STATE AID

Invitation to submit comments pursuant to Article 88(2) (ex Article 93(2)) of the EC Treaty, concerning the aid/measure C 22/99 (ex NN 117/98) — Spain — Ramondín

(1999/C 194/12)

(Text with EEA relevance)

By the letter reproduced below, dated 30 April 1999, the Commission notified Spain that it had decided to initiate the procedure under Article 88(2) (ex Article 93(2)) of the EC Treaty.

PROCEDURE

By letter dated 2 October 1997 (registered on 23 October 1997 under number SG(97) A/38452), Mr Sanz Alonso, President of the Autonomous Community of Rioja, submitted a complaint concerning the circumstances which led the company Ramondín SA (referred to below as “Ramondín”) to decide to move its facilities from Logroño (Rioja), where it is currently located, to Laguardia, a municipality located in the Province of Álava, one of the three Provinces that make up the Autonomous Community of the Basque Country. According to Mr Sanz, this decision was motivated by tax incentives and public aid for investments.

In a letter dated 2 January 1998 (SG(98) D/50003) the Commission informed the Spanish authorities of this complaint and requested them to present, within 15 working days, their observations and any information which would enable the Commission to determine whether aid within the meaning of Article 92(1) of the EC Treaty was involved.

After receiving a reminder sent on 11 March 1998 (SG(98) D/51136), the Spanish authorities presented their observations and furnished information in a letter dated 13 March 1998 (registered on that same date under number SG(98) A/32119).


In the light of information published in the press (El Correo, 4 October 1998), the aid was entered on the register of non-notified aid under number NN 117/98.

In the light of the observations and information presented by the Spanish authorities and the supplementary information presented by the Rioja authorities, the Commission sent a letter (SG(98) D/54346) on 26 October 1998, inviting Spain to provide within 15 working days detailed information about Ramondín’s investment at Laguardia — which, according to information published in the press, and meanwhile ceased to be a mere plan and had moved into the implementation stage — as well as information on the regional aid and tax concessions received by Ramondín. That same letter pointed out that when the Commission considers aid to have been granted or altered without due notification having been made, and after having allowed the Member State to express its opinion on the matter, the Commission is empowered to take an interim decision ordering the immediate suspension of payment of such aid and the transmission, within a time limit set by the Commission, of all documents, information and data necessary to determine whether such aid is compatible with the common market. The Commission therefore informed the Spanish Government that it might have to order suspension of payment of the aid in question pending a detailed investigation.


Complaint submitted by the Autonomous Community of Rioja and reply by the Spanish Permanent Representative

Complaint

In his complaint dated 2 October 1997, Mr Sanz Alonso, President of the Autonomous Community of Rioja, a region of Spain adjacent to the Province of Álava and separated from it by the River Ebro, alleged that Ramondín’s decision to move its industrial facilities from Logroño (Rioja) to Laguardia (Álava), five kilometres from its present site, was motivated by tax incentives offered by the Álava Provincial Council and public investment aid offered by the Autonomous Community of the Basque Country.

Ramondín, located at Logroño since 1972, manufactures a full range of capsules for sealing corked bottles for still and sparkling wines and liqueurs. These capsules are produced in plastic, aluminium and tin. Ramondín has over 50% of the world market for tin capsules, and more than 75% of its sales are exported from Spain, making it the world leader in the capsule industry. Ramondín employs 400 people and generates turnover of more than ESP 5 billion (1).

Reply by the Spanish Permanent Representative

In its letter of 2 January 1998, the Commission informed the Spanish authorities that, according to the complainant, the combination of the various aid measures (tax concessions and others) which Ramondin had received exceeded the maximum limit of 25 % set for regional aid in the Basque Country. This constituted a distortion of competition, particularly in view of Ramondin's position on the European and world markets.

In their reply dated 13 March 1998 the Spanish authorities first pointed out that the Commission had asked them to comment on the motives of a corporate decision, and observed that tax incentives were only one among many reasons for making a decision of this type. In support of this statement the Spanish authorities reported that Ramondin had been forced to seek a new site for its industrial facilities when the municipality of Logroño decided that the industrial land on which the company was located was to be reclassified as urban land.

Moreover, as the Basque authorities pointed out, if the information furnished by the Autonomous Community of Rioja was correct, corporate moves to the Basque Country would be a widespread phenomenon, which did not appear to be the case, particularly inasmuch as the complainant did not present any figures to that effect.

As regards the existence of aid, the Spanish authorities indicated in their response that the Basque authorities had not offered grants or other types of aid to Ramondin and the rules on combination of different types of aid were therefore not applicable.

More specifically, as regards tax aid, i.e. the tax concessions linked to investments made in the Province of Álava, the Basque authorities denied that they constituted aid within the meaning of Article 92(1) of the EC Treaty.

