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⁽¹⁾ Text with EEA relevance.

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 24 February 1999

concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa)

(notified under document number C(1999) 498)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(1999/718/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof,

Having given notice⁽¹⁾ to interested parties, in accordance with the above provisions, to submit their comments, and having taken account of those comments,

Whereas:

I. PROCEDURE

By letter of 11 June 1996, the Commission received a complaint from Asociación Nacional de Fabricantes de Electrodomésticos de Línea Blanca, the Spanish federation of manufacturers of household appliances (referred to below as 'ANFEL'), stating that Spain had granted aid to Daewoo Electronics Manufacturing España SA (referred to below as 'Demesa'), a company established at Vitoria-Gasteiz⁽²⁾ in the Autonomous Community of the Basque Country (referred to below as 'the Basque Country'), 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 a competitor of Demesa, from the European Committee of Manufacturers of Electrical Domestic Equipment (referred to below as 'CECED')

and from Associazione Nazionale Industria Elettrotecniche ed Elettroniche, the Italian federation of manufacturers of household appliances (referred to below as 'ANIE').

By letter dated 26 June 1996, the Commission asked the Spanish authorities for information.

After receiving a reminder sent on 11 September 1996, Spain provided some information by letter dated 16 September 1996. By letter of 11 February 1997, the Basque regional authorities forwarded additional information to the Commission.

Following further correspondence, the Commission informed Spain by letter of 16 December 1997 that it had decided to initiate proceedings under Article 93(2) of the Treaty in respect of possible aid received by Demesa, and urged the Spanish Government to provide a number of items of information.

The Commission's decision to initiate proceedings was the subject of a notice⁽³⁾ published in the *Official Journal of the European Communities*, in which the Commission invited interested parties to submit their comments on the measures concerned. Spain submitted its comments by letters dated 23 January 1998 and 6 March 1998.

The Commission forwarded the comments it received from interested parties to Spain, offering it an opportunity to respond, which it did by letter of 20 October 1998.

⁽¹⁾ OJ C 103, 4.4.1998, p. 3.

⁽²⁾ Vitoria-Gasteiz is a municipality located in Álava, one of the three provinces forming the Autonomous Community of the Basque Country.

⁽³⁾ See footnote 1.

By letter of 4 June 1998, the Commission informed Spain that it had decided to extend the proceedings.

The Commission's decision to extend the proceedings was published in a notice in the *Official Journal of the European Communities* ⁽⁴⁾. Spain submitted its comments by letters of 22 and 24 July 1998. In the notice, the Commission invited interested parties to submit their comments; it forwarded the comments received to Spain, offering it an opportunity to respond, which it did by letter received on 3 December 1998.

Two meetings were held in Brussels (29 October 1998) and Vitoria-Gasteiz (15 December 1998) between Commission staff and representatives of the Basque regional authorities, during which the latter reaffirmed their position.

II. DESCRIPTION OF THE AID

II.1. The measures concerned

The measures in respect of which proceedings under Article 93(2) of the Treaty were initiated and subsequently extended are the following:

- Demesa's use, free of charge, of a 500 000 m² plot in the Jándiz industrial estate at Vitoria-Gasteiz since 1996 and its subsequent purchase of the land at less than the market price,
- aid granted to Demesa in connection with the Ekimen programme ⁽⁵⁾, in so far as it is not covered by the general rule laid down in that scheme, which allows an aid intensity equal to 10% of the eligible costs corresponding to the amounts actually ⁽⁶⁾ invested by Demesa, given that the project is not strategic and does not involve job creation,

⁽⁴⁾ OJ C 266, 25.8.1998, p. 6.

⁽⁵⁾ Scheme approved by the Commission by letter SG (96) D/11028 of 13 December 1996 (State aid N 529/96). The Decree of the Basque Regional Government establishing the scheme (Decree No 289/1996 of 17 December 1996) was published in *Official Gazette of the Basque Country* No 246, 23.12.1996, p. 20138).

⁽⁶⁾ In the light of information submitted by the complainants (who presented a study conducted by an engineering company specialised in the design of refrigerator manufacturing plants), the Commission decided also to examine whether the cost of Demesa's investments had not been artificially increased in order to obtain a larger grant.

- a tax credit applied in the form of a 45% reduction in Demesa's corporation tax liability ⁽⁷⁾ and other tax concessions also granted to Demesa under the corporation tax arrangements of the Province of Álava ⁽⁸⁾.

II.2. The beneficiary

The beneficiary of the measures is Demesa, established in the Jándiz industrial estate at Vitoria-Gasteiz and a wholly owned subsidiary of Daewoo Electronics Co. Ltd (referred to below as 'Daewoo Electronics'), one of the companies belonging to the South Korean multinational group Daewoo.

Daewoo Electronics was created in 1971 and has a global network of 92 plants ⁽⁹⁾. It manufactures consumer electronics products and household electrical appliances (white goods) for the Korean and world markets. In 1997 its sales totalled USD 2 725 million ⁽¹⁰⁾.

II.3. The Cooperation Agreement between Demesa and the Basque regional authorities

On 13 March 1996 the Basque regional authorities and 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. The Agreement entered into force on the date of its signature.

Point 3 of the Cooperation Agreement made reference to the grants and other advantages that the project could receive from the regional authorities, namely a non-refundable grant

⁽⁷⁾ Sixth additional provision of Provincial Law (*Norma Foral*) 22/1994 of 20 December 1994 (*Official Journal of the Province of Álava* (BOTH A) No 5, 13.1.1995), whose validity was extended for 1996 by the fifth additional provision of Provincial Law 33/1995 of 20 December 1995 (BOTH A No 4, 10.1.1996) and for 1997 by point 2.11 of the single-derogating provision of Provincial Law 24/1996 of 5 July 1996 (BOTH A No 90, 9.8.1996) in conjunction with the seventh additional provision of Provincial Law 31/1996 of 18 December 1996 (BOTH A No 148, 30.12.1996). The tax credit may be granted for 1998 pursuant to the 11th additional provision of Provincial Law 33/1997 of 19 December 1997 (BOTH A No 150, 31.12.1997) and for 1999 pursuant to the seventh additional Provision of Provincial Law 36/1998 of 17 December 1998 (BOTH A No 149, 30.12.1998).

⁽⁸⁾ Provincial Law 24/1996 on corporation tax.

⁽⁹⁾ 33 production centres, 33 commercial subsidiaries and 19 branches.

⁽¹⁰⁾ EUR 2 388 million (EUR 1 = USD 1,1410, InfEuro exchange rate, February 1999).

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 making investments in the Basque Country in environmental protection, R&D and energy saving projects.

The maximum aid intensity allowed in the Basque Country is 25% nge (net grant equivalent)⁽¹¹⁾ (35% for SMEs).

Under the Agreement, Daewoo Electronics was to set up a company with its seat in the Basque Country (Demesa). The new company was immediately to draw up a business plan whose approval by the regional authorities was an indispensable condition for implementation of the Agreement. The business plan, which covered the period 1996 to 2001 and was presented to the regional authorities in September 1996, provided for an investment of ESP 11 835 600 000⁽¹²⁾ 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.

II.4. *The Ekimen scheme and the non-refundable grant awarded to Demesa*

The non-refundable grant equivalent to 25% of the investment in tangible fixed assets was negotiated in the framework of the abovementioned Cooperation Agreement of 13 March 1996 and granted on 24 December 1996 by decision of the Basque Government under the Ekimen regional aid scheme approved by the Commission on 13 December 1996.

The scheme covers the period 1996 to 1998. Its aims are regional development and job creation. Aid granted under the scheme takes the form of non-refundable grants or soft loans⁽¹³⁾ for the creation of new production facilities or the extension or modernisation of existing infrastructure. The eligible costs include land, buildings and plant.

The beneficiaries are, *inter alia*, industrial companies or firms engaged in extractive activities. In order to qualify for aid under the Ekimen scheme, investments have 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 ESP 360 million,
- it must entail the creation of at least 30 jobs,
- any fixed assets transferred to third parties or produced by another company in the same group are not eligible,
- at least 30% of the investment has to be financed from the beneficiary's own resources.

As regards the conditions in which non-refundable grants are awarded and, in particular, their variation in intensity in accordance with specific criteria, the Commission stated the following in its letter SG(96) D/11029 of 13 December 1996 approving the Ekimen scheme.

'The Commission notes that non-refundable grants, which must not exceed the ceiling of 25% gge⁽¹⁴⁾, 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) and 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'

The grant awarded on 24 December 1996 represents an aid intensity of 25% gge of the investment and amounts to a total of ESP 2 958,9 million⁽¹⁵⁾, to be paid in instalments over a four-year period in accordance with the following schedule (ESP million):

1996	30 500
1997	1 557 600
1998	759 900
1999	610 900

The grant represented an aid intensity of 18,76% nge, which falls below the ceiling of 25% nge laid down for the Basque Country.

Contrary to the forecasts set out in Demesa's business plan, the total investment of ESP 11 835,6 million justifying the grant of the aid was to be carried out during that same period 1996 to 1999 and not over the period from 1996 to 2001. The Commission expressed doubts, which were subsequently dispelled, as to whether the condition that the project was to be completed within three years, one of the qualifying

⁽¹¹⁾ The maximum limit for regional aid in the Basque Country, in accordance with the Spanish regional aid map (OJ C 25, 31.1.1996, p. 3).

⁽¹²⁾ EUR 71 133 388,63.

⁽¹³⁾ The interest rate applied can be between two and five points lower than the nominal interest rate.

⁽¹⁴⁾ Gross grant equivalent.

⁽¹⁵⁾ EUR 17 783 347,16.

conditions for the grant, would be fulfilled. The regional authorities confirmed that payment of the aid was to be made over a period of three years, although given the date on which the grant was awarded (24 December 1996) it would be split into four budget allocations. The regional authorities also confirmed that Demesa's investment would involve the creation of 412 jobs during the period 1996 to 1999.

According to information provided by the regional authorities, updated to June 1998, Demesa has declared investments corresponding to 44% of the total amount; 201 jobs had been created up to that date⁽¹⁶⁾.

II.5. *Tax concessions available in the Province of Álava*

The tax arrangements in force in the Basque Country are governed by the Economic Agreement established by Law 12/1981 of 13 May 1981, as last amended by Law 38/1997 of 4 August 1997. Under the Economic Agreement, the Álava Provincial Council may, under certain conditions, maintain, establish and regulate the tax system within its territory⁽¹⁷⁾.

Using the powers conferred on it by the Economic Agreement, the Álava Provincial Council has established the following tax aid measures:

- (a) a tax credit corresponding to 45% of the cost of investments, provided that these exceed ESP 2 500 million. The credit is applied to the amount payable by way of corporation tax. It was originally valid only for investments made between 1 January 1995 and 31 December 1995, but the period was subsequently extended until 31 December 1997 by successive budgetary provisions. Any tax credit not used up because it exceeds the amount of definitive tax liability may be carried forward and applied in subsequent years. Decisions granting the credit also lay down the time limits, ceilings and any other restrictions applicable in each case. Investments made in the preparatory phase of a project may be deemed eligible if so decided by the Álava Provincial Council. Demesa was granted the benefit of the tax credit by Decision 737/97 adopted by the Álava Provincial Council on 21 October 1997;
- (b) a reduction⁽¹⁸⁾ of 99%, 75%, 50% and 25% in the basis of assessment for corporation tax, applicable, respectively,

⁽¹⁶⁾ According to an article in the Spanish press (*El País*, 11. November 1998), reporting on trade union action, Demesa employed 170 workers, 90% of whom did not have open-ended employment contracts.

⁽¹⁷⁾ See Article 6 of the Economic Agreement, as amended by Law 38/1997 of 4 August 1997. The Provincial Councils of the other two provinces of the Basque Country (Vizcaya and Guipúzcoa) also have powers in the tax field.

⁽¹⁸⁾ See Article 26 of Provincial Law 24/1996.

for four consecutive years running from the first year in which the basis of assessment is positive. These reductions are available to companies newly established in the Province of Álava provided that they invest at least ESP 80 million and create at least 10 jobs;

- (c) various reductions in the amount of tax payable⁽¹⁹⁾, which may not total more than 40% of the tax liability.

III. REQUEST FOR INFORMATION AND INITIATION OF PROCEEDINGS

In the decision which it notified to Spain by letter dated 16 December 1997, the Commission:

- urged the Spanish Government to provide it with the information necessary for determining whether the non-refundable grant was awarded in accordance with the Ekimen aid scheme, and whether the investment costs covered were equivalent to the amounts actually invested,
- initiated proceedings under Article 93(2) of the Treaty in respect of certain tax measures and with regard to the free-of-charge use of a plot of land and the subsequent sale of the land at less than the market price.

III.1. *Spain's reply to the request for information: the grant awarded under the Ekimen scheme*

Spain transmitted the information set out below, which was provided by the Basque Regional Government.

In so far as the grant amounting to 25% gge of the investments made during the period 1996 to 1999 was awarded under a regional aid scheme approved by the Commission, the regional authorities took the view that there was no obligation to notify it. Following the request for information made by the Commission (which itself was acting in response to the complaints mentioned above), the Basque regional authorities nevertheless informed it of the award of the grant. The regional authorities also stressed that the plan submitted by Demesa fulfilled all the eligibility conditions laid down in the Ekimen scheme and that its economic and financial viability was ensured.

⁽¹⁹⁾ 15% of the amount invested in new tangible fixed assets; 10% of the accounting result set aside in a reserve for investments; 30% of R & D Expenditure; 15% of investments in environmental protection; 25% of investments made with a view to developing exports. See Articles 37, 39, 41, 42 and 43 of Provincial Law 24/1996.

As far as fulfilment of the conditions for the award of the grant is concerned in particular, the regional authorities made the points summarised below:

- the household-appliances sector is of strategic importance for the Basque Country. The regional authorities base their arguments concerning the strategic nature of the sector on the theory of competitive advantage and clusters⁽²⁰⁾. They claim that the household appliances cluster accounts for 6% of GDP in the region and can consequently be regarded as strategic; the project is furthermore strategic in its own right since Demesa's establishment in the Basque Country will lead to keener competition between companies in a sector in which there is no strong group of local competitors in the region,
- a multinational company was investing in a region severely affected by economic recession,
- the grant awarded to Demesa does not exceed the ceiling of 25% gge laid down in the Ekimen aid scheme, which in turn represents only around 20% nge. This is less than the maximum allowed in the Basque Country (25% nge),
- the fact that the investment is not located in a preferential interest area for the purposes of the Ekimen scheme does not mean that Demesa cannot be awarded aid up to the prescribed maximum of 25% gge: the regional authorities enjoy wide discretionary powers allowing them to award grants up to that limit,
- there is no objective factual basis for the complainant's claim that the real cost of Demesa's investment is only half the declared value. The regional authorities nevertheless decided to carry out an audit on the investments made,
- the Ekimen scheme comprises a procedure for checking and monitoring investments which makes it possible at all

times to verify that the investments actually made correspond to the amount of aid disbursed.

III.2. *Observations submitted by Spain*

III.2.1. **Free-of-charge use of a 500 000 m² plot of land and subsequent sale of the land at less than the market price**

The regional authorities claim that Demesa has never used a 500 000 m² plot of land free of charge. With the aid of documentary evidence, they point out that the company occupied and subsequently purchased a plot of only 100 000 m². In line with specific requirements of property law, the sale was formalised only after successive divisions and amalgamations of the different pre-existing plots had been completed. The regional authorities have also supplied aerial photographs demonstrating that Demesa has indeed occupied only the 100 000 m² of land it purchased.

A complication nevertheless arose in the course of the sale transaction owing to the presence on the land of tenant farmers who claimed compensation for crops ploughed up as a result of the construction work. It was only after enforcement proceedings had been initiated, and subsequently settled out of court, that the deed of sale was formalised on 30 December 1997. According to the regional authorities, the transfer of ownership could not take place until the dispute over tenure of the land had been resolved, since Gazteiko Industria Lurra SA, the company selling it, felt bound to act in good faith towards the purchaser. In any event, the regional authorities stress that the sale took place in accordance with Spanish law and therefore that there can be no question of aid as far as the conditions of sale are concerned.

As regards the price at which the land was sold, the average prices communicated by the complainant (between ESP 6 000 and ESP 7 000 per square metre) are for plots of land (between 1 000 and 10 000 m²) much smaller than that purchased by Demesa (100 000 m²). It is reasonable to assume that a lower price per square metre would be charged for a plot of land 10 times larger. In support of this, the regional authorities have submitted two reports drawn up after the sale by two independent experts, according to which the purchase price of a 100 000 m² plot of serviced land varies between ESP 4 000 and ESP 5 000 per square metre. The regional authorities consequently take the view that the price of ESP 4 125 per square metre of serviced land paid by Demesa is in line with market conditions.

The documentation submitted also includes a 'supplementary accounting report on available plots of land' drawn up, according to the regional authorities, by the auditors Price

⁽²⁰⁾ The regional authorities refer in particular to the 'theory of competitive advantage developed by Prof. Michael Porter'. Among works published by this author, see for example *The Competitive Advantage of Nations*, The Free Press, New York, 1990 or, more recently, 'Clusters and New Economics of Competition', in *Harvard Business Review*, Vol. 76, Issue 6, November/December 1998, pp. 79 to 90. In that article, clusters are defined as 'geographic concentrations of interconnected companies and institutions in a particular field' (p. 78). They include, for example, suppliers of specialised inputs such as components, machinery, and services, and providers of specialised infrastructure. Clusters also often extend downstream to channels and customers and laterally to manufacturers of complementary products [...]. Finally, many clusters include governmental and other institutions [...] that provide specialised training, education, information, research, and technical support.' The characteristic feature of this definition is summed up by the words 'geographic concentration'. The author also states in the article that 'government policies in developing economies often unwittingly work against cluster formation. Restrictions on industrial location and subsidies to invest in distressed areas, for example, can disperse companies artificially'.

Waterhouse for 1997. 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.

Lastly, the regional authorities take the view that the Commission communication of 10 July 1997 on State aid elements in sales of land and buildings by public authorities⁽²¹⁾ does not apply to the case in point since the purchase of the land was decided before the communication was adopted.

III.2.2. Tax aid

Spain has communicated an extremely detailed report, drawn up by the Basque regional authorities, on the basis and workings of the tax arrangements applicable in the Province of Álava. The report claims that, when it decided to initiate proceedings, the Commission did not take sufficient account of the historical, constitutional and legislative bases of the Province's specific legal arrangements.

In the taxation field in particular, the reference framework for these special arrangements is the Economic Agreement referred to in point II.5.

Using these legislative powers in the tax field, the Álava Provincial Council adopts, among other things, legal provisions relating to corporation tax.

The regional authorities consider that these corporation tax provisions are general measures which should not be examined in the light of Article 92 of the Treaty since they lay down the general corporation tax arrangements applicable in the Province of Álava. According to the Basque regional authorities, in taking the view that these arrangements could involve aid, in so far as the tax concessions they provide for are restricted to companies established in or maintaining economic links with part of the territory of a Member State, the Commission is failing to take into consideration the specific structure of taxation powers under Spanish law.

Neither is the tax credit in particular granted on a discretionary basis by the Álava Provincial Council. The tax credit is governed by law and granted automatically to eligible firms. The regional authorities stress that it is not possible under Spanish law to apply differentiated tax treatment, except in cases expressly provided for by law. Indeed, individual tax measures are prohibited. In the case of the tax credit, the Basque authorities do not enjoy any discretionary powers whatsoever. The decision to grant the tax credit (Decision

737/97) referred to in the legislation concerned merely involves a prior check that the eligibility conditions are fulfilled and is adopted for reasons of legal certainty and sound financial management. A company merely has to demonstrate that there is a causal link between the investments made during the preparatory phase of the project and the materialisation of those investments in order to qualify for the tax credit.

Decision 737/97 granted Demesa a tax credit of this nature amounting to 45% of the value of the investments. The tax credit cannot be combined with any other tax concession granted in respect of the same investments.

