

## COMMISSION DECISION

of 11 July 2001

on the State aid scheme applied by Spain to certain newly established firms in Navarre (Spain)

(notified under document number C(2001) 1762)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/893/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 <sup>(1)</sup>, called on interested parties to submit their comments, and having regard to those comments,

Whereas:

Representation dated 24 January 2000, registered on 31 January 2000, the Spanish authorities submitted their comments under the abovementioned procedure.

- (4) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* <sup>(4)</sup>. The Commission invited interested parties to submit their comments on the aid within one month of the date of publication.
- (5) The Commission has received no comments from interested parties.
- (6) Pursuant to Provincial Law 8/2001 of 10 April <sup>(5)</sup>, the first section of Chapter II of Provincial Law 24/1996 of 30 December <sup>(6)</sup>, which constituted the legal basis for the tax incentives in question, was repealed as from the tax year starting on 1 January 2001.

## I. PROCEDURE

- (1) As a result in particular of the information received in response to the procedures initiated following the complaints about the State aid granted to Daewoo Electronics Manufacturing España SA <sup>(2)</sup>, Ramondín SA and Ramondín Cápsulas SA <sup>(3)</sup>, the Commission learned of the existence of a scheme of non-notified investment aid in Spain, in Álava, consisting of tax incentives in the form of a reduction of taxable income for certain newly established firms. It also received unofficial information that similar measures existed in Navarre, since that territory enjoys the same autonomy in tax matters as Álava.
- (2) By letter dated 17 August 1999, SG(99)D/6865, the Commission informed Spain of its decision to initiate in respect of this aid the procedure laid down in Article 88(2) of the Treaty.
- (3) By letter from the Permanent Representation dated 26 August 1999, registered on 30 August 1999, the Spanish authorities requested more time in which to submit their comments. By letter from the Permanent

## II. DETAILED DESCRIPTION OF THE AID

- (7) According to the information at the Commission's disposal, the tax incentives in question were introduced by Articles 52 to 56 of Section 1 of Chapter II of Provincial Law 24/1996 of 30 December on Corporation Tax <sup>(7)</sup>. The text of the Articles reads as follows <sup>(8)</sup>:

‘Section 1

Incentives for newly established firms

Article 52 — Reduction of tax liability

Companies starting their business activity after the entry into force of the Provincial Law shall be entitled to a reduction of 50 % of their total tax liability in respect of the income from the

<sup>(4)</sup> See footnote 1.

<sup>(5)</sup> Published in the *Diario Oficial de Navarra* N° 51, 25.4.2001.

<sup>(6)</sup> Provincial Law 24/1996, *Boletín Oficial de Navarra* N° 159, 31.12.1996.

<sup>(7)</sup> *Boletín Oficial de Navarra* No 159, 31.12.1996.

<sup>(8)</sup> Only the parts essential to the assessment of the aid are cited.

<sup>(1)</sup> OJ C 340, 27.11.1999, p. 52.

<sup>(2)</sup> Commission Decision 1999/718/EC (OJ L 292, 13.11.1999, p. 1).

<sup>(3)</sup> Commission Decision 2000/795/EC (OJ L 318, 16.12.2000, p. 36).

consecutive tax periods completed within seven years from start-up, subject to a maximum of four periods, starting from the first one in which, in those seven years, they obtain a positive taxable income.

[...]

#### Article 53 — Conditions

1. To qualify for the reduction, taxpayers shall meet the following conditions:

[...]

(f) in the first two years of operation they invest at least ESP 100 million in new tangible fixed assets assigned to the business [...].

[...]

(g) at least ten jobs are generated in the six months following the start of trading, and the annual average workforce is kept at that figure from that time until the end of the fiscal year in which the right to apply the reduction of liability expires.

[...]

#### Article 54 — Incompatibility

Taxpayers who receive the reduction governed by this Section shall not be entitled to claim the tax exemptions or incentives laid down in this Provincial Law with regard to investment or job creation during the period intervening between the fiscal year in which they start to trade and the last fiscal year in which they qualify for the reduction.

