II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 December 2001

on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Guipúzcoa (Spain)

(notified under document number C(2001) 4448)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/192/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. **PROCEDURE**

(1) As a result of complaint submitted by certain organisations in the border autonomous community of Rioja against the urgent, transitional tax measures adopted in 1993 by the three Basque provincial councils, the Commission learned of the existence of State aid in Guipúzcoa in the form of an exemption from corporation tax for newly established firms. The Commission also received another complaint, from a competitor, about the ten-year exemption from corporation tax (the same tax measure as in Guipúzcoa) enjoyed by Depósitos Tubos Reunidos Lentz TR Lentz, S.A. (Detursa), located in Lantarón (Guipúzcoa).

(2) By letter dated 28 November 2000, SG(2000) D/108 806, the Commission informed the Kingdom of Spain of its decision to initiate in respect of this aid the procedure laid down in Article 88(2) of the Treaty.

(3) By letter from the Permanent Representation dated 14 December 2000, registered on 19 December 2000, the Spanish authorities asked that the time limit for submitting their comments be extended. By letter from the Permanent Representation dated 5 February 2001, registered on 8 February 2001, the Spanish authorities submitted their comments (prepared by the Guipúzcoa Provincial Council) under the abovementioned procedure.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the aid within one month of the date of publication of the Decision.

(5) Comments were received from: the Rioja Regional Government on 1 March 2001; from the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza (Confebask)) on 2 March 2001; from the Unión General de Trabajadores de la Rioja on 2 March 2001. By letter dated 2 July 2001 (D/52 703), the Commission sent these comments to Spain, asking for observations. By

[1] OJ C 37, 3.2.2001, p. 38.

[2] See footnote 1.

letter from the Permanent Representation dated 26 July 2001. The Spanish authorities asked that the time limit for submitting their comments be extended. By letter from the Permanent Representation dated 17 September 2001, the Spanish authorities submitted their comments (prepared by the Guipúzcoa Provincial Council) on the observations of interested third parties under the abovementioned procedure.

2. **DETAILED DESCRIPTION OF THE AID**

(6) The Commission notes that this tax aid scheme was introduced by Article 14 of Provincial Law 11/1993 of 26 June 1993 on urgent tax measures to assist investment and stimulate economic activity ([3]). The text of the Article ([4]) reads as follows:

'1. Companies formed between the entry into force of this Provincial Law and 31 December 1994 shall be exempt from corporation tax for a period of 10 tax years starting from, and including, the one in which they are formed, provided that the conditions laid down in the following paragraph are met.

2. The conditions of eligibility for the exemption established in this Article are that:

(a) they are formed with a minimum paid-up capital of ESP 20 million;

[…]

(f) between the date of incorporation and 31 December 1995 they invest at least ESP 80 million, all such investments being in assets assigned to the business which are not leased or sold to third parties for their use;

(g) they create at least 10 jobs in the six months following start-up, and the annual average workforce is kept at that figure during the exemption period;

[…]

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

[…]

6. The provisions of this Article shall be incompatible with any other tax concession.

7. The transitional exemption scheme shall be requested from the Treasury Department of the Provincial Council […],which, after checking that the requirements set out at the beginning have been met, shall communicate to the applicant company, as appropriate, its provisional authorisation, which shall be adopted with the approval of the councillors.'

(7) The Commission notes that, according to the preamble to the Provincial Law, the purpose of the aid is to stimulate the economy through enterprise and investment incentives for firms.

(8) The Commission also notes that the tax aid relates to the positive taxable income for corporation tax resulting from the conduct of the business, less the set-off for any losses from previous tax years. In this case, the recipients are companies which have started their commercial activities since the date of entry into force of the said provincial laws, have invested in tangible fixed assets a minimum of ESP 80 million (EUR 480 810) and have generated at least 10 jobs. In addition, recipient companies should, in particular, have a business strategy covering a minimum period of five years and should start their activity with a minimum paid-up capital of ESP 20 million (EUR 120 202).

(9) The Commission emphasises that the aid consists of an exemption from corporation tax during a period of 10 tax years, starting from, and including, the year in which the companies are formed.

(10) The Commission finds that the tax aid is not intended for firms, which carry out certain activities or belong to certain sectors, since any activity or sector may be eligible. Nor is it intended for a particular category of firm, such as SMEs, since any firm may qualify, if it satisfies the abovementioned conditions.

(11) As far as combination with other aid is concerned, it is stated that the tax aid in question may not be combined

([3]) *Boletín Oficial del Territorio Histórico de Guipúzcoa* No 128, 8.7.1993.
([4]) Only the parts of relevance to the assessment of the aid are cited.

with any other tax concessions that may be granted in respect of the minimum investment or the minimum creation of jobs. Nevertheless, combination with other, non-tax aid, including grants, subsidised loans, guarantees, equity purchases, etc., relating to the same investments is not ruled out. Nor is possible combination with other tax concessions whose operative event, i.e. the circumstance triggering each concession, is different. Such would be the case, for example, with tax incentives in the form of a tax credit ([5]).

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

(13) Firstly, it stated provisionally that the exemption from corporation tax confers on recipients an advantage, which relieves them of charges that are normally borne from their budgets.

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

(15) Thirdly, the Commission considered that the exemption from corporation tax 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 in intra-Community trade. It is clear therefore that the aid affects trade. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). In this way they are more able to compete with firms which are not eligible for the aid.

(16) Lastly, the Commission considered that the exemption from corporation tax is specific or selective in that it favours certain firms. The eligibility requirements expressly rule out any firm that was set up before the date of entry into force of the said Provincial Law (mid-1993), that has created fewer than 10 jobs, whose investment is less than ESP 80 million (EUR 480 810) and whose paid-up capital does not exceed ESP 20 million (EUR 120 202). In addition, the Commission considered that the tax aid is not justified by the nature or general scheme of the tax system.

(17) In short, the Commission considered, at that stage, that the exemption from corporation tax is State aid within the meaning of Article 87(1) of the Treaty, 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.

(18) Since the maximum amount of tax aid in question is not subject, in particular, to the requirement that it comply with the ceiling laid down for *de minimis* aid ([6]), the Commission considered that the aid cannot be regarded as *de minimis* aid ([7]).

(19) The Commission affirmed 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. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considered that the aid could be regarded as unlawful.

(20) The Commission found that, although the granting of the aid was conditional on a minimum investment and the creation of a minimum number of jobs, the tax arrangements did not ensure compliance with the Community rules on regional aid. The Commission therefore thought that the aid does not have the character of investment or job-creation aid.

([5]) See Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa), (OJ L 292, 13.11.1999, p. 1).

([6]) See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (SMEs) (OJ C 213, 19.8.1992, p. 2) and Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

([7]) See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (see footnote 6) and the Commission notice on the *de minimis* rule for State aid (see footnote 6).

(21) On the contrary, the Commission considered that the tax aid has the character of operating aid, since its purpose is to relieve a firm of the costs incurred through its normal business or its everyday management.

(22) The Commission pointed out that regional operating aid is in principle prohibited. It may nevertheless be granted in exceptional circumstances in regions, which meet certain conditions. But this is not the case here. The Commission therefore found that, in the light of the regional aid rules, there were doubts as to the compatibility of the tax aid.

(23) The exemption from corporation tax, which is not restricted to a particular sector, may be granted to firms that are subject to Community sectoral rules. The Commission therefore questioned whether the aid is compatible where the recipient belongs to a sector that is subject to special Community rules.

