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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 December 2001

on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Guipúzcoa (Spain)

(notified under document number C(2001) 4448)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2003/192/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:

1. PROCEDURE

(1) As a result of complaint submitted by certain organisations in the border autonomous community of Rioja against the urgent, transitional tax measures adopted in 1993 by the three Basque provincial councils, the Commission learned of the existence of State aid in Guipúzcoa in the form of an exemption from corporation tax for newly established firms. The Commission also received another complaint, from a competitor, about the ten-year exemption from corporation tax (the same tax measure as in Guipúzcoa) enjoyed by Depósitos Tubos Reunidos Lentz TR Lentz, S.A. (Detursa), located in Lantarón (Guipúzcoa).

(2) By letter dated 28 November 2000, SG(2000) D/108 806, the Commission informed the Kingdom of 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 14 December 2000, registered on 19 December 2000, the Spanish authorities asked that the time limit for submitting their comments be extended. By letter from the Permanent Representation dated 5 February 2001, registered on 8 February 2001, the Spanish authorities submitted their comments (prepared by the Guipúzcoa Provincial Council) under the abovementioned procedure.

(4) 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 within one month of the date of publication of the Decision.

(5) Comments were received from: the Rioja Regional Government on 1 March 2001; from the Basque Business Confederation (Confederación Empresarial Vasca/Euskal Entrepresarien Konfederakuntza (Confebask)) on 2 March 2001; from the Unión General de Trabajadores de la Rioja on 2 March 2001. By letter dated 2 July 2001 (D/52 703), the Commission sent these comments to Spain, asking for observations. By

(1) OJ C 37, 3.2.2001, p. 38.

(2) See footnote 1.

letter from the Permanent Representation dated 26 July 2001. The Spanish authorities asked that the time limit for submitting their comments be extended. By letter from the Permanent Representation dated 17 September 2001, the Spanish authorities submitted their comments (prepared by the Guipúzcoa Provincial Council) on the observations of interested third parties under the abovementioned procedure.

2. DETAILED DESCRIPTION OF THE AID

(6) The Commission notes that this tax aid scheme was introduced by Article 14 of Provincial Law 11/1993 of 26 June 1993 on urgent tax measures to assist investment and stimulate economic activity ([3]). The text of the Article ([4]) reads as follows:

‘1. Companies formed between the entry into force of this Provincial Law and 31 December 1994 shall be exempt from corporation tax for a period of 10 tax years starting from, and including, the one in which they are formed, provided that the conditions laid down in the following paragraph are met.

2. The conditions of eligibility for the exemption established in this Article are that:

(a) they are formed with a minimum paid-up capital of ESP 20 million;

[…]

(f) between the date of incorporation and 31 December 1995 they invest at least ESP 80 million, all such investments being in assets assigned to the business which are not leased or sold to third parties for their use;

(g) they create at least 10 jobs in the six months following start-up, and the annual average workforce is kept at that figure during the exemption period;

[…]

(i) they must have a business plan covering a period of at least five years. […].

[…]

6. The provisions of this Article shall be incompatible with any other tax concession.

7. The transitional exemption scheme shall be requested from the Treasury Department of the Provincial Council […],which, after checking that the requirements set out at the beginning have been met, shall communicate to the applicant company, as appropriate, its provisional authorisation, which shall be adopted with the approval of the councillors.’

(7) The Commission notes that, according to the preamble to the Provincial Law, the purpose of the aid is to stimulate the economy through enterprise and investment incentives for firms.

(8) The Commission also notes that the tax aid relates to the positive taxable income for corporation tax resulting from the conduct of the business, less the set-off for any losses from previous tax 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 laws, have invested in tangible fixed assets a minimum of ESP 80 million (EUR 480 810) and have generated at least 10 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).

(9) The Commission emphasises that the aid consists of an exemption from corporation tax during a period of 10 tax years, starting from, and including, the year in which the companies are formed.

(10) The Commission finds that the tax aid 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 a particular category of firm, such as SMEs, since any firm may qualify, if it satisfies the abovementioned conditions.

(11) As far as combination with other aid is concerned, it is stated that the tax aid in question may not be combined

([3]) *Boletín Oficial del Territorio Histórico de Guipúzcoa* No 128, 8.7.1993.
([4]) Only the parts of relevance to the assessment of the aid are cited.

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 ([5]).

(12) In its decision initiating the 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.

(13) Firstly, it stated provisionally that the exemption from corporation tax confers on recipients an advantage, which relieves them of charges that are normally borne from their budgets.

(14) Secondly, the Commission considered that the said exemption from corporation tax involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure.

(15) Thirdly, the Commission considered that the exemption from corporation tax 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 in intra-Community trade. It is clear therefore that the aid affects trade. Furthermore, the recipient firms' profitability is improved by the increase in their net profit (profit after tax). In this way they are more able to compete with firms which are not eligible for the aid.

(16) Lastly, the Commission considered that the exemption from corporation tax is specific or selective in that it favours certain firms. The eligibility requirements expressly rule out any firm that was set up before the date of entry into force of the said Provincial Law (mid-1993), that has created fewer than 10 jobs, whose investment is less than ESP 80 million (EUR 480 810) and whose paid-up capital does not exceed ESP 20 million (EUR 120 202). In addition, the Commission considered that the tax aid is not justified by the nature or general scheme of the tax system.

(17) In short, the Commission considered, at that stage, that the exemption from corporation tax is State aid within the meaning of Article 87(1) of the Treaty, 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.

(18) Since the maximum amount of tax aid in question is not subject, in particular, to the requirement that it comply with the ceiling laid down for *de minimis* aid ([6]), the Commission considered that the aid cannot be regarded as *de minimis* aid ([7]).

(19) The Commission affirmed 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. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considered that the aid could be regarded as unlawful.

(20) The Commission found that, although the granting of the aid 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. The Commission therefore thought that the aid does not have the character of investment or job-creation aid.

([5]) See Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa), (OJ L 292, 13.11.1999, p. 1).

([6]) See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (SMEs) (OJ C 213, 19.8.1992, p. 2) and 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).

([7]) See point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises (see footnote 6) and the Commission notice on the *de minimis* rule for State aid (see footnote 6).

(21) On the contrary, the Commission considered that the tax aid has the character of operating aid, since its purpose is to relieve a firm of the costs incurred through its normal business or its everyday management.

(22) The Commission pointed out that regional operating aid is in principle prohibited. It may nevertheless be granted in exceptional circumstances in regions, which meet certain conditions. But this is not the case here. The Commission therefore found that, in the light of the regional aid rules, there were doubts as to the compatibility of the tax aid.

(23) The exemption from corporation tax, which is not restricted to a particular sector, may be granted to firms that are subject to Community sectoral rules. The Commission therefore questioned whether the aid is compatible where the recipient belongs to a sector that is subject to special Community rules.

(24) Furthermore, the Commission doubted the compatibility of the tax aid with the common market in the light of the derogations in Article 87(2) and (3) of the Treaty. The aid 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(2)(c) concerning certain areas of the Federal Republic of Germany. As regards the derogations in Article 87(3) other than those in subparagraphs (a) and (c), which have already been discussed, the Commission considered that the aid is 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 aid does not fall within the scope of Article 87(3)(c), which concerns ‘aid to facilitate the development of certain economic activities…’, since it is not specific in any way to the activities of the recipient firms. Lastly, it is not intended to promote culture or heritage conservation within the meaning of Article 87(3)(d).

(25) Under the Article 88(2) procedure, the Commission asked the Spanish authorities to submit their comments and to supply all the information necessary for assessing the exemption of certain newly established firms in Guipúzcoa from corporation tax.

3. COMMENTS OF THE SPANISH AUTHORITIES

(26) By letter from the Permanent Representation dated 5 February 2001, the Spanish authorities submitted their comments (prepared by the Guipúzcoa Provincial Council). The Spanish authorities consider, essentially, that the decision to initiate in respect of the exemption from corporation tax the procedure laid down in Article 88(2) of the Treaty is automatically null and void, since it is based on a de facto wrong description of Provincial Law No 11/1993 as a new aid rather than an existing aid and was therefore adopted in breach of the procedure legally provided for in the Treaty.

(27) The Spanish authorities emphasise, firstly, that the tax measure did not constitute an aid when it came into force. As evidence of this they claim that the Commission has known of the existence of the said Provincial Law for many years, since by letter dated 25 May 1994 it informed the Spanish Permanent Representation of a complaint that referred to that Law. They argue that it is clear from the letter that the Commission did not in any way think that the measure put into effect was a State aid, nor that it was appropriate to initiate the procedure provided for in Article 93(2) (currently Article 88(2)) of the Treaty. By letter from the Permanent Representation dated 30 September 1994 the Spanish authorities informed the Commission that, in their opinion, the tax measures did not constitute State aid prohibited by Article 92 of the Treaty, since they were measures of a general nature. Furthermore, by letter to the Permanent Representation dated 19 January 1996, the Commission asked for information about the possible recipients of the measures. Later, by letter dated 6 February 1996, the Tax Coordination Authority (Órgano de coordinación fiscal) [8] informed the Commission that: ‘the Basque tax provisions are general in character and are not covered by the concept of State aid’. For the rest, the Spanish

[8] As alleged evidence of this letter, the Guipúzcoa Provincial Council attached to its comments a copy of a document bearing the letterhead of the Department of Finance and Public Administration of the Basque Government and not of the Tax Coordination Authority; it was not dated or signed. The document was never registered in the Commission.

authorities state that, if the Commission had entertained the slightest suspicion that the provincial law in question constituted State aid within the meaning of Article 87 of the Treaty, it would have been obliged (in accordance with the case-law of the Court of Justice ([9])) to initiate the Article 88(2) procedure immediately.

(28) Secondly, the Spanish authorities consider that the fact that the Commission, in November 2000, described Provincial Law 18/1993 as State aid is the result of a development in Community State aid policy (as is also indicated by the decision to initiate the procedure, taking the notice as the basis of examination). By adopting, on 1 December 1997, a resolution on a code of conduct for business taxation ([10]) (the 'Code of Conduct'), the Council acknowledged the possibility that the criteria used by the Commission to examine current tax arrangements — and not only current arrangements — in the context of applying the Community State aid rules could subsequently change. For its part, the Commission, in its 'First annual report on the implementation of the Code of Conduct for business taxation and fiscal State aid' ([11]), expressly recognises that its aim in publishing guidelines is 'to clarify the application of State aid rules to measures relating to direct business taxation' ([12]). Subsequently, the Commission adopted the notice on the application of the State aid rules to measures relating to direct business taxation ([13]). As stated in the decision to initiate the procedure, the Commission examines tax aid schemes, including Provincial Law 18/1993, on the basis of the guidelines referred to in point 37 of the notice. Further, in accordance with point 36, 'Article 93(1) states that the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States'. The notice itself makes clear, however, that all current tax schemes in the Member States that predate the notice may only be examined by the Commission under the procedure provided for in Article 88(1) of the Treaty (constant review), which thus prevents the 'aid' from being considered illegal. The schemes, therefore, are tax measures applied in the Member States, hence the term 'current', which prior to that date (December 1997) had not been regarded as State aid.

(29) Thirdly, the Spanish authorities contend that Provincial Law 18/1993 was never amended. It therefore satisfies the non-amendment test in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([14]), whereby an aid measure can be regarded as an existing aid.

(30) In short, the Spanish authorities consider that, even though, according to the Commission, Provincial Law 18/1993 should be regarded as State aid, it is an existing aid scheme. It has been shown that the Commission was informed, in 1994 or even earlier, of the application of Provincial Law 18/1993 and did not regard it as a State aid; that a change in State aid policy has occurred, since reference is made to existing tax measures in the Member States; and that the said Law has not been amended in any way since it came into force. However, Article 88(1) lays down the compulsory procedure which has to be followed in the case of existing aid: constant review in cooperation with Member States, and not the procedure provided for in Article 88(2). The Regulation also lays down the procedure that should be followed in the case of existing aid schemes: cooperation pursuant to Article 93(1) (currently Article 88(1) of the Treaty) and the proposal of appropriate measures. The Commission, therefore, should annul its decision to initiate the procedure and, if it considers, after a preliminary examination, that the Provincial law does constitute State aid for the purposes of Article 87 of the Treaty, should propose to the Member State in question the measures required in this case by the progressive development or the functioning of the common market.

(31) As to the character of the tax measure in question, the Spanish authorities consider that, since it is not caught by the selectivity requirement laid down in Article 87(1), it cannot be regarded as State aid. It is not selective, in particular since it is applied irrespective of the sector of the economy in which the firms operate and since its purpose, which is to promote the economy as a whole, is not selective as the Commission maintains: the objective, non-discriminatory implementing criteria which it lays down do not transform the firms that meet them into 'certain undertakings' within the meaning of Article 87 of the Treaty. In support of their conclusion, the Spanish authorities stress in particular that the measure in question, designed as its name suggests to 'promote economic activity', pursues a legitimate economic objective using all the instruments available to a State. In addition, they consider that the non-application of

([9]) See Case C-82/84 *Germany* v *Commission*, [1984] ECR 1451, paragraph 12.
([10]) Annex 1 to the Conclusions of the ECOFIN Council of 1 December 1997, (OJ C 2, 6.1.1998, p. 1).
([11]) Communication from the Commission to the Council and the European Parliament, COM(1998)595 final, 25.11.1998.
([12]) Point 14 of the communication mentioned in the above footnote.
([13]) OJ C 384, 10.12.1998, p. 3.
([14]) OJ L 83, 27.3.1999, p. 1.

the tax concession either to existing firms or new firms created after 31 December 1994 does not mean that it is selective, since, firstly, the purpose is to promote new activities and, secondly, firms created after that date are not disadvantaged compared with the recipients of the aid. As to the quantitative conditions concerning investment, job-creation and capital, the Spanish authorities consider that these do not mean that the measure is selective, since the conditions, as a result of their horizontal and objective nature, are not discriminatory. As the selectivity requirement is not met, the Spanish authorities conclude that the measure cannot be regarded as State aid, but as a measure of a general nature.

(32) For the rest, the Spanish authorities consider that another reason why the tax measure in question cannot be regarded as State aid is that it does not distort competition and does not affect trade between Member States. They point out that, under the Code of Conduct, Provincial Law 18/1993 has already been examined ([15]), and it was concluded that there was no effect on the location of business in the Community. In addition, Provincial Law 18/1993 does not strengthen, nor could it, the position of any firm As the firms, which have recently been set up, do not have a well-defined position on the market, it is not easy to see how they could be strengthened.

(33) Finally, the Spanish authorities reject the description of the tax measure introduced by Provincial Law 18/1993 as operating aid, since such a description, by definition, can only be given to firms that already exist but not, under any circumstances, to new ones. On the contrary, they consider that the measure, in view of the minimum investment and minimum job-creation levels on which it is conditional, is intended to promote initial investment within the meaning of the Commission communication of 1979 ([16]). In this connection, the Spanish authorities point out that where, in the guidelines on national regional aid ([17]), it says that tax aid 'may' be regarded as investment aid when it is based on investment, this does not mean that it is only in this case that it 'should' be regarded as investment aid.

4. OTHER COMMENTS RECEIVED BY THE COMMISSION

(34) 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.

4.1. Comments of the Rioja Regional Government

(35) The Rioja Regional Government states that the tax measure constitutes State aid, since it satisfies all four criteria set out in Article 87 of the Treaty. In support of this contention it argues that the term 'State' in Article 87 of the Treaty includes any public body irrespective of the extent of its territorial scope and hence, *inter alia*, the provincial governments. It also states that the description 'aid' does not depend on the form of the measure. It points out that the concept of aid in Article 87 is broader than that of subsidy and may therefore include tax measures. It also points out that the tax measure in question affords the recipients an advantage, since the purpose and the effect of the exemption from corporation tax for 10 consecutive tax years is to relieve the recipient of part of the tax burden which would have been imposed on its profits. Moreover, since the recipient firms are engaged in economic activities, which are likely to include intra-Community trade, the tax measure distorts competition and affects that trade. According to the Rioja Regional Government, the tax measure is specific in scope not only on account of the minimum share capital of ESP 20 million (EUR 120 202), the minimum investment of ESP 80 million (EUR 480 810) and the minimum of 10 jobs created, but because (a) existing firms are not eligible and (b) eligibility is restricted to firms in certain regions of the Member State.

(36) The Rioja Regional Government also points out that, under Article 88(3) of the Treaty, State aid should be notified to the Commission. Aid, it says, cannot be put into effect before the Commission has ruled on its compatibility with the common market.

([15]) Report by the 'Code of Conduct Group', submitted to the ECOFIN Council of 29 November 1999, point D009: 'Basque Country — Start-up aid'.

([16]) OJ C 31, 3.2.1979, p. 9. According to the communication, 'aids linked to initial investment' means aids linked and fixed directly in relation to initial investment or jobs created.

([17]) OJ C 74, 10.3.1998, p. 9. See footnote 46 in Annex I of the guidelines: 'Tax aid may be considered to be aid connected with an investment where it is based on an amount invested in the region'.

(37) The Rioja Regional Government also considers that the tax measure cannot be regarded as investment aid, because it does not satisfy the requirements in the guidelines on national regional aid ([18]). Despite the minimum investment and job-creation requirements, the aid does not depend on the size of the investment or the number of jobs created. Instead, the tax measure has the character of operating aid, since it relieves the recipient of some of the expenditure, which it would have incurred as part of its day-to-day operations. This operating aid, moreover, does not qualify for any of the exceptions provided for in Article 87(2) and (3) of the Treaty.

(38) The Rioja Regional Government considers that the tax measure cannot be justified on the grounds that there are five tax systems in Spain. Advocate-General Saggio ([19]) considered in this respect that the fact that authorities within a territory hold tax powers does not justify any discrimination in favour of firms established in that territory. Nor is the measure justified by the nature or general scheme of the tax system in Guipúzcoa, since its purpose is to improve the competitiveness of recipient firms. The Rioja Regional Government also argues that the Spanish Supreme Court has held ([20]) that other similar tax measures distorted competition and affected the free movement of capital and labour. The High Court of the Basque Country (Tribunal Superior de Justicia del País Vasco) ([21]) has also taken this line.

(39) The Rioja Regional Government believes, therefore, that the tax measures should be regarded as State aid, which, because the notification procedure provided for in Article 88(3) of the Treaty has not been followed, is unlawful and incompatible with the common market.

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

(40) Confebask started by drawing attention to the underlying historical reasons for the tax autonomy enjoyed by Guipúzcoa.

(41) Concerning the presumed reduction of the tax debt, Confebask considers that 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 that would initially be due. Confebask therefore asks the Commission to reconsider its position, since not to do so would be tantamount to unlawfully harmonising the tax burden by fixing a reference amount for determining possible losses of tax revenue.

(42) As regards the effect on trade, Confebask states that, in the Commission's view, the tax measure distorts trade because the recipients are involved in that trade. However, any trade will always be affected by any differences that there are between the various tax systems. Thus, to see whether the tax measures do affect trade, the Commission ought to analyse the tax system as a whole and not specific provisions in it. 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 this specific measure affects trade and others do not. In any event, even if such an effect did exist, the way to remove it would be through harmonisation, not State aid.

(43) Regarding the selective nature of the tax measure, Confebask States that the Commission considers the measure to be an instrument for the direct granting of aid. It points out in this respect that, according to points 17, 19 and 20 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, 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 measure in question has none of these characteristics, not even territorial specificity, since it applies to the whole territory for which the provincial authorities that introduced it 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 thresholds is normal practice in national and Community tax rules. Confebask also draws attention to the basis of various judgements 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,

([18]) See previous footnote.

([19]) Opinion of Advocate-General Saggio in Joined Cases C-400/97, C-401/97 and C-402/97, Administración General del Estado v Juntas Generales de Guipúzcoa y Diputación Foral de Guipúzcoa.

([20]) See its judgement of 7 February 1998.

([21]) See the judgements of 30 September and 7 October 1999 concerning the 'tax holidays' in the form of reductions of taxable income of 99 %, 75 %, 50 % and 25 %.

that the effect of promoting certain sectors does not necessarily mean that the measures are specific.

(44) As to the fact that the tax measure in question applies only to part of the territory of a Member State, which the Commission sees as evidence of specificity, Confebask points out that similar measures were introduced for the rest of that territory by the Finance Act 1994 [22]. These measures consisted in a reduction of 95 % in corporation tax liability for 1994, 1995 and 1996 for newly established firms which invested at least ESP 15 million (EUR 90 152) and had a workforce of between three and 20 persons. The measures were designed, moreover, to promote the formation of new companies. Consequently, the effect on competition of the exemption from corporation tax in Guipúzcoa is neutralised, since the neighbouring Basque historic territories also give tax concessions to newly established firms. Further, if the tax measures in question did affect competition, this would be on account of the central government's measures, for which the number of recipients could be greater.

(45) 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 Code of Conduct Group (Primarolo Group). In France, since 1994, new firms have been eligible for corporation tax exemptions and reductions for a period of five years (ten years in some regions), and in Corsica for even more favourable arrangements. In Luxembourg, there is a 25 % reduction of corporation tax for a period of eight years. In Italy, the exemption from the IRPEG and the ILOR in the Mezzogiorno is for 10 years. Lastly, in Portugal there is a 25 % reduction of corporation tax for a period of from seven to 10 years. Everything shows, therefore, that Guipúzcoa's exemption from corporation tax is not an exceptional system, which gives rise to any specificity. On the contrary, it is a system widely used in the Member States. In view of the above, Confebask concludes that the tax measures in question are not State aid but general measures.

(46) 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. The Basque tax system was already deemed compatible by Commission Decision 93/337/EEC [23]. In any event, the Commission may change its position, during the 'constant review', as regards future cases but not past ones.

(47) According to Confebask, since a legitimate expectation has been aroused, in particular by letter reference 4555 of 22 May 1994, which the Commission sent to the Spanish Permanent Representation in order to obtain information, the measure cannot be the subject of a recovery. The letter shows, firstly, that the Commission learned of the measure back in 1994 and, secondly, that the complainant described it as State aid. The Commission, however, did not initiate the procedure but apparently agreed with the reply from the Spanish authorities, who denied that the measure was State aid. The situation described, recalls the earlier one examined by the Court of Justice in RSV [24]. In that case, the Court held that the period of 26 months between the decision to initiate the procedure and the final decision had established, on the part of the beneficiary, a legitimate expectation of such a nature as to prevent the Commission from ordering the Dutch authorities to order the refund of the aid. Confebask considers that, if a period of 26 months between the initiation of the procedure and its conclusion establishes a legitimate expectation which prevents the recovery of the aid being ordered, a situation in which the Commission does not even initiate the procedure for six years and six months, so that no position is adopted concerning the possible existence of aid that is incompatible with the common market, is even clearer still. In short, the undertakings and authorities informed of the questions raised by the Commission, which did not react to the reply provided by the Spanish authorities, would be entitled to think that the system of exemption from corporation tax gave no cause for complaint as far as the State aid rules were concerned. Confebask also mentions other factors that prevented an experienced economic operator from noticing any irregularity in its acceptance of the tax concession in question. As early as 1993, the common tax law (i.e. the legislation applicable in the rest of Spain) contained systems for exempting newly established firms from corporation tax. Basically, these systems are no different from those in the Basque legislation cited in these pleadings. In the circumstances, no recipient firm could foresee that

[22] 'Law No 22 of 29 December 1993, on tax measures and the reform of the legal system of the public service and unemployment protection'.

