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

9 September 2009 (*)

(State aid – Tax advantages granted by a territorial entity within a Member State – Tax exemptions – Decisions declaring aid schemes incompatible with the common market and requiring recovery of aid paid out – Classification as new aid or as existing aid – Operating aid – Principle of the protection of legitimate expectations – Principle of legal certainty – Decision initiating the formal investigation procedure under Article 88(2) EC – No need to adjudicate)

In Cases T?30/01 to T?32/01 and T?86/02 to T?88/02,

Territorio Histórico de Álava – Diputación Foral de Álava (Spain), represented by M. Morales Isasi and I. Sáenz-Cortabarría Fernández, lawyers,

applicant in Cases T?30/01 and T?86/02,

Territorio Histórico de Guipúzcoa – Diputación Foral de Guipúzcoa (Spain), represented by M. Morales Isasi and I. Sáenz-Cortabarría Fernández, lawyers,

applicant in Cases T?31/01 and T?88/02,

Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya (Spain), represented by M. Morales Isasi and I. Sáenz-Cortabarría Fernández, lawyers,

applicant in Cases T?32/01 and T?87/02,

supported by

Comunidad autónoma del País Vasco – Gobierno Vasco (Spain), represented by M. Morales Isasi and I. Sáenz-Cortabarría Fernández, lawyers,

and by

Confederación Empresarial Vasca (Confebask), established in Bilbao (Spain), represented by M. Araujo Boyd, L. Ortiz Blanco and V. Sopeña Blanco, lawyers,

interveners in Cases T?86/02 to T?88/02,

v

Commission of the European Communities, represented initially, in Cases T?30/01 to T?32/01, by J. Flett, S. Pardo and J.L. Buendía Sierra and, in Cases T?86/02 to T?88/02, by J.L. Buendía Sierra and F. Castillo de la Torre, and subsequently by F. Castillo de la Torre and C. Urraca Caviedes, acting as Agents,

defendant,

supported by

Comunidad autónoma de La Rioja (Spain), represented, in Cases T?86/02 and T?87/02, by J.M. Criado Gámez and, in Case T?88/02, by I. Serrano Blanco, lawyers,

intervener in Cases T?86/02 to T?88/02,

APPLICATIONS in Cases T?30/01 to T?32/01 for annulment of the Commission decision of 28 November 2000 to initiate the procedure under Article 88(2) EC in relation to the tax advantages in the form of corporation tax exemption for certain newly established firms granted by provisions adopted by the Diputación Foral de Álava, the Diputación Foral de Guipúzcoa and the Diputación Foral de Vizcaya [respectively the Álava, Guipúzcoa and Vizcaya provincial councils] and APPLICATIONS in Cases T?86/02 to T?88/02 for annulment of Commission Decisions 2003/28/EC, 2003/86/EC and 2003/192/EC of 20 December 2001 on a State aid scheme in the form of corporation tax exemption implemented by Spain in 1993 for certain newly established firms in Álava (T?86/02), Vizcaya (T?87/02) and Guipúzcoa (T?88/02) (OJ 2003 L 17, p. 20, OJ 2003 L 40, p. 11, and OJ 2003 L 77, p. 1, respectively),

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

composed of M. Vilaras, President, M.E. Martins Ribeiro, F. Dehousse (Rapporteur), D. Šváby and K. Jürimäe, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 January 2008,

gives the following

Judgment

Legal context

I – *Community legislation*

1 Article 87 EC provides:

‘1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

…

3. The following may be considered to be compatible with the common market:

…

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

…’

2 Article 88 EC provides:

‘1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

…

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.’

3 Recital 4 in the preamble to 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) states:

‘[I]n order to ensure legal certainty, it is appropriate to define the circumstances under which aid is to be considered as existing aid; … the completion and enhancement of the internal market is a gradual process, reflected in the permanent development of State aid policy; … following these developments, certain measures, which at the moment they were put into effect did not constitute State aid, may since have become aid.’

4 Article 1 of Regulation No 659/1999 provides:

‘For the purpose of this Regulation:

…

(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 Under Article 2(1) and Article 3 of Regulation No 659/1999, ‘any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned’ and cannot be put into effect ‘before the Commission has taken, or is deemed to have taken, a decision authorising such aid’.

6 Article 6 of Regulation No 659/1999, on the formal investigation procedure, provides:

‘1. The 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. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.

2. The comments received shall be submitted to the Member State concerned. If an interested party so requests, on grounds of potential damage, its identity shall be withheld from the Member State concerned. The Member State concerned may reply to the comments submitted within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.’

7 In relation to measures which are not notified, Article 10(1) of Regulation No 659/1999 provides that, ‘where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay’.

8 Article 13(1) of the same regulation provides that that examination is to result, where appropriate, in a decision to initiate a formal investigation procedure. Article 13(2) of that regulation states that in cases of possible unlawful aid the Commission is not bound by the time-limits applicable in relation to the preliminary examination and the formal investigation procedure in cases of notified aid.

9 Article 14(1) of Regulation No 659/1999 states:

‘Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ... The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.’

10 In its communication on regional aid systems, sent to Member States on 21 December 1978 (OJ 1979 C 31, p. 9; ‘the 1978 communication on regional aid systems’), the Commission set out the principles of coordination applicable to regional aid systems and, by way of introduction, expressed ‘reservations in principle as to the compatibility of operating aids with the common market’. Furthermore, that communication fixed differentiated ceilings of aid intensity, as a percentage of the initial investment and in European units of account per job created by the initial investment (see points 2 and 3 of the communication).

11 In its communication on aid granted illegally (OJ 1983 C 318, p. 3; ‘the 1983 communication

on illegal aid'), the Commission reminded Member States of the obligation to notify aid, laid down in Article [88(3) EC], and informed potential recipients of State aid of the risk attaching to any aid granted illegally, in that any recipient of aid granted illegally, that is without the Commission having reached a final decision on its compatibility, might have to refund the aid. The Commission also stated that, whenever it became aware that aid measures had been adopted by a Member State without the obligations of Article [88(3) EC] having been fulfilled, it would publish a specific notice in the *Official Journal of the European Communities* warning potential aid recipients of the risk involved.

12 The guidelines on national regional aid (OJ 1998 C 74, p. 9), as amended (OJ 2000 C 258, p. 5; 'the 1998 Guidelines), replace inter alia the 1978 communication on regional aid systems. They provide, in point 2 headed 'Scope', that the Commission will apply them to regional aid granted in every sector of the economy apart from the production, processing and marketing of the agricultural products listed in Annex II to the Treaty, fisheries and the coal industry.

13 Point 6.1 of the 1998 Guidelines provides:

'… the Commission will assess the compatibility of regional aid with the common market on the basis of these Guidelines as soon as they are applicable. However, aid proposals which are notified before these Guidelines are communicated to the Member States and on which the Commission has not yet adopted a final decision will be assessed on the basis of criteria in force at the time of notification.'

14 As regards operating aid, the 1998 Guidelines state inter alia:

'4.15. Regional aid aimed at reducing a firm's current expenses (operating aid) is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) [EC] provided that it is justified in terms of its contribution to regional development and its nature and its level is proportional to the handicaps it seeks to alleviate. It is for the Member State to demonstrate the existence of any handicaps and gauge their importance. ...'

15 As regards aid connected with an investment, that is defined in footnote 1 to Annex I to the 1998 Guidelines as follows:

'Tax aid may be considered to be aid connected with an investment where it is based on the amount invested. In addition, any tax aid may be connected with an investment if it is paid up to a ceiling expressed as a percentage of the investment …'

II – *National legislation*

16 The tax arrangements in force in the Basque Country of Spain 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.

17 Under that legislation, the Territorios Históricos of Álava, Vizcaya and Guipúzcoa (Spain) may, under certain conditions, organise the tax systems within their respective territories. In that context, they have adopted various tax relief measures and in particular corporation tax exemptions for newly established businesses, at issue in the present actions.

18 In 1993, the Territorios Históricos of Álava, Vizcaya and Guipúzcoa, by Article 14 of respective Normas Forales (Provincial Laws) No 18/1993, No 5/1993 and No 11/1993 (together referred to as 'the 1993 Normas Forales'), introduced corporation tax exemptions for a period of 10

years for companies formed between the date of those provisions entering into force and 31 December 1994. Those provisions are as follows:

1. Companies formed between the entry into force of this Provincial Law [Norma Foral] and 31 December 1994 shall be exempt from corporation tax for a period of 10 tax years starting from, and including, the one in which they are formed, provided that the conditions laid down in the following paragraph are met.

2. The conditions of eligibility for the exemption established in this Article are that:

(a) they are formed with a minimum paid-up capital of ESP 20 million [Spanish pesetas] …;

...

(f) between the date of incorporation and 31 December 1995 they invest at least ESP 80 million in tangible fixed assets, all such investments being in assets assigned to the business which are not leased or sold to third parties for their use;

(g) they create at least 10 jobs in the six months following start-up, and the annual average workforce is kept at that figure during the exemption period;

...

(i) they must have a business plan covering a period of at least five years …

6. The provisions of this Article shall be incompatible with any other tax concession.

7. Application for the provisional tax exemption shall be made to the Treasury Department of the Diputación Foral …, which, after establishing that the prerequisite conditions are satisfied, shall inform the recipient undertaking, as appropriate, of provisional authorisation, which must be approved by the Consejo de Diputados of the Diputación Foral.'

19 By three identical orders of 30 July 1997, the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain), in proceedings brought by the Administración del Estado in June and October 1994, referred a question to the Court of Justice for a preliminary ruling on the compatibility of the 1993 Normas Forales with Community law. Advocate General Saggio delivered his Opinion on the cases concerned on 1 July 1999. However, because of the applicant's discontinuance in the main proceedings, the removal of those cases from the Register was ordered (order of the President of the Court of 16 February 2000 in Joined Cases C?400/97 to C?402/97 *Juntas Generales de Guipúzcoa and Others* [2000] ECR I?1073, and Opinion of Advocate General Saggio on that order [2000] ECR I?1074).

Background to the dispute

20 The 1993 Normas Forales providing for corporation tax exemptions, in the present case, were the subject of a complaint, dated 14 March 1994 and registered on 28 April 1994 ('the 1994 complaint'), from the Cámara de Comercio e Industria de la Rioja (Chamber of Commerce and Industry of La Rioja, Spain), the Federación de empresas de la Rioja (La Rioja Business Federation) and a number of companies.

21 On 10 May 1994, the Commission met the President of the Basque Government and, on 19 May 1994, the Basque Minister for the Economy and Finance.

22 By letter of 25 May 1994, the Commission invited the Kingdom of Spain to provide its

comments on the 1994 complaint within a period of 15 days. The Commission added in that letter that, if there was no reply or if the reply was unsatisfactory, when the period had elapsed it would be bound to initiate the formal investigation procedure under Article 88(2) EC. The Commission also drew attention in that letter to the obligations of Member States to notify and to the fact that illegal aid might have to be repaid.

23 On 27 July 1994, the Commission met the Deputy Finance Minister of the Basque Government.

24 By letter of 30 September 1994, the Kingdom of Spain sent a reply to the Commission, stating inter alia that the exemption schemes at issue did not constitute State aid, since they were general measures.

25 On 15 December 1994, the Commission met the President and the Industry Minister of the Basque Government and, on 1 June 1995, the vice-president of Interbask SA.

26 By letter of 18 July 1995, the Commission informed the complainers that it was continuing its analysis of the Spanish tax system and of the fiscal autonomy systems in force within Member States, while taking account in particular of 'ongoing developments in federal systems in various Member States'. It stated that Commission staff were gathering the necessary data, which involved considerable work both in collection and analysis. The Commission added that it would decide on the action to be taken on their complaint when those matters were clarified and that it would notify them of its decision.

27 By letter of 19 January 1996, the Commission informed the Kingdom of Spain that it was examining the effect of the provisions at issue on competition and requested that information be sent regarding the beneficiaries of the measures at issue.

28 On 7 February 1996, the Commission met the President of the Basque Government.

29 By letters of 19 February and 21 March 1996, the Kingdom of Spain asked the Commission for an extension of the time-limit for reply to the letter of 19 January 1996.

30 On 17 March 1997, the Commission met representatives of the Government of La Rioja and of management and labour in La Rioja.

31 On 5 January 2000, the Commission received a fresh complaint relating to the 10-year corporation tax exemption, provided for by Article 14 of Norma Foral No 18/1993, granted to an undertaking established in Álava. That complaint came from a company which was a competitor of the undertaking which had been granted the tax exemption at issue.

32 By letter of 3 February 2000, the Commission asked the Spanish authorities for information on the aid granted to the recipient undertaking.

33 By letter of 8 March 2000, the Spanish authorities provided the information requested by the Commission.

34 On 28 November 2000, the Commission notified the Spanish authorities of its decision to initiate the formal investigation procedure provided for by Article 88(2) EC in relation to the tax advantages (in the form of corporation tax exemption for certain newly established firms) granted by the provisions adopted by the Diputación Foral de Álava, the Diputación Foral de Guipúzcoa and the Diputación Foral de Vizcaya.

35 By letter of 14 December 2000, registered on 19 December 2000, the Spanish authorities

requested an extension of the period allowed for submission of their comments on each of the tax exemption schemes at issue.

36 By letters of 5 February 2001, registered on 8 February 2001, the Spanish authorities submitted their comments on each of the schemes at issue.

37 Following publication of the decision to initiate the formal investigation procedure in the Official Journal, the Commission received observations from third parties in the course of March 2001, and forwarded them to the Spanish authorities.

38 By letter of 17 September 2001, the Spanish authorities submitted their comments in response to the third-party observations.

39 On 20 December 2001, the Commission adopted Decisions 2003/28/EC, 2003/86/EC, and 2003/192/EC on State aid schemes implemented by Spain in 1993 for certain newly established firms in the respective provinces of Álava, Vizcaya and Guipúzcoa, in the form of corporation tax exemption (OJ 2003 L 17, p. 20, OJ 2003 L 40, p. 11, and OJ 2003 L 77, p. 1, respectively; together referred to as the 'contested final decisions'). By those decisions, the Commission considered that the exemption schemes at issue were not compatible with the common market.

Contested decisions

I – *Decision of 28 November 2000 to initiate the formal investigation procedure (Cases T?30/01 to T?32/01)*

40 In its decision to initiate the formal investigation procedure, the Commission first considers that the corporation tax exemptions at issue constitute State aid within the meaning of Article 87(1) EC, in that they favour certain undertakings and are not justified by either the nature or overall structure of the system.

41 Secondly, the Commission considers that the measures at issue cannot be regarded as *de minimis* aid, and consequently that prior notification should have been given. At that stage, the Commission states that the measures can therefore be regarded as unlawful aid.

42 Thirdly, the Commission considers that, although the granting of the aid was conditional on a minimum investment and the creation of a minimum number of jobs, the tax systems at issue did not ensure compliance with the Community rules on State aid to regional investment or regional employment. On the contrary, the Commission considers, at that stage of the investigation, that they constitute operating aid, since the aid relieves firms of the costs normally incurred through their normal business or everyday management. The Commission points out that operating aid is, in principle, prohibited and finds that the provisions at issue do not qualify for the exception provided for in Article 87(3)(a) EC. Further, the Commission expresses doubt as to the compatibility of the measures at issue with the provisions relating to regional aid and with sectoral provisions.

43 Lastly, the Commission considers that the measures at issue do not qualify for the exceptions provided for in Article 87(2) and (3) EC. The Commission therefore decides to initiate the procedure under Article 88(2) EC, in relation to the three exemption schemes, and calls upon the Spanish authorities to provide all relevant information within a period of one month.

