II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 June 2000

on the aid scheme implemented by Ireland to promote the transport of Irish livestock by sea to continental Europe

(notified under document number C(2000) 1659)

(Only the English text is authentic)

(2000/625/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 called on interested parties to submit their comments pursuant to the provision cited above [1],

Whereas:

I

PROCEDURE

(1) By letter of 18 September 1997, registered on 29 September 1997, addressed to the Director-General of Agriculture, the Irish authorities notified the Commission pursuant to Article 88(3) of the EC Treaty of their intention to grand IEP 1 000 000 in order to provide direct sea access to markets on the European continent for producers of livestock in Ireland. The case was registered as aid N 633/97.

(2) On 1 October 1997, a meeting took place between Irish officials and the Commission.

(3) Supplementary information has been sent by letter of 1 October 1997, registered on 6 October 1997, by letter of 9 October 1997 and by letter of 18 December 1997. A letter from Mr Walsh, the Irish Minister for Agriculture, addressed to Commissioner Fischler, was received on 28 January 1998.

(4) By letter dated 10 February 1998, the Irish authorities were informed by the Commission that the case had been re-registered as non-notified aid under NN 1/98 as the first instalment of the aid had already been disbursed.

(5) By letter dated 25 February 1998, the Commission informed Ireland of its decision to initiate the procedure laid down by Article 88(2) of the Treaty in respect of the measure.

(6) 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.

(7) The Commission has received comments from interested parties. It forwarded them to Ireland which was given the opportunity to react. Its comments were received by letter dated 21 July 1998. By fax of 14 April 2000, the Irish authorities submitted further observations in connection with the possible recovery of aid.

II

DESCRIPTION OF THE MEASURE

(8) Ireland granted IEP 1 000 000 to a shipping company to ensure that Irish livestock could be exported by sea to continental Europe during the 1997 to 1998 winter

[1] OJ C 142, 7.5.1998, p. 8.

[2] See footnote 1.

season by roll-on roll-off transport which is suitable for the delivery of small lots of animals to individual fatteners on the continent. The lorries charged with livestock enter ('roll-on') the ship without having to be unloaded and at arrival 'roll-off' to supply different destinations.

(9) Before October 1997, two companies provided a regular direct sea-transport service for roll-on roll-off freight between Ireland and France. Pandoro Limited, a subsidiary of the P & O group, provided a year round freight service. Irish Ferries provided a summer-only service, and for commercial reasons discontinued its service each year between the end of September and the beginning of April.

(10) On 24 June 1997, P & O informed the Irish authorities by letter that Pandoro would permanently discontinue the carriage of all livestock (except for animals for breeding) on the ferry service they operate between Ireland and France after 31 July 1997. It was explained that this decision was consequent on pressure from the animal welfare lobby, and concerns about the impact of livestock transport operations on the perception of the P & O group as a whole. Concern was also expressed about the lack of proper enforcement of animal welfare regulations on the continent. As a result of this decision by P & O, no regular commercial service would be available for the direct transport of Irish livestock exports to France between 27 September 1997 and 1 April 1998.

(11) On 1 August 1997, the Irish High Court dismissed an application for an injunction by Irish exporters against Pandoro's decision. Thus, the Irish exporters of livestock faced a situation of being cut off from their traditional access route to Continental Europe.

(12) In these circumstances, the Irish Government decided to offer State aid in order to support a direct sea transport link between Ireland (Cork) and France (Cherbourg) for the transport of livestock. According to the Irish authorities, there was no viable alternative to this measure, since Irish Ferries was unable to continue its services during the winter season, and alternative routes for exports via the UK 'landbridge' route were closed for legal reasons in the case of bovine livestock because of the restrictions imposed on the export of live animals from the UK in the wake of the BSE crisis, or were unavailable for practical reasons. Moreover, the alternative of substituting exports of carcases in place of livestock was considered unacceptable for economic reasons.

(13) On 18 December 1997, the Irish Supreme Court reversed the decision of the Irish High Court and granted an order restraining Pandoro from refusing to carry certain types of livestock on any of its services between Ireland and continental Europe. However, this decision did not affect the payment of the aid for the establishment of the service provided by Gaelic Ferries.

(14) As to the actual form of the aid the following description was provided by the Irish authorities. A vessel (the MV Purbeck) was chartered from shipping brokers in London for a period of seven months and an option was obtained for a further charter of six months. According to the Irish authorities, the vessel chosen was the only one available suitable for the transport of livestock and there was a danger of it being chartered by another party. In support of this contention, the Irish authorities supplied copies of correspondence from London shipbrokers indicating that in early October 1997 there were three potential alternative charterers of the vessel.

(15) Prior to the granting of the aid, the Irish authorities invited selected companies to indicate the amount of aid they would need to start up a transport service between Ireland and France. Dundalk was the company selected to organise the new service. Dundalk set up a subsidiary called Gaelic Ferries to operate the service. Gaelic Ferries was to be responsible for all relations with the brokers and the owners of the vessel. Should the service prove successful, it was envisaged that Dundalk would buy the vessel in order to provide a continuous service.

(16) As far as operating costs were concerned, the projected figures provided by the successful applicant for the seven-month period October 1997 to April 1998 made provision for operating costs of IEP 3 030 000 (including charter costs). The aid represented the projected shortfall between expenditure and revenue during the period concerned.

(17) Gaelic Ferries had an initial capital of IEP 100 000 to cover the operating costs of the service (fuel, port charges, wages, etc.) which was provided in equal shares by Dundalk, the Irish road hauliers of livestock, through their trade association, and the Port of Cork, from which the service operated.

(18) IEP 450 000 of the aid was paid to Gaelic Ferries on 24 October 1997, and a further tranche of IEP 250 000 was paid in mid-December 1997. Two further instalments — leading to the total amount of IEP 1 000 000 — were paid in mid-February (IEP 200 000) and late April 1998 (IEP 100 000). The aid was 'front-loaded' to take account of the heavy start-up costs of the service. The Irish authorities confirmed that Gaelic Ferries would charge shipper rates 'which are in line with what would be charged under "normal market conditions"' and that 'there is no subsidisation of livestock exports' (letter of 18 December 1997). The charges would be monitored by the Irish authorities to confirm that they reflect the going market rates.

(19) Should the service cease prematurely, no further aid would be paid after the cessation of the service. The charter conditions required a 90-day penalty payment if the charter were terminated prematurely. This payment was guaranteed by the Port of Cork. There was no provision for repayment of the aid if the service proved successful.

(20) Gaelic Ferries would have a de facto monopoly of livestock transport on the route until Irish Ferries resumed operations in spring 1998. It would compete with Pandoro for other freight. In the event that the service was operating at full capacity, the operator would be required to give priority to livestock transport, within the limit of the number of places available.

(21) The ship had a total capacity of 54 units. However, due to animal welfare legislation, only 10 units, on the upper deck, could be used for the transport of animals. The remaining 44 units on the lower deck lacked proper ventilation, and could only be used for the transport of other freight. According to the Irish authorities, the maritime rates charged by the new ferry service would be in line with what would be charged under normal market conditions.

