

## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 22 August 2002

on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya C 48/2001  
(ex NN 43/2000)

(notified under document number C(2002) 3141)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/81/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 invited interested parties to submit their comments <sup>(1)</sup> pursuant to the provisions cited above and having regard to their comments,

Whereas:

## I. PROCEDURE

(1) In 1997 the Economic and Financial Council adopted a Code of Conduct for business taxation with the objective of tackling harmful tax competition <sup>(2)</sup>. As a result of the commitment made in response to the Code, the Commission published in 1998 a notice on the application of State aid rules to measures relating to direct business taxation <sup>(3)</sup> (the notice), stressing its determination to apply the rules rigorously and to respect the principle of equality of treatment. On the basis of this notice, the Commission undertook to examine or re-examine case by case the tax arrangements in force in the Member States.

(2) In this context, the Commission wrote to the Spanish authorities on 12 February 1999 seeking information on various measures including the tax schemes in the

Basque Country and Navarre for coordination centres. None of these measures had been notified to the Commission. By letter dated 21 April 1999, the Spanish authorities supplied the information requested.

(3) By letter dated 22 June 2000, the Spanish authorities informed the Commission that the tax schemes for coordination centres in Álava and Guipúzcoa had been repealed.

(4) By letter dated 8 May 2001, Spain informed the Commission that the tax scheme for coordination centres in Navarre had been repealed and that the Vizcaya scheme was still in force but had not been applied. Since, according to the information available, no aid had been granted under the Álava, Guipúzcoa and Navarre schemes, the Commission dropped its inquiry into them and limited its investigation to the scheme for coordination centres in Vizcaya, which was still in force.

(5) By letter dated 11 July 2001, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of coordination centres in Vizcaya.

(6) The Commission 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.

<sup>(1)</sup> OJ C 304, 30.10.2001, p. 6.

<sup>(2)</sup> OJ C 2, 6.1.1998, p. 1.

<sup>(3)</sup> OJ C 384, 10.12.1998, p. 3.

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

- (7) By letter dated 20 November 2001, the Spanish authorities informed the Commission that the Vizcaya Provincial Council had adopted a draft law repealing the tax scheme for coordination centres.
- (8) By letters dated 18 March 2002 and 8 April 2002, the Commission asked Spain for further information on the repeal of the tax scheme for coordination centres and on the beneficiaries of the scheme. By letter dated 25 April 2002, Spain informed the Commission that the coordination centres scheme would be finally abolished on 30 April 2002, and that the sole beneficiary had already renounced its coordination centre status. By letter dated 3 June 2002, Spain confirmed that the scheme had been abolished.

## II. DESCRIPTION OF THE AID

- (9) A special tax scheme was introduced in Vizcaya for management, coordination and financial operations centres. The details of the scheme are governed by Articles 53 and 54 of Provincial Regulation No 3/1996 of 26 June 1996 on corporation tax and Provincial Decree No 81/1997 of 10 June 1997 adopting the Corporation Tax Regulations.
- (10) A management, coordination and financial operations centre (coordination centre) is a legal person subject to corporation tax, whose main purpose is to manage, direct, supervise and centralise the transactions and services of the international group of firms to which it belongs.
- (11) To qualify for the Vizcaya tax scheme, a group must meet the following requirements:
- (a) the aggregate own funds of the group must be more than ESP 1 250 million (EUR 7,51 million);
  - (b) the group must include firms resident in at least two foreign countries;
  - (c) at least 25 % of the group's own funds must be held by firms that are not resident in Spain;
  - (d) annual turnover must exceed ESP 8 000 million (EUR 48,1 million), of which at least 25 % must relate to foreign operations.
- (12) In addition, a coordination centre must:
- (a) employ at least eight persons full-time;
- (b) fulfil one of the following conditions:
- (i) its authorised capital must not be less than ESP 250 million (EUR 1,50 million), or its own funds not less than ESP 600 million (EUR 3,61 million);
  - (ii) its annual turnover must be more than ESP 1 000 million (EUR 6,01 million). If the centre performs management and coordination activities only, its turnover must be greater than ESP 150 million (EUR 0,902 million).
- (13) Under Article 54 of Provincial Regulation No 3/1996, a coordination centre may calculate its tax base in one of two ways: either by the classical method, i.e. by deducting expenses from taxable income, or by an alternative method. In the latter case, taxable profits are reckoned as 25 % of the coordination centre's expenditure, excluding financial costs. The amount thus obtained is then liable to corporation tax at the standard rate. This is known as the 'cost plus' method.
- (14) To qualify for the coordination centres scheme, an undertaking must obtain the prior approval of the tax authorities, which is granted for a period of up to five years. Approval is automatic if the conditions of the scheme are fulfilled; it may be renewed on request.

