II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 July 2001

on the State aid scheme applied by Spain to certain newly established firms in Álava

(notified under document number C(2001) 1760)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/892/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, called on interested parties to submit their comments [1], and having regard to those comments,

Whereas:

I. PROCEDURE

(1) As a result of the information received in response to the procedures initiated following complaints about State aid granted to Daewoo Electronics Manufacturing España SA [2] and to 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, consisting of a reduction in the tax base for certain newly established firms.

(2) By letter dated 29 September 1999 (SG(99) D/7813) the Commission informed 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 2 December 1999, registered on 6 December 1999, the Spanish authorities submitted their comments under the abovementioned procedure.

(4) The Commission's 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.

(5) Comments were received from: the Autonomous Community of Castile-Leon, on 17 March 2000; the Rioja Regional Government, on 24 March 2000; the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza) (hereinafter 'Confebask'), on 27 March 2000, plus, outside the time limit, supplementary comments by letter dated 29 December 2000, registered on 3 January 2001; the Basque Economists Association (Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa), on 27 March 2000; the Basque Business Circle (Círculo de Empresarios Vascos), on 27 March 2000; and the Professional Association of Tax Advisers of the Autonomous Community of the Basque Country (Asociación Profesional de Asesores Fiscales de la Comunidad del País Vasco), on 28 March 2000. By

[1] OJ C 55, 26.2.2000, p. 2.
[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.

letter dated 17 May 2000 (D/52998), the Commission sent these comments to Spain, asking for observations; it has not received any.

(6) By letter from the Permanent Representation dated 22 June 2000, the Spanish authorities informed the Commission that Provincial Law (Norma Foral) No 7/2000 of 29 March 2000 ([5]) had repealed, as from 5 April 2000, Article 26 of Álava Provincial Law No 24/1996 of 5 July 1996 on corporation tax ([6]), which formed the legal basis for the tax incentives in question.

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 incentives in question were introduced by Article 26 of Provincial Law No 24/1996 of 5 July 1996 ([7]). The text of the Article reads as follows:

> '1. Companies starting their business activity shall be entitled to a reduction over four consecutive tax periods, starting from the first one in which, within four years from start-up, they obtain positive tax bases, of 99 %, 75 %, 50 % and 25 % respectively in the positive tax base resulting from the conduct of their business, before offsetting any negative tax bases from previous periods.
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> […]
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> 2. To qualify for this reduction, taxable persons shall meet the following requirements:
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> (a) they start their business with a minimum paid-up capital of ESP 20 million;
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> […]
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> (e) in the first two years of operation they invest in tangible fixed assets worth at least ESP 80 million, all such investments being in assets assigned to the business which are not leased or transferred to third parties for their use. To this end, investments in tangible fixed assets shall include assets acquired through financial leasing, provided that they undertake to exercise the option to buy;
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> (f) at least 10 jobs are generated in the six months following start-up, and the annual average workforce is kept at that figure from that time until the financial year in which the right to apply the reduction in the tax base expires;
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> […]
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> (h) they have a business plan covering a minimum period of five years.
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> 3. […]
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> 4. The minimum amount of the investments within the meaning of paragraph 2(e) and the minimum number of jobs created within the meaning of paragraph 2(f) shall be incompatible with any other tax reduction laid down for such investment or job creation.
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> 5. The reduction laid down in this Article shall be requested from the tax authorities, which, after checking that the requirements set out at the beginning have been met, shall communicate to the applicant company, as appropriate, their provisional authorisation, which shall be confirmed by decision of the Álava Provincial Council (Diputación Foral de Álava).
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> […]'.

(8) The Commission notes that, according to the preamble of Provincial Law No 24/1996, the object of the aid in question is to promote the emergence of new companies.

(9) The Commission also notes that the tax incentives relate to the positive tax base for corporation tax resulting from the conduct of the business, prior to the set-off for negative tax bases from previous financial years. In this case, the recipients are companies which have started their commercial activities since the date of entry into force of the said Provincial Law, have invested in tangible fixed assets a minimum of ESP 80 million (EUR 480 810) and have generated at least ten jobs. In addition, recipient companies should, in particular, have a business strategy covering a minimum period of five years and should start their activity with a minimum paid-up capital of ESP 20 million (EUR 120 202).

(10) The Commission emphasises that the aid consists in a reduction in the positive tax base of 99 %, 75 %, 50 % and 25 % respectively over four consecutive tax periods, starting from the first one in which, within a period of four years from start-up, the recipients obtain positive tax bases.