(22) The service began operating on 14 October 1997 on the basis of the legal commitment of the Irish authorities to grant support amounting to IEP 1 000 000 to be paid in instalments. The service was discontinued in April 1998, and no additional aid was granted for the maintenance of the service beyond the period originally envisaged.

(23) In the decision to initiate the procedure, the Commission expressed its doubts concerning the compatibility of the measure at issue with the common market, considering that the measure might constitute State aid incompatible with the common market as it appeared to fulfil the conditions of Article 87(1) of the Treaty without qualifying for any of the derogations provided for in paragraphs 2 and 3 of that Article.

(24) The Commission underlined the need to look further into two aspects of the measure possibly involving the grant of State aid. First, the professed objective of the measure was to secure Irish livestock exports jeopardised by the withdrawal of a carrier from this service. It appeared that there were grounds for considering that the aid might distort competition by favouring certain undertakings and that it affects trade between Member States in so far as it enables Irish exporters of livestock to sell their products in continental Europe at lower prices than would be possible if they had to meet the full economic cost of shipping the livestock. Furthermore, in so far as the measure constituted aid, it did not appear to meet any of the conditions for exemption under Article 87(2) or Article 87(3).

(25) Secondly, although the aid was presented by the Irish authorities as an aid to agriculture, the fact that it was being paid to a shipping company raised the question of whether the measure should alternatively or additionally be considered as an aid to maritime transport within the meaning of the relevant guidelines.

III

COMMENTS FROM INTERESTED PARTIES

(26) The Commission has received comments from Compassion in World Farming (CIWF) by letter of 29 May 1998. CIWF essentially supports the arguments which led the Commission to initiate the procedure in respect of the measure. They have added that on account of an injunction against Pandoro, that carrier had resumed carrying live animals from Ireland for further fattening on the continent in January 1998. Also, Irish Ferries resumed services on the route in May and are willing to carry all classes of live farm animals. Irish Ferries, in fact, operate two services, one between Rosslare and Cherbourg and one between Rosslare and Roscoff.

(27) According to CIWF, there was no risk of the situation evolving into a serious disturbance of the Irish economy as a whole as the Irish exporters could convert their trade (or a proportion of it) from live to meat exports. Already around 90 % in value of Irish exports are in meat form.

(28) CIWF points out that as Pandoro resumed carrying live animals in January 1998, the aid which was to be paid to Gaelic Ferries was not necessary to enable traders to export live animals to the continent.

IV

COMMENTS FROM IRELAND

(29) In its letter of 24 April 1998, Ireland challenges the arguments that led the Commission to open the procedure under Article 88(2) in respect of the measure.

(30) According to a first argument, given the importance of continental Europe as an export outlet for Irish livestock production, Ireland is entitled to step in and provide a means of export where no others exist.

(31) The Irish authorities emphasise the heavy dependence on exports in the Irish livestock sector. 90 % of production needs to be exported either in live or carcase form. Statistics are provided to show that in 1994 and 1995 live exports to the European continent accounted for

5 % to 6 % of total cattle disposals. Furthermore, the maintenance of a separate trade for live animals also plays a significant part in sustaining prices for Irish farmers as it ensures that Irish meat factories cannot enjoy a monopoly position as regards the disposal of Irish animals. In this context, the Irish authorities claim there is a positive correlation between the level of live trade and prices for young cattle.

(32) The BSE crisis in 1996 reduced farm incomes in general (for instance by 4,5 % in nominal terms in 1997) and had especially severe consequences for beef farmers. As many of the traditional third-country markets for live cattle closed, the only other substantial export market available was continental Europe. Disruption of access to that market would have a disproportionately destabilising impact on Ireland's market as, in particular for the beef sector, Ireland produces 10 times its internal consumption. Against that background it was impossible for the Irish Government to countenance a further income loss, especially for beef farmers. Furthermore, according to the Irish authorities, had the State not intervened, economic activity in general would have been disrupted as farm bodies and those engaged in the live export trade would have demonstrated and protested.

(33) The Irish authorities address the doubts expressed by the Commission in its decision to open the procedure under three headings:

— did the measure distort competition,

— did the measure fulfil the conditions for a subsidy of a Public Service Obligation as set out in the Community guidelines on State aid for maritime transport ([3]),

— alternatively, did the aid fulfil the conditions for exemption under Article 93(2) and (3) of the Treaty (now Article 87(2) and (3)).

(34) As regards the effects of the measure on competition, the Irish authorities begin by pointing out that by virtue of Article 36 of the Treaty, the competition rules apply to agriculture only to the extent determined by the Council. The State aid rules of the Treaty apply to trade in beef, veal, pigmeat and sheepmeat by virtue of the regulations establishing the relevant common organisations of the market. The application of Articles 87, 88 and 89 of the Treaty must therefore take account of the objectives of the common agricultural policy which are set out in Article 33 of the Treaty. These include ensuring a fair standard of living for the agricultural community, stabilising markets, assuring the availability of supplies and ensuring that supplies reach consumers at reasonable prices. Account must also be taken of the particular nature of agricultural activity, resulting in part from natural and structural disparities between the various agricultural regions. This approach was confirmed by the judgment of the Court of Justice of the European Communities in Case C-122/94 *Commission* v *Council* ([4]). Ireland was therefore entitled, if not required, to provide a means for the export of livestock to Europe.

(35) The Irish authorities contest the Commission's assertion that an increase in the freight rates paid for the transport of livestock to Europe would have caused an alternative shipper to enter the market. First, they point out that Pandoro's decision to cease transporting livestock was not a normal commercial decision. It resulted from the protests of animal rights activists and from concern of the effects of other aspects of Pandoro's activities. Since no other carrier had the capacity to carry livestock on the route in winter, a completely new market entrant would be required. However, this would be a very high-risk venture, since Pandoro could at any time decide to resume the carriage of livestock. Furthermore, any new market entrant would be subject to the same constraints, resulting from animal welfare legislation, which limit the number of lorries carrying livestock on any crossing to about 20 % of actual capacity. In order to ensure a profitable service, a new market entrant would have to compete with Pandoro for dry freight road haulage, in which the P & O Group, including Pandoro, has a very strong if not dominant position. Had Pandoro withdrawn from the route entirely, normal market forces might have made it possible for a competitor to enter the market. However, as it only selectively withdrew part of its capacity, this was not possible.

(36) The Irish authorities consider that viewed in this light, the payment of IEP 1 000 000 did not insulate trade conditions from the impact of market development. Any new entrant on the market would be obliged to charge competitive rates for the vast bulk of the freight it carried without the possibility of taking into account the costs of starting up the business. Prior to the entry of Gaelic Ferries onto the market, Pandoro enjoyed a seasonal monopoly for 'RoRo' transport of livestock

([3]) OJ C 205, 5.7.1997, p. 5.

