the fundamental characteristics of taxpayers' obligations. The rules have been amended since 1997 and all the features which the Commission regards as discretionary have been repealed.

(41) The Spanish authorities reject the Commission's view that the tax rules do not satisfy the conditions of the sectoral rules. In their opinion, the Commission ought to determine what the specific conditions are that are infringed by the said tax rules. As regards the application of the tax rules to firms in difficulty, they consider that the condition of investing at least ESP 2 500 million makes it extremely difficult for such firms to obtain the tax credit; it should be regarded more as a guarantee that firms in difficulty will not qualify for the incentive. The Spanish authorities consider that the application of the rules on regional aid is inappropriate, since in this specific case no State aid is involved.

(42) In view of the above arguments, the Spanish authorities consider that the Commission should terminate the Article 88(2) procedure by a decision finding that the tax measures in question do not meet the criteria for being regarded as State aid.

(43) For the rest, the Spanish authorities do not consider it necessary to supply the information requested by the Commission concerning, in particular, decisions to

([16]) Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

grant the tax credit, since no State aid is involved. Consequently, they are not providing any of the information requested in the decision initiating the procedure.

IV. OTHER COMMENTS RECEIVED BY THE COMMISSION

(44) The Commission emphasises that the comments set out below are without prejudice to the question of whether the parties which submitted them can be considered interested parties within the meaning of Article 88(2) of the Treaty.

Comments by the Comunidad Autónoma de Castilla y León

(45) The Autonomous Community of Castile-Leon points out first of all that the tax measures in question are part of a set of tax measures adopted by the Álava Provincial Council that have been contested both in Spain and at Community level.

(46) It states that the tax measures in question constitute State aid, since they satisfy all four criteria laid down in Article 87 of the Treaty. In support of this contention it basically puts forward the same arguments as those given in the decision initiating the procedure.

(47) It also considers that the tax aid cannot be regarded as compatible by virtue of the derogations in Article 87 of the Treaty. Furthermore, the obligation to notify laid down in Article 88(3) of the Treaty has not been complied with.

(48) The Autonomous Community of Castile-Leon takes the view, therefore, that the tax measures in question should be regarded as State aid which is unlawful, since the notification procedure laid down in Article 88(3) has not been followed, and which is incompatible with the common market.

Comments from the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza (Confebask))

(49) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by Álava. As regards substance, Confebask's views are essentially as follows:

(a) the presumed reduction of the tax debt: the Commission is wrong to think that there is a tax debt whose reduction involves a loss of tax revenue. If this argument were sound, any tax deduction would always involve a loss of revenue compared with the amount initially due. Confebask therefore asks the Commission to reconsider its position, since otherwise it could be argued that taxes were being unlawfully harmonised by establishing a normal amount in relation to which any losses of tax revenue would have to be determined;

(b) the effect on trade: according to the Commission, where the recipients participate in intra-Community trade, the tax measures in question distort that trade. However, differences between tax systems always affect trade. To determine the extent to which trade is affected, the Commission should therefore analyse the entire tax system and not specific provisions. Confebask emphasises in this respect that, according to one study, the tax burden in the Basque Country is greater than in the rest of Spain. The Commission should explain why these specific measures and not other tax differences affect trade. In any event, even if such an effect did exist, the way to remove it would be through harmonisation, not State aid;

(c) the selective character of the aid: in Confebask's opinion, the selective nature of the tax measures should be assessed in one of two ways, either as an enabling rule conferring power on the tax authority subsequently to grant a specific relief, or as a rule directly granting the tax relief without requiring subsequent specification. The Commission, however, is using one argument which fits the first category, and another which fits the second. Given that the two are mutually exclusive, the Commission should explain in which category the tax measures in question fall, since otherwise it would be contradictory to try and use both.

— Confebask questions the approach whereby the tax measures are regarded as enabling rules, since the reduction is granted automatically and the authorities, accordingly, had no discretionary power either before 1997 or thereafter. The authorities are restricted to checking that the applicant satisfies the tests of eligibility. Moreover, if the tax measures are regarded as enabling rules which subsequently make it possible to grant the aid, it has to be concluded that the current procedure, in so

far as it is the rules that are being questioned and not specific instances of their application, is meaningless. Similarly, according to the first paragraph of the Commission's letter to the Member States ([17]), a general provision conferring relief is regarded as aid only if 'legislative machinery enabling it to be granted without further formality has been set up'. By contrast, because it is abstract, an enabling rule cannot be regarded as State aid and, hence, cannot be assessed for its effect on competition and trade between Member States.

— As for regarding the tax measures as rules granting aid directly, Confebask points out that, according to points 19, 20 and 17 of notice 98/C 384/03, a tax measure may be specific and, hence, may be State aid, if it is aimed solely at public undertakings, certain types of undertaking or undertakings in a given region. However, the tax measures in question have none of these characteristics, not even territorial specificity, since they apply to the whole territory for which the regional authorities that introduced them are competent. As to the specific character of the threshold of ESP 2 500 million, Confebask considers that the use of objective thresholds is normal practice in national and Community tax rules. Confebask also draws attention to the basis of various judgments of the Court of Justice and Commission decisions: hitherto, it has never been held that thresholds imply specificity. Moreover, the Commission itself acknowledges, in point 14 of the above notice, that the effect of promoting certain sectors does not necessarily mean that the measures are specific and, in point 207 of the 1998 Competition Report, that measures which have a cross-sectoral impact and are intended to favour the whole of the economy are general measures and do not involve State aid. In short, the tax measures in question are not specific, since they do not promote a particular sector or particular undertakings. On the contrary, they are open to all sectors and to all undertakings established in the territory for which the provincial authorities are competent;

