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

6 March 2002 *

In Joined Cases T-92/00 and T-103/00,

Territorio Histórico de Álava — Diputación Foral de Álava, represented by A. Creus Carreras and B. Uriarte Valiente, lawyers,

applicant in Case T-92/00,

Ramondín SA, established in Logroño, Spain,

Ramondín Cápsulas SA, established in Laguardia, Spain,

represented by J. Lazcano-Iturburu, lawyer,

applicants in Case T-103/00,

* Language of the case: Spanish.

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

defendant,

APPLICATION for the annulment of Commission 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),

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

composed of: J. Azizi, President, K. Lenaerts, V. Tiili, R.M. Moura Ramos and M. Jaeger, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 26 June 2001,

gives the following

Judgment

Legal context

Maximum aid intensity allowed in the Basque Country

1 According to the Spanish regional aid map proposed by the Commission (OJ 1996 C 25, p. 3), the maximum limit for aid in the Basque Country is 25% net grant equivalent (nge).

Tax concessions in force in the Territorio Histórico de Álava

2 The tax arrangements in force in the Basque Country are governed by the Economic Agreement established by Spanish Law 12/1981 of 13 May 1981, as last amended by Law 38/1997 of 4 August 1997. Under the Economic Agreement, the Diputación Foral de Álava (Álava Provincial Council) may, under certain conditions, organise the tax system within its territory.

3 On that basis, the Diputación Foral de Álava has established several tax aid measures, in particular a tax credit of 45% and a reduction of the basis of assessment to corporation tax.

Tax credit of 45%

4 The Sixth Additional Provision of Norma Foral 22/1994 of 20 December 1994 (regional regulations) implementing the 1995 budget of the Territorio Histórico de Álava [*Boletín Oficial del Territorio Histórico de Álava* (hereinafter 'BOTHA') No 5, of 13 January 1995] reads as follows:

'Investments in new fixed assets made between 1 January 1995 and 31 December 1995, which exceed ESP 2 500 million, in accordance with the Diputación Foral de Álava agreement, will receive a tax credit of 45% of the cost of investment determined by the Diputación Foral de Álava, to be applied to the definitive amount of tax payable.

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

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

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

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

5 The validity of that provision was extended, for the year 1996, by the Fifth Additional Provision of Norma Foral 33/1995 of 20 December 1995 (BOTHA No 4 of 10 January 1996), as amended by point 2.11 of the only derogating provision of Norma Foral 24/1996 of 5 July 1996 (BOTHA No 90 of 9 August 1996). For 1997, the fiscal measure was extended by the Seventh Additional Provision of Norma Foral 31/1996 of 18 December 1996 (BOTHA No 148 of 30 December 1996). The tax credit of 45% of the amount of the investments was retained, in an amended form, for the years 1998 and 1999 by the Eleventh Additional Provision of Norma Foral 33/1997 of 19 December 1997 (BOTHA No 150 of 31 December 1997) and by the Seventh Additional Provision of Norma Foral 36/1998 of 17 December 1998 (BOTHA No 149 of 30 December 1998) respectively.

Reduction of the basis of assessment to corporation tax

6 Article 26 of Norma Foral 24/1996 of 5 July 1996, referred to in the previous paragraph, provides as follows:

'1. Companies starting their business activity shall be entitled to a reduction of 99%, 75%, 50% and 25% respectively in the positive basis of assessment deriving from their economic activity, before this is offset by any negative bases of assessment arising in previous periods, for the four consecutive tax periods running from the first period in which, within four years of starting their business activity, they generate a positive basis of assessment.

...

2. To qualify for this reduction, businesses shall fulfil the following conditions:

(a) They shall start their business activity with a minimum paid-up capital of ESP 20 million;

(b) ...

(c) ...

(d) The new activity shall not have been carried on previously, either directly or indirectly, under different ownership;

(e) The new business activity shall be performed on premises or in an establishment where no other activity is carried on by any natural or legal person;

(f) They shall during the first two years of their activity invest at least ESP 80 million in tangible fixed assets, all of which assets shall be assigned to the activity and shall not be hired out or transferred for use by third parties. For the purposes of this requirement, goods acquired by leasing shall also be deemed to be investments in tangible fixed assets, provided that the business undertakes to exercise the purchase option;

(g) They shall create at least 10 jobs within six months of starting their business activity and shall maintain the annual average workforce at that level from that point and until the year in which their entitlement to the reduction in the basis of assessment expires;

(h) ...

(i) They shall have a business plan covering a period of at least five years.

3. ...

4. The minimum amount of investment referred to in subparagraph (f) and the minimum number of jobs created referred to in subparagraph (g) of paragraph 2 above shall be incompatible with any other tax concession established for the same investment or job creation.