## III. GROUNDS FOR INITIATING THE PROCEDURE

- (15) In its assessment of the information submitted by Spain in the course of its preliminary assessment, the Commission considered that the exclusion of financial costs from the calculation of profits under the cost plus method could confer an advantage on coordination centres. It also considered that this advantage was granted through state resources, affected trade between Member States and was selective. It also considered that none of the exceptions to the general prohibition on State aid provided for in Articles 87(2) and 87(3) of the Treaty applied. The Commission therefore had doubts about the compatibility of the measure with the common market and decided to initiate the formal investigation procedure.

## IV. COMMENTS FROM INTERESTED PARTIES

- (16) Comments were received from the Vizcaya Provincial Council. They may be summarised as set out in recitals 17 to 23.
- (17) The Vizcaya coordination centres scheme is in the process of being abolished.

- (18) Tax measures adopted in Vizcaya have been based on the experience of other Member States. The Vizcaya legislation on coordination centres was based essentially on the Belgian coordination centres scheme in force at the time. The Commission had taken no State aid action against the Belgian scheme, which covered more than 300 coordination centres. Nor did the subsequent changes to the Belgian scheme elicit the slightest comment from the Commission as to its classification as State aid under Article 92 (now Article 87) of the EC Treaty. The Vizcaya Provincial Council was therefore sure that the legislation it was about to adopt was consistent with Community law.
- (19) If there had been any doubt before 1996 as to the aid nature of the Belgian scheme or its compatibility with the common market, it is reasonable to assume that the Commission would have taken action under the former Article 93 of the Treaty (now Article 88). It is not too far-fetched to conclude that, by remaining silent, the Commission took a position in this matter consistent with *Lorenz*<sup>(5)</sup>, approving the Belgian scheme either because it was not State aid or because it was a tax measure manifestly compatible with the common market. It was only later that the Commission stated that the Belgian scheme had not deserved to be described as State aid.
- (20) The lack of any reservations on the part of the Commission with regard to the well-known Belgian scheme is a sufficient basis for a legitimate expectation. When it adopted the scheme, the Vizcaya Provincial Council would not know that the contested legislation might be regarded as State aid, still less that after a preliminary examination, there would be doubts about its compatibility with the common market.
- (21) If the Vizcaya coordination centre scheme were found to be State aid incompatible with the common market, the legitimate expectation would prevent the Commission from ordering the recovery of any aid granted under the scheme. Similarly, there would be a legitimate expectation on the part of the beneficiary of the scheme as to the legality of the Provincial Council's action, since the Provincial Council had been aware for many years of the existence of the Belgian scheme and since the Commission had raised no objections.
- (22) Apart from the question of legitimate expectations, there is also the principle of equality of treatment. At the same time as initiating this proceeding under Article 88(2) of the Treaty, the Commission proposed appropriate measures under Article 88(1) to Belgium in respect of its

coordination centres scheme. This means that the Commission considered the Belgian scheme to be an existing aid.

