JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
6 March 2002 *

In Joined Cases T-127/99, T-129/99 and T-148/99,

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

applicant in Case T-127/99,

Comunidad Autónoma del País Vasco,

Gasteizko Industria Lurra, SA, established in Vitoria (Spain),

represented by F. Pombo García, E. Garayar Gutiérrez and J. Alonso Berberena, lawyers, with an address for service in Luxembourg,

applicants in Case T-129/99,

Daewoo Electronics Manufacturing España, SA, established in Vitoria, represented by A. Creus Carreras and B. Uriarte Valiente, lawyers,

applicant in Case T-148/99,

* Language of the case: Spanish.

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

defendant,

supported by

Asociación Nacional de Fabricantes de Electrodomésticos de Línea Blanca (ANFEL), having its registered office in Madrid (Spain), represented by M. Muñiz and M. Cortés Muleiro, lawyers, with an address for service in Luxembourg,

intervener,

and by

Conseil européen de la construction d'appareils domestiques (CECED), represented by A. González Martínez, lawyer, with an address for service in Luxembourg,

intervener in Case T-148/99,

APPLICATION for the annulment of Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa) (OJ 1999 L 292, p. 1),

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

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

Registrar: J. Plingers, Administrator,

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

gives the following

Judgment

Legal context

Maximum aid intensity allowed in the Basque Country

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

Ekimen regional aid scheme for the Autonomous Community of the Basque Country

2 By decision of 12 December 1996 [SG (96) D/11028 (State aid N 529/96), the notice of which was published (OJ 1997 C 189, p. 7)], the Commission authorised the Ekimen regional aid scheme for the Autonomous Community of the Basque Country which was notified to it at the planning stage by Spain on 28 June 1996. The scheme was introduced by Decree No 289/1996 of 17 December 1996 (hereinafter 'the Ekimen Decree'), published in *Boletín Oficial del País Vasco* No 246 of 23 December 1996, p. 20138.

3 The scheme covered the period 1996 to 1998. It was designed to promote regional development and job creation in the Autonomous Community of the Basque Country (Article 1 of the Ekimen Decree). The aid could take the form of non-refundable grants or soft loans for the creation of new production facilities or the extension or modernisation of existing infrastructure (Article 9 of the Ekimen Decree). The eligible costs included land, buildings and plant (Article 7(a) of the Ekimen Decree).

4 The beneficiaries of the aid were, *inter alia*, industrial companies (Article 3 of the Ekimen Decree). Article 5 of the Ekimen Decree provided that, in order to qualify, investments had to comply with the following conditions:

— the investment project has to be technically, economically and financially viable and has to be implemented within a period of three years from the date when the aid is granted;

— the amount of the investment has to exceed 360 million Spanish pesetas (ESP);

— it must entail the creation of at least 30 jobs;

— both the investment and the job creation involved must be achieved by a single legal entity and, in the case of undertakings which have several production centres, in one of those centres, unless it is duly established that only one investment is concerned;

— at least 30% of the investment has to be financed from the beneficiary's own resources.

5 In accordance with Article 10 of the Ekimen Decree, aid granted under the aid programme must not exceed 25% of the investment (see paragraph 112 below).

Tax concessions in force in the Territorio Histórico de Álava

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

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

Tax credit of 45%

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

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

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

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

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

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

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

Reduction of the basis of assessment to corporation tax

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

'1. Undertakings starting their business activity shall be entitled to a reduction of 99%, 75%, 50% and 25% respectively in the positive basis of assessment

deriving from their economic activity, before this is offset by any negative bases of assessment arising in tax periods, for the four consecutive tax periods running from the first period in which, within four years of starting their business activity, they generate a positive basis of assessment.

...

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

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

(b)...

(c)...

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

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

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

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

(h) ...

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

3 ....

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

5. The reduction provided for in this Article shall be requested by means of an application lodged with the tax administration, which, after checking that the

initial requirements are satisfied, shall where appropriate notify the applicant company of its provisional authorisation, to be formally adopted by decision of the Álava Provincial Council.

...'.

The facts

11 On 13 March 1996 the Basque authorities and Daewoo Electronics Co. Ltd (hereinafter 'Daewoo Electronics') concluded a Cooperation Agreement in which Daewoo Electronics undertook to establish a refrigerator manufacturing plant in the Basque Country and the Basque regional authorities undertook in return to support the investment by providing a number of grants.

12 Under the Agreement the abovementioned project could receive a grant of up to 25% of investments in fixed assets and of start-up costs, as well as any other public aid generally available to operators wishing to make investments in the Basque Country in environmental protection, research and development and energy saving projects.

13 The company set up by Daewoo Electronics was to draw up a business plan whose approval by the Basque authorities was a prerequisite for implementation of the Agreement. The business plan, which covered the period 1996 to 2001 and was presented to the Basque authorities in September 1996, provided for an investment of ESP 11 835 600 000 and the creation of 745 jobs. Sales were planned to begin in 1997, mainly on the Spanish market and in France and Italy,

and were to spread to Germany and the United Kingdom in 1998. At the outset, most of the turnover was to be generated on the domestic market, but exports were to grow each year, reaching 60% of the total in three to four years.

14 On 7 October 1996 Daewoo Electronics Manufacturing España SA (hereinafter 'Demesa') was incorporated under Spanish law as a wholly-owned subsidiary of Daewoo Electronics.

15 By letter of 10 October 1996, Gasteizko Industria Lurra SA (hereinafter 'Gasteizko Industria'), a public-sector company, offered to sell to Demesa, for ESP 4 125 per square metre, a plot of land of 100 000 m^2 on the Júndiz industrial estate. Demesa accepted the offer in November 1996.

16 Around November 1996, Demesa began construction work on its refrigerator manufacturing plant.

17 On 24 December 1996, the Basque Consejo de Gobierno (Governing Council) decided, on the basis of the Ekimen Decree (see paragraphs 2 to 5 above), to make Demesa a grant of 25% in gross grant equivalent (gge) of the overall amount of the intended investment, that is, ESP 2 958 900 000.

18 Under Decision 737/1997 of 21 October 1997 of the Diputación Foral de Álava, Demesa obtained the tax credit of 45% mentioned in paragraphs 8 and 9 above.

19 On 30 December 1997, the day on which the deed of sale was signed, Demesa paid Gasteizko Industria the purchase price for the plot of land, which had been fixed in the offer of 10 October 1996 (see paragraph 15 above).

20 On 30 December 1997 the instrument of sale relating to that plot of land was also formalised.

Administrative procedure

21 By letter of 11 June 1996, the Commission received a complaint from Asociación Nacional de Fabricantes de Electrodomésticos de Línea Blanca (ANFEL), stating that Spain had granted aid to Demesa, in the form of grants and tax exemptions exceeding the ceilings allowed for regional aid in the Basque Country. The Commission received further complaints concerning the same aid from the Commission européen de la construction d'appareils domestiques (European Committee of Manufacturers of Electrical Domestic Equipment) (CECED) and from Associazione Nazionale Industria Elettrotecniche ed Elettroniche (ANIE).

22 By letter dated 26 June 1996, the Commission requested information from the Spanish authorities.

23 Spain provided some information by letter dated 16 September 1996. By letter of 11 February 1997, the Basque authorities forwarded additional information to the Commission.

24 By letter of 16 December 1997 the Commission informed Spain that it had decided, in particular, 'to initiate proceedings under Article 93(2) of the Treaty in respect of the possible exceeding of the maximum limit for aid in the region, fixed at 25% nge, owing to the grant... of aid to Demesa in the form of:

— fiscal measures under the tax scheme of the province of Álava (Norma Foral 24/1996 of 5 July 1996 concerning corporation tax),

— a tax credit consisting of a reduction of 45% in Demesa's corporation tax liability [Sixth Additional Provision of Norma Foral 22/1994 of 20 December 1994 implementing the budget of the province of Álava for 1995, extended by Norma Foral 33/1995 of 20 December 1995 (Fifth Additional Provision), by Norma Foral 24/1996 of 5 July 1996 (derogating provision, point 2.11) and by Norma Foral 31/1996 of 18 December 1996 (Seventh Additional Provision)],

— Demesa's use, free of charge, of a 500 000 m^2 plot in the Júndiz industrial estate at Vitoria-Gasteiz since 1996 and its subsequent purchase of the land at less than the market price'.

25 The Commission invited interested parties to submit their observations on the alleged aid (OJ 1998 C 103, p. 3). The Spanish authorities submitted their

observations by letters dated 23 January 1998 and 6 March 1998. The Commission forwarded the observations it received from interested parties to Spain, which submitted its comments on those observations by letter of 20 October 1998.

26 By letter of 4 June 1998, the Commission informed Spain that it had decided to extend the proceedings to the aid granted to Demesa under the Ekimen programme in respect of the section not covered by the general rule in Article 10(1) of the Ekimen Decree allowing an aid intensity of 10% of the effective eligible costs (see paragraph 112 below).

27 The Commission invited interested parties to submit their comments (OJ 1998 C 266, p. 6). Spain submitted its comments by letters of 22 and 24 July 1998. The Commission forwarded the comments of the other interested parties to the Spanish authorities, which responded to them by letter of 3 December 1998.

28 Two meetings were held in Brussels and Vitoria-Gasteiz between Commission staff and representatives of the Basque regional authorities, on 29 October 1998 and 15 December 1998 respectively.

29 On 24 February 1999 the Commission adopted Decision 1999/718/EC concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa) (OJ 1999 L 292, p. 1, hereinafter 'the contested decision').

30 The decision contains, in particular, the following provisions:

'*Article 1*

The State aid granted by Spain to [Demesa] in the form of:

(a) the advantage equivalent to postponement of payment of the price of a plot of land in the Júndiz industrial estate at Vitoria-Gasteiz for a period of nine months, running from the time [Demesa] first occupied the land for the purpose of carrying out construction work until the date on which it paid the price, amounting to EUR 184 075.79;

(b) the advantage equivalent to the difference between the market price and the price paid by [Demesa] for a plot of land in the Júndiz industrial estate, amounting to EUR 213 960.31;

(c) the amount corresponding to the five percentage points that exceed the maximum permissible grant of 20% of eligible costs under the Ekimen aid scheme, i.e. the plant valued at EUR 1 803 036.31 in the audit report submitted by the regional authorities as an annex to Spain's letter of 24 July 1998;

(d) the grant of a tax credit corresponding to 45% of the cost of the investment as determined by the Álava Provincial Council in Decision 737/1997 of 21 October 1997;

(e) the reduction in the tax base for newly created businesses provided for by Article 26 of Provincial Law 24/1996,

is incompatible with the common market.

Article 2

1. Spain shall take the necessary measures to:

(a) recover from the beneficiary company the aid referred to in Article 1(a), (b) and (c), which was granted to it illegally;

(b) withdraw from the beneficiary company the benefits deriving from the aid referred to in Article 1(d) and (e), which was granted to it illegally.

2. The aid shall be recovered in accordance with the procedures and provisions laid down in Spanish law. The sums to be recovered shall include the interest which has accrued between the granting of the aid and the date on which it is actually repaid. The interest shall be calculated on the basis of the reference rate used to calculate the grant equivalent of regional aid in Spain.

Article 3

Spain shall inform the Commission within a period of two months from the date of notification of this Decision of the measures taken to comply therewith.

Article 4

This Decision is addressed to the Kingdom of Spain.'

Proceedings

31 By applications lodged at the Court Registry on 25 May, 26 May and 18 June 1999 respectively, the applicants in Cases T-127/99, T-129/99 and T-148/99 brought the present actions for the annulment of the contested decision.

32 By documents lodged at the Court Registry on 17 November 1999, ANFEL applied for leave to intervene in support of the form of order sought by the Commission in Cases T-127/99 and T-129/99.

33 By documents lodged at the Court Registry on 13 December 1999, ANFEL and CECED applied for leave to intervene in support of the form of order sought by the Commission in Case T-148/99.

34 By orders of 25 February 2000, the President of the Third Chamber (Extended Composition) of the Court of First Instance allowed the applications to intervene.

35 On 12 April 2000, ANFEL and CECED lodged their statements in intervention, on which the main parties submitted their observations.

36 By order of 5 June 2000, Cases T-127/99, T-129/99 and T-148/99 were joined for the purposes of the oral procedure and the judgment.

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

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

Forms of order sought by the parties

39 The applicant in Case T-127/99 claims that the Court should:

— declare the action admissible and well founded, and annul Articles 1(d) and (e) and 2(1)(b) and Paragraph 2 of the contested decision;

— order the Commission to pay the costs.

40 In Case T-129/99, the applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs;

— order ANFEL to pay the costs of the proceedings relating to the intervention procedure.

