STATE AID

Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, concerning measure C 54/2001 (ex NN 55/2000) — Foreign income

(2001/C 308/02)

(Text with EEA relevance)

By means of the letter dated 11 July 2001, reproduced in the authentic language on the pages following this summary, the Commission notified to the Republic of Ireland of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning the abovementioned measure.

Interested parties may submit their comments within one month of the date of publication of this summary and the following letter, to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue de la Loi/Wetstraat 200
B-1049 Brussels
Fax (32-2) 296 12 42.

These comments will be communicated to the Republic of Ireland. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

SUMMARY

The measure concerned has not been notified to the Commission in accordance with Article 88(3) and it has therefore been entered into the register of non-notified aid under aid NN 55/2000.

The measure was established by law in 1988 with reference to foreign subsidiaries and in 1995 with reference to foreign branches of Irish parent companies, and was not notified as State aid. According to the measure, every Irish resident company that submits to the Minister for Finance an investment plan aimed to maintain or increase the employment level within Ireland, can qualify for the measure. Once qualified the Minister for Finance issues a certificate that allows the Irish company exemption from the Irish corporation tax the dividends or the profits coming from ‘foreign trade’ subsidiaries or branches located in a double treaty country. The exemption replaces the normal double taxation relief, given by way of a tax credit. This tax credit is subject to some limitations, such as the amount of corporate tax due in Ireland on the foreign income concerned.

The measure provides also an exemption on capital gains arising in these foreign branches: such as for dividends and branch trading profits, the exemption replaces the normal double taxation relief on capital gain, given in form of tax credit within the limit of the tax due in Ireland.

The measure seems to be of indefinite duration. It seems that each exemption is granted without any deadline. Moreover it seems that the advantage is not digressive over the period concerned by the investment.

The measure appears to constitute aid as it fulfils the four relevant criteria.

Firstly, the measure affords the beneficiaries an advantage that reduces the costs they normally bear in the course of their business. According to point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (1), the tax advantage may be granted through different types of reduction in the company’s burden and, in particular, through a reduction in the amount of tax.

Secondly, the advantage must be granted by the State or through State resources. The grant of a tax reduction involves a loss of tax revenue which, according to point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, is equivalent to the use of state resources in the form of fiscal expenditure.

Thirdly, the measure must affect competition and trade between Member States. As explained at the point 11 of above-mentioned Commission notice this condition is fulfilled if the company concerned carries on activities that involve international trade. In the present case, this is the only way to obtain the benefit by the measure.

Lastly, the measure must be specific or selective in that it favours ‘certain undertakings or the production of certain goods’. Only the companies that submit a plan to maintain or increase the employment level within Ireland can qualify for the exemption on income arising in foreign subsidiaries or branches. According to the point 13, 16 and 18 (with particular reference to the footnote 10 of point 18) of the Commission notice, this criteria seems to be fulfilled.

The scheme does not seem to fall within the logic of the system at least because it allows a special double taxation relief, that can involve a tax saving, only for those undertakings that obtained the prescribed certification from the tax authorities, which use still unclear criteria to issue it.

Furthermore, the State aid in question does not appear to fall within any of the exceptions laid down in Article 87(2) and (3) of the EC Treaty. With regard to the creation of new employment, the Commission is wondering if the level of aid does not exceed that which is necessary to provide an incentive to create jobs (point 21 of the Commission guidelines on aid to employment (>). The level of the advantage seems not to depend on the number of jobs created but rather on the amount of dividends or income repatriated.

Moreover with regard to the maintenance of the employment, at the present stage, the measure seems to constitute an operating aid (as laid down in points 31 and 32 of Commission notice on the application of the State aid rules to measures relating to direct business taxation and guidelines on aid to employment (>). The Commission has doubts as regards the compatibility of this tax measure.

In accordance with Article 14 of Regulation (EC) No 659/1999, all unlawful aid can be subject to recovery from the recipient.

In 1997, the Ecofin Council adopted a code of conduct for direct business taxation with the objective of tackling harmful tax competition (>). Following the commitment taken by way of this code, the Commission published in 1998 a notice on the application of State aid rules to measures relating to direct business taxation (>) stressing its determination to apply them rigorously and to respect the principle of equality of treatment. The current procedure is carried out within this framework.

1. PROCEEDURE

1. By letter dated 29 May 2000, the Commission requested information concerning the foreign income measure giving a delay of 20 working days. Following your request, the Commission allowed an extension of the time limit of a further 20 working days. The Commission received your answer dated 19 July 2000. A second request for information was sent on 8 August 2000, and a reminder was sent on 13 September 2000. The Commission received your second answer dated 20 September 2000.