(11) The Commission finds that the Álava tax incentive is not intended for firms which carry out certain activities or belong to certain sectors, since any activity or sector may be eligible. Nor is it intended for certain categories

([5]) *Boletín Oficial del Territorio Histórico de Álava*, of 5 Aril 2000.
([6]) *Territorio Histórico de Álava: Norma Foral 24/1996 del Impuesto sobre Sociedades* of 5 July 1996.
([7]) *Boletín Oficial del Territorio Histórico de Álava*, of 9 August 1996.

of firms, e.g. SMEs, since any firm may qualify, provided that it satisfies the abovementioned tests.

(12) The Commission finds that these reductions in the tax base are applicable from the tax year starting on 1 January 1996. As far as combination with other aid is concerned, it is clear that the tax incentives in question may not be combined with any other tax concessions that may be granted in respect of the minimum investment or the minimum creation of jobs. Nevertheless, combination with other, non-tax aid, including grants, subsidised loans, guarantees, equity purchases, etc., relating to the same investments is not ruled out. Nor is possible combination with other tax concessions ruled out whose operative event, i.e. the circumstance triggering each concession, is different. Such would be the case, for example, with tax incentives in the form of a tax credit ([8]).

(13) In its decision initiating the said 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 applies to aid measures 'in any form'. The Commission also emphasised, however, that, to be regarded as aid, the measures should meet all four of the criteria set out in Article 87 and explained below.

(14) Firstly, the Commission pointed out, at that stage, that the reductions of 99 %, 75 %, 50 % and 25 % in the abovementioned tax bases give their recipients an advantage, since they partially reduce their normal tax liability.

(15) Secondly, the Commission provisionally considered that the reductions involve a loss of tax revenue and are therefore equivalent to the consumption of public resources in the form of fiscal expenditure.

(16) Thirdly, the Commission considered at that stage that the reduction in the tax base 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 increase in recipient firms' net profit (profit after tax) improves their profitability. In this way they are more able to compete with firms which are not eligible for the aid.

(17) Lastly, the Commission considered, at that stage, that the reduction in the tax base in question is specific or selective in that it favours certain firms. The conditions for granting the incentives specifically state that firms established before the said Provincial Law came into force in mid-1996 are ineligible, as are other firms which have created fewer than 10 jobs, whose investments are below the threshold of ESP 80 million (EUR 480 810) and which do not have a paid-up capital of more than ESP 20 million (EUR 120 202). In addition, the Commission provisionally considered that the tax aid is not justified by the nature or general scheme of the tax system.

(18) Furthermore, the Commission considered, at that stage, that the selective nature of the concession is also due to a discretionary power of the tax authorities. The aid is not granted automatically, since the recipient's application is examined by the Álava Provincial Council, which may, subsequently, decide to grant the aid if appropriate.

(19) In short, the Commission considered, at that stage, that the reduction in the tax base 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.

(20) Since the tax incentives exceed the maximum limit of EUR 100 000 over a period of three years, the Commission considered, at that stage, that they cannot be regarded as subject to the *de minimis* rule ([9]).

(21) The Commission stated provisionally 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(1)(a) of the EEA Agreement. However, the Spanish authorities had not met that obligation, and the Commission therefore considered at that stage that the aid could be regarded as unlawful.

(22) The Commission also found at that stage that, although the granting of the incentives was conditional on a minimum investment and the creation of a minimum number of jobs, the tax arrangements did not ensure compliance with the Community rules on regional aid. It therefore considered at that stage that the incentives did not rank as investment or employment aid.

([8]) See in this connection Commission Decision 1999/718/EC concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa).

([9]) See point 3.2 of the Community guidelines on aid for SMEs (OJ C 213, 19.8.1992) and the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996).

(23) On the contrary, the Commission took the view at that stage that the tax concessions could be viewed as operating aid, as their aim is to relieve companies of the costs which they would normally have to bear as part of their everyday management or usual activities.

(24) The Commission pointed out that operating aid is in principle prohibited. It may nevertheless exceptionally be granted in regions meeting certain conditions. But that is not the case here. Consequently, the Commission took the view at that stage that there were doubts about the compatibility of the tax incentives with the rules on regional aid.

(25) The reduction in the tax base, 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 incentives were compatible where the recipient belongs to a sector that is subject to special Community rules.

(26) Lastly, the Commission questioned the compatibility of the tax incentives with the common market in the light of the derogations in Article 87(2) and (3) of the Treaty. The incentives cannot be regarded as aid having a social character under Article 87(2)(a), are not intended to make good the damage caused by natural disasters or exceptional occurrences under Article 87(2)(b) and are not subject to the provisions of Article 87(2)(c) concerning certain areas of the Federal Republic of Germany. As far as the derogations in Article 87(3) other than those in subparagraphs (a) and (c) which have already been discussed are concerned, the Commission considered provisionally that the incentives were not designed to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State under Article 87(3)(b). The incentives do not fall within the scope of Article 87(3)(c), which concerns 'aid to facilitate the development of certain economic activities ...', as they are not in any way specific to the activities of the recipient firms. Lastly, they are not intended to promote culture or heritage conservation within the meaning of Article 87(3)(d).

