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

In Joined Cases T-269/99, T-271/99 and T-272/99,

Territorio Histórico de Guipúzcoa — Diputación Foral de Guipúzcoa,

Territorio Histórico de Álava — Diputación Foral de Álava,

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 decisions, notified to the Spanish authorities by letters of 17 August 1999, to initiate the procedure under

* Language of the case: Spanish.

Article 88(2) EC against the Spanish State in relation to tax aid in the form of a 45% tax credit in the Provinces of Álava, Viscaya and Guipúzcoa (OJ 1999 C 351, p. 29, and OJ 2000 C 71, p. 8),

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 tax credits created 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 tax credits by the tax legislation of the Provinces of Álava, Vizcaya and Guipúzcoa.

The tax credit created by the tax legislation of the Province of Álava.

11 The Sixth Additional Provision of Norma Foral No 22/1994 of 20 December 1994 (a regional regulation) implementing the 1995 budget of the Province of Álava, reads as follows:

'Investments in new fixed assets made between 1 January 1995 and 31 December 1995 which exceed ESP 2.5 billion shall, by decision of the Diputación Foral de Álava, receive a tax credit of 45% of the cost of investment determined by the Diputación Foral de Álava, to be applied to the final amount of tax payable.

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

The decision of the Diputación Foral de Álava shall lay down the time-limits and restrictions applicable in each case.

The advantages granted under this provision may not be combined with any other fiscal advantage in respect of the same investment.

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

12 The validity of that provision was extended, for the year 1996, by the Fifth Additional Provision of Norma Foral No 33/1995 of 20 December 1995, as amended by point 2.11 of the single derogating provision of Norma Foral No 24/1996 of 5 July 1996. For 1997, the measure was extended by the Seventh Additional Provision of Norma Foral No 31/1996 of 18 December 1996.

13 The tax credit of 45% of the amount of the investments was retained, in an amended form, for the years 1998 and 1999 by means of the Eleventh Additional Provision of Norma Foral No 33/1997 of 19 December 1997 and the Seventh Additional Provision of Norma Foral No 36/1998 of 17 December 1998.

The tax credit created by the tax legislation of the Provinces of Vizcaya and Guipúzcoa

14 The Fourth Additional Provision of Norma Foral No 7/1996 de Vizcaya of 26 December 1996, extended by the Second Provision of Norma Foral No 4/1998 of 2 April 1998 and the Tenth Additional Provision of Norma Foral No 7/1997 de Guipúzcoa of 22 December 1997, provides:

'Investments in new fixed assets made after 1 January 1997 which exceed ESP 2.5 billion shall, by decision of the Diputación Foral de [Vizcaya/

Guipúzcoa], receive a tax credit of 45% of the cost of investment determined by the Diputación Foral de [Vizcaya/Guipúzcoa], to be applied to the final amount of tax payable.

Any tax credit not used up because it exceeds the amount of tax liability may be applied in the five tax years following the year in relation to which the decision to grant the tax credit was adopted.

The beginning of the period during which the credit may be applied may be deferred to the first financial year, within the limitation period, in which positive results are recorded.

The decision referred to in the first paragraph shall lay down the time-limits and restrictions applicable in each case.

...'

The contested decisions

15 In response to a complaint lodged in 1996, the Commission examined the grant of the 45% tax credit 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 credit to Demesa constituted State aid incompatible with the common market.

16 The Commission then conducted a general examination of the tax credit created by the tax legislation of the Province of Álava, with reference to Articles 87 EC and 88 EC. The tax credits 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'.)

17 This led the Commission to adopt Decision SG (99) D/6871 to initiate the formal investigation procedure with respect to the tax credit created by the tax legislation of the Provinces of Vizcaya and Guipúzcoa, notified to the Spanish authorities by letter of 17 August 1999. That decision, which is contested in Case T-269/99 *Territorio Histórico de Guipúzcoa* v *Commission* and Case T-272/99 *Territorio Histórico de Vizcaya* v *Commission*, was published in Spanish in the *Official Journal of the European Communities* of 4 December 1999 (OJ 1999 C 351, p. 29), 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.