II – *The contested final decisions (Cases T?86/02 to T?88/02)*

44 In the contested final decisions, the Commission first considers that the measures at issue constitute State aid, since they confer on their recipients an advantage which relieves them of

charges normally borne from their budgets, which affects competition and distorts trade between Member States. The Commission states in that regard that the Spanish authorities provided no information on the actual application of the measures at issue.

45 The Commission considers that those measures are selective, since '[t]he eligibility requirements expressly rule out any firm set up before the date of entry into force of the [Norma Foral concerned] whose investment is less than the threshold of ESP 80 million (EUR 480 810), whose paid-up capital does not exceed ESP 20 million (EUR 120 202) and that creates fewer than 10 jobs'. The Commission adds that it is clear from the case-law that the objective character of the thresholds does not prevent them from being selective.

46 Moreover, the Commission considers that the tax exemptions at issue cannot be justified by the nature or overall structure of the Spanish tax system, and the Spanish authorities provided no information in that regard during the procedures relating to Normas Forales No 18/1993 (Álava) and No 11/1993 (Guipúzcoa). The Territorio Histórico of Vizcaya for its part claimed that Norma Foral No 5/1993 would mean an increase in the number of taxpayers and hence in tax revenue because it promoted the formation of new companies. However, the Commission states that that argument is not supported by any detailed analysis and that no explanation was given why the exemption applied to a very small number of companies. In addition, the measure's temporary nature shows that its objectives were linked to the then current economic climate.

47 Secondly, the Commission considers that the tax exemption schemes at issue are new aid and not existing aid within the meaning of Regulation No 659/1999. The Commission observes, first, that the schemes were not adopted before the accession of the Kingdom of Spain to the Community on 1 January 1986 and that they have never been authorised, either expressly or tacitly. In addition, the Commission maintains that it has never stated that the tax exemptions at issue did not constitute aid. Lastly, the Commission adds that it cannot be criticised for not initiating the formal investigation procedures without delay, since the aid in question was not notified to it.

48 Thirdly, the Commission examines the unlawful nature of the tax exemptions and observes that the Spanish authorities made no commitment to grant those exemptions in a way which complies with the rules relating to *de minimis* aid. Consequently, the exemption schemes at issue were subject to the obligation of prior notification laid down by Article 88(3) EC. In the absence of notification, the Commission considers that aid to be unlawful.

49 Moreover, the Commission states that the principles of the protection of legitimate expectations and legal certainty are of no relevance, when the measures at issue were not notified. In that regard, the Commission makes clear that no approval was ever given by it to any 'Basque tax system' by 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), which related to tax measures introduced in 1988.

50 Fourthly, the Commission considers that the derogations in Article 87(3) EC are not applicable in the present case. It states that each of the Territorios Históricos concerned 'has never been eligible for the Article 87(3)(a) [EC] derogation' because the per capita gross domestic product is too high. The Commission also considers that, despite the requirements of a minimum investment and creation of a minimum number of jobs, the exemption schemes at issue do not qualify as investment or employment aid. The Commission states that the basis for the aid in question is not the size of the investment, the number of jobs or the corresponding wage costs, but taxable income. Further, the aid concerned was not paid up to the level of a ceiling expressed as a percentage of the amount invested, the number of jobs or the corresponding wage costs, but up to the level of a ceiling expressed as a percentage of taxable income.

51 On the other hand, the Commission states that, since the aid at issue partly exempts the recipient companies from corporation tax, it cannot be categorised as operating aid. However, the Commission emphasises, in the contested final decisions, that such aid is in principle prohibited and that the Territorios Históricos concerned do not meet the conditions to qualify for the exceptions in that area.

52 Consequently, the Commission considers that the exemption schemes cannot be regarded as compatible with the common market under the derogations in Article 87(3)(a) and (c) EC.

53 The Commission then examines whether the provisions at issue can be justified under Article 87(3)(c) EC, to the extent that that article covers measures which promote certain activities. However, it observes that the exemption schemes at issue contain no measures which assist small and medium-sized enterprises, research and development, environmental protection, job creation or training. Furthermore, the Commission states that the tax exemptions are not subject to any sectoral limitations and may be granted to firms in sensitive sectors of agriculture, fisheries, coalmining, steelmaking, transport, shipbuilding, synthetic fibres and the motor industry, without complying with the particular sectoral rules.

54 Lastly, the Commission excludes the application of other derogations provided for in Article 87(2) and (3) EC.

55 Fifthly, the Commission examines whether the recovery of aid already paid should be ordered. It considers that the recipient companies were aware of the advantage conferred on them by the tax exemptions. Furthermore, the exemption schemes were not put into effect in accordance with the procedure provided for in Article 88(3) EC and, in those circumstances, the companies in receipt of the aid could not, in principle, have any legitimate expectation that the aid was lawful.

56 Furthermore, the Commission considers that none of the circumstances put forward in the third-party observations can be regarded as exceptional. The Commission points out that the time-limits laid down in Regulation No 659/1999 do not apply to aid which is unlawful. In addition, the Commission states that it warned the Spanish authorities, as early as the letter of 25 May 1994, that the tax exemptions at issue might be unlawful and that there was the possibility that repayment would be required. The Commission also states that at no time subsequently did it describe the tax exemptions at issue, either directly or indirectly, as measures compatible with the common market. Further, the Commission considers that the fact that other tax measures were in force in the rest of the Kingdom of Spain could not give rise to any legitimate expectation that the tax exemptions at issue were compatible with the common market, since the characteristics of those exemptions were very different. Lastly, the Commission points out that the 'length of time' that elapsed between its first letter of 25 May 1994 and the decision to initiate the formal investigation procedure was largely caused by the lack of cooperation on the part of the Spanish

authorities. In that regard, the Commission mentions the failure to reply to its letter of 19 January 1996.

57 In conclusion, the Commission considers that the exemption schemes at issue constitute State aid incompatible with the common market (see Article 1 of the contested final decisions). The Commission therefore requires the abolition of the aid schemes in question; if still in force (see Article 2 of the contested final decisions).

58 Article 3 of the contested final decisions provides for the recovery of the aid as follows:

‘1. Spain shall take all necessary measures to recover from the recipients the aid referred to in Article 1, which has been unlawfully made available to them. Spain shall cancel all payment of outstanding aid.

2. Recovery shall be effected without delay in accordance with the procedures of national law, provided these allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it became available to the recipients until the date of its effective recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.’

59 Article 4 of the contested final decisions states that the Kingdom of Spain is to inform the Commission, within two months of the date of notification of the decisions, of the measures taken to comply with them and Article 5 states that the decisions are addressed to the Kingdom of Spain.

60 In an action brought by the Commission, the Court of Justice held that the Kingdom of Spain had failed to fulfil its obligations by failing to give effect to the contested final decisions (Case C?177/06 *Commission* v *Spain* [2007] ECR I?7689).

Procedure

61 By three applications lodged at the Registry of the Court of First Instance on 9 February 2001, the applicants, the Territorio Histórico de Álava – Diputación Foral de Álava, the Territorio Histórico de Guipúzcoa – Diputación Foral de Guipúzcoa and the Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya brought the present actions in Cases T?30/01 to T?32/01 for annulment of the decision initiating the formal investigation procedure in respect of the tax exemption schemes.

62 By separate document lodged at the Court Registry on 4 May 2001, the Commission raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance against the abovementioned actions. By order of the Court (Third Chamber, Extended Composition) of 22 April 2002, the objection was joined to the substance and costs were reserved.

63 By three applications lodged at the Court Registry on 26 March 2002, the applicants brought the present actions in Cases T?86/02 to T?88/02 for annulment of the final decisions on the abovementioned tax exemption schemes.

64 By order of the President of the Third Chamber (Extended Composition) of the Court of First Instance of 17 May 2002, Cases T?86/02 to T?88/02 were joined for the purposes of further procedure, in accordance with Article 50 of the Rules of Procedure.

65 By documents lodged at the Court Registry on 1 July 2002, the Comunidad autónoma del País Vasco applied for leave to intervene in the procedure relating to the actions in Cases T?86/02 to T?88/02 in support of the forms of order sought by the applicants. By order of 10 September

2002, the President of the Third Chamber (Extended Composition) of the Court of First Instance allowed the application to intervene. The intervener lodged its statement and the other parties lodged their observations on it within the time-limits allowed.

66 By documents lodged at the Court Registry on 9 July 2002, the Comunidad autónoma de La Rioja applied for leave to intervene in the procedure relating to the actions in Cases T?86/02 to T?88/02 in support of the forms of order sought by the Commission. By order of 12 September 2005, the President of the Fifth Chamber (Extended Composition) of the Court of First Instance allowed the application to intervene. The intervener lodged its statements and the other parties lodged their observations on them within the time-limits allowed.

67 By document lodged at the Court Registry on 29 July 2002, the Confederación Empresarial Vasca (Confebask) applied for leave to intervene in the procedure relating to the actions in Cases T?86/02 to T?88/02 in support of the forms of order sought by the applicants. By order of 9 September 2005, the President of the Fifth Chamber (Extended Composition) of the Court of First Instance allowed the application to intervene. The intervener lodged its statement and the other parties lodged their observations on it within the time-limits allowed.

68 By order of 10 September 2002, the President of the Third Chamber (Extended Composition) of the Court of First Instance decided to stay proceedings in Cases T?30/01 to T?32/01 and T?86/02 to T?88/02 until the Court of Justice had ruled on the appeals against the judgments of the Court of First Instance of 6 March 2002 in Joined Cases T?127/99, T?129/99 and T?148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II?1275 (‘*Demesa*’) and in Joined Cases T?92/00 and T?103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II?1385. In those two judgments, the Court of First Instance ruled on actions brought against two Commission decisions which classified as State aid incompatible with the common market the granting of tax advantages to Daewoo Electronics Manufacturing España SA (Demesa) and to Ramondín SA and Ramondín Cápsulas SA in the Territorio Histórico of Álava (Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa) (OJ 1999 L 292, p. 1), and 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)).

69 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fifth Chamber and the present cases were then assigned to the Fifth Chamber (Extended Composition).

70 The judgments of the Court of Justice of 11 November 2004 in Joined Cases C?183/02 P and C?187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I?10609 and in Joined Cases C?186/02 P and C?188/02 P *Ramondín and Others* v *Commission* [2004] ECR I?10653 dismissing the appeals brought against the judgments in *Demesa* and *Diputación Foral de Álava and Others* v *Commission*, paragraph 68 above, ended the stay of proceedings.

71 On 6 January 2005, the Court of First Instance raised with the parties the question of how those judgments might affect the present actions.

72 By letter of 7 February 2005, the applicants commented on those judgments and said that they wanted the actions to proceed. However, they withdrew the first plea in law of the applications in Cases T?86/02 to T?88/02.

73 By order of the President of the Fifth Chamber (Extended Composition) of the Court of First Instance of 11 November 2005, Joined Cases T?30/01 to T?32/01 were joined, for the purposes of further procedure, to Joined Cases T?86/02 to T?88/02, after the parties had been heard, in

accordance with Article 50 of the Rules of Procedure.

74 On 20 December 2005, the applicants requested, as a measure of organisation of procedure, that Joined Cases T?30/01 to T?32/01 and T?86/02 to T?88/02 should be heard and, as appropriate, adjudicated on before Joined Cases T?227/01 to T?229/01 and T?230/01 to T?232/01.

75 On 14 February 2007, as a measure of organisation of procedure, the Court asked the applicants, in Cases T?86/02 to T?88/02, to provide information on the beneficiaries of the tax systems at issue.

76 The applicants replied by letter lodged at the Court Registry on 12 March 2007 and questioned the relevance of that measure of organisation of procedure. By document lodged at the Court Registry on 1 March 2007, Confebask requested a review of that measure of organisation of procedure.

77 On 22 March 2007, the Court of First Instance confirmed the measure of organisation of procedure of 14 February 2007 and the applicants' reply was lodged at the Court Registry on 23 April 2007.

78 On 30 July 2007, as a measure of organisation of procedure, the Court addressed questions to the parties, to which the parties replied during October 2007.

79 On hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. The parties presented oral argument and replied to the questions put by the Court at the hearing which took place on 15 January 2008.

80 At that hearing, the applicants were allowed to produce a document, a copy of which was sent to the Commission, as officially noted in the record of the hearing.

81 At that hearing, the Court also required the applicants and Confebask to produce before 28 January 2008 certain information on the beneficiaries of the measures at issue. That was officially noted in the record of the hearing.

82 At the end of the hearing, the President of the Fifth Chamber (Extended Composition) decided to stay the close of the oral procedure.

83 By letters lodged at the Court Registry on 24 January 2008 by the Territorio Histórico of Vizcaya and on 28 January 2008 by the Territorios Históricos of Álava and Guipúzcoa, the applicants lodged documents concerning the information requested. Confebask did the same by letter of 29 January 2008. On 6 March 2008, the Commission, after the period for doing so was extended by the Court, submitted its comments on the documents produced.

84 The President of the Fifth Chamber (Extended Composition) closed the oral procedure on 12 March 2008. The parties were informed by letter dated 13 March 2008.

85 After hearing the parties' observations on joining the cases, the Court considers, pursuant to Article 50(1) of its Rules of Procedure, that Cases T?30/01, T?31/01, T?32/01, T?86/02, T?87/02 and T?88/02 should be joined for the purposes of judgment.

Forms of order sought by the parties

I – *In Cases T?30/01 to T?32/01*

86 The applicants claim that the Court should:

– annul the Commission decision of 28 November 2000 initiating the formal investigation procedure in respect of the three exemption schemes at issue;

– order the Commission to pay the costs.

87 The Commission contends that the Court should:

– primarily, declare the actions to be devoid of purpose;

– in the alternative, declare the actions to be inadmissible;

– in the further alternative, dismiss the actions as unfounded;

– order the applicants to pay the costs.

II – *In Cases T?86/02 to T?88/02*

88 The applicants claim that the Court should:

– primarily, annul the contested final decisions;

– in the alternative, annul the first sentence of Article 3 of those decisions;

– order the Commission to pay the costs.

89 Confebask and the Comunidad autónoma del País Vasco, interveners in support of the applicants, claim that the Court should:

– primarily, annul the contested final decisions;

– in the alternative, annul Article 3 of those decisions;

– order the Commission to pay the costs.

90 The Commission and the Comunidad autónoma de La Rioja, intervening in its support, contend that the Court should:

– dismiss the actions as unfounded;

– order the applicants to pay the costs.

Law

91 It is appropriate to examine initially the actions in Cases T?86/02 to T?88/02 against the contested final decisions and thereafter the actions in Cases T?30/01 to T?32/01 against the decision to initiate the formal investigation procedure of 28 November 2000.

I – *The actions in Cases T?86/02 to T?88/02 for annulment of the final decisions declaring the schemes at issue to be incompatible and ordering recovery of aid paid*

A – *Admissibility of Confebask's intervention in the actions in Cases T?86/02 to T?88/02*

1. Arguments of the parties

92 In the oral procedure, the Commission pleaded that Confebask was not entitled to intervene, on the ground that Confebask had not demonstrated that its members included any beneficiaries of the measures at issue.

93 Further to questions put at the hearing, Confebask supplied a number of documents. Confebask produced a document, from the Director-General of Finance (Director General de Hacienda) of each of the three Territorios Históricos, certifying that a number of companies had benefited from the tax exemptions at issue. Those documents are evidence that those companies are concerned by the contested final decisions and, in particular, by Article 3 of those decisions, which orders recovery of the aid. In addition, an affidavit, signed by the Secretary-General and the President of Confebask, certifies that each of those companies was a member of Confebask when the applications to intervene were lodged.

94 Those documents were sent to the Commission, which maintains that Confebask has not demonstrated that its intervention is admissible.