(27) 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 tax incentives in the form of a reduction in the tax base of certain newly established firms in the Province of Álava. The relevant information requested is as follows: copies of all decisions granting the reduction in the tax base, and data on the investments made by each recipient, the jobs created, the share capital, the amount of the reduction in the tax base which each firm has enjoyed, and the outstanding balance.

III. **COMMENTS OF THE SPANISH AUTHORITIES**

(28) The Spanish authorities submitted their comments by letter from the Permanent Representation, dated 2 December 1999. Basically, they consider that the reduction in the tax base does not constitute State aid within the meaning of Article 87 of the Treaty, but a general measure which is not subject to the State aid rules. They also maintain that the measure, whose purpose is to promote investment, is part of an economic policy which is much used by governments.

(29) They 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. Nor is there any 'de facto' restriction of this general scope. As to specificity of substance, this does not exist, since the requirements to invest ESP 80 million and create ten jobs are not discriminatory, but objective conditions deriving from the need to ensure the effectiveness of the measure and thus achieve the proposed objective.

(30) Furthermore, the Spanish authorities dispute that the measures in question are of a discretionary nature, since the incentives are granted automatically once the said objective conditions are satisfied. The Álava Provincial Council can thus check only that all the conditions are satisfied; it cannot alter or add any conditions. Nor is the procedure laid down in the abovementioned Article 26(5) for granting the tax incentives discretionary. Under that Article 'the tax authorities … shall communicate to the applicant company, as appropriate, their provisional authorisation, which shall be confirmed by decision of the Álava Provincial Council'. The procedure should be interpreted therefore as meaning that the incentives will be granted after a check has been made that all the objective conditions are met. This is why the phrase 'as appropriate' is not discretionary.

(31) Similarly, the Spanish authorities claim that the Álava reduction in the tax base is founded on measures existing in other Member States such as Ireland, or on

measures taken by the Spanish central government in 1993 ([10]). However, the Commission did not consider all these measures as State aid within the meaning of Article 87 of the Treaty. Given the similarity between the Álava measures and those of the central government, it can be concluded that if one measure is not specific in character, the other ought not to be either. Furthermore, the Spanish authorities state that both the Álava measures and those of the central government cover only one part of Spain. Therefore, if the Commission did not consider there was anything specific about the tax measures introduced by the Spanish central government, it ought to reach the same conclusion about the Álava measures.

(32) Moreover, the Spanish authorities argue that, even if the Commission were to consider that the measure was specific, it was justified by the nature and general scheme of the system, as provided for in the Commission notice on the application of the state aid rules to measures relating to direct business taxation (98/C 384/03) ([11]). The measure in question is justified by the nature and general scheme of the tax system, since the conditions that must be met before it can be granted are objective and cross-sector.

(33) The Spanish authorities question the view expressed by the Commission 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. 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.

(34) They also question the Commission's assumption that trade will be affected because the companies benefiting from the concessions carry out economic activities involving 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 other cases, the companies concerned may be operating on local markets only or in sectors which have not yet been liberalised. In all these cases, therefore, one of the prerequisites for describing an official measure as state aid is missing.

([10]) Law 22/1993 of 29 December 1993, on tax measures and the reform of the legal system of the public service and unemployment protection (BOE, 31.12.1993). The measure consisted in a reduction of the corporation tax base by 95 % in the tax years 1994 to 1996 for firms set up in 1994 which invested at least ESP 15 million and created at least three but less than twenty jobs.

([11]) OJ C 384, 10.12.1998, p. 3.

(35) As regards the operating-aid characteristics which, according to the Commission, the tax measures in question have, the Spanish authorities emphasise that, although the tax advantage derives from the tax base and not from the investment, it still has the character of an investment incentive and cannot, therefore, be described as operating aid.

(36) 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.

(37) For the rest, the Spanish authorities emphasise that, under Spanish tax rules, the tax authorities may disclose information on taxpayers only in certain exceptional cases. Such cases do not include sending information to the Commission. Consequently, the Spanish authorities are not providing any of the information requested in the decision initiating the procedure.

IV. **OTHER COMMENTS RECEIVED BY THE COMMISSION**

(38) 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 Autonomous Community of Castile-Leon

(39) 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. It states that, in the case in point, Article 26, which introduces the tax measure in respect of which the procedure was initiated, was quashed by the High Court of the Basque Country (Tribunal Superior del País Vasco) in 1999 ([12]).