(d) illegality of the 45 % tax credit: while still disputing that the tax credit constitutes State aid, something that has to be proven in order to classify the measure as illegal, Confebask argues that the Commission's description of the tax credit as unlawful aid calls into question the principles of legitimate expectations, the ban on arbitrary decisions by institutions, legal certainty and proportionality, since the Commission regarded the Basque tax arrangements as lawful in its Decision 93/337/EEC ([18]). In any event, the Commission could change its position as regards future cases but not as regards past ones. Confebask furthermore regards the tax measures in question as existing aid. In 1983 there were already rules providing for concessions of the same type (deduction of 65 % of the tax payable where new investments were made). In 1984 a threshold of ESP 500 million was introduced as a qualifying condition for a tax credit amounting to 50 % of investments. According to the definition given in Article 1(a) 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 ([19]), 'existing aid' means 'all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty'. The aid under examination here is therefore legal for the purposes of Article 88(3) of the Treaty;

(e) incompatibility with the common market: if the tax measures in question are regarded as enabling rules, Confebask considers that their compatibility cannot be assessed while the aid is not granted through an administrative decision. The procedure is meaningless and incapable by definition of yielding any results as to the compatibility of the aid. On the other hand, if the tax measures in question are regarded as rules granting aid directly, Confebask takes the view that the practice of the Commission and the Court requires that measures have to have sectoral specificity before the compatibility of the aid can be assessed. Furthermore, it would be necessary to establish the overall tax burden on firms and the reference tax burden.

([17]) Commission letter to Member States, SG(89) D/5521, of 27 April 1989.

([18]) OJ L 134, 3.6.1993, p. 25.

([19]) OJ L 83, 27.3.1999, p. 1.

Lastly, this approach would lead to the absurd conclusion that any tax burden lower than the highest tax burden in all the Member States would constitute State aid. Confebask also rejects the Commission's argument that the said tax measures are incompatible since they do not contain specific provisions on sectoral or regional aid, or aid for large investment projects, etc.: tax measures may not and should not contain this type of provision. According to the Court of Justice [20], the Commission should specify in its decisions what the adverse effects on competition are, determining the real effect of the measures examined. Incompatibility cannot be determined, therefore, in abstract situations specific to a tax system, since in that case any differences between tax systems would necessarily become aid. This leads Confebask to repeat that there is no normal tax debt which has been reduced by the tax measures in question;

(f) Confebask therefore asks the Commission to adopt a final decision terminating the procedure and finding that the tax measures in question comply with Community law.

(50) Confebask's additional comments, communicated by letter dated 29 December 2000, registered on 3 January 2001, were not taken into account, as they reached the Commission after the deadline had expired [21]. Furthermore, Confebask did not apply for an extension of the time limit pursuant to Article 6(1) of Council Regulation (EC) No 659/1999.

Comments from the Rioja Regional Government

(51) The Rioja Government's comments, sent by fax dated 19 April 2000, registered on 25 April 2000, were not taken into account, as they reached the Commission after the deadline had expired. Furthermore, the Rioja Regional Government did not apply for an extension of the time limit pursuant to Article 6(1) of Council Regulation (EC) No 659/1999.

[20] See Joined Cases C-278/92, C-279/92 and C-280/92 Spain v Commission [1994] ECR I-4103.

[21] The deadline for submitting comments was one month from the date of publication of the notice in the *Official Journal of the European Communities*, i.e. 26 February 2000.

V. COMMUNICATION OF THE THIRD PARTIES' COMMENTS TO SPAIN

(52) By letter to the Spanish Permanent Representation, dated 18 May 2000, the Commission sent, pursuant to Article 6(2) of the aforesaid Regulation (EC) No 659/1999, the third parties' comments to Spain, inviting it to submit its observations within one month of the date of the letter, but it received only a request for a 20-day extension of the deadline for replying. Spain has not submitted any such observations, therefore.

VI. ASSESSMENT OF THE AID

VII. CLASSIFICATION AS STATE AID

(53) The Commission would point out that, for the purpose of applying the Community rules on State aid, the tax nature of the measures in question does not matter, since Article 87 of the Treaty applies to aid measures 'in any form'. Nevertheless, the Commission emphasises that, to be regarded as aid, the measures in question should together satisfy all four of the criteria set out in Article 87 and explained below.

(54) Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through different types of reduction in the firm's tax burden and, in particular, through an exemption from or reduction in tax liability. The 45 % tax credit meets this criterion, since it reduces the recipient firms' tax burden by an amount equivalent to 45 % of the eligible investment. In the absence of the tax credit, the recipient firm would have to pay its full final tax liability. The tax credit thus implies an exception to the common tax system applicable.

(55) Secondly, the Commission considers that the said 45 % tax credit involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure. This criterion is also applied to aid granted by regional and local bodies in the Member States [22]. Furthermore, the intervention of the State can be effected both through tax provisions of a statutory, regulatory or administrative kind and through the practices of the tax authorities. In this specific case, State intervention is effected through the Álava Provincial Council on the basis of a statutory provision.

[22] See Case 248/84 Germany v Commission [1987] ECR 4013.

(56) The argument put forward in certain comments by third parties, to the effect that it would be wrong to regard the 45 % tax credit as involving a loss of tax revenue compared to the normal amount (determined by the Commission) of the tax due, is a fallacious one. It has to be pointed out that the normal level of tax derives from the tax system in question and not from any Commission decision allegedly pursuing a hidden agenda of tax harmonisation. Furthermore, according to the second indent in point 9 of notice 98/C 384/03, to qualify as State aid, 'firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including: (...) a total or partial reduction in the amount of tax (such as exemption or a tax credit)'. This is the case with the relief in the form of the 45 % tax credit. The comment is therefore without foundation.