41 The applicant in Case T-148/99 claims that the Court should:

— declare the action admissible and well-founded;

— annul the contested decision;

— order the Commission to pay the costs.

42 The applicants in Cases T-127/99 and T-148/99 also request the Court to instruct the Commission to disclose its internal documents concerning the adoption of the contested decision. In Case T-129/99, the applicants request disclosure of the whole administrative file relating to the contested decision.

43 In Case T-127/99 and in Case T-148/99, the Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

44 In Case T-129/99, the Commission contends that the Court should:

— declare the application inadmissible in so far as concerns Article 1(d) and (e) of the contested decision and, in the alternative, dismiss it on this point as unfounded;

— dismiss the application in so far as concerns Article 1(a) to (c) of the contested decision;

— order the applicants to pay the costs.

45 The Commission also contends that the request made by the applicants in Cases T-127/99, T-129/99 and 148/99 for disclosure of certain documents or of the whole file, should be refused.

46 Having clarified at the hearing the form of order which they seek, ANFEL, in all three cases, and CECED, in Case T-148/99, contend that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

The partial inadmissibility of the application in Case T-129/99

47 The Commission submits that the application in Case T-129/99 is inadmissible in so far as the applicants are seeking the annulment of Article 1(d) and (e) of the contested decision.The applicants are not directly and individually concerned, within the meaning of the fourth paragraph of Article 230 EC, by those provisions.

48 In response to that submission, the applicants in Case T-129/99 contend that the contested decision must be regarded as an indivisible whole. Furthermore, they submit that the Commission took into consideration the tax aid provided under Article 1(d) and (e) and also the aid affected by Article 1(a) to (c), and concluded, on that basis, that the total amount of aid granted to Demesa greatly exceeds the maximum aid allowed in the Basque Country. Finally, under Spanish law the Autonomous Community of the Basque Country has powers in the tax matters affected by Article 1(d) and (e) of the contested decision. It should therefore be acknowledged that it has *locus standi* in so far as concerns the provisions of that decision.

49 The Court finds, first of all, that the applicants in Case T-129/99, namely the Autonomous Community of the Basque Country and Gasteizko Industria, are not the addressees of the contested decision. It is therefore necessary to consider whether the contested decision is of direct and individual concern to those parties within the meaning of the fourth paragraph of Article 230 EC.

50 In that regard, it should be pointed out that Article 1(a) and (b) of the contested decision relate to aid which Gasteizko Industria granted to Demesa, and that Article 1(c) of the contested decision concerns aid which the Autonomous Community of the Basque Country granted to the same company. The relevant

provisions of the contested decision not only affect measures adopted by the applicants in Case T-129/99, but also prevent those applicants from exercising, as they see fit, their own powers, which they enjoy directly under Spanish law (see, to that effect, Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraphs 29 and 30, and Case T-288/97 *Regione Autonoma Friuli-Venezia Giulia* v *Commission* [1999] ECR II-1871, paragraph 31).

51 It follows that Gasteizko Industria is directly and individually concerned by Article 1(a) and (b) of the contested decision and that the Autonomous Community of the Basque Country is directly and individually concerned by Article 1(c) of the contested decision.

52 Since one and the same action is involved, it may therefore be held that the application in Case T-129/99 is admissible, in so far as it seeks the annulment of Article 1(a) to (c) of the contested decision (see, to that effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31).

53 As for the measures referred to in Article 1(d) and (e) of the contested decision, namely the tax credit and reduction in the basis of assessment, the parties agree that those measures were not adopted by any of the applicants in Case T-129/99.

54 The applicants in that case nevertheless claim that they are directly and individually concerned also by those provisions of the contested decision. For that purpose they refer first to the fiscal powers of the Autonomous Community of the Basque Country.

55 However, that argument is not convincing, since the Autonomous Community of the Basque Country has not established that Article 1(d) and (e) of the contested decision prevents it from exercising, as it sees fit, its own fiscal powers (*Vlaams Gewest* v *Commission*, cited in paragraph 50 above, paragraph 29).

56 Nor can the applicants claim that the contested decision is indivisible. It constitutes a bundle of decisions relating to various items of aid granted to the same company by different public entities.

57 Moreover, contrary to what the applicants claim, the Commission did not take account, in the contested decision, of the alleged aid mentioned in Article 1(d) and (e) of the contested decision in order to determine whether the concessions granted to Demesa under the Ekimen scheme exceeded the allowed limit stated in the decision of 12 December 1996 (see paragraph 2 above). Nor, in the contested decision, did the Commission base its assessment that the alleged aid mentioned in the contested decision is incompatible with the common market on the finding that the total of the various concessions granted to Demesa exceeds the ceiling of 25% NGE fixed for the Basque Country (see paragraph 1 above).

58 It must therefore be concluded that the application in Case T-129/99 is inadmissible in so far as it seeks the annulment of Article 1(d) and (e) of the contested decision and, consequently, also in so far as it seeks the annulment of Article 2(1)(b) of the contested decision.

Substance

59 Three pleas in law common to the applications relating to the present actions may be discerned. The first alleges infringement of Article 92(1) of the EC Treaty (now, following amendment, Article 87(1) EC). The second alleges breach of the

principles of the protection of legitimate expectations and legal certainty, and the third, infringement of Article 190 of the EC Treaty (now Article 253 EC).

60 In Cases T-129/99 and T-148/99, the applicants also invoke a plea alleging infringement of the right to a fair hearing. Finally, the applicants in Case T-129/99 invoke a further plea alleging infringement of Article 92(3) of the Treaty.

I — *The first plea, alleging infringement of Article 92(1) of the Treaty*

61 This plea comprises six parts. The first five relate to the various alleged items of aid identified in the provisions of the contested decision [Article 1(a) to (e)]. The sixth part concerns the possible distortions of competition and the effect on intra-Community trade within the meaning of Article 92(1) of the Treaty.

62 The Court considers it appropriate to examine the part of the plea which relates to the alleged aid mentioned in Article 1(b) of the contested decision before reviewing the legality of the other points in Article 1 of that decision.

The first part, relating to the purchase price of the 100 000 m² plot of land referred to in Article 1(b) of the contested decision

63 In the contested decision, the Commission assessed at ESP 4 481 per square metre the market price of the plot of land of 100 000 m² which Gasteizko Industria sold to Demesa (the final paragraph of point V.2.2 of the contested decision). This was a serviced plot of land, with water, gas, electricity and sewer connections.

64 The price of ESP 4 481 per square metre used by the Commission is that mentioned in a report by Price Waterhouse in January 1997 (the seventh paragraph of point V.2.2 of the contested decision). In fact, 'that report gives a unit cost of ESP 4 481 per square metre of serviced land for 50 000 m² plots located in the same area as the land occupied by Demesa' (the fourth paragraph of point III.2.1 of the contested decision).

65 It is apparent from the contested decision that the Commission verified the reliability of Price Waterhouse's valuation by referring to three other reports.

66 The Commission refers, first, to the valuations carried out by two real estate valuers on 13 January and 6 February 1998, which were submitted during the administrative procedure by the Basque regional authorities. In that regard, the contested decision states:

'The first valuation stated that the selling price of a serviced plot of over 10 000 m² should be between ESP 4 000 and ESP 4 500 per square metre. The second valuation, based on real data — that is to say, the selling prices of serviced plots

with similar characteristics sold in previous months — established a price of ESP 5 000 per square metre for two much larger plots of approximately 33 000 m^2; and 50 000 m^2, and concluded that there were no price indicators on the market for serviced plots of 100 000 m^2; however, a price of between ESP 4 000 and ESP 4 800 per square metre appeared justified in the circumstances, given the costs that could be incurred in servicing large plots. It stressed at the same time the political dimension of sales of this type, which were bound to be influenced by non-economic considerations' (the fifth paragraph of point V.2.2 of the contested decision).

67 The Commission also used an IDOM audit report drawn up in July 1998. The contested decision states that that audit 'quoted the price of a non-serviced plot in the same area at around ESP 5 000 per square metre. It stated that the price paid by Demesa could be justified by a discount offered on account of the size of the plot. Nevertheless, in his conclusions, the auditor maintains a price of ESP 5 000 per square metre and points to the difference between his estimate and the price of ESP 4 125 per square metre set by the regional authorities' (the sixth paragraph of point V.2.2 of the contested decision).

68 The Commission concludes that 'the average of [the] estimates [contained in the three aforementioned reports] does not differ substantially from the average unit price of ESP 4 481 per square metre of serviced land calculated in January 1997 by Price Waterhouse, which includes development costs' (the seventh paragraph of point V.2.2 of the contested decision). According to the Commission, that price therefore constitutes the market price.

69 The Commission adds: 'Given that Demesa paid only ESP 4 125 per square metre for the land, it enjoyed an advantage that must be calculated as the difference between the two figures, namely ESP 356 per square metre, making a total of EUR 213 960.31 (ESP 35 600 000)' (the final paragraph of point V.2.2 of the contested decision).

70 In those circumstances, the Commission, in Article 1(b) of the contested decision, described as State aid 'the advantage equivalent to the difference between the market price and the price paid by [Demesa] for a plot of land in the Júndiz industrial estate, amounting to EUR 213 960.31'.

71 The applicants in Cases T-129/99 and T-148/99 maintain that the Commission infringed Article 92(1) of the Treaty by considering that the purchase price of ESP 4 125 per square metre did not reflect the market price. They claim that the Commission arbitrarily fixed a market price in the contested decision. It took the price of ESP 4 481 per square metre calculated by the auditors Price Waterhouse for a plot of land of 50 000 m^2, whereas the reports of independent experts submitted to it in the course of the administrative procedure all include the actual sale price of ESP 4 125 per square metre in the range of market prices.

72 In that regard, the Court points out that the sale of assets by a public authority, such as that conducted through Gasteizko Industria, on preferential terms may constitute State aid (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 59).

73 In order to determine whether, in the present case, Demesa received State aid when it acquired the plot of land of 100 000 m^2, it is necessary to examine whether the company bought the plot in question at a price which it would have been unable to obtain under normal market conditions (Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41, and Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 22).

74 It is apparent from the contested decision (see paragraphs 63 to 70 above) that the Commission attached decisive weight to the price of ESP 4 481 per square metre given in the Price Waterhouse report. In order to determine whether the

price actually paid by Demesa for the plot of 100 000 m^2 included an aid element, the Commission compared the sale price only with the price given in the Price Waterhouse report. The prices stated in the other three reports mentioned in the contested decision, namely the reports of 13 January and 6 February 1998 and the IDOM report of July 1998, were used for the sole purpose of verifying the reliability of the price stated by Price Waterhouse.

75 In order to assess the legality of Article 1(b) of the contested decision, it is therefore necessary to examine whether it was reasonable for the Commission to attribute such decisive weight to the Price Waterhouse report.

76 For that purpose, it must be noted that, in the contested decision, the Commission states that 'two valuations [those of 13 January and 6 February 1998] and an audit [the IDOM audit] report carried out *after the event* cannot carry the same weight as a valuation carried out *before the sale*' (the third paragraph of point V.2.2 of the contested decision).

77 However, the Court points out that, by letter of 10 October 1996, Gasteizko Industria offered to sell to Demesa a plot of land of 100 000 m^2 in the Júndiz industrial estate for ESP 4 125 per square metre. The documents also show that, in November 1996, Demesa verbally accepted that offer. It must therefore be stated that the four valuations mentioned in the contested decision, including that of Price Waterhouse, were made after the agreement for sale. Therefore, even though it is apparent from the Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3) that a sale price that corresponds to a price estimated by an independent expert before the sale does not include an aid element, it was not reasonable for the Commission to use the date on which the Price Waterhouse report was drawn up (January 1977) as a basis for attaching decisive weight to the report.

78 In response to a written question from the Court, the Commission stated that the valuation provided by Price Waterhouse, auditor of the property company selling the land, is the only acceptable valuation since it was made in order to determine the financial value of that company's property holdings. Besides, it was the only valuation which had been made before the decision to initiate the procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC). Furthermore, the Commission calls in question the reliability of the reports of 13 January and 6 February 1998, since the first was not based on actual market data and the second had reviewed prices downwards on the basis of political criteria.

79 The Court considers, first, that the fact that the valuations of 13 January and 6 February 1998 and the IDOM report were prepared after the initiation of the procedure does not make it possible, in the present case, to accord preponderant weight to the Price Waterhouse report of January 1997. The four reports, including the Price Waterhouse report, were drawn up at a time when the Commission had already initiated an investigation into the alleged aid granted to Demesa. The first request for information in that file dates, in fact, from June 1996.

80 Next, it must be observed that none of the four reports mentioned in the contested decision is based directly on sales of plots of land of 100 000 m^2 in size. As stated in the contested decision, there are 'no price indicators on the market for serviced plots of 100 000 m^2' (the fifth paragraph of point V.2.2).