#### Article 55 — Negative taxable incomes

[...]

#### Article 56 — Application and non-compliance

[...].

- (8) The Commission notes that the tax incentives relate to the liability to corporation tax resulting from the performance of the business activities of certain companies. In this case, the recipients are companies which started trading after 1 January 1997, the date of entry into force of the said provincial law, and which have also invested in new tangible fixed assets at least ESP 100 million (EUR 601 012) and have generated at least ten jobs. The period for which they qualify for the reduction is the first seven years following the start of trading.
- (9) The Commission finds that the tax incentive is not intended for firms which carry out certain activities or

belong to certain sectors, since any activity or sector may be eligible. Nor is it intended for certain categories of firms, e.g. small and medium-sized enterprises (SMEs), since any firm may qualify, provided that it satisfies the abovementioned tests.

- (10) As far as combination with other aid is concerned, it is stated that the tax incentives in question may not be combined with any other tax concessions that may be granted in respect of the minimum investment or the minimum creation of jobs. Nevertheless, combination with other, non-tax aid, including grants, subsidised loans, guarantees, equity purchases, etc., relating to the same investments is not ruled out. Nor is possible combination with other tax concessions 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.
- (11) In its decision initiating the said procedure, the Commission pointed out that as far as the application of the Community State aid rules is concerned, the tax nature of the measures in question is irrelevant, since Article 87 applies to aid measures 'in any form'. However, the Commission also emphasised provisionally that, to be regarded as aid, the measures should meet all four of the criteria which are laid down in Article 87 and which are explained below.
- (12) Firstly, the Commission pointed out that the 50 % reduction of liability gives its recipients an advantage, since the charges normally affecting their budgets are reduced by a partial reduction of the normal tax liability.
- (13) Secondly, the Commission considered that the reduction involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure.
- (14) Thirdly, the Commission considered that the reduction of 50 % in tax liability affects competition and trade between Member States. Since the recipients conduct business which may be the subject of intra-Community trade, the aid strengthens their position vis-à-vis competitors who also trade between Member States. That trade is therefore affected. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). In this way they are able to compete with firms which are not eligible for the aid.
- (15) Similarly, the Commission took the view at that stage that the reduction of liability is specific or selective in that it favours certain firms, since the conditions for granting the incentives specifically state that firms established before 1 January 1997, date at which the said provincial law came into force are ineligible, as are

other firms whose investments are below the threshold of ESP 100 million (EUR 601 012) and which create fewer than 10 jobs. The Commission also considered that the tax aid is not justified by the nature or general scheme of the tax system.

- (16) Furthermore, the Commission considered, at that stage, that the selective nature of the concession is also due to a discretionary power of the tax authorities. The aid is not granted automatically, since the recipient's application is studied by the Provincial Council of Navarre (*Diputación Foral de Navarra*), which may, subsequently, decide to grant the aid if appropriate.
- (17) In short, the Commission considered that the reduction of liability is a State aid within the meaning of Article 87(1) of the Treaty and Article 61(1) of the Agreement on the European Economic Area, since it meets all four of the criteria of constituting a benefit, being granted by the State from State resources, affecting trade between Member States and distorting competition in favour of certain firms.
- (18) Since the tax incentives are not subject, in particular, to the condition that they do not exceed EUR 100 000 for a period of three years, the Commission considered, at that stage, that they cannot be regarded as subject to the *de minimis* rule <sup>(9)</sup>.
- (19) The Commission stated that, since State aid was involved which was not governed by the *de minimis* rule, it was subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(2) of the EEA Agreement. However, the Spanish authorities did not meet that obligation, and the Commission therefore considered at that stage that the incentives can be regarded as unlawful.
- (20) The Commission found that, although the granting of the incentives was conditional on a minimum investment and the creation of a minimum number of jobs, the tax arrangements did not ensure compliance with the Community rules on regional aid. It therefore considered at that stage that the incentives did not rank as investment or employment aid.
- (21) However, the Commission also considered that the tax incentives have the characteristics of operating aid. Their purpose is to relieve a firm of those costs which it would have had to meet under normal conditions as part of its everyday management or its usual activities.
- (22) The Commission pointed out that operating aid is in principle prohibited. It may nevertheless be granted in exceptional circumstances, i.e. in those regions which qualify for the regional derogations if they meet certain conditions. However, the incentives are not subject to these conditions. Consequently, the Commission took the view at that stage that there were doubts about the

compatibility of the tax incentives with the rules on regional aid.