In reference to this point, the Basque authorities noted, first, that by virtue of Spain's specific history and Constitution, there are five authorities with powers to adopt tax legislation in Spain: three in the Basque country (one for each of the three Provinces), one in Navarre, and the Central Government, whose tax powers cover the rest of Spain. The tax system applied in each of these territories is the general system. It cannot therefore be maintained that aid was granted or offered inasmuch as the current tax system is applicable in its entirety and without distinction to all companies established in the Province of Álava. The provincial tax authorities simply apply the law and are not empowered to decide whether the tax system is or is not applicable to a particular company. The fact that companies established — or wishing to establish operations — in the Province of Álava can enjoy the tax benefits pre-established by the system in no way means that any kind of aid has been granted to those companies inasmuch as the system (including its benefits) is applied automatically and not at the discretion of the authorities. Tax concessions thus constitute general measures which do not fall within the scope of Article 92 of the EC Treaty. This applies particularly to the tax credit applied in the form of a 45 % reduction in final corporation tax liability (7).

Supplementary information presented by the authorities of the Autonomous Community of Rioja

The Rioja authorities responded to the Commission's letters of 18 June 1998 and 17 July 1998 with a letter dated 2 October 1998, containing the following additional information:

(a) a report by the Legal Department of the municipality of Logroño, which states that the decision to reclassify the land will not take effect until the year 2016 and that, in any event, reclassification will not affect already existing buildings. Thus there is no causal link between the decision to reclassify the land and Ramondin's decision to leave the region;

(b) on 5 March 1997 Ramondin's managing director sent a letter to the President of the Autonomous Community of Rioja informing him that Ramondin was likely to leave Rioja and set up operations at Laguardia due to the economic and tax incentives offered by the Province of Álava, unless Rioja was to offer to make an “investment”, which, according to the managing director, would “be recouped in three years”. The authorities of Rioja have furnished a copy of this letter.

These same authorities have furnished the Commission with proof that the Álava provincial authorities have approached potential investors currently located in Rioja in an attempt to encourage them to move to the Basque Country in order to benefit from advantageous terms for purchasing land, financing within the framework of the Ekimen programme (8) and the tax concessions available in Álava.


The President of the Autonomous Community of Rioja has pointed out that his Autonomous Community is not able to offer advantages of this type because, on the one hand, Rioja is not eligible for regional aid under Article 92(3) of the EC Treaty and, on the other hand, Rioja is unable to offer investors the tax incentives offered by the Alava authorities because it applies the ordinary tax system.

Reply by the Spanish Permanent Representative to the Commission's letter of 26 October 1998

In the abovementioned letters dated 22 December 1998 and 5 January 1999, the Spanish Permanent Representative forwarded the Basque regional authorities’ reply to the various allegations. Their position, which was backed by very detailed documentation, can be summed up as follows:

(a) the fact that the town planning policy measures that the company claims as the basic reason for the decision to move its industrial facilities to a new location will not take effect until the year 2016 does not mean that Ramondin does not already have insurmountable problems of space. First, because any decision to enlarge its current facilities would only be temporary inasmuch as the current site, Cascajos, has been reclassified. Second, due to the prohibitive price of land as a result of this reclassification;

(b) the price paid by Ramondin for a 55 050 m² plot at Laguardia was ESP 2 500 per square metre. The Basque regional authorities have undertaken to produce proof that this corresponds to a market price;

(c) it is not true that the Basque regional authorities have approached companies established in Rioja in order to offer them advantageous economic terms. Basque Government action is limited to replying to requests for information from interested companies;

(d) in order to better illustrate their case, the Basque authorities furnished the Commission with a copy of a letter addressed to Ramondin by the Rioja authorities, informing the company of the benefits for which it would be eligible should it decide to remain in Rioja. Chief among them were the following:

(i) acquisition of a plot of land at a “symbolic” (sic) price;

(ii) a non-repayable grant of up to 60 % of costs for the purchase of fixed assets. This would involve constituting a new firm;

(iii) a non-repayable grant of up to 60 % of costs of R&D programmes;

(iv) a non-repayable grant of up to 50 % of costs for marketing;

(v) grants for employee training and job creation (ESP 750 000 per job created);

(e) moving the company facilities was not a move instigated by the regional authorities but was a corporate decision.

Having regard to the information presented by the Basque regional authorities, the Commission notes that the Rioja regional authorities offered financial advantages (as, for example, the offer of a plot of land at a symbolic price), which, had they materialised, could have constituted State aid, within the meaning of Article 92(1) of the Treaty. The Commission notes with concern that escalating promises of ever more generous aid, such as in the case in point, could lead some Community regions to exceed what is legally admissible under Community law in terms of State aid, which would necessarily be detrimental to competition, the harmonious development of the common market, and cohesion.

