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([1]) Text with EEA relevance

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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([1]) Text with EEA relevance

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 July 2001

on the State aid scheme applied by Spain to certain newly established firms in Álava

(notified under document number C(2001) 1760)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/892/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, called on interested parties to submit their comments [1], and having regard to those comments,

Whereas:

I. PROCEDURE

(1) As a result of the information received in response to the procedures initiated following complaints about State aid granted to Daewoo Electronics Manufacturing España SA [2] and to Ramondín SA and Ramondín Cápsulas SA [3], the Commission learned of the existence of a scheme of non-notified tax aid for investments in Spain, in the Province of Álava, consisting of a reduction in the tax base for certain newly established firms.

(2) By letter dated 29 September 1999 (SG(99) D/7813) 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 2 December 1999, registered on 6 December 1999, 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* [4]. The Commission invited interested parties to submit their comments on the aid within one month of the date of publication.

(5) Comments were received from: the Autonomous Community of Castile-Leon, on 17 March 2000; the Rioja Regional Government, on 24 March 2000; the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza) (hereinafter 'Confebask'), on 27 March 2000, plus, outside the time limit, supplementary comments by letter dated 29 December 2000, registered on 3 January 2001; the Basque Economists Association (Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa), on 27 March 2000; the Basque Business Circle (Círculo de Empresarios Vascos), on 27 March 2000; and the Professional Association of Tax Advisers of the Autonomous Community of the Basque Country (Asociación Profesional de Asesores Fiscales de la Comunidad del País Vasco), on 28 March 2000. By

[1] OJ C 55, 26.2.2000, p. 2.
[2] Commission Decision 1999/718/EC (OJ L 292, 13.11.1999, p. 1).
[3] Commission Decision 2000/795/EC (OJ L 318, 16.12.2000, p. 36).
[4] See footnote 1.

letter dated 17 May 2000 (D/52998), the Commission sent these comments to Spain, asking for observations; it has not received any.

(6) By letter from the Permanent Representation dated 22 June 2000, the Spanish authorities informed the Commission that Provincial Law (Norma Foral) No 7/2000 of 29 March 2000 ([5]) had repealed, as from 5 April 2000, Article 26 of Álava Provincial Law No 24/1996 of 5 July 1996 on corporation tax ([6]), which formed the legal basis for the tax incentives in question.

II. **DETAILED DESCRIPTION OF THE AID**

(7) According to the information at the Commission's disposal, which has not been questioned by the Spanish authorities or by third parties, the tax incentives in question were introduced by Article 26 of Provincial Law No 24/1996 of 5 July 1996 ([7]). The text of the Article reads as follows:

> '1. Companies starting their business activity shall be entitled to a reduction over four consecutive tax periods, starting from the first one in which, within four years from start-up, they obtain positive tax bases, of 99 %, 75 %, 50 % and 25 % respectively in the positive tax base resulting from the conduct of their business, before offsetting any negative tax bases from previous periods.
>
> […]
>
> 2. To qualify for this reduction, taxable persons shall meet the following requirements:
>
> (a) they start their business with a minimum paid-up capital of ESP 20 million;
>
> […]
>
> (e) in the first two years of operation they invest in tangible fixed assets worth at least ESP 80 million, all such investments being in assets assigned to the business which are not leased or transferred to third parties for their use. To this end, investments in tangible fixed assets shall include assets acquired through financial leasing, provided that they undertake to exercise the option to buy;
>
> (f) at least 10 jobs are generated in the six months following start-up, and the annual average workforce is kept at that figure from that time until the financial year in which the right to apply the reduction in the tax base expires;
>
> […]
>
> (h) they have a business plan covering a minimum period of five years.
>
> 3. […]
>
> 4. The minimum amount of the investments within the meaning of paragraph 2(e) and the minimum number of jobs created within the meaning of paragraph 2(f) shall be incompatible with any other tax reduction laid down for such investment or job creation.
>
> 5. The reduction laid down in this Article shall be requested from the tax authorities, which, after checking that the requirements set out at the beginning have been met, shall communicate to the applicant company, as appropriate, their provisional authorisation, which shall be confirmed by decision of the Álava Provincial Council (Diputación Foral de Álava).
>
> […]'.

(8) The Commission notes that, according to the preamble of Provincial Law No 24/1996, the object of the aid in question is to promote the emergence of new companies.

(9) The Commission also notes that the tax incentives relate to the positive tax base for corporation tax resulting from the conduct of the business, prior to the set-off for negative tax bases from previous financial years. In this case, the recipients are companies which have started their commercial activities since the date of entry into force of the said Provincial Law, have invested in tangible fixed assets a minimum of ESP 80 million (EUR 480 810) and have generated at least ten jobs. In addition, recipient companies should, in particular, have a business strategy covering a minimum period of five years and should start their activity with a minimum paid-up capital of ESP 20 million (EUR 120 202).

(10) The Commission emphasises that the aid consists in a reduction in the positive tax base of 99 %, 75 %, 50 % and 25 % respectively over four consecutive tax periods, starting from the first one in which, within a period of four years from start-up, the recipients obtain positive tax bases.

(11) The Commission finds that the Álava 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

([5]) *Boletín Oficial del Territorio Histórico de Álava*, of 5 Aril 2000.
([6]) *Territorio Histórico de Álava: Norma Foral 24/1996 del Impuesto sobre Sociedades* of 5 July 1996.
([7]) *Boletín Oficial del Territorio Histórico de Álava*, of 9 August 1996.

of firms, e.g. SMEs, since any firm may qualify, provided that it satisfies the abovementioned tests.

(12) The Commission finds that these reductions in the tax base are applicable from the tax year starting on 1 January 1996. As far as combination with other aid is concerned, it is clear 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 ruled out 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 ([8]).

(13) 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'. The Commission also emphasised, however, that, to be regarded as aid, the measures should meet all four of the criteria set out in Article 87 and explained below.

(14) Firstly, the Commission pointed out, at that stage, that the reductions of 99 %, 75 %, 50 % and 25 % in the abovementioned tax bases give their recipients an advantage, since they partially reduce their normal tax liability.

(15) Secondly, the Commission provisionally considered that the reductions involve a loss of tax revenue and are therefore equivalent to the consumption of public resources in the form of fiscal expenditure.

(16) Thirdly, the Commission considered at that stage that the reduction in the tax base 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 are also involved in intra-Community trade and therefore affects such trade. Furthermore, the increase in recipient firms' net profit (profit after tax) improves their profitability. In this way they are more able to compete with firms which are not eligible for the aid.

(17) Lastly, the Commission considered, at that stage, that the reduction in the tax base in question is specific or selective in that it favours certain firms. The conditions for granting the incentives specifically state that firms established before the said Provincial Law came into force in mid-1996 are ineligible, as are other firms which have created fewer than 10 jobs, whose investments are below the threshold of ESP 80 million (EUR 480 810) and which do not have a paid-up capital of more than ESP 20 million (EUR 120 202). In addition, the Commission provisionally considered that the tax aid is not justified by the nature or general scheme of the tax system.

(18) 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 examined by the Álava Provincial Council, which may, subsequently, decide to grant the aid if appropriate.

(19) In short, the Commission considered, at that stage, that the reduction in the tax base is 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 the cumulative criteria of constituting an advantage, being granted by the State from State resources, affecting trade between Member States and distorting competition in favour of certain firms.

(20) Since the tax incentives exceed the maximum limit of EUR 100 000 over a period of three years, the Commission considered, at that stage, that they cannot be regarded as subject to the *de minimis* rule ([9]).

(21) The Commission stated provisionally that State aid which is not governed by the *de minimis* rule is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(1)(a) of the EEA Agreement. However, the Spanish authorities had not met that obligation, and the Commission therefore considered at that stage that the aid could be regarded as unlawful.

(22) The Commission also found at that stage 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.

([8]) See in this connection Commission Decision 1999/718/EC concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa).

([9]) 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).

(23) On the contrary, the Commission took the view at that stage that the tax concessions could be viewed as operating aid, as their aim is to relieve companies of the costs which they would normally have to bear as part of their everyday management or usual activities.

(24) The Commission pointed out that operating aid is in principle prohibited. It may nevertheless exceptionally be granted in regions meeting certain conditions. But that is not the case here. 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.

(25) The reduction in the tax base, 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 were compatible where the recipient belongs to a sector that is subject to special Community rules.

(26) 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 or exceptional occurrences 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 provisionally that the incentives were 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 ...', as they are not in any way specific to the activities of the recipient firms. Lastly, they are not intended to promote culture or heritage conservation within the meaning of Article 87(3)(d).

(27) 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 tax incentives in the form of a reduction in the tax base of certain newly established firms in the Province of Álava. The relevant information requested is as follows: copies of all decisions granting the reduction in the tax base, and data on the investments made by each recipient, the jobs created, the share capital, the amount of the reduction in the tax base which each firm has enjoyed, and the outstanding balance.

III. **COMMENTS OF THE SPANISH AUTHORITIES**

(28) The Spanish authorities submitted their comments by letter from the Permanent Representation, dated 2 December 1999. Basically, they consider that the reduction in the tax base does not constitute State aid within the meaning of Article 87 of the Treaty, but a general measure which is not subject to the State aid rules. They also maintain that the measure, whose purpose is to promote investment, is part of an economic policy which is much used by governments.

(29) They argue that the measure is not specific or selective in character. In their opinion, the opening of the measure to all sectors and to all taxpayers that meet the appropriate criteria removes any specific character. Nor is there any 'de facto' restriction of this general scope. As to specificity of substance, this does not exist, since the requirements to invest ESP 80 million and create ten jobs are not discriminatory, but objective conditions deriving from the need to ensure the effectiveness of the measure and thus achieve the proposed objective.

(30) Furthermore, the Spanish authorities dispute that the measures in question are of a discretionary nature, since the incentives are granted automatically once the said objective conditions are satisfied. The Álava Provincial Council can thus check only that all the conditions are satisfied; it cannot alter or add any conditions. Nor is the procedure laid down in the abovementioned Article 26(5) for granting the tax incentives discretionary. Under that Article 'the tax authorities … shall communicate to the applicant company, as appropriate, their provisional authorisation, which shall be confirmed by decision of the Álava Provincial Council'. The procedure should be interpreted therefore as meaning that the incentives will be granted after a check has been made that all the objective conditions are met. This is why the phrase 'as appropriate' is not discretionary.

(31) Similarly, the Spanish authorities claim that the Álava reduction in the tax base is founded on measures existing in other Member States such as Ireland, or on

measures taken by the Spanish central government in 1993 ([10]). However, the Commission did not consider all these measures as State aid within the meaning of Article 87 of the Treaty. Given the similarity between the Álava measures and those of the central government, it can be concluded that if one measure is not specific in character, the other ought not to be either. Furthermore, the Spanish authorities state that both the Álava measures and those of the central government cover only one part of Spain. Therefore, if the Commission did not consider there was anything specific about the tax measures introduced by the Spanish central government, it ought to reach the same conclusion about the Álava measures.

(32) Moreover, the Spanish authorities argue that, even if the Commission were to consider that the measure was specific, it was justified by the nature and general scheme of the system, as provided for in the Commission notice on the application of the state aid rules to measures relating to direct business taxation (98/C 384/03) ([11]). The measure in question is justified by the nature and general scheme of the tax system, since the conditions that must be met before it can be granted are objective and cross-sector.

(33) The Spanish authorities question the view expressed by the Commission that the tax rules do not satisfy the conditions of the sectoral rules. In their opinion, the Commission ought to determine what the specific conditions are that are infringed by the said tax rules. The Spanish authorities consider that the application of the rules on regional aid is inappropriate, since in this specific case no State aid is involved.

(34) They also question the Commission's assumption that trade will be affected because the companies benefiting from the concessions carry out economic activities involving trade between Member States. In their opinion, it cannot be established, *pace* the Commission, that trade is affected generally, but only in specific cases, since there is a possibility that in some cases it will not be affected. In other cases, the companies concerned may be operating on local markets only or in sectors which have not yet been liberalised. In all these cases, therefore, one of the prerequisites for describing an official measure as state aid is missing.

([10]) Law 22/1993 of 29 December 1993, on tax measures and the reform of the legal system of the public service and unemployment protection (BOE, 31.12.1993). The measure consisted in a reduction of the corporation tax base by 95 % in the tax years 1994 to 1996 for firms set up in 1994 which invested at least ESP 15 million and created at least three but less than twenty jobs.

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

(35) As regards the operating-aid characteristics which, according to the Commission, the tax measures in question have, the Spanish authorities emphasise that, although the tax advantage derives from the tax base and not from the investment, it still has the character of an investment incentive and cannot, therefore, be described as operating aid.

(36) In view of the above arguments, the Spanish authorities consider that the Commission should terminate the Article 88(2) procedure by a decision finding that the tax measures in question do not meet the criteria for being regarded as State aid.

(37) For the rest, the Spanish authorities emphasise that, under Spanish tax rules, the tax authorities may disclose information on taxpayers only in certain exceptional cases. Such cases do not include sending information to the Commission. Consequently, the Spanish authorities are not providing any of the information requested in the decision initiating the procedure.

IV. **OTHER COMMENTS RECEIVED BY THE COMMISSION**

(38) The Commission emphasises that the comments set out below are without prejudice to the question of whether the parties which submitted them can be considered interested parties within the meaning of Article 88(2) of the Treaty.

Comments by the Autonomous Community of Castile-Leon

(39) The Autonomous Community of Castile-Leon points out first of all that the tax measures in question are part of a set of tax measures adopted by the Álava Provincial Council that have been contested both in Spain and at Community level. It states that, in the case in point, Article 26, which introduces the tax measure in respect of which the procedure was initiated, was quashed by the High Court of the Basque Country (Tribunal Superior del País Vasco) in 1999 ([12]).

(40) The Autonomous Community of Castile-Leon goes on to state that the tax measures in question constitute State aid, since they satisfy all four criteria laid down in Article 87 of the Treaty. In support of this contention it basically puts forward the same arguments as those given in the decision initiating the procedure. It states that the measure is also selective on account of the discretionary power of the authorities ([13]). Similarly, the

([12]) Judgment No 718/1999 of 30 September 1999.

([13]) See in this respect the judgment of the Court of Justice of the European Communities in Case C-241/94 *France* v *Commission* [1996] ECR I-4551.

tax measures are not justified by the nature or general scheme of the tax system, since their purpose is to promote the formation of new companies.

(41) For the rest, the Autonomous Community of Castile-Leon considers that the tax incentives cannot be regarded as compatible by virtue of the derogations in Article 87 of the Treaty. In this respect, it states that the tax measures are operating aid, since they are continuous and not linked to the execution of a specific project. However, operating aid can only be compatible, under certain conditions, in areas qualifying for aid under the derogation in Article 87(3)(a). As the Basque Country qualifies for aid under the derogation in Article 87(3)(c), the operating aid in question cannot be regarded as compatible. Furthermore, the obligation to notify laid down in Article 88(3) of the Treaty has not been complied with.

(42) The Autonomous Community of Castile-Leon takes the view therefore that the tax measures in question should be regarded as state aid which is unlawful, since the notification procedure laid down in Article 88(3) has not been followed, and which is incompatible with the common market.

Comments from the Rioja Regional Government

(43) The Rioja Regional Government states that the tax measures constitute State aid, since they satisfy all four criteria set out in Article 87 of the Treaty. In support of this contention, it argues in particular that the purpose and effect of the reduction in the tax base is to relieve the recipient of part of the tax burden which would otherwise have been imposed on its profits. It therefore constitutes a financial advantage for recipient firms, which, because there are no quid pro quos for the authorities, involves a loss of tax revenue. This means that the recipients' business benefits, as they have a competitive advantage over all other firms. In addition to the specificity of substance, in the form of a minimum share capital of ESP 20 million, a minimum investment of ESP 80 million and a minimum of 10 jobs created, the Rioja Regional Government states that the discretionary nature of the reduction in the tax base is due partly to the authorities' ability to determine firms eligible for aid, deadlines and maximum limits and partly to the fact that the granting of the reduction in the tax base is not automatic.

(44) Moreover, the Rioja Regional Government considers that the tax measure cannot be justified on the grounds that there are five tax systems in Spain. It points out that, in the Opinion on Joined Cases C-400/97, C-401/97 and C-402/97, Advocate General Saggio considered that the nature of the competent authorities for tax matters in a territory does not justify discrimination in favour of firms established in that territory. Furthermore, the measures are not justified by the nature or general scheme of the tax system in Álava, since their purpose is to improve the competitiveness of recipient firms. The Rioja Regional Government also points out that the High Court of Justice of the Basque Country (Tribunal Superior de Justicia del País Vasco) regarded the tax measures in question as disproportionate and inappropriate for achieving the objective of promoting economic activity, since they could indirectly affect the free movement of persons and goods by establishing unacceptable conditions of competitive advantage ([14]).

(45) In short, the Rioja Regional Government considers that the tax incentives cannot be considered compatible with the common market by virtue of the derogations in Article 87 of the Treaty. Moreover, the Spanish authorities did not fulfil the obligation to notify the incentives under Article 88(3) of the Treaty.

(46) The Rioja Regional Government therefore takes the view that the tax measures should be regarded as State aid which is unlawful, since the Article 88(3) notification procedure was not complied with, and incompatible with the common market.

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

(47) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by the Province of Álava. As regards substance, Confebask's views are essentially as follows:

(a) the presumed reduction of the tax debt: the Commission is wrong to think that there is a tax debt whose reduction involves a loss of tax revenue. If this argument were sound, any tax deduction would always involve a loss of revenue compared with the amount initially due. Confebask therefore requests the Commission to reconsider its position, since otherwise it could be argued that taxes were being unlawfully harmonised by establishing a normal amount in relation to which any losses of tax revenue would have to be determined;

(b) the effect on trade: according to the Commission, where the recipients participate in intra-Community trade, the tax measures in question distort that trade. However, differences between tax systems

([14]) See the judgments of 30 September and 7 October 1999 on the tax measures in question.

always affect trade. To determine the extent to which trade is affected, the Commission should therefore analyse the entire tax system and not specific provisions. Confebask emphasises in this respect that, according to one study, the tax burden in the Basque Country is greater than in the rest of Spain. The Commission should explain why these specific measures and not other tax differences affect trade. In any event, even if such an effect did exist, the way to remove it would be through harmonisation, not State aid;

(c) the selective character of the aid: in Confebask's opinion, the selective nature of the tax measures should be assessed in one of two ways, either as an enabling rule conferring power on the tax authority subsequently to grant a specific relief, or as a rule directly granting the tax relief without requiring subsequent specification. The Commission, however, is using one argument which fits the first category, and another which fits the second. Given that the two are mutually exclusive, the Commission should explain in which category the tax measures question fall, since otherwise it would be contradictory to try and use both;

— Confebask questions the approach whereby the tax measures are regarded as enabling rules, since the reduction is granted automatically and the authorities, accordingly, have no discretionary power. The authorities are restricted to checking that the applicant satisfies the tests of eligibility. Moreover, if the tax measures are regarded as enabling rules which subsequently make it possible to grant the aid, it has to be concluded that the current procedure, in so far as it is the rules that are being questioned and not specific instances of their application, is meaningless. Similarly, according to the first paragraph of the Commission's letter to the Member States ([15]), a general provision conferring relief is regarded as aid only if 'legislative machinery enabling it to be granted without further formality has been set up'. By contrast, because it is abstract, an enabling rule cannot be regarded as State aid and, hence, cannot be assessed for its effect on competition and trade between Member States,

— as for regarding the tax measures as rules granting aid directly, Confebask points out that, according to points 19, 20 and 17 of notice 98/C 384/03, a tax measure may be specific and, hence, may be State aid, if it is aimed solely at public undertakings, certain types of undertaking or undertakings in a given region. However, the tax measures in question have none of these characteristics, not even territorial specificity, since they apply to the whole territory for which the regional authorities that introduced them are competent. As to the specific character of the thresholds, share capital of ESP 20 million, investment of ESP 80 million, and 10 jobs created, Confebask considers that the use of objective thresholds is normal practice in national and Community tax rules. Confebask also draws attention to the basis of various judgments of the Court of Justice of the European Communities and Commission decisions: hitherto, it has never been held that thresholds imply specificity. Moreover, the Commission itself acknowledges, in point 14 of the above notice, that the effect of promoting certain sectors does not necessarily mean that the measures are specific,

— Confebask also maintains that Álava's reduction of the tax base is nothing more than an adjustment of a 1993 measure (mentioned above in the comments from the Spanish authorities) introduced by Spain's central government. It even maintains that the rules are identical, except for the quantitative thresholds. Thus the effect of Álava's reduction in the tax base on competition is cancelled, since the territories adjoining the Basque provinces qualify for tax concessions for new firms. Moreover, if there were an effect on competition, this should derive from the central government measures, since they may have a larger number of recipients. Confebask also stresses that there are similar measures in other Member States, but the Commission has not initiated any procedure with regard to them, nor have they been classified as harmful measures by the Primarolo Group. In this respect it states that, in France, new firms have been eligible for corporation tax exemptions and reductions for a period of five years (10 years in some regions, and for even more favourable arrangements in Corsica) since 1994. In Luxembourg, there is a 25 % reduction in corporation tax for a period of eight years. In the south of Italy there are tax holidays from the IRPEG and the ILOR for 10 years. Lastly, in

([15]) Commission letter to Member States (SG(89) D/5521) of 27 April 1989.

Portugal, there is a 25 % reduction in corporation tax for a period of from seven to 10 years. Everything shows, therefore, that Álava's reduction of the tax base is not an exceptional scheme which gives rise to any specificity. On the contrary, it is a system widely used in the Member States;

(d) the importance of legal certainty: Confebask argues that the Commission's description of the tax reduction as unlawful aid calls into question the principles of legitimate expectations, the ban on arbitrary decisions by institutions, legal certainty and proportionality, since the Commission regarded the Basque tax arrangements as lawful in its 1993 decision. In any event, the Commission could change its position as regards future cases but not as regards past ones;

(e) incompatibility with the common market: if the tax measures in question are regarded as enabling rules, Confebask considers that their compatibility cannot be assessed while the aid is not granted through an administrative decision. The procedure is meaningless and incapable by definition of yielding any results as to the compatibility of the aid. On the other hand, if the tax measures in question are regarded as rules granting aid directly, Confebask takes the view that the practice of the Commission and the Court requires that measures have to have sectoral specificity before the compatibility of the aid can be assessed. Furthermore, it would be necessary to establish the overall tax burden on firms and the reference tax burden. Lastly, this approach would lead to the absurd conclusion that any tax burden lower than the highest tax burden in all the Member States would constitute State aid. Confebask also questions the Commission's argument that the said tax measures are incompatible since they do not contain specific provisions on sectoral or regional aid, or aid for large investment projects, etc.; tax measures may not and should not contain this type of provision. According to the Court of Justice ([16]), the Commission should specify in its decisions what the adverse effects on competition are, determining the real effect of the measures examined. Incompatibility cannot be determined, therefore, in abstract situations specific to a tax system, since in that case any differences between tax systems would necessarily become aid. This leads Confebask to repeat that there is no normal tax debt which has been reduced by the tax measures in question;

(f) Confebask therefore asks the Commission to adopt a final decision terminating the procedure and finding that the tax measures in question comply with Community law.

(48) Confebask's additional comments, communicated by letter dated 29 December 2000, registered on 3 January 2001, were not taken into account, as they reached the Commission after the deadline had expired ([17]). Furthermore, Confebask did not apply for an extension of the time limit pursuant to Article 6(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 ([18]).

Comments from the Basque Economists Association (Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa) (hereinafter 'the CVE')

(49) The CVE considers that the tax system of each Basque province does not meet the specificity criterion in Article 87(1) of the Treaty, since it only applies in part of a Member State. In support of this view, it argues that the Commission's usual practice of considering that there is specificity when the tax measure is applied to part of the Member State is appropriate where there is a single tax system. However, it is not relevant where there are various tax systems in the same Member State. The practice, furthermore, is contrary to the coherence of the Spanish tax system, which is multiple by nature. Each system is applied exclusively in one part of the territory. Thus, each one of the systems is not a regional system, but a unique system applicable to the territory concerned. Moreover, the losses of tax revenue which result from certain tax measures are not the subject of a transfer from the central government. On the contrary, they have to be offset, either by increasing the revenues from other taxes or by cutting public expenditure. In addition, the specific nature of the Spanish tax system should not be penalised through the application of Community law. For the rest, any distortions of competition resulting from the existence of five tax systems should be tackled through the Community rules on tax harmonisation.

(50) Nonetheless, the CVE does not rule out the possibility that, in the exercise of their tax autonomy, the Provincial Councils may adopt tax measures that are

([16]) Judgment of the Court of Justice of the European Communities in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103.

([17]) The deadline for submitting comments was one month from the date of publication of the notice in the *Official Journal of the European Communities*, i.e. 26 February 2000.

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

caught by Article 87(1) of the Treaty. However, in the present case, it takes the view that the reduction in the tax base is not so caught, since it only meets the criterion of being granted from state resources. It does not distort competition, because its payment implies that there is a positive tax base. Moreover, its amount cannot be determined in advance, since, for example, if there were no profits, the aid would not be paid. The same applies as regards the effect on trade. This should be established in each specific case: it is not sufficient that trade might be affected. For the rest, it examines whether there is any specificity deriving from the thresholds for eligibility for the tax reduction or from the Provincial Council's discretionary power to grant the reduction. In this respect, it considers that the thresholds do not involve specificity, since they are objective and non-discriminatory. As for the grant of the tax reduction, this does not involve the exercise of a discretionary power, but checking that all the conditions are met.

(51) The CVE concludes that the reduction in the tax base, which is a general measure adopted under the tax powers of the Provinces in question, is not caught by Article 87 of the Treaty.

Comments from the Basque Business Circle (Círculo de Empresarios Vascos) and the Professional association of Tax Advisers of the Autonomous Community of the Basque Country (Asociación Profesional de Asesores Fiscales de la Comunidad del País Vasco) (hereinafter 'the CEV' and 'the APCPV')

(52) Since these associations submitted similar or even identical comments, their views are summarised together.

(53) The CEV and the APCPV reject the Commission's assessment that the reduction in the tax base is specific or selective because firms set up before it came into force and existing firms are excluded and because of the quantitative thresholds required. Tax rules always apply from the date of their entry into force, and retroactive application is exceptional. Furthermore, as the objective of the measure is to encourage investment, it is logical that the tax reduction should be confined to new firms. As regards the thresholds, everything indicates that they are objective and, moreover, much used in the tax sphere. As to the Provincial Council's approval before the reduction of the tax base can apply, this is an act of prior verification aimed at checking that all the conditions are met. Once the check has been made, the concession is granted automatically.

(54) As regards the issue of whether trade is affected, the CEV and the APCPV emphasise that this should be assessed on a case-by-case basis and not in a general way, as the Commission has done. For instance, there may be recipients which only produce for local markets. In such a case, the tax measures do not affect intra-Community trade. The same applies to their impact on competition. Moreover, the reduction in the tax base for recipients whose activities are carried out on markets that have not yet been liberalised cannot distort competition. For the rest, the loss of tax revenues cannot be assessed if it is regarded as a single measure, in this case the reduction in the tax base, while ignoring the overall tax burden. In this respect, the CEV and the APCPV state that the overall tax burden in the Basque Country is greater than in the rest of Spain.

(55) The CEV and the APCPV consider that, even if the Commission, despite the above comments, continues to think that the said reduction in the tax base is a specific measure, it would be justified by the nature and general scheme of the tax system. In support of this view, they emphasise that the tax measure is applied to all operators irrespective of their activity. Furthermore, it is necessary for the functioning and efficiency of the system, since to evaluate the inequality of a measure it is necessary to situate it in the system and determine whether this results in a lower tax burden. Moreover, the tax measure complies with the principle of equality, since new firms are not in the same situation as an existing firm.

(56) In addition, the CEV and the APCPV ask the Commission to assess the measure in question by taking into account similar measures in other Member States (e.g. Ireland), similar measures introduced from 1993 by the Spanish central government, and the application of the reduction in the tax base in question throughout Spanish territory. In this respect, the CEV and the APCPV state that the Commission has never considered that these measures are caught by Article 87 of the EC Treaty. Furthermore, they question whether the tax measures can be regarded as operating aid, since the latter is not applicable to new firms, but to the artificial maintenance of existing firms. For the rest, the CEV and the APCPV consider that the Commission's objective in initiating the procedure against the reduction in the tax base is tax harmonisation. However, for this it is using Articles 87 and 88 of the Treaty, and for this reason there is a misuse of powers.

(57) In view of the above, the CEV and the APCPV conclude that the reduction in the tax base is not caught by Article 87 of the Treaty.

V. **TRANSMISSION OF THE THIRD PARTIES' COMMENTS TO SPAIN**

(58) By letter to the Spanish Permanent Representation, dated 18 May 2000, the Commission sent, pursuant to Article 6(2) of the aforesaid Regulation (EC) No 659/1999, the third parties' comments to Spain, inviting it to submit its observations within one month of the date of the letter. Spain has not submitted any such observations.

VI. **ASSESSMENT OF THE AID**

VII. **CLASSIFICATION AS STATE AID**

(59) 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 of the Treaty applies to aid measures 'in any form'. Nevertheless, the Commission emphasises that, to be regarded as aid, the measures in question should satisfy every one of the four criteria set out in Article 87 and explained below.

(60) Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through different types of reduction in the firm's tax burden and, in particular, through an exemption from or reduction in tax liability. The said reduction of the tax base by 99 %, 75 %, 50 % and 25 % meets this criterion, since it reduces the recipient firms' tax burden by an amount equivalent to the result of applying the tax rate to the above reductions. If the tax base were not reduced, the recipient firm would have to pay the tax on 100 % of the tax base. The reduction of the base thus implies an exception to the common tax system applicable.

(61) Secondly, the Commission considers that the said reduction in the tax base 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 in the Member States ([19]). Furthermore, the intervention of the State can be effected both through tax provisions of a statutory, regulatory or administrative kind and through the practices of the tax authorities. In this specific case, State intervention is effected through the Álava Provincial Council on the basis of a statutory provision.

(62) The argument put forward in certain comments by third parties, to the effect that it would be wrong to regard the reductions of 99 %, 75 %, 50 % and 25 % in the tax base as involving a loss of tax revenue compared to the normal amount (determined by the Commission) of the tax due, is a fallacious one. It has to be pointed out that the normal level of tax derives from the tax system in question and not from a Commission decision. Furthermore, according to the second indent in point 9 of notice 98/C 384/03, to qualify as State aid, 'firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including (…) a total or partial reduction in the amount of tax (such as exemption or a tax credit)'. This is the case with the relief in the form of the partial reduction of 99 %, 75 %, 50 % and 25 % in the tax base. The comment is therefore without foundation.

(63) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, according to a report on the external dependency of the Basque economy in the period 1990 to 1995 ([20]), exports abroad went up ([21]), not only in absolute terms but, in particular, in relative terms as well, to the detriment of exports to the rest of Spain. The foreign market thus partly replaced the market which is the rest of Spain. Furthermore, according to another statistical report on the foreign trade of the Basque Country ([22]) at 28,9 % the Basque economy's 'propensity to export' (ratio of exports to GDP) is greater than that of Germany and the other Member States, where it is about 20 %. According to this report, the Basque trade balance was clearly in surplus during the period 1993 to 1998. In particular, in 1998, for each ESP 100 of imports there were ESP 144 of exports. In short, the Basque economy is very open to the outside, and its production is very much geared to exporting. Given these characteristics of the Basque economy, it may be deduced that recipient firms are engaged in economic activities which are likely to include intra-Community trade. Consequently, aid strengthens their position vis-à-vis their competitors in intra-Community trade, thereby affecting such trade. Furthermore, the increase in recipient firms' net profit

([19]) Judgment of the Court of Justice in Case 248/84 *Germany* v *Commission* [1994] ECR 4013.

([20]) Paxti Garrido Espinosa and Victoria García Olea, *'La dependencia exterior vasca en el periodo 1990—1995', Euskal Estatistika-Erakundea/Instituto Vasco de Estadística* (EUSTAT), the statistical office of the Basque Government.

([21]) Exports abroad accounted for 28,5 % of total exports (including sales to the rest of Spain) in 1990, and for 40,8 % five years later in 1995.

([22]) *Estadística de Comercio Exterior para la Comunidad Autónoma de Euskadi en el año 1998*, prepared by EUSTAT.

(profit after tax) improves their profitability. This enables them to compete with firms which are not eligible for the tax incentives.

(64) Since, in this case, the tax rules under examination are general and abstract in character, the Commission would point out that the analysis of their impact on trade can only be carried out at a general, abstract level; it is not possible to specify to what extent they affect a market, sector or specific product, as is stated in the abovementioned comments by third parties. This position has been confirmed on a number of occasions by European Court of Justice case-law ([23]).

(65) As regards the comment that the effect on trade should be assessed by the Commission on the basis of a comparison of all tax systems, the Commission would point out that the distortions of competition which are the subject of this procedure under Articles 87 and 88 of the Treaty are due to a derogating rule which favours certain firms (in this case certain newly established firms) vis-à-vis the other firms of the Member State; they are not possible distortions of competition which are due to differences between the tax systems of the Member States, which might, as appropriate, be caught by the provisions of Articles 93 to 97 of the Treaty.

(66) As regards the specific character which State aid must have, the Commission takes the view that the reduction in the tax base referred to above is specific or selective in that it favours certain firms, since the conditions for granting the incentives specifically state that firms established before the said Provincial Law came into force in mid-1996 are ineligible, as are other firms which have created fewer than 10 jobs, whose investments are below the threshold of ESP 80 million (EUR 480 810) and which do not have a paid-up capital of more than ESP 20 million (EUR 120 202). In this respect, the Commission would point out that, according to the Fifth Report on Enterprises in Europe ([24]), 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 ([25]). In Spain's case, the percentage was even higher, at about 95 % ([26]). It is likely that these percentages are higher still 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 higher still, at about 98 % ([27]). Consequently, everything indicates that one of the conditions of eligibility for the aid in itself excludes the majority of firms. For the rest, the objective character of the threshold cited does not prevent it, as some of the third-party comments claim, from being selective and excluding firms which do not satisfy the conditions in question.

(67) As for the possible discretionary power of the tax authorities, the Commission notes that the aid in question is not granted automatically, as the Álava Provincial Council first examines the application submitted by the recipient and may, if appropriate, grant the aid in question after such examination. 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, a posteriori.

(68) As regards the existence of tax measures in the form of a reduction in the tax base in other Member States, which the Commission did not consider selective in scope because they are aimed at new firms, according to certain comments by third parties, this leads to a legitimate expectation concerning tax incentives for new firms, the Commission would point out that the schemes mentioned in some of the third-party comments are different in certain respects from this reduction in the tax base. Furthermore, even supposing that certain schemes were similar and that the Commission had not reacted, it would not be justified in taking this misguided approach in the present case. It should be pointed out that, according to the case law of the Court of Justice, 'any breach by a Member State of an obligation under the Treaty in connection with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one

([23]) Judgment of the Court of Justice of the European Communities of 17 June 1999 in Case C-75/97 (Maribel) *Belgium* v *Commission*, paragraphs 48 and 51; Judgment of the Court of First Instance of 15 June 2002 in Case T-298/97 *Alzetta Mauro* and others v *Commission*, paragraphs 80 to 82; 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.'

([24]) *Enterprises in Europe. Fifth report*, Eurostat.

([25]) Taken from the data in the table on p. 31 of the report.

([26]) Taken from the data in the table on p. 224 of the report.

([27]) Taken from the data in the table on p. 73 of the report.

distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the common market are increased' ([28]).

(69) Concerning the question raised in some of the third-party comments about whether the Provincial Law in question has the character of an enabling rule or a rule granting aid directly, the Commission would point out that, in this case, the rules which introduced the reduction in the tax base have the character of an aid scheme. In support of this assessment, it is sufficient to point out that under Article 1(d) of Regulation (EC) No 659/1999 an aid scheme is defined as 'a system on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner ...'. However, this character of an aid scheme does not predetermine, as certain third-party comments claim, whether there is any discretionary power in the execution of the scheme or not. Discretionary power in regard to the granting of the aid will depend on the specific characteristics of the scheme. Furthermore, the Commission would point out that, if the tax authorities have discretion, this is enough, where there are no other specific elements, to demonstrate the existence of aid elements in a tax measure.

(70) As regards invoking the nature or general scheme of the tax system as justification for the reduction in the tax base, the Commission emphasises that what matters is determining 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. Moreover, it is up to the Member State concerned to establish that the tax measures in question follow the internal logic of the tax system ([29]). In the case at issue, the Spanish authorities state that because the measures are objective and cross-sector in character, they are consistent with the internal logic of the tax system. However, the fact that the measure is objective and cross-sector in character does not demonstrate that it follows the internal logic of the tax system. It is not sufficient evidence that the measure fulfils the principal objective inherent in any tax system, which is to gather the revenue for financing the expenditure of the State, or that it satisfies the principles of equality and progressiveness inherent in the Spanish tax system ([30]).

