OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 27 January 2000 *

1. By application under Article 173 of the EC Treaty (now Article 230 EC) the Federal Republic of Germany (hereinafter 'Germany') seeks the annulment of Commission Decision 98/476/EC (hereinafter 'the decision') on tax concessions under Paragraph 52(8) of the German Income Tax Act (the Einkommensteuergesetz, hereinafter 'the EStG'). [1]

In particular, Germany claims that the Commission adopted the decision without fulfilling the obligation to give a statement of reasons as laid down in Article 190 of the EC Treaty (now Article 253 EC), basing it on an incorrect application of the rules of the Treaty concerning State aid under Article 92(1) of the EC Treaty (now Article 87(1) EC) and Article 52 of the EC Treaty (now Article 43 EC) on freedom of establishment.

Facts of the case and pre-litigation procedure

2. In the German Tax Act for 1996, which entered into force on 1 January of that year, [2] an amendment was made to Paragraph 52(8) of the EStG, concerning the scope of the scheme for tax concessions laid down in Paragraph 6(b) and 6(c) of the EStG.

The new provision introduced special concessions limited to the financial years 1996, 1997 and 1998 in the event of the purchase of holdings in companies which have their registered office in the new Länder and West Berlin, and have no more than 250 employees.

3. The adoption of the new tax scheme was not notified to the Commission; it was only on 13 October 1995, following a specific request from the Commission, that the German Government provided that notifi-

* Original language: Italian.

1 — OJ 1998 L 212, p. 50.

2 — BGBl. 1995 I, p. 1250.

cation. The entry into force of the new provisions took place without the Commission's having given its view; the Commission therefore registered the scheme as unnotified. A circular issued by the Federal Ministry of Finance on 2 January 1996 postponed the application of the scheme pending a decision by the Commission.

4. In a series of letters the Commission asked for clarifications from the German Government concerning the nature of these new tax concessions; in its reply, Germany denied that the new provisions came within the definition of State aid under the relevant rules of the EC Treaty. The Commission did not consider that the explanations provided by the German Government were sufficient, and by a decision notified on 25 March 1997,[3] the Commission informed Germany that it was initiating proceedings under Article 93(2) of the EC Treaty (now Article 88(2) EC). The German Government gave its own comments in its letters of 13 May, 29 July and 30 September 1997, in which it disputed the validity of that step. The proceedings concluded with Decision 98/476/EC of 21 January 1998, which stated that the scheme adopted by the applicant constituted State aid incompatible with the common market. On 24 April 1998 Germany lodged this action.

3 — OJ 1997 C 172, p. 2.

Legal framework

(a) *National law*

5. Paragraph 52(8) of the EStG, in the version following the amendments made by the Tax Act of 1996, provides, as stated, for the amendment of the scheme of tax concessions under Paragraph 6(b) of the EStG, with respect to the tax years from 1996 to 1998. The original text of Paragraph 6(b) provided for taxable persons who gain a profit from the sale of immovable assets, movable perishable goods used for at least 25 years, and of shares in companies the possibility of deducting an amount of up to 50% of that profit from the costs of producing and acquiring commodities produced or acquired during the same financial year or the previous year.

6. In the new wording of the EStG the tax concessions granted to taxable persons are extended with respect to the financial years 1996, 1997 and 1998; a deduction is allowed equal to the entire amount of the profit realised with the sale if holdings are purchased in companies with share capital and this purchase is linked to an increase in

capital or the formation of new companies, provided that these companies:

(a) have their registered office and central administration in the new Länder or West Berlin and on the date the shares are acquired do not have more than 250 employees, or

(b) they are holding companies whose object, under their own statutes and articles of association, consists exclusively of acquiring holdings for a limited period of time or administering or selling those holdings to companies which, at the time those holdings are acquired, have their office and central administration in the new Länder or West Berlin and do not have more than 250 employees.

7. According to the estimates provided by Germany and set out by the Commission in its decision (part I, seventh paragraph) the measure will lead to a loss in tax revenues of some DEM 150 million for the years under consideration. The scheme is in theory applicable to an unspecified number of companies with registered offices in the new Länder and West Berlin and is not limited to specific sectors. There is no rule to prevent combination of the measure with other State aid.