(24) Furthermore, the Commission doubted the compatibility of the tax aid with the common market in the light of the derogations in Article 87(2) and (3) of the Treaty. The aid 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(2)(c) concerning certain areas of the Federal Republic of Germany. As regards the derogations in Article 87(3) other than those in subparagraphs (a) and (c), which have already been discussed, the Commission considered that the aid is not designed to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State under Article 87(3)(b). The aid does not fall within the scope of Article 87(3)(c), which concerns 'aid to facilitate the development of certain economic activities...', since it is not specific in any way to the activities of the recipient firms. Lastly, it is not intended to promote culture or heritage conservation within the meaning of Article 87(3)(d).

(25) Under the Article 88(2) procedure, the Commission asked the Spanish authorities to submit their comments and to supply all the information necessary for assessing the exemption of certain newly established firms in Guipúzcoa from corporation tax.

3. COMMENTS OF THE SPANISH AUTHORITIES

(26) By letter from the Permanent Representation dated 5 February 2001, the Spanish authorities submitted their comments (prepared by the Guipúzcoa Provincial Council). The Spanish authorities consider, essentially, that the decision to initiate in respect of the exemption from corporation tax the procedure laid down in Article 88(2) of the Treaty is automatically null and void, since it is based on a de facto wrong description of Provincial Law No 11/1993 as a new aid rather than an existing aid and was therefore adopted in breach of the procedure legally provided for in the Treaty.

(27) The Spanish authorities emphasise, firstly, that the tax measure did not constitute an aid when it came into force. As evidence of this they claim that the Commission has known of the existence of the said Provincial Law for many years, since by letter dated 25 May 1994 it informed the Spanish Permanent Representation of a complaint that referred to that Law. They argue that it is clear from the letter that the Commission did not in any way think that the measure put into effect was a State aid, nor that it was appropriate to initiate the procedure provided for in Article 93(2) (currently Article 88(2)) of the Treaty. By letter from the Permanent Representation dated 30 September 1994 the Spanish authorities informed the Commission that, in their opinion, the tax measures did not constitute State aid prohibited by Article 92 of the Treaty, since they were measures of a general nature. Furthermore, by letter to the Permanent Representation dated 19 January 1996, the Commission asked for information about the possible recipients of the measures. Later, by letter dated 6 February 1996, the Tax Coordination Authority (Órgano de coordinación fiscal) ([8]) informed the Commission that: 'the Basque tax provisions are general in character and are not covered by the concept of State aid'. For the rest, the Spanish

([8]) As alleged evidence of this letter, the Guipúzcoa Provincial Council attached to its comments a copy of a document bearing the letterhead of the Department of Finance and Public Administration of the Basque Government and not of the Tax Coordination Authority; it was not dated or signed. The document was never registered in the Commission.

authorities state that, if the Commission had entertained the slightest suspicion that the provincial law in question constituted State aid within the meaning of Article 87 of the Treaty, it would have been obliged (in accordance with the case-law of the Court of Justice ([9])) to initiate the Article 88(2) procedure immediately.

(28) Secondly, the Spanish authorities consider that the fact that the Commission, in November 2000, described Provincial Law 18/1993 as State aid is the result of a development in Community State aid policy (as is also indicated by the decision to initiate the procedure, taking the notice as the basis of examination). By adopting, on 1 December 1997, a resolution on a code of conduct for business taxation ([10]) (the 'Code of Conduct'), the Council acknowledged the possibility that the criteria used by the Commission to examine current tax arrangements — and not only current arrangements — in the context of applying the Community State aid rules could subsequently change. For its part, the Commission, in its 'First annual report on the implementation of the Code of Conduct for business taxation and fiscal State aid' ([11]), expressly recognises that its aim in publishing guidelines is 'to clarify the application of State aid rules to measures relating to direct business taxation' ([12]). Subsequently, the Commission adopted the notice on the application of the State aid rules to measures relating to direct business taxation ([13]). As stated in the decision to initiate the procedure, the Commission examines tax aid schemes, including Provincial Law 18/1993, on the basis of the guidelines referred to in point 37 of the notice. Further, in accordance with point 36, 'Article 93(1) states that the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States'. The notice itself makes clear, however, that all current tax schemes in the Member States that predate the notice may only be examined by the Commission under the procedure provided for in Article 88(1) of the Treaty (constant review), which thus prevents the 'aid' from being considered illegal. The schemes, therefore, are tax measures applied in the Member States, hence the term 'current', which prior to that date (December 1997) had not been regarded as State aid.

(29) Thirdly, the Spanish authorities contend that Provincial Law 18/1993 was never amended. It therefore satisfies the non-amendment test in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([14]), whereby an aid measure can be regarded as an existing aid.

(30) In short, the Spanish authorities consider that, even though, according to the Commission, Provincial Law 18/1993 should be regarded as State aid, it is an existing aid scheme. It has been shown that the Commission was informed, in 1994 or even earlier, of the application of Provincial Law 18/1993 and did not regard it as a State aid; that a change in State aid policy has occurred, since reference is made to existing tax measures in the Member States; and that the said Law has not been amended in any way since it came into force. However, Article 88(1) lays down the compulsory procedure which has to be followed in the case of existing aid: constant review in cooperation with Member States, and not the procedure provided for in Article 88(2). The Regulation also lays down the procedure that should be followed in the case of existing aid schemes: cooperation pursuant to Article 93(1) (currently Article 88(1) of the Treaty) and the proposal of appropriate measures. The Commission, therefore, should annul its decision to initiate the procedure and, if it considers, after a preliminary examination, that the Provincial law does constitute State aid for the purposes of Article 87 of the Treaty, should propose to the Member State in question the measures required in this case by the progressive development or the functioning of the common market.

(31) As to the character of the tax measure in question, the Spanish authorities consider that, since it is not caught by the selectivity requirement laid down in Article 87(1), it cannot be regarded as State aid. It is not selective, in particular since it is applied irrespective of the sector of the economy in which the firms operate and since its purpose, which is to promote the economy as a whole, is not selective as the Commission maintains: the objective, non-discriminatory implementing criteria which it lays down do not transform the firms that meet them into 'certain undertakings' within the meaning of Article 87 of the Treaty. In support of their conclusion, the Spanish authorities stress in particular that the measure in question, designed as its name suggests to 'promote economic activity', pursues a legitimate economic objective using all the instruments available to a State. In addition, they consider that the non-application of

([9]) See Case C-82/84 *Germany* v *Commission*, [1984] ECR 1451, paragraph 12.

([10]) Annex 1 to the Conclusions of the ECOFIN Council of 1 December 1997, (OJ C 2, 6.1.1998, p. 1).

([11]) Communication from the Commission to the Council and the European Parliament, COM(1998)595 final, 25.11.1998.

([12]) Point 14 of the communication mentioned in the above footnote.

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

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

the tax concession either to existing firms or new firms created after 31 December 1994 does not mean that it is selective, since, firstly, the purpose is to promote new activities and, secondly, firms created after that date are not disadvantaged compared with the recipients of the aid. As to the quantitative conditions concerning investment, job-creation and capital, the Spanish authorities consider that these do not mean that the measure is selective, since the conditions, as a result of their horizontal and objective nature, are not discriminatory. As the selectivity requirement is not met, the Spanish authorities conclude that the measure cannot be regarded as State aid, but as a measure of a general nature.

(32) For the rest, the Spanish authorities consider that another reason why the tax measure in question cannot be regarded as State aid is that it does not distort competition and does not affect trade between Member States. They point out that, under the Code of Conduct, Provincial Law 18/1993 has already been examined ([15]), and it was concluded that there was no effect on the location of business in the Community. In addition, Provincial Law 18/1993 does not strengthen, nor could it, the position of any firm As the firms, which have recently been set up, do not have a well-defined position on the market, it is not easy to see how they could be strengthened.