[23] OJ L 134, 3.6.1993, p. 25.

[24] Judgment of the Court of Justice of the European Communities of 24 November 1987, in Case C-223/85, *RSV* v *Commission*, [1987] ECR 4617.

several years after being informed of these rules, which are similar to those applicable in the rest of the common territory, the Commission, relying on Community law, would demand the recovery of the aid. As already explained, such recovery would involve recalculating the tax debt for tax periods that were closed years ago, which would be a manifest assault on legal certainty.

(48) As regards the assessment of compatibility with the common market, Confebask notes that, according to the decisions of the Court of Justice ([25]), where the Commission initiates proceedings it must have serious doubts as to the compatibility of the aid. As no reaction was forthcoming for several years, it must be concluded that the Commission did not harbour any doubts.

(49) On the other hand, if the tax measure in question is regarded as a rule granting aid directly, Confebask takes the view that the practice of the Commission and the Court requires that the measure has to be sectorally specific before its compatibility can be assessed. The overall tax burden on firms and the reference tax burden would also have to be established. 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 challenges the Commission's argument that the tax measure is incompatible with the common market, since it does 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 ([26]), 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 measure in question.

(50) Confebask therefore asks the Commission to terminate the procedure and state that the tax measures in question comply with Community law.

4.3. **Comments from the Rioja branch of the General Union of Workers (Unión General de Trabajadores de la Rioja (UGT))**

(51) The UGT's first point is that the labour force in Rioja is feeling the effects of the tax aid through the resultant migration of firms. This effect on the region's labour force is increased by the fact that Rioja adjoins the Basque Country.

(52) The Guipúzcoa measure in question, which is identical to the measures introduced by the other Basque historic territories, means that the Basque Country is becoming a tax haven in order to capture business from the whole of the EU, and in particular from the border region of Rioja. The measures therefore distort competition, since the decision to locate a firm is not the result of the free play of market forces but of the tax concessions created by a fiscal policy with objectives unconnected with the tax system. They also constitute an obstacle to the desirable tax harmonisation of the Community.

(53) Furthermore, the UGT considers that the tax measure has the character of a State aid. It notes that the Commission ([27]) has already regarded other tax measures of the Basque historic territories as State aid that is incompatible with the common market. It also notes that, in his Opinion of 1 July 1999, which dealt with preferential rulings on tax measures similar to those of the Basque historic territories, Advocate-General Saggio also considered that such measures constituted State aid in breach of the Treaty.

(54) For the rest, the UGT supports the Commission's assessment that the tax measure is State aid that is unlawful and incompatible. It believes, therefore, that the measure should be regarded as State aid, which, because the notification procedure provided for in Article 88(3) of the Treaty has not been followed, is unlawful and incompatible with the common market. The Commission should also require the recipients to repay aid that has been paid unduly.

5. **COMMENTS OF SPAIN ON THE OBSERVATIONS OF OTHER INTERESTED PARTIES**

(55) By letter from the Permanent Representation dated 17 September 2001, the Spanish authorities submitted their

([25]) See Judgment of the Court of Justice of the European Communities of 19 May 1993, in Case C-198/1991, *William Cook plc* v *Commission*, [1993] ECR I-2487.

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

([27]) Decision of 10 May 1993 on Provincial Laws 28/1988 (Álava), 8/1988 (Vizcaya) and 6/1988 (Guipúzcoa); Commission Decision 1999/718/EC (Daewoo) (see footnote 5) and Decision 2000/795/EC (Ramondín SA and Ramondín Cápsulas SA) (OJ L 318, 16.12.2000, p. 36).

comments (prepared by the Guipúzcoa Provincial Council) on the observations of interested third parties, which were sent to them in accordance with Article 6(2) of Regulation (EC) No 659/1999. Basically, the Guipúzcoa Provincial Council considers that none of the comments calls into question its original observations ([28]). It states that the Commission will not find any information in these comments that will help it to determine whether the measure is an existing aid or a new one.

(56) The Guipúzcoa Provincial Council also uses the reply to the observations of other interested parties to submit further comments of its own in addition to those which it had made on 5 February 2001 in the said letter from the Spanish Permanent Representation, under Article 6(1) of Regulation (EC) No 659/1999. However, the period of one month from the date of the letter (28 November 2000) in which the Commission notified the Spanish authorities of its decision to initiate the procedure and invited them to submit comments under the said Article, expired on 29 December 2001. These additional comments should not be taken into account, therefore. The Commission would point out in this respect that the possibility given to the authorities of the Member State in question to submit comments on the observations of interested third parties, pursuant to Article 6(2), definitely does not mean that they can have an additional period in which to present comments under the said Article 6(1).

6. **ASSESSMENT**

6.1. **State aid**

(57) The Commission would point out that, for the purpose of applying the Community rules on State aid, the tax nature of the measure in question is not important, since Article 87 of the Treaty applies to aid measures ‘in any form’. Nevertheless, the Commission emphasises that, to be regarded as aid, the measure should satisfy all four of the criteria set out in Article 87 and explained below.

(58) Firstly, it 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. The exemption from corporation tax meets this criterion, since it removes the tax burden on the recipient firms. If there were no exemption, the recipient firm would have to pay full corporation tax for 10 years. The exemption from corporation tax thus implies an exception to the common tax system applicable.

(59) Secondly, the Commission considers that the exemption from corporation tax involves a loss of tax revenue and is therefore equivalent to the consumption of public resources in the form of fiscal expenditure. This criterion is also applied to aid granted by regional and local bodies in the Member States ([29]). 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.

(60) According to the above claim put forward by certain third parties, the Commission is wrong to think that the exemption from corporation tax involves a loss of tax revenue. To determine the amount of revenue lost, so runs this argument, the Commission should fix a normal level or amount of tax. It should be noted here, however, that the normal level of tax is derived from the tax system in question and not from a Commission decision. Furthermore, according to the second indent in point 9 of the notice on the application of the State aid rules to measures relating to direct business taxation, 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)’. It should be noted in this respect that, as the Court of Justice has held ([30]) ‘a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers

([28]) See section III: ‘Comments of the Spanish authorities’.

([29]) See Judgment of the Court of Justice of 14 October 1987, in Case C-248/84, *Germany* v *Commission*, [1987] ECR 4013.

([30]) Case C-387/92, Banco de Crédito Industrial, now *Banco Exterior de España SA* v *Ayuntamiento de Valencia*, [1994] ECR I-877, paragraph 14.

constitutes State aid within the meaning of Article 92(1) of the Treaty'. This is the case with the tax advantage that an exemption from corporation tax confers. The argument, therefore, is not convincing.

(61) Thirdly, the measure must affect competition and trade between Member States. It should be pointed out in this respect that, according to a report ([31]) on the external dependency of the Basque economy in the period 1990 to 1995, exports went up ([32]), not only in absolute terms but, in particular, in relative terms as well, to the detriment of sales to the rest of the country. The external market has therefore partially replaced the Spanish market. Furthermore, according to another statistical report ([33]) 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, during the period 1993 to 1998 the Basque trade balance was clearly in surplus. 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 is clear that the 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 the Community. It is clear therefore that the aid affects trade. 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 aid.

(62) Since the tax rules under investigation 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 and their impact on a market, sector or specific product cannot be established, contrary to the claim made by certain third parties. This position has been confirmed by a number of decisions of the Court of Justice ([34]). Moreover, the Commission would emphasise that, in its decision initiating the procedure, it asked the Spanish authorities for all relevant information that would allow it to assess the aid. The request was clearly intended to enable the Commission to obtain a general idea of the actual effects of the scheme and not to gather data sufficient for carrying out individual appraisals. However, the Spanish authorities have not provided any information ([35]) on the instances where the tax holiday was applied. 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 information requested.

(63) As regards the Spanish authorities' argument that the tax measure in question neither distorts competition nor affects trade between Member States since the report by the Code of Conduct group concluded that it did not affect the location of business activities in the Community, the Commission considers that an analysis which draws on the Code of Conduct cannot be a substitute for an assessment based on the State aid rules. The criteria established in part B ([36]) of the Code of Conduct for determining whether a tax measure is 'harmful' are not the same as those for deciding whether

([31]) Patxi Garrido Espinosa and Mª Victoria Garcia Olea, 'La dependencia exterior vasca en el periodo 1990—1995', Eustat.

([32]) In 1990 exports accounted for 28,5 % of total sales, including those to the rest of Spain, but for 40,8 % only five years later.

([33]) 'Estadística de Comercio Exterior para la Comunidad Autónoma de Euskadi en el año 1998', prepared by Eustat (Euskal Estatistika-Erakundea/Instituto Vasco de Estadística).

([34]) See Case C-75/97, (Maribel) *Belgium* v *Commission*, [1999] ECR I-3691, paragraphs 48 and 51; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, *Alzetta Mauro and others*, [2000] ECR II-2319, paragraphs 80, 81 and 82; the Opinion of Advocate-General Ruíz-Jarabo in Case C-310/99, Italy v *Commission*, paragraphs 54 and 55 (17 May 2001), and the Opinion of Advocate-General Saggio in Case C-156/98, *Germany* v *Commission*, paragraph 31 (27 January 2000), 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'.

([35]) With regard to the complaint submitted by Schütz Ibérica SA, the Spanish authorities informed the Commission that no aid had been paid to Detursa at that date.

([36]) Section B of the Code of Conduct for Business taxation reads: '[…] When assessing whether such measures are harmful, account should be taken of, *inter alia*: (1) whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or (2) whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or (3) whether advantages are granted without any real economic activity or substantial economic presence within the Member State offering such tax advantages, or (4) whether the basis of profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably those agreed upon within the OECD, or (5) whether the tax measures lack transparency, including where statutory rules are relaxed at administrative level in a non-transparent way'.

a measure distorts competition or affects trade. It is possible, therefore, that a measure will not be considered harmful, because the criteria in B do not apply, even though it may distort and affect trade. In this specific case, the tax holiday is not caught by the criteria in B, since it is not granted exclusively to non-residents or in respect of transactions carried out by non-residents; it is not completely separate from the national economy; it is not granted even without any real economic activity and substantial economic presence within the Member State; it is not applied to profits determined in respect of activities within a multinational group of companies in accordance with internationally accepted principles and does not lack transparency. On the other hand, as explained above, it does distort competition and affect trade.

(64) As regards the comment from certain third parties 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 subject of the proceeding initiated under Articles 87 and 88 of the Treaty is the distortions of competition that may result from a rule favouring certain firms (in this case certain newly established firms) and not those that are due to differences between the tax systems of the Member States, which would in any event be caught by the provisions of Articles 93 to 97 of the Treaty.

(65) As regards the specific character which State aid must have, the Commission takes the view that the exemption from corporation tax is specific or selective in that it favours certain firms. The eligibility requirements expressly rule out any firm set up before the date of entry into force of the said Provincial Law (mid-1996) that has created fewer than 10 jobs, whose investment is less than ESP 80 million (EUR 480 810) and whose capital does not exceed ESP 20 million (EUR 120 202). The Commission would point out that, according to the Fourth Report on Enterprise in Europe ([37]), the number of firms in the European Community in 1992 which had fewer than 10 employees, or no employees at all, was 14 629 000, or 92,72 % of the total ([38]). In Spain's case, the percentage in 1991 was even higher, at about 95,11 % ([39]). Furthermore, according to the Fifth Report on Enterprises in Europe ([40]), the number of firms in the European Community in 1995 which had fewer than 10 employees, or no employees at all, was 16 767 000, or 92,89 % ([41]) of the total. In Spain's case, the percentage was higher still, at about 95 % ([42]). It is likely that these percentages are even higher in the case of new firms, since a firm usually starts with a workforce that will expand as the firm consolidates and reaches its cruising speed. This is the case in Spain, where in 1995 the percentage was even higher, at about 98 % ([43]). The main conclusion, therefore, is that one of the conditions of eligibility alone rules out the majority of firms.

(66) The Commission would also point out that the fact that the tax exemption is specific in scope does not mean that it has no other selective features, such as regional specificity. However, once it has been shown that the tax reduction favours certain firms on account of this specificity of scope, the Commission considers that it is not necessary to analyse in detail all the other specific features. In this particular case, therefore, it will not examine any regional specificity the measure may have.

(67) For the rest, the objective character of the thresholds cited does not, as some of the third-party comments claim, prevent them from being selective and excluding firms which do not satisfy the conditions in question. According to the case law ([44]), 'the fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria pursuant to which it may be granted, […] cannot suffice to call in question the selective nature of the measure and, accordingly, its classification as State aid within the meaning of Article 92(1) of the Treaty. […] It does not, however, preclude that public measure from having to be regarded as a system of aid constituting a selective, and therefore specific, measure if, owing to the criteria governing its application, it

([37]) Enterprises in Europe, Fourth Report, Eurostat.
([38]) Data taken from the table on page 27 of the report.
([39]) Data taken from the table on page 152 of the report.
([40]) Enterprises in Europe, Fifth Report, Eurostat.
([41]) Data taken from the table on page 31 of the report.
([42]) Data taken from the table on page 224 of the report.
([43]) Data taken from the table on page 73 of the report.
([44]) See Judgment of the Court of First Insance in Case T-55/99, *Confederación Española de Transporte de Mercancías (CETM) v Commission*, [2000] ECR II-3207, paragraph 40.

procures an advantage for certain undertakings or the production of certain goods, to the exclusion of others'.

(68) As regards invoking the nature or general scheme of the tax system as a possible justification for the exemption from corporation tax, 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. Furthermore, it is up to the Member State concerned to establish that the tax measures in question follow the internal logic of the tax system ([45]). In this particular case, the Spanish authorities did not supply any information on the internal logic of the tax system, which the tax measure is supposed to follow. The Commission notes however that, according to the provincial law introducing the tax holiday, the declared objective was to stimulate Guipúzcoa's economy, which was then in serious crisis. The objective is not determined therefore by primary tax concerns, but by economic policy considerations unconnected with the tax system. This extraneous quality is reinforced by the temporary nature of the tax measure. As regards the possibly legitimate nature of the objectives pursued, the Commission does not question this, although it would point out that it is not sufficient for a public measure to avoid being examined from a State aid perspective, since, as the case-law states ([46]): 'If that argument were followed, it would be sufficient for the public authorities to invoke the legitimacy of the objectives which the adoption of an aid measure sought to attain for that measure to be regarded as a general measure outside the scope of Article 92(1) of the Treaty. That provision does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects'.

(69) As to the existence of exemptions from corporation tax in other Member States and the fact that the Commission did not regard them as State aid because they were aimed at new firms, a point that, according to certain third parties, gives rise to legitimate expectations concerning tax aid for newly established firms, the Commission would point out that the preliminary results of the investigation of this question cast doubt on this line of argument. The tax holidays of these Member States were deemed to be State aid schemes ([47]) notified under Article 88(3) of the Treaty and compatible with the common market. Furthermore, even supposing that the Commission had not reacted, it would not be legitimate to take this misguided approach in the present case. 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 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' ([48]).

(70) As regards the third-party comments that there are other tax measures in Spain which the Commission has not regarded as State aid because they are aimed at new firms, it should be emphasised that the characteristics of these measures is very different from those of the tax holidays in question. A scheme where, to be eligible, it is necessary to create three jobs cannot be compared with one that requires ten, nor is one where the aid consists of a 95 % reduction of taxable income for three years comparable with a 10 year exemption. Furthermore, the Commission considers that the decisions adopted on the said tax holidays cannot prejudice those which, as appropriate, it has to adopt on the other tax measures cited.

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

([46]) See paragraph 53 of the judgment cited in footnote 45.

([47]) See France: tax aid scheme for 'enterprise areas' N 155/86, approved by Commission decision of 21 January 1987, Seventeenth Competition Report, point 245; Regional Planning Act aid scheme N 493/95, approved by Commission decision of 29 November 1995, OJ C 53, 22.2.1996; Italy: aid scheme pursuant to Law No 64 of 1 March 1986 on special assistance for the Mezzogiorno, approved by Commission decision of 2 March 1988 (OJ L 143, 10.6.1988); Luxembourg: Regional Planning Act aid scheme N 607/92, approved by Commission decision of 9 December 1992 (OJ C 39, 13.2.1993); regional aid map assistance scheme N 72/96, approved by Commission decision of 20 September 1996, OJ C 51, 21.2.1997; regional aid scheme for economic development N 793/B/99, approved by Commission decision of 19 July 2000 (OJ C 278, 30.9.2000).

([48]) See Case C-78/76, *Steinike & Weinlig* v *Federal Republic of Germany*, [1977] ECR 141, paragraph 24. On the other hand, Case C-313/90, *Comité International de la rayonne et des fibres synthétiques and others* v *Commission*, [1993] ECR I-1125, 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'.

(71) 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 tax system of each of the three Basque historic territories.

(72) In short, the Commission considers that the exemption from corporation tax is State aid within the meaning of Article 87(1) of the Treaty, since it confers an advantage, is granted by the State from state resources, affects trade between Member States and distorts competition in favour of certain firms.

6.2. **New aid**

(73) The Commission considers that the aid does not have the character of an existing aid, since it does not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999. It does not satisfy criteria (i) to (iv) ([49]) since it was not introduced before Spain's accession on 1 January 1986; was never authorised by the Commission or the Council; cannot be regarded as having been authorised, since it was never notified; and was granted at least 10 years ago.

(74) The Commission also considers that the tax exemption does not satisfy the conditions in Article 1(b)(v) ([50]). Neither in its correspondence nor in any other document has the Commission ever stated directly or indirectly that it considers the tax measure in question is not aid. On the contrary, in Decision 98/C 103/03 of 18 November 1997 ([51]), it took the view that the new tax holiday that Álava introduced in 1996, and for which, in addition to other aid, Demesa was eligible, could contain aid elements that might be incompatible. Subsequently, in Decision 1999/718/EEC concluding the procedure, the Commission considered that the tax holiday was State aid that was incompatible with the common market. The Commission has followed the same approach of considering tax holidays as State aid with regard to other tax measures introduced by other Member States, such as France (decision of 21 January 1987 in case N 155/86 and of 29 November 1995 in case N 493/95), Italy (decision of 2 March 1988) and Luxembourg (decision of 9 December 1992 in case N 607/92 and of 20 September in case N 72/96). Since all these decisions, except 1999/718/EEC, were adopted not only before 10 December 1998 (date of publication of the Commission notice on the application of the State aid rules to measures relating to direct business taxation) but even before 1 December 1997 (date of the resolution on a code of conduct for business taxation), the Commission would emphasise that the decision to consider the tax holiday introduced in 1993 as State aid is not due, as the Guipúzcoa Provincial Council claims in its comments, to the Commission changing the criterion when examining current tax schemes in the light of the notice or of the Code of Conduct.

(75) Furthermore, regarding the Spanish authorities' claim that if the Commission considered that the tax holiday was State aid it should have initiated the procedure immediately, on the basis of paragraph 12 in Case C-84/82 (see footnote 9), the Commission would point out that this precedent is not relevant, since it applies only to notified aid schemes. The Commission emphasises that under Article 13(2) of Regulation (EC) No 659/1999 it is not subject, where illegal aid is concerned, to the time limits applicable in the case of notified aid schemes. It also points out that, by letter to the Permanent Representation dated 19 January 1996, it asked for information about the possible recipients of the measure. By fax dated 16 February, confirmed by letter dated 19 February 1996, the Spanish Permanent Representation requested a 15-day extension of the

([49]) Article 1(b) (i) to (iv) of Regulation No 659/1999 read as follows:
'(b) 'existing aid' shall mean:
(i) 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;
(ii) authorised aid, that is to say, aid schemes and individual aid authorised by the Commission or by the Council;
(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;
(iv) aid which is deemed to be existing aid pursuant to Article 15.'

([50]) Article 1(b)(v) of Regulation (EC) No 659/1999 reads as follows:
'(b) "existing aid" shall mean:
(…)
(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation'.

([51]) Decision to initiate the formal investigation procedure in Article 93(2) in respect of certain aid granted to Demesa, Álava (OJ C 103, 4.4.1998, p. 3).

deadline for replying. By letter dated 21 March 1996, the Spanish Permanent Representation requested a further extension of 30 days. Despite these requests, which indicated that a reply might be forthcoming, the Spanish authorities did not answer the Commission's request for information. The Commission would also point out that it initiated a procedure in respect of other similar State aid measures in the form of a reduction of taxable income for certain new firms in Guipúzcoa (C 50/99) on 29 September 1999. In its final decision of 12 July 2001 it concluded that the said aid was incompatible.

(76) In short, because it does not meet the conditions laid down in Article 1(b) of Regulation (EC) No 659/1999, the tax measure in question cannot be regarded as existing aid. The Commission considers, however, that it may be regarded as new aid within the meaning of Article 1(c) of the same Regulation ([52]) ([53]).

6.3. **Illegality**

(77) 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 ([54]), 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. Nor can the aid comply with the *de minimis* rules, since there is no guarantee that the *de minimis* threshold will not be exceeded.

(78) The Commission affirms that State aid that 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. However, the Spanish authorities have not fulfilled this obligation. The Commission therefore considers that the aid should be regarded as unlawful.

(79) As regards the argument put forward by certain third parties that the tax measure cannot be classified as illegal on account of the legitimate expectations created by the Commission's approval of the Basque tax system, this can only be rejected, since, firstly, under Article 1(f) of Regulation (EC) No 659/1999, an aid is illegal if, as in the present case, it has not been notified under Article 88(3) of the Treaty. Secondly, since it was not notified, a decision could never be taken by the Commission as to its compatibility with the common market ([55]). As to the alleged approval by the Commission of the 'Basque tax system', which according to the comments of interested third parties, is the result of Decision 93/337/EEC, the Commission would point out, first, that the Decision did not refer to any 'Basque tax system' but to a series of specific tax measures ([56]) introduced by Álava, Guipúzcoa and Vizcaya respectively in 1988 and, second, that in that Decision those measures were regarded as State aid. Article 1(4) of the Decision ([57]) provided, moreover, that the granting of the aid should be subject to a series of conditions, such as observance of the ceilings for regional aid, the rules applicable to SMEs and the provisions on the combination of aid. It was not a question therefore of approving the Basque tax system but of describing as State aid certain tax measures and imposing conditions for the granting of that aid. Consequently, the decision did not prejudice in any way any positive decision that the Commission might take concerning any other new tax measure that might be

([52]) In Article 1(c) of Regulation (EC) No 659/1999, new aid is defined as '(c) "new aid": all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

([53]) Letter to the Spanish Permanent Representation, D/10687, dated 19 January 1996.