18 The Commission also initiated a formal investigation procedure in connection with the tax credit provided for by the tax legislation of the Province of Álava. Its decision, which bears the reference SG (99) D/6873, was notified to the Spanish authorities by letter of 17 August 1999 and was published in Spanish in the *Official Journal of the European Communities* of 11 March 200 (OJ 2000 C 71, p. 8), together with a summary in the relevant language for each linguistic version of the Official Journal. It is the decision contested in Case T-271/99 *Territorio Histórico de Álava* v *Commission*.

19 In both of those decisions (hereinafter 'the contested decisions') the Commission provisionally treats the tax credits at issue as State aid within the meaning of Article 87(1) EC. It does so on the following basis:

'The tax credit meets all four of the criteria laid down in Article 87 of the EC Treaty. In particular, it is specific in that it favours certain firms, being available only to firms investing more than ESP 2.5 billion (EUR 15 025 303). All other firms whose investments do not exceed the ESP 2.5 billion threshold are excluded.' (Paragraph 3.1 of the summary of Decision SG (99) D/6871 and paragraph 2.1 of the summary of Decision SG (99) D/6873.)

20 The selective nature of the tax credit is, according to the Commission, also clearly evidenced by the discretionary power which the tax authorities of the Provinces concerned enjoy in granting the tax advantage in question (OJ 1999 C 351, p. 32, in the case of Decision SG (99) D/6871 and OJ 2000 C 71, p. 11, for Decision SG (99) D/6873).

21 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 tax credit with the common market, concludes that there are doubts in this regard and decides to initiate the formal investigation procedure (paragraphs 3.2 and 3.3 of the summary of Decision SG (99) D/6871 and paragraphs 2.2 and 2.3 of the summary of Decision SG (99) D/6873).

22 After adopting the contested decisions, the Commission examined a specific case where the 45% tax credit provided for by the tax legislation of the Province of Álava was granted to a particular undertaking. 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

23 By applications lodged at the Registry of the Court of First Instance on 3 November 1999, the applicants brought the present actions.

24 The Province of Guipúzcoa, the applicant in Case T-269/99, claims that the Court should:

— declare its action admissible;

— annul Commission Decision SG (99) D/6871 in so far as it classified as State aid, within the meaning of Article 87 EC, the tax credit created by Norma Foral de Guipúzcoa No 7/1997 of 22 December 1997;

— order the Commission to pay the costs.

25 The Province of Álava, the applicant in Case T-271/99, claims that the Court should:

— declare its action admissible;

— annul Commission Decision SG (99) D/6873 in so far as it classified as State aid, within the meaning of Article 87 EC, the tax credit created by Norma Foral de Álava No 22/1994 of 20 December 1994, as amended;

— order the Commission to pay the costs.

26 The Province of Vizcaya, the applicant in Case T-272/99, claims that the Court should:

— declare its action admissible;

— annul Commission Decision SG (99) D/6871 in so far as it classified as State aid, within the meaning of Article 87 EC, the tax credit created by Norma Foral de Vizcaya No 7/1996 of 26 December 1996, as amended;

— order the Commission to pay the costs.

27 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.

28 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.

29 By order of the President of the Third Chamber, Extended Composition, of the Court of First Instance of 12 January 2001, Cases T-269/99, T-271/99 and T-272/99 were joined.

30 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.

31 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

32 The Commission argues that the contested decisions are merely preparatory measures which do not affect the legal position of the applicants. They are 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.

33 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.

34 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 decisions did the central, regional or provincial Spanish authorities submit that the tax measures at issue were existing measures.

35 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 credit created by the tax measures at issue is not State aid. The applicants in Cases T-271/99 and T-272/99 add that, even if the tax measures at issue did constitute State aid within the meaning of Article 87(1) EC, they would be existing aid, for the tax credit was in fact introduced in 1984 by the tax legislation of the Provinces of Álava and Vizcaya.