2. Findings of the Court

95 It must be observed that the order of 9 September 2005 of the President of the Fifth Chamber (Extended Composition) of the Court of First Instance, by which Confebask was given leave to intervene in the actions in Cases T?86/02 to T?88/02, does not preclude a fresh examination of the admissibility of its intervention in the final judgment (see, to that effect, Case C?199/92 P *Hüls* v *Commission* [1999] ECR I?4287, paragraph 52).

96 Pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 53 thereof, the right to intervene is open to any person establishing an interest in the result of the case.

97 According to settled case-law, intervention by representative associations whose object is to protect their members in cases raising questions of principle liable to affect those members is allowed (orders of the President of the Court of Justice in Joined Cases C?151/97 P(I) and C?157/97 P(I) *National Power and PowerGen* [1997] ECR I?3491, paragraph 66, and in Case C?151/98 P *Pharos* v *Commission* [1998] ECR I?5441, paragraph 6; order of the President of the Fourth Chamber of the Court of First Instance of 19 April 2007 in Case T?24/06 *MAAB* v *Commission* (not published in the ECR), paragraph 10).

98 Moreover, it must be recalled that the adoption of a broad interpretation of the right of associations to intervene is intended to facilitate assessment of the context of such cases whilst avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure (order in *National Power and PowerGen*, paragraph 97 above, paragraph 66, and order of 26 July 2004 in Case T?201/04 R *Microsoft* v *Commission* [2004] ECR II?2977, paragraph 38).

99 In the present case, Confebask is a trade organisation which is a cross-sectoral confederation, set up to represent, coordinate, communicate and defend the general and common interests of undertakings within its member organisations of the Basque Country in Spain. One of its purposes is to represent Basque undertakings and to defend their interests before the authorities and before trade unions and professional bodies.

100 It is not in dispute that Confebask is an organisation which represents undertakings in the

Basque Country in Spain.

101 Further, it must be stated that, as is clear from the documents produced during the oral procedure, a number of undertakings, which were members of Confebask when it lodged its application for leave to intervene, were the beneficiaries of aid granted in accordance with the tax systems at issue in the present case.

102 Consequently, the outcome of the present actions may affect the interests of those undertakings, which are both members of Confebask and actual beneficiaries of the tax measures at issue.

103 In addition, Confebask took part in the administrative procedure which led to the adoption of the contested final decisions.

104 Accordingly, it is clear that Confebask has established that it has an interest in the outcome of the proceedings and that its intervention in support of the applicants is admissible.

B – *The merits of the actions in Cases T?86/02 to T?88/02*

105 The applicants set out five pleas in law in their applications. They have however withdrawn their first plea in law, claiming that the measures at issue are general in scope and that the measures are not State aid within the meaning of Article 87(1) EC (see paragraph 72 above).

106 In their second plea in law, they claim that the exemption schemes at issue should be regarded as existing aid and not as new aid. The third plea in law concerns an alleged infringement of Article 88(1) EC, and of Articles 17 to 19 of Regulation No 659/1999, on the ground that the Commission should have applied the procedure relating to existing aid schemes. The fourth plea in law is based on infringement of Article 87(3)(c) EC, on the ground that the schemes in question were not operating aid incompatible with the common market, but rather aid for investment or the creation of employment. In their fifth plea in law, the applicants claim that the obligation to recover the aid in question is vitiated by procedural irregularity and infringement of the principles of legal certainty, good administration, the protection of legitimate expectations and equal treatment. Lastly, in their replies, the applicants claim that Article 6(1) of Regulation No 659/1999 was infringed, on the ground that the Commission, in its decision to initiate the formal investigation procedure, should have referred to the fact that meetings had been held with the Spanish authorities.

1. The second plea in law, claiming that the aid schemes at issue represent existing aid

107 The second plea in law has two parts. The first part is based on infringement of Article 1(b)(v) of Regulation No 659/1999; the second part is based on infringement of Article 1(b)(ii) of Regulation No 659/1999.

(a) The first part, based on infringement of Article 1(b)(v) of Regulation No 659/1999

Arguments of the parties

108 According to the applicants, the Commission should have considered that the exemption schemes were existing aid, given that, under Article 1(b)(v) of Regulation No 659/1999, they did not constitute aid schemes at the time they were put into effect and subsequently became aid schemes due to the evolution of the common market, without having been altered by the Member State.

109 First, the applicants claim that the Commission tacitly held that the exemption schemes did

not constitute State aid at the time they were put into effect.

110 According to the applicants, when the Commission became aware of those schemes, in 1994, it was under no obligation to close the preliminary examination stage by making a decision within the meaning of Article 249 EC and could indicate merely by remaining silent that its position was favourable, in the sense that the measures examined did not constitute aid.

111 The existing case-law to that effect in relation to notified measures has, they argue, equal force where there is a preliminary examination of measures which have not been notified, but of which the Commission is aware. The case-law requiring the Commission to initiate the formal investigation procedure if there is any doubt concerning the compatibility of a national measure with the common market permits moreover the inference that the significance of such a decision not being made is, as a general rule, that the Commission considers the measure at issue to be compatible with Community law.

112 The Commission communication to Member States of 4 March 1991 concerning the procedures for the notification of aid [plans] and the procedures applicable when aid is provided in breach of the rules of Article [88](3) EC ('the 1991 communication') confirms, moreover, that the Commission does not consider itself obliged to adopt a decision at the end of the preliminary examination, when the Member State responds satisfactorily to its request for information. Further, it is clear from the same communication that the Member of the Commission responsible for competition policy merely proposed that the Commission should take no action against the measure examined, when he was in no doubt as to its compatibility. The characteristic feature of that 'closing the procedure without further action' was that there was no formal decision.

113 To proceed in that way is not prevented by Article 232 EC. According to the applicants, national authorities are not competent to bring an action for failure to act with the aim of compelling the Commission to adopt a decision on a complaint submitted by persons other than themselves.

114 The applicants then comment on when the Commission is deemed to have closed the preliminary examination procedure without further action. They state, in that regard, that, before the entry into force of Regulation No 659/1999, there was no provision imposing any time-limit on the Commission. However, case-law on the principle of legal certainty gave rise to an obligation on the part of the Commission to define its position within a reasonable time. Given the nature of the preliminary examination procedure, the time allowed to close it ought consequently to be brief. The Commission has itself accepted that. According to the applicants, the Commission's obligation to act with due diligence persists even where the national measures have not been notified in accordance with the 1983 communication on illegal aid.

115 In those circumstances, the applicants consider that the Commission accepted, both implicitly and explicitly, that the exemption schemes could not be classified as State aid.

116 The applicants state that, in the Commission's request for information of 25 May 1994, it warned the Spanish authorities that it would be obliged to initiate the formal investigation procedure if there was no reply or if the reply was unsatisfactory. However, the Commission did not initiate that procedure after it received, on 30 September 1994, the reply in which the Kingdom of Spain contested the classification of the exemption schemes as State aid. The applicants conclude that the Commission deemed that reply to be satisfactory and considered that the schemes at issue were not aid within the meaning of Article 87 EC.

117 The applicants consider that the preceding argument can be supported by the letter of 18 July 1995, which the Commission sent to the authors of the 1994 complaint to inform them of the action to be taken on that complaint and which, according to the applicants, gives an indication

that the exemption schemes at issue were not State aid.

118 There are other circumstances from which it can be inferred that the Commission tacitly accepted that the exemption schemes did not constitute State aid. First, the Commission did not publish in the Official Journal a notice informing third parties of the risks attached to the exemption schemes. Secondly, the Commission acknowledges, in its pleadings, that the examination of the exemption schemes was conducted slowly. Yet in neither the decision to initiate the formal investigation procedure nor in the contested final decisions is any criticism in that regard made of the national authorities. Thirdly, the Commission's request for information of 3 February 2000 to the Spanish authorities made no reference to the 1994 complaint. It is on the contrary clear that the Commission's intention was that examination of the exemption scheme of the province of Álava should follow Decision 1999/718 (see paragraph 68 above). Moreover, that letter was not an instruction to supply information on the beneficiaries of the measures in question; that information is moreover irrelevant in the case of an alleged aid scheme of which an analysis *inabstracto* is to be carried out. Fourthly, the decision to initiate the formal investigation procedure also made no reference to the 1994 complaint. On the contrary, that decision was based on the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3; 'the 1998 notice on tax aid').

119 Moreover, the Commission's adoption since 1994 of decisions relating to other tax systems of the Territorios Históricos of Álava, Vizcaya and Guipúzcoa in no way alters the fact that the Commission initially considered that the exemption schemes were not State aid. The decision to initiate the formal investigation procedure and the contested final decisions demonstrate the Commission's arbitrariness, which, furthermore, does not explain why dealing with the 1996 systems, introducing other tax advantages such as tax credits and reductions in the taxable base, should have priority, even though the Commission considered the 1996 systems to be less 'aggressive' than the 1993 systems, which are at issue in the present case.

120 In their reply, the applicants refer to a number of factors from which, they argue, it can be inferred that the Commission explicitly rejected the 1994 complaint, on the ground that the exemption schemes did not constitute State aid.

121 It is apparent in the records of proceedings at the Spanish Senate of 22 April 1997 (*Boletin Oficial de las Cortes Generales* of 28 April 1997, No 204, 681/000550) that, at a meeting of 17 March 1997, the Member of the Commission responsible for competition policy confirmed to a delegation of the Comunidad autónoma de La Rioja that the 1994 complaint 'was not within the competence of the European Union but within that of the Member State concerned'. It is clear also from a press article published on the internet on 24 October 2002 that that complaint had not been taken into consideration. The applicants conclude from those two factors that the Comunidad autónoma de La Rioja intervened in the 1994 complaint and that the Commission expressly rejected it because, since the exemption schemes were not State aid, it was not within the scope of Community law. The applicants conclude from the Commission's decision on the aid granted to Ramondín that, in the context of the complaint against that aid, the Comunidad autónoma de La Rioja abandoned its challenge to the compatibility of Norma Foral No 22/1994 (Álava), considered in isolation, with the law relating to State aid. They consider that the change of position was due to the abovementioned rejection of the 1994 complaint. Lastly, the Commission at no time made the slightest reference to that complaint, or to the fact that examination of that complaint had been postponed for reasons of expediency, in the actions which it undertook from 1997 onwards against the various tax systems of the Territorios Históricos of Álava, Vizcaya and Guipúzcoa. In particular, the Commission made no mention of it in the observations which it lodged in relation to questions referred for a preliminary ruling by a Spanish court 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 to

C?402/97 *Juntas Generales de Guipúzcoa and Others* [2000] ECR I?1073, concerning the three exemption schemes at issue. Similarly, the decision to initiate the formal investigation procedure in relation to those schemes referred solely to the complaint lodged on 5 January 2000.

122 Consequently, neither the letter of 18 July 1995, sent by the Commission to the authors of the 1994 complaint, nor that of 19 January 1996, in which the Commission asked the Spanish authorities for further information, preclude the Court from finding that the Member of the Commission responsible for competition policy confirmed, in 1997, that the abovementioned complaint had been rejected. On the contrary, the letter of 18 July 1995 expressly states that a decision would be taken and that it would be made known to the complainers.

123 According to the applicants, the Commission therefore considered that the measures at issue were not State aid at the time they were put into effect.

124 Secondly, the applicants claim that the only reason for the contested decisions is a development of State aid policy, which changed the criteria for examination of certain tax measures. The applicants accordingly claim that there was an evolution of the common market within the meaning of Article 1(b)(v) of Regulation No 659/1999.

125 The applicants state that the [Commission] proposal which was the basis of Regulation No 659/1999 made no provision for the category of existing aid later specified in Article 1(b)(v) of the regulation. The applicants consider that that provision was specifically inserted a posteriori to take account of changes made in the interim in the Commission's State aid policy. It is clear moreover from recital 4 in the preamble to that regulation that that provision did indeed refer to developments in the Commission's State aid policy and the applicants conclude that the evolution of the common market is synonymous with the development of State aid policy.

126 According to the applicants, it is clear from the resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council, of 1 December 1997 [the Ecofin Council meeting] on a code of conduct for business taxation (OJ 1998 C 2, p. 1) that the Commission intended to re-examine the tax arrangements in force in the Member States, and thereby declared that the criteria for their assessment were changing. The 1998 notice on tax aid confirmed that, to the extent that the Commission there states that it will 're-examine case by case' tax arrangements 'on the basis of' that notice. They add that the decision to initiate the formal investigation procedure made explicit reference to that notice.

127 Moreover, the applicants consider that Decision 93/337, relied on by the Commission, is not a valid point of reference. According to the applicants, the Commission classified the 1988 tax credits, at issue in Decision 93/337, as selective measures, because they applied only to certain activities. The Commission did not apply a criterion linked to the minimum amount invested. On the other hand, the exemption measures at issue in the present case did not exclude any activity and could therefore legitimately be regarded in 1993 as general measures.

128 The applicants also rely on Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ 2003 L 282, p. 25), where the Commission is said to have accepted that Article 1(b)(v) of Regulation No 659/1999 applied to the situation where, after the Commission has initially considered that a measure did not constitute aid, it alters its assessment and consider that it does.

129 The applicants consider therefore that there has been a development of State aid policy within the meaning of Article 1(b)(v) of Regulation No 659/1999.

130 Thirdly, they state that the tax measures at issue have not been altered.

131 The applicants conclude that the Commission erred in law by refusing to consider the measures at issue to be existing aid within the meaning of Article 1(b)(v) of Regulation No 659/1999.

132 The Commission, supported by the Comunidad autónoma de La Rioja, contends that the first part of the plea in law should be rejected.

Findings of the Court

133 First, the Treaty establishes different procedures according to whether the aid is existing or new. Whereas new aid must, under Article 88(3) EC, be notified in advance to the Commission and cannot be implemented before the procedure has culminated in a final decision, existing aid may, under Article 88(1) EC, be duly implemented as long as the Commission has not found it to be incompatible (Case C?387/92 *Banco Exterior de España* [1994] ECR I?877, paragraphs 20 and 22). Existing aid may therefore only be the subject, should the situation arise, of a decision of incompatibility producing effects for the future (*Demesa*, paragraph 68 above, paragraph 172).

134 It is clear from Article 1(b)(v) of Regulation No 659/1999, which entered into force on 16 April 1999, and was therefore applicable when the contested final decisions were taken, that existing aid is, inter alia, ‘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’.

135 The applicants claim that the three conditions of Article 1(b)(v) of Regulation No 659/1999 are satisfied. The Commission considered that the first two conditions, that the schemes at issue did not constitute aid schemes at the time they were put into effect, but subsequently became aid schemes due to the evolution of the common market, were not satisfied in the present case (see paragraphs 78 of Decision 2003/28, 76 of Decision 2003/86 and 74 of Decision 2003/192).

136 The Court must examine whether the Commission was correct to consider that those conditions were not satisfied in the present case.

137 As regards the first condition, the applicants claim that the Commission accepted, both implicitly and explicitly, that the schemes at issue did not constitute State aid schemes when they were put into effect.

138 First, the applicants claim, in their reply, that the Commission explicitly rejected the 1994 complaint.

139 However, it is clear from the documents before the Court that, subsequent to the 1994 complaint, the Commission continued its investigation (see paragraph 21 et seq. above) and did not make any explicit decision.

140 By letter of 18 July 1995, the Commission informed the complainers that it was continuing its analysis of the Spanish tax system and the fiscal autonomy systems in force in the Member States, while taking account of ongoing developments in the federal systems of various Member States. The Commission stated that its staff were gathering the necessary data, that it would decide on the action to be taken on their complaint when those matters were clarified and that it would notify them of its decision. It is very clear that the Commission was continuing its investigation of the complaint and that it had not then made any decision.

