JUDGMENT OF THE COURT (Second Chamber)

11 November 2004 *

In Joined Cases C-183/02 P and C-187/02 P,

TWO APPEALS under Article 49 of the EC Statute of the Court of Justice lodged on 15 and 16 May 2002,

Daewoo Electronics Manufacturing España SA (Demesa), established in Vitoria (Spain), represented by A. Creus Carreras and B. Uriarte Valiente, abogados,

appellant in Case C-183/02 P,

Territorio Histórico de Álava — Diputación Foral de Álava, represented by A. Creus Carreras, B. Uriarte Valiente and Bravo-Ferrer Delgado, abogados,

appellant in Case C-187/02 P,

* Language of the case: Spanish.

supported by

Comunidad Autónoma del País Vasco, represented by E. Garayar Gutiérrez, abogado,

intervener in the appeal,

the other parties to the proceedings being:

Commission of the European Communities, represented by F. Santaolalla Gadea and J.L. Buendía Sierra, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Asociación Nacional de Fabricantes de Electrodomésticos de Línea Blanca (ANFEL), established in Madrid (Spain),

and

Conseil européen de la construction d'appareils domestiques (CECED), established in Brussels (Belgium),

interveners at first instance,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur) and N. Colneric, Judges,

Advocate General: J. Kokott,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 March 2004.

after hearing the Opinion of the Advocate General at the sitting on 6 May 2004,

gives the following

Judgment

1 By their appeals, Daewoo Electronics Manufacturing España SA ('Demesa') and the Territorio Histórico de Álava — Diputación Foral de Álava ('the Territorio Histórico de Álava') seek to have set aside the judgment of the Court of First Instance of the European Communities of 6 March 2002 in Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275 ('the judgment under appeal'), whereby the Court of First Instance annulled in part Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa) (OJ

1999 L 292, p. 1; 'the contested decision') and, for the remainder, dismissed their actions for annulment of that decision.

Legal framework

2 The tax arrangements in force in the Basque Country are governed by the Economic Agreement established by Spanish Law 12/1981 of 13 May 1981, as last amended by Law 38/1997 of 4 August 1997.

3 Under the Economic Agreement, the Diputación Foral de Álava (Álava Provincial Council) may, under certain conditions, organise the tax system within its territory.

4 On that basis, it adopted, inter alia, a tax measure in the form of a tax credit of 45% of the amount of the investment ('the tax credit of 45%' or 'the impugned tax measure').

5 The Sixth Additional Provision of Norma Foral (Regional Regulation) 22/1994 of 20 December 1994 implementing the 1995 budget of the Territorio Histórico de Álava (*Boletín Oficial del Territorio Histórico de Álava* No 5, of 13 January 1995) provides:

'Investments in new fixed assets made between 1 January 1995 and 31 December 1995, which exceed ESP 2 500 million, in accordance with the Diputación Foral de

Álava agreement, will receive a tax credit of 45% of the cost of investment determined by the Diputación Foral de Álava, to be applied to the definitive amount of tax payable.

Any tax credit not used up because it exceeds the amount of tax liability may be applied in the nine years following the year during which the Diputación Foral de Álava agreement was concluded.

The Diputación Foral de Álava agreement will lay down the time-limits, and any restrictions applicable in each case.

The advantages granted under this provision will be incompatible with any other fiscal advantage in respect of the same investments.

The Diputación Foral de Álava will also determine the length of the investment process, which may include investments made during the preparation of the project which is at the root of the investments.'

6 The validity of that provision was extended for the years 1996 and 1997, then the tax credit of 45% was maintained, in an amended form, for the years 1998 and 1999, by subsequent Normas Forales.

Facts

7 On 13 March 1996, the Basque authorities and Daewoo Electronics Co. Ltd ('Daewoo Electronics') concluded a Cooperation Agreement in which Daewoo Electronics undertook to establish a refrigerator manufacturing plant in the Basque Country and the Basque regional authorities undertook in return to support the investment by providing a number of grants.