It would be desirable for the Spanish authorities to take measures to prevent such escalation in promises of aid, each one more generous than the last, since it creates a significant risk of distorting competition in the single market.

Business plan

In a letter dated 5 January 1999, the Spanish Permanent Representative presented a copy of Ramondin’s investment plan, which reveals that the company planned to invest ESP 4 271 million to move existing assets currently located in Rioja and purchase new fixed assets. Ramondin subsequently decided to channel its new investments through a new company, Ramondin Cápsulas SA (referred to below as “Ramondin Cápsulas”), 99,8 % of whose capital is controlled by Ramondin. The new company plans to invest ESP 1 954 million between 1998 and 2000 in order to install a factory at Laguardia (Alava), which will be equipped with three production lines, two of which will produce plastic, aluminium and tin capsules while the third will produce lead for electric batteries.

The investment plan cites the following investments as eligible costs and forecasts that 30 jobs will be created.

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<th>1998</th>
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<th>2000</th>
<th>Total</th>
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<td>Land and buildings</td>
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<td>438 666</td>
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<tr>
<td>Machinery and equipment</td>
<td>932 000</td>
<td>214 000</td>
<td>170 000</td>
<td>1 318 000</td>
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<tr>
<td>Eligible costs</td>
<td>1 370 000</td>
<td>214 000</td>
<td>170 000</td>
<td>1 754 666</td>
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According to the plan, the world market for capsules, and particularly tin capsules, in which Ramondin has a 40 % market share, is flourishing.
Aid measures

In the light of the information contained in the abovementioned letters dated 22 December 1997 and 5 January 1999, Ramondín can be said to have benefited from the following aid:

(a) an ESP 150 million grant awarded by the Basque Regional Government to Ramondín Cásulas on 15 October 1998 within the framework of the Ekimen regional aid programme authorised by the Commission on 13 December 1996. This grant was awarded in respect of an investment of ESP 1 754 million, which corresponds to an intensity of 8,55 % gge (gross). The maximum intensity of aid allowed in the Basque Country is 25 % gge (1) (35 % in the case of SMEs);

(b) a tax credit equivalent to 45 % of the total amount of the ESP 3 857 million investment, granted by Decision 738/97 of 21 October 1997;

(c) a reduction of 99 %, 75 %, 50 % and 25 % in the basis of assessment for corporation tax, applicable, respectively, for four consecutive years running from the first year in which the basis of assessment is positive. These reductions are available to newly established companies, on condition that they invest a minimum of ESP 80 million and create a minimum of 10 jobs (2). As a newly-established company, Ramondín Cásulas is eligible for these reductions.

In a letter dated 5 January 1999, the Spanish authorities undertook to provide details on the price of the land and to demonstrate that it was purchased at market price. These details have not so far been presented and the Commission is consequently unable on the basis of information in its possession to establish whether aid was involved in the sale of the land by Álava Agencia de Desarrollo SA to Ramondín for ESP 2 500 per square metre as specified in a contract signed on 28 October 1997.

ASSESSMENT OF THE MEASURES AND THEIR LEGAL CONSEQUENCES

In its assessment, the Commission has taken into account those aspects of the case which are relevant for the purposes of Articles 92 to 94 of the EC Treaty in order to determine whether state aid exists and whether it is compatible with the common market in the light of the Treaty. A good number of the arguments presented by both the complainant and the Basque regional authorities are not pertinent to this issue.

(a) Aid granted under the Ekimen programme (information injunction)

The non-repayable grant covering 8,55 % of investments was awarded to Ramondín Cásulas within the framework of the abovementioned Ekimen programme, a regional aid scheme authorised by the Commission. In accordance with the case-law of the Court of Justice of the European Communities (Cases C-47/91 Italy v. Commission (3) and C-278/95 Siemens SA v. Commission (4)), when the Commission has before it a specific grant of alleged to be made in pursuance of previously authorised programme, it cannot at the outset examine it directly in relation to the Treaty. Prior to the initiation of any procedure, it must first examine whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it. If the Commission has doubts as to the conformity of individual aid measures with its decision approving the general scheme, it is up to it to order the Member State concerned to supply to it, within such a period as it may specify, all such documentation, information and data as are necessary in order that it may form a view on the compatibility of the aid in question with its decision approving the aid scheme. Where, following this examination, the Commission finds that the individual aid is not covered by its decision approving the scheme, the aid must be regarded as new.

In view of the circumstances surrounding Ramondín’s decision to relocate its facilities, the Commission has serious doubts as to whether the entire amount of Ramondín’s investment can possibly be considered an “initial investment” for the purposes of the rules governing the assessment of regional aid (5), which define “initial investment” as “an investment in fixed capital relating to the setting-up of a new establishment, the extension of an existing establishment, or the starting up of an activity involving a fundamental change in the product or production process of an existing establishment” (6).