The regional authorities have submitted a report stating that the tax burden is heavier in the Basque Country than in the rest of Spain, despite a tax rate which is 2,5 percentage points lower and the tax concessions available only in that region⁽²²⁾.

III.3. Observations submitted by interested parties

A number of observations were received from the complainants concerning the initiation of proceedings. These can be summarised as follows:

- the Spanish authorities were deliberately slow in answering the Commission's successive letters, pursuing a policy of *fait accompli*. The complainants point out that the first substantial answer to the Commission's first request for information, which dated from June 1996 (when it was still possible to take action to prevent disbursement of the aid) was not received until 11 February 1997,
- the household appliances sector, and particularly the refrigerators/freezers segment, continues to suffer from surplus capacity. Three of the leading European manufacturers (Electrolux, Whirlpool and Fagor) have announced plant closures and job cuts or restructuring operations. The complainants stress in this connection that the Court of Justice of the European Communities confirmed in *Pyrsa* (judgment of 14 January 1997 in Case C-169/95 *Spain v Commission*)⁽²³⁾ that regional aid should not give rise to a sectoral overcapacity,
- the conditions for the award of the grant have not been fulfilled, since:
 - (i) the project will not be completed within three years,

⁽²²⁾ 'Los principios y normas de armonización fiscal en el concierto económico' (tax harmonisation principles and rules in the economic agreement), Fundación Banco Bilbao Vizcaya, 1997.

⁽²³⁾ [1997] ECR I-135.

⁽²¹⁾ OJ C 209, 10.7.1997, p. 3.

- (ii) the project is not 'strategic', nor will it entail the 'creation of jobs'. Only a grant of 10% gge would be justified in accordance with the criteria laid down for the Ekimen scheme,

- the tax credit is illegal since it was not notified to the Commission before it was put into effect,
- Demesa is occupying a 500 000 m² plot of land without legal title and without paying rent. Free-of-charge use of the land is worth ESP 100 million per year, and the price of land in the same area is around ESP 6 000 per square metre,
- the cost of the plant and machinery has been overvalued, with the result that the amount of the grant corresponds to 51 % of the real cost of the investments,
- Demesa has not complied with the obligation, laid down by the Ekimen scheme, to finance 30 % of total net assets from its own resources during its second year in business.

III.4. *Comments made by Spain in response to observations submitted by interested parties*

These comments can be summarised as follows:

- the regional authorities consider that sufficient information has been provided to enable the Commission to establish that the conditions for applying the Ekimen scheme are complied with. However, as regards the claim that Demesa has not complied with the obligation to finance 30 % of total net assets from its own resources during its second year in business, they point out that, for the purposes of applying the Ekimen scheme to Demesa's investment, the three years should be counted from January 1997, and not 24 December 1996, the date on which the grant was awarded. Compliance with this condition should therefore be checked at the end of 1998 and not at the end of 1997,
- the case-law quoted by the complainants (the Court's judgment in *Pyrssa*) cannot be applied to the case in point: unlike *Pyrssa*, Demesa's investment project is not a high-risk venture, and Demesa is not a firm in difficulty,
- the complainants have not provided any proof in support of their claim that the cost of the plant and machinery has been overvalued.

IV. EXTENSION OF THE PROCEEDINGS

After receiving Spain's reply to the request that it provide the information necessary for examining whether the grant of

25 % gge awarded to Demesa fulfilled the conditions of the Ekimen scheme, the Commission informed Spain by letter of 4 June 1998 that it had decided to extend the proceedings in order to examine the part of the grant awarded to Demesa not covered by the general rule of the Ekimen scheme allowing an aid intensity of 10 % of the effective eligible costs.

IV.1. *Observations submitted by Spain*

The regional authorities have reiterated that the conditions for the award of a grant under the Ekimen scheme to cover 25 % of the costs of Demesa's investment at Vitoria-Gasteiz have been scrupulously observed.

They point out that, when it approved the Ekimen scheme (in December 1996), the Commission not only agreed to the definitions of 'strategic' projects and 'creation of jobs' to be used for the purposes of implementing the scheme, but also refrained from formulating any reservations of a sectoral nature, with the exception of a general reference to the sectors for which specific guidelines exist, which is not the case of the household appliances sector.

The Ekimen scheme draws a distinction between 'strategic projects' and 'strategic sectors', fulfilment of each of which criteria entitles the company concerned to an extra 5 % for the purposes of Article 10 of the Decree approving the Ekimen scheme.

Any project that fulfils the purely quantitative criteria, which the Commission accepted when it approved the scheme, constitutes a 'strategic' project. The Commission is not entitled to modify these criteria without at the same time infringing the principles of legitimate expectations and legal certainty.

The regional authorities also argue that it is right to regard the household appliances sector as 'strategic' since it accounts for 6 % of GDP in the region. The Competitiveness Programme for the Basque Country classifies the 'large household appliances' cluster among the clusters whose development is given priority. This definition is based on the nature and extent of the competitive advantage and the contribution which the companies concerned make to value added and job creation in the Basque Country.

The regional authorities stress that, for the purposes of implementing the scheme, job creation is to be checked on the basis of objective data and not, as the Commission suggested when it extended the proceedings, in terms of the sectoral impact of Demesa's investment. This is confirmed, according to the regional authorities, by the guidelines on national regional aid, which state that 'job creation' must be checked solely on the basis of the net number of jobs created in a particular establishment.

As far as the sector is concerned, the Commission has not provided precise figures making it possible to determine which specific sector is affected by surplus capacity. The statement that 95% of sales of appliances are based on replacements does not indicate either the product or the period of time concerned. Neither does the claim that the European market has shrunk by 5% over the last two years specify the individual sector concerned, nor is any specific period of time assigned to the figure quoted of a surplus production capacity of more than 4 million units in the cold range.

The regional authorities have submitted figures taken partly from information supplied by ANFEL, CECED, the complainants in these proceedings, and Master Cadena, the leading distributor on the Spanish market. The latter claims that turnover in household appliances grew by 3% in 1997; as far as refrigerators are concerned, the growth was 4,4%. According to CECED's figures, the number of units sold on the Spanish market rose from 1 000 066 in 1996 to 1 133 350 in 1997. The number of units sold has also grown in the other Member States, with the exception of Austria and Germany. The number of refrigerators manufactured in Spain rose from 1 308 844 units in 1996 to 1 456 019 in 1997. According to the regional authorities, forecasts by 'Consumer Europe' point to a 10% increase in refrigerator sales (measured in units) on the European market over the period 1996 to 2001.

The regional authorities also refer to statements made in April 1998 by the chairman of Electrolux, the leading European manufacturer of household appliances, to the effect that sales of these products will increase by 4% in 1997 and continue to improve in 1998.

On the question of the artificial overvaluation of the investment costs incurred by Demesa, the regional authorities have provided detailed information on the procedures for checking that the investments have actually been carried out. They have also confirmed that payment of the grant is conditional on actual implementation of the investment. In this connection, they have submitted detailed information on checks carried out during the period from June 1997 to September 1997.

On the doubts raised as to the real cost of Demesa's investment, an audit report drawn up by a consultant who regularly works for the Commission has been presented, which makes, *inter alia*, the following points:

- The price of non-serviced land in the Jándiz industrial estate (Vitoria-Gasteiz) is ESP 5 000 per square metre; the final price of ESP 4 125 per square metre paid by Demesa for serviced land is a market price with a normal discount given the size of the plot. The report's findings examine the differences between the estimates made by the consultant and the regional authorities (the column

'Consultant's estimate' gives a price for the land of ESP 500 million (or ESP 5 000 per square metre), whereas the column 'Demesa' shows a price of ESP 413 million⁽²⁴⁾ (or ESP 4 125 per square metre)),

- the cost of the buildings and construction work is in line with prices prevailing in the construction industry,
- the total estimated cost of plant and machinery currently installed therefore amounts to ESP 2 449 000 000 (EUR 14 718 786,44), as against the ESP 2 500 771 550 (EUR 15 029 939,72) calculated by Demesa. The cost estimated by the consultant is broken down as follows:

Machinery	ESP 1 565 million ⁽²⁵⁾
Plant	ESP 819 million ⁽²⁶⁾
Auxiliary machinery	ESP 65 million ⁽²⁷⁾

- there is no justification for claiming ESP 525 million in installation costs and costs prior to start-up.

The report also states that current production capacity is 140 000 refrigerator units of between 310 and 370 litres. There are plans for raising capacity to 600 000 units in future. To reach that level of output, it would be necessary, according to the auditor, to add an extra production line and create two shifts or to build a new factory with the same capacity.

IV.2. *Observations submitted by interested parties*

The new points made by interested parties in the observations they submitted can be summarised as follows:

- the argument put forward by the Basque regional authorities, according to which, in order to boost competition in the sector, it is necessary to subsidise a competitor, is incoherent, contrary to common sense and

⁽²⁴⁾ This amount differs slightly from the figure of ESP 412,5 million obtained by multiplying the surface area of 100 000 m² by the price per square metre.

⁽²⁵⁾ Cost according to information supplied by European manufacturers. The cost declared by Demesa is not given.

⁽²⁶⁾ Cost according to information supplied by European manufacturers. The plant was purchased from Daewoo Electronics (Demesa's sole shareholder) for ESP 718 565 011. Some of this plant (worth ESP 300 million) is installed on the premises of third parties.

⁽²⁷⁾ Cost according to information supplied by European manufacturers.

does not make the project at all strategic. Competition does exist on the Spanish market. This argument would make sense only if the relevant geographic market were the market of the Basque Country, and if that market were protected; however, the relevant geographic market is the European market,

- the jobs created are insecure and extremely low-paid⁽²⁸⁾,
- if the forecasts are fulfilled, Demesa will place an extra 600 000 units on the European market, thereby contributing to an aggravation of the surplus capacity estimated at 5 million units.

For these reasons, and in view of the seriousness of the situation, the interested parties requested the Commission to order the provisional recovery of the aid paid to Demesa, pending adoption of the final decision.

IV.3. *Comments made by Spain in response to observations submitted by interested parties*

In the comments it made on the observations submitted by interested parties, Spain reiterated the arguments it had already put forward in the course of the proceedings and claimed that there were no grounds for the Commission to order recovery of the aid already disbursed.

V. ASSESSMENT OF THE AID

Article 92(1) of the Treaty establishes the principle that, save as otherwise provided in the Treaty, any aid which distorts or

threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

V.1. *The refrigerator sector in Europe*

According to Demesa's business plan, the Álava plant 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 plant is to produce combined refrigerator-freezers equipped with the no-frost system.

This investment forms part of the overall strategy⁽²⁹⁾ pursued by Daewoo Electronics, whose goal is to become, by 2002, the world's leading refrigerator manufacturer, holding a share of around 12% of the world market in that product, with an annual production target of 7 million units, of which 5 million are to be produced at 12 centres located outside South Korea. The company plans to invest around USD 1 000 million in the construction of eight new factories with a view to gaining a share of around 12% of the world refrigerator market. Up to 2002, the production capacity of the four European plants will be 1,5 million units⁽³⁰⁾, i.e. 13% of total European production capacity forecast for 2001.

According to the data and information in the Commission's possession, demand and production vary according to the country concerned⁽³¹⁾:

⁽²⁹⁾ Daewoo Electronics had also considered setting up a plant creating 300 new jobs at Verdun, France. CECED likewise lodged a complaint against the aid that the French authorities were intending to grant in connection with that investment. In December 1997 the Commission requested information from the French authorities, which replied that Daewoo Electronics had suspended the project.

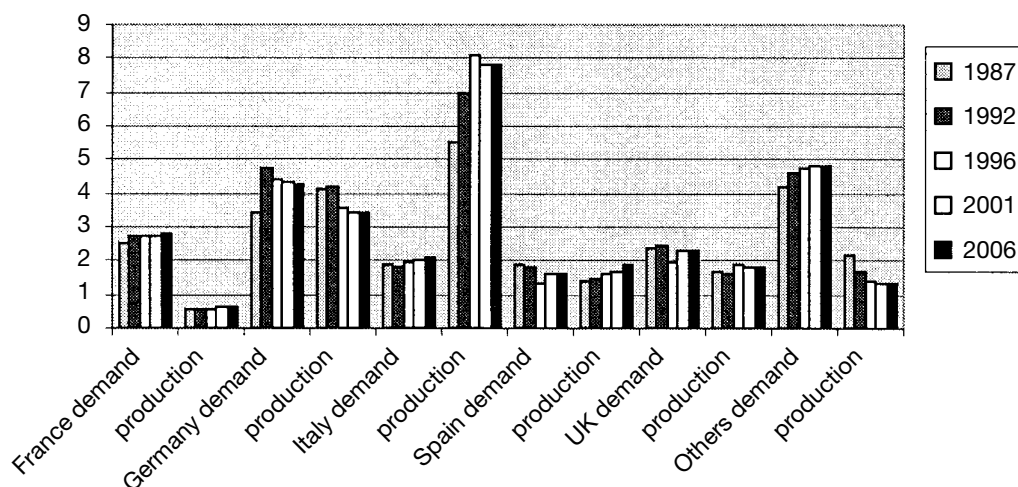
⁽³⁰⁾ 'Aims To Lead Global Refrigerator Market', June 1997, <http://www.dwe.daewoo.co.kr/news>.

⁽³¹⁾ Report entitled 'World Major Household Appliances to 2001', The Freedonia Group Inc., March 1998. See also the article published in the *Financial Times* on 2 July 1997, p. 13: 'Rough and tumble industry. Domestic appliance groups are adopting varied tactics to boost market share in Europe's stagnant market', which reports that the market in refrigerators and ovens has reached saturation point.

⁽²⁸⁾ See footnote 16.

Refrigerator and freezer demand and production

(million units), 1987 to 2006



France: Demand for refrigerators and freezers will remain relatively stagnant at around 2,7 million units per year. France is not a major producer and some 75% of demand is covered by appliances from Germany and Italy. The leading brands on the French market are Brandt, Electrolux, Whirlpool and Bosch-Siemens.

Germany: Demand for refrigerators and freezers will fall slightly, from 4,4 million units in 1996 to 4,3 million units in 2001. Output declined from 4,2 million units in 1992 to 3,55 million units in 1996 and is forecast to stand at 4 million units in 2001. A total of 2,8 million refrigerators were manufactured in 1996, 40% of which by Bosch-Siemens.

Italy: The market is dominated by combined refrigerator-freezers owing to lack of space in the average home. The overall market in domestic refrigeration equipment will grow by 0,7% per year up to 2001. Italy is one of the main manufacturers of refrigerators and freezers. Output was 8 million units in 1996, 75% of which were for export. Electrolux is the market leader, with over 30% of the 6,1 million units produced in 1996. Whirlpool is also one of the main manufacturers and holds a 25% share of sales.

Spain: Demand for refrigerators declined from 1,84 million units in 1992 to 1,36 million units in 1996. Demand is forecast to grow by 3,3% per year between 1996 and 2001, reaching 1,60 million units in that year. This growth points to a market trend whereby replacement sales are again supplementing the installed base. Output will increase from 1,58 million units in 1996 to 1,7 million units in 2001. Fagor

is one of the leading producers, with 700 000 units, representing around 40% of total output⁽³²⁾.

United Kingdom: Demand for refrigerators and freezers declined from 2,46 million units in 1992 to 1,935 million units in 1996. Sales will nevertheless grow by around 3,4% per year to reach 2,3 million units in 2001. Output will level out as the popularity of imported goods increases.

Other west European countries: In the rest of western Europe the market is mature and static. Demand will keep up at around 4,8 million units, 75% of which will be covered by imports. Output has been on a downward slope since 1992 and will stabilise at around 1,4 million units.

The market in refrigerators and freezers is saturated in western Europe, where most homes are equipped with a refrigerator and separate freezer. There is a growing preference among consumers for combined refrigerator-freezers, but the market

⁽³²⁾ See <http://www.fagorelectrodomesticos/mcc.es>. Fagor is a company belonging to the Mondragón Corporación Cooperativa (MCC) group [http://mondragon.mcc.es/spanish\(indice.html\)](http://mondragon.mcc.es/spanish(indice.html)) headquartered at Mondragón (Guipúzcoa, Basque Country). With more than 100 subsidiaries and branches and 29% of its turnover generated outside Spain, MCC is the largest industrial group in the Basque Country and one of the five leading industrial groups in Spain. In 1997 it generated a turnover of ESP 726 706 million (EUR 4 367 591 023,28), of which ESP 86 000 million (EUR 516 870 409,77) was from sales of household appliances, as compared with a total turnover of ESP 354 247 million in 1992. The MCC group employs 34 397 people and has assets valued at ESP 1 541 621 million (EUR 9 265 328 813,72). It has four plants in Asia, four in Latin America and two in Africa (including two factories producing refrigerators in Argentina and Morocco).

is not expected to show signs of growth as households tend to replace refrigerators and separate freezers with combined refrigerator-freezers. Demand is therefore expected to grow by only 0,6% per year to 2001 (up to 18 million units), with replacements accounting for approximately 94% of sales⁽³³⁾.

Electrolux (Sweden) is the largest manufacturer of refrigerators and freezers in western Europe, followed by Bosch-Siemens (Germany). Whirlpool (United States) and Merloni (Italy) are also major producers. Fagor Electrodomésticos is the market leader in Spain⁽³⁴⁾.

Surplus refrigerator production capacity has been estimated at some 5 million units in 1997⁽³⁵⁾. Spain has not supplied any figures concerning excess capacity. The state of the market has caused the sector to undergo extensive restructuring which has given rise to capacity reductions or relocations of production with heavy job losses. These trends are confirmed by the information mentioned earlier and illustrated, *inter alia*, by the closure of several of Electrolux's production facilities in Europe: refrigerator production at Spennymoor (County Durham, United Kingdom), which has a capacity of 320 000 units, is to be abandoned in the summer of 1999, with the loss of 650 jobs; Electrolux has also announced the closure of its plant at Luton (United Kingdom), with the loss of a further 650 jobs; production of refrigerators at Pori (Finland) is to be transferred to other plants in Europe, resulting in 200 job losses; and a plant producing chest-type freezers has been closed in Hungary, with the loss of 200 jobs⁽³⁶⁾⁽³⁷⁾. In its 1995 annual report, Whirlpool also announced severe job losses in western Europe, amounting to around 15% of its workforce; in September 1997, it announced 4 700 job cuts, most of which are in western Europe⁽³⁸⁾. Whirlpool employs 11 000 people in Europe (mid-1997 figures) at 11 plants, of which those located at Cassinetta (Italy)⁽³⁹⁾, Calw (Germany) and Trento (Italy) produce refrigerators. The MCC group, which owns Fagor, abandoned refrigerator production at Basauri (Basque Country) in 1998, with the loss of 180 jobs. Merloni also indicates in its 1997 annual report⁽⁴⁰⁾ that the recovery of the household appliances market has not led to firmer prices, since the industry has employed unused capacity.

The above analysis also shows that there is extensive intra-Community trade in the sector, a fact confirmed by

Eurostat data⁽⁴¹⁾. Consequently, any aid measure will necessarily affect intra-Community trade and competition.

V.2. Aid elements established

The procedure provided for in Article 93(2) of the Treaty has enabled the Commission to establish the existence of the following aid measures within the meaning of Article 92(1).

V.2.1. Free-of-charge use of a 100 000 m² plot of land

The Commission has taken note of the explanations given by the Basque regional authorities concerning the difficulties due to the presence of farmers on the land where Daewoo Electronics intended to build its plant and the fact that the sale could not be formalised until the divisions and amalgamations of the different pre-existing plots had been completed on the land register.

Nevertheless, 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, from the time the purchase agreement was signed (in October 1996) until the purchase price was actually paid. Neither has the precise date on which Demesa paid for the land been communicated.

According to the information provided, construction works began in January 1997. On 13 January 1997 the farmers, via their lawyer, addressed a complaint to the property company selling the land, Gasteizko Industria Lurra SA⁽⁴²⁾, on account of the destruction of their crops by the construction works for Demesa's plant.