(40) The Autonomous Community of Castile-Leon goes on to state 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. It states that the measure is also selective on account of the discretionary power of the authorities ([13]). Similarly, the

([12]) Judgment No 718/1999 of 30 September 1999.

([13]) See in this respect the judgment of the Court of Justice of the European Communities in Case C-241/94 *France* v *Commission* [1996] ECR I-4551.

tax measures are not justified by the nature or general scheme of the tax system, since their purpose is to promote the formation of new companies.

(41) For the rest, the Autonomous Community of Castile-Leon considers that the tax incentives cannot be regarded as compatible by virtue of the derogations in Article 87 of the Treaty. In this respect, it states that the tax measures are operating aid, since they are continuous and not linked to the execution of a specific project. However, operating aid can only be compatible, under certain conditions, in areas qualifying for aid under the derogation in Article 87(3)(a). As the Basque Country qualifies for aid under the derogation in Article 87(3)(c), the operating aid in question cannot be regarded as compatible. Furthermore, the obligation to notify laid down in Article 88(3) of the Treaty has not been complied with.

(42) 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 Rioja Regional Government

(43) The Rioja Regional Government states that the tax measures constitute State aid, since they satisfy all four criteria set out in Article 87 of the Treaty. In support of this contention, it argues in particular that the purpose and effect of the reduction in the tax base is to relieve the recipient of part of the tax burden which would otherwise have been imposed on its profits. It therefore constitutes a financial advantage for recipient firms, which, because there are no quid pro quos for the authorities, involves a loss of tax revenue. This means that the recipients' business benefits, as they have a competitive advantage over all other firms. In addition to the specificity of substance, in the form of a minimum share capital of ESP 20 million, a minimum investment of ESP 80 million and a minimum of 10 jobs created, the Rioja Regional Government states that the discretionary nature of the reduction in the tax base is due partly to the authorities' ability to determine firms eligible for aid, deadlines and maximum limits and partly to the fact that the granting of the reduction in the tax base is not automatic.

(44) Moreover, the Rioja Regional Government considers that the tax measure cannot be justified on the grounds that there are five tax systems in Spain. It points out that, in the Opinion on Joined Cases C-400/97, C-401/97 and C-402/97, Advocate General Saggio considered that the nature of the competent authorities for tax matters in a territory does not justify discrimination in favour of firms established in that territory. Furthermore, the measures are not justified by the nature or general scheme of the tax system in Álava, since their purpose is to improve the competitiveness of recipient firms. The Rioja Regional Government also points out that the High Court of Justice of the Basque Country (Tribunal Superior de Justicia del País Vasco) regarded the tax measures in question as disproportionate and inappropriate for achieving the objective of promoting economic activity, since they could indirectly affect the free movement of persons and goods by establishing unacceptable conditions of competitive advantage ([14]).

(45) In short, the Rioja Regional Government considers that the tax incentives cannot be considered compatible with the common market by virtue of the derogations in Article 87 of the Treaty. Moreover, the Spanish authorities did not fulfil the obligation to notify the incentives under Article 88(3) of the Treaty.

(46) The Rioja Regional Government therefore takes the view that the tax measures should be regarded as State aid which is unlawful, since the Article 88(3) notification procedure was not complied with, and incompatible with the common market.

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

(47) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by the Province of 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 requests 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

([14]) See the judgments of 30 September and 7 October 1999 on the tax measures in question.

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 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, have no discretionary power. 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 ([15]), 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 thresholds, share capital of ESP 20 million, investment of ESP 80 million, and 10 jobs created, 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 of the European Communities 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,

— Confebask also maintains that Álava's reduction of the tax base is nothing more than an adjustment of a 1993 measure (mentioned above in the comments from the Spanish authorities) introduced by Spain's central government. It even maintains that the rules are identical, except for the quantitative thresholds. Thus the effect of Álava's reduction in the tax base on competition is cancelled, since the territories adjoining the Basque provinces qualify for tax concessions for new firms. Moreover, if there were an effect on competition, this should derive from the central government measures, since they may have a larger number of recipients. Confebask also stresses that there are similar measures in other Member States, but the Commission has not initiated any procedure with regard to them, nor have they been classified as harmful measures by the Primarolo Group. In this respect it states that, in France, new firms have been eligible for corporation tax exemptions and reductions for a period of five years (10 years in some regions, and for even more favourable arrangements in Corsica) since 1994. In Luxembourg, there is a 25 % reduction in corporation tax for a period of eight years. In the south of Italy there are tax holidays from the IRPEG and the ILOR for 10 years. Lastly, in

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

Portugal, there is a 25 % reduction in corporation tax for a period of from seven to 10 years. Everything shows, therefore, that Álava's reduction of the tax base is not an exceptional scheme which gives rise to any specificity. On the contrary, it is a system widely used in the Member States;

(d) the importance of legal certainty: Confebask argues that the Commission's description of the tax reduction 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 1993 decision. In any event, the Commission could change its position as regards future cases but not as regards past ones;

(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. 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 questions 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 ([16]), 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.