(57) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, according to a report on the external dependency of the Basque economy in the period 1990 to 1995 ([23]), exports abroad went up ([24]), not only in absolute terms but, in particular, in relative terms as well, to the detriment of exports to the rest of Spain. The foreign market thus partly replaced the market which is the rest of Spain. Furthermore, according to another statistical report on the foreign trade of the Basque Country ([25]), at 28,9 % the Basque economy's 'propensity to export' (ratio of exports to GDP) is greater than that of Germany and the other Member States, where it is about 20 %. According to this report, the Basque trade balance was clearly in surplus during the period 1993 to 1998. In particular, in 1998, for each ESP 100 of imports there were ESP 144 of exports. In short, the Basque economy is very open to the outside, and its production is very much geared to exporting. Given these characteristics of the Basque economy, it may be deduced that recipient firms are engaged in economic activities which are likely to include intra-Community trade. Consequently, aid strengthens their position vis-à-vis their competitors in intra-Community trade, thereby affecting such trade. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). This enables them to compete with firms which are not eligible for the tax credit, either because they have not invested, or because their investments have not reached the threshold of ESP 2 500 million following the introduction of the tax credit.

(58) Since, in this case, the tax rules under examination are general and abstract in character, the Commission would point out that the analysis of their impact on trade can only be carried out at a general, abstract level; it is not possible to specify to what extent they affect a market, sector or specific product, as is stated in the abovementioned comments by third parties. This position has been confirmed on a number of occasions by Court of Justice case-law ([26]).

(59) As regards certain comments from third parties which maintain that the effect on trade should be assessed by the Commission on the basis of a comparison of all tax systems, the Commission would point out that the distortions of competition which are the subject of this procedure under Articles 87 and 88 of the Treaty are due to a derogating rule which favours certain firms vis-à-vis the other firms of the Member State; they are not possible distortions of competition which are due to differences between the tax systems of the Member States, which might, as appropriate, be caught by the provisions of Articles 93 to 97.

(60) As regards the specific character which State aid must have, the Commission takes the view that the 45 % tax credit is specific or selective in that it favours certain firms, since only firms which, after 1 January 1995, make investments exceeding the ESP 2 500 million (EUR 15 025 303) threshold are eligible. All other firms whose investments do not exceed that threshold are ineligible. The objective character of the threshold cited does not prevent it, as the Spanish authorities and some

([23]) Patxi Garrido Espinosa and Victoria García Olea, 'La dependencia exterior vasca en el periodo 1990–1995', Euskal Estatistika-Erakundea/Instituto Vasco de Estadística (Eustat), the statistical office of the Basque Government.

([24]) Exports abroad accounted for 28,5 % of total exports (including sales to the rest of Spain) in 1990, and for 40,8 % five years later in 1995.

([25]) 'Estadística de Comercio Exterior para la Comunidad Autónoma de Euskadi en el año 1998', prepared by Eustat.

([26]) See Case C-75/97 (Maribel) Belgium v Commission, paragraphs 48 and 51; Case T-298/97 Alzetta Mauro and others v Commission, paragraphs 80 to 82; the Opinion of Advocate General Ruiz-Jarabo in Case C-310/99 Italy v Commission, paragraphs 54 and 55; and the Opinion of Advocate General Saggio in Case C-156/98 Germany v Commission, paragraph 31, which ran thus: 'It should be pointed out in this respect that, with regard to a general aid scheme, to be able to determine the effect of that scheme on trade, it is sufficient if, from an *ex ante* assessment, it can reasonably be considered that the said effect may come about. If the position of a firm (or, as in the present case, an indefinite number of firms) is reinforced by an aid scheme, this privilege may in principle affect competition between Member States.'

of the third-party comments claim, from being selective and excluding firms which do not satisfy the conditions in question.

(61) The Commission is of the opinion, in the alternative, that the 45 % tax credit is specific on the grounds of the discretionary power of the tax authorities. In this case, the Commission finds that Álava Provincial Council had more of a discretionary power to alter the aid than to grant it. In 1995, 1996 and 1997, the Álava Provincial Council had to decide whether to grant the 45 % tax credit, since it was not automatic, determine the size of the investments to which the tax credit would apply, set the time limits and limitations that would apply in each case and, lastly, decide on the duration of the investment process, which could include investments made during the preparatory phase of the project generating the investments. All these powers of the Álava Provincial Council give it discretion to determine the size or the characteristics of the 45 % tax credit in the light of the particular circumstances of each applicant. A further discretionary feature is the scope for determining the investments made in the preparatory stage of the project which generates the investments. It should be noted that, in the decision initiating the procedure, the Commission pointed out that there was no precise, objective definition of this type of investment. No information on this point has been supplied, either in the comments submitted by the Spanish authorities or in those of third parties. However, the fact that there is no precise and generally accepted definition would seem to give the regional authorities scope to determine the amount of this type of investment.

(62) The Commission notes, furthermore, that from 1 January 1998 some of the conditions were altered or even abolished. Instead, a new concept, the 'investment process', was introduced, replacing 'investments in new tangible fixed assets', which had applied from 1 January 1995 to 31 December 1997. It should be noted that the provincial laws introducing the concept of 'investment process' do not define it. Unlike the concept of 'investments in tangible fixed assets', which is defined in accounting rules ([27]) and other provisions ([28]), there is no precise and generally accepted definition of the 'investment process'. In the absence of a precise definition, therefore, the regional authorities have some leeway in determining exactly what is meant by the 'investment process' in the case of each recipient.

([27]) For example, the 'Plan General de Contabilidad'.
([28]) For example, the 'Ley de Sociedades Anónimas'.

(63) It should also be stressed that, while in Decision 93/337/EEC the Commission used only the criterion of territorial or sectoral specificity in order to demonstrate the specific or selective nature of the aid under the scheme in question, this does not mean that the aid could not have displayed other types of specificity in relation to other criteria. For an official measure to be classed as selective or specific, in relation to State aid, it is enough to identify a single feature. There is therefore no need for each Commission decision to examine exhaustively every specific feature that may be displayed by the official measures under consideration in order to demonstrate that they are selective. Consequently, the argument put forward in some third-party comments, to the effect that because the Commission did not mention the selective nature of the minimum investment threshold as a condition of eligibility for the aid, it did not deem it to be selective, cannot be accepted.