(b) *Community law*

8. In its decision, the Commission states that the tax concession provided for in Paragraph 52(8) of the EStG to companies with up to 250 employees and having their registered office and central administration in the new Länder or West Berlin constitutes State aid which is incompatible with the common market pursuant to Article 92(1) of the EC Treaty, and Article 61(1) of the EEA Agreement (Article 1(1)); the Commission therefore calls upon Germany to repeal the aforementioned provision (Article 1(2)). In the grounds for the decision, the Commission also argues that the provision in the EStG infringes the prohibition of restrictions on freedom of establishment under Article 52 of the EC Treaty, as the aid scheme lays down, as a requirement for tax concessions, that the companies in which holdings are purchased must have their registered office and central administration in the new Länder or West Berlin.

9. As regards the nature of the aid in the provisions in issue, the Commission states first of all that the scheme in question concerns two groups of beneficiaries, namely taxable persons under the income tax legislation (direct beneficiaries) and

companies in the new Länder and West Berlin with no more than 250 employees (indirect beneficiaries). The Commission argues, on one hand, that the tax concession in favour of taxpayers is a general measure with no aid component because all taxpayers who invest gains in a way specified in the legislation qualify for the concession; those concessions are therefore compatible with Community law as they are laid down by a general measure of economic policy; on the other hand, however, the measures in favour of companies with share capital which have their registered office and central administration in the new Länder or West Berlin, in which a holding must be acquired in order to qualify for the tax concession, constitute State aid within the meaning of Article 92(1) of the EC Treaty.

Such a measure has undoubted economic advantages for the recipients as it has the effect of increasing the profitability of holdings in companies whose registered office and central administration are in the new Länder and West Berlin, compared to that of holdings in companies whose registered office and central administration are in the rest of the territory of Germany or outside German territory.

10. The Commission considers that the contested provisions are not linked to investment and therefore the measure is to be regarded as operating aid which, according to the practice of the Commission, can be granted only on certain conditions and only in areas assisted pursuant to Article 92(3)(a) of the EC Treaty. In any case, these areas do not include West Berlin which, according to the Commission Decision (N 613/96) on the designation of assisted areas for the years 1997 to 1999, is an assisted area only pursuant to Article 92(3)(c). In addition, given that there is no link between the granting of aid and the investment measures, according to the Commission there is a substantial danger that the measure may have an effect outside the assisted areas.

11. Later in the decision the Commission describes in detail the presence of factors which the Treaty and the case-law of the Court require for a State measure to be considered as 'aid', within the meaning of Articles 92 and 93 of the Treaty. Those factors will be examined below, in assessing whether the submissions put forward by the applicant are valid.

Merits of the case

12. The application is based, principally, on an alleged infringement of the obligation to state reasons as laid down in Article 190 of the EC Treaty (now Article 253 EC) and on the incorrect application of Article 92(1) of the EC Treaty.

13. In the alternative, the applicant also alleges failure to comply with the *de minimis* rule, infringement of Article 92(2)(c) of the EC Treaty, incorrect exercise of discretion in the application of Article 92(3)(a) and (c) of the EC Treaty, and infringement of Article 52 of the EC Treaty.

(1) *Compliance with the obligation to state reasons*

14. Germany argues that the decision which is challenged here is vitiated by infringement of the obligation to state reasons laid down in Article 190 of the EC Treaty. In its opinion, the decision does not comply with this obligation in various ways which will be examined below.

(a) Insufficient reasons with respect to the identification and quantification of the element of aid

15. According to Germany, in the contested decision the Commission has not specified how the element of aid is made up in concrete terms and in what way it could be quantified. Given that it can be deduced from the decision that, according to the Commission, the element of aid can be identified in the fact that the tax advantage for undertakings which acquire holdings in companies established in the territories indicated is partially transferred to the latter by a legal provision which aims to direct the investments of private investors, the German Government considers that it is not clear from the text of the decision how the beneficiary of the fiscal measure could pass on his advantage to the companies in which he acquires holdings. In addition, in the opinion of Germany, the Commission has omitted to quantify the alleged aid, confining itself to referring to a general economic advantage which the companies which benefit indirectly from the aid obtain by the application of the disputed scheme.

(b) Insufficient reasons with respect to the risk of distortion of competition and the impediment to trade between Member States

16. Secondly, Germany argues that the Commission has not demonstrated that the measure under discussion is capable of producing distortions of competition and damaging trade between Member States, as required by Article 92 of the Treaty.

