II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 December 1998

on the measure which Ireland is planning to implement in favour of employers for the refund of social security contributions paid in respect of seafarers employed on certain categories of ships not being required to be registered in a Member State

(notified under document number C(1998) 4278)

(Only the English text is authentic)

(Text with EEA relevance)

(1999/651/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having regard to the Community guidelines on state aid to maritime transport [1],

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

Whereas:

1. **Procedure**

By letter dated 15 May 1997, registered in the Commission on 20 May 1997, Ireland notified the Commission of the aid N 322/97. By letters dated 30 June and 8 September 1997 the Commission sent requests, for further information. A bilateral meeting took place on 9 July 1997. By letters registered in the Commission on 31 July, 27 October, 7, 13, 19 and 27 November 1997 as well as 2, 4, 8 and 10 December 1997, the Irish authorities furnished the Commission with supplementary information.

By letter dated 20 January 1998, the Commission informed Ireland of its decision:

— to authorise aid in respect of type (1) vessels,

— not to object to the refund of contributions paid in respect of old-age pensions to self employed contributors and formerly self employed voluntary contributors aged 56 years on 6 April 1998 since it does not constitute aid, and

— to initiate the procedure laid down in Article 93(2) of the EC Treaty in respect of aid towards type-2 ships (type-2 measure) under the Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No 2) Refunds) Regulations, 1997.

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 measure.

By letter of 23 February 1998, registered in the Commission on 24 February 1998, Ireland provided the Commission with its comments as regards the abovementioned Article 93(2) procedure. On several occasions thereafter bilateral contacts have taken place between representatives of the Commission and the Irish authorities.

The Commission has received no comments from other Member States or from interested parties.

[1] OJ C 205, 5.7.1997, p. 5.

[2] OJ C 103, 4.4.1998, p. 15.

2. **Detailed description of the aid measure**

(a) *The type-2 measure*

That part of the N 322/97 scheme in respect of which the Commission opened the procedure provides for the refund to employers of up to 100 % of the social security contributions paid in respect of the employment of EC seafarers on board ships engaged in merchant shipping at sea which are the subject of a letting on charter without crew by a lessor not resident in Ireland (type-2 vessels).

Type-2 vessels, which are chartered in and managed from within Ireland, are not required to fly the flag of a Member State in the framework of the aforementioned measure. For background purposes it should be recalled that type-1 vessels are ships owned as to not less than 51 % by a person or persons resident in Ireland and which are required to be registered in Ireland.

(b) *Budget and duration*

The aid budget to be spent on the type-2 measure has been notified as an amount in common with the budget for the type-1 measure (approved in the Commission decision earlier mentioned). The total budget foreseen for both measures is IEP 8 million, to be spent at a rate of IEP 2 million per annum over a four year aid period beginning on 6 April 1996 and ending on 5 April 2000. Since according to the indications of the Irish authorities there was at the time of notification only one type-2 vessel qualifying for the type-2 measure and since no other ships are expected to come on stream in the near future, only a small amount of this total budget would be attributed to the type-2 measure.

Funds for this measure are made available through tax payments previously levied.

(c) *Recipients*

The aid recipients of the Irish social security reimbursement are employers who employ seafarers on board the aforementioned type-2 vessels engaged in merchant shipping at sea.

(d) *Objective*

According to the Irish authorities, the introduction of the refund of social security contributions and its application to the aforementioned vessels is an important element of a strategy for the Irish shipping sector which is aimed at:

— retaining and attracting new tonnage to the register,

— strengthening the economic link between Irish shipowning and operating interests and the state, and

— promoting quality EU standard shipping.

(e) *Possible effect of the aid*

By refunding to employers their social security contributions paid in respect of the employment of seafarers being tax liable in Ireland on board type-2 vessels, the Irish authorities intend to support Irish shipping companies.

(f) *Grounds for initiating the procedure*

Considering that the type-2 measure does not require qualifying vessels to be registered in a Member State (that is, fly the flag of a Member State) as required by the guidelines on state aid to maritime transport, it appeared to the Commission that there were serious doubts regarding the compatibility of this measure with the common market. Therefore, in its letter dated 20 January 1998, the Commission decided to initiate the procedure provided for in Article 93(2) of the EC Treaty in respect of the type-2 measure described above.

3. **Comments from Ireland**

Ireland replied to the Article 93(2) procedure by raising two issues in particular:

— the case of the type-2 vessel m.v. *Normandy*, and

— the argument that the type-2 measure should be subject to point 3.1 rather than to subsection 3.2 of the guidelines.

(a) *Type-2 vessels*

As regards the procedure opened under Article 93(2) of the EC Treaty in respect of ships subject to the type-2 measure, Ireland noted that there is only one vessel qualifying for the type-2 measure, the m.v. *Normandy*, which is at present on short-charter letting to the Irish Continental Group plc, Ferryport, Dublin, from January 1998 to October 1999.

