OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 1 July 1999 *

1. By three orders for reference with identical content, the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) referred a question to the Court for a preliminary ruling concerning the interpretation of Articles 52 and 92 of the EC Treaty (now, after amendment, Articles 43 EC and 87 EC). The Court was asked to rule on the compatibility with these provisions of the provincial laws ('normas forales') adopted by three authorities belonging to the Autonomous Community of the Basque Country, containing urgent fiscal measures to aid investment and stimulate economic activity.

National legislation and provincial laws

2. Fiscal relations between the Spanish State and the Autonomous Community of the Basque Country are governed by the Economic Agreement (hereinafter 'the Agreement') approved by Law No 12/1981 of 13 May 1981, [1] as amended by Law No 27/1990 of 26 December 1990. [2] This scheme provides that the authorities of the Basque Historic Territories are responsible for regulating taxation in their territory, with the exception of customs duties, levies of all kinds imposed by fiscal monopolies and duty on alcohol, responsibility for which remains exclusively with the central authorities of the State.

3. Chapter 1 of the Agreement lays down the criteria governing the applicability of each tax in order to delimit the respective competence of the central and provincial treasuries. Competence is allocated on the basis of the principle of solidarity. Thus it prohibits the introduction of direct or indirect fiscal advantages and the grant of subsidies in the form of tax rebates (Article 4(8)); it states that the rules adopted by the institutions of the Historic Territories must not adversely affect competition between undertakings or distort the allocation of resources and the free movement of capital and labour (Article 4(11)); and, finally, it provides that the application of the Agreement must not have the consequence that the effective overall tax burden is less than that existing throughout the common territory (Article 4(12)).

Article 6 of the Agreement further provides that the Spanish State maintains exclusive competence for the management, inspec-

* Original language: Italian.

1 — Boletín Oficial del Estado (BOE) of 28 May 1981.

2 — BOE of 27 December 1990.

tion, review and collection of all taxes where the taxable person is a natural person or a body, with or without legal personality, not resident in Spain for the purposes of State tax laws. Finally, Article 7(1) provides that personal income tax can be characterised as an 'agreed' tax, subject to the Autonomous Community system and payable to the Diputación Foral which has competence *ratione territoriae* where the taxable person is ordinarily resident in the Basque Country. Article 18 of the Agreement lays down the criteria for the application of corporation tax.

4. On the basis of the legislative powers conferred by the provisions referred to above, the three Juntas Generales (Provincial Councils) of the Diputaciones Forales (Provincial Authorities) of Guipúzcoa, Álava and Vizcaya adopted *'normas forales'* (Provincial Laws) No 11/93 of 26 June 1993, No 18/93 of 5 July 1993 and No 5/93 of 24 June 1993 respectively, on urgent fiscal measures to aid investment and stimulate economic activity. These laws established a series of fiscal advantages in relation to corporation tax and personal income tax, for the period between their entry into force and 31 December 1994. The measures adopted gave undertakings and natural persons subject to the tax system of the Basque territories a number of advantages which the undertakings and natural persons subject to the common system did not have. With regard to legal persons, these advantages consisted more particularly of exemptions, reductions or deductions from taxes in respect of the formation of new undertakings, investments in fixed assets, investments in research and development, investments to boost exports, depreciation of new assets, capitalisation of small undertakings, and staff recruitment and training. The same advantages applied to taxable persons liable for personal income tax who carry out business or occupational activities and whose net income is determined according to the direct assessment system.

The scope *ratione personae* of the tax advantages was determined under the provincial laws mentioned above according to three parameters in descending order. The laws in question applied, first, to taxable persons who pay tax exclusively to the Diputación Foral responsible for adopting the law; second, to taxable persons who pay taxes both to the Diputación Foral responsible for adopting the law and another Diputación Foral and who are resident for tax purposes in the Historic Territory of the Diputación Foral which promulgated the law or who are resident in the common Spanish territory and achieve the greater part of their volume of transactions in the territory of the Diputación Foral responsible for adopting the law; finally, to taxable persons who pay tax both to the Diputación Foral responsible for adopting the law and to the State, or to the Diputación Foral responsible for adopting the law, to another Diputación Foral and to the State, who are resident for tax purposes in the Historic Territory of the Diputación Foral responsible for adopting the law and whose volume of transactions in the Basque Country during the previous tax year exceeded 25% of their total volume of transactions.

Concerning personal income tax, the fiscal advantages provided for in the provincial laws apply to taxable persons normally resident in the territories of the Diputaciones Forales of Guipúzcoa, Álava and Vizcaya.