(48) 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 ([17]). Furthermore, Confebask did not apply for an extension of the time limit pursuant to Article 6(1) 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 ([18]).

Comments from the Basque Economists Association (Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa) (hereinafter 'the CVE')

(49) The CVE considers that the tax system of each Basque province does not meet the specificity criterion in Article 87(1) of the Treaty, since it only applies in part of a Member State. In support of this view, it argues that the Commission's usual practice of considering that there is specificity when the tax measure is applied to part of the Member State is appropriate where there is a single tax system. However, it is not relevant where there are various tax systems in the same Member State. The practice, furthermore, is contrary to the coherence of the Spanish tax system, which is multiple by nature. Each system is applied exclusively in one part of the territory. Thus, each one of the systems is not a regional system, but a unique system applicable to the territory concerned. Moreover, the losses of tax revenue which result from certain tax measures are not the subject of a transfer from the central government. On the contrary, they have to be offset, either by increasing the revenues from other taxes or by cutting public expenditure. In addition, the specific nature of the Spanish tax system should not be penalised through the application of Community law. For the rest, any distortions of competition resulting from the existence of five tax systems should be tackled through the Community rules on tax harmonisation.

(50) Nonetheless, the CVE does not rule out the possibility that, in the exercise of their tax autonomy, the Provincial Councils may adopt tax measures that are

([16]) Judgment of the Court of Justice of the European Communities in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103.

([17]) 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.

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

caught by Article 87(1) of the Treaty. However, in the present case, it takes the view that the reduction in the tax base is not so caught, since it only meets the criterion of being granted from state resources. It does not distort competition, because its payment implies that there is a positive tax base. Moreover, its amount cannot be determined in advance, since, for example, if there were no profits, the aid would not be paid. The same applies as regards the effect on trade. This should be established in each specific case: it is not sufficient that trade might be affected. For the rest, it examines whether there is any specificity deriving from the thresholds for eligibility for the tax reduction or from the Provincial Council's discretionary power to grant the reduction. In this respect, it considers that the thresholds do not involve specificity, since they are objective and non-discriminatory. As for the grant of the tax reduction, this does not involve the exercise of a discretionary power, but checking that all the conditions are met.

(51) The CVE concludes that the reduction in the tax base, which is a general measure adopted under the tax powers of the Provinces in question, is not caught by Article 87 of the Treaty.

Comments from the Basque Business Circle (Círculo de Empresarios Vascos) and the Professional association of Tax Advisers of the Autonomous Community of the Basque Country (Asociación Profesional de Asesores Fiscales de la Comunidad del País Vasco) (hereinafter 'the CEV' and 'the APCPV')

(52) Since these associations submitted similar or even identical comments, their views are summarised together.

(53) The CEV and the APCPV reject the Commission's assessment that the reduction in the tax base is specific or selective because firms set up before it came into force and existing firms are excluded and because of the quantitative thresholds required. Tax rules always apply from the date of their entry into force, and retroactive application is exceptional. Furthermore, as the objective of the measure is to encourage investment, it is logical that the tax reduction should be confined to new firms. As regards the thresholds, everything indicates that they are objective and, moreover, much used in the tax sphere. As to the Provincial Council's approval before the reduction of the tax base can apply, this is an act of prior verification aimed at checking that all the conditions are met. Once the check has been made, the concession is granted automatically.

(54) As regards the issue of whether trade is affected, the CEV and the APCPV emphasise that this should be assessed on a case-by-case basis and not in a general way, as the Commission has done. For instance, there may be recipients which only produce for local markets. In such a case, the tax measures do not affect intra-Community trade. The same applies to their impact on competition. Moreover, the reduction in the tax base for recipients whose activities are carried out on markets that have not yet been liberalised cannot distort competition. For the rest, the loss of tax revenues cannot be assessed if it is regarded as a single measure, in this case the reduction in the tax base, while ignoring the overall tax burden. In this respect, the CEV and the APCPV state that the overall tax burden in the Basque Country is greater than in the rest of Spain.

(55) The CEV and the APCPV consider that, even if the Commission, despite the above comments, continues to think that the said reduction in the tax base is a specific measure, it would be justified by the nature and general scheme of the tax system. In support of this view, they emphasise that the tax measure is applied to all operators irrespective of their activity. Furthermore, it is necessary for the functioning and efficiency of the system, since to evaluate the inequality of a measure it is necessary to situate it in the system and determine whether this results in a lower tax burden. Moreover, the tax measure complies with the principle of equality, since new firms are not in the same situation as an existing firm.