(64) As regards the existence of tax measures in the form of tax credits for investments above a given threshold in other Member States, which the Commission did not consider selective in scope because of the threshold; according to certain comments by third parties, this leads to a legitimate expectation concerning all similar tax credits. The Commission would point out that the schemes mentioned by some of the parties are very different from the 45 % tax credit. Furthermore, even supposing that certain schemes were similar and that the Commission had not reacted, it would not be justified in taking this misguided approach in the present case. It should be pointed out that, according to the case-law of the Court of Justice, 'any breach by a Member State of an obligation under the Treaty in connection with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the common market are increased' ([29]).

(65) Concerning the question raised in some of the third-party comments about whether the Provincial Law in question has the character of an enabling rule or a rule granting aid directly, the Commission would point out that, in this case, the rules which introduced the 45 % tax credit have the character of an aid scheme. In support of this assessment, it is sufficient to point out that under Article 1(d) of Regulation (EC) No 659/1999 an aid

([29]) See Case C-78/76 Steinike & Weinlig v Federal Republic of Germany, paragraph 24. On the other hand, Case C-313/90 Comité International de la rayonne et des fibres synthétiques and others v Commission, paragraph 45, states that, 'neither the principle of equal treatment nor that of the protection of legitimate expectations may be relied upon in order to justify the repetition of an incorrect interpretation of a measure'.

scheme is defined as 'a system on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner (...)'. However, this character of an aid scheme does not predetermine, as certain third-party comments claim, whether there is any discretionary power in the execution of the scheme or not. Discretionary power in regard to the granting of the aid will depend on the specific characteristics of the scheme.

(66) As regards invoking the nature or general scheme of the tax system as justification for the 45 % tax credit, as the Spanish authorities seek to do, the Commission emphasises that what matters is determining whether the tax measures involved meet the objectives inherent in the tax system itself, or whether, on the contrary, they pursue other, possibly legitimate, objectives outside the tax system. In the case at issue, the 45 % tax credit does not fulfil the internal objectives of the Spanish tax system, which, apart from the principal objective inherent in any tax system of collecting revenue for financing public expenditure, is founded on the principles of equality and progressiveness. ([30]) In this regard it has to be pointed out that the 45 % tax credit involves ([31]) a discrimination in favour of large economic units at the expense of other smaller and less powerful units, without such discrimination being justified by the internal logic of the tax system. In short, because it does not comply with the internal principles inherent in the tax system, the 45 % tax credit cannot be justified by the nature or general scheme of that system. Neither does the fact that the tax credit was introduced by the provincial authorities with powers in the tax field demonstrate, contrary to what the Spanish authorities claim in their comments, that it is consistent with the nature of the tax system.

(67) Moreover, the Spanish authorities state in their comments that the 45 % tax credit satisfies the objective of promoting economic activity. It thus helps to achieve the industrial policy objectives pursued by the Basque Government. According to the Basque Government document entitled Industrial Policy: General Framework of Activities 1996-1999 (Política Industrial. Marco General de Actividades 1996-1999), 'tax policies are essential for boosting economic development and, similarly, for promoting industrial projects based on the industrial development of the Basque Country' (page 131), and in the chapter 'Tax policy instruments' one reads: 'the tax autonomy which we have (in the Basque Country) enables us to search for imaginative made-to-measure tax solutions, e.g. for priority projects or even tax incentives for large firms' (page 133). The 45 % tax credit in question, therefore, is part of an industrial policy whose objectives are not inherent in the tax system.

(68) In short, the Commission finds that, as the Spanish authorities have pointed out, the 45 % tax credit pursues an economic policy objective which is not inherent in the tax system. It is therefore not justified by the nature or general scheme of the system.

(69) As to the argument put forward in certain third-party comments concerning the existence of a higher overall tax burden in the Basque Country, the Commission repeats that this is not relevant in the case at issue, since the procedure was initiated in respect of a specific measure and not the whole the tax system of each of the three Basque provinces.

(70) To sum up, the Commission finds that the 45 % tax credit in question is State aid under Article 87(1) of the Treaty and Article 61(1) of the EEA Agreement, since it involves aid granted by a State, from State resources, which favours certain undertakings, distorts competition and affects trade between Member States.

VIII. ILLEGALITY OF THE 45 % TAX CREDIT

(71) Since the scheme does not require a commitment from the Spanish authorities to grant the aid in accordance with the conditions for *de minimis* aid ([32]), the Commission considers that the aid cannot be regarded as subject to those rules. It should be stressed in this respect that the Spanish authorities never maintained, in the procedure, that the aid in question should be classed as *de minimis* aid, either in full or in part. Moreover, it could not comply with the *de minimis* rules, since in particular there is no guarantee that the ceiling of EUR 100 000 would not be exceeded. The incentive does not qualify as existing aid either, since it does not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999.

([30]) Article 31 of the Spanish Constitution.

([31]) See the sixth paragraph of Judgment 411/99 of 17 May 1999 of the High Court of the Basque Country (Tribunal Superior de Justicia del País Vasco) in Case 907/98 Administración del Estado v Juntas Generales de Álava.

([32]) The result of the assessment of the aid is the same, whether that assessment is based on the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996) or on Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

(72) The claim made by some third parties that the 45 % tax credit constitutes existing aid must be rejected. In support of that argument, some third-party comments mention the existence of two tax credits prior to the introduction of the 45 % tax credit. However, scrutiny of those two schemes reveals that they differed substantially from the 45 % tax credit under examination. The first scheme did not specify any threshold and the second one established a threshold of ESP 500 million, which is much lower than the ESP 2 500 million threshold in the case at issue. In Article 1(c) of Regulation (EC) No 659/1999, new aid is defined as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. The tax credit in question, which involves substantial changes with respect to those schemes, is therefore to be classed as new aid and, in accordance with Article 2(1) of the Regulation, should be notified, save as otherwise provided in regulations adopted pursuant to Article 89 of the Treaty ([33]). In any case, even the two earlier schemes did not qualify as existing aid since they were apparently not in force on 1 January 1986, when Spain acceded to the European Union. They therefore did not meet the aforesaid criterion laid down in Article 1(b)(i) of Regulation (EC) No 659/1999 of having been put into effect before, and being still applicable after, the date of accession.