With regard to the risk of distortion of competition, the decision states only that the measure adopted by Germany favours companies which have their registered office in assisted areas rather than in another part of German or Community territory. The Commission therefore takes for granted that the threat to competition derives from the fact that the fiscal measure

is State aid; in actual fact, Germany argues, since it is a constituent of Article 92(1), the threat of distortion to competition should be the subject of a separate and thorough analysis.

With respect to the damage to trade, the Commission states in the decision that the modest nature of the aid is not sufficient to exclude the risk of effects on trade between Member States; in the opinion of the applicant, it is a general statement which is not sufficient to release the Commission from the obligation to state reasons.

(c) Insufficient reasons with respect to the absence of the conditions for the application of Article 92(2)(c) of the Treaty

17. The applicant considers that the Commission should have examined as a matter of course whether the measure in question falls within the derogation provided for in Article 92(2)(c) of the EC Treaty, under which aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany is compatible with the common market, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. The Commission, however, confines itself to stating that the information available does not allow it to clarify whether the scheme in question is necessary to alleviate the economic disadvantages caused by the division of Germany. In fact, Germany states, the Commission is in possession of documents which would prove the opposite and should, therefore, have indicated specifically on what grounds it considered Article 92(2)(c) not to operate. If the Commission did not consider this information sufficient, the onus was upon it to ask for more information from the German Government.

(d) Insufficient reasons for the statement of incompatibility within the meaning of Article 92(3) of the Treaty

18. The applicant also considers that there are insufficient reasons for the conclusion which the Commission reaches in the decision, according to which the tax scheme adopted constitutes aid incompatible with the common market since the derogation in Article 92(3)(a) cannot be applied. In the opinion of Germany, the Commission merely observes that the legislation adopted did not preclude the favourable fiscal scheme being applied in sensitive sectors or to undertakings in difficulties. The German Government argues that the Commission should, however, have based its assessment on the behaviour of a private investor.

(e) Lack of reasons for the decision to require the repeal of the provision rather than its amendment

19. Finally, Germany disputes the fact that, in its decision, the Commission exclusively calls for the repeal of Paragraph 52(8) of the EStG, rather than its amendment. In an assessment based on the principle of proportionality, enacted in Article 3b of the EC Treaty (now Article 5 EC), the Commission should, in the opinion of the applicant, request the repeal of a system of aid only if it is totally incompatible with the common market, while it is sufficient to call for amendment if the incompatibility involves only a part of national measures. In this case, the Commission should, therefore, have considered the possibility of amendment before demanding repeal of the provision. For that reason also, therefore, the contested decision does not comply with the obligation to state reasons as laid down in Article 190 of the Treaty.

20. I consider that the arguments put forward by Germany do not call into question the legality of the decision from the point of view of compliance with the obligation to state reasons. I do consider, however, that the decision indicates in a thorough way and in sufficient depth the reasons why the tax scheme adopted in Germany involves aid for the beneficiaries which is incompatible with the common market.

21. I would point out that, according to the settled case-law of the Court, the reasons for a Community act must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure, to allow the persons concerned to know the reasons for the measure and allow the Court to exercise its supervisory jurisdiction fully. [4] It should also be noted that, in order to comply with the requirement to state the reasons for a measure within the meaning of Article 190 of the EC Treaty, it is not necessary for all the elements of fact and law taken into consideration before the adoption of the decision to be specifically stated. As the Court has stated on several occasions, in order to assess whether the reasons given for a measure are such as to comply with the obligations laid down by the Treaty, account must be taken of the general context, the adoption procedure and all the Community rules governing the matter, including any measures adopted previously. [5] Indeed, from that point of view, it is quite clear that some assessments contained in the text of the decision, whose peremptory nature is taken by the applicant to be a flaw in the reasoning, have for some time been the subject of disputes between the Commission and Germany, for which reason I consider that, apart from the

4 — Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15; Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraph 39.