(33) Finally, the Spanish authorities reject the description of the tax measure introduced by Provincial Law 18/1993 as operating aid, since such a description, by definition, can only be given to firms that already exist but not, under any circumstances, to new ones. On the contrary, they consider that the measure, in view of the minimum investment and minimum job-creation levels on which it is conditional, is intended to promote initial investment within the meaning of the Commission communication of 1979 ([16]). In this connection, the Spanish authorities point out that where, in the guidelines on national regional aid ([17]), it says that tax aid 'may' be regarded as investment aid when it is based on investment, this does not mean that it is only in this case that it 'should' be regarded as investment aid.

([15]) Report by the 'Code of Conduct Group', submitted to the ECOFIN Council of 29 November 1999, point D009: 'Basque Country — Start-up aid'.

([16]) OJ C 31, 3.2.1979, p. 9. According to the communication, 'aids linked to initial investment' means aids linked and fixed directly in relation to initial investment or jobs created.

([17]) OJ C 74, 10.3.1998, p. 9. See footnote 46 in Annex I of the guidelines: 'Tax aid may be considered to be aid connected with an investment where it is based on an amount invested in the region'.

4. OTHER COMMENTS RECEIVED BY THE COMMISSION

(34) 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.

4.1. Comments of the Rioja Regional Government

(35) The Rioja Regional Government states that the tax measure constitutes State aid, since it satisfies all four criteria set out in Article 87 of the Treaty. In support of this contention it argues that the term 'State' in Article 87 of the Treaty includes any public body irrespective of the extent of its territorial scope and hence, *inter alia*, the provincial governments. It also states that the description 'aid' does not depend on the form of the measure. It points out that the concept of aid in Article 87 is broader than that of subsidy and may therefore include tax measures. It also points out that the tax measure in question affords the recipients an advantage, since the purpose and the effect of the exemption from corporation tax for 10 consecutive tax years is to relieve the recipient of part of the tax burden which would have been imposed on its profits. Moreover, since the recipient firms are engaged in economic activities, which are likely to include intra-Community trade, the tax measure distorts competition and affects that trade. According to the Rioja Regional Government, the tax measure is specific in scope not only on account of the minimum share capital of ESP 20 million (EUR 120 202), the minimum investment of ESP 80 million (EUR 480 810) and the minimum of 10 jobs created, but because (a) existing firms are not eligible and (b) eligibility is restricted to firms in certain regions of the Member State.

(36) The Rioja Regional Government also points out that, under Article 88(3) of the Treaty, State aid should be notified to the Commission. Aid, it says, cannot be put into effect before the Commission has ruled on its compatibility with the common market.

(37) The Rioja Regional Government also considers that the tax measure cannot be regarded as investment aid, because it does not satisfy the requirements in the guidelines on national regional aid ([18]). Despite the minimum investment and job-creation requirements, the aid does not depend on the size of the investment or the number of jobs created. Instead, the tax measure has the character of operating aid, since it relieves the recipient of some of the expenditure, which it would have incurred as part of its day-to-day operations. This operating aid, moreover, does not qualify for any of the exceptions provided for in Article 87(2) and (3) of the Treaty.

(38) The Rioja Regional Government considers that the tax measure cannot be justified on the grounds that there are five tax systems in Spain. Advocate-General Saggio ([19]) considered in this respect that the fact that authorities within a territory hold tax powers does not justify any discrimination in favour of firms established in that territory. Nor is the measure justified by the nature or general scheme of the tax system in Guipúzcoa, since its purpose is to improve the competitiveness of recipient firms. The Rioja Regional Government also argues that the Spanish Supreme Court has held ([20]) that other similar tax measures distorted competition and affected the free movement of capital and labour. The High Court of the Basque Country (Tribunal Superior de Justicia del País Vasco) ([21]) has also taken this line.

(39) The Rioja Regional Government believes, therefore, that the tax measures should be regarded as State aid, which, because the notification procedure provided for in Article 88(3) of the Treaty has not been followed, is unlawful and incompatible with the common market.

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

(40) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by Guipúzcoa.

(41) Concerning the presumed reduction of the tax debt, Confebask considers that 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 that would initially be due. Confebask therefore asks the Commission to reconsider its position, since not to do so would be tantamount to unlawfully harmonising the tax burden by fixing a reference amount for determining possible losses of tax revenue.

(42) As regards the effect on trade, Confebask states that, in the Commission's view, the tax measure distorts trade because the recipients are involved in that trade. However, any trade will always be affected by any differences that there are between the various tax systems. Thus, to see whether the tax measures do affect trade, the Commission ought to analyse the tax system as a whole and not specific provisions in it. 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 this specific measure affects trade and others do not. In any event, even if such an effect did exist, the way to remove it would be through harmonisation, not State aid.

(43) Regarding the selective nature of the tax measure, Confebask States that the Commission considers the measure to be an instrument for the direct granting of aid. It points out in this respect that, according to points 17, 19 and 20 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, 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 measure in question has none of these characteristics, not even territorial specificity, since it applies to the whole territory for which the provincial authorities that introduced it are competent. As to the specific character of the thresholds, share capital of ESP 20 million, investment of ESP 80 million, and 10 jobs created, Confebask considers that the use of thresholds is normal practice in national and Community tax rules. Confebask also draws attention to the basis of various judgements 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,

([18]) See previous footnote.
([19]) Opinion of Advocate-General Saggio in Joined Cases C-400/97, C-401/97 and C-402/97, Administración General del Estado v Juntas Generales de Guipúzcoa y Diputación Foral de Guipúzcoa.
([20]) See its judgement of 7 February 1998.
([21]) See the judgements of 30 September and 7 October 1999 concerning the 'tax holidays' in the form of reductions of taxable income of 99 %, 75 %, 50 % and 25 %.

that the effect of promoting certain sectors does not necessarily mean that the measures are specific.

(44) As to the fact that the tax measure in question applies only to part of the territory of a Member State, which the Commission sees as evidence of specificity, Confebask points out that similar measures were introduced for the rest of that territory by the Finance Act 1994 ([22]). These measures consisted in a reduction of 95 % in corporation tax liability for 1994, 1995 and 1996 for newly established firms which invested at least ESP 15 million (EUR 90 152) and had a workforce of between three and 20 persons. The measures were designed, moreover, to promote the formation of new companies. Consequently, the effect on competition of the exemption from corporation tax in Guipúzcoa is neutralised, since the neighbouring Basque historic territories also give tax concessions to newly established firms. Further, if the tax measures in question did affect competition, this would be on account of the central government's measures, for which the number of recipients could be greater.

(45) Confebask also stresses that there are similar measures in other Member States, but the Commission has not initiated any procedure with regard to them, nor have they been classified as harmful measures by the Code of Conduct Group (Primarolo Group). In France, since 1994, new firms have been eligible for corporation tax exemptions and reductions for a period of five years (ten years in some regions), and in Corsica for even more favourable arrangements. In Luxembourg, there is a 25 % reduction of corporation tax for a period of eight years. In Italy, the exemption from the IRPEG and the ILOR in the Mezzogiorno is for 10 years. Lastly, in Portugal there is a 25 % reduction of corporation tax for a period of from seven to 10 years. Everything shows, therefore, that Guipúzcoa's exemption from corporation tax is not an exceptional system, which gives rise to any specificity. On the contrary, it is a system widely used in the Member States. In view of the above, Confebask concludes that the tax measures in question are not State aid but general measures.

(46) Confebask argues that the Commission's description of the tax reduction as unlawful aid calls into question the principles of legitimate expectations, the ban on arbitrary decisions by institutions, legal certainty and proportionality. The Basque tax system was already deemed compatible by Commission Decision 93/337/EEC ([23]). In any event, the Commission may change its position, during the 'constant review', as regards future cases but not past ones.

