

COMMISSION DECISION**of 11 December 2002****on the application by Portugal of the financial and tax aid scheme for the free zone of Madeira in the period between 1 January and 31 December 2000***(notified under document number C(2002) 4825)***(Only the Portuguese text is authentic)****(Text with EEA relevance)**

(2003/294/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to those Articles ⁽¹⁾ and having regard to those comments,

Whereas:

(2) By letter No 327 of 21 April 1998 from the Portuguese Permanent Representation, registered as received by the Commission on the same day, the Portuguese authorities requested an additional period of two weeks in which to submit their comments on the proposed appropriate measures. By letters No 409 of 4 June 1998 and No 423 of 10 June 1998 from their Permanent Representation, registered as received by the Commission on 10 and 12 June 1998 respectively, the Portuguese authorities transmitted to the Commission a letter dated 29 May 1998 from the Minister for Foreign Affairs stating that the Portuguese Government agreed with the principles underlying the Commission's action on regional aid and including certain comments on the guidelines on national regional aid. Since the letter from the Minister for Foreign Affairs did not make it clear to the Commission that the Portuguese authorities agreed with the proposed appropriate measures mentioned above, by letter D/52552 of 18 June 1998, transmitted to the Portuguese Permanent Representation, and by letter D/53161 of 23 July 1998, transmitted to the Portuguese Minister for Foreign Affairs, the Commission asked the Portuguese authorities to confirm their agreement.

I. PROCEDURE

(1) When the Commission adopted the guidelines on national regional aid ⁽²⁾, it took the view, pursuant to Article 88(1) of the EC Treaty, that the gradual development and operation of the common market meant that a reassessment had to be carried out with the Member States of regional aid schemes in existence before the date of adoption of the guidelines so as to allow the establishment, from 1 January 2000, of a transparent and equitable system of regional aid for all Member States, based on full compliance with the guidelines. By letter SG(98) D/1684 of 24 February 1998, which set out appropriate measures pursuant to Article 88(1) of the Treaty in respect of national regional aid, the Commission proposed that the Portuguese authorities should amend all existing regional aid schemes which were in force on 1 January 2000, so as to make them compatible with the provisions of the guidelines as from that date.

(3) By letter No 629 of 2 September 1998 from the Portuguese Permanent Representation, registered as received by the Commission on 7 September 1998, the Portuguese authorities transmitted to the Commission a letter dated 20 August 1998 from the Minister for Foreign Affairs stating that the financial and tax aid scheme for the free zone of Madeira ⁽³⁾ would expire on 31 December 2000, being subject to the appropriate measures for national regional aid. By letter D/53951 of 29 September 1998 to the Portuguese Permanent Representation, the Commission stated that, in view of the abovementioned letter from the Minister for Foreign Affairs, it considered that the Portuguese authorities had confirmed their agreement on the proposed appropriate measures. At the same time, it asked the Portuguese authorities either to give an assurance that the financial

⁽¹⁾ OJ C 301, 21.10.2000, p. 4.

⁽²⁾ OJ C 74, 10.3.1998, p. 9.

⁽³⁾ State aid E 19/94, ex E 13/91 and N 204/86.

and tax aid scheme for the free zone of Madeira would be limited in duration to 31 December 1999 or to notify the proposed amendments that would make the scheme compatible with the guidelines as from 1 January 2000.

- (4) Despite the numerous contacts to this end between the Commission and the Portuguese authorities ⁽⁴⁾, no information was communicated to the Commission enabling it to take the view that all the necessary amendments had been made to bring the scheme into line with the guidelines on national regional aid as from 1 January 2000. Accordingly, given the presumed acceptance of the aforementioned appropriate measures by the Portuguese authorities, the scheme in question was entered in the register of non-notified aid under NN 60/2000.
- (5) By letter SG(2000) D/105022 of 17 July 2000 the Commission notified Portugal that, having examined the information provided by the Portuguese authorities on the financial and tax aid scheme for the free zone of Madeira in connection with appropriate measures proposed pursuant to Article 88(1) of the Treaty for national regional aid, it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the application of the scheme in the period between 1 January and 31 December 2000. At the same time, it asked Portugal to submit its comments and to provide all relevant information for assessing the aid concerned within one month of receipt of the abovementioned letter.
- (6) The Commission's decision to initiate the formal investigation procedure in respect of the aid concerned was published in the *Official Journal of the European Communities* ⁽⁵⁾. Interested parties were invited to submit their comments on the scheme concerned to the

Commission within one month of the date of publication.