([4]) [1996] ECR I-881.

between Ireland and continental Europe. Pandoro's decision to withdraw from that market effectively blockaded that trade. In order to ensure its continuance, in compliance with the common organisations of the market, and the aims of the common agricultural policy, the Irish Government was entitled to encourage another enterprise to enter the market, even though the bulk of that entrant's business would be the carriage of dry freight in direct competition with Pandoro. Market forces ensured that the new entrant charged competitive rates for dry freight. The Irish Government regulated the prices charged for the transport of livestock to ensure that the new entrant did not abuse its de facto monopoly.

(37) As regards the applicability of a rule governing the concept of a public service within the meaning of the guidelines on State aid in maritime transport, according to the Irish authorities, the route has to be considered to be thinly served within the meaning of the guidelines because there was no other service for the export of live animals from Ireland. The fact that the dry freight service could not be described as thinly served is not relevant, since a well-served dry freight route without any capacity for the carnage of livestock is of no benefit in terms of the free movement of animals.

(38) According to the Irish authorities, while there was no full public tender launched because of the urgency of the affair, a comprehensive and transparent selection procedure was implemented. Expressions of interest were received from a number of companies. On 17 September 1997, the Irish authorities had issued specific invitations to those interested to submit detailed business plans by 24 September 1997. Maximum sailings per week and in total were specified. Plans were required to clearly demonstrate the viability of any service proposed.

(39) Five business plans were received. These plans were independently assessed by the Nautical Enterprise Centre, based at Cork Regional Technical College. Two plans were assessed as unrealistic and one as insufficient in detail. A range of additional questions suggested by the assessor was put to the two remaining applicants. Additional issues explored included company structure and financing, marketing strategy, specific number of trips per week, berth availability and cattle facilities. The ship proposed, the MV Purbeck in both cases, had also to be inspected to ensure that regulatory obligations would be met and to fix a maximum capacity for livestock.

(40) The final decision on the successful applicant was only taken after detailed assessment of the additional information had been received.

(41) As part of the process, all requirements concerning the level and frequency of the service provided and the capacity and standards to be met were clearly specified. Payment levels were to be determined independently of the Irish authorities but would be monitored to confirm that they were in line with the rates normally applicable for the livestock transport service to ensure that there would be no hidden subsidy to producers. In the event, the rates charged by Gaelic Ferries for livestock exports have been exactly in line with the rates which had hitherto been charged by Pandoro and by Irish Ferries. Thus, there has not been any overcompensation on livestock exports nor, since the rates charged were not higher than the other operators rates, does the question of cross-subsidisation of other services arise.

(42) The provisional Gaelic Ferries trading profit and loss account for the period October to April shows a sales income of IEP 1,3 million with total expenditure, including overheads, of IEP 2,3 million. The deficit incurred in providing the service has been approximately equivalent to the grant given. Thus, the Irish authorities consider that the aid meets the requirement laid down in the guidelines that the aid should reimburse the extra costs incurred by the operator as a result of providing the service, and should be directly related to the calculated deficit incurred in providing the service.

(43) With regard to the other applicants (excepting the two 'finalists'), in one case the vessel was not immediately suitable, for animal welfare reasons, in that it lacked stabilisers. The second application was based on the purchase of a vessel by the Irish Government. The third sought a subsidy of a multiple of the figure contemplated by the Irish authorities. In any event, in the three cases where the business plans submitted were deemed unrealistic/inadequate by the independent evaluator, detailed examination of the ferries proposed did not arise.

(44) In this case the grant given was restricted to a period of just six months, well within the normal period of five years allowed by the guidelines, and was structured to be exceptional, temporary and digressive.

(45) On the other hand, the Irish authorities contend that the measure meets the conditions for exemption under Article 87(2) or (3) of the Treaty. As regards the application of Article 87(2)(b), Ireland claims that the Commission is wrong to express doubts as to the applicability of this exemption. The measure has to be considered as intended to make good damages caused by an exceptional occurrence. It is not reasonable to assume that aid qualifying for this provision must await the occurrence of the damage. It should be read to also include protective measures. However, in any event, the payments were made after the exceptional event occurred, i.e., the impossibility of exporting livestock from Ireland to continental Europe.

(46) The Irish authorities point out that the concept of 'exceptional circumstances' as mentioned in Article 87(2) of the Treaty has been referred to in the opinion of Advocate-General Cosmas in Case C-122/94, *Commission* v *Council*. It covers facts or situations which may relate to one sector in particular or to the economy in general, but which assessed in each case in a reasonable manner in the context of a specific Member State and a specific agricultural sector, show that there has been a change on such a scale, as compared with what was previously considered normal, or at least not extraordinary, that it has become clear that the situations previously obtaining have changed, that new situations have arisen and that protective measures are needed for which there is no provision in the existing rules governing the sector in question. The question whether in any Member State there is in a sector of production a state of crisis which cannot be dealt with by the existing machinery of the regulations governing that sector constitutes the essential factor for assessing whether or not there are exceptional occurrences as required by Article 87(2).

(47) The Irish authorities appear to accept the comment of the Commission that it must be careful not to shift normal entrepreneurial risks into the area of Article 87(2)(b) of the Treaty. However, they cannot emphasise strongly enough that the circumstances prevailing on the Irish beef market in the autumn of 1997 as a result of Pandoro's refusal to carry livestock went far beyond normal entrepreneurial risks and amounted to exceptional circumstances. Moreover, Pandoro's withdrawal cannot be seen as a normal economic event but was a reaction to protests of animal rights activists in the United Kingdom. In the Irish authorities' submission, the exceptional nature of the situation was reinforced by the fact that Pandoro withdrew its service selectively making it economically impossible for a new entrant to raise its rates in the dry freight sector unless it risked operating at solely 20 % of its capacity which would be wholly unprofitable. A new entrant has to compete on the sea-route with an existing supplier of a year-round service and a second supplier of a seasonal service for the transport of dry freight. The reference to 'historic rates' in the Commission's initiation of the procedure is thus not relevant to the argument.

(48) The Irish authorities contend furthermore that the withdrawal of Pandoro from livestock transport constituted an abuse of a dominant position within the meaning of Article 82 of the Treaty. In accordance with the judgment of the Court of Justice of the European Communities in Case C-265/95, *Commission* v *France* [5], the Irish authorities argue that a Member State has an obligation to prevent breaches of Community law by individuals. The Irish Government was therefore obliged to intervene to ensure that the action of Pandoro did not in fact jeopardise the free movement of agricultural products and thus undermine the objectives of the common agricultural policy.

(49) To this, Ireland adds that Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy [6] prohibited the dispatch from the United Kingdom of live bovine animals, thereby closing the landbridge route from Ireland to the continent, via the United Kingdom, to Irish cattle. The closure of this route prevented any alternative means of transporting livestock to the continent from being found.