5. The reduction provided for in this Article shall be requested by means of an application lodged with the tax administration, which, after checking that the initial requirements are satisfied, shall where appropriate notify the applicant company of its provisional authorisation, to be formally adopted by decision of the Álava Provincial Council.

....'

The facts

7 Ramondín SA is a company incorporated under Spanish law and specialised in the manufacture of capsules for sealing bottles of still and sparkling wines and other quality beverages. Since 1971 it has been established at Logroño in the Autonomous Community of Rioja.

8 In 1997 Ramondín decided to transfer its industrial plant from Logroño to Laguardia, which is in the Territorio Histórico de Álava in the Basque Country. Accordingly, on 15 December 1997 Ramondín set up a new company, Ramondín Cápsulas SA, of which it holds 99.8% of the capital. It is intended that Ramondín Cápsulas will take over all the activities of Ramondín.

9 Under Decision 738/1997 of 21 October 1997 of the Diputación Foral de Álava (Álava Provincial Council), Ramondín obtained the tax credit of 45% referred to in paragraphs 4 and 5 above. As a newly-established company, Ramondín Cápsulas is also eligible for the reduction in the basis of assessment referred to in paragraph 6.

Administrative procedure

10 By letter dated 2 October 1997, the Commission received a complaint from the President of the Autonomous Community of Rioja, concerning State aid granted to Ramondín on the occasion of the transfer of its activities to the Basque Country.

11 By letter dated 30 April 1999, the Commission notified the Spanish authorities that it had decided to initiate the procedure under Article 88(2) EC with regard to

the tax aid granted to Ramondín (OJ 1999 C 194, p. 18). In the same letter, it required Spain to provide certain specified items of information and to suspend payment of the tax aid already granted to Ramondín.

12 On 22 December 1999 the Commission adopted Decision 2000/795/EC on the State aid implemented by Spain for Ramondín and Ramondín Cápsulas (OJ 2000 L 318, p. 36, hereinafter 'the contested decision').

13 The operative part of the contested decision reads as follows:

'*Article 1*

1. The State aid which Spain has implemented in the form of the grant to [Ramondín] of a tax credit corresponding to 45% of the cost of the investment as determined by the Álava Provincial Council in Decision No 738/1997 of 21 October 1997 is compatible with the common market as regards the part of the aid which, in accordance with the rules on the cumulation of aid, does not exceed the ceiling of 25% nge for regional aid in the Basque Country.

2. Spain shall submit annual reports over the entire period in which the tax credit is in force in order to enable the Commission to check that the aid to [Ramondín] is granted in accordance with the rules on cumulation of aid and does not exceed the ceiling of 25% nge for regional aid in the Basque Country.

Article 2

The following State aid implemented by Spain is incompatible with the common market:

(a) the grant to [Ramondín Cápsulas] of the reduction in the tax base for newly established businesses provided for by Article 26 of Provincial Law 24/1996 of 5 July 1996;

(b) the grant to [Ramondín] of a tax credit corresponding to 45% of the cost of the investment as determined by the Álava Provincial Council in Decision No 738/1997 of 21 October 1997, as regards the part of the aid which, in accordance with the rules on the cumulation of aid, exceeds the ceiling of 25% nge for regional aid in the Basque Country.

Article 3

1. Spain shall take all necessary measures to withdraw the benefits deriving from, and where appropriate recover from the beneficiaries, the aid referred to in Article 2 and unlawfully made available to the beneficiaries.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

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

Article 5

This Decision is addressed to the Kingdom of Spain.'

Procedure and forms of order sought by the parties

14 By applications lodged at the Court Registry on 19 and 26 April 2000 respectively, the applicants in Cases T-92/00 and T-103/00 brought the present action for annulment of the contested decision.

15 By order of 5 June 2001, Cases T-92/00 and T-103/00 were joined for the purposes of the oral procedure and the judgment.

16 On hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure.

17 The parties presented oral argument and replied to the questions put by the Court at the hearing on 26 June 2001.

18 The applicant in Case T-92/00 claims that the Court should:

— declare this action admissible and well-founded;

— annul the contested decision in so far as it declares the fiscal measures provided for in Normas Forales 22/1994 and 24/1996 to be incompatible with the common market and requires the Spanish State to effect recovery in respect thereof;

— order the Commission to pay the costs.

19 The applicants in Case T-103/00 claim that the Court should:

— annul the contested decision in so far as it declares the fiscal measures provided for in Normas Forales 22/1994 and 24/1996 to be incompatible with the common market and requires the Spanish State to effect recovery in respect thereof;

— order the Commission to pay the costs.

