II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 December 1999

on aid scheme C 1/99 (ex NN 133/98)/State aid to non-residential building tenants in the Customs House Docks Area in Dublin

(notified under document number C(1999) 5206)

(Only the English text is authentic)

(Text with EEA relevance)

(2000/620/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments [1] pursuant to the provisions cited above and having regard to their comments,

Whereas:

I

PROCEDURE

(1) The Commission was informed on the above State aid scheme while examining notified aid scheme N 267/98, concerning tax incentives in a 12-acre site in the Customs House Docks Area (CHDA).

(2) In 1986 the Commission had approved the urban renewal scheme 'Incentives for development of certain inner city areas' (N 56/86, letter to the Irish authorities SG (86) D/10282 of 19 September 1986) providing for a package of tax incentives for building owners and tenants in a 27-acre site in the CHDA (the 'original' site). Following a request by the Commission, the Irish authorities informed it of the extension of the above scheme with regard to its geographical scope and its termination date, by letter of 28 June 1990. At the time, the Commission did not react to this communication.

(3) The Irish authorities further modified this scheme by way of the Finance Acts of 1992 to 1994 and 1995, without notifying these modifications to the Commission. However, by letter of 30 January 1998 the Irish authorities notified to the Commission a scheme providing for the same package of incentives for a 12-acre site in the CHDA. By letter of 8 May 1998, the Irish authorities withdrew from this notification the tax incentives offered to tenants. By letter of 20 October 1998 the authorities announced that despite their withdrawal from the notification, the tax incentives for tenants could be lawfully awarded, since, according to Ireland, they were covered by the approval in 1986 of the first urban renewal scheme (N 56/86).

(4) By letter dated 9 February 1999, the Commission informed Ireland that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the tax incentives for tenants awarded on the basis of the Finance Acts of 1992 to 1994 and 1995.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit their comments on the aid.

[1] OJ C 99, 10.4.1999, p. 2.

[2] See footnote 1.

(6) The Irish authorities submitted their comments to the Commission by letter of 9 March 1999. By letter dated 27 July 1999 Ireland informed the Commission that no grants had been made after 2 December 1998 and that no further grants would be made under the scheme, the scheme having terminated on that date. By letter dated 22 November 1999 Ireland informed the Commission that it would modify the scheme.

(7) The Commission has also received comments from the following interested parties: the Irish Business and Employers Confederation (IBEC), A & L Goodbody, the Dublin Chamber of Commerce and KPMG Chartered Accountants. The Commission has forwarded these comments to Ireland, which was given the opportunity to react.

II

DESCRIPTION OF THE AID

(8) The aid covered by this investigation procedure takes the form of tax incentives for tenants of non-residential property. The incentives in question are the following:

— 'double rent relief', meaning that for tax purposes the company is deemed to pay double the actual annual rent. In principle, this aid is granted against trading income for 10 years,

— 'local rates remission', meaning relief, in principle for 10 years, from the local property tax.

(9) The geographical area concerned consists of two sites in the CHDA, namely, a 27-acre site, designated in 1986, and a 12-acre site designated at a later stage.

(10) The aid recipients are tenant companies entering into leasing contracts in relation to non-residential buildings in the CHDA. The scheme is not sector-specific. International financial services companies are not excluded. The scheme does not apply to sectors of industrial activity subject to special rules and frameworks of Community law, including sectors falling under the ECSC Treaty, and those of shipbuilding, transport, fisheries and agriculture, together with the processing and marketing of agricultural products (as set out in the relevant guidelines ([3])).

(11) Qualifying leases are long-term (at least 15 years at the 27-acre site and 25 years — with one case of 14 years — at the 12-acre site).

(12) The purpose of the scheme is to promote regional development by providing an incentive to companies to operate in the area in question, which used to be one of the most derelict and dangerous of Dublin. It is noted that the whole of Ireland qualifies, until 31 December 1999, as an assisted region under Article 87(3)(a) EC for the purposes of national regional aid and as an Objective 1 region for the purposes of the Structural Funds.

Duration of the scheme

(13) It is noted that the initial urban renewal scheme, including the modifications communicated in 1990, had a termination date set at 24 January 1993 (a time limit within which expenditure qualifying for the award of capital allowances to the building owners must have been incurred). The same date was also the deadline for entering into leasing contracts giving entitlement to tax incentives for the tenants.