(50) In reply to the comments from CIWF, the Irish authorities, in their letter of 27 July 1998, maintain the point of view set out in their previous comments. They emphasise that although it only constitutes a limited percentage of disposals of animals, live animal exports are of crucial importance for the beef sector. They insist that Ireland complies with all requirements laid down in Community animal welfare legislation. Finally, they add that the fact that Pandoro resumed services in January 1998 following the injunction granted by the Irish Supreme Court should not be taken into consideration in the assessment of decisions taken in the light of the circumstances prevailing in the Autumn of 1997.

[5] [1997] ECR I/6959.
[6] OJ L 78, 20.3.1996, p. 47.

(51) In reply to requests from the Commission dated 5 March 1999 and 15 June 1999, the Irish authorities, by letter of 2 July 1999, a corrected version of which was transmitted on 14 July 1999, have provided a report on developments in the transport of livestock from Ireland to continental Europe since January 1998. Following the end of the financial support provided to Gaelic Ferries in March 1998, the service ran into financial difficulty. An attempt at restructuring the service, without further State aid, proved unsuccessful, and the service was discontinued in May 1998. Under Court injunction, Pandoro has continued to carry live cattle, excluding calves, and in addition Irish ferries were approved to carry cattle on their new vessel, the MV Normandy in May 1998, and carried livestock throughout the 1998 to 1999 peak season. A number of designated cattle vessels have also been approved to carry exports. Irish live animal exports to continental Europe on 'RoRo' transport and dedicated vessels reached record levels in 1998, amounting to 136 000 cattle. Furthermore, the Irish authorities have provided information to confirm that the rates charged by Gaelic Ferries were broadly similar to those charged by Pandoro.

V

ASSESSMENT

(52) In order for a national measure to fall within the scope of the prohibition on State aid contained in Article 87(1), four conditions must be fulfilled: the measure must involve aid being granted from State resources; that aid must favour certain undertakings or the production of certain goods; it must distort or threaten to distort competition and it must affect trade between Member States. The Commission finds that all four conditions are met, whether the effects of the measure are considered on the agricultural sector or on the maritime transport sector.

The presence of State aid within the meaning of the Treaty

(53) It results from the statements of the Irish authorities that the purpose of the measure was to provide an alternative means to transport exports of Irish livestock directly to continental Europe following the unilateral decision of Pandoro to cease carrying livestock on its services. The Commission is therefore of the opinion that the primary beneficiaries of the measure are intended to be Irish livestock exporters.

(54) At the time, production and trade in beef were covered by Council Regulation (EEC) No 805/68 of 27 June 1968 on the common organisation of the market in beef and veal [7]. Article 24 of this Regulation stipulates that save as otherwise provided for in the Regulation, Articles 87, 88 and 89 of the Treaty apply to the products covered by it. Analogous provisions are laid down by Article 21 of Council Regulation (EEC) No 2759/75 on the common organisation of the market in pigmeat [8], as last amended by Regulation (EC) No 3290/94 [9] and Article 22 of Council Regulation (EC) No 2467/98 of 3 November 1998 on the common organisation of the market in sheepmeat and goatmeat [10]. The measure is therefore covered by the rules laid down in Articles 87, 88 and 89 of the Treaty, subject to any contrary provisions in the regulations governing the common organisations of the market.

(55) It is not disputed that the Irish Government has made available IEP 1 million to subsidise the operation of the Gaelic Ferries service. This money clearly constitutes State resources.

(56) The aid was granted to a single undertaking, Gaelic Ferries, and could be considered to favour that undertaking. However, it is apparent from the comments submitted by the Irish authorities that the objective of the aid was to benefit the livestock sector by providing a means of transporting livestock from Ireland to continental Europe. The Irish authorities have explained that the amount of aid was calculated by reference to the difference between the estimated cost of providing the service and the estimated income, and this is confirmed in their written comments following the opening of the procedure. Thus, the position of Gaelic Ferries appears to be that of a service provider rather than the beneficiary of the aid. The primary beneficiaries of the aid are those undertakings operating in the Irish livestock sector, including producers, hauliers and traders. In any event, however, having regard to the comments submitted by the Irish authorities, it appears clear that the measure favoured, and was intended to favour livestock production in Ireland.

(57) The Irish authorities argue that the producers did not derive any benefit from the measure, as they continued to pay similar, if not identical shipping charges to those charged before. The Irish Government intervened to regulate these charges to ensure that, on the one hand, Gaelic Ferries did not obtain any unfair advantage from its de facto monopoly and, on the other hand, to avoid

[7] OJ L 148, 28.6.1968, p. 24.
[8] OJ L 282, 1.11.1975, p. 1.
[9] OJ L 349, 31.12.1994, p. 105.
[10] OJ L 312, 20.11.1998, p. 1.

any unfair advantage to producers. The Commission cannot accept this argument. It is clear that as a result of changes in circumstances, the cost of transporting livestock from Ireland to continental Europe increased. Without the financial intervention of the Irish Government that increase in cost would have amounted to IEP 1 million for the sector for the 1997 to 1998 winter season. The sector concerned would therefore have had to meet these costs, either through a reduced level of profitability or by charging higher prices to its customers.

(58) The Commission therefore concludes that the measure did favour certain undertakings or the production of certain goods within the meaning of Article 87(1).

(59) In its judgment of 17 September 1980 in Case C-730/79 *Philip Morris* v *Commision* ([11]), the Court of Justice of the European Communities has indicated that strengthening the economic position of an undertaking by means of a State aid normally indicates a distortion of competition in relation to competing undertakings.

(60) In the present case, the State intervention has shielded the economic position of the Irish livestock exporters from the negative consequences which would have otherwise ensued. The Irish producers of livestock are in competition with producers of livestock throughout the Community. Surplus livestock markets have, in the case of cattle, been further affected by the outbreak of the BSE crisis which in its turn has made conditions of competition even more difficult and delicate. Therefore, there is no doubt that the intervention of the State has insulated the transport conditions for Irish livestock exporters from the effects of Pandoro's decision, thereby artificially forestalling any advantages that producers elsewhere could have derived from such a situation.

(61) A measure affects trade between Member States if it makes imports from Member States more difficult or if it makes exports from one Member State to other Member States easier. The crucial factor is that as a result of the measure, trade within the Community evolves differently or is likely to evolve differently. The notion of 'affecting trade' therefore also encompasses measures which protect trading conditions from the impact of changes in the market and thereby artificially conserve the status quo.

(62) Ireland produces annually a total of 569 000 tonnes of beef meat. The overall Community production of beef meat is 7,89 million tonnes. The intra-Community trade in the beef sector amounts to 2,17 million tonnes ([12]). In this context, it should be observed that the avowed objective of the Irish authorities in introducing the measure was to permit the maintenance of Irish livestock exports to continental Europe. In their written observations, the Irish authorities emphasise the importance of this trade for the livestock sector. They also indicate that exports of live cattle to continental Europe using 'RoRo' transport reached record levels in 1998, amounting to 136 000 head. The Commission therefore concludes that the measure does affect trade between Member States.

