II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 3 June 2003
on the Orkney Islands Council track-record scheme

(notified under document number C(2003) 1686)

(Only the English text is authentic)

(2003/611/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),

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1], and in particular Article 14 thereof,

Having invited interested parties to submit their comments, in accordance with the first subparagraph of Article 88(2) of the EC Treaty,

Whereas:

I. PROCEDURE

(1) In February 1999 the Commission was informed by a Member of the European Parliament of a scheme involving the purchase of quotas by Orkney Islands Council (OIC), hereinafter 'the OIC scheme', whereby the quotas acquired were to be rented to fishermen. By letter dated 25 March 1999 the Commission requested the United Kingdom authorities, hereinafter 'the UK authorities', to provide information about this scheme. Following a reminder, the UK authorities provided a response by letter dated 9 August 1999.

(2) The Commission requested further information by letters dated 1 September 1999, 12 April 2000 and 22 June 2000. The UK authorities sent information by letters dated 6 March 2000, 9 March 2000 and 16 May 2000. However, no response to the letter dated 22 June 2000 was received. A meeting was held with the UK authorities at Commission offices on 18 October 2000.

(3) The Commission informed the United Kingdom by letter dated 28 November 2001 of its decision to initiate, in relation to the OIC scheme, the formal investigation procedure provided for in Article 88(2) of the EC Treaty. Following mutual agreement to extend the deadline for a response, confirmed to the UK authorities by Commission letter dated 20 December 2001, the United Kingdom provided its comments on the case by letters dated 6 February and 28 February 2002.

(4) By letter dated 7 August 2002, the Commission requested documents to which reference was made in the reply of the UK authorities dated 28 February 2002. They were received on 27 August 2002.

[1] OJ L 83, 27.3.1999, p. 1.

(5) The Commission's decision to initiate the formal investigation procedure was published in the *Official Journal of the European Communities* on 12 February 2002 [2]. The Commission invited any interested parties to provide their observations on the case. Comments were received from the Scottish Fishermen's Organisation Ltd (letter dated 4 March), Mrs Sheryll Murray of Torpoint, Cornwall, (letter dated 7 March 2002) and the Aberdeen Fish Producers' Organisation Ltd (letter dated 11 March 2002). In accordance with Article 6(2) of Regulation (EC) No 659/1999, those letters were forwarded to the UK authorities to enable them to inform the Commission of their own comments on those observations. The UK authorities replied by letter dated 3 May 2002, saying in substance that the issues raised had already been dealt with in their previous replies.

II. **FACTS**

(6) In the United Kingdom, national fishing quotas are allocated to three groups of fishermen: (i) the 'sector', which is made up of the fish producers' organisations (POs) on behalf of their members with vessels over 10 metres; (ii) the 'non-sector', which comprises fishermen with vessels over 10 metres but who are not members of a producers' organisation; (iii) the 'under 10-metre fleet'.

(7) Quotas are allocated annually to the three groups on the basis of track records (the catch levels of each vessel over a certain period). Before 1999, track records were based on the catches made by fishing vessels during the three years immediately preceding each quota year. Since 1 January 1999, track records have been based on the period from 1994 to 1996. This system is known as 'fixed quota allocation' (FQA); an FQA unit represents a 100 kg track-record unit in respect of which annual quotas are allocated.

(8) The track records, or FQA units, can be sold from one vessel to another under certain conditions. This situation is relatively specific to the United Kingdom. Except for the Netherlands, where a system of individual transferable quotas is in place, fishing quotas, or track records giving access to them, are not usually transferable. Under this system, a certain market for track records has developed within the United Kingdom. The buyers can be other fishermen or POs.

(9) As the track records are based on catches made by fishing vessels from 1994 to 1996 and are now no longer recalculated from one year to another, fishermen are not obliged to fish all the quotas their track records entitle them to, and can keep their track records as a whole for the following years. They can fully or partly let them to other fishermen or POs. In the same way, POs which have bought such track records are allowed to let them.

(10) It is within this context that the Orkney authorities decided in 1998 to set up the scheme in question. According to the UK authorities, the OIC scheme was set up because the Orkney fleet was unable to borrow money from commercial sources to buy track records.

(11) The bodies involved in the OIC scheme are:

— Orkney Islands Council (OIC),

— Shetland Fish Producers' Organisation (SFPO), which is a producers' organisation as defined in Community legislation [3],

— Orkney Fisheries Association (OFA), which is an unincorporated association.

(12) The OIC scheme operates in the following manner. Funding for the purchase of track records comes from the Reserve Fund established by the OIC. Monies for this fund come from a number of sources, in particular from surplus income of the OIC from harbour dues and fees in relation to the oil terminal and payments made by oil companies and other parties which make use of the harbour or harbour-related facilities of the Orkney Islands.

[2] OJ C 38, 12.2.2002, p. 2.
[3] Council Regulation (EEC) No 3759/92 of 17 December 1992 on the common organisation of the market in fishery and aquaculture products (OJ L 388, 31.12.1992, p. 1).

(13) OIC entered into an agreement, dated 14 to 17 December 1998, with SFPO which acts as the proper holder of the track record. That agreement contains the following statements:

— 'Notwithstanding that the Track Record is held by SFPO, the Track Record shall vest in OIC and SFPO hereby assigns to OIC its whole right, title and interest in and to the Track Record such as the same shall vest absolutely in OIC and, to the extent that the Track Record shall fail to vest effectively in OIC as aforesaid, SFPO shall hold the Trust Property in trust for the benefit of OIC' (point 3.2),

— 'During the period of this agreement, SFPO shall each year make available the quota for the utilisation by OIC …' (point 4.2).