141 Again, by letter of 19 January 1996, the Commission informed the Kingdom of Spain that it was examining the effect of the tax provisions at issue on competition and requested the provision of information on the beneficiaries of the measures at issue. However, irrespective of whether a reply was received by the Commission on that matter, a point on which the parties disagree, it must be held that, on any view, that letter demonstrates that the Commission had not at that time defined its position on the schemes at issue (see, to that effect and by analogy, Case T?95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II?3407, paragraph 88).

142 Lastly, it must be held that the text of a question put by a Spanish senator to the Spanish Government, concerning the meeting of 17 March 1997, is not attributable to the Commission and is evidence of no more than the fact that comments, supposedly made by the Member of the Commission responsible for competition policy, were reported in the context of proceedings of the national parliament. Such material, whatever its content, cannot be regarded as an explicit definition by the Commission of its position.

143 Equally, neither a press article nor the applicants' inferences as to the position of the complainers or the Commission in the context of other procedures are capable of demonstrating that a decision had been adopted by the Commission in the present case.

144 It must consequently be held that none of the documents produced constitutes a decision addressed to the Member State and that none of the circumstances put forward can lead to the conclusion that a clear and explicit position had been defined by the Commission (see, to that effect, Case T?351/02 *Deutsche Bahn* v *Commission* [2006] ECR II?1047, paragraphs 46 to 49).

145 Consequently, it is not established that the Commission had explicitly made a decision declaring that the schemes at issue did not constitute State aid schemes when they were put into effect.

146 Secondly, the applicants claim that the Commission was not obliged to close the preliminary examination phase with a decision within the meaning of Article 249 EC and could, merely by remaining silent, make known its position that the tax measures at issue did not constitute aid.

147 Such an interpretation cannot be accepted.

148 It must be observed that mere silence on the part of an institution cannot produce binding legal effects capable of affecting the interests of the applicant other than where that result is expressly contemplated by a provision of Community law. Community law provides that, in certain specific instances, silence on the part of an institution is deemed to constitute a decision where the institution has been called upon to express its view and has not done so by the end of a given period. Where there are no such express provisions laying down a deadline by which an implied decision is deemed to have been taken and prescribing the content of the decision, an institution's inaction cannot be deemed to be equivalent to a decision without calling into question the system of remedies instituted by the Treaty (Joined Cases T?190/95 and T?45/96 *Sodima* v *Commission* [1999] ECR II?3617, paragraphs 31 and 32).

149 In the present case, it is common ground that the tax systems at issue, established in 1993, were not notified to the Commission.

150 However, the applicable rules in relation to State aid do not provide that the Commission's silence is equivalent to an implicit decision that there has been no aid, in particular when the measures at issue have not been notified to the Commission. The Commission, which has exclusive jurisdiction to determine whether aid is incompatible with the common market, has a

duty, at the end of the preliminary stage of the investigation into a State measure, to adopt a decision vis-à-vis the Member State concerned: either that the State measure concerned does not constitute aid or that the measure, although constituting aid, is compatible with the common market; or that it is necessary to initiate the formal investigation procedure under Article 88(2) EC (*GestevisiónTelecinco* v *Commission*, paragraph 141 above, paragraphs 53 to 55).

151 Accordingly, such a decision, which moreover is to be notified to the Member State, cannot be tacit and implied from the Commission's silence over a period of time.

152 In the present case, it therefore cannot be accepted that the Commission could have adopted an implicit decision, to the effect that the tax systems at issue did not constitute aid schemes when they were brought into effect.

153 The mere fact that for a relatively long period the Commission did not initiate the formal investigation procedure in relation to a State measure cannot in itself confer on that measure the objective nature of existing aid, if it does constitute aid. Any uncertainty which may have existed in that regard may at most be regarded as having given rise to a legitimate expectation on the part of the recipients so as to prevent recovery of the aid paid in the past (Joined Cases T?195/01 and T?207/01 *Government of Gibraltar* v *Commission* [2002] ECR II?2309, paragraph 129).

154 Moreover, the applicants did not ask the Commission to define its position on the 1994 complaint; had they done so, they might, on the expiry of a period of two months, have brought an action for failure to act, pursuant to Article 232 EC, since, contrary to what is claimed by the applicants (see paragraph 113 above), they would have been entitled to do so, just as they are entitled, in the present actions, to bring an action for annulment of the final decisions adopted by the Commission (see, to that effect, Case C?68/95 *T. Port* [1996] ECR I?6065, paragraph 59).

155 Consequently, it cannot in the present case be held, on the basis of the Commission's silence, that any tacit decision that there was no aid had been adopted.

156 The applicants' arguments based, first, on the case-law, secondly, on the Commission's conduct in the present case, and, thirdly, on certain provisions in communications from the Commission cannot affect that assessment.

157 First, the case-law relied on by the applicants (Case C?367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I?1719, paragraph 45, and Case T?82/96 *ARAP and Others* v *Commission* [1999] ECR II?1889, paragraph 28, concerned situations where explicit decisions had been adopted by the Commission and is therefore of no relevance to the present case. Equally, Case 120/73 *Lorenz* [1973] ECR 1471, applicable to aid which has been notified, is not applicable to aid which has not been notified, as in the present case (Case C?39/94 *SFEI and Others* [1996] ECR I?3547, paragraphs 46 to 48, and Case C?99/98 *Austria* v *Commission* [2001] ECR I?1101, paragraph 32; see *Gestevisión Telecinco* v *Commission*, paragraph 141 above, paragraphs 77 and 78, and Case T?171/02 *Regione autónoma della Sardegna* v *Commission* [2005] ECR II?2123, paragraph 48, and case-law there cited).

158 Secondly, the arguments based on the Commission's conduct must also be rejected.

159 The lack of reaction to the Kingdom of Spain's response of 30 September 1994 or the fact that the Commission has acknowledged, in its pleadings, the slowness of the examination of the tax systems at issue in the present case cannot validly support the conclusion that there was a Commission decision accepting that there was no aid in the present case. In addition, contrary to what is asserted by the applicants, the letter of 18 July 1995, sent by the Commission to the complainers (see paragraph 26 above), is evidence that the Commission was continuing its

analysis and is inconsistent with the adoption of an implicit decision to the effect that the tax systems at issue had not constituted aid schemes when they were brought into effect.

160 Further, the applicants rely on the fact that the decision to initiate the formal investigation procedure refers only to the complaint of 5 January 2000 (see paragraph 31 above) and not to that of 1994.

161 It must be observed, in that regard, that the decision to initiate the formal investigation procedure relates to the three tax systems at issue, but none the less does not refer to the 1994 complaint. That decision was adopted by the Commission following the complaint of 5 January 2000, made by a competitor of an undertaking which was a beneficiary of the corporation tax exemption.

162 However, the fact that the 1994 complaint was not mentioned in the decision to initiate the formal investigation procedure cannot imply the existence of a tacit decision by the Commission to accept that the schemes at issue did not constitute State aid, since, as has been pointed out (see paragraph 152 above), such a decision cannot be implicit.

163 As regards the argument based on the fact that the Commission adopted decisions on other tax systems established by the applicants subsequent to the 1994 complaint and the arbitrariness of the contested decisions, that must also be rejected as being of no relevance to the plea in law which is advanced and which relates to the concept of existing aid.

164 Thirdly, no better argument can be made on the basis of the 1983 communication on illegal aid and the 1991 communication.

165 The 1983 communication on illegal aid reiterates, on the contrary, the obligation to notify proposed aid and states inter alia that any recipient of aid granted illegally, '[that is] without the Commission having reached a final decision [on its compatibility]', may have to refund the aid. It is true that that communication also states that, whenever the Commission becomes aware of the adoption of illegal aid measures by a Member State, the Commission is to publish in the Official Journal a specific notice warning potential aid recipients of the risk involved (see paragraph 11 above). It cannot however be inferred that a failure to publish such a notice can be the equivalent of adopting a tacit decision that there is no aid, in the light of the case-law referred to above (*Sodima* v *Commission*, paragraph 148 above).

166 No better argument can be drawn from the 1991 communication relied on by the applicants (see paragraph 112 above). That communication provides inter alia that, if the Member State provides an unsatisfactory reply, the Commission 'may' then resort to certain powers (requiring suspension of the measures at issue or the giving of notice to communicate comments and data necessary to assess the compatibility of the aid with the common market) and concludes that it 'is the Commission's intention to make use of the abovementioned powers whenever required to put a stop to any infringement of the provisions of the Treaty concerning State aid'. Accordingly, it in no way follows from that communication that a failure by the Commission to issue a formal response is equivalent to a tacit decision accepting that the measures at issue should not be classified as aid.

167 Consequently, the argument that the Commission had tacitly rejected the 1994 complaint and accepted that the schemes at issue did not constitute State aid schemes must be rejected.

168 It follows from the foregoing that it has not been established that there was any decision by the Commission accepting that the schemes at issue did not constitute State aid schemes at the time they were put into effect.

169 Since that first condition of Article 1(b)(v) of Regulation No 659/1999 is not satisfied, the measures at issue cannot be regarded as existing aid within the meaning of that provision.

170 Consequently, the arguments relating to the second condition, intended to show that the measures at issue became aid due to the evolution of the common market, are irrelevant.

171 In any event, the applicants' arguments concerning the second condition of Article 1(b)(v) of Regulation No 659/1999 cannot be accepted.

172 The applicants claim that it follows from Article 1(b)(v) of Regulation No 659/1999 and from recital 4 in its preamble that the concept of the evolution of the common market is synonymous with that of the development of State aid policy (see paragraph 125 above).

173 However, it must be pointed out that the concept of 'evolution of the common market' can be understood as a change in the economic and legal framework of the sector concerned by the measure in question (Joined Cases C?182/03 and C?217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I?5479, paragraph 71). Such a change can, in particular, be the result of the liberalisation of a market initially closed to competition (Case T?288/97 *Regione autónoma Friuli-Venezia Giulia* v *Commission* [2001] ECR II?1169, paragraph 89).

174 On the other hand, that concept does not cover the situation where the Commission alters its appraisal on the basis only of a more rigorous application of the Treaty rules on State aid (*Belgium and Forum 187* v *Commission*, paragraph 173 above, paragraph 71). In that 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 the Commission may have had (*Government of Gibraltar* v *Commission*, paragraph 153 above, paragraph 121; Joined Cases T?269/99, T?271/99 and T?272/99 *Diputación Foral de Guipúzcoa and Others* v *Commission* [2002] ECR II?4217, paragraph 80; and Joined Cases T?346/99 to T?348/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II?4259, paragraph 84).

175 It follows that the mere finding that there has been a development of State aid policy is not, in itself, sufficient to constitute an 'evolution of the common market' within the meaning of Article 1(b)(v) of Regulation No 659/1999, provided that the objective concept of State aid, as defined by Article 87 EC, is not itself altered.

176 In the present case, none of the applicants' arguments concerning the development of State aid policy is capable of representing 'the evolution of the common market' within the meaning of Article 1(b)(v) of Regulation No 659/1999.

177 In support of their arguments concerning the development of State aid policy, the applicants rely on the adoption, on 1 December 1997, by the Council of the European Union, of a code of conduct for business taxation (see paragraph 126 above).

178 The Court of First Instance points out in that regard that the Member States committed themselves to the gradual elimination of harmful tax measures, while the Commission expressed its intention to examine or re-examine, in the light of the State aid rules, the tax regimes in force in the Member States (points D and J of the code of conduct).

179 Contrary to what is claimed by the applicants, no change in the criteria for the assessment of the concept of State aid was announced in that code of conduct and the applicants provide no other foundation for their assertion of such a change.

180 The applicants also rely on the 1998 notice on tax aid, which made it known, according to them, that tax arrangements would be re-examined case by case (see paragraph 126 above).

181 In the 1998 notice on tax aid, which is substantially based on the case-law of the Court of Justice and the Court of First Instance and which elucidates the application to tax measures of Articles 87 EC and 88 EC, the Commission none the less does not announce any change of the criteria for the assessment of tax measures in the light of Articles 87 EC and 88 EC (see, to that effect, *Diputación Foral de Guipúzcoa and Others* v *Commission*, paragraph 174 above, paragraph 79, and *Diputación Foral de Álava and Others* v *Commission*, paragraph 174 above, paragraph 83).

182 Furthermore, the applicants claim that, in Decision 93/337, the selectivity criterion applied by Commission differed from that used in the present case (see paragraph 127 above).

183 In Decision 93/337, the Commission stated, inter alia, that the tax measures applied only to certain firms and that certain activities did not benefit from them (paragraph III of the decision). In the contested final decisions, the Commission relied on a different criterion of selectivity, relating to the minimum investment being above a certain amount.

184 Article 87(1) EC requires a determination whether, within a particular legal system, a national measure is such as to favour ‘certain undertakings or the production of certain goods’ as compared with others. That is an objective concept, which can be assessed according to various selectivity criteria, but it does not thereby follow that there is any change in the criteria for the assessment of the selectivity of State aid.

185 Consequently, it cannot be concluded from the arguments put forward that the selectivity criteria applied by the Commission in its assessment of tax measures in the light of Article 87(1) EC were subject to any change subsequent to the adoption of the tax measures at issue (see, to that effect, *Diputación Foral de Guipúzcoa and Others* v *Commission*, paragraph 174 above, paragraph 79).

186 Moreover, even if the applicants had established that the criteria for the assessment by the Commission of the status of aid had changed, the argument that the tax measures at issue were existing aid cannot be accepted. It has in no way been demonstrated that the alleged change in the selectivity criteria applied by the Commission was the result of an ‘evolution of the common market’ within the meaning of Article 1(b)(v) of Regulation No 659/1999. It must be recalled, in that connection, that that concept does not cover the situation where the Commission alters its appraisal on the basis only of a more rigorous application of the Treaty rules on State aid (*Belgium and Forum 187* v *Commission*, paragraph 173 above, paragraph 71).

187 Lastly, as regards Decision 2003/755, relied on by the applicants, that is of no relevance. The measure concerned in that decision was existing aid, since it had been notified and authorised previously and, in the context of the constant review of existing aid systems, provided for by Article

88(1) EC, the Commission had decided to re-examine the system concerned. Moreover, it was precisely in relation to Decision 2003/755 that the Court of Justice held that the concept of 'evolution of the common market' did not cover the situation where the Commission alters its appraisal on the basis only of a more rigorous application of the Treaty rules on State aid (*Belgium and Forum 187* v *Commission*, paragraph 173 above, paragraph 71). That decision therefore provides no support to the applicants' arguments.

188 Consequently, none of the circumstances put forward by the applicants is such as to demonstrate that there was an evolution of the common market within the meaning of Article 1(b)(v) of Regulation No 659/1999.

189 It follows from the foregoing that the tax systems at issue cannot be regarded as existing aid schemes within the meaning of Article 1(b)(v) of Regulation No 659/1999.

190 Consequently, the first part of the second plea in law, based on infringement of Article 1(b)(v) of Regulation No 659/1999, must be rejected as being unfounded.

(b) The second part, based on infringement of Article 1(b)(ii) of Regulation No 659/1999

Arguments of the parties

191 If the Court does not accept that the Commission considered that the exemption schemes were not State aid, the applicants claim nevertheless that the circumstances of the present case show that the Commission held them to be compatible with the common market and authorised them within the meaning of Article 1(b)(ii) of Regulation No 659/1999. That provision covers inter alia measures adopted before it entered into force to which the Commission had not taken objection.