- (23) The reduction of tax liability in question, which is not restricted to a particular sector, may be granted to firms that are subject to Community sectoral rules. The Commission therefore questioned at that stage whether the incentives are compatible where the recipient belongs to a sector that is subject to special Community rules.
- (24) Lastly, the Commission questioned the compatibility of the tax incentives with the common market in the light of the derogations in Article 87(2) and (3) of the Treaty. The incentives cannot be regarded as aid having a social character under Article 87(2)(a), are not intended to make good the damage caused by natural disasters under Article 87(2)(b) and are not subject to the provisions of Article 87(2)(c) concerning certain areas of the Federal Republic of Germany. As far as the derogations in Article 87(3) other than those in subparagraphs (a) and (c), which have already been discussed, are concerned, the Commission considered that the incentives are not designed to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State under Article 87(3)(b). The incentives do not fall within the scope of Article 87(3)(c), which concerns 'aid to facilitate the development of certain economic activities ...', since they are not specific in any way to the activities of the recipient firms. Finally, they are not intended to promote culture and heritage conservation within the meaning of Article 87(3)(d).
- (25) As well as inviting them to submit their comments under the Article 88(2) procedure, the Commission also asked the Spanish authorities to supply all the information necessary for assessing the reduction of the tax liability of certain newly established firms in Navarre. In this specific case, the relevant information requested is as follows: copies of all decisions granting the reduction of tax liability; data on the investments made by each recipient; the jobs created, the share capital, the size of the reduction for which each firm is eligible, and the outstanding balance.

### III. COMMENTS OF THE SPANISH AUTHORITIES

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

- (26) The Spanish authorities submitted their comments by letter from the Permanent Representation, dated 24 January 2000. Basically, they consider that the reduction

of tax liability does not constitute a State aid under Article 87 of the Treaty, but a general measure which is not subject to the State aid rules. In particular, they underline that the measure in question, which is limited in time, should not necessarily have an appreciable effect on the business of the recipient firms. Furthermore, there are other instruments of government, such as social security legislation, which have a greater effect than tax measures on the competitive position of firms as regards intra-Community trade. As far as fiscal instruments are concerned, the Spanish authorities state that their effect on firms is not uniform, since some firms always benefit more than others. But this is not a reason to conclude that such firms improve their competitiveness by this means. Moreover, tax incentives that promote protection of the environment, research or training are not regarded as State aid and cannot, therefore, be regarded as distorting competition, despite the fact that only some firms qualify for them.

(27) The Spanish authorities also state that the reduction in question cannot be combined with other tax incentives in Provincial Law 24/1996. Of the four investment firms, one, whose investment started in 1998, received a reduction of ESP 17,45 million. The second, whose investment started in 1996, received a reduction of ESP 0,45 million, and the two other firms, whose investment started in 1997, have not yet received any reduction. Between them, the four firms have invested ESP 2 362 million in new tangible assets, created 142 jobs and have a paid-up share capital of ESP 465 million. If, however, the firms had received all the other tax incentives introduced by the said Law, the tax aid would have been ESP 528 million (investment relief: ESP 236 million; job creation: ESP 99 million; set-off for negative taxable incomes: ESP 193 million). However, following the Commission's criterion, the incentives, which amount to ESP 528 million, do not distort competition, whereas the Commission maintains that the reduction of ESP 17,9 million does distort competition and affects trade between Member States. Further, if the Commission considers that the reductions in question affect intra-Community trade because the recipient firms carry on businesses that are the subject of trade, this must mean that all the other tax exemptions in the Law affect trade as well.

