Joined Cases C-428/06 to C-434/06

Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others

v

Juntas Generales del Territorio Histórico de Vizcaya and Others

(Reference for a preliminary ruling from the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco)

(State aid – Tax measures adopted by a regional or local authority – Selective nature)

Summary of the Judgment

1. *State aid – Definition – Selective nature of the measure*

(Art. 87(1) EC)

2. *State aid – Definition – Selective nature of the measure – Measures adopted by an infra-State body*

(Art. 87(1) EC)

1. When examining whether a measure is selective, it is essential to determine the reference framework and that framework is not necessarily defined within the limits of the national territory concerned.

Accordingly, in order to determine whether a measure, adopted by an infra?State body and seeking to fix in only one part of the territory of a Member State a lower tax rate than that which is applicable in the rest of that Member State, is selective, it is appropriate to examine whether the measure was adopted by that body in the exercise of sufficiently autonomous powers in relation to the central power and, if so, to investigate whether it applies to all undertakings established in or to all production of goods carried out on the territory falling within the competence of that body.

In the situation where a regional or local authority adopts, in the exercise of sufficiently autonomous powers in relation to the central power, a tax rate lower than the national rate and which is applicable only to undertakings present in the territory within its competence, the legal framework appropriate to determine the selectivity of a tax measure may be limited to the geographical area concerned where the infra-State body, in particular on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate. In that regard, that fundamental role is the consequence of the autonomy and not a precondition for that autonomy. Where an infra?State body is sufficiently autonomous, in other words, when it has autonomy from the institutional, procedural and economic points of view, it plays a fundamental role in the definition of the political and economic environment in which the undertakings operate.

In order for a decision taken in such circumstances to be regarded as having been adopted in the exercise of sufficiently autonomous powers, it must first have been adopted by a regional or local authority with, from a constitutional point of view, a political and administrative status which is distinct from that of the central government. That autonomy requires that the infra?State body

assume responsibility for the political and financial consequences of a tax reduction measure. That cannot be the case where the body is not responsible for the management of a budget, in other words, where it does not have control of both revenue and expenditure. Next, the decision must have been adopted without the central government being able to intervene directly as regards its content, even if such procedural autonomy does not preclude the establishment of a conciliation procedure in order to avoid conflicts, provided that the final decision taken at the conclusion of that procedure is adopted by the infra?State body and not by the central government. Finally, the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies, declared or resulting only from the actual examination of the financial flows from other regions or central government.

(see paras 46-51, 55, 67, 96, 133, 107, 123, 135, 144, operative part)

2. When examining whether an infra?State body has sufficient autonomy for it to be possible to consider that the provisions favourable to undertakings established on its territory which it adopts must be treated as general rules and, therefore, as not fulfilling the condition of selectivity necessary for the identification of State aid, it is necessary to take into consideration the provisions of national law fixing the extent of that body's competences, as those provisions are interpreted and enforced by the national courts, bearing in mind that the fact that that body is, in the exercise of those competences, under the control of the court, as is the case in all States governed by the rule of law, is not relevant for the purpose of measuring its degree of autonomy.

(see paras 77-83, operative part)

JUDGMENT OF THE COURT (Third Chamber)

11 September 2008 (*)

(State aid – Tax measures adopted by a regional or local authority – Selective nature)

In Joined Cases C?428/06 to C?434/06,

REFERENCES for a preliminary ruling under Article 234 EC, from the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (Spain), made by decisions of 20 September 2006 (C?428/06, C?429/06 and C?431/06 to C?434/06) and of 29 September 2006 (C?430/06), received at the Court on 18 October 2006, in the proceedings

Unión General de Trabajadores de La Rioja (UGT?Rioja) (C?428/06),

Comunidad Autónoma de La Rioja (C?429/06),

v

Juntas Generales del Territorio Histórico de Vizcaya,

Diputación Foral de Vizcaya,

Cámara de Comercio, Industria y Navegación de Bilbao,

Confederación Empresarial Vasca (Confebask),

and

Comunidad Autónoma de La Rioja (C?430/06),

Comunidad Autónoma de Castilla y León (C?433/06),

v

Diputación Foral de Álava,

Juntas Generales de Álava,

Confederación Empresarial Vasca (Confebask),

and

Comunidad Autónoma de La Rioja (C?431/06),

Comunidad Autónoma de Castilla y León (C?432/06),

v

Diputación Foral de Guipúzcoa,

Juntas Generales de Guipúzcoa,

Confederación Empresarial Vasca (Confebask),

and

Comunidad Autónoma de Castilla y León (C?434/06)

v

Diputación Foral de Vizcaya,

Juntas Generales del Territorio Histórico de Vizcaya,

Cámara de Comercio, Industria y Navegación de Bilbao,

Confederación Empresarial Vasca (Confebask),

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, J.N. Cunha Rodrigues, J. Klu?ka, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 February 2008,

after considering the observations submitted on behalf of:

– Unión General de Trabajadores de La Rioja (UGT-Rioja), by V. Suberviola González, abogado, and C. Cabezón Llach and J. Granda Loza, secretarios generales,

– Comunidad Autónoma de La Rioja, by J. Criado Gámez and I. Serrano Blanco, abogados,

– Comunidad Autónoma de Castilla y León, by S. Perandones Peidró and E. Martínez Álvarez, abogadas,

– Juntas Generales del Territorio Histórico de Vizcaya, Diputación Foral de Álava, Diputación Foral de Vizcaya and Cámara de Comercio, Industria y Navegación de Bilbao, by I. Sáenz?Cortabarría Fernández and M. Morales Isasi, abogados,

– Diputación Foral de Guipúzcoa, by A. Ibarguchi Otermin, I. Sáenz Cortabarría Fernández and M. Morales Isasi, abogados,

– Confederación Empresarial Vasca (Confebask), by M. Araujo Boyd and D. Armesto Macías, abogados,

– the Spanish Government, by N. Díaz Abad, acting as Agent,

– the Italian Government, by I.M. Braguglia, acting as Agent, and D. Del Gaizo, avvocato dello Stato,

– the United Kingdom Government, by E. O'Neill and I. Rao, acting as Agents, and by D. Anderson QC,

– the Commission of the European Communities, by F. Castillo de la Torre and C. Urraca Caviedes, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2008,

gives the following

Judgment

1 The present references for a preliminary ruling concern the interpretation of Article 87(1) EC.

2 The references have been made in the context of proceedings between, on the one hand, the Union General de Trabajadores de La Rioja (General Union of Workers of La Rioja, 'UGT-Rioja') (C?428/06), the Comunidad Autónoma de La Rioja (Autonomous Community of La Rioja) (C?429/06 to C?431/06) and the Comunidad Autónoma de Castilla y León (Autonomous Community of Castilla y León) (C?432/06 to C?434/06) and, on the other hand, the Juntas Generales del Territorio Histórico de Vizcaya (General Council of the Historical Territory of Biscay (Vizcaya)), the Diputaciones Forales (Provincial Councils) of Álava, Vizcaya and Guipúzcoa, which are the competent authorities for the Territorios Históricos de Vizcaya, Álava and Guipúzcoa ('the foral authorities'), along with the Cámara de Comercio, Industria y Navegación de Bilbao (Bilbao Chamber of Commerce, Industry and Shipping) and the Confederación Empresarial Vasca (Basque Business Confederation, 'Confebask'), concerning the tax law adopted by those authorities.

National law

The Spanish Constitution of 1978

3 Articles 2, 31(1), 137 to 139 and 143(1) of the Spanish Constitution of 1978 ('the Constitution') are worded as follows:

'Article 2

The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards. It recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity among them all.

…

Article 31

1. Everyone shall contribute to sustain public expenditure according to his or her economic capacity through a fair tax system based on the principles of equality and progressive taxation, which shall not in any event be confiscatory in scope.

…

Title VIII – Territorial Organisation of the State

Chapter 1 – General Principles

Article 137

The State is organised territorially into municipalities, provinces and Autonomous Communities which may be constituted. All these entities shall enjoy autonomy for the management of their respective interests.

Article 138

1. The State shall guarantee the effective implementation of the principle of solidarity laid down in Article 2 of the Constitution by endeavouring to establish a fair and adequate economic balance between the different parts of Spanish territory and taking into special consideration the circumstances pertaining to those which are islands.

2. The differences between the Statutes of the individual Autonomous Communities may not in any event imply economic or social privileges.

Article 139

1. All Spaniards have the same rights and obligations in any part of the State territory.

2. No authority may adopt measures which directly or indirectly obstruct freedom of movement and establishment of persons or free movement of goods throughout Spanish territory.