192 In the present case, authorisation stems from the Commission's letter of 25 May 1994 and the Commission's subsequent position. The Commission did not initiate the formal investigation procedure within a reasonable time after receipt of the replies from the Basque authorities to that letter, although it was obliged to initiate that procedure if it had the slightest doubt as to the compatibility of the schemes at issue with the common market. Further, neither the Commission's letter of 3 February 2000 nor its decision of 28 November 2000 to initiate the formal investigation procedure made any reference to the examination made in 1994. In addition, despite its commitment to publish in the Official Journal non-notified aid measures as soon as it was aware of them, the Commission published no such notice in advance of its abovementioned decision of 28 November 2000.

193 The Commission, supported by the Comunidad autónoma de La Rioja, contends that the second part of the second plea in law is unfounded.

Findings of the Court

194 Article 1(b)(ii) of Regulation No 659/1999 provides that existing aid is to mean 'authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council'.

195 It must be pointed out that that provision covers aid measures which have been the subject of a decision by the Commission declaring their compatibility.

196 Such a decision is, of necessity, explicit. The Commission must rule on the compatibility of the measures at issue in the light of the conditions laid down in Article 87 EC and, pursuant to Article 253 EC, state the reasons for such a decision in that regard.

197 In addition, where it is claimed that individual measures have been granted pursuant to a previously authorised scheme, the Commission must, before initiating the procedure laid down in Article 88(2) EC, first examine whether or not the measures are covered by the scheme concerned, and, if they are, whether they satisfy the conditions laid down in the decision approving it. Only if a negative conclusion is reached after that examination can the measures concerned be regarded as new aid. Conversely, if a positive conclusion is reached, the Commission must treat those measures as existing aid in accordance with the procedure laid down in Article 88(1) and (2) EC (Case C?47/91 *Italy* v *Commission* [1994] ECR I?4635, paragraphs 24 to 26, and Case C?400/99 *Italy* v *Commission* [2005] ECR I?3657, paragraph 57). So that it can be determined whether or not individual measures satisfy the conditions set in the decision approving the scheme at issue, that decision of approval must, of necessity, be explicit.

198 In the present case, it must be stated that the applicants do not, in support of their assertions, refer to any decision by which the Commission authorised the tax measures at issue and considered them to be compatible with the common market.

199 The applicants' argument that authorisation stems from the Commission's letter of 25 May 1994 cannot be accepted. The letter of 25 May 1994 does no more than call upon the Kingdom of Spain to submit its comments on the 1994 complaint, and does not rule on the compatibility of the measures at issue with the common market. That letter cannot therefore represent a decision authorising the schemes at issue.

200 Equally, the Commission's subsequent attitude cannot be regarded as an explicit decision of approval. Neither the Commission's failure to respond after receipt of the Kingdom of Spain's comments of 30 September 1994, nor the letter of 18 July 1995 sent by the Commission to the complainers, which gives no ruling on the compatibility of the schemes at issue (see paragraph 26 above), is capable of constituting a decision authorising the tax systems at issue within the meaning of Article 1(b)(ii) of Regulation No 659/1999.

201 Lastly, the applicants refer to the fact that the Commission made no mention of the enquiries in relation to the 1994 complaint either in its letter of 3 February 2000, in which it asked the Spanish authorities for information concerning the complaint of 5 January 2000 (see paragraph 32 above) or in its decision to initiate the formal investigation procedure. The applicants also refer to there being no publication in the Official Journal of the measures at issue, contrary to the Commission's undertaking in the 1983 communication on illegal aid.

202 However, none of those factors permits the conclusion that there was an explicit decision of authorisation by the Commission, within the meaning of Article 1(b)(ii) of Regulation No 659/1999.

203 It follows that the second part of the second plea in law, based on infringement of Article 1(b)(ii) of Regulation No 659/1999, must also be rejected as unfounded.

204 Consequently, the second plea in law, claiming that the tax systems at issue should be considered to be existing aid schemes, must be rejected as unfounded.

2. The third plea in law, alleging infringement of procedural rules applicable to existing aid

205 The applicants, supported by the Comunidad autónoma del País Vasco, consider that, since

the exemption schemes ought to be regarded as existing aid, the contested final decisions infringe Article 88(1) EC and Articles 17 to 19 of Regulation No 659/1999, in that they were adopted after a procedure relating to new aid.

206 The Court holds that, since the classification as existing aid schemes cannot be accepted in the present case (see paragraph 204 above), the Commission was correct to consider the aid schemes at issue as constituting new aid. In doing so, it did not disregard the procedural rules referred to by the applicants.

207 It follows that the third plea in law, alleging infringement of procedural rules, must be rejected as being unfounded.

3. The fourth plea in law, alleging infringement of Article 87(3)(c) EC

(a) Arguments of the parties

208 The applicants state that, according to what is said by the Commission in the contested final decisions, the exemption schemes do 'not qualify as investment or employment aid [because] the basis for the aid is not the size of the investment, the number of jobs created or the corresponding wage costs, but taxable income'.

209 The applicants deny that such a link is necessary and do not accept that the schemes at issue constitute operating aid solely because the tax on the profits of the recipient companies is reduced. That there is such a reduction is not sufficient reason to refuse to classify the exemption schemes at issue as investment or employment aid.

210 According to the applicants, the Commission accepted, in the contested final decisions, that the schemes in question encourage the formation of new businesses. Further, the abovementioned requirement, that aid schemes cannot be categorised as investment aid unless the aid is expressed as a percentage of investment, does not appear as such in the 1978 communication on regional aid systems. The expression of the amount of the aid as a percentage of investment serves only to determine whether the aid in question is below the authorised ceiling for aid in the region. The Commission should have made reference to the 1978 communication since it determined the Commission's position when the exemption schemes at issue were adopted. The Commission cannot, without disregarding the principle of legal certainty, rely on the 1998 Guidelines. The Comunidad autónoma del País Vasco is of the same opinion.

211 In any event, the applicants claim that the exemption schemes at issue were employment aid. Qualification for those schemes was subject to the creation of a minimum of 10 jobs and the preservation of the average workforce at that figure for 10 years. Moreover, the fact that the aid schemes in question were not expressed as a percentage of wage costs was only of significance, in the 1978 communication, for the purpose of calculating whether the aid complied with the authorised intensity.

212 The Commission, supported by the Comunidad autónoma de La Rioja, contends that the fourth plea in law should be rejected.

(b) Findings of the Court

213 First, the applicants claim an infringement of the principle of legal certainty, on the ground that the Commission applied the 1998 Guidelines, which post-date the 1993 tax provisions at issue.

214 It must first be recalled that the Commission is bound by the guidelines or notices that it

issues in the area of supervision of State aid where they do not depart from the rules in the Treaty (Case C?351/98 *Spain* v *Commission* [2002] ECR I?8031, paragraph 53).

215 It must next be observed that the 1998 Guidelines provide, in point 6.1, that 'the Commission will assess the compatibility of regional aid with the common market on the basis of these Guidelines as soon as they are applicable'. It is therefore apparent from the 1998 Guidelines that their application from the time of their adoption extends to situations pertaining prior to their entry into force. Consequently, the application of the 1998 Guidelines in the present case is not such as to constitute an infringement of the principle of legal certainty.

216 It is true that point 6.1 contains a qualification, that 'aid proposals which are notified before these Guidelines are communicated to the Member States and on which the Commission has not yet adopted a final decision will be assessed on the basis of criteria in force at the time of notification'.

217 However, it is common ground that the aid schemes at issue in the present case were put into effect without being notified.

218 Accordingly, those aid schemes cannot be deemed equivalent to 'aid proposals which are notified before [the 1998 Guidelines] are communicated to the Member States' within the meaning of that qualification, which therefore does not apply in the present case.

219 In addition, and in any event, it must be pointed out that, even if it could be established that there might have been an irregularity in the application of the 1998 Guidelines, that would render the contested decisions unlawful and, consequently, lead to their annulment only in so far as that irregularity might affect their content. If it were established that, in the absence of that irregularity, the Commission would have arrived at exactly the same conclusion since the irregularity in question was, in any event, incapable of influencing the content of the contested decisions, it would not be necessary to annul those decisions (see, to that effect, Case T?25/04 *González y Díez* v *Commission* [2007] ECR II?3121, paragraph 74, and case-law there cited).

220 In the present case, the applicants claim, first, that the definition of investment aid as laid down in the 1998 Guidelines and applied by the Commission in the contested final decisions was not laid down in the 1978 communication on regional aid systems and, secondly, that the Commission erred in refusing to consider the exemption schemes as employment aid.

221 However, it must be held that the applicants have not produced any evidence from which it could be concluded that the schemes at issue satisfied the conditions of the 1978 communication on regional aid systems (see paragraph 10 above) and that application of the 1978 communication would have led to the tax systems at issue being categorised differently. In particular, it is clear both from the 1998 Guidelines and from the 1978 communication on regional aid systems that operating aid cannot in principle be declared compatible with the common market, under Article 87(3)(c) EC, since such aid is likely, by its very nature, to affect trading conditions adversely to an extent contrary to the common interest. Furthermore, the 1978 communication on regional aid systems does not provide any definition of the concepts of operating aid, investment aid or employment aid which runs counter to the interpretations made in the present case by the Commission. On the other hand, the 1978 communication fixes differentiated ceilings of aid intensity, as a percentage of the initial investment and in European units of account per job created by the initial investment (see paragraph 10 above), and it has not been established that the tax systems at issue in the present case took any account of those ceilings.

222 Consequently, even if application of the 1998 Guidelines instead of the 1978 communication on regional aid systems could be regarded as an error, that would not, in any event, have any

effect on the content of the contested final decisions such as to entail the illegality of those decisions.

223 Secondly, as regards the applicants' arguments seeking to challenge the Commission's assessment in relation to Article 87(3)(c) EC, it must be borne in mind that the Commission has a wide discretion when applying that provision, the exercise of which involves complex economic and social assessments which must be made in a Community context (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18). Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and ascertaining that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (Case C?56/93 *Belgium* v *Commission* [1996] ECR I?723, paragraph 11; Case C?372/97 *Italy* v *Commission* [2004] ECR I?3679, paragraph 83; and *Demesa*, paragraph 68 above, paragraph 273).

224 In the present case, the Commission considered, in the contested final decisions, that the tax systems at issue, which provide for a corporation tax exemption, partly relieve the recipient companies of tax on profits and should be described as operating aid.

225 It must be held that, in so doing, the Commission made no manifest error of assessment.

226 Operating aid is intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities (Case C?156/98 *Germany* v *Commission* [2000] ECR I?6857, paragraph 30; Case T?459/93 *Siemens* v *Commission* [1995] ECR II?1675, paragraph 48; and Case T?190/00 *Regione Siciliana* v *Commission* [2003] ECR II?5015, paragraph 130). It is clear also from the 1998 Guidelines that operating aid is aimed at reducing a firm's current expenses (see paragraph 14 above).

227 However, that very much applies to the tax exemptions in the present case. In that regard, it is clear from Article 14 of the 1993 Normas Forales, which makes provision for the corporation tax exemptions at issue, that the obligations to make a minimum investment and to create a minimum number of jobs are no more than conditions of entry to the aid scheme, requirements to qualify for the tax exemptions (see paragraph 18 above). Where those conditions are satisfied, the amount of the aid depends on the positive tax base deriving from their economic activity and not on the amount of the investment. Notwithstanding those conditions relating to a minimum investment and creation of a minimum number of jobs, quantification of the tax exemptions is based on the profits made by the companies, without any correspondence to the size of the investment or the number of jobs created. The tax exemptions are therefore notably not linked to investment within the meaning of the 1998 Guidelines (see paragraph 15 above).

228 Accordingly the Commission was correct to hold that the tax exemptions at issue, which free the recipient companies of charges which they would as a general rule otherwise have had to bear, constituted operating aid and could not be classified as investment or employment aid.

229 In that regard, no argument put forward by the applicants is able to demonstrate a manifest error of assessment on the part of the Commission, whose interpretation is in accordance with Article 87 EC and the objective of undistorted competition pursued by that provision.

230 It follows that the fourth plea in law, alleging infringement of Article 87(3)(c) EC, must be rejected.

4. The fifth plea in law, alleging procedural irregularity and infringement of the principles of legal certainty, good administration, the protection of legitimate expectations and equal treatment

231 The applicants and the parties intervening in their support seek, in the alternative, annulment of the obligation to recover the aid, to be found in Article 3 of the contested final decisions. In support of those forms of order, they plead, first, procedural irregularity. Next, they claim infringement of the principle of legal certainty and good administration, infringement of the principle of the protection of legitimate expectations and infringement of the principle of equal treatment.

(a) The complaint alleging procedural irregularity

Arguments of the parties

232 The applicants complain that the Commission disregarded the comments submitted by the Kingdom of Spain within the formal investigation procedure. They claim that, by letter of 17 September 2001, submitted in response to third-party observations, the Kingdom of Spain put forward an argument based on the protection of legitimate expectations, in order to contest the possibility of recovering the aid already granted. According to the applicants, the Commission was wrong to consider that those comments were submitted out of time. Such a standpoint on the part of the Commission can entail, according to the applicants, a breach of the Member State's rights of defence. They add that such conduct does not preclude the Court of First Instance from carrying out a judicial review.

233 The Commission does not accept that argument.

Findings of the Court

234 Article 6(1) of Regulation No 659/1999 provides that, in the decision to initiate the formal investigation procedure, the Commission is to call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period, which is normally not to exceed one month and which may be extended by the Commission. Article 6(2) of Regulation No 659/1999 further provides that the comments received are to be submitted to the Member State concerned, which may reply to the comments submitted within a prescribed period, which is normally not to exceed one month and which may be extended by the Commission (see paragraph 6 above).

235 In the present case, it is clear that, in accordance with Article 6(1) of Regulation No 659/1999, in the decision of 28 November 2000 to initiate the formal investigation procedure, the Spanish authorities were called upon to submit their comments, which they did on 5 February 2001. Then, by letter of 17 September 2001, they responded to the observations lodged by third parties and presented comments on the argument based on legitimate expectations, in a section headed 'Additional comments: legitimate expectations preclude a decision to recover aid'.

236 In the contested decisions, the Commission considered that those additional comments, which supplemented those submitted by letters of 5 February 2001, did not have to be taken into consideration, since they were received by the Commission outside the period of one month laid down by Article 6(1) of Regulation No 659/1999.

237 The applicants consider that, in so doing, the Commission infringed the rights of defence of the Member State concerned.

238 It must first be recalled that breach of the rights of the defence is an irregularity which by its

nature is subjective (see Joined Cases T?67/00, T?68/00, T?71/00 and T?78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II?2501, paragraph 425, and case-law there cited), and which must therefore be raised by the Member State concerned itself (see, to that effect, Case T?198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II?2717, paragraph 203).

239 Accordingly, the applicants in the present case are not entitled to plead a breach of the rights of defence of the Member State concerned, in this case the Kingdom of Spain.

240 Secondly, even if the applicants were entitled to make such a complaint, the Court cannot accept it.

241 It is settled case-law that the principle of observance of the rights of the defence requires that the Member State concerned be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties under Article 88(2) EC and on which the Commission proposes to base its decision and that, in so far as the Member State has not been afforded the opportunity to comment on such observations, the Commission may not incorporate them in its decision against that State. However, if such an infringement of the right to be heard is to result in an annulment, it must be established that, had it not been for such an irregularity, the outcome of the procedure might have been different (Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraphs 12 and 13, and Case C?301/87 *France* v *Commission* [1990] ECR I?307, paragraphs 29 to 31).

242 In the present case, the specific complaint of the applicants is that the Commission did not take into account the comments of the Kingdom of Spain within its letter of 17 September 2001 which were a response to the request by an interested third party, namely the Unión General de Trabajadores de La Rioja, that the aid wrongly granted should be recovered.