Furthermore, the land was not paid for before September 1997. A document issued by the regional authorities concerning the investments made by Demesa and following an inspection covering a period ending on 10 September 1997

⁽³³⁾ See footnote 31.

⁽³⁴⁾ See footnote 32.

⁽³⁵⁾ Information provided by CECED in the context of these proceedings.

⁽³⁶⁾ 'Electrolux to phase out production at two UK factories', 14 October 1997, <http://www.electrolux.se/corporate/pressnotes>.

⁽³⁷⁾ 'Electrolux intends to move production from refrigerator factory in Finland', 27 October 1997, <http://www.electrolux.se/corporate/pressnotes>.

⁽³⁸⁾ See <http://www2.whirlpool.com/htm/corp/investor>.

⁽³⁹⁾ The Whirlpool group's largest factory in western Europe.

⁽⁴⁰⁾ See http://www.merloni.it/fr_azi.htm.

⁽⁴¹⁾ Intra-Community trade in household refrigerators (CN codes 8418 21, 8418 22 and 8418 29) amounted to EUR 677 692 000 in 1996 and EUR 732 189 000 in 1997; 6,91% (1996) and 7,67% (1997) of these sales involved products originating in Spain, while 8,23% (1996) and 7,41% (1997) corresponded to goods introduced into the Spanish market from other Member States. Intra-Community trade in combined refrigerator-freezers and refrigerator-freezers fitted with separate external doors (other than for use in civil aircraft) (CN codes 8418 10 91 and 8418 10 99) amounted to EUR 484 470 000 in 1996 and EUR 555 665 000 in 1997; 19,41% (1996) and 17,72% (1997) of these sales involved products originating in Spain, while 10% (1996) and 9,42% (1997) corresponded to goods introduced into the Spanish market from other Member States.

⁽⁴²⁾ According to information provided by the regional authorities, the shareholders in Gasteizko Industria Lurra SA are the Municipal Council of Vitoria-Gasteiz (58,22%) and Sprilur SA (41,78%). Sprilur SA is in turn controlled by the Basque Government, which holds 95,52% of its capital.

makes it clear that only the building, and not the land, was considered to be a completed investment qualifying for payment of the aid. Another document mentions the payment of ESP 413 million for the land in a column relating to November to December 1997 (see Annex III to the letter of 24 July 1998).

In view of the above, and in the light of the information provided by the regional authorities, there are grounds for concluding 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 regional authorities argue that the sale of the land could not be formalised until 30 December 1997 as a result of a dispute concerning tenure of the land. They refer to the rights enjoyed by the tenants under Spanish law and the principle of good faith, which rule out the possibility of transferring ownership of land where there is a dispute concerning tenure. These were the reasons why formalisation of the sale was delayed until the dispute was resolved. Since these requirements result from application of the principles and rules of civil law, the regional authorities conclude that they must be regarded as a general measure which falls outside the scope of Article 92(1) of the Treaty.

The Commission notes, in any event, that neither the principles of good faith alluded to nor the presence of the tenant farmers on the land prevented Demesa from beginning, continuing and completing construction of the plant throughout the whole of 1997. During the same period, Demesa made payments for the works carried out and did not refrain from requesting payment of the grant corresponding to 25% of the cost of the buildings erected. The absence of a formal deed of sale in no way detracts from the fact that Demesa used the land without having to pay the consideration that the company selling it was entitled to demand.

If, despite the precautions taken by the regional authorities, Demesa had not occupied the land and had not begun building the plant in accordance with the timetable laid down in the investment plan approved by those authorities, payment of the grant would have been seriously jeopardised. Demesa therefore had an obvious interest in beginning the construction work without delay.

The Commission accordingly takes the view that Demesa enjoyed an advantage equivalent to postponement of payment of the price of the land for a period of nine months, running from the time it first occupied the land for the purpose of carrying out the construction work (February 1997) until the date on which it paid the price (not before November 1997). In the absence of other comparative or calculation data, that advantage can be estimated as being equivalent to the interest

that could be gained from investing for nine months an amount equivalent to the price of the land, corrected as indicated at the end of point V.2.2. The interest rate to be applied is the reference rate for 1997⁽⁴³⁾. The economic advantage calculated in this manner amounts to EUR 184 075,79⁽⁴⁴⁾ (ESP 30 627 635) and constitutes state aid within the meaning of Article 92(1) of the Treaty.

V.2.2. Sale of a plot of land at less than the market price

The regional authorities argue that the communication of 10 July 1997⁽⁴⁵⁾ cannot be applied in this case. The Commission would point out that the communication does not impose any obligation on the Member States and is restricted to defining, on the basis of established administrative practice, the circumstances in which it may be presumed that no aid is present.

The Commission notes, as it stated when it initiated the proceedings, that the criteria which it set out in its communication of 10 July 1997 were not fulfilled when the land was sold to Demesa. The sale of the land to Demesa consequently does not qualify for a presumption that no aid, as provided for in that communication, was in evidence.

The Commission therefore has to examine, on the basis of the information in its possession, whether the price paid by Demesa corresponds to a market price, bearing in mind that two valuations and an audit report carried out after the event cannot carry the same weight as a valuation carried out before the sale.

The two valuations carried out on 13 January 1998 and 6 February 1998 by two different real estate valuers (see Annex IX to the letter of 6 March 1998) quote a unit price for serviced land of approximately ESP 6 120 per square metre.

However, 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 m²; and 50 000 m², and concluded that there were no price indicators on the market for serviced plots of 100 000 m²; however, a price of

⁽⁴³⁾ The reference rate is 10,56% for the period 1 January to 31 July 1997 and 6,22% for the period 1 August to 31 December 1997.

⁽⁴⁴⁾ This is the sum of the two amounts obtained by applying on a pro rata basis the reference rates established for the two periods in 1997 (January to July and August to December) to the respective number of months (six and three) during which the land was used in each of those two periods.

⁽⁴⁵⁾ See footnote 21.

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 audit report drawn up in July 1998 (see Annex IV to the letter of 24 July 1998) 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 Commission notes that the average of these estimates 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.

In the light of the foregoing, the Commission considers that this price of ESP 4 481 per square metre is the market price for the sale of plots similar to the one occupied by Demesa in the Jundiz industrial estate. 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). This price difference constitutes state aid within the meaning of Article 92(1) of the Treaty.

V.2.3. Aid elements not covered by the Ekimen scheme

Amount of the grant

The information provided by Spain in accordance with the procedure under Article 93(2) of the Treaty has enabled the Commission to examine whether the regional authorities complied with the conditions of the Ekimen scheme when they awarded a non-refundable grant corresponding to 25% of the cost of Demesa's investments in tangible fixed assets at Vitoria-Gasteiz.

The examination also established that some of the investments in respect of which the grant was awarded are covered by Ekimen, while the remainder fall outside the scope of that scheme.

The Commission takes the view that, in the case in point, 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.

Under Article 10 of Basque Government Decree No 289/1996, 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⁽⁴⁶⁾ 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.'

As was mentioned in point II. 4, the Commission stated the following in its decision to approve the Ekimen scheme, notified by letter dated 13 December 1996:

'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.'

Consequently, if an investment project is to benefit from a non-refundable grant under Ekimen and within the scope of that scheme, the grant must be awarded in accordance with

⁽⁴⁶⁾ Article 6(1)(a) of the Decree defines strategic projects as projects which involve an investment of not less than ESP 10 000 million or the creation of at least 300 jobs. Certain projects 'with complex financing arrangements' may also be deemed strategic.

the detailed conditions and criteria governing the scheme as approved by the Commission.

The Basque regional authorities made the following statement on page 8 of their letter of 23 January 1998:

'In accordance with the former (criteria determining the level of the grant), all projects have to receive a grant equivalent to at least 10% of the eligible investment costs (see criterion (a), i.e. Article 10(1) of Decree No 289/1996; in addition, where the project fulfils the conditions laid down in the second and third paragraphs of the Article (criteria (b) and (c), i.e. those set out in Article 10(2) and (3) of the Decree), that percentage is to be increased by an extra five percentage points respectively. Therefore, a project which fulfils all those conditions must receive a grant amounting to 20% gross.'

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%).

As far as the criterion laid down in Article 10(3) is concerned, 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⁽⁴⁷⁾. The argument put forward by the regional authorities at the meeting of 15 December 1998, to the effect that the beneficial effects of 'strategic' projects which were not located in 'preferential interest areas' extended to the latter, is not sufficient to justify awarding an extra 5% under Article 10(3) to Demesa's investment.

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 its letter of 13 December 1996, in view of the fact that each of paragraphs 2, 3 and 4 of Article 10 of the Decree (or each of items (b), (c) and (d) in the above paragraph of the Commission's letter of 13 December 1996) makes it possible to award a 5% supplement up to the maximum of 25% gge laid down for grants falling outside the scope of the Ekimen scheme. Furthermore, the 'preferential interest area' criterion was introduced for the purpose, which was expressly recognised in the preamble to and laid down in Article 4 of the Decree, of practising positive geographical discrimination in favour of specific areas of the Basque Country that suffer from particularly serious economic or development problems, an objective which is in line with the principle — confirmed by the Guidelines on national regional aid⁽⁴⁸⁾ — of varying the intensity of regional aid (within the maximum ceilings permitted) according to the seriousness of the regional problems to be tackled.

The regional authorities argued, at the meetings of 29 October 1998 and 15 December 1998, that the Commission's decisions to initiate and to extend the proceedings were not based on such an interpretation of that aspect of the Ekimen scheme. The Commission considers that the wording of those two decisions cannot be construed in such a way as to enable the regional authorities to evade compliance with the conditions for implementing the scheme as laid down in its letter of 13 December 1996. In their letter of 23 January 1998, the Basque regional authorities moreover confirmed that an investment fulfilling the criteria set out in items (b) and (c) qualified for two 5% supplements respectively, in addition to the general rate of 10%.

When it initiated and subsequently extended the proceedings, the Commission already raised serious doubts as to the strategic nature of Demesa's investment project and as to the effective creation of jobs. Those doubts have not been dispelled. The Commission maintains the view that the existence of surplus capacity in the sector, as described in point V.1., and the presence in the Basque Country of Spain's leading refrigerator manufacturer, Fagor⁽⁴⁹⁾ (a member of the MCC group), which holds a 25% share of a domestic market that is not protected by trade or other barriers, makes the alleged strategic nature of the project more than doubtful. The MCC industrial group is constantly building up its presence on the Community and world markets⁽⁵⁰⁾. The Commission also continues to believe that there is a very real risk that the aided investment will result in capacity reductions in Spain, particularly in the Basque Country, and in other areas of the Community, as can be seen from the current restructuring operations decided by Electrolux and Whirlpool.

However, as regards classification of the investment project as 'strategic' because it fulfils certain quantitative criteria (investment exceeding ESP 10 000 million, creation of more than 300 jobs), when the Commission approved the Ekimen scheme it did not express any reservations on the grounds of possible sectoral problems, either in the household appliances sector or elsewhere, except for the usual reservations with regard to sectors covered by specific state aid guidelines or rules. It would therefore be contrary to the principles of legal certainty and legitimate expectations to modify that overall approval where the Basque regional authorities have observed the criteria for deeming a project to be strategic.

In view of the foregoing, the amount of the grant may not exceed 20% of the eligible costs. The remaining 5%, which was granted under the 'preferential interest area' criterion, is not covered by the scheme and therefore constitutes state aid within the meaning of Article 92(1) of the Treaty and, since it is not covered by a previously approved scheme, must be deemed to be new aid whose compatibility must be assessed directly in the light of the Treaty provisions, as the Commission had already stated in its letter of 4 June 1998.

⁽⁴⁷⁾ The list of 'preferential interest areas' is set out in Annex I to the Decree.

⁽⁴⁸⁾ OJ C 74, 10.3.1998, p. 9.

⁽⁴⁹⁾ See footnote 32.

⁽⁵⁰⁾ MCC has carried out an extensive internationalisation programme affecting both its industrial plants and its commercial presence.

Costs eligible under the Ekimen scheme

The report submitted by the complainants, which was drawn up by a subsidiary of one of CECED's members, alleges that the investment costs were artificially overvalued. The Commission notes that the report is not based on the same assumptions regarding production capacity and product type as Demesa's investment.

The audit report submitted by the Basque Government, which was drawn up by an independent expert, furthermore confirms the reality and conformity of the costs actually incurred by Demesa, with the exception of ESP 525 million in installation costs prior to start-up. The regional authorities also rejected these costs in the course of their checks on implementation of the project.

As far as the eligible costs are concerned, the regional authorities have provided sufficient proof that internal auditing procedures prevent the payment of a grant under the Ekimen scheme if there is no tangible evidence that the investment has been carried out. The same procedures enable the regional authorities to check compliance with the obligation on the company to finance 30% of total net assets from its own resources during its second year in business (Article 5(b) of the Decree). As indicated in point II.4, the Commission considers that, for the purposes of that requirement, the second year is 1998 and not 1997.

However, the fact that the costs have been genuinely incurred and are in line with market prices does not necessarily mean that they are eligible.

The Commission points out in this connection that, in accordance with Article 7 of the Decree governing the Ekimen scheme, fixed assets that have been transferred to third parties are not eligible. According to the audit report, 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.

V.2.4. Tax credit equivalent to 45 % of the cost of investments and reduction in the tax base for newly created businesses

In this Decision, the Commission has restricted itself to examining in the light of Article 92 of the Treaty the 45% tax credit and the reduction in the tax base for newly created businesses, and not the other tax concessions.

V.2.4.1. The 45 % tax credit

The tax credit is governed by the Sixth Additional Provision of Provincial Law 22/1994 on the implementation of the budget of the Province of Álava for 1995, which reads as follows:

'Investments in new tangible fixed assets carried out between 1 January 1995 and 31 December 1995 and exceeding ESP 2 500 million shall, by decision of the Álava Provincial Council, qualify for a tax credit equivalent to 45% of the amount of the investment, as determined by the Álava Provincial Council, to be offset against the amount of personal tax liability.

Any tax credit not used up because it exceeds the amount of tax liability may be carried forward and used for up to nine years following that in which the decision of the Álava Provincial Council is taken.

The decision of the Álava Provincial Council shall lay down the time-limits and restrictions applicable in each individual case.

Benefits granted under this provision shall be incompatible with any other tax concessions for which the same investments may be eligible.

The Álava Provincial Council shall also decide on the duration of the investment process, which may include investments made during the preparatory phase of the project which generates the investments.'

This measure was kept in force in 1996 by the finance act for that year (Provincial Law 33/1995), as amended by the new corporation tax act (Provincial Law 24/1996, which deleted the reference to the period of nine years in the second paragraph) and in 1997 by the finance act for that year (Provincial Law 31/1996). The tax credit equivalent to 45% of the amount of investments was maintained, with amendments to the wording of the provisions, in 1998 and 1999 by Provincial Laws 33/1997 and 36/1998 respectively.

The principle that state aid is incompatible with the common market and the exceptions provided for by the Treaty apply to aid 'in any form whatsoever' and, in particular, to certain tax measures.

If it is to be classed as aid, a measure has to satisfy each of the four criteria mentioned in Article 92 and spelled out below.

First, the measure must afford the beneficiaries an advantage that reduces the costs they normally have to bear in the course of their business. The advantage may be granted through different types of reduction in the company's tax burden and, in particular, through an exemption from or reduction in tax liability.

The 45% tax credit in question undoubtedly fulfils this criterion since, thanks to the credit, Demesa enjoys a reduction in its tax burden equivalent to 45% of the amount of the investment as determined by the Álava Provincial Council. The tax credit can, however, be used without any time-limit, starting in the first year in which the company makes a profit. The Spanish authorities have furthermore confirmed⁽⁵¹⁾ that Demesa will be able to choose, in respect of each tax year, the most favourable methods of deduction or reduction, which makes it impossible in practice to determine the intensity of the aid over the whole period in which it is being received.

Second, the advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to the use of state resources in the form of tax expenditure. This criterion also applies to aid granted by regional or local bodies in the Member States (judgment of the Court of Justice of 14 October 1987 in Case 248/84 *Germany v Commission* ⁽⁵²⁾). The State aid may furthermore be granted by way of tax measures laid down by law, regulation or administrative practice or by way of decisions taken by the tax administration.

The tax credit granted to Demesa derives from the combined effect of a budgetary measure and an individual decision (Decision 737/97), both taken by a public authority.

Third, the measure must affect competition and trade between Member States. This criterion presupposes that the beneficiary of the measure carries on an economic activity, irrespective of its legal status or method of financing. The Court of Justice has repeatedly ruled, for the purposes of interpreting this condition, that intra-Community trade is to be deemed to be affected from the moment the beneficiary firm carries on an economic activity which is the subject of trade between Member States.

It has already been demonstrated that Demesa carries on an economic activity which is the subject of trade between member States, in a sector that is highly competitive.

Fourth, the measure must be specific or selective in the sense that it favours 'certain undertakings or the production of certain goods'. The advantage may be selective because it is granted either as an exception to general tax arrangements established by law, regulation or administrative practice, or at the discretion of the tax administration. In the present case, the advantage is selective chiefly on account of the discretion enjoyed by the administration in granting it.

With regard to this condition, the Court of Justice held in *Kimberly Clark Sopalin* (judgment of 26 September 1996 in

Case C-241/94 *France v Commission* ⁽⁵³⁾ that, where the entity granting an advantage enjoys a degree of latitude which enables it to vary 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 time-limits and other conditions under which it is provided, as well as to decide on whether or not to renew the measures concerned from one year to the next according to criteria unknown to the Commission, the conditions in which such assistance is granted are liable to place certain firms 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.

When it adopted Decision 737/97, the Álava Provincial Council enjoyed, pursuant to the abovementioned provisions, discretionary powers 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.

The Spanish authorities have not communicated the text of Decision 737/97 granting the tax credit to Demesa. The Commission consequently does not know the precise amount of the tax credit⁽⁵⁴⁾. However, it must be between ESP 1 125 000 000 and ESP 5 326 020 000, which correspond respectively to 45% of ESP 2 500 000 000 (the minimum investment qualifying for the credit) and 45% of ESP 11 835 600 000 (the amount officially invested by Demesa). Given that there is no time-limit on the use of the tax credit, it is impossible to calculate precisely its intensity. The intensity may be up to 45% nge. On the basis of the profit forecasts set out in Demesa's business plan, the aid intensity of the tax credit is 34% nge.

Secondly, although the discretionary nature of the tax credit is sufficient for it to be classed as a specific measure, and therefore as state aid, 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.

Thirdly, the Commission takes the view that the temporary (annual) nature of the measure in fact allows the authorities

⁽⁵³⁾ [1996] ECR I-4551.

⁽⁵⁴⁾ In their reply to the Commission's notification of its decision to initiate proceedings, the Spanish authorities merely stated that 'Demesa was granted, by means of Decision 737/97 of 21 October 1997, the tax concessions provided for in the Sixth Additional Provision of Provincial Law 22/1994 (tax credit equivalent to 45% of investments) for its investment project'.

⁽⁵¹⁾ See p. 42 of the letter of 6 March 1998.

⁽⁵²⁾ [1987] ECR 4013.

discretion to grant the tax credit to certain firms only, namely those initiating their investment processes during the period covered by the measure. The Commission notes that the measure does not appear in general tax legislation, only in the annual finance acts, which confirms its temporary nature and enables it to be used for specific projects.

Fourthly, the Commission underlines 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. The only difference between the two, which is that the Ekimen scheme supports only industrial investments, is more of a formal distinction, since the minimum investment (ESP 2 500 million) required to qualify for the tax credit effectively limits the possible beneficiaries to industrial firms.

Consequently, the tax credit granted to Demesa, corresponding to 45% of the amount of the investment as determined by the Álava Provincial Council, constitutes state aid within the meaning of Article 92(1) of the Treaty.