(47) According to Confebask, since a legitimate expectation has been aroused, in particular by letter reference 4555 of 22 May 1994, which the Commission sent to the Spanish Permanent Representation in order to obtain information, the measure cannot be the subject of a recovery. The letter shows, firstly, that the Commission learned of the measure back in 1994 and, secondly, that the complainant described it as State aid. The Commission, however, did not initiate the procedure but apparently agreed with the reply from the Spanish authorities, who denied that the measure was State aid. The situation described, recalls the earlier one examined by the Court of Justice in RSV ([24]). In that case, the Court held that the period of 26 months between the decision to initiate the procedure and the final decision had established, on the part of the beneficiary, a legitimate expectation of such a nature as to prevent the Commission from ordering the Dutch authorities to order the refund of the aid. Confebask considers that, if a period of 26 months between the initiation of the procedure and its conclusion establishes a legitimate expectation which prevents the recovery of the aid being ordered, a situation in which the Commission does not even initiate the procedure for six years and six months, so that no position is adopted concerning the possible existence of aid that is incompatible with the common market, is even clearer still. In short, the undertakings and authorities informed of the questions raised by the Commission, which did not react to the reply provided by the Spanish authorities, would be entitled to think that the system of exemption from corporation tax gave no cause for complaint as far as the State aid rules were concerned. Confebask also mentions other factors that prevented an experienced economic operator from noticing any irregularity in its acceptance of the tax concession in question. As early as 1993, the common tax law (i.e. the legislation applicable in the rest of Spain) contained systems for exempting newly established firms from corporation tax. Basically, these systems are no different from those in the Basque legislation cited in these pleadings. In the circumstances, no recipient firm could foresee that

([22]) 'Law No 22 of 29 December 1993, on tax measures and the reform of the legal system of the public service and unemployment protection'.

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

([24]) Judgment of the Court of Justice of the European Communities of 24 November 1987, in Case C-223/85, *RSV* v *Commission*, [1987] ECR 4617.

several years after being informed of these rules, which are similar to those applicable in the rest of the common territory, the Commission, relying on Community law, would demand the recovery of the aid. As already explained, such recovery would involve recalculating the tax debt for tax periods that were closed years ago, which would be a manifest assault on legal certainty.

(48) As regards the assessment of compatibility with the common market, Confebask notes that, according to the decisions of the Court of Justice ([25]), where the Commission initiates proceedings it must have serious doubts as to the compatibility of the aid. As no reaction was forthcoming for several years, it must be concluded that the Commission did not harbour any doubts.

(49) On the other hand, if the tax measure in question is regarded as a rule granting aid directly, Confebask takes the view that the practice of the Commission and the Court requires that the measure has to be sectorally specific before its compatibility can be assessed. The overall tax burden on firms and the reference tax burden would also have to be established. 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 challenges the Commission's argument that the tax measure is incompatible with the common market, since it does 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 ([26]), 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 measure in question.

(50) Confebask therefore asks the Commission to terminate the procedure and state that the tax measures in question comply with Community law.

([25]) See Judgment of the Court of Justice of the European Communities of 19 May 1993, in Case C-198/1991, *William Cook plc* v *Commission*, [1993] ECR I-2487.

([26]) Joined Cases C-278/92, C-279/92 and C-280/92, *Spain* v *Commission*, [1994] ECR I-4103.

4.3. **Comments from the Rioja branch of the General Union of Workers (Unión General de Trabajadores de la Rioja (UGT))**

(51) The UGT's first point is that the labour force in Rioja is feeling the effects of the tax aid through the resultant migration of firms. This effect on the region's labour force is increased by the fact that Rioja adjoins the Basque Country.

(52) The Guipúzcoa measure in question, which is identical to the measures introduced by the other Basque historic territories, means that the Basque Country is becoming a tax haven in order to capture business from the whole of the EU, and in particular from the border region of Rioja. The measures therefore distort competition, since the decision to locate a firm is not the result of the free play of market forces but of the tax concessions created by a fiscal policy with objectives unconnected with the tax system. They also constitute an obstacle to the desirable tax harmonisation of the Community.

(53) Furthermore, the UGT considers that the tax measure has the character of a State aid. It notes that the Commission ([27]) has already regarded other tax measures of the Basque historic territories as State aid that is incompatible with the common market. It also notes that, in his Opinion of 1 July 1999, which dealt with preferential rulings on tax measures similar to those of the Basque historic territories, Advocate-General Saggio also considered that such measures constituted State aid in breach of the Treaty.

(54) For the rest, the UGT supports the Commission's assessment that the tax measure is State aid that is unlawful and incompatible. It believes, therefore, that the measure should be regarded as State aid, which, because the notification procedure provided for in Article 88(3) of the Treaty has not been followed, is unlawful and incompatible with the common market. The Commission should also require the recipients to repay aid that has been paid unduly.

5. **COMMENTS OF SPAIN ON THE OBSERVATIONS OF OTHER INTERESTED PARTIES**

(55) By letter from the Permanent Representation dated 17 September 2001, the Spanish authorities submitted their

([27]) Decision of 10 May 1993 on Provincial Laws 28/1988 (Álava), 8/1988 (Vizcaya) and 6/1988 (Guipúzcoa); Commission Decision 1999/718/EC (Daewoo) (see footnote 5) and Decision 2000/795/EC (Ramondín SA and Ramondín Cápsulas SA) (OJ L 318, 16.12.2000, p. 36).

comments (prepared by the Guipúzcoa Provincial Council) on the observations of interested third parties, which were sent to them in accordance with Article 6(2) of Regulation (EC) No 659/1999. Basically, the Guipúzcoa Provincial Council considers that none of the comments calls into question its original observations ([28]). It states that the Commission will not find any information in these comments that will help it to determine whether the measure is an existing aid or a new one.

(56) The Guipúzcoa Provincial Council also uses the reply to the observations of other interested parties to submit further comments of its own in addition to those which it had made on 5 February 2001 in the said letter from the Spanish Permanent Representation, under Article 6(1) of Regulation (EC) No 659/1999. However, the period of one month from the date of the letter (28 November 2000) in which the Commission notified the Spanish authorities of its decision to initiate the procedure and invited them to submit comments under the said Article, expired on 29 December 2001. These additional comments should not be taken into account, therefore. The Commission would point out in this respect that the possibility given to the authorities of the Member State in question to submit comments on the observations of interested third parties, pursuant to Article 6(2), definitely does not mean that they can have an additional period in which to present comments under the said Article 6(1).

6. **ASSESSMENT**

6.1. **State aid**

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

(58) Firstly, it 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. The exemption from corporation tax meets this criterion, since it removes the tax burden on the recipient firms. If there were no exemption, the recipient firm would have to pay full corporation tax for 10 years. The exemption from corporation tax thus implies an exception to the common tax system applicable.

(59) Secondly, the Commission considers that the exemption from corporation tax involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure. This criterion is also applied to aid granted by regional and local bodies in the Member States ([29]). 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.

(60) According to the above claim put forward by certain third parties, the Commission is wrong to think that the exemption from corporation tax involves a loss of tax revenue. To determine the amount of revenue lost, so runs this argument, the Commission should fix a normal level or amount of tax. It should be noted here, however, that the normal level of tax is derived from the tax system in question and not from a Commission decision. Furthermore, according to the second indent in point 9 of the notice on the application of the State aid rules to measures relating to direct business taxation, to qualify as State aid, 'firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets'. The advantage may be provided through a reduction in the firm's tax burden in various ways, including: '[…] a total or partial reduction in the amount of tax (such as exemption or a tax credit)'. It should be noted in this respect that, as the Court of Justice has held ([30]) 'a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers

([28]) See section III: 'Comments of the Spanish authorities'.

([29]) See Judgment of the Court of Justice of 14 October 1987, in Case C-248/84, *Germany* v *Commission*, [1987] ECR 4013.