Consideration of the measure's effects on the maritime transport sector

(63) In its decision to open the procedure, the Commission considered it necessary to examine whether the measure might fall within the scope of the Community guidelines on State aid to maritime transport ([13]). In its comments reported at recitals 37 to 44, Ireland considers that the measure can be accepted as a subsidy for a public service obligation.

(64) In the preceding recitals, the Commission considered the measure to be one in favour of the Irish livestock sector, and considered Gaelic Ferries to be the provider of a service rather than the recipient of the aid. However, it could also be considered to be a measure in support of maritime transport of which Gaelic Ferries could be considered as the beneficiary. Nonetheless, the Commission considers that the measure cannot be authorised by virtue of the guidelines on State aid to maritime transport.

(65) In accordance with the relevant passage of the Community guidelines, a public service obligation (PSO) is 'any obligation imposed on a carrier to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing, which standards the carrier would not assume if it were solely considering its economic interest'. PSOs may be imposed for scheduled services to ports serving peripheral regions of the Community or thinly served routes considered vital for the economic development of that region, in cases where the operation of market forces would not ensure a sufficient service level.

([11]) [1980] ECR, p. 2671, paragraphs 11 and 12.

([12]) Commission's Report of the agricultural situation in the European Union: 1998.

([13]) OJ C 205, 5.7.1997, p. 5.

(66) According to Commission practice and to the case-law of the Court ([14]), when assessing contracts relating to PSOs, the reimbursement of operating losses incurred as a direct result of fulfilling certain PSOs constitutes compatible State aid provided that:

— the schemes are transparent and allow for the development of competition, in particular by using tender procedures,

— adequate publicity is given to the call for tender and all relevant requirements relating to the PSO are specified in a clear and transparent manner, thereby giving all carriers with the right of access to the route the opportunity to bid,

— except in exceptional and duly justified cases, the contract is awarded to the bidder requiring the lowest subsidy to operate the route.

(67) The Commission considers that the Irish measure does not meet the conditions necessary to be considered as a PSO.

(68) First, the concept of a PSO is limited to ports serving peripheral regions, or thinly served routes considered vital for the economic development of a region. Neither of these conditions is fulfilled. The Port of Cork cannot be considered to serve a peripheral region and the maritime routes between Ireland and continental Europe cannot be considered to be thinly served. The Irish authorities accept this as regards normal freight, but consider that the route was thinly served as regards the transport of livestock, since there was no other carrier for such cargo. However, the Commission does not accept that it is appropriate to assess whether or not a route is thinly served by reference to a single category of cargo, but to all types of cargo and passengers. Moreover, even if this were the case, it is still necessary to show that the route may be considered to be vital to the economic development of the region concerned. Notwithstanding the arguments advanced by the Irish authorities about the importance of livestock exports, the Commission does not accept that the export of 30 lorry-loads of livestock a week (assuming three sailings per week) can be considered as vital to the economic development of the regions served by the Port of Cork.

Furthermore, the Commission cannot accept that the financing of a system to allow Irish livestock exporters to maintain their current export levels into the continent constitutes a service of general interest in the meaning of Article 86(2) of the Treaty according to the relevant Commission communication ([15]). Besides the fact that the measure does not benefit all economic activities of the region nor the general public, the Commission considers that companies producing and marketing products referred to in Annex I to the Treaty covered by a common market organisation cannot be considered undertakings entrusted with the operation of services of general economic interest within the meaning of Article 86(2) of the Treaty. The functioning of the common market for beef meat (as well as other products subject to common market organisations) is incompatible with State intervention in the market through companies not acting according to the private investor principle (see, for instance, C 51/98 (EPAC and Silopor) ([16]) and C 28/98 (Centrale del Latte di Roma ([17]))).

(69) Even if the maintenance of a regular scheduled service for livestock exports could be considered to constitute a PSO, it is clear that the Irish authorities have not respected the requirements laid down in the guidelines to accept that the aid measure is compatible with the common market. In particular, no public tender procedure was followed and the relevant requirements relating to the PSO were not defined in a transparent manner. In fact, the possibility to participate in the tender process was by invitation only, and the service obligations, rather than being defined in advance, were a matter of negotiation between the Irish authorities and the potential shippers.

(70) In the light of these considerations, the Commission concludes that the requirements which allow it to consider that an operating subsidy for a PSO is compatible aid are not met. Therefore, the guidelines require that any aid must be assessed in accordance with the general State aid rules.

Beneficiary/beneficiaries of the aid

(71) As a general rule, the Commission considers the beneficiary of a State aid to be the undertaking(s) directly in receipt of State resources. In this case, that undertaking is Gaelic Ferries. However in certain cases, notably where

([14]) Case T-106/95 FFSA, [1997] ECR II-229.

([15]) OJ C 281, 26.9.1996, p. 3.
([16]) OJ C 363, 25.11.1998, p. 4.
([17]) OJ C 206, 2.7.1998, p. 6.

the direct recipient is granted the aid on condition that it provides an advantage (in the form of finance, services, premises, etc.) to another clearly defined group of undertakings, the Commission may consider the beneficiary/beneficiaries) to be the undertakings in this group.

(72) In the present case, and while the intentions of a Member State in formulating an aid measure are generally less important in its assessment than its effects, it can be noted that the explicit objective of the aid was to benefit the livestock sector. Without the transport service, it would have to meet the supplementary costs incurred by additional fattening, slaughtering the animals and processing the meat inside Ireland. This measure has thus shielded the economic position of the Irish livestock sector from the negative consequences which would have otherwise ensued.

Although other undertakings were also able to make use of Gaelic Ferries' services, the Commission considers that this was merely an incidental consequence of the choice of vessel used to provide the service. Following Pandoro's withdrawal from the livestock transport market, there was no practicable way to transport Irish livestock to the continent. Gaelic Ferries was set up to provide a service, executed it during the established period at uneconomic terms, discontinued the service in April 1998 and entered subsequently into a liquidation procedure. It should furthermore be noted that, within the adjudication procedure, applicants had to submit detailed business plans specifying the level and frequency of the service, capacity and standards to be met. Within the framework of this business plan, the operators were supposed to charge normal market rates for livestock and other freight. The subsidy of IEP 1 000 000 was then solely relating to the covering of the operating costs of the service between October 1997 and April 1998.

(73) In their comments reported in recital 41, the Irish authorities claim that the possibility of cross-subsidisation can be excluded because the rates charged by Gaelic Ferries for livestock corresponded to the historic rates charged by Pandoro. It should be noted that, due to the technical specifications of the vessel and animal welfare rules, only 20 % of the cargo could be covered by live animals. The remaining 80 % of the cargo would be other freight. However, the Commission took account of the fact that the aid was calculated by the difference between the operating costs (including start-up) and revenues assuming that Gaelic Ferries would in fact ship other freight at normal market rates. Furthermore, the Irish authorities have monitored the tariffs charged for livestock and for other freight during and after the operation of the service, namely during the liquidation procedure of Gaelic Ferries. Consequently, the Commission considered that the subsidy of IEP 1 000 000 was largely transferred to the Irish livestock sector.