8 The company set up by Daewoo Electronics was to draw up a business plan whose approval by the Basque authorities was a prerequisite for implementation of the agreement. The business plan, which covered the period 1996 to 2001 and was presented to the Basque authorities in September 1996, provided for an investment of ESP 11 835 600 000 and the creation of 745 jobs.

9 On 7 October 1996, Demesa was incorporated under Spanish law as a wholly-owned subsidiary of Daewoo Electronics.

10 Under Decision 737/1997 of 21 October 1997 of the Diputación Foral de Álava, Demesa obtained the tax credit of 45% provided for in the Sixth Additional Provision of Norma Foral 22/1994.

11 On 11 June 1996, the Asociación Nacional de Fabricantes de Electrodomésticos de Línea Blanca (ANFEL) submitted to the Commission of the European Communities a complaint against the Kingdom of Spain. It complained that that Member State had granted aid to Demesa in the form, inter alia, of tax measures. The Conseil européen de la construction d'appareils domestiques (European Committee of Manufacturers of Electrical Domestic Equipment) (CECED) submitted a complaint to the same effect to the Commission.

12 Following an exchange of correspondence, the Commission, by letter of 16 December 1997, informed the Spanish authorities that it had decided to initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC) concerning, in particular, the tax credit of 45% granted to Demesa.

13 At the close of the procedure, the Commission adopted the contested decision.

14 In Article 1(d) of that decision, the tax credit of 45% granted to Demesa is characterised as State Aid incompatible with the common market.

15 In Article 2 of the decision, the Commission orders the Kingdom of Spain to withdraw from the beneficiary company the benefits deriving from the aid which was granted to it illegally.

The actions before the Court of First Instance and the judgment under appeal

16 By applications lodged at the Registry of the Court of First Instance on 25 May, 26 May and 18 June 1999 respectively, the Territorio Histórico de Álava (Case T-127/99), the Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra SA (Case T-129/99) and Demesa (Case T-148/99) brought actions against the Commission.

17 Each of the applicants claimed that the contested decision should be annulled, whether in whole or in part.

18 By orders of the President of the Third Chamber of the Court of First Instance of 25 February 2000, the Asociación Nacional de Fabricantes de Electrodomésticos de Línea Blanca and the Conseil européen de la construction d'appareils domestiques were granted leave to intervene in support of the form of order sought by the Commission.

19 By order of 5 June 2001, the three cases were joined for the purposes of the oral procedure and the judgment.

20 In the judgment under appeal, the Court of First Instance, inter alia:

— dismissed the applications of the Territorio Histórico de Álava and of Demesa in so far as they sought annulment of the contested decision in respect of the tax credit of 45%;

— declared the applications of the Comunidad Autónoma del País Vasco and of Gasteizko Industria Lurra SA inadmissible in so far as they sought annulment in the same terms;

— ordered the parties to bear their own costs.

The appeals

21 By order of 23 October 2002, the Court granted the Comunidad Autónoma del País Vasco leave to intervene in support of the form of order sought by the Territorio Histórico de Álava.

22 By order of the President of the Court of 6 March 2003, an application by the Gobierno Foral de Navarra (Government of Navarro) for leave to intervene in support of the form of order sought by Demesa was dismissed.

23 Demesa claims that the Court should:

— set aside the judgment under appeal;

— give judgment itself in the matter and annul Articles 1(d) and 2 of the contested decision;

— in the alternative, refer the case back to the Court of First Instance;

— order the Commission to pay the costs of the proceedings at first instance and those of the proceedings on appeal.

24 The Territorio Histórico de Álava claims that the Court should:

— set aside the judgment under appeal;

— give judgment itself in the matter and annul the contested decision in so far as it concerns the tax credit of 45%;

— in the alternative, refer the case back to the Court of First Instance;

— order the Commission to pay the costs of the proceedings at first instance and those of the proceedings on appeal.