(28) According to the Spanish authorities, the reduction in question is open to all firms, since it is not intended for those carrying on particular businesses or belonging to certain sectors or categories (e.g. SMEs). Consequently, the reduction is a general measure in the same way as all the other tax concessions in the Law.

(29) In addition, the Spanish authorities question the discretionary character of the measures in question, since the incentives are granted automatically once the said objective conditions are satisfied. The Provincial Council of Navarre can therefore only check that all the conditions are satisfied; it cannot alter or add any conditions.

(30) For the above reasons, the Spanish authorities consider that the tax measures in question do not meet the four cumulative criteria for State aid in Article 87 of the Treaty.

#### IV. ASSESSMENT OF THE AID

#### V. THE CHARACTER OF A STATE AID

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

(32) Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne by 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 tax liability. The 50 % reduction in the tax liability meets this criterion, since it reduces the tax burden of the recipient firms. If the tax liability were not reduced, the recipient firm would have to pay this specific tax on 100 % of the taxable income. The reduction of tax liability thus implies an exception to the common tax system applicable.

(33) Secondly, the Commission considers that the said reduction of tax liability involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure. This principle also applies to aid granted by regional or local bodies of Member States<sup>(10)</sup>. Furthermore, the

<sup>(10)</sup> Judgment of the Court of Justice of the European Communities in Case 248/84, Germany v Commission, [1987] ECR 4013.

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, the intervention of the State is effected by the Autonomous Community of Navarre through a legislative provision.

(34) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, in Chapter 2.4 of Navarre's single programming document <sup>(11)</sup>, the regional economy is highly integrated into international markets; thus, industrial exports accounted in 1995 for 36 % of gross production. The main customers are the Member States of the European Community, which in 1997 absorbed 84 % of all exports. This percentage has increased by 20 percentage points since the accession of Spain. In addition, the volume of imports from the Member States is greater than the volume of exports to them. Similarly, the region's trade balance was clearly in surplus during the period 1994 to 1998. In short, Navarre's economy is very open to the outside. Given the nature of the regional economy, the recipient firms' business activities may be the subject of trade between the Member States. Consequently, aid strengthens their position vis-à-vis their competitors in intra-Community trade. That trade is therefore affected. 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 incentives.

(35) The Spanish authorities emphasise that because the tax incentives paid under this reduction are small they have a limited or even nil effect on trade between Member States. The Commission would point out in this respect that the Spanish authorities' conclusions are based on partial data. The data do not cover the whole four years during which the firms are eligible for the reduction (starting from the first of the seven years following the start of trading in which profits are obtained). The definitive amount of the aid cannot be established therefore until the end of each recipient's four-year period. Furthermore, the Navarre authorities may have granted other reductions after the comments were submitted by the Spanish authorities. Thus, no assumptions can be made about the size of the reductions for which the firms were eligible. For the rest, the Commission would point out that in any event

the relatively small size of the incentives does not automatically mean that trade between Member States is not affected. It would refer in this respect to the decisions of the Court of Justice <sup>(12)</sup> on this subject.

(36) Similarly, the Spanish authorities draw attention to the possible inconsistency of applying the State aid rules to the reduction but not to other, much larger tax incentives with a greater effect on competition. The Commission can only reject this argument, since the reduction should be assessed on its own merits. It should be pointed out in this respect that, as the Court of Justice has held, 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 <sup>(13)</sup>.

(37) Since, in this case, the tax rules examined are general and abstract in character, the Commission would point out that the analysis of their incidence can only be carried out at a general, abstract level; it is not possible to specify the particular incidence on a market, sector or specific product, as we see in the abovementioned comments of third parties. This position has been confirmed in the established case-law of the Court of Justice <sup>(14)</sup>.

