COMMISSION DECISION

of 11 July 2001

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

(notified under document number C(2001) 1764)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/894/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 proceedings 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, in the form of a 45 % tax credit. It also received informal information that similar measures existed in the province of Guipúzcoa, since that territory enjoys the same tax autonomy as Álava. The Commission therefore sent a letter to the Spanish Permanent Representation on 15 March 1999 requesting information on the matter. By letters dated 13 April and 17 May 1999 from its Permanent Representation, Spain requested successive extensions of the deadline for replying. By letter of 25 May 1999 the Commission refused to grant a second extension under Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [4]. Finally, by letter of 2 June 1999 from its Permanent Representation, Spain provided information on the tax incentive in question.

(2) By letter SG(99) D/6871 dated 17 August 1999, 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 9 November 1999, registered on 12 November 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* [5]. 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 3 January 2000; the Basque Business Confederation (*Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza*) (hereinafter Confebask), on 4 January 2000, plus, outside the time limit, supplementary comments by letter dated 29 December 2000, registered on 3 January 2001; the Rioja Regional Government, on 5 January 2000; the Basque Economists Association (*Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa*), on 5 January 2000; the Basque Business Circle (*Círculo de Empresarios Vascos*), on 5 January 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 7 January 2000. By letter dated 1 March 2000 (D/50912), the Commission sent these comments to Spain, asking for observations; it received only a request for a 20-day extension of the deadline for replying.

[1] OJ C 351, 4.12.1999, p. 29.
[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] OJ L 83, 27.3.1999, p. 1.
[5] See footnote 1.

(6) By letter from the Permanent Representation dated 22 June 2000, the Spanish authorities informed the Commission that Provincial Law (*Norma Foral*) No 3/2000 ([6]) of 13 March 2000 had repealed, with effect from 18 March 2000, the seventh additional provision of Provincial Law No 7/1997 ([7]) of 22 December 1997, which formed the legal basis for the 45 % tax credit.

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 incentive in question entered into force on 1 January 1997 pursuant to the 10th additional provision of Provincial Law No 7/1997 ([8]).

(8) As regards the 45 % tax credit in force since 1 January 1997, the 10th additional provision of Provincial Law No 7/1997 reads as follows:

> 'Investments in new tangible fixed assets made after 1 January 1997 and exceeding ESP *2 500* million shall, by decision of the Guipúzcoa Provincial Council, give rise to a tax credit equal to 45 % of the amount of the investment, as determined by the latter, to be deducted from the amount of tax payable.
>
> Any tax credit that is not used because it exceeds the amount of tax payable may be carried over and used within the five years immediately following the year in which the decision granting the credit is taken.
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> The date from which the time limit for using the tax credit starts to run may be postponed until the first year during the limitation period in which profits are made.
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> The decision referred to in the first paragraph shall lay down the time limits and restrictions applicable in each case.
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> Concessions granted under this provision may not be combined with any other tax concessions available in respect of the same investments.
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> The Guipúzcoa Provincial Council shall also determine the duration of the investment process, which may include investments made during the preparatory phase of the project giving rise to the investments.'

(9) It is clear from the above provisions, in short, that the aid is granted in respect of investments in new tangible fixed assets made after 1 January 1997, as well as investment expenditure ([9]) incurred during the preparatory phase of the project giving rise to the investments, where such investments exceed ESP 2 500 million.

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

(11) 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 of the Treaty, fisheries, coalmining, steelmaking, transport, shipbuilding, synthetic fibres and the motor industry.

(12) 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.

(13) 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.

(14) 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 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.

(15) Firstly, the Commission pointed out, at that stage, 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 normal tax liability.

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

([6]) *Boletín Oficial de Guipúzcoa*, 17.3.2000.
([7]) Tenth additional provision.
([8]) *Boletín Oficial de Guipúzcoa*, 31.12.1997.
([9]) No precise definition is given of what the Spanish authorities understand by 'investments made during the preparatory phase' for the purposes of applying the tax aid in question.

(17) Thirdly, the Commission considered at that stage that the 45 % 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 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.

