

# Joined Cases T-269/99, T-271/99 and T-272/99

Territorio Histórico de Guipúzcoa —  
Diputación Foral de Guipúzcoa and Others

v

Commission of the European Communities

(State aid — Decision to initiate the procedure under Article 88(2) EC —  
Actions for annulment — Admissibility — Tax measures — Selective  
nature — Legitimate expectations — Misuse of powers)

Judgment of the Court of First Instance (First Chamber), 23 October 2002 II-4221

## Summary of the Judgment

1. *Actions for annulment — Actionable measures — Measures producing legal effects — Commission decision to initiate the formal investigation procedure in relation to a State measure in the course of implementation and provisionally classified as new aid*  
(Arts 87(1) EC, 88(2) and (3) EC and 230 EC)

2. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision to initiate the formal investigation procedure in relation to a State measure in the course of implementation — Action brought by the regional authority which adopted the measure — Whether admissible (Arts 88(2) EC and 230 EC, fourth subpara.)*
3. *State aid — Commission decision to initiate the formal investigation procedure in relation to a State measure — Review by the Court — Limits (Art. 88(2) EC)*
4. *State aid — Commission decision to initiate the formal investigation procedure in relation to a State measure — Selective measure significantly favouring undertakings engaged in trade between Member States — No manifest error of assessment (Art. 88(2) EC)*
5. *State aid — Existing and new aid — Assessment of whether a measure constitutes aid — Prior practice of the Commission — Irrelevant (Arts 87 EC and 88 EC)*
6. *State aid — Commission decision to initiate the formal investigation procedure in relation to a State measure — Provisional nature of Commission's assessment — Consequences (Art. 88(2) EC)*
7. *State aid — Commission decision to initiate the formal investigation procedure in relation to a State measure provisionally classified as new aid — Duty to state reasons — Scope (Art. 88(2) EC; Council Regulation No 659/1999, Art. 6)*

1. A decision to initiate the formal investigation procedure in relation to a measure in the course of implementation and which the Member State concerned does not regard as falling within the scope of Article 87(1) EC, taken by the Commission on the ground that the measure in question is new aid, may form the subject-matter of an action under Article 230 EC because it necessarily alters the legal

implications of the measure and the legal position of the recipient firms.

The significant element of doubt as to the legality of a measure which is created by a decision to investigate it not only must lead the Member State to suspend its application but also may be

invoked before a national court and is capable of inclining both the firms which are beneficiaries of the measure and their trading partners to the view that the tax concession in question has not been definitively acquired.

unable to resolve all the difficulties on that point during its initial examination of the measure concerned.

(see para. 49)

(see paras 37-38, 40)

2. An intra-state body has *locus standi* to challenge, by means of an action for annulment, a decision taken by the Commission, in the exercise of its powers in matters involving State aid, to initiate the formal investigation procedure in respect of tax measures of which that body is the author and which it has implemented in the exercise of its own powers.
4. The Commission is not guilty of a manifest error of assessment if, on the conclusion of its preliminary assessment, in the exercise of its powers in matters involving State aid, it forms the view that the formal investigation procedure should be initiated in respect of tax measures which, in that they create a tax credit that is restricted to undertakings making substantial investments, seem to offer an appreciable advantage to the beneficiaries thereof in relation to their competitors and to be likely essentially to benefit undertakings which engage in trade between Member States.

(see para. 41)

(see paras 65, 69, 71)

3. Where, in an action against a decision to initiate the formal investigation procedure in relation to a measure already in the course of implementation, the applicants challenge the Commission's assessment of the measure in issue as constituting State aid, review by the Court is limited to ascertaining whether the Commission has made a manifest error of assessment in forming the view that it was
5. Since, in accordance with Article 1(b)(v) of Regulation No 659/1999, the regulation on State aid procedure, existing aid includes aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market

and without having been altered by the Member State, a change in the Commission's decision-making practice, for example in the criteria which it applies in ascertaining selectivity, does not provide grounds for disputing that a State measure is in fact new aid unless that change is attributable to the evolution of the common market.

doubts only as to the measure's compatibility with the common market.

(see paras 81-84)

Whether a State measure is existing or new aid cannot depend on a subjective assessment by the Commission and must be determined independently of any previous administrative practice it may have had.

(see paras 78, 80)

6. The Commission does not infringe Article 88(2) EC where it fails, in a decision formally to investigate national measures with reference to the Community rules on State aid, to formulate its doubts as to the classification of the measures in question as State aid. In a decision to initiate the formal investigation procedure, the Commission is merely required to give a preliminary assessment of the aid character of the measure in question and its compatibility with the common market and is required to set out its

7. According to Article 6(1) of Regulation No 659/1999, the regulation on State aid procedure, where the Commission decides to initiate a formal investigation into a national measure, it is permissible for its decision merely to summarise the relevant issues of fact and law, include a 'preliminary assessment' as to the aid character of the State measure in question and set out its doubts as to the measure's compatibility with the common market. Again under Article 6, a decision to initiate the procedure must give interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with the common market.

(see paras 104-105)