5. The national court stated in the order for reference that the application of the legislation set out above meant that taxable persons who were not resident in Spanish territory remained subject to the State tax system and, therefore, were excluded from possible entitlement to the fiscal advantages contained in the measures set out in the contested Provincial Law.

6. By Decision 93/337/EEC of 10 May 1993, [3] addressed to the Kingdom of Spain, the Commission commented on Provincial Laws No 28/1988, No 8/1988 and 6/1988, adopted by the Diputaciones Forales of Álava, Vizcaya and Guipúzcoa respectively. Those measures contained tax concessions identical to those included in the Provincial Laws which are the subject of the main proceedings. In that decision, the Commission considered that the fiscal aid for investment, as regards the measures relating to corporation tax and personal income tax, was incompatible with the common market for the purposes of Article 92(1) of the EC Treaty since it was granted in accordance with procedures which infringed Article 52 of the EC Treaty. [4] Under Article 1(2) of the same decision the Commission required the Kingdom of Spain to modify the tax arrangements in issue, so as to eliminate the distortions with regard to Article 52 of the Treaty, not later than 31 December 1993. The decision was not challenged, either by the addressee, under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC), or by the Basque Authorities which had adopted the laws at issue, under the fourth paragraph of Article 173. In order to comply with the decision, the Kingdom of Spain inserted the eighth additional provision into Law No 42/1994 of 30 December 1994. [5] That provision, entitled 'Grant of tax incentives and subsidies to persons resident in the European Union but not resident in Spain', modified the previous system, stating that companies should be entitled to a refund by the State tax authorities of amounts actually paid in excess of those which they would have been required to pay if they had been able to rely on the laws of the Autonomous Community or the Historic Territories of the Basque Countries. As a result of the adoption of this provision, the Commission concluded in its letter of 3 February 1995 to the Permanent Representation of Spain to the European Union, that the Basque tax arrangements were no longer discriminatory for the purpose of Article 52 of the Treaty.

3 — Commission Decision of 10 May 1993 concerning a scheme of tax concessions for investment in the Basque Country (OJ 1993 L 134, p. 25).

4 — Article 1(1) of Decision 93/337.

5 — BOE of 31 December 1994.

The main proceedings and the question referred for a preliminary ruling

7. The three Provincial Laws adopted by the Basque authorities were contested by the Administración del Estado (State Administration) in June and October 1994. The applicant in the main proceedings based its case on pleas including infringement of Articles 52 and 92 of the Treaty. In the opinion of the Spanish Government, that infringement resulted from the fact that the Provincial Laws in question excluded from the fiscal advantages the citizens and companies of other Member States which, although they carried out an economic activity in Basque territory, were not resident in Spain. By three orders for reference with identical content, made on 30 July 1997, the Tribunal Superior de Justicia del País Vasco (Chamber for Contentious Administrative Proceedings) referred the following question to the Court for a preliminary ruling:

'On a proper construction of Article 52 of the EC Treaty and, as the case may be, Article 92(1), do those provisions preclude legislation, affecting a territory within an Autonomous Community of a Member State, on urgent fiscal measures to aid investment and stimulate economic activity, which may benefit taxable persons who pay tax exclusively to the tax authorities for that territory or are resident there for tax purposes and whose volume of transactions in that Autonomous Community during the preceding tax year exceeds 25% of their total volume of transactions, and which does not include among those to which those measures apply other natural and legal persons resident in the State itself or in another Member State of the European Community?'

8. By order of 18 December 1997 of the President of the Court of Justice, the three cases were joined, in accordance with Article 43 of the Rules of Procedure, for the purposes of the written and oral procedures and the judgment.

Admissibility

9. First, the admissibility of the question referred by the Spanish court must be dealt with. An objection was raised on this point by the Juntas Generales and the Basque Government, defendants and intervener, respectively, in the main proceedings. In their opinion, the references for a preliminary ruling are not strictly necessary for the resolution of the disputes pending before the national court and they fail to define the factual and legal circumstances of the main proceedings as precisely as the Court's recent case-law requires.

10. As regards the necessity for the reference and the decision of the Court, the parties referred to above essentially consider that with the adoption of the eighth additional provision of Law No 42/1994 a remedy has already been provided for any effects contrary to Community law which

the impugned provincial laws might have. This provision, which applies with retroactive effect, could remedy any unfavourable situation which might arise owing to the application of the tax system of the Historic Territories of the Basque Country. The same parties add that the Commission, in its letter of February 1995, recognised that the adoption of the provision in question dispelled any doubts as to the compatibility of the provincial laws with the relevant provisions of Community law, and emphasise the fact that all the parties to the three main proceedings informed the Tribunal Superior de Justicia that they did not think a decision was necessary on the validity of the contested laws, since any incompatibility with Article 52 of the Treaty was eliminated by the additional provision.

