JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
23 October 2002 *

In Joined Cases T-346/99, T-347/99 and T-348/99,

Territorio Histórico de Álava — Diputación Foral de Álava,

Territorio Histórico de Guipúzcoa — Diputación Foral de Guipúzcoa,

Territorio Histórico de Vizcaya — Diputación Foral de Vizcaya,

represented by A. Creus Carreras and B. Uriarte Valiente, lawyers,

applicants,

v

Commission of the European Communities, represented by F. Santaolalla Gadea, G. Rozet and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision, notified to the Spanish authorities by letter of 29 September 1999, to initiate the procedure

* Language of the case: Spanish.

under Article 88(2) EC against the Spanish State in relation to tax aid in the form of a reduction in the tax base for firms in the Provinces of Álava, Viscaya and Guipúzcoa (OJ 2000 C 55, p. 2),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: M. Jaeger, President, R. García-Valdecasas, K. Lenaerts, P. Lindh and J. Azizi, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the written procedure and further to the hearing on 10 April 2002,

gives the following

Judgment

Relevant law

Community law

1 The procedural rules laid down in the EC Treaty concerning State aid vary according to whether the aid is existing or new, the former being governed by Article 88(1) and (2), the latter being governed (in chronological order) by the third and second paragraphs of Article 88.

2 As far as existing aid is concerned, Article 88(1) EC authorises the Commission to keep such aid under constant review in cooperation with Member States. As part of that review, it must propose to the Member States any appropriate measures required by the progressive development or by the functioning of the common market. Next, Article 88(2) provides that if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid is not compatible with the common market under Article 87, or that aid is being misused, it must decide that the State concerned must abolish or alter the aid within such period of time as the Commission determines.

3 In accordance with Article 88(3), new aid must be notified in advance to the Commission and may not be put into effect until the procedure has resulted in a final decision. Under the same provision, the Commission must, if it considers that a plan is not compatible with the common market, initiate the procedure provided for in Article 88(2) without delay.

4 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1, hereinafter 'the regulation on State aid procedure'), which entered into force on 16 April 1999, contains the following definitions of relevance to the present cases:

'(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article [87(1) EC];

(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 which have been authorised by the Commission or by the Council;

...

(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;

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

...

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article [88(3) EC];

...'

5 According to Article 2(1) of the regulation on State aid procedure, 'any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned'. Article 3 provides that new aid must not to be 'put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid'. Article 4(4) of the regulation provides that the Commission is to adopt a decision to initiate proceedings pursuant to Article 88(2) EC ('the formal investigation procedure') if, after a preliminary examination, the Commission finds that 'doubts are raised as to the compatibility with the common market' of a notified measure.

6 According to Article 6(1) of the regulation on State aid procedure, a 'decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market'.

7 Under Article 7(1) of the regulation, 'the formal investigation procedure shall be closed by means of a decision as provided for in paragraphs 2 to 5 of this article'. The Commission may find that a notified measure does not constitute aid (Article 7(2)) or that notified aid is compatible with the common market

(Article 7(3)), may be considered compatible with the common market if certain conditions are met (Article 7(4)) or is incompatible with the common market (Article 7(5)).

8 As regards measures that are not notified, Article 10(1) of the regulation on State aid procedure provides that '[w]here the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay'. Article 13(1) of the regulation provides that, where appropriate, such examination is to result in a decision to initiate the formal investigation procedure.

9 The procedure for existing aid schemes is laid down in Articles 17 to 19 of the regulation on State aid procedure. According to Article 18, where the Commission concludes that an existing aid scheme is not, or is no longer, compatible with the common market, it is to issue a recommendation to the Member State concerned proposing appropriate measures. Where the Member State concerned does not accept the proposed measures, the Commission may, pursuant to Article 19(2), initiate a formal investigation procedure in accordance with Article 4(4).

The reduction in the tax base for firms, introduced by the tax legislation of the Provinces of Álava, Vizcaya and Guipúzcoa

10 The present cases concern alleged tax concessions granted in the form of a reduction in the tax base for firms (hereinafter 'the reduction in the tax base') by the tax legislation of the Provinces of Álava, Vizcaya and Guipúzcoa.

11 Article 26 of Norma Foral No 24/1996 of 5 July 1996 (a regional regulation) of the Province of Álava, Article 26 of Norma Foral No 3/1996 of 26 June 1996 of the Province of Vizcaya and Article 26 of Norma Foral No 7/1996 of 4 July 1996 of the Province of Guipúzcoa provide as follows:

1. 'If within four years of commencing business a new firm records an operating profit, its taxable base (corresponding to its operating results) shall be reduced by 99%, 75%, 50% and 25% in each of the four consecutive tax years beginning with the year in which the operating profit is recorded; operating losses from previous years may not be carried over for this purpose.