(71) Moreover, the Spanish authorities state in their comments that the aim of reducing the tax base is to promote investment, and that it therefore fulfils the industrial policy objectives pursued by the Basque Government. According to the Basque Government document entitled Industrial Policy: General Framework of Activities 1996 to 1999 (*Política Industrial. Marco General de Actividades* 1996—1999), 'tax policies are essential for boosting economic development and, similarly, for promoting industrial projects based on the industrial development of the Basque Country' (page 131), and in the chapter 'Tax policy instruments' one reads: 'the tax autonomy which we have (in the Basque Country) enables us to search for imaginative made-to-measure tax solutions, e.g. for priority projects or even tax incentives for large firms' (page 133). The reduction in the tax base in question, therefore, is part of an industrial policy whose objectives are not even peculiar to tax systems.

(72) In short, the Commission finds that, as the Spanish authorities have pointed out, the reduction in the tax base in question pursues an economic policy objective which is not inherent in the tax system. The reduction is therefore not justified by the nature or general scheme of the system.

(73) As to the argument put forward in certain third-party comments concerning the existence of a higher overall tax burden in the Basque Country, the Commission repeats that this is not relevant in the case at issue, since the procedure was initiated in respect of a specific measure and not the whole the tax system of each of the three Basque provinces.

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

([28]) Judgment of the Court of Justice of the European Communities of 22 March 1977 in Case C-78/76 *Steinike & Weinlig* v *Federal Republic of Germany*, paragraph 24. On the other hand, Judgment of 24 March 1993 in Case C-313/90 *Comité International de la rayonne et des fibres synthétiques and others* v *Commission*, paragraph 45, states that neither the principle of equal treatment nor that of the protection of legitimate expectations may be relied upon in order to justify the repetition of an incorrect interpretation of a measure.

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

([30]) Article 31 of the Spanish Constitution.

VIII. **THE UNLAWFUL NATURE OF THE REDUCTION IN THE TAX BASE**

(75) Given that the said scheme does not require a commitment from the Spanish authorities to grant the aid in accordance with the conditions for *de minimis* aid ([31]), the Commission considers that the aid cannot be regarded as subject to those rules. It should be stressed in this respect that the Spanish authorities never maintained, in the procedure, that the aid in question should be classed as *de minimis* aid, either in full or in part. 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 exceeded. The incentives do not qualify as existing aid, either, since they do not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999.

(76) 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.

(77) As regards the argument in some of the third-party comments that basically there is a violation of legitimate expectations and legal certainty, the Commission feels bound to reject this, since firstly the scheme is not existing aid and, secondly, since it was not notified under Article 88(3) of the Treaty, the Commission has not been able to determine whether it is compatible with the common market. Consequently, the recipients cannot rely on any legitimate expectations or legal certainty as regards the State aid nature of the reduction in the tax base. 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' ([32]). This is why the argument that legitimate expectations or legal certainty have been violated is without foundation in this case. In this context, moreover, the Commission recalls that in its Decision 93/337/EEC ([33]) it deemed certain tax measures introduced in 1988 by the Provinces of Álava, Guipúzcoa and Vizcaya to be State aid.

IX. **ASSESSMENT OF COMPATIBILITY WITH THE COMMON MARKET**

(78) As a preliminary, the Commission would repeat that the reduction in the tax base has to be classed as an aid scheme. Given the general, abstract nature of an aid scheme, the Commission does not know the circumstances of existing or possible future recipient firms and is not, therefore, able to examine the exact repercussions on competition for specific firms. In this context it is sufficient to ascertain that potential recipients could benefit from aid that is not consistent with the directives, guidelines and frameworks applicable on this subject. Moreover, the Commission would emphasise that, in its decision initiating the procedure, it had asked for all relevant information relating to the aid and the particular circumstances of each recipient. However, the Spanish authorities have not provided any such information. This is why it is contradictory to reproach the Commission, as certain third-party comments do, for providing only a general assessment while at the same time refusing to supply the detailed data requested.

(79) As the scheme in question covers only the NUTS ([34]) III territory of Álava, it is necessary to examine whether aid in this territory can qualify for the regional derogations in Article 87(3)(a) or (c) of the Treaty. As regards the admissibility of Álava, the Commission would point out that the territory has never been eligible for the Article 87(3)(a) derogation, since the per capita GDP ([35]) of the NUTS II region of the Basque Country, of which it forms part, has always been higher than 75 % of the Community average. According to the rules on regional aid ([36]), the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty are met

([31]) 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, p. 9) 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, p. 30).

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

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

([34]) Nomenclature of Territorial Units for Statistics.

([35]) Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).

([36]) The references to the regional rules are confined 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).

only if the region, in the case of NUTS II, has a per capita GDP of not more than 75 % of the Community average.

(80) 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 September 1995 ([37]) on the changes in Spain's regional aid map, 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 the whole of Álava 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). 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. According to this map, the Province of Álava continues to be a region in which regional development aid may be considered compatible with the common market in accordance with the derogation in Article 87(3)(c) of the Treaty.

(81) The State aid in the form of a reduction in the tax base has the effect of promoting the creation, in the Province of Álava, of new firms in which the initial amount of investment and the number of jobs created exceed certain thresholds. However, despite this minimum investment and minimum number of jobs created, 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 tax base. Furthermore, they are not paid up to a limit 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 tax base. 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.

(82) On the contrary, since they partly reduce the profits tax payable 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.

(83) In this respect, the Commission would point out that, in accordance with the said Guidelines (98/C 74/06), regional aid which is classed as operating aid is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty, provided that it meets certain conditions laid down in points 4.15 to 4.17 of the said Guidelines, in the outermost regions or in regions of low population density if it is intended to offset additional transport costs. However, the NUTS III territory of Álava is not eligible for the derogation in Article 87(3)(a) of the Treaty, and the grant of the said operating aid does not meet the conditions described. The NUTS III territory of Álava is not an outermost region ([38]) nor a region of low population density ([39]). This is the reason why the operating aid elements in the reduction of the tax base are prohibited, in particular because they are not granted in a region that is eligible for the derogation in Article 87(3)(a) of the Treaty, in an outermost region or a region of low population density. The aid is therefore incompatible in this case.

(84) 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 EC Treaty, since it does not comply with the rules on regional aid.

(85) The derogation in Article 87(3)(c) of the Treaty has to be examined to see whether it might not apply, in the above cases, for other purposes as well as the development of certain economic activities. It should be noted in this respect that the aim of reducing the tax base is not to develop an economic activity within the meaning of Article 87(3)(c) of the Treaty, such as the development of measures to assist small and medium-sized enterprises, research and development, environmental protection, job creation or training in accordance with the appropriate Community rules. Consequently, the tax incentives cannot qualify for the derogation in Article 87(3)(c) of the Treaty in respect of the said purposes.

([37]) OJ C 25, 31.1.1996, p. 3.

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

([39]) According to point 3.10.4 of the guidelines on national regional aid (98/C 74/06).

(86) Similarly, the reduction in the tax base, which is not subject to any sectoral limitation, 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 ([40]). In the circumstances, the Commission considers that the tax incentives in the form of a reduction in the tax base cannot comply with the said sectoral rules. In this particular case, the reduction in the tax base does not meet the condition that it should not promote new production capacity so as not to exacerbate the overcapacity problems from which these sectors traditionally suffer. Therefore, where the recipient belongs to one of the abovementioned sectors, the Commission considers that, since it is not subject to the sectoral rules mentioned, the aid is incompatible with the common market and the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities does not apply.

(87) 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); it is not intended to make good the damage caused by natural disasters or exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Nor does it qualify for the derogation in Article 87(3)(d) as its purpose is not to promote culture or heritage conservation. The aid is therefore incompatible with the common market.

(88) As the reduction in the tax base 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 in the tax base which could still be due to certain recipients.

([40]) 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/.

(89) As regards incompatible aid already paid, it should be pointed out that, in accordance with the above 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 until the date of actual repayment on the basis of the reference rate used at that date to calculate the net grant equivalent of regional aid in Spain ([41]).

(90) 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.

(91) Since the compatibility of the State aid in the form of a reduction in the tax base granted to Daewoo Electronics Manufacturing España SA and to Ramondín SA and Ramondín Cápsulas SA has already been assessed in specific Commission Decisions ([42]), this Decision does not relate to that aid.

X. **CONCLUSIONS**

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

— Spain has unlawfully put into effect, in the Province of Álava, the reduction in the tax base for investments, thereby infringing Article 88(3) of the Treaty,

([41]) Commission letter to Member States of 4 March 1991 (SG(91)D/4577). See also Judgment of the Court of Justice of 21 March 1990 in Case 142/87 *Belgium* v *Commission* [1990] ECR I-950.

([42]) Commission Decisions 1999/718/EC (OJ L 292, 13.11.1999, p. 1) and 2000/795/EC (OJ L 318, 16.12.2000, p. 36).

— the reduction in the tax base in question is incompatible with the common market,

— the Spanish authorities must 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 must 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,

— this Decision does not relate to the reduction in the tax base granted to Daewoo Electronics Manufacturing España SA and to Ramondín SA and Ramondín Cápsulas SA,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a reduction in the tax base, unlawfully put into effect by Spain in the Province of Álava, in breach of Article 88(3) of the Treaty, through Article 26 of Provincial Law No 24/1996 of 5 July 1996, is incompatible with the common market.

Article 2

Spain shall abolish the aid scheme referred to in Article 1 in so far as 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 implementation 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 does not relate to the aid granted under the scheme in question to Daewoo Electronics Manufacturing España SA and to Ramondín SA and Ramondín Cápsulas SA.

Article 6

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 11 July 2001.

For the Commission

Mario MONTI

Member of the Commission

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 ([1]), called on interested parties to submit their comments, and having regard to those comments,

Whereas:

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 ([2]), Ramondín SA and Ramondín Cápsulas SA ([3]), 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 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* ([4]). 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 ([5]), the first section of Chapter II of Provincial Law 24/1996 of 30 December ([6]), which constituted the legal basis for the tax incentives in question, was repealed as from the tax year starting on 1 January 2001.

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 ([7]). The text of the Articles reads as follows ([8]):

‘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

([1]) OJ C 340, 27.11.1999, p. 52.
([2]) Commission Decision 1999/718/EC (OJ L 292, 13.11.1999, p. 1).
([3]) Commission Decision 2000/795/EC (OJ L 318, 16.12.2000, p. 36).
([4]) See footnote 1.
([5]) Published in the Diario Oficial de Navarra Nº 51, 25.4.2001.
([6]) Provincial Law 24/1996, Boletín Oficial de Navarra Nº 159, 31.12.1996.
([7]) Boletín Oficial de Navarra No 159, 31.12.1996.
([8]) Only the parts essential to the assessment of the aid are cited.

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 ([9]).

(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**

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

([9]) 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).

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 ([10]). Furthermore, the

([10]) 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 ([11]), 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 ([12]) 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 ([13]).

(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 ([14]).

(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

([11]) Navarre's single programming document for Objective 2, 2000 to 2006.

([12]) 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.

([13]) 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.

([14]) 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.

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 ([15]), 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 ([16]). In Spain's case, the percentage was even higher, at about 95 % ([17]). 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 % ([18]). 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 ([19]), 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 ([20]). 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 ([21]), 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 ([22]).

(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.

([15]) *Enterprises in Europe*, Fifth Report, EUROSTAT.
([16]) Taken from the data in the table on page 31 of the report.
([17]) Taken from the data in the table on page 224 of the report.
([18]) Taken from the data in the table on page 73 of the report.
([19]) See paragraph 27 of the Opinion of Advocate General Ruiz-Jarabo in Case C-6/97.
([20]) Article 31 of the Spanish Constitution.
([21]) 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).
([22]) 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' ([23]).

VII. **COMPATIBILITY WITH THE COMMON MARKET**

(45) As the scheme in question covers only the NUTS ([24]) 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 ([25]) has always been higher than 75 % of the Community average. According to the rules on regional aid ([26]) 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 ([27]) 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.

(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

([23]) 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.

([24]) Nomenclature of Territorial Units for Statistics.

([25]) Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).

([26]) 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).

([27]) OJ C 25, 31.1.1996, p. 3.

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 ([28]) nor a region of low population density ([29]). 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 ([30]). 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

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

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

([30]) 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/.

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 ([31]).

(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

([31]) 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.

COMMISSION DECISION

of 11 July 2001

on the State aid scheme implemented by Spain for firms in Guipúzcoa in the form of a tax credit amounting to 45 % of investments

(notified under document number C(2001) 1764)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/894/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, called on interested parties to submit their comments [1], and having regard to those comments,

Whereas:

I. PROCEDURE

(1) As a result of the information received in response to the proceedings initiated following complaints about State aid granted to Daewoo Electronics Manufacturing España SA [2] and to Ramondín SA and Ramondín Cápsulas SA [3], the Commission learned of the existence of a scheme of non-notified tax aid for investments in Spain, in the province of Álava, in the form of a 45 % tax credit. It also received informal information that similar measures existed in the province of Guipúzcoa, since that territory enjoys the same tax autonomy as Álava. The Commission therefore sent a letter to the Spanish Permanent Representation on 15 March 1999 requesting information on the matter. By letters dated 13 April and 17 May 1999 from its Permanent Representation, Spain requested successive extensions of the deadline for replying. By letter of 25 May 1999 the Commission refused to grant a second extension under Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [4]. Finally, by letter of 2 June 1999 from its Permanent Representation, Spain provided information on the tax incentive in question.

(2) By letter SG(99) D/6871 dated 17 August 1999, 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 9 November 1999, registered on 12 November 1999, 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* [5]. The Commission invited interested parties to submit their comments on the aid within one month of the date of publication.

(5) Comments were received from: the Autonomous Community of Castile-Leon, on 3 January 2000; the Basque Business Confederation (*Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza*) (hereinafter Confebask), on 4 January 2000, plus, outside the time limit, supplementary comments by letter dated 29 December 2000, registered on 3 January 2001; the Rioja Regional Government, on 5 January 2000; the Basque Economists Association (*Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa*), on 5 January 2000; the Basque Business Circle (*Círculo de Empresarios Vascos*), on 5 January 2000; and the Professional Association of Tax Advisers of the Autonomous Community of the Basque Country (*Asociación Profesional de Asesores Fiscales de la Comunidad del País Vasco*), on 7 January 2000. By letter dated 1 March 2000 (D/50912), the Commission sent these comments to Spain, asking for observations; it received only a request for a 20-day extension of the deadline for replying.

[1] OJ C 351, 4.12.1999, p. 29.
[2] Commission Decision 1999/718/EC (OJ L 292, 13.11.1999, p. 1).
[3] Commission Decision 2000/795/EC (OJ L 318, 16.12.2000, p. 36).
[4] OJ L 83, 27.3.1999, p. 1.
[5] See footnote 1.

(6) By letter from the Permanent Representation dated 22 June 2000, the Spanish authorities informed the Commission that Provincial Law (*Norma Foral*) No 3/2000 ([6]) of 13 March 2000 had repealed, with effect from 18 March 2000, the seventh additional provision of Provincial Law No 7/1997 ([7]) of 22 December 1997, which formed the legal basis for the 45 % tax credit.

II. **DETAILED DESCRIPTION OF THE AID**

(7) According to the information at the Commission's disposal, which has not been questioned by the Spanish authorities or by third parties, the tax incentive in question entered into force on 1 January 1997 pursuant to the 10th additional provision of Provincial Law No 7/1997 ([8]).

(8) As regards the 45 % tax credit in force since 1 January 1997, the 10th additional provision of Provincial Law No 7/1997 reads as follows:

> 'Investments in new tangible fixed assets made after 1 January 1997 and exceeding ESP *2 500* million shall, by decision of the Guipúzcoa Provincial Council, give rise to a tax credit equal to 45 % of the amount of the investment, as determined by the latter, to be deducted from the amount of tax payable.
>
> Any tax credit that is not used because it exceeds the amount of tax payable may be carried over and used within the five years immediately following the year in which the decision granting the credit is taken.
>
> The date from which the time limit for using the tax credit starts to run may be postponed until the first year during the limitation period in which profits are made.
>
> The decision referred to in the first paragraph shall lay down the time limits and restrictions applicable in each case.
>
> Concessions granted under this provision may not be combined with any other tax concessions available in respect of the same investments.
>
> The Guipúzcoa Provincial Council shall also determine the duration of the investment process, which may include investments made during the preparatory phase of the project giving rise to the investments.'

(9) It is clear from the above provisions, in short, that the aid is granted in respect of investments in new tangible fixed assets made after 1 January 1997, as well as investment expenditure ([9]) incurred during the preparatory phase of the project giving rise to the investments, where such investments exceed ESP 2 500 million.

(10) Since the scheme does not require the investment entitling firms to the aid to be located in Guipúzcoa, a firm resident there for tax purposes could obtain a tax credit equivalent to 45 % of the amount of investments made outside Guipúzcoa.

(11) The scheme is furthermore applicable to investments made in any sector and is not subject to any sectoral restriction such as those laid down in the Community sectoral rules applicable to the production, processing and marketing of the agricultural products in Article I of the Treaty, fisheries, coalmining, steelmaking, transport, shipbuilding, synthetic fibres and the motor industry.

(12) Furthermore, any firm may qualify for the 45 % tax credit in question irrespective of its economic and financial position, even if it is a firm in difficulty.

(13) Although the 45 % tax credit may not be combined with any other tax concessions that may be granted in respect of the same investment, combination with other, non-tax aid, including grants, subsidised loans, guarantees, equity purchases, etc., relating to the same investments is not ruled out.

(14) 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 of the Treaty applies to aid measures 'in any form'. The Commission also emphasised, however, that, to be regarded as aid, the measures must meet all four of the criteria set out in Article 87 and explained below.

(15) Firstly, the Commission pointed out, at that stage, that the tax credit confers on the recipients an advantage amounting to 45 % of the amount of the investments and relieves them of charges that are normally borne from their budgets through a partial reduction in their normal tax liability.

(16) Secondly, the Commission provisionally considered that the tax credit involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure.

([6]) *Boletín Oficial de Guipúzcoa*, 17.3.2000.
([7]) Tenth additional provision.
([8]) *Boletín Oficial de Guipúzcoa*, 31.12.1997.
([9]) No precise definition is given of what the Spanish authorities understand by 'investments made during the preparatory phase' for the purposes of applying the tax aid in question.

(17) Thirdly, the Commission considered at that stage that the 45 % tax credit 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 are also involved in intra-Community trade and therefore affects such trade. Furthermore, the increase in recipient firms' net profit (profit after tax) improves their profitability. In this way they are more able to compete with firms which are not eligible for the aid.

(18) Lastly, the Commission considered, at that stage, that the 45 % tax credit is specific or selective in that it favours certain firms, being available only to firms investing more than ESP 2 500 million (EUR 15 025 303). All other firms whose investments do not exceed the ESP 2 500 million threshold are excluded.

(19) 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 Guipúzcoa provincial authorities have the power to determine, at their discretion, the duration of the investment process and that of the preparatory phase of the investment qualifying for the aid.

(20) In short, the Commission considered, at that stage, that the 45 % tax credit is 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 the cumulative criteria of constituting an advantage, being granted by the State from State resources, affecting trade between Member States and distorting competition in favour of certain firms.

(21) Since the tax incentive in question is not subject, among other requirements, to the condition that it does not exceed EUR 100 000 over a period of three years, the Commission considered, at that stage, that it cannot be regarded as subject to the *de minimis* rule ([10]).

(22) The Commission stated provisionally that State aid, which is not governed by the *de minimis* rule, is subject to the obligation of prior notification laid down in Article 88(3) of the Treaty and Article 62(1)(a) of the EEA Agreement. However, the Spanish authorities had not met that obligation, and the Commission therefore considered at that stage that the aid could be regarded as unlawful.

(23) The Commission also found that the 45 % tax credit is aid conditional on investment ([11]). However, in the absence of a precise definition of the eligible expenditure, the Commission could not rule out at that stage the possibility that some of the investment expenditure qualifying for the 45 % tax credit might fall within the scope of the Community definition of initial investment ([12]).

(24) As regards the investment expenditure falling within the scope of the Community definition, the Commission took the view at that stage that the 45 % tax credit wholly or partly constitutes investment aid and therefore has to be examined in the light of the Community rules on investment aid. On the other hand, any aid to defray investment expenditure which does not fall within the Community definition cannot be regarded as investment aid and has to be considered as aid for other purposes, for example operating aid.

(25) The 45 % tax credit, 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 aid was compatible where the recipient belongs to a sector subject to special Community rules.

(26) The same applies where the 45 % tax credit is granted to firms in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty. Since the grant of the tax credit to such firms is not subject to the conditions laid down in those guidelines, the Commission doubted at that stage whether the aid was compatible with the common market when granted to firms in difficulty.

(27) On the question of whether investment aid in Guipúzcoa qualifies for the derogation under Article 87(3)(c) of the Treaty, the Commission noted that, in its decision of 26 July 1995 amending Spain's regional aid map, it found the whole of Guipúzcoa to be a region where investment aid in support of regional development could be deemed compatible with the common market under the Article 87(3)(c) derogation, provided that it did not exceed the ceiling of 25 % net grant equivalent (nge) in the case of large firms.

(28) The Commission also pointed out at that stage that the ceilings in question apply only to certain eligible expenditure included in the standard base and

([10]) See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992) and the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996).

([11]) See the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979).

([12]) See point 18 of the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979) or point 4.4 of the guidelines on national regional aid (98/C 74/06).

complying with the Community definition of initial investment, which excludes, *inter alia*, replacement investments. It stressed that aid granted between 1 January and 31 December 1999 is subject to the above regional aid guidelines, so that investment aid not exceeding the ceilings is also subject to certain additional conditions laid down in those guidelines.

(29) However, the Commission stated provisionally that the tax aid in the form of the 45 % tax credit was not limited to 25 % nge in the case of large firms and 30 % nge in the case of small and medium-sized firms, and also that the eligible expenditure might not correspond to the standard base. Under such circumstances, it could not rule out the possibility at that stage that the aid could rank as operating aid, since it was intended to reduce the recipient firms' current expenditure. The Commission therefore provisionally found that there were doubts as to the compatibility of the tax aid in question in the light of the rules on regional aid.

(30) As regards the period after 1 September 1998, the Commission further took the view at that stage that the possibility of the investment for which aid is granted being covered by the multisectoral framework on regional aid for large investment projects (98/C 107/05) could not be ruled out. The tax aid in question is not subject to the notification requirement where large projects are concerned or to a possible reduction in aid intensity that might result from the Commission's assessment. The Commission therefore stated provisionally that there were doubts as to the compatibility of the tax aid where large projects were concerned.

(31) To sum up, the Commission questioned at that stage the compatibility of the tax aid in question with the common market in the light of the derogation in Article 87(3)(c), which concerns 'aid to facilitate the development […] of certain economic areas […]'. Neither did it appear that the other derogations in Article 87(2) and (3) of the Treaty could apply. The tax credit cannot be regarded as aid having a social character under Article 87(2)(a), is not intended to make good the damage caused by natural disasters or exceptional occurrences under Article 87(2)(b) and is not subject to the provisions of Article 87(3)(c) concerning 'aid to facilitate the development of certain economic activities […]'. Nor is it 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). Lastly, it is not intended to promote culture or heritage conservation within the meaning of Article 87(3)(d).

(32) 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 tax aid in the form of a 45 % tax credit in Guipúzcoa. The relevant information requested related in particular to: any tax aid in the form of a tax credit for investments available in any year during the period 1986 to 1994, copies of all decisions granting the aid during the period 1995 to 1997 and copies of the declarations made by the firms concerned to the Provincial Council in 1998 and 1999, on the official form, setting out, at least, the nature of the investment expenditure qualifying for the aid, the amount of the tax credit granted to each recipient, the aid actually paid to each recipient and any balance still outstanding, whether the recipient constitutes a firm in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, the details of any combination of aid (amount, eligible expenditure, where appropriate the aid schemes applied, etc.), and precise and detailed definitions of what constitute 'investments' and 'investments made during the preparatory phase'.

III. **COMMENTS OF THE SPANISH AUTHORITIES**

(33) The Spanish authorities submitted their comments by letter from the Permanent Representation dated 9 November 1999. Essentially, they take the view that the tax credit does not constitute State aid within the meaning of Article 87 of the Treaty. In support of their view, they challenge the Commission's assumption that trade will be affected because the companies benefiting from the incentive carry out economic activities which may involve trade between Member States. In their opinion, it cannot be established, *pace* the Commission that trade is affected generally, but only in specific cases, since there is a possibility that in some cases it will not be affected. In such cases, therefore, one of the prerequisites for classifying an official measure as State aid is missing.

(34) They also argue that the measure is not specific or selective in character. In their opinion, the opening of the measure to all sectors and to all taxpayers that meet the appropriate criteria removes any specific character. Furthermore, since there are five separate tax systems in Spain, one of which in Guipúzcoa, the tax rules applicable in that territory have the status of general measures for the taxpayers to whom they apply. The measure therefore has no regional specificity.

(35) As to specificity of scope, this does not exist, since the measure is open to all sectors and to all taxpayers. The

Spanish authorities maintain that the requirement to invest ESP 2 500 million is not discriminatory, but an objective condition deriving from the need to ensure the effectiveness of the measure and thus achieve the proposed objective. However, even if the Commission were to consider that the measure was specific, it would be justified by the nature and general scheme of the system, as provided for in Commission Notice 98/C 384/03 ([13]). The measure in question is justified by the nature of the tax system, since it forms part of the single tax system applicable in the territory of Guipúzcoa and derives from the exercise of the Provincial Council's powers to adopt measures in the tax field; it is also justified by the general scheme of the tax system since its objective is to promote economic activity. It is furthermore logical that the incentive should be targeted at large investments since (i) it is large investments that will be of real benefit to Guipúzcoa in the long run, enabling the tax authorities to collect tax receipts that more than offset the tax expenditure incurred at the beginning of the investments, and (ii) the investment threshold does not penalise small and medium-sized enterprises, which already benefit from many Community funding programmes.

(36) Furthermore, the Spanish authorities dispute that the measure in question is of a discretionary nature, since the incentive is granted automatically once the condition of investing a minimum of ESP 2 500 million is satisfied. The Guipúzcoa Provincial Council can thus check only that all the conditions are satisfied; it cannot alter or add any conditions. The Spanish authorities also stress that Spanish tax law does not allow arbitrary decisions to be taken when it comes to determining the essential features of taxpayers' tax liabilities.

(37) The Spanish authorities reject the view expressed by the Commission that the tax rules do not satisfy the conditions of the sectoral rules. In their opinion, the Commission ought to determine what the specific conditions are that are infringed by the said tax rules. As regards the application of the tax rules to firms in difficulty, they consider that the condition of investing at least ESP 2 500 million makes it extremely difficult for such firms to obtain the tax credit; it should be regarded more as a guarantee that firms in difficulty will not qualify for the incentive. The Spanish authorities consider that the application of the rules on regional aid is inappropriate, since in this specific case no State aid is involved.

([13]) Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998).

(38) In view of the above arguments, the Spanish authorities consider that the Commission should terminate the procedure by a decision finding that the tax measures in question do not meet the criteria for being regarded as State aid.

(39) For the rest, the Spanish authorities do not consider it necessary to supply the information requested by the Commission concerning, in particular, decisions to grant the tax credit, since no State aid is involved. Consequently, they are not providing any of the information requested in the decision initiating the procedure.

IV. OTHER COMMENTS RECEIVED BY THE COMMISSION

(40) The Commission emphasises that the comments set out below are without prejudice to the question of whether the parties, which submitted them, can be considered interested parties within the meaning of Article 88(2) of the Treaty.

Comments by the Autonomous Community of Castile-Leon

(41) The Autonomous Community of Castile-Leon points out first of all that the tax measures in question are part of a set of tax measures adopted by the Guipúzcoa Provincial Council that have been contested both in Spain and at Community level.

(42) The Autonomous Community of Castile-Leon goes on to state that the tax measures in question constitute State aid, since they satisfy all four criteria laid down in Article 87 of the Treaty. In support of this contention it basically puts forward the same arguments as those given in the decision initiating the procedure.

(43) For the rest, the Autonomous Community of Castile-Leon considers that the tax incentive cannot be regarded as compatible by virtue of the derogations in Article 87 of the Treaty. Furthermore, the obligation to notify laid down in Article 88(3) of the Treaty has not been complied with.

(44) The Autonomous Community of Castile-Leon takes the view therefore that the tax measures in question should be regarded as State aid which is unlawful, since the notification procedure laid down in Article 88(3) has not been followed, and which is incompatible with the common market.

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

(45) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by Guipúzcoa. As regards substance, Confebask's views are essentially as follows:

(a) the presumed reduction of the tax debt: the Commission is wrong to think that there is a tax debt whose reduction involves a loss of tax revenue. If this argument were sound, any tax deduction would always involve a loss of revenue compared with the amount initially due. Confebask therefore requests the Commission to reconsider its position, since otherwise it could be argued that taxes were being unlawfully harmonised by establishing a normal amount in relation to which any losses of tax revenue would have to be determined;

(b) the effect on trade: according to the Commission, where the recipients participate in intra-Community trade, the tax measures in question distort that trade. However, differences between tax systems always affect trade. To determine the extent to which trade is affected, the Commission should therefore analyse the entire tax system and not specific provisions. Confebask emphasises in this respect that, according to one study, the tax burden in the Basque Country is greater than in the rest of Spain. The Commission should explain why these specific measures and not other tax differences affect trade. In any event, even if such an effect did exist, the way to remove it would be through harmonisation, not State aid;

(c) the selective character of the aid: in Confebask's opinion, the selective nature of the tax measures should be assessed in one of two ways: either as an enabling rule conferring power on the tax authority subsequently to grant a specific relief, or as a rule directly granting the tax relief without requiring subsequent specification. The Commission, however, is using one argument, which fits the first category, and another, which fits the second. Given that the two are mutually exclusive, the Commission should explain in which category the tax measures question fall, since otherwise it would be contradictory to try and use both:

— Confebask questions the approach whereby the tax measures are regarded as enabling rules, since the reduction is granted automatically and the authorities, accordingly, had no discretionary power either before 1997 or thereafter. The authorities are restricted to checking that the applicant satisfies the tests of eligibility. Moreover, if the tax measures are regarded as enabling rules which subsequently make it possible to grant the aid, it has to be concluded that the current procedure, in so far as it is the rules that are being questioned and not specific instances of their application, is meaningless. Similarly, according to the first paragraph of the Commission's letter to the Member States ([14]) a general provision conferring relief is regarded as aid only if 'legislative machinery enabling it to be granted without further formality has been set up'. By contrast, because it is abstract, an enabling rule cannot be regarded as State aid and, hence, cannot be assessed for its effect on competition and trade between Member States,

— as for regarding the tax measures as rules granting aid directly, Confebask points out that, according to points 19, 20 and 17 of notice 98/C 384/03, a tax measure may be specific and, hence, may be State aid, if it is aimed solely at public undertakings, certain types of undertaking or undertakings in a given region. However, the tax measures in question have none of these characteristics, not even territorial specificity, since they apply to the whole territory for which the regional authorities that introduced them are competent. As to the specific character of the threshold of ESP 2 500 million, Confebask considers that the use of objective thresholds is normal practice in national and Community tax rules. Confebask also draws attention to the basis of various judgments of the Court of Justice and Commission decisions: hitherto, it has never been held that thresholds imply specificity. Moreover, the Commission itself acknowledges, in point 14 of the above notice, that the effect of promoting certain sectors does not necessarily mean that the measures are specific and, in point 207 of the 1998 competition report, that measures which have a cross-sectoral impact and are intended to favour the whole of the economy are general measures and do not involve State aid. In short, the tax measures in question are not specific, since they do not promote a particular sector or particular undertakings. On the contrary, they are open to all sectors and to all undertakings established in the territory for which the provincial authorities are competent;

(d) illegality of the 45 % tax credit: while still disputing that the tax credit constitutes State aid, something

([14]) Commission letter to Member States SG(89) D/5521 of 27 April 1989.

that has to be proven in order to classify the measure as illegal, Confebask argues that the Commission's description of the tax credit as unlawful aid calls into question the principles of legitimate expectations, the ban on arbitrary decisions by institutions, legal certainty and proportionality, since the Commission regarded the Basque tax arrangements as lawful in its 1993 decision ([15]). In any event, the Commission could change its position as regards future cases but not as regards past ones. Confebask furthermore regards the tax measures in question as existing aid. In 1983 there were already rules providing for concessions of the same type (deduction of 65 % of the tax payable where new investments were made). In 1984 a threshold of ESP 500 million was introduced as a qualifying condition for a tax credit amounting to 50 % of investments. According to the definition given in Article 1(a) of Regulation (EC) No 659/1999, 'existing aid' means 'all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty'. The aid under examination here is therefore legal for the purposes of Article 88(3) of the Treaty;

(e) incompatibility with the common market: if the tax measures in question are regarded as enabling rules, Confebask considers that their compatibility cannot be assessed while the aid is not granted through an administrative decision. The procedure is meaningless and incapable by definition of yielding any results as to the compatibility of the aid. On the other hand, if the tax measures in question are regarded as rules granting aid directly, Confebask takes the view that the practice of the Commission and the Court requires that measures have to have sectoral specificity before the compatibility of the aid can be assessed. Furthermore, it would be necessary to establish the overall tax burden on firms and the reference tax burden. Lastly, this approach would lead to the absurd conclusion that any tax burden lower than the highest tax burden in all the Member States would constitute State aid. Confebask also rejects the Commission's argument that the said tax measures are incompatible since they do not contain specific provisions on sectoral or regional aid, or aid for large investment projects, etc.: tax measures may not and should not contain this type of provision. According to the Court of Justice ([16]), the Commission should specify in its decisions what the adverse effects on competition are, determining the real effect of the measures examined. Incompatibility cannot be determined, therefore, in abstract situations specific to a tax system, since in that case any differences between tax systems would necessarily become aid. This leads Confebask to repeat that there is no normal tax debt, which has been reduced by the tax, measures in question;

(f) Confebask therefore asks the Commission to adopt a final decision terminating the procedure and finding that the tax measures in question comply with Community law.

(46) Confebask's additional comments, communicated by letter dated 29 December 2000, registered on 3 January 2001, were not taken into account, as they reached the Commission after the deadline had expired ([17]). Furthermore, Confebask did not apply for an extension of the time limit pursuant to Article 6(1) of Council Regulation (EC) No 659/1999.

Comments from the Rioja Regional Government

(47) The Rioja Regional Government states that the tax measures constitute State aid, since they satisfy all four criteria set out in Article 87 of the Treaty. In support of this contention, it argues in particular that the purpose and effect of the 45 % tax credit is to relieve the recipient of part of the tax burden, which would otherwise have been imposed on its profits. It therefore constitutes a financial advantage for recipient firms, which, because there are no quid pro quos for the authorities, involves a loss of tax revenue. This means that the recipients' business benefits, as they have a competitive advantage over all other firms. In addition to the specificity of scope, in the form of a minimum investment of ESP 2 500 million, the Rioja Regional Government states that the discretionary nature of the 45 % tax credit is due partly to the authorities' ability to determine firms eligible for aid, deadlines and maximum limits and partly to the fact that the granting of the tax credit is not automatic.

(48) Moreover, the Rioja Regional Government considers that the tax measure cannot be justified on the grounds

([15]) Decision 93/337/EEC (OJ L 134, 3.6.1993).

([16]) See Joined Cases C-278/92, C-279/92 and C-280/92 dated 14 September 1994, *Spain* v *Commission*, [1994] ECR I-4103.

([17]) The deadline for submitting comments was one month from the date of publication of the notice in the *Official Journal of the European Communities*, i.e. 26 February 2000.

that there are five tax systems in Spain. It points out that, in the opinion on Joined Cases C-400/97, C-401/97 and C-402/97, Advocate General Saggio considered that the nature of the competent authorities for tax matters in a territory does not justify discrimination in favour of firms established in that territory. Furthermore, the measures are not justified by the nature or general scheme of the tax system in Guipúzcoa, since their purpose is to improve the competitiveness of recipient firms.

(49) In short, the Rioja Regional Government considers that the tax incentive cannot be considered compatible with the common market by virtue of the derogations in Article 87 of the Treaty. Moreover, the Spanish authorities did not fulfil the obligation to notify the incentive under Article 88(3) of the Treaty.

(50) The Rioja Regional Government therefore takes the view that the tax measures should be regarded as State aid which is unlawful, since the Article 88(3) notification procedure was not complied with, and incompatible with the common market.