(56) In addition, the CEV and the APCPV ask the Commission to assess the measure in question by taking into account similar measures in other Member States (e.g. Ireland), similar measures introduced from 1993 by the Spanish central government, and the application of the reduction in the tax base in question throughout Spanish territory. In this respect, the CEV and the APCPV state that the Commission has never considered that these measures are caught by Article 87 of the EC Treaty. Furthermore, they question whether the tax measures can be regarded as operating aid, since the latter is not applicable to new firms, but to the artificial maintenance of existing firms. For the rest, the CEV and the APCPV consider that the Commission's objective in initiating the procedure against the reduction in the tax base is tax harmonisation. However, for this it is using Articles 87 and 88 of the Treaty, and for this reason there is a misuse of powers.

(57) In view of the above, the CEV and the APCPV conclude that the reduction in the tax base is not caught by Article 87 of the Treaty.

V. **TRANSMISSION OF THE THIRD PARTIES' COMMENTS TO SPAIN**

(58) 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. Spain has not submitted any such observations.

VI. **ASSESSMENT OF THE AID**

VII. **CLASSIFICATION AS STATE AID**

(59) 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 satisfy every one of the four criteria set out in Article 87 and explained below.

(60) 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 said reduction of the tax base by 99 %, 75 %, 50 % and 25 % meets this criterion, since it reduces the recipient firms' tax burden by an amount equivalent to the result of applying the tax rate to the above reductions. If the tax base were not reduced, the recipient firm would have to pay the tax on 100 % of the tax base. The reduction of the base thus implies an exception to the common tax system applicable.

(61) Secondly, the Commission considers that the said reduction in the tax base involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure. This principle also applies to aid granted by regional or local bodies in the Member States ([19]). 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.

(62) The argument put forward in certain comments by third parties, to the effect that it would be wrong to regard the reductions of 99 %, 75 %, 50 % and 25 % in the tax base 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 a Commission decision. 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 partial reduction of 99 %, 75 %, 50 % and 25 % in the tax base. The comment is therefore without foundation.

(63) 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 ([20]), exports abroad went up ([21]), 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 ([22]) 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 increase in recipient firms' net profit

([19]) Judgment of the Court of Justice in Case 248/84 *Germany* v *Commission* [1994] ECR 4013.

([20]) Paxti 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.

([21]) 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.

([22]) *Estadística de Comercio Exterior para la Comunidad Autónoma de Euskadi en el año 1998*, prepared by EUSTAT.

(profit after tax) improves their profitability. This enables them to compete with firms which are not eligible for the tax incentives.

(64) 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 European Court of Justice case-law ([23]).

(65) As regards the comment 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 (in this case certain newly established 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 of the Treaty.

(66) As regards the specific character which State aid must have, the Commission takes the view that the reduction in the tax base referred to above is specific or selective in that it favours certain firms, since the conditions for granting the incentives specifically state that firms established before the said Provincial Law came into force in mid-1996 are ineligible, as are other firms which have created fewer than 10 jobs, whose investments are below the threshold of ESP 80 million (EUR 480 810) and which do not have a paid-up capital of more than ESP 20 million (EUR 120 202). In this respect, the Commission would point out that, according to the Fifth Report on Enterprises in Europe ([24]), the number of firms in the European Community in 1995 which had fewer than ten employees, or no employees at all, was 16 767 000, or 92,89 % of the total ([25]). In Spain's case, the percentage was even higher, at about 95 % ([26]). It is likely that these percentages are higher still in the case of new firms, since a firm usually starts with a workforce that grows as the firm consolidates and reaches its cruising speed. This was the case in Spain, in 1995, where the percentage was higher still, at about 98 % ([27]). Consequently, everything indicates that one of the conditions of eligibility for the aid in itself excludes the majority of firms. For the rest, the objective character of the threshold cited does not prevent it, as some of the third-party comments claim, from being selective and excluding firms which do not satisfy the conditions in question.

(67) As for the possible discretionary power of the tax authorities, the Commission notes that the aid in question is not granted automatically, as the Álava Provincial Council first examines the application submitted by the recipient and may, if appropriate, grant the aid in question after such examination. According to the Spanish authorities, this is simply to check that all the conditions are met. However, they do not explain why the check should be made beforehand and not, as is the normal practice in the management of tax revenue, a posteriori.