5 — See on all those points, Case 185/83 *University of Groningen* [1984] ECR 3623, paragraph 38, and Case C-350/88, cited above, paragraph 16.

merits of the assessments, the Member State involved was perfectly able to understand the scope of some statements which, at first sight, might appear not to be supported by adequate reasoning. [6]

22. I shall now look at the reasons which, in the opinion of the applicant, justify a finding, in this case, of non-compliance with the obligation to state reasons. First of all, with regard to the identification of the aid component, I consider that this is quite clearly stated in the grounds of the contested decision. The Commission states that the tax system in the EStG confers on some natural and legal persons a direct economic advantage, in terms of tax concessions, if they acquire certain assets from particular undertakings, indirectly benefiting the companies, established in the favoured territories, whose holdings are particularly desirable on the market: 'The economic advantage conferred is the greater demand for shares in the indirect beneficiary companies as compared with the legal situation which existed before Paragraph 52(8) entered into force; investors, the direct beneficiaries, will consequently be prepared to acquire holdings in East German and Berlin companies on terms more favourable to those companies than the terms which would have been obtained if the measure had not been introduced' (Part IV, sixth paragraph). The Commission therefore states that the measure in question is likely to give, without adequate consideration, an economic advantage to the undertakings which are indirect beneficiaries of the measure laid down in Paragraph 52(8) of the EStG, which have their registered offices in the new Federal Länder or West Berlin, an advantage which they would not have enjoyed without the State measure in question. It appears to me that the Commission has explained the element of aid sufficiently clearly. I do not therefore see the alleged 'contradictions' in the identification of the element of aid which the applicant ascribes to the Commission. In the decision the defendant makes a comparative assessment of the competitive position of the undertakings which are (indirect) beneficiaries of the tax scheme which is more favourable than that of undertakings established elsewhere, stating that, '[a]s a result of the increased demand for holdings in companies with their registered office and central administration in the new Länder or West Berlin... which arises as a result of the State measures, the financial investment behaviour of share purchasers as a whole will be affected, other things being equal, to the extent that they will now acquire holdings on terms more favourable to the share seller than they would have been without the introduction of Paragraph 52(8) of the EStG, holdings which in the absence of the tax concession they would not have acquired at all or would have acquired on terms less advantageous to the share seller' (Part IV, fourth paragraph). The Commission bases its argument on this comparison, corroborating its conclusion with other observations — relating to the impact of the measure on the common market or the use of the advantage by the direct beneficiaries — which do not deny or contradict

6 — I refer in particular to the applicability of the derogation stated in Article 92(2)(c) of the Treaty, concerning aid intended to compensate for the economic disadvantages resulting from the division of Germany.

the negative assessment made in the passages of the decision cited above.

23. However, as regards the quantification of the aid, I agree with the observation of the Commission that a precise quantification could not be made in the text of the decision; this is because the German tax provision which is the subject of the decision does not provide for individual aid granted to a particular company, but for a general system of aid, taking the form of an income tax rule, which is applied to an unspecified number of beneficiaries, that is to all companies which wish to invest in the holdings of other companies with registered offices in the territories indicated in the legislation. It is therefore not possible to determine the effects of this aid system *ex ante,* and before the measure is actually in force, as would have been possible if it had been an individual aid measure. In an assessment concerning the effects on competition, including potential effects, such a circumstance obviously does not exclude the possibility that the scheme laid down by German law, taken in an abstract way, may be described as contrary to the terms of the Treaty on matters of State aid.

24. Next, concerning the alleged insufficiency of the statement of reasons with regard to the impact of the measure on competition and the effect on trade between Member States, I consider that, even though it does so in a summary way, the Commission stated in its decision that the tax scheme adopted by the applicant, favouring certain companies with registered offices and central administration on its territory, systematically puts companies established in other Member States in an unfavourable position, making them less attractive on the share market. [7] Indeed, with a system of aid whose clear and stated purpose is to sustain economically companies established in a particular area of German territory, it is sufficient to demonstrate that its application is potentially able to distort competition: as the Court has stated, when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid. [8]

25. The reasons adopted by the Commission also appear to be sufficient with respect to the absence of conditions for the applicability, in this case, of the derogation under Article 92(2)(c) of the EC Treaty. As we know, the article in question considers 'aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division' to be compatible with the common market. In that connection, while it is true that in the text of the decision the Commission merely points out that it could not ascertain on the basis of the information available that the

7 — See the contested decision, 15th paragraph, p. 54.

8 — Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 40.

scheme was necessary to compensate for those disadvantages, I consider that that assessment, which hinges on the Member States' duty of cooperation, is justified in the light of the case-law of the Court[9] which states that it is up to the Member State to provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled. I consider that, in this case, it was for the applicant to provide the Commission with the information necessary to demonstrate that the measures adopted were necessary to compensate for the negative effects of division, while it is clear from the information available that during the course of the administrative procedure the applicant merely raised the need for a tax concession for companies established in the territory in question because of the lack of equity capital. Also as a result of the position taken with respect to the substantive applicability of the derogation — a position which I will examine in more detail below — the applicant does not seem to have put before the Court any assessment of the causal link between the measures adopted and the economic disadvantages directly caused by the division of Germany. Therefore, I consider that the Commission was properly able to state merely that it was not in possession of information which would show that the conditions required under Article 92(2)(c) of the Treaty were met.