(38) As to the specific character which State aid must have, the Commission takes the view that the reduction of tax liability is specific or selective in that it favours certain

<sup>(12)</sup> Judgment of the Court of Justice of the European Communities of 19 September 2002 in Case C-156/98, *Federal Republic of Germany v Commission*, paragraph 32: 'As regards the effects of the provision in question on trade between Member States, the Court has consistently held that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected'. See also the judgments rendered by the Court of Justice on 21 March 1990 in Case C-142/87, *Belgium v Commission* ('Tubemeuse'), [1990] ECR I-959, paragraph 43 and on 14 September 1994 in Joined Cases C-278/92 to C-280/92, *Spain v Commission*, [1992] ECR I-4103, paragraphs 40 to 42.

<sup>(13)</sup> See the the judgment by of Court of Justice dated 24 March 1993 in Case C-313/90, *Comité international de la Rayonne et des Fibres synthétiques and others v Commission*, [1993] ECR I-1125, paragraph 45.

<sup>(14)</sup> See Case C-75/97, *Belgium v Commission* ('Maribel'), paragraphs 48 and 51, judgment of the Court of Justice of 17 June 1999; Case T-298/97, *Alzetta Mauro and others v Commission*, paragraphs 80 to 82, judgment of the Court of First Instance of 15 June 2000; the Opinion of Advocate General Ruiz-Jarabo of 17 May 2001 in Case C-310/99, *Italy v Commission*, paragraphs 54 and 55; and the Opinion of Advocate General Saggio of 27 January 2000 in Case C-156/98, *Germany v Commission*, paragraph 31, which ran thus: 'It should be pointed out in this respect that, with regard to a general aid scheme, to be able to determine the effect of that scheme on trade, it is sufficient if, from an *ex ante* assessment, it can reasonably be considered that the said effect may come about.' If the position of a firm (or, as in the present case, an indefinite number of firms) is reinforced by an aid scheme, this privilege may in principle affect competition between Member States.

<sup>(11)</sup> Navarre's single programming document for Objective 2, 2000 to 2006.

firms, since the conditions for granting the incentives expressly state that firms established before the said provincial law came into force are ineligible, as are other firms whose investments are below the threshold of ESP 100 million (EUR 601 012) or which create fewer than 10 jobs. In this respect, the Commission would point out that, according to the Fifth Report on Enterprises in Europe <sup>(15)</sup>, the number of firms in the European Community in 1995 which had fewer than ten employees, or no employees at all, was 16 767 000, or 92,89 % of the total <sup>(16)</sup>. In Spain's case, the percentage was even higher, at about 95 % <sup>(17)</sup>. It is likely that these percentages are even higher in the case of new firms, since a firm usually starts with a workforce that grows as the firm consolidates and reaches its cruising speed. This was the case in Spain, in 1995, where the percentage was even higher, at about 98,00 % <sup>(18)</sup>. Consequently, one of the conditions of eligibility for the aid means, by itself, that the majority of firms are excluded. For the rest, the objective character of the threshold cited does not prevent it, as some interested parties claim, from being selective and excluding firms which do not satisfy the conditions in question.

- (39) As for the possible discretionary power of the tax authorities, the Commission finds that the aid in question is not granted automatically. The application submitted by the recipient is examined beforehand by the Provincial Council of Navarre, which, after carrying out the examination, may, if appropriate, grant the aid. According to the Spanish authorities, this is simply to check that all the conditions are met. However, they do not explain why the check should be made beforehand and not, as is the normal practice in the management of tax revenue, *ex post*.
- (40) As regards invoking the nature or general scheme of the tax system as justification for the reduction of tax liability, 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. It is up to the Member State concerned <sup>(19)</sup>, however, to establish that the tax measures in question follow the internal logic of the tax system. In this specific case, the Spanish authorities have not supplied any data in this respect. Furthermore, it should be pointed out that the preamble of Provincial Law 24/1996 states that the object of some of the tax measures it contains is to establish economic incentives for the development of productive activity and the real economy. The purpose of these measures, therefore, is to promote the economy. This does not meet the principal objective of any tax system, which is to gather revenue for financing state expenditure, nor does it

satisfy the principles of equality and progressiveness inherent in the Spanish tax system <sup>(20)</sup>. First of all, therefore, the Commission considers that, since the Spanish authorities have not demonstrated that the logic of these measures conforms to the internal logic of the tax system, the reduction of liability cannot be regarded as justified by the nature or general scheme of the system. Secondly, the Commission finds that the reduction fulfils objectives outside the tax system.