This was confirmed in the Commission’s letter of 13 December 1996 approving the Ekimen programme, which stipulated that the aid provided for by the scheme was to be used to finance initial investments or investments to enlarge or modernise existing establishments and that investments for replacement purposes were excluded from the scope of the scheme.

According to the information in the Commission’s possession, Ramondín does not have a new factory at Laguardia that operates in conjunction with the Logroño plant nor does it plan to open one. The decision to move the factory involved, on the one hand, closing the Logroño factory, and on the other opening the Laguardia factory. This was confirmed by Ramondín, which reported that the Logroño factory was "moved” due to a need to enlarge (7).

(1) [1994] I-4635.
(2) [1997] I-2507.
(3) See the Commission’s 1979 communication (OJ C 31, 3.2.1979), and in particular point 18(a) of the Annex for the definition of ‘initial investment’. This definition is reproduced in point 4.4 of the guidelines on national regional aid (OJ C74, 10.3.1998).
(4) See point 18(a) of the guidelines.
(5) See footnote 1.
The Commission takes the view that there is evidence for considering that the investment at Laguardia involves the extension of an already existing establishment. According to information published in the press, 30 new jobs are to be created. Ramondin's business plan also refers to an extension of the factory. On the basis of available information, the Commission now considers that the characteristics of Ramondin's "move" only partly correspond to the setting-up of a new establishment or the start-up of an activity involving a fundamental change in the product or production process of an existing establishment.

In view of the foregoing, and in accordance with the judgment of the Court of Justice in Case C-47/91 Italy v. Commission, the Commission considers it necessary to give the Spanish Government formal notice to supply, within one month, all the documentation, information and data necessary to enable the Commission to determine whether, in accordance with its decision notified by letter of 13 December 1996 approving the Ekimen programme, Ramondin CÆpsulas' investment at Laguardia constitutes an initial investment or an investment in extending or modernising an already existing establishment rather than a replacement investment.

(b) Tax aid (initiation of proceedings and request for information)

In his complaint, Mr Sanz Alonso requests the Commission to check the compatibility with the Treaty and secondary legislation not of the provincial tax system or arrangements in force in the Province of Álava but of the effects and impact of the aid granted in accordance with that system and of its combination with other aid granted to Ramondin. Mr Sanz Alonso further states that the practical effects of the Basque tax system are such that they distort free competition in the European Community.

It should also be recalled that tax relations between the Spanish State and the Basque Country are governed by the Economic Agreement established by Law 12/1981 of 13 May 1981, as last amended by Law 38/1997 of 4 August 1997. Under the Economic Agreement, the Álava Provincial Council may, under certain conditions, maintain, establish and regulate the tax system within its territory, with the exception of taxes associated with customs, tax monopolies and alcohol, regulations on which are the exclusive responsibility of the Central Government (1). Using the powers conferred on it by the Economic Agreement, the Álava Provincial Council established a system of tax aid for investment within the framework of corporation tax. The beneficiaries of this aid are natural and legal persons carrying on an economic activity within the Province of Álava.

The Commission further points out that tax incentives similar to those being assessed in this case (tax credit and reduction in the basis of assessment) were declared incompatible with the common market by the Commission's Decision of 24 February 1999 in Case C-76/97 (Daewoo Electronics Manufacturing España SA), which was notified to the Spanish authorities by letter dated 15 March 1999 and has not yet been published.

Tax credit equivalent to 45 % of the cost of investments and reduction in the tax base for newly created businesses

This Decision relates only to those tax measures explicitly examined herein and does not assess the other measures provided for by the specific tax arrangements adopted in the Province of Álava. The Commission reserves the right to examine any such measures that might constitute aid, either as general schemes, or in so far as they might be applied to Ramondin or Ramondin CÆpsulas.

Tax credit

The tax credit is governed by the Sixth Additional Provision of Provincial Law 22/1994 on the implementation of the budget of the Province of Álava for 1995, which reads as follows:

"Investments in new tangible fixed assets carried out between 1 January 1995 and 31 December 1995 and exceeding ESP 2 500 million shall, by decision of the Álava Provincial Council, qualify for a tax credit equivalent to 45 % of the amount of the investment, as determined by the Álava Provincial Council, to be offset against the amount of personal tax liability.

Any tax credit not used up because it exceeds the amount of tax liability may be carried forward and used for up to nine years following that in which the decision of the Álava Provincial Council is taken.

The decision of the Álava Provincial Council shall lay down the time-limits and restrictions applicable in each individual case.

Benefits granted under this provision shall be incompatible with any other tax concessions for which the same investments may be eligible.

The Álava Provincial Council shall also decide on the duration of the investment process, which may include investments made during the preparatory phase of the project which generates the investments."