(14) There is also an agreement, dated 16 to 17 December 1998, between OIC and OFA which manages the acquisition of track records and the benefits of the acquired track records. That agreement contains the following statements:

— 'OFA shall submit from time to time notification of track records which OFA considers would be suitable for OIC to acquire …' (point 3.1),

— 'OIC wishes that: (a) the quota be leased to eligible vessels so as to achieve maximum utilisation of the quota, (b) OFA shall collect the rental therefrom, (c) OFA shall remit to OIC the balance of the rental under deduction of the management fee …' (point 4.1),

— 'Eligible vessel shall mean any vessel (a) which is registered and licensed as a British fishing vessel, (b) which is in membership of OFA and (c) in relation to which 50 % of the crew members are resident in Orkney' (point 1.1),

— '…OFA shall use all reasonable endeavours to negotiate rental agreements... (a) the rental shall be the market rental then prevailing and … OFA shall use all reasonable endeavours to obtain a net rental in respect of any quota, after deduction of its management fee (1 %), representing a return to the OIC of no less than 7 % per annum … on the acquisition cost of the relative track record…; (b) the period of each rental agreement shall be no longer than one year …' (point 4.2),

— '…OFA shall direct SFPO regarding the transfer of quotas to the lessee…' (point 4.4),

— 'OIC shall be entitled to the rental payable under any rental agreement but OFA shall … collect all rental from lessees and shall remit to OIC the sum specified in clause 5.4 [7 %], whether or not OFA shall have collected that sum from the lessees' (point 5.1).

(15) According to the information sent by the UK authorities by letter dated 9 August 1999, the track records acquired cost GBP 1,543 million. No further purchases were planned under the OIC scheme. According to their next letter, dated 6 March 2000, eight vessels had benefited from the scheme; all were members of OFA.

Grounds for the formal investigation procedure

(16) As the Orkney fleet was unable to borrow from commercial sources for the purchase of track records, the OIC scheme enabled it to obtain quotas to which it would not otherwise have been entitled. At a time when banks were not prepared to provide loans, the OIC injected fresh capital to enable this purchase. That is to say, fresh capital was invested by a public body in circumstances not acceptable to a private investor. According to the Commission's position on public capital injections, this indicates a case of State aid. Moreover, as the Commission did not receive copies of the rental agreements, despite its requests, it was not able to check whether those agreements were fixed under normal market conditions nor that there was no State aid involved in the rental agreements.

(17) As the OIC scheme was set up in 1998, it was assessed in the light of the 1997 Guidelines for the examination of State aid to fisheries and aquaculture [4]. The Commission considered that quotas and track records were by nature non-durable goods; even though they can be bought, in theory they no longer have any value at the end of the calendar year. Aid for their purchase therefore appears to be aid related to operating costs for the running of the vessels which benefit from them.

[4] OJ C 100, 27.3.1997, p. 12.

As operating costs in the fisheries sector are allowed only in specific circumstances not existing here, this aid did not appear to be compatible with the common market. In addition, the Commission considered that the OIC scheme could not be considered as a scheme implemented by members of the industry, permissible under point 2.7 of the Guidelines, because its effect of ringfencing track records rather than letting the market forces work is protective in the context the industry must face and does not contribute to attaining the objectives of the common fisheries policy.

III. OBSERVATIONS OF THIRD PARTIES

The Scottish Fishermen's Organisation Ltd (SFO)

(18) The Scottish Fishermen's Organisation Ltd (SFO) welcomes the Commission's decision to initiate the formal investigation procedure and is of the opinion that the OIC scheme is by its very nature discriminatory and contrary to the rules governing State aid. It considers that the scheme was funded by the local authorities because no commercial financing would have been provided by banks to fund such purchases, not only because track records are intangible assets but also because the asset base of the local fishermen's association could not justify lending it GBP 1,543 million. The SFO has approached commercial financial institutions for money to purchase quotas but it would have had to mortgage its assets or effectively remove the money from its working capital. It is therefore clear that the local authorities in Orkney put the local fishermen in an economically advantageous position.

(19) The SFO also indicates that it was the intervention of the Orkney authorities which caused the cost of quotas to escalate and the development of the market for quotas. Furthermore, it believes that the minimum net rate of return of 7 % is not a binding commitment; many in the industry think that the GBP 1,543 million loan was interest-free and would eventually be written off.

(20) In addition, the SFO maintains that the OIC scheme was designed from the outset to benefit Orkney fishermen. They had ceased to be members of their original producers' organisation (Aberdeen Fish Producers' Organisation) and set up their own local PO with membership restricted to Orkney fishermen. The conditions offered to vessels in membership of OFA to rent quotas were preferential to the conditions prevailing outwith Orkney. The SFO cites, by way of example, the case of cod. It thinks it likely that the Orkney fishermen were able to purchase quotas at a price ranging from GBP 1 000 to GBP 2 000 per tonne and, to meet the 8 % return criterion, a leasing price of a maximum of GBP 160 would have sufficed. In comparison, in the year 2001, the price paid to lease cod in mainland Britain would not have been less than GBP 350 per tonne, since the average price was around GBP 450 per tonne.

(21) Finally, the SFO thinks that the assistance afforded to Orkney fishermen has benefited them in terms of operating expenses. Leasing expenditure is an operating cost and becomes a cost item in the vessels' balance sheet. Consequently, the OIC scheme is clearly an aid to those vessels participating in it. There has been considerable expansion in the fishing capacity of the Orkney fleet. The practical application of the scheme is such that it disadvantages fishermen in mainland Britain and indeed in the rest of the Community.