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

#### VI. THE UNLAWFUL NATURE OF THE REDUCTION OF TAX LIABILITY

- (42) 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 <sup>(21)</sup>, the Commission considers that the aid cannot be regarded as subject to those rules. It should be pointed out in this respect that the Spanish authorities never maintained, in the procedure, that the aid in question should have the character of *de minimis* aid, either in full or in part. Moreover, it could not comply with the *de minimis* rules, since in particular there is no guarantee that the ceiling of EUR 100 000 would not be reached. Nor does the aid have the character of existing aid, since it does not satisfy the tests of Article 1(b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(22)</sup>.
- (43) The Commission would point out that State aid which is not covered by the *de minimis* rules and is not existing aid is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(1)(a) of the EEA Agreement. However, the Spanish authorities have not fulfilled this obligation, which is why the Commission believes that the aid should be regarded as unlawful. The Commission regrets this failure by the Spanish authorities to fulfil their obligation to notify the aid in advance.

<sup>(15)</sup> *Enterprises in Europe*, Fifth Report, EUROSTAT.

<sup>(16)</sup> Taken from the data in the table on page 31 of the report.

<sup>(17)</sup> Taken from the data in the table on page 224 of the report.

<sup>(18)</sup> Taken from the data in the table on page 73 of the report.

<sup>(19)</sup> See paragraph 27 of the Opinion of Advocate General Ruiz-Jarabo in Case C-6/97.

<sup>(20)</sup> Article 31 of the Spanish Constitution.

<sup>(21)</sup> The result of the assessment of the aid is the same, whether that assessment is based on the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996) or on Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 10, 13.1.2001, S.30).

<sup>(22)</sup> OJ L 83, 27.3.1999, p. 1.

(44) The Commission would also point out that, since the reduction of tax liability was never notified under Article 88(3) of the Treaty, it has not been able to decide about the scheme's compatibility with the common market. It is for this reason that, since no specific assurance has been given by the Commission, neither the Spanish authorities nor interested third parties can entertain justified hopes as to the legality and compatibility of the aid in question. Consequently, the recipients cannot claim legitimate expectations or legal certainty as regards the State aid nature of the reduction of tax liability. 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' <sup>(23)</sup>.

#### VII. COMPATIBILITY WITH THE COMMON MARKET

(45) As the scheme in question covers only the NUTS <sup>(24)</sup> II region of Navarre, it is necessary to examine whether aid in this territory can qualify for the regional exceptions in Article 87(3)(a) or (c) of the Treaty. The Commission would point out that the Autonomous Community of Navarre has never been eligible for the Article 87(3)(a) derogation, since its per capita GDP <sup>(25)</sup> has always been higher than 75 % of the Community average. According to the rules on regional aid <sup>(26)</sup> the test of eligibility for the derogation in Article 87(3)(a) is met, in the case of NUTS II, only if the region has a per capita GDP of not more than 75 % of the Community average.