(14) With the 1992 to 1994 Finance Acts the scheme's termination date was extended to 24 January 1997 and the following special clause was added:

'a lease for double rent relief purposes may be entered into for up to two years after the scheme's termination date.'

This clause applies when no leasing contracts have been entered into during the construction works, or before, and thus the completed building has no tenants.

(15) By virtue of this clause, the deadline for entry into qualifying leasing contracts was extended to 24 January 1999. The 1995 Finance Act also extended the scheme's termination date to 24 January 1999 and consequently, in accordance with the special clause mentioned above, the deadline for qualifying leasing contracts to 24 January 2001.

(16) By letter dated 27 July 1999 Ireland informed the Commission that the scheme had been modified, the termination date of the scheme now being 2 December 1998. In addition, during the course of the proceedings Ireland informed the Commission that it would modify the scheme. Under the terms of the modified scheme, the two reliefs will be available only until 31 December 2003 (that is, the reliefs will be available only in relation to rent and rates normally accruing up to and including 31 December 2003), unless certain conditions are fulfilled. Those conditions are either that (a) the construction of the building was completed before 1 April 1998 or (b) the construction of the building commenced before 1 April 1998 and the tenant occupation of the completed building commenced before 9 February 1999. Where either condition (a) or (b) applies, the two reliefs will continue to their intended end-date. This Decision is restricted to assessing the compatibility with the common market of the modified scheme.

([3]) OJ C 29, 2.2.1996, p. 4.

Grounds for initiating the procedure

(a) *Unlawfulness of the aid*

(17) The non-notified modifications to the initial scheme, effected by the 1992 to 1994 and 1995 Finance Acts, extended significantly the scheme's termination date, the deadline for entering into leasing contracts and consequently the end of the enjoyment of the double rent relief and rates remission. In the Commission's view, such modifications to a scheme are not simply implementing measures and, although they do not alter the nature of the aid, they change the scheme to a substantive degree. Thus they should have been notified pursuant to Article 88(3) EC which lays down that 'the Commission should be informed, in sufficient time to enable it to submit its comments, of any plans to [...] alter aid'.

(b) *Doubts as to the compatibility of the aid*

(18) In its decision opening the procedure the Commission stated its view that the double rent relief and the local rates remission constitute operating aid because they relieve the ordinary tax burdens of a company.

(19) No derogation among those provided under Articles 87(2) and 87(3)(c) EC may apply in relation to this aid. The only possible derogation from Article 87(1) EC would be the one laid down in Article 87(3)(a) EC (aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment). This is possible, first, because Ireland as a whole qualifies as an assisted area for national regional aid on the basis of that Article. Secondly, it is possible because, according to the 1988 Commission communication on the method for the application of Article 92(now Article 87)(3)(a) and (c) to regional aid ([4]) and specifically point 6 thereof concerning the range of aid instruments required to promote regional development in Article 87(3)(a) areas, it is accepted that the Commission may, by way of derogation, authorise certain operating aid in Article 87(3)(a) regions under certain conditions which must be demonstrated by the Member States. Thus, the aid must be:

— limited in time and designed to overcome the structural handicaps of enterprises located in those regions,

— designed to promote a durable and balanced development of economic activity and not give rise to overcapacity at the Community level, such that the resulting Community sectorial problem produced is more serious than the original regional problem; in this context a sectorial approach is required and in particular the Community rules, directives and guidelines applicable to certain industrial (steel, shipbuilding, synthetic fibres, textile and clothing) and agricultural sectors, and those concerning certain industrial enterprises involving the processing of agricultural products are to be observed;

— not granted in violation of the specific rules on aid granted to companies in difficulties.

In addition, an annual report must be sent to the Commission, indicating total expenditure (or loss of revenue in the case of tax concessions and social security reductions) by type of aid and an indication of the sectors concerned. Furthermore, aid designed to promote exports to other Member States is excluded.