81 Nevertheless, the experts who drew up the report of 6 February 1998 and the IDOM audit report made every effort, on the basis of the information available, to estimate the sale price of a plot of land of that size. The report of 13 January 1998 contains an overall valuation for any plot of more than 10 000 m^2.

82 In contrast, the Price Waterhouse report gives an estimate of the price of a plot of 55 481 m^2 and does not take into consideration the actual area of the plot bought by Demesa.

83 In those circumstances, it must be found that the Commission, by using, as a definitive reference price in the contested decision, the price given in the Price Waterhouse report, acted arbitrarily.

84 The fact that the Commission verified the price suggested by Price Waterhouse, by comparing it with the average of the prices suggested in the other three reports, namely, the reports of 13 January and 6 February 1998 and the IDOM audit report, does not invalidate that conclusion.

85 First, the Commission had to examine whether the sale price paid by Demesa was a market price. It therefore should have compared the sale price actually paid by Demesa — not the price determined by Price Waterhouse — with the prices given in the various reports of experts which were available to it during the administrative procedure in order to assess whether the price paid by Demesa deviated so far from the prices given in those reports as to provide grounds for concluding that there had been State aid.

86 Second, it must be observed that in the contested decision (the seventh paragraph of point V.2.2) the calculation of the average of the values contained in the reports of 13 January and 6 February 1998 and in the IDOM audit report is based on an incorrect reading of those reports.

87 In that regard, it should be pointed out that the Commission stated, in reply to a written question put by the Court, that it calculated the average of the valuations referred to in the contested decision (seventh paragraph of point V.2.2) in the following way:

'The minimum values were [...]: ESP 4 000 per square metre (Luis Perales Agency [report of 13 January 1998]), ESP 4 000 per square metre (Juan Calvo Agency [report of 6 February 1998]) and ESP 5 000 per square metre (IDOM). The average of those minimum values is ESP 4 333 per square metre. The maximum values were: ESP 4 500 per square metre (Luis Perales Agency [report of 13 January 1998]) and ESP 4 800 per square metre (Juan Calco Agency [report of 6 February 1998]). The average of those maximum values is therefore ESP 4 650 per square metre. Consequently, the average value of the three valuations is ESP 4 491 per square metre.'

88 It must be observed, first, that the Commission was in error as to the facts in considering that the IDOM audit report showed a minimum value of ESP 5 000 per square metre for the land bought by Demesa. It is true that the IDOM audit gives a figure of 'about ESP 5 000 per square metre' ('entorno a las 5 000 pesetas') for an unserviced plot of land. However, the audit report also confirms that the final price obtained by Demesa, namely ESP 4 125 per square metre, is a market price with a normal discount taking account of the size of the plot of land ('el precio final obtenido por Demesa es un precio de mercado con un descuento normal, teniendo en cuenta el tamaño de la superficie comprada'). Furthermore, although the final conclusions again show a price of ESP 5 000 per square metre, they also confirm that, according to the investigations carried out by IDOM, Demesa's investment was made at current market prices ('la inversión realizada por DEMESA se ajusta a los precios de mercado actuales, tras las comprobaciones efectuadas por IDOM'). The IDOM audit report therefore shows that, although ESP 5 000 per square metre may be regarded as the normal price, the price paid by Demesa is a market price if the area of the plot of land is taken into account.

89 Second, it must be observed that the reports of 13 January and 6 February 1998 also show that the price of ESP 4 125 per square metre is a market price. The first report states that the market price of a plot of more than 10 000 m^2 is between

ESP 4 000 and ESP 4 500 per square metre. The second report gives a market price of between ESP 4 000 and ESP 4 800 per square metre. Nevertheless, by calculating a single average of the values given in the various reports, the Commission misinterpreted the reports of 13 January and 6 February 1998. Since the price paid by Demesa, namely ESP 4 125 per square metre, is close, in each case, to the minimum value in the range given in the reports of 13 January and 6 February 1998, the Commission, by calculating a single average of the values contained in the reports of 13 January and 6 February 1998, was bound to be left with an alleged market price higher than the price paid by Demesa even though those same reports confirm that a price of ESP 4 125 per square metre is a market price.

90 On the basis of the foregoing, it must be concluded that the approach taken by the Commission in the contested decision in determining whether the price of ESP 4 125 per square metre which Demesa paid for the plot of land of 100 000 m^2 contained a State aid element is arbitrary. Furthermore, in its calculations, the Commission made a number of factual errors.

91 That being so, the Commission infringed Article 92(1) of the Treaty in considering, in the contested decision, that the difference between the price of ESP 4 481 per square metre put forward by Price Waterhouse and the price of ESP 4 125 per square metre constituted State aid.

92 The first part of this plea is therefore well founded. Accordingly, Article 1(b) of the contested decision must be annulled in Cases T-129/99 and T-148/99. In the same cases, Article 2(1)(a) of the contested decision must also be annulled, since it instructs the Kingdom of Spain to recover from Demesa the alleged aid mentioned in Article 1(b) of the contested decision.

The second part, relating to the postponement of payment of the purchase price of the plot of land, referred to in Article 1(a) of the contested decision

93 In Article 1(a) of the contested decision the Commission describes as State aid 'the advantage equivalent to postponement of payment of the price of a plot of land [of 100 000 m^2 sold to it by the public undertaking Gasteizko Industria] in the Júndiz industrial estate at Vitoria-Gasteiz for a period of nine months, running from the time [Demesa] first occupied the land for the purpose of carrying out construction work until the date on which it paid the price, amounting to EUR 184 075.79'.

94 Since the operative part of an act is indissociably linked to the statement of the reasons for it, account must be taken, in interpreting it, of the reasons which led to its adoption (judgment of the Court of Justice in Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21).

95 It is apparent from the reasons stated for the contested decision that the aid element referred to in Article 1(a) of the contested decision is the advantage gained by Demesa from the free use of a plot of land of 100 000 m^2 during at least nine months, due to the delay in the formalisation of the deed of sale and, consequently, in the payment of the purchase price of the plot.

96 Point V.2.1 of the contested decision, concerning Article 1(a) of the operative part, is entitled 'free-of-charge use of a 100 000 m^2 plot of land'. In that point, the Commission states that 'no proof has been given that Demesa incurred any cost during the period in which it occupied the land for the purpose of building the plant, [...] until the purchase price was actually paid' (the second paragraph of point V.2.1). The Commission adds that 'Demesa occupied, at least between

February 1997 and October 1997, a plot of land with the aim of building or commissioning the construction of a plant on it, without paying the purchase price of the land or incurring any cost whatsoever in connection with its use' (the fifth paragraph of point V.2.1). It also states: 'Demesa used the land without having to pay the consideration that the company selling it was entitled to demand' (the seventh paragraph of point V.2.1).

97 The Court points out that, by letter of 10 October 1996, Gasteizko Industria offered to sell Demesa a plot of land of 100 000 m^2 in the Júndiz industrial estate for ESP 4 125 per square metre and that Demesa accepted the offer verbally in November 1996. The purchase price agreed for the plot was paid on 30 December 1997, the day on which the instrument of sale was signed.

98 In reply to a written question from the Court, Demesa acknowledged that it had begun construction work on its factory on the plot concerned in about November 1996.

99 Since the purchase price was not paid until 30 December 1997, the Commission was entitled to find, in the contested decision, that for at least nine months Demesa occupied a plot of land of 100 000 m^2 free of charge.

100 Nevertheless, the Commission cannot automatically infer from that occupation that Gasteizko Industria granted State aid to Demesa. That would be the case

only if the conduct of Gasteizko Industria were not the normal conduct of a private undertaking (see, to that effect, Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 8).

101 In that regard, the applicants in Cases T-129/99 and T-148/99 refer to Article 1502 of the Spanish Civil Code in order to justify the postponement of the formalisation of the instrument of sale and, in consequence, of payment of the purchase price. That provision states: 'If the purchaser suffers interference in the possession or ownership of the purchased asset, or is justified in fearing such interference because of an action for recovery of property or a mortgage action, he shall be entitled to suspend payment of the price until the vendor has caused the interference or threat of interference to cease....'

102 The applicants maintain that, in the present case, the conditions for application of Article 1502 of the Spanish Civil Code were satisfied. First, Gasteizko Industria had to separate a plot of 100 000 m^2 from two larger properties. Second, a group of farmers claimed implementation of a verbal agreement concluded with Gasteizko Industria giving them the right to cultivate the plot. The farmers had brought proceedings before the court in Vitoria-Gasteiz and those proceedings did not end until 4 November 1997. The advantage stemming from occupation of the land before payment of the purchase price cannot be described as State aid since it is the consequence of the application of general rules of Spanish civil law.

103 In response to that argument, which was also submitted by the Basque authorities during the administrative procedure, the Commission states, in the contested decision, that 'no proof has been given that Demesa incurred any cost during the period in which it occupied the land for the purpose of building the plant..., until the purchase price was actually paid' (the second paragraph of point V.2.1; see also the seventh paragraph of point V.2.1).

104 Consequently, it is apparent from the contested decision that the Commission inferred the existence of State aid within the meaning of Article 92(1) of the Treaty directly from its finding that Demesa occupied free of charge the plot of land of 100 000 m^2 for at least nine months, without considering whether Gasteizko Industria had acted as a private operator would have done.

105 Following the explanations provided during the administrative procedure, giving the reasons for the delay in the formalisation in the instrument of sale and in the payment of the purchase price until 30 December 1997, the Commission should have considered whether a private operator could have required payment of the purchase price before that date and, if that were not the case, whether he could have required a payment in respect of the period during which the land was occupied before payment of the purchase price.

106 In the absence of such an examination, it must be held that the Commission did not prove to the requisite legal standard that Demesa received State aid within the meaning of Article 92(1) of the Treaty by virtue of occupying the plot of land of 100 000 m^2 free of charge before paying the purchase price on 30 December 1997.

107 The second part of this plea is therefore well founded.

108 In those circumstances, in Cases T-129/99 and T-148/99, Article 1(a) of the contested decision must be annulled. In the same cases, Article 2(1)(a) of the contested decision must also be annulled, since it instructs the Kingdom of Spain

to recover from Demesa the aid referred to in Article 1(a) of the contested decision.

The third part, relating to the alleged exceeding of the ceiling fixed by the Ekimen Decree, referred to in Article 1(c) of the contested decision

109 In Article 1(c) of the contested decision, the Commission describes as State aid incompatible with the common market 'the amount corresponding to the five percentage points that exceed the maximum permissible grant of 20% of eligible costs under the Ekimen aid scheme, i.e. the plant valued at EUR 1 803 036.31 in the audit report submitted by the regional authorities as an annex to Spain's letter of 24 July 1998'.

110 The arguments raised by the applicants in Cases T-129/99 and T-148/99 relate to the maximum grant allowed under the Ekimen scheme and also to the exclusion of the cost of certain plant from the eligible costs under the Ekimen aid scheme.

A. Maximum grants allowed under the Ekimen aid scheme

111 By decision of the Consejo de Gobierno of the Autonomous Community of the Basque Country of 24 December 1996, a grant of 25% of the investment in fixed assets was granted to Demesa under the Ekimen scheme.

112 At that time, Article 10 of the Ekimen Decree was worded as follows:

'A non-refundable grant of up to 25% gge is to be awarded in accordance with the following conditions:

1. A grant of 10% of investment costs deemed eligible shall be awarded as a general measure.

2. Furthermore, in the case of strategic projects and investment projects involving significant job creation which create at least 50 jobs and entail investments worth at least ESP 750 million, the above percentage shall be increased by five points.

3. Similarly, businesses whose project is carried out in a preferential interest area as provided for in Article 4 of this Decree shall receive an additional grant of 5% of the investment costs deemed eligible.

4. Lastly, the percentage may be further increased by up to five points according to the following criteria:

— the extent to which the project is integrated into the Basque Country's industrial base;

— whether the investment is in one of the Basque Country's strategic sectors;

— the number of jobs created by the project.'

113 In the decision of 12 December 1996 to approve the aid elements contained in the Ekimen scheme (see paragraph 2 above), the Commission stated as follows:

'The Commission notes that non-refundable grants, which must not exceed the ceiling of 25% gge, will be awarded in accordance with the following conditions: (a) 10% as the general rule; (b) an extra 5% for strategic projects or projects which create jobs; (c) an extra 5% for projects located within priority areas; and (d) an extra 5% for projects which make a significant contribution to regional development or job creation.'