Findings of the Court

36 It must be noted that, at the time the contested decisions were adopted, the tax measures at issue had already been implemented by the applicants, who consistently argue that the tax credit created thereby is not State aid within the meaning of Article 87(1) EC.

37 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 34 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*).

38 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 undertakings, particularly as regards the continued implementation of the measure. Until the adoption of such a decision, the Member State, the recipient undertakings 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 undertakings 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 34, paragraphs 59 and 69, Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 85).

39 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).

40 It thus follows that the contested decisions are measures which may form the subject-matter of an action under Article 230 EC.

41 Next, it must be observed that the applicants are directly and individually concerned by the contested decisions, within the meaning of the fourth paragraph of Article 230 EC. The contested decisions relate to tax measures of which the applicants themselves are the authors. Moreover, they prevent 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).

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

Substance

43 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

44 By their first plea, the applicants argue that the tax credit created by the tax measures at issue is not State aid within the meaning of Article 87/1) EC.

45 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).

46 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'.

47 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).

48 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.

49 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).

50 The applicants argue primarily that the contested decisions relate to measures of a general nature which do not fall within the scope of Article 87(1) EC: the tax credit created by the tax measures at issue benefits in the same way all taxpayers investing more than ESP 2.5 billion.

51 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 decisions.

52 Next, they argue that the Commission should not infer that the tax measures at issue are specific from any discretionary power which the Diputaciónes Forales (provincial authorities) allegedly enjoy in granting the tax credit. The provincial 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 undertakings should benefit, or alter the intensity of the 'aid' according to the particular characteristics of the undertaking concerned.

53 Lastly, they argue that it would be wrong to infer that the tax credit is specific from the fact that it requires a minimum investment of ESP 2.5 billion. That is an objective qualitative criterion which merely limits the scope of the tax concession.

54 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 41 above, paragraph 144, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 39).

55 Now, in the contested decisions, the Commission identifies two reasons for provisionally treating the tax credit as a selective measure for the purposes of

Article 87(1) EC: the ESP 2.5 billion investment threshold, which must be exceeded in order to benefit from the tax concession (paragraph 3.1 of the summary of Decision SG (99) D/6871 and paragraph 2.1 of the summary of Decision SG (99) D/6873), and the discretionary power enjoyed by the tax authorities of the Provinces concerned in granting the tax concession (OJ 1999 C 351, p. 32, for Decision SG (99) D/6871 and OJ 2000 C 71, p. 11, for Decision SG (99) D/6873).

56 Contrary to the applicants' submission, the Commission did not, therefore, rely in the contested decisions 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 tax credit is selective. The applicants cannot therefore claim that the contested decisions call into question the power of the three Basque provinces to enact tax legislation.

57 Next, the Court observes that it is clear from the tax measures at issue that they restrict application of the tax credit to undertakings making investments in new fixed assets of over ESP 2.5 billion. The tax measures at issue thus *de facto* limit application of the tax credit to undertakings with significant financial resources. On that basis, the Commission was reasonably entitled to take the provisional view that the tax credit created by the tax measures at issue was reserved to 'certain undertakings', within the meaning of Article 87(1) EC (see *Diputación Foral de Álava and Others* v *Commission*, cited in paragraph 41 above, paragraph 157).

58 The applicants none the less argue that the tax credit created 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 instituted it.

59 In support of this, they argue that the investment incentive which the tax credit was designed to create is needed in an area which normally attracts few economic operators. They add that, where a State encourages investment and manages to attract undertakings to its territory, it guarantees future tax receipts because the undertakings concerned will be taxed in that State. The objective pursued by the tax measures of the provinces in question is thus, as is the case with State measures of this kind, to maximise tax revenue.

60 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 (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671 ('*Maribel*'), paragraph 33, and Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 42).

61 In order to determine whether that justification applies in the present case, it is necessary to consider whether restricting the circle of potential beneficiaries of the tax credit is justified by the internal logic of the Basque tax system (see *Diputación Foral de Álava and Others* v *Commission*, cited above, paragraph 164).