11. On this point, it should be noted that the Court has at times declared inadmissible some questions referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), since the answer to those questions was not thought to be objectively necessary in order to resolve the dispute pending before the national courts. [6] However, I do not consider that this is the solution in this case. We must take into consideration the fact that the national court referred the matter to the Court three years after the adoption of the additional provision in Law No 42/1994. While being aware of the position of the parties, according to which any incompatibility of the provincial laws with Article 52 of the Treaty had been eliminated with the adoption of the aforementioned measure, the national court still considered it necessary for the Court to give a ruling on this matter. As regards the division of jurisdiction (and responsibilities) under the Treaty, this decision lies in principle with the national court. Due to its direct knowledge of the relevant facts and elements of law, it is in the best position to evaluate the relevance of the questions of Community law raised in the case. [7] The solution reached by the national court in this respect can be questioned by the Court only if it is obvious that the interpretation or the assessment of the validity of a provision of Community law has no connection with the purpose or the subject-matter of the case.

12. I consider that in this case we are not in any of the above situations, which are indeed exceptional. The doubts which the parties have raised do not concern the relevance of the question for the purposes of the resolution of the dispute in the main proceedings. In fact, since it is a case of assessing the legality of the contested provisions with respect to parameters in Community law, there can be no doubt that the interpretation of the Court of the relevant provisions of the Treaty is useful for the resolution of the dispute. The doubts raised by the parties therefore concern not the relevance of the *question referred for a preliminary ruling* for the purpose of resolving the dispute before the national court, but rather the usefulness of *any annulment, by the national court, of the measures at issue*, since the alleged

6 — See Case 126/80 *Salonia* [1981] ECR 1563; and the order in Case C-428/93 *Monin Automobiles* [1994] ECR I-1707.

7 — For all these points see Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 25; and Case C-146/93 *McLachlan* [1994] ECR I-3229, paragraph 20.

grounds of incompatibility have already been eliminated with the adoption of the abovementioned additional provision. That being so, I consider that it is not for the Court to get involved in the dispute in the main proceedings, making assessments which should be made either by the national court, which could raise a lack of sufficient legal interest to bring proceedings with respect to provisions which are no longer in force, or by the parties to the main proceedings. In fact, it should be noted that the central Administration — which had expressed, before the national court, a positive opinion that the illegality of the contested laws with regard to Community law had been overcome — did not, however, withdraw from the proceedings, which shows that the dispute before the national court is still of interest despite the legislative amendments which have been made.

Nor, by modifying the grounds of inadmissibility indicated by the parties, could one find that the dispute is fictional, following a line of case-law which in actual fact starts and finishes with the two *Foglia* judgments. [8] It is sufficient to note, excluding any assessment of the correctness of the solution reached in those cases, that the parties are not at all in agreement on how to answer the question referred for a preliminary ruling or how to resolve the dispute, which therefore appears anything but contrived.

8 — Case 104/79 *Foglia* v *Novello* [1980] ECR 745, and Case 244/80 *Foglia* v *Novello* [1981] ECR 3045.

13. In addition, the observations submitted by the parties in writing and at the hearing do not clearly indicate the temporal scope of the measure adopted by the Kingdom of Spain in order to eliminate the incompatibility of the local legislation with the provisions of the Treaty, or the effectiveness of that measure in actually putting an end to the inequality of treatment allegedly caused by that legislation. On this point, we have grounds for doubting that a compensatory measure such as that laid down in the eighth additional provision is actually equivalent to the non-application of the provincial laws, since it involves an activity which requires time and extra costs on the part of undertakings.

14. The further objections to the inadmissibility of the reference for a preliminary ruling, which are raised by the defendants in the main proceedings, appear even less well-founded. The assertion that the references are not strictly necessary for the resolution of the dispute, since the question raised before the national court was 'in part' internal in nature, is irrelevant. The discrimination or elements of aid related, in the opinion of the defendants, to a legal situation which affects natural or legal persons resident in the Basque Country as opposed to those resident in the rest of Spain. To deal with this objection, it is sufficient to note that the unfavourable measure affects residents in the common Spanish territory and residents in other Member States in the same way.

Then, concerning the alleged incompleteness of the three references for a preliminary ruling, which do not state with the necessary precision that a number of fiscal systems co-exist in the various areas of Spanish territory, but lead us to believe that there is only one general system with exceptions in particular areas, suffice it to say that the order sets out, albeit succinctly, the scheme applicable to taxable persons in the Historic Territories, its application *ratione personae,* and the disparity of treatment between the natural and legal persons subject to the scheme in question and those subject to the common legislation. The presence of a number of fiscal systems raises a substantive problem which will be dealt with in the appropriate place, that is in the context of assessing the measures in question in the light of the Community law on State aid.