This measure was kept in force in 1996 by the finance act for that year (Provincial Law 33/1995), as amended by the new corporation tax act (Provincial Law 24/1996, which deleted the reference to the period of nine years in the second paragraph) and in 1997 by the finance act for that year (Provincial Law 31/1996). The tax credit equivalent to 45 % of the amount of investments was maintained, with amendments to the wording of the provisions, in 1998 and 1999 by Provincial Laws 33/1997 and 36/1998 respectively.

The principle that State aid is incompatible with the common market and the exceptions provided for by the Treaty apply to aid "in any form whatsoever" and, in particular, to certain tax measures.

If it is to be classed as aid, a measure has to satisfy each of the four criteria mentioned in Article 92 and spelled out below.

First, the measure must afford the beneficiaries an advantage that reduces the costs they normally have to bear in the course of their business. The advantage may be granted through different types of reduction in the company's tax burden and, in particular, through an exemption from or reduction in tax liability.

The 45 % tax credit in question undoubtedly fulfils this criterion since, thanks to the credit, Ramondín enjoys a reduction in its tax burden equivalent to 45 % of the amount of the investment as determined by the Álava Provincial Council. The tax credit can, however, be used without any time-limit, starting in the first year in which the company makes a profit.

Second, the advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to the use of State resources in the form of tax expenditure. This criterion also applies to aid granted by regional or local bodies in the Member States (judgment of the Court of Justice of 14 October 1987 in Case 248/84 Germany v. Commission (12)) that, where the entity granting an advantage enjoys a degree of latitude which enables it to vary its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the time-limits and other conditions under which it is provided, as well as to decide on whether or not to renew the measures concerned from one year to the next according to criteria unknown to the Commission, the conditions in which such assistance is granted are liable to place certain firms in a more favourable situation than others and thus to meet the conditions for classification as aid within the meaning of Article 92(1) of the Treaty.

When it adopted Decision 738/97, the Álava Provincial Council, pursuant to the abovementioned provisions, discretionarily powers for determining which investments in tangible fixed assets amounting to more than ESP 2 500 million qualified for the tax credit, deciding to which part of the investments the 45 % reduction could be applied, and establishing the time-limits and maximum ceilings applicable in each case.

The text of Decision 738/97 granting the tax credit to Ramondín indicates that the credit corresponds to 45 % of an ESP 3 857 million investment. The Decision also stipulates that there is no time-limit on the use of the tax credit; it is therefore impossible to calculate precisely its intensity. On the basis of the profit forecasts set out in Ramondín's business plan, the aid intensity of the tax credit is 33,5 % nge. However, the Álava Provincial Council reserves the right to determine the amount of the tax credit for each year, depending on the investments made.

With regard to this condition, the Court of Justice held in Kimberley Clark Sopalin (judgment of 26 September 1996 in Case C-241/94 France v. Commission (13)) that, where the entity granting an advantage enjoys a degree of latitude which enables it to vary its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the time-limits and other conditions under which it is provided, as well as to decide on whether or not to renew the measures concerned from one year to the next according to criteria unknown to the Commission, the conditions in which such assistance is granted are liable to place certain firms in a more favourable situation than others and thus to meet the conditions for classification as aid within the meaning of Article 92(1) of the Treaty.

Secondly, although the discretionary nature of the tax credit is sufficient for it to be classed as a specific measure, and therefore as State aid, the Commission considers that the minimum investment required (ESP 2 500 million) to qualify for the credit is high enough to restrict its application in practice to investments which involve the raising of large amounts of capital, and that it is not justified by the nature or overall structure of the tax system to which an exception is made. The fact that only large investors can qualify for the tax credit makes it a specific measure, which in turn classifies it as State aid within the meaning of Article 92(1) of the Treaty.

Third, the measure must affect competition and trade between Member States. This criterion presupposes that the beneficiary of the measure carries on an economic activity, irrespective of its legal status or method of financing. The Court of Justice has repeatedly ruled, for the purposes of interpreting this condition, that intra-Community trade is to be deemed to be affected from the moment the beneficiary firm carries on an economic activity which is the subject of trade between Member States.

The information contained in the abovementioned business plan demonstrates that Ramondín is engaged in an economic activity which is the subject of trade between Member States.

(12) [1987] ECR 4013.

Fourth, the measure must be specific or selective in the sense that it favours "certain undertakings or the production of certain goods". The advantage may be selective because it is granted either a an exception to general tax arrangements established by law, regulation or administrative practice, or at the discretion of the tax administration. In the present case, the advantage is selective chiefly on account of the discretion enjoyed by the administration in granting it.

The tax credit granted to Ramondín derives from the combined effect of a budgetary measure and an individual decision (Decision 738/97), both taken by a public authority.

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Thirdly, the Commission takes the view that the temporary (annual) nature of the measure in fact allows the authorities discretion to grant the tax credit to certain firms only, namely those initiating their investment processes during the period covered by the measure. The Commission notes that the measure does not appear in general tax legislation, only in the annual finance acts, which confirms its temporary nature and enables it to be used for specific projects.