In the very specific circumstances of this case, therefore, the Commission has taken the view that the beneficiaries of the measure should be regarded as being the Irish livestock operators.

Compatibility of the aid to the Irish livestock sector with the Treaty

(74) The prohibition on State aid laid down in Article 87(1) of the Treaty is not unconditional. Exceptions are provided for in Article 87(2) and (3) of the Treaty. In the interest of the functioning of the common market and having regard to Article 3(g) of the Treaty, these exceptions must be interpreted restrictively.

(75) Ireland argues that the application of Articles 87, 88 and 89 of the Treaty is subject to the objectives of the common agricultural policy. Since the measure was intended by the Irish authorities to further the objectives of the common agricultural policy, it is compatible with the common market.

(76) The Commission cannot accept this argument. According to Article 36 of the Treaty, the provisions relating to rules of competition apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 37(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives of the common agricultural policy set out in Article 33.

(77) In Article 24 of Regulation (EEC) No 805/68, the Council, having taken into account the objectives of the common agricultural policy, determined that save as otherwise provided for in the Regulation, Articles 87, 88 and 89 shall apply to the production and trade of beef. The same holds true for sheepmeat and pigmeat ([18]). In the absence of any contrary provisions in the relevant regulations, by virtue of Article 88 of the Treaty, the Commission therefore has exclusive competence, subject to review by the Court of Justice, to determine whether an aid measure is compatible with the Treaty, having regard to the provisions of Article 87(2) and (3). To permit a Member State, acting unilaterally, to determine what national aid measures might be considered necessary to attain the objectives of the common agricultural policy would fatally weaken both the application of the common agricultural policy and the control of State aid within the Community.

([18]) See recital 54.

(78) The Commission does not consider that the judgment of the Court in Case C-122/94 *Commission* v *Council* [19] assists the Irish argument. That case arose from a dispute between the Commission and the Council regarding the application of the third subparagraph of Article 88(2) of the Treaty. By way of derogation from the principle of exclusive competence stated in the previous paragraph, this provision allows the Council, acting unanimously, to decide that aid which a Member State intends to grant or is granting shall be considered compatible with the common market in derogation from the provisions of Article 87, if such a decision is justified by exceptional circumstances. The fact that the Council, in deciding whether or not a decision can be justified by exceptional circumstances, is entitled to take account of the objectives of the common agricultural policy can in no way be used to support an argument that a Member State is entitled to take unilateral action in contravention of the Treaty rules.

(79) In fact, if Ireland considered that a derogation from the provisions of Article 87 were justified by exceptional circumstances, it should have made an application to the Council.

(80) Furthermore, Ireland has not suggested that there are any contrary provisions in the regulations governing the common organisations of the market concerned which might be cited as a legal basis for the measure, nor has the Commission been able to find any such provision of its own initiative.

(81) It follows that the compatibility of this aid with the common market is to be assessed exclusively by reference to the provisions of Article 87 of the Treaty and any relevant provisions of the regulations governing the common organisations of the market concerned.

(82) Ireland did not rely on the derogations in Article 87(2)(a) and (c) of the Treaty and there is no reason to consider the present measure as qualifying for these derogations (aid of a social character granted to individual consumers or aid to compensate for the effects of the division of Germany). The same holds true as far as aids to compensate damage inflicted by natural disasters are concerned. However, in its comments, Ireland has suggested that the measure can be considered as aid to make good the damage caused by exceptional occurrences and thereby fall within the scope of the exception laid down in Article 87(2)(b) of the Treaty.

(83) The Treaty does not define what constitutes an exceptional occurrence within the meaning of Article 87(2)(b), nor is any definition to be found in secondary Community legislation or in the judgments of the Court of Justice. Furthermore, the Commission does not consider the comments of Advocate-General Cosmas referred to by the Irish authorities at recital 46 to be relevant to the present case. Those comments concerned the interpretation of the third subparagraph of Article 88(2) of the Treaty, according to which the Council may, acting unanimously, in derogation from Article 87, find an aid to be compatible with the common market if this is justified by exceptional circumstances. Since Article 88(2) allows the Council to derogate from the whole of Article 87, the meaning of the expression 'exceptional circumstances' in Article 88(2) must inevitably be wider than the meaning of 'exceptional occurrences' in Article 87(2)(b).

According to point 11.2 of the Community guidelines for State aid in the agriculture sector [20], the Commission has consistently held that the notions of 'natural disaster' and 'exceptional occurrence' contained in Article 87(2)(b) must be interpreted restrictively because they constitute exceptions from the general principle of the incompatibility of State aid with the common market laid down by Article 87(1) of the Treaty.

(84) In its decision to initiate the procedure, the Commission doubted whether the decision of an economic operator to discontinue providing a service could fall within the scope of Article 87(2)(b). According to Ireland, however, Pandoro's decision was exceptional as it was not based on normal commercial considerations but was due to pressure from animal welfare lobbies. The Commission does not accept this argument. The distinction which Ireland makes between so-called normal commercial considerations and the supposedly non-commercial motives underlying Pandoro's decision appears artificial. It is clear from the supporting documents that the carriage of livestock represented only a limited part of Pandoro's business. That activity was deeply unpopular with a certain sector of the public, notably those concerned with animal welfare issues. For P & O, the parent company of Pandoro, facing the alternatives as to whether to continue its livestock service or not, the possible negative effects of loss of goodwill resulting from the continued transport of livestock appears to have constituted a tangible factor in a cost-benefit analysis. P & O appears to have considered these effects to outweigh the economic gains of continuing the service for livestock.

(85) Moreover, it does not appear that Pandoro's decision was taken rapidly, or without prior consultation of those concerned. Already in August 1994, the P & O group announced that, for animal welfare reasons, it would stop transporting livestock other than for breeding purposes on its vessels. This decision was implemented by the P & O Group as a whole. After Pandoro had recommenced transporting livestock for fattening and

[19] See recital 34.

[20] OJ C 28, 1.2.2000, p. 2.

breeding from 30 July 1996 onwards, it decided to discontinue the service for the export of livestock for fattening with effect from 1 December 1996 because of animal welfare problems on the continent. Following protests from farming groups it agreed, in March 1997, to recommence the transport of livestock for fattening purposes. Protests by animal rights activists and attempts to block Pandoro's vessels generated negative publicity. This was further evidenced by demonstrations and questions at the annual meeting of P & O in London in May 1997 and these events in turn led to Pandoro's decision in June 1997. Subsequently, by letter of 24 June 1997, Pandoro advised the Irish Minister for Agriculture that it had decided that all shipments of livestock for fattening and slaughter would cease on the 31 July 1997. Given that Irish Ferries regularly stop their seasonal service at the end of September, that meant that the full impact of Pandoro's decision was delayed by three months until October 1997. This timescale was more than enough to enable alternative charter arrangements to be put in place, through the establishment of Gaelic Ferries.