...

2. In order to benefit from that reduction, tax payers must satisfy the following conditions:

— they must start business with paid up capital of at least ESP 20 million;

...

— they must not have carried on the new business activity previously, whether directly or indirectly, under a different name;

...

— they must during their first two years of business invest at least ESP 80 million in fixed assets, all of which must be for the purposes of the business and may not be let or sold to a third party for its own use. Property acquired under a commercial lease shall be regarded as a fixed asset investment provided that the lessee gives an undertaking to exercise an option to purchase;

— they must create at least ten jobs in the first six months of business and ensure that the average number of staff annually is kept at that level from that time until the financial year in which their entitlement to a reduction in their tax base expires;

...

— they must have a business plan of at least five years' duration.

3. ...

4. The minimum investment... and the number of jobs mentioned in paragraph 2... may not be taken into account for the purposes of any other tax concession introduced for such investments or such job creation.

5. Requests for application of the reduction shall be addressed to the tax authorities, which, after checking compliance with the conditions initially imposed, shall, where appropriate, send applicants a provisional authorisation, which must be ratified by the Province of [Álava/Vizcaya/Guipúzcoa].

...'

The contested decision

12 In response to a complaint lodged in 1996, the Commission examined the application of the reduction in the tax base provided for by the tax legislation of the Province of Álava to the company Daewoo Electronics Manufacturing España SA (Demesa). By Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Demesa (OJ 1999 L 292, p. 1), the Commission found that the grant of the tax concession to Demesa constituted State aid incompatible with the common market.

13 The Commission then conducted a general examination of the reduction in the tax base introduced by the tax legislation of the Province of Álava, with reference to Articles 87 EC and 88 EC. Similar tax measures applicable in the Provinces of

Vizcaya and Guipúzcoa were also examined. (Hereinafter, for the three historic regions of the Basque country, these will be referred to as 'the tax measure(s) at issue'.)

14 This led the Commission to adopt Decision SG (99) D/7814 to initiate the formal investigation procedure with respect to the reduction in the tax base provided for by the tax legislation of the Provinces of Álava, Vizcaya and Guipúzcoa (hereinafter 'the contested decision'). The contested decision was notified to the Spanish authorities by letter of 29 September 1999 and was published in Spanish in the *Official Journal of the European Communities* of 26 February 2000 (OJ 2000 C 55, p. 2), together with a summary in the relevant language for each linguistic version of the Official Journal, in accordance with Article 26(2) of the regulation on State aid procedure.

15 In the contested decision, the Commission provisionally classified the reduction in the tax base as State aid within the meaning of Article 87(1) EC on the basis of the following considerations:

'The measure... consists of a 99%, 75%, 50% and 25% reduction in the tax base and meets all four criteria laid down in Article 87 of the EC Treaty. In particular, the reduction in the tax base is specific or selective in that it favours certain firms. The conditions for the grant of aid are such as to exclude firms which were established before the date of entry into force of the provincial laws in mid-1996, which carry out investment of less than the threshold of ESP 80 million (EUR 480 810), which create fewer than ten jobs and which are not companies with a paid-up capital of at least ESP 20 million (EUR 120 202). Moreover, the tax aid is not justified by the nature or general scheme of the tax system, its objective being to encourage the creation and assist the start-up of only some new firms.' (OJ 2000 C 55, p. 3, paragraph 4.1.)

16 The selective nature of the reduction in the tax base is, according to the Commission, also clearly evidenced by a certain discretionary power which the tax authorities of the Provinces concerned enjoy in granting the tax advantage in question (OJ 2000 C 55, p. 5).

17 Next, after noting that the Spanish authorities have failed to satisfy the obligation to give prior notice laid down in Article 88(3) EC, the Commission assesses the compatibility of the reduction in the tax base with the common market, concludes that there are doubts in this regard and decides to initiate the formal investigation procedure (OJ 2000 C 55, p. 3, paragraphs 4.2 and 4.3).

18 After adopting the contested decision, the Commission also examined a specific case where the reduction in the tax base provided for by the tax legislation of the Province of Álava was applied to a particular firm. This led to Decision 2000/795/EC of 22 December 1999 on the State aid implemented by Spain for Ramondín SA and Ramondín Cápsulas SA (OJ 2000 L 318, p. 36).

Procedure and forms of order sought by the parties

19 By applications lodged at the Registry of the Court of First Instance on 6 December 1999, the applicants brought the present actions.

20 The Province of Álava, the applicant in Case T-346/99, claims that the Court should:

— declare its action admissible;

— annul the contested decision in so far as it classified as State aid, within the meaning of Article 87 EC, the reduction in the tax base provided for by Article 26 of Norma Foral de Álava No 24/1996;

— order the Commission to pay the costs.