Fourthly, the Commission underlines the close similarities between this measure and the Ekimen scheme.

Consequently, and in line with the Commission's Decision of 24 February 1999 in Case C-76/97, the tax credit granted to Ramondín, corresponding to 45% of the amount of the investment as determined by the Álava Provincial Council, constitutes State aid within the meaning of Article 92(1) of the Treaty.

In its letter to Member States SG(89) D/5521 of 29 April 1989 the Commission stated that it "considers that a Member State has failed to fulfil its obligation to notify it where the process of putting aid into effect has been initiated. By 'putting into effect' it means not the action of granting aid to the recipient but rather the prior action of instituting or implementing the aid at a legislative level according to the constitutional rules of the Member State concerned. Aid is therefore deemed to have been put into effect as soon as the legislative machinery enabling it to be granted without further formality has been set up". This is undoubtedly the case with this measure, which has been carried out unlawfully in breach of the provisions of Article 93(3) of the Treaty.

Reduction in the tax base for newly created businesses

The reduction in the tax base for newly created businesses is laid down in Article 26 of Provincial Law 24/1996, which reads as follows:

"Article 26 — Reductions in the tax base: Newly created businesses

1. Companies starting their business activity shall be entitled to a reduction of 99%, 75%, 50% and 25% respectively in the positive basis of assessment deriving from their economic activity, before this is offset by any negative bases of assessment arising in previous periods, for the four consecutive tax periods running from the first period in which, within four years of starting their business activity, they generate a positive basis of assessment.

[...].

2. To qualify for this reduction, businesses shall fulfil the following conditions:

(a) They must start their business activity with a minimum paid-up capital of ESP 20 million;

(b) [...];

(c) [...];

(d) The new activity must not have been carried on previously, either directly or indirectly, under different ownership;

(e) The new business activity must be performed on premises or in an establishment where no other activity is carried on by any natural or legal person;

(f) They must during the first two years of their activity invest at least ESP 80 million in tangible fixed assets, all of which assets must be assigned to the activity and must not be hired out or transferred for use by third parties. For the purposes of this requirement, goods acquired by leasing shall also be deemed to be investments in tangible fixed assets, provided that the business undertakes to exercise the purchase option;

(g) They must create at least 10 jobs within six months of starting their business activity and must maintain the annual average workforce at that level from that point and until the year in which their entitlement to the reduction in the basis of assessment expires;

(h) [...];

(i) They must have a business plan covering a period of at least five years.

3. [...].

4. The minimum amount of investment referred to in subparagraph (f) and the minimum number of jobs created referred to in subparagraph (g) of paragraph 2 above shall be incompatible with any other tax concession established for the same investment or job creation.

5. The reduction provided for in this Article shall be requested by means of an application lodged with the tax administration, which, after checking that the initial requirements are satisfied, will where appropriate notify the applicant company of its provisional authorisation, to be formally adopted by decision of the Álava Provincial Council.

[...]."


(15) Only the provisions which are relevant for the purposes of assessing the State aid elements are quoted here.
The Commission has to examine whether this reduction in the tax base constitutes State aid within the meaning of Article 92(1) of the Treaty.

If it is to be classed as aid, the reduction in the tax base has to satisfy each of the four criteria mentioned in Article below.

First, the reduction in the tax base affords Ramondín Cápsulas an advantage that reduces the costs it would normally have to bear in the course of its business.

Second, the reduction in the tax base involves a loss of tax revenue equivalent to the use of state resources in the form of tax expenditure.

Third, the reduction in the tax base affects competition and trade between Member States since Ramondín Cápsulas carries on an economic activity which is the subject of trade between the Member States, in a sector that is highly competitive (16).

Fourth, the measure must be specific or selective in the sense that it favours "certain undertakings or the production of certain goods". In the present case, the reduction in the tax base is selective chiefly because only newly created businesses can qualify for it. Article 26 of Provincial Law 24/1996 makes it possible to afford newly created businesses more favourable tax treatment than that applied to other businesses already present on the market. This circumstance is sufficient to establish the specific nature of the measure, on the basis of which the Commission classifies the reduction in the tax base granted to newly created businesses as State aid within the meaning of Article 92(1) of the Treaty. The specific nature of the measure is strengthened by the fact that only businesses investing ESP 80 million and creating 10 jobs qualify for the reduction in the tax base.