62 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 to undertakings investing more than ESP 2.5 billion is justified by the internal logic of the tax systems of the three provinces concerned (see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in paragraph 60 above, paragraph 53).

63 As regards the argument that the objective of the tax credit is to encourage economic development in the Basque region, it must be remembered that the

objective pursued by a measure cannot enable it to escape classification as State aid within the meaning of Article 87(1) EC (see *Diputación Foral de Álava and Others* v *Commission*, cited in paragraph 41 above, paragraph 168 and the references cited therein).

64 Lastly, the argument alleging a future increase in tax revenue is hard to reconcile with the granting of tax reductions. Even if that were the intended objective, it could also have been attained by general fiscal measures (see Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR I-1385, paragraph 62).

65 That being so, the Commission did not make a manifest error of assessment in taking the provisional view in the contested decisions that the tax credit created by the tax measures at issue is a selective measure, within the meaning of Article 87(1) EC, in that it solely benefits undertakings which invest more than ESP 2.5 billion.

66 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 decisions, that the Basque tax authorities enjoyed a discretionary power in granting the tax credit and that that supposed discretion was capable of rendering the tax measures at issue selective in nature (see paragraph 20 of the present judgment).

67 Secondly, the applicants argue that the Commission has failed to show that the tax credit created 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, Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18, and Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 58).

68 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 undertakings engaged in trade between Member States (see *Maribel*, cited in paragraph 60 above, 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 in paragraph 60 above, paragraph 48).

69 Now, it was reasonable for the Commission to express, in the contested decisions, the provisional view that the tax measures at issue, which *de facto* restrict the grant of the tax credit to undertakings with significant financial resources, offer an appreciable advantage to the beneficiaries of that tax concession in relation to their competitors and are likely essentially to benefit undertakings which engage in trade between Member States.

70 The applicants' argument set out in paragraph 67 of the present judgment must therefore be rejected.

71 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.

72 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

73 First of all, the applicants in Cases T-271/99 and T-272/99 submit that the tax credit which is the subject of the contested decisions is existing aid.

74 In this connection they state, firstly, that the tax concession, having in fact been introduced in 1984, already existed in the Provinces of Álava and Vizcaya before Spain joined the European Community. That being so, it constitutes existing aid, if indeed it must be classified as State aid. Consequently, the contested decisions, which initiate a procedure laid down for new aid, are unlawful.

75 That argument must be rejected. The tax concession in question was clearly granted on the basis of legal instruments adopted at a time when Spain was already a Member State, those being Norma Foral No 22/1994 of 20 December 1994 in the case of Álava and Norma Foral No 7/1996 of 26 December 1996 in the case of Vizcaya (see, to that effect, Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission*, cited in

paragraph 41 hereof, paragraphs 171 to 177). Moreover, the applicants offer no evidence to show that the tax concession allegedly introduced in 1984 and the tax credit referred to in the contested decisions are identical or that there is continuity between them.

76 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 decisions as being selective measures. The gradual change in the criteria applied by the Commission in ascertaining selectivity means that, if the tax credit must be regarded as State aid, it ought to be regarded as existing aid.

77 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).

78 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'.

79 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 77 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.

80 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 38 above, paragraph 121).

81 Secondly, the applicants in all three cases argued at the hearing that the Commission infringed Article 88(2) EC in that it failed, in the contested

decisions, to formulate its doubts as to the classification of the tax credit as State aid. They insist that, in the contested decisions, 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.

82 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 45 above, paragraph 39, *BP Chemicals* v *Commission*, cited in paragraph 45 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.

83 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'.

84 The fact that the Commission did not explicitly set out in the contested decisions its doubts regarding classification of the tax credit 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.

85 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.

86 Lastly, the remarks made by the applicants following initiation of the formal investigation procedure, communicated to the Commission by letter of 9 November 1999, show clearly that they themselves took the Commission's classification of the tax credit 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.