21 The Province of Guipúzcoa, the applicant in Case T-347/99, claims that the Court should:

— declare its action admissible;

— annul the contested decision in so far as it classified as State aid, within the meaning of Article 87 EC, the reduction in the tax base provided for by Article 26 of Norma Foral de Guipúzcoa No 7/1996;

— order the Commission to pay the costs.

22 The Province of Vizcaya, the applicant in Case T-348/99, claims that the Court should:

— declare its action admissible;

— annul the contested decision in so far as it classified as State aid, within the meaning of Article 87 EC, the reduction in the tax base provided for by Article 26 of Norma Foral de Vizcaya No 3/1996;

— order the Commission to pay the costs.

23 By separate documents lodged at the Registry of the Court of First Instance on 26 January 2000, the Commission pleaded the inadmissibility of those three actions, pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance. By orders of the Court of First Instance (Third Chamber, Extended Composition) of 6 July 2000, those pleas were reserved for final judgment.

24 In all three cases the Commission contends that the Court should:

— declare the action inadmissible;

— in the alternative, declare the action unfounded;

— order the applicant to pay the costs.

25 By order of the President of the Third Chamber, Extended Composition, of the Court of First Instance of 12 January 2001, Cases T-346/99, T-347/99 and T-348/99 were joined.

26 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure. By way of measures of organisation of procedure, as provided for in Article 64 of its Rules of Procedure, it addressed a written question to the applicants, who replied thereto within the time allowed.

27 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 10 April 2002.

Admissibility

Arguments of the parties

28 The Commission argues that the contested decision is merely a preparatory measure which does not affect the legal position of the applicants. It is therefore not actionable under Article 230 EC. The Commission adds that, if its decision to initiate the formal investigation procedure were to have definitive legal consequences as to the classification of measures as State aid, then the fact that an action might be brought, within the prescribed period, to challenge that

classification would render inadmissible any action against the Commission's final decision on whether or not the measure in question constituted aid, because the later decision would merely be confirmatory of the earlier definitive decision.

29 Next, the Commission observes that the Court of Justice has held, in Case C-301/87 *France* v *Commission* [1990] ECR I-307, that the Commission may issue an injunction to a Member State to suspend aid before completing its review of the aid's compatibility with the common market. Such a decision, adopted at the conclusion of a procedure different from that under Article 88(2) EC, is distinct from a decision to initiate the formal investigation procedure and, unlike the latter, may form the subject-matter of an action (*France* v *Commission*, cited above, paragraph 18). The fact that the Court judged it necessary to require the procedure and decision for issuing an injunction to differ from the procedure and decision for initiating the formal investigation procedure indicates that injunctions cannot follow on from the mere classification, in a decision to initiate the formal investigation procedure, of a measure under review as aid.

30 Lastly, the Commission observes that, by contrast with the background to the decisions which led to the Court's judgments in Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145 and Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303 (the latter hereinafter referred to as '*Tirrenia*'), at no point during the procedure prior to adoption of the contested decision did the central, regional or provincial Spanish authorities submit that the tax measures at issue were existing measures.

31 The applicants rely on the judgments just cited to argue that a decision to initiate the formal investigation procedure is an actionable measure because it produces immediate and final legal effects. They insist that the Commission was not entitled to initiate the formal investigation procedure because the tax measures at issue are not State aid.

Findings of the Court

32 It must be noted that, at the time the contested decision was adopted, the tax measures at issue had already been implemented by the applicants, who consistently argue that the reduction in the tax base introduced thereby is not State aid within the meaning of Article 87(1) EC.

33 A decision to initiate the formal investigation procedure entails independent legal effects, particularly in relation to the suspension of measures (paragraphs 62 and 69 of *Tirrenia*, cited in paragraph 30 above). That is plainly the case not only where a measure in the course of implementation is regarded by the authorities of the Member State concerned as existing aid, but also where the authorities take the view that the measure to be formally investigated does not fall within the scope of Article 87(1) EC (paragraphs 59, 60 and 69 of *Tirrenia*).

34 A decision to initiate the formal investigation procedure in relation to a measure in the course of implementation and classified by the Commission as new aid necessarily alters the legal implications of the measure under consideration and the legal position of the recipient firms, particularly as regards the continued implementation of the measure. Until the adoption of such a decision, the Member State, the recipient firms and other economic operators may think that the measure is being lawfully implemented as a general measure not falling within the scope of Article 87(1) EC or as existing aid. On the other hand, after its adoption there is at the very least a significant element of doubt as to the legality of the measure which, without prejudice to the possibility of seeking interim relief from the court, must lead the Member State to suspend its application, since the initiation of the formal investigation procedure excludes the possibility of an immediate decision that the measure is compatible with the common market, which would enable it to continue to be lawfully implemented. Such a decision might also be invoked before a national court called upon to draw all the

consequences arising from infringement of the last sentence of Article 88(3) EC. Finally, it is capable of leading the firms which are beneficiaries of the measure to refuse in any event new payments or new advantages or to hold the necessary sums as provision for possible subsequent financial compensations. Businesses will also take account, in their relations with those beneficiaries, of the uncertainty cast on the legal and financial situation of the latter (*Tirrenia*, cited in paragraph 30 hereof, paragraphs 59 and 69, and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 85).