25 The Comunidad Autónoma del País Vasco claims that the Court should:

— set aside the judgment under appeal in part, in so far as it finds that the tax credit of 45% constitutes State aid;

— order the Commission to pay the costs of the proceedings.

26 Having withdrawn during the oral procedure an objection of inadmissibility in respect of the appeal brought by the Territorio Histórico de Álava, the Commission definitively contends, in both Case C-183/02 P and Case C-187/02 P, that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

The grounds for setting aside the judgment under appeal

27 In its application, Demesa put forward five grounds for setting aside the judgment under appeal, alleging:

— incorrect categorisation of the impugned fiscal measure as State aid incompatible with the common market;

— failure to state the grounds of the judgment under appeal on that point;

— an error of law on the part of the Court of First Instance in so far as it held that the impugned measure was not existing aid;

— failure to state the grounds of the judgment under appeal on that point;

— an error of law on the part of the Court of First Instance in so far as it held that the principle of protection of legitimate expectations was not applicable.

28 By a pleading lodged on 20 February 2004, Demesa informed the Court that it was maintaining only the ground of appeal based on the principle of protection of legitimate expectations and that it was withdrawing its other grounds of appeal.

29 In its application, the Territorio Histórico de Álava put forward six grounds for setting aside the judgment under appeal, alleging:

— incorrect categorisation of the impugned tax measure as State aid incompatible with the common market;

— failure to state the grounds of the judgment under appeal on that point;

— an error of law on the part of the Court of First Instance in so far as it held that the impugned measure was not existing aid;

— failure to state the grounds of the judgment under appeal on that point;

— an error of law on the part of the Court of First Instance in so far as it did not find that the Commission had misused its powers;

— failure to state the grounds of the judgment under appeal on that point.

30 In a pleading lodged on 20 February 2004, the Territorio Histórico de Álava informed the Court that it was:

— maintaining in part the first and second grounds of appeal alleging, respectively, incorrect categorisation of the impugned tax measure as State aid incompatible

with the common market and failure to state the grounds of the judgment under appeal on that point;

— maintaining the fifth and sixth grounds of appeal alleging, respectively, misuse of powers and failure to state the grounds of the judgment under appeal on that point;

— withdrawing its other grounds of appeal.

The appeals

31 After hearing the parties and the Advocate General on this point, the Court considers that it is appropriate, on account of the connection between them, to join the present cases for the purposes of the judgment, in accordance with Article 43 of the Rules of Procedure of the Court of Justice.

The ground of appeal which Demesa bases on the principle of protection of legitimate expectations

Arguments of the parties

32 Before the Court of First Instance, Demesa invoked the principle of protection of legitimate expectations. It referred to Commission Decision 93/337/EEC of 10 May

1993 concerning a scheme of tax concessions for investment in the Basque country (OJ 1993 L 134, p. 25). It claimed that that decision had categorised as State aid incompatible with the common market, on the ground that they were contrary to Article 52 of the EC Treaty (now, after amendment, Article 43 EC), certain tax credits for investments made. Demesa maintained that the provisions necessary for adjusting the regional legislation to Decision 93/337 had been laid down and that the Commission had expressed its approval of the solution adopted. Accordingly, both the Spanish authorities and the Commission itself considered that the problem was solved. For that reason, the Commission never initiated a procedure in respect of State aid or raised any objection against similar tax measures adopted subsequently. It therefore led Demesa, and any trader subject to the regional legislation concerned, to entertain legitimate expectations that the tax measures adopted by the Diputación Foral de Álava were authorised by the Commission provided that they did not involve any infringement of Article 52 of the Treaty.

33 Demesa complains that the Court of First Instance, at paragraph 234 et seq. of the judgment under appeal, rejected its plea on the ground that the impugned tax measure had not been the subject of prior notification, contrary to the requirements of Article 93(3) of the EC Treaty (now Article 88(3) EC).

34 In its submission, in the context of the policy followed by the Commission at the time of its application for the tax credit of 45%, it was excessive to require a trader to ascertain whether the tax measure applicable to it satisfied the conditions of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and should, in consequence, be notified to the Commission.