26. Finally, contrary to what is stated by the German Government, the contested decision indicates sufficiently the reasons why the tax system, set up under Paragraph 52(8) of the EStG, cannot be declared compatible with the common market within the meaning of Article 92(3)(a) and (c) of the EC Treaty. Since Paragraph 52(8) of the EStG provides for an aid scheme and not individual aid, the Commission was able initially only to examine the potential scope of application of that scheme. As it is operating aid, the Commission rightly pointed out that the conditions of application are such that they do not exclude the possibility that companies which operate in sensitive sectors or are in difficulty may benefit from it, or that the capital made available to companies is used in economic activities outside the assisted area. Likewise, there cannot be compatibility under Article 92(3)(c) of the EC Treaty, since West Berlin is not an assisted area under that provision, except for a limited part of the period covered by the legislation at issue. In addition the Commission rightly, in the decision, sought the repeal rather than amendment of the scheme, since the components of aid indicated in the text of the decision are such a significant and determinant feature of the measures adopted by Germany that they cannot be removed without draining the measures in question of their content.

27. In view of all the above considerations, I consider that the decision is supported by sufficient reasons.

9 — See, for all these points, Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20.

(2) *Nature of aid in the contested measure*

28. Germany submits on the substance that the Commission, in regarding the tax measure intended to benefit companies with share capital under Paragraph 52(8) of the EStG as State aid incompatible with the common market, has contravened Article 92 of the EC Treaty. The German Government puts forward a series of arguments in support of that submission; however, I do not consider that they conclusively justify an assessment that the contested decision is unlawful.

29. Indeed, none of the points put forward by the applicant calls into question the assessment made by the Commission in its decision, while it is clear that the conditions required by the provisions of the Treaty in order for a measure adopted by a Member State to be described as State aid incompatible with the common market are present in this case. First of all, it should be stated that there are no reasonable grounds to doubt that the tax concession for the taxable persons indicated above constitutes State aid within the meaning of Articles 92 et seq. of the Treaty. Since the concept of State aid is to be understood broadly, it must be considered that there is aid when the measure in question, irrespective of its form or nature, gives the recipient companies an economic and financial advantage which they would not normally have obtained, in terms of a reduction of the ordinary tax burden. The economic advantage granted by the public authorities to alleviate the tax burden to which a company is normally subject must be considered to be aid. The tax measure which is the subject of the decision procures for the companies which are indirect beneficiaries an advantage which they would not have obtained under normal market conditions, by attracting participation in the capital of those undertakings with the remission of taxes. I am therefore in agreement with the position of the Commission where it states that the aid influences the behaviour of private investors. Therefore the observation by the applicant is not relevant inasmuch as it maintains that the tax rules at issue do not automatically mean that a private investor has an interest in acquiring shares in the capital of companies with their registered offices in favoured areas, since that decision depends on other factors, of a purely economic nature, which are not altered by the tax concession measures. It is sufficient to reply that the assessment of the nature of the aid — particularly if general schemes such as this are involved — can only be made on the basis of a comparative assessment of the position of the undertakings benefiting from the measure compared to that of undertakings which do not benefit. From that point of view, it cannot be disputed that the measure adopted alters the market situation obtaining without the rules, by attracting the purchase of holdings in the capital of companies with their registered office in the favoured areas. In other words, the overt objective of Paragraph 52(8) of the EStG is to procure economic advantages for the beneficiary undertakings, making it more attractive to invest in their capital compared to the normal market situation: the component of aid in that case can be identified by comparing the conditions of investment in the capital of undertakings

established in the favoured areas with or without the tax concession.

30. I should add that the economic advantage secured by the tax concession provided for in Paragraph 52(8) of the EStG — which is effected by the State's waiving of the general tax system on investments in companies with share capital or holding companies — is granted with the use of State resources. Suffice it to recall on this point that the definition of 'State resources' used by the Court is wider than that of a subsidy, because it embraces 'not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect.' [10] More specifically concerning measures which involve tax concessions, in the *Banco Exterior* case the Court stated that 'a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 92(1) of the Treaty' (paragraph 14). The measures at issue in this case are certainly intended to alleviate the tax burden of the companies which are direct beneficiaries, but also at the same time to make holdings in the capital of undertakings which are indirect beneficiaries more attractive than holdings of capital in other companies established in other areas of German territory or in other Member States. The measure therefore involves 'State resources', and no importance attaches to the fact that the measure may have a transitional application or that it may be described as a complete renunciation of tax revenue — as the Commission believes — or as a mere deferral of the application of the tax, as the applicant believes.