(73) The Commission would point out that State aid which is not covered by the *de minimis* rule and is not existing aid is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(3) of the EEA Agreement. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considers that the aid should be regarded as unlawful. The Commission regrets this failure by the Spanish authorities to fulfil their obligation to notify the aid in advance.

(74) As regards the argument in some of the third-party comments that basically there is a violation of legitimate expectations and legal certainty, the Commission feels bound to reject this, since firstly the 45 % tax credit is not existing aid and, secondly, as it was not notified under Article 88(3) of the Treaty, the Commission was not able to determine whether it is compatible with the common market. Neither can it be accepted that there is a legitimate expectation of the 45 % tax credit being compatible with the common market on the grounds that, as claimed in some of the third-party comments, the Basque tax system was already deemed compatible by Commission Decision 93/337/EEC concerning a scheme of tax concessions for investment. In that Decision, the Commission in fact found that the tax measures concerned were to be classed as State aid and, as such, were subject to the Community rules on State aid (rules on regional aid or aid for SMEs, rules on combination of aid and sectoral rules). Therefore, if as claimed in some third-party comments the 45 % tax credit was a measure similar to the scheme examined in the 1993 Decision, it should, in the first place, have been notified as it is new State aid and, secondly, comply in particular with the rules on regional aid or aid for SMEs, the rules on combination of aid and the sectoral rules. In these circumstances, the recipients cannot rely on any legitimate expectations or legal certainty as regards the State aid nature of the 45 % tax credit.

(75) In short, as regards the principles of legitimate expectations and legal certainty invoked in the third-party comments, the Commission gave no specific assurances either to the Spanish authorities or to third parties, who could not therefore harbour any legitimate expectations with regard to the legality or compatibility of the aid in question. It should be pointed out in this connection that 'it is settled case-law that the right to protection of legitimate expectations may be claimed by any individual who finds himself in a position in which it is shown that the Community administration gave rise to justified hopes on his part (...). However, no one may plead infringement of the principle of the protection of legitimate expectations in the absence of specific assurances given to him by the administration' ([34]). This is why the argument that legitimate expectations or legal certainty have been violated is without foundation in this case. The Commission would also point out in this respect that in its Decision 93/337/EEC it had already deemed certain tax credits introduced in 1988 by the Provinces of Álava, Guipúzcoa and Vizcaya to be State aid.

IX. ASSESSMENT OF COMPATIBILITY WITH THE COMMON MARKET

(76) As a preliminary, the Commission would repeat that the 45 % tax credit has to be classed as an aid scheme. Given the general, abstract nature of an aid scheme, the Commission does not know the circumstances of existing or possible future recipient firms and is not, therefore, able to examine the exact repercussions on competition for specific firms. In this context it is sufficient to

([33]) At no time during the period of validity of the scheme in question was any such exemption regulation in force.

([34]) Joined Cases T-132/96 and T-143/96 Freistaat Sachsen and others v Commission [1999] ECR II-3663, paragraph 300.

ascertain that potential recipients could benefit from aid that is not consistent with the Community directives, guidelines and frameworks applicable on this subject. Moreover, the Commission would emphasise that, in its decision initiating the procedure, it asked for all relevant information relating to the aid and the particular circumstances of each recipient. However, the Spanish authorities have not provided any such information. This is why it is contradictory to criticise the Commission, as certain third-party comments do, for providing only a general assessment while at the same time refusing to supply the detailed data requested.

(77) The State aid in the form of a 45 % tax credit has the effect of encouraging large investments costing more than ESP 2 500 million. According to Annex I to the guidelines on national regional aid (98/C 74/06), 'tax aid may be considered to be aid connected with an investment where it is based on an amount invested in the region. In addition, any tax aid may be connected with an investment if one sets a ceiling expressed as a percentage of the amount invested in the region'. In the case in point, the 45 % tax credit fulfils these conditions, at least partly, since it is based on investment expenditure and its amount does not exceed 45 % of the investment. The Commission accordingly takes the view that the 45 % tax credit should be classed as investment aid to the extent that it fulfils the above criteria. It must therefore be examined in the light of the Community rules on investment aid.

(78) If State aid for investment is to qualify for one of the regional derogations in Article 87(3)(a) or (c) of the Treaty, the region in which the scheme is applied must have been recognised as eligible for one of those derogations on the regional aid map. As regards the admissibility of Álava, the Commission would point out that the territory has never been eligible for the Article 87(3)(a) derogation, since the per capita GDP ([35]) of the NUTS ([36]) II region of the Basque Country, of which it forms part, has always been higher than 75 % of the Community average. According to the rules on regional aid ([37]), ([38]), the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty are met only if the region, at NUTS level 2, has a per capita GDP of not more than 75 % of the Community average.

(79) As regards admissibility for the derogation in Article 87(3)(c), during the period 1995 to 1999 two successive regional aid maps were in force. The first was adopted in 1988 under Commission Decision (88/C 351/04). This provided that investment aid for regional development could be regarded as compatible with the common market under the derogation in Article 87(3)(c), provided that it did not exceed the ceiling of 30 % nge in the case of large firms in the industrial zone of the Nervión valley and 20 % nge in the case of large firms in the Pyrenees. However, investment aid in the rest of Álava could not be regarded as compatible with the common market under the derogation in Article 87(3)(c) of the Treaty.

(80) The Commission would also point out that, in its Decision of 26 July 1995 ([39]) amending Spain's regional aid map, it proposed, under the procedure laid down in Article 88(1) of the Treaty, that the Spanish authorities should revise the map and consider in future that the whole of Álava was a region in which aid for regional development could be regarded as compatible with the common market under the derogation in Article 87(3)(c), provided that it did not exceed the ceiling of 25 % nge in the case of large firms. By letter from the Permanent Representation dated 26 September 1995, the Spanish authorities accepted this proposal. The new map thus came into force from that date.