35 It is true that, in such a context, unlike a suspension injunction addressed to a Member State, which is immediately binding, and non-compliance with which enables the Commission to refer the matter directly to the Court of Justice pursuant to Article 12 of the regulation on State aid procedure for a declaration that such non-compliance constitutes an infringement of the Treaty, a decision to initiate the formal investigation procedure, taken in relation to measures in the course of implementation and classified by the Commission as new aid, produces legal effects the consequences of which it is for the Member State concerned and, in appropriate cases, economic operators themselves to draw. However, that procedural difference does not affect the scope of those legal effects (*Tirrenia*, paragraph 60).

36 It thus follows that the contested decision is a measure which may form the subject -matter of an action under Article 230 EC.

37 Next, it must be observed that the applicants are directly and individually concerned by the contested decision, within the meaning of the fourth paragraph of Article 230 EC. The contested decision relates to tax measures of which the applicants themselves are the authors. Moreover, it prevents the applicants from exercising, as they see fit, their own powers, which they enjoy directly under

Spanish law (see, to that effect, Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraphs 29 and 30, and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 50).

38 It follows from all the foregoing that the actions are admissible.

Substance

39 The applicants put forward five pleas in law in support of their applications. The first alleges infringement of Article 87(1) EC, the second, infringement of Article 88(2) and (3) EC, the third, misuse of powers, the fourth, breach of the principle of the protection of legitimate expectations, and lastly the fifth, infringement of Article 253 EC.

The first plea, alleging infringement of Article 87(1) EC

40 By their first plea, the applicants argue that the reduction in the tax base introduced by the tax measures at issue is not State aid within the meaning of Article 87/1) EC.

41 However, it must be remembered that the Commission is required to initiate the formal investigation procedure if an initial examination does not enable it to

resolve all the difficulties raised by the question whether the measure under consideration constitutes aid for the purposes of Article 87(1) EC, unless, in the course of that initial examination, the Commission is able to satisfy itself that the measure at issue would in any event be compatible with the common market, even if it were aid (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 39, Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR I-3235, paragraph 166).

42 That is why Article 6 of the regulation on State aid procedure provides that a decision to initiate the formal investigation procedure must include a 'preliminary assessment of the Commission as to the aid character of the proposed measure'.

43 It follows that the classification of a measure as State aid in a decision to initiate the formal investigation procedure is merely provisional. The very aim of initiating the procedure is to enable the Commission to obtain all the views it needs in order to be able to adopt a definitive decision on the point (see, to that effect, Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraph 33, Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 59).

44 In order to avoid confusion between the administrative and judicial proceedings, and to preserve the division of powers between the Commission and the Court, any review by the Court of First Instance of the legality of a decision to initiate the formal investigation procedure must necessarily be limited (see, to that effect, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 20). The Court must in fact avoid giving a final ruling on questions on which the Commission has merely formed a provisional view.

45 Thus, where in an action against a decision to initiate the formal investigation procedure the parties challenge the Commission's assessment of a measure as constituting State aid, review by the Court is limited to ascertaining whether or not the Commission has made a manifest error of assessment in forming the view that it was unable to resolve all the difficulties on that point during its initial examination of the measure concerned (see the order of the President of the Court of First Instance in Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 79).

46 The applicants argue primarily that the reduction in the tax base introduced by the tax measures at issue is a measure of a general nature.

47 They argue, first, that the Commission inferred that the tax measures at issue are specific from the fact that they are regional. However, they point out that the Provinces of Álava, Vizcaya and Guipúzcoa have, since the 19th century, enjoyed a fiscal autonomy that is recognised and protected by the Spanish constitution. That autonomy is implicitly called into question by the contested decision.

48 Next, the applicants observe that the reduction in the tax base applies to all newly-established firms irrespective of the sector in which they operate and the origins of the investments they make, provided that they satisfy the conditions laid down in the legislation, which are formulated in 'horizontal' and objective terms. Restricting the scope of application of the reduction in the tax base is all the more justified because it is necessary in order to attain the objectives pursued by the tax measures at issue, which are to promote investment and to create jobs.