In their comments to the Commission, the Irish authorities further mention that they consider the charter contract of the *Normandy* complies with the spirit of the Guidelines even though the vessel flies the flag of the Bahamas.

The arguments for that contention are summarised below.

(i) An EU registered (Swedish) company ultimately owns the vessel.

(ii) The vessel is crewed solely by EU nationals (predominantly Irish and UK), 150 in low season and 250 in peak season.

(iii) The vessel is marketed and managed by an EU company, Irish Ferries, from Dublin and Rosslare as well as from Liverpool for the UK trade. These activities support a substantial number of jobs for EU nationals in Dublin and Rosslare and in related companies in mainland Europe.

(iv) The vessel serves a marginal and peripheral route between Rosslare in Ireland and the mainland of Europe, which is important for intra-EU tourism and trade links. This link, which commenced in 1973, was under threat from economic forces and due to the introduction of new safety rules which precluded continued use of the existing vessel on the route.

The economic viability of the route remains questionable. Nevertheless, Irish Ferries has chartered the m.v. *Normandy* for a period of 21 months in order to keep the link open and to assess its future viability. The Irish Government fully supports the maintenance of this route for strategic reasons (as an alternative to the land route through the UK) and also as a contribution to the general policy of increasing the use of short sea shipping routes in the EU.

(v) The current charter is a temporary measure (until October 1999). In the course of sourcing a replacement vessel for the Rosslare route, Irish Ferries made bids to purchase two vessels with the intention of placing them under the Irish flag. In the event, the bids were not successful. The only vessel which could be sourced with sufficient bed space for the route was the m.v. *Normandy*.

When the charter expires in 1999, Irish Ferries will have the opportunity to negotiate with the owners of the vessel regarding its flag. Alternatively, if the route's viability can be proven it may be possible for Irish Ferries to purchase a vessel for the route, which could then be placed under the Irish flag. Therefore the current position should be regarded as provisional since it will only apply until October 1999.

(vi) The vessel is one of a fleet of vessels which the company operates between Ireland, the UK and France, all other vessels in the fleet being on the Irish register.

Furthermore, as regards type-2 vessels in general, the Irish authorities pointed out that type-2 vessels are vessels in respect of which it can be shown that all the requirements of the Merchant Shipping Acts 1894 to 1996 (which lay down the requirements for Irish registration of vessels), have been complied with as if they had been registered under that part of Irish legislation.

The Irish authorities therefore mention that the 'type-2 vessel' m.v. *Normandy* is treated under Irish law for the purposes of the state aid in an analogous way to an Irish registered ship.

(b) *The applicability of the Guidelines to the type-2 measure*

As regards the applicable section of the Community guidelines on state aid to maritime transport, Ireland argues that the levying of employers' social insurance on company payrolls should be looked on as a form of corporate taxation, quite unlike personal taxes such as employees' social insurance and income tax. Ireland regards the flexibility implicit in point 3.1 of the guidelines on the 'fiscal treatment of shipowning companies' as applicable in the present case where the employer's contribution (pay-related social insurance — PRSI) is levied on the total seafarer payroll of the company.

Ireland submits that there is a strong case that the more flexible regime implicit in point 3.1 should apply particularly to concessions in the area of taxes which are levied on shipping companies in respect of employment. The primary added value of EU shipping can often be the employment of EU seafarers; reductions in costs of employment through such concessions are the most effective and targeted instruments available to attain that objective.

While the aid in question is not aimed at repatriation of management in terms of management and ancillary services, since these are already located within the EU, it will help to consolidate the Company's position with a well-grounded EU base and serve to maintain and consolidate that base, thereby avoiding the need for repatriation at some later stage.

4. **Assessment of the measure**

(a) *Legal basis of the assessment*

Articles 92 and 93 of the Treaty contain the rules on the compatibility of state aids with the common market.

The Community guidelines on state aid to maritime transport provide guidance as regards the compatibility with the common market, in accordance with Article 92 of the Treaty, of state aid measures in favour of the maritime transport sector.

(b) *Compatibility of the measure*

(i) Existence of state aid

Article 92(1) of the Treaty provides that 'any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

The refunding of contributions for the social protection of seafarers results in the state receiving less income and must therefore be considered to be granted through state resources. Since the type-2 measure favours only the maritime sector it is to be considered as sector-specific. Furthermore, maritime transport being a sector with a strong international and infra-Community element, a public subsidy to this sector risks distorting competition and affecting maritime transport activities in other Member States. It follows that the aforementioned social security refund is therefore to be considered as state aid within the meaning of Article 92(1) of the Treaty.