(20) The 1988 communication, mentioned above, recognises that 'in the early stages of development [of the Article 87(3)(a) regions] maintenance of existing investment, perhaps on a short or medium-term basis, can form a sine qua non for the attraction [through operating aid] of new investment which will help in turn to develop the region'. Considering that in 1994, the regions concerned were no longer in the early stages of their development and also that the operating aid awarded through the tax incentives for tenants is enjoyed for 10 years, the question at this stage is whether successive geographical and time extensions of a scheme with long-lasting effects could be in keeping with the above position taken in the 1988 communication.

(21) It was in these circumstances that the Commission expressed its doubts, in a decision opening the Article 88(2) EC procedure, as to whether the tax incentives for Tenants under the 1992 to 1994 and 1995 Finance Act were compatible with the common market ([5]).

III

COMMENTS FROM THE IRISH AUTHORITIES

(22) In their written comments, the Irish authorities have presented three lines of argument.

(23) The contested aid is not unlawful (NN) but covered by the approved 1986 urban renewal scheme (N 56/86). The authorities' response aims to prove that, without time extensions of that original scheme, no results in terms of urban development would have been achieved.

([4]) OJ C 212, 12.8.1988, p. 2.

([5]) It is noted that in the decision opening this procedure the Commission has approved the tax incentive of capital allowances for building owners in the 12-acre site (N 267/98, termination date, 31 December 1999) and for the 27-acre site (NN 133/98, termination date 24 January 1999).

Thus, the authorities consider these extensions to be 'essential implementing measures' of the 1986 scheme and not, as the Commission maintains, substantive modifications to the original scheme which justify a notification.

(24) The double rent relief and rates remission in favour of tenants are not operating aid. The authorities insist on the 'package' logic: incentives to both owners and tenants are necessary in order to attract the investments in the derelict areas concerned. Thus, the whole package constitutes investment aid. On the basis of this logic, the Commission had approved this combination of reliefs in 1986, without making any mention of whether the aid was investment or operating aid. The Commission did not contest this logic up to as recently as December 1997, when it approved as investment aid the same package of reliefs for different enterprise zones in Ireland.

(25) Even if the reliefs for tenants were to be considered operating aid, this is compatible with the relevant rules. The authorities describe how the award of the aid in the 27 and 12-acre sites complied with the conditions for the admissibility of regional operating aid as these are laid down in the 1988 guidelines.

(26) Specifically, the incentives are limited in time.

Incentives to overcome the structural handicaps of enterprises

(27) The fiscal incentives in question were specifically designed to overcome the structural handicaps of the enterprises operating in the area in question.

(28) The argumentation on this point must be read in the context of a regional development policy for an area covered by the derogation under Article 87(3)(a) EC as well as in the context of a targeted and integrated urban development policy (also endorsed by other Community actions, like the URBAN initiative). For reasons pertaining to the condition of the site, the structural handicap of the enterprises receiving aid is related to their location.

(29) The authorities provide a historical review and photographic record of the urban renewal process specifically as follows.

(30) The first urban renewal scheme was approved in 1986 in order to reclaim former dockland areas which had become redundant with the transfer of the port facilities to a new location. With the continuing decline of port employment, the area became under-utilised and derelict and also suffered from significant social problems during the 1970s and 1980s, notably high unemployment, with associated poverty, crime and vandalism. During this period most new commercial and residential development within the city took place on the more fashionable south side of the river Liffey, continuing an established trend. In the absence of occupier demand to settle in these areas, no commercial developer was prepared to risk operating there. The bias against the CHDA was reinforced by the fact that it was located beside a local authority residential complex (in Sheriff Street) with a reputation for social deprivation, drug-taking, crime and vandalism.

(a) *The period between 1986 and 1991*

(31) The Customs House Docks Development Company has been awarded, by way of an international competition, the contract for the development of the CHDA. The winning proposal for the CHDA included offices, residential apartments, and hotel, car-parking, cultural, retail and leisure facilities.

(32) In 1987 it was recognised that the development of the CHDA would have to act as a catalyst for the development of adjoining sites. On 23 May 1988 the 12-acre site was designated as a buffer between completed developments and further dereliction in the eastern part of the CHDA, notably the Sheriff Street residential complex. The Irish authorities have provided clear evidence (letter of 11 June 1999) showing that this designation was annexed to the 1990 communication to the Commission concerning modifications to the initial scheme.

(33) Construction works on the 27-acre site commenced in June 1988.