49 They also argue that the Commission should not infer that the tax measures at issue are specific from any discretionary power which the tax authorities allegedly enjoy in applying the reduction in the tax base. The tax authorities in fact merely check whether or not the conditions laid down by the tax measures at issue are satisfied and have no discretionary power of any sort in that regard. They cannot decide which firms should benefit, or alter the intensity of the 'aid' according to the particular characteristics of the firm concerned.

50 In this connection, it must be remembered that Article 87(1) EC requires that, in order for a measure to be classified as State aid, it must favour 'certain undertakings or the production of certain goods'. The specific or selective nature of a measure therefore constitutes one of the characteristics of State aid (Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 40, *Diputación Foral de Álava and Others* v *Commission*, cited in paragraph 37 above, paragraph 144, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 39).

51 Now, in the contested decision, the Commission identifies two reasons for provisionally treating the reduction in the tax base as a selective measure for the purposes of Article 87(1) EC: first, the conditions for granting the tax concession, which 'exclude firms which were established before the date of entry into force of the provincial laws in mid-1996, which carry out investment of less than the threshold of ESP 80 million (EUR 480 810), which create fewer than ten jobs and which are not companies with a paid-up capital of at least ESP 20 million (EUR 120 202)' (OJ 2000 C 55, p. 3, paragraph 4.1) and, secondly, the discretionary power enjoyed by the tax authorities of the Provinces concerned in granting the tax concession (OJ 2000 C 55, p. 5).

52 Contrary to the applicants' submission, the Commission did not, therefore, rely in the contested decision on the finding that the tax measures at issue applied only to part of the Spanish territory, namely the Provinces of the Basque country, in

drawing the provisional conclusion that the reduction in the tax base is selective. The applicants cannot therefore claim that the contested decision calls into question the power of the three Basque provinces to enact tax legislation.

53 Next, the Court observes that it is clear from the tax measures at issue that only newly-established firms are entitled to the reduction in the tax base. No other firms may benefit. Moreover, newly-established firms must have paid-up capital of at least ESP 20 million, must invest at least ESP 80 million and must create at least ten jobs. On that basis, the Commission was reasonably entitled to take the provisional view that the reduction in the tax base introduced by the tax measures at issue was reserved to 'certain undertakings', within the meaning of Article 87(1) EC, even if, as the applicants allege, the scope of the measures in question is established on the basis of objective and horizontal criteria (see Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 50).

54 Furthermore, it would render the provisions of Article 87(1) EC nugatory if the pursuit of an economic or financial policy objective, such as the promotion of investment, were capable of removing a measure from their scope. In accordance with consistent case-law it must therefore be held that the objective pursued by the tax measures at issue cannot enable them to escape classification as State aid within the meaning of Article 87(1) EC (Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20, Case C-75/97 *Belgium* v *Commission* ('*Maribel*') [1999] ECR I-3671, paragraph 25, and *CETM* v *Commission*, cited at paragraph 50, paragraph 53).

55 The applicants none the less argue that the reduction in the tax base introduced by the tax measures at issue must be regarded as being justified by the nature or structure of the tax system, because it operates according to objective criteria of

uniform application and contributes to achieving the objective pursued by the tax provisions which introduced it.

56 The applicants add that the tax system in force in the three provinces, which has its basis in the Spanish constitution, is justified as it is by the nature and structure of the general Spanish system.

57 Moreover, the conditions for applying the reduction in the tax base are necessary for, or instrumental in improving the efficiency of, the tax system of which it forms part. The investment incentive which the measure is designed to create is necessary in an area which normally attracts few economic operators. Also, the overall tax burden is greater in the Basque country than in the rest of Spain.

58 In this connection it must be remembered that a State measure which is justified by the nature or general scheme of the system of which it is part does not fulfil the condition of selectivity, even if it confers an advantage on its recipients (*Maribel*, cited in paragraph 54, paragraph 33, and Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 42).

59 It must also be pointed out that justification based on the nature or overall structure of the tax system reflects the consistency of a specific tax measure with the internal logic of the tax system of which it forms part (Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission*, cited in paragraph 37, paragraph 164).

60 However, none of the arguments put forward by the applicants shows that restricting the circle of beneficiaries of the tax concession in issue is justified by the internal logic of the Basque tax system.

61 First of all, the fact that the tax measures at issue operate according to objective criteria and conditions does not prove that restricting the circle of beneficiaries of the tax concession is justified by the internal logic of the Basque tax system (see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in paragraph 58, paragraph 53).

62 Next, the fact that the Basque authorities were granted certain powers in matters of taxation under the Spanish constitution does not mean that any and every tax concession they might grant would be justified by the nature or structure of the tax system. Indeed, measures adopted by intra-state entities (decentralised, federated, regional or other) of the Member States, whatever their legal status and description, fall, in the same way as measures taken by the federal or central authority, within the ambit of Article 87(1) EC, if the conditions laid down in that provision are satisfied (Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 17, and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission*, cited in paragraph 37, paragraph 142).