([54]) The assessment of the aid is the same whether it is based on the Community guidelines on State aid for small and medium-sized enterprises (SMEs), the Commission notice on the *de minimis* rule for State aid or Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (see footnote 6).

([55]) Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen and others* v *Commission*, [1999] ECR II-3663, paragraph 300.

([56]) The measures consisted basically in 95 % relief of the tax on capital transfers and documented legal acts, a 20 % tax credit in respect of investments, complete freedom as to the depreciation of assets constituting new investments, an increase in the tax credit up to 5 % of the investment, depending on the employment created, and an increase in the tax credit up to 20 % of the investment in the case of investments of special technological interest.

([57]) See Article 1(4) of Decision 93/337/EEC: 'Within two months of the notification of this decision, the Spanish authorities shall ensure that the aid is granted within the national regional aid areas and ceilings or in accordance with the conditions laid down in the Community guidelines on State aid for small and medium-sized enterprises, in compliance with the Community rules on the cumulation of aid for different purposes and with the limits laid down for certain sectors of activity in industry, agriculture and fisheries'.

introduced in the Basque Country. In short, contrary to what is claimed in the third-party comments, there never was any Commission decision that approved the 'Basque tax system' in the abstract and, hence, any new tax measure such as the tax exemption in question, or at least deprived that system of its illegal character ([58]).

6.4. **Compatibility with the common market**

(80) As a preliminary, the Commission would repeat that the exemption from corporation tax has to be classed as an aid scheme. Given the general, abstract nature of an aid scheme, the Commission is not obliged to examine the situation of each potential recipient individually. In any event, it does not know the circumstances of existing or prospective recipients and is not, therefore, able to examine the exact repercussions on the competitiveness of specific firms. It is sufficient to ascertain that potential recipients could benefit from aid that is not consistent with the Community directives, guidelines and frameworks. Moreover, the Commission would again stress that, in its decision initiating the procedure, it asked the Spanish authorities for all relevant information that would allow it to assess the aid. The request was clearly intended to enable the Commission to obtain a general idea of the actual effects of the scheme and not to gather data sufficient for carrying out individual appraisals. However, the Spanish authorities have not provided any information on the instances where the tax holiday was applied. 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 information requested.

(81) As the scheme in question covers only the NUTS ([59]) III territory of Guipúzcoa, it is necessary to examine whether aid in this historic territory can qualify for the regional derogations in Article 87(3)(a) or (c). The Commission would point out in this respect that Guipúzcoa has never been eligible for the Article 87(3)(a) derogation, since the per capita GDP ([60]) 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 ([61]) ([62]), the conditions of eligibility for the derogation in Article 87(3)(a) of the Treaty are met only if the region, at NUTS II, has a per capita GDP of not more than 75 % of the Community average. The Commission notes however that, according to the regional aid map ([63]) Guipúzcoa was a region in which State aid could be considered partly compatible with the common market under the regional derogation in Article 87(3)(c) of the Treaty.

(82) State aid in the form of an exemption from corporation tax promotes the formation in Guipúzcoa of new firms whose initial investments and numbers of employees exceed certain thresholds. However, despite this minimum investment and the creation of a minimum number of jobs, the tax aid in question does not qualify as investment or employment aid. The basis for the aid is not the size of the investment, the number of jobs created, or the corresponding wage costs, but taxable income. Furthermore, the amount of aid is not a function of an investment ceiling, the number of jobs, or the corresponding wage costs, but of taxable income. According to Annex I to the guidelines on national regional aid, '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'. It follows that aid, which, as in the present case, does not meet these criteria, cannot be regarded as investment aid.

(83) On the contrary, since it partly reduces the profits tax paid by the recipient firms, the aid qualifies 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 aid in the light of any

([58]) See footnote 23.

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

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

([61]) The references to the regional rules are confined, in the following recitals, to the guidelines on national regional aid (see footnote 17). Where the aid was granted before the guidelines came into force, the Commission's assessment is based on the rules current at the time it was granted. Nevertheless, since the relevant parts of the said rules have not changed, it is sufficient to refer to the latest text in this case.

([62]) See point 3.5 of the guidelines on national regional aid (see footnote 17).

([63]) The successive regional aid maps that have applied since Spain's accession were the one adopted in 1988 in Commission Decision 88/C 351/04, the amended map (see communication 96/C 25/03) in the decision of 26 July 1995, and the map for 2000 to 2006 adopted in the decision of 11 April 2000.

derogations that may apply to the operating aid in question.

(84) The Commission would point out that, under the guidelines on national regional aid, regional aid, which has the character of operating aid, is in principle prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty, subject to certain conditions laid down in points 4.15 to 4.17 of the 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 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 III territory of Guipúzcoa is neither an outermost region ([64]) nor a region of low population density ([65]). This is the reason why the operating aid elements in the exemption from corporation tax 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.

(85) The Commission therefore considers that the tax aid scheme 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.

(86) 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 purposes other than the development of certain economic activities. The Commission notes in this respect that the exemption from corporation tax is not intended 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 aid cannot qualify for the derogation in Article 87(3)(c) of the Treaty in respect of the said purposes.

(87) The exemption from corporation tax is not subject to any sectoral limitation and may therefore be granted without any restriction to firms 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 ([66]). The Commission considers that, as a result, the exemption from corporation tax cannot comply with the said sectoral rules. In this particular case, the aid 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.

(88) 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), nor is it intended to make good the damage caused by natural disasters or exceptional occurrences in accordance with 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) of the Treaty. 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.

(89) Since the exemption from corporation tax covers several tax years, there could still be some tax aid left to pay, but as this aid is unlawful and incompatible, the Spanish authorities should cancel the payment of any balance

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

([65]) See point 3.10.4 of the guidelines on national regional aid (see footnote 17).

([66]) For the sectoral rules currently in force see, in addition to the *Official Journal of the European Union*, the website of the Directorate-General for Competition: http://europa.eu.int/comm/competition/state_aid/legislation/.

from the exemption from corporation tax which could still be due to certain recipients

6.5. **Recovery of aid already paid**

(90) According to certain of Confebask's comments (see above), the aid should not be repaid on account of the legitimate expectations arising, first, from the fact that for many years the Commission did not describe the measures in question as State aid and, second, from the existence of other tax holidays in the rest of the Member State, which were not called into question by the Commission.

(91) As a preliminary, it should be noted that Confebask is not arguing that the Basque firms it represents did not realise that the exemption from corporation task granted on certain conditions to newly established firms did not confer an advantage. The Commission considers therefore that those firms were aware of the advantage conferred by the exemption.

(92) It should also be pointed out that the tax exemption was not put into effect in accordance with the procedure provided for in Article 88(3) of the Treaty. According to established case law [67], however, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent economic operator should normally be able to make sure that this procedure has been complied with. In the case in point, Confebask, which attached copies of the correspondence between the Commission and the Spanish authorities to its comments, cannot claim it was unaware that the measures were illegal.

(93) To be sure, the case-law [68] does not rule out the possibility that recipients of illegal aid may invoke exceptional circumstances, which may reasonably have sustained their legitimate expectation that the aid was valid, in order to oppose repayment, but in this case none of the circumstances put forward in the comments of interested third parties may be taken into account. As regards the possible legitimate expectation created by the Commission not describing the measures in question as State aid for a long period, the Commission would point out firstly that, under Article 13(2) of Regulation (EC) No 659/1999, in cases of possible unlawful aid it is not bound by the time limits applicable to notified aid. Consequently, it is not obliged to adopt decisions on unlawful aid, as in the present case, within two months [69] (in accordance with Article 4(5)) or within 18 months [70] (under Article 7(6)). It should also be pointed out that in its letter of 25 May 1994 to the Spanish Permanent Representation, which Confebask attached to its comments, the Commission drew the Spanish Government's attention to the letter to Member States of 3 November 1983 concerning the obligations arising from Article 93(3) of the Treaty and to the communication published in OJ C 318 of 24 November 1983, in which it repeated that any aid granted unlawfully could be the subject of a request for repayment. Consequently, in the first letter which it sent to the Spanish Permanent Representation following the complaint lodged in 1994, the Commission warned the Spanish authorities that the tax exemption might have the character not only of an aid but also of an illegal aid and that, if appropriate, it might have to be repaid. Moreover, in its correspondence with the Spanish authorities since 1994, the Commission has never described the tax exemption, either directly or indirectly, as compatible with the common market.

(94) As regards the legitimate expectation arising from the existence of other tax holidays in the rest of Spain, it should be noted, as already explained, that the measure has very different characteristics. In the circumstances, it is difficult to justify similar treatment for measures that are very disparate. It should also be noted that, in the case of the other tax holidays, the Commission was unable to rule as to their compatibility, either because they had not been notified or because no complaint had been made against them. Nor has it ever given an opinion, either directly or indirectly, on these measures.

(95) As to the precedent of RSV [71], cited by third parties in support of a legitimate expectation arising out of the

(67) See Case C-5/89, *Germany* v *Commission*, [1990] ECR I-3437, paragraph 14; Case C-169/95, *Spain* v *Commission*, [1997] ECR I-135, paragraph 51; Case C-24/95, Land *Rheinland-Pfalz* v *Alcan Deutschland* GmbH, [1997] ECR I-1591, paragraph 25.

(68) See paragraph 16 of the judgment cited in footnote 71, and Case C-183/91, *Commission* v *Greece*, [1993] ECR I-3131, paragraph 18.

(69) Decision to raise no objection or to initiate the formal investigation procedure.

(70) Decision to terminate the formal investigation procedure.

(71) See footnote 24.

long period that elapsed between the Commission's first letter, of 25 May 1994, and the decision to initiate the procedure in respect of the tax exemption, it is important to stress the particular circumstances of that case. In RSV, the aid was formally notified to the Commission, albeit late. It was also related to additional costs associated with a transaction for which aid had already been authorised by the Commission. It concerned a sector that had been receiving aid authorised by the Commission for several years. An exhaustive investigation was not necessary, therefore, in order to determine whether the aid was compatible. In the present case, however, the aid was not notified, is not linked to aid that has been authorised by the Commission, and does not concern a sector that has received aid before. The Commission therefore considers that the RSV decision is not relevant in this case.

(96) The length of time that elapsed is largely due to the lack of cooperation on the part of the Spanish authorities. By letter to the Permanent Representation dated 19 January 1996, the Commission requested information about the possible recipients of the measures. By fax dated 16 February, confirmed by letter dated 19 February 1996, the Spanish Permanent Representation requested a 15-day extension of the deadline for replying. By letter dated 21 March 1996, the Spanish Permanent Representation requested a further extension of 30 days. Despite these requests, which would suggest that a reply might be forthcoming, the Spanish authorities did not answer the Commission's request for information. The Commission also notes that during this period the Spanish authorities were informed of the procedures it had initiated, following the complaints lodged in 1996 about aid to Demesa ([72]) and, in 1997, about aid to Ramondín ([73]), in respect of the tax holidays ([74]) introduced in Álava in 1996 and enjoyed, in addition to other aid, by those firms. As both files concluded that the 1996 tax holidays were unlawful and incompatible State aid, the information which the Spanish authorities received in this connection, far from arousing any legitimate expectation as to the compatibility of the tax exemption, indicated that it might be incompatible.

(97) In the circumstances, the Commission considers that it did not give any reason to hope that the tax exemption might be compatible. Thus the recipients cannot plead any legitimate expectations or legal certainty where this exemption is concerned. 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' ([75]).

(98) In short, in view of the arguments set out above, the Commission considers that the recipients may not rely on general principles of Community law such as legitimate expectations or legal certainty as regards incompatible aid already paid. 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 that 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 ([76]).

(99) 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.

([72]) State aid file on aid to Demesa (see footnote 52); final Decision 1999/718/EC (see footnote 5).

([73]) State aid file on aid to Ramondín: Decision to initiate the procedure, 30 March 1999 (OJ C 194, 10.7.1999, p. 18); final Decision 2000/795/EC (see footnote 27).

([74]) State aid cases C 49/99, C 50/99 and C 52/99 relating respectively to the tax aid schemes (tax holidays) introduced by Article 26 of the following provincial laws: Provincial Law No 24 of 5 July 1996 (Álava), Provincial Law No 7 of 4 July 1996 (Guipúzcoa) and Provincial Law No 3 of 26 June 1996 (Vizcaya).

([75]) See paragraph 300 of the judgment cited in footnote 56.

([76]) Commission letter to Member States SG(91) D/4577, 4 March 1991. See also Case C-142/87, *Belgium* v *Commission*, [1990] ECR I-959.

7. **CONCLUSIONS**

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

(a) Spain has unlawfully put into effect, in Guipúzcoa, an exemption from corporation tax for certain newly established firms, in breach of Article 88(3) of the Treaty;

(b) the exemption from corporation tax in question is incompatible with the common market;

(c) the Spanish authorities should 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 should take all necessary measures to recover it, so as to restore the economic situation which the recipient firms would be in if the aid had not been granted unlawfully.

HAS ADOPTED THIS DECISION:

Article 1

The state aid in the form of an exemption from corporation tax, unlawfully put into effect by Spain in the Historic Territory of Guipúzcoa, in breach of Article 88(3) of the Treaty, through Article 14 of Provincial Law No 18 of 5 July 1993, is incompatible with the common market.

Article 2

Spain shall abolish the aid scheme referred to in Article 1, if it is still in force.

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 aid to be recovered shall include interest from the date on which it became available to the recipients until the date of its effective 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, 20. December 2001

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 5 June 2002

on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding

C 27/99 (ex NN 69/98)

(notified under document number C(2002) 2006)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2003/193/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:

1. PROCEDURE

(1) On 3 March 1997 the Commission received a complaint concerning alleged State aid granted by Italy in the form of tax exemptions and access to subsidised loans to various public utilities.

(2) On 12 May, 16 June and 21 November 1997 the Commission asked the Italian authorities for initial information concerning the measures in question. By letter of 17 December 1997, registered as received by the Commission on 23 December, the Italian authorities provided some of the information requested. At the request of the Italian authorities, a meeting was held in Rome on 19 January 1998.

(3) By letter dated 17 May 1999, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measures referred to in the complaint.

(4) 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 measures.

(5) The Commission received comments from interested parties. The comments were forwarded to Italy, which replied with its own observations on the followings dates:

— 2 August 1999: first submission,

— 15 October 1999: request for postponement of deadline for presenting observations,

— 28 October 1999: observations on loans from Cassa Depositi e Prestiti (CDDPP),

— 14 December 1999: request for postponement of deadline for presenting observations,

— 3 February 2000: additional observations,

— 8 February 2001: letter stating that Italy would not be adopting the measure referred to in the comments from Federazione Gas Italian (Gas-it),

— 31 July and 3 August 2001: request for postponement of deadline for answering the Commission letter of 25 July 2001,

— 25 October 2001: comments on the 'transfer tax exemption' (see recital 16),

([1]) OJ C 220, 31.7.1999, p. 14.

([2]) See footnote 1.

— 22 November 2001: comments on CDDPP loans,

— 21 December 2001: comments on CDDPP loans.

(6) The Commission received comments from interested parties as follows:

— 10 September 1999: comments submitted by Azienda Elettrica Municipale SpA (AEM) and ACEA SpA (ACEA),

— 31 August 1999: comments submitted by the Bundesverband der Deutschen Industrie (BDI),

— 21 January 2000: additional comments from AEM and ACEA.

(7) The Commission received further comments from interested third parties on the following dates:

— 16 March 2000: comments from Confservizi Cispel (Cispel),

— 13 March and 7 April 2000: comments from Gas-it concerning a new measure planned by the Italian State which, combined with the measures already under investigation, allegedly involve further aid,

— 11 April 2000: comments from Azienda Mediterranea Gas e Acqua SpA (AMGA).

(8) Lastly, the Commission received other comments from AMGA, ACEA and AEM on 12 June 2000. On 7 July 2000 the same parties sent comments to the Commission concerning the Court of First Instance's judgment in *Alzetta Mauro* [3].

(9) The Commission also wrote to the Italian authorities on the following dates:

— 23 August 1999: first letter following the decision to initiate the procedure,

— 1 October 1999: letter forwarding third parties' observations,

— 5 October 1999: reminder following the letter of 23 August 1999,

— 25 October 1999: letter extending the deadline for presenting further observations,

— 4 February 2000: letter forwarding to Italy further observations by third parties,

— 21 January 2000: reminder following the letter of 23 August 1999,

— 11 and 14 April 2000: forwarding to Italy further observations by third parties,

— 25 April 2000: reminder of the obligation to notify new aid measures under Article 87 of the Treaty in connection with the measure referred to by Gas-it,

— 25 July 2001: letter requesting clarification of the 'transfer tax exemption' (see recital 16),

— 17 August 2001: extension of the deadline for presenting further observations.

(10) The Commission also had meetings with representatives from ACEA and AEM on 18 November 1999, 23 March 2000 and 20 June 2000. On 14 April 2000 it also met with representatives from Gas-it.

(11) The Commission met the Italian authorities on 24 October 2001.

2. DESCRIPTION OF THE MEASURES

2.1. National legal background

(12) In Italy municipalities have traditionally provided directly or indirectly [4] various services to their local communities (such as distribution and treatment of water, public transport, gas distribution, etc.) through different organisational arrangements. In 1990 Law No 142 of 8 June 1990 (Law No 142/90) reformed the legal arrangements available to municipalities to provide those services. In accordance with Article 22 of this Law, subsequently amended by Article 17(58) of Law No 127 of 15 May 1997, a municipality may provide the services:

[3] Judgment of the Court of First Instance in Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 [2000] ECR II-2319.

[4] Normally through a separate administrative accounting entity known as a municipal undertaking (azienda municipalizzata).

(a) directly (in economia);

(b) through a separate administrative accounting entity (azienda speciale);

(c) through an institution for non-commercial services;

(d) through licences granted to public or private undertakings (concessione a terzi);

(e) by setting up a joint stock company (società per azioni) or a limited liability company (società a responsabilità limitata) with a majority public shareholding.

(13) A further option for administering such services was introduced by Article 12 of Law No 498 of 1992 (Law No 498/92), namely the possibility of setting up a joint stock company with a minority public shareholding.

(14) As a general rule, in the case of public services provided directly by a municipality or by a separate accounting entity, the service provider cannot operate outside the territory of the municipality itself ([5]). However, joint stock companies set up under Law No 142/90 are not limited by law to a predefined territory or activity and in general they conduct their business as normal commercial entities, subject to the rules of private and commercial law ([6]).

2.2. Detailed description of the measures

(15) In its decision initiating the procedure, the Commission explained that it had doubts whether certain national provisions applicable to joint stock companies with a majority public shareholding set up under Law No 142/90 constituted State aid within the meaning of Article 87 of the Treaty and were compatible with the common market. The provisions in question are:

(a) Article 3(69) of Law No 549 of 28 December 1995, read in conjunction with Article 13a of Decree-law No 6 of 12 January 1991 ([7]);

(b) Article 3(70) of Law No 549, read in conjunction with Article 66(14) of Decree-law No 331 of 30 August 1993 ([8]); and

(c) Article 9a of Law No 488 of 9 August 1986 converting and amending Decree-law No 318 of 1 July 1986 in respect of urgent provisions for public financing (hereinafter Article 9a of Decree-law No 318/1986).

(16) Article 3(69) and (70) of Law No 549/95 provides for a special tax regime for joint stock companies with a majority public shareholding set up under Law No 142/90 and in particular:

(a) exemption from all transfer taxes related to the conversion of special and municipal undertakings into joint stock companies (the transfer tax exemption);

(b) a three-year income tax exemption, up to the tax year 1999, for joint stock companies with a majority public shareholding (the 'three-year income tax exemption').

(17) More specifically, Article 3(69) of Law No 549/95, by making reference to Article 13a of Decree-law No 6 of 12 January 1991 (Article 3(69)) provides that the transfer of assets linked to the conversion of special and municipal undertakings into joint stock companies set up under Laws Nos 142/90 and 498/92 is not subject to the following taxes:

(a) registration tax;

(b) stamp tax;

(c) tax on the increase in value of real estate properties (INVIM);

([5]) Although, under Article 5(1) of Decree No 902 of 4 October 1986, a municipality may, with the agreement of other interested municipalities, widen the territorial scope of its undertaking to the territories of those municipalities. However, Italian case-law has imposed strict conditions on this possibility: see, for instance, Council of State No 1291, Session IV of 29 September 1988, No 1159, Session V of 3 August 1995, No 1374, Session V of 14 November 1996.

([6]) See for instance Court of Cassation, Sezioni unite, No 4989, 6.5.1995.

([7]) As converted and amended by Law No 80 of 15 March 1991.

([8]) Converted into Law No 427 of 29 October 1993.

(d) mortgage tax and cadastral duty;

(e) any other transfer taxes.

(18) The tax regime provided for in Article 3(69) was later confirmed in Articles 115(6) and 118(1) and (2) of Decree-law No 267 of 18 August 2000.

(19) Article 3(70) of Law No 549/95, read in conjunction with Article 66(14) of Decree-law No 331 of 30 August 1993 ([9]) (Article 3(70)), provides that joint stock companies set up under Law No 140/90 qualify for exemption from income tax (tax on incomes of legal persons (IRPEG) and local income tax (ILOR)) for three years starting from their incorporation and, in any case, not beyond the tax year ending on 31 December 1999.

(20) Article 9a of Decree-law No 318/1986 allowed joint stock companies with a public majority shareholding which provide public services to contract loans directly with CDDPP. According to information from the Italian authorities, such loans were granted to joint stock companies set up under Law No 142/90 from 1994 to 1998 ([10]). Only loans granted to such companies in accordance with Article 9a of Decree-law No 318/1986 are concerned by this Decision.

3. COMMENTS FROM INTERESTED PARTIES

(21) The Commission received comments from various interested parties.

(22) Several firms (AEM, AMGA and ACEA) commented as follows:

(a) the measures do not constitute State aid. As the sectors in which the joint stock companies in question operate were not open to competition, the measures could not distort competition. Thus an essential requirement for a measure to be regarded as State aid, i.e. that it distorts competition, is missing;

(b) in any event, even if the measures constituted State aid, they should be regarded as existing aid;

(c) furthermore, the aid should be regarded as being compatible under Article 87(3)(c) because, although the measures were temporary, their purpose was to facilitate the transformation and restructuring of the companies with a view to helping them to cope with the transition from a closed to a liberalised market.

(23) As regards point (a) in the preceding recital, the abovementioned firms argued that the joint stock companies provided services on the basis of exclusive rights in the territory of the municipality to which they belonged. At the same time, they did not tender for the provision of the services in the territories of other municipalities. There was apparently only one exception to this, see the tender for the management of the Arezzo municipal waterworks, in which ACEA, AMGA and Compagnie Générale des Eaux took part ([11]). In addition, AMGA and Lyonnaise des Eaux submitted a bid for management of the Alto Valdarno waterworks ([12]). The firms also maintained that the measures in question did not give the joint stock companies an advantage in entering new markets. The tax advantage was not significant when compared with the cost of expanding into new markets (e.g. in the telecoms sector).