15. For the foregoing reasons, I consider that the Court should give a ruling on the question referred by the Spanish court.

Freedom of establishment

16. By the first part of the question, the Spanish court asks the Court whether Article 52 of the Treaty precludes legislation, such as the Basque legislation relating to urgent measures to aid investment, which may benefit taxable persons who pay tax exclusively to the tax authorities for the territory of a Diputación Foral or are resident there for tax purposes or whose volume of transactions in that Autonomous Community during the preceding tax year exceeds 25% of their total volume of transactions, and which does not include among those to which those measures apply other natural or legal persons resident in another Member State of the European Community.

In fact, the Economic Agreement (Article 6 of Law No 12/1981, as amended by Law No 27/1990) provides that natural and legal persons who are not resident in the territory of the Spanish State are subject to the fiscal legislation of the State. They are therefore excluded from the advantages provided by the fiscal legislation of the Basque Country.

17. Before examining the substance of the question I believe it would be useful to confirm what has already been mentioned concerning the corrective provisions adopted by the Spanish Government. In accordance with Decision 93/337, the Spanish Government inserted the eighth additional provision into Law No 42/1994 on the grant of tax incentives and subsidies to persons resident in the European Union but not resident in Spain. Under this provision, companies which operate in the Historic Basque Territories but are unable to make use of the tax relief granted by those territories are to be entitled to a refund by the State tax authorities of the sums actually paid in excess of those which

they would have been required to pay if they had been able to rely on the laws of the Historic Territories. The Spanish Government considers that, with the adoption of this measure, any discrimination from the point of view of Community law was eliminated. The Commission did not oppose this conclusion, for reasons of consistency with what had been communicated to the Spanish Government by letter of 3 February 1995.

18. On this point, it is useful to note that, in the accounts of a company, there is a considerable difference between exemption upstream, such as that guaranteed by the local legislation, and refund *a posteriori*, which is introduced by the corrective measure adopted by the Spanish Government. The mechanism of '*solve et repete*' does not eliminate the discriminatory situation faced by foreign companies. Time and staff must in any event be used to track the administrative files required to obtain the refund, resulting in additional costs for the company. I therefore consider that the eighth additional provision to Law No 42/1994 was not able completely to eliminate the inequality of treatment, caused by the provincial laws, between companies whose residence for tax purposes is in the Basque Country and foreign companies.

19. With regard to the substance of the question, it should first be confirmed for the sake of clarity that the legislation of the Basque Country makes the grant of tax concessions conditional on residence, residence for tax purposes or a considerable percentage of the total volume of transactions in the Basque territory. A company from another Member State which wishes to open a branch, agency or establishment in the Basque Country while maintaining its own business (and therefore its residence for tax purposes) in the State of origin could not benefit from this aid.

20. That being so, it is useful to recall that freedom of establishment, which Article 52 of the Treaty confers on nationals of a Member State and which gives them the right to take up activities as self-employed persons and pursue them on the same conditions as those laid down by the law of the Member State of establishment for its own nationals, comprises, pursuant to Article 58 of the EC Treaty (now, after amendment, Article 48 EC), the right for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to carry on business in the Member State concerned through a branch or agency. [9]

Within the scope of Articles 52 and 58 of the Treaty, the registered office of a company serves as the connecting factor with the legal system of a State, like nationality in the case of natural persons. As the Court

9 — Case C-1/93 *Halliburton Services* [1994] ECR I-1137, paragraph 14.

stated in *Commission* v *France*, [10] '[a]cceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another Member State would ... deprive that provision of all meaning'.

21. This principle is also applied, according to the settled case-law of the Court, in cases where national tax legislation grants concessions only to companies whose registered office is in that State. While it is true that, in the absence of harmonisation measures, the regulation of direct taxation falls in principle within the competence of the Member States, they must exercise their powers consistently with Community law. [11] Discriminatory tax treatment which obstructs or limits the exercise of the right of establishment therefore falls within the scope of Article 52 of the Treaty. [12]

22. The Court has emphasised on a number of occasions that freedom of establishment is one of the fundamental principles of the Community and that the provisions which guarantee it give those to whom it applies absolute rights which can be limited only if there are interests which are considered to be pre-eminent for reasons of public policy, public safety or public health (Article 56 of the EC Treaty (now, after amendment, Article 46 EC)). It is only in these specific and exceptional cases that discriminatory national legislation can be justified. Considerations which are merely economic in nature, such as the loss of tax revenue or the fight against tax fraud, cannot justify restrictions to a fundamental right as guaranteed by the Treaty. [13]