(86) Thus, on the basis of the information available to it, it appears to the Commission that Pandoro's decision to discontinue the transport of livestock for fattening must be considered to constitute a normal commercial decision of an economic operator. Furthermore, the documents made available to the Commission in connection with this case, and in particular the affidavits sworn in connection with national court proceedings, show that similar decisions to discontinue livestock transport were reached by other economic operators offering RoRo freight transport services between the British Isles, and between the British Isles and continental Europe.

(87) Nor can the Commission accept the argument of the Irish authorities that the selective nature of Pandoro's withdrawal from the market, from the transport of livestock alone, contributed to the existence of an exceptional occurrence. This is simply the logical consequence of the commercial decision taken by Pandoro.

(88) The Irish authorities also refer to the effects of Decision 96/239/EC adopted as a result of the BSE crisis, which prohibits the dispatch from the United Kingdom of live bovine animals, thereby closing the landbridge route from Ireland to the continent via the United Kingdom to Irish cattle.

(89) Whilst the Commission has previously accepted that the incidence of BSE in the United Kingdom constituted an exceptional occurrence within the meaning of Article 87(2)(b), which justified the payment of aid to farmers in that country, it does not consider that this is relevant for the present case. Indeed, as the Irish authorities themselves point out in their letter of 1 October 1997, the most common route for Irish livestock exports to the Continent was by direct ferry services from Ireland to France. Thus it appears that the causal event which induced the economic damage the Irish authorities set out to forestall is in principle to be found in Pandoro's decision. The Commission is therefore of the opinion that the line of causality between the event and the actual damage is insufficient.

(90) Moreover, although from the legal point of view the United Kingdom landbridge route remains open for non-bovine livestock, in practical terms this route no longer appears to be an option due to the refusal of ferry companies providing roll-on roll-off ferry services across the English channel to carry livestock. Given the absence of a direct route for the transport of livestock between Ireland and continental Europe, exports of livestock would in any case have come to a halt.

(91) In those circumstances, the Commission considers it likely that the Irish authorities would have wished to maintain direct ferry services for livestock from Ireland to the Continent, even if the United Kingdom landbridge route had not been closed to bovine livestock by Decision 96/239/EC.

(92) In its decision to initiate the procedure, the Commission indicated that the aid in question is of preventive character and therefore cannot be seen to make good the damage caused by exceptional occurrences. In reply, the Irish authorities have contended that such an interpretation is unduly restrictive. On that basis, aid to purchase sandbags to staunch an anticipated flood does not come within Article 87(2)(b) but aid to pay for cleaning up afterwards would be covered. The wording of the Treaty is nonetheless unambiguous, and appears to result from the implicit assumption that an exceptional occurrence is something which is, by its nature, unforeseeable. Aid paid in advance to prevent losses from an adverse event may qualify for exemption from the prohibition on State aid by virtue of other provisions

of Article 87, but not by virtue of the derogation contained in Article 87(2)(b). In any case, however, in view of the conclusion that Pandoro's withdrawal from the transport of livestock did not amount to an exceptional occurrence, it is not necessary to consider this aspect further.

(93) The Irish authorities contend that Pandoro's refusal to carry livestock amounts to an abuse of a dominant position within the meaning of Article 82 of the Treaty. This factor is cited to support the exceptional nature of the occurrence and to show that the present measure is justified, possibly even necessary, in accordance with the judgment of the Court of Justice of the European Communities in Case C-265/95 *Commission* v *France*. The Commission does not accept these arguments.

(94) The Commission is expressly reserving its position in this Decision as to whether the conduct of Pandoro infringed Article 82 of the Treaty. However, even if it were shown that the conduct of Pandoro in refusing to carry livestock did infringe Article 82, this would not of itself be relevant for the purpose of determining whether that behaviour constitutes an exceptional occurrence within the meaning of Article 87(2)(b).

(95) Furthermore, the possible abuse of a dominant position by Pandoro could not be used to support action by a Member State which was itself contrary to the Treaty. The judgment of the Court to which the Irish authorities refer emphasises the duty of Member States to intervene to put an end to behaviour by natural or legal persons which results in an infringement of Community law. However, it does not in any way imply the acceptance of unlawful behaviour by the Member States themselves.

(96) In any case, the Commission doubts that the Article 82 aspects of the matter were a factor in the decision of the Irish authorities to grant this aid. There is no information in the file to suggest that the Irish authorities considered the institution of legal proceedings in the Irish Courts to bring about an end to the alleged abuse of a dominant position by Pandoro, nor is the Commission aware that any such proceedings were in fact brought by the Irish authorities themselves. In fact the possibility of an abuse of a dominant position by Pandoro was first mentioned by the Irish authorities only after the judgment of the Irish Supreme Court of 18 December 1997, in an action brought by private parties, which granted an injunction requiring Pandoro to resume live animal exports, several months after the decision to grant the aid had in fact been taken.

(97) For all the reasons set out above, the Commission considers that the measure does not fall within the scope of the derogation provided for in Article 87(2)(b) of the Treaty.

(98) As regards the applicability of the exceptions provided for in Article 87(3) of the Treaty, it should be noted that the aid does not fulfil the requirements laid down in the guidelines on national regional aid ([21]). Nor has Ireland claimed that the measure in question would be justifiable under Article 87(3)(a) or (c) on the basis of those guidelines. Manifestly the measure is not intended for the conservation of culture or heritage, within the meaning of Article 87(3)(d).

Point I.6(d) of the Commission communication of 1988 ([22]) on the method for the application of Article 92(3)(a) and (c) to regional aid provides that in recognition of their special difficulties, the Commission may, by way of derogation, authorise certain operating aid in these regions under specific conditions which are enumerated in sub-points (i) to (v). Sub-point (ii) of these conditions specifies that the aid should be designed to promote a durable and balanced development of economic activity and not give rise to sectoral overcapacity at the Community level such that the resulting Community sectoral problem produced is more serious that the original regional problem; in this context, a sectoral approach is required and in particular the Community rules, directives and guidelines applicable to certain industrial (steel, shipbuilding, synthetic fibres, textiles and clothing) and agricultural sectors, and those concerning the industrial enterprises involving the transformation of agricultural products are to be observed ([23]). In the agriculture sector, which covers the production, processing and marketing of Annex I products, it has been constant Commission policy for many years to prohibit the payment of operating aid in all regions, including regions which fall under Article 87(3)(a) of the Treaty. Point 3.5 of the Community guidelines for State aid in the agriculture sector provide that unilateral State aid measures which are simply intended to improve the financial situation of producers but which in no way contribute to the development of the sector are considered operating aids incompatible with the common market. Furthermore, by their very nature, such aids are likely to interfere with the mechanisms of the common organisation of the markets, which take precedence over the competition rules laid down in the Treaty ([24]).

([21]) OJ C 74, 10.3.1998, p. 9.
([22]) OJ C 212, 12.8.1988, p. 2.
([23]) Judgment of the Court of Justice of 14 January 1997 in Case C-169/97 — *Spain* v. *Commission* [1997] ECR I-0135.
([24]) Judgment of the Court of Justice in Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161.