20 In Cases T-92/00 and T-103/00, the Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

Law

21 The applicants put forward four pleas in law in support of their actions. The first plea alleges infringement of Article 87(1) EC. The second alleges misuse of powers. The third alleges breach of the principle of equality of treatment and the fourth, infringement of Article 253 EC.

The first plea: infringement of Article 87(1) EC

22 This plea has four parts. The first two parts concern the alleged general nature of the fiscal measures relating to the tax credit and the reduction in the tax base. Under the third part it is alleged that the objection based on the nature and overall structure of the tax system was incorrectly assessed. Under the fourth part it is alleged that there has been no distortion of competition or effect on intra-Community trade.

The first part, concerning the alleged general nature of the tax measure introducing the tax credit

23 It must be borne in mind that Article 87(1) EC requires that, in order to be classified as State aid, a measure 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, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 39).

24 In the contested decision (point VII.3.1), the Commission states that the specific nature of Norma Foral 22/1994 introducing a tax credit of 45% of the amount of the investment is evidenced by four factors, namely the discretionary power enjoyed by the Diputación Foral 'for determining which investments in tangible fixed assets amounting to more than ESP 2 500 million qualified for the tax credit, deciding to which part of the investments the 45% reduction could be applied, and establishing the time-limits and maximum ceilings applicable in each case' (recitals 79 to 87); the minimum investment required (ESP 2 500 million) which in practice restricts the application of the tax credit to large investors without that restriction being justified by the nature or overall structure of the tax system to which an exception is made (recitals 88 to 97); the temporary nature of the measure, which allows 'the authorities discretion to grant the tax credit to certain firms only' (recitals 98 to 101) and the 'close similarities between [the tax] measure and the Ekimen [regional aid] scheme, both in terms of the objectives pursued (the financing of new investments in both cases) and as regards their geographical scope (regional in the case of Ekimen, provincial in the case of the tax credit' (recitals 102 to 104).

25 It is therefore necessary to examine, in the light of the arguments raised by the applicants, whether the information which the Commission did take as a basis for the contested decision allowed the conclusion that the tax credit introduced by Norma Foral 22/1994 is a specific measure favouring 'certain undertakings or the production of certain goods' within the meaning of Article 87(1) EC.

26 The applicants maintain, first, that Norma Foral 22/1994 reflects a tax policy choice made by the Basque authorities. Those authorities have unlimited jurisdiction in tax matters under the Spanish Constitution and the Economic Agreement. The Commission, which considers that Norma Foral 22/1994 is selective because it applies only to part of the Spanish territory, namely Álava, is calling in question the legislative capacity of the Basque authorities. According to the applicants, a regional fiscal measure may be classified as selective and as State aid only if it is established that it does not apply generally to the territory of the region concerned, that it is clearly arbitrary or discretionary and also that it clearly affects competition between taxpayers subject to that regional tax system. Since those conditions are not fulfilled in the present case, the Commission should have used a tax harmonisation procedure if it intended to have the fiscal measure in question amended.

27 In that regard, the Court finds that the applicants' argument is based on a misreading of the contested decision. In the decision, the Commission made no reference at all to a criterion of regional selectivity in order to establish that the tax measure in question constitutes State aid within the meaning of Article 87(1) EC (see paragraph 24 above). The contested decision therefore has no effect on the competence of the Territorio Histórico de Álava to adopt general tax measures applicable to the whole of the region concerned.

28 The first complaint must therefore be rejected.

29 Secondly, the applicants claim that the Diputación Foral de Álava has no discretionary power in respect of granting the tax credit. It simply checks that the conditions laid down by legislation are fulfilled, in order to avoid any grant of the tax credit as a result of fraud. It does not have the authority to choose the recipient undertakings or to vary the percentage of the tax credit. The fiscal measure in question was therefore applied to all the undertakings falling within the scope of the relevant provisions.

30 The applicants add that both in national and in Community legislation there are many examples in which the application of a provision requires a prior check or inspection by the administrative authority without that implying that that authority has a discretionary power.

31 The Court points out that measures of purely general application do not fall within the ambit of Article 87(1) EC. However, the case-law has already made it clear that even interventions which, prima facie, apply to undertakings in general may be to a certain extent selective and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods. That is the case, in particular, where the administration called upon to apply a general rule has a discretionary power so far as concerns the application of the measure (Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 23 and 24, *Ecotrade*, cited in paragraph 23 above, paragraph 40, and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 39; Opinion of Advocate General La Pergola in Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, I-2461, point 8). Thus, in its judgment in *France* v *Commission*, cited above, paragraphs 23 and 24, the Court of Justice held that the system under which the French National Employment Fund contributes to measures accompanying the social plans of undertakings in difficulties was 'liable to place certain undertakings in a more favourable situation than others and thus to meet the conditions for classification as aid' within the meaning of Article 87(1) EC, since the fund in question 'enjoy[ed, by virtue of the statutory provisions concerning State participation in support for social plans], a degree of latitude which [enabled] it to adjust its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided'.