63 As to the remainder, the applicants refer, in the main, to economic policy objectives external to the Basque tax system. However, an economic objective pursued by a measure cannot enable it to escape classification as State aid within the meaning of Article 87(1) EC (see the case-law cited in paragraph 54 above).

64 That being so, the Commission did not make a manifest error of assessment in taking the provisional view in the contested decision that the reduction in the tax

base introduced by the tax measures at issue is a selective measure, within the meaning of Article 87(1) EC, in that it benefits solely newly-established firms which satisfy various other special conditions (see paragraph 53 above), without being justified by the nature or overall structure of the system of which it forms part.

65 There is therefore no need to consider further whether or not it was reasonable for the Commission to find, on the basis of the information available to it at the time it adopted the contested decision, that the Basque tax authorities enjoyed a certain discretionary power in applying the reduction in the tax base and that that supposed discretion was capable of rendering the tax measures at issue selective in nature (see paragraph 16 of the present judgment).

66 Secondly, the applicants argue that the Commission has failed to show that the reduction in the tax base introduced by the tax measures at issue gives rise to distortion of competition and affects trade between Member States. They emphasise that, before a measure can be considered to constitute State aid, it is necessary that the effect of that measure on competition is real and appreciable (Case 47/69 *France* v *Commission* [1970] ECR 487, paragraph 16, *Germany* v *Commission*, cited at paragraph 62, paragraph 18, and Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 58).

67 In this connection, it must be remembered that, in the case of an alleged aid programme, the Commission may confine its examination to the characteristics of the programme in question in order to determine whether it gives an appreciable advantage to the recipients in relation to their competitors and is likely to benefit essentially firms engaged in trade between Member States (see *Maribel*, cited in paragraph 54, paragraph 48, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 89). In a case such as the present,

where an alleged aid programme has not been notified, it is not necessary for the reasoning on which the Commission bases its final decision, or *a fortiori* its decision to initiate the formal investigation procedure, to contain an up-to-date assessment of the effects of the aid on competition and on trade between Member States (see *Maribel*, cited above, paragraph 48).

68 Now, it was reasonable for the Commission to express, in the contested decision, the provisional view that the tax measures at issue, which *de facto* restrict application of the reduction of between 25% and 99% in the tax base to newly-established firms that satisfy various special conditions, improves the competitive position of the recipient firms, which probably include firms engaged in trade between Member States. Furthermore, it would be reasonable to assume that the tax concession in issue is likely to impede competitor firms established in other Member States in exporting their goods to the Spanish market.

69 The applicants' argument set out in paragraph 66 of the present judgment must therefore be rejected.

70 It follows from all the foregoing that the Commission could, without making a manifest error of assessment, take the view that a preliminary examination did not enable it to resolve all the difficulties raised by the question whether the tax concession in question constitutes State aid within the meaning of Article 87(1) EC.

71 That being so, the plea alleging infringement of Article 87(1) EC must be rejected.

The second plea, alleging infringement of Article 88(2) and (3) EC

72 The applicants point out that the Commission regarded the reduction in the tax base as unlawful aid because the obligation to give prior notice laid down in Article 88(3) EC was not satisfied. However, according to the applicants, because the tax measures at issue are not State aid within the meaning of Article 87(1) EC the Spanish authorities were under no obligation to give notice.

73 That argument must be rejected. Indeed, given that it was reasonable for the Commission to take the view that a preliminary examination did not enable it to resolve all the difficulties raised by the question whether the tax concession in question constitutes State aid within the meaning of Article 87(1) EC, it was also reasonable for it to take the provisional view that the Spanish authorities had infringed Article 88(3) EC by failing to give prior notice to the Commission of the tax measures at issue. Any other interpretation of Article 88(3) might render nugatory the obligation to give prior notice of new aid.

74 Next, the applicants argue that the Commission infringed Article 88(2) EC in that it failed, in the contested decision, to formulate its doubts as to the classification of the reduction in the tax base as State aid. They insist that, in the contested decision, the Commission thus reached a final decision on the matter. That being so, the procedural guarantees afforded to the applicants by Article 88(2) EC were infringed.

75 It should be remembered that the Commission is required to initiate the formal investigation procedure if an initial examination does not enable it to resolve all the difficulties raised by the question whether the measure it is considering constitutes aid for the purposes of Article 87(1) EC, unless, in the course of that initial examination, it is able to satisfy itself that the measure at issue would in any event be compatible with the common market, even if it were aid (*Commission* v *Sytraval and Brink's France*, cited in paragraph 41 above, paragraph 39, and *BP Chemicals* v *Commission*, cited in paragraph 41 above, paragraph 166). A decision to initiate the formal investigation procedure thus implies a provisional assessment of both the aid character of the measure and its compatibility with the common market.