The Aberdeen Fish Producers' Organisation Ltd (AFPO)

(22) The AFPO indicates that it had seven Orkney vessels in its membership in 1999. It had understood from verbal information that one of the attractions to Orkney vessels to establish a local PO was that quota entitlements would be acquired and made available to them under some kind of arrangement. The AFPO submitted an objection to the Scottish Executive against the creation of a new PO because it would be a very small body which could result in the unnecessary duplication of financial contributions and because the abovementioned seven vessels seldom, if ever, landed in Orkney. The Scottish Executive replied that the Orkney Fish Producers' Organisation met the criteria for official recognition and that this recognition was appropriate as fisheries are an important part of Orkney's economy.

(23) The AFPO also mentioned that it had asked the local City Council a few years ago for preferential loans to enable it to purchase quota entitlements and that it was advised that such assistance could not be given as it was in breach of Community rules.

Mrs Sheryll Murray, Torpoint, Cornwall

(24) Mrs Murray is a member of Cornwall County Council and mentioned that a similar scheme was discussed by this Council in January 2001. In her opinion, since the United Kingdom may manage its quotas as it wishes, there is no problem with allowing local authorities to use funds to safeguard

local Community fishing industries. She further commented on the fixing of production opportunities available to each UK vessel, which would be contrary to the common organisation of the market in fisheries products if the scheme was, in itself, contrary to this common organisation.

IV. **COMMENTS FROM THE UNITED KINGDOM**

(25) In its first reply, dated 6 February 2002, the United Kingdom only forwarded comments made by the Orkney Island Council (OIC) in a letter to the Scottish Executive dated 22 January 2002. In its second reply, dated 22 February 2002, the United Kingdom sent its own comments, saying that they might equally be considered to be the comments of an interested party as referred to in the invitation which appeared in the Official Journal on 12 February.

Comments from the OIC

(26) As a preamble to its comments, the OIC expresses concern that the European Commission has seen fit to investigate this matter notwithstanding the fact that the 'deemed consent' procedure had been carried out and complied with by the UK authorities.

(27) The OIC questions the accuracy of the FQA market prices quoted in *Fishing News*, particularly for 2000. At that point, the market was just emerging and the values quoted could not be relied upon to determine a reasonable long-term return. It is a very volatile market and recent valuations have shown variations in price of up to 66 % in respect of the same track records. In the absence of more reliable indices, the best way of proceeding and assessing a reasonable return is to make use of more reliable alternative indices, such as rates of commercial lenders, stock market returns and government stocks. OIC gives examples of some of its other investments with a lower return obtained: temporary loans with a return of $3\ ^{7}/_{8}$ % on call, $3\ ^{21}/_{32}$ % for one month and 4¼ % for a 12-month loan and a reserve fund investment portfolio with a return of 6,3 % before capital gains and losses for the year 2001.

(28) The OIC refers to the Orkney County Council Act 1974 which authorises it to exercise harbour jurisdiction, in particular to Section 69(3)(e) which allows the Council to set up a reserve fund if the revenue of the harbour undertaking exceeds the money expended, this reserve fund being created 'for any purpose which, in the opinion of the Council, is solely in the interest of the County or its inhabitants'. The reserve fund is therefore not used to fund the Council's compliance with its statutory obligations, nor is it used to replace public sector contributions. It is accounted for separately and remains distinct from other accounts within the Council. The OIC refers to the Commission document 'Competition Law and the European Communities, Volume IIB, Explanation of rules applicable to State aid' in which it is stated, on page 8, that 'on the basis of the Court's judgements, a measure which originates directly or indirectly within the State, and which confers an advantage on one or more specific firms, falls outside the scope of Article 92 [now Article 87] if it imposes no extra burden on the State budget', reference being made to the judgements of the Court of Justice of the European Communities in Case 82/77 *Netherlands* v *Van Tiggele* (1978) ECR 25 and Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* (1993) ECR I-887.

(29) The OIC indicates that it had received a 7 % rate of return on its investments since the inception of the scheme to date and that this agreement was only intended to last for a year; it had thus reserved its right to adjust the rate of return in order to ensure that that rate was a commercial one. Although the rental agreements were not finalised because of the lengthy process that required to be undertaken in respect of Commission consent, their terms have been honoured. Even if it is true to say that the scheme was set up because the Orkney fleet was unable to borrow from commercial sources, the Council was aware of commercial lending secured against track records for a commercial return, a by-product of which is to assist in attracting and sustaining a fishing fleet in Orkney. In the opinion of the OIC, since the leasing of track records and the granting of funds in security of track records is more widely available, the undertakings involved in the OIC scheme have not benefited commercially from it.

(30) The OIC believes that the scheme falls outside Article 87 on the grounds that the aid is not selective and does not affect the balance between the undertakings in receipt of aid and other undertakings. Membership of OFA is not restricted to undertakings of a particular Member State; it is merely subject to a residential and registration requirement within Orkney. This requirement can be complied with by any undertaking or resident in the Community and therefore cannot be seen to benefit one single Member State.

(31) The OIC is of the opinion that the catch of the Orkney fleet availing themselves of the scheme is landed entirely within Scotland and is consumed almost entirely by the local market (Scotland). As operated, that scheme does not therefore distort competition between Member States.

Comments from the United Kingdom

(32) The United Kingdom highlights the fact that the amount used for the purchase of track records (GBP 1,543 million) was provided by the Orkney Islands Council Oil Reserve Fund (ORF) which is funded as a result of a voluntary agreement with the oil companies active in the Orkney area. As these contributions to the ORF are not compulsory, the funds cannot be considered as a tax revenue or a State resource; they are not used to meet the Council's statutory obligations, nor do they replace public sector contributions. They are also accounted for separately. Referring to the judgements of the Court of Justice of the European Communities in Case 82/77 (cited above, recital 28), Joined Cases C-72/91 and C-73/91 (cited above, recital 28) and Case C-189/91 *Kirsammer-Hack* v *Sidal* (1993) ECR I-6185, the United Kingdom maintains that the scheme fails to meet one of the key tests for establishing the existence of aid.