The specific nature of the measure is also strengthened by its purpose, as set out in Provincial Law 24/1996 establishing it. After listing the general objectives of the tax system, the preamble to that instrument enumerates another set of objectives that have more to do with industrial policy, among which it specifically mentions the aim of "stimulating the creation of new business initiatives", an objective pursued in the instrument by measures aimed at the specific category of newly created businesses (see point (g) of the preamble), which are granted a reduction in the tax base during the first four years of operation in which they make a profit. This stated objective, which confirms that the measure constitutes start-up aid for newly created businesses, does not enable it to be considered compatible with the nature or general scheme of the tax system in question. Neither have the regional authorities indicated or demonstrated that the selective nature of the measure is justified by the "nature or general scheme" of the tax system concerned (see the judgment of the Court of Justice of 2 July 1974 in Case 173/73 Italy v. Commission (17)).

In line with its Decision of 24 February 1999 in Case C-76/97, the Commission concludes that the measure in question clearly constitutes operating aid. Since any profits will be generated in the future and are essentially uncertain, it is not possible to calculate precisely the aid intensity involved in the reduction in the tax base.

In its letter to Member States SG(89) D/5521 of 29 April 1989 the Commission stated that it "considers that a Member State has failed to fulfill its obligation to notify it where the process of putting aid into effect has been initiated." By "putting into effect" it means not the action of granting aid to the recipient but rather the prior action of instituting or implementing the aid at a legislative level according to the constitutional rules of the Member State concerned. Aid is therefore deemed to have been put into effect as soon as the legislative machinery enabling it to be granted without further formalities has been set up (18). This is undoubtedly the case with this measure, which has been carried out unlawfully in breach of the provisions of Article 93(3) of the Treaty.

**Conclusion: proceedings should be initiated in relation to the tax aid and Spain should be ordered to suspend payment thereof**

**Tax credit**

As regards the tax credit, the exceptions provided for in Article 92(2) of the Treaty are not applicable since the aid does not pursue the objectives listed in that provision. Neither have the Spanish authorities attempted to rely on those exceptions.

Under Article 92(3)(a), an exception may be made in the case of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. The municipality of Laguardia is not located in an area qualifying for regional aid under Article 93(3)(a) of the Treaty.

As regards the exceptions provided for in Article 92(3)(b) and (d), the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the Spanish economy, nor does it display the features of projects of that kind. Nor is it intended to promote culture or heritage conservation.

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(16) According to information provided by the Basque authorities, Ramondín has 40 % of the world market for tin capsules, followed by Pechinay with 30 %, Relvas with 30 % and Vatke with 6 %.


(18) See footnote 14.
As far as the exception provided for in Article 92(3)(c) of the Treaty is concerned, Laguardia is located in an area which qualifies for regional aid in accordance with that provision. The tax credit was not awarded under regional aid schemes approved by the Commission, but granted by means of an individual decision taken by the competent authorities. In such cases, the impact of the aid has to be examined in the context of the Community as a whole. The Court of Justice confirmed this interpretation in Hytasa (judgment of 14 September 1994 in Joined Cases C-278/92, C-279/92 and C-280/92, Spain v. Commission (19)) and Pyrsa (judgment of 14 January 1997 in Case C-169/95 Spain v. Commission (20)). An individual aid measure may be classed as regional aid compatible with the common market where it effectively contributes to the long-term development of the area and does not have effects that are detrimental to the common interest and competitive conditions in the Community. The aid can accordingly be considered to be compatible with the common market where it does not adversely affect trading conditions to an extent contrary to the common interest. The maximum aid intensity allowed in the Basque Country is 25 % nge (21) (35 % in the case of SMEs). Ramondín Cápulas, the beneficiary of the tax credit, does not correspond to the definition of an SME. On the basis of the forecasts set out in Ramondín's business plan, the aid intensity of the tax credit is 33.5 % nge, which exceeds the maximum permitted ceiling.

For the time being and on the basis of the information at its disposal, the Commission cannot rule out the possibility that the aid under examination may adversely affect trading conditions in the Community to an extent contrary to the common interest and, consequently, may not be deemed compatible with Article 92(3)(c) of the Treaty.

Reduction in the tax base for newly created companies

The reduction in the tax base for newly created companies is continuous in nature and not contingent on carrying out a specific project. Consequently, it is aid intended to reduce the company's current expenses and therefore constitutes operating aid. Operating aid, that is to say aid intended to relieve a company of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities, does not normally fall within the scope of the exceptions provided for by Article 92(3) of the Treaty. According to the relevant case-law, the effect of such aid is in principle to distort competition in the sectors in which it is granted, whilst nevertheless being incapable, by its very nature, of achieving any of the objectives of the exceptions laid down by that provision (see, in this connection, the judgment of the Court of the First Instance of 8 June 1995 in Case T-459/93 Siemens SA v. Commission (22)). However, this type of aid may exceptionally be allowed in the regions which are eligible for the exception laid down in Article 92(3)(a) of the Treaty, where justified by its contribution to regional development and its nature and where the amount of the aid is proportionate to the disadvantages it is intended to mitigate. The Commission notes that the municipality of Laguardia is not located in one of the regions referred to in Article 92(3)(a) of the Treaty. The Commission therefore has serious doubts as to whether this aid is compatible with the common market.