76 That is why Article 6(1) of the regulation on State aid procedure provides that a decision to initiate the formal investigation procedure must both 'include a preliminary assessment of the Commission as to the aid character of the proposed measure' and 'set out the doubts as to its compatibility with the common market'.

77 The fact that the Commission did not explicitly set out in the contested decision its doubts regarding classification of the reduction in the tax base as State aid does not indicate that such classification was not temporary (see Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 21). In a decision to initiate the formal investigation procedure, the Commission is merely required to set out its doubts as to the measure's compatibility with the common market.

78 The fact that classification of a measure as State aid in a decision to initiate the formal investigation procedure is merely provisional is confirmed by Article 7(2) of the regulation on State aid procedure, which provides that, on completion of

the formal investigation procedure, the Commission may find that the measure does not constitute aid.

79 Lastly, the remarks made by the applicants following initiation of the formal investigation procedure, communicated to the Court of First Instance in response to a written question, show clearly that they themselves took the Commission's classification of the reduction in the tax base as State aid to be provisional, for they in fact invited the Commission to terminate the procedure with a decision that the tax concession did not constitute State aid.

80 At the hearing the applicants also asserted that the concept of State aid has evolved somewhat over time, as is recognised by Article 1(b)(v) of the regulation on State aid procedure. They argue that, when the tax measures at issue were adopted, the Commission did not regard tax concessions such as the one addressed by the contested decision as being selective measures. The gradual change in the criteria applied by the Commission in ascertaining selectivity means that, if the reduction in the tax base must be regarded as State aid, it ought to be regarded as existing aid. Consequently, the contested decision, which initiates a procedure laid down for new aid, is unlawful.

81 In support of their argument, the applicants refer 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) and Commission Decision 96/369/EC of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility (OJ 1996 L 146, p. 42). They submit that the change in the criteria applied by the Commission in ascertaining selectivity in the context of its assessment of tax measures with reference to Article 87(1) EC was made clear for the first time in the Commission's Notice on the application of the State aid rules to measures relating to direct business taxation published in the *Official Journal of the European Communities* on 12 December 1998 (OJ 1998 C 384, p. 3).

82 In this connection, it must be remembered that, in accordance with Article 1(b)(v) of the regulation on State aid procedure, existing aid includes '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'.

83 However, the points put forward by the applicants fail to persuade the Court that the criteria for establishing selectivity applied by the Commission in its assessment of tax measures in light of Article 87(1) EC changed at all after the adoption of the tax measures at issue. In both of the contested decisions (cited in paragraph 81 above), the Commission found that the tax measures under consideration were selective measures and classified them as State aid incompatible with the common market. There is nothing in either decision to indicate that the Commission would have regarded the tax measures at issue as measures of general application falling outside the scope of Article 87(1) EC had it examined them at the time they were adopted. As regards the Commission's notice of 12 December 1998, which is substantially based on the case-law of the Court of Justice and of the Court of First Instance, that document elucidates the application to tax measures of Articles 87 EC and 88 EC. However, nowhere in it does the Commission announce any change of practice in its decisions concerning the assessment of tax measures in the light of Article 87 EC and 88 EC.

84 Even if the applicants were able to establish that there had been such a change of practice, their argument that the tax measures at issue are existing aid could still not be accepted, for they fail to show that any change in the criteria for ascertaining selectivity applied by the Commission is attributable to the 'evolution of the common market' within the meaning of Article 1(b)(v) of the regulation on State aid procedure. In this connection, it must be remembered that whether a State measure is existing or new aid cannot depend on a subjective assessment by the Commission and must be determined independently of any

previous administrative practice it may have had (see *Gibraltar* v *Commission*, cited in paragraph 34 above, paragraph 121).

85 It follows that the second plea must also be rejected.

The third plea, alleging misuse of powers

86 The applicants argue that the Commission is guilty of a misuse of powers in that it availed itself of its right of action under Articles 87 EC and 88 EC in order to pursue a tax harmonisation objective.

87 They maintain that the contested decision is part of a larger endeavour on the Commission's part to call into question the entire Basque tax system; the Commission is attempting to achieve tax harmonisation by means of State aid politics instead of taking the proper course laid down by the Treaty, that is to say the procedure provided for in Articles 96 EC and 97 EC.

88 It must be remembered that 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 — predominantly, if not exclusively — for purposes other than those stated (Case T-46/89 *Pitrone* v *Commission* [1990] ECR II-577, paragraph 71, and Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission*, cited in paragraph 53 above, paragraph 84).