2. The measure concerned has not been notified to the Commission in accordance with Article 88(3) and it has therefore been entered into the register of non-notified aid under aid NN 55/2000.

II. DESCRIPTION OF THE MEASURE

3. According to the information available to the Commission, the measure was introduced by law in 1988 with regard to foreign dividends from foreign subsidiaries of companies resident in Ireland. The law underwent some clarifying amendments in 1991.

4. With reference to foreign profits from foreign branches of Irish companies, the measure was introduced by law in 1993. This law introduces also a special treatment for the capital gains arising in the foreign branches concerned by the measure.

5. Neither part of the scheme is restricted to companies that carry on particular activities. Both parts apply to all companies, providing that they are resident in Ireland and that the subsidiary or the branch concerned is in a country which has entered into a double taxation treaty with Ireland.

6. In order to qualify, the company has to obtain a certificate from the Ministry of Finance on the basis of an investment plan that must be directed towards the creation of at least 40 jobs or the maintenance of employment in Ireland by trading operations carried on by the foreign subsidiary or branch.

TEXT OF THE LETTER

The Commission wishes to inform Ireland that, having examined the information supplied by your authorities on the aid/measure referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.


7. The tax benefit consists in the tax exemption of the dividends or profits paid to the parent company resident in Ireland by the foreign subsidiary or branch. Double taxation relief is normally given by way of the credit system. This means that Irish tax on income and gains is reduced by the foreign tax paid on the income or gains, within the limit of the tax amount due in Ireland on the foreign income or gains concerned.

8. The measure provides an exemption on capital gains arising in these foreign branches: like for dividends and branch trading profits, the exemption replaces the normal double taxation relief on capital gain, given in form of tax credit within the limit of the tax due in Ireland. Moreover if the tax burden suffered abroad on the capital gain concerned is less than the Irish tax, the excess of the Irish tax over the foreign tax would be payable. The measure allows avoiding these limitations of the credit system.

9. The measure provides an advantage in cases where the effective tax expenditure of the foreign company or branch is lower than the effective tax level applied to the Irish parent company. The advantage is different case by case following the tax expenditure of each case, the amount of the benefits of the foreign entity (subsidiary/branch) and the amount of dividends or profits repatriated. It is not the official tax rate that affects the benefit level but rather the effective tax expenditure of the entities involved case by case.

10. The measure seems to be of indefinite duration.

11. It seems that the creation of a minimum of 40 jobs has to be forecasted in the investment plan in order to obtain the specific certificate from the Ministry of Finance. However it is not still clear what it happens in the cases of investment plans for the maintenance of the employment level.

12. The amount of the benefit varies from case to case and seems undetermined about the total worth.

13. It seems that each exemption is granted without any deadline. Moreover it seems that the advantage is not digressive over the period concerned by the investment.

III. ASSESSMENT OF THE MEASURE

14. The stated purpose of this regime is to maintain or increase the level of employment in Ireland by promoting trading operations carried on by foreign subsidiaries or branches of Irish parent companies.

15. The measure appears to constitute an aid, as it seems to fulfil the four relevant criteria.

16. Firstly, the measure affords the beneficiaries and the group of companies to which they belong an advantage that reduces the tax costs they normally bear in the course of their business. In fact the measure allows them to exempt such foreign incomes instead of having the credit system relief for the tax burden suffered abroad. According to point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, the tax advantage may be granted through different types of reduction in the company's burden and, in particular, through a reduction in the amount of taxes.

17. Secondly, the advantage must be granted by the State or through State resources. If the grant of a tax reduction involves a loss of tax revenue, as explained in point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation, it is equivalent to the use of State resources in the form of fiscal expenditure.

18. Thirdly, the measure must affect competition and trade between Member States. As explained in point 11 of abovementioned Commission notice this condition is fulfilled if the company concerned carries on activities that involve international trade. In the present case, this is the only way to obtain a benefit by the measure. In fact the measure concerns not the benefits arising directly in Ireland from export activities, but the profits repatriated from foreign subsidiaries or branches involved in international trade activities. Moreover as explained in point 11 of the abovementioned Commission notice, the fact that a measure strengthens the position of a competitor compared with that of other competitors in intra-community trade, is deemed to be understood as fulfilling the requirement of affectation of intra-Community trade.