- (7) By letters No 860 of 11 August 2000 and No 867 of 16 August 2000 from the Portuguese Permanent Representation, registered as received by the Commission on 11 and 17 August 2000 respectively, the Portuguese authorities asked for an additional period of one month in which to submit their own comments under the procedure laid down in Article 88(2) of the Treaty. By letter D/54485 of 31 August 2000 to the Portuguese Permanent Representation, the Commission granted that additional period. By letter No 932 of 18 September 2000 from their Permanent Representation, registered as received by the Commission on 19 September 2000, the Portuguese authorities communicated their comments to the Commission.
- (8) The Commission also received comments from 16 interested parties. The Commission forwarded these comments to the Portuguese authorities by letters D/56003 of 4 December 2000 and D/56048 of 6 December 2000, addressed to the Portuguese Permanent Representation, to allow them to give their opinion. The respective comments were received by letter No 82 of 10 January 2001 from the Portuguese Permanent Representation, registered as received by the Commission on 12 January 2001.

II. DESCRIPTION OF THE MEASURE IN RESPECT OF WHICH THE COMMISSION INITIATED THE PROCEDURE

- (9) Under the terms of the most recent Commission decision on the financial and tax aid scheme for the free zone of Madeira ⁽⁶⁾, tax aid was allowed for industrial, financial and service firms and for operators entered in the shipping register who set up in the free zone by 31 December 2000. These firms were exempt from all direct taxes up to the end of 2011, after which they were to be partially exempt (they would then be required to pay property and income taxes, which constitute the principal part of their tax burden).
- (10) Following the adoption of the guidelines on national regional aid, the Commission proposed, as appropriate measures pursuant to Article 88(1) of the EC Treaty and by letters of 24 February 1998, that Member States should amend all existing regional aid schemes which were in force on 1 January 2000, so as to make them compatible with the guidelines as from that date. The guidelines on national regional aid enshrine the

⁽⁴⁾ Letters No 9 of 5 January 1999, No 233 of 15 March 1999, No 848 of 25 August 1999, No 1156 of 18 November 1999 and No 19 of 5 January 2000 from the Permanent Representation, and No 853 of 4 April 2000 from the Portuguese Finance Minister (registered as received by the Commission on 7 January 1999, 18 March 1999, 27 August 1999, 24 November 1999, 7 January 2000 and 6 April 2000 respectively), and fax No 11684/99 of 14 December 1999 from the Portuguese Permanent Representation; letters from the Commission D/50399 of 27 January 1999 and D/51612 of 16 April 1999 to the Permanent Representation, and D/522 of 10 March 2000 to the Portuguese Finance Minister; bilateral meetings of 26 May 1999, 8 December 1999 and 15 December 1999 between the Commission and the Portuguese authorities.

⁽⁵⁾ See footnote 1.

⁽⁶⁾ State aid E 19/94 — letter SG(95) D/1287 of 3 February 1995.

principle that regional aid intended to reduce a firm's current expenses (operating aid) is normally prohibited, while exceptionally allowing such aid to be granted in regions eligible under the derogation in Article 87(3)(a) of the Treaty 'provided that it is justified in terms of its contribution to regional development and its nature, and its level is proportional to the handicaps it seeks to alleviate' (point 4.15). The guidelines also stipulate that 'with the exception of the cases mentioned in point 4.16,' (aid for transport in the outermost regions and regions of low population density) 'operating aid must be both limited in time and progressively reduced' (point 4.17).