23. However, the Basque Authorities maintain that the measures adopted were justified by the need to guarantee the cohesion of the national tax system. In their opinion, the discrimination between taxable persons is based on the fact that the criteria for applicability reflect the internal distribution of powers between the tax authorities of the Basque Country and those of the State. To support this view, the Juntas Forales cite the judgment in the *Bachmann* case, [14] in which the Court used the concept of the 'cohesion of the tax system' for the first time in evaluating the tax legislation and its effects with regard to persons established in other Member States. The concept of 'fiscal cohesion', understood as an overriding reason in the public interest capable of limiting the fundamental economic freedoms guaranteed by the Treaty, was then clarified and circumscribed in

10 — Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18.

11 — Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585; Case C-279/93 *Schumacker* [1995] ECR I-225; Case C-107/94 *Asscher* [1996] ECR I-3089; Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471; Case C-264/96 *ICI* [1998] ECR I-4695.

12 — Case C-330/91 *Commerzbank* [1993] ECR I-4017.

13 — Case C-288/89 *Gouda* [1991] ECR I-4007; and Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955.

14 — Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28.

subsequent judgments, including *Svensson and Gustavsson*, [15] *Asscher* [16] and *Futura Participations and Singer*. [17]

24. Leaving aside any assessment of the possibility of relying on that exception with regard to clearly discriminatory measures, [18] I do not consider that in this case there is any question of safeguarding the cohesion of the Spanish tax system. It is clear from the cases cited above that the application of that 'overriding reason in the public interest', in order to justify national measures restricting freedom of establishment and freedom to provide services, requires the presence of a direct link between taxation and deduction within the same tax system. In particular, offsetting must take place between the sums received by the State following taxation and those returned to the taxpayer in the form of deduction. [19]

The 'cohesion of the tax system' to which the Court refers does not concern, as the Basque Authorities would like, the allocation of competence for tax matters within a Member State, but the particular link between two operations — one debit, the other credit — within the same fiscal system. In this case, within the Spanish tax system, there is no taxation which may be regarded as directly linked to the deductions provided for by the legislation of the Basque Territories for companies which have their residence there for tax purposes.

25. I therefore consider that the conditions imposed by the Basque legislation for entitlement to fiscal advantages constitute a discriminatory measure for the purposes of Article 52 of the Treaty, and I therefore propose that the Court respond to the first part of the question from the Tribunal Superior del País Vasco that Article 52 of the Treaty precludes legislation on urgent measures to aid investment which may benefit taxable persons who pay tax exclusively to the tax authorities of the Historic Basque Territories or are resident there for tax purposes or whose volume of transactions in that Autonomous Community during the preceding tax year exceeds 25% of their total volume of transactions, and which does not include among those to which those measures apply other natural or legal persons resident in another Member State of the European Community.

15 — Case C-484/93, cited in note 13, paragraphs 16 to 18.

16 — Case C-107/94, cited in note 11, paragraphs 56 to 60.

17 — Case C-250/95, cited in note 11.

18 — See my Opinion delivered on 10 June 1999 in Case C-55/98 *Vestergaard*, point 27 et seq.

19 — In *Bachmann*, the loss of tax revenue due to the deduction of contributions to life insurance was offset by the tax applied on pensions, income and capital payable by the insurers. In the *Svensson* case the Court also stated that the existence of such a link was not sufficient: it should be a direct link between the two operations involved. In that case, concerning a system of housing benefit in the form of an interest rate subsidy on loans from credit institutions established on the national territory, the Court decided (paragraph 18 of the judgment) that 'in this case there was no direct link between the grant of the interest rate subsidy to borrowers on the one hand, and its financing by means of the profit tax on financial establishments, on the other.'

The concept of State aid

26. In the second part of the question referred for a preliminary ruling the national court asks the Court whether measures to encourage investment, such as those adopted by the Basque Authorities and described above, are compatible with the provisions of the Treaty on State aid (Article 92 et seq. of the Treaty).