Comments from the Basque Economists Association (*Colegio Vasco de Economistas/Ekonomilarien Euskal Elkargoa*) (hereinafter the 'CVE')

(51) The CVE considers that the tax system of each Basque province does not meet the specificity criterion in Article 87(1) of the Treaty merely because it applies only in part of a Member State. In support of this view, it argues that the Commission's usual practice of considering that there is specificity when a tax measure is applied to part of the Member State is appropriate where there is a single tax system. However, it is not relevant where there are various tax systems in the same Member State. The practice, furthermore, is contrary to the coherence of the Spanish tax system, which is multiple by nature. Each system is applied exclusively in one part of the territory. Thus, each one of the systems is not a regional system, but a unique system applicable to the territory concerned. Moreover, the losses of tax revenue which result from certain tax measures are not the subject of a transfer from the central government. On the contrary, they have to be offset, either by increasing the revenues from other taxes or by cutting public expenditure. In addition, the specific nature of the Spanish tax system should not be penalised through the application of Community law. For the rest, any distortions of competition resulting from the existence of five tax systems should be tackled through the Community rules on tax harmonisation.

(52) Nonetheless, the CVE does not rule out the possibility that, in the exercise of their tax autonomy, the Provincial Councils may adopt tax measures that are caught by Article 87(1) of the Treaty. However, in the present case, it takes the view that the 45 % tax credit is not so caught, since it only meets the criterion of being granted from State resources. It does not distort competition, because its payment implies that the recipient company has made profits. Moreover, its amount cannot be determined in advance, since, for example, if there were no profits, the aid would not be paid and if the profits were insufficient, it would be less than 45 %. The same applies as regards the effect on trade. This should be established in each specific case: it is not sufficient that trade might be affected. For the rest, the CVE examines whether there is any specificity deriving from the threshold of ESP 2 500 million or the need to obtain the Provincial Council's approval in order to apply the tax credit. In this respect, they consider that the threshold does not involve specificity, since it is objective and non-discriminatory. As for the determination by the Provincial Council of (i) the investments qualifying for the 45 % tax credit; (ii) the deadlines and limitations applicable to the deduction; and (iii) the duration of the investment process, which may include investments made during the preparatory phase of the project giving rise to the investments, the CVE takes the view that this does not involve the exercise of a discretionary power, but is governed by rules and, ultimately, subject to judicial review.

(53) The CVE concludes that the 45 % tax credit, which is a general measure adopted under the tax powers of the Provinces in question, is not caught by Article 87 of the Treaty.

Comments from the Basque Business Circle (Círculo de Empresarios Vascos) and the Professional Association of Tax Advisers of the Autonomous Community of the Basque Country (Asociación Profesional de Asesores Fiscales de la Comunidad del País Vasco) (hereinafter the CEV and the APCPV)

(54) Since these associations submitted similar or even identical comments, their views are summarised together.

(55) The CEV and the APCPV reject the Commission's assessment that the 45 % tax credit has regional specificity. In their view, any provision, such as the 45 % tax credit, adopted by the Provincial Councils within the scope of their powers has the status of a general measure. The tax credit is also non-specific because of the threshold of ESP 2 500 million or the need to obtain the Provincial Council's approval in order to apply the credit. The threshold is an objective criterion, which is, moreover, much used in the tax sphere and the Community rules on VAT or the taxation of SMEs. As to the Provincial Council's approval before the tax credit can be applied, this is a

purely administrative act of prior verification deriving from the need for legal certainty and sound administration of the tax system. The authorities cannot select the recipients or determine the amount of the 45 % tax credit or the time limit for its application.

(56) As regards the issue of whether trade is affected, the CEV and the APCPV emphasise that this should be assessed on a case-by-case basis and not in a general way, as the Commission has done. For instance, there may be recipients, which only produce for local markets. In such a case, the tax measure does not affect intra-Community trade. The same applies to its impact on competition. Moreover, where the recipients carry on their business on markets that have not yet been liberalised, the 45 % tax credit cannot distort competition. For the rest, the loss of tax revenues cannot be assessed if only a single measure is examined — in this case the 45 % tax credit — while ignoring the overall tax burden. In this respect, the CEV and the APCPV state that the overall tax burden in the Basque Country is greater than in the rest of Spain.

(57) Furthermore, in its decision of 10 May 1993 on Provincial Law No 8/1988 of 5 July 1988 the Commission did not call into question the aid measures concerned on the grounds that they required a minimum amount of investment. It therefore cannot challenge the 45 % tax credit without violating the legitimate expectations deriving from that Decision.

(58) For the rest, the CEV and the APCPV consider that the Commission's objective in initiating the procedure against the 45 % tax credit is tax harmonisation. However, for this it is using Articles 87 and 88 of the Treaty, and for this reason there is a misuse of powers.

(59) In view of the above, the CEV and the APCPV conclude that the 45 % tax credit is not caught by Article 87 of the Treaty.

V. **TRANSMISSION OF THE THIRD PARTIES' COMMENTS TO SPAIN**

(60) By letter of 1 March 2000 to the Spanish Permanent Representation the Commission sent, pursuant to Article 6(2) of the aforesaid Regulation (EC) No 659/1999, the third parties' comments to Spain, inviting it to submit its observations within one month of the date of the letter. It received only a request for a 20-day extension of the deadline for replying. Consequently, Spain has not submitted any such observations.

VI. **ASSESSMENT OF THE AID**

VII. **CLASSIFICATION AS STATE AID**

(61) 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 of the Treaty applies to aid measures 'in any form'. Nevertheless, the Commission emphasises that, to be regarded as aid, the measures in question must satisfy every one of the four criteria set out in Article 87 and explained below.

(62) Firstly, the measure must confer on recipients an advantage, which relieves them of charges that are normally borne from their budgets. The advantage may be provided through different types of reduction in the firm's tax burden and, in particular, through an exemption from or reduction in tax liability. The 45 % tax credit meets this criterion, since it reduces the recipient firms' tax burden by an amount equivalent to 45 % of the amount of the eligible investment. In the absence of the tax credit, the recipient firm would have to pay its full final tax liability. The tax credit thus implies an exception to the common tax system applicable.

(63) Secondly, the Commission considers that the said tax credit 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 in the Member States ([18]). Furthermore, the intervention of the State can be effected both through tax provisions of a statutory, regulatory or administrative kind and through the practices of the tax authorities. In this specific case, State intervention is effected through the Guipúzcoa Provincial Council on the basis of a statutory provision.

(64) The argument put forward in certain comments by third parties, to the effect that it would be wrong to regard the 45 % tax credit as involving a loss of tax revenue compared to the normal amount (determined by the Commission) of the tax due, is a fallacious one. It has to be pointed out that the normal level of tax derives from the tax system in question and not from any Commission decision allegedly pursuing a hidden agenda of tax harmonisation. Furthermore, according to the second indent in point 9 of notice 98/C 384/03, to qualify as State aid, 'firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the

([18]) See Case 248/84 dated 14 October 1987, *Germany* v *Commission*, [1987] ECR 4013.

firm's tax burden in various ways, including: […] a total or partial reduction in the amount of tax (such as exemption or a tax credit)'. This is the case with the relief in the form of the 45 % tax credit. The comment is therefore without foundation.

(65) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, according to a report ([19]) on the external dependency of the Basque economy in the period 1990 to 1995, exports abroad went up ([20]), not only in absolute terms but, in particular, in relative terms as well, to the detriment of exports to the rest of Spain. The foreign market thus partly replaced the market, which is the rest of Spain. Furthermore, according to another statistical report ([21]) on the foreign trade of the Basque Country, at 28,9 % the Basque economy's 'propensity to export' (ratio of exports to GDP) is greater than that of Germany and the other Member States, where it is about 20 %. According to this report, the Basque trade balance was clearly in surplus during the period 1993 to 1998. In particular, in 1998, for each ESP 100 of imports there were ESP 144 of exports. In short, the Basque economy is very open to the outside, and its production is very much geared to exporting. Given these characteristics of the Basque economy, it may be deduced that recipient firms are engaged in economic activities, which are likely to include intra-Community trade. Consequently, aid strengthens their position vis-à-vis their competitors in intra-Community trade, thereby affecting such trade. Furthermore, the increase in recipient firms' net profit (profit after tax) improves their profitability. This enables them to compete with firms which are not eligible for the tax credit, either because they have not invested, or because their investments have not reached the threshold of ESP 2 500 million following the introduction of the 45 % tax credit.

(66) Since, in this case, the tax rules under examination are general and abstract in character, the Commission would point out that the analysis of their impact on trade can only be carried out at a general, abstract level; it is not possible to specify to what extent they affect a market, sector or specific product, as is stated in the abovementioned comments by third parties. This position has been confirmed on a number of occasions by Court of Justice case-law ([22]).

(67) As regards the comment that the effect on trade should be assessed by the Commission on the basis of a comparison of all tax systems, the Commission would point out that the distortions of competition which are the subject of this procedure under Articles 87 and 88 of the Treaty are due to a derogating rule which favours certain firms vis-à-vis other taxpayers in Guipúzcoa; they are not possible distortions of competition which are due to differences between the tax systems of the Member States, which might, as appropriate, be caught by the provisions of Articles 93 to 97 of the Treaty.

(68) As regards the specific character which State aid must have, the Commission takes the view that the 45 % tax credit is specific or selective in that it favours certain firms, since only firms which make investments exceeding the ESP 2 500 million (EUR 15 025 303) threshold after 1 January 1997 are eligible. All other firms whose investments do not exceed that threshold are ineligible. The objective character of the threshold cited does not prevent it, as the Spanish authorities and some of the third-party comments claim, from being selective and excluding firms which do not satisfy the conditions in question.

(69) The Commission is of the opinion, in the alternative, that the 45 % tax credit is specific on the grounds of the discretionary power of the tax authorities. The Guipúzcoa Provincial Council has a discretionary power to determine, in particular, the duration of the investment process and that of the preparatory phase of the investment qualifying for the aid. It should be

([19]) Patxi Garrido Espinosa and Maria Victoria García Olea, *'La dependencia exterior vasca en el periodo 1990—1995'*, Euskal Estatistika-Erakundea/Instituto Vasco de Estadística (Eustat), the statistical office of the Basque Government.

([20]) Exports abroad accounted for 28,5 % of total exports (including sales to the rest of Spain) in 1990, and for 40,8 % five years later in 1995.

([21]) *'Estadística de Comercio Exterior para la Comunidad Autónoma de Euskadi en el año 1998'*, prepared by Eustat.

([22]) See judgment by the Court of Justice on 17 June 1999 in Case C-75/97 ('Maribel'), *Belgium* v *Commission*, paragraphs 48 and 51; the judgment rendered by the Court of First Instance on 15 June 2000 in Case T-298/97, *Alzetta Mauro and others* v *Commission*, paragraphs 80 to 82; the opinion of Advocate General Ruíz-Jarabo dated 17 May 2001 in Case C-310/99, *Italy* v *Commission*, paragraphs 54 and 55; and the opinion of Advocate General Saggio, dated 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.

stressed here that the Provincial Law introducing the notions of 'investment process' and 'preparatory phase of the project giving rise to the investments' does not define those terms. Unlike the concept of 'investments in tangible fixed assets', which is defined in accounting rules ([23]) and other provisions ([24]) there is no precise and generally accepted definition of the 'investment process' or the 'preparatory phase'. In the absence of a precise definition, therefore, the regional authorities have some leeway in determining exactly what is meant by the 'investment process' or the investment in the 'preparatory phase' in the case of each recipient.

(70) It should also be stressed that, while in Decision 93/337/EEC the Commission used only the criterion of territorial or sectoral specificity in order to demonstrate the specific or selective nature of the aid under the scheme in question, this does not mean that the aid could not have displayed other types of specificity in relation to other criteria. For an official measure to be classed as selective or specific, in relation to State aid, it is enough to identify a single feature. There is therefore no need for each Commission decision to examine exhaustively every specific feature that may be displayed by the official measures under consideration in order to demonstrate that they are selective. Consequently, the argument put forward in some third-party comments, to the effect that because the Commission did not mention the selective nature of the minimum investment threshold as a condition of eligibility for the aid, it did not deem it to be selective, cannot be accepted.

(71) As regards the existence of tax measures in the form of tax credits for investments above a given threshold in other Member States, which the Commission did not consider selective in scope because of the threshold — according to certain comments by third parties, this leads to a legitimate expectation concerning all similar tax credits — the Commission would point out that the schemes mentioned in some of the third-party comments are very different from the 45 % tax credit. Furthermore, even supposing that certain schemes were similar and that the Commission had not reacted, it would not be justified in taking this misguided approach in the present case. It should be pointed out that, according to the case-law of the Court of Justice, 'any breach by a Member State of an obligation under the Treaty in connection with the prohibition laid down in Article 87 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the common market ([25]) are increased'.

(72) Concerning the question raised in some of the third-party comments about whether the Provincial Law in question has the character of an enabling rule or a rule granting aid directly, the Commission would point out that, in this case, the rules which introduced the 45 % tax credit have the character of an aid scheme. In support of this assessment, it is sufficient to point out that under Article 1(d) of Regulation (EC) No 659/1999 an aid scheme is defined as 'a system on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner […]'. However, this character of an aid scheme does not predetermine, as certain third-party comments claim, whether there is any discretionary power in the execution of the scheme or not. Discretionary power in regard to the granting of the aid will depend on the specific characteristics of the scheme.

(73) As regards invoking the nature or general scheme of the tax system as justification for the 45 % tax credit, as the Spanish authorities seek to do, the Commission emphasises that what matters is determining 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. In the case at issue, the 45 % tax credit does not fulfil the internal objectives of the Spanish tax system, which, apart from the principal objective inherent in any tax system of collecting revenue for financing public expenditure, is founded on the principles of equality and progressiveness ([26]). In this regard the 45 % tax credit ([27]) can be said to discriminate in favour of large economic units at the expense of other smaller and less powerful units, without such discrimination being justified by the internal logic of the tax system. In short, because it does not comply with the internal principles inherent in the

([23]) For example, the 'Plan General de Contabilidad'.
([24]) For example, the 'Ley de Sociedades Anónimas'.
([25]) See the judgment dated 22 March 1977 in Case C-78/76, *Steinike & Weinlig* v *Federal Republic of Germany*, paragraph 24. On the other hand, Case C-313/90, *Comité international de la rayonne et des fibres synthétiques and others* v *Commission*, paragraph 45 of the judgment dated 24 March 1993, states that 'neither the principle of equal treatment nor that of the protection of legitimate expectations may be relied upon in order to justify the repetition of an incorrect interpretation of a measure'.
([26]) Article 31 of the Spanish Constitution.
([27]) See the sixth paragraph of judgment 411/99 of 17 May 1999 of the High Court of the Basque Country (*Tribunal Superior de Justicia del País Vasco*) in Case C-907/98, *Administración del Estado* v *Juntas Generales de Álava*.

tax system, the 45 % tax credit cannot be justified by the nature or general scheme of that system. Neither does the fact that the tax credit was introduced by the regional authorities with powers in the tax field demonstrate, contrary to what the Spanish authorities claim in their comments, that it is consistent with the nature of the tax system.

(74) Moreover, the Spanish authorities state in their comments that the aim of the 45 % tax credit is to promote economic activity, and that it therefore fulfils the industrial policy objectives pursued by the Basque Government. According to the Basque Government document entitled Industrial Policy: General Framework of Activities 1996 to 1999 (*Política Industrial. Marco General de Actividades 1996-1999*), '[…] tax policies are essential for boosting economic development and, similarly, for promoting industrial projects based on the industrial development of the (Basque) Country' (page 131), and in the chapter 'Tax policy instruments' one reads: '[…] the tax autonomy which we have (in the Basque Country) enables us to search for imaginative made-to-measure tax solutions, e.g. for priority projects or even tax incentives for large firms' (page 133). The 45 % tax credit in question, therefore, is part of an industrial policy whose objectives are not inherent in the tax system.

(75) In short, the Commission finds that, as the Spanish authorities have pointed out, the 45 % tax credit pursues an economic policy objective, which is not inherent in the tax system. It is therefore not justified by the nature or general scheme of the system.

(76) As to the argument put forward in certain third-party comments concerning the existence of a higher overall tax burden in the Basque Country, the Commission repeats that this is not relevant in the case at issue, since the procedure was initiated in respect of a specific measure and not the whole of the tax system in each of the three Basque provinces.

(77) To sum up, the Commission finds that the 45 % tax credit in question is State aid under Article 87(1) of the Treaty and Article 61(1) of the EEA Agreement, since it involves aid granted by a State, from State resources, which favours certain undertakings, distorts competition and affects trade between Member States.

VIII. THE UNLAWFUL NATURE OF THE 45 % TAX CREDIT

(78) Given that the said scheme does not comprise a commitment from the Spanish authorities to grant the aid in accordance with the conditions for *de minimis* aid ([28]), the Commission considers that the aid cannot be regarded as subject to those rules. It should be stressed in this respect that the Spanish authorities never maintained, in the procedure, that the aid in question should be classed as *de minimis* aid, either in full or in part. 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 exceeded. The incentive does not qualify as existing aid, either, since it does not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999.

(79) The claim made by some third parties that the 45 % tax credit constitutes existing aid must be rejected. In support of that argument, some third-party comments mention the existence of two tax credits prior to the introduction of the 45 % tax credit. However, scrutiny of those two schemes reveals that they differed substantially from the 45 % tax credit under examination. The first scheme did not specify any threshold and the second one established a threshold of ESP 500 million, which is much lower than the ESP 2 500 million threshold in the case at issue. In Article 1(c) of Regulation (EC) No 659/1999, new aid is defined as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. The tax credit in question, which involves substantial changes with respect to those schemes, is therefore to be classed as new aid and, in accordance with Article 2(1) of the Regulation, should be notified, save as otherwise provided in regulations ([29]) adopted pursuant to Article 89 of the Treaty. In any case, even the two earlier schemes did not qualify as existing aid since they were apparently not in force on 1 January 1986, when Spain acceded to the European Union. They therefore did not meet the aforesaid criterion laid down in Article 1(b)(i) of Regulation (EC) No 659/1999 of having been put into effect before, and being still applicable after, the date of accession.

([28]) 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, p. 3).

([29]) At no time during the period of validity of the scheme in question was any such exemption regulation in force.

(80) The Commission would point out that State aid which is not covered by the *de minimis* rule 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 considers 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.

(81) As regards the argument in some of the third-party comments that basically there is a violation of legitimate expectations and legal certainty, the Commission feels bound to reject this, since firstly the 45 % tax credit is not existing aid and, secondly, as it was not notified under Article 88(3) of the Treaty, the Commission was not able to determine whether it is compatible with the common market. Neither can it be accepted that there is a legitimate expectation of the 45 % tax credit being compatible with the common market on the grounds that, as claimed in some of the third-party comments, the Basque tax system was already deemed compatible by Commission Decision 93/337/EEC concerning a scheme of tax concessions for investment. In that Decision the Commission in fact found that the tax measures concerned were to be classed as State aid and, as such, were subject to the Community rules on State aid (rules on regional aid or aid for SMEs, rules on combination of aid and sectoral rules). Therefore, if as claimed in some third-party comments the 45 % tax credit was a measure similar to the scheme examined in the 1993 Decision, it should, in the first place, have been notified as it is new State aid and, secondly, comply in particular with the rules on regional aid or aid for SMEs, the rules on combination of aid and the sectoral rules. In these circumstances, the recipients cannot rely on any legitimate expectations or legal certainty as regards the State aid nature of the 45 % tax credit.

In short, as regards the principles of legitimate expectations and legal certainty invoked in the third-party comments, the Commission gave no specific assurances either to the Spanish authorities or to third parties, who could not therefore harbour any legitimate expectations with regard to the legality or compatibility of the aid in question. 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' ([30]). This is why the argument that legitimate expectations or legal certainty have been violated is without foundation in this case.

(82) In this context, moreover, the Commission recalls that in its Decision 93/337/EEC it already deemed certain tax credits introduced in 1988 by the Provinces of Álava, Guipúzcoa and Vizcaya to be State aid.

IX. **ASSESSMENT OF COMPATIBILITY WITH THE COMMON MARKET**

(83) As a preliminary, the Commission would repeat that the 45 % tax credit has to be classed as an aid scheme. Given the general, abstract nature of an aid scheme, the Commission does not know the circumstances of existing or possible future recipient firms and is not, therefore, able to examine the exact repercussions on competition for specific firms. In this context it is sufficient to ascertain that potential recipients could benefit from aid that is not consistent with the Community directives, guidelines and frameworks applicable on this subject. Moreover, the Commission would emphasise that, in its decision initiating the procedure, it asked for all relevant information relating to the aid and the particular circumstances of each recipient. However, the Spanish authorities have not provided any such information. This is why it is contradictory to criticise the Commission, as certain third-party comments do, for providing only a general assessment while at the same time refusing to supply the detailed data requested.

(84) The State aid in the form of a 45 % tax credit has the effect of encouraging large investments costing more than ESP 2 500 million. According to Annex I to the guidelines on national regional aid (98/C 74/06), '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'. In the case in point, the 45 % tax credit fulfils these conditions, at least partly, since it is based on investment expenditure and its amount does not exceed 45 % of the investment. The Commission accordingly takes the view that the 45 % tax credit should be classed as investment aid to the extent that it fulfils the above criteria. It must therefore be examined in the light of the Community rules on investment aid.

([30]) See paragraph 300 of the judgment rendered by 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.

(85) If State aid for investment is to qualify for one of the regional derogations in Article 87(3)(a) or (c) of the Treaty, the region in which the scheme is applied must have been recognised as eligible for one of those derogations on the regional aid map. As regards the admissibility of Guipúzcoa, the Commission would point out that the territory has never been eligible for the Article 87(3)(a) derogation, since the per capita GDP ([31]) of the NUTS ([32]) II region of the Basque Country, of which it forms part, has always been higher than 75 % of the Community average. According to the rules on regional aid ([33]), the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty ([34]) are met only if the region, at NUTS level II, has a per capita GDP of not more than 75 % of the Community average.

(86) As regards the admissibility of Guipúzcoa for the derogation in Article 87(3)(c), the Commission would point out that, during the period from 1 January 1997 to 18 March 2000, two successive regional aid maps were in force. The first one, adopted by its Decision of 26 July 1995 ([35]), applied from 26 September 1995 until 31 December 1999 and provided that the whole of Guipúzcoa was a region in which investment aid for regional development could be regarded as compatible with the common market under the derogation in Article 87(3)(c), provided that it did not exceed the ceiling of 25 % nge in the case of large firms. 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. According to this map, Guipúzcoa continues to be a region in which regional development aid may be considered compatible with the common market in accordance with the derogation in Article 87(3)(c) of the Treaty, provided that it does not exceed the ceiling of 20 % nge in the case of large firms, instead of 25 % nge under the previous map.

(87) The Commission would also point out that, in the case of SMEs ([36]), the intensity of investment aid may, in accordance with the SME guidelines ([37]), be 10 percentage points higher than the regional ceiling for large firms, provided that the total does not exceed 30 % nge.

(88) It should also be stressed that, to be eligible for investment aid, investments in tangible assets must correspond, in particular, to the Community definitions of initial investment and the standard base ([38]). Conversely, all other investment expenditure that does not correspond to those definitions, such as replacement investments or expenditure on items other than land, buildings or plant/machinery, is not deemed eligible. Although there is no doubt that the 45 % tax credit is aid granted subject to the carrying-out of a tangible investment ([39]) in new tangible fixed assets, it does not exclude replacement investments ([40]) or expenditure related to the 'investment process' and 'investments made during the preparatory phase'. In the absence of a precise definition of those terms, the possibility cannot be ruled out that the 45 % tax credit could be applied not only to expenditure included in the standard base but also to expenditure linked to replacement investments or other items of expenditure lying outside

([31]) Per capita gross domestic product (GDP) measured in purchasing power standards (PPS).

([32]) Nomenclature of territorial units for statistics.

([33]) The references to the regional rules are, in some of the subsequent recitals, to the guidelines on national regional aid (98/C 74/06) or to the earlier rules. In any event, the result of the assessment is the same in all cases.

([34]) See point 1 of the Commission communication to the Member States on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988) and point 3.5 of the guidelines on national regional aid (98/C 74/06).

([35]) See 96/C 25/03.

([36]) For the purposes of the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992) or the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (96/C 213/04).

([37]) Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992) or Community guidelines on State aid for small and medium-sized enterprises (96/C 213/04) (OJ C 213, 23.7.1996).

([38]) See the Annex to the Council resolution of 20 October 1971 (OJ C 111, 4.11.1971), point 5(c); the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979), point 18; the Community guidelines on State aid for small and medium-sized enterprises, point 4.2.1; or the guidelines on national regional aid (98/C 74/06) (OJ C 74, 10.3.1998), point 4.4 ('initial investment means 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 (through rationalisation, diversification or modernisation)'), point 4.5 ('aid for initial investment is calculated as a percentage of the investment's value. This value is established on the basis of a uniform set of items of expenditure (standard base) corresponding to the following elements of the investment: land, buildings and plant/machinery') and footnote 23 ('in the transport sector, expenditure on the purchase of transport equipment (movable assets) cannot be included in the uniform set of items of expenditure (standard base). Such expenditure, therefore, is not eligible for aid for initial investment').

([39]) See the Annex to the Commission communication on regional aid systems (OJ C 31, 3.2.1979).

([40]) Footnote 21 in the guidelines on national regional aid (98/C 74/06) states that 'replacement investment is thus excluded from the concept. Aid for this type of investment falls within the category of operating aid, to which the rules described at points 4.15 to 4.17 apply'.

the standard base. The Commission consequently takes the view that the aid may be applied to initial investment but also to other items of expenditure that cannot be deemed compatible with the relevant Community rules, such as replacement investments.

(89) The Commission notes that, since the entry into force of the guidelines on national regional aid (98/C 74/06), aid that may qualify for the derogation in Article 87(3)(c) of the Treaty in Guipúzcoa must not only comply with the abovementioned Community definitions of initial investment and the standard base and observe the applicable ceilings; it must also satisfy other requirements. In the case in point, the aid must be subject to certain conditions: the recipient's contribution to the investment must be at least 25 % (point 4.2); the application for aid must be submitted before the investment projects begin to be implemented (point 4.2); the investment must be maintained for a minimum period of five years (point 4.10); and the respective aid intensity ceilings must be complied with where different types of aid are combined (points 4.18 to 4.21).

(90) In this specific case, the Commission points out that the tax aid in the form of a 45 % tax credit is not limited (during the period 1 January 1997 to 31 December 1999) to 25 % nge in the case of large firms or to 30 % nge in the case of SMEs. Neither, as regards the period after 1 January 2000, is it limited to 20 % nge in the case of large firms or to 30 % in the case of SMEs. Furthermore, the costs that may be accepted for aid may not fully correspond to those included in the standard base since replacement investments are not excluded and other items of expenditure may be accepted. In these circumstances, the Commission finds that a tax credit amounting to 45 % of investments which does not comply with the Community rules on regional aid cannot be deemed compatible with the common market under the regional derogation in Article 87(3)(c) of the Treaty.

(91) The aid for investment expenditure ([41]) that does not correspond to the Community definition cannot be regarded as investment aid. In accordance with Annex I to the regional aid guidelines (98/C 74/06), any tax aid may be classed as investment aid where its amount is subject to a ceiling expressed as a percentage of investment expenditure in accordance with the Community rules. However, in the case in point, the amount of the aid represents a percentage of investment expenditure that does not comply with the Community rules. That is why, under those rules, the aid cannot be regarded as investment aid. On the contrary, the aid may finance expenditure of a periodic and necessary nature such as that linked to replacement investments. Such current or periodic expenditure is the type of expenditure that has to be incurred by a firm as part of its day-to-day operations or its normal activities. Aid for this type of investment therefore has to be classed as operating aid and as such is subject to specific rules.

(92) In this respect, the Commission would point out that, in accordance with the Commission's 1988 communication ([42]) and the regional aid guidelines (98/C 74/06), regional aid which is classed as operating aid is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty, provided that it meets certain conditions laid down in point 6 of the communication and points 4.15 to 4.17 of the guidelines, or in the outermost regions or regions of low population density if it is intended to offset additional transport costs. However, the NUTS level III territory of Guipúzcoa is not eligible for the derogation in Article 87(3)(a) of the Treaty, and the grant of the said operating aid does not meet the conditions described. The NUTS level III territory of Guipúzcoa is neither an outermost region ([43]) nor a region of low population density ([44]). This is the reason why the operating aid elements in the 45 % tax credit are prohibited, in particular because they are not granted in a region that is eligible for the derogation in Article 87(3)(a) of the Treaty, in an outermost region or a region of low population density. The aid is therefore incompatible in this case.

(93) The Commission therefore considers that the tax incentive 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.

(94) As far as investments made by SMEs outside Guipúzcoa are concerned, the Commission would point out that, in such cases, the corresponding aid cannot be regarded as regional aid and therefore does not qualify for the regional derogation in Article 87(3)(c) of the Treaty. The same applies where such investments are made by large firms. On the other hand, in accordance with the

([41]) It should be stressed that neither the Spanish authorities nor the third parties, which submitted comments, denied the existence of this type of investment expenditure.

([42]) Commission communication to the Member States on the method for the application of Article 87(3)(a) and (c) to regional aid (OJ C 212, 12.8.1988).

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

([44]) According to point 3.10.4 of the guidelines on national regional aid (98/C 74/06).

Community guidelines on State aid for small and medium-sized enterprises (96/C 213/04), where the recipient is an SME, the other derogation in Article 87(3)(c), for aid to facilitate the development of certain economic activities, may apply. In addition to requiring compliance with the definition of initial investment and the rules on eligible expenditure forming part of the standard base, the above guidelines state that the exception will apply to aid for tangible investments up to a ceiling of 15 % gross grant equivalent (gge) in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. The Commission notes that the tax aid in the form of a 45 % tax credit is not limited to 15 % gge in the case of small enterprises and 7,5 % gge in the case of medium-sized enterprises. Neither are the eligible investments fully in line with the definition of initial investment given in point 4.2.1 of the guidelines, nor are the costs that may be accepted compatible with those forming part of the standard base also laid down in point 4.2.1, since the scheme does not rule out replacement investments or expenditure items other than those covered by the standard base. The Commission accordingly finds that the tax aid under examination cannot be deemed compatible with the common market under the derogation in Article 87(3)(c) of the Treaty for aid to facilitate the development of certain economic activities.

(95) Furthermore, the scope of the regional aid guidelines (98/C 74/06) excludes the production, processing and marketing of the agricultural products listed in Annex I to the Treaty, fisheries and the coal industry. Transport, steelmaking, shipbuilding, synthetic fibres and the motor industry are subject to special rules over and above those set out in the abovementioned guidelines, while specific rules apply to investments covered by the multisectoral framework on regional aid for large investment projects (98/C 107/05). Those rules must therefore be taken into account in assessing the compatibility of the aid in question where the recipient company belongs to one of those sectors or where the investment falls within the scope of the multisectoral framework.

(96) The derogation in Article 87(3)(c) of the Treaty has to be examined to see whether it might not apply, in the above cases, for other purposes as well as the development of certain economic activities. It should be noted in this respect that the aim of the 45 % tax credit is not to develop an economic activity within the meaning of Article 87(3)(c) of the Treaty, such as the development of measures to assist small and medium-sized enterprises, research and development, environmental protection, job creation or training in accordance with the appropriate Community rules. Consequently, the tax incentive in question cannot qualify for the derogation in Article 87(3)(c) of the Treaty in respect of the said purposes.

(97) Similarly, the 45 % tax credit, which is not subject to any sectoral limitation, 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, shipbuilding, synthetic fibres and the motor industry ([45]). In the circumstances, the Commission considers that the tax incentive in the form of a 45 % tax credit cannot comply with the said sectoral rules. In this particular case, the 45 % tax credit does not meet the condition that it should not promote new production capacity so as not to exacerbate the overcapacity problems from which these sectors traditionally suffer. Therefore, where the recipient belongs to one of the abovementioned sectors, the Commission considers that, since it is not subject to the sectoral rules mentioned, the aid is incompatible with the common market and the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities does not apply.

(98) As far as the period after 1 September 1998 is concerned, the Commission further takes the view that the aided investment may possibly fall within the scope of the multisectoral framework on regional aid for large investment projects (98/C 107/05) ([46]). All investment projects costing at least EUR 50 million (EUR 15 million in the case of the textile and clothing sector), with an aid intensity of at least 50 % of the regional aid ceiling and involving aid per job of at least EUR 40 000 (EUR 30 000 in the case of the textile and clothing sector), as well as investment projects for which the total aid is at least EUR 50 million, are subject to the conditions laid down in that framework. Each such investment project must be notified in advance, in accordance with Article 88(3) of the Treaty, to enable the Commission to determine the maximum aid intensity that is compatible with the common market. However, the tax aid in question is not subject either to prior notification in the case of the abovementioned large projects or to possible reduction in intensity

([45]) 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/

([46]) OJ C 107, 7.4.1998.

following the Commission's assessment. The Commission therefore finds that the tax aid under examination is not compatible with the common market under the derogation in Article 87(3)(c) of the Treaty, since the derogation in Article 87(3)(a) does not apply in Guipúzcoa.

(99) Since the tax aid in question is granted irrespective of the economic and financial position of the recipient firms, the Commission considers that there is no way of ruling out the possibility that the recipient may be a firm in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (1999/C 288/02) ([47]) despite the Spanish authorities' claim that the tax credit, as it has been designed, is unlikely to be applied to firms in difficulty. The Commission would point out in this connection that the grant of the tax aid in question is not subject to the conditions ([48]) laid down in those guidelines. As stated in point 20 of the abovementioned rescue and restructuring aid guidelines (1999/C 288/02), 'the Commission considers that aid for rescue and restructuring may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest if the conditions set out in these guidelines are met.' If those conditions are not met, the aid is incompatible with the common market where it is intended for firms in difficulty. The Commission therefore finds that the tax aid in question, where granted to firms in difficulty, is not compatible with the common market under the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities.

Application of the other exceptions

(100) 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); it is not intended to make good the damage caused by natural disasters or exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Nor does it qualify for the derogation in Article 87(3)(d) as its purpose is not to promote culture or heritage conservation.

Summary

(101) The Commission finds that the State aid in question in the form of a 45 % tax credit does not qualify for the derogation in Article 87(3)(a) of the Treaty, since Guipúzcoa is not eligible for assistance under that provision, or for the derogation in Article 87(3)(c) for 'aid to facilitate the development […] of certain economic areas', since it does not comply with the Community rules on regional aid. Neither does it qualify for the derogation in Article 87(3)(c) for 'aid to facilitate the development of certain economic activities', since, on the one hand, it does not comply with the Community rules applicable to SMEs in this context and, on the other hand, as far as large firms are concerned, it does not relate to certain activities. The aid 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); it is not intended to make good the damage caused by natural disasters or exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Nor does it qualify for the derogation in Article 87(3)(d) as its purpose is not to promote culture or heritage conservation. The aid is therefore incompatible with the common market.

(102) Since any tax credit that is not used because it exceeds the final amount of tax payable may be carried over and used for several years following adoption of the decision granting the tax credit ([49]), there could still be some tax aid left to pay. However, this aid is unlawful and incompatible. The Spanish authorities should therefore cancel the payment of any balance from the 45 % tax credit, which could still be due to certain recipients.

(103) As regards incompatible aid already paid, it should be pointed out that, in accordance with the above

([47]) OJ C 288, 9.10.1999. These guidelines have since 1999 replaced a previous version (94/C 368/05) of the same guidelines (OJ C 368, 23.12.1994).

([48]) Among other things, that the aid is conditional on implementation of a restructuring plan which enables the long-term viability of the firm to be restored.

([49]) In the case of tax credits granted under Provincial Law No 22/1994 of 20 December 1994, the period in which they may be used is limited to nine years. Tax credits granted under subsequent provincial laws are no longer subject to any such limitation.

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 until the date of actual repayment on the basis of the reference rate used at that date to calculate the net grant equivalent of regional aid in Spain ([50]).

(104) The State aid in question does not qualify for the derogation in Article 87(3)(a) of the Treaty or for the derogation in Article 87(3)(c) for 'aid to facilitate the development […] of certain economic areas', since it does not comply with the Community rules on regional aid. Neither does it qualify for the derogation in Article 87(3)(c) for 'aid to facilitate the development of certain economic activities', since, on the one hand, it does not comply with the Community rules applicable to SMEs in this context and, on the other hand, as far as large firms are concerned, it does not relate to certain activities. The aid 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); it is not intended to make good the damage caused by natural disasters or exceptional occurrences within the meaning of Article 87(2)(b). Furthermore, its object is not to promote the execution of an important project of common European interest, nor to remedy a serious disturbance in the economy of a Member State, as provided for in Article 87(3)(b). Nor does it qualify for the derogation in Article 87(3)(d) as its purpose is not to promote culture or heritage conservation. The aid is therefore incompatible with the common market.