(18) Lastly, the Commission considered, at that stage, that the 45 % tax credit is specific or selective in that it favours certain firms, being available only to firms investing more than ESP 2 500 million (EUR 15 025 303). All other firms whose investments do not exceed the ESP 2 500 million threshold are excluded.

(19) 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 Guipúzcoa provincial authorities have the power to determine, at their discretion, the duration of the investment process and that of the preparatory phase of the investment qualifying for the aid.

(20) In short, the Commission considered, at that stage, 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.

(21) 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 ([10]).

(22) 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.

(23) The Commission also found that the 45 % tax credit is aid conditional on investment ([11]). 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 ([12]).

(24) 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 and therefore has to 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.

(25) 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.

(26) 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. Since the grant of the tax credit to such firms is not subject to the conditions laid down in those guidelines, the Commission doubted at that stage whether the aid was compatible with the common market when granted to firms in difficulty.

(27) On the question of whether investment aid in Guipúzcoa qualifies for the derogation under Article 87(3)(c) of the Treaty, the Commission noted that, in its decision of 26 July 1995 amending Spain's regional aid map, it found the whole of Guipúzcoa to be a region where investment aid in support of regional development could be deemed compatible with the common market under the Article 87(3)(c) derogation, provided that it did not exceed the ceiling of 25 % net grant equivalent (nge) in the case of large firms.

(28) The Commission also pointed out at that stage that the ceilings in question apply only to certain eligible expenditure included in the standard base and

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

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

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

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.

(29) However, the Commission stated provisionally that the tax aid in the form of the 45 % tax credit was not limited to 25 % nge in the case of large firms and 30 % nge in the case of small and medium-sized firms, and also that the eligible expenditure might not correspond to the standard base. Under such circumstances, it could not rule out the possibility at that stage that the aid could rank as operating aid, since it was intended to reduce the recipient firms' current expenditure. The Commission therefore provisionally found that there were doubts as to the compatibility of the tax aid in question in the light of the rules on regional aid.

(30) As regards the period after 1 September 1998, the Commission further took the view at that stage that the possibility of the investment for which aid is granted being covered by the multisectoral framework on regional aid for large investment projects (98/C 107/05) could not be ruled out. The tax aid in question is 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.

(31) To sum up, the Commission questioned at that stage the compatibility of the tax aid in question 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 cannot be regarded as aid having a social character under Article 87(2)(a), is 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(3)(c) concerning 'aid to facilitate the development of certain economic activities […]'. Nor is it 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). Lastly, it is not intended to promote culture or heritage conservation within the meaning of Article 87(3)(d).

(32) 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 aid in the form of a 45 % tax credit in Guipúzcoa. The relevant information requested related in particular to: any tax aid in the form of a 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 constitutes 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 constitute 'investments' and 'investments made during the preparatory phase'.

III. **COMMENTS OF THE SPANISH AUTHORITIES**

(33) 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.

(34) 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 Guipúzcoa, 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.

(35) 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 ([13]). 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 Guipúzcoa 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. It is furthermore logical that the incentive should be targeted at large investments since (i) it is large investments that will be of real benefit to Guipúzcoa in the long run, enabling the tax authorities to collect tax receipts that more than offset the tax expenditure incurred at the beginning of the investments, and (ii) the investment threshold does not penalise small and medium-sized enterprises, which already benefit from many Community funding programmes.

(36) Furthermore, the Spanish authorities dispute that the measure in question is of a discretionary nature, since the incentive is granted automatically once the condition of investing a minimum of ESP 2 500 million is satisfied. The Guipúzcoa 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 to be taken when it comes to determining the essential features of taxpayers' tax liabilities.

(37) The Spanish authorities reject 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. 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.

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

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

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

(40) 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

(41) 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 Guipúzcoa Provincial Council that have been contested both in Spain and at Community level.

(42) 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.

(43) For the rest, the Autonomous Community of Castile-Leon considers that the tax incentive 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.

(44) 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'))

(45) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by Guipúzcoa. 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 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, 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 ([14]) 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

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

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 1993 decision ([15]). 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 Regulation (EC) No 659/1999, '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. 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 ([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.

(46) 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.