(33) According to the United Kingdom, on the basis of a comparison between the actual rate of return achieved and estimates made by a commercial quota letting agent (InterQuo Ltd), the differences between the two are within the margins tolerated by acceptable commercial practice, as the rate of return achieved under the scheme is 8 %, of which 1 % is paid to SFPO to cover its administration costs, and estimates made by InterQuo Ltd suggest that the return on investment for leasing these quotas commercially during 1999 and 2000 could have been 8,78 % and 8,27 %, respectively. The quotas were therefore leased at market rates and aid to producers did not exist. Consequently, the OIC scheme did not distort or threaten to distort competition. As for the cost of quota leasing published in *Fishing News*, the United Kingdom contends that the rates were published so infrequently that they could not provide the basis for a true assessment of this volatile market.

(34) The United Kingdom maintains that the involvement of OIC in the administration of ORF does not constitute the direction or supervision by the State of the payments. Since the ORF is managed for the benefit of the community, there are few alternatives to its administration by the Council; alternative arrangements, such as trusts, are difficult to apply in practice because of the small population of the islands. The United Kingdom points out that the Commission has accepted that contributions made from the ORF are considered to be private contributions in the context of expenditure from the European Agriculture Guidance and Guarantee Fund (EAGGF). It follows that the payments made in this case do not represent State expenditure; nor were they directed by a body acting as an emanation of the State. The United Kingdom contends that OIC had reasonably assumed that the payments would not be considered as State aid and that this was a legitimate expectation on the part of the Council, given the status of the ORF and the fact that no similar scheme had been previously established in the Community.

(35) Even if the Commission considers that there is State aid, the United Kingdom contends that trade between Member States is unaffected. Fishermen operate in an artificially constrained market, since the supply of fish caught by Community vessels is regulated by Community legislation (quotas) and, more importantly, quotas are allocated to Member States. Arrangements for the management of quotas are matters for the Member State; trade in UK quotas is, by definition, not possible with other Member States. Trade would have been affected only if fishing opportunities, rather than fish, had constituted the traded commodity.

(36) In the opinion of the United Kingdom, this aid should not be considered as operating aid, or as aid implemented by the industry, as the Commission did in its preliminary examination. Track records and quota entitlements should be considered as assets. Notwithstanding the UK policy position that there was no intention of creating a 'free trade' situation in FQAs, there has always been scope for permanent transfers of quotas, something which is being formally recognised through adjustment of the Register of FQA holdings. Moreover, although security for the purchase of quotas was originally provided by the vessel, commercial lenders changed their position and considered the track records purchased as security (a letter from the Royal Bank of Scotland was attached as evidence). Track records are included within the annual accounts of many vessels and permanent transfers of quotas

are regarded by the UK Customs and Excise as a capital item for the purposes of Capital Gains Tax and Related Rollover Relief. The United Kingdom challenges the Commission's view that FQA units are 'raw products' which in theory no longer have any value at the end of the year. FQA units represent, year on year, a variable level of fish quotas and remain as a permanent share of available fishing opportunities. Therefore, if aid exists, it should not be considered as operating aid but rather as analogous with investment aid. As investment aid is not addressed in the 1997 Guidelines, it should be considered on a case-by-case basis in line with section 1.2 and its compatibility assessed with regard to the objectives of the Common Fisheries Policy.

(37) The United Kingdom refers to the Guidelines, which state that aid must not be protective in its effect and must promote the rationalisation and efficiency of production and marketing in a way which encourages the adaptation of the industry. It also refers to the EC Treaty, which assigns to the common fisheries policy, as to the common agricultural policy, the task of ensuring a fair standard of living for the community, in particular by increasing individual earnings and assuring the availability of supplies (Article 33(1)(b) and (d)). The OIC scheme resulted in the buying and pooling of track records at a time of decreasing stocks. Such pooling can be considered to be rationalisation through the development of viable fishing enterprises in the context of decreasing fish stocks and erosion of catch entitlement. The scheme, which resulted in some of those smaller fishermen continuing in business in heavily fisheries-dependent areas where little alternative economic activity exists, could equally be consistent with the socioeconomic dimension of the common fisheries policy as required by Article 159 of the EC Treaty.

(38) Finally, should the Commission adopt a negative decision, the United Kingdom indicates its willingness to amend the scheme as required to ensure future compliance with the rules. However, it urges the Commission to refrain from attempting any recovery from fishermen whom it may consider to have benefited from the scheme.

V. **ASSESSMENT**

A. **Existence of State aid**

(39) Under Article 87(1) of the EC Treaty, '[s]ave as otherwise provided in this Treaty, 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'. Four conditions must be satisfied in order to class a measure as a State aid: first, the measure must provide some advantage to the undertakings which benefit from it; second, the aid must be granted by the State or through State resources; third, it must distort or threaten to distort competition by favouring certain undertakings; and, finally, it must affect trade between Member States.

Advantage to beneficiaries

(40) The OIC scheme was set up because the Orkney vessel owners were unable to borrow money to buy track records. The UK authorities clearly indicated this in their letter dated 9 August 1999. Consequently, the scheme has resulted in providing quotas to SFPO, and these quotas are rented and used by those vessel owners who would otherwise not have had them at their disposal. As aid exists when an intervention results in favouring specified beneficiaries, whatever the form of intervention, there is a presumption that the OIC scheme corresponds to an aid system to fishermen to whom quotas were rented.