114 In the contested decision the Commission maintains that the grant of 25% of the cost of the investment in fixed assets granted to Demesa under the Ekimen Decree does not comply with the conditions of the Ekimen scheme as approved by the Commission. It states that 'a proper application of the rules governing the Ekimen scheme should have led to the award of a maximum non-refundable grant amounting to 20% gge of the total eligible costs' (the third paragraph of point V.2.3 of the contested decision). Indeed, 'the Commission considers that Demesa's investment project fulfils the criteria laid down in Article 10(1) of the Decree (the 10% awarded to all eligible projects) and in Article 10(4) (an extra 5%)' (the eighth paragraph of point V.2.3 of the contested decision). On the other hand, the criterion laid down in Article 10(3) of the Ekimen Decree is not

fulfilled since 'Vitoria-Gasteiz, the municipality in which Demesa's investment is located, is not a "preferential interest area" in accordance with the provisions governing the Ekimen scheme' (the ninth paragraph of point V.2.3 of the contested decision). Finally, 'as regards the criterion laid down in Article 10(2) of the Decree, the Commission considers that the award of two 5% supplements under that provision constitutes an incorrect application of the rules governing the Ekimen scheme as approved by the Commission in [the decision of 12 December 1996]' (the tenth paragraph of point V.2.3 of the contested decision). A project cannot therefore receive two 5% supplements as both a 'strategic project' and a 'project which makes a significant contribution to job creation'. According to the Commission, only one 5% supplement may be granted under Article 10(2) of the Ekimen Decree.

115 The applicants in Cases T-129/99 and T-148/99 maintain that Demesa was entitled to receive the grant of 25% gge accorded to it by the Basque Government: 10% under Article 10(1) of the Ekimen Decree; 5% as a strategic project and 5% as a project which created jobs, under Article 10(2); 5% in accordance with the criteria laid down in Article 10(4). Demesa was therefore entitled, under Article 10(2) of the Ekimen Decree, to two 5% supplements to the grant, one because the investment was a strategic project and the other because it was a project which made a significant contribution to job creation, namely, a project which created at least 50 jobs and entailed investment of ESP 750 million. In the decision of 12 December 1996 approving the Ekimen scheme, the Commission wrongly determined that Article 10(2) of the Ekimen Decree authorises a grant of 5% for projects which are strategic or which create jobs.

116 The applicants claim that the Commission made a clerical error in its decision of 12 December 1996 approving the Ekimen scheme. The scheme should be regarded as approved by the Commission in the form notified to it. In any event, the Commission has no power to amend unilaterally an aid scheme notified to it. If the Ekimen scheme had posed problems for it, the Commission could have initiated the investigation procedure under Article 93(2) of the Treaty and made its approval conditional. However, it did not do so.

117 The Court finds, first, that the parties agree that Demesa received a grant of 25% gge under the Ekimen scheme, namely 10% under Article 10(1) of the Decree, two 5% supplements under Article 10(2) of the Decree, and 5% under Article 10(4) of the Decree. However, the double application of Article 10(2) of the Decree is refused by the Commission in the contested decision.

118 The Court finds, next, that Article 10(2) of the Ekimen Decree allows only one 5% supplement to the grant which may be given for an investment project under the aid scheme concerned.

119 In that regard, it must be pointed out that Article 10 of the Ekimen Decree, which advocates the principle of a maximum grant of 25%, has four paragraphs: the first provides for a grant of 10%, and each of the other three provides for a 5% supplement (see paragraph 112 above). In order not to exceed the maximum amount of the grant, paragraphs 2 to 4 of Article 10 of the Decree can give entitlement to only one 5% supplement each.

120 Furthermore, it must be observed that the Basque Government explained, in the observations submitted to the Commission by the Permanent Representation of Spain on 23 January 1998, that an investment project which fulfils all the criteria laid down in Article 10(1), (2) and (3) of the Ekimen Decree must receive a gross grant of 20%. If the interpretation of Article 10(2) of the Ekimen Decree suggested by the applicants were correct, a project fulfilling all the criteria in Article 10(1), (2) and (3) should receive a gross grant of 25%, and this has just been contradicted.

121 Since Article 10(2) of the Ekimen Decree allows only one 5% supplement to the grant, it must be concluded that the Commission's reading of that provision, in the decision of 12 December 1996 ('a [supplementary] band of 5% for projects

which are strategic *or* which create jobs' [emphasis added]) and in the contested decision, is based on an incorrect interpretation of that provision.

122 As a result, Demesa's investment project was entitled to only one 5% supplement under Article 10(2) of the Ekimen Decree as approved by the Commission in the decision of 12 December 1996.

123 The applicants in Cases T-129/99 and T-148/99 also argue that the Autonomous Community of the Basque Country is the only authority which may provide an authentic interpretation of its own legislation.

124 That argument must be rejected. The Commission alone has competence to approve State aid which falls within the scope of Article 92(1) of the Treaty. Since State aid is in principle prohibited under that provision, national legislation comprising aid elements is lawful only in so far as the aid elements have been approved by the Commission. It is apparent from the decision of 12 December 1996 (see paragraph 113 above) that the interpretation given by the Autonomous Community of the Basque Country to Article 10(2) of the Ekimen Decree is not covered by the approval given in that decision. Furthermore, it is clear from the analysis conducted above that the Commission's interpretation of the Ekimen Decree in its decision of 12 December 1996 and in the contested decision is wholly compatible with the wording and spirit of the Ekimen Decree.

125 Finally, the applicants in Cases T-129/99 and T-148/99 raise the point that, in July 1999, the Commission approved the new Ekimen Decree (Decree 241/1999 of 8 June 1999 amending the Ekimen scheme of financial aid to profitable industrial investments creating employment), which provides that, in the case of

'strategic projects and investment projects involving significant job creation which create at least 50 jobs and entail investments worth at least ESP 750 million, the above percentage shall be increased by five points'.

126 However, that argument is irrelevant to the assessment of the legality of the contested decision since the Commission's approval of July 1999 was given after the adoption of the contested decision and relates, moreover, to a new legislative provision (see, to that effect, Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 86).

127 It follows from all the foregoing that the Commission was right in holding in the contested decision that the maximum grant authorised under the Ekimen scheme — as the Commission had approved it in the decision of 12 December 1996 — is 20% gge. It therefore correctly described the 5% grant in excess of that ceiling, received by Demesa, as new aid within the meaning of Article 92(1) of the Treaty (the 14th paragraph of point V.2.3 of the contested decision).

128 The complaint relating to the maximum grant allowed under the Ekimen scheme must therefore be rejected.

B. Eligible costs under the Ekimen scheme

129 In the contested decision, the Commission notes that, 'in accordance with Article 7 of the [Ekimen Decree], fixed assets that have been transferred to third parties are not eligible. According to the audit report [submitted by the Basque

Government] some of the production plant acquired by Demesa (at a cost of ESP 300 000 000, or EUR 1 803 036.31) has been installed on the premises of other companies. This plant is consequently not eligible for aid under the Ekimen scheme, and its financing also constitutes aid within the meaning of Article 92(1) of the Treaty' (the final paragraph of point V.2.3).

130 The applicants in Cases T-129/99 and T-148/99 point out that Article 7 of the Ekimen Decree does not prohibit grants in respect of assets transferred to third parties, but merely states that 'as a general rule [only assets which] have not been transferred to third parties, with or without consideration, [may be subject to a grant]'. In any event, the manufacturing plant (moulds and seals), assessed by the Commission at ESP 300 million (EUR 1 803 036.31) in the final paragraph of point V.2.3 of the contested decision, had been installed at the premises of four companies which, for reasons of efficiency, had been commissioned by the applicant to manufacture part of the finished product. However, the ownership of those assets remained exclusively with Demesa and their use was reserved exclusively to Demesa. They had not, therefore, been 'transferred'.

131 The Court finds, first, that the decision of 12 December 1996 approving the Ekimen scheme (see paragraph 2 above) contains no specific reference to Article 7(d) of the Ekimen Decree.

132 It is common ground between the parties that that provision, which does not automatically exclude grants for assets transferred to third parties, should be interpreted as being designed to avoid abuse. Article 7(d) of the Ekimen Decree is intended to prevent aid granted to undertakings under the Ekimen Decree being transferred to undertakings which do not fulfil the conditions laid down in the Decree. There may be risk of such abuse not only where an undertaking which has received a grant under the Ekimen Decree transfers ownership of an asset

whose purchase price has been taken into account in order to determine the total amount of the aid, but also if the asset in question is made available to another undertaking on favourable terms. From an economic point of view, the legal rules governing the transfer are not of decisive significance for the purpose of determining whether an element of aid has been transferred from one undertaking to another.

133 However, in the light of the objective of Article 7(d) of the Ekimen Decree, it must be considered that, if there is no risk of abuse in connection with the transfer of the aid in question, the acquisition costs of assets, even if they are subsequently 'transferred', continue to be eligible costs under the Ekimen regional aid scheme, as approved by the Commission in the decision of 12 December 1996 (see paragraph 2 above).

134 It is therefore necessary to consider whether the Commission proved to the requisite standard in the contested decision that, in the present case, the undenied transfer of certain assets to four companies involved a risk of abuse related to the transfer of elements of aid.

135 In that regard, it must be observed that, in the contested decision, the Commission did not undertake any analysis in order to ascertain whether the transfer of certain assets for which Demesa received aid under the Ekimen scheme conferred on the four companies concerned an advantage which they would not have obtained under normal market conditions (see, to that effect, the judgments in *SFEI and Others*, cited in paragraph 72 above, paragraph 60, and *Spain* v *Commission*, cited in paragraph 73 above, paragraph 41).

136 It must further be observed that, during the administrative procedure, the Commission never examined that point. In its communication relating to this case, which was published in the *Official Journal* of 25 August 1998 (C 266, p. 6), the Commission did not even suggest that it intended not to take into consideration as eligible costs certain costs relating to assets which had been transferred to third parties.

137 Since there is no evidence of risk of abuse in connection with the transfer of elements of aid, it must be concluded that the Commission has not established that the assets 'transferred' to third parties and valued at EUR 1 803 036.31 could not be the subject of a grant under the Ekimen Decree. Accordingly, by considering that the grant received by Demesa to finance the assets in question constitutes a new aid which is not covered by the decision of 12 December 1996 approving the Ekimen Decree, the Commission infringed Article 92(1) of the Treaty.

138 It follows that in Cases T-129/99 and T-148/99 Article 1(c) of the contested decision must be annulled in so far as it excludes the plant valued at EUR 1 803 036.31 from the eligible costs under the Ekimen aid scheme. In the same cases, Article 2(1)(a) of the contested decision must also be annulled in so far as it instructs the Kingdom of Spain to recover from Demesa aid which it received under the Ekimen Decree in order to finance the assets valued at EUR 1 803 036.31, which were 'transferred' to third parties.

The fourth part, concerning the tax credit referred to in Article 1(d) of the contested decision

139 In Article 1(d) of the contested decision, the Commission describes as State aid 'the grant of a tax credit corresponding to 45% of the cost of the investment as determined by the Álava Provincial Council in Decision 737/1997 of 21 October 1997'.

140 Under this part of the plea, the applicants in Cases T-127/99 and T-148/99 refer first to the historical rights of the Territorio Histórico de Álava concerning taxation. Second, they deny that the tax measure in question is specific in nature. They claim that the Sixth Additional Provision of Norma Foral 22/1994 of

20 December 1994, which the Diputación Foral de Álava applied, is a general tax measure which confers the same benefit on all taxpayers making investments of ESP 2 500 million. The same applicants also state that the tax measure, even if it were specific, is justified by the nature and scheme of the tax system concerned. Finally, they claim that the tax measure, if it had to be categorised as State aid within the meaning of Article 92(1) of the Treaty, must be regarded as existing aid.

The historic rights of the Territorio Histórico de Álava concerning taxation

141 The applicants in Cases T-127/99 and T-148/99 claim that the Commission failed to take account, in its assessment of the tax credit from the point of view of Article 92(1) of the Treaty, of the historic rights of the Territorio Histórico de Álava concerning taxation. They point out for that purpose that, for hundreds of years, the Territorio Histórico de Álava has enjoyed an autonomy in tax matters which is recognised and protected by the Constitution of the Spanish State.

142 The Court observes that the fact that, in the present case, the tax credit was granted on the basis of legislation adopted by the Territorio Histórico de Álava, and not by the Spanish State, is irrelevant for the purposes of the application of Article 92(1) of the Treaty. That provision, by referring to aid granted by 'a Member State or through state resources in any form whatsoever', is directed at all aid financed from public resources. It follows that measures adopted by intra-state entities (decentralised, federated, regional or other) of the Member States, whatever their legal status and description, fall, in the same way as measures taken by the federal or central authority, within the ambit of Article 92(1) of the Treaty, if the conditions laid down in that provision are satisfied (Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 17).

143 The applicants' arguments relating to the historical rights of the Territorio Histórico de Álava concerning taxation cannot, therefore, affect the legality of the contested decision.