31. In addition, as regards the further feature of the selectivity of the measure, I do not think there can be any doubt that the measure provided for in the German tax rules is not general in nature, but concerns a well-defined type of company, following criteria which are clear and objectively verifiable both as regards geography and the size of the company. Companies which do not have their registered office in the assisted areas and those with more than 250 employees cannot benefit from that fiscal system. The measure also threatens to distort competition between undertakings with their registered office in the assisted territories on one hand, and those with their registered office elsewhere in Germany or in other Member States on the other hand, and is capable of affecting trade. It should be noted here that, in a general aid scheme, in order to be able to establish the effect of such a system on trade it is sufficient that in an assessment *ex ante*, it is reasonable to argue that that effect may occur. If the position of a company (or, as in this case, of an unspecified number of companies) is strength-

10 — See Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34.

ened by a system of aid, that favourable treatment is in principle likely to affect trade between Member States. [11] The measure laid down in Paragraph 52(8) of the EStG clearly improves the position of the companies which are indirect beneficiaries compared to their competitors, which cannot offer the same advantages to taxable persons who intend to purchase shares in their capital. It therefore favours the strengthening of equity in the companies in question. There is nothing to indicate that that economic advantage may produce its effects solely within German territory, since in principle any company established in another Member State and not participating in the system offers its shares on the market under less favourable conditions.

(3) *Application of the* 'de minimis' *principle*

32. In the alternative, Germany complains that the Commission did not apply the *de minimis* principle in this case. In particular, Germany states that the Commission did not attribute any importance to the fact that the alleged aid granted to the companies is quite negligible, on the basis of a general principle, of which the Commission notice on the *de minimis* rule for State aid [12] is only one expression, by which the provisions on State aid are not applied in respect of State interventions of a modest size. In the decision, however, the Commission excludes application of that rule, pointing out that, in the light of the case-law of the Court, the fact that the aid is small is not sufficient to exclude the possibility that there are effects on trade between Member States. In addition, in the decision the Commission states that Germany has not undertaken to comply with the *de minimis* rule. The German Government replies by arguing that, in this case, it was not possible to apply the criterion followed in the Commission notice concerning *de minimis* aid, as any economic advantage attributed to the undertakings established in the favoured sectors cannot be measured in concrete terms. The Commission should not therefore have excluded application of the *de minimis* principle on the basis that there was no direct undertaking to comply with it by the applicant Member State.

33. I consider that the position of the Commission on the impossibility of applying the *de minimis* principle in this case is correct and supported by valid arguments. It should be observed first of all that the consequences of applying the scheme at issue are indeed anything but negligible. It appears from the text of the decision that, according to estimates provided by Germany, 'the measure will lead to a temporary loss in tax revenues of some DEM 150 million (approximately ECU 75 million)', while the notice on *de minimis* aid indicates a maximum ceiling (cumulative with any other measures) of ECU 100 000. It does not seem that Germany undertook to limit the application of the measures in question in such a way as to contain the effects

11 — Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 19.

12 — Communication 96/C 68/06 (OJ 1996 C 68, p. 9).

below that maximum limit, or that it has excluded cumulative application with any other interventions in favour of companies established in the territories taken into consideration by the disputed provision of the EStG. In addition, the case-law of the Court shows that the small amount of State aid does not as such exclude the possibility that the measure adopted might distort competition or affect trade between the Member States, within the meaning of Article 92(1) of the EC Treaty. [13] In this case, while on one hand, the generalised scope of the measure does not allow, as stated, a precise assessment *ex ante* of the economic advantage granted to the undertakings which are indirect beneficiaries, on the other hand it makes it plausible that the limit indicated above may easily be exceeded in the actual application of the measures in question. I therefore consider that the Commission correctly considered that it could not apply the *de minimis* principle in this case.