(41) The present assessment is based on an analysis concerning the trade in track records and quota lease. It cannot be done, as the OIC has argued, by comparison with other investments ([5]). The assessment must be carried out with regard to the market concerned, with the data available for that market.

([5]) See recital 27.

(42) The fishermen who benefit from the OIC scheme are fishermen who were not able to borrow money to buy track records. It has enabled them to fish against quotas to which they would otherwise not have been entitled. These acquired track records have therefore enabled them to increase their production in conditions that could otherwise not have been possible. The scheme has therefore conferred an advantage on these fishermen.

(43) The Commission has no knowledge of the price of the quotas leased by SFPO to the Orkney fishermen. The UK authorities sent a summary sheet of the payments made to the OIC between April 1999 and January 2000; that summary shows that, as expected, the payments represented 8 % of the investment in the acquired track records (GBP 1,543 million), but it does not indicate the number of leased quotas to which the payments correspond. Although the Commission requested copies of the rental agreements, it never received them. The UK authorities replied, first, before the opening of the formal investigation procedure, that the rental agreements had been put on hold and, second, in their comments on that investigation, that the agreements had not been finalised but that their terms had been honoured. That was the justification put forward by the UK authorities for sending the Commission copies of the agreements in which the details concerning the quantities of quotas rented and the rental amounts had not yet been entered, even though the agreements had been signed by the lessees.

(44) The Commission considers that there is a lack of coherence in the information sent by the United Kingdom. By nature, an agreement concluded by a party which commits itself to paying a certain amount of money is signed only after an understanding is reached between the parties involved on the amount in return for the quantity leased. As the agreements sent by the United Kingdom do not contain these data, the Commission must assess the evolution of the prices of purchase of quotas, of their lease and of the existence of State aid on the basis of the information available, that is to say, on the information that it has obtained from other sources.

(45) In their first letter to the Commission, dated 9 August 1999, the UK authorities said that the track records had already been acquired. As the decision to set up the OIC scheme was taken in 1998, it was intended to be implemented from the first year of application of the new system of allocation of quotas ([6]). According to a House of Commons' report issued at that time on the subject ([7]), there was a huge tension in that particular market at that time: 'quota [more precisely "track record"] for cod was priced at GBP 1 800-2 000 per tonne; finally, rental values for cod, haddock and saithe quotas were around GBP 300 per tonne per year'.

(46) In its observations, the Scottish Fishermen's Organisation assumed that the lease conditions to the Orkney fleet were preferential, giving the example of cod, the track record for which was probably acquired at a price of GBP 2 000 per tonne at the most and the quota for which was probably leased at around half the price charged outside Orkney (GBP 160 instead of GBP 350 per tonne) ([8]). The UK authorities did not make any comments about these figures.

(47) From April to December 2000, the trade newspaper *Fishing News* regularly gave the prices for the purchase of track records (FQA units) and for the rental of quotas, the source of those figures being the Quota Trading Association of Fraserburgh. For example, the cost of track records was, per tonne, for North Sea cod, from GBP 1 800 in April down to GBP 1 500 in December and, for West Coast cod, at about GBP 1 450 all year round; for North Sea haddock, the cost of track records varied from GBP 1 900 to GBP 2 400 in April to GBP 1 700 to GBP 1 800 in December and, for West Coast haddock, from GBP 1 700 to GBP 1 900 in April to GBP 1 400 to GBP 1 500 in December. For other species, the trend was broadly the same, that is to say, prices remained stable or showed a slight decrease. As for quota rental prices, for North Sea cod, prices ranged from GBP 250 per tonne from April to September to GBP 200 in October and GBP 100 in December and, for West Coast cod, from GBP 300 in April and May, to GBP 230 from June to August, to GBP 200 in December; for North Sea haddock, they ranged from GBP 350 in April to GBP 100 in December and, for West Coast haddock, from GBP 280 to GBP 180; for other species, the prices decreased in the same way throughout the year 2000.

([6]) See recital 7.
([7]) House of Commons, Agriculture Committee, Eighth Report (1999) 'Sea Fishing', Vol. I; see points 77 to 94, and in particular, for the prices quoted, point 83.
([8]) See recital 20.

(48) The OIC and the United Kingdom have pointed out that this quota market was very volatile and that the rates published by *Fishing News* could not provide a true reflection of the situation ([9]). However, these figures confirm the observations made in the House of Commons Report. The implementation of the new system of quota allocation in the United Kingdom in 1999 led to great tension in the track records market. It is natural that the purchase prices remained around the same level or decreased a little in the following year. As for their renting, high levels of rental are observed at the beginning of the year because it is at that time that the fishermen wish to secure the quotas they want to fish against, which creates tension in the market in question.

(49) The UK authorities have not provided the Commission with information showing that the setting up of the OIC scheme did not lead to preferential rental conditions. If they had had such information they could easily have sent it. Given that they have not provided such information and since the Commission has information allowing it to assume that preferential rental conditions existed ([10]) and the UK authorities have not shown that information to be unreliable, it can be assumed that such preferential conditions did indeed exist and that the fishermen who benefited from the OIC scheme enjoyed a specific advantage.

(50) State aid exists when an intervention results in favouring specified beneficiaries, whatever the form of intervention. As the intervention of the Orkney Council in the implementation of the OIC scheme has resulted in the favouring of fishing enterprises established in the Orkney Islands, the OIC scheme must have been selective in character and has thus clearly conferred an advantage upon those particular enterprises. The opinion of the OIC, as transmitted by the United Kingdom ([11]) and according to which membership in OFA can be complied with by any undertaking in the Community, cannot be accepted. In practice, membership would have entailed registration of the vessel in the UK fishing vessel register, which is subject to specific obligations based on a national regime of entries and exits of the fleet, as provided for in Article 6 of Council Regulation (EC) No 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector ([12]); in addition, the vessel owner would have had to be a member of OFA and 50 % of the crew would have had to reside in Orkney.