243 It is however clear that the contested decisions were not based on the abovementioned request.

244 The order for recovery of aid within Article 3 of each of the contested decisions is the consequence which, logically, follows necessarily and solely from the fact that the Commission has first established that the aid at issue is illegal and incompatible with the common market.

245 Further, it must be held that the applicants confine themselves to identifying a procedural irregularity but do not even claim, far less establish, that, had it not been for that irregularity, the outcome of the procedure might have been different.

246 It follows from the foregoing that the complaint of infringement of the rights of defence of the Member State concerned must be rejected.

(b) The complaint alleging infringement of the principles of legal certainty and good administration, the principle of the protection of legitimate expectations and the principle of equal treatment

Arguments of the parties

247 The applicants and the parties intervening in their support consider that the Commission created the justified expectation, on their part and on the part of the recipients, that the tax measures at issue were ‘lawful under Community law’ and that there would be no request for repayment.

248 The applicants state that, even if the existence of non-notified aid is established, its recipients can rely on legitimate expectations in exceptional circumstances. Confebask considers moreover that it ought to be more readily accepted that traders may have legitimate expectations

that general rules establishing tax concessions are ‘lawful’ than when the aid is the result of an individual measure.

249 In that regard, first, they claim that the Commission’s letter of 25 May 1994 and its subsequent standpoint convinced them that the schemes in question were compatible with Community law.

250 The Commission gave notice, in that letter, that it might initiate the procedure under Article 88(2) EC if it did not receive a satisfactory reply to its request for information. However, the applicants state that the Commission did not initiate that procedure upon receipt of the reply from the Basque authorities. Moreover, only the Comunidad autónoma de La Rioja attended the meetings with the ‘Spanish authorities’ mentioned by the Commission in its letter of 18 July 1995. The national authorities and the Basque authorities did not take part. Consequently, by refraining from taking measures demonstrating that it was continuing to analyse the exemption schemes and by initiating the formal investigation procedure only on 28 November 2000, the Commission permitted the belief in the meantime that the reply from the Basque authorities, sent in September 1994, was satisfactory and that the schemes at issue either did not constitute State aid or were, as the case may be, aid compatible with the common market.

251 The applicants and the Comunidad autónoma del País Vasco state, in particular, that the Commission was under an obligation to rule within a reasonable period of time. The Court of Justice held in Case 223/85 *RSV* v *Commission* [1987] ECR 4617 that a delay of 26 months in making a decision in the context of the formal investigation procedure was not acceptable and made recovery of aid already paid impossible, pursuant to the principle of the protection of legitimate expectations. That case-law has moreover influenced the Commission’s practices and the applicants also claim in that regard that the principle of equal treatment has been infringed. Furthermore, the Commission was also under an obligation to conduct the preliminary examination expeditiously. Strict compliance with that obligation is even more imperative when there are no major difficulties attached to decisions to initiate investigation procedures, since they contain only provisional assessments. Lastly, the fact that aid was not notified does not exempt the Commission from the obligation to commence the formal investigation procedure without delay. The requirement of legal certainty precludes the Commission being able to delay indefinitely the exercise of its powers even in such circumstances.

252 However, in the present case, the decision to initiate the formal investigation procedure was made 79 months after registration of the 1994 complaint by the Commission on 28 April 1994. A preliminary examination of such length is unconscionable. Given the length of that period, recovery of aid is also contrary, in the present case, to the principle of good administration.

253 Moreover, in the present case, it is clear, from the letter of 25 May 1994, that when the 1994 complaint was registered on 28 April 1994 the Commission had all the information it required to make a decision. In addition, the Commission did not ask for any specific information from the Spanish authorities in its letter of 19 January 1996 and the applicants produce a letter on the headed notepaper of the Basque Government, which is unsigned, dated 5 February 1996, which they claim to be the reply to the Commission’s letter of 19 January 1996. That letter states that the measures at issue are general in application and provides the information that the beneficiaries of those measures are any undertakings which may be affected by the Normas Forales. Furthermore, the decision to initiate the formal investigation procedure made no reference to there having been any slowness on the part of the Spanish authorities in communicating information requested up to that point. In addition, the Commission cannot justifiably take refuge behind the need to make a preliminary assessment of other tax systems, since the case-law does not permit mere grounds of administrative convenience to be taken into account. Lastly, the Commission

acknowledged in the contested final decisions that there was no need to analyse the ‘real effect’ of tax systems as part of the examination of a general aid scheme.

254 Secondly, the applicants claim that the Commission did not publish a notice in the Official Journal, notwithstanding the statement in the 1983 communication on illegal aid that the Commission would do so as soon as it became aware of illegal aid measures.

255 Thirdly, the applicants claim that it is clear from the Commission’s decision-making practice that, even in cases of non-notified aid, where the length of preliminary examination has exceeded the time that is reasonable, the Commission has not insisted on recovery of the aid. The applicants refer, inter alia, to a number of specific Commission decisions (Commission Decision 92/329/EEC of 25 July 1990 on aid granted by the Italian Government to a manufacturer of ophthalmic products (Industrie ottiche riunite – IOR) (OJ 1992 L 183, p. 30), and Commission Decision 2002/15/EC of 8 May 2001 concerning State aid implemented by France in favour of the Bretagne Angleterre Irlande company (‘BAI’ or ‘Brittany Ferries’) (OJ 2002 L 12, p. 33)), and to Commission decisions on coordination centres (inter alia, Commission Decision 2003/81/EC of 22 August 2002 on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya (OJ 2003 L 31, p. 26); Commission Decision 2003/512/EC of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres (OJ 2003 L 177, p. 17); Commission Decision 2003/438/EC of 16 October 2002 on the aid scheme C 50/2001 (ex NN 47/2000) – Finance companies – implemented by Luxembourg (OJ 2003 L 153, p. 40); Commission Decision 2004/76/EC of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres (OJ 2004 L 23, p. 1); Commission Decision 2004/77/EC of 24 June 2003 on the aid scheme implemented by Belgium – Tax ruling system for United States foreign sales corporations (OJ 2004 L 23, p. 14)). The applicants also refer to Commission Decision 2001/168/ECSC of 31 October 2000 on Spain’s corporation tax laws (OJ 2001 L 60, p. 57). The applicants therefore claim that in the present case the principle of equal treatment has been infringed.

256 Lastly, according to Confebask, the Commission altered its assessment of the tax systems of Member States by adopting the 1998 notice on tax aid. It is clear in that connection from the first annual report on the implementation of that notice (COM(1998) 595 final) that the Commission’s objective was to ‘clarify the application of the State aid rules to measures relating to direct business taxation’. Confebask also claims that rejection of the plea in law alleging an infringement of the principle of the protection of legitimate expectations in *Demesa and Territorio Histórico de Álava* v *Commission*, paragraph 70 above, does not preclude annulment of the obligation to recover the aid already granted in the present case.

257 The Commission, supported by the Comunidad autónoma de La Rioja, contends that this complaint should be rejected.

Findings of the Court

– The complaint based on infringement of the principles of legal certainty and good administration, due to the length of the preliminary examination

258 The applicants claim that, by not initiating the formal investigation procedure until 28 November 2000, namely 79 months after registration of the 1994 complaint, the length of the Commission’s preliminary examination procedure exceeded what was reasonable and therefore infringed the principles of legal certainty and good administration.

259 The Court observes that, at the material time of the 1994 complaint, and until the adoption of Regulation No 659/1999, the Commission was not bound by any specific time-limits. The

fundamental requirement of legal certainty nevertheless had the effect of preventing the Commission from indefinitely delaying the exercise of its powers (Joined Cases C?74/00 P and C?75/00 *P Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I?7869, paragraph 140, and Joined Cases C?346/03 and C?529/03 *Atzeni and Others* [2006] ECR I?1875, paragraph 61).

260 Since the assessment of the compatibility of State aid with the common market falls within its exclusive competence, the Commission is bound, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of a complaint alleging the existence of aid that is incompatible with the common market. It follows that the Commission cannot prolong indefinitely its preliminary investigation into State measures that have been the subject of a complaint. Whether or not the duration of the investigation of a complaint is reasonable must be determined in relation to the particular circumstances of each case and, especially, its context, the various procedural stages to be followed by the Commission and the complexity of the case (Case T?395/04 *Air One* v *Commission* [2006] ECR II?1343, paragraph 61).

261 In the present case, it is not in dispute that the Commission was made aware of the aid schemes at issue by the 1994 complaint, registered on 28 April 1994. It is also not in dispute that on 28 November 2000 the Commission notified the Spanish authorities of its decision to initiate the formal investigation procedure in relation to the tax exemption schemes at issue.

262 A period of time which can be reckoned to be more than six and a half years therefore elapsed between the time when the Commission became aware of the aid schemes at issue and the time when the Commission initiated the formal investigation procedure in relation to them.

263 However, it must first be observed that the tax measures at issue required the Commission to undertake a thorough examination of the Spanish legislation. In its letter of 18 July 1995 sent to the complainers, the Commission thus made clear that it was continuing its analysis in relation to the Spanish tax system and the systems of fiscal autonomy in force in the Member States, while taking account of, inter alia, ongoing changes in the federal systems of various Member States. It stated that Commission staff members were gathering the necessary data, which involved ‘considerable work in collection and analysis’. While the complexity of the examination to be carried out is not, in itself, something which justifies the length of the preliminary examination in the present case, it is however a factor to be taken into account.

264 Secondly, the responsibility for the length of the procedure lies, in large part, with the Spanish authorities.

265 The letter of 19 January 1996 in which the Commission requested from the Spanish authorities information on the beneficiaries of the measures at issue remained unanswered.

266 In that regard, the Commission was justified in requesting that information. In the present case, the granting of the tax exemptions at issue was, on the one hand, limited in time, since only companies created prior to 31 December 1994 could benefit from them and, on the other hand, subject to the approval of the Consejo de Diputados of the provincial government, after the requisite conditions were established (see paragraph 18 above). Consequently, for the purposes of a decision on the compatibility of the tax exemptions at issue, the question of beneficiaries was likely to assume fundamental importance, particularly with regard to the scope of the measures at issue.

267 However, the only letter before the Court which the Spanish authorities officially sent to the Commission is that of 30 September 1994, which states in essence that the national measures at issue are general in application and disputes their classification as State aid.

268 It must therefore be held that the Commission's question, of 19 January 1996, on the implementation of the schemes at issue and their beneficiaries, was unanswered, even though the Spanish authorities had, by letters of 19 February and 21 March 1996, requested an extension of the time-limit for reply on that subject (see paragraph 29 above).

269 The applicants do produce an unsigned letter on the headed notepaper of the Basque Government, dated 5 February 1996, which they claim to be the reply to the Commission's letter of 19 January 1996. They do not however provide any evidence that that reply was officially sent to the Commission, which maintains that it did not receive it.

270 Furthermore, the fact that, by letters of 19 February and 21 March 1996, the Kingdom of Spain asked the Commission for an extension of the period allowed for a reply to the Commission's letter of 19 January 1996 (see paragraph 29 above) supports the Commission's position, namely that it received no response to its questions. In addition, it is clear that, in any event, the content of the letter of 5 February 1996, which states that the measures at issue are general in application and declares that the beneficiaries of those measures are all the undertakings which might be affected by those Normas Forales, does not provide a clear reply to the questions put by the Commission on beneficiaries.

271 Accordingly, it was not until the Commission received, first, the further complaint of 5 January 2000 on aid granted to a recipient company on the basis of the tax provisions at issue in Álava, and, secondly, the comments of the Spanish authorities on that complaint, that the Commission considered that it had sufficient information to initiate, on 28 November 2000, the formal investigation procedure in relation to the tax measures at issue.

272 Lastly, it is not apparent from the material in the documents before the Court that the Commission was formally required to define its position on the 1994 complaint, in order to clarify the situation, and also to ensure the possibility, in the light of what was at stake, of seeking a declaration of the Commission's failure to act, if that were necessary.

273 Consequently, the length of the preliminary procedure is, in the light of the foregoing, largely attributable to the national authorities which, having failed to notify the schemes at issue, then declined to provide the appropriate information to the Commission (see, to that effect, Case C?303/88 *Italy* v *Commission* [1991] ECR I?1433, paragraph 43).

274 Thirdly, as regards the background to the tax measures, it must be observed that, during the period from 1996 to 1999, the Commission examined other tax systems established by the applicants in that period (tax credits established in 1994, 1996 and 1997 and reductions in the basis of tax assessment established in 1996, which were particularly at issue in *Demesa* and *Diputación Foral de Álavaand Others* v *Commission*, paragraphs 68 above). Consequently, when the Commission received complaints in June 1996 and October 1997 about the application, in the Territorio Histórico of Álava, to the undertakings Demesa and Ramondín of a tax credit of 45% and the reduction in the basis of assessment to corporation tax, the Commission initiated several procedures, which led to Decisions 1999/718 and 2000/795 (see paragraph 68 above) and to the Commission decisions of 17 August and 29 September 1999 to initiate formal investigation procedures in relation to the schemes in question, namely the tax credit of 45% and the reduction in the basis of assessment to corporation tax, which decisions were themselves the subject of actions before the Court of First Instance (*Diputación Foral de Guipúzcoa and Others* v *Commission*

and *Diputación Foral de Álavaand Others* v *Commission*, paragraph 174 above). While it is true that those procedures do not relate to the 1993 tax exemptions which are at issue in the present case, they did nevertheless also deal with tax advantages, adopted by the same authorities and likely to raise the same type of legal issues, on which the Commission might, within the scope of its discretion in relation to State aid, have taken the view that they required to be dealt with more quickly, taking into account, inter alia, the failure to reply to its questions concerning the beneficiaries of the tax exemptions at issue in the present case.

275 It follows from the foregoing that, in the particular circumstances of the present case, the length of the preliminary procedure was not in breach of the general principle of legal certainty.

276 Lastly, as regards the arguments relating to the Commission's infringement of the principle of good administration, it is clear that those arguments are, in essence, closely bound up with the argument relating to the infringement of principle of legal certainty because of the length of the preliminary examination and must therefore, in the light of the foregoing, be rejected.

277 In conclusion, the complaint based on infringement of the principles of legal certainty and good administration must be rejected.

– The complaint based on infringement of the principle of the protection of legitimate expectations

278 It must first be recalled that a legitimate expectation that aid is lawful cannot be invoked unless that aid has been granted in compliance with the procedure laid down in Article 88 EC (Case C?5/89 *Commission* v *Germany* [1990] ECR I?3437 paragraph 14, and *Regione autónoma della Sardegna* v *Commission*, paragraph 157 above, paragraph 64).

279 In fact, a regional authority and a diligent businessman should normally be able to determine whether that procedure has been followed (*Commission* v *Germany*, paragraph 278 above, paragraph 14; Case C?169/95 *Spain* v *Commission* [1997] ECR I?135, paragraph 51; and *Demesa* , paragraph 68 above, paragraph 236).

280 Furthermore, since Article 88 EC makes no distinction between aid schemes and individual aid, those principles are equally applicable to aid schemes, contrary to what is claimed by Confebask (paragraph 248 above).

281 In the present case, it is not in dispute that the tax exemptions, which were the subject of the contested final decisions, were introduced without prior notification, contrary to Article 88(3) EC.

282 However, according to the case-law, a recipient of aid which is granted unlawfully, because it was not notified, as is the case of the aid schemes at issue in the present case, is not precluded from relying on exceptional circumstances on the basis of which it legitimately assumed the aid to be lawful, in order to oppose repayment of the aid (Case C?183/91 *Commission* v *Greece* [1993] ECR I?3131, paragraph 18; see, to that effect, *Demesa and Territorio Histórico de Álava* v *Commission*, paragraph 70 above, paragraph 51, Joined Cases T?126/96 and T?127/96 *BFM and EFIM* v *Commission* [1998] ECR II?3437, paragraphs 69 and 70, Case T?55/99 *CETM* v *Commission* [2000] ECR II?3207, paragraph 122, and *Regione autónoma Friuli-Venezia Giulia* v *Commission*, paragraph 173 above, paragraph 107).