([30]) Case C-387/92, Banco de Crédito Industrial, now *Banco Exterior de España SA* v *Ayuntamiento de Valencia*, [1994] ECR I-877, paragraph 14.

constitutes State aid within the meaning of Article 92(1) of the Treaty'. This is the case with the tax advantage that an exemption from corporation tax confers. The argument, therefore, is not convincing.

(61) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, according to a report ([31]) on the external dependency of the Basque economy in the period 1990 to 1995, exports went up ([32]), not only in absolute terms but, in particular, in relative terms as well, to the detriment of sales to the rest of the country. The external market has therefore partially replaced the Spanish market. Furthermore, according to another statistical report ([33]) 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, during the period 1993 to 1998 the Basque trade balance was clearly in surplus. 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 is clear that the 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 the Community. It is clear therefore that the aid affects trade. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). This enables them to compete with firms, which are not eligible for the tax aid.

(62) Since the tax rules under investigation 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 and their impact on a market, sector or specific product cannot be established, contrary to the claim made by certain third parties. This position has been confirmed by a number of decisions of the Court of Justice ([34]). Moreover, the Commission would emphasise that, in its decision initiating the procedure, it asked the Spanish authorities for all relevant information that would allow it to assess the aid. The request was clearly intended to enable the Commission to obtain a general idea of the actual effects of the scheme and not to gather data sufficient for carrying out individual appraisals. However, the Spanish authorities have not provided any information ([35]) on the instances where the tax holiday was applied. 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 information requested.

(63) As regards the Spanish authorities' argument that the tax measure in question neither distorts competition nor affects trade between Member States since the report by the Code of Conduct group concluded that it did not affect the location of business activities in the Community, the Commission considers that an analysis which draws on the Code of Conduct cannot be a substitute for an assessment based on the State aid rules. The criteria established in part B ([36]) of the Code of Conduct for determining whether a tax measure is 'harmful' are not the same as those for deciding whether

([31]) Patxi Garrido Espinosa and Mª Victoria Garcia Olea, 'La dependencia exterior vasca en el periodo 1990—1995', Eustat.

([32]) In 1990 exports accounted for 28,5 % of total sales, including those to the rest of Spain, but for 40,8 % only five years later.

([33]) 'Estadística de Comercio Exterior para la Comunidad Autónoma de Euskadi en el año 1998', prepared by Eustat (Euskal Estatistika-Erakundea/Instituto Vasco de Estadística).

([34]) See Case C-75/97, (Maribel) *Belgium* v *Commission*, [1999] ECR I-3691, paragraphs 48 and 51; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, *Alzetta Mauro and others*, [2000] ECR II-2319, paragraphs 80, 81 and 82; the Opinion of Advocate-General Ruíz-Jarabo in Case C-310/99, Italy v *Commission*, paragraphs 54 and 55 (17 May 2001), and the Opinion of Advocate-General Saggio in Case C-156/98, *Germany* v *Commission*, paragraph 31 (27 January 2000), 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'.

([35]) With regard to the complaint submitted by Schütz Ibérica SA, the Spanish authorities informed the Commission that no aid had been paid to Detursa at that date.

([36]) Section B of the Code of Conduct for Business taxation reads: '[…] When assessing whether such measures are harmful, account should be taken of, *inter alia*: (1) whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or (2) whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or (3) whether advantages are granted without any real economic activity or substantial economic presence within the Member State offering such tax advantages, or (4) whether the basis of profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably those agreed upon within the OECD, or (5) whether the tax measures lack transparency, including where statutory rules are relaxed at administrative level in a non-transparent way'.

a measure distorts competition or affects trade. It is possible, therefore, that a measure will not be considered harmful, because the criteria in B do not apply, even though it may distort and affect trade. In this specific case, the tax holiday is not caught by the criteria in B, since it is not granted exclusively to non-residents or in respect of transactions carried out by non-residents; it is not completely separate from the national economy; it is not granted even without any real economic activity and substantial economic presence within the Member State; it is not applied to profits determined in respect of activities within a multinational group of companies in accordance with internationally accepted principles and does not lack transparency. On the other hand, as explained above, it does distort competition and affect trade.

(64) As regards the comment from certain third parties 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 subject of the proceeding initiated under Articles 87 and 88 of the Treaty is the distortions of competition that may result from a rule favouring certain firms (in this case certain newly established firms) and not those that are due to differences between the tax systems of the Member States, which would in any event be caught by the provisions of Articles 93 to 97 of the Treaty.

(65) As regards the specific character which State aid must have, the Commission takes the view that the exemption from corporation tax is specific or selective in that it favours certain firms. The eligibility requirements expressly rule out any firm set up before the date of entry into force of the said Provincial Law (mid-1996) that has created fewer than 10 jobs, whose investment is less than ESP 80 million (EUR 480 810) and whose capital does not exceed ESP 20 million (EUR 120 202). The Commission would point out that, according to the Fourth Report on Enterprise in Europe ([37]), the number of firms in the European Community in 1992 which had fewer than 10 employees, or no employees at all, was 14 629 000, or 92,72 % of the total ([38]). In Spain's case, the percentage in 1991 was even higher, at about 95,11 % ([39]). Furthermore, according to the Fifth Report on Enterprises in Europe ([40]), the number of firms in the European Community in 1995 which had fewer than 10 employees, or no employees at all, was 16 767 000, or 92,89 % ([41]) of the total. In Spain's case, the percentage was higher still, at about 95 % ([42]). It is likely that these percentages are even higher in the case of new firms, since a firm usually starts with a workforce that will expand as the firm consolidates and reaches its cruising speed. This is the case in Spain, where in 1995 the percentage was even higher, at about 98 % ([43]). The main conclusion, therefore, is that one of the conditions of eligibility alone rules out the majority of firms.

(66) The Commission would also point out that the fact that the tax exemption is specific in scope does not mean that it has no other selective features, such as regional specificity. However, once it has been shown that the tax reduction favours certain firms on account of this specificity of scope, the Commission considers that it is not necessary to analyse in detail all the other specific features. In this particular case, therefore, it will not examine any regional specificity the measure may have.

(67) For the rest, the objective character of the thresholds cited does not, as some of the third-party comments claim, prevent them from being selective and excluding firms which do not satisfy the conditions in question. According to the case law ([44]), 'the fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria pursuant to which it may be granted, […] cannot suffice to call in question the selective nature of the measure and, accordingly, its classification as State aid within the meaning of Article 92(1) of the Treaty. […] It does not, however, preclude that public measure from having to be regarded as a system of aid constituting a selective, and therefore specific, measure if, owing to the criteria governing its application, it

([37]) Enterprises in Europe, Fourth Report, Eurostat.
([38]) Data taken from the table on page 27 of the report.
([39]) Data taken from the table on page 152 of the report.
([40]) Enterprises in Europe, Fifth Report, Eurostat.
([41]) Data taken from the table on page 31 of the report.
([42]) Data taken from the table on page 224 of the report.
([43]) Data taken from the table on page 73 of the report.
([44]) See Judgment of the Court of First Insance in Case T-55/99, *Confederación Española de Transporte de Mercancías (CETM)* v *Commission*, [2000] ECR II-3207, paragraph 40.

procures an advantage for certain undertakings or the production of certain goods, to the exclusion of others'.