…

Chapter 3 – Autonomous Communities

Article 143

1. In the exercise of the right to autonomy recognised in Article 2 of the Constitution, bordering provinces with common historical, cultural and economic characteristics, the island territories and the provinces constituting a historical regional entity may accede to self?government and form Autonomous Communities in accordance with the provisions of [Title VIII] and the respective Statutes [of Autonomy].'

4 Article 148 of the Constitution, which describes the matters in respect of which the autonomous communities may exercise competences, is worded as follows:

'1. The Autonomous Communities may assume powers over the following matters:

…

(3) town and country planning and housing;

(4) public works of benefit to the Autonomous Community in its own territory;

(5) railways and roads whose routes lie exclusively within the territory of the Autonomous Community and transport by the above means or by cable fulfilling the same conditions;

(6) ports of haven, recreational ports and airports and, in general, those which are not engaged in commercial activities;

(7) agriculture and livestock raising, in accordance with general economic planning;

(8) woodlands and forestry;

(9) the management of environmental protection;

(10) the planning, construction and exploitation of hydraulic projects, canals and irrigation of interest to the Autonomous Community; mineral and thermal waters;

(11) inland water fishing, the shellfish industry and aquaculture, hunting and river fishing;

(12) local fairs;

(13) the promotion of the economic development of the Autonomous Community in accordance with the objectives set by national economic policy;

(14) handicrafts;

…'

5 Article 149(1) of the Constitution states:

'1. The State shall have exclusive competence over the following matters:

(1) regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties;

…

(6) commercial, criminal and prison legislation; procedural legislation, without prejudice to the

necessary differences in these fields deriving from the special characteristics of the substantive law of the Autonomous Communities;

(7) labour legislation, without prejudice to its enforcement by the bodies of the Autonomous Communities;

…

(11) monetary system: foreign currency, exchange and convertibility; bases for the regulation of credit, banking and insurance;

…

(13) the bases for and the coordination of the general planning of economic activity;

(14) general finances and the State Debt;

…

(17) basic legislation and the financial system of the Social Security [Administration], without prejudice to the performance of its services by the Autonomous Communities;

…

(24) public works of general interest, the execution of which affects more than one Autonomous Community;

…’

6 Articles 156 to 158 of the Constitution are worded as follows:

‘Article 156

1. The Autonomous Communities shall enjoy financial autonomy for the development and exercise of their powers, in conformity with the principles of coordination with the State Treasury and solidarity amongst all Spaniards.

2. The Autonomous Communities may act as delegates or agents of the State for the collection, management and settlement of the latter’s tax resources, in conformity with the law and the Statutes [of Autonomy].

Article 157

1. The resources of the Autonomous Communities shall consist of:

(a) taxes wholly or partially assigned to them by the State; surcharges on State taxes and other shares in State revenue;

(b) their own taxes, rates and special levies;

(c) transfers from an inter-territorial compensation fund and other allocations to be charged to the State Budget;

(d) revenues accruing from their property and private law income;

(e) revenue from credit operations.

2. Under no circumstances may the Autonomous Communities adopt measures which impose taxes on property located outside their territory or which hinder the free movement of goods or services.

3. Exercise of the financial powers set out in paragraph 1 above, rules for settling the conflicts which may arise and possible forms of financial cooperation between the Autonomous Communities and the State may be laid down by a Basic Law.

Article 158

1. An allocation may be made in the State Budget to the Autonomous Communities in proportion to the amount of State services and activities for which they have assumed responsibility and to guarantee a minimum level of basic public services throughout Spanish territory.

2. With the aim of redressing inter?territorial economic imbalances and implementing the principle of solidarity, a compensation fund shall be set up for investment expenditure, the resources of which shall be distributed by the Cortes Generales [Spanish Parliament] among the Autonomous Communities and provinces, as the case may be.'

Statute of Autonomy

7 In accordance with Article 2, Chapter 3 of Title VIII (Articles 143 to 158) and the First Additional Provision and Second Transitional Provision of the Constitution, the Basque Country constitutes an Autonomous Community within the Kingdom of Spain. The Autonomous Community of the Basque Country is governed by the Statute of Autonomy of the Basque Country ('Estatuto de Autonomía del País Vasco'), which was approved by Basic Law 3/1979 of 18 December 1979 of the Cortes Generales (BOE No 306 of 22 December 1979, 'the Statute of Autonomy').

8 The Autonomous Community of the Basque Country is made up of three Territorios Históricos (territorial administrative bodies, 'the Historical Territories') which are themselves formed of the Municipios (municipalities). The institutional political structure of that Autonomous Community is comprised of two different levels, namely, that of institutions common to the whole territory of the Basque Country (autonomous government and parliament) and that of 'foral' institutions and bodies, the competence of which is restricted to the Historical Territories.

9 Article 37 of the Statute of Autonomy is worded as follows:

'1. The traditional legal institutions of the Historical Territories shall be governed by the judicial regime exclusive to each.

2. The provisions of this Statute shall not entail any alteration of the nature of the special "foral" system based on traditional, regional law or of the jurisdiction of the particular regimes of each Historical Territory.

3. In all cases they shall have exclusive competence within their respective territories for the following matters:

(a) the organisation, system and functioning of their own institutions;

(b) the drawing up and approval of their budgets;

(c) territorial demarcations of supra?municipal scope not going beyond provincial boundaries;

(d) the system of provincial and municipal property, in the public domain or of a heritage nature or their own and community property;

(e) the municipal electoral system;

(f) all other areas of competence specified in this Statute or which are transferred to them.

4. They shall also be responsible for the development of legislation and for implementation within their territory in respect of the matters which the Basque Parliament shall indicate.'

10 Article 40 of the Statute of Autonomy states that, for the proper exercise and financing of its powers, the Basque Country is to 'have its own Autonomous Treasury'.

11 Article 41 of the Statute is worded as follows:

'1. Tax relations between the State and the Basque Country shall be regulated by the traditional "foral" system of the Economic Agreement ["Concierto Económico"] or Conventions ["Convenios"].

2. The content of the regime of the Agreement shall comply with and be adapted to the following principles and guidelines:

(a) The competent institutions of the Historical Territories may maintain, establish and regulate, within their own territory, the tax system, bearing in mind the general tax structure of the State, the rules contained in the Economic Agreement itself for coordination, fiscal harmonisation and cooperation with the State, and those which the Basque Parliament may adopt for the same purposes within the Autonomous Community. The Economic Agreement shall be adopted by legislation.

(b) The levying, management, liquidation, collection and inspection of all taxes, except customs duties and those currently collected by means of tax monopolies, shall be carried out, within each Historical Territory, by the respective Diputaciones Forales, without prejudice to cooperation with the State and its inspection service.

(c) The competent institutions of the Historical Territories shall adopt the relevant agreements, with the object of applying within their respective territories whatever exceptional or provisional tax rules the State may decide to enforce in the common territory. Such rules shall remain in force for the same length of time as indicated for those State rules.

(d) The Basque Country's contribution to the State shall consist of an overall quota, made up of the individual quotas of each of its territories, as a contribution towards all State burdens that are not assumed by the Autonomous Community.

(e) In order to determine the quotas for each Historical Territory which makes up the abovementioned overall quota, a Joint Committee shall be set up, consisting, on the one hand, of one representative of each Diputación Foral and the same number of representatives of the Basque Government, and on the other, of an equal number of representatives of the State Administration. The quota thus set shall be adopted by law at intervals to be determined in the Economic Agreement, without prejudice to its annual adjustment by a procedure likewise to be established in the Agreement.

(f) The system of [Economic] Agreements shall be applied in accordance with the principle of solidarity to which Articles 138 and 156 of the Constitution refer.'

The Economic Agreement

12 The Economic Agreement between the Autonomous Community of the Basque Country and the Kingdom of Spain was adopted by Law 12/2002 (Ley 12/2002 por la que se aprueba el Concierto Económico con la Comunidad Autónoma del País Vasco) of 23 May 2002 (BOE No 124 of 24 May 2002, 'the Economic Agreement').

13 Articles 2 to 4 of the Economic Agreement are worded as follows:

'Article 2 General Principles

1. The tax system established by the Historical Territories shall comply with the following principles:

(1) Respect for the principle of solidarity in the terms laid down in the Constitution and in the Statute of Autonomy.

(2) Compliance with the general tax structure of the State.

(3) Coordination, fiscal harmonisation and cooperation with the State, in accordance with the rules laid down in the present Economic Agreement.

(4) Coordination, fiscal harmonisation and mutual cooperation between the institutions of the Historical Territories pursuant to the provisions enacted by the Basque Parliament for those purposes.

(5) Submission to the international treaties or agreements signed and ratified by the Spanish State or to those to which it is a party.