In its letter to Member States SG(89)D/5521 of 29 April 1989 the Commission stated that it 'considers that a Member State has failed to fulfil its obligation to notify it where the process of putting aid into effect has been initiated. By "putting into effect" it means not the action of granting aid to the recipient but rather the prior action of instituting or implementing the aid at a legislative level according to the constitutional rules of the Member State concerned. Aid is therefore deemed to have been put into effect as soon as the legislative machinery enabling it to be granted without further formality has been set up'⁽⁵⁵⁾. This is undoubtedly the case with this measure, which has been carried out unlawfully in breach of the provisions of Article 93(3) of the Treaty.

V.2.4.2. *Reduction in the tax base for newly created businesses*

The reduction in the tax base for newly created businesses is laid down in Article 26 of Provincial Law 24/1996, which reads as follows:⁽⁵⁶⁾

'Article 26 — Reductions in the tax base: Newly created businesses

⁽⁵⁵⁾ See *Competition law in the European Communities, Volume IIA: Rules applicable to state aid*, Office for Official Publications of the European Communities, Luxembourg, 1995, p. 62.

⁽⁵⁶⁾ Only the provisions which are relevant for the purposes of assessing the state aid elements are quoted here.

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

[...].

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

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

(b) [...].

(c) [...].

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

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

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

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

(h) [...].

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

3. [...].

4. The minimum amount of investment referred to in subparagraph (f) and the minimum number of jobs created

referred to in subparagraph (g) of paragraph 2 above shall be incompatible with any other tax concession established for the same investment or job creation.

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

[...].'

In their letter of 6 March 1998, the regional authorities maintain that the benefit of this measure cannot be combined with that of the tax credit.

Before examining whether the reduction in the tax base provided for by Article 26 of Provincial Law 24/1996 contains elements of state aid within the meaning of Article 92(1) of the Treaty, the Commission has to determine whether, as was claimed by the regional authorities, the tax credit cannot be used where the company concerned decides to apply the reduction in the tax base for which it qualifies under the above provision. The wording of Article 24(6) and the overall structure of the system do not confirm such an interpretation.

The Commission notes in the first place that the qualifying conditions for each of the tax concessions are different.

In the case of the tax credit (see point V.2.4.1), the qualifying condition is investment in new tangible fixed assets exceeding ESP 2 500 million.

For the reduction in the tax base, the qualifying condition is, on the other hand, the creation of a new business.

Consequently, a newly created business could be entitled to the reduction in the tax base without investing ESP 2 500 million and, conversely, an existing company investing more than ESP 2 500 million could qualify for the tax credit without being entitled to the reduction in the tax base. In this case, however, Demesa is a newly created business and has invested more than ESP 2 500 million in the Province of Álava.

According to the provision governing the tax credit (see point V.2.4.1), the advantages granted under that provision cannot be combined with any other tax concessions available by virtue of the same investments. The reduction in the tax base

is granted by virtue, not of investments but of the creation of a new business. The reduction in the tax base consequently does not fall within the scope of the ban on combination with other tax concessions.

This is confirmed by the wording of Article 26(4) of Provincial Law 24/1996, which provides that the minimum amount of investment (ESP 80 million) referred to in subparagraph (f) and the minimum number of jobs created (10) referred to in subparagraph (g) of Article 26(2) are incompatible with any other tax concession established for the same investment or job creation. In reality, only tax concessions granted by reason of an investment of ESP 80 million (or the creation of 10 jobs) cannot be combined with the reduction in the tax base. In accordance with this principle, ESP 80 million of the ESP 11 835 600 000 invested by Demesa should not be taken into consideration in calculating the 45% of investments eligible for the tax credit.

Neither is the combination of tax concessions ruled out in the administration of the tax, in so far as the tax credit is applied to the amount of personal tax payable (that is, after all deductions and reductions in the tax base have been made), whereas the reduction in the tax base takes place at an earlier stage in the calculation of the tax. Consequently, once there is a positive basis of assessment, the business will apply the reduction in the tax base provided that it has the corresponding authorisation. Once the reduction has been made, the amount of tax payable will be calculated. To the latter, Demesa will apply the 45% tax credit that has been previously calculated on the basis of the total amount of the investments minus ESP 80 million.

Having established that the two measures (the reduction in the tax base and the tax credit granted to Demesa) are liable to be combined, the Commission has to examine whether the reduction in the tax base constitutes state aid within the meaning of Article 92(1) of the Treaty.

If it is to be classed as aid, the reduction in the tax base has to satisfy each of the four criteria mentioned in Article 92 and examined below.

Firstly, the reduction in the tax base affords Demesa an advantage that reduces the costs it would normally have to bear in the course of its business.

Secondly, the reduction in the tax base involves a loss of tax revenue equivalent to the use of state resources in the form of tax expenditure.

Thirdly, the reduction in the tax base affects competition and trade between Member States since Demesa carries on an

economic activity which is the subject of trade between the Member States, in a sector that is highly competitive.

Lastly, the measure must be specific or selective in the sense that it favours 'certain undertakings or the production of certain goods'. In this case, the reduction in the tax base is selective chiefly because only newly created businesses can qualify for it. Article 26 of Provincial Law 24/1996 makes it possible to afford newly created businesses more favourable tax treatment than that applied to other businesses already present on the market. This circumstance is sufficient to demonstrate the specific nature of the measure, on the basis of which the Commission classifies the reduction in the tax base granted to Demesa as State aid within the meaning of Article 92(1) of the Treaty. The specific nature of the measure is strengthened by the fact that only businesses investing ESP 80 million and creating 10 jobs qualify for the reduction in the tax base.

The specific nature of the measure is also strengthened by its purpose, as set out in Provincial Law 24/1996 establishing it. After listing the general objectives of the tax system, the preamble to that instrument enumerates another set of objectives that have more to do with industrial policy, among which it specifically mentions the aim of 'stimulating the creation of new business initiatives', an objective pursued in the instrument by measures aimed at the specific category of newly created businesses (see point (g) of the preamble), which are granted a reduction in the tax base during the first four years of operation in which they make a profit. This stated objective, which confirms that the measure constitutes start-up aid for newly created businesses, does not enable it to be considered compatible with the nature or general scheme of the tax system in question. Neither did the regional authorities indicate or demonstrate in their response to the decision to initiate proceedings that the selective nature of the measure is justified by the 'nature or general scheme' of the tax system concerned (see the judgment of the Court of Justice of 2 July 1974 in Case 173/73 *Italy v Commission* ⁽⁵⁷⁾).

The measure in question clearly constitutes operating aid. Since any profits will be generated in the future and are essentially uncertain, it is not possible to calculate precisely the aid intensity involved in the reduction in the tax base.

In its letter to Member States SG(89) D/5521 of 29 April 1989 the Commission stated that it 'considers that a Member State has failed to fulfil its obligation to notify it where the process of putting aid into effect has been initiated. By "putting into effect" it means not the action of granting aid to the recipient but rather the prior action of instituting or implementing the aid at a legislative level according to the

constitutional rules of the Member State concerned. Aid is therefore deemed to have been put into effect as soon as the legislative machinery enabling it to be granted without further formality has been set up' ⁽⁵⁸⁾. This is undoubtedly the case with this measure, which has been carried out unlawfully in breach of the provisions of Article 93(3) of the Treaty.

As regards the nature of the aid granted to Demesa in the light of Community law, with the exception of that granted by the Basque authorities in accordance with the criteria of the Ekimen scheme, the aid was not granted under schemes approved by the Commission but pursuant to national measures that had not been approved by the Commission and should have been notified to it at the planning stage in accordance with Article 93(3) of the Treaty. This aid is consequently illegal under Community law.

Article 92(1) of the Treaty provides that aid meeting the criteria laid down therein shall normally be incompatible with the common market.

In this particular case the exceptions provided for in Article 92(2) of the Treaty are not applicable since the aid does not pursue the objectives listed in that paragraph. Nor indeed have the Spanish authorities attempted to rely on those exceptions.

Compatibility of the investment aid (points V.2.1, V.2.2, V.2.3 and V.2.4.1)

Article 92(3) of the Treaty lists the types of aid that may be considered to be compatible with the common market. Compatibility must be determined with reference to the Community as a whole, and not with reference to one Member State — or region thereof — taken individually. To ensure that the common market functions normally and given the principle established in Article 3(g) of the Treaty, the exceptions listed in Article 92(3) should be construed strictly when it comes to examining any aid scheme or individual aid measure. In particular, the exceptions may be relied on only where it can be demonstrated that, without the aid, market forces would not be sufficient on their own to induce the beneficiaries to act in such way as to enable one of the objectives mentioned in the exceptions to be achieved.

Under Article 92(3)(a), an exception may be made in the case of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. The municipality of Vitoria-Gasteiz is not located in an area qualifying for regional aid under Article 92(3)(a) of the Treaty.

⁽⁵⁷⁾ [1974] ECR 709.

⁽⁵⁸⁾ See footnote 55.

As regards the exceptions provided for in Article 92(3)(b) and (d), the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the Spanish economy, nor does it display the features of projects of that kind. Nor is it intended to promote culture or heritage conservation.

As far as the exception provided for in Article 92(3)(c) of the Treaty is concerned, Vitoria-Gasteiz is located in an area which qualifies for regional aid in accordance with that provision. The maximum aid intensity allowed in the Basque Country is 25 % nge⁽⁵⁹⁾ (35 % in the case of SMEs). Given the difference between this and the intensity of aid granted to Demesa in accordance with the Ekimen scheme (20 % gross), the Commission has to check whether the aid granted within that limit can be considered compatible by way of regional aid within the meaning of that exception.

The aid in question was not awarded under regional aid schemes approved by the Commission, but granted by means of individual decisions taken by the competent authorities. In such cases, the impact of the aid has to be examined in the context of the Community as a whole. The Court of Justice confirmed this interpretation in *Hytasa* (judgment of 14 September 1994 in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission*⁽⁶⁰⁾) and *Pyrsa*⁽⁶¹⁾. The 'cluster' approach based on the concept of 'geographic concentration', whose appropriateness as part of the industrial policy pursued by the regional authorities is not addressed in this Decision, cannot justify analysing the impact of the aid without taking the Community context into account.

An individual aid measure may be classed as regional aid compatible with the common market where it effectively contributes to the long-term development of the area and does not have effects that are detrimental to the common interest and competitive conditions in the Community. The aid can accordingly be considered to be compatible with the common market where it does not adversely affect trading conditions to an extent contrary to the common interest.

As already stated and according to information obtained by the Commission in the course of the proceedings under Article 93(2) of the Treaty, the company receiving the aid is operating in a sector which is suffering from problems of surplus capacity at Community level, as illustrated by an extensive restructuring process that has given rise to capacity reductions or production relocations involving heavy job losses within the Community. The aid under examination, which was

awarded outside the Ekimen scheme and other regional aid schemes approved by the Commission, contributes to a further deterioration in the situation and runs counter to the process embarked on by the company's main competitors.

The award of aid in a highly competitive sector subjected to nearly constant restructuring and on a market which is stagnant 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 aid will result in distortion of competition that will force certain competitors to withdraw from the market or will cause production capacities or jobs to be shifted from one competitor to another or from one region to another, something that should be regarded as contrary to the common interest. The 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, far in excess of the number of jobs which Demesa expects to create at Vitoria-Gasteiz. This situation is illustrated by the MCC group's decision to discontinue refrigerator production at Basauri, involving a loss of 180 jobs, authorised by the Basque Government, precisely on the grounds of the poor market conditions in the sector. It is difficult not to see a link between the loss of jobs in refrigerator production at Basauri and Demesa's announcement, at around the same time, of the creation of 200 jobs at Vitoria-Gasteiz.

Neither can an assessment of the compatibility of the aid overlook the information and forecasts concerning market prospects available at the time when the decision to grant aid to Demesa was taken, a period when the main European producers were deciding to undertake the adjustments demanded by the state of the sector. The sector was at that time experiencing great difficulties — as is immediately apparent from the annual reports of the main European manufacturers — which prompted the abovementioned restructuring decisions. It is worth stressing here that the speech given by the chairman of Electrolux on 29 April 1998, quoted by the regional authorities in support of their argument that the refrigerators and freezers segment had been experiencing an upturn since 1997, refers in the first place to the major 'restructuring programme' announced in 1996, involving, *inter alia*, the closure of three plants in the Community, with the aim of 'improving capacity utilisation'. The relative improvement observed in 1997 and mentioned by the chairman of Electrolux concerns the household appliances sector in general and not the refrigerators segment, which continues to undergo extensive restructuring.

It must consequently be concluded that the aid under examination adversely affects trading conditions to an extent contrary to the common interest and therefore cannot be deemed compatible with Article 92(3)(c) of the Treaty. The investment aid in question does not qualify for any of the exceptions provided for in the Treaty. The Commission accordingly concludes that it is incompatible with the common market.

⁽⁵⁹⁾ See footnote 11.

⁽⁶⁰⁾ [1994] ECR I-4103.

⁽⁶¹⁾ See footnote 23.

Operating aid: reduction in the tax base (point V.2.4.2)

Regional aid intended to reduce businesses' running costs (operating aid) is normally prohibited. This type of aid may nevertheless be granted exceptionally in areas qualifying for the derogation provided for in Article 92(3)(a) of the Treaty where it is justified on the grounds of its nature and contribution to regional development and where the amount of the aid is in proportion to the disadvantages which it is intended to mitigate. The Commission notes that the Basque Country is not one of the areas covered by Article 92(3)(a) of the Treaty.

It consequently has to be concluded that, since the operating aid in question does not qualify for any of the exceptions provided for in the Treaty, it is incompatible with the common market.

This Decision relates only to those tax measures explicitly examined herein and does not pass judgment on the other measures provided for by the specific tax arrangements adopted in the Province of Álava. The Commission reserves the right to examine any such measures that might constitute aid, either as general schemes, or in so far as they might be applied to Demesa.

VI. CONCLUSIONS

The Commission finds that Spain has acted illegally and in breach of Article 93(3) of the Treaty in granting the following aid:

- (a) the advantage equivalent to postponement of payment of the price of a plot of land in the Jundiz industrial estate at Vitoria-Gasteiz for a period of nine months, running from the time at which Demesa first occupied the land for the purpose of carrying out construction work (February 1997) until the date on which it paid the price (no earlier than November 1997), the amount of which is calculated at EUR 184 075,79 (ESP 30 627 635);
- (b) the advantage equivalent to the difference between the market price and the price paid by Demesa for a plot of land in the Jundiz industrial estate, the amount of which is calculated at EUR 213 960,31 (ESP 35 600 000);
- (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, namely 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.

This aid has to be deemed incompatible with the common market. Consequently, in order to re-establish the economic conditions with which the company would have had to contend if it had not been granted incompatible aid, Spain must take all the necessary steps to recover it from the beneficiary,

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted by Spain to Daewoo Electronics Manufacturing España SA in the form of:

- (a) the advantage equivalent to postponement of payment of the price of a plot of land in the Jundiz industrial estate at Vitoria-Gasteiz for a period of nine months, running from the time Daewoo Electronics Manufacturing España SA 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 Daewoo Electronics Manufacturing España SA for a plot of land in the Jundiz 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.

Done at Brussels, 24 February 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 30 March 1999

on State aid which France is planning to grant as development aid in the sale of two cruise vessels to be built by Chantiers de l'Atlantique and operated by Renaissance Financial in French Polynesia

(notified under document number C(1999) 903)

(Only the French text is authentic)

(Text with EEA relevance)

(1999/719/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

II. DESCRIPTION OF THE AID

Having regard to the Treaty establishing the European Communities, and in particular the first subparagraph of Article 93(2) thereof,

Having regard to Council Directive 90/684/EEA of 21 December 1990 on aid to shipbuilding⁽¹⁾, as prolonged by Regulation (EC) No 2600/97⁽²⁾, and in particular Article 4(7) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above,

Whereas:

Development aid to French Polynesia, hereinafter referred to as 'FPO', is to be granted in the form of tax concessions related to the purchase of two cruise vessels, which are to be built in Chantiers de l'Atlantique. The aid was notified in accordance with Article 4(7) of Directive 90/684/EEA, hereinafter referred to as 'the Shipbuilding Directive'.

The aid is to be granted under a fiscal scheme⁽⁴⁾ allowing tax concessions on investments in the French departments and territories. The Commission approved the scheme by letter of 27 January 1993⁽⁵⁾, in which it stated that the application of the scheme was subject to the Community rules, guidelines and frameworks on aid for various purposes and for various sectors.

I. PROCEDURE

By letter dated 4 February 1998, France notified the Commission of the aid which it planned to grant for two cruise vessels that were to be built in Chantiers de l'Atlantique. By letter dated 20 March 1998, France furnished the Commission with supplementary information.

By letter dated 18 June 1998 and a corrigendum dated 30 July 1998, the Commission informed France of its decision to initiate the procedure laid down in Article 93(2) of the Treaty in respect of the aid.

The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities*⁽³⁾. The Commission invited interested parties to submit their comments on the aid.

The Commission has received no comments from interested parties. France has furnished the Commission with its comments by letters dated 9 July 1998, 31 August 1998 and 25 February 1999.

The cruise vessels are to be sold to investors who are in a financial position to take advantage of the tax exemption offered to investors who reinvest their profits in the vessels. The tax relief amounts to 41,6%, which equals the aid intensity. The group of investors will lease the vessels to Renaissance Financial, hereinafter referred to as 'RF'. RF is obliged to run the vessels in FPO for at least five years (that is, for seven years after the placing of the order). Further, the company has committed itself to the investors to buy the vessels at the end of that period. The cruise vessels have a contractual value of FRF [...] (*) each.

RF is a subsidiary of the American company, Renaissance Cruise Inc. RF was established for the purpose of purchasing and operating the two vessels, and at the time of the notification it was domiciled in Paris. France argued that in the absence of the aid the operator could not acquire the vessels at normal market conditions, because the normal interest rate would be too high to allow their operation in FPO. Despite the

⁽¹⁾ OJ L 380, 31.12.1990, p. 27.

⁽²⁾ OJ L 351, 23.12.1997, p. 18.

⁽³⁾ OJ C 307, 7.10.1998, p. 6.

⁽⁴⁾ La loi du 11 juillet 1986 modifiée, relative aux investissements productifs dans les départements et territoires d'Outre-Mer.

⁽⁵⁾ SG(93) D/1300.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

advantage derived from the aid, the forecast budget for the vessels will balance only if capacity utilisation is more than 75%. In fact, in the first five years an annual deficit of FRF 50 million is expected. The French authorities conclude that the project is not viable without the aid.

France further claims that the regional authorities in FPO are seeking to develop tourism, and cruises in particular. The aim to increase the annual growth rate of tourism from the current 3,2% to approximately 9% in the year 2010. It argues that the project is especially suitable for pursuing this goal. The two vessels, with 350 cabins each, will treble the capacity of cruise trips by the end of 1999, and it is claimed that the local authorities in FPO have given a very favourable reception to the project.

The Commission decided to initiate the procedure provided for in Article 93(2) of the Treaty. The Commission was doubtful that the development aid was compatible with the conditions laid down in Article 4(7) of the Shipbuilding Directive.

According to Article 4(7) of the Shipbuilding Directive, aid granted as development assistance to a developing country may be deemed compatible with the common market if it complies with the terms laid down for that purpose by OECD Working Party No 6 in its Agreement concerning the interpretation of Articles 6 to 8 of the understanding on Export Credits for ships or any addendum or corrigendum to the Agreement. The Commission has to verify the particular 'development content' of the proposed aid and satisfy itself that it falls within the scope of the Agreement mentioned above.

The OECD criteria require among other things that the donor shall give appropriate assurances that the real owner is resident in the beneficiary country and that the beneficiary company is not a non-operational subsidiary of a foreign company⁽⁶⁾.

In this case the Commission interprets the abovementioned provision as meaning that the owner must be resident in FPO. Since the investors were resident in France and the operator was registered in Paris, the Commission had doubts that the aid proposal complied with the OECD criteria.