Comments from the Rioja Regional Government

(47) 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 45 % tax credit 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 scope, in the form of a minimum investment of ESP 2 500 million, the Rioja Regional Government states that the discretionary nature of the 45 % tax credit 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 tax credit is not automatic.

(48) Moreover, the Rioja Regional Government considers that the tax measure cannot be justified on the grounds

([15]) Decision 93/337/EEC (OJ L 134, 3.6.1993).

([16]) See Joined Cases C-278/92, C-279/92 and C-280/92 dated 14 September 1994, *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.

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 Guipúzcoa, since their purpose is to improve the competitiveness of recipient firms.

(49) In short, the Rioja Regional Government considers that the tax incentive 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 incentive under Article 88(3) of the Treaty.

(50) 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 Economists Association (*Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa*) (hereinafter the 'CVE')

(51) The CVE considers that the tax system of each Basque province does not meet the specificity criterion in Article 87(1) of the Treaty merely because it applies only 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 a 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.

(52) 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 caught by Article 87(1) of the Treaty. However, in the present case, it takes the view that the 45 % tax credit 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 the recipient company has made profits. Moreover, its amount cannot be determined in advance, since, for example, if there were no profits, the aid would not be paid and if the profits were insufficient, it would be less than 45 %. 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, the CVE examines whether there is any specificity deriving from the threshold of ESP 2 500 million or the need to obtain the Provincial Council's approval in order to apply the tax credit. In this respect, they consider that the threshold does not involve specificity, since it is objective and non-discriminatory. As for the determination by the Provincial Council of (i) the investments qualifying for the 45 % tax credit; (ii) the deadlines and limitations applicable to the deduction; and (iii) the duration of the investment process, which may include investments made during the preparatory phase of the project giving rise to the investments, the CVE takes the view that this does not involve the exercise of a discretionary power, but is governed by rules and, ultimately, subject to judicial review.

(53) The CVE concludes that the 45 % tax credit, 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)

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

(55) The CEV and the APCPV reject the Commission's assessment that the 45 % tax credit has regional specificity. In their view, any provision, such as the 45 % tax credit, adopted by the Provincial Councils within the scope of their powers has the status of a general measure. The tax credit is also non-specific because of the threshold of ESP 2 500 million or the need to obtain the Provincial Council's approval in order to apply the credit. The threshold is an objective criterion, which is, moreover, much used in the tax sphere and the Community rules on VAT or the taxation of SMEs. As to the Provincial Council's approval before the tax credit can be applied, this is a

purely administrative act of prior verification deriving from the need for legal certainty and sound administration of the tax system. The authorities cannot select the recipients or determine the amount of the 45 % tax credit or the time limit for its application.

(56) 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 measure does not affect intra-Community trade. The same applies to its impact on competition. Moreover, where the recipients carry on their business on markets that have not yet been liberalised, the 45 % tax credit cannot distort competition. For the rest, the loss of tax revenues cannot be assessed if only a single measure is examined — in this case the 45 % tax credit — 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.

(57) Furthermore, in its decision of 10 May 1993 on Provincial Law No 8/1988 of 5 July 1988 the Commission did not call into question the aid measures concerned on the grounds that they required a minimum amount of investment. It therefore cannot challenge the 45 % tax credit without violating the legitimate expectations deriving from that Decision.

(58) For the rest, the CEV and the APCPV consider that the Commission's objective in initiating the procedure against the 45 % tax credit 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.

(59) In view of the above, the CEV and the APCPV conclude that the 45 % tax credit is not caught by Article 87 of the Treaty.

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

(60) By letter of 1 March 2000 to the Spanish Permanent Representation 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. It received only a request for a 20-day extension of the deadline for replying. Consequently, Spain has not submitted any such observations.

VI. **ASSESSMENT OF THE AID**

VII. **CLASSIFICATION AS STATE AID**

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

(62) 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 amount 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.

(63) Secondly, the Commission considers 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. This principle also applies to aid granted by regional or local bodies in the Member States ([18]). 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 Guipúzcoa Provincial Council on the basis of a statutory provision.

(64) 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

([18]) See Case 248/84 dated 14 October 1987, *Germany* v *Commission*, [1987] ECR 4013.

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.