(ii) Point 3.2 of the guidelines

The Community guidelines on state aid to maritime transport provide in point 3.2 that aid in the form of the alleviation of the burden of social security contributions in respect of social security contributions of Community seafarers should be allowed, provided those seafarers are employed on board ships registered in a Member State. The guidelines allow such aid up to a maximum of 100 % relief from contributions. On the basis of this provision the Commission opened the Article 93(2) procedure in respect of the type-2 measure, since type-2 vessels are not bound to be registered in a Member State.

(iii) Applicability of point 3.2 of the guidelines

Summarising the comments on the Article 93(2) procedure mentioned above, Ireland argues that the levying of employers' social insurance on companies' payrolls should be looked on as a form of corporate taxation, quite unlike personal taxes such as employees' social insurance and income tax. Ireland would also regard the flexibility implicit in point 3.1 of the guidelines on the fiscal treatment of shipowning companies (providing for the possibility of an exception to the normally required EU flag link under certain circumstances) as applicable in the present case where the employer's contribution (PRSI) is levied on the total seafarer payroll of the company.

As regards this argument it has to be noted that Chapter 3 of the guidelines specifically deals with the issue of 'Fiscal and social measures to improve competitiveness'. It is divided into point 3.1, which deals with the 'Fiscal treatment of shipowning companies', and point 3.2 which deals with 'Labour-related costs'.

Point 3.1 deals with the compatibility with the common market of certain state aid measures such as those relating to a tonnage tax or accelerated depreciation on investment. Only for such measures do the guidelines provide that they may exceptionally be applicable to the entire fleet operated by a Community shipowner provided a certain number of criteria are fulfilled.

Point 3.2 however deals with the compatibility with the common market of state aid measures relating to different types of labour-related costs, which are defined as being the following:

— reduced rates of contributions for the social protection of Community seafarers employed on board ships registered in a Member State, and

— reduced rates of income tax for Community seafarers on board ships registered in a Member State.

The fact that employment cost reductions in the form of reduced rates of contribution for social protection and income tax reductions are dealt with in a special and distinct point of the guidelines clearly shows the Commission's intention to separate these issues from point 3.1 which deals with other measures such as the tonnage tax.

It follows that for the purpose of applying the guidelines, any scheme providing for the refund of contributions for the social protection of seafarers cannot be seen as a fiscal incentive within the meaning of point 3.1 but must be seen as a labour-related measure within the meaning of point 3.2.

It should be noted that the Irish argument according to which type-2 vessels are subject to Irish law as if they had been registered in Ireland is not sufficient to fulfil the requirement of point 3.2 of the guidelines, which provides that qualifying ships must be registered in a Member State. Even though the refund is intended to be limited to Community seafarers (masters and seamen liable to social security contributions in Ireland), as in the approved measure concerning type-1 vessels and as required by point 3.2 of the guidelines, the aforementioned requirement that ships be registered in a Member State is not fulfilled.

In this respect it should further be noted that the guidelines have identified the low tax environment in certain third countries as the main incentive for shipping companies to flag out their vessels and have analysed the various negative consequences resulting from that trend. To halt that trend and to remedy the situation, the guidelines permit Member States to introduce fiscal and social relief measures in order to improve the competitiveness of shipping under their flags. The Commission considered, when drawing up those guidelines, that measures to reduce labour costs of seafarers, such as those at issue here, should only be applied in respect of seafarers employed on ships registered in Member States. To diverge from that policy would not provide a sufficient incentive to shipowners to operate under Member State flags and could be construed as state aid to improve the competitiveness of non-EU shipping.

The type-2 measure, as proposed by Ireland, which comprises no flag link, must therefore be considered to be incompatible with the aforementioned Community guidelines on state aid to maritime transport.

(iv) The case of the m.v. *Normandy*

As regards the m.v. *Normandy*, which according to the Irish authorities is presently the only type-2 vessel qualifying for the proposed type-2 measure, it should be noted that during several bilateral contacts subsequent to the opening of the Article 93(2) procedure, the Irish authorities have indicated that an agreement may be found between the shipowner and the ship operator to reflag the vessel under the Irish flag. However, such an agreement has not taken place and no commitments as regards such a move have been provided to the Commission.

5. **Conclusions**

In conclusion, the aid scheme as regards type-2 vessels should be held to be incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The state aid which Ireland is planning to implement in favour of employers in respect of the employment of seafarers on ships engaged in merchant shipping at sea which are the subject of a letting on charter without crew by a lessor not resident in Ireland is incompatible with Article 92 of the EC Treaty.

That aid may accordingly not be implemented.

Article 2

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

Article 3

This Decision is addressed to Ireland.

Done at Brussels, 9 December 1998.

For the Commission

Neil KINNOCK

Member of the Commission