(b) *The period between 1991 and 1994*

(34) By the end of 1991, only 34 % of the total development proposed in the 27-acre site had been completed. No development took place between 1991 and 1994 owing to the economic crisis (the Gulf war, economic recession, the currency crisis of 1992 to 1993, high interest rates and an unprecedented decline in the Irish property market). Unlike the more established southern location, commercial banks were unable to secure project finance.

(c) *The period between 1994 and 1997*

(35) By the end of May 1995 only 38 % of the 27-acre site was fully developed. The extension of the tax incentives allowed for 60 % of the site to be developed by the end of that period. The difficulties over the 12-acre site continued and posed a problem of image and security for candidate projects in the 27-acre site.

(d) *The period since 1997*

(36) Only when the development of the 27-acre site was substantially advanced was it possible to envisage the development of the 12-acre site. The authorities cite professional views according to which the continued availability of tax incentives was a sine qua non for the continuation of development works. The demolition and redevelopment of the Sheriff Street residential complex, owing to residential tax incentives, also favoured the cultural revolution required if commercial office development was to take place in the most deprived inner city area of Dublin.

(37) The professional advisors cited by the Irish authorities confirm that tenants would be most unlikely to operate in the CHDA, in preference to other more attractive areas, unless the incentives were available. It is also pointed out in the authorities' comments and in the supporting reports that the existence of pre-letting agreements, or agreements for lease, were important for the investors in buildings and for banks in the granting of loans.

(38) The incentives offered were designed to alleviate the structural handicap of the enterprises operating in the area by helping to improve it.

Durable and balanced development

(39) The tax incentives have been designed to promote a durable and balanced development of economic activity in the CHDA and not to give rise to sectorial overcapacity.

(40) The durable character of the results obtained through this scheme is a priority objective of the scheme. In their written opinion the authorities emphasise that all tax reliefs (double rent relief, rates remission and the capital allowances) are combined and structured in a way which seeks to tie both the owners and the tenants into a long-term commitment to the area. (The capital allowances for instance are adjusted downwards if the owner sells the building during the 14-year write-off period). Without the double rent relief and rates remission spread over ten years, it would not be possible to persuade tenants to commit themselves for such long periods to the area. Through this commitment, the area is given time to become established and accepted as a business location.

(41) As regards the balanced nature of the development, the authorities prove that the incentives in the CHDA have been provided, without targeting specific sectors, as part of an integrated and wider development plan of the area which is coordinated by a single authority and combines, successfully, enterprise and residential development.

(42) The scheme has not given rise to sectorial overcapacity at the Community level.

(43) Special rules on State aid in certain sectors and on enterprises in difficulties have been adhered to.

(44) The incentives in question were never designed to promote exports to other Member States.

(45) Since the incentives under examination had never been described by the Commission as operating aid, the Irish authorities have not submitted annual reports. They have, however, made regular public pronouncements (such as public invitations for tender in the C series of the *Official Journal of the European Communities*) announcing the development of the site. In the context of this investigation procedure, however, the authorities have provided all information requested on all the projects in the CHDA.

(46) Furthermore the authorities have underlined that the double rent relief and the rates remission for non-residential property tenants have not been included in the new urban renewal (N 563/98) or pilot rural renewal scheme (N 564/98), nor in the scheme concerning an enterprise zone adjacent to the Cork regional airport (N 204/99).

(47) In its letter initiating the Article 88(2) EC procedure, the Commission had also pointed out that the successive extensions of this long-lasting operating aid might extend the effect of this aid beyond the 'early stages of development'. The authorities answer this point by referring to the slow progress in developing the CHDA, completed development representing by now just 13 % of the 'urban waste land' in the Docklands area.

IV

COMMENTS FROM INTERESTED PARTIES

(48) Comments submitted by interested parties may be summarised as follows.

(49) The incentives are either not State aid or are, at least, aid exempted under Article 86(2) EC, because the State is only rewarding in a reasonable manner the 'occupants' for taking the risk (which would have been otherwise borne by the State) of developing the site. The Customs House Docks Authority (and its successor, the Dublin Docklands Development Authority) has been entrusted with the public service obligation to develop the sites in question. The site's 'occupants' are essentially performing, through joint ventures with this Authority, some of the tasks which have been entrusted to the Authority on behalf of the State. The aid is permissible in the light of Article 86(2) EC, as being necessary to ensure the performance of a service of general economic interest.