In particular, it shall comply with the provisions laid down in the international agreements signed by Spain for the avoidance of double taxation and the fiscal harmonisation rules of the European Union, and shall be responsible for making the refunds to be made as a result of the application of those agreements and rules.

2. The rules laid down herein shall be interpreted in accordance with the provisions of the Tax Code for the interpretation of tax law.

Article 3 Fiscal Harmonisation

In drafting their tax legislation, the Historical Territories shall:

(a) respect the Tax Code in matters of terminology and concepts, without prejudice to the special circumstances laid down in the present Economic Agreement;

(b) maintain an overall effective fiscal pressure equivalent to that in force in the rest of the State;

(c) respect and guarantee freedom of movement and of establishment of persons and free movement of goods, capital and services throughout the territory of Spain, without giving rise to discrimination or a restriction of the possibility of commercial competition or distortion in the allocation of resources;

(d) use the same system for classifying livestock, mining, industrial, commercial, service, professional and artistic activities as is used in the common territory, without prejudice to further classification of those activities that might be made.

Article 4 Principle of cooperation

1. The competent institutions of the Historical Territories shall inform the State Administration, giving due advance notice, of any draft tax legislation.

Similarly, the State Administration shall inform the aforementioned institutions of any such drafts.

2. The State shall develop mechanisms for allowing the institutions of the Basque Country to participate in any international agreements affecting the application of the present Economic Agreement.

3. The State and the Historical Territories, in the exercise of functions within their powers regarding the administration, inspection and collection of taxes, shall, without delay and in due form, exchange any information and records deemed necessary with a view to levying them more efficiently.

In particular, both Administrations shall:

(a) provide each other, through their data?processing centres, with any information they may require. To this end, the necessary technical connections between them shall be set up. A jointly coordinated fiscal data?processing system plan shall be drawn up on a yearly basis;

(b) The inspection services shall draw up joint inspection plans for coordinated selective objectives, sectors and procedures, and for taxable persons who have changed their place of residence, undertakings declaring under the tax transparency system and companies subject to corporation tax proportionate to turnover.’

14 Articles 48 to 60 of the Economic Agreement govern the financial relations between the State and the Basque Country. Articles 48 to 50 of that agreement are worded as follows:

‘Article 48 General Principles

The financial relations between the State and the Basque Country shall be governed by the following principles:

1. Fiscal and financial autonomy of the institutions of the Basque Country in the regulation and implementation of their powers.

2. Respect for the principle of solidarity in the terms laid down in the Constitution and the Statute of Autonomy.

3. Coordination and cooperation with the State in matters of budgetary stability.

4. Contribution by the Basque Country to State burdens not assumed by the Autonomous Community, in the form determined by the present Economic Agreement.

5. The faculties of financial supervision developed by the State at any time in matters concerning local or regional authorities shall be enjoyed by the competent institutions of the Basque Country, without this being construed to mean, in any way, that the Basque local or regional authorities have a lower level of autonomy than that enjoyed by those under the common regime.

Article 49 Quota

The Basque Country's contribution to the State shall consist in an overall quota, comprising the quotas from each of the Historical Territories as the Basque Country's share of all State burdens not assumed by the Autonomous Community of the Basque Country.

Article 50 Frequency and adjustment of the quota

1. Every five years, by means of a Law passed by the Cortes Generales, subject to the prior approval of the Joint Committee on the Economic Agreement, the methodology to be used in setting the quota for the following five?year period shall be determined in accordance with the general principles laid down herein, and the quota for the first year of the five?year period shall be approved.

2. In each of the years following the first, the Joint Committee on the Economic Agreement shall adjust the quota by applying the methodology approved in the Law referred to in the preceding subparagraph.

3. The principles underlying the methodology for determining the quota and contained herein may be amended in the Law on the quota [for the following five?year period], when circumstances and the experience acquired in its application make this advisable.'

15 The Economic Agreement provides for the intervention of two committees composed of an equal number of representatives. Pursuant to the first paragraph of Article 61 of that agreement, the Joint Committee is to be composed, on the one hand, of a representative of the respective governments of each of the Historical Territories and, on the other hand, of the same number of representatives of the State Administration.

16 Article 62 of the Economic Agreement lays down that the purpose of the Joint Committee is to include, in particular, reaching agreement on amendments to that agreement, undertakings of cooperation and coordination in relation to budgetary stability as well as the methodology for calculating the quota for each five-year period and concluding agreements which may be necessary at any time concerning fiscal or financial matters for the application and proper operation of the provisions of the Agreement.

17 Article 63 of the Economic Agreement provides for the constitution of the Comisión de Coordinación y Evaluación Normativa (Coordination and Legislative Evaluation Committee), composed of four representatives of the State Administration and four representatives of the Autonomous Community of the Basque Country. The latter are designated by the Basque

Government, three of whom are each appointed on the proposal of one each of the Diputaciones Forales.

18 The areas of competence conferred on the Coordination and Legislative Evaluation Committee by Article 64 of the Economic Agreement include, first, evaluating, prior to publication, whether fiscal legislation complies with the agreement. Article 64(a) of that agreement expressly states, to that end, that 'when, as a result of the substitution of draft legislation pursuant to Article 4(1) of the present Economic Agreement, observations are drafted concerning the proposals contained therein, any of the institutions and administrations represented may request, in writing stating grounds, the convocation of that committee, which shall meet within a maximum period of 15 days from the date of the convocation request, and shall proceed to analyse whether the proposed legislation complies with the Economic Agreement and shall seek, prior to the publication of the corresponding provisions, to bring about an agreement between the institutions and the administrations concerning the possible disagreements as to the content of the tax legislation'.

The Law of 2002 on the quota for 2002 to 2006

19 By Law 12/2002 of 23 May 2002 the methodology for determining the quota for the Basque Country for 2002 to 2006 was adopted (BOE No 124, p. 18636, 'the Law of 2002 on the quota'). Articles 3 to 7 of that Law state:

'Article 3 Determination of the quota for the base year

The net quota for the base year of the five?year period from 2002 to 2006 shall be determined by applying the attribution rate to the total amount of the burdens not assumed by the Autonomous Community and by making the relevant adjustments and compensations, as provided for in the following articles.

Article 4 State burdens not assumed by the Autonomous Community

1. State burdens not assumed by the Autonomous Community are those which correspond to areas of competence the exercise of which has not actually been assumed by the Autonomous Community.

2. In order to determine the total amount of such burdens, the entire budget allocation which, at State level, corresponds to the areas of competence assumed by the Autonomous Community from the date of entry into force of the transfer established in the corresponding Royal Decrees shall be deducted from the total State budget expenditure.

…

Article 5 Adjustments

1. Without prejudice to the provisions of Articles 14 and 15 below, the figures resulting from the attribution referred to in Article 4(4) shall be adjusted to improve the accuracy of the estimated income from direct taxes attributable to the Basque Country and to the rest of the State territory pursuant to Article 55 of the Economic Agreement.

…

Article 6 Compensation

1. From the quota corresponding to each Historical Territory shall be deducted the following

items:

(a) the attributable portion of non?transferred taxes;

(b) the attributable portion of budgetary income not from taxes;

(c) the attributable portion of the deficit figuring in the general State budget.

…

Article 7 Attribution rate

The attribution rate referred to in Articles 4 and 6 above, set essentially in accordance with the income of the Historical Territories in proportion to that of the State, shall be 6.24% for the current five?year period.'

20 According to Annex I to the Law of 2002 on the quota, laying down the provisional quota for the Autonomous Community of the Basque Country for the base year 2002, the amount to be paid by the Historical Territories was EUR 1 034 626 080.

The tax legislation at issue in the main proceedings

21 In Cases C?428/06, C?429/06 and C?434/06, the actions for annulment brought in the main proceedings concern the Foral Law of the Juntas Generales de Vizcaya 7/2005 of 23 June 2005, Article 2 of which amends Foral Law 3/1996 of 26 June 1996 on corporation tax. The first two of those actions seek annulment of Article 2(4), (6) and (7), whilst the third seeks annulment of Article 2(4) and (6) only.

22 Article 2(4) of Foral Law 7/2005 amends Article 29 of Foral Law 3/1996 and sets the rate of corporation tax 'generally at 32.5%'. The national court states that, according to common State legislation, namely Article 28(1) of the consolidated text of the Law on Corporation Tax, adopted by Royal Legislative Decree 4/2004 of 5 March 2004, the basic rate of corporation tax is 35%.

23 Article 2(6) of Foral Law 7/2005 amends Article 37 of Foral Law 3/1996 and provides that investments made in new tangible fixed assets and intended for the economic operation of an undertaking may be deducted at a rate of 10%. Article 2(7) amends Article 39 of Foral Law 3/1996 and provides for a deduction equal to 10% of the amount resulting from the accounting income for the financial year and capable of serving as a 'reserve for production investments and/or as a reserve for environmental conservation and improvement and energy saving'. The national court states that there are no such deductions under Spanish corporation tax law.