(4) *Infringement of Article 92(2)(c) of the Treaty concerning aid to compensate for the disadvantages caused by the division of Germany*

34. In the alternative, the applicant considers that, even if the disputed measure had to be described as aid, it could not be declared incompatible with the common market. In this case, the derogation set out in Article 92(2)(c) of the Treaty applies, since the measures in question are intended to compensate undertakings with registered offices in favoured territories for the economic disadvantages caused by the division of Germany.

On the assumption that that provision is still applicable, notwithstanding the reunification of the two Germanies, the applicant states that, following the division, the system of small and medium-sized private businesses in the Länder of the former East Germany was systematically dismantled. Consequently, at the time of reunification, individuals who wished to carry out business activity were unable to obtain the capital necessary to finance their activity with their own resources. The measures adopted by Germany, therefore, were intended to compensate for that situation of economic disadvantage, which in the final analysis stems from the consequences of division.

35. On that point it must be stated first of all that Article 92(2)(c) of the EC Treaty continues of course to be applicable notwithstanding the reunification of the two Germanies, an event which certainly did not entail implied repeal. However, as it is a provision which contains a derogation from a fundamental principle of the Treaty, that is the prohibition on States causing distortions to normal competition, and

13 — Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 43.

therefore to the functioning of the common market, with aid measures which favour certain companies operating on Community territory, there is still the need to interpret this provision narrowly. [14]

36. I therefore consider that, on one hand, its scope must be limited to the consequences caused directly by the division of German territory into two parts, at the moment in history when that division occurred (for example, the problems caused to German companies, situated in particular areas of the old Länder and West Berlin, by the creation of an internal frontier, the breaking of communication links, or the loss of some markets as a result of the breaking off of commercial relations with the areas subject to a State-planned economy [15]); on the other hand, the measure adopted is strictly aimed at remedying the economic disadvantages which this division caused. However, the provision in question cannot be used to justify any intervention to support the economy of areas which, before reunification, were part of East Germany, in order to compensate fully for the undeniable economic backwardness suffered by the new Länder; such an interpretation as shown by the Court of First Instance in the recent judgment on German aid to the automobile sector, [16] disregards both the nature of that provision as a derogation, and its context and aims.

37. Having said that, I consider that the system of tax concessions laid down in the legislation in question does not comply with the conditions indicated above. Indeed, as stated by the Commission, the backwardness of the new Länder, which means that it is difficult for undertakings established there to obtain capital on the market, is due not to the division of Germany into two different States, but to the new political and economic system adopted, when the division had ended, in the territory of the former East Germany. The obliteration of the old system, following reunification, with the consequent readaptation to the market economy, required the entire economic system of the new Länder to deal with outside competition, from which it was protected for years. The backwardness of this economic system compared to that of the rest of Germany cannot, however, be considered to be a direct effect of division, except by construing the derogation stated in Article 92(2)(c) of the Treaty as an extremely wide-ranging exception — geographically and substantively — to the principle that aid granted by the States which affects trade is incompatible with the common market. I therefore consider that the Commission has not exceeded the limits of its discretion by arguing for the inapplicability of the derogation stated in Article 92(2)(c) since, in an assessment based on the principle of direct causality, it does not appear that the measures adopted under the contested system are aimed at compensating for the economic disadvantages resulting from the division of Germany.

14 — See, to that effect, the recent decision of the Court of First Instance, Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 132.

15 — *Freistaat Sachsen*, cited above, paragraph 134.

16 — Loc. cit., paragraph 135.

(5) *Applicability of the derogation in Article 92(3)(a) and (c) of the EC Treaty*

38. Also in the alternative, the applicant argues that the contested decision is *ultra vires* and therefore invalid, inasmuch as the measures adopted should have been declared compatible with the common market within the meaning of Article 92(3)(a) and (c) of the Treaty.