(50) The measures in question are not unlawful aid, because they represent an 'immaterial' modification to an existing scheme which was approved by the Commission under Article 87(3)(a) EC in 1986. Geographical extensions do not alter in any material way the conditions on the basis of which that approval was granted. Furthermore, the 12-acre geographical extension had been communicated to the Commission in 1990. Time extensions were introduced in order to help fulfil the urban renewal objective of the scheme which was being achieved at a very slow pace.

(51) The measures in question do not fall within the scope of Article 87(1) EC because they do not affect trade between Member States, and because the levels of aid received by individual recipients are *de minimis*.

(52) To the extent to which the aid is considered to fall within the scope of Article 87(1) EC it qualifies for exemption under Article 87(3)(a) EC, as regional investment aid. Besides the status of the area in question as an area qualifying for regional aid, the party underlines the unemployment situation, the lengthy process of development and the absolute need to find and secure tenants.

(53) Even if the scheme were to be considered operating aid, it is compatible with the common market because it complies with the conditions set forth in the 1988 communication on the application of Article 87(3) to regional aid, as far as the granting of aid in regions contemplated by Article 87(3)(a) is concerned.

(54) A legitimate expectation has been created on the part of the recipients who are already installed in the area and who have taken all diligent and prudent steps to verify themselves that the aid was legal; a tenant in the 'original' site had moved activities there on the clear understanding and expectation that the CHDA as a whole would be developed.

(55) It is questioned how the Commission could conclude that the scheme is incompatible with the common market without having researched comparable urban renewal incentives in other Member States. It is claimed that such incentives are very common and feature in URBAN programmes.

V

ASSESSMENT OF THE AID

V.1. ***State aid***

(56) After having considered the opinion of the Irish authorities as well as the arguments of the parties, the Commission maintains its position, expressed in the letter to the Irish authorities initiating the Article 88(2) EC procedure, that the aid scheme under examination constitutes unlawful, operating State aid, within the scope of Article 87(1) EC.

(57) The Commission considers that the measures in question involve aid granted by the Member State or through State resources. Article 87(1) EC refers to aid granted 'in any form whatsoever'. Aid granted in the form of tax exemptions (such as rates remission) or other favourable tax arrangements (such as double rent relief) involve State resources, in so far as the Member State thereby forgoes fiscal income, or the possibility of fiscal income, that would normally accrue to it. This is so whether or not such aid is granted by the central authorities of the Member State or by its local authorities, which are part of or emanations of the Member State. The Commission considers that such aid clearly distorts or threatens to distort competition by favouring the recipient undertakings compared with other undertakings located in the same Member State that do not receive such aid. Furthermore, having regard to the broad terms of the scheme, it cannot be excluded that such aid may affect trade between Member States. This is confirmed by the information that the Commission has concerning the activities of certain of the individual beneficiaries. In particular, for example, the Commission considers that aid to undertakings operating in the financial services sector (and related or analogous sectors) is, in principle, capable of affecting trade between Member States. In the first place, there is significant intra-Community trade in financial services, a sector that has been the subject of extensive liberalising legislation at Community level, and which may be profoundly affected by the introduction of the euro. In the second place, financial services companies are increasingly mobile, and State aid may well be a significant factor affecting their assessments of the best place to operate their business. Similarly, in a sector such as hotels, regardless of the geographic market that the particular establishment may be said to be serving, there always remains the possibility that undertakings in other Member States may wish to establish themselves in that market, but are prevented or deterred from doing so because of the State aid. In such cases, too, the Commission considers that an effect on trade between Member States cannot be ruled out.

(58) The Commission does not accept the contention that, even if the Member State is only rewarding the beneficiaries in a reasonable manner because they have agreed to behave in a way that not only benefits them but also fulfils one of the Member State's (and the Community's) policy objectives, it follows that no State aid is involved. Such an application of Article 87(1) may be appropriate in certain cases where the Member State is directly purchasing, for example, land, goods, securities or services for consumption by it. It is not appropriate

when, as in this case, the State is inducing behaviour intended to achieve more general policy objectives, such as those indicated in Article 87(2), Article 87(3) or Article 86(2) EC. Any other approach would risk depriving Article 88(3) EC of its effectiveness. Presenting the arrangements under consideration as a 'transfer of risk' by the Member State does not change this view, but confirms it. Thus, whether or not the subsidy in the present case may be considered compatible with the common market must be assessed not in the context of Article 87(1) EC but in the context of Article 87(3) EC and, where appropriate, in the context of Article 86(2) EC [6].