(24) With regard to recital 22(b), the firms argued that the classification of the measures in question as existing State aid was based on two sets of considerations. First, it should be stressed that municipalities and municipal undertakings have been exempt from income tax since the beginning of the century. The new joint stock companies under Law No 142/90 are, from an economic viewpoint, the same special undertakings that used to benefit from the exemption. The three-year income tax exemption provided for in Article 3(70) is thus in fact a limitation of a prior tax exemption. As Article 3(70) does not therefore constitute either a new measure or an amendment to an existing one, it must be classified as existing aid.

([9]) The provisions stipulate that the same tax regime applicable to a local authority controlling joint stock companies set up under Law No 142/90 applies to the joint stock company itself for three years after incorporation. As a result, the latter qualifies for the three-year income tax exemption.

([10]) Comments from the Italian authorities of 28 October 1999 and 21 December 2001.

([11]) AEM and ACEA comments of 21 January 2000, paragraph 28.

([12]) AMGA comments of 11 April 2000, paragraph 23. It is not clear whether the comments refer to the same tender mentioned by AEM and ACEA in their comments of 21 January 2000.

(25) Second, and more generally, as they entered into force when the markets in which the joint stock companies operated were closed to competition, all the above measures should now be classified as existing aid (see in particular Article 1(b)(v) 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]) and the Court of First Instance's judgment in *Alzetta Mauro* ([14]).

(26) With regard to recital 22(c), AEM, AMGA and ACEA explained that the measures were aimed solely at favouring the transition from a monopolistic market structure to a competitive one allowing private capital and private ownership to participate in the management of local services. This being so, the measures should be regarded as being covered by Article 87(3)(c) since they constitute aid facilitating the development of a certain economic activity, i.e. the provision of local public services. The Commission has already decided that aid facilitating the transition from a monopolistic market structure to a competitive one may be compatible under Article 87(3)(c) (see in particular the Commission decisions on the Milk Marketing Board ([15]) and Dutch public transport ([16])).

(27) Finally, the firms argued that the measures were not discriminatory because it was not necessary for possible private competitors of joint stock companies set up under Law No 142/90 to become private companies in order to operate freely on the market and that the State had not forgone any resources to which it was entitled because the loss in tax revenue was offset by higher profits for the municipalities.

(28) Cispel, an association representing such joint stock companies and special undertakings, commented as follows:

(a) at the time the measures in question in the sector concerned were adopted, there was a legal monopoly. Local authorities could either reserve for themselves the provision of certain services on their territory or grant licences to third parties together with exclusive rights. As there is thus no competition, the measure cannot be regarded as constituting State aid under Article 87(1);

(b) the measures were intended to facilitate the conversion of public-sector undertakings governed by public law into firms governed by common law via a transition from a monopolistic situation to a competitive one. They did not discriminate between private- and public-sector undertakings because the latter were in a different position: they did not require any changes in order to operate in the market. The measures should therefore be regarded at least as compatible aid under Article 87(3)(c), which provides for aid aimed at facilitating the development of certain economic activities;

(c) in addition, the measures do not constitute State aid because: (i) the joint stock companies are not undertakings for the purposes of competition law; (ii) the measures simply offset the extra cost of the public service entrusted to them; (iii) they are not financed from State resources as the State forgoes tax revenues at central level but gains at local level; (iv) they are general measures; (v) they are justified by the nature and general scheme of the system: under Italian tax law, the legislator has a wide margin of manoeuvre in determining taxable persons and was therefore able to exempt the joint stock companies for a transitional period; (vi) they did not affect trade between Member States since the goods and services produced by the recipients are not traded between Member States but intended only for the local market; (vii) the transfer tax exemption does not confer any advantage on the joint stock companies as the municipality would have been liable for the taxes in any case.

(29) Cispel also argued that the measures in question were justified by the exemption in Article 87(3)(b) of the Treaty which provides for 'aid to remedy a serious disturbance in the economy of a Member State' and by Article 86(2).

([13]) OJ L 83, 27.3.1989, p. 1.
([14]) See footnote 3.
([15]) Case C 45/93 (N 663/93) (OJ C 100, 9.4.1994, p. 9).
([16]) Case N 199/99 (Dutch local public transport services) (OJ C 379, 31.12.1999, p. 11.)

(30) The Bundesverband der Deutschen Industrie observed that tax exemptions and soft loans for firms controlled by the State would distort competition not only in Italy but also in Germany.

(31) Gas-it, an Italian association of private companies distributing gas on the basis of concessions granted by local authorities, considered that the measures referred to by the Commission constitute State aid. In particular, the three-year exemption from income tax is clearly State aid because private firms engaged in the same activity as the joint stock companies are, unlike the latter, subject to a tax on profits of almost 50 %. Furthermore, Gas-it stressed that Article 87(3)(c) could not be invoked to justify the measures as they were not aimed at facilitating the development of a whole economic sector but rather at granting advantages to certain firms operating in the sector on the basis of their legal status (entity transformed into a joint stock company) and shareholding structure (public majority and private minority). Finally, Gas-it pointed out that the Italian authorities were discussing a draft law that contained other advantages for the joint stock companies. However, on 8 February 2001 the Italian authorities informed the Commission that discussion of the draft law had been blocked.

4. COMMENTS FROM THE ITALIAN AUTHORITIES

(32) The Italian authorities stated that the measures under examination applied only to companies that were almost exclusively involved in providing what they described as local public services, i.e. services on a local scale in the sectors of electricity, gas, water, transport, waste, and pharmaceutical products. The Italian authorities argued that the measures did not constitute State aid for the following reasons:

(a) they did not distort competition because when they were adopted the sectors in which the joint stock companies operate were not open to competition;

(b) they did not affect trade between Member States because the companies operated on a purely local level;

(c) they were not financed from State resources as the State did not forgo resources to which it was entitled. Being part of the public administration, the recipients were already exempt from tax even before they were converted into joint stock companies. Rather, the State earned revenue at the level of the municipalities.

(33) The authorities also argued that, if the measures were regarded as State aid, they should constitute existing aid because the economic sectors concerned were not open to competition when they were adopted. In addition, they would be compatible under Article 87(3)(c) (restructuring aid) or Article 86(2) (service of general economic interest).

(34) As regards the exemption in Article 87(3)(c), the Italian authorities argued that the measures in question enabled the public undertakings providing local services to acquire a more competitive market structure. They also claimed that the Commission had already declared aid to be compatible if it facilitated the transition from a monopoly to a situation of free competition. They added that the requirement in Article 87(3)(c) that aid must not 'adversely affect trading conditions to an extent that is contrary to the common interest' was met because of the very weak degree of competition ([17]) in the sectors concerned.

(35) As regards the exemption in Article 86(2), the Italian authorities claimed that all the firms concerned provided services of general economic interest and that, therefore, the Article should cover the measures, which applied to all public undertakings providing this type of service. Only the three-year income tax exemption applies solely to firms with a majority public shareholding, but this can be explained by the fact that the control of public authorities in this kind of company is greater than in companies where the public authorities have only a minority shareholding.

(36) As to Article 3(69), the Italian authorities also pointed out that (i) as the municipalities would in any case be liable for the taxes, the measure could not be regarded as conferring an advantage on the joint stock companies and (ii) exemption from the transfer tax should be regarded as a measure which is justified by the nature and scheme of the system.

([17]) Italian authorities' observations of 2 August 1999, p. 10.

(37) As regards the latter argument, the Italian authorities stressed first that setting up a joint stock company under Law No 142/90 could not be treated in the same way as the setting-up of a normal commercial firm. Second, the exemption in question is an application of the principle of tax neutrality. This principle is enshrined in Italian tax law and underlies the transformation of the legal status of a firm (i.e. when the legal status of a firm changes but the firm remains the same from an economic viewpoint). According to this principle, simply changing the legal status of a firm is not relevant for tax purposes because it does not confer an economic advantage on the firm.

(38) With particular regard to Article 9a of Decree-law No 318/1986, the Italian authorities claimed that the loans from CDDPP were granted only to allow the joint stock companies to carry out the public service task entrusted to them and that the measure should accordingly be considered compatible under Articles 87(3)(c) or 86(2). Moreover, as from 1999, CDDPP can grant loans to any provider of public services regardless of its legal status ([18]).

(39) As regards the issue of the comparison between the interest rate applied by CDDPP to its loans and the rate that the joint stock companies might have obtained on the market, the Italian authorities claimed in their comments of 2 August 1999 that the interest rate applied by CDDPP was lower than market rate only when 'it was clear beyond any doubt that the activities in question were not subject to competition'. In their comments of 28 October 1999, they argued that the interest rate applied by CDDPP was substantially in line with the market rate. They reached that conclusion by comparing the rate applied by CDDPP with the maximum rate for loans to local authorities, which is fixed by the Treasury.

(40) In their comments of 22 November 2001, the Italian authorities repeated the arguments set out in recitals 38 and 39. The maximum interest rate fixed by the Treasury for loans to local authorities should serve as the reference rate for the Commission's assessment. In any event, the articles of association of the joint stock companies as well as the case-law prohibited them from operating outside the territory of the municipality to which they belonged. However, they also added that CDDPP practice had been not to grant loans to firms when 'it was clear that they would engage in activities outside their own municipalities'.

(41) Lastly, in their comments of 21 December 2001, the Italian authorities added that they could not agree that the interest rate applied by CDDPP conferred an advantage on the companies in question as CDDPP rates were consistently higher than other rates for soft loans, which are fixed according to parameters established by the Treasury Minister.

5. ASSESSMENT OF THE MEASURES

(42) As already stated in its decision to initiate the procedure, the Commission 'having regard to the broad and abstract nature of the legislation concerned (…) has instituted the present procedure in relation only to the specific aspects identified in the preceding analysis ([19])'. The Commission's analysis therefore concerns the aid schemes consisting in the measures in question, and not individual grants of aid to particular undertakings ([20]). The schemes are the instruments by which Italy conferred advantages on all firms satisfying the relevant conditions (i.e. joint stock companies set up under Law No 142/90).

(43) Italy did not grant the tax advantages on an individual basis or notify any individual cases to the Commission, together with all the information necessary for the Commission to assess it. Accordingly, the Commission is bound by the nature of the measures to carry out a general and abstract examination to determine both whether they constitute State aid under Article 87(1) of the Treaty and whether such aid is compatible with the common market. Thus, all the elements necessary to assess whether the schemes involve State aid and whether such aid is compatible with the common market are to be found in the schemes themselves. The Treaty, Regulation (EC) No 659/1999 and the case-law

([18]) See Decree-law No 284 of 1 September 1999.

([19]) See section 3.

([20]) In its decision, the Commission had reserved the right to investigate individual grants of aid made under the scheme (section 3).

of the Court ([21]) empower the Commission to conduct such an analysis.

(44) The Commission will therefore not be examining the application of the measures in individual cases. It should also be borne in mind that in the present case Italy has not asked the Commission to analyse the individual applications of the schemes. The Commission does not know the exact number or identity of the beneficiaries of the measures ([22]), does not have all the relevant information and is unaware of the amounts of aid granted in individual cases.

(45) As regards CDDPP loans, both entitlement and the interest rate were provided for in a general way and did not take account of the specific conditions of each beneficiary. The Italian authorities did not notify the Commission of the individual loans granted to the joint stock companies by CDDPP. They simply provided a list of joint stock companies benefiting from CDDPP loans, which, as it does not contain any relevant information on the financial situation of the companies, does not allow the Commission to make an individual assessment. The Commission considers that it would be required to assess individual cases only if the national authorities had requested it to do so and had supplied it with all the information necessary to conduct an assessment, i.e. all the information that would normally have to be provided to the Commission when individual aid under Article 88(3) of the EC Treaty was notified. Since the opening of the procedure, the Italian authorities have been fully aware of the Commission's doubts concerning the scheme. If they considered that some particular cases, because of their specific features, should have been assessed on an individual basis, they should have informed the Commission of the features and provided all the information needed for an individual assessment to be made.

5.1. **Article 87(1)**

(46) A State measure constitutes State aid within the meaning of Article 87(1) of the Treaty if:

(a) it is granted by a Member State or through State resources in any form whatsoever;

(b) it favours certain undertakings or the production of certain goods (grants a selective advantage);

(c) it distorts or threatens to distort competition;

(d) it affects trade between Member States.

(47) The Commission notes that the three-year exemption from income tax and the loans granted under Article 9a of Decree-law No 318/1986 meet all the requirements of Article 87(1). The measures therefore comprised State aid within the meaning of Article 87(1). On the other hand, the Commission is of the opinion that the transfer tax exemption is not State aid within the meaning of Article 87(1) in view of the nature and general scheme of the system.

Aid granted by a Member State or through state resources

(48) Although the three-year income tax exemption does not involve a direct cash outflow for the State, it nevertheless directly affects the public budget as the State forgoes tax revenue to which it is legally entitled and which it would normally have claimed. It is thus clear that the aid is granted through state resources. The Court of Justice has consistently held that 'a measure whereby the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the exemption applies in a more favourable financial position than other taxpayers, constitutes State aid within the meaning of Article 92(1) of the Treaty' ([23]).

(49) As regards the soft loans granted by CDDPP, the Commission notes that, under the relevant Italian legislation, CDDPP was established and fully controlled

([21]) Judgment in Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraphs 17 and 18; Judgment in Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, paragraphs 20 and 21; Judgment in Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 48; Judgment in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 51.

([22]) In their letter of 2 August 1999, the Italian authorities stated that some 100 joint stock companies were incorporated pursuant to Law No 142/90. In their letter of March 2000, they provided a list of 31 joint stock companies that benefited from the tax measures under examination. As the tax measures at issue are applicable to any joint stock company at the moment of incorporation, it is not even clear how many beneficiaries are involved.

([23]) Case C-6/97 *Italian Republic* v *Commission* [1999] ECR I-2981, paragraph 16.

by the Treasury, now the Ministry of Economic and Financial Affairs, which provides the chairman for its managing board and appoints its members and the Director-General. CDDPP's activities are supervised by Parliament through a specific committee. According to the Court of Justice, in order to determine if a measure can be regarded as constituting State aid within the meaning of Article 87 of the Treaty, 'no distinction should be drawn between cases where aid is granted directly by the State and cases where it is granted by public or private bodies established or appointed by the State to administer the aid' ([24]). The individual CDDPP loans to the joint stock companies were indeed granted under Article 9a of Decree-law No 318/1986. Moreover, under Italian law, CDDPP is explicitly defined as a State administration ([25]). The fact that some of the funds managed by CDDPP are from private sources and must be reimbursed is not relevant in this context. Even if the sums corresponding to the measure in question were not permanently held by the Treasury, the fact that they remain at all times under public control and thus available to the competent national authorities is sufficient for them to be classed as State resources ([26]).

(50) It is clear from a number of elements that, although the loans were granted by CDDPP, they are attributable to the State ([27]). CDDPP is an integral part of the structures of the public administration, it is subject to public law and the public authorities supervise its management. The loans themselves are expressly provided for in Article 9a of Decree-law No 318/1986 and must comply with the conditions (in particular the interest rate) laid down by Treasury decree in accordance with Article 9(3) of the same instrument. All these elements clearly show involvement of the public authorities in the granting of CDDPP loans. Accordingly, loans granted by CDDPP are granted by a Member State or through State resources.

Aid that favours certain undertakings or the production of certain goods

(51) According to settled case-law, State aid should not be limited to capital grants or subsidies but includes all measures which, while not being in the nature of a subsidy, are capable of producing the same economic effects. In particular, this concept is thus wider than that of a subsidy because it embraces not only positive benefits, such as the subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which have the same effect ([28]).

(52) The three-year income tax exemption has the same effect as a direct subsidy as it eliminates a cost item which otherwise would have been included in the budget of the beneficiary ([29]). The beneficiary's net profit is thus increased compared with that of any other firm in a comparable situation.

(53) In the comments received from the Italian authorities ([30]) and other parties, it is pointed out that, in the relevant period, joint stock companies were subject to income tax amounting to around 50 % of profits. The exemption in question enabled only municipal undertakings that had become joint stock companies under Law No 142/90 to avoid for three years (but not after the tax year 1999) the standard rate of income tax applicable to joint stock companies on condition that at least a majority of the share capital remained public.

(54) The measure therefore favoured certain undertakings within the meaning of Article 87(1) of the Treaty.

(55) According to established case-law ([31]) the granting of a loan by State-controlled entities such as CDDPP to a firm may favour that firm within the meaning of Article 87(1) of the Treaty if the borrower is granted terms that are more favourable than those that it would have obtained in the capital market.

(56) In order to determine whether the CDDPP loans to the joint stock companies favoured them, the CDDPP interest rates must be compared with the interest rate that they would have obtained over the same period on

([24]) Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 13.
([25]) Decree-law No 284/1999.
([26]) See Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 50, and Case C-482/99 *France* v *Commission*, judgment of 16 May 2002, not yet reported, paragraph 37. See also Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraphs 65 to 68.
([27]) See Case C-482/99 *France* v *Commission*, *op cit.*, paragraphs 55 and 56.
([28]) Judgment in Case C-387/92 *Banco Exterior* [1994] ECR I-877, paragraph 13.
([29]) See Case C-387/92 *Banco Exterior, op cit.*
([30]) Italian authorities' comments of 2 August 1999, p. 4.
([31]) Case C-142/87 *Belgium* v *Commission* [1986] ECR 231.

the capital market [32]. In order to carry out the comparison, the Commission must also use a general rate, given the general and abstract nature of the measure in question. It is clear that the Commission cannot accept as reference rates the rates proposed by the Italian authorities. These by definition are not market rates since they are determined according to criteria established by the public authority. Moreover, the maximum rate for loans to local authorities does not even appear to be a rate that should be available to undertakings while the rates for subsidised credit operations are specifically designed to be more favourable than market rates.

(57) The market rate to be used as a reference point for this comparison is therefore the rate laid down for the evaluation of regional State aid schemes [33].

(58) The table below compares the CDDPP rate, as communicated to the Commission by the Italian authorities, with the said reference rate.

CDDPP interest rate and Commission reference rate

	CDDPP rate	Reference rate	
1994	9,00	11,9	
1995	9,00	11,35	
1996	8,81	11,35	12,37 (*)
1997	7,48	10,86	8,21 (*)
1998	5,53	8,20	6,95 (**)

(*) Rate applicable as from 1 August to 31 December of the relevant year.
(**) Rate applicable as from 1 June to 31 December of the relevant year.

(59) The table shows that the joint stock companies benefited from a selective advantage. In addition, the Commission notes that CDDPP applied a uniform interest rate each year without taking into account the specific risk associated with each financing operation. In effect, loans at below market rates gave the joint stock companies access to the capital market at a lower cost than that available to other firms.

(60) The measure therefore favoured certain undertakings within the meaning of Article 87(1) of the Treaty since only joint stock companies under Law No 142/90 (i.e. in which the municipalities retained a majority holding) and not other firms in a similar position were allowed to benefit from CDDPP loans.

Aid that distorts or threatens to distort competition

(61) Competition is distorted when State aid reinforces the competitive position of the recipient firm in relation to its competitors [34].

(62) The measures strengthen the competitive position of the joint stock companies in question in relation to other firms intending to provide the same services. Firms that are not joint stock companies and a majority of whose shares are not held by the local authorities find themselves in a disadvantaged position if they intend to compete for the granting of a licence to provide a particular service in a given territory.

(63) The three-year income tax exemption removes a significant cost item from the budget of these firms that they would otherwise have borne. At the same time, the beneficiary's net profit is thus increased in relation to that of another firm in a comparable situation. The profit can be used to distribute higher dividends (therefore making capital investments in such firms particularly profitable, with distorting effects on the capital market) or to make investments without the need to call on the market for the necessary financial resources (and so affect competition on the market where the investment is made). On the other hand, the advantages resulting from the exemption allow the firms to operate under conditions that would not otherwise be possible. The same holds for the financial advantage inherent in the loans granted at below market rate by CDDPP to the joint stock companies in question.

(32) Case T-16/96 *Citiflyer* [1998] ECR II-0757.
(33) Reference rate for the monitoring of State aid as defined by the Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3), as amended by Commission notice (OJ C 241, 26.8.1999, p. 9).
(34) See Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11 and the opinion of the Advocate General; see also Case 259/85 [1987] ECR 4393, paragraph 24. See also the opinion of the Advocate General in Case C-280/00 *Altmark* not yet published, paragraph 103, where he notes that this requirement is very easy to fulfil since it can be assumed that any State aid distorts or threatens to distort competition.

(64) The additional financial resources may help the firms to expand into other markets, thus also distorting sectors other than local public services ([35]). They may also make it more difficult for firms in other Member States to enter the Italian markets where the joint stock companies are present.

Effect on trade

(65) 'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid' ([36]), even if the recipient firm is not itself involved in exporting ([37]). Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipients themselves to carry on their business outside the Member State for the aid to have an effect on Community trade, especially in the case of firms established close to the frontier between two Member States ([38]).

(66) In the sectors where joint stock companies set up under Law No 142/90 are mainly active (as claimed by the Italian authorities), i.e. local public services, competition often is not related to the sale of a service in the same area as another competitor. Most of the services are in fact provided on the basis of exclusive rights covering part or all of the territory of the municipality ([39]). Competition occurs primarily when companies established in Italy as well as in other Member States bid for concessions or public procurement contracts to provide the service in different municipalities in Italy or in other Member States.

(67) As noted in the decision instituting the procedure ([40]), 'in the case of services, as in the present case, trade does not involve a physical flow of goods from one Member State to another. In this sector, firms compete for the award of concessions to provide services in the various municipalities. Firms benefiting from the measures in question may possibly offer lower prices for concessions in different municipalities, thus reducing the available market for actual or potential competitors' ([41]).

(68) It is worth noting that the market for concessions for local public utilities is open to Community competition and to all Community firms and is subject to the rules of the Treaty ([42]).

(69) The measures under investigation affect trade between Member States in so far as they injure foreign companies bidding for local concessions in Italy, as public firms benefiting from the scheme can bid at more competitive prices than national or foreign competitors not benefiting from it. In addition, the scheme would make it less attractive for companies from other Member States to invest in the utilities sector in Italy (e.g. by acquiring majority holdings) since any companies acquired would not be entitled to (or may lose) the aid because of the nature of their new shareholders.

(70) In general, aid to local service providers may create an obstacle for foreign firms wishing to establish themselves or sell their services in Italy ([43]) and therefore affects trade between Member States. These factors are sufficient, in the Commission's view, to satisfy the requirement in Article 87(1) that the measure affects trade between Member States ([44]).

(71) The Italian authorities argued that very few concessions were awarded by selective procedure during the period

([35]) This risk of distortion of competition is real. It is well known and there is confirmation from information in the Commission's possession that some joint stock companies have entered other markets which do not fall within the definition of local public services given by the Italian authorities.

([36]) See Case 730/79, paragraph 11, and Case 259/85, paragraph 11 (see footnote 34).