- (23) Since there is no specific feature of the Belgian scheme compared with the Vizcaya scheme that objectively warrants the former being regarded as existing aid but the latter as new aid, both schemes should be treated equally by the Commission. Where a scheme is regarded as existing aid, the Commission may not require recovery of the aid, even if it declares the scheme to be incompatible with the common market. It is difficult to see how an instruction to recover the aid in the case of the Vizcaya scheme is warranted, when the scheme is essentially the same as the Belgian one.

#### V. COMMENTS FROM THE SPANISH AUTHORITIES

- (24) In their written comments, which forwarded the information supplied by the Vizcaya Provincial Council, the Spanish authorities informed the Commission of the adoption of the Vizcaya legislation abolishing the coordination centre scheme. They also forwarded a copy of the comments from the Vizcaya Provincial Council, summarised above. In addition, Spain confirmed that contrary to the information supplied in their letter of 8 May 2001, one firm had been approved as a coordination centre under the scheme prior to the date of that letter, but had renounced that status on 27 November 2001.

#### VI. ASSESSMENT OF THE AID

- (25) Having considered the opinion of the Spanish authorities and the Vizcaya Provincial Council, the Commission maintains its position, expressed in its letter of 11 July 2001<sup>(6)</sup> to the Spanish authorities initiating the procedure under Article 88(2) of the EC Treaty, that the scheme under examination constitutes unlawful, operating aid which falls within the scope of Article 87(1) of the EC Treaty.

#### *State aid*

- (26) Neither the Spanish authorities nor the Vizcaya Provincial Council have challenged the Commission's preliminary assessment, given in its letter of 11 July 2001<sup>(7)</sup>, that the coordination centres scheme constitutes State aid within the meaning of Article 87(1) of the EC Treaty. The Commissions showed that the scheme appeared to satisfy the four cumulative criteria which must be met in order for a measure to constitute State aid. This assessment may be summarised and refined as follows.

<sup>(5)</sup> Case 120/73, *Lorenz v. Germany* [1973] ECR 1471.

<sup>(6)</sup> See footnote 1.

<sup>(7)</sup> See footnote 1.

- (27) Under the coordination centres scheme, eligible undertakings may opt for an alternative method of calculating their tax liability. In the context of transfer pricing<sup>(8)</sup>, tax authorities may apply such alternative methods to ensure that transactions between associated enterprises are at arm's length. The arm's length principle provides that the taxable profits from transactions between associated firms should be charged as if the transaction had been carried out between unrelated parties under normal market conditions. As regards transfer pricing, the international rules (the arm's length principle) were established by Article 9 of the OECD Model Tax Convention on Income and on Capital, as implemented in the OECD Transfer Pricing Guidelines of 1995. Since such analysis requires that individual facts and circumstances are taken into account, the OECD Guidelines do not recommend the use of fixed margins.
- (28) As stated in point 9 of the notice<sup>(9)</sup>, an advantage may be conferred by reducing the firm's tax burden, and in particular by reducing its taxable income. The Vizcaya coordination centres scheme allows firms to choose the cost plus method for calculating their taxable income. The method may result in a reduction of the tax paid, if it does not reflect the economic reality of the underlying transactions. Depending on the nature of the firm's business, the cost plus method together with a fixed markup may lead to the economic reality being underestimated and therefore to the payment of less tax than under the more traditional, comparable unrelated price (CUP) method. This risk is particularly great where the firm conducts high value-added transactions. It is therefore incumbent on the tax authorities to ensure that the cost plus method applied is appropriate to the individual enterprise, or, as the case may be, the particular sector, in order that the tax paid is comparable to that under the more traditional (CUP) method.
- (29) The Vizcaya coordination centres scheme makes it possible to exclude financial costs from the calculation of the taxable income. This increases the probability that the tax paid by firms will be lower than that using the more traditional (CUP) method. The difference will be even greater if the main function of the coordination centre is to carry out financial transactions. Neither the Spanish authorities nor the Vizcaya Provincial Council have supplied any evidence that the cost plus method applicable under the scheme results in an equivalent level of taxation to the classical method. The Commission therefore concludes that the scheme confers an advantage on coordination centres and on the groups to which they belong.
- (30) The lowering of the tax base leads to a reduction in Vizcaya's tax revenue. This is equivalent to the use of State resources.
- (31) The scheme affects competition and trade between Member States, since the groups to which coordination centres belong must generate at least 25 % of their turnover in two foreign countries. Firms covered by the scheme are therefore likely to be active in sectors in which intra-Community trade is intense. By strengthening the financial position of such groups, the measure will distort or threaten to distort intra-Community trade.
- (32) The scheme is selective. Only those enterprises which satisfy the particular criteria set out in Provincial Regulation No 3/1996 can benefit from the coordination centres scheme.
- (33) Neither the Spanish authorities nor the Vizcaya Provincial Council have given any reasons why the tax measures in question are necessary for the functioning and effectiveness of the Spanish tax system and therefore do not constitute State aid (point 23 of the notice<sup>(10)</sup>).
- Compatibility*
- (34) Neither the Spanish authorities nor the Vizcaya Provincial Council have challenged the Commission's assessment in its letter of 11 July 2001<sup>(11)</sup> that none of the exceptions provided for in Articles 87(2) and 87(3), under which State aid may be considered compatible with the common market, applies in the present case. The Commission has no reason, therefore, to change its assessment, which is summarised in recitals 35 to 39.
- (35) Since the coordination centre scheme constitutes State aid within the meaning of Article 87(1) of the EC Treaty, its compatibility must be assessed in the light of the exceptions provided for in Articles 87(2) and 87(3).
- (36) The exceptions provided for in Article 87(2), which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.