24 In Cases C?430/06 and C?433/06, the actions for annulment brought in the main proceedings concern Decreto Foral Normativo de Urgencia Fiscal 2/2005 del Consejo de Diputados de Álava of 24 May 2005, validated by the agreement of the Juntas Generales de Álava of 13 June 2005, paragraphs 4 and 5 of the sole article of which amend Articles 29 and 37 of Foral Law 24/1996 of 5 July 1996 on corporation tax. The content of the contested law in those actions is the same as that of the law at issue in the action in the main proceedings leading to the reference for a preliminary ruling in Case C?434/06.

25 In Cases C?431/06 and C?432/06, the actions for annulment brought in the main proceedings concern Decreto Foral 32/2005 of the Diputación foral de Guipúzcoa, of 24 May 2005, paragraphs 3 and 4 of the sole article of which amend Articles 29 and 37 of Foral Law 7/1996 of 4 July 1996 on corporation tax. The content of the law contested in those actions is the same as that of the law at issue in the action in the main proceedings which led to the reference

for a preliminary ruling in Case C?434/06.

The actions in the main proceedings and the questions referred for preliminary ruling

26 It is apparent that the contested provisions in the cases in the main proceedings were adopted by the foral authorities after the Tribunal Supremo (Supreme Court) (Spain), by judgment of 9 December 2004 in appeal (cassation) No 7893/1999, declared numerous similar provisions adopted by the same authorities to be automatically invalid on the ground that, as those measures were capable of constituting State aid, they should have been notified to the Commission of the European Communities pursuant to Article 88(3) EC. However, the defendants in the main proceedings state in their written observations submitted to the Court that, in view of the fact that the Tribunal Supremo gave judgment without making a preliminary reference to the Court of Justice and for other reasons, a 'recurso de amparo' (constitutional complaint) has been brought before the Tribunal Constitucional (Constitutional Court) (Spain) against that judgment.

27 In the context of the actions for annulment in the main proceedings, the national court asks whether tax legislation which is adopted with general application and which does not confer an advantage on certain undertakings or the production of certain goods, is to be regarded as 'selective' and subject to the provisions of Articles 87 EC and 88 EC, solely on the ground that the effects and effectiveness of that legislation are limited exclusively to the territorial jurisdiction of an infra?State authority with autonomy in tax matters.

28 The national court mentions in that regard the judgment in Case C?88/03 *Portugal* v *Commission* [2006] ECR I?7115, concerning tax measures adopted by the Autonomous Region of the Azores and refers to the three conditions of institutional, procedural and economic autonomy laid down by the Court in paragraph 67 of that judgment.

29 Examining whether the Basque Country and its Historical Territories fulfil those three conditions, the national court states that it has no doubt as to the existence of institutional autonomy.

30 The national court asks, however, whether the formal procedure for drawing up the tax legislation in the Basque Country satisfies the procedural autonomy criterion. Although that procedure is not subject to direct intervention by the central government, it does entail mechanisms based on non?coercive conciliation, reciprocity and the equal representation of both sides, for the purpose of examining whether draft legislation, once it is known, is compatible with the Economic Agreement between the parties, in order to ensure that legislation to be enacted by both parties accords with what has been agreed and has attained the force of law between the authorities concerned. In addition, from the perspective of the objectives pursued by the autonomous tax legislation and the Basque administration's obligation to 'take the national interest into account when setting the tax rate', Article 3 of the Economic Agreement sets negative thresholds relating to the real global tax burden, to freedom of movement and establishment, and to the absence of discriminatory effects. Those limits may give rise *a posteriori* to judicial review of implemented tax provisions in order to determine whether they comply with the legal rules or guidelines mentioned above.

31 As regards the economic autonomy criterion, the national court asks whether, despite being the responsible tax body, the Basque Country nevertheless has sufficient powers to satisfy that criterion. The national court states in that regard that, although the Basque Country has a very high level of autonomy compared with other examples of regional autonomy within the European Union, that autonomy is nevertheless limited by the fact that the State has exclusive powers in certain areas which have an economic impact on the Basque Country, such as, inter alia, the other areas of competence set out in Article 149 of the Spanish Constitution, the monetary system, basic

rules and coordination of general economic planning, financial rules governing the social security system, and public works of general benefit. Accordingly, the existence of a distinct economic framework in the Basque Country must be viewed in context and by reference to certain essential requirements, such as market unity and economic unity, which are an intrinsic feature of the Spanish system of autonomous communities according to the Tribunal Constitucional (see, inter alia, judgments of the Tribunal Constitucional No 96/1984 of 19 October 1984 and No 96/2002 of 25 April 2002).

32 Against that background, the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (Supreme Court of Justice of the Autonomous Community of the Basque Country) decided to stay the proceedings and to refer the following question, which is formulated in identical terms in Cases C?428/06, C?429/06 and C?434/06, to the Court of Justice for a preliminary ruling:

‘Must Article 87(1) EC be construed as meaning that, by providing for a rate of tax lower than the basic rate set in Spanish State legislation and for deductions from the amount of tax payable which do not exist in State tax legislation, provisions in the field of taxation adopted by the Juntas Generales del Territorio Histórico de Vizcaya amending Articles 29(1)(a), 37 and 39 of the Provincial Law on Company Tax, which take effect in the jurisdiction of that infra-State autonomous body, must be regarded as selective and as covered by the definition of State aid enshrined in Article 87(1) EC and, accordingly, must be notified to the Commission pursuant to Article 88(3) EC?’

33 In Cases C?430/06 to C?433/06, the question referred for a preliminary ruling is the same as that set out in the preceding paragraph, save that it refers to the relevant foral laws of Álava and Guipúzcoa.

34 By order of the President of the Court of 30 November 2006, Cases C?428/06 to C?434/06 were joined for the purposes of the written and oral procedure and of the judgment.

Admissibility of the requests for a preliminary ruling

Observations submitted to the Court

35 The Comunidad Autónoma de La Rioja submits that the requests for a preliminary ruling are not admissible since the answer to the question referred is not necessary in order to enable the national court to deliver judgment. By order of 14 November 2005, confirmed by subsequent order of 17 March 2006, both adopted in the context of proceedings for the enforcement of the judgment of the Tribunal Supremo of 9 December 2004 (Enforcement No 3753/96?1), the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco had already annulled certain of the provisions contested in the main proceedings, namely Article 29 of the respective amended foral laws on the rate of corporation tax and Article 39, as amended, of Foral Law 3/1996, taking the view that they were counter to that judgment and had been adopted with the aim of avoiding the enforcement thereof. Regarding the two orders mentioned above, they were currently subject to appeals in cassation.

36 By letter of 23 January 2008, the Comunidad Autónoma de La Rioja informed the Court, however, that it was withdrawing its application for a declaration that the references for a preliminary ruling were inadmissible.

37 UGT-Rioja also claims that those references are inadmissible on the ground that there is absolutely no doubt that the tax measures at issue in the main proceedings constitute State aid. It refers in that regard to the judgment of the Tribunal Supremo and to certain Commission decisions concerning tax provisions adopted by the Historical Territories and which are similar to the

measures in question.

38 Confebask also claims that the references for a preliminary ruling were not necessary since the judgment in *Portugal* v *Commission* is very clear and that there can be no doubt that the tax measures at issue in the main proceedings do not constitute State aid.

Findings of the Court

39 It is clear from both the wording and the scheme of Article 234 EC that a national court or tribunal is not empowered to bring a matter before the Court of Justice by way of a reference for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (see, to that effect, Joined Cases C?422/93 to C?424/93 *Zabala Erasun and Others* [1995] ECR I?1567, paragraph 28; Case C?314/96 *Djabali* [1998] ECR I?1149, paragraph 18; and Case C?225/02 *García Blanco* [2005] ECR I?523, paragraph 27).

40 As the Court's jurisdiction is dependent on the existence of an action in the main proceedings, the Court may verify it of its own motion. Consequently, the Comunidad Autónoma de La Rioja's withdrawal of its claim that the reference for a preliminary ruling is inadmissible has no effect on that verification.

41 In the present case, it is not apparent from any of the evidence submitted to the Court that, following the annulment of certain of the provisions contested therein, the cases in the main proceedings no longer serve any purpose or that the answer to the references for a preliminary ruling is no longer needed by the national court to enable it to deliver judgment in the cases before it.

42 Regarding the claim that the answer to the question referred is clear, it should be pointed out that, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law and where it leaves no scope for any reasonable doubt, first, a court or tribunal against the decisions of which there is no judicial remedy under national law is not required, in certain circumstances, to make a preliminary reference (see, to that effect, Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraphs 14 and 16 to 20) and, second, this Court may give its decision by reasoned order pursuant to Article 104(3) of its Rules of Procedure.