27. On this point, it should be stated first that the assessment which the national court makes, possibly with the assistance of the Court of Justice, with respect to the characterisation of a national measure as State aid for the purposes of Article 92 of the Treaty is important, since any positive assessment would allow the aid measures to be regarded as illegal by definition if they had not been notified to the Commission in accordance with Article 93(3) of the EC Treaty (now Article 88(3) EC). In the procedural context of the dispute before the national court, the provincial laws are the subject of an action for annulment brought by the central Government on the ground that they allow favourable fiscal treatment to companies established in the Historic Basque Territories. In this context, the national court is required to assess whether, in this case, the conditions necessary for a national measure to be characterised as 'aid' for the purposes of Article 92 are met. In view of the settled case-law of the Court concerning the powers of the national court in the case of aid which is not notified,[20] a positive response would enable the Spanish court to annul the provincial laws on the ground that they were adopted in breach of the obligation to notify the Commission as stated in Article 93 of the Treaty.[21] The national court could not, however, give a judgment on whether the aid measures are compatible with the common market, as this assessment is reserved by the Treaty to the Commission, although it can decide, for the purpose of the application of Article 93(3), whether the measure adopted falls within the meaning of State aid.[22] For this purpose, the national court may, as in this case, or must, if it is a court or tribunal against whose decisions there is no judicial remedy under national law, submit a question for a preliminary ruling on the interpretation of Article 92 of the Treaty.

28. That being so, we should now decide whether, in concrete terms, the measures adopted by the Basque Authorities fall within the concept of aid referred to in Article 92(1). The analysis must focus on three factors in particular: whether the

20 — See, in particular, Case C-39/94 *SFEI* [1996] ECR I-3547, paragraph 39, in which the Court stated that '[t]he involvement of national courts is the result of the direct effect which the prohibition on implementation of planned aid laid down in the last sentence of Article 93(3) has been held to have.' The Court then added that 'the immediate applicability of the prohibition on implementation referred to in that article extends to all aid which has been implemented without being notified'.

21 — Case C-39/94 cited above, paragraph 39. See the recent Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraphs 24-27.

22 — As stated by the Court on many occasions (Case 78/76 *Steinike and Weinlig* [1977] ECR 595, paragraph 14; Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 14; *SFEI*, cited above, paragraph 49), 'a national court may have cause to interpret the concept of aid ... in order to determine whether a State measure introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to that procedure'.

measures in question can be attributed to the Spanish State; whether there is an appreciable advantage or benefit for companies, obtained as a result of public measures; and the specific nature of the State measure, in so far as it is intended to favour certain undertakings or the production of certain goods.

29. I consider that there can be no doubt that the measures adopted by the Juntas Forales by virtue of powers conferred by Law No 12/1981 approving the Economic Agreement constitute aid granted in the form of fiscal advantages and are attributable to the State.

30. Concerning the first of the aforementioned conditions, relating to the classification of the measures adopted under the concept of aid within the meaning of Article 92 of the Treaty, suffice it to note that, according to the settled case-law of the Court, the concept of aid is wider than that of a subsidy because it embraces 'not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect.' [23] Concerning more specifically measures which involve tax concessions, in the *Banco Exterior de España* judgment the Court stated that '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 constitutes State aid within the meaning of Article 92(1) of the Treaty'. [24] It can therefore be concluded that the provincial laws at issue in this case constitute aid, since they have the effect of mitigating the tax burden imposed on the companies which fall within the scope of those laws.

31. With regard to whether measures adopted, as in this case, by regional authorities are attributable to the State, it is sufficient to recall the judgment of the Court in *Germany* v *Commission*. [25] This concerned a system of aid set up by the Land of Nordrhein-Westfalen under a programme to improve the regional economic structure, in favour of companies established in certain areas of its territory. The regional legislation had been adopted on the basis of a federal framework law. In assessing the legality of the Commission decision which found the programme of regional aid to be incompatible with the common market, the Court stated first that

23 — Case 30/59 *Steenkolenmynen* v *High Authority* [1961] ECR 1; more recently Case C-387/92 *Banco Exterior de España* [1994] ECR I-877; Case C-200/97 *Ecotrade* [1998] ECR I-7907.

24 — Case C-387/92, cited above, paragraph 14; Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 16.

25 — Case 248/84 [1987] ECR 4013.

'the fact that the aid programme was adopted by a State in a federation or by a regional authority, and not by the federal or central power, does not prevent the application of Article 92(1) of the Treaty if the relevant conditions are satisfied. In referring to any aid granted by a Member State or through State resources in any form whatsoever, Article 92(1) is directed at all aid financed from public resources. It follows that aid granted by regional and local bodies of the Member States, *whatever their status and description*, [26] must be scrutinised to determine whether it complies with Article 92 of the Treaty'. [27] The question of aid granted by regional authorities was also discussed in the judgment of 8 March 1988 in *Exécutif régional wallon and Glaverbel* v *Commission*. [28] In that case the Court examined, in a case brought by the Walloon regional executive, the legality of the decision addressed to the Belgian State by which a proposal of aid to production which was to be granted by the aforementioned regional authority was considered not to be compatible with the common market. [29] In short, the fact that the actual aid measures have been adopted or granted by regional authorities does not prevent their being attributable to the State for the purpose of the application of the Community rules on State aid. As a result, the laws at issue in this case fall within the scope of Article 92 of the Treaty.