V.2. ***No existing aid scheme***

(59) Ireland and certain of the interested parties have argued that the scheme under examination is an existing aid scheme, or that the individual aid grants in question are covered by an existing aid scheme. The Commission notes that the argument invoked does not concern the substantive conditions of the individual aid in relation to the scheme that is alleged to cover it. The problem is purely temporal. Furthermore, there is no dispute as to the facts. The date on which the aid scheme previously authorised by the Commission came to an end is not disputed: neither are the dates on which the individual aids in question were granted. Nor is it disputed that the individual grants were made after the end of the period of validity of the scheme originally authorised by the Commission. Finally, it is not disputed that the new scheme (or the extension of the original scheme) was not notified to the Commission and has never been authorised by it. Thus, the argument advanced by Ireland and certain of the interested parties is essentially a question of principle, in respect of which the Commission requires no further factual information in order to reach its determination.

(60) When the Commission approves an aid scheme that is established for a defined period of time, the Commission's authorisation only covers the scheme up to the specified date. If a new scheme is established to cover the period after the specified date, or if the existing scheme is modified so as to extend its period of validity, or if new individual aids are granted, then new aid is involved, which is not covered by the Commission's original authorisation. Such new aid must be notified to the Commission in accordance with Article 88(3) EC. The Commission is not entitled to treat such arrangements as existing aid.

(61) The Commission considers that, in principle, any modification of an existing scheme requires notification. In any event, the Commission does not consider that temporal extensions to aid schemes could, as a general rule, be described as immaterial — certainly not in this case, where the extensions cover several years. Neither does the Commission consider that modifications of the essential elements of a scheme, whether of its substantive provisions, territorial scope, or temporal application, could be considered to be implementing measures. Nor would considerations of practical expediency, including the assertion that the extension contributed in practice to the realisation of the original scheme's objective, release the Commission from its obligation to apply the appropriate Treaty rules [7].

(62) Having regard to all these considerations, the Commission confirms its view that the aid scheme in question is not an existing aid scheme, and that the individual aid grants concerned are not covered by any existing aid scheme.

V.3. ***Failure to notify***

(63) The Commission recalls the rule contained in Article 88(3) EC pursuant to which the Commission is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Commission notes and regrets that, in this case, Ireland has not complied with that obligation.

(64) The Commission would further recall that undertakings in receipt of State aid that has been implemented without being notified to the Commission, and which has been found by the Commission to be incompatible with the common market, are not entitled to rely on the Community law principle of legitimate expectations in order to justify retaining such State aid. In any event, such considerations are irrelevant, regard being had to the Commission's determination that the scheme, as modified by Ireland, is compatible with the common market.

V.4. ***De minimis***

(65) The Commission stresses that this Decision concerns the scheme. not the individual measures implementing the scheme in relation to specific undertakings, some of which may constitute State aid within the meaning of Article 87(1) EC, and some of which may not. This Decision does not affect any State measures which do not constitute State aid within the meaning of Article 87(1) EC. Such measures may continue to be implemented without contravening the State aid rules. In

[6] Case T-106/98 *FFSA* v *Commission* [1997] ECR II-229.

[7] Case C-295/97 *Piaggio*, judgment of 17 June 1999, paragraphs 45 and 46, not yet published in the Official Journal.

particular, the Commission points out that measures in conformity with the *de minimis* rule ([8]) are not caught by Article 87(1) EC. Should the Member State have any doubt as to whether or not, in a specific case, Article 87(1) EC applies, it is for the Member State to notify the Commission of the specific case.