43 However, those circumstances in no way prevent a national court from making a reference for a preliminary ruling to this Court (see, to that effect, *Cilfit and Others*, paragraph 15) and do not have the effect of depriving this Court of jurisdiction to rule on such a question.

44 In any event, it should be pointed out that, for UGT-Rioja, the tax measures at issue in the main proceedings unquestionably constitute State aid, whereas, for Confebask, they definitely do not constitute State aid. Those contradictory assessments of the tax measures in the light of the provisions of the EC Treaty are sufficient to establish the need to reply to the requests for a preliminary ruling.

The question referred for a preliminary ruling

45 By its question the national court essentially asks whether Article 87(1) EC must be interpreted as meaning that tax measures such as those at issue in the main proceedings, which were adopted by infra?State bodies, are to be considered to be selective measure and, accordingly, State aid within the meaning of that provision on the sole ground that they do not apply to the whole territory of the Member State concerned.

46 As the Court indicated at paragraph 56 of its judgment in *Portugal* v *Commission*, in order to determine whether the measure at issue is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation.

47 In that connection, the reference framework need not necessarily be defined within the limits of the Member State concerned, so that a measure conferring an advantage in only one part of the national territory is not selective on that ground alone for the purposes of Article 87(1) EC (*Portugal* v *Commission*, paragraph 57).

48 It is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate (*Portugal* v *Commission*, paragraph 58).

49 The Court described, at paragraph 65 of the judgment in *Portugal* v *Commission*, the situation in which a regional or local authority adopts, in the exercise of sufficiently autonomous powers in relation to the central power, a tax rate lower than the national rate and which is applicable only to undertakings present in the territory within its competence.

50 In the latter situation, the legal framework appropriate to determine the selectivity of a tax measure may be limited to the geographical area concerned where the infra-State body, in particular on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate (*Portugal* v *Commission*, paragraph 66).

51 In order that a decision taken by a regional or local authority can be regarded as having been adopted in the exercise of sufficiently autonomous powers, that authority must first have, from a constitutional point of view, a political and administrative status which is distinct from that of the central government. Next, the decision must have been adopted without the central government being able to intervene directly as regards its content. Finally, the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government (*Portugal* v *Commission*, paragraph 67). Those three conditions are commonly considered to be the criteria of institutional, procedural, and economic and financial autonomy.

52 The Court found, in paragraph 68 of its judgment in *Portugal* v *Commission*, that a political and fiscal independence of central government which is sufficient as regards the application of Community rules on State aid presupposes not only that the infra?State body has powers in the territory within its competence to adopt measures reducing the tax rate, regardless of any considerations related to the conduct of the central State, but also that, in addition, it assumes the political and financial consequences of such a measure.

The lack of a precondition

53 Contrary to the Commission’s contention, paragraphs 58 and 66 of the judgment in *Portugal* v *Commission* do not lay down any precondition for the operation of the three criteria set out in paragraph 67 of that judgment.

54 The actual wording of paragraph 58 of that judgment is unequivocal in that regard. The Court states therein that an infra-State body may enjoy a legal and factual status which makes it

sufficiently autonomous in relation to the central government, with the result that it is that body which plays a fundamental role in the definition of the political and economic environment in which undertakings operate.

55 Expressed differently, where an infra?State body is sufficiently autonomous, in other words, when it has autonomy from the institutional, procedural and economic points of view, it plays a fundamental role in the definition of the political and economic environment in which the undertakings operate. That fundamental role is the consequence of the autonomy and not a precondition for that autonomy.

56 Paragraph 66 of *Portugal* v *Commission* also expresses that idea of consequence, since the Court refers therein to the situation in which an infra?State body, ‘in particular on account of its status and powers’, occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate.

57 Paragraph 66 is a sufficient clarification of paragraph 67 of that judgment, which describes the criteria which a decision must satisfy in order for it to be considered to have been adopted in the exercise of sufficiently autonomous powers, in other words, in circumstances such as those referred to in paragraph 66.

58 That interpretation of the principle laid down by the Court in paragraphs 54 to 68 of *Portugal* v *Commission* is supported by an examination of the review effected by the Court in that judgment. In that regard, it should be pointed out that in paragraph 70 of that judgment the Court examined the criteria for institutional autonomy and procedural autonomy and in paragraphs 71 to 76 the economic autonomy criterion.

59 As the Advocate General stated at point 70 of her Opinion, it is not, however, in any way apparent from the review effected by the Court that it examined whether the precondition the existence of which is alleged by the Commission was satisfied.

60 It follows that the only conditions which must be satisfied in order for the territory falling within the competence of an infra?State body to be the relevant framework in order to assess whether a decision adopted by that body is selective in nature are the conditions of institutional autonomy, procedural autonomy and economic and financial autonomy as set out in paragraph 67 of *Portugal* v *Commission*.

The infra?State body to be taken into consideration

Observations submitted to the Court

61 In order to verify whether the measures at issue in the cases in the main proceedings were adopted by a ‘sufficiently autonomous’ infra?State body, it is necessary first to determine which body is to be taken into consideration.

62 Although the question referred for a preliminary ruling in each of Cases C?428/06 to C?434/06 concerns the tax measures adopted by one specific Historical Territory, it should be pointed out that, in its reasoning explaining why an answer to such a question is necessary, the national court refers to the Autonomous Community of the Basque Country and to the Historical Territories.

63 Before the Court, the Comunidad Autónoma de La Rioja, the Comunidad Autónoma de Castilla y León and the Commission submitted that only the Historical Territories should be taken into consideration, since they are the bodies which adopted the measures at issue in the main

proceedings. In that regard, they stress the limited competence of those bodies and, therefore, the selective nature of the contested foral laws.

64 Like the national court, the foral authorities and the Spanish Government refer to the same infra?State body as both the Historical Territories and the Autonomous Community of the Basque Country, according to whether they are referring to the authority competent in tax or other matters.

The Court's reply

65 As is apparent from the national rules set out in this judgment, the institutional system of the Kingdom of Spain is particularly complex. Moreover, the Court does not have jurisdiction to interpret national law. The interpretation of Article 87(1) EC, however, makes it necessary to identify the infra?State body which must be taken into consideration when an assessment is made as to the selective nature of a tax measure.

66 The Autonomous Community of the Basque Country is made up of three provinces: Álava, Vizcaya and Guipúzcoa. The boundaries of those provinces coincide with those of the Historical Territories, bodies which enjoy rights of ancient origin called 'fueros', entitling them to levy and collect tax. However, many other areas of competence, in particular those of an economic nature, are exercised by the Autonomous Community.

67 There appears to be little doubt that, considered as such, the Historical Territories do not enjoy sufficient autonomy within the meaning of the criteria set out in paragraphs 67 and 68 of *Portugal* v *Commission*. The existence of political and fiscal autonomy requires that the infra?State body assume responsibility for the political and financial consequences of a tax reduction measure. That cannot be the case where the body is not responsible for the management of a budget, in other words, where it does not have control of both revenue and expenditure. It appears that that is the situation in which the Historical Territories find themselves, as they are competent only in tax matters and the other areas of competence belong to the Autonomous Community of the Basque Country.

68 It does not, however, appear to be indispensable when assessing whether an infra?State body satisfies the autonomy criteria, to take into consideration only the Historical Territories or, alternatively, only the Autonomous Community of the Basque Country.

69 It follows from the explanations submitted to the Court that there are historical reasons why the areas of competence exercised in the geographical territory corresponding both to the Historical Territories and the Autonomous Community of the Basque Country are organised in such as way that competence for tax matters is vested in the Historical Territories and that for economic matters is vested in the Autonomous Community.

70 In order to prevent this leading to incoherent situations, this sharing of areas of competence necessitates close collaboration between the different bodies.

71 Thus, the Statute of Autonomy deals with the areas of competence of the Autonomous Community of the Basque Country, but also sets out, in Article 41(2), the fundamental principles which the foral authorities must comply with and which are more fully covered by the Economic Agreement.

72 That Economic Agreement, adopted by statute, was concluded between the Autonomous Community of the Basque Country and the Spanish State. It does not, however, deal only with the areas of competence of the Autonomous Community, but includes numerous provisions concerning the Historical Territories, which have competence in numerous tax matters.

73 The proper enforcement of the Economic Agreement is reviewed by the Joint Committee. According to the first paragraph of Article 61 of that agreement, that committee is made up, on the one hand, of a representative of the respective territorial governments of each of the Historical Territories and, on the other, of the same number of representatives of the State Administration.