The specific nature of the tax credit

— Preliminary observations

144 It must be borne in mind that Article 92(1) of the Treaty requires that, in order to be defined as State aid, a measure must favour 'certain undertakings or the production of certain goods'. The specific or selective nature of a measure therefore constitutes one of the characteristics of State aid (Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 40, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 39).

145 In the contested decision (point V.2.4.1), the Commission states that the specific nature of Norma Foral 22/1994 introducing a tax credit of 45% of the amount of the investment is evidenced by four factors, namely the discretionary power enjoyed by the Diputación Foral 'for determining which investments in tangible fixed assets amounting to more than ESP 2 500 million qualified for the tax credit, deciding to which part of the investments the 45% reduction could be applied, and establishing the time-limits and maximum ceilings applicable in each case' (14th paragraph of point V.2.4.1); the minimum investment required (ESP 2 500 million) which in practice restricts the application of the tax credit to large investors without that restriction being justified by the nature or overall structure of the tax system to which an exception is made (16th paragraph of point V.2.4.1); the temporary nature of the measure, which allows 'the authorities discretion to grant the tax credit to certain firms only' (17th paragraph of point

V.2.4.1) and the 'close similarities between this measure and the Ekimen scheme, both in terms of the objectives pursued (the financing of new investments in both cases) and as regards their geographical scope (regional in the case of Ekimen, provincial in the case of the tax credit); Ekimen was, however, regarded as a regional aid scheme by the Spanish authorities and was notified as such' (18th paragraph of point V.2.4.1).

146 Contrary to what the applicants claim, the Commission did not, therefore, base its conclusion in the contested decision that the tax measure in question was selective on its finding that the tax measure in question applied only to one part of Spain, namely Álava. The applicants cannot therefore claim that the contested decision calls in question the legislative powers of the Territorio Histórico de Álava to adopt tax measures of a general nature.

147 It is necessary to examine, in the light of the arguments raised by the applicants, whether the factors which the Commission did take as a basis for the contested decision allow the conclusion that the tax credit introduced by Norma Foral 22/1994 is a specific measure favouring 'certain undertakings or the production of certain goods' within the meaning of Article 92(1) of the Treaty.

— The alleged discretionary power of the Diputación Foral

148 The applicants in Cases T-127/99 and T-148/99 maintain that the Diputación Foral de Álava does not have any discretionary power, whether in choosing the undertakings which are to receive the tax credit, or in varying the degree of the concession or the period of application of the tax measure. The Diputación Foral is required to apply the tax credit uniformly and automatically, after satisfying

itself that the recipient undertaking meets the relevant legislative requirements. Referring to a statement made by the Director General of Finance for Álava, they point out that no undertaking which fulfils those statutory conditions can be refused the benefit of the measure in question.

149 The Court points out that measures of purely general application do not fall within the ambit of Article 92(1) of the Treaty. However, the case-law has already made it clear that even interventions which, prima facie, apply to undertakings in general may be to a certain extent selective and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods. That is the case, in particular, where the administration called upon to apply a general rule has a discretionary power so far as concerns the application of the measure (Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 23 and 24, *Ecotrade*, cited in paragraph 144 above, paragraph 40, and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 39; Opinion of Advocate General La Pergola in *Spain* v *Commission*, cited in paragraph 73 above, ECR I-2461, point 8). Thus, in its judgment in *France* v *Commission*, cited above, paragraphs 23 and 24, the Court of Justice held that the system under which the French National Employment Fund contributes to measures accompanying the social plans of undertakings in difficulties was 'liable to place certain undertakings in a more favourable situation than others and thus to meet the conditions for classification as aid' within the meaning of Article 92(1) of the Treaty, since the fund in question '[enjoyed] [by virtue of the provisions of regulations concerning State participation in support for social plans] a degree of latitude which [enabled] it to adjust its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided'.

150 It must be observed that, under the provisions of Normal Foral 22/1994, the Diputación Foral de Álava has a certain discretionary power in applying the tax credit. It is clear from Norma Foral 22/1994 (see paragraph 8 above) that the tax credit is 45% 'of the cost of investment determined by the Diputación Foral de Álava'. However, Norma Foral 22/1994, which allows the Diputación Foral de Álava to fix the amount of the allowable investment, at the same time allows the

Diputación Foral to vary the amount of the financial assistance. It must also be observed that, under Norma Foral 22/1994, the Diputación Foral is empowered to lay down 'the time-limits, and any restrictions applicable in each case'.

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

152 The applicants in Cases T-127/99 and T-148/99 cannot use as an argument the fact that no undertaking which fulfils the relevant legislative conditions can be refused the benefit of the tax credit. It does not follow from that fact that all applications have been approved by the Diputación Foral on the same terms.

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

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

— The minimum amount of investment

155 In the contested decision it is stated (16th paragraph of point V.2.4.1) as follows:

'The Commission considers that the minimum investment required (ESP 2 500 million) to qualify for the credit is high enough to restrict its application in practice to investments which involve the raising of large amounts of capital, and that it is not justified by the nature or overall structure of the tax system to which an exception is made. The fact that only large investors can qualify for the tax credit makes it a specific measure, which in turn classifies it as State aid within the meaning of Article 92(1) of the Treaty.'

156 The applicants in Cases T-127/99 and T-148/99 maintain that the requirement of a minimum investment of ESP 2 500 million is an objective condition which creates no discrimination between economic operators or sectors. They state that, overall, the tax burden is heavier in the Basque Country than in the rest of Spain. All tax systems include measures whose grant or observance is conditional on a quantitative criterion. Furthermore, the Commission itself has used quantitative criteria in several directives, recommendations or communications in the field of taxation. The quantitative criterion is the most objective means of restricting the scope of a given tax measure. In the present case, the requirement relating to the amount of the investment does not favour any undertaking or any particular sector. Moreover, the Commission did not indicate the level below which a requirement of that kind is not to be regarded as a selective factor. Moreover, if the contested measure were to be seen as conferring an advantage on large undertakings, it would be necessary to take account of the existence of many Community programmes granting aid to small and medium-sized enterprises (SMEs) and of the more flexible terms enjoyed by the SMEs with regard to the rules governing State aid.

157 The Court finds that, by restricting the application of the tax credit to investments in new fixed assets of over ESP 2 500 million, the Basque authorities in fact reserved the tax concession in question for undertakings with significant financial resources. The Commission was therefore right in concluding that the tax credit provided under Norma Foral 22/1994 is intended to apply selectively to 'certain undertakings' within the meaning of Article 92(1) of the Treaty.

158 Even if it were conceded that, overall, the tax burden is heavier in the Basque Country than in the rest of Spain, the fact remains that Norma Foral 22/1994 reserves the tax concession in question only to certain undertakings covered by the Basque tax system.

159 Nor does the fact that tax systems often contain concessions in favour of SMEs or that the Commission uses quantitative criteria in several directives, recommendations or communications allow the conclusion that Norma Foral 22/1994, by introducing a tax concession in favour only of undertakings with significant financial resources, avoids application of Article 92(1) of the Treaty. It must be pointed out for that purpose that selective measures in favour of SMEs also do not avoid being characterised as State aid either (see the Community guidelines on State aid for SMEs, OJ 1996 C 213, p. 4).

160 It follows from all the foregoing considerations that Norma Foral 22/1994 introducing the tax credit constitutes a concession in favour of 'certain undertakings' within the meaning of Article 92(1) of the Treaty. In those circumstances, it is no longer necessary to go on to consider whether the temporary nature of Norma Foral 22/1994 and the alleged close similarity between the tax credit and the Ekimen scheme also render the measure under consideration specific in nature.

161 Unless the measure is justified by the nature or overall structure of the tax system — which will be considered in paragraphs 162 to 170 —, it must therefore be concluded that the tax credit provided under Norma Foral 22/1994 constitutes State aid within the meaning of Article 92(1) of the Treaty.

The nature or overall structure of the tax system

162 The applicants in Cases T-127/99 and T-148/99 maintain that the tax credit introduced by Norma Foral 22/1994 is justified by the nature and overall structure of the tax system, since it meets uniformly applicable objective criteria and is used to attain the objective of the tax provisions which introduce it. Those applicants refer for that purpose to the case-law of the Court of Justice and of the Court of First Instance (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27; Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 34; *CETM* v *Commission*, cited in paragraph 144 above, paragraph 52) and to Commission Decision 96/369/EC of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility (OJ 1996 L 146, p. 42).

163 The Court points out that, even if the tax measure in question determines its scope on the basis of objective criteria, the fact remains that it is selective in nature (see paragraphs 144 to 161 above). However, as noted by the applicants, the selective nature of the measure may, in certain circumstances, be justified 'by the nature or overall structure of the system'. If that is the case, the measure avoids application of Article 92(1) of the Treaty (*Italy* v *Commission* [1974], cited in paragraph 162 above, paragraph 27, *Belgium* v *Commission*, cited in paragraph 162 above, paragraph 34, and *CETM* v *Commission*, cited in paragraph 144 above, paragraph 52).

164 However, it must be pointed out that justification based on the nature or overall structure of the tax system reflects the consistency of a specific tax measure with

the internal logic of the tax system in general (see, to that effect, the judgment in *Belgium* v *Commission*, cited in paragraph 162 above, paragraph 39, and the Opinion delivered by Advocate General La Pergola in that case, ECR I-3675, point 8: see, too, the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, I-2983, point 27). Thus, a specific tax measure which is justified by the internal logic of the tax system — such as the progressiveness of the tax which is justified by the system's aim of redistribution — will avoid application of Article 92(1) of the Treaty.

165 The applicants in Cases T-127/99 and T-148/99 argue that the tax credit referred to in Article 1(d) of the contested decision has some of the characteristics of the nature and overall structure of the Spanish tax system. The tax credit is inspired by the principles of progressiveness and of efficiency in tax collection.

166 However, by fixing the minimum amount of investment at ESP 2 500 million, the tax credit introduced by Norma Foral 22/1994 favours only undertakings with significant financial resources. The measure therefore breaches the principles of progressiveness and redistribution which form an integral part of the Spanish tax system. Furthermore, the applicants concerned have not shown at all how the measure in question could contribute to efficiency in tax collection.

167 For the rest, the applicants merely assert that the aim of the tax credit is to promote economic development in the Basque Country, which is situated in the Member State of the European Union with the highest unemployment rate. They are thereby referring to economic policy objectives which are unrelated to the tax system concerned.

168 However, if it were to be considered that reasons relating to the creation or maintenance of employment caused specific measures to fall outside the scope of

Article 92(1) of the Treaty, that provision would have no practical effect. In the large majority of cases, State aid is granted in order to create or protect employment. In accordance with settled case-law, it must therefore be held that the objective pursued by the measure in question cannot enable it to avoid being characterised as State aid within the meaning of Article 92(1) of the Treaty (*France* v *Commission*, cited in paragraph 149 above, paragraph 20, *Belgium* v *Commission*, cited in paragraph 162 above, paragraph 25, and *CETM* v *Commission*, cited in paragraph 144 above, paragraph 53).

169 The arguments put forward by the applicants in Cases T-127/99 and T-148/99 based on the nature and overall structure of the Spanish tax system must therefore be rejected.

170 It follows from all the foregoing considerations that the Commission was entitled to find in the contested decision that the tax credit of 45% of the amount of the investment constitutes State aid within the meaning of Article 92(1) of the Treaty.

The claim that the aid in question is existing aid

171 The applicants claim that, even if the tax credit provided under Norma Foral 22/1994 does constitute State aid within the meaning of Article 92(1) of the Treaty, it must be characterised as existing aid since the tax concession in question was introduced before Spain entered the European Community. The tax credit had been introduced by decision of the Juntas Generales (General Councils) de Álava of 30 July 1984 and since then been extended by successive Normas Forales, namely, Norma Foral 28/1988 of 18 July 1988, Norma Foral 9/1990 of 14 February 1990, Norma Foral 18/1993 of 5 July 1993 and Norma Foral 22/1994 of 20 December 1994.

172 The Court points out that the Treaty establishes different procedures according to whether the aid is existing or new. Whereas, under Article 93(3) of the Treaty, new aid must be notified in advance to the Commission and cannot be implemented before the procedure has culminated in a final decision, under Article 93(1) of the Treaty, existing aid may be duly implemented as long as the Commission has not found it to be incompatible with the common market (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 20). Existing aid may therefore only be the subject, should the situation arise, of a decision of incompatibility producing effects for the future.

173 According to settled case-law, existing aid is aid which existed before the entry into force of the Treaty or entry of the Member State into the European Communities and aid which could be properly put into effect under the conditions laid down in Article 93(3) of the Treaty (*Piaggio*, cited in paragraph 149 above, paragraph 48). On the other hand, measures to grant or alter aid, where the alterations may relate to existing aid or initial plans notified to the Commission, must be regarded as new aid subject to the obligation of notification laid down by Article 93(3) (Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraphs 17 and 18, and Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 13).