(46) As regards the aid's eligibility for the derogation in Article 87(3)(c), the Commission would point out that, in its decision of 26 July 1995 on the changes in Spain's regional aid map <sup>(27)</sup> it proposed, under the procedure laid down in Article 88(1) of the Treaty, that the Spanish authorities should revise the map and consider in future that part of Navarre was a region in which aid for regional development could be regarded

as compatible with the common market under the derogation in Article 87(3)(c), provided that it does not exceed the ceiling of 15 % net grant equivalent (NGE) in the case of large firms. However, regional aid in the rest of Navarre could not be regarded as compatible with the common market under the derogation in Article 87(3)(c) of the Treaty. By letter from their Permanent Representation dated 26 September 1995, the Spanish authorities accepted this proposal. The new map thus came into force from that date. As regards the subsequent period, the Commission would point out that, in its decision of 11 April 2000, it approved the Spanish regional aid map for the period 2000 to 2006. In accordance with this map, certain parts of Navarre are considered to be regions where regional aid may be regarded as compatible with the common market under the exception laid down in Article 87(3)(c) of the Treaty, provided that it does not exceed the ceiling of 20 % NGE. However, regional aid in the rest of Navarre could not be regarded as compatible with the common market under the derogation in Article 87(3)(c) of the Treaty.

(47) The State aid in the form of a reduction of tax liability has the effect of promoting the creation, in the Autonomous Community of Navarre, of new firms in which the initial amount of investment and the number of jobs created exceed certain thresholds. However, although the minimum investment and the minimum number of jobs are achieved, the tax incentives in question do not qualify as investment or employment aid. They are not based on the amount of investment, the number of jobs created, or the corresponding wage costs, but on the taxable income. Furthermore, they are not paid up to a ceiling expressed as a percentage of the amount of investment, the number of jobs created or the corresponding wage costs, but up to a ceiling expressed as a percentage of the taxable income. In this respect, the Commission would point out that Annex I of the Guidelines on national regional aid (98/C 74/06) states that 'tax aid may be considered to be aid connected with an investment where it is based on an amount invested in the region. In addition, any tax aid may be connected with an investment if one sets a ceiling expressed as a percentage of the amount invested in the region'. Therefore, tax incentives, which, as in this case, do not meet these criteria, cannot qualify as investment aid.

<sup>(23)</sup> Judgment of the Court of First Instance of 15 December 1999 in Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen and others v Commission*, [1999] ECR II-3663, paragraph 300.

<sup>(24)</sup> Nomenclature of Territorial Units for Statistics.

<sup>(25)</sup> Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).

<sup>(26)</sup> The references to the regional rules are confined, in the following recitals, to the guidelines on national regional aid (98/C 74/06). In any event, the result of the assessment would be the same if the analysis were based on the earlier rules. See point 3.5 of the Guidelines on national regional aid (98/C 74/06).

<sup>(27)</sup> OJ C 25, 31.1.1996, p. 3.

(48) On the contrary, since they partly reduce the tax paid on profits by the recipient firms, the incentives qualify as operating aid. Corporation tax is a tax burden which companies subject to it have to pay regularly and inevitably as part of their everyday management. It is

therefore appropriate to examine the tax incentives in the light of any derogations that may apply to the operating aid in question.