74 Likewise, the composition of the Coordination and Legislative Evaluation Committee is evidence of the close cooperation between the Historical Territories and the Autonomous Community of the Basque Country. According to Article 63 of the Economic Agreement, that committee is composed of four representatives of the State Administration and four representatives of the Autonomous Community designated by the Basque Government, three of whom are each appointed on the proposal of one each of the Diputaciones Forales.

75 Thus, it is both to the Historical Territories and to the Autonomous Community of the Basque Country that reference must be made for the purpose of determining whether the infra?State body made up of those Historical Territories and that Community enjoys sufficient autonomy to constitute the reference framework in the light of which the selectivity of a measure adopted by one of those Historical Territories should be assessed.

The relevance of judicial review

76 Before examining whether the three autonomy criteria set out in paragraph 67 of *Portugal* v *Commission* are satisfied in the cases in the main proceedings, it is also necessary to state on what basis review by national courts should be taken into account. Certain of the parties to the main proceedings which have submitted observations claim that the foral laws have the status of administrative provisions and are subject to judicial review by the administrative courts, which has an effect on the procedural autonomy of the Historical Territories. Other parties contend, on the contrary, that that review is not relevant for the assessment of the autonomy criteria.

77 In that regard, it must be pointed out that, in the context of Article 234 EC, the Court does not have jurisdiction to apply Community law, but solely to interpret it or to assess its validity.

78 It is, thus, not appropriate to ask whether the foral laws at issue in the cases in the main proceedings constitute State aid within the meaning of Article 87(1) EC, but rather to interpret that provision in order to verify whether legislation such as the foral laws adopted by the Historical Territories within the limits of their areas of competence may be termed rules of general application within the meaning of the concept of State aid arising from that provision or whether those laws are selective in nature.

79 It is apparent that the boundaries of the areas of competence of the Historical Territories are laid down in the Constitution and in other provisions, such as the Statute of Autonomy and the Economic Agreement. In that regard, it is necessary to take into account those provisions as interpreted and enforced by the national courts. It is not the review by the national court which is relevant for the purpose of verifying the existence of autonomy, but the criterion which that court uses when carrying out that review.

80 The purpose of reviewing the legality of acts is to enforce compliance with the pre?established limits on the areas of competence of the different State authorities, organs or

bodies, not to determine those limits. As the Spanish Government stated at the hearing, the existence of judicial review is inherent in the existence of the rule of law.

81 Although the case?law of the courts of a Member State is important in order to ascertain the limits of an intra?State body's areas of competence, this is because the interpretation of case?law forms an integral part of the laws defining those areas of competence. However, the review decision is limited to interpreting the law establishing the limits of the areas of competence of such a body and cannot generally call into question the exercise of those powers within those limits.

82 It follows that it is the applicable laws as interpreted by the national courts which determine the limits of the areas of competence of an infra?State body and which must be taken into account for the purpose of verifying whether that body has sufficient autonomy.

83 Consequently, it cannot validly be found that an infra?State body lacks autonomy solely on the ground that the acts which it adopts are subject to judicial review.

The three autonomy criteria

The institutional autonomy criterion

– Observations submitted to the Court

84 The foral authorities, Confebask and the United Kingdom state that they agree with the national court's analysis in respect of institutional autonomy. Likewise, the Spanish Government is of the view that the first condition is satisfied.

85 The Comunidad Autónoma de Castilla y León claims that the Historical Territories do not have complete institutional autonomy, since they must contribute to the cost of Spanish State burdens. The Comunidad Autónoma de La Rioja states that is necessary to draw a distinction between the foral authorities, which adopted the tax measures at issue in the main proceedings, and the Autonomous Community of the Basque Country. The Autonomous Community of the Basque Country, like the other autonomous communities, must exercise the powers conferred on it by the State within the framework of national economic policy objectives or those of the general organisation of the economy as defined by the State, whereas the foral authorities do not have areas of competence of an economic nature. Without, however, contesting the existence of institutional autonomy, the Commission also refers to the reduced areas of competence of the foral authorities, which essentially act as tax collectors for other administrations.

– The Court's reply

86 To the requisite extent, the different arguments in this case have been set out. However, as already indicated in paragraph 75 above, it is necessary to take into account the infra?State body made up of both the Historical Territories and the Autonomous Community of the Basque Country.

87 In that regard, it is apparent from an examination of the Constitution, the Statute of Autonomy and the Economic Agreement that infra?State bodies such as the Historical Territories and the Autonomous Community of the Basque Country, since they have a political and administrative status which is distinct from that of central government, satisfy the institutional autonomy criterion.

The procedural autonomy criterion

– Observations submitted to the Court

88 The Comunidad Autónoma de La Rioja and the Comunidad Autónoma de Castilla y León, along with the Commission, claim that the foral authorities are limited in the exercise of their powers, with regard to both the central State and the Autonomous Community of the Basque Country and between themselves. Prior review exists in that regard in accordance with the principle of cooperation with the State. The Comunidad Autónoma de Castilla y León stresses the role of the Coordination and Legislative Evaluation Committee, which is referred to in Articles 63 and 64 of the Economic Agreement.

89 Those parties to the main proceedings also claim that the foral authorities must comply with numerous constitutional and other principles, subject to review by the administrative courts. Those principles constitute significant material limits on the powers of those authorities. That is the case of the principle of solidarity, enshrined in Article 138 of the Constitution, the principle of fiscal harmonisation, the requirements of which are set out in Article 3 of the Economic Agreement, and the principles of equality, expressed, in particular, in Article 31 of the Constitution, and market unity.

90 The foral authorities and Confebask claim that the State does not intervene in the adoption of foral laws. There is a mechanism for reciprocal communication, but this is merely informative in nature. Even if the Coordination and Legislative Evaluation Committee were to issue a negative decision, that would not prevent the foral laws adopted from entering into force, and that entry into force could not be contested before the national courts.

91 The United Kingdom, along with the Italian Government, is of the view that conciliation measures are not incompatible with the recognition of procedural autonomy. According to the United Kingdom, what is important is that the consent of the State is not required for the adoption of a regional tax measure, and that the State has no power to veto that measure or override the position of the regional authority.

92 Confebask bases its argument – that, when verifying the procedural autonomy criterion, it is of little importance that the local authority is required to take into account national interests – on the difference between the formulation in the Opinion of Advocate General Geelhoed in *Portugal* v *Commission* and the wording of the judgment in that case. In point 54 of the Opinion, it is written that '... The decision must be taken by the local authority pursuant to a procedure where the central government does not have any power to intervene directly in the procedure of setting the tax rate, and without any obligation on the part of the local authority to take the interest of the central State into account in setting the tax rate'. However, in paragraph 67 of the judgment, the Court did not retain the last part of the sentence just quoted, limiting itself to indicating that the measure must have been adopted 'without the central government being able directly to intervene as regards its content'.

93 The Commission contends, contrary to Confebask, that the fact of taking into account the interests of the State is important. According to the Commission, the condition of procedural autonomy is not satisfied if the infra?State body is subject to the procedural obligation to consult the central government and/or the material obligation to take into account the repercussions of its decisions on the whole territory, for example, for the purpose of complying with the principles of equality, solidarity and equivalence of fiscal pressure.

94 The Commission bases its argument in that regard on the final sentence of paragraph 68 of *Portugal* v *Commission*, according to which the infra?State authority must have fiscal competence 'regardless of any considerations related to the conduct of the central State', a detail in the light of which the second condition set out in paragraph 67 of that judgment must be interpreted, namely the condition that the decision taken by the infra?State body must have been adopted 'without the

central government being able to directly intervene as regards its content'.

– The Court's reply

95 As is apparent from paragraph 67 of *Portugal* v *Commission*, in order to be adopted in the exercise of powers which are sufficiently autonomous, a decision of an infra?State authority must have been taken without the central government being able directly to intervene as regards its content.

96 Such procedural autonomy does not preclude the establishment of a conciliation procedure in order to avoid conflicts, provided that the final decision taken at the conclusion of that procedure is adopted by the infra?State body and not by the central government.

97 In that regard, it is apparent from Article 4(1) of the Economic Agreement that the foral authorities notify the State administration of drafts of foral laws in the area of taxation and that the State administration does likewise in respect of those authorities.

98 In accordance with Article 64 of that agreement, a Coordination and Legislative Evaluation Committee composed of an equal number of representatives of the State administration and representatives of the Autonomous Community of the Basque Country may examine draft foral laws and seek, by negotiation, to eliminate any divergences between those draft laws and the tax legislation applicable in the rest of the Spanish territory.

99 As the Advocate General rightly stated in point 87 of her Opinion, it is not apparent from the Economic Agreement that, in the absence of agreement within the committee, the central government is able to impose the adoption of a law with a particular content.