State resources

(51) The 'State' is to be understood in the broadest possible sense, including all levels of regional and local government. In the present case, it covers the OIC. It covers also the Oil Reserve Fund (ORF) administered under the control of the Council and created under Section 69 of the Orkney County Council Act of 1974 ([13]). As the ORF funds remain under the control of the OIC, they constantly remain under public control and thus available to the competent public authority; they may therefore be considered as State resources. Paragraph 2 of Section 69 does indeed state that securities acquired with the funds should be managed by trustees. But, as the United Kingdom pointed out in its observations ([14]), no trust was instituted for that purpose because such an arrangement would have been difficult to apply in practice. Anyway, if a trust had been instituted, it would certainly have remained under the control of the OIC and decisions taken by the trustees would have been considered as decisions taken by the OIC, that is to say, by the State for the purposes of Article 87 of the EC Treaty.

([9]) See recitals 26 to 29 and 33.
([10]) See recitals 40 and 46.
([11]) See recital 30.
([12]) OJ L 337, 30.12.1999, p. 10.
([13]) Section 69: '1. If in respect of any financial year the monies received by the Council on account of the revenue of the undertaking exceed the monies expended or applied by the Council in respect thereof, the Council may in respect of that year apply out of the County fund and carry to the credit of a reserve fund in respect of the undertaking such a sum as they consider reasonable not exceeding the amount of such excess.
2. Any monies for the time being standing to the credit of the reserve fund may be invested in securities in which trustees are for the time being authorised to invest trust monies including any debenture stocks or other security created by the Council.
3. Any reserve fund provided under this section may be applied: a) in making good to the County fund any deficiency at any time arising in the income of the Council from the undertaking [harbour undertaking] or, b) in meeting any extraordinary claim or demand at any time arising against the Council in respect of the undertaking, or, c) for defraying any expenditure in connection with the undertaking for which capital is properly applicable, or in providing money for repayment of loans (but not in making annual payment required to be made in respect of loans), or, d) for defraying expenditure to be incurred from time to time in repairing, maintaining, replacing and renewing any buildings, works, plant, vessel, equipment or article forming part of the undertakings, or, e) for any other purpose which in the opinion of the Council is solely in the interests of the County or its inhabitants.'
([14]) See recital 34.

(52) The United Kingdom contends that the resources from the ORF are private money, which must be understood in the sense that they do not constitute State resources, because they come from a voluntary agreement and are not used to fund the Council's compliance with its statutory obligations. In addition, the Commission had already recognised that feature.

(53) The Commission observes that this agreement, concluded on 29 April 1975 between the OIC and the Pipeline Group (Occidental of Britain, Getty Oil, Allied Chemical Ltd and Thomson Piper Petroleum Ltd), contains provisions relating to: a minimum quarterly payment with an exemption clause in case of force majeure; the renegotiation of the agreement; arbitration in case of dispute ([15]). These provisions show that the commitment to pay those sums in return for use of the islands' facilities goes beyond what could be characterised as a voluntary contribution, as in the case, for instance, of a charity organisation. If renegotiation is possible (it is stated in the related paragraph that 'the Parties recognise that the payments set out in this agreement have been agreed to as fair and equitable'), it follows that the agreement was the result of a negotiation in the course of which each party upheld its own interests; the payment made under that agreement is not like a gift made to a charitable organisation. The agreement cannot therefore be classed as a voluntary agreement, that is to say, as resulting merely from the goodwill of the oil companies towards the County of Orkney and its inhabitants.

(54) In addition, the Commission observes that the content of the agreement did not primarily concern private interest between two undertakings. Article 295 of the Treaty is without prejudice to the rules in Member States governing the system of ownership and a public body may act as a private undertaking. But that is not the position here. The agreement states in its preamble that payments thereunder are made: 'a) in respect of any injurious affection, disturbance or depreciation of the community arising or likely to arise from oil transportation and shipment as a result of the installation and the operation of the terminal, b) towards facilitating the promotion of development in the Harbour areas and c) as contribution towards the additional expenses and costs which the Council will incur in providing increased public services as a consequence of the installation of the terminal.' It is clear, therefore, that payments made by the oil industry under this agreement do not correspond to the acquisition of goods or payments of services. For the recipient (the OIC through the ORF), it cannot be considered as money resulting from a commercial contract in which it would have been engaged. Accordingly, the payments made by the Pipeline Group cannot be considered as private money, but public money.

(55) The United Kingdom pointed out that, in the context of the EAGGF, the Commission has previously considered the ORF funds to be private. That was stated in a letter from the Directorate-General for Agriculture, dated 28 January 2002, concerning the national financing of a project ('the Orkney Meat project') cofinanced by the EAGGF. The Commission stresses that this reply was made in a very specific context. The Scottish Executive wanted to implement this project. Before doing so, it asked the Commission department concerned if it could do so by considering a contribution from ORF as private money (a private contribution is required for implementation of that kind of EAGGF project). The Scottish Executive forwarded some information to the Commission department concerned, which replied that 'on the basis of the information provided,… the money from the ORF can be considered as being a private contribution …'. The Commission department gave its advice on the basis of the information provided, without requesting further information and, therefore, without going into a more in-depth analysis. In the present case, however, the Commission has deepened its analysis and asked for specific information (which the United Kingdom sent). The Commission now observes that the United Kingdom had previously provided only incomplete information, which led to the reply given by the Commission department concerned by letter dated 28 January 2002. On the basis of the information now available, none of those documents indicate that the ORF is managed with any measure of autonomy and there is therefore no doubt that the ORF funds remain fully under public control.