35 Demesa was therefore correct to invoke the principle of protection of legitimate expectations.

36 The appellant maintains that the declaration of incompatibility in Decision 93/337 was based on a finding of an infringement of Article 52 of the Treaty and not also, as the Court of First Instance held at paragraph 237 of the judgment under appeal, on the finding of an infringement of the Community rules on State aid.

37 In any event, in Demesa's submission, the measures called in question in Decision 93/337 were characterised as State aid on the basis of three criteria of selectivity (regional, sectoral and material selectivity) which, it contends, could not be upheld in relation to the impugned tax measure. Accordingly, that decision cannot be relied on to support the argument that Demesa should have considered that the tax credit of 45% constituted State aid and should, in consequence, have been notified to the Commission.

38 The Commission claims that when the tax credit was granted to Demesa, certain elements clearly showed that it entailed State aid.

39 In particular, Decision 93/337 considered that comparable measures constituted aid incompatible with the common market. That declaration of incompatibility was not linked solely to breach of the principle of freedom of establishment but, as the Court of First Instance observed at paragraph 237 of the judgment under appeal, also to breach of the various rules relating to aid.

40 It is clear, moreover, that Decision 93/337 could only be based on a prior finding that the measures in question were in the nature of State aid.

41 However, Demesa did not ascertain whether the aid it received had been authorised by the Commission.

42 In any event, in the absence of prior notification of the impugned tax measure, the appellant could not plead that the Commission had failed to act.

43 Accordingly, the Court of First Instance was correct to find that there had been no legitimate expectation.

Findings of the Court

44 It should be borne in mind, first, that in view of the mandatory nature of the review of State aid by the Commission under Article 93 of the Treaty, undertakings to which 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 and, second, that a diligent businessman should normally be able to determine whether that procedure has been followed (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51; and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25).

45 In particular, where aid is paid without prior notification to the Commission, so that it is unlawful under Article 93(3) of the Treaty, the recipient of the aid cannot have

at that time a legitimate expectation that its grant is lawful (see *Alcan Deutschland*, cited above, paragraphs 30 and 31).

46 In the present case, the Court of First Instance stated at paragraph 235 of the judgment under appeal that it was not disputed that the tax credit of 45% had been introduced without prior notification, in infringement of Article 93(3) of the Treaty.

47 At paragraph 236 of the judgment under appeal, the Court of First Instance correctly held, referring inter alia to *Commission* v *Germany*, cited above, that the argument based on the principle of the protection of legitimate interests could not be upheld.

48 At the following paragraph of that judgment, the Court of First Instance correctly stated that the applicant's argument was based on a misreading of Decision 93/337. In that decision, as the Court of First Instance emphasised, the Commission had characterised the aid in question as incompatible with the common market not only because it was contrary to Article 52 of the Treaty but also, at Part V of that decision, in which the Commission examines the possibility of applying one of the derogations provided for in Article 92 of the Treaty, because it did not comply with the various rules relating to aid.

49 More specifically, in Decision 93/337 the Commission:

— had stated that the aid in question included a tax credit of 20% in respect of investments (Part I);

— had considered that, for the purpose of applying the derogation provided for in Article 92(3)(c) of the Treaty, the conditions laid down in the Community guidelines of 19 August 1992 on State aid for small and medium-sized enterprises (OJ 1992 C 213, p. 2), which, after defining in point 2.2 the components of the category of small and medium-sized enterprises, stated, at point 4.1, fifth paragraph, that the Commission had decided to allow investment aid only up to the levels of 15% of the investment for small enterprises and 7.5% of the investment for other enterprises in the same category, were not satisfied (Part V);

— had ordered the Spanish authorities to ensure that the aid was granted, inter alia, in accordance with the conditions laid down in the Community guidelines on State aid for small and medium-sized enterprises (Article 1(4)).