Furthermore, whilst tourism is a priority sector in development terms in the Pacific region, in the light of the specific conditions under which it was to be implemented, the Commission was not convinced that the project contained a genuine development content. The development element in FPO appeared to be limited, since the immediate beneficiaries of the aid were the investors who enjoyed the tax exemption. In other words the recipients of the quantifiable aid would not be resident in the developing country. It appeared that FPO would only benefit to the extent to which extra passengers

might visit the islands, which would mainly profit from the money spent by visiting tourists, and, *inter alia*, from the positive impact on local employment.

In addition, the Commission doubted that the viability of the project was as low as the estimation indicated, given that French private companies would invest their profits in the vessels. Logically, investors will only invest in a project if they anticipate a profit.

Thus, the Commission initiated the procedure because at that stage of the investigation it was doubtful that the OECD criteria were met or that the development element could be verified.

III. COMMENTS FROM FRANCE

In the course of procedure France stated that the Commission had approved the application of 'la Loi Pons' to similar projects. The Commission had agreed in the past not to call into question such projects when run in an overseas territory. Thus, for a similar procedure commenced in 1995, the Commission had indicated in its letter SG(97) D/500 of 23 January 1997 that the application of the law was only restricted in respect of ships intended for the overseas departments. Accordingly, ships such as the 'Club Med II' or more recently the 'Paul Gauguin' will be able to continue to benefit from the provisions of article 4(7) of the Shipbuilding Directive when they are assigned mainly to the overseas territories.

The real objective of 'la Loi Pons' is to help the operators overseas to develop their business so as to compensate for the specific disabilities facing them (insularity, in the case of French Polynesia). The aid enables the investors to engage in a joint ownership that provides the operator with vessels. The company RF, domiciled in Paris, leases the ships from the investors in order to run them in FPO for at least five years (seven years after the order). Furthermore, RF has committed itself to the investors to buying the vessels at the end of this period. The profitability is linked to fiscal measures, whereby the benefit of the aid is transferred towards the operator of the vessels who is the effective recipient of the aid. This set-up allows the tax aid effectively to flow back to the operator.

It was initially planned that RF should be domiciled in (metropolitan) France in order to ensure better security for the investors who thus contract with a company established in the metropolis. This domicile does not change the fact that the vessels will be run in FPO. However, France has confirmed to the Commission that the operational domicile of the company RF would be transferred to FPO, but that such a transfer would take approximately three months.

⁽⁶⁾ Commission letter to Member States SG(89) D/311 of 3 January 1989.

France further argues that the operation of the cruise vessels would confer considerable advantages on the economic development of FPO. Tourism is a priority in the strategic programme of FPO, adopted by the FPO Government for the years 1996 to 2005. By the end of that period it should yield net resources of about FRF 3 billion per year. In this context, the potential of developing cruising in FPO is very important, considering the four million-odd square kilometres of ocean across which it lies and the fact that it consists of hundreds of islands and islets with extremely varied physical features.

The cruising envisaged by RF is suited to the objectives sought by the Government of French Polynesia. The activity will entail hotel stays on the ground, and calling at ports, thereby involving local suppliers. Three preparatory missions by the organisers have already served to locate the ports of call and to establish contacts with local companies and to devise how best to pace visits to the various islands, using groups of passengers of reasonable size and safeguarding the environment. It is plain that the current infrastructure, in view of additional arrangements envisaged in two years' time by the local authorities, will be compatible with the size of the ships once they are brought into service.

The organisers of the on-shore excursions evaluate expenditure on the arranged programme at FRF [...] (*) per year per ship. These forecasts are consistent with the sales of excursions realised for cruises in the Seychelles using cruise vessels belonging to the RF holding company. In addition, air transfer expenditure is expected to be approximately FRF [...] (*) per year, with an equivalent expenditure by passengers on local purchases (souvenirs, handicrafts, flowers, and restaurants). Also, a considerable part of RF's operating costs (harbour expenses, victualling, local maintenance costs) will benefit FPO. On the basis of the operating accounts, the expenditure of this nature accruing to FPO is expected to be approximately FRF [...] (*) per year and per ship. Altogether, the yearly revenue generated for FPO is about FRF 145 million per ship.

Finally, France emphasises the number of jobs created in FPO by the arrival of these vessels. The jobs on board the ships or on land, created by the shipowner, will employ about 40 persons, in addition to which jobs will be generated by tourist infrastructure, reception and various resultant activities (tourism, folklore and handicrafts) as well as by the supply of agri-foodstuff products from the local market. In all, the impact of the commissioning of the vessels is estimated at 852 direct and indirect jobs.

IV. ASSESSMENT OF THE AID

According to Article 4(7) of the Shipbuilding Directive, aid granted as development assistance to a developing country should not be subject to the ceiling. It may be deemed

compatible with the common market if it complies with the terms laid down for that purpose by OECD Working Party No 6 in its Agreement concerning the interpretation of Articles 6 to 8 of the Understanding on Export Credits for ships or any corrigendum to the said Agreement. The Commission must be given prior notification of any such individual aid proposal. It is required to verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the Agreement mentioned above.

As the Commission informed the Member States by letter SG(89) D/311 of 3 January 1989, the projects of development aid must comply with the following OECD criteria:

- (1) The vessels must not be operated under a flag of convenience.
- (2) In the event that the aid cannot be classified as public development aid for the purposes of the OECD, the donor must confirm that the aid is part of an intergovernmental agreement.
- (3) The donor must give appropriate assurances that the real owner is resident in the beneficiary country and that the beneficiary company is not a non-operational subsidiary of a foreign company.
- (4) The beneficiary must give undertakings not to sell the ship without governmental approval.

Also, the aid granted must include a concessionary element of 25 % at least.

By letter to Member States SG(97) D/4333 of 10 June 1997, the Commission provided an updated list of countries eligible for development aid under the Shipbuilding Directive.

On the basis of the notification and comments from France made during the procedure, the Commission considers that all requirements related to development aid set out in its letters SG(89) D/311 and SG(97) D/4333 are met in this case:

- (1) The vessels will be operated under French flag, which is not a flag of convenience.
- (2) French Polynesia is listed in the Annex to letter SG(97) D/4333 regarding countries that are eligible for development aid.
- (3) The Commission accepts the arguments put forward by France that RF is the effective recipient of the aid, and since RF is obliged to buy the vessels, RF can be considered to be the de facto owner of the vessels. In addition if, as is suggested by France, RF is going to be

registered in FPO, the owner may be considered to be resident in FPO. Also, RF is not a non-operational subsidiary of a foreign company.

- (4) The operator is obliged to deploy the vessels in FPO for at least five years (seven years after placing the order). Since RF has promised the French authorities to deploy the vessels in FPO, the vessels cannot be sold without the knowledge of the French Government.

Also, the level of the OECD grant element exceeds the required minimum of 25 %.

Regarding the development content of the project, the Commission acknowledges the importance of developing tourism in FPO. The Commission has found no information to support its initial fear that the profitability of the vessels will be lower than was anticipated by France. France has on the other hand clarified that the investments will be profitable for the investors, despite the fact that the operator expects a loss over the first five years.

Moreover, on the basis of the study put forward by France showing an overall revenue for FPO of almost FRF 300 million per year and an impact on employment of more than 800 jobs, the Commission is satisfied that the vessels will contribute significantly to the economic development as well as having a positive impact on employment. Furthermore, the Commission considers that the aid is necessary, since the vessels would probably not be used in FPO without it. First, RF will not be obliged to use the vessels in that region. Secondly, the low profit expectations in FPO are likely to encourage the operator to deploy the vessels elsewhere. Finally, since Renaissance Cruise Inc. is already active on other routes, it would be able to adjust its schedule and deploy the vessels wherever it anticipates a higher level of profitability. The Commission therefore regards the aid as necessary in order to ensure that the vessels will actually be deployed in FPO and thereby enhance its development.

Clearly, if the vessels are not deployed in FPO, they will not bring about any economic development there. Therefore, it is essential that the aid is linked to a requirement that the vessels be deployed in FPO. France has undertaken that the vessels will be used exclusively in FPO for at least five years. The Commission has decided make this a condition upon which it approves the aid, since the development content of the project would otherwise be compromised.

It should be noted that in the event of a breach of this Decision whereby the aid could not be considered to comply with Article 4(7) of the Shipbuilding Directive, it would follow that the aid would have to be regarded as aid to the yard. Therefore, in such an event the Commission would request France to recover the aid from the yard. In addition, the fact that the Commission has approved projects in the past where the same scheme has been used to grant development aid to French territories, does not absolve the Commission of its

obligation to verify that an individual application to shipbuilding is in accordance with the Community rules governing state aid to shipbuilding.

V. CONCLUSIONS

In the light of the foregoing, the notification and the comments made by France in the course of the procedure have allayed the doubts which originally prompted the Commission to initiate the procedure. Subject to the transfer of RF's place of residence from Paris to FPO, and subject also to the exclusive use of the vessels in FPO for a minimum of five years, the Commission considers the aid to be in accordance with Article 4(7) of the Shipbuilding Directive,

HAS ADOPTED THIS DECISION:

Article 1

The aid which France is planning to grant in the form of tax concessions in the sale by Chantiers de l'Atlantique of two cruise vessels and which the notification states as having an aid intensity of 41,6 % is compatible with the common market, subject to the conditions set out in Article 2.

Article 2

France shall ensure that the company Renaissance Financial is registered in French Polynesia prior to delivery of the two vessels. In addition, the vessels shall be deployed solely in French Polynesia for a minimum of five years.

Article 3

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

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 30 March 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION**of 8 July 1999****on State aid granted by Germany to Gröditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH**

(notified under document number C(1999) 2264)

(Only the German text is authentic)**(Text with EEA relevance)**

(1999/720/EC, ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 88(2) thereof,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4(c) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Protocol 14 thereto,

Having regard to Commission Decisions No 3855/91/ECSC of 27 November 1991 ⁽¹⁾ and No 2496/96/ECSC of 18 December 1996 ⁽²⁾ establishing Community rules for state aid to the steel industry,

Having given notice to the parties concerned to submit their comments in accordance with the abovementioned provisions, and having regard to those comments,

Whereas:

1. Procedure

- (1) By letter dated 6 June 1997 Germany notified the Commission, under Article 88(3) of the EC Treaty, of the financing measures that preceded and accompanied the privatisation of Gröditzer Stahlwerke GmbH (Gröditzer) and its subsidiary Walzwerk Burg GmbH (Burg).
- (2) By letter dated 5 August 1997 the Commission informed Germany that it had decided to initiate the procedure laid down in Article 6(5) of Decision No

2496/96/ECSC in respect of the state aid involved. The Commission decision to initiate the procedure which was published in the *Official Journal of the European Communities* ⁽³⁾. The Commission gave notice to interested parties to submit their comments on the measures.

- (3) Germany supplied the Commission with further information and papers by letters dated 23 September and 13 November 1997; 24 July, 14 August and 14 October 1998; and 7 and 20 January, 1 February and 29 March 1999. Meetings between the Commission and Germany took place in January 1998, on 1 December 1998, and on 11 March and 23 and 29 April 1999.
- (4) The Commission has received observations from interested parties; it forwarded these to Germany, and Germany commented by letter dated 27 April 1998.

2. Detailed description of the measures**2.1. Notification**

- (5) In the notification of 6 June 1997 Germany stated that in the years 1992 to 1996 Gröditzer received financing amounting to DEM 263,7 million. This was made up of DEM 207,3 million in shareholder loans provided by the successive public shareholder in the company, DEM 53,4 million in bank loans guaranteed by the Treuhandanstalt privatisation agency and its successor the Bundesanstalt für Vereinigungsbedingte Sonderaufgaben (BvS), and DEM 3 million as an outright grant. A further DEM 8,4 million was paid to Gröditzer separately under the joint Federal Government/Länder regional development scheme, the *Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur*. Germany also informed the Commission that the last public shareholder, Beteiligungs-Management-Gesellschaft mbH (BMGB), had sold Gröditzer and its wholly owned subsidiary Burg to Georgsmarienhütte GmbH (Georgsmarienhütte) on 1 January 1997. The sale of Gröditzer and Burg had cost BMGB a total of DEM 393 million, mainly as a result of the waiver of the

⁽¹⁾ OJ L 362, 31.12.1991, p. 57.

⁽²⁾ OJ L 338, 28.12.1996, p. 42.

⁽³⁾ OJ C 395, 31.12.1997, p. 5.

shareholder loans and the redemption of bank loans. Germany stated that Georgsmarienhütte had submitted the best offer, taking into account its commitments in respect of jobs, investment and the transfer of technology.

The 'outright grants' column includes not only the DEM 3 million notified and the DEM 8,4 million in regional aid, but also DEM 28,3 million for social measures and DEM 4,1 million in tax incentives: these sums were identified by Germany in the course of the procedure.

(9) The figures break down as follows.

2.2. The initiation of the procedure

(6) The Commission decided to initiate the procedure laid down in Decision No 2496/96/ECSC (the sixth Steel Aid Code). A letter was sent to Germany on 5 August 1997, and was published in the *Official Journal of the European Communities* ⁽⁴⁾.

(7) In the letter initiating the procedure the Commission argued that it had to be assumed at that stage that the shareholder loans of DEM 207,3 million constituted aid, as they were free of interest and the company had provided no security; the guaranteed bank loans of DEM 53,4 million likewise appeared to constitute aid, as the premium was only 0,5%. The compatibility of the DEM 8,4 million in regional aid had also to be examined. Turning to the privatisation itself, the Commission doubted whether the sale, at a negative price, was in accordance with the private investor principle. On the figures available it appeared that it would have been less costly to wind up the company. Nor was it clear that the privatisation procedure had been open, transparent and unconditional. Lastly, the privatisation agreement appeared to commit BMGB to providing investment aid for Gröditzer.

2.3. Total state resources transferred prior to privatisation

(8) On the basis of the notification and the additional information that Germany has provided in the course of the procedure, the Commission has established that Gröditzer received the following financing prior to its privatisation:

(million DEM)

	Shareholder loans	Guaranteed bank loans	Outright-grants	Total
Investment measures	43,5	53,4	12,5	109,4
Social measures	30,0	—	31,3	61,3
Operational measures	133,8	—	—	133,8
	207,3	53,4	43,8	304,5

2.3.1. Investment measures

(10) Gröditzer received a total transfer of state resources of DEM 109,4 million towards an investment programme costing DEM 110,2 million. Details of the investment programme have been supplied to the Commission; they show that taking the company's business as a whole there was investment every year from 1992 to 1996. The sum of DEM 109,4 million is made up of three items:

- (a) DEM 43,5 million was in the form of shareholder loans; these loans were free of interest, and no schedule was drawn up for their repayment;
- (b) DEM 53,4 million was in the form of loans provided by banks that were 100% guaranteed by the successive public shareholders in Gröditzer;
- (c) outright grants amounted to DEM 8,4 million in regional aid and DEM 4,1 million in tax incentives for investment under the applicable legislation, the Investment Allowances Act (*Investitionszulagengesetz*).

As the legal basis of the shareholder loans and guarantees, Germany has cited the general restructuring obligation imposed by Article 25 of the German Unification Treaty and paragraphs 2 to 6 of the Treuhand Act.

(11) As regards the expenditure to which this investment aid related, Germany has informed the Commission that DEM 13,3 million was invested in steelmaking, while DEM 96,9 million was invested in production facilities falling outside the scope of the ECSC Treaty. The various investments were described in detail in the decision to initiate the procedure.

2.3.2. Social measures

(12) Social measures totalled DEM 61,3 million. This comprised the following.

- (a) DEM 26,1 million was paid towards a social plan comprising redundancy and early retirement

⁽⁴⁾ See footnote 3.

schemes and an employment pool. These costs would as a rule have been borne by the company, but in view of Gröditzer's financial difficulties they were covered by shareholder loans provided by EREL Verwaltungs GmbH & Co management KG (EREL).

- (b) BMGB paid Gröditzer a sum of DEM 28,3 million to cover the costs of other social measures on top of the social plan. The main such measures were a reduction of working hours and training for redundant staff. According to Germany, the various public shareholders financed such measures for all the East German companies for which they were responsible.
- (c) DEM 6,9 million was to finance employment measures under paragraph 249 of the Employment Promotion Act (*Arbeitsförderungsgesetz*). Under that Act a scheme was set up to employ redundant or dismissed staff of current and former Treuhand companies in environmental clean-up activities. As a rule the public authorities and the companies concerned each contributed to the cost of such measures; the figure of DEM 3 million which had been quoted embodied the share falling to Gröditzer, which owing to its financial difficulties it was unable to pay.

2.3.3. Operational measures

- (13) Shareholder loans of DEM 133,8 million were used to cover operational measures. The notification stated that aid for operational measures amounted to DEM 166,8 million, but in the course of the procedure it has become clear that out of that figure DEM 33 million was in fact used for social measures; these are the sums referred to in recital 12 at points (a) and (c).
- (14) On 14 August 1998 Germany submitted to the Commission a report prepared by KPMG⁽⁵⁾. The report allocated the DEM 133,8 million between Gröditzer's different product areas on an *ex post* basis, by establishing the cash-flow requirement of each of them (the EBDIT-Ergebnis) for the years 1991 to 1996. KPMG's findings were based on Gröditzer's internal bookkeeping system. The German Government has endorsed KPMG's conclusions.
- (15) KPMG divided the money between the operational measures as follows.
 - (a) DEM 49 million covered the accrued operating losses of three of Gröditzer's four divisions, namely

the forge, the ring-rolling mill and the foundry. Total losses here amounted to DEM 62 million, but this was partially offset by an operating profit of DEM 13 million at the steelmaking plant.

- (b) DEM 18 million was for overheads.
 - (c) DEM 40 million was needed to comply with contractual obligations and to settle claims which arose mainly from decisions to stop investment programmes originating in the GDR period.
 - (d) DEM 17 million was for site clean-up and clearance operations.
 - (e) DEM 9 million covered miscellaneous costs.
- (16) Out of the sums referred to at points (b) to (e) in recital 15, KPMG assigned a total of DEM 3,6 million to the steelmaking plant. It assigned the rest to the non-ECSC sectors.

2.4. Financial measures in connection with the privatisation

- (17) Gröditzer and its subsidiary Burg were sold to Georgsmarienhütte on 1 January 1997. According to the notification the total cost or negative purchase price of the privatisation was DEM 393 million. The main costs were the waiver of shareholder loans, the non-recovery of subsidies, and the redemption of the guaranteed bank loans (see recital 5).
- (18) However, the total cost also included new funds provided by the seller, the publicly owned BMGB:
 - (a) DEM 37,5 million was provided as 'equity assistance' (*Eigenkapitalhilfe*). According to the notification, this was to be used to finance a DEM 43,5 million investment programme in 1997 and 1998. But according to the privatisation agreement it was to be used for operating purposes.
 - (b) DEM 20,8 million was to be paid as 'bridging finance' (*Zuschüssen zur Zwischenfinanzierung*), to be offset against regional aid; DEM 16,3 million of this was for Gröditzer and DEM 4,5 million for Burg. Between its privatisation and 10 January 1999 Gröditzer received regional aid amounting to DEM 13 million. Under the privatisation agreement Gröditzer remains entitled to the remainder of the DEM 16,3 million, that is to say DEM 3,3 million.

⁽⁵⁾ 'Stellungnahme zur Finanzmittelverwendung für die Jahre 1991 bis 1996 der Gröditzer Stahlwerke GmbH, Gröditz'.

2.5. *Burg*

- (19) Burg is a separate company that operates in the non-ECSC sector. It was sold to Gröditzer by its public shareholder EREL at the time of privatisation; it had never previously been a Gröditzer subsidiary.