(68) As regards the existence of tax measures in the form of a reduction in the tax base in other Member States, which the Commission did not consider selective in scope because they are aimed at new firms, according to certain comments by third parties, this leads to a legitimate expectation concerning tax incentives for new firms, the Commission would point out that the schemes mentioned in some of the third-party comments are different in certain respects from this reduction in the tax base. 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

([23]) Judgment of the Court of Justice of the European Communities of 17 June 1999 in Case C-75/97 (Maribel) *Belgium* v *Commission*, paragraphs 48 and 51; Judgment of the Court of First Instance of 15 June 2002 in Case T-298/97 *Alzetta Mauro* and others v *Commission*, paragraphs 80 to 82; the Opinion of Advocate General Ruiz-Jarabo of 17 May 2001 in Case C-310/99 *Italy* v *Commission*, paragraphs 54 and 55; and the Opinion of Advocate General Saggio of 27 January 2000 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.'

([24]) *Enterprises in Europe. Fifth report*, Eurostat.

([25]) Taken from the data in the table on p. 31 of the report.

([26]) Taken from the data in the table on p. 224 of the report.

([27]) Taken from the data in the table on p. 73 of the report.

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' ([28]).

(69) 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 reduction in the tax base 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 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. Furthermore, the Commission would point out that, if the tax authorities have discretion, this is enough, where there are no other specific elements, to demonstrate the existence of aid elements in a tax measure.

(70) As regards invoking the nature or general scheme of the tax system as justification for the reduction in the tax base, 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. Moreover, it is up to the Member State concerned to establish that the tax measures in question follow the internal logic of the tax system ([29]). In the case at issue, the Spanish authorities state that because the measures are objective and cross-sector in character, they are consistent with the internal logic of the tax system. However, the fact that the measure is objective and cross-sector in character does not demonstrate that it follows the internal logic of the tax system. It is not sufficient evidence that the measure fulfils the principal objective inherent in any tax system, which is to gather the revenue for financing the expenditure of the State, or that it satisfies the principles of equality and progressiveness inherent in the Spanish tax system ([30]).

(71) Moreover, the Spanish authorities state in their comments that the aim of reducing the tax base is to promote investment, and that it therefore fulfils the industrial policy objectives pursued by the Basque Government. According to the Basque Government document entitled Industrial Policy: General Framework of Activities 1996 to 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 reduction in the tax base in question, therefore, is part of an industrial policy whose objectives are not even peculiar to tax systems.

(72) In short, the Commission finds that, as the Spanish authorities have pointed out, the reduction in the tax base in question pursues an economic policy objective which is not inherent in the tax system. The reduction is therefore not justified by the nature or general scheme of the system.

(73) 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.

(74) To sum up, the Commission finds that the reduction in the tax base 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.

([28]) Judgment of the Court of Justice of the European Communities of 22 March 1977 in Case C-78/76 *Steinike & Weinlig* v *Federal Republic of Germany*, paragraph 24. On the other hand, Judgment of 24 March 1993 in 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.

([29]) See paragraph 27 of the Opinion of Advocate General Ruiz-Jarabo in Case C-6/97.

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

VIII. **THE UNLAWFUL NATURE OF THE REDUCTION IN THE TAX BASE**

(75) Given that the said scheme does not require a commitment from the Spanish authorities to grant the aid in accordance with the conditions for *de minimis* aid ([31]), 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 incentives do not qualify as existing aid, either, since they do not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999.

(76) The Commission would point out that State aid which is not covered by the *de minimis* rules 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(1)(a) of the EEA Agreement. However, the Spanish authorities have not fulfilled this obligation, which is why the Commission believes 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.

(77) 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 scheme is not existing aid and, secondly, since it was not notified under Article 88(3) of the Treaty, the Commission has not been able to determine whether it is compatible with the common market. Consequently, the recipients cannot rely on any legitimate expectations or legal certainty as regards the State aid nature of the reduction in the tax base. 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' ([32]). This is why the argument that legitimate expectations or legal certainty have been violated is without foundation in this case. In this context, moreover, the Commission recalls that in its Decision 93/337/EEC ([33]) it deemed certain tax measures introduced in 1988 by the Provinces of Álava, Guipúzcoa and Vizcaya to be State aid.

IX. **ASSESSMENT OF COMPATIBILITY WITH THE COMMON MARKET**

(78) As a preliminary, the Commission would repeat that the reduction in the tax base 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 ascertain that potential recipients could benefit from aid that is not consistent with the directives, guidelines and frameworks applicable on this subject. Moreover, the Commission would emphasise that, in its decision initiating the procedure, it had 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 reproach 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.

(79) As the scheme in question covers only the NUTS ([34]) III territory of Álava, it is necessary to examine whether aid in this territory can qualify for the regional derogations in Article 87(3)(a) or (c) of the Treaty. 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 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 ([36]), the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty are met

([31]) 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, p. 9) or on Commission 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).

([32]) Judgment of the Court of First Instance of 15 Decembre 1999 in Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and others* v *Commission* [1999] ECR II-3663, paragraph 300.