174 It is not denied that the aid referred to in Article 1(d) of the contested decision was granted on the basis of a legal instrument adopted at a time when Spain was already a Member State, namely Norma Foral 22/1994 of 20 December 1994.

175 Moreover, it should be pointed out that, in the Territorio Histórico de Álava, legal instruments relating to the tax credit are laws applicable for a limited time only. Therefore, even if, as the applicants claim, the tax concession granted under Norma Foral 22/1994 constituted only the 'extension' of a tax measure which

had already been introduced in 1984, the fact remains that, because of the amendment to the duration of the aid in question, it should also be regarded as new aid.

176 It must therefore be concluded that the aid referred to in Article 1(d) of the contested decision is new aid which should have been notified to the Commission under Article 93(3) of the Treaty and which could not lawfully be implemented before the Commission had taken a final decision on the measure concerned.

177 It follows from all the above that the fourth part of the present plea cannot be upheld.

The fifth part, referring to the reduction in the tax base referred to in Article 1(e) of the contested decision

178 In Article 1(e) of the contested decision, the Commission states that 'the reduction in the tax base for newly created businesses provided for by Article 26 of Provincial Law 24/1996 of 5 July 1996' was put into effect by Spain in favour of Demesa and that that advantage must be classified as State aid incompatible with the common market.

179 The applicants in Cases T-127/99 and T-148/99 claim that Article 1(e) of the contested decision is based on an incorrect assessment of the facts. In their submission, Demesa never used the reduction in tax base provided by Article 26 of Norma Foral 24/1996.

180 In response to that submission, the Commission contends that the classification of the reduction in tax base provided under Article 26 of Norma Foral 24/1996 as an aid element does not depend on whether or not the person to whom the measure applies has actually made use of it, but on fulfilment of the criteria laid down in Article 92 of the Treaty.

181 According to the Commission, the implementation of State aid must be taken to mean not the action of granting aid to the recipients, but rather the adoption of the legislative machinery enabling the aid to be granted without further formality. The tax measure referred to in Article 1(e) of the contested decision is therefore illegal aid.

182 The fact that the applicant has not yet made use of its right to the tax reduction cannot, whatever the reason, obscure the fact that it has had that right since the commencement of its activities.

183 The Court points out that, under Article 93(3) of the Treaty, new aid must be notified to the Commission. In accordance with the same provision, it may not be implemented before the Commission has reached a final decision with regard to its compatibility with the common market.

184 Article 93(3) of the Treaty makes no distinction between individual aid and general aid schemes.

185 It follows that, where a Member State or a regional or local authority of a Member State establishes a legislative and/or administrative mechanism involving a general aid scheme, that scheme has to be notified to the Commission.

186 In such a situation, if the decision which is the subject of the present action related in general to the alleged aid scheme introduced by Article 26 of Norma Foral 24/1996, the question whether Demesa or other undertakings have actually benefited from the application of that provision would be irrelevant to the assessment of the legality of the decision.

187 However, the contested decision does not relate in general to the alleged aid scheme introduced by Article 26 of Norma Foral 24/1996. It concerns only individual aid received by Demesa.

188 In the operative part of the contested decision, the Commission states that Spain 'granted... to [Demesa]' various aid measures (Article 1 of the contested decision), and in particular 'the reduction in the tax base for newly created businesses provided for by Article 26 of Provincial Law 24/1996' [Article 1(e)]. Article 2(b) of the contested decision requires Spain to take all the steps necessary to 'withdraw from the beneficiary company the benefits deriving from [the reduction in the tax base], which was granted to it illegally'.

189 The contested decision therefore finds that the reduction in the tax base provided for by Article 26 of Norma Foral 24/1996 was implemented in favour of Demesa. That finding is a complaint against the Spanish authorities which is said to have granted individual aid in infringement of the provisions of the Treaty as well as against Demesa which is said to have received illegal aid. Furthermore, in Article 2(1)(b) of the contested decision, Spain is instructed to recover the aid.

190 However, the applicants in Cases T-127/99 and T-148/99 dispute the factual accuracy of that finding.

191 It must be observed that the contested decision contains nothing to show that the Álava authorities put into effect, in favour of Demesa, the concession provided for by Article 25 of Norma Foral 24/1996.

192 In that regard, it must be pointed out that it is apparent from Article 26(5) of Norma Foral 24/1996 (see paragraph 10 above) that, in order to qualify for the reduction in the tax base, an undertaking must lodge a prior application with the tax authority, which, under that provision, 'shall where appropriate notify... its... authorisation, to be formally adopted by decision of the Álava Provincial Council'.

193 In the course of the administrative procedure, the Basque Government stated, in a letter communicated by Spain's Permanent Representation to the Commission on 6 March 1998, that, '*if Demesa applied for them*, the reductions on the tax bases provided for by Article 26 of the Norma Foral relating to taxation would be applicable to it under that provision' (emphasis added).

194 However, the Commission did not consider whether Demesa had actually lodged an application within the meaning of Article 26(5) of Norma Foral 24/1996. Nor did it check whether the Álava authorities had granted the authorisation provided for by the same provision.

195 Furthermore, at the time of the proceedings before the Court of First Instance, the parties in Cases T-127/99 and T-148/99 stated, without being contradicted by the Commission on that point, that, when the contested decision was adopted, Demesa no longer qualified for the reduction in the tax base provided for by Article 26 of Norma Foral 24/1996. They refer, for that purpose, to Article 25 of the Corporation Tax Regulation (Reglamento del Impuesto sobre Sociedades) under which an undertaking wishing to obtain a reduction in the tax base must submit an application within three months from the date on which it commences its activities.

196 It follows from all the above that the Commission was in error as to the facts when it stated, in the contested decision, that the reduction in the tax base provided for by Article 26 of Norma Foral 24/1996 had been put into effect in favour of Demesa.

197 Article 1(e) of the contested decision must therefore be annulled in Cases T-127/99 and T-148/99. In the same cases, Article 2(1)(b) of the contested decision must also be annulled, in so far as it instructs the Kingdom of Spain to withdraw from Demesa the advantages deriving from the alleged aid referred to in Article 1(e) of the contested decision.

The sixth part, alleging that there was no distortion of competition and no effect on intra-Community trade, and also alleging a failure to state reasons on those points

198 This part of the plea was raised in Case T-148/99 and, purporting to refer to an infringement of Article 190 of the Treaty, also in Case T-127/99.

199 The applicant in Case T-148/99 claims that a measure which does not have a real and significant effect on competition does not constitute State aid as prohibited by Article 92(1) of the Treaty. It refers for that purpose to the case-law of the Court of Justice (Case 47/69 *France* v *Commission* [1970] ECR 487, paragraph 16, *Germany* v *Commission*, cited in paragraph 142 above, paragraph 18, and Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy* [1988] ECR 219, paragraph 58), to the Commission notice on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9) and to the Commission publication 'Explanation of the rules applicable to State aid; the position in December 1996', *Competition law in the European Communities*, volume II B. The Commission did not adequately

examine whether the measures granted to Demesa led to a significant distortion of competition which affected intra-Community trade within the meaning of Article 92(1) of the Treaty. The applicant in Case T-127/99 contends that the Commission failed to carry out a specific examination of the effects of the measures concerned on competition and intra-Community trade.

200 The applicants in Cases T-127/99 and T-148/99 claim that the contested decision is insufficiently reasoned on those points.

201 The Court points out that, under Article 92(1) of the Treaty, only State aid which 'affects trade between Member States' and which 'distorts or threatens to distort competition' is incompatible with the common market. Although in certain cases the very circumstances in which the aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 66, and the references cited therein).

202 In point V.1 of the contested decision, the Commission explains why it considers that the aid received by Demesa affects competition and trade between Member States. It points out, first of all, that, according to Demesa's business plan, that company will have an annual production capacity of 600 000 combined refrigerator-freezers (the first paragraph of point V.1). It states that the market in refrigerators and freezers is saturated in western Europe (the fourth paragraph of point V.1 of the contested decision). Surplus refrigerator production capacity has been estimated at some five million units in 1997 (the sixth paragraph of point V.1). In the light of the fact that Demesa 'should, by 1999 at the latest, have an annual production capacity of 600 000 units, of which 30% are to be sold on the

Spanish market and 70% elsewhere (mainly France and the United Kingdom)' (the first paragraph of point V.1 of the contested decision), and that 'there is extensive intra-Community trade', the Commission concludes that 'any aid measure will necessarily affect intra-Community trade and competition' (the final paragraph of point V.1 of the contested decision).

203 The contested decision therefore adequately states the reasons for which the Commission considers that the contested measures distort or threaten to distort competition and affect intra-Community trade. Consequently, that part of the contested decision satisfies the requirements of Article 190 of the Treaty.

204 As regards the validity of the Commission's assessment that the aid received by Demesa distorts or threatens to distort competition and affects intra-Community trade within the meaning of Article 92(1) of the Treaty, it should be borne in mind that it is apparent from the case-law (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraphs 11 and 12, Joined Cases 296/82 and 318/82 *Netherlands and Leeuwar Papierwarenfabriek* v *Commission* [1985] ECR 809, *Belgium* v *Commission*, cited in paragraph 162 above, paragraphs 47 and 48, and *Vlaams Gewest* v *Commission*, cited in paragraph 50 above, paragraphs 48 to 50) that any grant of aid to an undertaking exercising its activities in the Community market is liable to cause distortion of competition and affect trade between Member States.

205 It has already been found that the Commission was entitled to conclude that Demesa received State aid in various forms. Furthermore, it has not been denied that Demesa envisages, in its business plan, producing 600 000 combined refrigerator-freezers per annum. Nor has it been denied that other refrigerator and freezer manufacturers are active in the Community market and that Demesa's business plan forecasts that it will export a large proportion of its production to other Member States, particularly France and the United Kingdom.

206 Demesa's business plan also states that there is 'a domestic market which is over supplied'.

207 In those circumstances, the Commission was right in concluding that the aid granted to Dèmesa 'affects trade between Member States' and 'distorts or threatens to distort competition' within the meaning of Article 92(1) of the Treaty.

208 Even though the Commission acknowledged in its publication 'Explanation of the rules applicable to State aid', cited in paragraph 199 above, that 'the aid must have a significant effect on competition' if it is to fall within Article 92(1) of the Treaty, the fact remains that the Commission, referring to its *de minimis* aid notice, cited in paragraph 199 above, fixed that threshold at a level of aid of EUR 100 000, which has clearly been exceeded in the present case (see, to that effect, the judgment in Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 39 to 41).

209 As for the argument put forward by the applicants in Cases T-127/99 and T-148/99 that competition had been intensified with the arrival of a new refrigerator- freezer manufacturer to the Spanish market, it must be pointed out that the creation of a new business always has an effect on the structure of competition. However, in the present case, the grant by the Basque authorities of various forms of aid to a new arrival is liable to distort the operation of competition on the market in question.

210 During the written procedure, the applicant in case T-148/99 stated that its production is mainly intended for non-member countries, namely North Africa and the Arab countries. The concessions it has been granted are not therefore, it claims, liable to affect trade and to distort competition on the Community market.

211 However, it is clear from Demesa's business plan of September 1996 that it was envisaged, at that time, that the company would export between 60% and 65% of its production, mainly to France and the United Kingdom. At the hearing, the applicant in Case T-148/99 explained that exports had developed differently from the way originally envisaged in the business plan.

212 In that regard the Court observes that, in the context of an action for annulment under Article 230 EC, the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (*Alitalia* v *Commission*, cited in paragraph 126 above, paragraph 86).

213 In the absence of any intervention by Demesa in the administrative procedure, it was reasonable for the Commission, in the contested decision, to use Demesa's business plan as a basis for its assessment of the effects of the aid granted to Demesa on trade between Member States and on competition.

214 In any event, the applicant in Case T-148/99 does not deny that a large part of its production is sold on the Spanish market. At the hearing, it gave the figure of between 50% and 60%. However, since imports of refrigerator-freezers represent 30% of the Spanish market (according to Demesa's business plan), Demesa's production was bound to affect the opportunities for rival companies established in other Member States to export their products to the Spanish market. Furthermore, even if a large part of Demesa's production is intended for non-member countries, Demesa is in direct competition with other companies established in the Community as regards exports to those countries.

215 The concessions granted to Demesa are therefore liable to affect trade and to distort competition (see, to that effect, Joined Cases 62/87 and 72/87 *Exécutif*

régional wallon and Glaverbel v *Commission* [1988] ECR 1573, paragraph 13, Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 19, and *Belgium* v *Commission*, cited in paragraph 162 above, paragraph 47).