(105) Since any tax credit that is not used because it exceeds the final amount of tax payable may be carried over and used for several years following adoption of the decision granting the tax credit ([51]), there could still be some tax aid left to pay. However, this aid is unlawful and incompatible. The Spanish authorities should therefore cancel the payment of any balance from the 45 % tax credit, which could still be due to certain recipients.

(106) As regards incompatible aid already paid, it should be pointed out that, in accordance with the above 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 until the date of actual repayment on the basis of the reference rate used at that date to calculate the net grant equivalent of regional aid in Spain ([52]).

(107) 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.

X. **CONCLUSIONS**

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

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

([51]) In the case of tax credits granted under Provincial Law No 22/1994 of 20 December 1994, the period in which they may be used is limited to nine years. Tax credits granted under subsequent provincial laws are no longer subject to any such limitation.

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

— Spain has unlawfully put into effect, in Guipúzcoa, the 45 % tax credit for investments, thereby infringing Article 88(3) of the Treaty,

— the 45 % tax credit for investments is incompatible with the common market,

— the Spanish authorities must cancel the payment of any balance of the tax credit, which could still be due to certain recipients. As regards the incompatible aid already paid, the Spanish authorities must 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 45 % tax credit for investments, unlawfully put into effect by Spain in the Province of Guipúzcoa, in breach of Article 88(3) of the Treaty, through the 10th additional provision of Provincial Law No 7/1997 of 22 December 1997, is incompatible with the common market.

Article 2

Spain shall abolish the aid scheme referred to in Article 1 in so far as 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 implementation 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

COMMISSION DECISION

of 30 January 2002

on the State aid granted by Germany to Hirschfelder Leinen und Textil GmbH (Hiltex)

(notified under document number C(2002) 310)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/895/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 called on interested parties to submit their comments pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 9 April 1999, registered on 12 April 1999, Germany informed the Commission of restructuring aid for Hirschfelder Leinen und Textil GmbH (Hiltex).

(2) By letter dated 11 May 2000, the Commission informed Germany that it had initiated the procedure laid down in Article 88(2) of the EC Treaty in respect of the ad hoc aid granted to Hiltex. At the same time Germany was asked to provide sufficient information and data to allow the Commission to assess whether aid of some DEM 60,472 million complied with the terms of the approved aid schemes under which it was claimed it had been granted.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([1]). The Commission invited interested parties to submit their comments on the aid. The Commission received no comments from interested parties.

(4) On 6 June 2000, Germany informed the Commission that Hiltex had been declared bankrupt and that no contacts could be established with its owners, Linen Production Ltd and Uniwear Asia.

(5) By letter dated 6 September 2000, Germany responded to the information injunction contained in the initiation of the formal investigation procedure stating that the aid which it claimed to have awarded under approved aid schemes had been reduced to DEM 48,53 million and submitting some information on the aid measures.

(6) By letter dated 7 February 2001, the Commission informed Germany that it had decided to extend the formal investigation procedure to the aid, which, on the basis of the information submitted, did not seem to be covered by approved aid schemes.

([1]) OJ C 272, 23.9.2000..

(7) The Commission decision to extend the procedure was published in the *Official Journal of the European Communities* ([2]). The Commission invited interested parties to submit their comments on the aid. The Commission received no comments from interested parties.

(8) By letter received on 6 April 2001, Germany responded to the extension of the formal investigation procedure. In its letter Germany informed the Commission of the grant of a further DEM 1 million by way of restructuring aid for the bankrupt company. That amount is not covered by this Decision.

II. **DESCRIPTION**

A. **The relevant undertakings**

(9) Hiltex is a flax and textile spinning mill located in Hirschfelde, Saxony, an assisted area pursuant to Article 87(3)(a) of the EC Treaty. It produces middle to fine spun linen yarns, long linen yarn (100 % linen) and tow yarn (100 % linen). The yarns are used for technical, household and home textiles as well as outer garments.

(10) The enterprise, founded in 1848, operated in the former German Democratic Republic in form of a *Volkseigener Betrieb* (State-owned corporation), VEB Vereinigte Leinenindustrie Grosspostwitz. According to the information submitted, the Treuhandanstalt (THA) set about restructuring the company as from 1990/91. On 19 December 1994, Hiltex was incorporated into Schröder & Partner GmbH & Co. Management KG (S+P MKG) ([3]). The company was to be privatised once the most necessary investment had been carried out. During 1994 and 1995, investment totalling DEM 9,4 million was carried out. No indication was given of how the investment was financed.

(11) After the initiation and extension of the formal investigation procedure, Germany informed the Commission that in 1993 Hiltex had 134 employees, a turnover of DEM 4,4 million and assets of DEM 33,2 million. In 1994 Hiltex had the same workforce, a turnover of DEM 8,993 million and assets of DEM 38,321 million.

(12) Following a call for tender on 21 December 1995, Hiltex was privatised for DEM 25 500 to Uniwear Trading Ltd (51 %), which belonged to Uniwear SA, Belgium (the Uniwear group) and whose manager was Mr Jvan Bontognali. MCC-Credit Commercial à moyen terme Ltd (MCC) acquired 49 % of the shares for DEM 24 500. According to the information provided by Germany, two other potential investors had shown interest, but subsequently withdrew.

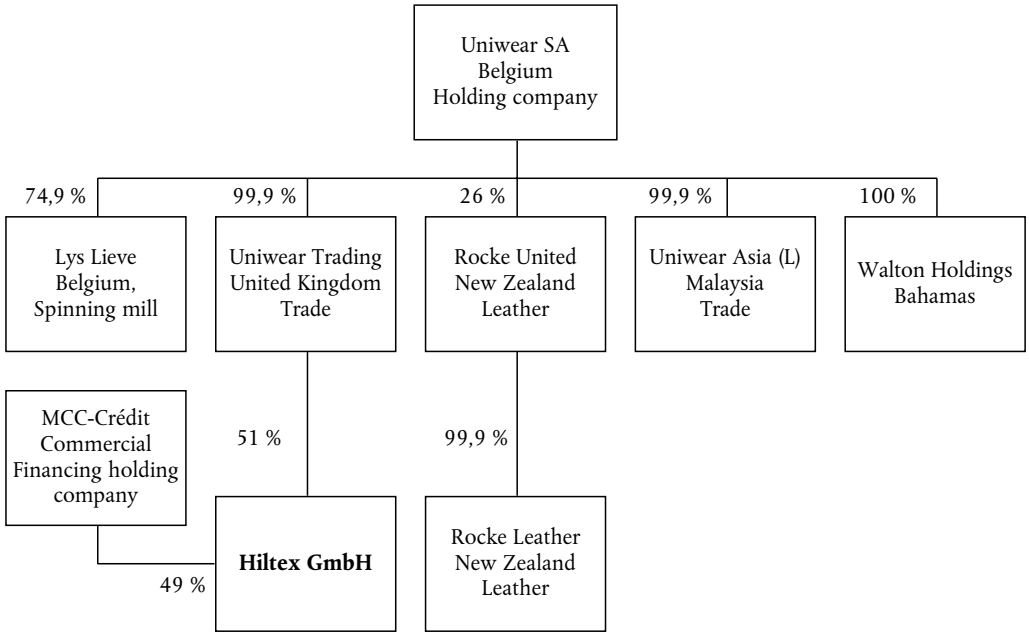
1. *Structure at the time of privatisation in December 1995*

(13) In 1995, Hiltex employed 113 people, had a turnover of DEM 4,186 million and a balance sheet total of DEM 11 million. MCC, based in Ireland, employed 140 people, had assets of EUR 565 301 and an annual turnover of EUR 4 167 065 in 1995. On 31 December 1995, the Uniwear group employed 438 people, had a turnover of EUR 8,754 million and a balance sheet total of EUR 31,811 million.

([2]) OJ C 87, 17.3.2001, p. 2.

([3]) The THA ended its tasks on 31 December 1994. Since 1995, some of the companies to be privatised were assembled under the 'Berlin Management Beteiligungsgesellschaft mbH' (BMGB) grouping another five holdings named 'Managementkommanditgesellschaften' (MKGs). These held companies from specific industry sectors (textiles, manufacturing, metal and steel production, etc.). The BMGB was in charge of the restructuring and subsequent privatisation of the companies. In 1998, those companies which remained in the BMGB were transferred to the THA's successor, the BvS.

(14) The figures for December 1995 indicate the following structure:



2. *Structure of the company in 1996*

(15) The structure of the Uniwear group changed during the course of 1996, with an increase in employees, turnover and assets ([4]). According to the 1996 management report, in January 1996 the Uniwear group acquired 37,9 % of the shares of PEX plc (United Kingdom) ([5]) a sock manufacturer, and 100 % of the shares of Australia Slinkskins, a company specialising in the treatment of skins.

(16) On 4 September 1996, with retroactive effect from 1 July 1996, MCC sold its shares in Hiltex to Uniwear Asia, which then belonged to the Uniwear group, and whose manager was also Mr Jvan Bontognali. Hiltex was then 100 % owned by the Uniwear group.

(17) According to its 1996 management report, on 2 November 1996, with retroactive effect from 1 January 1996, the Uniwear group sold off Uniwear Trading and Uniwear Asia on the grounds that 'Hiltex was not able to receive the subsidies it expected due to the size of Uniwear' ([6]).

3. *Structure since May 1999*

(18) On 6 June 1997, Uniwear Trading Ltd changed its name to Linen Production Ltd and, together with Uniwear Asia, was integrated in the Key Corporate Ventures Ltd group, Virgin Islands, whose main or sole shareholder seems to be Mr Jvan Bontognali. No further data on this group have been made available. The exact date when both companies joined this group is also unknown.

(19) Germany states that, since autumn 1998, there have been no management or personnel relationships with the Uniwear group. This would seem to imply that, up to that time, relationships with the Uniwear group still existed despite the fact that Hiltex's owners had been sold off in November 1996. In particular it is to be noted that until 22 July 1997, Mr De Poorter, one of the managers of the Uniwear group, acted as manager of Hiltex.

([4]) The balance sheets as at December 1996 show that the group employed 549 people (as against 438 in 1995), had a turnover of EUR 23,448 million and a balance sheet total of EUR 41,279 million.

([5]) In December 1996, PEX employed 152 people, had a turnover of EUR 8,376 million and assets of EUR 7,048 million.

([6]) Management report of Uniwear S.A. for 1996, page 3.

(20) In this connection, the Commission also notes the business relationship between Hiltex and the Uniwear group subsidiary Lys Lieve ([7]), a wetspun linen producer based in Belgium. Hiltex acted as sales agent for Lys Lieve's products in Germany. Lys Lieve has since 1997 stored machinery which Hiltex acquired in 1996 from the company Mackie International Ltd ([8]), one of the shareholders of the Uniwear group. For the payment of these machines Uniwear Asia and the Uniwear group intended to increase Hiltex's capital by DEM 6,6 million. The Commission also notes that, in 1998, Hiltex sold under its own brand name products manufactured by Lys Lieve. According to the information submitted, Lys Lieve will irreversibly close its plant facilities and Hiltex will take over its market shares.

(21) According to the information provided, with effect from 30 June 1999, the nominal capital of Hiltex was to be increased by DEM 6,6 million, to which Uniwear Asia would contribute DEM 6 million and the Uniwear group DEM 0,6 million. A further capital increase of DEM 3,3 million was planned for the end of 1999. After these capital increases, Uniwear Asia would have a share of 65 % (DEM 6,409 million), the Uniwear group a share of 15 % (DEM 1,5 million) and Linen Production Ltd a share of 20 % (DEM 1,941 million) in Hiltex.

(22) In its response to the initiation of the formal investigation procedure, Germany stated that none of the capital increases took place and that therefore the Uniwear group never held 15 % of Hiltex. According to Germany, the Uniwear group filed for bankruptcy in June 2000. Hiltex filed for bankruptcy on 6 July 2000. The manager of Hiltex, Linen Production Ltd, Uniwear Asia and Key Corporate Ventures Ltd, Mr Jvan Bontognali, seems to have disappeared.

B. **The restructuring**

(23) Despite the information injunction, it is still unclear when the restructuring started. The information submitted states that the THA initiated the restructuring of the company in 1990/1991, i.e. prior to its privatisation. However, it is also stated that the restructuring started in 1995, when a sharp fall in demand and prices led to a drop in turnover of more than 50 %. A further amendment to the restructuring plan took place in 1999, when the obligations under the 1995 privatisation contract were revised.

(24) The only restructuring plan submitted to the Commission covered the period from 21 December 1995 to 30 June 2000. According to it, Hiltex would closely co-operate with the Uniwear group in order to become one of the main suppliers of fine linen yarn in Europe. For this purpose, Hiltex bought machinery from Mackie International Ltd in 1996 and intended to enlarge the range of nature fibres produced (wool, silk, cotton and linen). Hiltex was to concentrate on the production on very fine yarns whilst coarse yarns would be imported from China and marketed by Hiltex. For this purpose, the Uniwear group acquired a spinning mill in China and intended to acquire a further spinning mill in Brazil.

(25) The core element of the restructuring plan was the moving of the current production site from a 150-year-old building to a modern industrial park. This was intended to reduce internal transport costs and optimise the operational activities. The machinery acquired was supposed to improve efficiency and help reduce material costs as well as personnel and energy expenditure. Facilities to treat waste water were to reduce energy and water expenditure by 10-15 %.

(26) Hiltex expected to increase sales from some 400 tonnes/year up to 1 343 tonnes/year as from 2000 which, according to Germany, would be realised without increasing capacities. The Commission notes that Hiltex was supposed to take over the market shares of Lys Lieve, which in 1999 produced 600 tonnes/year.

([7]) In 1998, Lys Lieve had a turnover of EUR 4,806 million, a balance sheet total of EUR 7,743 million and employed 86 persons.

([8]) Now Bridge Mackie Textile International.

(27) Table 1 shows the investment measures included in the plan and the position regarding their realisation:

Table 1

(in DEM million)

Investment	Total project	Realised	To be realised in 1999/2000
Land and buildings	15,275	0,025	15,250
Machinery and spinning facilities	12,392	4,898	7,494
Water treatment	0,380	0	0,380
Humidification	0,410	0	0,410
Looms machinery	0,361	0,111	0,250
Informatics (including software)	0,161	0,096	0,065
Total	28,980	5,130	23,850

(28) In its decision to initiate the formal investigation procedure, the Commission noted that the planned restructuring measures had not been implemented in 1999 as intended. According to Germany, this was due to financial problems on the part of the acquirers, as a result of which the construction of the new production site could not be started. Germany conceded that this meant a one-year delay in Hiltex's sales forecasts, but the break-even point was still deemed to be 1999/2000.

(29) According to Germany, Hiltex reduced its capacities for both long flax yarn and tow yarn between 1995 and 1999 from 606 tonnes/year to 595 tonnes/year. A further reduction to 577 tonnes/year was planned in 2000. During the implementation of the plan for the period 1996-2000, the capacities were to be increased with regard to long flax, but reduced with regard to tow yarn. According to Germany, total production capacity was reduced.

(30) The information submitted by Germany indicated that as from 1992 Hiltex acquired 47 machines, at least some of which were purchased from the Uniwear group, and scrapped 76 machines. The information indicated the existence of some 21 machines for different production purposes. A further 12 machines were to be acquired in 1999-2000.

(31) Germany drew particular attention to the cost reduction to be achieved by the restructuring. The expansion to international markets as well as the specialisation in fine-spun yarns were expected to lead in the medium term to improved operating results, with the break-even point being reached in 1999/2000. According to Germany, Hiltex would then be able to compete in the market on its own merits.

(32) The Commission notes that on 6 July 2000 Hiltex filed for bankruptcy. The Commission has never been informed on the state of implementation of the above measures. The break-even point was never achieved.

C. **The costs of the restructuring**

(33) The overall costs of the restructuring for the period 1996–2000 and the financial measures planned for the covering of these costs are detailed in the following table presented by Germany:

Table 2

(in DEM million)

Restructuring measures	Amount	Public measures	Amount	Private measures	Amount
Investments 1996-2000	28,980	Direct investment grants (Land)	10,820	Cash/kind	6,000
		Investment allowance (Land)	3,430	Investment loan	3,100
		Loan (BvS)	3,000	Waiver of loan repayment	0,499
Interest on Uniwear group loan	0,101			Waiver of interests	0,101
Interest on BvS loan	0,136	Underwriting (BvS)	0,136		
Environmental liabilities (Altlasten)	0,250	Underwriting (BvS)	0,250		
				Loan	1,140
Negative cash-flow 1996-1999	5,903	Loan (BvS)	3,000	Cash	3,300
				Remaining	0,549
Total	35,370	Total	20,636	Total	14,734

D. **The financial commitment from the public authorities**

(34) According to the information submitted by Germany, Hiltex benefited from four sets of financial measures. The following tables provided by Germany show the financial measures taken to assist Hiltex (the amounts have been rounded).

(35) Financial measures granted from 1991 to 1995:

Table 3

(in DEM million)

	Granting entity	Description	1991	1992	1993	1994	1995
1	Zittau tax office	Investment allowance			0,003	0,228	
2	Sächsische Aufbaubank	Direct investment grants				1,260	
3	THA/BvS	Waiver of loans					23,938
4	THA/BvS	Grants for social plan	1,504	0,136	0,317	0,079	0,185
5	THA/BvS	Grant for loss cover				1,751	0,658
6	Federal Ministry of Food and Agriculture	Grants		0,249			
7	Federal Ministry of Research and Technology	Grants				0,022	0,025
8	Saxon Ministry of Food and Agriculture	Promotion of projects		0,820	0,230		
9	SMWA, Dresden	Promotion of employment			0,149	0,132	
	Total		1,504	1,205	0,699	3,472	24,806
	Total						31,686

(36) Financial measures granted upon privatisation:

Table 4

(in DEM million)

	Granting entity	Description	1995	1996	1997	1998	1999
10	THA/BvS	Grants for covering of liabilities			0,070		
11	THA/BvS	Grants for personnel reduction		0,241	0,001		
12	THA/BvS	Waiver of liabilities, cash-pool	1,867				
13	THA/BvS	Loss compensation		1,125	1,184	0,607	0,083
14	THA/BvS	Waiver of loans	0,820				
15	S+P MKG	Guarantee for Deutsche Bank credit	3,000				
16	S+P MKG	Guarantee for Deutsche Bank credit	3,000				
	Total		8,687	1,366	1,255	0,607	0,083
	Total						11,998

(37) Financial measures granted from 1996 to 1999:

Table 5

(in DEM million)

	Granting entity	Description	1996	1997	1998	1999
17	Zittau tax office	Investment allowance	0,687	0,172		
18	Sächsische Aufbaubank	Direct investment grants	0,966	0,631		
19	Land of Saxony	Promotion of employment		0,065	0,009	
20	SMWA	Promotion of technology			0,001	
21	Federal Ministry of Economic Affairs	Grant for certification fees	0,007			
22	Sächsische Landesanstalt f. Landwirtschaft	Promotion of projects	0,020			
23	Regierungspräsidium Chemnitz	Grant		0,009		
24	BAW, Eschborn	Grant for participation in fairs	0,002	0,003	0,004	
25	Federal Labour Office	Promotion of employment		0,021	0,027	
26	Bautzen labour office	Promotion of employment		0,003	0,013	0,002
	Total		1,682	0,904	0,054	0,002
	Total					2,642

(38) In its decision to initiate the formal investigation procedure, the Commission also noted that, in 1996, Hiltex received financial assistance for the promotion of projects from the Federal Ministry of Food, Agriculture and Forestry amounting to DEM 479 (measure 27). Due to its small amount this measure is not included in Table 5.

(39) Financial measures granted in 1999, within the context of the amendment of the financial obligations deriving from the 1995 purchase contract:

Table 6

(in DEM million)

	Granting entity	Description	1999
27(a)	Tax office	Investment allowance	0,710
28	Sächsische Aufbaubank	Direct investment grants	—
29	BvS	Waiver of repayment of 'Altlasten' grant	—
30	BvS	Redemption of guaranteed bank dues (Deutsche Bank)	—
31	BvS	Redemption of loan interest (Deutsche Bank)	0,136
	Total		2,444

(40) In its response to the information injunction, Germany explained that, since Hiltex had been declared bankrupt, measure 27(a) (originally amounting to DEM 3,430 million) and measure 28 (originally amounting to DEM 10,820 million) had been only partially paid out. In its response to the extension of the formal investigation procedure, Germany explained that measures 28, 29 and 30 had not been implemented and that their amount is therefore not included in the total. Table 6 has been modified to reflect the actual payments.

E. **The private commitment**

(41) The Commission first notes that, in view of the changing corporate relationships and the insufficient information provided, it is impossible to determine who should be considered to be Hiltex's investor. The information submitted on this point is contradictory sometimes describing the Uniwear group as the investor, but at other times including Uniwear Asia and Linen Production Ltd as investors. The information on the form, amount and origin of the investor's contribution is both contradictory and misleading. From the terms of the information submitted, the investor's contribution to the restructuring of Hiltex seems to consist of the following items:

(42) A capital increase of DEM 6 million, originally described as cash and contribution in kind (machinery) from the Uniwear group, but subsequently as cash from Uniwear Asia, was to be directly transmitted by Hiltex to Idra Consult as payment for eight machines acquired in 1996 from Mackie International Ltd. According to the information submitted after the initiation of the formal investigation procedure, this amount was paid into a bank account in the Bahamas, with instructions that it be transferred to Idra Consult. According to the information submitted by Germany, the capital increase never took place. The Commission has not been informed on the current location of this money.

(43) A capital increase by the Uniwear group of DEM 0,6 million, including interest of DEM 0,101 million. This is described by Germany as a waiver of a corporate loan originally amounting to some DEM 1 million granted to Hiltex by the group in 1997. The information submitted states that the loan was directly transmitted to Mackie International Ltd. In return, three machines stated to be the property of the Uniwear group were leased to Hiltex.

(44) A further capital increase in the form of a grant of DEM 3,3 million, from which DEM 0,385 million was to be provided by Uniwear Asia, DEM 1 million by the Uniwear group and DEM 1,915 million by Linen Production Ltd. According to Germany, from the total amount, DEM 1,592 million has effectively been paid in.

(45) An investment credit of DEM 3,1 million. According to Germany, although the contract for the award of this credit was signed, it was never paid.

(46) A loan for the covering of liabilities amounting to DEM 1,14 million, which, according to Germany, was actually granted.

(47) The information submitted further mentions a loss cover originally amounting to DEM 0,927 million, later to DEM 0,594 million. There is no indication as to its origin or effectiveness.

(48) In view of the above, it seems that DEM 3,332 million has been effectively paid in favour of Hiltex.

F. **Market analysis**

(49) The market for linen yarn comprises weaving plants for dress fabrics, weaving mills for home textiles and manufacturers of technical articles. The first segment influences the second one insofar as dress fashion trends raise the price of linen yarns, and home textile manufacturers then switch to other yarns. According to the information provided by Germany, Hiltex sells 20 % of its production in Germany and the remaining 80 % in the other Member States.

(50) Germany supported its assumptions on the restoration of long-term viability with a short market analysis, according to which the European market for linen yarn is currently undergoing a restructuring process. The rate of capacity utilisation currently fluctuates between 60 % and 70 % as against almost 100 % in previous years of high demand. The trend shows a preference for high-quality fine-spun yarns, the market segment in which Hiltex is operating.

(51) The development of capacities in Europe is described by Germany as follows:

Table 7

Year	Middle fineness Nm	Capacities (t/a)
1990	10,2	1 098
1995	13,9	606
2000	22,6	536

(52) Hitherto, upturns and downturns alternated in seven-year cycles. The last boom in demand took place in 1993/1994, and the suppliers thus expect a similar development in 2000/2001. With regard to technical articles, the information provided by Germany indicates that the market has been declining for years.

III. **COMMENTS FROM GERMANY**

(53) In its response to the initiation of the formal investigation procedure, Germany stated that all relevant information concerning Hiltex's SME status had already been submitted. Germany gave details on some aid measures and informed the Commission that some of these had not been actually implemented. Germany stated that all the measures made available to Hiltex either did not constitute aid or were covered by aid schemes approved by the Commission.

(54) In its response to the extension of the formal investigation procedure, Germany submitted some data on the company for the years 1993 and 1994 and provided further information on the aid allegedly granted under approved aid schemes.

IV. **ASSESSMENT**

(55) As part of the initiation of the formal investigation procedure, Germany was requested by means of an information injunction to provide the Commission within one month with enough information to allow it to assess the measures under investigation. The decision on the extension of the formal investigation procedure noted that most of the questions contained in the information injunction remained unanswered. In spite of these measures, the information submitted in response to the information injunction remains insufficient to dispel the doubts expressed by the Commission in the opening of the formal investigation procedure and its extension. The Commission therefore bases the assessment on the information available ([9]).

A. **Aid beneficiary**

(56) According to the latest information submitted, Hiltex qualified as an SME in 1993 and 1994. However, despite the information injunction, in view of Hiltex's relationship with the Uniwear group and subsequently with the Key Corporate Ventures group, the Commission cannot conclude that the immediate aid beneficiary, Hiltex, qualified as an SME after its privatisation.

(57) At the time of its privatisation in December 1995, Hiltex considered on its own might have qualified as an SME within the meaning of the Commission recommendation of 3 April 1996 concerning the definition of SMEs ([10]). However, since the Uniwear group holding 49 % of its shares at that time was a large undertaking, the independence criterion was not fulfilled and Hiltex did not qualify as an SME.

(58) In its decision to initiate the formal investigation procedure, the Commission pointed out that the retroactive sale of Hiltex in November 1996, in order to enable the company to benefit from regional aid up to the ceilings allowed for SMEs, was likely to constitute a circumvention of the SME criteria.

(59) According to the Commission recommendation of 3 April 1996 concerning the definition of SMEs, in order to verify the fulfilment of the thresholds laid down for qualifying as an SME, the reference year to be considered is that of the last approved accounting period. Since in 1996 Hiltex benefited from aid granted up to the ceilings allowed for SMEs (measures 17 and 18), the reference year for clarifying its status would then be 1995. As explained above, as at 31 December 1995 Hiltex, having been integrated in the Uniwear group, did not qualify as an SME.

(60) As regards its current status, since 1997 Linen Production Ltd and Uniwear Asia have been integrated into the Key Corporate Ventures Ltd group. In the absence of data on this group, it cannot be determined whether Hiltex qualifies as an SME since its two owners Linen Production Ltd and Uniwear Asia were sold off in November 1996.

B. **State aid within the meaning of Article 87(1) of the EC Treaty**

(61) In its decision to initiate the formal investigation procedure, the Commission took the view that all the above financial measures constituted State aid. The measures derived directly or indirectly from State resources, threatened to distort competition and affect trade between Member States and had conferred on the company advantages which it would not have obtained from a private investor in the light of its difficulties.

([9]) Article 13(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, OJ L 83, 27.3.1999, p. 1.

([10]) OJ L 104, 30.4.1996, p. 4.

(62) Germany contested this with regard to measures 4 and 6 to 9. However, in its decision to extend the formal investigation procedure, the Commission pointed out that through the State interventions under measures 4, 6, 7 and 8 the company was liberated from charges which it would otherwise have borne from its own resources. Hiltex thus obtained an advantage with respect to its competitors which in view of its difficulties it would not have received from a private investor. Such advantages threaten to distort competition and affect trade within the common market and are therefore to be regarded as aid within the meaning of Article 87(1) of the EC Treaty.

(63) As regards measure 9, the Commission noted in its decision to extend the formal investigation procedure that it had not been provided with sufficient information to allow it to determine whether the State had any discretionary power in selecting the companies benefiting from such grants. Since Germany has not provided any further information in this respect, the Commission cannot conclude that this was a general measure. Consequently, measure 9 will be regarded as State aid within the meaning of Article 87(1).

C. **Aid which Germany claims was granted under approved aid schemes**

(64) Germany claims that measures 1-28 were granted under aid schemes approved by the Commission. Since the Commission seriously doubted that these measures complied with the terms of the approved aid schemes under which, according to Germany, they had been granted, it issued an information injunction on the basis of Article 10(3) of Council Regulation (EC) No 659/1999 calling on Germany to submit all data, documentation and information necessary to enable the Commission to decide whether the aid which Germany claimed was granted under approved aid schemes effectively complied with the terms of those schemes.

(65) In its decision to extend the formal investigation procedure, the Commission concluded that measures 12, 14, 15 and 16 granted during the privatisation were covered by the THA-Regime N 768/94 ([11]). This scheme states that when the liquidation of a company is the less costly option from an economic point of view, but the THA/BvS decides to sell the company (negative price), the sale must be notified to and assessed by the Commission only if the company employs more than 250 employees. Hiltex employed 113 people at the time of its privatisation and the price of DEM 0,5 million paid for it must be deemed negative in view of the financial engagement of some DEM 10 million by the public authorities. Thus, the sale itself did not need to be notified and the aid measures granted during the privatisation must be deemed to be covered by this scheme.

(66) The Commission also found that measure 19 complied with the terms of an approved aid scheme for the promotion of employment within the context of R&D projects and thus constituted existing aid which did not need to be re-assessed ([12]).

(67) The remaining measures which Germany claimed had been awarded under approved aid schemes were found to constitute new aid, since the Commission could not conclude that the terms of the schemes under which they allegedly had been awarded had been complied with. This was the case with measures 1 to 11, 13, 17, 18 and 20 to 23. After the extension of the formal investigation procedure, Germany submitted information which prompted the Commission to revise its view in part.

(68) Measures 1 and 2, direct investment grants and investment allowances awarded under regional investment aid schemes up to the ceilings for SMEs: According to the latest information submitted, Hiltex qualified as an SME before its privatisation. However, Germany has conceded that Hiltex received excessive regional aid up to its privatisation. Germany has also stated that the excess was

([11]) THA-Regime N 768/94 (SG (95) D/1062).
([12]) N 493/97, SG (98) D/1836, 3.3.1998.

partially repaid through the grants under measure 10. However, the Commission has not been informed on the amount of aid that exceeded the provisions of the approved aid schemes. No evidence has been provided that the excess amount of regional aid was fully reimbursed. It has not been indicated whether interest was paid for the period until the excess was allegedly repaid. Consequently, the Commission cannot conclude that the total amount of aid complied with approved aid schemes.

(69) Measure 3, a waiver of the repayment of loans: Germany has stated that this waiver related to loans of DEM 23,938 million granted by S+P MKG before privatisation. The loans did not need to be notified to the Commission under the provisions of THA-Regime N 768/94 ([13]). Germany states that in order to prepare for privatisation their repayment was waived in April 1995 until such time as profits were achieved (Besserungsschein). Upon privatisation, since no profits had been yet achieved, repayment was completely waived. The Commission acknowledges that these loans had been granted to a company in difficulty. In view of the high risk of default in such cases combined with the specific circumstances of the new Länder, the potential aid element in these loans was 100 % ([14]). Consequently, the waiver of their repayment does not constitute new aid ([15]).

(70) Measure 5: grants to cover losses were allegedly awarded in 1994 and 1995 under the relevant THA-Regimes. However, as already established in the initiation of the formal investigation procedure and its extension, the THA-Regimes do not cover grants before the privatisation of companies ([16]). Consequently, these grants cannot be considered to be covered by the relevant THA-Regime.

(71) Measure 10: Germany states that according to the privatisation contract, if excessive regional aid had been awarded in the run-up to privatisation and part had to be paid back, the THA should pay 50 % of the amount to be returned, with a maximum of DEM 70 000. Germany admits that Hiltex received excessive regional aid in the run-up to privatisation, so that measure 10 is to be regarded as the THA's payment of the excessive aid received by Hiltex. The Commission considers that, if such an agreement took place, it would imply awarding aid to return part of aid falling outside approved aid schemes. Such an agreement would circumvent the Commission's regional aid policy and cannot be the subject of Commission approval.

(72) Measure 11: according to Germany, investors agreed, upon privatisation, to employ 70 people. Germany states that since the workforce had to be given notice before dismissal, over 70 employees had to be provisionally taken over. The THA agreed to compensate for any personnel reduction exceeding 70 people. The Commission concludes that this compensation derived from engagements undertaken upon privatisation and was covered by the relevant THA-Regime.

(73) Measure 13: Germany states that the privatisation contract stipulated that the State would take over the losses for the period 1996 to 1998. Measure 13 is claimed to constitute partial payments covering the losses during those years. However, the privatisation contract established limits for the coverage of those losses which were exceeded by DEM 0,184 million in 1997 and by DEM 0,107

([13]) This scheme, cited in footnote 13, allows for loans granted before privatisation to companies employing less than 250 employees when the amount of the loans does not exceed DEM 50 million.

([14]) Commission communication to the Member States (OJ C 307, 13.11.1993) in relation with the Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980). Point 33 of the Commission communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aids in the aviation sector (OJ C 350, 10.12.1994). See also cases Chemieanlagenbau Staßfurt (OJ L 130, 26.5.1999), C 30/98 Wildauer Kubelwelle, NN 4/99 Esda Feinstrumpffabrik, Lautex Weberei und Veredlung (OJ C 387, 12.12.1998).

([15]) See also point 3.4 of the abovementioned THA-Regime 'when the THA or its succeeding institutions renounce to its rights within the context of the *Vertragsmanagement*, a notification is needed in case the company employs more than 250 employees and the obligations surpass DEM 50 million'.

([16]) See footnote 12.

million in 1998. Moreover, the loss cover for the year 1999 was not provided for in the privatisation contract. Consequently, the Commission concludes that the amounts exceeding the provisions of the privatisation contract are not covered by the relevant THA-Regime.

D. **New aid**

(74) After an assessment of the information submitted in response to the initiation of the formal investigation procedure, the Commission extended the formal investigation procedure to those measures which, on the basis of the information available, still did not seem to be covered by approved aid schemes.

(75) The Commission has reviewed its assessment with respect to part of measures 1-3 and measures 11 and 13, which according to the latest information, are covered by approved aid schemes. Their amount must nevertheless be taken into account in assessing the proportionality of the aid. The remaining measures continue to be regarded as new aid.

(76) Part of the new aid was claimed to fall under the *de minimis* rule. The *de minimis* rule provides that the ceiling for such aid is EUR 100 000 over a three-year period. This ceiling applies to the total of public assistance considered to be de minimis aid and does not affect the possibility of the recipient obtaining aid under schemes approved by the Commission.

(77) Germany states that measures 7 (amount paid in 1995), measures 21, 22, 23, 24 (amounts paid in 1996 and 1997), 25 (amount paid in 1997) and 26 (amount paid in 1997) totalling DEM 90 000, i.e. EUR 46 016, do not exceed the limit allowed under the *de minimis* rule.

(78) Germany further states that measures 20, 24 (amount paid in 1998), 25 (amount paid in 1998) and 26 (amounts paid in 1998 and 1999) totalling DEM 47 000, i.e. EUR 24 030, do not exceed the limit allowed under the *de minimis* rule.

(79) Germany has stated that the conditions for application of the *de minimis* rule have been complied with. The Commission therefore regards these amounts as *de minimis* aid.

E. **Derogation under Article 87 of the EC Treaty**

(80) In view of the above, aid of at least DEM 9,978 million falls to be assessed as new aid by the Commission. The aid is in principle incompatible with the common market, but might fall within the scope of the derogations of Article 87 of the EC Treaty. The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the aid measures neither have a social character and are not granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences, nor is the aid granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(81) Further exemptions are set out in Article 87(3)(a) and (c) of the EC Treaty. In this case, Article 87(3)(c) of the EC Treaty is relevant, because the main objective of the aid is not regional development, but the restoration of the long-term viability of an undertaking in difficulty. Article 87(3)(c) gives the Commission discretion to permit State aid granted to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. In the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([17]), the Commission spelled out the conditions governing the exercise of its discretionary powers. The Commission considers that none of the other Community guidelines, such as those for research and development, the environment, small and medium-sized enterprises, or for employment and training, is applicable.

([17]) OJ C 368, 23.12.1994, p. 12.

1. *Restoration of viability*

(82) The award of restructuring aid requires a feasible, coherent and far-reaching restructuring plan capable of restoring the long-term viability and health of the firm within a reasonable time span. It is therefore necessary to consider the exact time span of the restructuring plan.

(83) Despite an information injunction, the Commission still cannot determine when the restructuring of Hiltex started. Thus, it is impossible to ascertain whether the long-term viability would be restored within a reasonable period. Furthermore, in view of the numerous grants of State aid to Hiltex since 1991 and the negative operating results achieved by the undertaking, the Commission has grounds to believe that Hiltex was kept artificially alive.

(84) Restructuring usually involves the reorganisation and rationalisation of the firm's activities on to a more efficient basis typically involving the withdrawal from activities that are no longer viable or are already loss-making. In addition, those existing activities that can be made competitive again should be restructured and, possibly, new viable activities should be developed or diversified into. Financial restructuring usually has to accompany the physical restructuring.