(68) As regards invoking the nature or general scheme of the tax system as a possible justification for the exemption from corporation tax, the Commission emphasises that what matters is to know 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. Furthermore, it is up to the Member State concerned to establish that the tax measures in question follow the internal logic of the tax system ([45]). In this particular case, the Spanish authorities did not supply any information on the internal logic of the tax system, which the tax measure is supposed to follow. The Commission notes however that, according to the provincial law introducing the tax holiday, the declared objective was to stimulate Guipúzcoa's economy, which was then in serious crisis. The objective is not determined therefore by primary tax concerns, but by economic policy considerations unconnected with the tax system. This extraneous quality is reinforced by the temporary nature of the tax measure. As regards the possibly legitimate nature of the objectives pursued, the Commission does not question this, although it would point out that it is not sufficient for a public measure to avoid being examined from a State aid perspective, since, as the case-law states ([46]): 'If that argument were followed, it would be sufficient for the public authorities to invoke the legitimacy of the objectives which the adoption of an aid measure sought to attain for that measure to be regarded as a general measure outside the scope of Article 92(1) of the Treaty. That provision does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects'.

(69) As to the existence of exemptions from corporation tax in other Member States and the fact that the Commission did not regard them as State aid because they were aimed at new firms, a point that, according to certain third parties, gives rise to legitimate expectations concerning tax aid for newly established firms, the Commission would point out that the preliminary results of the investigation of this question cast doubt on this line of argument. The tax holidays of these Member States were deemed to be State aid schemes ([47]) notified under Article 88(3) of the Treaty and compatible with the common market. Furthermore, even supposing that the Commission had not reacted, it would not be legitimate to take this misguided approach in the present case. According to the case-law of the Court of Justice, 'any breach by a Member State of an obligation under the Treaty in connection with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the common market are increased' ([48]).

(70) As regards the third-party comments that there are other tax measures in Spain which the Commission has not regarded as State aid because they are aimed at new firms, it should be emphasised that the characteristics of these measures is very different from those of the tax holidays in question. A scheme where, to be eligible, it is necessary to create three jobs cannot be compared with one that requires ten, nor is one where the aid consists of a 95 % reduction of taxable income for three years comparable with a 10 year exemption. Furthermore, the Commission considers that the decisions adopted on the said tax holidays cannot prejudice those which, as appropriate, it has to adopt on the other tax measures cited.

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

([46]) See paragraph 53 of the judgment cited in footnote 45.

([47]) See France: tax aid scheme for 'enterprise areas' N 155/86, approved by Commission decision of 21 January 1987, Seventeenth Competition Report, point 245; Regional Planning Act aid scheme N 493/95, approved by Commission decision of 29 November 1995, OJ C 53, 22.2.1996; Italy: aid scheme pursuant to Law No 64 of 1 March 1986 on special assistance for the Mezzogiorno, approved by Commission decision of 2 March 1988 (OJ L 143, 10.6.1988); Luxembourg: Regional Planning Act aid scheme N 607/92, approved by Commission decision of 9 December 1992 (OJ C 39, 13.2.1993); regional aid map assistance scheme N 72/96, approved by Commission decision of 20 September 1996, OJ C 51, 21.2.1997; regional aid scheme for economic development N 793/B/99, approved by Commission decision of 19 July 2000 (OJ C 278, 30.9.2000).

([48]) See Case C-78/76, *Steinike & Weinlig* v *Federal Republic of Germany*, [1977] ECR 141, paragraph 24. On the other hand, Case C-313/90, *Comité International de la rayonne et des fibres synthétiques and others* v *Commission*, [1993] ECR I-1125, paragraph 45, states that 'neither the principle of equal treatment nor that of the protection of legitimate expectations may be relied upon in order to justify the repetition of an incorrect interpretation of a measure'.

(71) 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 tax system of each of the three Basque historic territories.

(72) In short, the Commission considers that the exemption from corporation tax is State aid within the meaning of Article 87(1) of the Treaty, since it confers an advantage, is granted by the State from state resources, affects trade between Member States and distorts competition in favour of certain firms.

6.2. **New aid**

(73) The Commission considers that the aid does not have the character of an existing aid, since it does not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999. It does not satisfy criteria (i) to (iv) ([49]) since it was not introduced before Spain's accession on 1 January 1986; was never authorised by the Commission or the Council; cannot be regarded as having been authorised, since it was never notified; and was granted at least 10 years ago.

(74) The Commission also considers that the tax exemption does not satisfy the conditions in Article 1(b)(v) ([50]). Neither in its correspondence nor in any other document has the Commission ever stated directly or indirectly that it considers the tax measure in question is not aid. On the contrary, in Decision 98/C 103/03 of 18 November 1997 ([51]), it took the view that the new tax holiday that Álava introduced in 1996, and for which, in addition to other aid, Demesa was eligible, could contain aid elements that might be incompatible. Subsequently, in Decision 1999/718/EEC concluding the procedure, the Commission considered that the tax holiday was State aid that was incompatible with the common market. The Commission has followed the same approach of considering tax holidays as State aid with regard to other tax measures introduced by other Member States, such as France (decision of 21 January 1987 in case N 155/86 and of 29 November 1995 in case N 493/95), Italy (decision of 2 March 1988) and Luxembourg (decision of 9 December 1992 in case N 607/92 and of 20 September in case N 72/96). Since all these decisions, except 1999/718/EEC, were adopted not only before 10 December 1998 (date of publication of the Commission notice on the application of the State aid rules to measures relating to direct business taxation) but even before 1 December 1997 (date of the resolution on a code of conduct for business taxation), the Commission would emphasise that the decision to consider the tax holiday introduced in 1993 as State aid is not due, as the Guipúzcoa Provincial Council claims in its comments, to the Commission changing the criterion when examining current tax schemes in the light of the notice or of the Code of Conduct.

(75) Furthermore, regarding the Spanish authorities' claim that if the Commission considered that the tax holiday was State aid it should have initiated the procedure immediately, on the basis of paragraph 12 in Case C-84/82 (see footnote 9), the Commission would point out that this precedent is not relevant, since it applies only to notified aid schemes. The Commission emphasises that under Article 13(2) of Regulation (EC) No 659/1999 it is not subject, where illegal aid is concerned, to the time limits applicable in the case of notified aid schemes. It also points out that, by letter to the Permanent Representation dated 19 January 1996, it asked for information about the possible recipients of the measure. By fax dated 16 February, confirmed by letter dated 19 February 1996, the Spanish Permanent Representation requested a 15-day extension of the

([49]) Article 1(b) (i) to (iv) of Regulation No 659/1999 read as follows:
'(b) 'existing aid' shall mean:
(i) 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;
(ii) authorised aid, that is to say, aid schemes and individual aid authorised by the Commission or by the Council;
(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;
(iv) aid which is deemed to be existing aid pursuant to Article 15.'

([50]) Article 1(b)(v) of Regulation (EC) No 659/1999 reads as follows:
'(b) "existing aid" shall mean:
(…)
(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation'.

([51]) Decision to initiate the formal investigation procedure in Article 93(2) in respect of certain aid granted to Demesa, Álava (OJ C 103, 4.4.1998, p. 3).

deadline for replying. By letter dated 21 March 1996, the Spanish Permanent Representation requested a further extension of 30 days. Despite these requests, which indicated that a reply might be forthcoming, the Spanish authorities did not answer the Commission's request for information. The Commission would also point out that it initiated a procedure in respect of other similar State aid measures in the form of a reduction of taxable income for certain new firms in Guipúzcoa (C 50/99) on 29 September 1999. In its final decision of 12 July 2001 it concluded that the said aid was incompatible.

(76) In short, because it does not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999, the tax measure in question cannot be regarded as existing aid. The Commission considers, however, that it may be regarded as new aid within the meaning of Article 1(c) of the same Regulation ([52]) ([53]).

6.3. **Illegality**

(77) Since the scheme does not require a commitment from the Spanish authorities to grant the aid in accordance with the conditions for *de minimis* aid ([54]), 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. Nor can the aid comply with the *de minimis* rules, since there is no guarantee that the *de minimis* threshold will not be exceeded.