283 If the applicants, which are not traders but the territorial entities which introduced the aid schemes at issue, are to be entitled to rely on a legitimate expectation (*Regione autónoma della Sardegna* v *Commission*, paragraph 157 above, paragraph 66), the Court must examine, in the light of the above principles, whether their arguments disclose exceptional circumstances, which

might have justified a legitimate expectation that the aid schemes at issue were lawful.

284 The applicants and the parties intervening in their support claim that the Commission's conduct constitutes an exceptional circumstance capable of justifying their legitimate expectation that the aid schemes at issue were lawful, on the grounds of, first, the unconscionable length of the preliminary procedure and the Commission's inaction during that period; secondly, the failure to publish a notice to potential aid recipients, provided for in the 1983 communication on illegal aid; thirdly, the Commission's decision-making practice; and, fourthly, the change in the Commission's State aid policy.

285 First, the applicants claim that the unconscionable length of the preliminary examination procedure gave rise to their legitimate expectations that the aid was lawful, and consequently recovery of the aid is precluded. They rely in particular on *RSV* v *Commission*, paragraph 251 above, paragraph 17, according to which, if the Commission is slow to decide that aid is illegal and that it must be abolished and recovered by a Member State, the recipients of that aid may, in certain circumstances, be justified in holding legitimate expectations which prevent the Commission instructing that Member State to demand repayment of that aid.

286 The Court holds however that the circumstances of the case *RSV* v *Commission*, paragraph 251 above, were exceptional and are in no way similar to those of the present case. The aid in question had been formally notified to the Commission, admittedly after it had been paid to the recipient. It concerned the supplementary costs of one transaction, which had already been the subject of aid authorised by the Commission. It concerned a sector which since 1977 had been in receipt of aid granted by the national authorities and authorised by the Commission. Consideration of the compatibility of the aid with the common market had not called for deep research. The Court of Justice concluded that in those circumstances the applicant had reasonable grounds for believing that the aid would encounter no objection from the Commission (*RSV* v *Commission*, paragraph 251 above, paragraphs 14 to 16).

287 Such factors are fundamentally different from the particular circumstances of the present case. The tax exemptions at issue were not notified and are not the continuation of an earlier aid scheme authorised by the Commission. They do not concern a particular sector and, a fortiori, do not concern a particular sector which is in receipt of authorised aid. Furthermore, examination of the complaint in relation to the schemes at issue needed, as stated by the Commission in its letter of 18 July 1995 to the complainers, 'considerable work in collection and analysis' (see paragraph 26 above).

288 The applicants in the present case cannot therefore validly rely on *RSV* v *Commission*, paragraph 251 above.

289 The circumstances of the present case are not comparable either to those at issue in the judgment of 12 September 2007 in Case T?348/03 *Koninklijke Friesland Foods* v *Commission* (not published in the ECR). The Commission had accepted, in the contested decision, that the Dutch scheme at issue had certain similarities to the Belgian scheme, on which the Commission had defined its position more than once, thereby creating legitimate expectations that the Dutch scheme was not aid (*Koninklijke Friesland Foods* v *Commission*, paragraph 129). That is not the situation in the present case, since the Commission at no time defined its position on the schemes at issue, or on any other comparable scheme, in such a way that there could have arisen legitimate expectations that the schemes were lawful.

290 Consequently, in the light of the circumstances of the present case, the length of the preliminary procedure cannot be regarded as exceptional nor, consequently, as capable of justifying legitimate expectations that the schemes at issue were lawful.

291 The applicants rely also on the standpoint of the Commission, and in particular its inaction during the preliminary procedure, which, according to them, created justified hopes that the schemes at issue were lawful (see paragraphs 249 and 250 above).

292 The Court observes that, by letter of 25 May 1994, the Commission called upon the Kingdom of Spain to provide its comments on the 1994 complaint within a period of 15 days. The Commission added, in that letter, that, in the event of there being no reply or an unsatisfactory reply, when the period had elapsed, the Commission would be bound to initiate the formal investigation procedure.

293 After receipt of the reply from the Spanish authorities of 30 September 1994, it is clear from the documents before the Court (see paragraph 25 et seq. above) that meetings were held in relation to the schemes at issue, which is evidence that examination of the complaint was continuing.

294 Again, by letter of 18 July 1995, the Commission informed the complainers that it was continuing the analysis of their complaint, that it would decide on the action to be taken when certain matters were clarified and that it would notify them of its decision.

295 Lastly, by letter of 19 January 1996, the Commission informed the Kingdom of Spain that it was examining the effect of the tax measures at issue on competition and requested in that regard information on the beneficiaries of those measures.

296 The Court holds that the Commission was therefore not inactive following the 1994 complaint. On the contrary, the Commission carried out its enquiries by exchanges of correspondence up to the point of dispatching its letter of 19 January 1996 to the Kingdom of Spain, which letter was unanswered. The correspondence and meetings with the Commission during the preliminary procedure are evidence therefore of a dialogue, in the course of which the Commission attempted inter alia to obtain information from the Spanish authorities, in order to form a preliminary opinion.

297 The letter of 19 January 1996 shows, moreover, that the Commission considered, at that date, that it did not have the information it required to take the decision to initiate the formal investigation procedure.

298 However, in spite of the request for information of 19 January 1996, on the beneficiaries of the schemes at issue, the Commission did not obtain any answer from the Spanish authorities, notwithstanding the latter’s request for an extension of the time-limit in order to do so (see paragraph 29 above).

299 It is clear, furthermore, from reading the exchange of letters that the Commission stated more than once, both to the complainers and to the Kingdom of Spain, that examination of the complaint was still under way, and that the Commission took no position on the lawfulness of those schemes.

300 Furthermore, even if it can be considered that the Commission remained silent between the sending of its letter of 19 January 1996 to the Kingdom of Spain and the receipt of the fresh complaint of 5 January 2000, such silence, in the light of the factors in the present case, cannot

constitute an exceptional circumstance capable of justifying legitimate expectations that the tax systems at issue were lawful.

301 In the absence of any reply from the Spanish authorities to the request for information on the beneficiaries of the schemes, the Commission could consider, as it stated in its written pleadings, that it did not have the information to enable it to assess the actual scope of the schemes at issue. The Commission could, in particular, take the view that there was no evidence that the schemes at issue, which did not remain in force after the end of 1994, had benefited any undertaking.

302 Moreover, and in any event, such silence cannot be construed as an implied approval on the part of that institution (see, to that effect, *Regione autónoma della Sardegna* v *Commission*, paragraph 157 above, paragraph 69).

303 Accordingly, the argument based on the claim that the Commission was inactive during the preliminary procedure cannot be accepted, since the standpoint of the Commission cannot, in the present case, be regarded as an exceptional circumstance capable of justifying legitimate expectations that the tax systems at issue were lawful.

304 Secondly, in support of their argument based on legitimate expectations caused by the Commission's conduct, the applicants rely on the failure to publish in the Official Journal a specific notice, warning potential recipients of aid of the risks involved. They claim that, in its 1983 communication on illegal aid, the Commission states that, as soon as it becomes aware of the adoption of illegal aid measures by a Member State, it will publish in the Official Journal a specific notice warning potential aid recipients of the risks involved, which did not happen in the present case.

305 The Court recalls that the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty (see Case C?310/99 *Italy* v *Commission* [2002] ECR I?2289, paragraph 52, and case-law there cited, and *Spain* v *Commission*, paragraph 214 above, paragraph 53).

306 It must be observed that, in its 1983 communication on illegal aid, the Commission makes a point of restating the obligation to notify aid, in accordance with Article 88(3) EC. Further, the Commission informs potential recipients of State aid of the risk attaching to aid which is granted to them illegally, in that any recipient of aid granted illegally, that is when the Commission has not reached a final decision on its compatibility with the common market, may have to refund the aid (see paragraph 11 above).

307 However regrettable the failure to publish in the Official Journal the notice provided for in the 1983 communication on illegal aid, it remains the case that the information contained in that communication, as set out in paragraph 306 above, is wholly unambiguous. Moreover, to adopt the construction proposed by the applicants is to give the 1983 communication on illegal aid a significance which is contrary to Article 88(3) EC. The risk attaching to illegally granted aid is a consequence of the practical effect of the obligation to notify laid down in Article 88(3) EC and does not depend on whether or not the notice provided for in the 1983 communication on illegal aid is published in the Official Journal. In particular, if the system of monitoring State aid established by the Treaty is to be maintained, the recovery of illegally granted aid cannot be rendered impossible merely because there was no publication of such a notice by the Commission.

308 Consequently, the failure to publish the notice provided for in the 1983 communication on illegal aid does not constitute an exceptional circumstance capable of justifying any expectation

whatever that the illegally granted aid was lawful.

309 Thirdly, the applicants claim that the Commission's decision-making practice at the material time is a circumstance which could give rise to legitimate expectations.

310 It must however be recalled that, whilst the principle of the protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained (Case C?350/88 *Delacre and Others* v *Commission* [1990] ECR I?395, paragraph 33). That principle clearly applies in the field of competition policy, which is characterised by a wide discretion on the part of the Commission (see, in relation to the determination of the amount of fines, Joined Cases C?189/02 P, C?202/02 P, C?205/02 P to C?208/02 P and C?213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I?5425, paragraph 172).

311 However, that is particularly the situation when the question is whether the conditions under which no recovery of aid granted illegally will be sought, depending on whether there are exceptional circumstances, are satisfied. Accordingly, decisions concerning other cases in the same area merely provide guidance and cannot justify any legitimate expectation, since the circumstances are specific to each case.

312 That being the case, the Commission's decisions on the subject, relied on by the applicants, cannot constitute an exceptional circumstance capable of justifying such a legitimate expectation.

313 Fourthly and lastly, Confebask claims that the Commission altered its policy in relation to State aid in 1998 and relies on a legitimate expectation that the measures at issue were lawful when they were adopted.

314 However, the Court observes in that regard that the fact that the Commission adopted the 1998 notice on tax aid does not imply any alteration of its criteria for the assessment of the tax systems of the Member States.

315 As has been stated above (see paragraph 180), the 1998 notice on tax aid, which to a great extent rests on the case-law of the Court of Justice and the Court of First Instance, provides clarification on the application of Articles 87 EC and 88 EC to tax measures. In that notice, the Commission does not however announce any change in the assessment of tax measures with regard to Articles 87 EC and 88 EC (*Diputación Foral de Guipúzcoa and Others* v *Commission*, paragraph 174 above, paragraph 79, and *Diputación Foral de Álava and Others* v *Commission*, paragraph 174 above, paragraph 83).

316 Consequently, the argument that there was a change in the Commission's policy cannot be regarded as an exceptional circumstance capable of justifying a legitimate expectation that the illegally granted aid was lawful.

317 It follows from all the foregoing that the complaint that the Commission's conduct constituted an exceptional circumstance capable of justifying a legitimate expectation that the illegally granted aid was lawful must be rejected as unfounded.

– The complaint based on infringement of the principle of equal treatment

318 The applicants claim, as part of their plea in law based on the legitimate expectations which would have been created by the length of the preliminary examination, that the principle of equal treatment was infringed, to the extent that, in some of its decisions, the Commission took the view

that due to the length of the procedure an order for recovery of the aid concerned was not justified.

319 It is clear from settled case-law that compliance with that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C?248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I?10211, paragraph 72, and case-law there cited).

320 However, in the present case, the applicants do not establish that the situation pertaining to the aid schemes at issue is comparable to the situations pertaining in the decisions to which they make reference, where the Commission considered that recovery of aid should not be ordered.

321 It must be held that, in the decisions referred to by the applicants concerning, inter alia, aid schemes, the non-recovery of aid was justified by circumstances which could give rise to a legitimate expectation that the schemes under examination were lawful, and the Commission took that into account. The Commission particularly took into consideration the fact that declarations of the absence of aid had been expressly made in other decisions concerning measures analogous to the schemes examined in the decisions in question, and that justified there being no recovery of aid (see the Commission decisions on coordination centres, paragraph 255 above). The Commission also took into account, in some cases, the fact that the length of the procedure in question was in no way attributable to the Member State concerned (see Decision 2001/168, paragraph 255 above), or the fact that the only [approved] beneficiary of the scheme in question had not been granted the advantage at issue and that therefore there was no need to recover aid (see Decision 2003/81, paragraph 255 above).

322 That is not the situation in the contested final decisions, where the Commission stated that, on the contrary, the conditions governing the right to claim the protection of legitimate expectations were not satisfied (see paragraphs 55 and 56 above), [a position] which, in the light of the circumstances of the present case, has been upheld by the Court (see paragraphs 284 to 317 above).

323 It follows that the circumstances at issue in the present case are in no way comparable to those at issue in the decisions referred to by the applicants, where the Commission did not order recovery of aid.

324 Consequently, the applicants have not demonstrated any infringement of the principle of equal treatment.

325 It must moreover be observed that the contested final decisions make clear that they are without prejudice to the possibility that individual aid, granted under tax exemption schemes, may be regarded, in full or in part, as compatible with the common market on its own merits, either in a subsequent Commission decision or under exempting regulations (see paragraph 103 of Decision 2003/28, paragraph 101 of Decision 2003/86, paragraph 99 of Decision 2003/192).

326 The complaint based on infringement of the principle of equal treatment must therefore be rejected as unfounded.

327 In conclusion, the fifth plea in law, alleging procedural irregularity and infringement of the principles of legal certainty and good administration, the principle of the protection of legitimate expectations and the principle of equal treatment, must be rejected in its entirety.

5. The sixth plea in law, alleging infringement of Article 6(1) of Regulation No 659/1999

(a) Arguments of the parties

328 The applicants claim, after the Commission's letter of 18 July 1995 which was annexed by the Commission to its defence became known to them, that the content of that letter should have been mentioned in the decision to initiate the formal investigation procedure in order to enable them to submit their comments in good time. The applicants refer particularly to the meetings mentioned in that letter which were attended only by the Comunidad autónoma de La Rioja. The applicants claim that, if they had been informed of the content of that letter, they could have questioned the national authorities about those meetings and particularly about their content. They consider that they were not able to submit their comments in good time and that their rights as interested parties were accordingly infringed.

329 The Commission contends that the sixth plea in law is inadmissible and in any event unfounded.

(b) Findings of the Court

330 It must be observed that under Article 48(2) of the Rules of Procedure, 'no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure'.

331 In the present case, this plea in law was put forward by the applicants following the production, by the Commission, in its defence, of the letter of 18 July 1995. It must therefore be regarded as based on facts which were discovered during the procedure and, accordingly, must be regarded as admissible (Joined Cases C?238/99 P, C?244/99 P, C?245/99 P, C?247/99 P, C?250/99 P to C?252/99 P and C?254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I?8375, paragraph 369 et seq.).

332 As regards the substance of that plea in law, it must be recalled that interested parties other than the Member State responsible for granting aid cannot themselves claim a right to debate the issues with the Commission in the same way as may that Member State (see *Technische Glaswerke Ilmenau* v *Commission*, paragraph 238 above, paragraph 192, and case-law there cited; see, to that effect, Case T?176/01 *Ferriere Nord* v *Commission* [2004] ECR II?3931, paragraph 74).