3. Comments from interested parties

- (20) On 30 January and 2 February 1998 comments were submitted to the Commission by three interested parties belonging to the same group, namely Max Aicher GmbH & Co., Neue Maxhütte Stahlwerke GmbH and Lech Stahlwerke GmbH. They argued that sale at a negative price had provided Georgsmarienhütte with a cash injection which enabled Georgsmarienhütte to improve its financial position and to finance acquisitions. The conditions associated with the sale of Gröditzer also distorted competition.

4. Comments from Germany

- (21) Germany commented on the initiation of the procedure in a letter of 23 September 1997, and provided further information in the papers referred to in recital 3. These comments have been taken into account here.
- (22) Replying to the comments from interested parties, on 7 May 1998, Germany stated that the sale of Gröditzer had not affected Georgsmarienhütte's cash position. Under the privatisation agreement Georgsmarienhütte had undertaken not to sell Gröditzer's assets. It would not currently be able to do so in any event, as the sale of shares was in suspense, pending the outcome of the Commission's assessment of the aid granted to Gröditzer. The two companies' prices were determined on an arm's length basis, and there was no common cash management. Georgsmarienhütte supported the position taken by Germany.

5. Assessment

5.1. *Which Treaty is applicable to Burg and Gröditzer?*

5.1.1. *Burg*

- (23) As stated in the decision to initiate the procedure, Burg is a separate, non-ECSC company that was sold to Gröditzer by its public shareholder at the time of privatisation. Before privatisation it was not a Gröditzer subsidiary. Since privatisation it has served as a steel service centre for Gröditzer.

- (24) Burg has therefore to be considered under the EC Treaty. Germany has submitted that given Burg's size the financial measures from which it benefited did not have to be notified on the basis of the arrangements governing the Treuhandanstalt's operations, which had been approved by the Commission, most recently in its decision on aid measure N 786/94, letter reference (95) D/1062⁽⁶⁾. The Commission will accordingly consider Burg's position only with respect to the privatisation and in so far as it enters into the total cost of liquidation.

5.1.2. *Gröditzer*

ECSC rules on steel undertakings; initiation of procedure

- (25) Gröditzer is an undertaking engaged in the production of liquid steel and ingots, which are steel products within the scope of Annex I to the ECSC Treaty, and it therefore falls under Article 80 of the ECSC Treaty. It is also subject to levies under Article 49 of the ECSC Treaty.
- (26) It is worthwhile recalling the position of ECSC steel undertakings in the new *Länder*, which has been addressed in a number of decisions. Until 1995 these undertakings qualified for certain exemptions from the strict requirements of Decision No 3855/91/ECSC (the fifth Steel Aid Code), which among other things allowed them to receive regional investment aid. Decisions were also taken under Article 95 of the ECSC Treaty, with the unanimous assent of the Council, approving a wide range of aid payments to EKO Stahl and SEW Freital, in order to enable them to return to viability. A vital consideration was that they were to be privatised on the basis of far-reaching rescue and restructuring measures.

The aid measures in Gröditzer's case were not notified to the Commission. This was contrary to the arrangements governing the Treuhandanstalt, under which aid had to be notified in advance if the company operated in a sensitive industry. Notification took place only after the company had been privatised in 1997, and after the aid in the form of shareholder loans and the like had been paid. As Gröditzer is an ECSC

⁽⁶⁾ Under the arrangements governing the Treuhandanstalt, aid to Treuhandanstalt companies in non-sensitive sectors did not have to be notified if in the period 1992 to 1994 the company employed less than 1 500 people and net aid amounted to less than DEM 150 million. In 1995 these thresholds changed to 250 employees and DEM 50 million. Burg had an average workforce of 125, and the total aid paid to it from 1992 to 1997 was DEM 56 million.

undertaking, the only aid measures for which it qualified in 1997 were those permitted by the Steel Aid Code in force at the time, that is to say aid for research and development, environmental measures and closure. This means that ECSC undertakings could receive state aid of other kinds, such as operating aid or regional investment aid, only on the basis of Article 95 of the ECSC Treaty.

(27) As the Commission made clear when it decided to initiate the procedure, the principle that aid benefiting an ECSC steel-producing undertaking has to be assessed under the ECSC Treaty results unconditionally from the ECSC Treaty itself⁽⁷⁾. It applies whether or not an ECSC undertaking also manufactures non-ECSC products.

(28) The Commission has accepted, however, that by way of exception to this rule certain aid to an ECSC undertaking may be assessed under the relevant provisions of the EC Treaty. But the aided activities must be covered by the EC Treaty, and must be completely separate from the activities falling within the scope of the ECSC Treaty.

(29) When it initiated the procedure, the Commission took the view that these conditions did not appear to be satisfied. As Gröditzer was one company and did not keep separate accounts, the Commission considered that there was a danger of spillover and that it was not possible to differentiate the state aid received so as to allocate it between the various ECSC and non-ECSC activities.

The German reply

(30) In its response to the initiation of the procedure, Germany did not contest the Commission's view that Gröditzer was an ECSC undertaking engaged in steel production. But Germany did consider that it was possible to allocate the financial measures between the company's ECSC and non-ECSC activities.

(31) Germany argues that that a yearly average of 6 to 7% of the ECSC steel products manufactured by Gröditzer has been sold to outsiders, a situation which continues today. The other 93 to 94% is used by Gröditzer itself as input for its own forging, casting and ring-rolling mill facilities. Here the steel is processed into non-ECSC steel products. Consequently, aid to this plant affects competition only in respect of products which are within the scope of the EC Treaty. It should therefore be assessed under the state aid rules of the EC Treaty.

As far as the investment measures are concerned, Germany contends that the relevant fixed assets can be related to specific production facilities, so that the only investment that should be assessed under the ECSC Treaty is that in facilities manufacturing ECSC products, which amounts to DEM 13,3 million. All other investment aid should be assessed under the EC Treaty.

Turning to the social plan and the operating measures, Germany refers to the KPMG report mentioned in recital 14, and endorses its conclusions on the allocation of aid between ECSC and non-ECSC facilities.

(32) Germany therefore considers that financing in respect of activities not directly related to the production of ECSC steel products should be assessed under the state aid rules of the EC Treaty. In a letter of 29 March 1999 Germany stated that all aid to Gröditzer should be considered under the state aid rules of the EC Treaty.

The Commission's view

(33) The ECSC rules on state aid lay down rules for aid measures that distort competition between the recipient undertaking and its competitors on the markets in ECSC products. In the same way, the state aid rules in the EC Treaty apply to aid measures that distort competition between undertakings on the markets in EC products.

As a rule, aid to an ECSC undertaking will be assessed under the ECSC Treaty. In some circumstances, however, the EC Treaty may apply to aid to non-ECSC activities carried on by an ECSC undertaking, provided they are clearly separate from the same undertaking's ECSC activities.

In order to ascertain whether the activities assisted in this case are in fact clearly separate, the forms of aid granted will have to be considered individually.

Investment aid

(34) Gröditzer is indeed a single company which does not keep separate accounts for its various activities, and this does make it more difficult to ascribe aid to its different areas of business, but it is nevertheless true that the aided investment related to fixed assets in particular production facilities.

Gröditzer's ECSC and other production processes are physically separated. Steel made in the steel plant

⁽⁷⁾ Judgment of the Court of First Instance of the European Communities in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte v Commission*, 21 January 1999, not yet reported.

proceeds to other facilities on Gröditzer's premises, namely the forge, ring-rolling mill and foundry. The end products of these plants⁽⁸⁾ are different from the end products of the steelmaking plant, and are sold on different relevant markets. As they are manufactured in dedicated facilities, the production processes are not integrated, and there is physical separation between them. This makes it possible to distinguish between ECSC and EC activities in the case of the investment aid.

Operating aid and social measures

(35) But this is not true of the operating measures and the social measures. Here there is no direct link between the loans or grants given and the activity being financed. Aid measures can be assessed separately under the ECSC and EC Treaties only where a distinction can be drawn between aid towards ECSC activities and aid towards other activities. In Gröditzer's case there is no separate accounting or bookkeeping to facilitate such a distinction. In cases like this, where there is a real danger of a spillover from one activity to another, it has to be concluded that aid to an ECSC undertaking must be assessed under the ECSC rules.

(36) And indeed, such a spillover between ECSC and non-ECSC activities has in fact occurred at Gröditzer. The individual loans and grants were not tied at the time they were given to the specific activities that they served to finance. The report drawn up *ex post* by KPMG contradicts the notification with respect to the assignment of DEM 166,8 million in aid for operating measures and social measures (see recital 12, points (a) and (c), and recitals 13 to 16):

	Notification	KPMG
Social aid	103	33
Loss compensation	40	49
Site clearance	17	17
Settlement of claims	—	40
Financing costs	—	18
Miscellaneous	—	9
Unspecified	6	—
Total	166	166

⁽⁸⁾ The main products of the ring-rolling mill are coils, flanges and tyres; of the foundry, machine parts; and of the forge, bars, forgings, hollow forgings, and crankshafts.

(37) This clearly shows that resources were being provided to Gröditzer for operational purposes without any clause or mechanism for allocating them between ECSC and non-ECSC activities. Allocation was left entirely to the discretion of the company; there were no *ex ante* criteria for a rational separation between the different production areas.

(38) Of Gröditzer's total steel output, 93 % was not sold on the market but processed into end products within the company. In Gröditzer's internal pricing and bookkeeping system the steelmaking plant transferred its products downstream against full repayment of its direct and indirect costs, regardless of the fact that the company was selling its end products at a heavy loss. It appears from the figures provided when the procedure was initiated that Gröditzer has not made a profit since 1990; it accrued losses of more than DEM 317 million over the years 1992 to 1996. In each of those years, operating costs far exceeded turnover, by an average of DEM 30 million a year.

(39) The assignment of profits and losses in the internal bookkeeping system is therefore arbitrary; no account is taken of the fact that the production process as a whole is loss-making. The KPMG report does show the results for Gröditzer's various branches of activity in the years 1991 to 1996 on the basis of the internal bookkeeping system, but it also shows that 7 % of Gröditzer's production, namely its steel production, operates at a profit, while the other 93 %, accounted for by the forge, ring-rolling mill and foundry, operate at a loss. The cost accounting applied to its business by Gröditzer hardly seems logical.

(40) In these circumstances the forge, the foundry and the ring-rolling mill can continue only by virtue of the operating aid they receive. This means that Gröditzer has been able to devote its own resources in the first place to the steelmaking plant, that is to say the ECSC production area. The steelmaking plant has enjoyed the benefit of the aid given to the downstream EC activities.

(41) It follows from the foregoing that the evidence provided to show a separation between the ECSC and EC activities from an accounting point of view is insufficient to demonstrate that operating aid to those activities should be considered under the two Treaties. Unlike the investment aid, there is no clear separation (*vollkommene Trennung*) between the company's different activities.

Conclusion

(42) The operating aid and social aid provided by Germany are subject to the state aid rules in the ECSC Treaty.

There is overcapacity in the steel industry, and strict discipline must be observed.

In the case of investment in fixed assets which are used by Gröditzer for the production of EC products, the EC Treaty aid rules apply: see recital 34.

Aid to investment in fixed assets used by Gröditzer for the production of ECSC products is subject to the state aid rules in the ECSC Treaty.

5.2. Assessment of the financial measures preceding privatisation: general

- (43) The notification identified investment aid in the form of guaranteed bank loans of DEM 53,4 million, shareholder loans of DEM 43,5 million, and regional aid of DEM 8,4 million under the joint Federal Government/*Länder* scheme paid in 1994. On 14 October 1998, Germany informed the Commission that an investment allowance (*Investitionszulage*) had been granted in the years 1992 to 1995 to cover the investments up to 1994.
- (44) Gröditzer is a firm in difficulty, as it has accrued substantial losses since it was set up. Successive public shareholders have provided loans with no obligation in respect of repayment and interest. It is clear that a private investor would never have advanced such loans to Gröditzer. The shareholder loans therefore constitute state aid in their entirety.
- (45) As the Commission made clear in its communication to the Member States on public undertakings in the manufacturing sector⁽⁹⁾, where state guarantees are given to firms in difficulty there is state aid equal to the entire amount of the loan guaranteed. In the course of the procedure Germany informed the Commission that the premiums were equal to 0,25% and that no risk assessment took place. The Commission is of the opinion that in view of Gröditzer's financial difficulties a premium of 0,25% is extremely low. The guarantees therefore constitute state aid in their entirety.
- (46) As explained in recital 34, the investment aid has to be assessed under two different treaties. The investment aid relating to ECSC plant has to be assessed under Article 4(c) of the ECSC Treaty and the Steel Aid Code applicable at the time it was granted. The investment aid relating to EC plant has to be assessed under the rules of Articles 87 and 88 of the EC Treaty and the rules applicable to investment aid at the time it was granted. A detailed assessment is set out below.

5.2.1. Assessment of the investment aid to the ECSC steel plant

- (47) According to Article 4(c) of the ECSC Treaty, subsidies or aids granted by states, in any form whatsoever, are incompatible with the common market and accordingly prohibited. Exceptions to this rule are made in the successive Steel Aid Codes.
- (48) Germany states that of the investment in the steelmaking plant DEM 0,5 million was financed by investment allowances. The remainder was financed by shareholder loans and guaranteed bank loans. Regional aid under the joint Federal Government/*Länder* scheme was not used to cover investment in the steelmaking plant.
- (49) Part of the investment aid was granted during the lifetime of the fifth Steel Aid Code. Article 5 of the Code stated that aid granted to steel undertakings for investment under general regional aid schemes could be deemed compatible with the common market provided that the undertaking was located in the territory of the former GDR and that the aid was notified by 30 June 1994 and was approved and paid by 31 December 1994 (for investment allowances under the Investment Allowances Act 1990, the deadline for payment was 31 December 1995).
- (50) The aid was notified only on 6 June 1997. The Court of First Instance confirmed in *Preußag Stahl v Commission* that the notification and approval deadlines of the Fifth Steel Aid Code were binding on the Commission⁽¹⁰⁾. The Commission is consequently prevented from considering any of this aid, as it was notified after 30 June 1994, and could not be assessed by 31 December 1994. The question whether there were elements of the aid that might have been eligible in substantive terms is thus irrelevant.
- (51) The investment aid amounting to DEM 13,3 million which has been assigned to the steel plant is therefore incompatible with the ECSC Treaty and the Steel Aid Code.

5.2.2. Assessment of the aid to investment in the non-ECSC production facilities

- (52) The investment in the non-ECSC facilities amounted to DEM 96,9 million, and the total aid granted for this investment amounted to DEM 96,1 million. The aid included DEM 8,4 million in regional aid and DEM 3,6

⁽⁹⁾ OJ C 307, 13.11.1993, p. 3.

⁽¹⁰⁾ Case T 129/96 [1998] ECR II-629.

million in investment allowances, with the remainder financed through shareholder loans and guaranteed bank loans. The shareholder loans and bank loans were granted under the general provisions of the Unification Treaty and the Treuhand Act.

- (53) On 14 October 1998 Germany informed the Commission that in the period under consideration the joint Federal Government/*Länder* regional development scheme did not apply to Treuhand companies. When granting and guaranteeing these loans, therefore, the Treuhandanstalt and its successors were acting as a de facto regional aid authority, and the loans were a substitute for regional investment aid.
- (54) The Commission recalls that in the period under consideration the ceiling for regional investment aid under the joint Federal Government/*Länder* scheme, including any aid granted under other regional aid schemes, was 35 % gross.
- (55) Germany on the other hand contends that under the successive arrangements governing the activities of the Treuhandanstalt⁽¹¹⁾ a higher amount could be granted for investment aid.
- (56) This argument cannot be accepted. Gröditzer is a steel undertaking, and the fifth Steel Aid Code allowed investment aid to be given to steel undertakings only if the aid was declared exempt from the general prohibition, for a limited period of time and up to a maximum intensity of 35 %. This was confirmed in the *EKO Stahl* case⁽¹²⁾, and reiterated in the Commission's report on the implementation of the fifth Steel Aid Code in 1994⁽¹³⁾.

Furthermore, Gröditzer operates in a sensitive sector for purposes of the successive Treuhandanstalt arrangements. The framework for certain steel sectors not covered by the ECSC Treaty⁽¹⁴⁾ explains that the concept of a sensitive sector takes in not only ECSC steel production but also the preliminary processing of ECSC steel, which includes such things as forging and casting. Gröditzer operates in both of these areas, and is thus clearly in a sensitive sector.

- (57) Under the Treuhandanstalt arrangements, aid to firms in sensitive sectors had to be notified in all circumstances. The Treuhandanstalt arrangements did make provision for exceptions to the notification requirement, but specifically excluded these sensitive sectors, and clearly stated the Commission had to assess aid to these sectors under the rules in force, such as the guidelines on state

aid for rescuing and restructuring firms in difficulty⁽¹⁵⁾ and the guidelines on national regional aid⁽¹⁶⁾.

- (58) As had been explained, the possibilities for approving aid in the ECSC sector are limited. Gröditzer is an ECSC company, and there is no legal basis for permitting it rescue and restructuring aid under that Treaty. Where restructuring aid has been allowed to other ECSC firms, by decisions taken under Article 95 of the ECSC Treaty, the overriding consideration has been a return to viability in a context of privatisation. In Gröditzer's case no restructuring plan showing a return to viability has ever been submitted.
- (59) Moreover, Germany itself considers that the investment aid was granted as regional aid or as a substitute for regional aid.
- (60) The Commission therefore takes the view that the only legal basis on which the investment aid can be assessed is that provided by the guidelines on national regional aid in force at the time the aid was granted. Gröditzer's EC activities are in a sensitive sector, and under the framework for certain steel sectors not covered by the ECSC Treaty the regional aid ceilings apply here too.
- (61) The Commission is consequently of the opinion that the overall regional investment aid ceiling of 35 % cannot be exceeded.
- (62) The Commission concludes that aid with an intensity of more than 35 % would constitute an unacceptable distortion of competition. All the investment aid towards EC activities must therefore be assessed on the basis of the ceilings for regional investment aid approved in connection with the joint Federal Government/*Länder* regional scheme. The total intensity of aid which was admissible under that scheme and any other regional aid schemes at the time in question was 35 % gross.
- (63) The Commission consequently finds that of the aid paid to cover investment in Gröditzer's non-ECSC activities, which amounted to DEM 96,1 million, 35 % can be declared compatible with the common market under Article 87(3) of the EC Treaty; this is equal to DEM 33,7 million. The remainder, amounting to DEM 62,4 million, is incompatible with the common market under Article 88(2) of the EC Treaty.

⁽¹¹⁾ Commission letter SG(91) D/17825, 26.10.1991; Commission letter SG(92) D/17613, 8.12.1992, and communication regarding aid measure E 15/92, 15.10.1992; and Commission letter SG(95) D/1062, 1.11.1995.

⁽¹²⁾ Notice in case C 35/94, (OJ C 1, 17.1.1997, p. 7).

⁽¹³⁾ SEC(95) 1309 final, p. 10 to 11.

⁽¹⁴⁾ OJ C 320, 13.12.1988.

⁽¹⁵⁾ See most recently OJ C 368, 23.12.1994, p. 12.

⁽¹⁶⁾ See most recently OJ C 74, 10.1.1998, p. 9.

5.3. *Assessment of the social measures*

5.4. *Assessment of the operational measures*

(64) The social measures totalled DEM 61,3 million, as explained in recital 12.

(65) The money granted for employment promotion measures under Paragraph 249 of the Employment Promotion Act (DEM 6,9 million) does not constitute state aid⁽¹⁷⁾.

(66) The Commission does not accept the German argument that a sum of DEM 28,3 million paid towards the social plan constitutes a general measure, since it was granted to a specific undertaking out of resources that were not available to all undertakings without distinction. This means that the social aid totals DEM 54,4 million.

(67) It has already been explained that all the social aid has to be assessed under the ECSC Treaty. According to Article 4(c) of the ECSC Treaty, subsidies or aids granted by states, in any form whatsoever, are incompatible with the common market and accordingly prohibited. Exceptions to this rule are made in the successive Steel Aid Codes. The aid under consideration here was granted during the lifetime of the fifth Steel Aid Code. The sixth Steel Aid Code contains identical provisions.