([15]) '2. Payments: 2.1.… the Pipeline Group shall … make payment to the Council of the following sums: …;
4. Force majeure: If due to any act of God, war, …the Pipeline Group are unable to ship from the Terminal a sufficient quantity of crude oil during any quarter and thereby incur liability for the minimum payment under sub-clause 2.3 hereof, the payment … shall nevertheless be restricted to a sum calculated by reference..
5. Renegotiation: The parties recognise that the payments set out in this agreement have been agreed as fair and equitable in the light of the circumstances as presently known or anticipated by the parties. If, in the future, there should be any change in the circumstances.… they will meet and renegotiate the parts of this agreement so affected in good faith, in order, so far as possible, to restore the parties affected to their original position and, in the event of the parties thereafter failing to reach agreement, the matters in dispute between them shall be referred to arbitration in accordance with Clause 6.
6. Arbitration: Any reference or dispute between the parties hereto which may arise.… shall be determined by an arbiter appointed by the Sheriff of the Grampians, Highlands and Islands and the decision of such arbiter shall be final and binding on the parties.
7. Applicable law: The construction, validity and performance shall be governed by Scots law.'

(56) Furthermore, as stated in Section 69 of the Orkney County Council Act, the way in which the funds are to be used is clearly defined. They are to be used in the interests of the community of the Orkney Islands, as defined by the Council, and not used as a private investor would do in a market economy, with the sole aim of deriving profit from them. That is in line with the reasons given by the United Kingdom for the setting up of the OIC scheme ([16]), according to which the scheme was created because the Orkney fleet was unable to borrow from commercial resources. The ORF funds are therefore attributable to the State for the purposes of Article 87 of the EC Treaty.

(57) This finding is in line with the judgements in the cases referred to by the United Kingdom (Case 82/77, Joined Cases C-72/91 and C-73/91, and Case C-189/91) ([17]), in which the Court of Justice of the European Communities stated that only advantages granted from resources other than those of the State do not fall within the scope of the rules concerning State aids.

Distortion or threat to distort competition

(58) The quotas from which the fishing enterprises have benefited under the OIC scheme have reinforced their position with regard to the other fishing enterprises, whether registered in the United Kingdom or in the other Member States. They have been allowed to land and sell more fisheries products that they would have done had they not benefited from those quotas.

(59) The implementation of the OIC scheme has therefore affected competition conditions. It has given rights to fish for products which are sold on the Community market. The track records acquired concern fish species such as cod, haddock, saithe and whiting, which are species covered by the common organisation of the markets in the fisheries and aquaculture sector ([18]). Thus, this scheme has affected competition within the Community market.

(60) In addition, the Scottish Fishermen's Organisation ([19]) claims that it was the setting up of the OIC scheme that triggered the escalation of the cost of quotas. The UK authorities have not countered this statement.

Impact on trade between Member States.

(61) The question of whether trade has been affected must not be addressed with regard to the quota or track record market only, as the UK contends ([20]). An aid scheme must be assessed in relation to all the effects that it could have on trade within the Community. Consequently, the OIC scheme must also be assessed with regard to its effect on trade in the products concerned, namely products of the fisheries sector, and in the products which enter into competition with fisheries products.

(62) According to the official UK sea fisheries statistics for 1999 and 2000 ([21]), trade in fisheries products between the United Kingdom and the other Member States was very significant. Landings in 2000 were just under 500 000 tonnes. During the same year, exports of fish and fish products amounted to 365 000 tonnes including 233 000 tonnes to other Member States and imports of fish and fish preparations were just under 550 000 tonnes including 133 000 tonnes from other Member States.

(63) The OIC ([22]) has indicated that the Orkney catch is believed to be landed and consumed almost entirely within the Scottish market, but has not provided any proof that this is the case. It is only an assumption which does not tally with the significant nature of the trade exchanges just referred to. However, even if it were the case, the possibilities for enterprises established in other Member States to export their products into the United Kingdom would still be affected. The OIC scheme allows the fishermen who benefit from it to maintain a share of the market that competitors could otherwise have seized. Thus, trade between the Orkney fleet and producers from other Member States is affected.

([16]) See recital 10.
([17]) See recitals 28 and 32.
([18]) At the time of the setting up of the scheme, this common organisation of markets was regulated by Council Regulation (EC) No 3759/92 of 17 December 1992 (OJ L 388, 31.12.1992, p. 1), which was replaced on 1 January 2001 by Council Regulation No 104/2000 of 17 December 1999 (OJ L 17, 21.1.2000, p. 22).
([19]) See recital 19.
([20]) See recital 35.
([21]) Available on the website http://www.defra.gov.uk/
([22]) See recital 31.

Conclusion

(64) The four criteria for classing these measures as State aid measures for the purposes of Article 87 of the EC Treaty are met. Since these measures concern the fisheries sector, they must be examined under the Guidelines for the examination of State aid to fisheries and aquaculture, hereinafter 'the Guidelines'. Under point 3.4 of the current Guidelines ([23]), they must be examined under the Guidelines in force at the time of the grant of the aid. Consequently, they are examined under the 1997 Guidelines ([24]).

B. **Compatibility with the common market**

(65) The Commission's doubts as to the compatibility of the OIC scheme with the common market were based on the assumption that quotas and track records are, by nature, not durable goods. The aid system established by the OIC in favour of the Orkney fleet therefore appeared to the Commission as aid related to operating costs. As aid of such a type is, in principle, not compatible with the common market and as no acceptable justification was provided, the Commission raised doubts about the scheme.