333 In the present case, not only did the applicants not intervene as concerned third parties during the administrative procedure, they do not at all establish how the absence of any reference in the decision to initiate the formal investigation procedure to the Commission's letter of 18 July 1995, which informed the complainers that the analysis of the Spanish tax system was continuing, infringed their right under Article 88(2) EC to submit comments during the investigation. In that regard, the lack of communication between the central authorities of a Member State and regional bodies, as reported by the applicants, is an internal problem of the Member State for which the Commission cannot be held responsible.

334 In the light of the above, the sixth plea in law, alleging infringement of Article 6(1) of Regulation No 659/1999, must be rejected as unfounded.

335 Consequently, the actions in Cases T?86/02 to T?88/02 for annulment of the contested final decisions must be rejected in their entirety.

II – *The actions in Cases T?30/01 to T?32/01 seeking annulment of the decision to initiate the formal investigation procedure*

336 In Cases T?30/01 to T?32/01, the applicants seek annulment of the decision of 28 November 2000 to initiate the formal investigation procedure, on the ground that the schemes at issue in the present case were existing aid and that, by analysing them in accordance with the procedure laid down for new aid, the Commission infringed Article 88 EC, Articles 17 to 19 of Regulation No 659/1999, and the principles of legal certainty and the protection of legitimate expectations.

337 The applicants also claim, contrary to the Commission's contention, that their actions are admissible, since the decision to initiate the formal investigation procedure implies a choice of which procedural rules to apply and therefore has definite legal effects. As regards the choice of investigation procedure, the final decision does no more than confirm the decision to initiate the formal investigation procedure, which therefore is open to challenge.

338 The Commission, for its part, submitted, by separate documents of 3 May 2001 in each of Cases T?30/01 to T?32/01, formal pleas of inadmissibility. Within its defences of 5 July 2002, the Commission contends, first, that the actions in Cases T?30/01 to T?32/01 have become devoid of purpose. The Commission requests, in the alternative, that the actions be declared inadmissible and, in any event, unfounded.

339 The Court considers it appropriate to rule first on whether the actions have become devoid of purpose.

A – *Arguments of the parties*

340 Within its defence, the Commission contends that the actions in Cases T?30/01 to T?32/01 have become devoid of purpose.

341 The applicants consider, for their part, that the plea in law in support of annulment in the present cases, on the one hand, and the pleas in law in Joined Cases T?86/02 to T?88/02 relating to the actions against the contested final decisions, on the other hand, are not identical, even though the second plea in law put forward in Cases T?86/02 to T?88/02 duplicates the plea in law in support of annulment relied on in Cases T?30/01 to T?32/01, as is allowed by the case-law. In that regard, they maintain that, as regards the choice of procedure, the final decision can do no more than confirm the earlier decision to initiate the formal investigation procedure and is not capable of curing an irregularity in the earlier decision.

342 The applicants also claim that the judgment in Case T?168/99 *Diputación Foral de Álava* v *Commission* [2002] ECR II?1371, relied on by the Commission, is not transposable to the present case, since, in that case, the arguments in the action solely concerned the classification of the measure at issue as aid and not an irregularity in the investigation procedure.

343 Lastly, the applicants consider that the fact that the Commission's adoption of the decisions on the exemption schemes post-dates the lodging of the actions against the decision to initiate the formal investigation procedure is a new factor which enables them to ask the Court to consider the form of order sought in their action for annulment as extending to the application for annulment of the decisions on the exemption schemes.

B – *Findings of the Court*

344 Under Article 113 of the Rules of Procedure, the Court of First Instance may at any time, of

its own motion, after hearing the parties, declare that the action has become devoid of purpose and that there is no longer any need to adjudicate on it.

345 An action for annulment becomes devoid of purpose if, irrespective of whether or not it succeeds, in the sense of securing the annulment of the contested act, the applicant's legal position will remain the same, whether the contested measure is annulled or not. In such a case, it is appropriate to rule that there is no need to give a decision (Joined Cases T?204/97 and T?270/97 *EPAC* v *Commissio*n [2000] ECR II?2267, paragraph 154).

346 It is necessary to examine, in the present case, whether the decision of 28 November 2000 initiating the formal investigation procedure continued to affect the legal position of the applicants after the Commission's adoption of the final decisions, which closed the formal investigation procedure and against which the applicants brought the actions in Cases T?86/02 to T?88/02 which were examined above and rejected (see paragraph 335 above).

347 It must be observed that, in the decision of 28 November 2000 to initiate the formal investigation procedure, the provisional conclusion is that there is illegal State aid. By the three decisions of 20 December 2001, the Commission categorised the three tax systems at issue as aid which was unlawful and incompatible with the common market, and ordered their abolition and the recovery of aid paid, with interest running from the date on which the aid at issue became available to the recipients.

348 In the circumstances of the present case, it must be held that any annulment of the decision to initiate the formal investigation procedure cannot alter the applicants' legal position.

349 It must be pointed out in that regard that the decision to initiate the formal investigation procedure does not in itself produce any irreversible effects as regards the legality of the State measure it concerns. It is only the final decision which, since it definitively defines the measure in question as aid, has the effect of establishing that it is unlawful (order in Case T?90/99 *Salzgitter* v *Commission* [2002] ECR II?4535, paragraph 14).

350 It is true that the decision to initiate the formal investigation procedure may have independent legal effects which may be the subject of an action for annulment and the case-law has accepted the possibility that an action may be brought against that decision when it entails such legal effects, independent of those of the final decision. Accordingly, the suspension of the measure concerned, which results from the provisional classification of that measure as new aid is, independent of the final decision, limited in time until the conclusion of the formal procedure (Case C?400/99 *Italy* v *Commission* [2001] ECR I?7303, paragraphs 56 to 62 and 69; *Government of Gibraltar* v *Commission*, paragraph 153 above, paragraphs 80 to 86; and *Regione Siciliana* v *Commission*, paragraph 226 above, paragraph 46).

351 In the present case, however, it is not in dispute that the suspension of the tax measures concerned, resulting, under Article 88(3) EC, from the provisional classification of that measure as new aid, was not implemented.

352 Moreover, it is clear that the effects of the contested final decisions, since their entry into force, have, by reason of, first, the nature of the measures which they prescribe and, secondly, the fact that they do not deal with existing aid schemes, superseded the effects of the provisional decision to initiate the formal investigation procedure. The fact that the schemes at issue are not existing aid entails recovery of aid paid out and the consequences of abolition and recovery of the aid supersede those of mere suspension (see, to that effect, *EPAC* v *Commission*, paragraph 345 above, paragraph 156), since they entail the paying back of advantages which were *ab initio* unlawfully received.

353 Furthermore, it must be observed that the applicants claim, in support of their actions in Cases T?30/01 to T?32/01 against the decision to initiate the formal investigation procedure, that the measures at issue were existing aid and that the Commission, by initiating the formal investigation procedure and categorising them as new aid, infringed the procedural rules applicable to existing aid. It is clear that those arguments revert to those set out in support of the actions for annulment in Cases T?86/02 to T?88/02 against the final decisions (see the second and third plea in laws of the actions in Cases T?86/02 to T?88/02, examined above, paragraph 108 et seq.). The Court has however ruled that the Commission correctly classified the aid schemes at issue as new aid (see paragraph 204 above) and has dismissed the actions in Cases T?86/02 to T?88/02 against the final decisions (see paragraph 335 above).

354 Consequently, having regard to the nature of the arguments advanced by the applicants in their actions against the decision to initiate the formal investigation procedure, those actions have become devoid of purpose.

355 In those circumstances, since the Court of First Instance has upheld the lawfulness of the Commission’s decisions, now final, requiring the abolition of the tax systems at issue and recovery of the aid, the applicants no longer have any interest in obtaining the annulment of the decision to initiate the formal investigation procedure.

356 As regards, moreover, *Italy* v *Commission*, paragraph 350 above, and the judgment in Case T?246/99 *Tirrenia di Navigazione and Others* v *Commission* [2007] ECR II?065, referred to by the parties, it is clear that the circumstances were not the same as in the present case. The decision to initiate the formal investigation procedure, categorising the measures at issue as new aid, led to the Commission’s adoption of final decisions categorising the measures at issue as new aid, but compatible with the common market subject to compliance with certain conditions (*Tirrenia di Navigazione and Others* v *Commission*, paragraphs 7 and 12).

357 In the present case, on the other hand, the Commission adopted three final decisions categorising the three schemes at issue as new aid incompatible with the common market.

358 Since that assessment by the Commission, part of which was the classification of the schemes as new aid, has been upheld by the Court (see paragraphs 204, 207 and 335 above), it follows that the aid measures at issue must be abolished and the aid recovered *ab initio* and that there is no longer any need to rule on whether it was or was not necessary that those same measures, the suspension of which the Commission requested in the decision to initiate the formal investigation procedure, be suspended pending the decision or decisions bringing to an end the procedure initiated by the contested decision (see, to that effect, *Diputación Foral de Álava* v *Commission*, paragraph 342 above, paragraphs 23 to 27).

359 The applicants claim that *Diputación Foral de Álava* v *Commission*, paragraph 342 above, is not transposable to the present case, on the ground that the arguments in that case solely related to the classification of the disputed measure as aid, while, in the present case, their argument

relies on the fact that there was existing aid and that the investigation procedure was invalid.

360 The Court holds however that that argument cannot rebut the conclusion that the actions in Cases T?30/01 to T?32/01 have become devoid of purpose.

361 It must be observed that *Diputación Foral de Álava* v *Commission*, paragraph 342 above, concerned an action against the Commission's decision to initiate the procedure laid down in Article 88(2) EC, in relation to a tax credit and a reduction in the basis of tax assessment from which Ramondín and Ramondín Cápsulas respectively benefited. However, the Court held that the action against the decision to initiate the formal investigation procedure had become devoid of purpose, since the action against the Commission's final decision, using an identical line of argument, had itself been dismissed by the Court.

362 The Court of First Instance holds that the situation is therefore transposable to the present case, notwithstanding the argument put forward by the applicants. As has been stated above, the arguments on the classification of the schemes as existing aid and the alleged procedural irregularity have been examined by the Court and rejected. Consequently, having regard to the matters at issue, the outcome in *Diputación Foral de Álava* v *Commission*, paragraph 342 above, is transposable to the present case.

363 It follows that, without it being necessary to rule on either the Commission's plea of inadmissibility or on the application presented by the applicants in their replies for annulment of the contested final decisions, it must be held that the actions in Cases T?30/01 to T?32/01 have become devoid of purpose, so that there is no need to adjudicate on them.

The applications for measures of organisation of procedure

364 First, the applicants request that the Court call upon the Commission to produce certain documents.

365 The Court finds, in that regard, that the Commission produced, as an annex to its defence, a copy of the 1994 complaint and the letter of 18 July 1995 which it had sent to the complainers.

366 To the extent that the Court has been able to examine all the applicants' pleas in law on the basis of the material contained in the Court documents and the explanations given at the hearing, there is no need to request from the Commission production of additional documents (see, to that effect, Case C?260/05 P *Sniace* v *Commission* [2007] ECR I?10005, paragraphs 77 to 79, confirming Case T?88/01 *Sniace* v *Commission* [2005] ECR II?1165, paragraph 81).

367 Secondly, the applicants request that the Court hear and rule on the actions brought in Cases T?30/01 to T?32/01 and T?86/02 to T?88/02 before ruling on the actions brought by them in Cases T?227/01 to T?229/01 and T?230/01 to T?232/01, which concern decisions of the Commission which hold that tax systems establishing, first, a tax credit of 45% of sums invested and, secondly, a reduction in the tax base for corporation tax are aid schemes incompatible with the common market

368 The Court states that consideration of the cases referred to by the applicants has proceeded together. The hearings therefore were held, in all those cases, on 15, 16 and 17 January 2008 and the judgments are to be delivered on the same day, with the result that this request for a measure of organisation of procedure has become devoid of purpose.

369 The applicants' requests for measures of organisation of procedure must therefore be rejected.

Costs

I – *Cases T?30/01 to T?32/01*

370 Under Article 87(6) of the Rules of Procedure of the Court of First Instance, where a case does not proceed to judgment, the costs are to be in the discretion of the Court. Since the applicants have been unsuccessful in the actions which they brought against the final decisions in Cases T?86/02 to T?88/02, adopted following the decision to initiate the formal investigation procedure contested in Cases T?30/01 to T?32/02, the applicants must be ordered to pay the costs in Cases T?30/01 to T?32/02 (see, to that effect, *Diputación Foral de Álava* v *Commission*, paragraph 342 above, paragraph 28).

II – *Cases T?86/02 to T?88/02*

371 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 in their forms of order and pleas in law in the actions in Cases T?86/02 to T?88/02, the applicants must be ordered to bear their own costs and also to pay the costs of the Commission and of the Comunidad autónoma de La Rioja, as applied for by those parties in their pleadings.

372 The Comunidad autónoma del País Vasco and Confebask shall bear their own costs.

On those grounds,

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

hereby:

1. **Joins Cases T?30/01 to T?32/01 and T?86/02 to T?88/02 for the purposes of judgment;**

2. **In Cases T?30/01 to T?32/01:**

– **declares there is no longer any need to adjudicate on those actions**,

– **orders the Territorio Histórico de Álava – Diputación Foral de Álava, the Territorio Histórico de Guipúzcoa – Diputación Foral de Guipúzcoa and the Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya to bear their own costs and to pay the costs of the Commission**;

3. **In Cases T?86/02 to T?88/02:**

– **dismisses the actions**,

– **orders the Territorio Histórico de Álava – Diputación Foral de Álava, the Territorio Histórico de Guipúzcoa – Diputación Foral de Guipúzcoa and the Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya to bear their own costs and to pay the costs of the Commission and the Comunidad autónoma de La Rioja**,

– **orders the Comunidad autónoma del País Vasco – Gobierno Vasco and the Confederación Empresarial Vasca (Confebask) each to bear their own costs**.

Vilaras

Martins Ribeiro

Dehousse

Šváby

Jürimäe

Delivered in open court in Luxembourg on 9 September 2009.

[Signatures]

Table of contents

2. Findings of the Court

B – The merits of the actions in Cases T?86/02 to T?88/02

1. The second plea in law, claiming that the aid schemes at issue represent existing aid

(a) The first part, based on infringement of Article 1(b)(v) of Regulation No 659/1999

Arguments of the parties

Findings of the Court

(b) The second part, based on infringement of Article 1(b)(ii) of Regulation No 659/1999

Arguments of the parties

Findings of the Court

2. The third plea in law, alleging infringement of procedural rules applicable to existing aid

3. The fourth plea in law, alleging infringement of Article 87(3)(c) EC

(a) Arguments of the parties

(b) Findings of the Court

4. The fifth plea in law, alleging procedural irregularity and infringement of the principles of legal certainty, good administration, the protection of legitimate expectations and equal treatment

(a) The complaint alleging procedural irregularity

Arguments of the parties

Findings of the Court

(b) The complaint alleging infringement of the principles of legal certainty and good administration, the principle of the protection of legitimate expectations and the principle of equal treatment

Arguments of the parties

Findings of the Court

– The complaint based on infringement of the principles of legal certainty and good administration, due to the length of the preliminary examination

– The complaint based on infringement of the principle of the protection of legitimate expectations

– The complaint based on infringement of the principle of equal treatment

5. The sixth plea in law, alleging infringement of Article 6(1) of Regulation No 659/1999

(a) Arguments of the parties

(b) Findings of the Court

II – The actions in Cases T?30/01 to T?32/01 seeking annulment of the decision to initiate the formal investigation procedure

A – Arguments of the parties

B – Findings of the Court

The applications for measures of organisation of procedure

Costs

I – Cases T?30/01 to T?32/01

II – Cases T?86/02 to T?88/02

* Language of the case: Spanish.