100 It is necessary to point out, in addition, that the Coordination and Legislative Evaluation Committee may examine not only draft foral laws, but also drafts sent by the State Administration. That possibility suffices to show that that committee is merely a consultation and conciliation body rather than a mechanism by which the central government, in the case of a conflict between a draft foral law and the tax legislation of the Spanish State, could impose its own decision.

101 As to the different principles relied on by the Comunidad Autónoma de La Rioja, the Comunidad Autónoma de Castilla y León and the Commission, it does not appear that they call into question the decision?making autonomy of the Historical Territories, but rather that they define the limits of that autonomy.

102 Thus, the principle of solidarity, defined in Article 138 of the Constitution and according to which the State is to 'guarantee the effective implementation of the principle of solidarity laid down in Article 2 of the Constitution by endeavouring to establish a fair and adequate economic balance between the different parts of Spanish territory …', does not appear to call into question the procedural autonomy of the Historical Territories.

103 The requirement for an infra?State body to take into account the economic balance between the different parts of the national territory when adopting tax legislation defines the limits of that body's powers, even if the concepts used to define those limits, such as that of economic balance, may be developed in the context of interpretation as part of judicial review.

104 However, as stated in paragraph 81 above, the fact that pre?established limits must be complied with when a decision is adopted does not, in principle, call into question the decisional autonomy of the body adopting that decision.

105 As for the principle of fiscal harmonisation laid down in Article 3 of the Economic Agreement,

it is necessary, in particular, to maintain ‘an overall effective fiscal pressure equivalent to that in force in the rest of the State’ and to respect and guarantee ‘freedom of movement and of establishment of persons and free movement of goods, capital and services throughout the territory of Spain, without giving rise to discrimination or a restriction of the possibility of commercial competition or distortion in the allocation of resources’.

106 While it appears to result from that principle that the Historical Territories do not have very extensive competence in respect of the overall fiscal pressure liable to be established by foral laws, since that pressure must be equivalent to that which exists in the rest of the Spanish State, it is, however, not in dispute that overall fiscal pressure is only one of the elements to be taken into consideration when tax laws are being adopted. Provided that they comply with that principle, the Historical Territories thus have the power to adopt tax provisions which differ in many respects from the provisions applicable in the rest of the State.

107 In any event, as is apparent from paragraph 67 of *Portugal* v *Commission*, the essential criterion for the purpose of determining whether procedural autonomy exists is not the extent of the competence which the infra?State body is recognised as having, but the possibility for that body, as a result of that competence, to adopt a decision independently, in other words, without the central government being able directly to intervene as regards its content.

108 It follows that an infra?State body’s obligation to take into consideration the State interest in order to respect the limits of the areas of competence which are accorded to it, does not, generally, constitute an element calling into question the procedural autonomy of that body where it adopts a decision within those limits.

109 In the cases in the main proceedings, it is necessary to find – as is apparent from the applicable national provisions and, in particular, from Articles 63 and 64 of the Economic Agreement – that it does not appear that the central government is able directly to intervene in the process of adopting a foral law in order to ensure compliance with principles such as the principle of solidarity, that of fiscal harmonisation or the other principles as relied on by the applicants in the main proceedings.

110 However, whilst the Court has jurisdiction to interpret Community law, it is the national court which has jurisdiction to identify the national law applicable and to interpret it, as well as to apply Community law to the cases before it. It is thus to the national court that it falls, on the basis of the evidence examined and all other evidence which it considers relevant, to determine whether the second criterion laid down in paragraph 67 of *Portugal* v *Commission*, namely the procedural autonomy criterion, is satisfied in the cases in the main proceedings.

The economic and financial autonomy criterion

– Observations submitted to the Court

111 With regard to this criterion, it is apparent from the observations submitted to the Court that their authors are referring to paragraphs 67 and 68 of *Portugal* v *Commission*. The Court held there, first, that the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government and, second, that economic autonomy exists only where the infra?State body assumes the political and financial consequences of a tax reduction measure. A number of the observations submitted to the Court deal with the determination of the quota and the inferences to be drawn from it concerning the economic and financial autonomy of the Autonomous Community of the Basque Country as well as of the Historical Territories.

112 The Comunidad Autónoma de La Rioja and the Comunidad Autónoma de Castilla y León claim that the Historical Territories do not have economic autonomy, in particular because of the different principles imposed by the Constitution and the Economic Agreement.

113 The foral authorities, by contrast, contend that the tax system of the Historical Territories is based on two pillars, the first of which represents autonomy and responsibility and the second of which represents the principle of unilateral risk.

114 Examining the grounds of the orders for reference, Confebask states that, according to the national court, the economic autonomy criterion requires there to be economic differentiation between the autonomous territory and the rest of the Spanish State in the field of taxation, inasmuch as any principle of market unity may call into question the existence of genuine autonomy. Confebask states, however, that the judgment in *Portugal* v *Commission* in no way requires the presence of an element such as a 'distinct economic framework', something not even present among the Member States of the European Community, which constitutes a substantially integrated economic and social unit. The only relevant element is that the lower tax applicable in a particular region must not be financed by a transfer from the central government, which implies that the political and economic risks of the decision taken in the tax field by the infra?State body are assumed by the latter, a requirement referred to in Spanish law as the 'principle of fiscal responsibility'. That, it is submitted, is the case with regard to the Historical Territories, fiscal responsibility being inseparable from the rules contained in the Economic Agreement itself.

115 The Spanish Government examines the quota system and states that, although various financial flows exist between the Spanish State and the Autonomous Community of the Basque Country, a net contribution also exists benefiting the Spanish Ministry of Finance, which is earmarked for the financing of matters assumed by the State and not by the Basque Country. It stresses the point that the tax changes adopted by the competent institutions of the Historical Territories do not alter either the financial flows between the State and the Basque Country or the quantum of services provided by the State. It concludes from this that, from both the political and the economic points of view, the Historical Territories assume the consequences of their decisions in the tax field.

116 The Italian Government is of the view that the fact that the Spanish State may have exclusive competence in sectors such as the monetary system, basic rules and coordination of general economic planning, financial rules governing the social security system, and public works of general benefit does not call into question the existence of a sufficient degree of economic and financial autonomy.

117 The United Kingdom is of the view that the fact that the Spanish State retains some control over the general economic framework and that a quota contributing to the cost of burdens assumed by that State exists does not appear to be incompatible with the economic and financial autonomy criterion, inasmuch as the tax rate has no effect on the amount of that quota.

118 The Commission claims, first, that, where it is a question of examining whether or not a tax measure constitutes State aid, it is not appropriate to take into account the 'call effect', namely the creation of undertakings and thus, the tax revenue growth which a reduction in taxes might lead to, an effect which could not be determined *a priori*. In any event, the question whether a measure constitutes State aid must be examined on a case?by?case basis, at the level of the beneficiary company at a particular time. Second, it claims that the examination of the economic autonomy of a given territory calls for an analysis of all the financial transfer mechanisms and the solidarity mechanisms, even if they are not presented as such (for example, the single social security fund mechanism, the State's guarantee of a minimum public service, etc.). Third, the Commission

claims that, rather than the objective pursued by State interventions, it is the effects of a tax measure which must be taken into account in order to verify whether a tax measure constitutes State aid. It points out, in that context, that the fact that a territory is endowed with very extensive areas of competence in the tax field and has control of its revenue does not necessarily imply that it plays a fundamental role in defining the political and economic environment.

119 The Commission emphasises in that regard the importance of the constitutional principle of solidarity, which constitutes a limit to the financial autonomy of the Historical Territories and must guarantee a minimum level of services throughout Spanish territory.

120 The Commission examines more specifically the Inter?territorial Compensation Fund, provided for in Article 158(2) of the Constitution. According to the Commission, the very existence of that fund indicates that the Historical Territories do not assume the financial consequences of a decision to reduce the tax rate or to increase authorised deductions. As regards the quota, the Commission concludes from analysis of the quota mechanism that it is calculated with reference to the revenue of the Historical Territories in relation to that of the State and that, consequently, it constitutes a solidarity mechanism. Moreover, there are other financial transfers, such as the adjustments and compensations in respect of direct and indirect taxes, which are also solidarity mechanisms, since certain forms of compensation are calculated with reference to that revenue of the Historical Territories.

121 With regard to social security, the Commission relies on a report of the Ministry of Employment and Social Affairs relating to the years 1999?2005. In the pensions field, for example, in 2005, the system showed a deficit of EUR 311 million in the Autonomous Community of the Basque Country. The Commission concludes from this that social security services and benefits are financed by the other Autonomous Communities. As the financing of deficits forms part of the non?assumed powers, the Autonomous Community of the Basque Country contributes to them through the quota. Since that quota is calculated on the revenue relating to that Autonomous Community, the system established in order to compensate for the social security deficit constitutes a solidarity mechanism.