([37]) Case C-75/97 *Maribel* bis/ter [1999] ECR I-3671.

([38]) Case C-310/99 *Italy* v *Commission*, judgment of 7 March 2002, not yet reported.

([39]) This, however, does not apply to all the sectors that have been indicated by Italy as the main sectors for the joint stock companies. For instance, it does not apply to the retail sale of pharmaceutical products and services relating to waste.

([40]) Section 3(3).

([41]) It should be borne in mind that the award of a concession to a third undertaking is one of the possibilities under Law No 142/90 that is available to municipalities in organising the provision of local public services.

([42]) See Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000, p. 2).

([43]) See Commission Decision of 14 October 1998 *Société Marseillaise de crédit* (OJ L 198, 30.7.1999, p. 1), Case C-475/99 *Ambulanz Glockner* [2001] ECR I-8089, paragraph 49, and the opinion of the Advocate General in the same case, paragraph 170.

([44]) The Commission does not need to base its appraisal of the effect on trade on evidence of the real effect of the aid on competition or trade between Member States (see Joined Cases T-204/97 and T-270/97 *EPAC* [2000] ECR II-2267, paragraph 85, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro* [2000] ECR II-2319, paragraph 76.

in which the measures were applied. They added that, as the firms in question provided services at a local level, the effect on trade was insignificant. These arguments cannot be accepted. According to well-established case-law, even if trade between Member States in a certain economic sector and at a given point in time is limited, it does not prevent the measure from constituting State aid ([45]), especially where the limited amount of trade might be the result of a breach of Community law. Otherwise, Member States could have an incentive to hamper the development of trade in that sector in order to prevent the application of the rules of the Treaty on State aid. It cannot be ruled out that the very existence of the aid for the joint stock companies encouraged the municipalities to entrust them directly with the services instead of granting licences by open tender procedure. Lastly, it must be noted that, as the Italian authorities carried out few selective procedures over the relevant period, that situation might be also the consequence of an infringement of Community rules and principles on public procurement and concessions. This infringement is currently the matter of infringement proceedings initiated by the Commission against Italy ([46]). Moreover, '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' ([47]). By the same token, the fact that the recipient does not itself export its products to other Member States or operates at a local level does not mean that trade between Member States might not be affected ([48]).

(72) As nothing in the aid schemes ensures that the aid to be granted in each individual case will comply with the *de minimis* criteria, the *de minimis* principle laid down in Commission notices and secondary legislation ([49]) is clearly not applicable as such to the measures under examination. However, it cannot be ruled out that some individual cases might fall below the *de minimis* thresholds. In those particular cases the measures would be deemed to fall outside the scope of Article 87(1) of the Treaty and of this Decision.

(73) It should also be noted that the measures under examination could also affect trade between Member States because some of the sectors referred to by the Italian authorities as the main sectors of activity for the joint stock companies at the time that the measures in question were implemented were certainly already involved in trade between Italy and other Member States (e.g. pharmaceutical products, electricity, waste). Trade was thus not only foreseeable but already existed to a certain extent.

(74) Finally, the joint stock companies in question can choose to operate in markets for other products traded between Member States. As was noted by the Commission when it initiated the procedure and as was later confirmed by some of the firms that submitted comments, several joint stock companies have entered other markets characterised by very intensive trade between Member States ([50]). It was therefore foreseeable that the measures could affect trade in sectors other than utilities.

(75) Accordingly, the Commission concludes that the three-year income tax exemption and the loans granted to the joint stock companies under Article 9a of Decree-law No 318/1986 constitute State aid within the meaning of Article 87(1) of the Treaty ([51]).

([45]) Joined Cases T-132/96 and T-143/96 *Volkswagen* [1999] ECR II-3663, paragraph 211; Joined Cases T-447/93, T-448/93 and T-449/93 *Associazione Italiana Tecnico Economica del Cemento, British Cement Association, Blue Circle Industries plc, Castle Cement Ltd, The Rugby Group plc* and *Titan Cement Company SA* v *Commission* [1995] ECR II-1971, paragraphs 139 and 140.

([46]) Infringement proceedings No 1999/2184, letter of formal notice dated 8 November 2000.

([47]) Case C-142/87 *Tubemeuse* [1990] ECR I-959, paragraphs 42 and 43; Case C-310/99 *Italy* v *Commission*, judgment of 7 March 2002, not yet reported, paragraph 86.

([48]) Case C-142/87 *Kingdom of Belgium* v *Commission* [1990] ECR I-959, paragraph 35; Case 102/87 *French Republic* v *Commission* [1988] ECR 4067, paragraph 19; Case C-75/97 *Kingdom of Belgium* v *Commission* (Maribel bis/ter scheme) [1999] ECR I-3671, paragraph 49; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro* [2000] ECR II-2319, paragraph 91; Case T-55/99 *CETM* [2000] ECR II-3207, paragraph 86.

([49]) See the Community guidelines on State aid for small and medium-sized enterprises (OJ C 213, 19.8.1992, p. 2); the Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9 and Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 010, 13.1.2001, p. 30).

([50]) For example, ACEA and AEM entered the telecommunications market; AMGA has declared that it is also involved in the supply of network management software and specialised services to other undertakings, e.g. in the water distribution sector.

([51]) In so far as it could be argued that the measures in question are not State aid because they offset the net cost of a service of general economic interest, see the reasoning below concerning compatibility within the meaning of Article 86(2).

5.2. **The transfer tax exemption is not covered by Article 87(1)**

(76) The Italian authorities acknowledge that the transfer tax exemption is a special tax regime applicable only to the conversion of municipal or special undertaking into joint stock companies. However, the selective nature of a measure may be justified by 'the nature or general scheme of the system' ([52]), in which case the measure is not State aid.

(77) In this connection, the Commission notes first that transfer taxes normally apply to the creation of a new economic entity or to the transfer of assets between different economic entities. When a municipal undertaking is converted into a joint stock company under Law No 142/90, it seems, merely because of the technicalities of the Italian legal system, as if a new economic entity has been created. This, however, is in appearance only: the municipal undertaking and the joint stock company are substantially the same economic entity operating under a different legal form.

(78) As indicated in the preparatory work by the Italian Senate ([53]), the Italian legal system makes no provision in its general rules on conversions of the legal form of companies for conversion of a municipal undertaking into a joint stock company. The conversion therefore had to take place by 'technically' winding up the municipal undertaking and setting up a 'new' joint stock company. The upshot is that a new economic entity is apparently created although, as already stated, it is the same economic entity operating under a different legal status. It is thus justifiable that the normal tax rules on transfers of assets for the setting-up of a new economic entity should not apply in this case.

(79) The Italian authorities also claimed that the simple conversion of the legal form of companies is governed by the principle of tax neutrality because the conversion in itself is not an indication of an increase in income or in the capacity to produce income. The transfer tax exemption is therefore a specific application of that principle to this particular case. And indeed, unlike the three-year income tax exemption, the transfer tax exemption applies to any conversion of a special or municipal undertaking into a joint stock company, regardless of the latter's shareholding composition.

(80) At the same time, it is also clear that the conversion of a special or municipal undertaking into a joint stock company cannot be treated like the normal incorporation of a company since it is not a transaction that would be carried out by a private investor but a public authority decision regarding the choice of legal instrument offered by Law No 142/90 for the provision of certain services at local level ([54]).

(81) In the light of the foregoing, the Commission concludes that the reasons for the exemption are consistent with the proper functioning and efficiency of the tax system. The exemption is based on the principle of tax neutrality, which is a basic principle of the tax system. The measure in question is therefore justified by the nature or general scheme of the system and does not constitute State aid within the meaning of Article 87(1) of the Treaty.

5.3. **Nature of the aid: new or existing**

(82) There are two questions to be answered in this connection. The first is based on the argument that, at the time of the entry into force of the measures under consideration, the sectors in which the joint stock companies were operating were not open to competition. As a result, all the measures in question should be regarded as existing aid under Article 1(b)(v) of Regulation (EC) No 659/99 and by virtue of the Court of First Instance's judgment in *Alzetta Mauro* ([55]).

(83) This argument cannot be accepted. The measures under examination must be examined as aid schemes. They are capable of benefiting all joint stock companies set up under Law No 142/90. These are firms that are allowed to operate directly or indirectly in whatever economic

([52]) Case 173/73 *Italy* v *Commission* [1974] ECR 709. Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3, point 12).

([53]) Parliamentary acts of the XIIth Legislature, Senate of the Republic, p. 18, No 2157.

([54]) Essentially, the choice facing the municipality is whether to limit the operation of its undertaking to the provision of local public services within its own territory or to set up a company that is entitled to operate in different economic sectors and wherever it can seize business opportunities.

([55]) See footnote 3.

sector they and/or their shareholders choose. There is nothing in these schemes to indicate that the aid was to be restricted exclusively to sectors not open to competition.

(84) Moreover, contrary to the Italian authorities' submissions, the information in the Commission's possession shows that there was indeed some competition in at least some of the sectors indicated by the Italian authorities as being those in which the joint stock companies were mainly operating when the measures were put into effect. Examples of such sectors are pharmaceutical products, waste, gas and water. This analysis was confirmed by the Italian authorities themselves when they claimed that there was a 'very weak degree of competition' in the sectors concerned ([56]). Even if competition in a particular economic sector and at a given point in time is limited, Member States are not free to adopt State aid measures that might prevent the development of competition or reduce existing competition.

(85) In conclusion, the claim that all the sectors in which the joint stock companies were operating at the time of the entry into force of the measures were not subject to any competition is unfounded. The measures under examination cannot therefore be regarded as existing aid on the basis of that argument, except for the possibility that individual aid granted under the schemes in question is regarded as existing aid by virtue of the recipient's special situation.

(86) The second question to be resolved is the claim that the three-year income tax exemption should be regarded as existing aid. The argument runs substantially as follows. Since the beginning of the century, municipal undertakings and then special undertakings ranked as local authorities for tax purposes and, as such, they were not liable for the tax in question. The joint stock companies have taken the place of municipal undertakings. The three-year income tax exemption enjoyed by the joint stock companies is not therefore a new tax measure but the application of an existing one. Rather than introducing new State aid, Article 3(70) of Law No 549/95 had the effect of limiting to three years the tax exemption in question and abolishing a provision that distorted competition.

(87) Leaving aside the question of whether municipal and then special undertakings were really exempt from all income tax, the Commission concludes that the concept of existing aid does not cover the three-year income tax exemption in question.

(88) The leading case-law on the concept of existing aid is the *Namur Ducroire* case ([57]), where the Court answered the question whether a decision authorising the enlargement of the field of activity of a public undertaking (OND in this case) implies that aid granted to such an undertaking becomes new aid. The Court noted that legislation predating the entry into force of the Treaty defined (i) the purpose and areas of operation of OND in very general terms (provision of export guarantees), (ii) provided for some advantages, and (iii) contained no restriction in terms of subject matter or geographical area on OND's activity ([58]). In these circumstances OND, which for many years limited its activity to the insurance of certain export risks, decided (with the necessary consent of the Belgian Government) to provide insurance also for export to western European countries.

(89) The Court observed that the question of whether aid is new or existing aid must be answered by reference to the provisions laying down the measure. It held that the decision to expand the export risks covered by OND (which did not go beyond the original description of the scope of OND's activity) did not amend the legislation granting those advantages either in regard to the nature of those advantages or in regard to the activities of the public undertaking. Accordingly, the aid was existing aid.

(90) None of the requirements referred to in the abovementioned ruling for a measure to be regarded as existing aid are met in the present case.

(91) There was no statutory provision for the three-year income tax exemption for the joint stock companies

([56]) Italian authorities' observations of 2 August 1999, p. 10. At the same time, the Italian authorities suggested that the joint stock companies also engage in activities open to competition.
In addition, AMGA, one of the firms that submitted comments, after denying the existence of any competition, acknowledges that, in reality, there was some competition. Indeed, in point 35 of its observations of 11 April 2000, it argued the three-year income tax exemption was aimed at removing a distortion of competition.

([57]) Case C-44/93 [1994] ECR I-3829.

([58]) *Op. cit.*, paragraphs 23 and 24.

prior to the entry into force of the Treaty. The exemption is provided for in Article 66(14) of Decree-law No 331 of 30 August 1993 and Article 3(70) of Law No 549/95. In 1990, when Law No 142/90 enabled municipalities to set up joint stock companies with public majority shareholdings to manage local public utilities, no exemption from income tax was envisaged for the joint stock companies. Any joint stock companies set up between 1990 and the entry into force in 1993 of Article 66(14) of Decree-law No 331 was liable for income tax. This is clearly confirmed by the preparatory work carried out by the Italian Senate ([59]), which reports that the tax exemption in question was granted on the basis that, without it, joint stock companies set up under Law No 142/90 would be liable for income tax ([60]). Hence, in order to extend to the joint stock companies the same tax treatment as that for local authorities, Italy had to enact new legislation several decades after the entry into force of the Treaty.

(92) In addition, neither the purposes nor the areas of operation of the municipal undertakings were defined in general terms. Municipal and special undertakings are limited to the provision of certain public services to the local community. They are thus subject to statutory and case-law limitations as to object or geographical area. The law does not impose similar limitations on joint stock companies set up under Law No 142/90, which may engage in any kind of economic activity in any territory ([61]). Unlike in the case of OND, therefore, the extension of the purposes and areas of operation resulted directly from Law No 142/90 and from the subsequent conversion of municipal and then special undertakings into joint stock companies.

(93) In conclusion, the three-year tax exemption for joint stock companies set up under Law No 142/90 constitutes new State aid.

5.4. **Compatibility with the common market**

(94) Having concluded that the three-year income tax exemption and the loans granted under Article 9a of Decree-law No 318/1996 constitute State aid within the meaning of Article 87(1) of the Treaty for the joint stock companies, the Commission must assess whether the aid is compatible with the common market. The assessment covers the two measures, unless otherwise stated.

(95) The aid is not compatible under Article 87(2) since it is not aid having a social character, granted to individual consumers, or aid to make good the damage caused by natural disasters or exceptional occurrences, or aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. Nor is the aid compatible under Article 87(3)(d) (aid to promote culture and heritage conservation) or (e) (such other categories of aid as may be specified by decision of the Council). The Member State has not invoked any of these exceptions. Furthermore, the aid is not compatible under Article 87(3)(b). The reorganisation of the Italian public utilities sector cannot be considered a ‘project of common European interest’ since it will essentially benefit the economic operators of one Member State and not the Community as a whole and since it will not promote a specific and well-defined project. The aid does not ‘remedy a serious disturbance in the economy of a Member State’ either, since there is no evidence that the Italian local public services sector was suffering from a systemic crisis.

(96) The aid extends throughout Italy and therefore cannot be regarded as compatible under Article 87(3)(a) and (c) (development of certain areas).

([59]) Parliamentary acts of the XIIth Legislature, Senate of the Republic, p. 18, No 2157. The relevant part reads as follows: ‘on the ground that “new” subjects would not have benefited from the not inconsiderable tax concessions granted to the local bodies (exemption from income tax (IRPEG) and local income tax (ILOR)) (...) a “moratorium” is provided for (...) which is intended to remove the disincentives connected with the sudden loss of all tax concessions’.

([60]) AMGA, ACEA and AEM, by acknowledging that the measure constitutes existing aid, recognise that, in the absence of the new legislation, the simple conversion of municipal undertakings would have entailed the application of income tax to the joint stock companies (see AMGA observations of 11 April 2000, paragraph 11, and ACEA and AEM observations of 21 January 2000, point 7).

([61]) As the Italian Court of Cassation (meeting in plenary session) has stated, ‘Le SpA a prevalente capitale pubblico locale sono da considerarsi a tutti gli effetti soggetti societari privati …’ (joint stock companies with public majority shareholding must be regarded as private companies for all purposes); judgment of 6 May 1995, No 4989. Indeed, joint stock companies set up under Law No 142/90 were and are operating outside the territory of the controlling municipality even outside Italy or have entered markets that are not markets in local public services.

Article 87(3)(c)

(97) As for compatibility under Article 87(3)(c) (development of certain economic activities), the measures in question, by reducing the charges normally included in a firm's budget, may in practice have helped some firms to reorganise, increase their efficiency and become more competitive ([62]). However, the conditions for applying the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([63]) are not met. The aid was not notified individually to the Commission and no restructuring plan was submitted, although the measures also concerned large firms. The aid is not designed to benefit only firms in difficulty nor has it been demonstrated that all recipients were in difficulty. Moreover, the aid is not intended to restore the firms' long-term viability. The guidelines require that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. There is no trace of any such measure.

(98) The measures are not limited to SMEs. As far as aid to SMEs is concerned, the Commission notes that the scheme can apply to firms other than SMEs and that the advantages do not qualify as investment aid or as aid in respect of expenditure that can otherwise be regarded as compatible under the rules on aid to SMEs.

(99) It is not quite clear what is meant by the argument that the three-year income tax exemption is compatible under Article 87(3)(c) because it was aimed at favouring the restructuring of the undertakings in question and the transition from a monopolistic to a competitive market structure.

(100) If this argument is interpreted literally, then it is unfounded. All the joint stock companies benefit in their municipality from the same exclusive rights previously enjoyed by the municipal or special undertakings that they replaced. This was confirmed repeatedly by the Italian authorities, which stated that every municipality that set up a joint stock company under Law No 142/90 directly entrusted it with the tasks previously carried out by the municipal undertakings. Similarly, the firms that submitted comments also stressed that the joint stock companies are responsible for exactly the same local monopolies previously entrusted to the municipal or special undertakings ([64]). In addition, the advantages granted to the joint stock companies go beyond the conversion of their legal form and last for three years thereafter.

(101) Accordingly, the fact that the Commission has decided in respect of measures of a different kind that aid facilitating the transition from a monopolistic market structure to a competitive one may be regarded as being compatible under Article 87(3)(c) is completely irrelevant for the purpose of assessing the measure in question ([65]).

(102) On the other hand, this argument may be construed as meaning that the measure in question was aimed at assisting the privatisation of the undertakings controlled by the local authorities with a view to promoting greater liberalisation and participation of private capital in the provision of local services.

(103) The reasons set out above are already sufficient for the Commission to reject this argument. It can also be added that, if the aim of the aid in question was really to help the transition towards a more liberalised market and the participation of private capital, then this measure should have been applied to all forms of privatisation or applied with greater intensity where the privatisation was more extensive (e.g. where a municipality retained a minority stake in a joint stock company). On the contrary, the measure was not applied uniformly, but only to the joint stock companies in question (i.e. with a majority public shareholding). In any event, in accordance with the principle of equal treatment of public and private firms, the fact that the aid is granted in order to assist privatisation of a firm is not, as a rule, a ground for declaring the aid to be compatible.

([62]) See AEM and ACEA comments of 21 January 2000, point 42.

([63]) OJ C 288, 9.10.1999, p. 2. The previous Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12) and the rules set out in 1979 in the Eighth Competition Report (points 177, 227 and 228) apply to aid granted before publication of the new guidelines in the Official Journal. For the purposes of this case, the content of all these rules is identical and the application of any set of rules has no impact on the assessment.

([64]) See comments of 21 January 2000, recital 6.

([65]) See recital 26.

(104) The Italian authorities argued that without the three-year income tax exemption it would have been extremely costly for municipalities to convert their special undertakings into private-law firms. However, it is normal for an undertaking that changes its legal form (in this case from special undertaking to joint stock company) to enjoy the rights and advantages of the new legal form (freedom to operate outside the territory of the municipality and in any economic sector) and to assume the responsibilities linked to the new legal form, including different tax treatment. It is also logical that such consequences are passed on to the owner of the undertaking. In any case, it has not been demonstrated that, without the measure, the conversion would not have taken place or the advantage was commensurate with the objective pursued. Finally, as already stated, the aid was not accompanied by any measure to reduce the inherent distortion of competition.

(105) This assessment is not at odds with Commission policy, in particular its decision on Dutch local transport ([66]), as claimed by the Italian authorities. In the latter case, unlike the present one:

— the recipients were prohibited from participating in tenders throughout the duration of the aid measure until such time as their home markets were exposed to open, transparent, and non-discriminatory procedures,

— the aid was granted on condition that the firm produced a detailed business plan.

(106) The Commission therefore concludes that the aid in the form of the three-year income tax exemption and the loans granted under Article 9a of Decree-law No 318/1986 cannot be considered compatible with the Treaty under Article 87(3)(c), which also stipulates that the aid must 'not adversely affect trading conditions to an extent contrary to the common interest', a requirement which, in view of the foregoing, the Commission considers has not been satisfied in the present case. The main effect of the measures in question is not to make the Italian market more competitive but to strengthen certain Italian firms (i.e. those still controlled by local authorities) in comparison with their competitors in other Member States and to impede the latter's access to the Italian market.

([66]) See footnote 16.

Article 86(2) of the Treaty

(107) The Italian authorities stated that the three-year income tax exemption and the loans under Article 9a should be regarded as compatible State aid under Article 86(2) of the Treaty. They argued that most of the activities of the joint stock companies are services of general economic interest and that, without the measures in question, it would have been impossible for them to fulfil the general interest task entrusted to them.

(108) The Commission does not agree that Article 86(2) covers the aid in question as it cannot accept that the measures represent a system of compensation for a general interest task entrusted to the joint stock companies. In its Communication on services of general interest in Europe ([67]), the Commission stressed that three principles underlie the application of Article 86(2) and the question of compensation for obligations of general economic interest:

(a) neutrality;

(b) Member States' freedom to define what they regard as public services; and

(c) proportionality.

(109) Neutrality means that the Commission does not question whether the undertaking responsible for providing the general interest service should be public or private. On the other hand, the rules of the Treaty apply regardless of the ownership of an undertaking.

(110) Member States' freedom to define services of general economic interest is limited only by Commission control of abuse or manifest error. 'However, in every case, for the exception provided for by Article 86(2) to apply, the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts)'. This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment ([68]).

(111) Proportionality implies that the means used to fulfil the general interest mission do not create unnecessary

([67]) OJ C 17, 19.1.2001, p. 4.

([68]) Point 22 of the Communication.

distortions of trade or exceed what is necessary to guarantee fulfilment of the mission. Performance of the service of general interest must be ensured. As the undertaking concerned must be able to carry the specific burden, the State may therefore cover the net extra cost of the particular task assigned to that undertaking.

(112) The Italian authorities' reference to Article 86(2) must be rejected, first because the measures discriminate between private and public firms and are therefore incompatible with the principle of neutrality enshrined in Article 295 of the Treaty and with the principle of equal treatment and non-discrimination, which is a general principle of Community law.

(113) The aid was not in fact granted because of the imposition of general service obligations but only on the basis of the shareholding composition of certain firms. Soft loans from CDDPP and the three-year income tax exemption apply only to undertakings converted into joint stock companies under Law No 142/90 (i.e. where the municipalities retain at least the majority of the capital). Firms in which the municipality has only a minority share and fully private-sector firms are not entitled to those advantages, even if they provide the same service.