(85) The Commission first notes that the core element of the restructuring plan, the construction of the new production site in a nearby park, was postponed until 2000, thus impeding the installation of the new machinery bought in 1996, which was intended to contribute to the planned concentration of production on very fine yarns. In these circumstances, it was unrealistic to expect that Hiltex would restore its viability or reach break-even point in 2000.

(86) The following table shows the development of the actual and expected economic results of Hiltex:

Table 8

(in DEM million)

	1995 (*)	1996 (*)	1997 (*)	1998 (*)	1999 (*)	2000 (*)	2001 (*)
Turnover	4,186	3,433	7,212	5,942	9,968	20,647	21,814
Operating result	−3,023	−2,024	−3,566	−3,130	−2,799	−0,365	0,709

(*) final figures

(87) Hiltex expected a turnover increase of 370 % by the year 2001 in relation to the operating result achieved in 1998. However, the Commission notes that the market analysis provided by Germany showed a declining market. In addition, most of the necessary investments could not be realised during the first three years of the restructuring and it did not seem realistic that they would be realised within the following two years. In its initiation of the formal investigation procedure, the Commission concluded that such an increase in turnover did not correspond to economic reality and did not seem to be based on realistic assumptions.

(88) The Commission's doubts are confirmed by the fact that the company filed for bankruptcy in July 2000. It is thus clear that long-term viability will not be achieved.

2. *No undue distortions of competition*

(89) The restructuring must contain measures taken to offset as far as possible adverse effects on competitors, otherwise the aid involved is contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty.

(90) If the undertaking is situated in a relevant market in the EU where an objective assessment of demand and supply shows that there is a structural excess of production capacity, the restructuring plan must make a significant contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market by irreversibly reducing or closing capacity.

(91) The market on which Hiltex operates is currently undergoing a significant restructuring phase. According to the information available, Hiltex intended to expand its capacities in the 'long linen yarns' segment and to increase its market shares. A company in receipt of restructuring aid is not allowed to increase its production capacity unless its survival depends on it. Such an exception must be explicitly invoked and justified. In the present case, no explanation on the necessity of the intended increase in capacities and market shares was provided.

(92) In addition, Hiltex acquired new and more modern machinery, intended to improve efficiency and increase production capacity. Although it was claimed that several machines had been scrapped, the Commission believed that they may have been reallocated within the Uniwear group. The total capacities within the group, which *de facto* seems to have controlled Hiltex, would then remain unaltered.

(93) Germany has submitted no information to dispel the Commission's doubts. The Commission cannot therefore conclude that the intended restructuring, which was never carried out, contained sufficient measures to counterbalance possible negative effects on competitors.

3. *Proportionality to restructuring costs and benefits*

(94) The amount and intensity of the aid must be limited to the strict minimum needed to enable the restructuring to be carried out and must be related to the benefits anticipated from the Community's viewpoint. Therefore, the investors must make a contribution to the restructuring plan from their own resources. Moreover, the way in which the aid is granted must be such as to avoid providing the company with surplus cash which would be used for aggressive, market-distorting activities not linked to the restructuring process.

(95) In its initiation of the formal investigation procedure, the Commission noted that in the absence of a precise starting date for the restructuring, it was impossible to determine the overall amount of the restructuring costs. Without an account of the overall restructuring costs throughout the whole restructuring period, it could not be determined whether the aid granted to cover those costs was the strict minimum required for the restructuring or whether the alleged investor contribution could be considered substantial within the meaning of the guidelines. Moreover, the lack of information prevented the Commission from determining who should be considered to be the investor in Hiltex. In addition, no explanation was provided as to why the different shareholders could not finance the restructuring from their own resources. In the absence of full information on the investor groups, the Commission could not assess whether the aid was really necessary. Furthermore, the Commission doubted that the purported capital increases in the form of loans directly transmitted to one of the shareholders in the Uniwear group could be considered to be an investor contribution within the meaning of the guidelines.

(96) These doubts were not dispelled after the initiation and extension of the investigation procedure. Moreover, the information submitted indicates that a substantial part of the purported investor contribution was never paid in. Since Uniwear Asia filed for bankruptcy and Mr Bontognali seems to have disappeared, it is highly doubtful that any outstanding contributions will be paid. In view of the foregoing, the Commission cannot conclude that the investor contribution criterion is met.

4. *Full implementation of the restructuring plan*

(97) Finally, a company in receipt of restructuring aid must fully implement the plan submitted and approved by the Commission. In the present case, the different changes in the ownership of Hiltex,

entailing subsequent amendments to the restructuring plan, raised doubts that any plan would be fully implemented. These doubts were confirmed by the fact that the company filed for bankruptcy and the restructuring plan was not fully implemented.

V. **CONCLUSION**

(98) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has granted to Hirschfelder Leinen und Textil GmbH (Hiltex), amounting to at least DEM 9,978 million, is incompatible with the common market.

The aid consists of the following measures:

— the amount of measures 1 and 2 (direct investment grants and investment allowances) exceeding the provisions of the schemes under which they were granted and which may have not yet been reimbursed, as well as the interest generated from the time they were granted until their full reimbursement,

— measure 4, grants for the social plan of DEM 2,221 million,

— measure 5, grants to cover losses of DEM 2,409 million,

— measure 6, grants of DEM 0,249 million,

— measure 7, amount paid in 1994, grants of DEM 0,022 million,

— measure 8, grants for the promotion of projects of DEM 1,050 million,

— measure 9, grants for the promotion of employment of DEM 0,281 million,

— measure 10, grants to cover liabilities of DEM 0,070 million,

— the amount of measure 13 exceeding the provisions of the privatisation contract, i.e. DEM 0,374 million,

— measure 17, investment allowance of DEM 0,859 million,

— measure 18, direct investment grants of DEM 1,597 million,

— measure 27, grants of DEM 479,

— measure 27(a), investment allowance stated to have only been paid in an amount of DEM 0,710 million,

— measure 31, redemption of interest of DEM 0,136 million.

Article 2

1. Germany shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 January 2002.

For the Commission
Mario MONTI
Member of the Commission

COMMISSION DECISION

of 30 January 2002

on the State aid implemented by Germany for Gothaer Fahrzeugtechnik GmbH

(notified under document number C(2002) 316)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/896/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 called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

A. **PROCEDURE**

(1) By letter dated 19 May 1998, Germany provided the Commission with information on aid that had already been granted to Gothaer Fahrzeugtechnik GmbH (hereinafter called Gotha Technik). The case was registered under No NN 64/98.

(2) By letter dated 28 May 2001, the Commission informed Germany that it had initiated the procedure laid down in Article 88(2) of the EC Treaty in respect of a grant of DEM 3,655 million by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (hereinafter called the BvS). It also ordered Germany to provide it with all such information as was necessary to enable it to examine the compatibility of the grants made under the relevant scheme.

(3) The Commission's decision to initiate the Article 88(2) procedure was published in the *Official Journal of the European Communities* ([2]). In it the Commission invited interested parties to submit their comments. The firm in receipt of the aid commented by letter dated 27 June 2001. The comments were forwarded to Germany by letter dated 11 July 2001. By letter dated 25 July 2001, Germany expressed its agreement with the comments.

(4) Germany submitted its comments by letter dated 6 July 2001. By letter dated 1 October 2001, the Commission put a number of questions, which Germany answered by letter dated 17 October 2001.

B. **DESCRIPTION**

(5) Gotha Technik is active in the welding of fine-grained steel and produces booms and jibs for mobile cranes. It also runs a training centre for welders. The company is located in a region eligible for aid under Article 87(3)(a) of the EC Treaty. According to the information provided, it qualifies as an SME ([3]).

I. **Background**

(6) In 1990 ownership of VEB Kraftfahrzeugwerk Gotha was transferred to the Treuhandanstalt and the firm was converted into a company with limited liability, Gothaer Fahrzeugwerk GmbH (hereinafter called old Gotha). At that time, it produced, repaired and sold vehicles and vehicle components of the Wartburg type. At the end of 1994, old Gotha was privatised along with seven other companies by being placed under the ownership of Lintra Beteiligungsholding GmbH. Its results were unsatisfactory, however, even after privatisation, as can be seen from the following table:

(DEM million):

Year	*1994*	*1995*	*1996*	*1997*
Turnover	55 500	113 000	48 200	48 615
Profit	−13 900	500	−12 400	−5 636
Staff costs	387	388	383	362

([1]) OJ C 211, 28.7.2001, p. 2.
([2]) See footnote 1.
([3]) Community guidelines on State aid for small and medium-sized enterprises, OJ C 213, 23.7.1996, p. 4.

II. **The restructuring**

(7) At the end of 1996, when the original privatisation plan had proved a failure, the BvS stepped in to prevent the group from going bankrupt. In old Gotha's case, it opted for a continuation of the restructuring. As no one was willing to buy old Gotha as a whole, the BvS tried to sell the company's two production lines, vehicle production and component production, separately. A Mr Schwabe made a management buyout offer for two units of the component production division, namely the jibs production unit and the training centre ([4]). The other production units of the component production division, such as production for Audi/VW/MAN and cab production, remained within old Gotha.

(8) By contract dated 3 November 1997 ([5]), old Gotha transferred assets with a book value of DEM 6,89 million and liabilities of DEM 1,099 million to a newly created company, Die Gothas-Forschungs-Entwicklungs-Projektierung GmbH (hereinafter called Gothas), owned by old Gotha. By contract dated 18 November 1997 ([6]), old Gotha sold its shareholding in Gothas with a par value of DEM 100 000 to the new investor, Mr Schwabe, for DEM 1. Gothas was thereupon renamed Gotha Fahrzeugtechnik GmbH.

1. *The restructuring plan*

(9) At the time of the takeover, the new investor drew up a restructuring plan lasting from 1997 to 2000.

(10) According to the information received, old Gotha's market positioning had long been insufficiently clear. Under the plan, Gotha Technik was to concentrate on its expertise in welding fine-grained steel. It produces lattice booms and jibs for mobile cranes between 30 and 300 tonnes. Loss-making activities such as the production of oil storage tanks and waste containers were terminated at the end of 1997. Gotha Technik supplies major crane manufacturers and avails itself of the growing tendency in the vehicle market to outsource parts production. In 2000, its customers were Deutsche Grove GmbH (accounting for 47 % of turnover), Liebherr Werk Ehingen GmbH (27 %), Mannesman Dematic GmbH (15 %), Faun GmbH (10 %) and Sennebogen GmbH (1 %).

(11) As a high degree of welding expertise is indispensable in this market, the welding training centre is another key element of the plan. It is responsible for the initial and further training of welders, both in-house and external.

(12) The company switched from the production of individual components to that of tailor-made, high-quality systems. In order to ensure production of such a high quality that the long-term viability of the company was assured, investment was largely used to replace obsolete plant and equipment. Production itself was optimised and concentrated in two workshops, having been inefficiently split beforehand.

2. *Costs of the restructuring*

(13) The overall cost of restructuring Gotha Technik came to DEM 10,915 million. This can be broken down as follows:

(DEM million)

General investment in plant and equipment	7,100
Building maintenance	1,700
Separation of infrastructure	1,115
Working capital	1,000

(14) According to the latest information provided by Germany, the public authorities contributed DEM 6,395 million, broken down as follows:

(DEM million)

No	Source	Measure	Legal basis	Amount
1	BvS	Investment grant	Ad hoc aid	3,655
2	Land	Grant	NN 123/97, joint Federal Government/ *Länder* programme for improving regional economic structures, 26th framework plan	1,738
3	Land	SME grant	NN 142/97, SME scheme	0,315
4	KfW	Loan	NN 563/c/94, ERP reconstruction programme — east	0,120
5	*Land*	Investment allowance	N 494/A/95, Investment Allowance Act	0,567
				= 6,395

([4]) Old Gotha's vehicle production line was bought by Schmitz Cargobull AG and Josef-Koch GmbH for DEM 1. The aid granted in this context is being examined in the context of the investigation of Case No C 31/01, Schmitz-Gotha.

([5]) Contract for the bringing-in of assets of 3 November 1997, valid retroactively from 30 September 1997.

([6]) Contract for the purchase and assignment of shares of 18 November 1997, valid retroactively from 1 October 1997.

— Measure No 1: as indicated in the decision to initiate the formal investigation procedure (hereinafter called the initiation decision), Gotha Technik received a grant of DEM 3,655 million from the BvS when it was sold to the new investor.

— Measure No 2: Thüringer Aufbaubank awarded a DEM 1,738 million grant under a Commission-approved aid scheme ([7]).

— Measure No 3: according to the information available at the time of the preliminary investigation, a DEM 200 000 grant was awarded under an aid scheme by decision of 10 November 1998 ([8]). By decision of 26 April 1999, the company received a further grant of DEM 115 000 under the same scheme. During the course of the formal investigation procedure, Germany claimed that, when the aid was first granted in 1998, the company's viability prospects were good.

— Measure No 4: as indicated in the initiation decision, Kreditanstalt für Wiederaufbau (hereinafter called KfW) granted through Deutsche Kreditbank (hereinafter called DKB) a loan of DEM 1,956 million under an aid scheme. During the course of the formal investigation procedure, Germany identified the scheme as the ERP reconstruction programme-east ([9]). It claimed that the loan had an intensity of DEM 120 000.

— Measure No 5: by decision of 10 November 1998, the allowance was granted under an aid scheme ([10]). The Commission only learned about it during the course of the procedure.

(15) According to the latest information, the investor and other parties contributed DEM 4,341 million.

III. **The market**

(16) Gotha Technik is active in the welding of steel and produces booms and jibs for mobile cranes. These products fall within the category of general-purpose machinery and the subcategory of lifting and handling equipment (NACE Rev. 1 29.22) ([11]). The category of motor vehicle parts and accessories within the transport equipment industry (NACE Rev. 1.34.3) ([12]) is also relevant.

(17) According to the information submitted, the company's turnover in 1998, 1999 and 2000 was generated as follows:

(%)

	1998	1999	2000
Jibs and booms production	70,63	77,58	92,27
Welding training centre	9,43	8,99	4,66
Production for Weidemann GmbH	7,72	4,37	/
Production for the Bundeswehr	5,05	4,33	1,93
Production for VW	4,86	3,01	0,86
Other activities	2,31	1,72	0,28

(18) As for the market in fine-grained steel, Germany forwarded information provided by Deutscher Verband für Schweißen und artverwandte Techniken (DVS). This high-strength material is characterised by its greater strength and improved elongation at rupture compared with ordinary steel. Thanks to improved smelting technology, yield strengths of 960 Newton/mm^2 are offered, and the introduction of yield strengths of 1 100 Newton/mm^2 is envisaged. This material enables the company to produce components of reduced thickness and hence lower weight and volume. For the time being, fine-grained steel is used almost exclusively for the production of cranes. Because of improved production, casting and rolling technology, fine-grained steel exhibits good weldability and the overall costs of welding are five times lower than for ordinary steel. In view of this, DVS is of the opinion that the market for high-strength fine-grained steel is growing.

(19) As for the capacity situation, Germany states that there is no excess capacity, only undercapacity. Since the early 1990s, an increasing share of the added value generated in this market has been transferred from crane manufacturers to crane equipment manufacturers. This is due to increased outsourcing and the transferring of responsibility for manufacture and quality assurance to suppliers. Today, almost 50 % of components are

([7]) NN 123/97, Joint Federal Government/*Länder* programme for improving regional economic structures, 26th framework plan, SG(97) D/7104 of 18 August 1997.
([8]) NN142/97, Directive of the Land of Thuringia in favour of investments by SMEs, SG(96) D/4313 of 2 June 1998.
([9]) N 563/c/94, SG(94) D/17293 of 1 December 1994.
([10]) N 494/a/95, Investment Allowance Act, SG(95) D/17154 of 27 December 1995.
([11]) European Commission, Panorama of European Business 1999, p. 283.
([12]) European Commission, Panorama of European Business 1999, p. 385.

produced by way of outsourcing. The possibility for crane manufacturers to outsource is, however, limited by the need for welding expertise.

(20) As for market share, it is apparent from the information received that Gotha Technik operates on the basis of orders that are outsourced by its customers. Gotha Technik's market share is therefore gauged by reference to the volume of orders that its customers outsource per year. The following table shows the volume of outsourcing by the company's customers on the Community market and elsewhere in 2000:

(DEM million)

Company	Community	elsewhere	Total
Faun GmbH	8,95	16,19	25,14
Grove GmbH	34,50	25,50	60,00
Demag GmbH	35,00	25,00	60,00
Liebherr GmbH	60,00	90,00	150,00
Total	138,45	156,69	= 295,14

(21) Gotha Technik therefore has a market share of 20 % on the Community market and 9,5 % outside the Community.

(22) As for the company's capacity, Germany showed that it was not expanded during the restructuring. The building of a new production shop was necessary in order to increase added value. The main aim of the restructuring was to enable the company to take over assembly of its own components. The new production shop covers the increased need for storage space, assembly itself and quality control.

IV. **Grounds for initiating the Article 88(2) procedure**

(23) The Commission was inclined to believe that Gotha Technik had profited from a BvS grant of DEM 6,1 million awarded to old Gotha in 1997. It also believed that the company had received an additional wage cost subsidy of DEM 398 000. It suspected, moreover, that the sale may have involved aid to the investor.

(24) Measures Nos 2 to 4 were granted on the basis of aid schemes approved by the Commission. For lack of information, the Commission was unable, however, to assess in the initiation decision whether this aid complied with the terms of the schemes. An information order was therefore issued pursuant to Article 10(3) 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 ([13]).

(25) Measure No 1, worth DEM 3,665 million, was considered to be new aid. It was examined under Article 88(3)(c) of the EC Treaty and under the Commission notice Community guidelines on State aid for rescuing and restructuring firms in difficulty ([14]) (hereinafter called the guidelines). The 1994 guidelines continue to apply to non-notified aid granted prior to the publication of the 1999 guidelines ([15]), which is the case with the aid to Gotha Technik. The Commission had reservations about whether the plan was capable of restoring the company's viability, whether there was overcapacity on the markets on which the company operated, and whether the investor contribution was significant.

C. **LEGAL ASSESSMENT**

I. **Aid within the meaning of Article 87(1) of the EC Treaty**

(26) As stated in the initiation decision, measures Nos 1 to 4 were considered to be aid. Germany did not challenge this statement in its comments. Measure No 5 is likewise to be considered aid. These measures have undoubtedly conferred advantages on Gotha Technik by reducing the costs it normally has to bear. Gotha Technik, the aid recipient, produces jibs and booms for cranes, which is an activity involving trade between Member States.

1. *Aid elements in the sale of Gotha Technik*

(27) Germany claims that the investor's offer was the best to emerge from an open and transparent sales procedure. As no one was willing to take over old Gotha as a whole, the BvS tried to sell the company's component production division separately. One MBO offer was received for two units of that division, namely the jibs production unit and the training centre. The assets and liabilities of the jibs production unit and training centre were brought into a new company, owned by old Gotha, the shares in which were transferred to the

([13]) OJ L 83, 27.3.1999, p. 1.
([14]) OJ C 368, 23.12.1994, p. 12.
([15]) See Chapter 7.5 of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty (notice to Member States including proposals for appropriate measures), OJ C 288, 9.10.1999, p. 2.

investor for a consideration of DEM 1. Germany is of the opinion that no aid was involved in the transaction as no better price was obtainable on the market.

(28) To rule out any aid element in the transaction, the BvS would have had to demand a price corresponding to the company's market value. The Commission therefore verifies whether the sales procedure was an appropriate one for the purpose of establishing the market value. According to Commission communication 97/C 209/03 on State aid elements in sales of land and buildings by public authorities ([16]) and the Commission's remarks on privatisation in the 1993 Competition Report ([17]), the sales price is the market price if the sale is effected through an open and unconditional tender procedure and the assets go to the highest or only bidder. Bidders must be given enough time and information to carry out a proper valuation of the assets. If this procedure is not used, an independent assessment must be carried out in order to establish the market value. For lack of information, the Commission was unable to carry out such an assessment in the initiation decision. It accordingly issued an information order.

(29) First, the Commission assesses whether a tender procedure satisfying the conditions set out in recital 28 took place. It notes that no call for tenders was made in 1997. Germany considered a renewed invitation to tender unnecessary as the planned sale of the company had been reported in numerous press articles and was hence known about in the industry. Moreover, potential buyers had, it said, been contacted in writing ([18]). A sales procedure is open when it is advertised over a reasonably long period in the press, so that it can come to the notice of all potential buyers ([19]). The contacting of only five potential buyers is not an appropriate way to inform all likely bidders. And in the light of the information provided in the course of the formal investigation procedure in Case C 31/01 Schmitz Gotha ([20]), companies seem to be involved here which are active more in the vehicle construction sector than in the sector in which Gotha Technik operates. As for press articles, Germany has neither submitted a copy of any such article nor furnished any details of their origin or content. The Commission accordingly considers that the sales procedure was not an open one. A sales procedure that is not open is not an appropriate means of establishing the market value.

(30) Consequently, the Commission verifies whether the market price was established by way of an independent assessment. On the basis of an independent evaluation of the liquidation value of old Gotha carried out in 1997 (hereinafter called the 1997 study) ([21]), Germany invokes a liquidation value of zero for the assets taken over by the investor. The 1997 study contains, among other things, a liquidity plan for the entire component production division during the scheduled break-up period (July 1997 to June 1998) ([22]). The plan is based on expected earnings and investment over this period, less reserves to be used during the year in question. With respect to component production, it shows liquidity of DEM 4,18 million. According to Germany, the figure of DEM 4,18 million takes account of the current assets of production units within the component production division worth DEM 6,851 million which were not transferred to the investor but remained within old Gotha. Germany is therefore of the opinion that these current assets should not be included in the calculation of the break-up value of the jibs production unit and training centre taken over by the investor. In view of this, Germany considers that the liquidation value of the production units transferred to the investor is zero and that the price of DEM 1 paid by the investor is therefore the market price. The Commission would point out, however, that the figure of DEM 4,18 million invoked by Germany stems from a liquidity plan which is not based on the net asset value of the component production division or individual production units within that division. Germany's hypothesis that the figure of DEM 4,18 million covers assets which remained within old Gotha and which are therefore not taken into account is therefore implausible. The Commission accordingly takes the view that Germany's contention that the investor paid the market price cannot be based on the 1997 study.

(31) In the absence of an open tender procedure and a suitable independent evaluation, the Commission cannot assume that the price paid by the investor was indeed the market price. It cannot therefore rule out the possibility that the transaction involved aid to Mr Schwabe. In view of the fact that the transfer to the new investor is an essential element of the restructuring of a company located in one of the new *Länder* and that the

([16]) OJ C 209, 10.7.1997, p. 3.
([17]) European Commission, 'XXIIIrd Report on Competition Policy 1993', 1994, p. 255.
([18]) This involved the companies Kässbohrer Fahrzeugwerke, Kögel Fahrzeugwerk AG, Fahrzeugwerk Bernhardt Krone GmbH, Fahrzeugbau Langendorf GmbH & Co. KG and Schmitz Cargobull AG.
([19]) Communication on public land sales (see footnote 16), p. 2.
([20]) See letter from Germany dated 10 August 2001.
([21]) Forensika GmbH Wirtschaftsprüfungsgesellschaft, 'Gutachten zur Ermittlung des Liquidationswertes der Gothaer Fahrzeugwerk GmbH zum 1.7.1997', 1997.
([22]) See Annex 4 to the evaluation.

1994 guidelines are applicable, the Commission will examine the measure within the framework of the present proceeding. As regards the amount of aid involved, the Commission takes note of the fact that breaking up the company was the only alternative to selling it to the new investor. The Commission therefore considers that the liquidation value best reflects the true value of old Gotha at the time it was sold. On the basis of the information obtained in the course of the formal investigation procedure, the total liquidation value of the component production division is DEM 1,173 million ([23]). The amount of aid granted to the investor in connection with the transfer can therefore be at most DEM 1,173 million. In the absence of further information, the Commission is obliged to use this figure.

2. *Aid elements in the shareholding in TBS*

(32) In the initiation decision, the Commission was unable to assess whether any aid was involved when Gotha Technik purchased a 5 % stake in Technische Bildungsstätte GmbH (hereinafter called TBS) from old Gotha, which was controlled by the BvS. An information order was therefore issued. In the course of the procedure, the Commission learned that, following an open and unconditional tender procedure, the shares in the company, with a par value of DEM 200 000, had been transferred for DEM 1 to the management and to seven enterprises by contract of 19 June 1998. The Commission therefore considers that no aid was involved when Gotha Technik acquired its shareholding.

3. *The BvS grant of DEM 6,1 million*

(33) In September 1997, old Gotha received a DEM 6,1 million BvS grant to cover severance payments to workers made redundant. In the initiation decision, the Commission expressed the view that Gotha Technik had also benefited from this aid ([24]). As the Commission did not have enough information on the use to which the aid had been put, it was for the time being regarded as aid to both Gotha companies. An information order was issued.

(34) In response to the order, Germany stated that Section 613a of the German Civil Code was not applicable in the new German *Länder* before 1 January 1999. According to the information furnished, the aid was used to make severance payments to workers laid off by old Gotha. Germany stated that Gotha Technik hired all 90 employees of the jibs production unit and welding training centre of old Gotha. As, moreover, all claims by the workers based on seniority were transferred to the company, no redundancy benefits were to be paid by Gotha Technik. In view of this, the company received no aid. The Commission takes the view that the question whether Section 613a of the Civil Code was applicable at the time is of secondary importance, as Gotha (now Gotha Technik) itself undertook contractually to take on the employees. The key element of the Commission's assessment is the real use to which the aid was put, of which it was informed only during the course of the procedure. As is clear from the information received in the course of the formal investigation procedure, no aid payments were made to Gotha Technik. The Commission therefore takes the view that Gotha Technik cannot be regarded as a recipient of the aid.

4. *The DEM 398 000 employment grant*

(35) According to the information received prior to the initiation of the procedure, the company clearly received employment grants totalling DEM 398 000. For lack of sufficient information, the Commission was, however, unable to assess in the initiation decision whether these grants were to be considered aid. It therefore issued an information order. According to the information furnished during the course of the procedure, a grant of DEM 170 000 was made under an aid scheme approved by the Commission ([25]) and therefore constituted aid. Its compatibility is examined in recital 41. A grant of DEM 228 000 was made under Section 217 of the German Social Code, Part III, and hence was not based on an approved aid scheme. The Commission notes that any undertaking is entitled to this kind of grant, provided it complies with the terms of the relevant legislation. As the measure is not limited to any one undertaking or sector of production, it qualifies as a general measure ([26]).

([23]) This value stems from the new evaluation of old Gotha's commercial balance sheet in the event of the company being broken up; see Annex 1 to the 1997 study.

([24]) According to the contract of sale, old Gotha was to ensure, by appropriate means, that only 90 employees would be transferred to Gothas (subsequently Gotha Technik), in accordance with Section 613a of the Civil Code. The reduction of old Gotha's workforce from 316 to 163 seems to have been effected in order to comply with this contractual obligation and is therefore considered a measure preparatory to the takeover.

([25]) NN 107/97, Wage cost subsidy — east, SG(98) D/1049 of 6.2.1998.

([26]) The same line was taken in Case C 35/2000, Saalfelder Hebezeugbau GmbH; see letter to Germany dated 20 July 2001, SG(2001) D/28991.

II. **Aid stated by Germany to be existing aid**

(36) According to Germany, measures Nos 2 to 5 and the employment grant are covered by existing aid schemes.

(37) As regards measure No 2 (the grant under the joint Federal Government/*Länder* programme), the Commission was unable to assess, in the initiation decision, whether the use of the aid complied with the terms of the programme in question. An information order was therefore issued. The investment project is located in a region falling within Article 87(3)(a) of the EC Treaty. In the case of Gotha Technik, the maximum aid intensity comes to 43 % gross. Eligible investment of DEM 5,765 million was carried out between October 1997 and October 2000. As the total amount of regional aid, including measures 2 to 4 (plus special depreciation) comes to DEM 3,343 million, the intensity is indeed 43 %. The aid is therefore existing aid. It will, however, be taken into account in assessing proportionality under the guidelines.

(38) Measure No 3 was awarded under the SME investment scheme. However, only companies with good prospects of viability are eligible for aid under this scheme. In the initiation decision, the Commission expressed reservations based on the viability criterion and accordingly had doubts about whether measure No 3 complied with the scheme. An information order was issued. During the formal investigation procedure, Germany claimed that the company had good prospects of viability from the end of 1998 onwards. To back up this claim, it provided the company records for September 1998 on which the assessment of measure No 3 had been based at the time. The Commission notes that old Gotha was threatened with bankruptcy in 1997 and hence was not viable. Old Gotha's jibs production unit was clearly incurring losses when it was sold to the investor. In 1998, under the new investor, the company's turnover notably improved, however, resulting in an operating profit of DEM 865 000 in September of that year. Throughout the year the company had no excess capacity. The asset value grew from DEM 12,887 million in 1997 to DEM 18,702 million in September 1998. The Commission notes that the *Land* guarantee normally provided to banks in such circumstances was not called in the present case. Hence it is of the opinion that the company had indeed good prospects of viability when the aid was granted at the end of 1998 ([27]). The Commission is therefore of the opinion that measure No 3 is existing aid. It will be taken into account for the purpose of assessing proportionality.

(39) As regards measure No 4, during the course of the procedure Germany merely identified the relevant scheme as the 'ERP reconstruction programme — east' of the Kreditanstalt für Wiederaufbau. According to the information furnished during the course of the procedure, the conditions, in particular the maximum aid ceiling of 7,5 % for SMEs located in the new *Länder*, were met ([28]). The aid therefore qualifies as existing aid and will be taken into account only for the purpose of assessing proportionality under the guidelines. As regards the aid element in the loan, an amount of DEM 120 000 was referred to during the course of the procedure. The Commission notes that the only possible aid element in the loan is an interest subsidy ([29]). As for the evaluation of the interest subsidy, the Commission applies the Community reference interest rate of 4,6 % applicable at the time. The aid element therefore does indeed come to DEM 120 000.

(40) As regards measure No 5, the tax refund, the Commission was not informed of it until after the procedure was initiated. The conditions, in particular the maximum aid intensity of 10 % gross for SMEs located in the new *Länder*, were, however, met ([30]). The aid therefore qualifies as existing aid, but will nevertheless be taken into account in the proportionality assessment under the guidelines.

(41) As regards the DEM 170 000 employment grant, the Commission learnt during the course of the procedure that it had been awarded under an approved aid scheme ([31]). In the light of the information furnished during the course of the procedure, it is, however, of the opinion that the conditions are satisfied. Hence the aid is regarded as existing aid. It will, however, be taken into account in the proportionality assessment.

([27]) This view is borne out by the assessment of the viability criterion in recitals 45 et seq.

([28]) Since eligible investment of DEM 5,765 million was carried out until July 2000, the intensity comes to 1,27 %.

([29]) The public guarantee and the exemption from liability that are usually provided as security to the banks in such cases were not requested for Gotha Technik.

([30]) Since eligible investment of DEM 5,765 million was carried out until July 2000, the intensity comes to 9,93 %.

([31]) See footnote 25.

III. **New aid**

(42) As indicated in the initiation decision, measure No 1, the BvS grant, was not based on any existing scheme and is therefore to be regarded as new aid which falls to be examined in this procedure. Such aid is in principle incompatible with the common market unless one of the derogations in Article 87 of the EC Treaty applies.

(43) Germany has not invoked any of the derogations in Article 87(2) of the Treaty. Nor has it tried to justify the aid on the basis of the derogations in Article 87(3)(b) and (d) of the Treaty. As for the derogation in Article 87(3)(a) of the Treaty, the Commission notes that Thuringia is an assisted region within the meaning of that provision. As it states in its guidelines on national regional aid ([32]), the Commission is of the opinion that, in the absence of proof to the contrary, an individual ad hoc aid payment made to a single firm does not fulfil the requirements for the grant of regional aid. The Commission also states in these guidelines that ad hoc aid to individual firms in difficulty is not to be treated as regional aid but falls within the scope of Article 87(3)(c). In view of the primary aim of the aid, which is to re-establish the viability of a firm, it is therefore the derogation in Article 87(3)(c) of the Treaty that applies. The Commission has accordingly verified whether the aid satisfies the criteria set out in the guidelines on State aid for rescuing and restructuring firms in difficulty (see recital 25).

1. *Eligibility under the guidelines*

(44) According to point 2.1 of the guidelines, the typical symptoms of a firm in difficulty are diminishing turnover, increasing losses, declining cash flow and low net asset value. The Commission notes that old Gotha was threatened with bankruptcy in 1997 and Gotha Technik was clearly incurring losses when the sale to the new investor took place and the aid was granted. The company is therefore eligible for restructuring aid under the guidelines.

2. *Restoration of viability within a reasonable time scale*

(45) According to point 3.2.2(i) of the guidelines, the restructuring plan must restore the long-term viability of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions.

(46) The Commission notes that the performance of the company has been better than expected. Breakeven was achieved in 1998 instead of 1999, as planned. In 2000, the company achieved a turnover of DEM 36,7 million and earned an operating profit of DEM 1,175 million. However, in the initiation decision the Commission raised the question whether the obligation to recover incompatible aid of approximately DEM 7 million from old Gotha in the context of aid case No C 41/99 (Lintra) ([33]) might be seen as an additional liability in the restructuring of Gotha Technik which could influence the evaluation of the viability criterion. According to the information furnished during the course of the procedure, old Gotha discharged its recovery obligation (with interest) on 20 June 2001 by paying a total of DEM 8,827 million. The Commission accordingly regards the matter as settled.

(47) Consequently, the Commission considers that the company will be able to compete on its own merits. The doubts about viability that it expressed in the initiation decision have been allayed by the information furnished during the course of the procedure.

3. *No undue distortion of competition*

(48) According to the guidelines, the aid must not unduly distort competition. Point 3.2.2(ii) of the guidelines stipulates that, in the event of excess capacity in the sector, the restructuring plan must provide for a reduction in the capacity of the aid recipient.

(49) The Commission notes that Gotha Technik is an SME located in an Article 87(3)(a) region. Gotha Technik produces booms and jibs for the crane industry, which is a highly specialised market. According to the latest information, the company has a share of 20 % of the Community market and of 9,5 % outside the Community, benefiting from the growing tendency among crane manufacturers to outsource the production of components.

([32]) OJ C 74, 10.3.1998, p. 9.

([33]) OJ L 236, 5.9.2001, p. 3.

(50) In the initiation decision, the Commission did not have enough information to be able to verify whether there was overcapacity on the market or not. On the basis of the information furnished during the course of the procedure, the Commission is of the opinion that the market is a growth market on which there is no excess capacity. According to Germany, the capacity will remain the same, only its utilisation will be increased. For lack of information the Commission was, however, unable to evaluate, in the initiation decision, whether the building of a new production shop meant an increase in capacity or not. During the formal investigation procedure, Germany showed that the building was necessary in order to increase added value in line with the restructuring plan without expanding capacity. Before the present procedure was initiated, it was stated that the company was also active in the welding of aluminium profiles for rail vehicles. For lack of information on the market, the Commission was unable to evaluate, in the initiation decision, whether there are overcapacities in the market in question. During the course of the procedure, Germany stated that the business of welding aluminium profiles had never been taken up.

(51) In the light of the information furnished during the course of the procedure, the Commission is of the opinion that its reservations as expressed in the initiation decision have been allayed. In its view, the aid does not unduly distort competition.

4. *Proportionality of the aid*

(52) According to point 3.2.2(iii) of the guidelines, the intensity of the aid must be limited to the strict minimum needed to enable the restructuring to be undertaken. Aid recipients should make a significant contribution of their own to the restructuring plan.

(53) The contribution made by public authorities to the restructuring comes to a total of DEM 7,738 million.

(54) In the initiation decision, the Commission had reservations about whether an investor contribution of DEM 200 000, or 1,2 %, was significant. The contribution of DEM 3,1 million invoked by Germany could not be taken into account for lack of information at that stage. An information order was issued. During the course of the procedure an updated table was received, according to which the investor and banks had contributed DEM 4,341 million, broken down as follows:

(DEM million)

No	Source	Contribution	Amount
1	Investor	Capital injection	0,400
2	House bank	Loan	0,500
3	GEFA and others	Leasing agreement	1,482
4	DKB	Guarantee for KfW loan (measure No 4)	1,836
5	Senior executives	Loan	0,123

— Regarding contribution No 2, the Commission had no information about the exact terms before the initiation decision. According to the information obtained during the course of the procedure, the loan in question amounted to DEM 0,5 million at 6,45 % per annum with a term of one year and was secured by a mortgage on the land in Gotha. The Commission notes that the company had good prospects of viability when the loan was granted. It therefore considers that the loan qualifies as an investor contribution.