122 Having regard to all of the foregoing, the Commission concludes that the Historical Territories do not assume all the financial consequences of measures to reduce the tax rate or to increase authorised deductions. Consequently, the third condition set out in paragraph 67 of *Portugal* v *Commission* is not satisfied.

– The Court’s reply

123 As is apparent from paragraph 67 of *Portugal* v *Commission*, one condition for an infra?State body to enjoy economic and financial autonomy is that the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government.

124 The financial transfers between the Spanish State and the Autonomous Community of the Basque Country are governed by the Economic Agreement and the Law of 2002 on the quota. It is necessary, therefore, to examine those provisions first, in order to ascertain whether they may have the effect of compensation, by the State, for the financial consequences of a tax measure adopted by the foral authorities.

125 The method of calculating the quota is particularly complex. The first stage of that calculation consists in evaluating the amounts of the burdens assumed by the State in the whole of the Kingdom of Spain concerning the areas of competence which are not assumed by the Autonomous Community of the Basque Country. An attribution rate is applied to that amount which

must, generally, reflect the relative weight of the Basque economy within the whole Kingdom of Spain. Lastly, various adjustments are made which are designed to perfect the estimate of the revenue received by the different entities with regard to various taxes.

126 It is apparent from the observations submitted to the Court that the amount of the tax revenue of the Historical Territories does not have any impact on the first stage of the calculation, which consists exclusively of an assessment of the various burdens assumed by the Spanish State. With regard to the adjustments, it is only indirectly that they might be affected by a foral law establishing an income tax structure which is more favourable for taxpayers to whom that law applies.

127 One of the essential data for the calculation of the quota is the attribution rate, currently set at 6.24%. In that regard, it is clear from the arguments presented to the Court that, although that rate is determined on the basis of economic data, it is, however, set during what are essentially political negotiations between the Spanish State and the Autonomous Community of the Basque Country. A decision to reduce the tax rate thus does not necessarily have an impact on the level of that rate.

128 At the hearing, the Commission called into question the current attribution rate, contending that it was undervalued and that, consequently, the Historical Territories contribute less that they should to State burdens. It is necessary, however, to point out once again that the Court has jurisdiction only to interpret Article 87(1) EC and not to decide, in the main proceedings, whether the attribution rate calculated pursuant to the Law of 2002 on the quota was correctly calculated from the economic perspective, or whether it was undervalued.

129 It is necessary, however, to point out that an undervaluation of the attribution rate is capable of constituting merely an indicator that the Historical Territories lack economic autonomy. There must be compensation, namely, a causal relationship between a tax measure adopted by the foral authorities and the amounts assumed by the Spanish State.

130 As has been stated before the Court, the attribution rate is set on the basis of economic data during political negotiations in which the Spanish State participates and in the context of which it defends the national interest and that of the other regions of the Kingdom of Spain. It is for the national court to determine whether that process of setting the rate has the aim of permitting the central government to compensate the cost of a subsidy or a tax measure adopted by the Historical Territories which is of benefit to undertakings.

131 Likewise, it is for that court to examine the effects of that process and to verify whether, because of the methodology adopted and the economic data taken into account, the setting of the attribution rate and, more generally, the calculation of the quota may have the effect of causing the Spanish State to compensate the consequences of a tax measure adopted by the foral authorities.

132 In its written observations, the Commission also contends that a number of other financial transfers which compensate for tax measures reducing taxes also exist, such as those resulting from the existence of a single social security fund, a minimum public service guaranteed by the State or the Inter?territorial Compensation Fund. Moreover, at the hearing, the Commission referred to transfers and subsidies of considerable amounts to public authorities of the Autonomous Community of the Basque Country which are not taken into account in the calculation of the quota.

133 In that regard, if financial compensation may be declared and specific, it may also be hidden and result only from the actual examination of the financial flows existing between the infra?State body concerned, the Member State which it comes under and the other regions of that Member

State.

134 That examination may indicate that a tax reduction decision adopted by the infra?State body results in larger financial transfers in its favour, because of the calculation methods used in order to determine the amounts to be transferred.

135 However, as the Advocate General stated in point 109 of her Opinion and contrary to what the Commission appears to be claiming, the mere fact that it appears from a general examination of the financial relations between the central State and its infra?State bodies that there are financial transfers between the former and the latter, cannot, in itself, suffice to demonstrate that those bodies do not assume the financial consequences of the tax measures which they adopt and, accordingly, that they do not enjoy financial autonomy, since such transfers may take place for reasons unconnected with the tax measures.

136 In the main proceedings, it is common ground that the areas of competence of the Historical Territories are limited by, inter alia, the different principles relied on before the Court and, more specifically, by that of fiscal harmonisation.

137 Having regard to those limits, it is necessary to examine whether the foral laws adopted by the Historical Territories may result in hidden compensation in sectors such as social security, the guarantee of minimum public services by the Spanish State, or in the functioning of the Inter?territorial Compensation Fund, as the Commission in particular asserts. In that regard, it is necessary to observe that the Commission has failed to give precise details of its allegations.

138 Lastly, with regard to the Commission's argument, stated at the hearing, that the tax measures in dispute do not apply to all undertakings established in or to all production of goods carried out in the Historical Territories, suffice it to state that this cannot affect the foregoing analysis since it is not contested that, in accordance with the Court's findings at paragraph 62 of *Portugal* v *Commission*, those measures apply to all the undertakings or all production of goods coming, in accordance with the rule on allocation of fiscal powers used by the Member State concerned and that infra?State body, within the competence of the latter.

139 In any event, it is not for this Court to declare whether the foral laws at issue in the main proceedings constitute State aid within the meaning of Article 87(1) EC. Such a classification implies that the Court proceeds to determine, interpret and apply the relevant national law and to examine the facts, tasks which fall within the jurisdiction of the national court, whilst this Court has sole jurisdiction to interpret the concept of State aid within the meaning of Article 87(1) EC in order to provide the national court with the criteria which will enable it to decide the cases before it.

140 It must thus be held that, on the basis of the elements examined and all the other elements which the national court considers relevant, it is for that court to determine whether the Historical Territories assume the political and financial consequences of a tax measure adopted within the limits of the powers conferred on them.

Conclusion as to the three criteria set out in paragraph 51 above

141 In order to determine whether the foral laws adopted by the Historical Territories constitute State aid within the meaning of Article 87(1) EC, it is necessary to establish whether those Historical Territories and the Autonomous Community of the Basque Country have sufficient institutional, procedural and economic autonomy for a law adopted by those authorities within the limits of the powers conferred on them to be considered as being of general application within that infra?State body and as being non?selective within the meaning of the notion of State aid referred to in Article 87(1) EC.

142 That verification may be carried out only after prior review in order to ensure that the Historical Territories and the Autonomous Community of the Basque Country respect the limits of their areas of competence since the rules on, in particular, financial transfers have been drawn up on the basis of those areas of competence as defined.

143 The finding of infringement of the limits of those areas of competence could call into question the results of the analysis carried out on the basis of Article 87(1) EC, since the reference framework for assessing whether the law of general application in the infra?State body is selective is no longer necessarily constituted by the Historical Territories and the Autonomous Community of the Basque Country, but could, where appropriate, be extended to the whole Spanish territory.

144 In the light of all of the foregoing, the answer to the question referred must be that Article 87(1) EC is to be interpreted as meaning that, for the purpose of assessing whether a measure is selective, account is to be taken of the institutional, procedural and economic autonomy enjoyed by the authority adopting that measure. It is for the national court, which alone has jurisdiction to identify the national law applicable and to interpret it, as well as to apply Community law to the cases before it, to determine whether the Historical Territories and the Autonomous Community of the Basque Country have such autonomy, which, if so, would have the result that the laws adopted within the limits of the areas of competence granted to those infra?State bodies by the Constitution and the other provisions of Spanish law are not of a selective nature within the meaning of the concept of State aid as referred to in Article 87(1) EC.

Costs

145 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 87(1) EC is to be interpreted as meaning that, for the purpose of assessing whether a measure is selective, account is to be taken of the institutional, procedural and economic autonomy enjoyed by the authority adopting that measure. It is for the national court, which alone has jurisdiction to identify the national law applicable and to interpret it, as well as to apply Community law to the cases before it, to determine whether the Historical Territories and the Autonomous Community of the Basque Country have such autonomy, which, if so, would have the result that the laws adopted within the limits of the areas of competence granted to those infra?State bodies by the Spanish Constitution of 1978 and the other provisions of Spanish law are not of a selective nature within the meaning of the concept of State aid as referred to in Article 87(1) EC.

[Signatures]

* Language of the cases: Spanish.