(78) The Commission affirms that State aid that 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. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considers that the aid should be regarded as unlawful.

(79) As regards the argument put forward by certain third parties that the tax measure cannot be classified as illegal on account of the legitimate expectations created by the Commission's approval of the Basque tax system, this can only be rejected, since, firstly, under Article 1(f) of Regulation (EC) No 659/1999, an aid is illegal if, as in the present case, it has not been notified under Article 88(3) of the Treaty. Secondly, since it was not notified, a decision could never be taken by the Commission as to its compatibility with the common market ([55]). As to the alleged approval by the Commission of the 'Basque tax system', which according to the comments of interested third parties, is the result of Decision 93/337/EEC, the Commission would point out, first, that the Decision did not refer to any 'Basque tax system' but to a series of specific tax measures ([56]) introduced by Álava, Guipúzcoa and Vizcaya respectively in 1988 and, second, that in that Decision those measures were regarded as State aid. Article 1(4) of the Decision ([57]) provided, moreover, that the granting of the aid should be subject to a series of conditions, such as observance of the ceilings for regional aid, the rules applicable to SMEs and the provisions on the combination of aid. It was not a question therefore of approving the Basque tax system but of describing as State aid certain tax measures and imposing conditions for the granting of that aid. Consequently, the decision did not prejudice in any way any positive decision that the Commission might take concerning any other new tax measure that might be

([52]) In Article 1(c) of Regulation (EC) No 659/1999, new aid is defined as '(c) "new aid": all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

([53]) Letter to the Spanish Permanent Representation, D/10687, dated 19 January 1996.

([54]) The assessment of the aid is the same whether it is based on the Community guidelines on State aid for small and medium-sized enterprises (SMEs), the Commission notice on the *de minimis* rule for State aid or Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (see footnote 6).

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

([56]) The measures consisted basically in 95 % relief of the tax on capital transfers and documented legal acts, a 20 % tax credit in respect of investments, complete freedom as to the depreciation of assets constituting new investments, an increase in the tax credit up to 5 % of the investment, depending on the employment created, and an increase in the tax credit up to 20 % of the investment in the case of investments of special technological interest.

([57]) See Article 1(4) of Decision 93/337/EEC: 'Within two months of the notification of this decision, the Spanish authorities shall ensure that the aid is granted within the national regional aid areas and ceilings or in accordance with the conditions laid down in the Community guidelines on State aid for small and medium-sized enterprises, in compliance with the Community rules on the cumulation of aid for different purposes and with the limits laid down for certain sectors of activity in industry, agriculture and fisheries'.

introduced in the Basque Country. In short, contrary to what is claimed in the third-party comments, there never was any Commission decision that approved the 'Basque tax system' in the abstract and, hence, any new tax measure such as the tax exemption in question, or at least deprived that system of its illegal character ([58]).

6.4. **Compatibility with the common market**

(80) As a preliminary, the Commission would repeat that the exemption from corporation tax has to be classed as an aid scheme. Given the general, abstract nature of an aid scheme, the Commission is not obliged to examine the situation of each potential recipient individually. In any event, it does not know the circumstances of existing or prospective recipients and is not, therefore, able to examine the exact repercussions on the competitiveness of specific firms. It is sufficient to ascertain that potential recipients could benefit from aid that is not consistent with the Community directives, guidelines and frameworks. Moreover, the Commission would again stress that, in its decision initiating the procedure, it asked the Spanish authorities for all relevant information that would allow it to assess the aid. The request was clearly intended to enable the Commission to obtain a general idea of the actual effects of the scheme and not to gather data sufficient for carrying out individual appraisals. However, the Spanish authorities have not provided any information on the instances where the tax holiday was applied. 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 information requested.

(81) As the scheme in question covers only the NUTS ([59]) III territory of Guipúzcoa, it is necessary to examine whether aid in this historic territory can qualify for the regional derogations in Article 87(3)(a) or (c). The Commission would point out in this respect that Guipúzcoa has never been eligible for the Article 87(3)(a) derogation, since the per capita GDP ([60]) of the NUTS II region of the Basque Country, of which it forms part, has always been higher than 75 % of the Community average. According to the rules on regional aid ([61]) ([62]), the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty are met only if the region, at NUTS II, has a per capita GDP of not more than 75 % of the Community average. The Commission notes however that, according to the regional aid map ([63]) Guipúzcoa was a region in which State aid could be considered partly compatible with the common market under the regional derogation in Article 87(3)(c) of the Treaty.

(82) State aid in the form of an exemption from corporation tax promotes the formation in Guipúzcoa of new firms whose initial investments and numbers of employees exceed certain thresholds. However, despite this minimum investment and the creation of a minimum number of jobs, the tax aid in question does not qualify as investment or employment aid. The basis for the aid is not the size of the investment, the number of jobs created, or the corresponding wage costs, but taxable income. Furthermore, the amount of aid is not a function of an investment ceiling, the number of jobs, or the corresponding wage costs, but of taxable income. According to Annex I to the guidelines on national regional aid, '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'. It follows that aid, which, as in the present case, does not meet these criteria, cannot be regarded as investment aid.

(83) On the contrary, since it partly reduces the profits tax paid by the recipient firms, the aid qualifies as operating aid. Corporation tax is a tax burden which companies subject to it have to pay regularly and inevitably as part of their everyday management. It is therefore appropriate to examine the tax aid in the light of any

([58]) See footnote 23.
([59]) Nomenclature of territorial units for statistics.
([60]) Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).
([61]) The references to the regional rules are confined, in the following recitals, to the guidelines on national regional aid (see footnote 17). Where the aid was granted before the guidelines came into force, the Commission's assessment is based on the rules current at the time it was granted. Nevertheless, since the relevant parts of the said rules have not changed, it is sufficient to refer to the latest text in this case.
([62]) See point 3.5 of the guidelines on national regional aid (see footnote 17).
([63]) The successive regional aid maps that have applied since Spain's accession were the one adopted in 1988 in Commission Decision 88/C 351/04, the amended map (see communication 96/C 25/03) in the decision of 26 July 1995, and the map for 2000 to 2006 adopted in the decision of 11 April 2000.

derogations that may apply to the operating aid in question.

(84) The Commission would point out that, under the guidelines on national regional aid, regional aid, which has the character of operating aid, is in principle prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty, subject to certain conditions laid down in points 4.15 to 4.17 of the guidelines, in the outermost regions or in regions of low population density if it is intended to offset additional transport costs. However, the NUTS III territory of 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 III territory of Guipúzcoa is neither an outermost region ([64]) nor a region of low population density ([65]). This is the reason why the operating aid elements in the exemption from corporation tax 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.

(85) The Commission therefore considers that the tax aid scheme 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.

(86) 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 purposes other than the development of certain economic activities. The Commission notes in this respect that the exemption from corporation tax is not intended 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 aid cannot qualify for the derogation in Article 87(3)(c) of the Treaty in respect of the said purposes.

(87) The exemption from corporation tax is not subject to any sectoral limitation and may therefore be granted without any restriction to firms 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 ([66]). The Commission considers that, as a result, the exemption from corporation tax cannot comply with the said sectoral rules. In this particular case, the aid 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.

(88) 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), nor is it intended to make good the damage caused by natural disasters or exceptional occurrences in accordance with 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) of the Treaty. 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.

(89) Since the exemption from corporation tax covers several tax years, there could still be some tax aid left to pay, but as this aid is unlawful and incompatible, the Spanish authorities should cancel the payment of any balance

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

([65]) See point 3.10.4 of the guidelines on national regional aid (see footnote 17).