— As for contribution No 3, the Commission was likewise not informed about the terms before the initiation decision. According to the latest information, six private firms are involved. The agreement concerns machinery and equipment and provides for an interest rate between 5,22 % and 7,09 % and a term between 36 and 60 months. Hence the Commission is of the opinion that these agreements can be considered an investor contribution.

— As regards contribution No 4, the Commission notes that the KfW loan granted through DKB was granted under an aid scheme. As explained in recital 39, the aid element is DEM 120 000. The question is whether the part of the loan that is not covered by the aid scheme can be regarded as an investor contribution. The Commission notes that the interest subsidy is the only aid element in this case ([34]). In view of this, the Commission is of the opinion that the DKB guarantee for DEM 1,836 million can be considered an investor contribution.

— As for contribution No 5, the Commission learned during the course of the formal investigation procedure that it had been granted by seven senior executives in 1998 at an interest rate of 15 % and for a term expiring in September 2000. In its decision-making practice, the Commission has

([34]) No public guarantee or exemption from liability was granted, the loan being secured only by a mortgage on the land in Gotha.

accepted management loans as an investor contribution where the restructuring was effected by way of a management buyout. However, Germany has never clearly stated that the seven senior executives actually formed part of the company's management. In view of this, the Commission cannot consider the loan an investor contribution.

(55) In the initiation decision, the Commission raised the question whether the obligation to recover incompatible aid of approximately DEM 7 million from old Gotha in the context of aid case C 41/99 (Lintra) could influence the assessment of the proportionality of the aid. As stated in paragraph 46, the recovery obligation was discharged by old Gotha on 20 June 2001. The Commission accordingly regards the matter as settled.

(56) In view of the above, the investor contribution amounts to DEM 4,218 million. The Commission would reiterate, however, that, in the sale of Gothas (now Gotha Technik) to the investor for DEM 1, there was to be seen an aid element of DEM 1,173 million (see recital 31). According to the guidelines, the investor must contribute to the restructuring from his own resources or from external commercial financing. To the amount of this aid to the investor, the investor contribution does not fulfil this condition. The investor contribution accordingly amounts to DEM 3,045 million, or 27,9 % of the restructuring costs. The Commission considers this amount to be significant within the meaning of the guidelines. On the basis of the information furnished during the course of the procedure, the Commission is of the opinion that its reservations have been allayed. It accordingly considers that the aid is proportionate to the restructuring benefits.

D. **CONCLUSION**

(57) The Commission finds that Germany has implemented the aid in breach of Article 88(3) of the EC Treaty. However, the aid is compatible with the common market as it complies with the terms of the 1994 guidelines,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Germany has implemented for Gothaer Fahrzeugtechnik GmbH, amounting to DEM 3,655 million (EUR 1 686 711,83), is compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 January 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 12 March 2002

on the State aid implemented by Germany for Ingenieur- und Gewerbebau GmbH (IGB)

(notified under document number C(2002) 912)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/897/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 called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

I. PROCEDURE

(1) By fax of 29 December 1999, registered by the Commission on 10 January 2000 as aid NN 2/2000, the German Government informed the Commission of financial measures to assist Ingenieur- und Gewerbebau GmbH (hereinafter IGB). Given that the financial measures had already been granted to the company, they were registered as unnotified State aid (NN) in accordance with Article 88(3) of the EC Treaty.

(2) By letter dated 29 September 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the aid. The case was then registered as C 66/2001. No comments were received from third parties. Comments were received from Germany on 11 November 2001.

II. DESCRIPTION

(4) The case concerns financial measures to assist the restructuring of an SME active in the building sector in Thuringia. On 1 January 1997 IGB was merged with HAB, a company owned by IGB's shareholders, and subsequently traded under the name of HAB. Some basic economic data are given below:

Progress/output

(in DEM '000)

	1996 (IGB)	1997 (HAB)	1998 (HAB)	1999 (HAB)
Turnover	1 655	10 500	9 175	5 404
Net profit	3	44	22	23
Employees	25	85	85	82

(5) On 28 March 2001 HAB filed for bankruptcy.

1. The restructuring

(6) The restructuring period lasted from 1996 to 2000. The restructuring costs amounted to DEM 2 610 000.

2. State financial measures to assist the restructuring

(7) According to the information in the Commission's possession, the following measures were granted from public sources to assist the restructuring of:

[1] OJ C 330, 24.11.2001, p. 5.
[2] See footnote 1.

(a) a DEM 580 000 grant from the BvS (successor to the Treuhand privatisation agency);

(b) a 80 % deficiency guarantee from the Land of Thuringia amounting to DEM 1 200 000 and covered by an approved aid scheme ([3]);

(c) a one-off investment allowance of DEM 1 700 granted under an approved investment allowance scheme ([4]).

(8) According to the information provided, a loan of DEM 500 000 at 5,5 % from the European Recovery Programme (ERP) and a loan of DEM 250 000 at 5,5 % from the Thuringia Development Bank (TAB) were granted. No further information on these measures could be obtained.

3. **Financial contributions from other sources**

(9) Germany indicated the following contributions as contributions from the beneficiary or from external commercial sources:

(a) investor's own capital: DEM 170 000;

(b) a 20 % personal guarantee from the investor amounting to DEM 300 000;

(c) joint liability of the investors for 80 % of the loans, i.e. some DEM 920 000;

(d) decision by the workforce to forgo the Christmas allowance, representing DEM 345 000.

(10) Germany is of the opinion that these contributions have to be regarded as contributions from the beneficiary from its own or external commercial sources to the restructuring totalling DEM 1 735 000, i.e. 66 % of the restructuring costs.

4. **Reasons for initiating the procedure under Article 88(2) of the EC Treaty**

(11) The Commission expressed the following doubts as to the compatibility of the aid with the common market:

(a) the ERP loan of DEM 500 000 and the TAB loan of DEM 250 000 possibly contained aid elements; an information injunction was thus issued;

(b) the restructuring plan was possibly not suited to restoring the long-term viability of IGB/HAB since the market conditions in the sector were very difficult and the company was a small company with limited resources;

(c) the aid to IGB possibly distorted competition unduly since IGB operated in a sector characterised by overcapacity and the restructuring should have involved some reduction of capacity; despite a request for information, Germany did not provide any details of the capacity situation at IGB/HAB. Accordingly, the Commission issued a further information injunction;

(d) the aid was possibly not in proportion to the restructuring costs and benefits since, contrary to the opinion of the German authorities, the beneficiary's contribution appeared to be DEM 240 000, i.e. 9,2 % of the restructuring costs.

III. **COMMENTS FROM GERMANY**

(12) In its reply to the decision to initiate the procedure, Germany informed the Commission that the local court in Gera refused to set the bankruptcy proceedings in motion because the remaining assets were insufficient to cover the administrative costs. The company was *ipso jure* dissolved. According to Germany, a continuation of the business in any form whatsoever is thus ruled out in practice.

(13) No further comments concerning the points raised in the decision to initiate the procedure were made since Germany is of the opinion that, in view of developments, this would serve no purpose.

IV. **ASSESSMENT OF THE AID**

(14) Article 87(1) of the EC Treaty applies to all the financial measures granted by Germany to the recipient undertaking since they confer economic benefits on a specific undertaking which it would not have received from commercial sources. The measures therefore constitute State aid likely to distort competition. Given the nature of the support provided and the existence of inter-State trade within the common market in the sector in which the recipient undertaking was active, the financial measures granted fall within the scope of Article 87(1).

([3]) Bürgschaftsrichtlinie der Thüringer Aufbaubank, SG(96)D/11696 of 27 December 1996 (N 117/96).

([4]) Investitionszulage für die neuen Länder, SG(95)D/17154 of 27 December 1995, as amended by SG(96)D/3794 of 12 April 1996 (N 494/A/95).

(15) With respect to the aid allegedly granted under approved schemes, the Commission notes that, according to the information available to it, these measures comply with the conditions of those schemes and need not be further assessed in this decision.

(16) In addition to the BvS grant of DEM 580 000, the ERP loan of DEM 500 000 and the TAB loan of DEM 250 000 have also to be considered as ad hoc aid for the restructuring since no other information is available.

(17) The Commission further notes that Germany failed to comply with its obligation under Article 88(3) of the EC Treaty. From a formal viewpoint, the aid is therefore unlawful. This does not necessarily mean, however, that it is incompatible with the common market. As a consequence, the individual measures must be examined under Article 87 of the EC Treaty.

(18) Since the other derogations provided for in Article 87(2) and (3) of the EC Treaty do not apply, the measures are assessed under Article 87(3)(c) and under the 1994 guidelines on rescue and restructuring aid ([5]) (the guidelines). The guidelines are applicable in the present case since all the aid measures were granted before the 1999 guidelines ([6]) took effect.

(19) Since no comments on the substance of the case were received in the course of the formal investigation procedure, the doubts raised in the decision to open the procedure have not been allayed. Accordingly, on the basis of the available information, the Commission must conclude that:

(a) the restructuring plan was not suited to restoring the long-term viability of HAB;

(b) the aid for IGB unduly distorted competition;

(c) the aid was not in proportion to the restructuring costs and benefits.

(20) Consequently, the aid for IGB does not comply with the criteria laid down in the guidelines and has to be considered incompatible with the common market.

(21) Where an unlawfully granted aid measure has been found to be incompatible with the common market, the Commission is required under 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 ([7]) to order recovery of the aid unless this would be contrary to a general principle of Community law. According to the information provided by Germany, the beneficiary company has been dissolved by order of the local court in Gera on account of a lack of assets and any continuation of its activities in any form whatsoever is ruled out. The Commission has therefore decided that an order for recovery of the aid in the present case would serve no purpose.

V. **CONCLUSION**

(22) The Commission finds that Germany has unlawfully implemented financial measures for Ingenieur- und Gewerbebau GmbH (IGB) in breach of Article 88(3) of the Treaty. On the basis of its assessment, it concludes that the aid is incompatible with the common market as it does not fulfil the conditions set out in the guidelines. However, in view of the facts of the case, recovery of the aid should not be required under the second sentence of Article 14(1) of Regulation (EC) No 659/1999,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for Ingenieur- und Gewerbebau GmbH (IGB), amounting to EUR 680 018 (DEM 1 330 000), is incompatible with the common market.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 12 March 2002.

For the Commission

Mario MONTI

Member of the Commission

([5]) OJ C 368, 23.12.1994, p. 12.
([6]) OJ C 288, 9.10.1999, p. 2.
([7]) OJ L 83, 27.3.1999, p. 1.

COMMISSION DECISION

of 9 April 2002

on the State aid implemented by Germany for SKL Motoren- und Systembautechnik GmbH

(notified under document number C(2002) 1342)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/898/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 called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

I. PROCEDURE

(1) By letter dated 9 April 1998, Germany informed the Commission about several aid measures granted in favour of SKL Motoren- und Systembautechnik GmbH (hereinafter 'SKL-M') as part of its second restructuring.

(2) The restructuring project contained aid measures that were registered under aid number NN 56/98. The Commission requested additional information from Germany by letters dated 23 June 1998, 2 March 1999, 28 September 1999, 26 October 1999, 15 December 1999 and 28 February 2000. Germany replied by letters dated 28 September 1998, 6 January 1999, 1 April 1999, 10 May 1999, 29 September 1999, 4 October 1999, 19 October 1999, 10 February 2000, 14 February 2000, 28 February 2000 and 22 March 2000. On 2 March 2000 the Commission received an amended notification (*überarbeitete Notifizierung*) from Germany.

(3) By letter dated 22 March 2000, Germany notified to the Commission a proposed asset deal between SKL-M and MTU Motoren- und Turbinen-Union Friedrichshafen GmbH (hereinafter MTU). Further information on the asset deal was provided by Germany on 13 April 2000 and 17 May 2000.

(4) Additional details were provided in meetings with representatives of the German Government, SKL-M and the investor MTU on 11 November 1999 and 7 December 1999.

(5) By letter dated 8 August 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid and the notified asset sale. The Commission decision was published in the *Official Journal of the European Communities* [2]. The Commission called on interested parties to submit their comments.

(6) The Commission received no comments from interested parties.

(7) On 16 October 2000, 6 April and 17 October 2001 Germany submitted its comments on the opening of the procedure. It also withdrew its notification of the asset deal (ex N 153/2000).

(8) On 19 September 2001 the Commission decided to require Germany pursuant to Article 10 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 [3] to supply the missing information necessary to assess the compatibility of the aid. It sought in particular information that would allow it to determine whether MTU might have benefited or might benefit in the future from the State aid granted to SKL-M. It also asked Germany to forward a copy of this decision to the beneficiary.

[1] OJ C 27, 27.1.2001, p. 5.

[2] See footnote 1.

[3] OJ L 83, 27.3.1999, p. 1.

(9) On 9 November 2001 the Commission reminded Germany that, if no further information were provided, it would, pursuant to Article 13 of Regulation (EC) No 659/1999, take a decision on the basis of the available information.

(10) In response to the information injunction, Germany submitted comments on 23 January 2002, 26 February 2002 and 11 March 2002.

II. DESCRIPTION OF THE AID

1. Background prior to the second restructuring

(11) SKL-M is based in Magdeburg, Saxony-Anhalt. It develops and manufactures engines for ships and the energy sector, produces spare parts and provides repair services. Saxony-Anhalt is an area eligible for regional aid under Article 87(3)(a) of the EC Treaty.

(12) SKL-M belonged to a group of eight eastern German companies which were privatised in 1994 as EFBE Verwaltungs GmbH & Co. Management KG (EFBE), now Lintra Beteiligungsholding GmbH ('Lintra'). The restructuring plan under Lintra was regarded as having failed at the end of 1996. In January 1997 the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* (BvS, the successor to the Treuhand privatisation agency) decided to continue the restructuring of SKL-M with a view to preparing it for sale at a later date.

2. The second restructuring

(13) In 1997 SKL-M had some 295 employees and a turnover of DEM 63 million. Since it did not meet the relevant employee thresholds and financial ceilings for two consecutive years, it does not rank as an SME within the meaning of Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ([4]).

(14) A repetition of a public invitation to tender for SKL-M was deemed not necessary by the BvS since the interest in finding an industrial partner for SKL-M had been reported in several press articles and virtually all potential industrial partners for SKL-M had been contacted. In mid-1996 the only interested parties were Waukesha Engine Division Dresser Industries Inc/USA (Waukesha) and MTU. Owned 88,35 % by the DaimlerChrysler Group, MTU is one of the leading diesel engine manufacturers worldwide. In 1997 Waukesha announced that it was no longer interested. MTU remained the sole candidate proposing a restructuring plan for SKL-M.

(15) On account of the unresolved problems with the State aid for LINTRA, MTU was not prepared to take over SKL-M directly. Therefore, an interim solution (*interimistische Übernahme*) was sought by the BvS and MTU until a definitive decision had been taken on all the State aid for SKL-M.

(16) On 5 November 1997 all SKL-M shares were transferred (for token DEM 1) from Lintra to BVT Industrie-Beteiligungsgesellschaft Magdeburg mbH (BVT) and Wikom Gesellschaft für Wirtschafts-kommunikation und Know-how-Transfer mbH (Wikom). BVT and Wikom act only as trustees for the BvS and the investor MTU. SKL-M has since been jointly managed by BVT, MTU and the BvS.

(17) Furthermore, three supplementary agreements were concluded:

— a basic agreement (Grundsatzvereinbarung) between MTU, the BvS, BVT and SKL-M whereby in particular MTU receives an option to buy the shares of SKL-M. Either MTU would acquire all the shares for DEM 1 before 1 December 1999 or, subsequently, for an 'appropriate price' before 31 December 2001,

— a financing agreement between the BvS, the Land of Saxony-Anhalt and SKL-M which basically determines how the restructuring aid is to be paid. The main element of aid was the granting of loans totalling DEM 54,9 million for loss compensation and investments. The BvS promised that these loans would eventually be converted into grants, subject to approval by the Commission,

— a joint venture agreement between MTU and SKL-M setting out the terms governing joint use of the existing know-how of the two enterprises and the development, production and sale of a new type of engine. It states that the value of the industrial property of each party is identical, with the result that no licensing fees are to be paid by either party. If the joint venture is terminated, MTU is entitled to acquire all the know-how created before and during the period of cooperation for a price which is to be determined on the basis of the development budget.

([4]) OJ L 107, 30.4.1996, p. 4; see in particular the Annex (Article 1(1) and (6)).

3. **The restructuring plan**

(18) The strategic partnership between SKL-M and MTU forms the core of the restructuring plan. The operational restructuring includes: (i) improvements to the production programme (development of new SKL-M engines and converting MTU's diesel engines into gas engines); (ii) modernisation of production; (iii) access to MTU's supply and distribution network; (iv) increase in productivity and improvement of the cost structure.

(19) The cooperation was designed to assist SKL-M in modernising its production programme. A new series of gas and diesel engines was to be developed and produced jointly with MTU. R&D and production were to be coordinated so as to reduce costs and improve competence on both fronts. In this way, the company was to be able to overcome the disadvantages associated with its small size (development of new products, access to the market and boosting of customer confidence). Furthermore, SKL-M was to have access to MTU's cash management system.

(20) According to the restructuring plan, turnover was to increase from DEM 63 million in 1997 to DEM 152 million in 2003. The number of employees was to be reduced from 295 in 1997 to 266 in 2003. A positive operating result was expected in 2003.

(21) The total restructuring costs for SKL-M were given by Germany as DEM 266 million for the period 1997-2003:

(in DEM)

Purpose	Amount
Loss cover 1997-2002	74 733 000
Investments 1997-2002 in: Assets	44 477 000
Know-how	109 000 000
R&D measures	4 281 000
Skilling	1 247 000
Repayment of debts	15 427 000
Working capital increase	16 934 000

(22) The investment costs include an MTU licence allowing SKL-M to use MTU engines as the basis for the new series of gas engines. The amount of DEM 109 million was calculated on basis of the R&D costs of MTU ([5]).

([5]) R&D costs of DEM 252 million; a 3 % licensing fee on SKL-M's total turnover in the relevant products over a period of 25 years (total expected turnover of DEM 3,6 billion).

(23) According to Germany, the public contribution to the restructuring costs comprises:

Aid (DEM)	Form	Source	Granted	Purpose
Ad hoc aid measures paid out in full				
45 400 000	Several loans/7,5 % p.a. (to be converted into grants)	BvS/Land	November 1997	Loss cover 1997—1999
9 500 000	Several loans/7,5 % p.a. (to be converted into grants)	BvS/Land	November 1997	Investments 1997—1999
9 000 000 ([6])	Postponed and reduced liability arising from land sale	BvS	November 1997	Loss cover 1996
(3 934 000 676 000) ([7])	Postponed repayment of rescue loan and interest	BvS/ LINTRA	April/May 1997	Rescue loan to meet overdue liabilities from 1996
Aid schemes previously approved by the Commission				
12 233 000	Several grants and investment allowances ([8])	Land	1997—2002	R&D investment/staff training
76 133 000	Total			

([6]) The measure amounted to DEM 12,117 million, of which Germany intended only DEM 9 million as State aid in respect of the restructuring costs.

([7]) This measure need not be assessed in the present decision since it was assessed in Case C 41/99 LINTRA Beteiligungsholding GmbH. It forms part of the DEM 8,41 million which Germany had to recover from SKL-M in line with the Commission decision. In the present case it is to be included in the assessment of the proportionality of the aid (OJ L 236, 5.9.2001, p. 3 (Lintra Decision)).

([8]) Richtlinie über die Gewährung von Zuwendungen zur Qualifizierung von Beschäftigten in KMU mit Mitteln des ESF und des Land Sachsen-Anhalt (N 188/95)/Richtlinie über die Gewährung von Zuwendungen an KMU zur Beteiligung an Messen und Ausstellungen (N 649/98)/26. Rahmenplan der Gemeinschaftsaufgabe zur Förderung der Investitionen (N 186/96)/Investitionszulagegesetz (N 702/97).

(24) The private contribution to the restructuring costs comprises:

Private contribution (DEM)	Form	Source	Date
(20 333 000)	Loss cover/depreciation ([9])	Investor	Until 2002
3 203 000	Accumulated depreciation allowance	Cash flow of SKL-M	Until 2002
3 571 000	Loan at commercial rate	'Hausbank'/investor	Until 2002
5 173 000	Equity financed out of cash flow	SKL-M/ investor	Until 2002
27 188 000	Shareholder resources	Investor	Until 2002
109 000 000	Licensing fees forgone	Investor	n.a.
1 165 000	MTU test stand	Investor	1999
189 966 000	Total		

([9]) Depreciation was included in the total restructuring costs but was not regarded as an investor contribution.

4. **Change in the original restructuring plan**

(25) On 2 March 2000 Germany notified a change in the restructuring plan and explained that an asset deal between SKL-M and MTU was envisaged. According to this information, MTU was to take over the assets (including 220 employees) and current liabilities of SKL-M at their market price. The sales contract was signed on 24 March 2000. The entry into force (retroactively as of 1 January 2000) of this sales contract was suspended pending a positive decision by the Commission by 15 May 2000. On 17 May 2000 Germany informed the Commission that this deadline had been extended to 25 May 2000.

5. **Market analysis**

(26) SKL-M develops and manufactures engines for ships and the energy sector, produces spare parts and provides repair services. Its products fall within the categories of transport equipment (NACE code 17), electric motors, generators and transformers (NACE code 31) and machinery for mechanical power (NACE code 29) ([10]). They can be further subdivided into diesel engines for seaborne use (drive and auxiliary drive engines, on-board power and emergency power aggregates) and gas and diesel engines (for decentralised energy systems).

(27) Geographically, the most important markets for SKL-M are Germany, the rest of Europe, South-East Asia and the Near East. According to the information provided by Germany, SKL-M has a market share of about 2 % in Germany, while its share of the world market is below 1 %.

(28) According to Germany, there is overcapacity on the market for diesel engines. The established diesel engine manufacturers are also entering the gas engine market. However, according to information submitted by MTU, this is a growth market.

(29) SKL-M has steadily reduced its capacity and discontinued a number of activities since 1993 in order to improve cost structures. It was to cut back its output of diesel engines (old product programme) while starting to produce gas engines. In addition, the production capacity of 143 589 hours (1997/88 engines) was to be increased slightly to 146 082 hours (2002/239 engines).

6. **Opening of the investigation procedure**

(30) By letter dated 8 August 2000, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty since it was not clear:

— whether the restructuring plan submitted would be implemented in full;

— whether the aid would not unduly distort competition;

— whether the full amount of the loan of DEM 12 117 million granted by the BvS in the form of a partial debt waiver and a deferred repayment was to be considered State aid with an intensity of 100 %;

— whether the beneficiary would make an appropriate contribution from its own resources;

— whether the investor MTU was chosen on the basis of a open, transparent and unconditional bidding procedure and whether it therefore benefited or would benefit in the future from State aid granted to SKL-M.

(31) Furthermore, the Commission notes that SKL-M filed for insolvency on 16 June 2000, that MTU withdrew from the cooperation agreement with SKL-M and that the sales contract signed on 24 March 2000 between MTU and SKL-M did not enter into force.

(32) The Commission also observes that the aid measures for the first restructuring of SKL-M, which were considered incompatible in the Lintra decision, needed to be taken into account in the assessment of the private investor contribution to the restructuring costs ([11]).

III. **COMMENTS FROM GERMANY AND INTERESTED PARTIES**

(33) In its response to the initiation of the formal investigation procedure, Germany stated that, at the time the aid was granted, a restructuring plan had been submitted which would have restored SKL-M to long-term viability without unduly distorting competition. It further stated that the investor would have provided a substantial contribution to the restructuring cost and drew attention to comments by the receiver of SKL-M indicating that MTU took over the know-how that had been developed in cooperation with SKL-M for a price of DEM 6,71 million, whereas the development costs were DEM 12,015 million.

([10]) Panorama of EU Industry 1999.

([11]) On 28 March 2001 the Commission took a partly negative decision in respect of aid granted to Lintra and its subsidiaries. Germany was required to recover DEM 34,978 million from Lintra and its subsidiaries. The incompatible aid granted to SKL-M totalled DEM 8,41 million.

(34) On 5 March 2002 Germany submitted the comments of MTU on the initiation of the procedure. MTU states that it was the best bidder in an open, transparent and unconditional bidding procedure. It takes the view that it did not directly or indirectly benefit from the aid granted to SKL-M. As to the know-how, it states that the price paid was in line with market conditions. This position was also taken by MTU in two letters to the BvS dated 1 October 2001 and 21 November 2001. Copies of these letters were forwarded to the Commission on 5 March 2002.

(35) Germany also withdrew the notification of the planned asset sale (ex N 153/2000), stating that it would not press ahead with the sale of SKL-M to MTU. It also stated that all the aid measures granted would be taken into account in the insolvency proceedings of SKL-M. It also provided information indicating that the receiver of SKL-M plans to sell the assets via a public tender procedure.

IV. **ASSESSMENT OF THE AID**

1. **State aid within the meaning of Article 87(1) of the EC Treaty**

(36) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. Pursuant to the established case law of the courts of the European Community, the criterion of trade being affected is met if the recipient firm carries out an economic activity involving trade between Member States.

(37) The Commission notes that aid was granted through state resources to an individual company and that it favoured the company by reducing the costs it would normally have had to bear in carrying out the restructuring plan. Moreover, the recipient of the aid, SKL-M, develops and manufactures engines that are the subject of intra-Community trade. As the aid threatens to distort competition, it falls within the scope of Article 87(1) of the EC Treaty.

(38) As to the amount of the aid to be assessed in the present decision, the Commission observes that the BvS agreed to convert loans totalling DEM 54,9 million (DEM 45,4 million + DEM 9,5 million) into grants, subject to the Commission's approval. In addition, the loans were granted to a company which, as explained below, was in difficulty. Therefore, it was foreseeable that it would not be able to repay these loans. Under the circumstances, the full amount of the loans has to be considered as aid.

(39) However, in its decision to initiate the formal investigation procedure, the Commission raised doubts as to whether, instead of the amount of DEM 9 million, the full amount of DEM 12,117 million granted by the BvS in the form of a partial debt waiver and a deferred payment was not to be regarded as aid towards the restructuring of SKL-M. Germany has not provided any evidence that the remaining amount of DEM 3,117 million was actually paid back by the investor. It follows that the full amount of DEM 12,117 million was granted to a company in difficulty. This amount is thus regarded as State aid to the restructuring of SKL-M.

(40) Accordingly, the amount of ad hoc State aid within the meaning of Article 87(1) to be assessed in the present decision is EUR 34,26 million (DEM 67,017 million).

(41) A derogation from the fundamental ban on aid under Article 87(1) can result from either Article 87(2) or Article 87(3).

(42) Germany did not state that the aid was compatible with Article 87(2). It is also evident that this provision does not apply.

(43) This case is caught by Article 87(3), whereby the Commission may allow State aid in certain specified circumstances. The derogations in Article 87(3)(b), (d) and (e) were not invoked in the present case and are indeed not relevant. Article 87(3)(a) empowers the Commission to approve State aid intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. The *Land* of Saxony-Anhalt falls within this provision. In this case, however, the main purpose of the aid was to promote the development of a certain economic sector rather than the economic development of a region. Thus the restructuring aid according to the restructuring plan submitted should be assessed under Article 87(3)(c) and not under Article 87(3)(a).

2. **Restructuring aid to SKL-M**

(44) In its Community guidelines on State aid for rescuing and restructuring firms in difficulty ([12]) (the guidelines), the Commission spelled out in detail the criteria for assessing aid for restructuring a company.

(45) According to point 2.1. of the guidelines, typical symptoms of a firm in difficulty are deteriorating profitability or increasing size of losses, diminishing turnover, declining cash flow and low net asset value. The Commission notes that SKL-M has been a loss-making enterprise since its privatisation in 1994. The difficulties were apparent in 1997, when the aid was granted and the restructuring plan drawn up. The losses in 1999 were DEM 28 million. Therefore, the company is considered to be a firm in difficulty.

(46) In its decision to open the formal investigation procedure, the Commission noted that of the total public contribution to the restructuring costs an amount of DEM 12,233 million was granted on the basis of approved aid schemes. The measures respect the ceilings and conditions laid down in the schemes. At this stage, therefore, this aid is considered to be existing aid within the meaning of Article 1(b)(ii) of the Regulation (EC) No 659/99. Its compatibility need not therefore be assessed by the Commission in this decision but it is to be taken into account in the assessment of the proportionality of the aid pursuant to point 3.2.2(iii) of the guidelines.

2.1. *Restoration of viability*

(47) The granting of restructuring aid is conditional on the submission of a detailed restructuring plan capable of restoring the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions.

(48) When initiating the formal investigation procedure, the Commission noted that the main element of the restructuring plan submitted was the cooperation between MTU and SKL-M and that, if the plan were implemented in full, it could restore SKL-M to long-term viability. However, since it appeared that MTU was not prepared to take over SKL-M, the Commission raised doubts as to whether the restructuring plan would be fully implemented and whether, therefore, it was based on realistic assumptions.

(49) From the information provided it appears that the investor MTU never gave a clear commitment to take over SKL-M. The agreements signed in November 1997 gave MTU only an option to acquire the shares of SKL-M. MTU was not prepared to take over the shares before the Commission took a positive decision on all the aid granted to SKL-M. At the same time, the German authorities did not require a stronger commitment from MTU, while they granted the illegal aid to SKL-M. Moreover, MTU did not provide the financial resources or take the restructuring measures which were necessary to restore SKL-M to long-term viability, as had been envisaged in the restructuring plan. Thus the company has recorded losses ever since 1997. The Commission cannot therefore conclude that the restructuring plan was based on realistic assumptions and was such as to restore the company's long-term viability.

(50) The Commission's doubts are further confirmed by the fact that MTU withdrew from the cooperation agreement with SKL-M. In addition, the asset sales contract concluded with SKL-M did not enter into force. This suddenly left SKL-M without an investor and insolvency proceedings against SKL-M were instituted in September 2000.

2.2. *No undue distortion of competition*

(51) The restructuring must contain measures to offset as far as possible adverse effects on competitors since otherwise the aid would be contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty.

(52) This means that, where a firm is active in a market in the EU on which an objective assessment of demand and supply conditions shows that there is a structural excess of production capacity, the restructuring plan must make a significant contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market by irreversibly reducing or closing capacity. In cases where there is no structural excess of production capacity, the Commission will normally not require a reduction of capacity in return for the aid. However, it must be satisfied that the aid will not be used to enable the recipient to expand production capacity during the implementation of the restructuring plan unless the contrary would endanger its survival. Such an exception must, however, be explicitly invoked and justified.

([12]) OJ C 368, 23.12.1994, p. 12. These guidelines were revised in 1999 (OJ C 288, 9.10.1999, p. 2). The 1999 version of the guidelines does not apply because all the aid measures were granted prior to publication of the 1999 guidelines (see Section 7 of the 1999 version).

(53) The markets where SKL-M operates are undergoing a period of change. According to the information submitted by Germany, there is overcapacity on the market for diesel engines, whereas the market for gas engines has not yet been fully exploited.

(54) Under the restructuring plan submitted, SKL-M was to increase its output of gas engines. Its production capacity was also to be expanded slightly. Germany explained that the increase in SKL-M's output would be due to an improvement of the test stand facilities, which were previously a production bottleneck.

(55) Germany did not, however, indicate that a slight increase in capacity was essential for the survival of SKL-M or provide an objective assessment of the demand and supply situation in the market for gas engines. The Commission cannot therefore conclude that a relaxation of the principle of a proportionate capacity reduction would be justified. It does not therefore appear that the restructuring plan contained sufficient measures to counterbalance any possible negative effects on competitors.

2.3. *Proportionality to restructuring costs and benefits*

(56) The amount and intensity of the aid must be limited to the strict minimum needed to enable the restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, the investors must make a significant contribution to the restructuring costs from their own resources.

(57) The Commission also had doubts as to whether the investor would contribute significantly to the restructuring costs. In fact it appeared that a major part of the investor contribution was to be granted in form of forgone licensing fees which formed part of a cooperation and cross-licensing agreement with SKL-M and which were stated to be worth DEM 109 million. In the agreement it was expressly stipulated that the industrial property of each party has the same value and so there is no need for licensing fees. Therefore the Commission doubted whether the fees forgone by MTU could be regarded as contribution by the aid beneficiary to the restructuring costs.

(58) Moreover, the Commission doubted whether SKL-M would benefit from the other parts of the investor contribution, as there was no clear commitment on the part of MTU to acquire the shares of SKL-M or to take over the firm by means of an asset sale. The only element of the investor contribution was an engine test stand said to be worth DEM 1,2 million.

(59) As there was some uncertainty about the investor contribution to the restructuring costs, the Commission could not determine the overall restructuring costs. Without this, it could not be ascertained whether the alleged investor contribution could be considered 'significant' within the meaning of the guidelines.

(60) In its response to the initiation of the investigation procedure, Germany holds to its view that the value of the property rights transferred by MTU is to be regarded as an investor contribution.

(61) The Commission notes that the licensing agreement between MTU and SKL-M is actually a cross-licensing arrangement under which both parties make their industrial property available to each other. The agreement also expressly states that, since the industrial property of each party has the same value, there is no need for a licensing fee (Section 4 of the Agreement). The Commission cannot therefore conclude that, by offering the licences to SKL-M, the investor made a significant contribution to the restructuring costs from its own resources.

(62) The Commission's other doubts about the investor contribution have been confirmed in the course of the investigation procedure. It appears that a substantial part of the promised investor contribution was never made. Since MTU is not taking over the shares or assets of SKL-M, there are serious doubts as to whether any outstanding contribution will be made.

(63) Moreover, when initiating the formal investigation procedure, the Commission noted that the aid granted to SKL-M in 1997 via Lintra was to be assessed as part of aid case C 41/99 Lintra Beteiligungsholding GmbH. In the present case this amount is to be taken into account when assessing the contribution made by the investor to the restructuring costs.

(64) On 28 March 2001 the Commission took a partly negative decision in respect of the aid for Lintra and its subsidiaries. Germany was required to recover DEM 34,978 million from Lintra and its subsidiaries. The aid granted unlawfully to SKL-M amounts to DEM 8,41 million.

(65) Germany has not provided any information on the extent to which this amount should be taken into account when ascertaining whether the aid is limited to the strict minimum needed and whether the aid beneficiary makes a significant contribution to the restructuring plan (from its own resources). It informed the Commission, however, that all the aid measures for SKL-M will be or were already registered as claims in the insolvency proceedings of SKL-M, which were instituted on 1 September 2000.

(66) Consequently, the only investor contribution actually made is the test stand stated to be worth DEM 1,2 million. The public measures for the second restructuring amount to some DEM 87,6 million, including the aid measures deemed to be incompatible with the common market and amounting to DEM 8,41 million, which must be recovered as a result of the Lintra decision, and the DEM 12,23 million granted under schemes previously approved by the Commission. Thus, it cannot be concluded that the aid is in proportion to the restructuring costs and benefits.

(67) The Commission cannot therefore conclude that this criterion in the guidelines is met.

3. **Aid to the investor MTU**

(68) The Commission doubted whether the investor MTU was chosen on the basis of a procedure comparable to an open bid. It was, therefore, unclear whether MTU did or would benefit from the restructuring aid granted to SKL-M in three different ways: directly, by way of the joint venture agreement or by way of the planned asset deal or share deal.

(69) As to the question whether the planned asset deal or share deal involved aid, Germany indicated that MTU had decided not to take over the shares or assets of SKL-M. Germany therefore withdrew its notification of the asset deal.

(70) According to Article 8 of Regulation (EC) No 659/1999, the Member State concerned may withdraw the notification in due time before the Commission has taken a decision on the aid. In cases where the Commission has initiated the formal investigation procedure, it must close that procedure.

(71) Since Germany has withdrawn the notification, the Commission, acting in accordance with Article 88(2) of the EC Treaty, is closing the formal investigation procedure as regards the notified asset sale between SKL-M and MTU and the question whether an aid element is included in the purchase price.

(72) As to the procedure by which MTU was chosen as the investor, the Commission notes on basis of the information available to it that the BvS had contacted potential industrial partners for SKL-M prior to the cooperation agreement signed with MTU in November 1997. However, SKL-M was not sold to MTU immediately, but MTU was given the opportunity to manage SKL-M jointly with the BvS and BVT, provided that SKL-M received State aid. MTU was also given the opportunity to acquire the shares of SKL-M at a later stage on favourable conditions (see recital 16). The Commission thus maintains that the procedure selected does not constitute an open bidding procedure.

(73) In its response to the initiation of the procedure, Germany forwarded information from MTU indicating that no cash-concentration system or clearing system existed between the two companies. MTU also pointed out that transactions between them were concluded under market conditions. It further explained that the know-how taken over was not yet marketable and that the price paid was in line with market conditions. It expressed the same view in two letters to the BvS dated 1 October 2001 and 21 November 2001, copies of which were forwarded to the Commission. MTU also submitted a copy of a letter dated 4 November 1999 in which it promised to pay SKL-M's bank DEM 6.71 million if it acquired the know-how. In 1998 SKL-M had assigned its potential claim on MTU to the bank. Germany also indicated that investments carried out in cooperation with MTU remained with SKL-M after the cooperation had been discontinued.