89 The aim of initiating the formal investigation procedure is to enable the Commission to obtain all the views it needs in order to be able to adopt a definitive decision on the classification of the measure under consideration and its compatibility with the common market (see, to that effect, *Portugal* v *Commission*, cited in paragraph 43 above, paragraph 33, and *British Airways and Others and British Midland Airways* v *Commission*, cited at paragraph 43 above, paragraph 59).

90 It is quite clear that the applicants have proffered no objective evidence indicating that the Commission's real purpose in adopting the contested decision was something other than obtaining the views it needed. Their whole argument is based on subjective speculation concerning possible concealed motives underlying the contested decision.

91 The plea alleging misuse of powers must therefore also be rejected.

The fourth plea, alleging breach of the principle of the protection of legitimate expectations.

92 The applicants argue that, as early as 1993, tax measures similar to the reduction in the tax base which is the subject of the contested decision were already included in tax laws in the three Basque provinces (Norma Foral No 18/1993 of the Province of Álava, Norma Foral No 5/1993 of the Province of Vizcaya and Norma Foral No 11/1993 of the Province of Guipúzcoa) and in Spanish Law No 22/1993 of 29 December 1993 on tax measures and the reform of the law

governing the public service and unemployment protection. The Commission called into question neither the Spanish law nor the 1993 Normas Forales and the applicants were therefore entitled to consider that selectivity, such as might attract application of Article 87 EC, was not a feature of the tax concession addressed by the contested decision.

93 It must be borne in mind that, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations. On the other hand, a person may not plead a breach of the principle of the protection of legitimate expectations unless the administration has given him precise assurances (see, in particular, Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 72).

94 However, it is quite clear that the sole basis of the applicants' argument is an allegation of inaction on the part of the Commission with respect to certain tax measures adopted in 1993 which they do not even claim were notified by them to the Commission.

95 It would be wrong to take inaction on the part of the Commission with regard to tax measures similar to the reduction in the tax base introduced by the tax measures at issue in this case as being in any way equivalent to its giving a precise assurance that the tax concession addressed by the contested decision does not constitute State aid. In any event, inaction on the part of the Commission with regard to similar measures, or even with regard to the measures in issue in this case, is incapable of giving rise to a legitimate expectation on the part of the applicants that the Commission would not initiate the formal investigation procedure in connection with the measures at issue.

96 The plea of infringement of the principle of the protection of legitimate expectations cannot therefore be upheld.

The fifth plea, alleging infringement of Article 253 EC

97 The parties argue that the statement of reasons for the contested decision is inadequate. First of all, the Commission failed to consider in the decision to what extent it might be possible to regard the reduction in the tax base as being justified by the nature or structure of the Basque tax system. Secondly, the Commission failed to give any real consideration to the effect that the tax measures at issue might have on competition and trade between Member States. Thirdly, there is insufficient reasoning to support the Commission's assessment of the measure's compatibility with the common market.

98 It must be borne in mind that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Commission* v *Sytraval and Brink's France*, cited in paragraph 41 of the present judgment, paragraph 63).

99 In order to determine the extent of the obligation to state reasons for a decision to initiate the formal investigation procedure it should be remembered that, according to Article 6(1) of the regulation on State aid procedure, where the Commission decides to initiate that procedure, it is permissible for its decision merely to summarise the relevant issues of fact and law, include a 'preliminary assessment' as to the aid character of the State measure in question and set out its doubts as to the measure's compatibility with the common market.

100 Thus, a decision to initiate the procedure must give interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with the common market (*Gibraltar* v *Commission*, cited above in paragraph 34, paragraph 138).

101 In the contested decision the Commission clearly states the reasons for which it concludes provisionally that the reduction in the tax base constitutes State aid (OJ 2000 C 55, p. 3, paragraph 4.1, and p. 5, paragraph 1). It goes on to set out its doubts as to the compatibility of the tax concession with the common market (OJ 2000 C 55, p. 3, paragraph 4.3, and p. 6, paragraph 3).

102 The statement of reasons for the contested decision was thus sufficient to enable the applicants to be aware of the reasoning which led the Commission to adopt the decision and to enable the Court to exercise its power of review.

103 Moreover, the observations formulated by the applicants following the initiation of the formal investigation procedure show that they did not misunderstand the arguments developed by the Commission in the contested decision.

104 That being so, it must be held that the statement of reasons for the contested decision was sufficient.

105 The last plea must therefore also be rejected.

106 In view of all of the foregoing, the actions must be dismissed.

Costs

107 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 applicants have been unsuccessful, they must, in accordance with the form of order sought by the Commission, be ordered to pay the costs of the Commission in addition to their own.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition),

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants to pay their own costs together with those of the Commission.**

Jaeger García-Valdecasas Lenaerts

Lindh Azizi

Delivered in open court in Luxembourg on 23 October 2002.

H. Jung K. Lenaerts

Registrar President