50 It is thus apparent that Demesa could not infer from Decision 93/337 that a tax credit of 45% granted to an undertaking of a size allowing it to make a minimum investment of ESP 2 500 million required by the Sixth Additional Provision of Norma Foral 22/1994 could not be categorised as aid for the purposes of Article 92 of the Treaty.

51 In the light of the terms of Decision 93/337, the appellant cannot therefore claim the possibility, which cannot be excluded (see *Commission* v *Germany*, cited above, paragraph 16), for the recipient of unlawful aid to rely on exceptional circumstances on the basis of which it legitimately assumed the aid to be lawful.

52 As regards the Commission's alleged failure to act, the Commission rightly claims that any apparent failure to act is irrelevant when an aid scheme has not been notified to it.

53 It follows that the ground of appeal which Demesa bases on the principle of protection of legitimate expectations must be rejected.

The grounds of appeal whereby the Territorio Histórico de Álava alleges, first, incorrect categorisation of the impugned tax measure as State aid incompatible with the common market and, second, failure to state the grounds of the judgment under appeal on that point

Arguments of the parties

54 Before the Court of First Instance, the Territorio Histórico de Álava maintained that the Commission had infringed Article 92 of the Treaty by considering the tax credit of 45% to be State aid incompatible with the common market, on the ground that Norma Foral 22/1994 constituted a specific measure favouring 'certain undertakings or the production of certain goods'. It claimed that, in any event, any selective nature which that measure might have was justified by the nature and scheme of the tax system.

55 The Territorio Histórico de Álava complains that the Court of First Instance, at paragraphs 148 to 170 of the judgment under appeal, rejected that argument and thus erred in law in applying Article 92 of the Treaty.

56 In the pleading which it lodged on 20 February 2004, it states that it maintains its ground of annulment, but at an earlier stage than that of the categorisation of the impugned tax measure as State aid. It claims that during the proceedings at first instance it maintained that the tax credit of 45% was outside the scope of Article 92 of the Treaty, in so far as, as a tax measure, it was justified as a means of attaining an economic-policy objective. The Court of First Instance considered that that did not preclude its categorisation as State aid incompatible with the Treaty. That conclusion is incorrect, because it was formulated at an inappropriate point in the interpretation process. In reality, the Court of First Instance should, before addressing any question of categorisation as State aid, have considered that a tax measure adopted before the conclusions of the Ecofin Council meeting on 1 December 1997 concerning taxation policy (OJ 1998 C 2, p. 1) and the Commission notice of 10 December 1998 on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3) was excluded from the review of State aid. Where such a measure formed part of the industrial policy implemented by the Member State concerned, it was excluded from the outset from the scope of Article 92 of the Treaty.

57 In the same pleadings, the Territorio Histórico de Álava further states that it also maintains its ground of appeal alleging failure to state the grounds of the judgment under appeal as regards the point of law raised.

58 The Commission contends that, in its present form, the ground of appeal alleging incorrect categorisation of the impugned tax measure as State aid incompatible with the common market, notwithstanding the amended form in which it is presented, still requires an examination by the Court of the question of the nature as aid of that measure. The analysis carried out pursuant to Article 92 of the Treaty contains no stage preceding that of discussion of whether the measure in question must be categorised as State aid; the fiscal nature of a measure is of no relevance to the determination of whether or not it constitutes aid. Nor could the conclusions of the

Ecofin Council meeting on 1 December 1997 concerning taxation policy and the code of conduct annexed thereto alter the allocation of powers established in the Treaty. In those circumstances, by disputing the competence of the Commission, the Territorio Histórico de Álava is persisting in challenging the categorisation as State aid of the impugned tax measure.

Findings of the Court

59 It must be borne in mind that to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to review of the findings of law on the pleas argued before the Court of First Instance (see, in particular, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59; Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 62; and Case C-217/01 P *Hendrickx* v *Cedefop* [2003] ECR I-3701, paragraph 37).