39. In the opinion of the German Government, the Commission has incorrectly exercised the power of assessment given to it under the provision. The Commission argues, in part V of the decision, that as the tax system is not aimed at initial investment within the meaning of the Commission communication on regional aid systems, [17] but is designed to overcome specific structural disadvantages, it must be treated as operating aid which, according to the practice of the Commission, can be declared compatible with the common market only in exceptional cases, including that in respect of the areas indicated in Article 92(3)(a) of the Treaty. While acknowledging that the five Länder of the former East Germany and East Berlin were designated as assisted areas under that provision until the end of 1999, [18] the Commission argues that the derogation cannot be applied in this case, for a number of reasons: firstly, in so far as the purpose of the aid system is to strengthen the resources of the beneficiary undertakings, those resources could subsequently be diverted outside the territory of the assisted regions, while the communication provides that aid can be granted only if it can contribute to a durable and balanced development of the economy of the assisted areas, and if it decreases and is limited over time. There are therefore risks of abuse, since the increase in capital could encourage the beneficiary undertakings to carry out activities outside the new Länder as well; the risk exists because the aid system is not tied to particular investment projects in the region. Secondly, the Commission argues that the measures adopted by Germany do not exclude the possibility that the tax concession may benefit persons who invest in undertakings operating in sensitive sectors, for which specific provisions are laid down as regards aid; nor is it excluded that that tax system will be applied to undertakings in difficulty. In both cases, the aforementioned Commission communications preclude the possibility of the measure benefiting from the derogation laid down in Article 92(3)(c). In addition, the decision states that the system of aid does not fall within the scope of the derogation, in so far as it is also applicable in favour of undertakings with their registered office in West Berlin, whose territory is only partially included in the assisted areas.

17 — OJ 1979 C 31, p. 9.

18 — See Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ 1998 C 212, p. 2) and subsequent practice.

40. I consider that the assessment made by the Commission is correct and cannot be

called into question in the light of the arguments put forward by the applicant. Firstly, I do not believe that the circumstance, relied on by Germany, that the contribution of capital to undertakings established in the favoured territory takes place by way of a synallagmatic type of relationship — since shares are acquired for consideration — means that it should not be regarded as operating aid in this case. In any event, the measures under discussion make holdings in the assisted undertakings more attractive, by compensating for the pre-existing structural disadvantages. In addition, the arguments presented by the applicant — that the risks of abuse, as indicated in the decision, are just as slight as the probability that undertakings operating in sensitive sectors might benefit from the aid — do not appear to be relevant in an assessment *ex ante* — and the Commission can make only an assessment *ex ante* in order to avoid risks of distortion in the operation of the market being translated into reality — in which it is sufficient to note that the system adopted does not preclude its being applied in a way that is prohibited. There is no discussion of the fact that the geographical application of the derogation, in so far as the territory of West Berlin is included, does not in any event allow recourse to that derogation.

41. Therefore, I do not believe that the Commission has used its discretionary powers incorrectly, as it respected the procedural requirements laid down in the relevant rules and based the decision on precise circumstances of fact and of law. The assessments made, which are based on the guidelines already set out in the communications on regional aid systems and the method for the application of Article 92(3)(a) and (c) of the Treaty, preclude a finding that such aid is compatible with the common market.

(6) *Freedom of establishment*

42. With regard to the alleged infringement of Article 52 of the Treaty, I consider that Germany is right in its contention that this article cannot be used as a legal basis for the contested decision. It should not be forgotten that the decision was adopted following a special 'abbreviated' procedure referred to in Article 93(2) of the Treaty, which provides for derogation from the general infringement procedure referred to in Articles 169 et seq. of the EC Treaty (now Articles 226 et seq. EC). In particular, Article 93 allows the Commission, if it finds that aid granted by a Member State or through State resources is not compatible with the common market having regard to Article 92, to decide that the State concerned is to abolish or alter the aid within a prescribed period of time. If the State does not comply with that decision within the prescribed period, the Commission or any other State concerned may, in derogation from the procedure laid down in Articles 169 and 170, refer the matter to the Court of Justice direct.

43. It is clear from the wording of Article 93 that the power of the Commission to adopt the decisions in question is not general in nature, but is strictly limited to cases in which it considers that a Member State has infringed the rules of the Treaty on State aid. However, the Commission cannot have recourse to the special procedure provided for in Article 93 of the Treaty to declare a national measure incompatible with other rules of the Treaty, in this case, those which guarantee freedom of establishment, since in these cases the Commission must follow the procedure set out in Article 169 of the Treaty, which offers more 'safeguards' for the Member State concerned.

44. From the foregoing it is clear that, in the part where the tax system adopted by Germany is stated to be in breach of the provisions of the Treaty on freedom of establishment, the decision appears to be vitiated by lack of competence. This means that the question whether the prescriptions contained in the EStG are actually incompatible with Article 52 of the Treaty need not be examined on the merits. However, since that assessment does not affect the enacting terms of the decision, it does not call its legality into question.

Conclusion

45. For the reasons given above, I suggest that the Court:

(1) dismiss the application;

(2) order the applicant to pay the costs of the case.