87 Thirdly, the applicants observe that the Commission regarded the tax credit created by the tax measures at issue 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 credit is not State aid within the meaning of Article 87(1) EC the Spanish authorities were under no obligation to give notice.

88 None the less, the analysis set out in paragraphs 73 to 80 of the present judgment indicates that the Commission was entitled to take the view that, if the tax credit were State aid, it was new aid. That being so, the Commission was entitled to take the provisional view that the Spanish authorities had infringed Article 88(3) EC by failing to give prior notice of the measures to the Commission. Any other interpretation of Article 88(3) EC would render nugatory the obligation to give prior notice of new aid.

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

The third plea, alleging misuse of powers

90 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.

91 They maintain that the contested decisions are 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.

92 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 64 above, paragraph 84).

93 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 47 above, paragraph 33, and *British Airways and Others and British Midland Airways* v *Commission*, cited at paragraph 47 above, paragraph 59).

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

95 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.

96 The applicants call attention to the Commission's adoption of Decision 93/337, in which it declared that certain tax concessions implemented in the Basque country, and in particular a tax credit for investment, constituted aid incompatible with the common market on the ground that they were contrary to

Article 43 EC. The Commission raised no objection, however, to the fact the tax credit was applied only where investments exceeded a certain threshold.

97 The Commission's finding in the contested decisions that the investment threshold of ESP 2.5 billion rendered the tax credit selective in nature is, according to the applicants, a breach of their legitimate expectations.

98 It must be observed, first of all, that the tax measures referred to by Decision 93/337 are not the measures referred to in the contested decisions, Decision 93/337 relating to tax concessions introduced by Normas Forales Nos 28/1988 in the case of Álava, 8/1988 for Vizcaya and 6/1988 for Guipúzcoa.

99 Decision 93/337 does relate to tax measures which create a tax credit in the Basque country. However, the fact that the Commission's finding that the tax measures under consideration in that decision were selective was based on the circumstance that the tax credit applied only to undertakings operating exclusively in the Basque country does not mean that the Commission could not have found those measures to be selective on a different basis.

100 It follows that Decision 93/337 — in which, it must be emphasised, the tax credit created by the 1998 Normas Forales was declared incompatible with the common market — was incapable of generating an expectation in the minds of the applicants that the Commission would not initiate the formal investigation procedure with regard to the tax credit created by the tax measures at issue.

101 The plea of infringement of the principle of the protection of legitimate expectations must therefore be rejected.

The fifth plea, alleging infringement of Article 253 EC

102 The parties argue that the statement of reasons for the contested decisions is inadequate. First of all, it is less detailed than that in Decision 1999/718 concerning Demesa or Decision 2000/795 concerning Ramondín. Secondly, in the contested decisions, the Commission failed to consider to what extent it might be possible to regard the tax credit as being justified by the nature or structure of the Basque tax system. Thirdly, the Commission failed to give any real consideration to the effect that the tax credit might have on competition and trade between Member States. Fourthly and lastly, there is insufficient reasoning to support the Commission's assessment of the tax credit's compatibility with the common market.

103 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 45 of the present judgment, paragraph 63).

104 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.

105 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 38, paragraph 138).

106 In the contested decisions the Commission clearly states the reasons for which it concludes provisionally that the tax measures at issue constitute State aid (paragraph 2 of Decision SG (99) D/6781 and paragraph 3.1 of the summary thereof; Decision SG (99) D/6783, OJ 2000 C 71, p. 11, and paragraph 2.1 of the summary). It goes on to set out its doubts as to the compatibility of the tax measures with the common market (paragraph 4 of Decision SG (99) D/6871 and paragraph 3.3 of the summary, Decision SG (99) D/6873, OJ 2000 C 71, p. 12, and paragraph 2.3 of the summary).

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

108 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 decisions.

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

110 The last plea must therefore also be rejected.

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

Costs

112 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 K. Lenaerts

Lindh Azizi

Delivered in open court in Luxembourg on 23 October 2002.

H. Jung K. Lenaerts

Registrar President