(74) Germany also forwarded information from the receiver of SKL-M indicating that the know-how developed jointly by MTU and SKL-M was acquired by MTU in June 2000 for DEM 6,71 million. According to the receiver, with the inclusion of the sales price, the development of the know-how had represented a loss of DEM 5,30 million for SKL-M.

(75) On basis of the information provided, the Commission notes that the subsidised investments undertaken by SKL-M during the restructuring remained with it. This is confirmed by a stocktaking carried out by the receiver when the insolvency proceedings were instituted. The Commission also notes that no cash-concentration system or clearing system existed between SKL-M and MTU.

(76) In the Commission's view, MTU did not therefore benefit from the restructuring aid in the form of a direct transfer of funds.

(77) Despite an information injunction pursuant to Article 10(3) of Regulation (EC) No 659/1999 and a reminder sent on 9 November 2001, Germany did not provide sufficient information to enable the Commission to rule out the possibility that MTU benefited by way of the joint venture agreement from the aid which was granted to SKL-M for loss cover during the restructuring period.

(78) According to Article 13 of Regulation (EC) No 659/1999, the Commission must therefore take a decision on basis of the information available.

(79) Section 4 of the joint venture agreement concluded between SKL-M and MTU in November 1997 states that the industrial know-how brought in by the two companies has the same value. Section 5 states that, if the agreement is terminated, MTU has the right to acquire the know-how developed under the cooperation agreement for a price to be determined on the basis of the development budget.

(80) It appears from the available information that MTU exercised its right under Section 5 of the joint venture agreement to take over the know-how developed with SKL-M under the agreement.

(81) The price of DEM 6,71 million paid by MTU for the know-how was established on basis of the development costs estimated in 1997. The actual development costs of the know-how for SKL-M were DEM 5,30 million more than the price paid. The losses were at least partly covered by the restructuring aid granted to SKL-M.

(82) The Commission notes that MTU is of the opinion that the know-how was not yet marketable. MTU expressed this opinion in two letters to the BvS dated 1 October 2001 and 21 November 2001, copies of which were forwarded to the Commission on 5 March 2002.

(83) The Commission further notes that back in November 1999 MTU promised to pay SKL-M's bank DEM 6,71 million if it took over the know-how developed under the cooperation agreement.

(84) It would also point out that, apart from the above-mentioned statements by and letters from MTU, Germany did not provide any objective information on the actual or expected market value of the know-how.

(85) In absence of any objective information on the actual or expected market value of the know-how, the Commission has taken into account the actual development costs of the know-how. From the information provided, it appears that the development costs were not covered by the price paid. The Commission must therefore take the view that the aid in question, which was used to cover the losses resulting from the development of the know-how, might have been used in the interests of MTU rather than in the interests of SKL-M.

(86) Bearing in mind that SKL-M is a State-controlled company, that its decision to give MTU an option to acquire the know-how at a price based on the development budget and to assume a cost risk was not in line with the market economy investor principle and that the involvement of MTU was not based on a procedure comparable to an open bid, the Commission is of the opinion, on the basis of the information available, that the transfer of the know-how could rank as a transfer to MTU of state resources amounting to DEM 5,30 million.

V. **CONCLUSION**

(87) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty.

(88) The amount of aid incompatible with the common market is EUR 34,26 million (DEM 67,017 million). It must be recovered from the aid recipient. In view of the fact that, on the basis of the available information, it cannot be ruled out that MTU benefited from the transfer of know-how, an amount of EUR 2,71 million (DEM 5,30 million), corresponding to the difference between the development costs and the price paid, must be recovered jointly and severally from SKL-M and MTU,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has implemented for SKL Motoren- und Systemtechnik GmbH, amounting to EUR 34,26 million (DEM 67,017 million), is incompatible with the common market.

Article 2

The procedure initiated in respect of the measure notified by Germany on 22 March 2000 and concerning an asset deal between SKL Motoren- und Systembautechnik GmbH and MTU Motoren- und Turbinen-Union Friedrichshafen GmbH is hereby closed.

Article 3

1. Germany shall take all necessary measures to recover the aid referred to in Article 1 and unlawfully made available to the beneficiary.

2. Of the amount mentioned in Article 1, EUR 2,71 million (DEM 5,30 million) shall be recovered jointly and severally from SKL Motoren- und Systemtechnik GmbH and MTU Motoren- und Turbinen-Union Friedrichshafen GmbH.

3. Recovery shall be effected in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

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

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 9 April 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 7 May 2002

on State aid Spain is planning to implement in favour of Ford España SA

(notified under document number C(2002) 1803)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/899/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 given interested parties notice, in accordance with the abovementioned Articles, to submit their comments [1],

Whereas:

I. PROCEDURE

(1) By letter dated 15 December 2000, registered on 18 December 2000, Spain notified the Commission of a plan to grant regional aid to Ford España S.A. The Commission requested more information on 7 February 2001. After requesting an extension of the deadline for reply on 14 February 2001, the Spanish authorities submitted additional information on 2 April 2001.

(2) By letter dated 6 June 2001 the Commission informed Spain of its decision to initiate proceedings pursuant to Article 88(2) of the Treaty, since it had doubts about the compatibility of the aid with the common market.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2], with an invitation for comments on the aid from interested parties.

(4) The Commission received no replies from interested parties.

(5) On 24 and 26 October 2001 the Commission carried out on-site visits to the Almusafes (Valencia) and Bridgend (United Kingdom) plants, and on 12 November 2001 requested further information. After requesting an extension of the deadline for reply on 19 November 2001, the Spanish authorities submitted the additional information on 14 January 2002.

II. DETAILED DESCRIPTION OF THE AID

The I4 project

(6) The planned aid would be granted to Ford España SA (Ford), a subsidiary of the automotive group Ford Motor Company Inc. The notified project concerns the production of an engine known as 'I4', which has never been produced in Europe before. The I4 is a four-cylinder, 16-valve engine, which comes in 1,8, 2,0 and 2,3 litre versions. A 2,5 litre and a diesel version will be developed at a later stage. Among others, the Focus and new Mondeo models will use the new engine from 2003 onwards.

(7) According to the company plans, production of the I4 engine at Almusafes will replace production of the smaller HCS and Zetec engines. The former is to be phased out due to obsolescence, and production of the latter is to be concentrated at the group's Bridgend (United Kingdom) factory.

(8) Capacity for the new I4 engine will be 700 000 engines/year, with a reduction of total capacity in the Almusafes plant by 330 000 units/year from 2000 to 2004. A similar reduction should occur at group level, following an increase in capacity at the Bridgend (United Kingdom) plant, and a decrease at the Cologne (Germany) plant. In all, 79 % of the engines produced at Almusafes will be exported to Ford plants in Germany and Sweden.

(9) The investment programme covers a three-year period, from August 2000 to August 2003.

(10) The Spanish authorities affirm that the technologies employed in the current plant do not allow the production of the I4 engine. For this reason, it is

[1] OJ C 219, 4.8.2001, p. 14.
[2] See footnote 1.

necessary to dismantle the existing production lines, modify radically the lines for production of components, and transform the assembly line.

Legal basis; investment and aid amounts

(11) The notified aid, which takes the form of direct investment aid, is granted under the approved scheme provided for by Royal Decree No 2489 of 5 December 1996 ([3]) ([4]) amending Royal Decree No 883 of 14 June 1989 defining the assisted area in the Community of Valencia ([5]) this was adopted pursuant to Law No 50 of 27 December 1985 ([6]) and Royal Decree No 1535 of 11 December 1987 ([7]) which approved the implementing regulations.

(12) Ford intends to invest EUR 334 460 000, of which EUR 297 990 000 have been considered eligible investment by the Spanish authorities (real value: EUR 277 320 000, taking 2000 as the base year and assuming a discount factor of 5,7 %). The gross grant equivalent of the proposed aid (real value) is EUR 15 740 000.

III. **COMMENTS FROM SPAIN**

(13) On 13 July 2001 the Spanish authorities submitted their comments on the initiation of the proceedings; they supplied further information on 14 January 2002. The Commission has taken the comments into account.

(14) In their comments, the Spanish authorities first reaffirm that the project is mobile, and that Ford seriously considered the alternative site of Bridgend. In their letter of 14 January 2002 the Spanish authorities provided additional documents as evidence of this claim.

(15) Secondly, in their comments of 13 July 2001, the Spanish authorities reaffirm that the project is to be regarded as a transformation, and invite the Commission to visit the Almusafes plant to verify the ongoing transformation of the production lines.

(16) Thirdly, the Spanish authorities affirm that the amount eligible for assistance is EUR 297 990 000 (ESP 49 582 million) in nominal terms. In their letter of 14 January 2002 the Spanish authorities give a detailed breakdown of the machinery concerned and the investment amounts.

(17) Fourthly, the Spanish authorities do not consider that a cost-benefit analysis is necessary for assessing the case, since the aid intensity of the project is lower than the relevant regional ceiling of 20 %. This is the threshold below which a cost-benefit analysis (CBA) is not required by the Community framework for State aid to the motor vehicle sector ([8]) (the framework), since the regional maps for 2000-06 have lower ceilings than those for the 1994-1999 period.

(18) The Spanish authorities maintain that, although the regional aid ceiling for the region of Valencia increased with the new maps from 30 % to 37 %, the overall ceilings in Spain decreased, and that therefore no CBA is needed if the project's aid intensity is lower than 20 % of the regional ceiling.

(19) The Spanish authorities also argue that the CBA presented to the Commission was not intended to verify the proportionality of the aid, but exclusively to reinforce the claim that an economically viable alternative for the project was effectively considered.

(20) Fifthly, the Spanish authorities cleared up the doubts expressed by the Commission concerning the CBA provided with the notification.

(21) Regarding the costs for equipment and machinery, the Spanish authorities state that the greater distance of Almusafes from the suppliers was only indicated in the notification as a minor inconvenience, while its economic impact is not important. The greater obsolescence of the plant in Almusafes is the reason why a transformation of the existing lines was necessary. The more modern lines in Bridgend would have required a less radical intervention, and thus lower transformation costs. In their letter of 14 January 2002, the Spanish authorities provided a detailed breakdown by machining operation of the investment costs in Almusafes and Bridgend.

(22) With regard to transport costs, the Spanish authorities provided additional information on the calculation of the costs of shipping the finished engines to the destination assembly plants, including the original estimates of transport costs by Ford that were used to calculate the costs presented in the CBA.

([3]) BOE No 21, 24.1.1997, p. 2405.
([4]) Case N 463/94, approved by the Commission by letter dated 7 September 1995. OJ C 25, 31.1.1996, p. 14.
([5]) BOE No 171, 19.7.1989, p. 22874.
([6]) BOE No 3, 3.1.1986, p. 790.
([7]) BOE No 299, 15.12.1987, p. 36729.
([8]) OJ C 279, 15.9.1997, p. 1. Its validity was extended in OJ C 368, 22.12.2001, p. 10.

(23) As regards layoff costs, the Spanish authorities affirm that if the project were not carried out in Almusafes, the Spanish plant […](*). However, the company has not considered the relative layoff costs when studying the alternative locations.

(24) The Spanish authorities state that the exchange rates used in the analysis are those determined by Ford for its internal studies. This is considered legitimate, since the CBA was presented not to prove the proportionality of the proposed aid, but to demonstrate the economic viability of the alternative location.

(25) Regarding the reference discount rate, the Spanish authorities provided a CBA in which the figures are updated using a discount rate of 5,7 %.

(26) Regarding the Ford group's production capacity in 2000—2005, the Spanish authorities provided information both for engines and for cars, including the brands of the Premier Automotive Group and Volvo.

IV. **ASSESSMENT OF THE AID**

(27) The measure notified by Spain in favour of Ford constitutes State aid within the meaning of Article 87(1) of the Treaty, since it is financed by the State or through state resources. Furthermore, as it constitutes a significant proportion of the funding of the project, the aid is liable to distort competition in the Community by giving Ford an advantage over competitors not receiving aid. Lastly, the fact that the majority of the engines manufactured at Almusafes are exported to other European countries and installed in vehicles sold throughout Europe shows that there is a substantial trade in automobiles between Member States.

(28) Article 87(2) of the EC Treaty lists the types of aid that are compatible with the Treaty. In view of the nature and purpose of the aid, and the geographical location of the firm, subparagraphs (a), (b) and (c) are not applicable to the plan in question. Article 87(3) specifies other forms of aid that may be regarded as compatible with the common market. The Commission notes that the project is located in the region of Valencia, which qualifies for assistance under Article 87(3)(a), with a maximum regional ceiling of 37 % net grant equivalent for large companies.

(*) Business secret.

(29) The aid in question is intended for Ford, which manufactures and assembles cars. The firm is therefore part of the motor vehicle industry within the meaning of the framework.

(30) The framework specifies that aid which the public authorities plan to grant to an individual project under an authorised aid scheme for a firm operating in the motor vehicle industry must, in accordance with Article 88(3) of the Treaty, be notified before being granted if either of the following thresholds is reached: (i) a total amount for the project of EUR 50 million; (ii) total gross aid for the project, whether State aid or aid from Community instruments, of EUR 5 million. Both the total cost of the project and the amount of aid exceed the notification thresholds. Thus, in notifying the proposed aid for Ford, the Spanish authorities have complied with the requirements of Article 88(3) of the Treaty.

(31) According to the framework, the Commission should ensure that the aid granted is both necessary for the realisation of the project and proportional to the gravity of the problems it is intended to solve. Both tests, necessity and proportionality, must be satisfied if the Commission is to authorise state aid in the motor vehicle industry.

(32) According to point 3.2.(a) of the framework, in order to demonstrate the necessity for regional aid, the aid recipient must clearly prove that it has an economically viable alternative location for its project. If there were no other industrial site, whether new or in existence, capable of receiving the investment in question within the group, the undertaking would be compelled to carry out its project in the sole plant available, even in the absence of aid. Therefore, no regional aid may be authorised for a project that is not geographically mobile.

(33) The Commission has, with the help of an external automotive expert, assessed the documentation provided by Spain, with a view to establishing whether the project is mobile. The documents provided with the letter of 14 January 2002 prove that in 1998 Ford conducted a study for the selection of a European site for the production of the I4 engine. The study includes a comparative analysis of the Cologne, Bridgend and Almusafes plants. Documents dated June 1999 indicate that Valencia and Bridgend were the most suitable locations for the project, and that the final choice would be between the two sites. In the course of the on-site visit to the Bridgend plant on 26 October 2001, the

Commission was able to verify that the plant had the technical capability to host the project. Official press releases show that the decision to produce the engines in Valencia was announced on 12 November 1999.

(34) Regional aid intended for modernisation and rationalisation, which is generally not mobile, is not authorised in the motor vehicle sector. However, a transformation, involving a radical change in production structures on the existing site could be eligible for regional aid. During the on-site visit to the Almusafes plant on 24 October 2001, the Commission was able to verify the considerable investment in machinery needed for the changeover to the I4 engine, which is completely different to the Zetec model produced at the same location. The investment required a complete halt in the production of the old Zetec engine, the dismantling of the lines, and the introduction of completely new or extensively modified machines.

(35) In view of the above, the Commission concludes that the project is a transformation that is mobile in character and can therefore be considered eligible for regional aid, since the aid is necessary to attract the investment to the assisted region.

(36) Regarding the eligible costs, the Commission notes that the costs considered eligible by the Spanish authorities amount to EUR 297 990 000 in nominal terms. The communicated eligible costs include EUR […] in vendor tooling investments, of which EUR […] arise within Spanish assisted areas. The Commission notes that, under the framework, eligibility of aid is defined by the regional scheme applicable in the assisted region concerned. Furthermore, vendor tooling costs cannot be considered eligible for aid if they arise in non-assisted areas.

(37) The Commission notes that the approved scheme, which provides the legal basis for the measure ([9]) authorises aid for projects if they satisfy the conditions both on areas and ceilings laid down in the Spanish regional maps. The Commission concludes that the investment that Ford intends to carry out in locations outside Spain cannot be considered as eligible investment under the framework. Therefore, only EUR […] in vendor tooling investment can be considered as eligible costs. Total eligible costs for the project amount to EUR 234 620 000 in nominal terms, or EUR 217 439 000 in real terms.

(38) In accordance with point 3.2.(c) of the framework, the Commission needs to ensure that the planned aid is in proportion to the regional problems it is intended to resolve. For that, the Commission requires a CBA, unless the aid intensity of the project is very small. This is because a mobile project located in an assisted area always suffers from disadvantages.

(39) The Commission notes that the Spanish authorities consider that the threshold below which a CBA is not required in the present case is an aid intensity of 20 %, because the overall regional ceilings in Spain were lower in the 2000—2006 map. The Commission notes, however, that the framework consistently refers to the regional ceiling for the region where the investment takes place, and not to a national average of different regional aid ceilings. The regional ceiling for the Valencia region is higher with the new regional maps (37 %) than with the old ones (30 %). In such cases, under the framework, the threshold below which a CBA is not required is an aid intensity of 10 %.

(40) The Commission concludes therefore that, since the CBA submitted was not intended primarily for verifying the proportionality of the aid, the maximum aid intensity allowable for the investment in the Valencia region is 10 % of the 37 % regional ceiling, i.e. a grant equivalent of 3,7 % net, or 5,11 % gross.

(41) Nevertheless, the Commission has analysed, with the assistance of its external automotive expert, the CBA presented by the Spanish authorities, to see whether it can demonstrate the proportionality of the aid in accordance with the rules laid down in the framework.

(42) The Commission notes that the CBA presented by the Spanish authorities indicates a net cost handicap of EUR 29 900 000 for the location in Almusafes compared with the location in Bridgend. Consequently, the 'regional handicap ratio' of the project reported in the CBA is 10,77 %.

(43) The Commission notes that in the CBA the Spanish authorities use the same exchange rate forecasts as Ford, i.e. EUR 1 = GBP […] = ESP […] for 2000, EUR 1 = GBP […] = ESP […] for 2001, and EUR 1 = GBP […] = ESP […] for 2002—2005.

(44) However, it is the Commission's established practice in the assessment of the CBA to use, whenever possible, the historical rates at the time of the location decisions. Only if the time of the location decision is not verifiable, or if no decision has yet been taken, is the applicable rate the rate at the time of notification. The

([9]) See recital 11.

Commission's practice was explained to the Spanish authorities after the project had been notified. In the present case, the time of the decision can be established as November 1999; the exchange rate at the time was EUR 1 = GBP 0,637 ([10]).

(45) The Commission notes that the exchange rates used by the Spanish authorities give the euro (and the peseta) a higher value vis-à-vis the pound sterling during the years in question than would be the case under the Commission's practice. The Commission also notes that the exchange rates used by the Spanish authorities are, respectively, […] and […] higher than the historical values in the years 2000 and 2001, and that the predicted sharp devaluation of the pound has not occurred in recent years.

(46) The Commission notes that the lower estimated value attributed to the GBP by the Spanish authorities has the effect of making the costs occurring in the alternative site of Bridgend lower than under the Commission's practice. The Commission has calculated that, if the exchange rate of EUR 1 = GBP 0,637 is applied to the operating costs, the regional handicap of the Almusafes location is reduced from the notified EUR 29 900 000 to EUR 15 210 000 (7 % of the eligible costs).

(47) As regards the costs for equipment and machinery, the Commission, with the aid of its external automotive expert, was able to verify that the existing machines in Almusafes are older and less flexible than those in Bridgend. The Bridgend plant could have been adapted to the production of the I4 engine with a lower degree of transformation of the existing lines, and therefore with a lower capital investment. However, these factors do not suffice to justify the entirety of the 17 % difference in investment costs between the two plants.

(48) In this respect, the Commission notes that the investment costs at Bridgend are artificially low because of the exchange rate assumptions. The investment breakdown provided by the Spanish authorities on 14 January 2002 assumes a euro 25 % stronger with respect to the USD and 18 % stronger with respect to the GBP than it actually was in November 1999. This has the effect of reducing all non-euro denominated investment costs, which would largely arise at the alternative location of Bridgend. Assuming, conservatively, that using the correct exchange rate would increase the costs of machinery and equipment in Bridgend by only 7 %, the regional handicap would be reduced further to EUR 2 870 000 (or 1,04 % gge of the eligible costs).

([10]) Source: Eurostat.

(49) Regarding transport costs, the Commission notes that the original internal estimates carried out by Ford (using the dollar as the reference currency) indicate a slight advantage in unit transport costs for Almusafes (around 2,5 % per engine on average). This would mean an advantage of approximately EUR 370 000 a year, which has not been included in the CBA. The Commission also notes that the advantage for Almusafes would have been greater, if the exchange rate used in the calculations had been that at the time of the investment decision.

(50) As regards layoff costs, the Commission accepts that even without the I4 project, redundancies would have been limited if production of the Zetec engine had continued. However, the Commission is not in a position to evaluate the extra costs deriving from the […] potential layoffs indicated in the letter of 14 January 2002, as the Spanish authorities have stated that Ford did not take them into consideration when studying the alternative locations. The Commission notes however that, had such costs been considered, they would have increased the costs of carrying out the project in the alternative location of Bridgend, and would therefore have further decreased the cost disadvantage of Almusafes.

(51) Lastly, the Commission considered in its analysis the question of the regional adjustment. Such an adjustment is authorised on condition that the investment does not aggravate existing capacity problems in the motor vehicle industry. The Spanish authorities provided documentation which shows that the Ford group's capacity in the European Economic Area and the countries of central and eastern Europe will decline in 2000—2005 for engines and vehicles alike. In accordance with the framework, the project would have a minimum impact on competition and the intensity of the disadvantage resulting from the CBA would be increased by four percentage points.

(52) In the light of the information submitted and of the considerations above, the Commission concludes that the elements of the CBA presented by the Spanish authorities do not show that the location of Almusafes would suffer a regional handicap higher than 5,11 % gge of the eligible costs, even if a positive regional adjustment of four percentage points is taken into account. For this reason, it concludes that an aid intensity that is higher than the intensity for which no CBA is necessary under the framework would not be compatible with the common market.

(53) The Commission calculates that the maximum aid that can be granted to Ford for the project in question is 5,11 % gross grant equivalent of the total eligible costs

of EUR 217 439 000 at 2000 prices (discount factor: 5,7 %). The maximum aid amount is therefore EUR 11 111 146 gross grant equivalent at 2000 prices (discount factor: 5,7 %).

V. **CONCLUSIONS**

(54) The Commission finds that the aid for the project in question is compatible with the common market, provided it does not exceed 5,11 % gross grant equivalent of the eligible investment of EUR 217 439 000 at present value, base year 2000, discounted at the rate of 5,7 %. The maximum amount of aid that can be granted is EUR 11 111 146 at present value.

(55) Any additional state aid for the investment projects in question is incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The state aid which Spain has planned to implement for Ford España SA for the project relating to the production of the new I4 engine is compatible with the common market within the meaning of Article 87(3)(a) of the Treaty, up to a maximum intensity of 5,11 % gross grant equivalent of the eligible investment, which is EUR 217 439 000, discounted at a rate of 5,7 % (base year 2000).

Implementation of the aid, amounting to no more than EUR 11 111 146, discounted at the rate of 5,7 % (base year 2000), is accordingly authorised.

Article 2

Any state aid in addition to the aid referred to in Article 1 that Spain plans to grant to Ford for the project relating to the production of the new I4 engine shall be incompatible with the common market.

Article 3

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

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 7 May 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 5 June 2002

on the State aid which Spain plans to grant Renault España SA

(notified under document number C(2002) 1992)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2002/900/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 called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

I. PROCEDURE

(1) By letter dated 15 December 2000 the Spanish authorities notified a plan to grant regional aid to Fabricación de Automóviles Renault España S.A., which is located in Valladolid in the autonomous community of Castile-Leon, Spain ('Renault España'). The Commission requested further information on 26 January 2001 (submitted by the Spanish authorities on 22 and 27 February); on 26 April 2001 (submitted by the Spanish authorities on 28 May 2001); and on 5 July 2001 (submitted by the Spanish authorities on 14 September 2001).

(2) The Commission decided on 13 November 2001 to initiate proceedings pursuant to Article 88(2) of the Treaty (decision to open the formal investigation procedure), as it found that there were doubts about compatibility with the common market. After a meeting held at the Commission's premises on 8 January 2002, Spain submitted its comments on the initiation of proceedings on 17 January 2002. On 8 March 2002 the Commission visited the Bursa plant (Turkey), where further information was supplied.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2], with an invitation to interested parties to submit their comments on the aid.

(4) The Commission did not receive any comments from interested parties.

II. DETAILED DESCRIPTION OF THE AID

The project

(5) Renault España is a subsidiary of the French automotive group Renault. The notified project concerns the production of two distinct engines of the 'K' family: the K4, a 4-cylinder, 16-valve petrol engine, with 1,4 and 1,6 litre versions, and the K9, a common rail 4-cylinder, 8-valve, 1,5 litre diesel engine.

(6) The notified project concerns the installation of various production lines for engine components and a new flexible assembly line with a capacity of 1 200 K4 or K9 engines/day. At Valladolid, capacity will increase from 4 800 to 6 000 engines/day. At group level, Renault plans to increase engine production substantially between 1998 and 2005, from 1 600 000 to more than 3 000 000 engines/year.

(7) According to the notification, the investment programme covers a six-year period, from January 1999 to December 2004.

(8) According to Spain, the project is mobile, and an alternative site in Bursa, Turkey, was regarded as a viable alternative by the Renault group. The cost-benefit analysis (CBA), however, was carried out on the basis of a hypothetical site within the EEA or the central and

[1] OJ C 33, 6.2.2002, p. 13.

[2] See footnote 1.

eastern european countries (CEECs). Mioveni in Romania was chosen for its similarities with Bursa as regards location and costs.

Legal basis; investment and aid amounts

(9) The notified aid will be granted in the form of direct investment aid in accordance with the following provisions: Royal Decree No 78/1997 of 24 January ([3]), which partially amends the central government's general scheme of regional aid so as to adapt it to the regional aid map for 1994 to 1999 (approved by the Commission by letter dated 7 September 1995, Case N 463/94); Royal Decree No 2486/1996 of 5 December ([4]); and Decree No 125/2000 of 1 June of the Autonomous Community of Castile-Leon ([5]), a draft version of which was approved by the Commission on 16 May 2000 (Case N 410/99).

(10) Renault España intends to invest a nominal amount of EUR 164 530 000, of which EUR 149 441 660 (discounted value: EUR 128 724 990, taking 1999 as the base year and assuming a discount rate of 4,72 %) were regarded as eligible investment by Spain.

(11) According to the information received in January 2002, the planned aid in nominal values amounts to EUR 22 333 832 gross grant equivalent, the present value of which is EUR 18 366 569. Therefore, the aid intensity would be 14,27 % gross grant equivalent.

(12) According to the notification, no other Community aid or financing has been allocated to the project.

III. **COMMENTS FROM SPAIN**

(13) On 17 January 2002 the Spanish authorities submitted their comments on the initiation of proceedings. Additional information was provided during the visit to the Bursa plant on 8 March 2002. The Commission has taken the comments and information into account.

(14) In their comments, the Spanish authorities firstly reaffirm that the project is mobile, and that the Renault group seriously considered the alternative site of Bursa. They also clarified the timetable for the project, and stated that the quality standards for the engine produced would be the same in Valladolid and Bursa. During the visit to Bursa on 8 March 2002, additional documents to prove these claims were made available to the Commission.

(15) Secondly, in their comments of 17 January 2002, the Spanish authorities confirm that the project is an expansion of the existing facilities in Valladolid, which will increase their capacity from 4 800 to approximately 6 000 engines per day. The expansion will require completely new machinery, and therefore any notion of rationalisation or modernisation of the project can be excluded.

(16) Thirdly, the Spanish authorities maintain that only eligible costs have been included in the CBA. Total eligible costs for the project amount to EUR 149 441 660, or EUR 128 724 990 at 1999 values. The investment costs of EUR 154 802 794 reported in the CBA are expressed in 2003 values and, once the appropriate discounting has been carried out, correspond to the amounts mentioned above.

(17) Fourthly, the Spanish authorities clarified the doubts expressed by the Commission about the CBA comparing Valladolid with the hypothetical comparator site of Mioveni (Romania).

(18) Regarding the lack of economies of scale at the comparator site of Mioveni, the Spanish authorities affirm that such diseconomies had already been taken into consideration as regards supplier tooling, transfer of technical staff and a higher proportion of indirect labour. After a more detailed investigation, they assessed the impact of carrying out the investment at Mioveni in the following areas: auxiliary installations and flooring; quality control facilities; and IT systems. These operations would have involved additional costs of EUR 4 650 000, which have been included in an updated CBA.

(19) As regards outward transport costs, the Spanish authorities state that the transport costs for Mioveni have been calculated on the basis of Renault's estimates of its plants' demand in the coming year. A detailed breakdown was submitted, specifying the number of cars assembled outside the Community and intended for Community markets.

(20) As regards potential redundancy costs, the Spanish authorities maintain that a decision not to locate the second flexible line at Valladolid would not have led to redundancy costs at that plant. An increase in engine production at Valladolid (1 800 engines per day) was planned irrespective of the site chosen for the mobile

([3]) BOE No 34, 8.2.1997, p. 4167.
([4]) BOE No 3, 3.1.1997, p. 89.
([5]) BOCyL No 109, 7.6.2000, p. 6901.

project. This capacity increase would be enough to absorb the workers released by outsourcing various operations.

(21) As regards labour costs, the updated CBA assumes an annual rate of convergence of labour costs at Mioveni of 5 %, in accordance with Commission practice in cases where the comparator plant is located in a CEEC.

IV. **ASSESSMENT OF THE AID**

(22) The measure notified by Spain concerning Renault España constitutes State aid within the meaning of Article 87(1) of the Treaty. It would be financed by the State or through State resources. Furthermore, as it represents a significant proportion of the project's funding, the aid is liable to distort competition in the Community by giving Renault España an advantage over competitors not receiving aid. Lastly, there is extensive trade between Member States on the automobile market.

(23) Article 87(2) of the Treaty lists certain types of aid that are compatible with the EC Treaty. In view of the nature and purpose of the aid, and the geographical location of the firm, subparagraphs (a), (b) and (c) are not applicable to the plan in question. Article 87(3) specifies other forms of aid that may be regarded as compatible with the common market. The Commission notes that the project is located in Valladolid, an area which qualifies for assistance under Article 87(3)(a), with a regional ceiling of 35 % net grant equivalent for large companies.

(24) The aid in question is intended for Renault España, which manufactures and assembles automobiles. The firm is therefore part of the motor vehicle industry within the meaning of the Community framework on State aid to the motor vehicle industry ([6])(the motor vehicles framework).

(25) The motor vehicles framework specifies that aid which the public authorities plan to grant to an individual project under an authorised aid scheme for a firm operating in the motor vehicle industry must, in accordance with Article 88(3) of the Treaty, be notified before being granted if either of the following thresholds is reached: (i) total cost of the project equalling EUR 50 million, (ii) total gross aid for the project, whether State aid or aid from Community instruments equalling EUR 5 million. Both the total cost of this project and the amount of aid exceed the notification thresholds. Thus, in notifying the proposed aid for Renault España, the Spanish authorities have complied with the requirements of Article 88(3) of the Treaty.

(26) According to the motor vehicles framework, the Commission has to ensure that the aid granted is both necessary for the realisation of the project and proportional to the gravity of the problems it is intended to solve. Both tests, necessity and proportionality, must be satisfied if the Commission is to authorise State aid in the motor vehicle industry.

(27) According to point 3.2(a) of the motor vehicles framework, in order to demonstrate the necessity for regional aid, the aid recipient must clearly prove that it has an economically viable alternative location for its project. If there were no other industrial site, whether new or in existence, capable of receiving the investment in question within the group, the undertaking would be compelled to carry out its project in the sole plant available, even in the absence of aid. Therefore, no regional aid may be authorised for a project that is not geographically mobile.

(28) The Commission has, with the help of its external automotive expert, assessed the documentation and information provided by Spain, with the view to establishing whether the project is mobile.

(29) Firstly, the documents made available to the Commission show that in […] (*) the Renault group carried out an initial comparison of the technical feasibility and the necessary investment at Valladolid and Bursa. Aid was mentioned as a possible element that would at least partially compensate the higher costs at Valladolid. In January 1999 an aid application was submitted to the Spanish authorities. In […] 1999, the Renault group discussed the Valladolid and Bursa options in more detail at the […] level. A study was presented, showing that the Bursa location would have been more advantageous from the economic point of view, while Valladolid presented advantages in terms of engineering, possible synergies, and the possibility of State aid. A final decision was postponed to a later stage, pending confirmation of aid possibilities. In March 2000, the […] opted for the Valladolid site for carrying out the project, again indicating State aid as an important factor in the final decision.

(30) Secondly, during the on-site visit of 8 March 2002 the Commission was able to verify that the plant is capable of producing complete engines. Although K-type

([6]) OJ C 279, 15.9.1997, p. 1 (validity extended in OJ C 368, 22.12.2001, p. 10).

(*) Business secret.

engines are only assembled in Bursa, the site has until very recently carried out machining operations for all the main components (cylinder head, crankshaft, camshaft, cylinder block, flywheel and connecting rods) of C-type engines. The Bursa plant therefore has enough experience of manufacturing complete engines to host the project. Setting up a new engine plant at Bursa would have required a transfer of skilled labour from other plants during the installation and start-up phases. However, this factor does not undermine the fact that engine production is technically feasible at Bursa.

(31) Thirdly, from the information supplied and from that obtained during the on-site visit of 8 March 2002, the Commission was able to check that the Bursa plant is capable of achieving quality levels comparable to those of other Renault plants. A detailed breakdown of the production operations scheduled at the two sites shows that quality-critical operations would be automated at both plants, while certain non-critical assembly operations would be manual at Bursa and automated at Valladolid.

(32) It should be noted in this context that the Renault group has a single set of quality standards, which do not vary from one production plant to another. Internal quality indicators ('machining rejects' and 'assembly rectifications') measuring the number of parts failing to meet specifications during the production process indicate a similar number of faulty parts per million at Valladolid and Bursa. Quality indicators for finished products (which have a direct impact on warranty costs) also indicate a similar trend for the different production plants. The target number of defaults for complete engines is the same for every plant of the Renault Nissan venture, irrespective of the level of automation, and has to be achieved by 2005.

(33) Regional aid intended for modernisation and rationalisation, which is generally not mobile, is not authorised in the motor vehicle industry. However, the project in question consists in expanding current installations by investing in completely new production lines, which are mobile in character.

(34) In view of the above, the Commission concludes that the project is mobile and can therefore be considered eligible for regional aid, since the aid is necessary to attract the investment to the assisted region.

(35) The Commission notes that the eligible costs amount to EUR 128 724 990 at 1999 values (discount rate: 4,72 %), as communicated by the Spanish authorities.

(36) According to point 3.2(c) of the motor vehicles framework the Commission needs to ensure that the planned aid is proportional to the regional problems it is intended to resolve. For that, a CBA is used.

(37) A CBA compares, with regard to the mobile elements, the costs which an investor would bear in order to carry out the project in the region in question with those it would bear for an identical project in a different location, which makes it possible to determine the specific handicaps of the assisted region concerned. The Commission authorises regional aid within the limit of the regional handicaps resulting from the investment in the comparator plant.

(38) According to the motor vehicles framework, if a company is comparing one European site (whether in the EEA or the CEECs) with a site outside Europe from which it would import vehicles, the CBA may have to be carried out using a hypothetical alternative site, unless more than half of the production is to be sold outside Europe. The alternative site of Bursa, Turkey, is not within the EEA or the CEECs, and more than half the engines produced will be sold within Europe. Therefore, the CBA must be carried out using a hypothetical European site. In this case, the hypothetical comparator site is Mioveni, in Romania, where Dacia, a car manufacturer controlled by Renault, is located.

(39) Since the project is an expansion project and not a new development (greenfield site), the operating handicaps of Valladolid compared with Mioveni are assessed over a three-year period in the CBA, in accordance with point 3.2(c) of the motor vehicles framework. The CBA submitted covers the period 2003—2005, i.e. three years from the start of production, as required by point 3.3 of Annex I to the framework.

(40) With the help of its external automotive expert the Commission has examined the notified cost-benefit analysis with a view to ascertaining how far the proposed regional aid is proportional to the regional problems it seeks to solve. The CBA was amended as explained below to take account of the additional information received from Spain following the initiation of the proceeding.