V.5. ***Compatibility with the common market***

Operating aid

(66) In principle, the Commission does not consider the payment of periodic taxes, rates or other charges, expenses or rents to be in the nature of investment. On the contrary, the Commission considers that an undertaking doing business in Ireland would normally have to bear the expense of paying taxes on its taxable income, established, in principle, on the basis of income less costs, without any special provision for artificially inflating such costs (such as double rent relief). Such undertakings would also normally have to bear the expense of paying local rates and other charges or rents. In the Commission's view, such expenses would normally have to be borne by the undertaking in its day-to-day management or its usual activities. They would normally occur periodically over a continuous and indefinite period. The Commission concludes that the aid in this case is aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities ([9]). In this respect, the Commission recalls its view that operating aid typically takes the form of tax exemptions. The Commission concludes that such aid is not investment aid, but operating aid. The Commission does not consider that assertions about the unemployment situation, the lengthy process of development, the risks taken by tenants and the absolute need to find and secure tenants are capable of altering the objective characteristics of the aid. Neither does the Commission consider in all the circumstances of this case that the aids in question should be considered together with the capital allowances granted to developers as a single 'package', the whole being construed as investment aid. Such an approach could well cause operating aids to be given the more favourable treatment reserved for investment aid, not only in regions covered by Article 87(3)(a) EC, but also in regions covered by Article 87(3)(c) EC. Such an approach would also be a matter of particular concern in regions shortly due to lose their Article 87(3)(a) status, as in this case. In the light of all these considerations, the Commission confirms its view that the measures in question involve operating aid.

Application of the substantive regional aid rules

(67) The aid in question will be assessed on the basis of Article 87(3)(a) EC which is the only derogation from Article 87(1) EC which may apply in this case.

(68) The Commission accepts the arguments put forward by the Irish authorities on the compliance of this operating aid with the substantive conditions laid down in the regional aid communication specifically as follows.

(69) The aid is limited in time

(70) The history of the development of the site, professional experts' opinions and the comments of tenants, prove that the handicap suffered by the enterprises operating in the CHDA has been the poor condition of the site and the fear that its deservedly negative reputation in terms of safety would reflect upon the image of the company. The incentives were specifically designed to overcome this handicap.

(71) The incentives have been designed to promote a durable and balanced development of economic activity in the CHDA and do not give rise to sectorial overcapacity. The incentives have not targeted specific sectors but were designed to alleviate the structural handicap of enterprises operating in the area, by helping to improve the area as such. Furthermore, the overall effect of the scheme has been a balanced economic development in the CHDA, achieved as part of an overall plan having a beneficial impact upon the residential sector as well.

(72) Special rules on State aid in certain sectors and on enterprises in difficulties have been adhered to.

(73) The incentives were never designed to promote exports to other Member States.

(74) In the context of the procedure under Article 88(2) EC, the Irish authorities have fully informed the Commission on the implementation of the scheme so far.

Employment

(75) One of the interested parties (but not the Member State) has referred to the guidelines on employment aid ([10]). Having regard to the fact that the Commission approves the modified scheme as compatible with the common market, the Commission considers that these submissions are no longer pertinent.

([8]) Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9).

([9]) Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 48.

([10]) OJ C 334, 12.12.1995, p. 4.

Effects of the aid beyond the period of eligibility as an assisted area

(76) In principle, the Commission takes as the point of departure for its analysis the time at which an aid is granted as opposed to the time when payments are subsequently made. However, when assessing whether or not it may consider an aid to be compatible with the common market, the Commission takes into account all the relevant facts, which may in certain circumstances include the time at which the costs (in respect of which aid is granted) accrue and the time at which the aid is paid. In the great majority of cases, no special difficulty should arise. A difficulty may arise, however, particularly in the case of operating aid, where aid is granted in relation to costs which are expected to accrue periodically over a relatively long period of time in the future, the aid also being paid periodically as those costs accrue. This may apply especially when the period of time in question extends significantly beyond the validity of an existing legislative framework, and particularly when the aid grant would post-date the time at which relevant changes in the legal framework became reasonably foreseeable. Such considerations are further reinforced in cases of fiscal aid, in respect of which the Commission is making special efforts to ensure equitable conditions of competition ([11]).