32 It must be observed that, under the provisions of Normal Foral 22/1994, the Diputación Foral de Álava has a certain discretionary power in applying the tax credit. It is apparent, in fact, from Norma Foral 22/1994 (see paragraph 4 above) that the tax credit is 45% 'of the cost of investment determined by the Diputación Foral de Álava'. However, Norma Foral 22/1994, which allows the Diputación

Foral de Álava to fix the amount of the allowable investment, at the same time allows it to vary the amount of the financial assistance. It must also be stated that, under Norma Foral 22/1994, the Diputación Foral is empowered to lay down 'the time-limits, and any restrictions applicable in each case'.

33 By granting the Diputación Foral de Álava a discretionary power, the provisions of Norma Foral 22/1994 concerning the tax credit are liable to place certain undertakings in a more favourable situation than others. In consequence, the tax measure in question must be regarded as fulfilling the condition as to specific nature.

34 The applicants concerned also add that the discretionary power of the Diputación Foral de Álava cannot, in any event, be regarded as a power to adopt arbitrary decisions. Indeed, public authorities are prohibited from acting arbitrarily by Article 9 of the Spanish Constitution.

35 However, as the Commission points out, in order to preclude characterisation as a general measure, it is not necessary to determine whether the conduct of the tax administration is arbitrary. It need only be established, as it has been in this case, that the administration has a discretionary power enabling it, in particular, to vary the amount of, or the conditions for granting, the tax concession in question according to the characteristics of the investment project submitted for its assessment.

36 The second complaint must therefore likewise be rejected.

37 Thirdly, the applicants maintain that the fact that a minimum investment of ESP 2 500 million is required to qualify for the tax credit does not mean that the fiscal measure is selective. According to the applicants, it is an objective quantitative criterion. All tax systems have measures the grant of or compliance with which is subject to a quantitative criterion.

38 The applicants add that the fact that, in practice, application of the measure is restricted to large undertakings is the normal consequence of the limitation of the scope of the fiscal measure. Other provisions apply only to small undertakings. According to the Commission's argument, a rule imposing a threshold for investment is always selective, even if that threshold is low, for example, ESP 10 million, because there are always taxpayers who do not reach the minimum threshold. The applicants argue that, if limits were not fixed, that would detract from the effectiveness of the rule. It is necessary to set limits in order to make possible or stimulate an investment effort that creates collective wealth or well-being.

39 The Court finds that, by restricting the application of the tax credit to investments in new fixed assets of over ESP 2 500 million, the Basque authorities in fact reserved the tax concession in question only to undertakings with significant financial resources. The Commission was therefore right in concluding that the tax credit provided under Norma Foral 22/1994 is intended to apply selectively to 'certain undertakings' within the meaning of Article 87(1) EC.

40 Nor does the fact that tax systems often use quantitative criteria or contain concessions in favour of small and medium-sized enterprises (SMEs) allow the conclusion that Norma Foral 22/1994, by introducing a tax concession in favour only of undertakings with significant financial resources, avoids application of Article 87(1) EC. It must be pointed out for that purpose that selective measures

in favour of SMEs do not avoid being characterised as State aid either (see the Community guidelines on State aid for SMEs, OJ 1996 C 213, p. 4).

41 It follows from all the foregoing considerations that Norma Foral 22/1994 introducing the tax credit constitutes a concession in favour of 'certain undertakings' within the meaning of Article 87(1) EC. In those circumstances, it is no longer necessary to go on to consider whether the temporary nature of Norma Foral 22/1994 and the alleged close similarity between the tax credit and the Ekimen scheme also render the measure under consideration specific in nature.

42 Consequently, the first part of the plea cannot be upheld.

The second part, alleging that the fiscal measure introducing the reduction in tax base is general in nature

43 In the contested decision, the Commission considers that the reduction in the tax base introduced by Article 26 of Norma Foral No 24/1996 constitutes an advantage in favour of 'certain undertakings' within the meaning of Article 87(1) EC. It is specific or selective chiefly because only newly-established companies can qualify for the tax advantage. The specific nature of the measure is strengthened by the fact that only businesses investing ESP 80 million and creating 10 jobs qualify for the reduction in the tax base (recital 111). The Commission adds: 'The specific nature of the measure is also strengthened by its purpose, as set out in Provincial Law 24/1996 establishing it. After listing the general objectives of the tax system, the preamble to that instrument enumerates

another set of objectives that have more to do with industrial policy, among which it specifically mentions the aim of "stimulating the creation of new business initiatives", an objective pursued in the instrument by measures aimed at the specific category of newly established companies' (contested decision, recital 112).