(68) In order to qualify for aid under the Steel Aid Code, social measures must be paid to workers made redundant or accepting early retirement; they must arise from the total or partial closure of steel plants that have been in regular production up to the time of notification of the aid, and they must not exceed the payment levels customary in the Member States on 1 January 1991.

(69) According to the information provided by Germany, production capacity at Gröditzer fell from 285 000 t per year in 1989 to 150 000 t per year in 1996. Annual steel production fell to 69 000 t. Between 1990 and the end of 1996 about 4 300 of the 5 000 employees left the company owing to the reduction in capacity. The funding provided was used to finance redundancy and early retirement schemes and short-time working and training facilities for the benefit of former Gröditzer employees. Thus all the social measures were aimed at staff who ultimately left the company.

(70) The Commission is therefore of the opinion that these measures are compatible with the common market.

(71) A sum of DEM 133,8 million, financed by shareholder loans, was paid to cover operational costs in the years 1992 to 1996. Its breakdown is detailed in recitals 13 to 16.

(72) As has already been explained, all this aid has to be assessed under the ECSC Treaty. According to Article 4(c) of the ECSC Treaty, subsidies or aids granted by states, in any form whatsoever, are incompatible with the common market and accordingly prohibited. Exceptions to this rule are made in the successive Steel Aid Codes, but the Codes do not permit operating aid. In recitals 35 to 41 it has been explained why the operating aid cannot be considered as intended for a particular purpose, especially as it was not earmarked on any rational basis in advance. This aid is consequently incompatible with the ECSC Treaty and the Steel Aid Code.

(73) The Commission notes that after privatisation a sum of DEM 9,6 million was used to repay part of the shareholder loans. The total amount of the loans granted for operational purposes is therefore DEM 124,2 million.

5.5. *Assessment of the measures taken in connection with the privatisation*

5.5.1. *Summary of the arguments put forward by Germany*

(74) The German view that the privatisation did not comprise any state aid rests on two arguments.

(a) In the first place, even if Georgsmarienhütte's bid did involve a cost, in the form of a negative purchase price, this outcome was nevertheless advantageous to the public shareholder which was selling the company, since the costs entailed by a liquidation of Gröditzer would have been higher. A private investor would have sold Gröditzer on the same basis.

(b) In the second place, Georgsmarienhütte's bid was the best to emerge from an unconditional, open and transparent procedure. Georgsmarienhütte was the only bidder to have submitted a business plan that satisfied the seller's demands. Germany refers to the Commission policy according to which a sale following a privatisation process that is open, transparent and unconditional does not constitute aid.

5.5.2. *The cost of privatising Gröditzer*

(75) The first argument put forward by Germany is that although the price secured was negative, privatisation

⁽¹⁷⁾ Commission letter SG(95) D/341, 13.1.1995.

was still more advantageous than liquidation. The cost of liquidating Gröditzter would have been DEM 475 million gross, or DEM 381 million net after deduction of the liquidation value of Gröditzter's assets⁽¹⁸⁾.

(76) The total cost of privatising Gröditzter proved to be DEM 340 million. Germany accordingly contends that privatisation was still the cheapest option. Thus the price arrived at satisfied the private investor test.

(77) According to the KPMG liquidation report sent by Germany, the cost of liquidating Gröditzter would have been DEM 475 million, breaking down as follows:

(a) liabilities: DEM 418 million (shareholder loans DEM 196 million; guaranteed bank loans DEM 49 million; other liabilities DEM 26 million, and provisions for miscellaneous costs DEM 147 million);

(b) cost of the liquidation itself: DEM 57 million (mainly operating and running-down costs incurred during the liquidation process).

(78) But the Court of Justice held in the *Hytasa* case that a private shareholder in a limited company was liable for the debts of the company only up to the liquidation value of the company's assets⁽¹⁹⁾. According to the liquidation report, the liquidation value of the assets was DEM 94 million. This sum was available to satisfy all the debts of the company in the order in which they were ranked under the applicable German insolvency law. The cost of liquidation was therefore limited to DEM 94 million.

(79) The figure of DEM 475 million assumes full satisfaction of all debts by the public authorities, which would necessitate further funding. As the Court held in the same judgment, this calculation is incorrect. The Court found that, even if guided by prospects of viability in the long term and considerations of image and reputation, a private investor would not consider contributing capital to a company which was to be sold off, especially if the injection was linked to the sale of the undertaking, as in that case there was no hope of profit even in the long term, and the operation would be costlier than selling the assets⁽²⁰⁾. This reasoning applies in cases of liquidation too.

⁽¹⁸⁾ The KPMG liquidation report describes the situation on 30 June 1996. Privatisation did not take place until February 1997, so that there is a small difference between the figures given and the figures for privatisation. The public seller considered in the report, EREL, had also been succeeded in the meantime by BMGB.

⁽¹⁹⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103.

⁽²⁰⁾ Same judgment, paragraph 26.

(80) The Court also held that a distinction had to be drawn between the obligations which the state had to assume as owner of the share capital of a company and its obligations as a public authority. In Gröditzter's case Germany has cited as items in the total cost of liquidation a series of costs to the shareholder which are in fact costs that the state has to bear in its capacity as a public authority. These are:

(a) the repayment of DEM 49 million in guaranteed bank loans. These guarantees were provided by the Treuhandanstalt and the BvS. Both bodies were federal institutions owned directly by the state. At the time of the privatisation they were not the state shareholders; these were in the first place EREL and later BMGB, both of which were also likewise federal institutions under direct state control⁽²¹⁾. Any guarantee claims on loans that could not be repaid out of the company's assets would therefore be made not on the shareholder EREL but on the Treuhandanstalt or the BvS as state institutions;

(b) a provision of DEM 15 million for existing environmental damage (*Altlasten*, see recital 83); a sum of DEM 22 million towards costs arising out of a social plan that are not required by any binding obligation, and a provision of DEM 87 million for the cost of site clearance, that is to say demolishing all buildings, completely clearing the site, and selling the site to a third party despite the fact that the selling price would amount to no more than DEM 9 million.

Given Gröditzter's financial situation, it is unlikely that a private investor would have provided additional funding towards a social plan. And if the sale value of the land was only DEM 9 million, a private investor would not have decided to clear the site. Even if Gröditzter was under a legal obligation to clear the site, the shareholder would not have injected additional funding when the company was to be liquidated. Costs of that kind would have been borne by the state.

(81) Germany contends that in the event of insolvency German law classes shareholder loans as equity (*Eigenkapitalersatz*, equity substitution), which means that they cannot be claimed back from the assets. Shareholder loans constitute capital that the shareholder

⁽²¹⁾ This division was the result of the decision to dissolve the Treuhand in 1994; its activities were shared between three separate organisations. The Guarantees were transferred to the BvS, while management, and shareholdings, were transferred to EREL, and later BMGB.

has made available to the company, and cannot be recovered in a liquidation.

The Commission remains of the opinion that in accordance with the case-law of the Court of Justice the cost of liquidation comprises only the liquidation value of the assets, that is to say DEM 94 million. But even if the shareholder loans were to be included in the cost of liquidation at full value, the total would still be DEM 292 million (assets DEM 94 million + shareholder loans DEM 198 million) ⁽²²⁾.

takeover to take place on 1 January 1997 (*Angebots-synopse für GSW vor Endverhandlungen mit GMH*).

(86) According to the information supplied by Germany, Georgsmarienhütte was awarded the contract mainly because it was the only company to provide a business plan as requested. Its offer was also the best in both financial and conceptual terms. The German authorities have forwarded Georgsmarienhütte's business plan (*Unternehmenskonzept Gröditzer Stahlwerke GmbH*).

(82) The cost of privatisation was DEM 340 million, so that liquidation would have been cheaper. A private investor would have wound up the company.

(87) The Commission considers that the procedure was not unconditional. The memoranda issued by the investment banks did not call for any binding bid. Potentially interested parties were asked to submit a business plan in which they were to put forward detailed commitments regarding jobs to be created or saved, future investment and financing. Those selected were to be invited to bilateral negotiations, and the commitments entered into would have a decisive influence on the purchase price. The memoranda expressly mentioned the possibility that state aid might be granted. No concrete bid was sought, and no parameters or ceilings were laid down for the assessment of bids.

(83) With regard to the DEM 15 million in environmental costs, the Commission sees an additional argument in the fact that in comparing the cost of liquidation with the cost of privatisation Germany has not used comparable figures. Germany has stated that in the event of liquidation the environmental costs would be borne by the shareholder. In the case of privatisation the costs arising out of existing environmental damage were covered by an exceptional arrangement laid down by the *Land* of Saxony. But the privatisation costs listed by Germany do not include any provision for existing environmental liabilities. For an objective comparison, the DEM 15 million for site clearance, at least, should either be excluded from the cost of liquidation or included in the cost of privatisation. If the cost of privatisation is taken to include the DEM 15 million made available, it rises to DEM 355 million.

(88) The Commission also considers that the procedure was neither open nor transparent. Negotiations were entered into with three parties on the basis of documentation that did not comprise an open call for bids, meeting clear requirements, but merely an invitation to open individual negotiations regarding commitments to be entered into by both seller and buyer, which were to be finalised through a negotiation process which was not clearly defined.

5.5.3. The privatisation procedure

(84) Turning to the second argument, Germany has informed the Commission that on 12 June 1996 the public shareholder instructed two investment banks, M. M. Warburg & Co. and Freyberg Hambros, to search for a candidate. In September 1996 both banks issued a memorandum with information on Gröditzer and its subsidiary Burg, on the basis of which bids were to be made. A total of 23 potentially interested investors asked for supplementary information. Three of these, Georgsmarienhütte, Industrial Technology and JPS, were selected as having the necessary technical and financial background. Bilateral negotiations were entered into with those three.

The commitments ultimately entered into influenced the purchase price negotiated. Any differences between positions in the final negotiations were therefore necessarily due to the methods chosen. The Commission considers that Georgsmarienhütte's offer and business plan did not constitute a binding bid.

(89) In these circumstances, where differences between the offers were inherent in the procedure chosen, Georgsmarienhütte was the only candidate of the three to be given a final opportunity to close the negotiations and to adapt its final position to the seller's requirements.

(85) Germany has submitted a synopsis of the state of negotiations with the three parties with a view to a

(90) The Commission is accordingly of the opinion that the privatisation did not take place on the basis of an open, transparent and unconditional procedure. The German argument that tendering was open, transparent and unconditional cannot be accepted.

⁽²²⁾ An exact valuation of the shareholder loans would require a thorough analysis of the undertaking and its prospects.

5.5.4. *The amount of aid to Gröditzer to be taken into consideration*

- (91) In line with its established practice, the Commission considers that when a sale is made on terms unacceptable to a private investor the whole of the negative sales price constitutes aid.
- (92) The bulk of the negative sales price consists of the waiver, redemption or partial takeover of loans and the non-recovery of subsidies. These measures have been assessed above⁽²³⁾. In order to calculate the state aid component in the privatisation, account must also be taken of the financial measures referred to in recitals 17 and 18. The commitments entered into by the seller BMGB in the agreement for the privatisation of Gröditzer amounted to:
- (a) DEM 37,5 million in subsidies for investment and operating purposes;
 - (b) DEM 16,3 million in the form of loans to be paid back on receipt of regional aid under the joint Federal Government/Länder regional scheme at a later stage; but to date only DEM 13 million has been paid out.
- (93) These measures were taken pursuant to the privatisation agreement which entered into force on 1 January 1997. The total is DEM 53,8 million. Of this figure DEM 50,3 million has been paid. A further DEM 3,3 million in aid has been committed as a residual loan under the privatisation agreement, but has not yet been paid.
- (94) As regards the allocation of these sums, Germany has indicated that in 1997 and 1998 a total of DEM 33 million was invested in Gröditzer. Of this figure DEM 1 million went to steel production, DEM 32 million went to plant covered by the EC Treaty, and the remaining DEM 17 million was used for operating purposes.

5.5.5. *Assessment of the aid to Gröditzer*

- (95) The considerations set out in recitals 43 to 63 lead to the conclusion that the DEM 1 million invested in steel production and the operating aid of DEM 17 million are

to be assessed under the Steel Aid Code. The investment aid for non-ECSC production plant, including regional aid under the joint Federal Government/Länder regional development scheme, are to be assessed in the light of the ceilings for regional aid.

- (96) Under the sixth Steel Aid Code, neither general investment aid nor operating aid may be given to the ECSC steel industry. The amount concerned is DEM 18 million (DEM 1 million + DEM 17 million), and this is incompatible with Article 4(c) of the ECSC Treaty and with the sixth Steel Aid Code.
- (97) Germany has supplied no data regarding the allocation of the sum of DEM 3,3 million that remains to be paid under the privatisation agreement, so that it cannot be concluded that this aid will be used to cover investment in the non-ECSC sector. This aid is therefore incompatible with the common market in coal and steel under Article 4(c) of the ECSC Treaty and under the sixth Steel Aid Code.
- (98) The investment aid for non-ECSC production plant can be assessed under the relevant provisions of the EC Treaty. Under the applicable rules on regional aid, however, the total admissible intensity of this aid combined with other regional aid measures is only 35% gross. The relevant investment amounts to DEM 32 million, so that DEM 11,2 million can be declared compatible with the common market. The remainder, amounting to DEM 20,8 million, constitutes state aid incompatible with the common market.

5.5.6. *Aid to Burg*

- (99) Additional aid to Burg in connection with the privatisation amounted to DEM 4,5 million in advance payments against future regional aid. As explained in recitals 23 and 24, the Commission should confirm that the aid to Burg remained within the limits set in the successive arrangements governing the Treuhand. This aid is therefore compatible with the common market.

5.6. *Transfer of fixed assets*

- (100) In order properly to implement a Commission decision requiring the recovery of state aid, the Member State must behave as a private creditor would, and with at least the same care that the Member State itself would exercise if it were collecting such things as tax or social security debts. Domestic law must be applied in the same way as it would be applied to a claim made purely under domestic law, and in such a way that collection is not rendered impossible or extremely difficult. As a general principle this means that the Member State must

⁽²³⁾ The cost of the privatisation of Gröditzer amounted to DEM 340 million, including DEM 286 million for agreements ahead of privatisation providing for: a waiver of shareholder loans, DEM 198 million; redemption and continuation of guaranteed loans, DEM 53 million; grants towards social measures, DEM 28 million; non-recovery of subsidies under paragraph 249h of the Employment Promotion Act, DEM 7 million, and other items comprising the balance. The total is made up of this figure and the new aid of DEM 38 million and DEM 16 million.

seek to collect the debt at once and must use all available means to do so, where possible taking measures to enforce its claim against all available assets of the debtor, and seeking the liquidation of the debtor undertaking if the undertaking is unable to repay the debt.

(101) It is possible, indeed it is likely, that in a liquidation as a result of insolvency proceedings all the undertaking's remaining assets will be sold. In itself this raises no particular problem, as the sale takes place under the supervision of a liquidator who is required to seek the best possible result in the interest of the creditors, with the proceeds of the sale of the assets being used to satisfy their claims. Although the proceeds of the sale of the assets might not be sufficient to pay off all the undertaking's debts, and thus to ensure full repayment, a liquidation is not without importance in terms of competition. Competing undertakings, who might have suffered injury as a result of the incompatible state aid, will have the opportunity to fill the gap in the market left by the liquidated undertaking, and indeed themselves to buy the assets being sold with a view to using them more efficiently.

(102) After initiating the procedure in this case, and shortly before adopting its final decision, the Commission learnt that Gröditzer assets were being transferred to other undertakings controlled by the BvS, at their current value as Gröditzer assets, below the market price, or without any attempt to sell them on the open market. The object or effect of this proceeding may be to take these assets outside the reach of the Commission decision and to continue the weakest parts of the business. This would be in contradiction with the duty of Member States to ensure that the obligations imposed by a Commission decision are complied with.

(103) As with the collection of any debt, a Member State acting as an ordinary creditor must seek to ensure that there is no danger that the collection of the debt might be contested or annulled; to do so it must make use of all the means available under domestic law, for example under provisions governing fraud at the expense of creditors, or suspected agreements prior to insolvency proceedings.

(104) Moreover, in order to prevent evasion of its decision and to ensure that all distortion of competition is eliminated, the Commission has a duty if necessary to require that recovery proceedings should not be confined to the initial recipient, but should instead be extended to include any undertaking continuing the business of the initial undertaking using the transferred production plant, in so far as there are aspects of the transfer on either side which indicate that the business is in fact being continued. Examples of considerations of this kind, which the Commission would have to

investigate, would be what is transferred (assets and liabilities, staff, consolidated assets), the purchase price, the identity of the shareholder or owner or the initial undertaking and of the buyer, the time at which the transfer takes place (after investigations have begun, after the initiation of the formal investigation procedure, or after the adoption of the final decision), and the commercial character of the transfer.

(105) Although Germany has informally denied that any agreements of the kind referred to will be put into effect, the Commission considers it necessary to make it clear in this Decision that the term 'the recipient' includes not just Gröditzer but also any other undertaking to which assets may have been transferred in order to evade the effect of this decision.

6. Conclusions

(106) The measures taken under paragraph 249 of the Employment Promotion Act to cover no more than DEM 6,9 million in employment promotion costs do not constitute state aid. Subsidies of DEM 54,4 million to cover the financing of the social plan and additional measures are compatible with Article 4(c) of the ECSC Treaty and the applicable Steel Aid Code.

(107) The Commission concludes that investment aid amounting to DEM 44,9 million which was made available to Gröditzer under different headings in the period 1992 to 1999 is compatible with the common market under Articles 87 and 88(2) of the EC Treaty.

(108) The Commission also concludes that before and after Gröditzer's privatisation Germany took a number of measures in respect of the company which were unlawful. The amount of state aid involved totalled DEM 242,4 million. This figure breaks down as follows.

(a) A sum of DEM 155,5 million has to be assessed under the ECSC Treaty; it is made up of the following:

I. DEM 13,3 million in investment aid for steel production in the years 1992 to 1996;

II. DEM 1,0 million in investment aid for steel production in the years 1997 to 1998;

III. DEM 124,2 million in operating aid in the years 1992 to 1996;

IV. DEM 17,2 million in operating aid in the years 1997 to 1998.

This aid is incompatible with Article 4(c) of the ECSC Treaty and with the applicable Steel Aid Code. Germany must recover it.

- (b) Investment aid in excess of the 35% ceiling for regional aid, which amounts to DEM 83,2 million (DEM 62,4 million before privatisation and DEM 20,8 million in the course of privatisation), has to be assessed under the EC Treaty. It is incompatible with the common market under Articles 87 and 88(2) of that Treaty. Germany must recover this aid.

- (c) A further sum of DEM 3,3 million which Germany plans to grant to Gröditzer has to be assessed under the ECSC Treaty. It is incompatible with Article 4(c) of that Treaty and with the Sixth Steel Aid Code. It must not be granted,

HAS ADOPTED THIS DECISION:

Article 1

The payment of DEM 6,9 million by Germany to Gröditzer Stahlwerke GmbH (Gröditzer) in order to cover the cost of measures under paragraph 249 of the Employment Promotion Act does not constitute state aid within the meaning of Article 4(c) of the ECSC Treaty.

Article 2

The following measures which Germany has taken in respect of Gröditzer in order to finance a social plan and additional measures for the benefit of redundant Gröditzer employees are compatible with the common market in coal and steel:

- (a) financing in the form of loans granted by Gröditzer's successive public shareholders, namely the Treuhandanstalt, EREL and BMGB, which amounted to DEM 26,1 million;
- (b) a sum of DEM 28,3 million paid by BMGB.