(114) The fact that the measures are not linked to any public service obligations and their discriminatory nature are evident if it is borne in mind that a joint stock company set up under Law No 142/90 would have lost its entitlement to the three-year income tax exemption and the CDDPP loans if, during the period of application of the aid measures, the municipality had reduced its stake to below the majority threshold.

(115) Second, the Commission notes that the principles of definition and mission allocation have not been complied with in the present case.

(116) As stated by the Italian authorities, the joint stock companies engage in certain activities that may qualify, in principle, for exemption under Article 86(2). Article 22 of Law No 142/90 allows municipalities to provide public services via joint stock companies. However, the Law does not specify which services should be regarded as public services and to what extent. Nor does it list any specific public service obligations. It cannot therefore be regarded as an act that clearly defines the public service mission and specifically entrusts certain firms with carrying out that mission. The Italian authorities have not submitted any other evidence, legislation or information relating either to the definition or to the allocation of the public service mission.

(117) Third, there is also a failure to respect the proportionality principle. The Italian Government has not indicated the general service obligations imposed on the firms, the net extra costs deriving from these obligations or even the amount of public funds granted to the joint stock companies by these measures or through other instruments. As a consequence, it is impossible for the Commission to check proportionality. In addition, the advantage deriving from the three-year exemption is related to the amount of the company's taxable income and not to the net cost resulting from any public service obligation. As to the CDDPP loans, the Italian authorities failed to prove that they were always justified because of the costs resulting from specific public service obligations.

(118) It is therefore clear that the measures have nothing to do with the reimbursement of the extra net cost arising from the fulfilment of a general service mission: had this been true, the reimbursement could not be linked to the shareholding composition but rather to the imposition of specific obligations. On the contrary, the measures are linked solely to the shareholding composition and there is no evidence of any general service obligation that applies only to joint stock companies set up under Law No 142/90 because of their legal status and not to other firms providing the same kind of services.

(119) Lastly, it is clear from the foregoing that the Italian authorities have not set out in detail their reasons why, if the measures objected to are abolished, the performance of the task of general economic interest under acceptable economic conditions would be jeopardised. They have not therefore complied with the principle established by the Court of Justice according to which 'it is incumbent on the Member State which invokes Article 86(2), as a derogation from the fundamental rules of the Treaty, to show that the

conditions for the application of that provision are fulfilled' ([69]).

(120) The Commission concludes that the aid in the form of the three-year income tax exemption and the loans granted under Article 9a of Decree-law No 318/1986 cannot be regarded as compatible with the common market pursuant to Article 86(2) and that the measures do not constitute a form of compensation for a possible general service mission entrusted to the firms.

Compatibility with other provisions of the Treaty

(121) Lastly, the Commission finds that the State aid is also incompatible with the common market for an additional reason. The measures apply to different economic sectors (water, gas, electricity, etc.) but not to all firms operating in such sectors. The eligibility of a firm for the scheme depends only on its legal form (former public entity transformed into a joint stock company) and on the nature of its shareholders (public-sector majority).

(122) Firms operating in the same sectors but in which, for example, private investors hold a majority or all of the share capital are not entitled to the aid measures. In particular, the conditions for benefiting from these measures can never be fulfilled by firms from other Member States with a secondary establishment in Italy. The aid therefore discriminates between firms operating in the same sector on the sole basis of their shareholding structure and, in effect, of the country in which their headquarters are established, without this different treatment being justified by any objective reason. The measure is thus contrary to the principle of non-discrimination on grounds of nationality, which is a general principle of EC law, and to that of freedom of establishment provided for in Article 43 of the EC Treaty. It is established case-law that 'State aid, certain conditions of which contravene other provisions of the Treaty, cannot therefore be declared by the Commission to be compatible with the common market' ([70]).

6. CONCLUSION

(123) The Commission finds that the transfer tax exemption provided for in Article 3(69) of Law No 549 of 28 December 1995 does not constitute State aid as it accords with the nature and general scheme of the system.

(124) It further finds that Italy has, in breach of Article 88(3) of the Treaty, unlawfully implemented the State aid schemes provided for in Article 3(70) of Law No 549 and Article 9a of Decree-law No 318/1986. It concludes that the State aid is incompatible with the common market.

(125) In accordance with established case-law and with Article 14 of Regulation (EC) No 659/1999, the Commission concludes that the Member State concerned should take all necessary measures to recover the aid from the recipients. In the present case, the Italian authorities have not argued that the recovery of the aid would be contrary to a general principle of Community law and the Commission would point out that no such principle prevents the recovery of the aid.

(126) This Decision concerns the two aid schemes in question and must be implemented immediately, in particular as regards the recovery of all individual aid granted under the schemes. The Commission also notes that a decision on aid schemes is without prejudice to the possibility that individual aid may be deemed, wholly or partially, compatible with the common market on its own merits (for instance, because the individual grant of aid is covered by the *de minimis* rules or in the context of a future Commission decision or by virtue of an exemption regulation).

(127) The aid to be recovered includes interest which, in accordance with the Commission's practice, is calculated on the basis of the reference rate used to calculate the grant equivalent of regional aid,

HAS ADOPTED THIS DECISION:

Article 1

The exemption from transfer tax provided for in Article 3(69) of Law No 549 of 28 December 1995 does not constitute aid within the meaning of Article 87(1) of the Treaty.

Article 2

The three-year exemption from income tax provided for by Article 3(70) of Law No 549 of 28 December 1995 and by

([69]) Case C-159/94 *GDF* [1997] ECR I-5815, paragraphs 94 and 101.
([70]) Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 78.

Article 66(14) of Decree-law No 331 of 30 August 1993, converted into Law No 427 of 29 October 1993, and the advantages resulting from loans granted under Article 9a of Decree-law No 318 of 1 July 1986, as converted and amended by Law No 488 of 9 August 1986, to joint stock companies with majority public shareholdings set up in accordance with Law No 142 of 8 June 1990, constitute State aid within the meaning of Article 87(1) of the Treaty.

Such aid is incompatible with the common market.

Article 3

Italy shall take all necessary measures to recover from the beneficiaries the aid granted under the schemes referred to in Article 2 and unlawfully made available to the beneficiaries.

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 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

Italy 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 Italian Republic.

Done at Brussels, 5 June 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 30 October 2002

on the State aid implemented by Germany for Schmitz-Gotha Fahrzeugwerke GmbH

C 31/2001 (ex NN 156/99 and N 288/98)

(notified under document number C(2002) 2145)

(Only the German version is authentic)

(Text with EEA relevance)

(2003/194/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:

I. PROCEDURE

(1) By letter dated 18 May 1998, Germany informed the Commission of aid to Schmitz-Gotha Fahrzeugwerke GmbH (Schmitz-Gotha). The aid case was registered under NN 156/99. By letters dated 12 June 1998, 21 December 1999 and 17 May 2000, the Commission asked Germany for further information. Germany replied by letters dated 15 October 1998, 21 July 1999, 27 April 2000, 1 December 2000 and 8 January 2001.

(2) By letter dated 23 May 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 and to register it as C 31/2001. Comments presented by Germany were received on 14 and 22 August 2001. 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. No comments from interested parties were received. The Commission asked Germany further questions by letter dated 1 October 2001. Germany replied on 14 December 2001. Further information was received on 16 and 28 May and 3 July 2002.

II. DESCRIPTION

1. The aid recipient

(3) The case concerns financial measures for the restructuring of Schmitz-Gotha, a company situated in Thuringia active in motor vehicle construction and the construction of bodies and trailers in particular. Schmitz-Gotha is the successor to Gothaer Fahrzeugwerke GmbH (Gotha-old), a formerly State-owned company, which after its privatisation in 1994 belonged to the Lintra

(1) OJ C 211, 28.7.2001, p. 15.
(2) See footnote 1.

Beteiligungsholding GmbH (Lintra-Holding). In addition to other aid, the eight companies belonging to Lintra-Holding were granted loss compensation amounting to DEM 175 million for the period 1995 to 1997 by the public authorities in support of their privatisation. This public loss compensation was completely used up as early as 1996, and Gotha-old made a loss of DEM 12,4 million the following year. A further loss of DEM 7,5 million was expected for 1997. Consequently, in 1996 the privatisation of Gotha-old was regarded as having failed, and the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* (BvS) resumed the control over the company and decided to continue its restructuring with the aim of preparing it for sale. Finally, two companies, Schmitz-Gotha and Gothaer Fahrzeugtechnik, took over the parts of the assets of Gotha-old that where deemed suitable for sale. The remaining assets of the former operation were put into liquidation. The following figures were given for the performance of Gotha-old up to that point:

(in DEM 1 000)

	1994 (before privatisation)	1995	1996	1997 (estimates ([a]))
Turnover	55 500	113 000	48 200	62 800
Profit/loss	−13 900	500	−12 400	−7 500

([a]) These figures are hypothetical, since in 1997 the physical assets were transferred to the new investors

(4) Out of eight potential investors, only the two present-day investors Schmitz Cargobull AG (70 %) and Josef Koch GmbH (30 %) jointly submitted an offer for Schmitz-Gotha. They acquired the assets on 10 September 1997 at a purchase price of DEM 1. Mr Koch subsequently became the sole manager of Schmitz-Gotha. After the takeover in 1997, Schmitz-Gotha employed 77 people.

2. **The restructuring**

(5) The main problem of Gotha-old in motor vehicle construction (now Schmitz-Gotha) was the inability to carry out serial production of its own competitive products, which made the firm dependent on production to order for essentially two main customers. Production to order meant the production of only small batches. Given the small production quantities, the technical and staffing capacity of the firm was excessively large, leading to excessive fixed costs. Germany states that, for the purpose of restructuring, investment was necessary to separate the infrastructure of the two successor companies and for revamping, maintenance and replacement of machinery and logistics in order to set up efficient serial production of its own products.

(6) Before the decision to open the formal investigation procedure, the costs for restructuring were indicated as follows:

(in DEM)

General investment in machinery and equipment	13 900 000
Separation of infrastructure	1 600 000
Working capital	1 600 000
Total	17 100 000

(7) Under the plan originally presented, the firm was to reach marketability within two to three years and to achieve sustained positive business results by the end of the fourth business year. According to the restructuring plan, Schmitz-Gotha was to concentrate its production on vehicle bodies,

trailers and different types of special trailers and was to take over the project sales of the Schmitz group for clients such as the army and rental companies. Schmitz-Gotha was supposed to benefit from the large sales network of its investors.

(8) On 9 October 1997, one month after the takeover by the new investors, Schmitz-Gotha acquired, for DEM 3,7 million, a 100 % holding in one of its subcontractors, ((…)(*)), a company founded by Mr Koch and run by him as managing partner. Despite the information injunction contained in the decision to initiate proceedings, regarding in particular the circumstances under which the 100 % holding in (…)* was acquired, Germany did not provide any purchase contract or any precise information on the previous owners of (…)*. The information submitted merely indicated that (…)* was previously owned by three private individuals. DEM 2,2 million of the purchase price was paid on 25 February 1998. The remaining DEM 1,5 million was to be paid in four annual instalments of DEM 375 000, provided that (…)* achieved an annual trading profit before tax of DEM 500 000. Since it was assumed that the company would achieve the planned results, the outstanding amount of DEM 1,5 million was set aside in full. With the payment of each instalment, the amount to be repaid decreased accordingly. With the takeover, production was to be streamlined and the subcontracting of special vehicle parts secured.

(9) The plan originally submitted by letter dated 18 May 1998 foresaw the following business development:

(in DEM 1 000)

	1997/1998	1998/1999	1999/2000	2000/2001	2001/2002
Turnover	19 020	25 208	29 315	35 000	40 000
Cost of materials	(…)*	(…)*	(…)*	(…)*	(…)*
Staff costs	(…)*	(…)*	(…)*	(…)*	(…)*
Depreciations	(…)*	(…)*	(…)*	(…)*	(…)*
Other operating costs	(…)*	(…)*	(…)*	(…)*	(…)*
Operating result	(…)*	(…)*	(…)*	(…)*	(…)*
Result before tax	−2 527	−1 836	−668	547	1 618

3. **State financial measures for the restructuring**

(10) Originally the following measures were indicated by Germany as contributions from public sources which were granted after the 1997 takeover for the restructuring:

TABLE 1

Measures originally indicated as public contributions

(in DEM)

	Source	Measure	
1	Thuringia	Employment measures [a]	
		(a) Grant supposedly made under a scheme which Germany could not identify before the initiation of the procedure	(7 500)
		(b) Grant made under an approved wage subsidy scheme [3]	(342 198)
			349 698

(*) Business Secret replaced by '(…)*'.

(in DEM)

	Source	Measure	
2	Thuringia	Investment grant supposedly given under an approved scheme ([4])	2 420 000
3	BvS	Investment grant to carry out the separation of infrastructure and urgent repair work	3 200 000
		Total	5 970 198

([a]) Germany claimed that these measures do not constitute aid.
([3]) *Arbeitsförderungsreformgesetz, — Lohnkostenzuschuss Ost*, SG(98) D/1049, 6.2.1998 (NN 107/97).
([4]) 26. *Rahmenplan der Gemeinschaftsaufgabe 'Förderung der regionalen Wirtschaftstruktur'*, NN 123/97, 18.8.1997.

(11) In 1997 Gotha-old also received a BvS grant of DEM 6,1 million in order to compensate laid-off employees. In Germany's view, the measure did not qualify as aid since the laid-off employees were the recipients. Even if the measure were considered to be aid, Germany argued, Schmitz-Gotha could not be considered to be the recipient, since, in accordance with German law, it had taken over all remaining employees. Therefore, according to Germany, if the measures were considered to be aid, Gotha-old would have to be considered to be the recipient as the measure served to reduce the workforce at Gotha-old and liquidate the company.

4. **Financial contributions from other sources**

(12) Originally Germany indicated the following contributions as contributions from the recipient or external commercial sources:

TABLE 2

Measures originally indicated as private contributions

(in DEM)

	Source	Measure	
4	Investor	Shareholder loan Schmitz Cargobull — DEM 2 100 000 (70 %) J. Koch — DEM 900 000 (30 %)	3 000 000
5	Vereinsbank	Investment loan ([a])	2 650 000
6	Vereinsbank	Creditline at an adjustable interest rate according to the market rate secured by a mortgage of DEM 7,5 million on the company premises	1 000 000
7	Vereinsbank	Loan granted on 30.7.1998 termed until 30.9.2008 at 5,11 % p.a. refinanced by the *Kreditanstalt für Wiederaufbau* (KfW) secured by mortgage of DEM 7,5 million on the company premises	2 350 000
			9 000 000
		Total contribution to the restructuring (Nos 1–7 of Tables 1 and 2 above)	14 970 000

([a]) According to the information originally submitted, this loan was not used.

5. **Market information**

(13) The company is active in the field of motor vehicle manufacture and in particular the manufacture of bodies and trailers, which falls under NACE Rev. 1.34.20, a sector in which there is intra-Community trade. The share in trailer production in 2000 amounted to 19 % on the German market and 7 % on the European market.

(14) Originally Germany stated that the relevant capacities had to be measured according to the number of workers and production halls, since the production mainly consisted of assembly work. Between 1997 and 2001, the number of workers increased from 77 to 240, while the number of production halls remained the same. Germany stated that the long waiting lists for delivery on the trailer market indicated that the market was not in excess capacity.

6. **The decision to initiate the proceedings under Article 88(2) of the EC Treaty**

(15) In the decision to initiate the formal investigation procedure, measures under No 1 in Table 1 above, contrary to Germany's claim that they did not constitute aid, were considered to be aid, because, even though they are intended to facilitate the employment of individual workers, they also have to be regarded as benefits to the company. Consequently, they fall under the application of Article 87 of the EC Treaty.

(16) Contrary to the arguments put forward by Germany, the BvS grant of DEM 6,1 million as described in recital 11 was also considered to be aid, since obligations to provide redundancy benefits deriving from employment legislation or collective agreements were considered to be part of the normal costs which an undertaking has to bear itself. The measures were therefore considered to be aid to Schmitz-Gotha, because the Commission took the view that, even though the aid was paid to Gotha-old, its sole purpose was to enable the subsequent takeover by its successors. Since no information on the breakdown of this grant between the two successors was available, an information injunction was issued.

(17) When the proceedings were initiated, the aid was considered to fall under the new Community guidelines on State aid for rescuing and restructuring firms in difficulty ([5]) (the 1999 guidelines), since it was assumed that part of the aid had been granted after the new guidelines had been published in the *Official Journal of the European Communities*.

(18) Furthermore, the Commission expressed the following doubts when it initiated the proceedings:

(a) whether the sale to the new investors at DEM 1 comprised new aid, since it was not clear if the sales procedure was open and unconditional. Additionally, it was unclear whether the price corresponded to the market price as the liquidation value appeared to be DEM 4,36 million;

(b) whether the investment grant under measure No 2 in Table 1 above complied with the conditions of the scheme referred to by Germany;

(c) whether the grant under measure No 1(b) in Table 1 above complied with the conditions of the scheme referred to by Germany;

(d) whether the restructuring plan was suitable to restore the long-term viability of Schmitz-Gotha, since the potential obligation to repay aid to the amount of DEM 7,1 million deriving from the negative Commission decision concerning the predecessor company Lintra-Holding, for which Schmitz-Gotha amongst other beneficiaries is jointly and severally liable, might threaten the accomplishment of the goals of the restructuring plan;

([5]) OJ C 288, 9.10.1999, p. 2.

(e) whether, contrary to the arguments put forward by Germany, the aid unduly distorted competition through an increase in capacity, since the number of employees had increased from 77 to 240 within the restructuring period;

(f) whether the aid was in proportion to the restructuring costs and benefits, since the financial contributions to the restructuring as indicated within the preliminary assessment procedure appeared not to cover the indicated restructuring costs. In that context it also appeared doubtful whether the beneficiary had made a significant contribution to the restructuring from its own or external commercial resources, because it seemed that the following contributions indicated by Germany could be considered to be contributions by the beneficiary within the meaning of the guidelines:

(i) the Vereinsbank loan amounting to DEM 2,65 million (measure No 5 in Table 2 above), as according to the information submitted it was never used;

(ii) the Vereinsbank loan of DEM 2,35 million (measure No 7 in Table 2 above), as it appeared to be refinanced by aid measures, namely a KfW programme.

Therefore, contrary to what was stated by Germany, the contributions of the beneficiary to the restructuring appeared to amount to only DEM 4 million;

(g) at the same time it appeared doubtful whether the aid was limited to the minimum needed for the restructuring to be undertaken, since during the restructuring period Schmitz-Gotha acquired a 100 % holding in another undertaking at a price of DEM 3,7 million.

(19) With respect to the doubts raised in conjunction with points (a) to (c), (e), (f)(ii) and (g), the Commission issued an information injunction 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 ([6]).

III. **COMMENTS FROM GERMANY**

(20) Under the formal investigation procedure, Germany supplied the following new or amended information.

(21) In relation to the measures under No 1 in Table 1 above, Germany informed the Commission that these consisted of different amounts than originally indicated. According to the latest information, Schmitz-Gotha had from 1997 to 2000 received wage subsidies to the amount of DEM 527 000. Of this amount, DEM 43 824 was supposedly granted in accordance with the Commission notice on the *de minimis* rule for State aid ([7]) and an amount of DEM 351 160 was supposedly granted under an approved aid scheme ([8]). Lastly, an amount of DEM 131 745 was granted under a provision of national law ([9]), which in the opinion of Germany does not constitute aid, but is a general measure since it is aimed at the re-employment of individual workers and does not therefore confer benefits on the company, but rather on the individual re-employed workers.

(22) As regards the allocation of the BvS grant of DEM 6,1 million for the compensation of laid-off workers during the transition from Gotha-old to its successor (recital 11), Germany informed the Commission that in relation to the assets taken over by Schmitz-Gotha only 26 out of 144 employees were not employed and subsequently received redundancy allowances amounting to DEM 497 000, which were covered by the BvS grant. According to Germany, all remaining amounts were used for the winding-up of Gotha-old.

([6]) OJ L 83, 27.3.1999, p. 1.
([7]) OJ C 68, 6.3.1996, p. 9.
([8]) See footnote 3.
([9]) Paragraphs 217 and 10 of the Sozialgesetzbuch III (German social law code).

(23) Germany informed the Commission that the BvS grant of DEM 3,2 million (measure No 3 in Table 1) was granted in 1998, not 1999.

(24) Concerning the sales procedure, Germany stated that due to the extensive press coverage on the collapse of Lintra-Holding all potentially interested bidders were aware of the envisaged sale of the assets. Additionally, all leading companies in the vehicle industry were also contacted directly before the sale. Subsequently, eight companies showed an interest in acquiring the assets and received information material. Four of those companies entered into closer negotiations at the end of which only two submitted credible offers. Of these two, the offer of Schmitz/Koch proved to be the soundest in economic terms.

(25) As regards the liquidation value of DEM 4,26 million in relation to the sales price of DEM 1, Germany pointed out that the liquidation value as established by an expert report (Forensika report) concerned only parts of the assets, which also were not exactly identical to the assets sold to Schmitz-Gotha. It also had to be taken into account that the overall liquidation required the supply of further financial resources of DEM 15,375 million and that, due to the negative overall result, the earning capacity value for the relevant assets would in any case not have been positive. Furthermore, the individual liquidation value of the assets sold would have to take account of the fact that the capacities which were the basis of the evaluation could never realistically have been fully used. The realistic value therefore would amount to only 50 % of the evaluation and again would have to be reduced by immediate restructuring costs of DEM 2,5 million. Therefore, the market value of the assets sold to Schmitz-Gotha could not have exceeded DEM 0.

(26) As regards the potential obligation to repay DEM 7,1 million in relation to illegal aid to Lintra-Holding, Germany informed the Commission that these liabilities were repaid out of the liquidation of Gotha-old.

(27) With respect to the potential distortion of competition, Germany supplied additional information on the market, as follows:

(a) Schmitz-Gotha's market share in the semi-trailers segment was 4,28 % in Germany and 0,2 % in the Community;

(b) due to strong cyclical fluctuations which are typical of the industry, it is difficult to give accurate information on the capacity situation. However, the number of registrations from 1998 to 2000 and the existing waiting lists for delivery of about 6 to 8 months in 1999 would indicate that there are no excess capacities on the market. Capacity utilisation had increased from 80,2 % in 1997 to 89,2 % in 1999. Orders on hand increased between 1996 and 1999 from an average of 10,8 weeks to 12,8 weeks. Average turnover increased by 30 % between 1997 and 2000;

(c) the firm's production capacity was too large by some 50 %, but could not be partially shut down. Therefore, the increase in employees led only to improved utilisation of the existing production capacity.

Additionally, Germany argued that, according to the guidelines, capacity is measured as production capacity in the sense of technical capacity, and its previous statements that the capacity at Schmitz-Gotha was better measured according to the workforce employed must not therefore be misunderstood. Germany stressed that the technical capacity had never been increased and consistently had been only 50 % used. Concerning the increase in the number of employees, it was stated that the operation was taken over in October 1997 without an exact estimate of future contracts and possible production quantities. Therefore, the most significant increase took place in 1998 when the actual need for staff could be more accurately estimated. Germany stated that since then the increase in staff had been rather insignificant.