(77) These concerns may be particularly pertinent in the context of regional aid, especially when the region in question loses its status as an assisted region, or changes its status, with the consequence that operating aid can no longer be authorised. Exceptionally, operating aid may be considered to contribute to regional development in Article 87(3)(a) regions, provided that certain conditions continue to be fulfilled. Such aid may be justified because of the handicap affecting the undertaking as a result of its location in an Article 87(3)(a) region, and because of the contribution that the undertaking makes, simply by its presence, to the development of the Article 87(3)(a) region. As long as both of these elements are present — that is, as long as the region continues to fall under Article 87(3)(a) — such aid may continue to be justified. However, as soon as the region ceases to fall under Article 87(3)(a), the justification for such operating aid also ceases. It is this continuous nature of operating aid that particularly leads to the conclusion that such aid should not, in principle, be authorised in relation to periodic costs that continue to accrue for a significant period after the date on which the region in question ceases to fall under Article 87(3)(a). Otherwise, the restrictive and strict nature of the derogation, as an exception from the general rule, would not be respected. Any other approach could compromise the effectiveness of the exercise by which the Commission periodically establishes the list of assisted areas, ensuring that aid is focused on those regions that most need it.

(78) The Commission would also point out that periodic tax exemptions are as a rule regarded as schemes, having regard to the fact that Member States usually remain, in principle, free at any time to alter their fiscal arrangements. As aid schemes, periodic tax exemptions would be susceptible to the procedure provided for by Article 88(1) EC. The Commission would also recall that its objective as regards regional aid schemes is to limit their period of validity to the period of validity of the existing regional aid maps. For example, the Commission proposed appropriate measures to that effect in the context of the introduction of the 1998 regional aid guidelines. In these circumstances, the Commission cannot accept that by the simple device of the Member State's entry into a formal commitment, whether by administrative act or by contract, what is in reality an aid scheme potentially caught by the Article 88(1) EC procedure could be presented as escaping that procedure, and as not being subject to any further scrutiny. The formal circumstances of the grant should not be permitted to obscure the real effect of the aid.

(79) Having regard to all of these considerations, having regard to the complex social and economic assessments that may be involved, and having regard to the need to ensure that aid does not adversely affect trading conditions to an extent contrary to the common interest, the Commission may consider such arrangements to be incompatible with the common market.

(80) In this case, it is anticipated that Dublin, which has been a region eligible for regional aid under Article 87(3)(a) EC, will become a region eligible for regional aid under Article 87(3)(c) EC with effect from 1 January 2000. Consequently, it would not be possible for Ireland to grant regional aid in the form of operating aid, in the Dublin area, with effect from that date Notwithstanding this situation, the Member State originally envisaged that it would allow periodic tax incentives (in the form of double rent relief and rates remission) to be available in relation to costs normally incurred and taxes paid periodically over a period of some 10 years, such period potentially extending, substantially beyond the date on which Dublin's status as an assisted region under Article 87(3)(a) would normally be lost. Having regard to the considerations set out already and to all the circumstances of the case, the Commission would not normally consider that such a measure would be compatible with the common market. However, the Commission has also taken into account the fact that Ireland has modified the original scheme, introducing, with certain exceptions, a termination date of 31 December 2003. Having regard to all the particular circumstances of the case, and particularly to the fact that the Commission treated similar aid measures as investment aid until the end of

([11]) Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

1997, the Commission considers that such arrangements would be reasonable, also having regard to the length of transitional arrangements that may be considered compatible with the common market in similar circumstances. The Commission concludes that the modified scheme may be considered compatible with the common market.

Article 86(2) EC

(81) One of the interested parties (but not the Member State) has invited the Commission to take cognisance of the relevance of Article 86(2) EC to this case. Having regard to the fact that the Commission approves the modified scheme as compatible with the common market, the Commission considers that these submissions are no longer pertinent.

VI

CONCLUSIONS

(82) The Commission finds that Ireland has unlawfully implemented the aid in question, in breach of Article 88(3) of the Treaty. However, after examining the modified scheme (and taking into account the undertaking given by Ireland) the Commission has concluded that it may be considered compatible with the common market pursuant to Article 87(3)(a) EC,

HAS ADOPTED THIS DECISION:

Article 1

The modified State aid scheme by which entitlement to double rent relief and rates remission may be granted to lessees in the relevant area of the Customs House Docks Area of Dublin, Ireland, is compatible with the common market.

Article 2

This Decision is addressed to Ireland.

Done at Brussels, 22 December 1999.

For the Commission

Mario MONTI

Member of the Commission