60 In the present case, the Territorio Histórico de Álava did not contend at first instance that:

— the impugned tax measure is excluded as such from the scope of the law on State aid;

— Article 92 of the Treaty has applied to the provisions of tax law only since the conclusions of the Ecofin Council meeting on 1 December 1997 concerning tax

policy and the Commission notice of 10 December 1998 on the application of the State aid rules to measures relating to direct business taxation.

61 In reality, it referred to the economic-policy objectives of the impugned tax measure in the course of argument as to whether that measure was justified by the nature and scheme of the tax system, that is to say, at the stage of the argument concerning the categorisation of the measure as State aid incompatible with the common market for the purposes of Article 92 of the Treaty.

62 The Court of First Instance examined the corresponding arguments at paragraphs 167 and 168 of the judgment under appeal.

63 The argument submitted to the Court in the present appeal, namely that, in substance, the impugned tax measure was excluded from the outset, at a stage preceding the legal reasoning, from the scope of Article 92 of the Treaty and, subsequently, from actual review by the Commission, therefore constitutes a plea raised for the first time in the appeal.

64 This new plea must be declared inadmissible, as must the ground of appeal alleging failure to state the grounds in the judgment under appeal on the point of law raised, as the latter cannot be dissociated from the former.

The grounds of appeal whereby the Territorio Histórico de Álava alleges, first, an error of law on the part of the Court of First Instance in so far as it did not find that there had been a misuse of power and, second, failure to state the grounds of the judgment under appeal on that point

Arguments of the parties

65 The Territorio Histórico de Álava states that it claimed before the Court of First Instance that the Commission had used the State aid procedure, an area in which it has exclusive competence and wide powers, in order to implement tax harmonisation. Such harmonisation belongs in reality to the procedure provided for in Articles 101 of the EC Treaty (now, after amendment, Article 96 EC) and 102 of the EC Treaty (now Article 97 EC), which confers competence on the Council of the European Union.

66 The Territorio Histórico de Álava criticises the Court of First Instance for having confined itself:

— to referring, at paragraph 84 of the judgment in Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385), relating to aid granted to another undertaking, to the case-law according to which a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the sole, or at least the decisive, aim of achieving purposes other than those stated;

— to declaring that the existence of a de facto harmonisation brought about by the contested decision had not been demonstrated.

67 The Commission contends that the ground of appeal is manifestly inadmissible, as it was not raised before the Court of First Instance.

68 It states that in the judgment under appeal the Court of First Instance did not adjudicate on the question of a possible misuse of power. The Court of First Instance examined that question in a different judgment, namely the judgment in Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission*, which was delivered on the same day as the judgment under appeal.

Findings of the Court

69 The Territorio Histórico de Álava did not raise a plea alleging misuse of powers before the Court of First Instance in the proceedings at first instance which gave rise to the present appeal.

70 For the reasons stated at paragraph 59 of this judgment, this ground of appeal must be declared inadmissible, as a new plea, as must the ground of appeal alleging failure to state the grounds of the judgment under appeal on that point, as the latter cannot be dissociated from the former.

71 It follows from all of the foregoing that the appeals must be dismissed.

Costs

72 Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs.

73 Under Article 69(2) of the Rules of Procedure of the Court of Justice, applicable to the procedure on appeal by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellants have been unsuccessful, they must be ordered, in addition to bearing their own costs, to pay those incurred by the Commission, in accordance with the form of order sought to that effect by the Commission.

74 Under the third subparagraph of Article 69(4) of the Rules of Procedure of the Court of Justice, also applicable to the procedure on appeal by virtue of Article 118 of those Rules, the Comunidad Autónoma del País Vasco, which has intervened in support of the form of order sought by the Territorio Histórico de Álava in Case C-187/02 P, must be ordered to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. Joins Cases C-183/02 P and C-187/02 P for the purposes of the judgment;

2. Dismisses the appeals;

3. Orders the appellants, in addition to bearing their own costs, to pay those incurred by the Commission of the European Communities;

4. Orders the Comunidad Autónoma del País Vasco to bear its own costs.

Signatures.