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

from the exemption from corporation tax which could still be due to certain recipients

6.5. **Recovery of aid already paid**

(90) According to certain of Confebask's comments (see above), the aid should not be repaid on account of the legitimate expectations arising, first, from the fact that for many years the Commission did not describe the measures in question as State aid and, second, from the existence of other tax holidays in the rest of the Member State, which were not called into question by the Commission.

(91) As a preliminary, it should be noted that Confebask is not arguing that the Basque firms it represents did not realise that the exemption from corporation task granted on certain conditions to newly established firms did not confer an advantage. The Commission considers therefore that those firms were aware of the advantage conferred by the exemption.

(92) It should also be pointed out that the tax exemption was not put into effect in accordance with the procedure provided for in Article 88(3) of the Treaty. According to established case law ([67]), however, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent economic operator should normally be able to make sure that this procedure has been complied with. In the case in point, Confebask, which attached copies of the correspondence between the Commission and the Spanish authorities to its comments, cannot claim it was unaware that the measures were illegal.

(93) To be sure, the case-law ([68]) does not rule out the possibility that recipients of illegal aid may invoke exceptional circumstances, which may reasonably have sustained their legitimate expectation that the aid was valid, in order to oppose repayment, but in this case none of the circumstances put forward in the comments of interested third parties may be taken into account. As regards the possible legitimate expectation created by the Commission not describing the measures in question as State aid for a long period, the Commission would point out firstly that, under Article 13(2) of Regulation (EC) No 659/1999, in cases of possible unlawful aid it is not bound by the time limits applicable to notified aid. Consequently, it is not obliged to adopt decisions on unlawful aid, as in the present case, within two months ([69]) (in accordance with Article 4(5)) or within 18 months ([70]) (under Article 7(6)). It should also be pointed out that in its letter of 25 May 1994 to the Spanish Permanent Representation, which Confebask attached to its comments, the Commission drew the Spanish Government's attention to the letter to Member States of 3 November 1983 concerning the obligations arising from Article 93(3) of the Treaty and to the communication published in OJ C 318 of 24 November 1983, in which it repeated that any aid granted unlawfully could be the subject of a request for repayment. Consequently, in the first letter which it sent to the Spanish Permanent Representation following the complaint lodged in 1994, the Commission warned the Spanish authorities that the tax exemption might have the character not only of an aid but also of an illegal aid and that, if appropriate, it might have to be repaid. Moreover, in its correspondence with the Spanish authorities since 1994, the Commission has never described the tax exemption, either directly or indirectly, as compatible with the common market.

(94) As regards the legitimate expectation arising from the existence of other tax holidays in the rest of Spain, it should be noted, as already explained, that the measure has very different characteristics. In the circumstances, it is difficult to justify similar treatment for measures that are very disparate. It should also be noted that, in the case of the other tax holidays, the Commission was unable to rule as to their compatibility, either because they had not been notified or because no complaint had been made against them. Nor has it ever given an opinion, either directly or indirectly, on these measures.

(95) As to the precedent of RSV ([71]), cited by third parties in support of a legitimate expectation arising out of the

([67]) See Case C-5/89, *Germany* v *Commission*, [1990] ECR I-3437, paragraph 14; Case C-169/95, *Spain* v *Commission*, [1997] ECR I-135, paragraph 51; Case C-24/95, Land *Rheinland-Pfalz* v *Alcan Deutschland* GmbH, [1997] ECR I-1591, paragraph 25.

([68]) See paragraph 16 of the judgment cited in footnote 71, and Case C-183/91, *Commission* v *Greece*, [1993] ECR I-3131, paragraph 18.

([69]) Decision to raise no objection or to initiate the formal investigation procedure.

([70]) Decision to terminate the formal investigation procedure.

([71]) See footnote 24.

long period that elapsed between the Commission's first letter, of 25 May 1994, and the decision to initiate the procedure in respect of the tax exemption, it is important to stress the particular circumstances of that case. In RSV, the aid was formally notified to the Commission, albeit late. It was also related to additional costs associated with a transaction for which aid had already been authorised by the Commission. It concerned a sector that had been receiving aid authorised by the Commission for several years. An exhaustive investigation was not necessary, therefore, in order to determine whether the aid was compatible. In the present case, however, the aid was not notified, is not linked to aid that has been authorised by the Commission, and does not concern a sector that has received aid before. The Commission therefore considers that the RSV decision is not relevant in this case.

(96) The length of time that elapsed is largely due to the lack of cooperation on the part of the Spanish authorities. By letter to the Permanent Representation dated 19 January 1996, the Commission requested information about the possible recipients of the measures. By fax dated 16 February, confirmed by letter dated 19 February 1996, the Spanish Permanent Representation requested a 15-day extension of the deadline for replying. By letter dated 21 March 1996, the Spanish Permanent Representation requested a further extension of 30 days. Despite these requests, which would suggest that a reply might be forthcoming, the Spanish authorities did not answer the Commission's request for information. The Commission also notes that during this period the Spanish authorities were informed of the procedures it had initiated, following the complaints lodged in 1996 about aid to Demesa ([72]) and, in 1997, about aid to Ramondín ([73]), in respect of the tax holidays ([74]) introduced in Álava in 1996 and enjoyed, in addition to other aid, by those firms. As both files concluded that the 1996 tax holidays were unlawful and incompatible State aid, the information which the Spanish authorities received in this connection, far from arousing any legitimate expectation as to the compatibility of the tax exemption, indicated that it might be incompatible.

([72]) State aid file on aid to Demesa (see footnote 52); final Decision 1999/718/EC (see footnote 5).

([73]) State aid file on aid to Ramondín: Decision to initiate the procedure, 30 March 1999 (OJ C 194, 10.7.1999, p. 18); final Decision 2000/795/EC (see footnote 27).

([74]) State aid cases C 49/99, C 50/99 and C 52/99 relating respectively to the tax aid schemes (tax holidays) introduced by Article 26 of the following provincial laws: Provincial Law No 24 of 5 July 1996 (Álava), Provincial Law No 7 of 4 July 1996 (Guipúzcoa) and Provincial Law No 3 of 26 June 1996 (Vizcaya).

(97) In the circumstances, the Commission considers that it did not give any reason to hope that the tax exemption might be compatible. Thus the recipients cannot plead any legitimate expectations or legal certainty where this exemption is concerned. 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' ([75]).

(98) In short, in view of the arguments set out above, the Commission considers that the recipients may not rely on general principles of Community law such as legitimate expectations or legal certainty as regards incompatible aid already paid. 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 that 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 ([76]).

(99) 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.

([75]) See paragraph 300 of the judgment cited in footnote 56.

([76]) Commission letter to Member States SG(91) D/4577, 4 March 1991. See also Case C-142/87, *Belgium* v *Commission*, [1990] ECR I-959.

7. **CONCLUSIONS**

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

(a) Spain has unlawfully put into effect, in Guipúzcoa, an exemption from corporation tax for certain newly established firms, in breach of Article 88(3) of the Treaty;

(b) the exemption from corporation tax in question is incompatible with the common market;

(c) the Spanish authorities should cancel the payment of any aid balance, which could still be due to certain recipients. As regards the incompatible aid already paid, the Spanish authorities should take all necessary measures to recover it, so as to restore the economic situation which the recipient firms would be in if the aid had not been granted unlawfully.

HAS ADOPTED THIS DECISION:

Article 1

The state aid in the form of an exemption from corporation tax, unlawfully put into effect by Spain in the Historic Territory of Guipúzcoa, in breach of Article 88(3) of the Treaty, through Article 14 of Provincial Law No 18 of 5 July 1993, is incompatible with the common market.

Article 2

Spain shall abolish the aid scheme referred to in Article 1, if it is still in force.

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 aid to be recovered shall include interest from the date on which it became available to the recipients until the date of its effective 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, 20. December 2001

For the Commission

Mario MONTI

Member of the Commission