44 The applicants first criticise the fact that the Commission characterises the fiscal measure concerned as State aid within the meaning of Article 87(1) EC on the basis of its regional selectivity.

45 However, it is apparent from the contested decision that the Commission did not take that criterion as a basis for characterising Article 26 of Norma Foral 24/1996 as a specific measure within the meaning of Article 87(1) EC. The argument, which is founded on a misreading of the contested decision, must therefore be rejected.

46 Next, the applicants claim that the reduction in tax base established in Article 26 of Norma Foral 24/1996 cannot be regarded as a specific measure favouring certain undertakings or the production of certain goods. In their submission, the measure in question applies to any undertaking which invests at least ESP 80 million and creates at least 10 jobs, irrespective of the sector of activity in which the undertaking operates. They state that the objective of the measure at issue is to promote investment in the Basque Country. It is necessary to limit the scope of the fiscal measure in question in order to attain the objective pursued.

47 Referring to 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), the applicant in Case T-92/00 adds that the conditions for application of Article 26 of Norma Foral 24/1996 are horizontal and objective.

48 The Court points out that the specific nature of a State measure, namely its selective character, is one of the defining characteristics of the concept of State aid within the meaning of Article 87(1) EC. In this respect, it is important to determine whether or not the measure in question generates advantages for the exclusive benefit of certain undertakings or certain sectors of activity (*France* v *Commission*, cited in paragraph 31 above, paragraph 24, *Ecotrade*, cited in paragraph 23 above, paragraphs 40 and 41, and *CETM* v *Commission*, cited in paragraph 23 above, paragraph 39).

49 In the present case, the selective nature of the tax concession introduced by Article 26 of Norma Foral 24/1996 is evidenced by several factors. First of all, the right to the reduction in the tax base is afforded only to newly-established undertakings, thus excluding all other undertakings from the benefit in question. Furthermore, those newly-established undertakings must carry out a certain investment (ESP 80 million at least) and assure the creation of at least 10 jobs.

50 It follows that, even if — as claimed by the applicant in Case T-92/00 — the fiscal measure at issue determines its scope on the basis of objective and horizontal criteria, it must be considered that the reduction in the tax base, instituted by Article 26 of Norma Foral 24/1996, constitutes a concession granted only to certain undertakings. It is therefore a specific measure within the meaning of Article 87(1) EC.

51 Next, if it were to be considered that a specific measure avoided application of Article 87(1) EC if it pursued an economic or industrial policy objective, such as the promotion of investment, that provision would have no practical effect. In accordance with settled case-law, it must therefore be held that the objective pursued by the measure in question cannot enable it to avoid being characterised as State aid within the meaning of Article 87(1) EC (judgments of the Court of

Justice in *France* v *Commission*, cited in paragraph 31 above, paragraphs 20 and 21, Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 25, and of the Court of First Instance in *CETM* v *Commission*, cited in paragraph 23 above, paragraph 53).

52 Finally, the applicants point out that the legislation of the Basque Country (Norma Foral 18/1993) and the Spanish legislation [Law 22/1993 of 29 December 1993 concerning fiscal measures, measures to reform the legal system of the civil service and measures to protect against unemployment (BOE of 31 December 1993)] contained, before the adoption of Norma Foral 24/1996, fiscal measures similar to the reduction in the tax base referred to in the contested decision. Since the Commission did not call in question either the Spanish legislation or Norma Foral 18/1993, it was reasonable for the Territorio Histórico de Álava and Ramondín Cápsulas to take the view that Article 26 of Norma Foral 24/1996 did not contain any selective element likely to lead to the application of Article 87 EC.

53 In that regard, it must be held that the fact that the Commission did not rule on similar fiscal measures, applicable in the same region or nationally, does not affect the conclusion that the reduction in the tax base introduced by Article 26 of Norma Foral 24/1996 is a selective measure within the meaning of Article 87(1) EC.

54 Furthermore, the alleged inaction of the Commission could not cause the applicants to entertain legitimate expectations since the reduction in the tax base was introduced by Norma Foral 24/1996 without prior notification, in breach of Article 88(3) EC. Acknowledgment of a legitimate expectation presupposes that the aid was granted in accordance with the provisions of Article 88 EC (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 17, and Joined

Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 69).