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

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

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

([36]) The references to the regional rules are confined to the guidelines on national regional aid (98/C 74/06). In any event, the result of the assessment would be the same if the analysis were based on the earlier rules. See point 3.5 of the Guidelines on national regional aid (98/C 74/06).

only if the region, in the case of NUTS II, has a per capita GDP of not more than 75 % of the Community average.

(80) As regards the aid's eligibility for the derogation in Article 87(3)(c), the Commission would point out that, in its Decision of 26 September 1995 ([37]) on the changes in 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). By letter from their Permanent Representation dated 26 September 1995, the Spanish authorities accepted this proposal. The new map thus came into force from that date. As regards the subsequent period, the Commission would point out that, in its Decision of 11 April 2000, it approved the Spanish regional aid map for the period 2000 to 2006. According to this map, the Province of Álava continues to be a region in which regional development aid may be considered compatible with the common market in accordance with the derogation in Article 87(3)(c) of the Treaty.

(81) The State aid in the form of a reduction in the tax base has the effect of promoting the creation, in the Province of Álava, of new firms in which the initial amount of investment and the number of jobs created exceed certain thresholds. However, despite this minimum investment and minimum number of jobs created, the tax incentives in question do not qualify as investment or employment aid. They are not based on the amount of investment, the number of jobs created, or the corresponding wage costs, but on the tax base. Furthermore, they are not paid up to a limit expressed as a percentage of the amount of investment, the number of jobs created or the corresponding wage costs, but up to a ceiling expressed as a percentage of the tax base. In this respect, the Commission would point out that Annex I of the Guidelines on national regional aid (98/C 74/06) states that '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'. Therefore, tax incentives which, as in this case, do not meet these criteria cannot qualify as investment aid.

(82) On the contrary, since they partly reduce the profits tax payable by the recipient firms, the incentives qualify as operating aid. Corporation tax is a tax burden which companies subject to it have to pay regularly and inevitably as part of their everyday management. It is therefore appropriate to examine the tax incentives in the light of any derogations that may apply to the operating aid in question.

(83) In this respect, the Commission would point out that, in accordance with the said 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 points 4.15 to 4.17 of the said 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 ([38]) nor a region of low population density ([39]). This is the reason why the operating aid elements in the reduction of the tax base 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.

(84) The Commission therefore considers that the tax incentives 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 EC Treaty, since it does not comply with the rules on regional aid.

(85) 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 noted in this respect that the aim of reducing the tax base 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 incentives cannot qualify for the derogation in Article 87(3)(c) of the Treaty in respect of the said purposes.

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

([38]) It is not in the list of outermost regions in Article 299 of the Treaty.

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

(86) Similarly, the reduction in the tax base, 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, transport, shipbuilding, synthetic fibres and the motor industry ([40]). In the circumstances, the Commission considers that the tax incentives in the form of a reduction in the tax base cannot comply with the said sectoral rules. In this particular case, the reduction in the tax base 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.

(87) 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 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.

(88) As the reduction in the tax base covers various tax years, there could still be some tax aid currently left to pay. However, this aid is unlawful and incompatible. The Spanish authorities should therefore cancel the payment of any balance from the reduction in the tax base which could still be due to certain recipients.

([40]) 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/.

(89) 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 ([41]).

(90) 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.

(91) Since the compatibility of the State aid in the form of a reduction in the tax base granted to Daewoo Electronics Manufacturing España SA and to Ramondín SA and Ramondín Cápsulas SA has already been assessed in specific Commission Decisions ([42]), this Decision does not relate to that aid.

X. **CONCLUSIONS**

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

— Spain has unlawfully put into effect, in the Province of Álava, the reduction in the tax base for investments, thereby infringing Article 88(3) of the Treaty,

([41]) Commission letter to Member States of 4 March 1991 (SG(91)D/4577). See also Judgment of the Court of Justice of 21 March 1990 in Case 142/87 *Belgium* v *Commission* [1990] ECR I-950.

([42]) Commission Decisions 1999/718/EC (OJ L 292, 13.11.1999, p. 1) and 2000/795/EC (OJ L 318, 16.12.2000, p. 36).

— the reduction in the tax base in question is incompatible with the common market,

— the Spanish authorities must cancel the payment of any aid balance 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 relate to the reduction in the tax base granted to Daewoo Electronics Manufacturing España SA and to Ramondín SA and Ramondín Cápsulas SA,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a reduction in the tax base, unlawfully put into effect by Spain in the Province of Álava, in breach of Article 88(3) of the Treaty, through Article 26 of Provincial Law No 24/1996 of 5 July 1996, is incompatible with the common market.

Article 2

Spain shall abolish the aid scheme referred to in Article 1 in so far as 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 implementation 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 relate to the aid granted under the scheme in question to Daewoo Electronics Manufacturing España SA and to 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