Accordingly, the Commission hereby informs the Spanish Government that it has decided to initiate the procedure under Article 93(2) of the Treaty in respect of the following tax measures:

(a) the tax credit equivalent to 45 % of the total amount of the ESP 3 857 million investment, granted by Decision of 21 October 1997;

(b) the reduction of 99 %, 75 %, 50 % and 25 % in the basis of assessment for corporation tax, applicable, respectively, for four consecutive years running from the first year in which the basis of assessment is positive, for which Ramondín Cápulas is eligible as a newly established company.

In the light of the foregoing considerations, the Commission invites Spain, pursuant to the procedure provided for in Article 93(2) of the EC Treaty, to submit its comments and any information which may be useful for assessing the aid, within one month of receipt hereof. The Commission requests the Spanish authorities immediately to forward a copy of this letter to the potential beneficiary of the aid.

The Commission would remind Spain of the suspensive effect of Article 93(3) of the EC Treaty and draw its attention to the letter it addressed on 22 February 1993 to all Member States, in which it stated that all aid unduly granted could have to be recovered from the beneficiary in accordance with the provisions of national law together with accrued interest, calculated at the reference rate used for calculating the net grant equivalent of regional aid, from the date on which the aid was made available to the beneficiary or beneficiaries until such time as it is effectively recovered.

Aware of the practical difficulties which would be involved in enforcing a negative decision once aid has been granted, and in view of the fact that it is difficult to eliminate distortions retroactively (opinion delivered by Advocate General Reischl on 7 November 1973 in Case 120/73 (24)), the authors of the Treaty gave the obligation to give prior notification a suspensive effect which, as the Court has pointed out on numerous occasions, is of fundamental importance to controlling State aid.

(21) See footnote 4.
(22) [1995] ECR II-1675, paragraph 48.
Once it has established that aid has been granted or altered without notification, the Commission has the power, after giving the Member State in question an opportunity to submit its comments on the matter, to issue an interim decision requiring it to suspend immediately the payment of such aid pending the outcome of the examination of the aid and to provide the Commission, within such period as it may specify, with all such documentation, information and data as are necessary in order that it may examine the compatibility of the aid with the common market (see the judgments of the Court of 14 February 1990 in Case C-301/87 Boussac (24), and 21 March 1990 in Case C-142/87 Belgium v. Commission (25)).

In its abovementioned letter of 26 October 1998 the Commission enabled the Spanish Government to submit its comments on the award of the tax aid.

The Commission hereby requires Spain immediately to suspend payment of that aid.

Spain shall notify the Commission within 15 days of the measures it has taken to comply with the decision requiring suspension of payment of the tax aid.

(c) Sale of the land (request for information)

On the basis of the information at its disposal in this case, the Commission cannot rule out the possibility of State aid within the meaning of Article 92(1) of the Treaty being involved in the sale of land by Alava Agencia de Desarrollo SA to Ramondín at a price of ESP 2,500 per square metre, under the terms of a contract concluded on 28 October 1997.

In the absence of prior notification and of the information which the Spanish authorities undertook to provide, the Commission cannot reach a final decision on whether State aid was involved in the sale or on whether it can be deemed compatible with the common market.

As the Court recognised in its judgment of 14 February 1990 in the abovementioned Case C-301/87 (Boussac) and confirmed in its judgment of 13 April 1994 in Cases C-324/90 and C-342/90 (Pleuger-Worthington) (26), the Commission has the power to formally require the Member State to provide all the necessary information and data.

The Commission hereby gives the Spanish Government formal notice to provide within one month all the documentation, information and data necessary to enable the Commission to determine whether State aid was involved in the sale of the land and whether it can be deemed compatible with the common market. Spain should provide among other things details of the following:

(a) the identity of the owner of the land. Should the owner be a legal person, the composition of its capital and board of directors;
(b) the composition of the capital of Alava Agencia de Desarrollo and its board of directors;
(c) whether or not there exists an independent valuation of the price of the land and, if so, the content of same and confirmation as to whether this valuation was made prior to 28 October 1997.
(d) price per square metre of industrial land in the Casablanca industrial estate at Llaguardia (Alava).

Spain is entitled to present any information it considers relevant to the assessment of this case.

Should Spain fail to respond or provide only part of the information requested, the Commission will take a final decision on the basis of the information in its possession.

The Commission hereby gives notice to interested parties to submit their comments on the aid/measure in question, within one month of the date of this notice, to:

European Commission,
Directorate-General for Competition,
Directorate H,
Rue de la Loi/Wetstraat 200,
B-1049 Brussels;
Fax (32-2) 296 98 16.

Those comments will be communicated to Spain.