(65) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, according to a report ([19]) on the external dependency of the Basque economy in the period 1990 to 1995, exports abroad went up ([20]), 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 ([21]) on the foreign trade of the Basque Country, 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 (profit after tax) improves their profitability. 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 45 % tax credit.

(66) 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 ([22]).

(67) 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 vis-à-vis other taxpayers in Guipúzcoa; 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.

(68) 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 make investments exceeding the ESP 2 500 million (EUR 15 025 303) threshold after 1 January 1997 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 of the third-party comments claim, from being selective and excluding firms which do not satisfy the conditions in question.

(69) 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. The Guipúzcoa Provincial Council has a discretionary power to determine, in particular, the duration of the investment process and that of the preparatory phase of the investment qualifying for the aid. It should be

([19]) Patxi Garrido Espinosa and Maria 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.

([20]) 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.

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

([22]) See judgment by the Court of Justice on 17 June 1999 in Case C-75/97 ('Maribel'), *Belgium* v *Commission*, paragraphs 48 and 51; the judgment rendered by the Court of First Instance on 15 June 2000 in Case T-298/97, *Alzetta Mauro and others* v *Commission*, paragraphs 80 to 82; the opinion of Advocate General Ruíz-Jarabo dated 17 May 2001 in Case C-310/99, *Italy* v *Commission*, paragraphs 54 and 55; and the opinion of Advocate General Saggio, dated 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.

stressed here that the Provincial Law introducing the notions of 'investment process' and 'preparatory phase of the project giving rise to the investments' does not define those terms. Unlike the concept of 'investments in tangible fixed assets', which is defined in accounting rules ([23]) and other provisions ([24]) there is no precise and generally accepted definition of the 'investment process' or the 'preparatory phase'. In the absence of a precise definition, therefore, the regional authorities have some leeway in determining exactly what is meant by the 'investment process' or the investment in the 'preparatory phase' in the case of each recipient.

(70) 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.

(71) 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 in some of the third-party comments 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 87 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 ([25]) are increased'.

(72) 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 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.

(73) 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 ([26]). In this regard the 45 % tax credit ([27]) can be said to discriminate 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

([23]) For example, the 'Plan General de Contabilidad'.
([24]) For example, the 'Ley de Sociedades Anónimas'.
([25]) See the judgment dated 22 March 1977 in 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 of the judgment dated 24 March 1993, 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'.
([26]) Article 31 of the Spanish Constitution.
([27]) 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 C-907/98, *Administración del Estado* v *Juntas Generales de Álava*.

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 regional 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.

(74) Moreover, the Spanish authorities state in their comments that the aim of the 45 % tax credit is to promote economic activity, 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 45 % tax credit in question, therefore, is part of an industrial policy whose objectives are not inherent in the tax system.

(75) 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.

(76) 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 of the tax system in each of the three Basque provinces.

(77) 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. THE UNLAWFUL NATURE OF THE 45 % TAX CREDIT

(78) Given that the said scheme does not comprise a commitment from the Spanish authorities to grant the aid in accordance with the conditions for *de minimis* aid ([28]), 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.

(79) 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 ([29]) adopted pursuant to Article 89 of the Treaty. 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.

([28]) 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 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. 3).

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

(80) 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(1)(a) of the EEA Agreement. However, the Spanish authorities have not fulfilled this obligation, which is why the Commission 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.

(81) 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.

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' ([30]). This is why the argument that legitimate expectations or legal certainty have been violated is without foundation in this case.

(82) In this context, moreover, the Commission recalls that in its Decision 93/337/EEC it 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**

(83) 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 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.

(84) 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.

([30]) See paragraph 300 of the judgment rendered by the Court of First Instance of 15 December 1999 in joined Cases T-132/96 and T-143/96, *Freistaat Sachsen and others* v *Commission*, [1999] ECR II-3663.

(85) 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 Guipúzcoa, the Commission would point out that the territory has never been eligible for the Article 87(3)(a) derogation, since the per capita GDP ([31]) of the NUTS ([32]) 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 ([33]), the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty ([34]) are met only if the region, at NUTS level II, has a per capita GDP of not more than 75 % of the Community average.