32. The third of the conditions referred to above, that the aid must 'favour certain undertakings or the production of certain goods', requires more thorough analysis of the very nature of the measures to encourage investment adopted by the Basque Authorities. We must clarify whether those measures are in effect 'State aid', giving a competitive advantage over other companies which are subject to the common system, or a general measure which, as such, comes within the political and economic choices of the State which are not subject to review at Community level under the rules stated in Article 92 et seq. of the Treaty, but may be subject to other less rigorous provisions of the Treaty. [30] For this purpose, we can, as a first approximation, understand as 'general measures' provisions of a legislative and regulatory nature which are applied generally within a particular Member State, while measures, attri-

26 — Emphasis added.

27 — Case C-248/84, paragraph 17. In the following paragraph, the Court then added that '[a]id programmes may concern a whole sector of the economy or may have a regional objective and be intended to encourage undertakings to invest in a particular area'. In both cases these are measures which fall within the concept of aid within the meaning of Article 92 of the Treaty.

28 — Joined Cases 62/87 and 72/87 [1988] ECR 1573.

29 — The attribution to the States of aid measures adopted by regional authorities may be inferred from the general system laid down by the Treaty, under which the sole interlocutor of the Commission in the procedure for reviewing aid, as in every subsequent stage of the centralised system of review prescribed in Article 93 of the Treaty, is the State. In this context, see Case 130/83 *Commission* v *Italy* [1984] ECR 2849. On that occasion, in censuring the Italian Republic for not complying with a decision of the Commission which found certain aid and subsidies granted by the Sicilian Regional Authorities under a regional law to be incompatible, the Court dismissed the objection raised by the Italian Government which stated that it had made several approaches to the Sicilian Regional Authorities with a view to inducing them to repeal the provisions referred to in the Commission's decision (paragraph 3 of the judgment).

30 — I refer to Article 99 of the EC Treaty (now Article 93 EC) which gives the Council the power to adopt provisions for the harmonisation of legislation on fiscal matters.

butable to the State, which favour certain economic sectors or certain operators as opposed to others are to be regarded as 'aid' within the meaning of Article 92.

33. From the case-law of the Court it does not seem possible to identify with any certainty a criterion of a general nature which provides a clear demarcation line between the two concepts. The case-law of the Court has up to now essentially determined the element of specificity of the measure by reference to the *beneficiaries of the aid*: aid intended for specific sectors, [31] a particular company, [32] or even companies situated in a particular region. [33] Another criterion, used by Advocate General Darmon in his Opinion in *Sloman Neptun*, [34] refers to the measure as a *derogation* from the scheme of the general system in which it is set.

34. In this case, reference is made to fiscal advantages given exclusively to companies which meet the requirements indicated in the provincial laws; namely, in essence, companies which have their residence for tax purposes in the Basque Country. These advantages are granted by the three Historic Territories on the basis of the Economic Agreement of 1981, which recognises their full autonomy in determining direct taxation.

35. I consider that the laws adopted by the Juntas Forales must be characterised as 'aid' within the meaning of Article 92 of the Treaty, and not as general measures of economic policy. These measures are selective in nature, whether one takes into consideration the recipients of the aid or whether one applies the criterion of the legislative measure as a derogation from the general system. They are intended exclusively for companies situated in a particular region of the Member State in question and constitute for them an advantage which companies intending to carry out similar economic operations in other areas in the same State cannot enjoy.

36. Nor do I consider that those measures may be justified, as the defendants in the main proceedings and the Spanish Government would wish, on the basis of the particular allocation of competence, in matters of taxation, which exists in the Spanish legal system. Those parties claim a distinction between fiscal measures adopted by the State, whose scope is limited to a fixed area of the territory, on the one hand, and general measures adopted by a competent authority within the territory, on the other. While in the first

31 — Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraphs 12, 27 and 28.

32 — Case 173/73, cited above; Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy* [1988] ECR 219.

33 — Case 248/84, cited above in note 25.

34 — Joined Cases C-72/91 and C-73/91 [1993] ECR I-887.

case there would be an element of selectivity with regard to taxable persons, since the measure is limited in its scope to some of the taxable persons who could be addressees, in the second case the element of selectivity is lacking, since the measure is addressed to all taxable persons who, under the rules of allocation of competence, are subject to the fiscal legislation of the local authorities.