(41) Regarding the lack of economies of scale at the comparator site of Mioveni, the new CBA takes account of additional investment costs at the Romanian site. The

Mioveni plant has undergone a rationalisation process in recent years, which has freed a large amount of floor space with the result that additional investment in buildings would not be necessary. However, additional costs of EUR 1 500 000 were included for the renovation of the floor space and for support infrastructure. The plant (which produces E-type engines) already has end-of-line test benches, but additional investment of EUR 3 million is planned for the installation of modern measuring systems for the quality control of machined parts. Lastly, additional investment of EUR 150 000 in IT equipment for logistic planning has been taken into account.

(42) The Commission considers that the additional investment figure of EUR 4 650 000, coupled with the additional costs already included in the CBA (higher supplier tooling investment, the transfer of technical staff and a higher proportion of indirect labour) adequately expresses the economic disadvantages of Mioveni resulting from the lack of economies of scale.

(43) As regards outward transport costs, the Commission accepts the breakdown supplied by the Spanish authorities of Renault's forecast demand for its non-Community plants. The fact that production outside the Community is in part intended for Community markets explains why the demand for engines at non-Community plants is higher than local markets can supply.

(44) As regards potential redundancy costs, the Commission was able to establish that the plan was for engine production at Valladolid to expand, even if the mobile project did not take place there. This expansion would be sufficient to absorb the workers released by outsourcing various operations. The Commission therefore concludes that there would not be any redundancy costs at Valladolid, even if the mobile investment were not carried out in Spain.

(45) As regards the evolution of wage rates in Romania, the Commission notes that the updated CBA follows its practice for cases where the comparator plant is located in a CEEC by assuming an annual rate of convergence of labour costs at Mioveni of 5 %.

(46) The above changes in the analysis produce cost-benefit results that differ from those initially notified by Spain. The amended CBA indicates a net cost handicap for Valladolid of EUR 31 498 101 at 1999 values (compared with the EUR 35 927 252 initially notified). The project's handicap ratio is therefore 24,47 % (as opposed to the 27,91 % initially notified). The determining factor is labour, which is considerably cheaper in Romania than Spain.

(47) Lastly, the Commission considered the question of a 'top-up', which is an increase in the allowable aid intensity and is intended as a further incentive to the investor to invest in the region in question. The documents supplied show that the capacity of the Renault group will increase in the relevant period both for engines and cars. Therefore, the regional handicap ratio resulting from the CBA is reduced by 1 %, resulting in a final ratio of 23,47 %.

V. **CONCLUSION**

(48) The aid intensity of the project (14,27 % gross grant equivalent) is less than both the disadvantage identified by the cost-benefit analysis (23,47 %) and the regional aid ceiling (35 % net grant equivalent). The regional aid that Spain plans to grant Renault España therefore satisfies the tests of compatibility with the common market under Article 87(3)(a) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Spain plans to grant Renault España SA in Valladolid — a nominal EUR 22 333 832 (equivalent to a present value of EUR 18 366 569, taking 1999 as the base year and assuming a discount rate of 4,72 %) — for an eligible investment of EUR 149 441 660 (present value: EUR 128 724 990), is compatible with the common market within the meaning of Article 87(3)(a) of the Treaty.

The aid may therefore be granted.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 5 June 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 19 June 2002

on State aid implemented by the Netherlands for operations by Dutch tugboats in seaports and on inland waterways in the Community

(notified under document number C(2002) 2158)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2002/901/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 regard to Council Regulation (EC) No 659/1999 of 22 March 1999 [1] laying down detailed rules for the application of Article 93 of the EC Treaty,

Having called on interested parties to submit their comments pursuant to the provisions cited above [2] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By complaint lodged on 17 April 2000, the Commission was informed that the Netherlands had allegedly illegally granted State aid in respect of tonnage tax to tugboat operations in ports and on inland waterways in the Community. Three other parties [3] raised concerns about this issue, one of whom filed a formal complaint.

(2) By letter of 12 September 2000, the Commission addressed a number of preliminary questions to the Dutch authorities, which were discussed in a meeting and formally replied to by letter of 8 November 2000, as rectified by a corrigendum of the same day.

(3) Furthermore, the complainant who filed the complaint of 17 April 2000 provided numerous additional items of information which led to several meetings between the complainant and Commission staff.

(4) Following a letter from Germany of 18 January 2001, a meeting on this matter was held with the German authorities on 29 March 2001.

(5) On the basis of the information at their disposal, the Commission services held a meeting with the Dutch authorities on 19 April 2001.

(6) By letter dated 11 July 2001, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(7) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [4]. The Commission invited interested parties to submit their comments.

(8) The Commission received initial comments from the Dutch government and comments from 51 interested parties. It forwarded them to the Netherlands, which was given the opportunity to react; its comments were received by letter of 18 April 2002, registered on 22 April 2002 (A/57255).

2. DETAILED DESCRIPTION OF THE AID

2.1. Commission Decisions in Cases N 394/88, N 384/91, N 738/95, NN 89/97 and N 8/98

(9) By letter of 23 August 1988, the Netherlands first notified a fiscal facility for the improvement of the competitive position of the Dutch fleet. The Netherlands referred to a 1985 Commission communication to the

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 298, 24.10.2001, p. 5.
[3] Letter of 4 August 2000, registered in the DG for Energy and Transport on 9 August 2000.
Formal complaint of 4 April 2001, registered in the Secretariat of the Commission on 6 April 2001.
[4] See footnote 2.

Council concerning a common Community sea transport policy. These measures were approved by the Commission by letter of 2 December 1988.

(10) On 12 December 1994, the Commission decided to raise no objections to income tax and social security contribution reductions of 19 % and 5 % respectively (the 'fiscal facility') (Case N 384/91).

(11) By letter of 12 April 1996 (SG(96) D/3852), the Commission informed the Netherlands of its decision to raise no objections to further reductions in income tax and social security contributions of up to 38 % and 10 % respectively ('fiscal facility') and to raise no objections to the introduction of a 'tonnage tax' (Case N 738/95).

(12) As announced in its letter of 12 April 1996 mentioned in recital 11, the Commission reassessed and reapproved the tonnage tax and informed the Netherlands thereof by letter of 31 July 1997 (SG(97) D/6453) (Case NN 89/97).

(13) By letter of 20 May 1998 (SG(98) D/4032), the Commission informed the Netherlands of its decision to raise no objections to an increase from 38 % to 40 % in the aid under the fiscal facility approved under Case N 738/95.

2.2. **'Fiscal facility' and 'tonnage tax'**

(14) The *'fiscal facility'* provides for reductions in the levels of income tax and social security contributions for Community seafarers normally paid by the employer. Such a measure is intended to improve the competitiveness of the Dutch merchant fleet.

(15) The *'tonnage tax'* is an optional measure regarding corporate taxation of shipping companies. Under the tonnage tax, profits from maritime shipping activities are established at a standard rate on the basis of the tonnage operated by the shipping company irrespective of the actual profits made or the associated costs. Such a measure is also intended to improve the competitiveness of the Dutch merchant fleet.

(16) Neither of the Commission decisions in Cases N 738/95 and NN 89/97 (extension of the 'tonnage tax', see below) refers to tugboat operations or to tugboats in particular.

2.3. **Relevant scope of the notifications**

(17) The notifications and the information provided by the Dutch authorities in the cases mentioned in section 2.2 are clearly focused on transport operations carried out (mainly) at sea and include some further explanations, according to which tugboat operations carried out mainly at sea would qualify for the fiscal facility and the tonnage tax.

(18) It should be added that the tax law notified to the Commission in this context is entitled 'Belastingwetten in het belang van de zeescheepvaart' (Tax law related to seagoing shipping). The extent to which the information provided during the notifications in the abovementioned cases focused exclusively on maritime transport activities carried out at sea is illustrated below.

2.3.1. *Notification in Case N 384/91*

(19) The first notification in this context concerns Case N 384/91 which was approved in 1995. The notified law ([5]) provides that 'seagoing ship means a ship issued with a certificate of registry within the meaning of Article 3(1) of the "Zeebrievenwet" (Certificates of Registry Act), … that is operated at sea as part of a commercial undertaking or is intended for tugboat or rescue activities at sea and is engaged in providing such services to seagoing ships, with the exception of ships used for pilot services.'

(20) The explanatory note on this article (page 11) provides that the seagoing ship must be operated at sea as part of a shipping undertaking or intended and used for tugboat or rescue activities for seagoing ships. A seagoing ship that is used both at sea and on inland waterways is considered as being operated at sea provided its main activities are carried out at sea.

2.3.2. *Notification in Case N 738/95*

(21) According to the notification from the Dutch authorities, the only change in the 1995 Law as regards the 'fiscal facility', between Case N 348/91 and Case N 738/95, was the amount of aid. The prevailing definition of 'seagoing ship' remained unchanged as a basis for Case N 738/95.

(22) The same applies for the increase in aid intensity between the fiscal facility approved under Case N 738/95 and Case N 8/98, where nothing else changed apart from the increase in aid intensity.

([5]) Tax and National Insurance Contribution Scheme for Shipping Act 1994.

(23) Article 8c(2) of the 1964 Income Tax Act, as amended by the law notified as Case N 738/95 ([6]), provided that: 'For the purpose of this Article (related to tonnage tax), profits from shipping shall be taken to be profits earned from the use of a ship for the transport of goods or persons in international traffic over sea … as well as profits earned from the use of a ship for towing or the provision of general assistance at sea to the ships referred to above.'

(24) In the explanatory memorandum on the amending law ([7]) mentioned in recital 23, the following interpretation of Article 8c(2) was given: 'For the purpose of the tonnage tax basis, profits from shipping are taken to be profits earned from the use of a ship for the transport of goods or persons in international traffic over sea … as well as profits earned from the use of a ship for towing or the provision of general assistance at sea to ships.'

(25) That explanatory memorandum further contained the following paragraph: 'International traffic over sea: Following from the definitions given [in Article 50 of the Income Tax Act 1964 and Article 19 of the Corporate Tax Act 1969], for the purpose of the regulation under consideration, international traffic over sea is taken to mean traffic between a Dutch port and a foreign port and traffic between one foreign port and another. This does not cover traffic between two Dutch ports and the associated transport from the port to the depot or from the port to the consignee. The ship must be employed at sea for the transport of goods and persons. For the purposes of these regulations, a ship which is used for both activities at sea and on inland waterways is held as being used for activities at sea if the main focus of the activities is at sea …'.

(26) Finally, it is mentioned that 'Towing and the provision of general assistance: furthermore, ships intended to be used for towing or providing general assistance to ships at sea are taken into account for the purposes of the tonnage basis'.

([6]) Amendment to the Income Tax Act 1964, the Corporation Tax Act 1969 and the Tax and National Insurance Credit for Shipping Act 1995 (amendment to some of the tax laws relating to seagoing shipping). Ministry of Finance, Directorate-General for Taxation, Board of Legislation for Direct Taxes, No WDB95/166, The Hague, 13 June 1995: for consideration by the Council of Ministers.

([7]) Explanatory memorandum on the Amendment to the Income Tax Act 1964, the Corporate Tax Act 1969 and the Tax and National Insurance Credit for Shipping Act 1995 (amendment to some of the tax laws relating to seagoing shipping).

2.3.3. *Information provided in Case NN 89/97*

(27) The documentation provided for the reapproval of the tonnage tax focuses essentially on the effectiveness of the measure and contains no new conditions for qualification for the aid.

2.3.4. *Notification in Case N 8/98*

(28) The aid notified in Case N 8/98 concerns an increase in aid intensity for the 'fiscal facility' notified under Case N 738/95 (from 38 % to 40 %).

2.4. **Grounds for initiating the procedure**

(29) The Commission opened the formal investigation procedure in this case (Case C 56/01) on the grounds that it considered that it had not approved maritime transport State aid to operations by Dutch tugboats in ports and on inland waterways in the Community neither in Cases N 738/95 and NN 89/97 nor in any other related decision ([8]).

(30) This Commission decision was based, inter alia, on the information provided by the Dutch authorities (letter of 8 November 2000), according to which a certain number of the abovementioned port towage operations were granted or could be granted maritime transport aid under the schemes in Cases N 738/95 and NN 89/97.

(31) In decision C 56/01, the aid in question (tugboat operations in and around ports and on inland waterways in the Community) was therefore classified as new aid, which *a priori* was not considered compatible with the Treaty. The Netherlands was further requested to suspend such aid payments with a view to limiting potential damage caused to competitors by such illegal grants.

3. **COMMENTS FROM INTERESTED PARTIES**

(32) In the course of the procedure the Commission received (a) initial comments from the Netherlands, (b) comments from 51 other interested parties and (c) comments from the Netherlands on the comments from the 51 interested parties.

([8]) This decision was challenged by the Netherlands before the European Court of Justice (Case C-368/01).

3.1. **Initial comments from the Netherlands**

(33) By letter of 7 August 2001, the Netherlands replied to the opening of the procedure in Case C 56/01. The Dutch authorities essentially disagree with the Commission's decision to classify the subsidies in question as 'new' aid, since they consider that: (a) the 'fiscal facility' and the 'tonnage tax' were both approved or reapproved by Commission decisions; (b) the notification in Case N 738/95 provided for the 'tonnage tax' to apply to ships used for the provision of towage services or assistance to seagoing ships, qualification should be based on the construction and equipment of the tugboat and does not necessarily result from its activities being carried out at sea; (c) the letter of 8 November 2000 mentioned in paragraph 30 merely reiterates this point.

(34) The Dutch authorities further point out that inland waterway towage takes place in areas distinct from seaports and that inland waterway tugs are not qualified to operate at sea. Unlike inland waterway tugs, maritime law applies to tugs as from the moment they provide assistance to a seagoing ship, wherever such assistance is provided.

(35) It is also mentioned that the recent withdrawal of a Dutch tugboat operator from the port of Hamburg shows that the fiscal arrangements are not decisive factors as regards competitive position. The Dutch authorities also note that a number of other countries apply the same fiscal regime as the Netherlands.

3.2. **Comments from 51 other interested parties**

(36) The comments from the 51 other interested parties are summarised below, grouped together by type of comment.

(37) Parties

1. Arnold Ritscher; 2. Bremer Reederverein; 3. Freie Hansestadt Bremen; 4. Freie und Hansestadt Hamburg; 5. Handelskammer Hamburg; 6. Johanssen & Son; 7. […] (*); 8. Rhenus AG & Co.; 9. Ständige Vertretung der Bundesrepublik Deutschland; 10. Unternehmensverband Hafen; 11. Hamburg Unterweser Reederei GmbH; 12. Verband Deutscher Reeder; 13. Wirtschaftsverband Weser; 14. Zentralverband der Deutschen Seehafenbetriebe; 15 and 16 (names confidential)

provided separate and independent comments which can be summarised as follows ([9]):

(38) It is argued that the Dutch beneficiaries of the aid have a substantial competitive advantage (arguments backed up by a study from Price, Waterhouse Cooper (PWC) submitted by the German Government) allowing them to take a strong position on the German port towage market. This situation is reflected by asset sales and job shedding by German companies. The aid favours not only Dutch towage companies but also Dutch ports. Moreover, the aid cannot be in line with the Community guidelines on State aid for maritime transport when it is applied to national traffic on inland waterways and/or in ports and is not related to competition between Community and non-Community registers. The aid should therefore be recovered.

(39) On behalf of a German tugboat company, party 17, White & Case, made the following comments: in summary White & Case argued, *inter alia*, that there is a distinction to make between (deep) sea towage and port towage, since these represent different markets with different contract length and often managed by separate entities of the same company. There is basically no competition between Community port tugs and port tugs under third county flags. However, Dutch port towage operators have a competitive advantage over their counterparts in the Community since they receive illegal aid which enables them to adopt aggressive market behaviour.

(40) On the specific issue of which tugboats would qualify, White & Case argues that even if technical criteria are to be used to establish eligibility for aid, that does not necessarily mean that a seagoing tug operating mainly in port would be eligible for aid, since that would be contrary to the reiterated principle of the law stating that eligible operations must be carried out mainly at sea. White & Case refers to Dutch national court cases in which the government (fiscal authorities) argued that port towage is not eligible for the aid in question and where the government was overruled by the National Court which considered port towage to be eligible.

(*) Business secret.

([9]) Not every individual interested party made all the comments summarised. Nevertheless, since there are a number of similarities, their comments have been grouped together.

(41) Furthermore the maritime transport aid granted to Dutch port towage operations is to be considered new aid basically since the 1995 notification and at least since 5 January 1999, the date on which the Dutch authorities agreed to adapt all earlier legislation to the 'new' 1997 Community guidelines on State aid to maritime transport. This is backed up by the argument that any doubt as regards a notified text works to the detriment of the Member State which notified it, since it is the Member State which is responsible for the completeness and clarity of the content of a notification. In this sense the Member State has to be considered as the guarantor of legal certainty. The aid in question is also contrary to the Community guidelines on State aid to maritime transport which focus on competition aspects between Community and non-Community registers, whereas port towage is basically not subject to that type of competition. In the light of the foregoing and in the absence of legitimate expectations by the Netherlands, White & Case concludes that the Commission should recover any such illegal aid from which the operators concerned benefited even under schemes prior to the 1995 notification.

(42) Undertakings

18. Birger Gran; 19. Hual; 20. Hydro Belgium SA; 21. Krogstads Shippings; 22. Minerva Marine Inc.; 23. Mitsui OSK Shipping (Europe) Ltd; 24. NYK Bulkship (Europe) Ltd; 25. Rotterdam Municipal Port Management; 26. Sanko Kisen (Europe) BV; 27. Simpson, Spence & Young Ltd; 28. Stolt-Nielsen Transportation Group BV; 29. Thenamaris (Ships Management) Inc.; 30. Vopak; and 31. Wallenius Wilhelmsen

provided separate and independent comments which can be summarised as follows ([10]):

(43) The companies underline that the aid in question was approved by the Commission, that any attempt to interfere in a well regulated but free market would have serious consequences, that a really free market can only be achieved when there is an open market which companies are free to enter, that the entry of Dutch companies into the German towage market is in accordance with the idea of free provision of services, as advocated in a Commission legislative proposal concerning ports, and that only a free market situation would ensure the most efficient price/quality/performance ratio. The market in question will consequently work in such a way that high safety and quality standards will be maintained along with competitive long-term prices.

([10]) See footnote 9.

(44) Undertakings

32. Cape Reefers; 33. Coerclerici Armatori; 34. Maritime Services Aleuropa GmbH; 35. Pan Ocean Shipping Co Ltd.; and 36. Polsteam (Benelux)

provided separate and independent comments which can be summarised as follows ([11]):

(45) They argued that the aid in question was approved and is thus in line with the Community guidelines on State aid to maritime transport. In this way tugowners from a Member State can compete at the same cost level with tugowners operating under open registers, although with higher safety and quality standards.

(46) The complaint triggering this case is based merely on the fact that a German towage company cannot benefit from tax advantages similar to those in the Netherlands since Germany apparently refuses to implement similar fiscal advantages.

(47) The approach by the complainant, according to which towage operations may qualify or not depending where the towage services are provided, is too limited and fails to reflect the economic and operational reality. The only relevant distinction can be made on the basis of the technical criteria for different types of tugboat.

(48) A protectionist attitude in favour of the German towage market will result in less competition and higher towage rates.

(49) The towage market is international with competition between international ports.

(50) Undertakings

37. Kotug Europe BV; 38. Kotug Schleppreederei GmbH; 39. Adriaan Kooren BV; 40. Bais Maritiem BV; 41. Belgische Redersvereniging; 42. Corus Services; 43. Multraship BV; 44. Nissan Carrier Europe BV; 45. Scheepvaart & Industrie Vereniging Noordzee-kanaalgebied; 46. Koninklijke Vereniging van Nederlandse Reders; 47. Smit International NV; 48. Unie van Redding- en Sleepdienst in Nederland BV; 49. Wagenborg Sleepdienst BV; 50. Wijsmuller Marine Service BV; 51. Zeeland Seaports

provided separate and independent comments which can be summarised as follows ([12]):

([11]) See footnote 9.
([12]) See footnote 9.

(51) It is argued that the aid constitutes 'existing aid' since the Commission approved it. Existing aid cannot be recovered. Considering the approved aid as 'new aid' is in breach of the principle of legitimate expectations and legal certainty. The approved aid is in line with the aims of the rules on State aid for maritime transport, the aim being to create a level playing field for all shipping companies exposed to international competition.

(52) The number of Dutch tugboats which qualify as seagoing tugs is still below 10 % and not all of them make use of the measures.

(53) Ports have now an open market structure where tugboats under the flags of non-Community countries operate. The fact that tugboats providing assistance to seagoing vessels in ports are covered by the arrangement is perfectly appropriate since the markets are open. Consequently, the same level playing field must be created both within the ports and beyond. A purely geographic criterion, in particular the area of activity, should not be used to exclude tugboats which are seaworthy and have a crew holding the certificates required to work onboard seagoing vessels. If, however, the State aid for tugs is abolished, tariffs will increase. Such aid measures ensure maritime quality standards and limit the comparative disadvantage over tugboats operated under open registers and employing low-wage crews.

(54) The comments state that a recovery order should be avoided. An order to adapt the existing rules to the new rules should provide for sufficient time to adjust the current business arrangements to the new rules.

4. DUTCH COMMENTS ON THE COMMENTS FROM THE 51 OTHER INTERESTED PARTIES

(55) By letter of 18 April 2002, the Netherlands provided comments which can be summarised as follows:

(56) The Dutch authorities argue that the aid has made only a small contribution to the success of Dutch towage operations in German ports. The measure is at the same time effective in that it allows the employment of Community seafarers and the strengthening of Community shipping companies. Other Community tug operators can also benefit from fiscal aid to be more competitive internationally.

(57) Furthermore, the Dutch authorities argue that towage assistance to seagoing vessels must be in line with the guidelines independently of where the service is carried out. Community port towage companies/activities would be internationally disadvantaged if they could not benefit from the aid. The fact that Germany has chosen not to allow its tax facilities to apply in Germany but only in European ports cannot be used as an argument against the Dutch tax facilities applied in German ports. The Dutch authorities do not agree with White & Case's argument that towage operations must be provided at sea in order to qualify for the tax facility or with the findings of the PWC study on the extent of the tax facility. The Netherlands commented that it is very common for different kinds of services, such as sea and port towage, to be managed by different companies. It also commented that tugs have three to four assignments a day, sometimes in the harbour sometimes at sea, so they will never fulfil a criterion of 'mainly at sea'.

(58) The Netherlands further submitted a report from JBR focusing mainly on the market situation and stating that the access of Kotug to the German towage market is essentially due to its strategy and experience. After the entry of Dutch firms into the German towage market prices went down and quality went up. Furthermore, it is argued that the German companies underestimated the effects of competition and were too slow to react.

(59) According to a second report from Loyens & Loeff, submitted by the Netherlands, the PWC report sent by the German government is not based on the right assumptions nor on the local market situation.

5. ASSESSMENT OF THE AID

5.1. Existence of aid under Article 87(1) of the EC Treaty

(60) Under Article 87(1) of the EC Treaty 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

(61) The application of subsidies by the Dutch authorities through State resources in favour of operations by Dutch tugboats in ports and on inland waterways in the

Community favours certain undertakings since the measure is specific to certain towage operations ([13]). Subsidies granted in this context threaten to distort competition and could affect trade between Member States since they can be carried out by companies registered in a country different from the country where the service is carried out ([14]). For these reasons, subsidies granted to port and inland waterway towage operations constitute State aid within the meaning of Article 87(1) of the Treaty.

5.2. **Legal basis for the assessment**

(62) The 1997 Community guidelines on State aid to maritime transport ([15]) (hereinafter referred to as 'the guidelines') give details of which aid to maritime transport may be considered compatible with the common market.

(63) Regulation (EC) No 659/1999.

5.3. **'Unlawful' aid (aid not notified)**

(64) Since the Dutch authorities confirmed that the aid in question has been granted, it has to be clarified whether this aid was notified or if it constitutes unlawful aid.

5.3.1. *Scope of the notification(s)*

(65) In the notification and information provided on Cases N 738/95 and NN 89/97, the Netherlands notified aid schemes which focused almost exclusively on activities carried out at sea. This is clear from analysis of both the general scope and the different elements of the notified schemes as summarised above. The sole derogation to the condition that the operations must be performed at sea is that a ship which is used both at sea and in ports or on inland waterways is considered as being used for activities at sea if the main focus of the activities is at sea.

(66) It should be added that the act notified in Case N 738/95 is entitled 'Wijziging van enige belastingwetten in het belang van de zeescheepvaart' (Amendment to certain tax laws relating to seagoing shipping).

(67) The general and specific details notified by the Netherlands contain nothing which should have led the Commission to doubt that the aid would be granted only to seagoing vessels operating exclusively or at least predominantly at sea.

(68) The following relevant information came to light as a result of the appeal lodged by the Netherlands against the decision by the Commission to open the Article 88(2) procedure. A phrase in the explanatory memorandum on the law approved by the Commission under Case N 384/91, as presented to the Dutch parliament by the Dutch government, clarified, in order to avoid misunderstandings, that tugboats which are suitable and licensed for towing at sea do not actually need to perform such activities at sea in order to benefit from the aid. However, this phrase was not contained in the version of the explanatory memorandum submitted to the Commission. It is therefore clear that the Commission was not properly informed by the Netherlands of its plan to provide the aid in such cases as well.

5.3.2. *Interpretation in the Netherlands: Government versus Court*

(69) Concerning the argument raised by the Dutch authorities that the notification of Case N 738/95 gave an indication that tugboats would qualify for the aid in question on the basis of technical criteria rather than the location where activities are carried out, the Commission notes that this was not the position officially defended by the Dutch government before the Dutch courts.

During the Article 88(2) procedure the following information was brought to the attention of the Commission. The application of the aid schemes (i.e. the Dutch laws) approved by the Commission to activities in ports and on inland waterways was the object of litigation in the Dutch courts. In that litigation, the Dutch authorities took the position that the aid was not available if the vessels concerned were not, or were hardly, used at sea ([16]). In fact, in one of these cases the Dutch authorities even appealed to the Dutch Supreme Court, defending this position. It appears that the Dutch Supreme Court overruled the government and ruled that port towage services qualify for the aid ([17]).

([13]) Even if considered part of a package such as the 'tonnage tax' or 'fiscal facility', such a subsidy would still be sector specific since it affects one particular activity in the seaports sector.

([14]) In the particular case under assessment, Dutch towage companies have been carrying out port towage operations in German ports (Hamburg and Bremen).

([15]) OJ C 205, 5.7.1997, p. 5.

([16]) Judgment of the Court of Justice in The Hague No 96/0195 of 5 June 1997, Case 23850.

([17]) Judgment dated 17 February 1999 by the Supreme Court (LJN-number: AA2667, Case 33504).

(70) The foregoing shows that the Dutch authorities themselves officially defended the view that the aid should not be available to the situations covered by this decision. Moreover, they never informed the Commission of the outcome of the Dutch court cases and did not even mention them in the course of the Article 88(2) proceedings.

It follows from this that (a) the interpretation of the relevant Dutch law at national level was changed without informing the Commission and (b) the Dutch government clearly notified aid which it did not originally intend to include port towage. The abovementioned remark (see paragraph 68) in the explanatory memorandum on the law, which might indicate a change of position, was not included in the text notified to the Commission ([18]).

(71) Taking the foregoing into account, the Commission concludes on this point that it has not been notified by the Dutch authorities of aid in favour of towage operations in and around ports and on inland waterways in the Community and that, therefore, no such aid has been approved by the Commission.

5.4. **Classification as 'new aid'**

(72) It has further to be clarified whether this aid constitutes 'existing' or 'new' aid within the meaning of Article 1 of Regulation (EC) No 659/1999.

(73) For the period after 12 September 1990 (see paragraph 74) the subsidy cannot be classified as 'existing aid' under Article 1(b) of Regulation (EC) No 659/1999 for the following reasons:

(a) the aid was not put into effect prior to the entry into force of the Treaty,

(b) the aid has not been authorised by the Commission,

(c) the subsidy was not duly notified and was therefore not, after preliminary examination by the Commission, considered as aid, as compatible aid or as having been object of a formal investigation procedure within the appropriate periods. It cannot, therefore, be deemed to have been authorised by the Commission,

(d) the subsidy did not become State aid due to the evolution of the common market or following the liberalisation of the sector by Community law.

(74) It is possible that the aid had already been granted to tugboats not operating mainly at sea for more than ten years before the Commission addressed its first questions to the Dutch authorities (letter of 12 September 2000). To that extent in the light of Article 1(b)(iv) of Regulation (EC) No 659/1999 such aid would have to be considered as existing and non-recoverable aid.

(75) The aid granted after 12 September 1990 to tugboats not operating mainly at sea constitutes 'new aid', as provided for by Article 1(c) of Regulation (EC) No 659/1999, which covers all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid. In particular, due to the interpretations provided by the Dutch government to the Dutch Parliament and/or the rulings by the Dutch courts, the aid scheme presented to the Commission was, in practice, altered without the Commission being informed thereof.

5.5. **Compatibility of the aid**

(76) The guidelines focus essentially on measures to preserve and improve the competitiveness of the Community shipping industry against non-Community shipping and registers while keeping distortion of competition between Member States to the minimum.

5.5.1. *Maritime transport*

(77) The guidelines ([19]), when discussing the philosophy behind Community policy in the field of sea transport, refer to Council Regulation (EEC) No 4055/86 ([20]) and Council Regulation (EEC) No 3577/92 ([21]), which define

([18]) The ports sector or the (inland) waterway sector are distinct from the maritime transport sector in that the Community guidelines on State aid to maritime transport do not apply to them.

([19]) Paragraph 1.1, second subparagraph.

([20]) OJ L 378, 31.12.1986, p. 4.

([21]) OJ L 364, 12.12.1992, p. 7.

maritime transport services as 'the carriage of passengers or goods by sea' ([22]) (underlining added by the Commission).

5.5.2. *Deep sea towage*

(78) Deep sea towage is usually characterised by the fact that the tug operator alone is in charge of the towage operation, since the object towed (a vessel, an oilrig or an empty hull) is inert and incapable of influencing the manoeuvre. Deep-sea towage can thus be considered to constitute transport of goods (and perhaps of persons) by sea. It can therefore be argued that deep-sea towage should qualify as 'maritime transport' activity according to the Community legislation referred to in the guidelines.

5.5.3. *Port towage*

(79) Port towage clearly does not fall under those definitions since it does not take place at sea. Moreover, the guidelines are clearly limited to approving aid in order to improve the competitive position of Community Member States' fleets on the global maritime transport market. State aid to port towage does not fit within that policy.

5.5.4. *Rules on State aid for port towage and maritime transport*

(80) The guidelines 'cover any aid granted by EC Member States or through State resources in favour of maritime transport'.

Also because the complaint which triggered this procedure made the Commission aware that Member States might grant aid to port towage activities, the Commission has started explicitly to remind Member States, in individual decisions, that the guidelines do not in any way provide that State aid to port towage would be compatible with the common market. In the decision concerning the United Kingdom's tonnage tax (Case N 790/99) ([23]), commercial services provided to third parties within the port area, such as towing vessels in ports, are specifically excluded.

In a decision concerning Belgium (Case N 142/00) ([24]) the application of a fiscal facility was assessed, *inter alia* as regards towage. In this same decision the Commission approved the fiscal facility for towage activities at sea but excluded application of the fiscal facility to port towage.

(81) Taking account of the above analysis leading to the conclusion that tugboat operations in ports and on inland waterways in the Community cannot be considered as maritime transport within the meaning of Regulation (EEC) No 4055/86 and Regulation (EEC) No 3577/92 and taking account of the abovementioned Commission decisions, the Commission concludes that maritime transport State aid cannot be approved for towage services in ports and on inland waterways in the Community.

5.5.5. *Incompatibility with other provisions in the Treaty*

(82) It must also be assessed whether maritime transport aid to tugboat operations in ports and on inland waterways in the Community is compatible with the other provisions in the Treaty.

(83) While the aid falls under Article 87(1) of the Treaty, it must also be examined whether the measure comes under consideration for derogation or exception under Articles 87(2), 87(3) and 86(2) of the Treaty.

(84) The aid in question cannot be considered under Article 87(2) of the Treaty as it is not aid of a social character

([22]) Regulation (EEC) No 4055/86, Article 1(4):'For the purpose of this Regulation, the following shall be considered 'maritime transport services between Member States and between Member States and third countries' where they are normally provided for remuneration:
(a) intra-Community shipping services: the carriage of passengers or goods by sea between any port of a Member State and any port or off shore installation of another Member State;
(b) third country-traffic: the carriage of passengers or goods by sea between the ports of a Member State and ports or offshore installations of a third country.'

Regulation (EEC) No 3577/92, Article 2:'For the purpose of this Regulation "maritime transport services within a Member State (maritime cabotage)" shall mean services normally provided for remuneration and shall in particular include:
(a) mainland cabotage: the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State without calls at islands;
(b) off-shore supply services: the carriage of passengers or goods by sea between any port in a Member State and installations of structures situated on the continental shelf of that Member State;
(c) island cabotage: the carriage of passengers or goods by sea between:
— ports situated on the mainland and on one or more of the islands of one and the same Member State,
— ports situated on the islands of one and the same Member State.'

([23]) Letter to the United Kingdom of 2 August 2000 (No SG(2000) D/105768).

([24]) Letter to Belgium of 27 July 2000 (No SG(2000) D/105460).

granted to individual consumers, nor was it put in place to alleviate the damage caused by a natural disaster or granted to compensate for the effects of the division of Germany.

(85) However, Article 87(3)(a) may exempt aid which promotes the development of areas where the standard of living is abnormally low or where there is serious underemployment. The aid in question was, however, not granted under an aid scheme designed primarily to promote regional development. In any case, even if it had been, Article 87(3)(a) does not exempt an aid scheme which, like the one in question, is not in line with Community guidelines on aid to specific sensitive sectors such as maritime transport.

(86) With regard to the possibility of derogation under Article 87(3)(b), the aid at issue is not intended to promote the execution of an important project of common interest nor to remedy a serious disturbance in the Dutch economy, nor does it have any of the features of such projects.

(87) As to the possibility of derogation under Article 87(3)(c) relating to aid to facilitate the development of certain economic activities, it is found that operating aid for towage services in ports and on inland waterways in the Community could adversely affect trading conditions to an extent contrary to the common interest and that no specific Community provisions allow the subsidies to be granted. In particular, the situation which gave rise to this decision shows that the aid clearly leads to undesirable effects on competition between undertakings in the Member States without being adequately justified by competition from vessels from non-Community States.

(88) Furthermore, Article 86(2) of the Treaty would not apply to the case in point since the aid is part of a scheme for a particular industry operating, *inter alia*, in another Member State and does not appear to be a service of general economic interest. Also, the Netherlands has not invoked Article 86(2).

(89) The Commission therefore considers that the aid under examination does not meet any of the requirements related to the abovementioned derogations and notes that the Dutch authorities have invoked no such derogations in their contacts with the Commission.

(90) The Commission has also investigated, on the basis of Article 14(1) of Regulation (EC) No 659/1999, whether general principles of Community law would warrant non-recovery of the aid. In this context, it has noted in particular that the undertakings which have benefited from the aid when performing towage activities in German ports, were most likely aware of the fact that the Dutch authorities had defended up to the Dutch Supreme Court the view that the aid schemes approved by the Commission were not intended to cover such activities. In any case, they could have been aware of this fact since such information is publicly available. Moreover, they should have been aware of the fact that the guidelines concern sea transport.

6. **CONCLUSION**

(91) The Commission concludes that the measures in question constitute State aid within the meaning of Article 87(1) of the Treaty and that the aid is unlawful since this 'new aid' has been put into effect without having been notified in accordance with Article 88(3) of the Treaty.

(92) The Commission further finds that the maritime transport State aid granted by the Netherlands in favour of operations by Dutch tugboats in and around Community ports and on Community inland waterways is not in conformity with the guidelines and is incompatible with Article 87 of the EC Treaty.

(93) As a result of its incompatibility with the Treaty and in accordance with Article 14 of Regulation (EC) No 659/1999 the unlawful aid granted by the Netherlands in favour of operations by Dutch tugboats in and around Community ports and on Community inland waterways must be recovered,

HAS ADOPTED THIS DECISION:

Article 1

Application by the Netherlands of the 'fiscal facility' and 'tonnage tax' to Dutch tugboat operations carried out mainly in and around Community ports and on Community inland waterways, which are not carried out mainly at sea, is incompatible with the common market.

Article 2

The Netherlands shall withdraw the relevant elements of the scheme referred to in Article 1.

Article 3

1. The Netherlands shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to the beneficiaries. Aid granted before 12 September 1990 shall not be recovered.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was placed at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

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

Article 5

This Decision is addressed to The Kingdom of the Netherlands.

Done at Brussels, 19 June 2002.

For the Commission

Loyola DE PALACIO

Vice-President