([35]) Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).

([36]) Nomenclature of Territorial Units for Statistics.

([37]) The references to the regional rules are, in some of the subsequent recitals, to the guidelines on national regional aid (98/C 74/06) or to the earlier rules. In any event, the result of the assessment is the same in all cases.

([38]) See point 1 of the Commission communication to the Member States on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2) and point 3.5 of the guidelines on national regional aid (98/C 74/06).

([39]) OJ C 25, 31.1.1996, p. 3.

(81) The Commission would also point out that, in the case of SMEs ([40]), the intensity of investment aid may, in accordance with the SME guidelines ([41]), be 10 percentage points higher than the regional ceiling for large firms, provided that the total does not exceed 30 % nge.

(82) It should also be stressed that, to be eligible for investment aid, investments in tangible assets must correspond, in particular, to the Community definitions of initial investment and the standard base ([42]). Conversely, all other investment expenditure that does not correspond to those definitions, such as replacement investments or expenditure on items other than land, buildings or plant/machinery, is not deemed eligible. Although there is no doubt that the 45 % tax credit is aid granted subject to the carrying-out of a tangible investment ([43]) in new tangible fixed assets, it does not exclude replacement investments ([44]) or expenditure related to the 'investment process' and 'investments made during the preparatory phase'. In the absence of a precise definition of those terms, the possibility cannot be ruled out that the 45 % tax credit could be applied not only to expenditure included in the standard base but also to expenditure linked to replacement investments or other items of expenditure lying outside the standard base. The Commission consequently takes the view that the aid may be applied to initial investment but also to other items of expenditure that cannot be deemed compatible with the relevant Community rules, such as replacement investments.

(83) The Commission notes that, since the entry into force of the guidelines on national regional aid (98/C 74/06), aid that may qualify for the derogation in Article 87(3)(c) of the Treaty in Álava must not only comply with the abovementioned Community definitions of initial investment and the standard base and observe the applicable ceilings; it must also satisfy other requirements. In the case in point, the aid must be subject to certain conditions: the recipient's contribution to the investment must be at least 25 % (point 4.2); the application for aid must be submitted before the investment projects begin to be implemented (point 4.2); the investment must be maintained for a minimum period of five years (point 4.10); and the respective aid intensity ceilings must be complied with where different types of aid are combined (points 4.18 to 4.21).

(84) In this particular case, the Commission would observe that the 45 % tax credit was not limited (in the period culminating in the entry into force of its Decision of 26 September 1995) to the industrial zone of the Nervión valley and the areas in the Pyrenees (which were the only areas eligible for aid under the regional aid map current at the time) and were not subject to the 30 %, 25 % and 20 % nge ceilings, depending on the area and the period in question, in the case of large firms, nor to the 30 % nge ceiling in the case of SMEs. Furthermore, the costs that may be accepted for aid may not fully correspond to those included in the standard base since replacement investments are not excluded and other items of expenditure may be accepted. In these circumstances, the Commission finds that a tax credit amounting to 45 % of investments which does not comply with the Community rules on regional aid cannot be deemed compatible with the common market under the regional derogation in Article 87(3)(c) of the Treaty.

(85) Aid for investment expenditure ([45]) that does not correspond to the Community definition cannot be regarded as investment aid. In accordance with Annex I to the regional aid guidelines (98/C 74/06), any tax aid may be classed as investment aid where its amount is subject to a ceiling expressed as a percentage of investment expenditure in accordance with the Community rules. However, in the case in point, the amount of the aid

([40]) For the purposes of the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2) or the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (96/C 213/04).

([41]) Community guidelines on State aid for small and medium-sized enterprises (92/C 213/02) (OJ C 213, 19.8.1992, p. 2) or Community guidelines on State aid for small and medium-sized enterprises (96/C 213/04).

([42]) See the Annex to the Council resolution of 20 October 1971 (OJ C 111, 4.11.1971, p. 1), point 5(c); the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9), point 18; the Community guidelines on State aid for small and medium-sized enterprises, point 4.2.1; or the guidelines on national regional aid (98/C 74/06) (OJ C 74, 10.3.1998, p. 9), point 4.4 (initial investment means 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 (through rationalisation, diversification or modernisation)), point 4.5 (aid for initial investment is calculated as a percentage of the investment's value. This value is established on the basis of a uniform set of items of expenditure (standard base) corresponding to the following elements of the investment: land, buildings and plant/machinery) and footnote 23 (in the transport sector, expenditure on the purchase of transport equipment (movable assets) cannot be included in the uniform set of items of expenditure (standard base). Such expenditure, therefore, is not eligible for aid for initial investment).

([43]) See the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979, p. 9).

([44]) Footnote 21 in the guidelines on national regional aid (98/C 74/06) states that 'replacement investment is thus excluded from the concept. Aid for this type of investment falls within the category of operating aid, to which the rules described at points 4.15 to 4.17 apply'.

([45]) It should be pointed out that neither the Spanish authorities nor others have questioned the existence of this type of investment expenditure.

represents a percentage of investment expenditure that does not comply with the Community rules. That is why, under those rules, the aid cannot be regarded as investment aid. On the contrary, the aid may finance expenditure of a periodic and necessary nature such as that linked to replacement investments. Such current or periodic expenditure is the type of expenditure that has to be incurred by a firm as part of its day-to-day operations or its normal activities. Aid for this type of investment therefore has to be classed as operating aid and as such is subject to specific rules.

(86) In this respect, the Commission would point out that, in accordance with the 1988 communication [46] and the regional aid guidelines (98/C 74/06), regional aid which is classed as operating aid is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty, provided that it meets certain conditions laid down in point 6 of the communication and points 4.15 to 4.17 of the guidelines, in the outermost regions or in regions of low population density if it is intended to offset additional transport costs. However, the NUTS III territory of Álava is not eligible for the derogation in Article 87(3)(a) of the Treaty, and the grant of the said operating aid does not meet the conditions described. The NUTS III territory of Álava is not an outermost region [47] nor a region of low population density [48]. This is the reason why the operating aid elements in the 45 % tax credit are prohibited, in particular because they are not granted in a region that is eligible for the derogation in Article 87(3)(a) of the Treaty, in an outermost region or a region of low population density. The aid is therefore incompatible in this case.