(11) When it was called upon to assess the tax and financial aid scheme for the free zone of Madeira, the Commission stated that, apart from the exemption from tax on the acquisition of land and buildings, the tax aid granted by the Portuguese authorities constituted operating aid that might be granted for long periods or indefinitely. Given that the Madeira region is still covered by the derogation laid down in Article 87(3)(a) of the Treaty in the period between 2000 and 2006, compliance with the conditions laid down to that effect by the guidelines would thus be an obligation the Portuguese authorities would have to fulfil in applying the scheme and granting aid to firms established in the abovementioned free zone between 1 January and 31 December 2000.

(12) In general, in so far as it arose only in connection with some regional and/or minor taxes, the question of limitation in time did not appear to cause the Portuguese authorities much concern. On the other hand, as regards the progressive reduction of operating aid in the form of tax exemptions and its proportionality in relation to the handicaps it was intended to alleviate, the Portuguese authorities felt that the arrangements for implementing the financial and tax aid scheme for the free zone of Madeira should be re-examined only in the context of an overall agreement covering the period from 1 January 2000 to 31 December 2006, taking into account changes in the socioeconomic situation of the Madeira region.

(13) In this respect the Commission first pointed out that, under its decision on the matter ⁽⁷⁾, the financial and tax aid scheme for the free zone of Madeira was to expire on 31 December 2000. This being so, the scheme was subject to appropriate measures for national regional aid only for the year 2000, and any change in the implementation of the scheme during the period 2001 to 2006 still had to be notified to and

approved by the Commission. In this respect, given that Portugal had not submitted any new notification for the period 2000 to 2006, these two aspects were independent of each other. In so far as the only change envisaged by the Portuguese authorities in the conditions for granting the aid in 2000 were to restrict the number of new financial firms admitted to the free zone to not more than 20 % of the total number of such firms active the previous year, the proposal put forward by the Portuguese authorities did not seem capable of ensuring the scheme's conformity with the guidelines.

(14) In this context the Commission also noted that, even though it had already announced ⁽⁸⁾ that it was planning to amend the guidelines to make it possible to approve operating aid that was not progressively reduced and not limited in time in the outermost regions eligible for regional aid where such aid was intended to reduce the additional costs arising in the pursuit of the economic activity from the handicaps set out in Article 299(2) of the Treaty, the only exceptions then allowed to the principles of limitation in time and progressive reduction related to aid specifically designed to offset additional transport costs in the outermost regions and regions with low population density.

III. COMMENTS SUBMITTED BY THE PORTUGUESE AUTHORITIES

(15) The comments submitted by the Portuguese authorities under the formal investigation procedure first of all challenged the grounds of the decision to initiate the procedure. In this respect the Portuguese authorities pointed out in particular that Portugal had never accepted the guidelines on national regional aid, nor the appropriate measures proposed by the Commission in this area. Consequently, according to the Portuguese authorities, since such acceptance could not be inferred from any document transmitted to the Commission, the latter would have no grounds for considering the aid granted in accordance with the financial and tax aid scheme for the free zone of Madeira in the period between 1 January and 31 December 2000 to be unlawful and subject to recovery.

(16) The Portuguese authorities also considered the initiation of the procedure to be excessive and unjustified in any event for two reasons in particular:

— the Commission was obliged, at least from the entry into force of the Treaty of Amsterdam, to discriminate positively in favour of the outermost regions. In initiating the procedure laid down in

⁽⁷⁾ See footnote 6.

⁽⁸⁾ Report COM(2000) 147 final, 14 March 2000.

Article 88(2), the Commission was failing to comply with that obligation, in particular because the Commission itself subsequently considered it necessary to amend the guidelines on regional aid ⁽⁹⁾ in order to take full account of the new Article 299(2),

- the approach adopted in relation to the financial and tax aid scheme for the free zone of Madeira represented unequal treatment in comparison with other cases and/or regions. In this respect the Portuguese authorities considered in particular that the Irish International Financial Service Center had been allowed relatively flexible phasing out arrangements ⁽¹⁰⁾ while the Commission departments had rejected any possibility of compromise in relation to the free zone of Madeira.