Those parties add that, from this point of view, the rules on the allocation of competence in tax matters to the authorities of the Historic Territories are no different from the rules governing the allocation of competence between the sovereign tax authorities of two Member States of the European Union. The differences between fiscal systems cannot constitute State aid for the purposes of Article 92 of the Treaty, while the only remedy to the distortions caused to the market would be the adoption of measures to harmonise national laws. To consider, however, that the allocation of competence in tax matters between the State and the Historic Territories is contrary to the provisions of the Treaty on State aid would be tantamount to issuing a value judgment on the constitutional structure of the Spanish State.

37. I cannot agree with this conclusion. The fact that the measures at issue were adopted by regional authorities with exclusive competence under national law is, as observed by the Commission, merely a matter of form, which is not sufficient to justify the preferential treatment reserved to companies which fall within the scope of the provincial laws. If this were not the case, the State could easily avoid the application, in part of its own territory, of provisions of Community law on State aid simply by making changes to the internal allocation of competence on certain matters, thus raising the 'general' nature, for that territory, of the measure in question. In addition, this solution would be difficult to justify in view of the case-law of the Court, according to which the words 'in any form whatsoever' in Article 92 mean that it is necessary to assess the effects of the aid, rather than the nature of the authority granting the aid or its powers in the light of domestic rules. [35] In *Exécutif régional wallon*, [36] for example, the Court interpreted the concept of State aid in the context of measures adopted by the Walloon Regional Executive, although in the framework of a State law introducing measures to favour economic development. In *Germany* v *Commission*, cited above, the Court excluded the possibility of giving importance to the internal constitutional structure of the State in question, emphasising the fact that, '[i]n referring to any aid granted by a Member State or through State resources in any form whatsoever Article 92(1) is directed at all aid financed from public resources. It follows that aid granted by regional and local bodies of the Member

35 — Case 323/82 *Intermills* v *Commission* [1984] ECR 3809.

36 — Case 62/87 and 72/87 cited above, paragraph 6: '[o]ne of the two applicants is the Exécutif régional wallon which, by virtue of the rules which apply in Belgium, is at present the body empowered to grant aid to undertakings established in Wallonia'.

States, *whatever their status and description*,[37] must be scrutinised to determine whether it complies with Article 92 of the Treaty.'[38] Finally, in *Commission* v *Italy*, also cited above, the Court ordered the central government to take the necessary steps to eliminate aid measures adopted by a law of the Sicilian Regional Authorities in a sector in which they had exclusive competence. It emerges from this case-law that all the measures which involve a competitive advantage limited to companies which invest in a particular area of the Member State are attributable to the State in question and cannot therefore, by definition, in the scheme of the fiscal system of the State, be understood as measures of a general nature.

38. As the Commission observed, 'the nature and scheme of the system', which, according to the Court,[39] can justify treatment different from that under the legislation of general application, refer not to elements of form, such as the degree of autonomy of the regional body in question, but to the existence of a different substantive situation which justifies a deviation from the general rules. In this case, it is difficult to determine which circumstances, linked to the nature and scheme of the system, can justify the difference of treatment which arises from the Basque laws. The fiscal autonomy of the Basque Territories does not reflect any specificity of the territory in question — in terms of economic conditions such as level of employment, production costs, infrastructures, labour cost — which would require, indirectly, fiscal treatment different from that in force in the rest of the Spanish territory. The scheme which results from the provisions in question satisfies only the desire to favour investment in the Historic Territories. The reasons given by the Basque Authorities for the adoption of the measures at issue show that they are short-term measures which aim to improve the competitiveness of the companies to which they apply in order to meet the challenges of the market. This clearly shows, once again, the exceptional nature of the measures in question which derogate from the general scheme of the tax legislation.

37 — Emphasis added.

38 — Case C-248/84, cited above, paragraph 17.

39 — Case 173/73, cited above in note 31; Case C-353/95 P *Tierce Ladbroke* v *Commission* [1997] ECR I-7007.

Conclusions

39. In view of the foregoing, I propose that the Court respond as follows to the question referred by the Tribunal Superior de Justicia del País Vasco:

Articles 52 and 92 of the EC Treaty (now, after amendment, Articles 43 EC and 87 EC) must be interpreted as meaning that they preclude the legislation, affecting a territory within an Autonomous Community of a Member State, on urgent fiscal measures to aid investment and stimulate economic activity, which may benefit taxable persons who pay tax exclusively to the tax authorities for that territory or are resident there for tax purposes and whose volume of transactions in that Autonomous Community during the preceding tax year exceeds 25% of their total volume of transactions, and which does not include among those to which those measures apply other natural and legal persons resident in the State itself or in another Member State of the European Community.