Article 3

Investment aid granted to Gröditzer totalling DEM 44,9 million constitutes state aid compatible with Article 87(a) of the EC Treaty; this aid breaks down as follows:

- (a) DEM 8,4 million under the joint Federal Government/Länder scheme for the improvement of regional economic structures (*Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur*) in 1994
- (b) DEM 3,6 million in investment aid in the form of tax concessions under the Investment Allowances Act (*Investitionszulagengesetz*) in the years 1992 to 1995

- (c) DEM 32,9 million in bank loans carrying a 100% guarantee from the Treuhandanstalt and the Bundesanstalt für Vereinigungsbedingte Sonderaufgaben (BvS), shareholder loans granted by Gröditzer's successive public shareholders in the years 1992 to 1996, and regional aid paid under the joint Federal Government/Länder scheme for the improvement of regional economic structures in the years 1997 to 1999.

Article 4

Investment aid to Gröditzer amounting to DEM 83,2 million, consisting of bank loans carrying a 100% guarantee from the Treuhandanstalt or the BvS, shareholder loans granted by the Gröditzer's successive public shareholders in the years 1992 to 1996, and regional aid under the joint Federal Government/Länder scheme for the improvement of regional economic structures paid in the years 1997 to 1999 are incompatible with the common market under Articles 87 and 88(2) of the EC Treaty.

Article 5

Measures taken by Germany in respect of Gröditzer totalling DEM 155,5 million, comprising investment aid of no more than DEM 14,3 million and operating aid of no more than DEM 141,2 million (being a payment of DEM 17,0 million under the privatisation agreement and funding of DEM 124,2 million financed by means of bank loans carrying a 100% guarantee from the Treuhandanstalt or the BvS and by means of shareholder loans granted by Gröditzer's successive public shareholders), constitute state aid incompatible with the common market in coal and steel.

Article 6

The aid that Germany plans to grant to Gröditzer under Article 9(2) of the agreement of 27 February 1997 governing the sale of shares in Gröditzer to Georgsmarienhütte GmbH, amounting to DEM 3,3 million, in the form of loan as advance payments against regional aid to be received, is incompatible with the common market in coal and steel.

Article 7

1. Germany shall take the measures necessary to recover from the recipient the aid referred to in Articles 4 and 5, which was granted to it unlawfully.
2. Recovery shall be effected in accordance with the procedures of national law in so far as national law does not

render it impossible or unduly difficult. The sums to be recovered shall bear interest from the date on which they were made available to the recipient until their actual recovery, at the reference rate used for calculating the grant equivalent of regional aid.

3. For the purposes of this Article the term 'recipient' comprises not only Gröditzer but any other undertaking to which assets have been transferred in such a way as to deprive paragraph 1 of effect.

Article 8

Walzwerk Burg GmbH benefits under an existing aid arrangement. Accordingly, no further procedural steps are envisaged.

Article 9

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

Article 10

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 8 July 1999.

For the Commission

Monika WULF-MATHIES

Member of the Commission

COMMISSION RECOMMENDATION**of 12 October 1999****on the results of the risk evaluation and on the risk reduction strategies for the substances:****2-(2-butoxyethoxy)ethanol;****2-(2-methoxyethoxy)ethanol;****Alkanes, C₁₀₋₁₃, chloro; Benzene, C₁₀₋₁₃-alkyl derivs.***(notified under document number C(1999) 3232)***(Text with EEA relevance)****(1999/721/EC)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 793/93 of 23 March 1993 on the evaluation and control of the risks of existing substances ⁽¹⁾ and in particular Article 11(2) thereof,

- (1) Whereas Article 10 of Regulation (EEC) No 793/93 establishes the procedure to be followed for the risk evaluation of the substances on the priority lists at the level of the Member States designated as rapporteur;
- (2) Whereas Commission Regulation (EC) No 1488/94 ⁽²⁾ outlines the principles for the assessment of risks to man and the environment of existing substances in accordance with Regulation (EEC) No 793/93,
- (3) Whereas the Member State rapporteur after evaluating the risk of a given priority substance to man and the environment shall suggest where appropriate a strategy for limiting this risk, including control measures and/or surveillance programmes;
- (4) Whereas Article 11 of Regulation (EEC) No 793/93 foresees that the results of the risk evaluation and the recommended strategy for limiting risks in respect of substances on the priority lists should be adopted at Community level in accordance with the procedure laid down in Article 15 and shall be published by the Commission;
- (5) Whereas Article 1 of Regulation (EEC) No 793/93 foresees that this Regulation shall apply without prejudice to Community legislation on the protection of consumers and on safety and protection of health of workers at work, in particular Council Directive 89/391 EEC;
- (6) Whereas a first priority list identifying priority substances requiring attention has been adopted by Commission Regulation (EC) No 1179/94 ⁽³⁾; whereas this priority list provides, among other substances, for the evaluation of the following:

— 2-(2-butoxyethoxy)ethanol,

— 2-(2-methoxyethoxy)ethanol,

⁽¹⁾ OJ L 84, 5.4.1993, p. 1.⁽²⁾ OJ L 161, 29.6.1994, p. 3.⁽³⁾ OJ L 131, 26.5.1994, p. 3.

— Alkanes, C₁₀₋₁₃, chlor,

— Benzene, C₁₀₋₁₃-alkyl derivs.

- (7) Whereas the Member States rapporteur for the four substances have completed all the risk evaluation activities with regard to man and environment⁽¹⁾ and, where appropriate, have suggested strategies for limiting these risks;
- (8) Whereas the results of the risk evaluation of the four substances and the recommended risk reduction strategies for three of the four substances concerned should be adopted at Community level;
- (9) Whereas in accordance with Article 11(3) of Regulation (EEC) No 793/93 the Commission will consider the results of the risk evaluation and the recommended strategy for limiting the risks, when proposing Community measures in the framework of Council Directive 76/769 EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations⁽²⁾ and in the framework of Council Directive 89/391 EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work⁽³⁾, as well as in the framework of other relevant existing Community instruments;
- (10) Whereas the Scientific Committee on Toxicity, Ecotoxicity and the Environment (CSTEE) has been consulted and has issued an opinion with respect to the risk assessment reports referred to in this recommendation;
- (11) Whereas the measures provided for in this recommendation are in accordance with the opinion of the Committee set up pursuant to Article 15 of Regulation (EEC) No 793/93.

HEREBY FORMULATES THIS RECOMMENDATION:

1. All sectors producing, transporting, storing, formulating into a preparation or other processing, using and disposing or recovering the following substances:

— 2-(2-butoxyethoxy)ethanol
CAS No 112-34-5
Einecs No 203-961-6

— 2-(2-methoxyethoxy)ethanol
CAS No 111-77-3
Einecs No 203-906-6

— Alkanes, C₁₀₋₁₃, chloro
CAS No 85535-84-8
Einecs No 287-476-5

should take into account the results of the risk evaluation as summarised in Section I (human health/environment) of Parts 1, 2, 3 of Annex I to this recommendation. These results were formulated in the light of the opinions delivered by the Scientific Committee on Toxicity, Ecotoxicity and the Environment (CSTEE)⁽⁴⁾.

2. The risk reduction strategies described in Section II (strategy for limiting the risks), Parts 1, 2, 3 of Annex I to this recommendation should be implemented.

⁽¹⁾ The comprehensive risk assessment reports as forwarded to the Commission by the Member States rapporteur are publicly available. Short summaries are also available. Both can be obtained by contacting the European Chemicals Bureau, Institute for Health and Consumer Protection of the Joint Research Centre in Ispra, Italy.

⁽²⁾ OJ L 262, 27.9.1976, p. 201.

⁽³⁾ OJ L 183, 29.6.1989, p. 1.

⁽⁴⁾ The risk evaluation reports were peer-reviewed by the CSTEE and its opinions were expressed at the sixth CSTEE plenary meeting held in Brussels on 27 November 1998. The CSTEE opinions can be found on the Internet (http://www.europa.eu.int/comm/dg24/health/sc/sct/outcome_en.html).

3. All sectors producing, transporting, storing, formulating into a preparation or other processing, using and disposing or recovering the following substance:

— Benzene, C₁₀₋₁₃-alkyl derivs.
CAS No 67774-74-7
Einecs No 267-051-0

should take into account the results of the risk evaluation as summarised in Section I (Human health/environment) of Annex II to this recommendation. These results were formulated in the light of the opinion delivered by the Scientific Committee on Toxicity, Ecotoxicity and the Environment (CSTEE).

Done at Brussels, 12 October 1999.

For the Commission
Margot WALLSTRÖM
Member of the Commission

ANNEX I

PART ONE

CAS No 112-34-5

Einecs No 203-961-6

 $\text{CH}_3\text{-(CH}_2\text{)}_3\text{-O-CH}_2\text{-CH}_2\text{-O-CH}_2\text{-CH}_2\text{-OH}$ Einecs name: **2-(2-butoxyethoxy)ethanol**

Member State rapporteur: The Netherlands

Classification: Xi; R 36

The risk assessment is based on current practices related to the life cycle of the substance as described in the risk evaluation forwarded to the Commission by the Member State rapporteur.

The risk assessment, based on the available information, has determined that in the European Community the substance is mainly used in preparations of cleaning agents (e.g. floor and metal cleaners) for industry and public domain. It is further used as solvent in paints and coatings in the industrial and public sector. A minor utilisation of the substance consists in the use as chemical intermediate for butyldiglycol acetate.

I. RISK ASSESSMENT

A. Human health

The conclusion of the evaluation of the risks to man for

WORKERS

is that there is a need for specific measures to limit the risks. This conclusion is reached because of:

- concerns for anticipated local effects as a consequence of dermal and respiratory exposure arising from manual application of products containing the substance,
- concerns for anticipated general systemic effects as a consequence of repeated respiratory exposure arising from manual application of products containing the substance.

The conclusion of the evaluation of the risks to man for

CONSUMERS

is that there is a need for specific measures to limit the risks. This conclusion is reached because of:

- concerns for anticipated local effects as a consequence of respiratory exposure arising from spraying application of products containing the substance.

The conclusion of the evaluation of the risks to man for

MAN EXPOSED VIA THE ENVIRONMENT

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

- the risk assessment shows that risks related to the populations mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

B. Environment

The conclusion of the evaluation of the risks to the environment for

AQUATIC ECOSYSTEMS, MICRO-ORGANISMS in the SEWAGE TREATMENT PLANT, ATMOSPHERE, TERRESTRIAL ECOSYSTEM and NON-COMPARTMENT SPECIFIC EFFECTS RELEVANT to the FOOD CHAIN

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

- the risk assessment shows that risks related to the environment spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

II. STRATEGY FOR LIMITING RISKS

for WORKERS

The legislation for workers' protection currently in force at Community level is generally considered to give an adequate framework to limit the risks of the substance to the extent needed.

Within the framework it is recommended:

- to prescribe as a good practice in the safety data sheets adequate eye protection (goggles) and hand protection (gloves) to all persons handling the pure substance,
- to provide in the safety data sheets information on the risks resulting from the manual application of products containing the substance,
- to provide adequate training and instructions to the workers as well as information and consultation on the risks resulting from the manual application of products containing the substance,
- to develop at Community level occupational exposure limit values for the substance;

for CONSUMERS

It is recommended that paints containing the substance and which are intended for spray applications should not be made available to consumers. Furthermore, paints containing the substance and which are available to consumers, should contain a use instruction on the product to clearly indicate that they should not be sprayed.

In the first place it is recommended to pursue these objectives through a unilateral self-binding commitment made by the producers, the importers of the substance, the trade organisations representing the companies manufacturing the products containing the substance (the formulators). The commitment should be recognised by the public authorities. The producers, the importers of the substance and the formulators should subsequently implement the measures and monitor the compliance to the commitment periodically. The results achieved should be assessed at regular intervals and appropriate additional measures should be considered if necessary.

PART TWO

CAS No 111-77-3

Einecs No 203-906-6

CH₃-O-CH₂-CH₂-O-CH₂-CH₂-OH

Einecs name: **2-(2-methoxyethoxy)ethanol**

Member State rapporteur: the Netherlands

Classification: Repr. Cat. 3; R 63

The risk assessment is based on current practices related to the life cycle of the substance as described in the risk evaluation forwarded to the Commission by the Member State rapporteur.

The risk assessment, based on the available information, has determined that in the European Community the substance is mainly used as an anti-icing agent in jet fuel. Further uses are as a chemical intermediate, basic chemical (processing solvent), in paint strippers and solvent in paints or floor polish.

I. RISK ASSESSMENT

A. Human health

The conclusion of the evaluation of the risks to man for

WORKERS

is that there is a need for specific measures to limit the risks. This conclusion is reached because of:

- concerns for anticipated general systemic effects as a consequence of repeated dermal exposure arising from production of the substance, formulation of products containing the substance and manual application of products containing the substance,
- concerns for anticipated developmental effects as a consequence of dermal exposure arising from formulation of products containing the substance and manual application of products containing the substance.

The conclusion of the evaluation of the risks to man for

CONSUMERS

is that there is a need for specific measures to limit the risks. This conclusion is reached because of:

- concerns for general systemic and developmental effects as a consequence of exposure arising from consumer use of paints or paint strippers containing the substance.

The conclusion of the evaluation of the risks to man for

MAN EXPOSED VIA THE ENVIRONMENT

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

- the risk assessment shows that risks related to the populations mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

B. Environment

The conclusion of the evaluation of the risks to the environment for

AQUATIC ECOSYSTEM, MICRO-ORGANISMS in the SEWAGE TREATMENT PLANT, ATMOSPHERE, TERRESTRIAL ECOSYSTEM and NON-COMPARTMENT SPECIFIC EFFECTS RELEVANT to the FOOD CHAIN

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

- the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

II. STRATEGY FOR LIMITING RISKS

for WORKERS

The legislation for workers protection currently in force at Community level is generally considered to give an adequate framework to limit the risks of the substance to the extent needed.

Within this framework it is recommended:

- to provide as a good practice additional information on the risks resulting from the production of the substance, formulation of products containing the substance and manual application of products containing the substance, for instance in the safety data sheets,
- to emphasise risks posed to women in the reproductive age,
- to provide adequate training and instructions to the workers as well as information and consultation on the risks resulting from the manual application of products containing the substance,
- to develop at Community level occupational exposure limit values for the substance;

for CONSUMERS

It is recommended to prevent dermal exposure of consumers to paints and paint strippers containing the substance.

It is recommended to clearly state in use instructions on these products (packaging, containers) the fact that women in the reproductive age are a vulnerable group.

Furthermore, industry should commit itself to substituting the substance in paints and paint strippers for substances posing less risk, without shifting the risks to other human populations or environmental compartments.

In the first place it is recommended to pursue these objectives through a unilateral self-binding commitment made by the producers, the importers of the substance, the trade organisations representing the companies manufacturing the products containing the substance (the formulators). The commitment should be recognised by the public authorities. The producers, the importers of the substance and the formulators should subsequently implement the measures and monitor the compliance to the commitment periodically. The results achieved should be assessed at regular intervals and appropriate additional measures should be considered if necessary.

PART THREE

CAS No 85535-84-8

Einecs No 287-476-5

$C_xH_{(2x-y+2)}Cl_y$ where $x = 10-13$ AND $y = 1-13$

Einecs name: **Alkanes, C_{10-13} , chloro**

Member State rapporteur: United Kingdom

Classification: Carc. Cat. 3; R 40
N; R 50-53

The risk assessment is based on current practices related to the life cycle of the substance as described in the risk evaluation forwarded to the Commission by the Member State rapporteur.

The risk assessment, based on the available information, has determined that in the European Community the substance is mainly used as an additive in metal working fluids. Other uses are as a flame retardant in rubber formulations and as an additive for paints and other coating systems. Minor uses reported are as a fatting and softening agent in the leather industry, an impregnation agent in the textile industry and as an additive for sealing compounds. It was not possible to obtain information on the use of the total volume of the substances produced or imported into the European Community, therefore, some uses may exist which are not covered by this risk assessment.

I. RISK ASSESSMENT

A. Human health

The conclusion of the evaluation of the risks to man for

WORKERS, CONSUMERS and MAN EXPOSED VIA THE ENVIRONMENT

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

- the risk assessment shows that risks related to the population mentioned above are not expected. The main route of potential worker exposure during production and use is via dermal exposure. Inhalation is also a potential route of exposure during use of metal working fluids and hot-melt adhesives containing the substance. Risk reduction measures already being applied in the framework of the workplace or other relevant Community legislation in force are considered sufficient,
- Consumer exposure, which may occur by contact with leather goods treated with the substance and from non-professional use of metal working fluids, was considered not to be of concern.

B. Environment

The conclusion of the evaluation of the risks to the environment for

AQUATIC (sediment) and TERRESTRIAL ECOSYSTEM

is that there is a need for further information and/or testing. This conclusion is reached because:

- there is a need for better information to adequately characterise the risk to sediment compartment arising from production of the substance and its use in rubber, to the soil and sediment compartments arising from the formulation and use of metal working fluids and leather finishing products, and to the soil and sediment compartments at regional level.

The information requirements are:

- experimental determination of the Koc,
- monitoring data in soil and sediment near sources of release,
- toxicity testing on soil and sediment dwelling organisms if the abovementioned information does not remove the concern for the abovementioned compartments.

The conclusion of the evaluation of the risks to the environment for

MICRO-ORGANISMS in the SEWAGE TREATMENT PLANT and ATMOSPHERE

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

- the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

The conclusion of the evaluation of the risks to the environment for

AQUATIC (excluding sediment) ECOSYSTEM and NON-COMPARTMENT SPECIFIC EFFECTS RELEVANT TO THE FOOD CHAIN

is that there is a need for specific measures to limit the risks. This conclusion is reached because of:

- concerns for effects on the local aquatic environmental spheres mentioned above as a consequence of exposure arising from formulation and use of metal working fluids containing the substance and leather finishing products containing the substance,
- concerns for non-compartmental specific effects relevant to the food chain arising from the formulation and use of leather finishing products containing the substance and from use of metal working fluids containing the substance.

II. STRATEGY FOR LIMITING RISKS

for the ENVIRONMENT

Marketing and use restrictions should be considered at Community level for the substance to protect the environment from the use and formulation of products, in particular for use in metal working and leather finishing. Further work is necessary to establish those uses for which derogations can be justified.

The measures identified to protect the environment will also reduce human exposure.

ANNEX II

CAS No 67774-74-7

Einecs No 267-051-0

 $\text{CH}_3-(\text{CH}_2)_m-\text{CH}(\text{C}_6\text{H}_5)-(\text{CH}_2)_n-\text{CH}_3$ where $m+n = 7:10$ Einecs name: **benzene, C_{10-13} -alkyl derivs.**

Member State rapporteur: Italy

Classification: not yet classified

The risk assessment is based on current practices related to the life cycle of the substance as described in the risk evaluation forwarded to the Commission by the Member State rapporteur.

The risk assessment, based on the available information, has determined that in the European Community the substance is mainly used as an intermediate in the chemical industry for the production of linear alkyl benzenesulphonates. Minor uses reported are as a solvent or binder for asphalt, paints, inks and varnishes. It was not possible to obtain information on the use of the total volume of the substances produced or imported into the European Community, therefore, some uses may exist which are not covered by this risk assessment.

I. RISK ASSESSMENT**A. Human Health**

The conclusion of the evaluation of the risks to man for

WORKERS, CONSUMERS and MAN EXPOSED VIA THE ENVIRONMENT

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied. This conclusion is reached because:

- the risk assessment shows that risks related to the populations mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

B. Environment

The conclusion of the evaluation of the risks to the environment for

AQUATIC ECOSYSTEM, MICRO-ORGANISMS in the SEWAGE TREATMENT PLANT, ATMOSPHERE, TERRESTRIAL ECOSYSTEM and NON-COMPARTMENT SPECIFIC EFFECTS RELEVANT TO THE FOOD CHAIN

is that there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied.

This conclusion is reached because:

- the risk assessment shows that risks related to the environmental spheres mentioned above are not expected. Risk reduction measures already being applied are considered sufficient.

II. STRATEGY FOR LIMITING RISKS

None