- (17) In view of these comments, the Portuguese authorities considered in particular that the Commission should close the procedure by means of a decision confirming the authorisation of the scheme until 31 December 2000, in the same terms as the decision it took in 1995 ⁽¹¹⁾.

IV. COMMENTS FROM INTERESTED PARTIES AND RESPONSE OF THE PORTUGUESE AUTHORITIES

- (18) The comments submitted by interested parties came largely from the direct or indirect beneficiaries of the financial and tax aid scheme for the free zone of Madeira. Although they were relatively numerous, these comments contained virtually no relevant information for assessing the scheme in question, since they were generally confined to regretting that the procedure had been initiated and asking the Commission to refrain from taking decisions that could be detrimental to the efficient operation of the free zone. None of the interested parties, for example, seemed to share the doubts voiced by the Commission when the procedure was initiated (this element was in fact the only aspect stressed in the Portuguese authorities' responses to the abovementioned comments, as notified to the Commission by letter No 82 of 10 January 2001 from their Permanent Representation).

V. ASSESSMENT

- (19) The Commission examined the comments submitted both by the Portuguese authorities and by interested parties under the formal investigation procedure concerned.

- (20) As regards the alleged non-acceptance of the proposed appropriate measures in respect of national regional aid, the Commission would like to point out in particular that at no time during the period of 28 months between letter SG(98) D/1684 of 24 February 1998, which proposed appropriate measures in relation to national regional aid, and the decision to initiate the formal investigation procedure in respect of implementation of the financial and tax aid scheme for the free zone of Madeira during the year 2000 (which was taken on 28 June 2000) did the Portuguese authorities inform the Commission that they did not accept those appropriate measures. Quite the contrary, the Portuguese authorities always suggested, both by letters from the Portuguese Permanent Representation and during the various bilateral meetings held on the matter, that they were willing to cooperate fully with the Commission to identify the changes that had to be made to the scheme to ensure that it complied with the guidelines, and they were fully aware that the Commission considered their acceptance of the appropriate measures as given.

- (21) Notwithstanding the foregoing, the Commission nevertheless has to acknowledge that the Portuguese authorities never explicitly notified it of their unconditional acceptance of the appropriate measures transmitted by letter SG(98) D/1684 of 24 February 1998. The Commission is therefore not able to refute the comments submitted by the Portuguese authorities under the formal investigation procedure, according to which such acceptance was never given. Under these circumstances the procedure initiated in respect of Portugal's non-compliance with the appropriate measures proposed by the Commission with regard to the application of the financial and tax aid scheme in the free zone of Madeira in the period between 1 January and 31 December 2000 no longer serves any useful purpose.

- (22) The Commission also notes that the aid scheme for the free zone of Madeira expired on 31 December 2000. Under these circumstances, any observations the Commission could make either in relation to the other comments submitted by the Portuguese authorities or in relation to the comments submitted by interested parties would also no longer serve any useful purpose.

VI. CONCLUSION

- (23) In view of the foregoing, the Commission considers that the procedure initiated under Article 88(2) of the Treaty as regards the application of the financial and tax aid scheme for the free zone of Madeira in the period

⁽⁹⁾ OJ C 258, 9.9.2000, p. 5.

⁽¹⁰⁾ OJ C 395, 18.12.1998, p. 8.

⁽¹¹⁾ See footnote 6.

between 1 January and 31 December 2000 no longer serves any useful purpose. The Commission regrets, however, that the Portuguese authorities did not inform it in good time that they did not accept its proposal for appropriate measures pursuant to Article 88(1) of the Treaty as regards national regional aid, contrary to what would appear to be required by the principle of fair cooperation underlying the aforesaid Article 88(1),

the free zone of Madeira in the period between 1 January and 31 December 2000 no longer serves any useful purpose.

Article 2

This Decision is addressed to the Portuguese Republic.

HAS ADOPTED THIS DECISION:

Done at Brussels, 11 December 2002.

Article 1

The formal investigation procedure in respect of the application by Portugal of the financial and tax aid scheme for

For the Commission

Mario MONTI

Member of the Commission