<sup>(8)</sup> Transfer prices are the prices at which a firm transfers goods or provides services to associated firms.

<sup>(9)</sup> See footnote 3.

<sup>(10)</sup> See footnote 3.

<sup>(11)</sup> See footnote 1.

- (37) Nor does the exception provided for in Article 87(3)(a), which provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.
- (38) Similarly, the coordination centres scheme cannot be considered to be a project of common European interest or to remedy a serious disturbance in the economy of Spain, as provided for by Article 87(3)(b). Nor does it have as its object the promotion of culture and heritage conservation as provided for by Article 87(3)(d).
- (39) Finally, the coordination centres scheme must be examined in the light of Article 87(3)(c), which provides for the authorisation of aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent that is contrary to the common interest. The tax advantages granted by the coordination centres scheme are not related to investments, to job creation or to specific projects. They simply constitute a reduction of charges that should normally be borne by firms in the course of their business and must therefore be considered as operating aid, the benefits of which cease as soon as the aid is withdrawn. According to the established practice of the Commission, such aid cannot be considered to facilitate the development of certain activities or of certain economic areas.

#### *Legitimate expectations*

- (40) Where illegally granted State aid is found to be incompatible with the common market, the normal requirement is that the aid should be recovered from the beneficiaries. Through recovery of the aid, the competitive position that existed before the aid was granted is restored as far as possible. However, Article 14(1) 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>(12)</sup> (now Article 88) states that 'the Commission shall not require the recovery of the aid if this would be contrary to a general principle of Community law'. The case law of the Court of Justice and the Commission's own decisions have established that where, as a result of the Commission's actions, the beneficiary of a measure has a legitimate expectation that the aid has been granted in accordance with Community law, then an order to recover the aid would infringe a general principle of Community law.
- (41) In *Van den Bergh & Jurgens*<sup>(13)</sup>, the Court ruled that it:

has consistently held that any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of protection of legitimate expectation. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted.'