19. Lastly, the measure must be specific or selective in that it favours 'certain undertakings or the production of certain goods'. Only the companies that submit a plan to maintain or increase the employment level within Ireland and obtain the prescribed certification qualifies for the exemption on income arising in foreign subsidiaries or branches. As explained in points 13, 16 and 18 (with particular reference to footnote 10 of point 18) of the Commission notice, this limitation seems to remove the possibility that this exemption could be considered a general measure.

20. It appears that the measure can affect the pattern of trade within the EU, in the aim to increase the employment level, by promoting the export of goods or services by way of foreign subsidiaries or branches.

21. The scheme seems not to fall within the logic of the system at least because it allows a special double taxation relief, that can involve a tax saving, only for those undertakings that obtained the prescribed certification from the tax authorities. The issue of such a certification depends upon still unclear discretionary powers of the tax authorities in evaluating a proposed investment plan. As explained in points 21 and 22 of the abovementioned Commission notice on application of State aid rules to direct business taxation, any discretionary power must that can benefit an individual undertaking must be analysed in details.
22. It is therefore necessary to determine if such a scheme is compatible with the common market under the exceptions laid down in Article 87(2) and (3) of the EC Treaty.

23. It appears that the exceptions under Article 87(2) of the EC Treaty cannot be applied in this case, as the scheme is not aimed at the objectives listed in these provisions.

24. Under Article 87(3)(a), aid is considered compatible with the common market when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Since the aim to promote the employment is not linked to a particular region of Ireland with a low standard of living or a high unemployment level, this provision seems not to apply. With regard to the exception laid down in Article 87(3)(a), since the beginning of 2000 Ireland is no more entirely eligible for this Article (letter SG D1617 24 February 1998). The new Irish regional aid map (State aid N 523/1999) confirms this situation.

25. Moreover at the present stage, the measure seems to constitute an operating aid (as explained in points 31 and 32 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation and the guidelines on aid to employment (5), with particular reference to point 22). Operating aid is normally allowed only in Article 87(3)(a) regions. At present it seems that the part of the scheme oriented to the maintenance of the employment level can be compatible only within Article 87(3)(a) exemptions, considering also that it does not result any link between the amount of aid granted by the measure and the number of jobs involved. Moreover at present it does not result any cutoff date in the scheme. These criteria are normally requested in employment aid schemes (Commission guidelines on aid to employment).

26. As regard to the exceptions laid down in Article 87(3)(b) and (d), the scheme in question does not result to promote the execution of an important project of common European interest or to remedy to a serious disturbance in the economy of Ireland, nor is it intended to promote culture or heritage conservation.

27. With regard to the creation of new employment, the Commission is wondering whether the level of aid does not exceed that which is necessary to provide an incentive to create jobs (point 21 of the Commission guidelines on aid to employment). The level of the advantage does not seem to depend on the number of jobs created but rather on the amount of dividends or income repatriated.

28. As regard to the exceptions laid down in Article 87(3)(c) the measure does not seems to fall within them. They state that it may be considered compatible aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest. At present these condition seems not to be met. The scheme does not facilitate any particular economic activity. With regard to the creation of new jobs it seems that it does not exist any link between the amount of aid granted by the measure and the creation of jobs concerned. Moreover it does not result any degresivity in the aid level during the period of existence of the aid. These criteria are normally requested in employment aid schemes (Commission guidelines on aid to employment).

29. Finally it does not result any other appropriate categories of aid established by a Council decision in accordance with Article 87(3)(e) that could apply.

30. Since the scheme seems not to be justified by the logic of the system and also seems not to qualify for any of the exceptions provided for in the Treaty, in the context of its preliminary assessment as provided by Article 6 of Council Regulation (EC) No 659/1999, the Commission has doubts about the compatibility of the scheme with the common market.

31. In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests to the Republic of Ireland to submit its comments and to provide all such information as may help to assess the measure, with particular reference to any information concerning the criteria of evaluation of the investment plans oriented to obtain the special foreign income relief, within one month of the date of receipt of this letter. The Commission would in addition like to gather the observations of Ireland and interested parties on possible legitimate expectations of the sort that would pose an obstacle to the recovery of aid, in the event that this aid would be qualified as being illegal and incompatible. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

32. The Commission wishes to remind to the Republic of Ireland that Article 88(3) of the EC Treaty has suspensory effect, and would draw its attention to Article 14 of Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

33. The Commission warns the Republic of Ireland that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Communities. It will also inform interested parties in the EEA countries, which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Communities and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.