55 It follows from the above that the second part of the plea likewise cannot be upheld.

The third part, alleging incorrect assessment of the objection based on the nature and overall structure of the tax system

56 The applicants maintain that, even if the fiscal measures at issue were selective, they would avoid application of Article 87(1) EC since they are justified by the nature and overall structure of the tax system in question. In support of their argument, they refer to the Commission notice on the application of State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3) and to Decision 96/369, cited in paragraph 47 above. They state, first, that the Basque tax system, which is based on the Spanish Constitution, is itself justified by the nature and overall structure of the Spanish general system. Second, the fiscal measures at issue fulfil conditions and objective criteria, which are uniformly applicable to all economic operators who satisfy them, whatever their sector of activity.

57 The Court observes first of all that the fact that the Territorio Histórico de Álava has an autonomy in taxation matters which is recognised and protected by the Constitution of the Kingdom of Spain does not exempt it from complying with the provisions of the Treaty concerning State aid. In that regard, it should be pointed out that Article 87(1) EC, by referring to aid granted by 'a Member State or through state resources in any form whatsoever', is directed at all aid financed from public resources. It follows that measures adopted by intra-state entities

(decentralised, federated, regional or other) of the Member States, whatever their 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 of that provision are satisfied (Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 17).

58 It must next be pointed out that, even if the tax measures in question determine their scope on the basis of objective criteria, the fact remains that they are selective in nature (see paragraphs 41 and 50 above).

59 Admittedly, as the Commission conceded in the notice and decision to which the applicants refer (cited in paragraphs 56 and 47 above, respectively), the selective nature of the measure may, in certain circumstances, be justified 'by the nature or overall structure of the system'. If that is the case, the measure avoids application of Article 87(1) EC (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27; *Belgium* v *Commission*, cited in paragraph 51 above, paragraph 34; and *CETM* v *Commission*, cited in paragraph 23 above, paragraph 52).

60 However, 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 in general (see, to that effect, the judgment in *Belgium* v *Commission*, cited in paragraph 51 above, paragraph 39, and the Opinion delivered by Advocate General La Pergola in that case, ECR I-3675, point 8: see, too, the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, I-2983, point 27). Thus, a specific tax measure which is justified by the internal logic of the tax system — such as the progressiveness of the tax which is justified by the system's aim of redistribution — will avoid application of Article 87(1) EC.

61 According to the applicants, the objective of the fiscal measures at issue is to promote investment in the Territorio Histórico de Álava. They add that when a State promotes investment and manages to attract businesses to its territory, it secures tax revenue for the future, since those businesses will be taxed in its territory. The objective of the fiscal measures in question is therefore to collect as much revenue from taxes as possible.

62 It must be observed, however, that the applicants adduce no evidence in support of their argument that the real objective of the fiscal measures at issue is to increase tax revenue. That explanation is, moreover, hard to reconcile with the granting of tax reductions. Even if that were the intended objective — which is not established —, it could also have been attained by general fiscal measures. In those circumstances, the specific fiscal measures in question cannot be regarded as justified by the nature or overall structure of the tax system.

63 Finally, the applicants go on to maintain that the overall tax burden is heavier in the Basque Country than in the rest of Spain.

64 That argument, however, in no way establishes that fiscal measures which grant specific advantages to some companies only are justified by the internal logic of the tax system of the Territorio Histórico de Álava.

65 It follows from the above that the third part of the plea must also be rejected.

The fourth part, alleging that there was no distortion of competition and no effect on intra-Community trade

66 The applicants point out that the market in which Ramondín and Ramondín Cápsulas (hereinafter 'Ramondín') operate is not highly competitive. In the manufacture of tin capsules for sealing bottles, Ramondín leads the European market and has a large share of the world market. It has no competitors in Spain and very few in Europe.

67 They state that the decision to transfer Ramondín's activities to the Basque Country was taken, not because of possible tax advantages applicable in the Territorio Histórico de Álava, but because of the town-and-country planning policy pursued by the Rioja authorities, which made it impossible to expand the business there.

68 In those circumstances, the applicants contend that Ramondín's setting up in the territory of Álava and the grant of tax advantages could not have an adverse impact either on competition or on trade between Member States. Ramondín's market share, which was already very large before the company transferred its activities to the Territorio Histórico de Álava, had not increased to the detriment of other companies. They also point out that, in the present case, no complaint has been lodged by any of Ramondín's competitors.

69 The Court points out that only State aid which 'affects trade between Member States' and which 'distorts or threatens to distort competition' falls within the scope of Article 87(1) EC. Although in certain cases the very circumstances in which the aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its

decision (Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 66, and the references cited therein).