(87) The Commission therefore considers that the tax incentive scheme in question cannot be regarded as compatible with the common market under the regional derogations in Article 87(3)(a) and (c) of the Treaty, since it does not comply with the rules on regional aid.

(88) With regard to investments made by SMEs outside the assisted areas of Álava in the period from 1 January to 26 July 1995, and outside Álava in the period from 1 January 1995 to 31 December 1999, the Commission would point out that the related aid cannot be considered regional aid and therefore does not qualify for the regional derogation in Article 87(3)(c) of the Treaty. The same applies where such investments are made by large firms. On the other hand, in accordance with the Community guidelines on State aid for small and medium-sized enterprises (96/C 213/04), where the recipient is an SME, the other derogation in Article 87(3)(c), for aid to facilitate the development of certain economic activities, may apply. In addition to requiring compliance with the definition of initial investment and the rules on eligible expenditure forming part of the standard base, the above guidelines state that the exception will apply to aid for tangible investments up to a ceiling of 15 % gross grant equivalent (gge) in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. The Commission notes, however, that the 45 % tax credit is not limited to 15 % gge in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. Neither are the eligible investments fully in line with the definition of initial investment given in point 4.2.1 of the guidelines, nor are the costs that may be accepted compatible with those forming part of the standard base also laid down in point 4.2.1, since the scheme does not rule out replacement investments or expenditure items other than those covered by the standard base. The Commission accordingly finds that the tax aid under examination cannot be deemed compatible with the common market under the derogation in Article 87(3)(c) of the Treaty for aid to facilitate the development of certain economic activities.

(89) Furthermore, the scope of the regional aid guidelines (98/C 74/06) excludes the production, processing and marketing of the agricultural products listed in Annex I to the Treaty, fisheries and the coal industry. Transport, steelmaking, shipbuilding, synthetic fibres and the motor industry are subject to special rules over and above those set out in the abovementioned guidelines, while specific rules apply to investments covered by the multisectoral framework on regional aid for large investment projects (98/C 107/05). Those rules must therefore be taken into account in assessing the compatibility of the aid in question where the recipient company belongs to one of those sectors or where the investment falls within the scope of the multisectoral framework.

(90) The derogation in Article 87(3)(c) of the Treaty has to be examined to see whether it might not apply, in the above cases, for other purposes as well as the development of certain economic activities. It should be

[46] Commission communication to the Member States on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988, p. 2).

[47] It is not in the list of outermost regions in Article 299 of the Treaty.

[48] According to point 3.10.4 of the guidelines on national regional aid (98/C 74/06).

noted in this respect that the aim of the 45 % tax credit is not to develop an economic activity within the meaning of Article 87(3)(c) of the Treaty, such as the development of measures to assist small and medium-sized enterprises, research and development, environmental protection, job creation or training in accordance with the appropriate Community rules. Consequently, the tax incentive in question cannot qualify for the derogation in Article 87(3)(c) of the Treaty in respect of the said purposes.

(91) Similarly, the 45 % tax credit, which is not subject to any sectoral limitation, may be granted without any restriction to undertakings in sensitive sectors subject to specific Community rules, such as those applicable to the production, processing and marketing of the agricultural products in Annex I to the Treaty, fisheries, coalmining, steelmaking, shipbuilding, synthetic fibres and the motor industry ([49]). In the circumstances, the Commission considers that the tax incentive in the form of a 45 % tax credit cannot comply with the said sectoral rules. In this particular case, the 45 % tax credit does not meet the condition that it should not promote new production capacity so as not to exacerbate the overcapacity problems from which these sectors traditionally suffer. Therefore, where the recipient belongs to one of the abovementioned sectors, the Commission considers that, since it is not subject to the sectoral rules mentioned, the aid is incompatible with the common market and the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities does not apply.

(92) As far as the period after 1 September 1998 is concerned, the Commission further takes the view that the aided investment may possibly fall within the scope of the multisectoral framework on regional aid for large investment projects (98/C 107/05) ([50]). All investment projects costing at least EUR 50 million (EUR 15 million in the case of the textile and clothing sector), with an aid intensity of at least 50 % of the regional aid ceiling and involving aid per job of at least EUR 40 000 (EUR 30 000 in the case of the textile and clothing sector), as well as investment projects for which the total aid is at least EUR 50 million, are subject to the conditions laid down in that framework. Each such investment project must be notified in advance, in accordance with Article 88(3) of the Treaty, to enable the Commission to determine the maximum aid intensity that is compatible with the common market. However, the tax aid in question is not subject either to prior notification in the case of the abovementioned large projects or to possible reduction in intensity following the Commission's assessment. The Commission therefore finds that the tax aid under examination is not compatible with the common market under the derogation in Article 87(3)(c) of the Treaty, since the derogation in Article 87(3)(a) does not apply in Álava.

(93) Since the tax aid in question is granted irrespective of the economic and financial position of the recipient firms, the Commission considers that there is no way of ruling out the possibility that the recipient may be a firm in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (1999/C 288/02) ([51]), despite the Spanish authorities' claim that the tax credit, as it has been designed, is unlikely to be applied to firms in difficulty. The Commission would point out that the grant of the tax aid in question is not subject to the conditions ([52]) laid down in those guidelines. As stated in point 20 of the abovementioned rescue and restructuring aid guidelines (1999/C 288/02), 'the Commission considers that aid for rescue and restructuring may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest if the conditions set out in these guidelines are met'. If those conditions are not met, the aid is incompatible with the common market where it is intended for firms in difficulty. The Commission therefore finds that the tax aid in question, where granted to firms in difficulty, is not compatible with the common market under the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities.