(28) As regards the appropriate own contribution in relation to the restructuring costs and benefits, Germany provided additional information on the contributions made by the beneficiary:

(a) the restructuring costs amounted not to DEM 17,1 million, but to DEM 27,328 million, comprising the following amounts:

(in DEM)

Wage cost subsidies	351 000
Severance pay	497 000
Separation of infrastructure	1 833 000
Investment	23 817 000
Miscellaneous	830 000
Total	27 328 000

Amongst other things, these had consisted of the following investments for renovation, maintenance and new procurements amounting to DEM 23,8 million:

(in DEM)

Investments	1997/1998	1998/1999	1999/2000	2000/2001	Total
Intangible assets (software)	(…)*	(…)*	(…)*	(…)*	(…)*
Physical assets (land, buildings, plant)	(…)*	(…)*	(…)*	(…)*	(…)*
Financial assets (holdings)	3 712 379	(…)*	(…)*	(…)*	(…)*
Total	(…)*	(…)*	(…)*	(…)*	23 836 821

Note: The table contains rounded figures and is not arithmetically correct.

(b) measure No 2 in Table 1 above, which initially amounted to DEM 2,42 million, consists of a different amount than originally indicated. This comprises investment grants of DEM 1,836 million and an investment subsidy under an approved investment subsidy scheme ([10]) of DEM 362 000, giving a total of DEM 2,198 million;

(c) a surplus of DEM 14,732 million was achieved which contributed to the company's capital reserves. Therefore, DEM 650 000 of the investment grants contained in measure No 2 in Table 1 as well as a Vereinsbank loan (measure No 5 in Table 2) did not need to be used;

(d) measure No 7 in Table 2 was exclusively secured by collateral of Schmitz-Gotha, for which the KfW, which refinanced this loan, did not provide any fallback guarantees. With respect to the reduced interest rate of 4,25 % instead of the 5,11 % originally indicated, Germany states that the aid element contained in the loan amounts to either 1,69 % p.a., i.e. DEM 39 000 p.a., or 5,69 %, i.e. DEM 131 000 p.a., depending on whether an increase of 4 %, in accordance with the notice on the method for setting of the reference and discount rates ([11]), is applied.

Germany claims that the contribution of the beneficiary from its own and external commercial sources amounts to DEM 20,692 million or 75,72 %.

([10]) *Investitionszulage für die neuen Bundesländer*, SG(96) D 3794, 11.4.1996 (N 494/A/95).
([11]) OJ C 273, 9.9.1997, p. 3.

(29) Therefore, according to the latest information, the assistance from public sources amounted to DEM 6,636 million, comprising the following:

TABLE 3

Measures indicated as public contributions after the initiation of proceedings

(in DEM)

	Source	Measure	
1	Thuringia	Employment measures	
		(a) Supposedly not aid:	
		(i) Grant supposedly given as a general measure under § 227 SGB [a] III	(131 745)
		(ii) Grant supposedly given in accordance with the *de minimis* rule	(43 824)
		(b) Grant given under an approved wage subsidy scheme [12]	351 000
2	Thuringia	(a) Investment grant (GA-Mittel)	1 836 000
		(b) Investment subsidy	362 000
3	BvS	(a) Redundancy allowance	497 000
		b) Investment grant	3 200 000
	KfW	(c) Investment subsidy contained in refinanced loan (measure No 7 in Table 2)	390 000
		Total (excluding No 1 (a) and (b))	6 636 000

[a] Sozialgesetzbuch (German social law code)
[12] *Arbeitsförderungsreformgesetz, — Lohnkostenzuschuss Ost*, SG(98) D/1049, 6.2.1998 (NN 107/97).

(30) As regards the takeover of (…)* by Schmitz-Gotha, Germany states that the four outstanding instalments of DEM 375 000 have been paid. According to the information provided by Germany, (…)* was taken over in order to acquire additional know-how and to add technical development capacities to production. Germany states that Schmitz-Gotha was not in a position to manufacture itself parts acquired from (…)* or to improve appreciably (…)* terms of delivery. The main objective in the acquisition was to cut production costs, since Schmitz-Gotha is now supplied by (…)* at production prices. (…)* earns its profits from turnover with some 30 other firms which it also supplies. With regard to various models, production costs were significantly reduced by the takeover, which helped to shorten the restructuring phase by one year. Annual profits before tax were increased by DEM (…)* between 1998 and 2002, as a result of which the takeover financed itself from the profits which it generated itself. The takeover resulted in the following changes in the original restructuring plan:

(in DEM 1 000)

	1997/1998	1998/1999	1999/2000	2000/2001	2001/2002
Turnover	19 020	25 208	29 315	35 000	40 000
Cost of materials	10 965	14 461	16 580	19 868	22 668
Staff costs	5 593	6 498	6 765	7 300	7 800
Depreciations	1 506	1 683	1 740	1 740	1 683
Other operating costs	2 301	2 957	3 356	3 942	4 430
Operating result	−1 145	−192	1 074	2 350	3 619
Result before tax	−1 645	−722	544	1 595	2 864

IV. **ASSESSMENT OF THE AID**

(31) Pursuant 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 incompatible with the common market. Measures falling within the scope of Article 87(1) of the EC Treaty that do not constitute existing aid are generally incompatible with the common market unless they fall within the scope of the derogation of either Article 87(2) or Article 87(3) of the EC Treaty.

1. **State aid**

(32) According to the information received, the measure under § 227 SGB III, i.e. measure No 1(a)(i) in Table 3, appears to constitute a general measure. In any case, even if considered to be aid, it would not affect the outcome of this Decision and therefore need not be further assessed here. According to the information received, only DEM 497 000 (see measure No 3(a) in Table 3) of the BvS grant of DEM 6,1 million were used for redundancy allowances in relation to workers that Schmitz-Gotha would have been obliged to take over. The remaining amount of DEM 5,6 million was used in conjunction with the winding-up of Gotha-old and therefore need not be assessed for the purposes of this Decision.

(33) All leading companies in the motor vehicle construction sector were contacted in the 1997 sales procedure, of which eight showed interest and two finally participated in the tender. Furthermore, the liquidation value as established by the Forensika report concerned only parts of the assets which were not identical to those sold to Schmitz-Gotha and also did not include additional financial burdens which would have occurred immediately in conjunction with the sale. As a result of the additional information submitted by Germany on the sales procedure in 1997, the initial doubts whether the sale included an aid element have been allayed.

(34) Article 87(1) of the EC Treaty applies to all the other financial measures made available by Germany to the recipient undertaking. The Commission notes that the BvS is a federal body whose task, like that of its predecessor the *Treuhandanstalt*, is to privatise State-owned operations in eastern Germany. The BvS is part of the federal administration and accountable to it. Consequently, measures taken by the BvS must be regarded as State measures. The Commission also notes that the KfW, Germany's development bank, is a body governed by public law for which the federal government provides a 100 % liability guarantee. For these reasons, the measures taken by the KfW are also attributable to the State.

(35) All these measures involve conferring on a specific undertaking economic benefits which it would not have received from commercial sources. The measures therefore constitute State aid which is liable to distort competition. Given the nature of the assistance and the existence of intra-Community trade in the sector in which the recipient undertaking was active, the financial measures fall within the scope of Article 87(1) of the EC Treaty.

(36) With respect to measure No 1(a)(ii) in Table 3, the Commission notes that, according to the information submitted, this measure complies with the notice on *de minimis* aid ([13]) since within the relevant three-year period it did not exceed the amount of EUR 100 000. It does not therefore need to be assessed for the purposes of this Decision. Even so, the assessment of this case would not be any different if this measure were taken into account.

(37) With respect to the aid granted under approved schemes, it can be noted that, in view of the additional information provided by Germany concerning measures No 1(b) and No 2(a) in Table 3, the Commission's doubts concerning the correct application of the schemes have been allayed. Additionally, in view of the information provided with respect to the investment subsidy of DEM 362 000 (measure No 2(b) in Table 3), which was first mentioned after the initiation of the formal investigation procedure, it can be noted that, in the light of the available information, the subsidy

([13]) See footnote 7. See also Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

complies with the conditions of the scheme referred to. Therefore, the aforementioned measures do not need to be further assessed for the purposes of this Decision.

(38) The measures amounting to DEM 4,087 million referred to under No 3 in Table 3 were not granted in accordance with an aid scheme approved by the Commission and therefore have to be considered to be ad hoc aid in this Decision.

(39) In particular with respect to measure No 3(c) in Table 3, the loan of DEM 2,35 million, it has to be noted that the loan was refinanced by the KfW at a reduced interest rate and consequently contains an interest-rate subsidy. As explained below, at the time it was granted, Schmitz-Gotha had to be considered to be a firm in difficulty. Consequently, an increased reference interest rate must be applied here to take account of the aid element involved in this interest-rate subsidy financed with public money. According to the notice on the method for setting the reference and discount rates, a premium of 4 % or more may be added for such situations involving a particular risk. Since Schmitz-Gotha would not have obtained this loan on the same terms without the re-financing provided by the KfW, the Commission is applying here a reference interest rate increased by the minimum premium of 4 %, i.e. 9,94 %, to establish the aid element contained in this loan. Therefore the investment subsidy contained in this loan is represented by the annual premium of 5,69 %, i.e. DEM 131 000 a year, and has to be regarded as aid.

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

2. **Derogations under Article 87 of the EC Treaty**

(41) The purpose of the aid was to enable the restructuring of the beneficiary. Since none of the other derogations mentioned in Article 87(2) and (3) is applicable, Article 87(3)(c) applies.

(42) In its guidelines on rescue and restructuring aid, the Commission set out in detail the preconditions for exercise of its discretion under Article 87(3)(c) of the EC Treaty. Since the information submitted by Germany under the formal investigation procedure showed that all the aid was granted to the recipient before publication of the 1999 guidelines, pursuant to recital 101 of those guidelines, the 1994 guidelines on State aid for rescuing and restructuring firms in difficulty are applicable ([14]).

(43) A precondition for the eligibility of restructuring aid under the guidelines is that the aid recipient must be a firm in difficulty. Under section 2.1 of the guidelines, the typical symptoms of a firm in difficulty include deteriorating profitability or increasing size of losses, diminishing turnover, declining cash flow and low net asset value.

(44) The Commission notes that Gotha-old was previously making continual losses which it proved possible to cover only in the first year following privatisation, partly through the public takeover of losses. Consequently, Gotha-old could clearly be regarded as a firm in difficulty. The aid was granted to the firm after the 1997 takeover. It must be noted that the activity taken over by Schmitz-Gotha involved difficulties such as the inability to carry out serial production and excess technical and workforce capacities, leading to excessive fixed costs. It may be assumed that the

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

structural difficulties of Gotha-old were also taken over by the new investors. Additional costs were also generated by the necessary separation of infrastructure. The restructuring plan originally submitted in 1998 anticipated continuing losses for the first three years, despite the granting of aid. Consequently, the Commission assumes that, even after the takeover, the company had to be regarded as a firm in difficulty.

(45) In the decision to initiate the formal investigation procedure, the Commission expressed doubts whether the conditions laid down in the guidelines were met.

(a) *Restoration of viability*

(46) In the initiation of proceedings, it was noted that the measures under the restructuring plan seemed generally suitable to restore the long-term viability of the company. However, it was also noted that the potential obligation under the restructuring to repay old aid to the amount of DEM 7,1 million threatened the achievement of the goals of the plan.

(47) During the formal investigation procedure, Germany informed the Commission that the 'old' liabilities meanwhile had been paid back by Gotha-old. The initial doubts concerning the restoration of viability were therefore allayed. This seems to be confirmed by the economic performance of the firm, which in 1999 exceeded its planned operating result of DEM 5 million by DEM (…)* million, achieving an operating profit of DEM (…)* million.

(b) *Avoidance of distortions of competition*

(48) The Commission notes that the market in which Schmitz-Gotha operates is marked by cyclical fluctuations, so that it is difficult to determine the precise situation regarding capacities. In view of the additional information provided, however, it appears that no excess capacities exist. The Commission also notes that, according to the information provided by Germany, technical capacities were not increased. It is also noted that, in order to restore profitability, it was necessary to increase once again the workforce capacity which had initially been very drastically reduced and that, nevertheless, the workforce capacity has not increased in comparison with Gotha-old. Consequently, the initial doubts concerning a distortion of competition have been allayed.

(c) *Proportionality to the restructuring costs and benefits*

(49) The 1994 guidelines state that aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources, or from external commercial financing. The latter is to be understood as financing in accordance with market conditions.

(50) According to the latest information, the restructuring costs amount to DEM 27,328 million. As explained, most of the costs incurred are investment in the firm's fixed assets.

(51) The latest information submitted indicates that these costs were financed from the following sources:

TABLE 4

Financing of the restructuring costs as indicated after the initiation of proceedings

(in DEM)

Public sources			
	Source	Measure	
		Measures 1 to 3 in Table 3 (excluding measures under No 1(a)	6 636 000
Private sources			
4	Investor	Shareholder loan	3 000 000
5	Vereinsbank	Credit (not used)	2 650 000
6	Vereinsbank	Credit line	1 000 000
7	Vereinsbank	Loan (measure No 7 in Table 2) reduced by the interest subsidy (measure No 3(c) in Table 3)	1 960 000
8	Beneficiary	Surplus/cashflow	14 732 000
		Subtotal (excluding No 5)	20 692 000
		Total (excluding No 5)	27 328 000

Note: The table contains rounded figures and is not arithmetically correct.

(52) Germany takes the view that this contains contributions from the beneficiary's own resources or from external commercial financing amounting to DEM 20 692 000.

(53) In the light of the information available to the Commission, the following must be noted.

(54) Measure No 4 in Table 4, the provision of own capital to the amount of DEM 3 million, can be considered to be a contribution by the beneficiary.

(55) The loan of DEM 1 million (measure No 6 in Table 4) was granted by a private bank and is exclusively secured by collateral provided by the beneficiary without public participation. It can therefore be considered to be a contribution by the beneficiary.

(56) The Vereinsbank loan amounting to DEM 2,35 million (measure No 7 in Table 2) was refinanced by the KfW and therefore contains aid in the form of an interest subsidy. Therefore, the contribution cannot in principle be considered to have been provided under market conditions. However, in accordance with the Commission's practice in previous cases, the amount remaining after the deduction of that interest subsidy can be considered to be a contribution made by the beneficiary as long as no other aid elements are contained in it. Since the loan was exclusively secured by collateral provided by the beneficiary without further public participation, the amount of DEM 1,96 million (measure No 7 in Table 4) can be considered to be a contribution from the beneficiary.

(57) In relation to the surplus of DEM 14,732 million (measure No 8 in Table 4), it has to be noted that cashflow generally cannot be considered to be a contribution from the beneficiary since it is directly or indirectly generated through granted aid measures and its exact amount cannot be determined at the time the restructuring plan is set up. Therefore, in principle measure No 8 cannot be taken into account. This also applies to the amount of DEM 650 000 which Germany claims was not used from the investment grant (measure No 2 in Table 3), since this measure in

any case would have had to be regarded as aid. Since Germany states that a loan already granted by the Vereinsbank to the amount of DEM 2,65 million (measure No 5 in Table 4) was not used due to the generated surplus, it appears questionable whether this amount can be considered to be a contribution from the beneficiary to the restructuring. However, this does not affect the outcome of the proportionality assessment.

(58) It must therefore be concluded that, contrary to the view taken by Germany, the contribution by the beneficiary from its own or external commercial sources amounts to only DEM 5,96 million.

(59) On the other hand, a considerable proportion of the restructuring costs has been financed by contributions that can be regarded neither as contributions from the recipient nor as aid, since they are part of the capital surplus to be achieved by the company. Because of this fact in particular, the proportion of the contribution which the aid recipient is to be recognised as making to the overall costs of the restructuring is small. However, it must also be noted that the amount is close to the amount of DEM 6,6 million financed by aid and that, in previous cases involving the new German *Länder*, the Commission has sometimes accepted fairly small contributions from the recipient. Consequently, the initial doubts as to whether the recipient had made a significant contribution from its own resources to the restructuring can be considered to have been allayed.

(60) When the proceedings were initiated, doubts were also expressed as to whether the aid, as stipulated in the 1994 guidelines, would be limited to the strict minimum. Under the proportionality criterion, the aid must be limited to the strict minimum needed so as to limit the distortive effect. This also means that the aid must not enable the recipient to finance new investment not required for the restructuring.

(61) At the start of the restructuring in October 1997, Schmitz-Gotha acquired the subcontractor (…)* for DEM 3,7 million. DEM 2,2 million of the purchase price was paid right away during the first half-year of the restructuring. The remaining DEM 1,5 million, however, was paid in four further annual instalments that were tied to the achievement of a specific level of turnover by (…)*. The takeover of (…)* must be regarded as 'new investment' which, under the 1994 guidelines, is justified only if it is to be regarded as being required for the restructuring.

(62) In this context, it must be noted that the investors acquired the fixed assets for DEM 1. Mr Koch was one of the investors and at the same time the founder and managing partner of (…)* and the future manager of both firms. The Commission would point out once again that, despite the information injunction, neither the purchase contract nor detailed written information on the original ownership structure of (…)* were provided by Germany. Consequently, in the light of other circumstances and of information provided orally, the Commission cannot exclude the possibility that, prior to the takeover, a substantial part of (…)* was directly or indirectly owned by Mr Koch or his family. Germany has stated that Schmitz-Gotha could not itself manufacture the parts obtained from (…)* and was not in a position to appreciably improve the terms of delivery, and that consequently the main purpose of the takeover was to cut production costs. The Commission cannot exclude the possibility that, through the takeover of (…)*, a substantial amount that should have been used to finance the restructuring was in fact paid to one of the new investors. At any rate, the takeover of (…)* was not necessary in order to ensure good cooperation with (…)*. Since Mr Koch was the founder and managing partner of (…)* and subsequently also became the manager of Schmitz-Gotha, it appears improbable that better purchase terms could not have been agreed with (…)*. Furthermore, a competitive firm should in principal be able to finance its subcontracting requirements at market prices without thereby getting into financial difficulties.

(63) The information supplied by Germany shows that the takeover of (…)* was a useful investment for the company, since it resulted in substantial savings which helped to shorten the restructuring period by a year. However, this does not necessarily mean that the investment was required in order to carry out the restructuring. If a company receives aid for the purposes of financing its restructuring, in principle not every investment which increases its efficiency is permissible, since such investment also inevitably simultaneously reduces the aid recipient's ability to finance the restructuring from its own resources. Only if, without the investment, the success of the restructuring as a whole would be jeopardised or unreasonably delayed can an investment be

regarded as being required for the restructuring, since the purpose of the aid is restricted to restoring the viability of the firm within a reasonable timescale. Any investment which goes beyond what is required for restoring viability within a reasonable time scale inevitably uses up financial resources which should have been used for the restructuring costs actually required and which would thus have reduced the amount of aid required for the restructuring. It follows that investment not thus required for the restructuring results in an aid intensity that goes beyond the necessary minimum which, according to the proportionality criterion, is required for the restructuring.

(64) The cutting of supply costs cannot on its own justify the need to carry out the acquisition for the purposes of the restructuring. Furthermore, Germany has never claimed that, without the takeover of (…)*, the success of the restructuring would have been jeopardised or delayed to an unreasonable extent. Even without taking account of the takeover of (…)*, the original plan foresaw the achievement of a positive business result by the end of the fourth business year. According to the most recent information, this period was shortened by one year as a result of the takeover. However, a period of four years in order to achieve the profitability threshold cannot be regarded as an unreasonable period for the purposes of restructuring. On the contrary, the original plan provided for the fairly rapid restoration of viability. It must therefore be noted that, even without the takeover of (…)*, the restructuring could have been carried out successfully within an appropriate period and the acquisition was not therefore necessary in order for the restructuring to be successful. Consequently, the Commission finds that the acquisition of (…)* was not essential to achieving the objectives of the plan. It follows from this that the resources used for the acquisition should have been used elsewhere for the financing of the restructuring so as to reduce the amount of aid required for the restructuring.

(65) The purchase price of DEM 3,7 million is part of the investment of DEM 23,8 million anticipated for the restructuring of DEM 27,3 million. The fact that the takeover occurred at the very outset of the restructuring and that DEM 2,2 million was paid already in the first half year of the restructuring shows that, even at this stage, the firm already had surplus liquidity of at least DEM 2,2 million with which it was able to undertake the investment that was not necessary for the restructuring. The remaining amount of DEM 1,5 million was only paid in four subsequent annual instalments of DEM 375 000. Although these instalments were also actually paid, it must be noted that they were payable only in so far as (…)* achieved an annual result before tax of DEM 500 000. Even if, at the time of the acquisition, (…)* was seen to be a profitable undertaking and subsequently also achieved the anticipated results, the Commission notes that, at the time of the acquisition, it was not yet certain whether the firm would actually be able to achieve the desired results. Consequently, the view may be taken that, for the same reasons as those for which capital reserves that are to be generated cannot be assessed as contributions from the recipient to the restructuring, the surpluses with which the acquisition was financed were not guaranteed to the amount of DEM 1,5 million and thus did not form part of the surplus liquidity of the firm.

(66) The Commission therefore concludes that aid amounting to DEM 2,2 million was granted in excess of the strict minimum needed for the restructuring within the meaning of the guidelines. The Commission accordingly considers an aid amount of DEM 2,2 million to be incompatible with the common market pursuant to Article 87(1) of the EC Treaty.

V. **CONCLUSIONS**

(67) The Commission concludes that, in respect of an amount of DEM 2,2 million, the aid to Schmitz-Gotha was not limited to the strict minimum needed for the restructuring and therefore does not comply with the criteria set out in the 1994 guidelines.

(68) Germany has unlawfully granted the aid in question in breach of Article 88(3) of the EC Treaty. Aid amounting to DEM 2,2 million is incompatible with the common market, since it does not fulfil the conditions set out in the 1994 guidelines,

HAS ADOPTED THIS DECISION:

Article 1

An amount of EUR 1,12 million of the aid which Germany has granted to Schmitz-Gotha Fahrzeugwerke GmbH is incompatible with the common market.

Article 2

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.

Recovery shall be effected without delay and in accordance with the procedures of German law, provided that they allow the immediate and effective execution of this 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 October 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 16 October 2002

on the scheme by which Italy plans to aid employment in the Region of Sicily

C 56/1999 (ex N 668/1997)

(notified under document number C(2002) 3738)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2003/195/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 laying down detailed rules for the application of Article 88 of the EC Treaty [1],

Having called on interested parties to submit their comments pursuant to the provisions cited above [2],

Whereas:

I. PROCEDURE

(1) By letter No 6307 of 19 September 1997, the Italian authorities notified the Commission, in accordance with Article 88(3) of the Treaty, of Article 11(1) of Sicilian Regional Law No 16 of 27 May 1997 (Regional Law No 16/97). The Law was to enter into force subject to the Commission's prior authorisation under Articles 87 and 88 of the Treaty. The scheme was accordingly entered in the register of notified aid under number N 668/1997.