70 In the contested decision, the Commission states that 'Ramondín has nearly 40% of the world market for tin capsules' (recital 18). It mentions Ramodín's six European competitors and their respective market shares. The Commission also states that, in 1997, Ramondín generated 'turnover of EUR 24 million, of which 70% came from sales outside Spain' (recital 19) adding that '[t]his, together with the fact that there are few suppliers on the world market, shows that there is intra-Community trade in the product concerned' (recital 19).

71 That cursory and uncontested statement of reasons is enough to show that the aid in question falls within the scope of Article 87(1) EC.

72 It should be noted, in that regard, that it is apparent from the case-law (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraphs 11 and 12, *Belgium* v *Commission*, cited in paragraph 51 above, paragraphs 47 and 48, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraphs 48 to 50) that any grant of aid to an undertaking exercising its activities in the Community market is liable to cause distortion of competition and affect trade between Member States.

73 In the present case, the aid granted to Ramondín improved its means of operation and, consequently, the competitive position of an undertaking which, on the admission of the applicants themselves, was already the leading European undertaking in the sector. It is therefore clear that that aid may distort competition within the meaning of Article 87(1) EC. It is also liable to affect

trade between Member States. In reply to a written question put by the Court, the applicants in Case T-103/00 stated that 24% of Ramondín's products are exported to countries in the European Union.

74 The applicants cannot use as an argument the fact that Ramondín did not increase its market share. If Ramondín had had to bear all the costs of transferring its activities to the Basque Country, it is conceivable that it would have had to raise the prices of its products and that its competitors could have taken advantage of that situation to increase their own market share.

75 The fact that none of Ramondín's competitors lodged a complaint is irrelevant since it has been established, in the present case, that the aid in question is liable to affect trade between Member States and to distort or threaten to distort competition.

76 Finally, the applicants maintain that, if the measures at issue are to be regarded as State aid falling within the scope of Article 87(1) EC, the Commission had to establish that they have a real and significant effect on competition and trade between Member States. The applicant in Case T-92/00 again refers to the Commission notice on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9) and to the Commission publication 'Explanation of the rules applicable to State aid; the position in December 1996', *Competition law in the European Communities*, volume II B.

77 It must be pointed out that the Commission is not required to demonstrate the real effect which the aid has had on competition and trade between Member States (*CETM* v *Commission*, cited in paragraph 23 above, paragraph 103). If the

Commission were required in its decision to demonstrate the real effect of aid which had already been granted, that would ultimately favour those Member States which grant aid in breach of the duty to notify laid down in Article 88(3) EC, to the detriment of those which do notify aid at the planning stage (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33).

78 Furthermore, contrary to what the applicants claim, the case-law does not require the distortion of competition, or the threat of distortion, and the effect on intra-Community trade to be significant or substantial (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraphs 42 and 43, *Vlaams Gewest* v *Commission*, cited in paragraph 72 above, paragraph 46, and *CETM* v *Commission*, cited in paragraph 23 above, paragraph 94).

79 Even though the Commission acknowledged in its publication 'Explanation of the rules applicable to State aid', cited in paragraph 76 above, that 'the aid must have a significant effect on competition' if it is to fall within Article 87 EC, the fact remains that the Commission, referring to its *de minimis* aid notice, cited in paragraph 76 above, fixed that threshold at a level of aid of EUR 100 000, which has clearly been exceeded in the present case (see, to that effect, the judgment in Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 39 to 41).

80 Therefore, the third part of the plea likewise cannot be upheld.

81 Accordingly, the first plea must be rejected in its entirety.

The second plea: misuse of powers

82 The applicants claim that the Commission misused its powers, since it used the powers conferred on it by Articles 87 EC and 88 EC to pursue, in actual fact, objectives of tax harmonisation.

83 They state that the contested decision is part of a comprehensive course of action engaged in by the Commission and designed to call in question the Basque tax system in its entirety. They point out, for that purpose, that several procedures were initiated under Article 88(2) EC concerning the Basque fiscal measures. Instead of using the procedure laid down in Articles 96 EC and 97 EC, the Commission is thus attempting to achieve a certain degree of tax harmonisation by the indirect means of the State aid policy.

84 The Court points out 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 with the sole, or at least decisive, aim of achieving purposes other than those stated (Case T-46/89 *Pitrone* v *Commission* [1990] ECR II-577, paragraph 71 and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 779).

85 As it is, the applicants have not adduced any objective evidence that would allow the conclusion that the Commission's real purpose in adopting the contested decision was to achieve tax harmonisation. All their arguments are based on speculation regarding possible underlying reasons for the contested decision. Furthermore, the applicants have not even shown that any harmonisation has in fact been achieved at Community level by the contested decision.