Application of the other exceptions

(94) The aid in question, which cannot qualify for the derogations in Article 87(3)(a) and (c) of the Treaty, cannot qualify either for other derogations in Article 87(2) and (3). It cannot be regarded as aid of a social nature under Article 87(2)(a); it is not intended to make good the damage caused by natural disasters or

([49]) For the sectoral rules currently in force see, in addition to the *Official Journal of the European Communities*, the website of the Directorate-General for Competition http://europa.eu.int/comm/competition/state_aid/legislation/.

([50]) Multisectoral framework on regional aid for large investment projects (OJ C 107, 7.4.1998, p. 7).

([51]) OJ C 288, 9.10.1999, p. 2. These guidelines have since 1999 replaced a previous version (94/C 368/05) of the same guidelines (OJ C 368, 23.12.1994, p. 12).

([52]) Among other things, that the aid is conditional on implementation of a restructuring plan which enables the long-term viability of the firm to be restored.

exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Finally, it is not intended to promote culture and heritage conservation within the meaning of Article 87(3)(d).

Summary

(95) The Commission finds that the State aid in question in the form of a 45 % tax credit does not qualify for the derogation in Article 87(3)(a) of the Treaty, since Álava is not eligible for assistance under that provision, or for the derogation in Article 87(3)(c) for 'aid to facilitate the development (...) of certain economic areas', since it does not comply with the Community rules on regional aid. Neither does it qualify for the derogation in Article 87(3)(c) for 'aid to facilitate the development of certain economic activities', since, on the one hand, it does not comply with the Community rules applicable to SMEs in this context and, on the other hand, as far as large firms are concerned, it does not relate to certain activities. It cannot be regarded as aid of a social nature under Article 87(2)(a); it is not intended to make good the damage caused by natural disasters or exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Nor does it qualify for the derogation in Article 87(3)(d) as its purpose is not to promote culture or heritage conservation. The aid is therefore incompatible with the common market.

(96) Since any tax credit that is not used because it exceeds the final amount of tax payable may be carried over and used for several years following adoption of the decision granting the tax credit ([53]), there could still be some tax aid left to pay. However, this aid is unlawful and incompatible. The Spanish authorities should therefore cancel the payment of any balance from the 45 % tax credit which could still be due to certain recipients.

(97) As regards incompatible aid already paid, it should be pointed out that, in accordance with the above arguments, the recipients may not rely on general principles of Community law such as legitimate expectations or legal certainty. Consequently, there is nothing to prevent the application of Article 14(1) of Regulation (EC) No 659/1999, according to which 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'. In this case, therefore, the Spanish authorities should take all necessary measures to recover the aid already paid in order to restore the economic situation which the recipient firms would be in without the unlawful grant of the aid. The aid should be recovered in accordance with the procedures and provisions of Spanish law and should include all interest due, calculated from the date the aid was granted until the date of actual repayment on the basis of the reference rate used at that date to calculate the net grant equivalent of regional aid in Spain ([54]).

(98) This decision relates to the scheme and should be implemented immediately, including the recovery of any individual aid granted under that scheme. The Commission would also point out that, as usual, this Decision is without prejudice to whether individual aid may be regarded, in full or in part, as compatible with the common market on its own merits, either in a subsequent Commission decision or under exempting regulations.

(99) Since the compatibility of the State aid in the form of tax credits granted to Daewoo Electronics Manufacturing España SA, Ramondín SA and Ramondín Cápsulas SA has already been assessed in various Commission decisions, this Decision does not refer to that aid.

X. **CONCLUSIONS**

(100) In view of the above, the Commission concludes that:

([53]) In the case of tax credits granted under Provincial Law No 22/1994 of 20 December 1994, the period in which they may be used is limited to 9 years. Tax credits granted under subsequent provincial laws are no longer subject to any such limitation.

([54]) Commission letter to Member States, SG(91)D/4577, of 4 March 1991. See also Case 142/87 Belgium v Commission [1990] ECR I-950.

— Spain has unlawfully put into effect, in Álava, the 45 % tax credit for investments, thereby infringing Article 88(3) of the Treaty,

— the 45 % tax credit for investments is incompatible with the common market,

— the Spanish authorities must cancel the payment of any balance of the tax credit which could still be due to certain recipients. As regards the incompatible aid already paid, the Spanish authorities must take all necessary measures to recover it, so as to restore the economic situation which the recipient firms would be in without the unlawful grant of the aid,

— this Decision does not cover the tax credits granted to Daewoo Electronics Manufacturing España SA, Ramondín SA and Ramondín Cápsulas SA,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a 45 % tax credit for investments, which, in violation of Article 88(3) of the Treaty, has been unlawfully put into effect by Spain in Álava pursuant to Provincial Law No 22/1994 of 20 December 1994, the fifth additional provision of Provincial Law No 33/1995 of 20 December 1995, the sixth additional provision of Provincial Law No 31/1996 of 18 December 1996, as amended by point 2.11 of the derogating provision in Provincial Law No 24/1996 of 5 July 1996 on corporation tax, the eleventh additional provision of Provincial Law No 33/1997 of 19 December 1997 and the seventh additional provision of Provincial Law No 36/1998 of 17 December 1998, is incompatible with the common market.

Article 2

Spain shall abolish the aid scheme referred to in Article 1, since it is continuing to produce effects.

Article 3

1. Spain shall take all necessary measures to recover from the recipients the aid referred to in Article 1 which has been unlawfully made available to them.

Spain shall cancel all payment of outstanding aid.

2. Recovery shall be effected without delay in accordance with the procedures of national law, provided these allow the immediate and effective execution of this Decision. The sums to be recovered shall bear interest from the date on which they were available to the recipients until their actual 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 the date of notification of this Decision, of the measures taken to comply with it.

Article 5

This Decision does not cover the tax credits granted under the scheme in question to Daewoo Electronics Manufacturing España SA, Ramondín SA and Ramondín Cápsulas SA.

Article 6

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 11 July 2001.

For the Commission

Mario MONTI

Member of the Commission