216 The applicant in Case T-148/99 also criticises the fact that the Commission considered the effects of the contested measures on competition on the basis solely of the information supplied to it by the complainants during the administrative procedure. On the basis of those data, the Commission wrongly held, in the contested decision, that there was overcapacity on the Spanish refrigerator market. Referring to a report by Master Cadena of 1 July 1998, the applicant in Case T-148/99 states that, in fact, the market was going through a phase of expansion following immediately upon a general slump in the household appliances market.

217 The Court notes that, in the present case, the Commission opened an investigation after receiving several complaints concerning the aid which had been granted to Demesa. Since it had serious doubts as to the compatibility of that aid with the common market, the Commission initiated the procedure under Article 93(2) of the Treaty, with a view to obtaining all the information necessary to enable it to take a final decision in the case. Demesa, which did not consider it necessary to submit observations during the administrative procedure, cannot criticise the Commission for taking as a basis for the contested decision information contained in those complaints, information which was not contradicted by the information gathered following its decision to initiate the procedure under Article 93(2) of the Treaty.

218 As for Master Cadena's report, it must be observed that it contains only sales figures relating to Spain and does not contain information about production capacities. Furthermore, Demesa's business plan clearly mentions as a 'weak point' the existence of 'a domestic market which is oversupplied'.

219 In any event, even if Master Cadena's report were to show that there is no surplus supply on the market in which Demesa operates — which is not the case — that situation would not affect the Commission's conclusion that the aid received by Demesa affects trade and competition. It must be pointed out in that regard that significant aid, such as the aid in this case, granted to an undertaking in order to enable it to start manufacturing a certain product in a Member State has the effect, in a competitive market, of reducing the opportunities for undertakings established in other Member States to export their products to the market in that Member State. Such aid is therefore likely to affect trade between Member States and to distort competition (see, to that effect, the judgments in *Exécutif régional wallon and Glaverbel* v *Commission*, cited in paragraph 215 above, paragraph 13, *France* v *Commission* [1988], cited in paragraph 215 above, paragraph 19, and *Belgium* v *Commission*, cited in paragraph 162 above, paragraph 47).

220 The applicants in Cases T-127/99 and T-148/99 state that Demesa is the only company devoted exclusively to the manufacture of 'no-frost' refrigerators. The Commission should have taken that fact into account in the contested decision. The applicants in Case T-129/99 maintain that the freezer market is different from the refrigerator market.

221 Even if the freezer market is different from the refrigerator market and even if Demesa is devoted exclusively to the manufacture of 'no-frost' refrigerators, the applicants do not explain how those facts call in question the Commission's conclusion that the aid granted to Demesa affects trade between Member States and distorts competition. The argument must therefore be rejected.

222 The applicant in Case T-148/99 submits that the Commission completely failed to consider the market from a vertical perspective. It did not examine the effects

produced by the contested measures on suppliers and subcontractors, or the effect of those measures on the consumers of household appliances.

223 However, as the Commission points out, ascertaining whether State aid is in conformity with the Treaty does not involve assessing reasons which might possibly justify an individual exemption of an agreement, practice or anti-competitive decision, under Article 85(3) of the EC Treaty (now Article 81(3) EC). Since the Commission has proved to the requisite legal standard that the aid granted to Demesa distorts or threatens to distort (horizontal) competition within the meaning of Article 92(1) of the Treaty and that it is liable to affect trade between Member States, that aid is, subject to exceptions, incompatible with the common market.

224 Finally, the applicants in Case T-127/99 and T-148/99 state that, in order to assess the effects of the contested measure, the Commission should have considered how the market reacted to Demesa's arrival, not how the market operated previously.

225 That argument must also be rejected. If the Commission were required in its decision to demonstrate the real effect of aid which had already been granted, that would ultimately favour those Member States which grant aid in breach of the duty to notify laid down in Article 93(3) of the Treaty, to the detriment of those which do notify aid at the planning stage (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33). The Commission is therefore not required to carry out an up-to-date assessment of the effect on competition and trade between Member States of aid which has been implemented without being notified (*France* v *Commission*, cited above, paragraph 33, and *Belgium* v *Commission*, cited in paragraph 162 above, paragraph 48).

226 It follows from all the above that the final part of the first plea must also be rejected.

II — *The second plea, alleging breach of the principles of protection of legitimate expectations and legal certainty*

227 First, with regard to the grant referred to in Article 1(c) of the contested decision, the applicants in Cases T-129/99 and T-148/99 argue that the decision of 12 December 1996, which authorised the Ekimen general aid scheme in the terms in which it was notified to the Commission by the national authorities, that is to say, in the terms of the decree published in the *Boletín Oficial del País Vasco*, represents a specific guarantee of the compatibility with the common market of any grant made under that scheme. The applicants dwell on the fact that the Commission approved the Ekimen scheme very shortly before Demesa set up its business in Álava.

228 The Court points out that, when the Commission has before it individual aid alleged to be granted in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the Treaty. Prior to the initiation of any procedure, it must first confine itself to examining whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it. If it did not do so, the Commission could, whenever it examined each individual aid, go back on its decision approving the aid scheme which already involved an examination in the light of Article 92 of the Treaty. This would jeopardise the principles of the protection of legitimate expectations and legal certainty from the point of view of both the Member States and traders since individual aid in strict conformity with the decision approving the aid scheme could at any time be called in question by the Commission (Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, paragraph 24, and Case T-442/93 *AAC and Others* v *Commission* [1995] ECR II-1329, paragraph 86).

229 However, the Commission rightly found that individual aid granted under the Ekimen scheme was not fully covered by its decision of 12 December 1996 approving that general aid scheme (see paragraph 127 above). In those circumstances, it was entitled to consider, without breaching the principles of protection of legitimate expectations and legal certainty, that the grant accorded under the Ekimen scheme constituted new aid in so far as it exceeded the ceiling established in its decision approving the scheme (see to this effect the judgment in *Italy* v *Commission*, cited in paragraph 228 above, paragraph 26).

230 The applicants cannot claim that the decision of 12 December 1996 approving the Ekimen programme and the contested decision are based on an incorrect interpretation of the Ekimen decree. The Commission's interpretation of the decree in both decisions is compatible with the wording and spirit of the decree (see paragraphs 118 to 124 above).

231 Finally, it must be observed that the applicants have not adduced any evidence to show that the Commission gave them specific assurances leading them to entertain reasonable expectations that the aid element which was not covered by the decision of 12 December 1996 was compatible with the common market (see, to that effect, Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 78).

232 It follows from all the above that the first argument must be rejected.

233 Second, in respect of the tax credit, the applicants in Cases T-127/99 and T-148/99 state that, on 10 May 1993, the Commission adopted Decision 93/337/EEC concerning a scheme of tax concessions for investment in the Basque Country (OJ 1993 L 134, p. 25), and in particular Norma Foral 28/1988, in which it declared that certain tax concessions provided for in that Norma Foral,

especially a tax credit for the investments made, constituted aid which was incompatible with the common market on the ground that it was contrary to Article 52 of the EC Treaty (now, after amendment, Article 43 EC). The provisions necessary for adjusting the regional legislation to Decision 93/337 were laid down and the Commission, by letter of 3 February 1995, officially notified the Spanish authorities of its approval of the solution adopted. Since incompatibility had been ruled out, both the Spanish authorities and the Commission itself considered that the problem relating to State aid was solved. The abovementioned applicants claim that, for that reason, the Commission never initiated procedures in respect of State aid or raised any objection against similar tax measures adopted subsequently. It follows, according to the applicants, that the Commission led Demesa, and any trader subject to the regional legislation concerned, to entertain legitimate expectations that the tax measures adopted by the Diputación Foral de Álava were authorised by the Commission in so far as they did not involve an infringement of Article 52 of the Treaty.

234 However, the Court finds that, even if the Commission's letter of 3 February 1995 were to be interpreted as meaning that Norma Foral 28/1988 was from then on compatible with the common market, the tax credit referred to in Article 1(d) of the contested decision was not introduced by that Norma Foral and is not, therefore, covered either by Decision 93/337 or by the letter of 3 February 1995. The tax credit referred to in the contested decision was introduced by Norma Foral 22/1994. It therefore constituted new aid which should have been notified to the Commission under Article 93(3) of the Treaty (see, to that effect, the judgment in *Namur-Les assurances du crédit*, cited in paragraph 173 above, paragraph 13).

235 It is not disputed that the tax credit referred to in the contested decision was introduced without prior notification, in infringement of Article 93(3) of the Treaty.

236 Those findings provide a sufficient basis on which to reject this argument. It is clear from settled case-law that acknowledgement of legitimate expectations

presupposes, in principle, that the aid was granted in accordance with the provisions of Article 93 of the Treaty, which was not the situation in this case. It is considered, in fact, that a trader and a regional authority exercising all due care should normally be able to ensure compliance with that procedure (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 17 and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 69).

237 For the sake of completeness, it should also be observed that the applicants who raised this argument have misread Decision 93/337. In that decision, the Commission characterised the aid in question as incompatible with the common market not only because it infringed Article 52 of the Treaty but also because it did not comply with the various rules relating to aid, in particular those concerning regional aid, sectorial aid, aid to SMEs and the cumulation of aid (point V of Decision 93/337). As for the letter of 3 February 1995, it should be noted that, in that letter, the Commission takes note of the fact that the tax scheme in question does not infringe Article 52 of the Treaty but does not, however, decide whether that scheme complies with the various aid rules mentioned in Decision 93/337.

238 The Commission could not therefore have led the applicants to entertain a legitimate expectation that the tax credit introduced by Norma Foral 22/1994 would be regarded as compatible with the common market even if it were to be established that it was similar to the tax credit introduced by the tax measure which was the subject of Commission Decision 93/337 and the Commission's letter of 3 February 1995.

239 The second plea cannot therefore be upheld either.

III — *The third plea, alleging infringement of Article 190 of the Treaty*

240 The applicants in Cases T-127/99, T-129/99 and T-148/99 maintain that the assessment, pursuant to Article 92(1) of the Treaty, of the various measures referred to in the contested decision is insufficiently reasoned.

241 As a preliminary point, it must be borne in mind that the statement of reasons required by Article 190 of the Treaty must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it in order to protect their rights and to enable the Court to carry out its review. It is also clear from the relevant case-law that it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86 and the case-law cited therein).

242 When applied to the characterisation of a measure as aid, the requirement to state reasons assumes that the reasons for which the Commission considers that the aid measure in question falls within the scope of Article 92(1) of the Treaty should be indicated (*Vlaams Gewest* v *Commission*, cited in paragraph 50 above, paragraph 64, Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 66, and *CETM* v *Commission*, cited in paragraph 144 above, paragraph 59).

243 First, the applicants in Cases T-129/99 and T-148/99 claim that the contested decision does not define the market affected by the State aid allegedly granted to Demesa. The contested decision does not explain whether the relevant market is

the household appliances market in general, the white goods market, the refrigerator market or some other market. The applicant in Case T-148/99 adds that it is essential to define the market when assessing the effect that a measure classifiable as State aid may have on competition.

244 The applicants in Cases T-127/99 and T-148/99 state that Demesa is the only undertaking devoted exclusively to the manufacture of 'no frost' refrigerators. However, the contested decision does not take account of that fact. The applicants in Case T-129/99 maintain that the freezer market is different from the refrigerator market.

245 The Court finds that it is clear from the reasons stated in the contested decision (point V.1) that the Commission defined the refrigerator and freezer market in Europe as the relevant market. It is a single market since households tend to replace refrigerators and separate freezers with combined refrigerator-freezers (the fourth paragraph of point V.1 of the contested decision). Point V.1 of the contested decision contains a detailed description of the market in question and therefore satisfies the requirements of Article 190 of the Treaty.

246 Second, the applicant in Case T-127/99 states that the Commission sets out in the contested decision the elements which led it to consider that the tax measures referred to in Article 1(d) and (e) were selective. The contested decision does not specify whether it is the whole body of elements put forward in relation to the tax credit mechanism and the reduction in the tax base respectively which makes those measures selective in nature or whether a single element is sufficient to entail classification as State aid within the meaning of Article 92(1) of the Treaty.

247 That argument must also be rejected. It is clear from the contested decision (12th and 18th paragraphs of point V.2.4.1 and the 16th and 17th paragraphs of point V.2.4.2) that just one element demonstrating the selective nature of the measure is sufficient to preclude classification as a general measure.

248 Third, the applicants in Cases T-127/99 and T-148/99 maintain that the Commission's assertions that the tax measures at issue are not justified by the nature or general scheme of the system are not adequately reasoned. In fact, the Commission did not examine that question at all.