86 The applicant in Case T-92/00 also refers to the Commission's observations, in the cases which gave rise to the order of the President of the Court of Justice of 16 February 2000 in Joined Cases C-400/97, C-401/97 and C-402/97 *Juntas Generales de Guipúzcoa and Others* [2000] ECR I-1073, to the effect that the Normas Forales constitute State aid since they are applicable exclusively to a particular area of a Member State. To follow that line of reasoning would be tantamount to undermining the legislative capacity of the Basque authorities in the field of taxation, which is recognised by the Spanish Constitution.

87 That argument must be rejected. It must be recalled that, in the contested decision, the Commission did not take the criterion of regional selectivity as a basis for establishing that the tax advantages from which Ramondín benefited constitute State aid falling within the scope of Article 87(1) EC (see paragraphs 27 and 45 above).

88 It follows from the above that the second plea must also be rejected.

The third plea: breach of the principle of equality of treatment

89 The applicants claim that Ramondín and Daewoo Electronics Manufacturing España SA (Demesa), another company involved in a State aid procedure concerning the Territorio Histórico de Álava, are not the only undertakings which have benefited from the tax credit and the reduction in the tax base introduced by the Normas Forales of the Territorio Histórico de Álava. However, the Commission took decisions only in respect of the application of those measures to Ramondín and Demesa. By acting in that way, the Commission infringed the principle of equality of treatment.

90 The Court finds, first, that the applicants in Case T-103/00 pleaded a breach of the principle of equality of treatment for the first time in their reply. This is a new plea which is inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance.

91 In any event, the plea is unfounded.

92 The system laid down by the Treaty is a system for monitoring aid in advance. For that reason, Member States are required, under Article 88(3) EC, to notify new aid to the Commission. The applicants do not show in any way, and do not even claim, that the Spanish State notified the Commission of the implementation of the fiscal measures at issue in favour of other undertakings, without the Commission taking a decision that the aid granted to them was incompatible.

93 The applicant in Case T-92/00, which is also an applicant in Case T-127/99, concerning Demesa, contends, however, that it is clear from a point in the Commission's rejoinder in the latter case, that the Commission knew the identity of several undertakings which have benefited, like Ramondín and Demesa, from the fiscal measures in question.

94 In that regard, the Court finds that the relevant point in the Commission's rejoinder in Case T-127/99 refers only to the grant of aid by the authorities of Vizcaya, not of Álava, to an undertaking under Vizcayan law. In any event, even though, at the time it lodged its rejoinder in Case T-127/99, on 21 February 2000, the Commission was aware of the fact that several undertakings were benefiting from the fiscal measures of Álava which are in issue, that does not show that the Commission, by adopting the contested decision, on 22 December

1999, infringed the principle of equality of treatment. It must be borne in mind, for that purpose, that the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 86).

95 In any event, even if it were shown that the Commission knew, when it adopted the contested decision, the identity of other undertakings benefiting from the same aid as Ramondín, this plea could not succeed. Such a finding would not make it possible to disregard the fact that the aid received by Ramondín is unlawful and incompatible with the common market (see, by analogy, *Cimenteries CBR and Others* v *Commission*, cited in paragraph 84 above, paragraph 4428).

96 Finally, it must be remembered that the Commission, by letters dated 17 August and 29 September 1999, notified the Spanish authorities of its decisions to initiate procedures relating, in general, to the tax credit and the reduction in the tax base provided for by the Normas Forales of Álava (summaries published in OJ 2000 C 71, p. 8 and OJ 2000 C 55, p. 2 respectively). Those procedures refer indirectly to all the undertakings which have benefited from the fiscal measures in question.

97 The third plea must therefore be rejected.

The fourth plea: infringement of Article 253 EC

98 The applicants maintain that, in the contested decision, the Commission did not give sufficient reasons to establish that the measures classified as State aid

affected competition and trade between Member States. They point out that the only information which the Commission supplies in that regard in the contested decision is a list of the undertakings operating in the same sector as Ramondín and the market share of each.

99 However, it is clear from the analysis carried out in paragraphs 68 to 81 above that the contested decision is sufficiently reasoned in respect of the effect on competition and on trade between Member States to enable the parties concerned to defend their rights and to enable the Court to exercise its power of review (see to this effect the judgment in Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86).

100 The final plea likewise cannot be upheld.

101 It follows from all the above that the applications must be dismissed.

Costs

102 Under Article 87(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for costs and the applicants have been unsuccessful, the latter must be ordered to bear their own costs and pay those of the Commission.

On those grounds,

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

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants to bear their own costs and pay those incurred by the Commission.**

Azizi **Lenaerts** **Tiili**

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 6 March 2002.

H. Jung

Registrar

M. Jaeger

President