(99) At an earlier stage of the procedure, Ireland suggested that the aid could be considered compatible with the common market as a measure to remedy a serious disturbance in the economy of a Member State within the meaning of Article 87(3)(b).

(100) The Irish authorities have at no time claimed that the Irish economy was already seriously disturbed in the autumn of 1997, before the introduction of the Gaelic Ferries service. The Commission does not accept that the interruption of Irish livestock exports during the winter of 1997 to 1998 would have resulted in a serious disturbance of the Irish economy. The Commission has already stated in the initiation of the procedure that to a certain extent the negative effects on the prices of livestock in Ireland would have been cushioned by the intervention mechanisms provided for in the relevant common organisation of the market. Furthermore, the information submitted by the Irish authorities makes clear only the possible adverse impact of Pandoro's decision on the agricultural sector and in particular on cattle farmers. However, the only reference pointing to a disturbance of the Irish economy in general is that the Irish authorities contend that the situation 'would have resulted in major protests by farming bodies and those engaged in the live export trade with inevitable disruption of economic activity generally'. This cannot be seen as a sufficiently direct and adequate perspective to conclude that the Irish economy would have been seriously disturbed ([25]).

(101) The Commission therefore concludes that the measure cannot benefit from the exemption provided for in Article 87(3)(b) of the Treaty.

(102) According to Article 87(3)(c) of the Treaty, aid to facilitate the development of certain economic activities may be considered to be compatible with the common market provided that such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(103) In the present case, the purpose of the aid was to reduce the costs to be born by the Irish livestock sector for the transport of livestock to continental Europe. Since the transport of goods to export markets is a normal, everyday commercial activity, aids which are intended to reduce transport costs must be considered to constitute operating aids. According to a long-standing body of case-law, operating aids cannot be considered to promote the development of any economic sector. They provide the beneficiaries with artificial financial support such as to distort competition and to affect trade to an extent contrary to the common interest ([26]). They therefore cannot benefit from the exemption provided for by Article 87(3)(c) of the Treaty.

(104) The Commission does not accept the point of view of the Irish authorities that the aid can nevertheless be considered to be justified in order to maintain transport services between Ireland and continental Europe. The Irish Government certainly had the possibility of intervening to assist in the organisation of the necessary transport arrangements. It also had the possibility of assisting in the organisation of the necessary financial arrangements in a form which did not constitute aid, for example through the provision of a loan at market rates. However, the Commission considers that the provision of a grant of IEP 1 000 000 to subsidise the costs of maintaining a freight transport service for livestock between Ireland and continental Europe during the winter of 1997 to 1998 constitutes an operating aid which cannot benefit from the exemption provided for by Article 87(3)(c) of the Treaty.

VI

CONCLUSION

(105) The Commission considers that the provision of a grant of IEP 1 000 000 to subsidise the costs of maintaining a freight transport service for livestock between Ireland and continental Europe during the winter of 1997 to 1998 constitutes State aid within the meaning of Article 87(1) of the Treaty.

(106) The Commission regrets that Ireland has illegally put that aid into effect in breach of Article 88(3) of the Treaty.

(107) For the reasons set out the aids cannot qualify for any of the exceptions provided for in Article 87(2) and (3). They are therefore incompatible with the common market.

([25]) For Commission practice on the application of Article 87(3)(b), see for instance Commission Decision 88/167/EEC of 7 October 1987 (OJ L 76 22.3.1988, p. 18). Embracing the applicability of the provision, the Commission had taken into account that the economic situation in Greece had been constantly deteriorating and that national authorities were confronted with very serious external payments and pressure on the exchange rate. An economic stabilisation and recovery programme was launched which included measures like devaluing the drachma by 15 %. The European Community reacted by issuing a loan of ECU 1 750 million and permitted the grant of export subsidies for a limited period of time. The aid which was approved under Article 92(3)(b) of the EC Treaty was targeted at avoiding liquidation of companies which accounted for 20 % of the industrial employment of Greece and a considerably larger percentage of its industrial output and international trade.

([26]) See Judgment of the Court of First Instance in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 48 and 77.

(108) In cases such as the present where non-notified aid is introduced without awaiting the Commission's final decision, the imperative character of the procedural rules set out in Article 88(3) of the Treaty, the direct effect of which has been recognised by the Court of Justice in its judgments of 19 June 1973 (Case 77/72 *Carmine Capolongo* v *Azienda Agricola Maya*) ([27]), 11 December 1973 (Case 120/73 *Gebr. Lorenz GmbH* v *Federal Republic of Germany* ([28]) and 22 March 1977 (Case 78/76 *Steinicke and Weinlig* v *Federal Republic of Germany*) ([29]), prevents any retrospective legalisation of the aid (judgment of 21 November 1991 in Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and others* v *France* ([30])).

(109) Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([31]) provides that, where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. Reimbursement is necessary in order to restore the previous situation by removing all financial advantages unduly obtained by the beneficiaries since the date the aid was granted.

Article 14(2) of Regulation (EC) No 659/1999 states that the aid to be recovered is to include interest at an appropriate rate set by the Commission. Interest runs from the date on which the illegal aid was made available to the recipients until that of its recovery. The aids should be repaid in accordance with the procedures of Irish law. The amounts of these aids shall bear interest from the date on which the aid was granted to the moment of its effective recovery. It shall be calculated on the basis of the market rate, with reference to the rate used for calculating the grant-equivalent in the framework of regional aid.

(110) According to the case-law of the Court of Justice concerning the implementation of negative State aid decisions with recovery obligation ([32]), Member States are, under certain circumstances, in particular after a first trial, permitted to invoke the absolute impossibility of recovering State aid. In view of the special circumstances of the present case and the difficulties already announced by the Irish authorities in this respect, the Commission invites the Irish Government to detail its arguments and submit its evidence (i.e. records, statistics, legal texts) on the alleged impossibility of recovering. The Commission will examine this evidence and the respective arguments in the framework of its obligation of loyal cooperation with the national authorities.

(111) The present Decision is without prejudice to any conclusions that the Commission may draw as regards financing of the common agricultural policy by the European Agricultural Guidance and Guarantee Fund (EAGGF).

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Ireland has implemented for the transport of livestock between Ireland and continental Europe amounting to IEP 1 000 000 is incompatible with the common market.

Article 2

1. The Irish authorities shall take all the measures necessary to recover from the recipients the aid referred to in Article 1(2) and unlawfully made available to them, within two months of the notification of this Decision.

2. Recovery shall be effected in accordance with the procedures of Irish law. The sums to be recovered shall bear interest from the date on which they were made available to the recipients until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

Article 3

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

Article 4

This Decision is addressed to Ireland.

Done at Brussels, 13 June 2000.

For the Commission

Franz FISCHLER

Member of the Commission

([27]) [1973] ECR 611.
([28]) [1973] ECR 1471.
([29]) [1977] ECR 595.
([30]) [1991] ECR I-5505.
([31]) OJ L 83, 27.3.1999, p. 1.
([32]) See Case C-280/95, [1998] ECR I-259.