249 In that regard, the Court finds that, in the 17th paragraph of point V.2.4.2 of the contested decision, the Commission explains that, since a selective tax measure pursues an industrial policy objective, it cannot be considered compatible with the nature or overall structure of the tax system in question. The reasons stated for the decision therefore enabled the applicants to understand why the Commission believed that the tax measures referred to in the contested decision were not justified by the nature or overall structure of the tax system at issue.

250 Furthermore, as the Commission points out, justification based on the nature or overall structure of the tax system in question constitutes an exception to the principle that State aid is prohibited and must therefore be interpreted strictly. Since the Spanish authorities did not put forward any argument, during the administrative procedure, relating to the compliance of the contested measures with the principles governing the tax system, the Commission was not even required to state reasons for its decision on that point (see, to that effect, Opinion of Advocate General Ruiz-Jarabo Colomer in *Italy* v *Commission* [1999] cited in paragraph 164 above, point 27).

251 That last argument must therefore also be rejected.

252 It follows from all the above that the third plea, too, cannot be upheld.

IV — *The fourth plea, alleging infringement of the right to a fair hearing*

253 The applicant in Case T-148/99 points out that, even if a procedure under Article 93(2) of the Treaty is not a procedure likely to culminate in sanctions, the fact remains that it may have harmful financial consequences for the undertakings which receive the aid in question. Referring to the case-law (judgments of the Court of Justice in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 and Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, and of the Court of First Instance in Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177 and Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997), it argues that the Commission was required to notify it of the initiation of the procedure under Article 93(2) of the Treaty and to allow it a period, during that procedure, within which it could make known its views in good time on the reality of the facts and circumstances relied on and also on the documents used by the Commission as a basis and support for its arguments concerning infringement of Community law. The applicant also contends that it should have been granted a special hearing.

254 In that regard, the Court points out that the administrative procedure relating to State aid is only initiated against the Member State concerned. In the present case, Spain is the addressee of the contested decision and it is not disputed that its rights to a fair hearing were observed during the administrative procedure.

255 In an administrative procedure relating to State aid, the recipient of the aid, such as the applicant in Case T-148/99, is regarded as a 'party concerned' within the meaning of Article 93(2) of the Treaty. The 'parties concerned' are not the holders of the right invoked under the plea now under consideration. Far from enjoying the same rights to a fair hearing as those which individuals against whom a procedure has been initiated are recognised as having, parties concerned have only the right to be involved in the administrative procedure (Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraphs 60 and 61). In that regard, they have, under Article 93(2) of the Treaty, the right to submit observations during the review stage referred to in that provision.

256 It is not disputed that, by two notices published in the *Official Journal* (see paragraphs 25 and 27 above), the Commission invited the 'parties concerned' to submit observations in respect of the measures referred to in the contested decision.

257 Even though the applicant in Case T-148/99 did not react to those notices, it was invited, as was every other party concerned, to submit observations in the course of the administrative procedure. The procedural rights which the applicant in Case T-148/99 derives under Article 93(2) of the Treaty were therefore observed.

258 The applicants in Case T-129/99 allege infringement of their right to a fair hearing arising from the fact that the Commission, during the administrative procedure, made no reference to the fact that there may have been a failure to comply with Article 7(d) of the Ekimen Decree.

259 It must be pointed out that, in the contested decision, the Commission found that, under Article 7(d) of the Ekimen Decree, the plant which had been transferred to third parties by Demesa, was not eligible for aid under the Decree (the final paragraph of point V.2.3 of the contested decision).

260 As it has already been held that Article 1(c) of the contested decision must be annulled in so far as it excludes that plant from the eligible costs under the Ekimen aid scheme (see paragraph 138 above), the argument now in point is irrelevant.

261 It follows from all the above that the fourth plea is unfounded.

V — *The fifth plea, alleging infringement of Article 92(3) of the Treaty*

262 First, the applicants in Case T-129/99 maintain that the Commission was wrong in refusing to regard the elements referred to in Article 1(a) to (c) of the contested decision as regional aid within the meaning of Article 92(3)(c) of the Treaty. They point out for that purpose that the maximum intensity of aid allowed in the Basque Country is 25% nge (the third paragraph of point II.3 of the contested decision). The grant of 25% gge to Demesa represents an aid intensity of 18.76% nge (the sixth paragraph of point II.4 of the contested decision). In those circumstances, the grant of 20% gge allowed by the Commission under the Ekimen programme is equivalent to a grant of 15% nge, so that the supplementary grant of 10 nge should have been authorised in accordance with Article 92(3)(c) of the Treaty.

263 It must be observed that the Commission acknowledges, in the contested decision, that 'Vitoria-Gasteiz is located in an area which qualifies for regional aid in accordance with [Article 92(3)(c) of the Treaty]. The maximum aid intensity allowed in the Basque Country is 25% nge (35% in the case of SMEs)' (the second paragraph on page 20 of the contested decision).

264 However, the ceiling of 25% nge fixed by the Commission for the Basque Country only means that the Commission will find it necessary to reach a favourable decision with regard to the Basque regional aid which falls within the scope of Article 92(3)(a) or (c) of the Treaty and which observes that ceiling. It does not necessarily mean that any individual aid granted in the Basque Country which is beneath that ceiling is automatically compatible with the common market.

265 It must be pointed out that the only regional aid scheme approved by the Commission under which Demesa has received a grant in the present case is the aid scheme introduced by the Ekimen Decree. However, part of the grant made under that decree to Demesa, 'since it is not covered by a previously approved scheme, must be deemed to be new aid' (the 14th paragraph of point V.2.3 of the contested decision). The other aid referred to in the contested decision is not covered by any general regional aid scheme approved by the Commission.

266 In those circumstances, it must be held that the Commission was justified in finding in the contested decision (the third and fourth paragraphs on page 20) that the aid whose compatibility with the common market it had to consider was *ad hoc* aid.

267 However, the fact that aid is *ad hoc* cannot preclude it from being classified as regional aid within the meaning of Article 92(3)(a) or (c) of the Treaty (see, to that effect, judgment in Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 49).

268 In that regard, it must be observed that the applicants in Case T-129/99 do not claim that the aid granted to Demesa should have qualified for the derogation

provided for in Article 92(3)(a) of the Treaty. According to them, the Commission was wrong in refusing to regard the aid in question as regional aid falling within the scope of Article 92(3)(c) of the Treaty.

269 In the contested decision, the Commission held that the aid granted to Demesa cannot, for various reasons, be regarded as regional aid fulfilling the conditions laid down in Article 92(3)(c) of the Treaty. It found first of all that there is surplus production capacity at Community level in the refrigerator-freezer market which has given rise to a restructuring process that has in turn given rise to capacity reductions or production relocations involving heavy job losses within the Community. The aid granted to Demesa contributes, according to the Commission, to a further deterioration in the situation (the fifth paragraph on page 20 of the contested decision). In that economic context, the Commission is of the opinion that the aid in question will not result in net job creation in the Community, in Spain or even in the Basque Country, nor will it bring other economic benefits (the sixth paragraph on page 20 of the contested decision). The Commission adds that '[t]he fact that some improvement in demand was observed on the Community market in 1998 in no way detracts from the fact that the industry is still adjusting to surplus installed production capacity in the Community by making very heavy job cuts' (the sixth paragraph on page 20 of the contested decision). It is referring to the decision of the MCC group, established in the Basque Country, to cut 120 jobs in refrigerator production on account of the poor market conditions (the sixth paragraph on page 20 of the contested decision).

270 However, the applicants in Case T-129/99 dispute the analysis which the Commission made on that point in the contested decision and on which it based its conclusion that the aid was incompatible. First, the analysis of the Spanish household appliances sector set out in the report by Master Cadena, Spain's leading distributor in the sector, shows that the durable consumer goods market increased by 5% in 1997 over 1996. The white goods market also increased by 5.1% and the refrigerator-freezer market by 3.8%. Demesa's arrival on the

Spanish market could therefore be absorbed without difficulty. Second, a series of data relating to the refrigerator sector sent to the Commission shows that, with the exception of Germany and Austria, the European market, between 1996 and 1997, recorded a significant growth in the region of about 10% in most European countries, even more in the Netherlands, the United Kingdom, Spain and Norway. The average annual growth of the refrigerator market is 1.7%. The market is booming in Scandinavia and eastern Europe. Refrigerator production increased by 10% in Spain between 1995 and 1997.

271 That information is consistent with the data supplied by Eurostat and confirms that there has been a significant increase in refrigerator-freezer production in Spain. Furthermore, according to the forecasts in the magazine '*Consumer Europe*', unit sales of refrigerators increased by 10% between 1996 and 2001.

272 On the basis of those various items of information, the applicants in Case T-129/99 conclude that Demesa's investment is beneficial to the Basque Country, which faces serious structural problems relating to employment and the competitiveness of its undertakings, and that the advantages granted to that company do not affect intra-Community trade to an extent which is contrary to the common interest within the meaning of Article 92(3)(c) of the Treaty. The aid granted to Demesa should therefore be declared compatible with the common market, in accordance with that provision.

273 In that regard, the Court points out that judicial review of a decision concerning the compatibility of aid with the common market, since it involves a complex economic appraisal, must be confined to verifying whether the rules governing procedure and the statement of reasons were complied with, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error in assessing those facts or any misuse of powers.

In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (*Belgium* v *Commission* [1996], cited in paragraph 241 above, paragraph 11, and Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 56).

274 It must be observed that the Commission based the assertions reproduced in paragraph 269 above on documents which were all identified in the contested decision (point V.1). The applicants do not allege that the Commission distorted the content of those documents.

275 It must also be observed that nothing put forward by the applicants in Case T-129/99 contradicts the Commission's claim that there is surplus production capacity in the refrigerator-freezer market in the Community. First, it must be pointed out that the market's surplus capacity is confirmed by Demesa's business plan (see paragraph 218 above). Second, a finding that sales in the market have increased does not necessarily mean that surplus capacity in Europe has been eliminated. The Commission even states in the contested decision that '[t]he fact that some improvement in demand was observed on the Community market in 1998 in no way detracts from the fact that the industry is still adjusting to surplus installed production capacity in the Community by making very heavy job cuts' (the sixth paragraph on page 20 of the contested decision).

276 The applicants do not deny that there have been job losses in the sector in question.

277 It must therefore be concluded that the assertions made by the applicants in Case T-129/99 in no way show that the Commission committed a manifest error of

assessment by holding that significant aid granted to Demesa when it set up new production facilities in the refrigerator-freezer market is incompatible with the common market.

278 The fifth plea, too, is therefore unfounded.

The request for disclosure of documents relating to the adoption of the contested decision

279 The applicants in Cases T-127/99 and T-148/99 request that the Commission be ordered to produce its internal documents relating to the adoption of the contested decision. In Case T-129/99, the applicants request disclosure of the whole administrative file relating to the contested decision.

280 However, it must be observed that the applicants have put forward nothing to show that the documents of which they request disclosure would be of assistance in their argument or in the review of the legality of the contested decision.

281 In those circumstances, the requests for disclosure of the documents must be rejected (see, to that effect, the judgment in *Cityflyer Express* v *Commission*, cited in paragraph 242 above, paragraphs 102 to 106).

Costs

282 Under Article 87(3) of the Rules of Procedure, the Court may order that costs be shared or that each party is to bear its own costs if each party succeeds on some and fails on other heads. As the applicants and the Commission have succeeded on some and failed on other heads, each party must bear its own costs.

283 The interveners must be ordered to pay their own costs, in accordance with the final subparagraph of Article 87(4) of the Rules of Procedure,

On those grounds,

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

hereby:

1. **Declares, in Case T-129/99, the application to be inadmissible in so far as it seeks the annulment of Article 1(d) and (e) of Commission Decision**

1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa) and of Article 2(1)(b) thereof;

2. In Cases T-129/99 and T-148/99, annuls Article 1(a) of Decision 1999/718;

3. In Cases T-129/99 and T-148/99, annuls Article 1(b) of Decision 1999/718;

4. In Cases T-129/99 and T-148/99, annuls Article 1(c) of Decision 1999/718 in so far as it excludes the plant valued at EUR 1 803 036.31 from the eligible costs covered by the Ekimen aid scheme;

5. In Cases T-127/99 and T-148/99, annuls Article 1(e) of Decision 1999/718;

6. In Cases T-129/99 and T-148/99, annuls Article 2(1)(a) of Decision 1999/718 in so far as it refers to Article 1(a) and (b) of that decision and in so far as it instructs the Kingdom of Spain to recover from Demesa aid relating to the annulled part of Article 1(c) of that decision;

7. In Cases T-127/99 and T-148/99, annuls Article 2(1)(b) of Decision 1999/718 in so far as it refers to Article 1(e) of that decision;

8. Dismisses the applications as to the remainder;

9. Orders the parties to bear their own costs.

Azizi Lenaerts Tiili

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 6 March 2002.

H. Jung

Registrar

M. Jaeger

President