- (49) The Commission would point out that, in accordance with the 98/C 74/06 Guidelines, regional aid which has the character of operating aid is normally prohibited. Exceptionally, however, such aid may be granted in regions caught by the derogation in Article 87(3)(a), provided that it meets certain conditions laid down in points 4.15 to 4.17 of the Guidelines, or in the outermost regions or in regions of low population density if it is intended to offset additional transport costs. However, the NUTS II territory of Navarre is not eligible for the derogation in Article 87(3)(a), and the grant of the said operating aid does not meet the conditions described. The NUTS II territory of Navarre is not an outermost region<sup>(28)</sup> nor a region of low population density<sup>(29)</sup>. Thus the operating aid elements in the reduction of tax liability are prohibited, specifically 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 incentives are therefore incompatible in this case.
- (50) The Commission therefore considers that the tax incentives scheme in question cannot be regarded as compatible with the common market under the regional derogations in Article 87(3)(a) and (c) of the Treaty, since it does not comply with the rules on regional aid.
- (51) The derogation in Article 87(3)(c) has to be examined to see whether it might not apply, in the above cases, for other purposes as well as the development of certain economic activities. It may be noted in this respect that the object of the reduction of tax liability is not to develop an economic activity within the meaning of Article 87(3)(c), in particular the development of measures to assist small and medium-sized enterprises, research and development, environmental protection, job creation or training in accordance with the appropriate Community rules. Consequently, the tax incentives cannot qualify for the derogation in Article 87(3)(c) in respect of the said purposes.
- (52) Similarly, in the absence of any sectoral limitations, the reduction of tax liability may be granted without any restriction to undertakings in sensitive sectors subject to specific Community rules, such as those applicable to the production, processing and marketing of the agricultural products in Annex I to the Treaty, fisheries, coalmining, steelmaking, transport, shipbuilding, synthetic fibres and the motor industry<sup>(30)</sup>. In the circumstances, the Commission considers that the tax incentives in the form of a reduction of tax liability cannot comply with the said sectoral rules. In this particular case, the reduction of tax liability 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 EC Treaty on the promotion of certain activities does not apply.
- (53) 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), since it is not intended to make good the damage caused by natural disasters or, for the purposes of Article 87(2)(b), by other exceptional occurrences. 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). For the rest, it cannot qualify for the derogation in Article 87(3)(d), since it is not intended to promote culture or heritage conservation. The aid is therefore incompatible with the common market.
- (54) As the reduction of tax liability covers various tax years, there could still be some tax aid currently left to pay. However, this aid is unlawful and incompatible. The Spanish authorities should therefore cancel the payment of any balance from the reduction of tax liability which could still be due to certain recipients.
- (55) As regards incompatible aid already paid, it should be pointed out that, in accordance with the above

<sup>(28)</sup> It is not in the list of outermost regions in Article 299 of the Treaty.

<sup>(29)</sup> According to point 3.14 of the guidelines on national regional aid (98/C 74/06).

<sup>(30)</sup> For the sectoral rules currently in force see, in addition to the *Official Journal of the European Communities*, the website of the Directorate-General for Competition [http://europa.eu.int/comm/competition/state\\_aid/legislation/](http://europa.eu.int/comm/competition/state_aid/legislation/).

arguments, the recipients may not rely on general principles of Community law such as legitimate expectations or legal certainty. Consequently, there is nothing to prevent the application of Article 14(1) of Regulation (EC) No 659/1999, according to which 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'. In this case, therefore, the Spanish authorities should take all necessary measures to recover the aid already paid in order to restore the economic situation which the recipient firms would be in without the unlawful grant of the aid. The aid should be recovered in accordance with the procedures and provisions of Spanish law and should include all interest due, calculated from the date the aid was granted to 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 <sup>(31)</sup>.

(56) 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.

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

- Spain has unlawfully put into effect, in the Autonomous Community of Navarre, the reduction of tax liability for investments, thereby infringing Article 88(3) of the Treaty,
- the reduction of the tax liability in question is incompatible with the common market,
- the Spanish authorities shall 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 shall take all necessary measures to recover it, so as to restore the economic situation which the recipient firms would be in without the unlawful grant of the aid,

HAS ADOPTED THIS DECISION:

*Article 1*

The State aid in the form of a reduction of tax liability, unlawfully put into effect by Spain in the Autonomous Community of Navarre, in breach of Article 88(3) of the Treaty, through Articles 52 to 56 of Provincial Law 24/1996 of 30 December, is incompatible with the common market.

*Article 2*

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

*Article 3*

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

Spain shall cancel all payment of outstanding aid.

2. Recovery shall be effected without delay in accordance with the procedures of national law, provided these allow the immediate and effective execution of this Decision. The sums to be recovered shall bear interest from the date on which they were available to the recipients until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

*Article 4*

Spain shall inform the Commission, within two months of the date of notification of this Decision, of the measures taken to comply with it.

*Article 5*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 11 July 2001.

*For the Commission*

Mario MONTI

*Member of the Commission*

<sup>(31)</sup> Commission letter to Member States SG(91)D/4577 of 4 March 1991. See also Case 142/87 of 21 March 1990, *Belgium v Commission* [1990] ECR I-950.