- (42) In Commission Decision 2001/168/ECSC of 31 October 2000 on Spain's corporation tax laws<sup>(14)</sup>, the Commission noted the similarities between the Spanish scheme in question and a French scheme which it had approved on the grounds that it did not constitute aid within the meaning of Article 92(1) of the EEC Treaty (now Article 87(1) of the EC Treaty).
- (43) In the present case, the Commission notes that the Vizcaya coordination centres scheme bears close similarities to the scheme introduced in Belgium by Royal Decree No 187 of 30 December 1982 on the tax treatment of coordination centres. Both schemes concern intra-group activities and both use cost plus methods to determine the tax base. In its decision of 2 May 1984, the Commission considered the scheme not to be an aid within the meaning of Article 92(1) of the EEC Treaty (now Article 87(1) of the EC Treaty). Even if this decision was not published, the fact that the Commission had not raised any objections to the Belgian coordination centres scheme was publicised both in the XIVth Report on Competition Policy and in an answer to a parliamentary question<sup>(15)</sup>.
- (44) In this context, the Commission notes that its decision on the Belgian coordination centres scheme was taken before the entry into force of the Vizcaya coordination centres scheme. The Commission also notes that the sole beneficiary of the scheme was approved as a coordination centre before the Commission's decision of 11 July 2001<sup>(16)</sup> opening the formal investigation procedure. Furthermore, the sole beneficiary renounced its rights under the scheme before the closure of the present formal investigation procedure. Therefore, the arguments of the Vizcaya Provincial Council that both it and the beneficiary of the scheme had a legitimate expectation which, if the scheme were found to be incompatible with the common market, would prevent the Commission from ordering the recovery of any aid granted, are sound. This legitimate expectation covers firms approved under the scheme before the opening of the formal investigation procedure in respect of any aid granted up to the closure of that procedure.

<sup>(12)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(13)</sup> Case C-265/85 *Van den Bergh en Jurgens BV v. Commission* [1987] ECR, p. 1155, paragraph 44.

<sup>(14)</sup> OJ L 60, 1.3.2001, p. 57.

<sup>(15)</sup> Written question No 1735/90, OJ C 63, 11.3.1991.

<sup>(16)</sup> See footnote 1.

*Equality of treatment*

- (45) The Vizcaya Provincial Council argues that the Vizcaya coordination centres scheme should have been subject to a proposal for appropriate measures under Article 88(1) EC, thereby subjecting it to the same treatment as the Belgian coordination centres scheme. However, this argument presumes a margin of discretion that the Commission does not have. In *Piaggio* <sup>(17)</sup>, the Court ruled that the Commission's classification of the scheme at issue as an existing aid, when that scheme had not been notified in accordance with Article 88(3) EC, could not be accepted.
- (46) In the present case, the Vizcaya legislation enacting the coordination centres scheme was not notified to the Commission prior to its entry into force. Therefore, the Commission cannot consider it to be an existing aid scheme.

**VII. CONCLUSIONS**

- (47) The Commission concludes that the Vizcaya coordination centres scheme constitutes State aid within the meaning of Article 87(1) of the EC Treaty and that none of the derogations provided for in Article 87(2) or Article 87(3) apply. The Commission also finds that Spain has unlawfully implemented the scheme in question, in breach of Article 88(3) of the EC Treaty. However, the Commission notes that legislation to repeal the scheme was adopted on 30 April 2002 and entered into force on 9 May 2002 <sup>(18)</sup>. The Commission

also notes that the only firm approved under the scheme renounced its rights on 27 November 2001. Both the Spanish authorities and the sole beneficiary of the scheme were entitled to entertain legitimate expectations that the scheme did not constitute State aid. Therefore, the Commission does not need to require recovery of the aid.

HAS ADOPTED THIS DECISION:

*Article 1*

The illegal State aid scheme implemented by Spain under Articles 53 and 54 of Vizcaya's Provincial Regulation No 3 of 26 June 1996 on corporation tax and implemented by Provincial Decree No 81/1997 of 10 June 1997 is incompatible with the common market.

*Article 2*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 22 August 2002.

*For the Commission*

Mario MONTI

*Member of the Commission*

<sup>(17)</sup> Case C-295/97 *Piaggio v. Ifitalia & others*, [1999] ECR I-3735.

<sup>(18)</sup> See Provincial Regulation No 4 of 30 April 2002 (*Boletín Oficial de Vizcaya* No 87, 9.5.2002).