(66) In its reply, the United Kingdom indicated that 'permanent transfers of quota are regarded by Customs and Excise as a capital item for the purposes of Capital Gains Tax and related Rollover Relief'. Thus, although it was first officially declared that there would not be a free trade in track records, it now appears that the UK authorities officially recognise that these track records have acquired a value as an asset. Arguably, therefore, the Commission could itself perhaps adopt that approach and consider the purchase of track records by SFPO on behalf of OIC as an investment.

(67) Whatever the correct classification may be, the Commission does not need to discuss it. With regard to fishermen, since the period of rental of quotas is not longer than one year ([25]), the rental represents an operating cost. An aid, the effect of which is on the amount of the rental, is therefore an operating aid.

(68) According to point 1.2, fourth indent, third subindent, of the Guidelines, aid related to operating costs, which does not impose any obligation on the part of recipients is incompatible with the common market unless the aid scheme is directly linked to a restructuring plan considered to be compatible with the common market. As the OIC scheme is in no way linked to a restructuring plan as defined in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ([26]), it cannot be considered compatible with the common market.

(69) In addition, the UK authorities have indicated that, in so far as the OIC scheme pools track records, it could be considered to be rationalisation through the development of viable fishing enterprises in the context of decreasing fish stocks. But, as this pooling concerns SFPO, which has not been considered as a beneficiary under the current analysis, that argument is not relevant to the assessment of this aid scheme to fishermen.

C. **Recovery of the aid**

(70) Under Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary. The Commission is not to require recovery of the aid if that would be contrary to a general principle of Community law.

([23]) OJ C 19, 20.1.2001, p. 1.
([24]) See footnote 4.
([25]) As specified in point 4.2 of the agreement between OIC and OFA. See recital 14.
([26]) OJ C 288, 9.10.1999, p. 2.

The principle of the protection of legitimate expectations is a general principle of Community law. The Commission considers that in the present case, that principle precludes recovery, for the following reasons.

While there is no necessary link between actions and decisions of the Commission in relation to the use of Community Structural Funds in the context of Regulation (EC) No 1260/1999 ([27]) and Commission decisions regarding State aid, in the specific circumstances of this case, legitimate expectations as to the private nature of the fund in question may have been created through the combination of a number of events.

In fact, both the United Kingdom Government and the Commission consistently acted in such a way that it could reasonably be concluded that the fund is a private fund from the point of view of the rules governing Community Structural funds. Even if, legally speaking, there is no automatic link between the two issues, this may have led to a reasonable assumption on the part of the national authorities and fishermen that grants from such a fund do not fall under the rules on State aid, thus creating a legitimate expectation in this respect.

(71) First, there is a close link between the Orkneys and the Shetlands. In fact, the fishermen of Orkney and Shetland belong to the same producer organisation. The Orkney Islands authorities and beneficiaries were therefore probably aware that an explanatory leaflet by the Scottish Executive for the implementation of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture ([28]) clearly indicates that grants and loans from the parallel Shetland Islands Council Charitable Trust (SICCT — see on this State aid Case C-88/2001) will not be regarded as the grant of public money, which justified the conclusion that they were to be regarded as a private contribution.

Second, in the European Regional Development Fund (ERDF) under the Highlands and Islands Objective 1 Programme 1994-1996, the funding from Shetland Leasing and Property Ltd (SLAP), which is wholly owned by the SICCT, was regarded as a private contribution. Again, it is very likely that the Orkney Islands Authorities were aware of this.

Third, the Orkney Reserve Fund itself has also been considered in practice by the UK authorities and the Commission as being of a private nature, thus making it permissible to provide a private cofinancing contribution in the context of financing from the European Agriculture Guidance and Guarantee Fund (EAGGF) ([29]).

(72) The Commission considers that these elements taken together have created a legitimate expectation on the part of the Orkney authorities and the bodies involved, as well as on the part of fishermen. They could assume that only private funds were involved when the fund was providing cofinancing to Community Structural Funds. In view of that, they may have wrongly assumed that the State aid rules of the Treaty do not apply, even if, legally speaking, there is no automatic link between the two issues.

On these grounds, and on the basis of Article 14(1) of Council Regulation (EC) No 659/1999, since the principle of the protection of legitimate expectations is a general principle of Community law, the recovery of the aid from which fishermen have already benefited will not be required.

(73) But, as has been determined in this Decision, the funds involved must actually be considered State resources under the State aid rules. Therefore, the scheme is an operating aid which exists year after year for the benefit of the fishermen to whom annual quotas are rented. Since that aid is not compatible with the common market, it must be brought to an end. With that aim, all the provisions in the agreements made between OIC, OFA and SFPO which lead to preferential renting conditions must be repealed and replaced by provisions which show that the renting is made under normal market conditions. At the same time, it must be ensured that under any new arrangements thus created, neither the SFPO nor the OFA benefit from State aid.

([27]) Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, OJ L 161, 26.6.1999, p. 1.
([28]) OJ L 376, 31.12.1986, p. 7.
([29]) See recitals 34 and 55.

VI. **CONCLUSION**

(74) The Commission finds that the United Kingdom has implemented, in breach of Article 88(3) of the EC Treaty, the aid scheme entitled 'Orkney Islands Council Track Record Scheme'.

(75) In the light of the assessment made in Paragraph V, this aid scheme is not compatible with the common market. However, the recovery of the aid is not required,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme entitled 'Orkney Islands Council Track Record Scheme', implemented by the United Kingdom, is not compatible with the common market.

The United Kingdom shall abolish the aid scheme referred to in the previous paragraph.

Article 2

The United Kingdom shall inform the Commission, within a period of two months from the receipt of this Decision, of the measures it has taken to comply with it.

Article 3

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 3 June 2003.

For the Commission
Franz FISCHLER
Member of the Commission