(2) The Commission requested additional information in letters dated 24 October 1997 and 1 April 1998, and the Italian authorities replied by letter of 11 May 1999.

(3) By letter dated 10 August 1999, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [3]. The Commission invited interested parties to submit their comments on the aid.

(5) On 15 February 2000 a meeting took place in Brussels between the Commission departments and the Italian authorities in the course of which the Italian authorities stated that they intended to submit comments on the decision to initiate the procedure in this case as soon as the Court of Justice had delivered judgment on Italy's application for the annulment of Commission Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment [4]. That Decision declared that a scheme of assistance towards the hiring of employees under training and work experience contracts, and the conversion of those contracts into open-ended contracts, was incompatible with the Community rules.

(6) On 7 March 2002, by its Judgment in Case C-310/99 Italy v Commission [5] the Court of Justice dismissed Italy's application.

(7) In the case at issue here the Commission received no comments from interested parties.

(8) By letter of 24 June 2002, the Commission told the Italian authorities that if it did not receive information or observations within twenty days of the date of that letter it would take a decision on the basis of the information in its possession.

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 27, 29.1.2000, p. 13.
[3] See footnote 2.
[4] OJ L 42, 15.2.2000, p. 1.
[5] Not yet reported.

(9) The Commission received no such observations or information.

II. DESCRIPTION

(10) Article 11(1) of Regional Law No 16/97 concerns the financing in 1997 and 1998 of an aid scheme (NN 91/A/95) introduced by Article 10 of the Regional Law of 15 May 1991, No 27, which the Commission authorised on 14 November 1995, and which was to have expired at the end of 1996.

(11) The scheme provides in the first place for a grant of 30 % of gross remuneration for employees hired under training and work experience contracts (contratti di formazione e lavoro); the grant is available for the entire duration of the contract. The percentage rises to 50 % of gross remuneration if the employee belongs to any of a number of disadvantaged groups: young people unemployed for three years or more, handicapped people, and former drug addicts.

Secondly, the scheme provides for grants of 50 %, 40 % and 25 % of the employee's gross remuneration if the fixed-term training and work experience contract is converted into an open-ended contract; the grant is available for the first three years of the open-ended contract. Those percentages rise to 60 %, 50 % and 50 % if the employee belongs to any of a number of disadvantaged groups: once again unemployed people, handicapped people, and former drug addicts. These grants are given only if at least 50 % of the employees hired under training and work experience contracts are then kept on under open-ended contracts.

(12) The scheme is available to businesses in the Region of Sicily which are engaged in the distributive trades, craft industry, tourism, manufacturing or agriculture.

III. ASSESSMENT OF THE AID

1. Do the measures constitute aid?

Form and intensity of the aid

(13) In order to assess whether the measures provided for in the scheme constitute State aid within the meaning of Article 87(1) of the Treaty, it has to be determined whether they confer an advantage on the recipients, whether that advantage derives from state resources, whether they affect competition, and whether they are liable to affect trade between Member States. The first requirement for the applicability of Article 87(1) of the Treaty is that the measure must confer an advantage on certain specific undertakings. It has to be determined whether the recipients receive an economic advantage they would not have received under normal market conditions, or whether they avoid costs which they would normally have had to bear out of their own financial resources, and whether this advantage is conferred on a specific category of undertaking. In the case at issue here the Italian authorities allow firms located in one region of the country, namely Sicily, to be paid grants towards the hiring of employees under training and work experience contracts, and towards the conversion of those contracts into open-ended contracts; the authorities thus take over part of the firms' labour costs, which are normal expenditure incurred in their own interest, and confer a financial advantage that improves their competitive position. In addition, these measures favour firms operating in specific areas of Italy, because they are not available to firms outside those areas.

(14) The second requirement for the applicability of Article 87 is that the planned measures must be paid for by the State or out of State resources. In the present case the use of State resources is shown by the fact that the cost of the measure is borne by the public budget.

(15) The third and fourth conditions for the applicability of Article 87(1) of the Treaty require that the aid distort or threaten to distort competition, and that it be liable to affect trade between Member States. The measures at issue here favour firms operating in lines of business open to competition, strengthening their financial position and freedom of action as compared with competitors who do not qualify. If that effect makes itself felt in intra-Community trade, then trade between Member States is affected. The Court of Justice has held, for example in Case 102/87 France v Commission ([6]), that such measures distort competition and affect trade between Member States if the recipient firms export part of their output to other Member States, and that if they do not themselves export, domestic output is nevertheless favoured, because firms in other Member State have less opportunity to export their products to the firms' home market.

(16) The measures at issue are therefore in principle banned by Article 87(1), and can be considered to be compatible with the common market only if they qualify for one of the exemptions laid down in the Treaty.

([6]) [1988] ECR 4067.

2. Compatibility of the measures with the common market

(17) After determining that the measures under examination constitute State aid caught by Article 87(1) of the Treaty, the Commission has to consider whether they can be declared compatible with the common market under Article 87(2) and (3).

(18) The Commission takes the view that the aid does not qualify for the exemptions in Article 87(2): it is not aid having a social character of the kind referred to in Article 87(2)(a), nor is it aid intended to make good the damage caused by natural disasters or exceptional occurrences of the kind referred to in Article 87(2)(b), nor does it satisfy the tests of Article 87(2)(c). For obvious reasons the exemptions in Article 87(3)(b) and (d) are not applicable either.

(19) As the aid is aid to employment, the Commission has to consider whether it qualifies for exemption under Article 87(3)(a) and (c).

(20) In line with the guidelines on aid to employment ([7]), the Commission is generally favourably disposed towards aid in respect of people who have never had a job or who have lost their previous job, if the aid is intended for the creation of new jobs (net job creation) in SMEs and in regions eligible for regional aid, and likewise towards aid to encourage firms to take on certain groups of workers experiencing particular difficulties entering or re-entering the labour market anywhere in the country. In the latter case it is enough that 'the post falls vacant following voluntary departure and not redundancy'.

(21) The guidelines on aid to employment state that 'The Commission will make sure that the level of the aid does not exceed that which is necessary to provide an incentive to create jobs', and will satisfy itself that there is some degree of stability in the jobs created.

(22) The guidelines state that on certain conditions the Commission may also authorise aid to maintain jobs, provided it is confined to regions eligible for exemption under Article 87(3)(a), and provided it satisfies the conditions for operating aid. Such aid must be limited in time and progressively reduced, must be designed to overcome structural handicaps and to promote lasting development, and must comply with the rules governing sensitive industries.

(23) The measures provided for in this scheme:

(a) are not aimed solely at people who have never had a job or who have lost their previous job;

(b) are not intended for net job creation within the meaning of the guidelines on aid to employment, because the recipient firm is under no obligation to increase the number of employees as compared with a reference period;

(c) are not aimed solely at encouraging firms to take on certain groups of workers experiencing particular difficulties entering or re-entering the labour market.

(24) The Commission concludes that the aid can be considered aid to maintain jobs, and in accordance with point 22 of the guidelines on aid to employment can be treated as operating aid. It has to be determined, therefore, whether it satisfies the tests for the admissibility of operating aid described in recital 23 of this Decision.

Eligibility of the region

(25) On 1 March 2000 the Commission approved the Italian regional aid map for the period 2000-2006, delimiting the regions qualifying for exemption under Article 87(3)(a) of the Treaty ([8]). In accordance with that map Sicily is a region eligible for aid under the exemption.

(26) The aid at issue here is indeed confined to a region qualifying for exemption under Article 87(3)(a) of the Treaty, and is limited in time, but it is not being progressively reduced.

(27) The measures were introduced in 1991, and had thus been in force for six years at the time when a two-year extension was proposed. Eligible costs and aid intensities remained unchanged over the six years for which the scheme had been authorised, and the two-year extension now being considered would not reduce the aid in any

([7]) OJ C 334, 12.12.1995, p. 4.

([8]) OJ C 175, 24.6.2000, p. 11.

way from what it was in the six years preceding: the aid measures proposed for the year 1998 are identical to those proposed for 1997, and both are identical to those in force in 1991—1996.

(28) This is a separate scheme which comes on top of the national scheme for training and work experience contracts provided for in Laws Nos 863/84, 407/90, 169/91 and 451/94; among other things that scheme provided for total exemption from social security contributions for firms located in areas where the level of unemployment was above the national average.

(29) Decision 2000/128/EC declared that in this respect the training and work experience scheme was incompatible with the common market, because it was not aimed at the creation of jobs in the recipient firm for persons who had not yet found employment or had lost their previous employment, and was not intended to encourage the employment of workers experiencing particular difficulties in entering or re-entering the labour market. The Commission asked that the incompatible aid which had already been unlawfully paid be recovered from the recipients. No such recovery has yet taken place.

(30) The aid scheme at issue here, therefore, does not satisfy the tests of the guidelines on aid to employment.

IV. **CONCLUSIONS**

(31) On the basis of the assessment set out in point III.2, the Commission must find that the aid scheme provided for in Article 11(1) of Regional Law No 16/1997 is incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme which Italy plans to implement under Article 11(1) of the Sicilian Regional Law No 16 of 27 May 1997 is incompatible with the common market.

The scheme may accordingly not be implemented.

Article 2

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

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 16 October 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 11 December 2002

concerning State aid scheme C 42/2002 (ex N 286/2002) which France proposes to implement to assist French airlines

(notified under document number C(2002) 4833)

(Only the French text is authentic)

(Text with EEA relevance)

(2003/196/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having invited interested parties to submit their comments in accordance with the aforementioned Articles [1],

Whereas:

I. PROCEDURE

(1) By fax dated 11 April 2002, recorded on 12 April 2002 (TREN (2002) A/56617), France notified the Commission of a compensation scheme for losses in the aviation sector for the period starting on 15 September 2001.

(2) By letter dated 5 June 2002, the Commission informed France of its decision to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the said aid.

(3) The Commission's 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 in question.

(4) The Commission received no comments on this matter from interested parties.

II. DETAILED DESCRIPTION OF THE AID

Background

(5) As a result of the terrorist attacks perpetrated in the United States on 11 September 2001, certain parts of air space were closed for several days. This was particularly true of United States air space, which was entirely off limits from 11 to 14 September 2001 and was only gradually reopened to navigation as of 15 September 2001. Other States were prompted to take similar measures on all or part of their territory.

(6) Accordingly, during this initial period, airlines were forced to cancel flights using the air space concerned. In addition, they suffered losses as a result of disruption to other traffic and the impossibility of routing some passengers to their final destination.

(7) In view of the scale and sudden nature of these events, and the costs they engendered for the airlines, the Member States were prompted to envisage special compensation arrangements.

(8) France's compensation scheme for losses sustained from 11 to 14 September 2001 received Commission approval [3]. The decision was taken on the basis of Article 87(2)(b) of the Treaty and the guidelines set out in the communication from the Commission to the European Parliament and the Council 'The repercussions of the terrorist attacks in the United States on the air transport industry' [4] (hereinafter the communication of 10 October 2001). The budget authorised for France was EUR 54,9 million.

New scheme notified by France

(9) The notified scheme covered by the present decision is an extension of the scheme approved for the period ending on 14 September 2001. It provides compensation for losses for the period from 15 to 19

[1] OJ C 170, 16.7.2002, p. 11.

[2] See footnote 1.

[3] Decision of 30 January 2002 on aid N 806/2001 (OJ C 59, 6.3.2002, p. 25).

[4] COM (2001) 574 final, 10.10.2001.

September 2001 sustained by scheduled airlines and charter companies, and from 15 to 30 September 2001 by business airlines.

(10) In support of their notification, the French authorities contend that the closure of United States air space had direct consequences for airlines beyond 14 September 2001, as it was only as of 20 September that the scheduled airlines were able to resume a stabilised flight schedule while complying with the new security measures imposed by the American authorities as a condition for entering their air space. Similar restrictions are claimed to have affected business airlines until the end of September 2001.

(11) In point 2.1 of the notification, the French authorities specify that the new scheme does not alter the budgetary allocation of EUR 54,9 million approved in the Commission's decision regarding the compensation scheme for losses following the closure of air space from 11 to 14 September 2001.

(12) The eligible airlines are air carriers with a licence to operate as such or an air transport authorisation issued by the French authorities and valid on 11 September 2001. To qualify for compensation, operating losses sustained by airlines must be directly linked to the access restrictions to United States air space applied over the period from 15 to 19 September 2001 ([5]) following the attacks of 11 September 2001, and must relate to one of the following:

— the airline's inability to carry out a flight owing to the restrictions imposed by the United States,

— the disruption those restrictions caused to the operation of the other flights of that airline or other airlines,

— the fact that some passengers on other flights of that airline or other airlines were unable to reach their final destination.

(13) However, losses resulting from flight cancellations at the airline's own initiative, or from journey cancellations by passengers on personal grounds, are not considered to qualify for compensation.

(14) Only activities linked to public passenger transport or freight transport may be considered for compensation. Losses relating to other airline activities, such as maintenance or the provision of on-board services, are not eligible under this measure.

(15) The maximum compensation provided is to be calculated with reference to those of the airline's routes or networks on which incurred operating losses may be compensated. Nonetheless, loss of turnover eligible for compensation under the scheme may relate to airlines' entire networks, in both North America and in Europe or in other parts of the world.

(16) For these routes or networks, the calculation will take into account:

— loss of turnover recorded during the period from 15 to 19 September 2001 ([6]) compared with the situation which would have been considered normal had the events of 11 September 2001 not occurred; loss of turnover is to be calculated by comparing the traffic recorded by each airline during the five days in question with that recorded by the same airline over the same five days of the first week of September, adjusted to take account of the trend seen in the corresponding period in 2000;

— costs which would have been incurred had activity not been affected by the events of 11 September 2001, and which were avoided;

— additional operating costs borne by the airlines as a result of the suspension of their activity, and which are not covered by insurance.

(17) The maximum amount of compensation may not exceed 5/365ths of an airline's turnover.

(18) The French authorities indicate that they consulted all the eligible airlines. As a result of this process they propose to grant compensation to eight Community French airlines for a total of around EUR 20,96 million ([7]). They also indicate that they envisage compensation for extra-Community French airlines based in French Polynesia ([8]) should the individual aid planned for the Community airlines be accepted by the Commission.

([5]) From 15 to 30 September 2001 for business airlines.

([6]) From 15 to 30 September 2001 for business airlines.

([7]) […].

([8]) […].

(19) France told the Commission that this detailed information on each proposed recipient has been sent to allow a case-by-case examination; the French authorities believe this approach to be in line with that laid down by the Transport Council on 16 October 2001 ([9]) for assessing compensation beyond 14 September 2001.

(20) The Commission decided to initiate the formal examination procedure in the light of doubts as to the compatibility of such an aid scheme with the Treaty, not just because it extends beyond the period stipulated in paragraph 35 of the communication of 10 October 2001, but also, and above all, because of the absence of exceptional occurrences and the different nature of the losses being compensated after 14 September 2001.

III. COMMENTS FROM INTERESTED PARTIES

(21) No interested third party submitted comments to the Commission within the allotted one month period.

IV. COMMENTS FROM FRANCE

(22) The French authorities submitted no further comments to the Commission within the one-month period stipulated by the decision to initiate the procedure or within the additional one-month period they requested by fax dated 3 July 2002, registered by the Commission under the number TREN (2002) A/61839. The Commission also notes that at 1 November 2002 no comments had been received.

V. ASSESSMENT OF THE AID

Existence of aid

(23) Pursuant to Article 87(1) of the Treaty, 'save as otherwise provided …, 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.'

(24) Subventions to airlines constitute an allocation of State resources to those airlines and thus represent a definite economic advantage for them.

(25) The measure covered by this decision and relating to air transport is by nature selective. Moreover, the eight airlines due to receive aid under the scheme have been explicitly identified (see recital 18 and footnote 6).

(26) In the context of an air market liberalised since the 'third package' entered into force on 1 January 1993 ([10]), a Member State's airlines find themselves competing with other airlines from other Member States. Specifically, the eight airlines eligible for the aid operate actively on the Community market. The subsidies proposed for them, and the advantage this would give them, would affect trade between Member States and are liable to affect competition.

(27) These measures, which constitute State aid, are compatible with the common market only if they qualify for one of the derogations provided for.

Legal basis for assessing the aid

(28) Having examined the scheme in question in the light of its provisions and its possible application to the eight potential recipients identified (see recital 18 and footnote 6), the Commission does not consider any of the derogations provided for in Article 87(2) and (3) to be applicable in this instance.

(29) The derogations provided for in Article 87(2)(a) and (c) of the Treaty do not apply because the aid in question is neither aid of a social character granted to individual consumers nor aid granted to certain areas of the Federal Republic of Germany.

(30) The derogations provided for in Article 87(3)(a) and (c) of the Treaty cannot be considered as the aid is neither aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment nor aid to facilitate the development of certain economic activities or of certain economic areas.

(31) Lastly, the derogations provided for in Article 87(3)(b) and (d) of the Treaty, for aid to promote the execution

([9]) See recital 40.

([10]) Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), and Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8).

of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State and aid to promote culture and heritage conservation, respectively, are not relevant in this instance.

(32) Pursuant to Article 87(2)(b) of the Treaty, 'aid to make good the damage caused by natural disasters or exceptional occurrences' is compatible with the common market. In the communication of 10 October 2001 ([11]), the Commission considers that the events of 11 September 2001 may be described as exceptional occurrences within the meaning of Article 87(2)(b) of the Treaty.

(33) In point 35 of the communication of 10 October 2001, the Commission sets out the conditions it believes must be met in order for compensation relating to these events to be considered to be in line with Article 87(2)(b) of the Treaty:

'The Commission considers that the costs arising directly from the closure of American airspace between 11 and 14 September 2001 are a direct consequence of the events of 11 September. They may therefore give rise to compensation by Member States in accordance with Article 87(2)(b) of the Treaty on the following conditions:

— compensation is paid in a non-discriminatory manner to all airlines in a given Member State,

— it concerns only the costs incurred during the days 11 to 14 September 2001 following the grounding of air traffic decided by the American authorities,

— the amount of compensation is calculated accurately and objectively by comparing the traffic recorded by each airline during the four days in question with that recorded by the same airline in the preceding week, adjusted to take account of the development in the corresponding period of 2000. The maximum amount of compensation, which must take account in particular both of the actual costs incurred and those avoided, is equal to the loss of revenue duly recorded during these four days. It must of course be less than 4/365ths of the airline's turnover.'

([11]) See point 33 of the communication.

Compatibility within the meaning of Article 87(2)(b) of the Treaty

(34) The notified scheme is designed to compensate for losses during the period up to 19 September 2001 for scheduled airlines and up to 30 September 2001 for business airlines. It thus clearly exceeds the frame considered admissible in the communication of 10 October 2001 for applying Article 87(2)(b) of the Treaty, that frame being limited to the period from 11 to 14 September 2001 and confined to losses, directly linked to the closure of air space and already approved, sustained during that period.

(35) While the Commission has already stated, in point 35 of the communication of 10 October 2001, that the closure of United States air space from 11 to 14 September 2001 and the compatibility of compensation for losses resulting from that closure constitute an 'exceptional occurrence', it has not said the same of other damage indirectly linked to the said closure. This is the case, for instance, of losses sustained by airlines following the reopening of air space on 15 September.

(36) The Commission explained in the communication of 10 October 2001 that losses eligible for compensation must concern 'only the costs incurred … during the days 11 to 14 September 2001 following the grounding of air traffic decided by the American authorities.' In their notification, the French authorities describe in detail the additional security measures imposed by the American authorities, including searching of hold baggage at check-in, close surveillance of aircraft and screening of staff, plus the checks those authorities intended to make on the implementation of these measures, and indicate that 'the deadlines for implementing these measures prevented the airlines from resuming all their flights on 15 September.'

(37) The French authorities thus recognise that, after 14 September 2001, the situation was no longer marked by traffic disruption but by tighter operating arrangements for airlines in terms of security measures. Though unusual, such additional costs cannot be considered to be exceptional occurrences within the meaning of Article 87(2)(b) of the Treaty. Similar additional costs or operating constraints have arisen or persist where conflicts in certain geographical areas result in an overflying ban, e.g. the Balkans, or in respect of air services to countries posing a specific political risk, without this giving rise to any eligibility for aid.

(38) The Commission cannot therefore accept that the indirect repercussions of the attacks of 11 September 2001, such as difficulties in operating air routes as of 15 September, be placed on the same level as the direct repercussions, i.e. the complete closure of some air space until 14 September and the impossibility of operating routes which used that space. The indirect repercussions of the attacks were felt, and continue to be felt, in many sectors of the world economy to differing degrees, but as with any other economic or political crisis, these difficulties, however burdensome, cannot be looked upon as exceptional occurrences such as would allow application of Article 87(2)(b) of the Treaty.

(39) Moreover, the compensation ceiling of 5/365ths of an airline's annual turnover, while corresponding in spirit to the 4/365ths ceiling the Commission specified for the four days from 11 to 14 September, would lead to a given airline being able to receive maximum compensation of 9/365ths of its annual turnover. The limits set in the communication of 10 October 2001 would thus be exceeded very significantly, and this would also mean that the circumstances referred to in Article 87(2)(b) of the Treaty could not be deemed to obtain.

(40) Regarding the conclusions of the Transport Council of 16 October 2001, to which France refers in support of its notification, the Commission points out that these only have indicative policy value and are not legally binding in the context of examining the compatibility of aid. Moreover, while in point 7 of the conclusions the Council invites the Commission, for the period following 14 September, to examine 'on a case by case basis the compensation which could be granted on the basis of objective criteria to make up for restrictions imposed to European airlines by the country of destination,' it also indicates that 'any aid or compensation may not lead to distortion of competition between operators.' In assessing equality of treatment between operators, which it must ensure, the Commission thus notes that no other proposal for an equivalent period has been notified by the other Member States for their air operators. What is more, the Commission, in its decisions in this area ([12]) has yet to authorise any compensation beyond the period ending on 14 September 2001.

VI. **CONCLUSIONS**

(41) In view of the foregoing, the Commission concludes that the notified measure is incompatible with the common market and is not eligible for the derogation provided for in Article 87(2)(b), as interpreted in the communication of 10 October 2001,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which France proposes to implement in favour of French airlines to provide compensation beyond 14 September 2001 for the losses those airlines sustained on account of the partial closure of air space is incompatible with the common market.

For that reason, the aid may not be implemented.

Article 2

France shall inform the Commission within two months of the notification of this decision of the measures taken to comply with it.

Article 3

This decision is addressed to the French Republic.

Done at Brussels, 11 December 2002.

For the Commission

Loyola DE PALACIO

Vice-President

([12]) See the Decisions of 12 March 2002 on aid N 854/2001 granted by the United Kingdom and 2 July 2002 on aid N 269/2002 granted by Germany, available for consultation at: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/transports.htm.