(86) As regards the admissibility of Guipúzcoa for the derogation in Article 87(3)(c), the Commission would point out that, during the period from 1 January 1997 to 18 March 2000, two successive regional aid maps were in force. The first one, adopted by its Decision of 26 July 1995 ([35]), applied from 26 September 1995 until 31 December 1999 and provided that the whole of Guipúzcoa was a region in which 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 25 % nge in the case of large firms. 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, Guipúzcoa 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, provided that it does not exceed the ceiling of 20 % nge in the case of large firms, instead of 25 % nge under the previous map.

(87) The Commission would also point out that, in the case of SMEs ([36]), the intensity of investment aid may, in accordance with the SME guidelines ([37]), be 10 percentage points higher than the regional ceiling for large firms, provided that the total does not exceed 30 % nge.

(88) 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 ([38]). 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 ([39]) in new tangible fixed assets, it does not exclude replacement investments ([40]) 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

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

([32]) Nomenclature of territorial units for statistics.

([33]) 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.

([34]) 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) and point 3.5 of the guidelines on national regional aid (98/C 74/06).

([35]) See 96/C 25/03.

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

([37]) Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992) or Community guidelines on State aid for small and medium-sized enterprises (96/C 213/04) (OJ C 213, 23.7.1996).

([38]) See the Annex to the Council resolution of 20 October 1971 (OJ C 111, 4.11.1971), point 5(c); the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979), 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), 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').

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

([40]) 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'.

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.

(89) 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 Guipúzcoa 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).

(90) In this specific case, the Commission points out that the tax aid in the form of a 45 % tax credit is not limited (during the period 1 January 1997 to 31 December 1999) to 25 % nge in the case of large firms or to 30 % nge in the case of SMEs. Neither, as regards the period after 1 January 2000, is it limited to 20 % nge in the case of large firms or to 30 % 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.

(91) The aid for investment expenditure ([41]) 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 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.

(92) In this respect, the Commission would point out that, in accordance with the Commission's 1988 communication ([42]) 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, or in the outermost regions or regions of low population density if it is intended to offset additional transport costs. However, the NUTS level III territory of Guipúzcoa 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 level III territory of Guipúzcoa is neither an outermost region ([43]) nor a region of low population density ([44]). 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.

(93) 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.

(94) As far as investments made by SMEs outside Guipúzcoa are concerned, the Commission would point out that, in such cases, the corresponding aid cannot be regarded as 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

([41]) It should be stressed that neither the Spanish authorities nor the third parties, which submitted comments, denied the existence of this type of investment expenditure.

([42]) Commission communication to the Member States on the method for the application of Article 87(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988).

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

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

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 that the tax aid in the form of a 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.

(95) 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.

(96) 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 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.

(97) 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 ([45]). 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.

(98) 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) ([46]). 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

([45]) 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/

([46]) OJ C 107, 7.4.1998.

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 Guipúzcoa.

(99) 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) ([47]) 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 in this connection that the grant of the tax aid in question is not subject to the conditions ([48]) 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

(100) 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.

Summary

(101) 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 Guipúzcoa 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. The aid 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.

(102) 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 ([49]), 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.

(103) As regards incompatible aid already paid, it should be pointed out that, in accordance with the above

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

([48]) 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.

([49]) 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 nine years. Tax credits granted under subsequent provincial laws are no longer subject to any such limitation.

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 ([50]).

(104) The State aid in question does not qualify for the derogation in Article 87(3)(a) of the Treaty 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. The aid 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.

(105) 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 ([51]), 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.

(106) 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 ([52]).

(107) 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.

X. **CONCLUSIONS**

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

([50]) 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.

([51]) 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 nine years. Tax credits granted under subsequent provincial laws are no longer subject to any such limitation.

([52]) 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 Guipúzcoa, 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,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a 45 % tax credit for investments, unlawfully put into effect by Spain in the Province of Guipúzcoa, in breach of Article 88(3) of the Treaty, through the 10th additional provision of Provincial Law No 7/1997 of 22 December 1997, 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 is addressed to the Kingdom of Spain.

Done at Brussels, 11 July 2001.

For the Commission

Mario MONTI

Member of the Commission