COMMISSION DECISION

of 3 June 2003

on loans for the purchase of fishing quotas in the Shetland Islands (United Kingdom)

(notified under document number C(2003) 1687)

(Only the English text is authentic)

(Text with EEA relevance)

(2003/612/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, hereinafter the Scheme, related to the purchase of fishing quotas in which the authorities of the Shetland Islands were involved. By letter of 25 March 1999 the Commission requested the United Kingdom authorities to provide information about the Scheme. Following a reminder, the United Kingdom authorities provided a response by letter dated 9 August 1999.

(2) The Commission requested further information by letters of 1 September 1999, 12 April 2000 and 22 June 2000. The United Kingdom authorities sent information by letters of 6 March 2000, 16 May 2000, 17 October 2000 and 8 December 2000.

(3) The Commission informed the United Kingdom by letter of 28 November 2001 of the Decision to initiate, in relation to the 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 United Kingdom authorities by Commission letter of 20 December 2001, the United Kingdom provided its comments on the case by letters of 6 February and 8 March 2002.

(4) The Commission 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 (letters of 27 February and 18 March 2002), Mrs Sheryll Murray of Torpoint, Cornwall, (letter of 7 March 2002), the Aberdeen Fish Producers' Organisation Ltd (letter of 11 March 2002) and the Shetland Development Trust (letter of 12 March 2002). In accordance with Article 6(2) of Council Regulation (EC) No 659/1999, all the comments received were forwarded to the United Kingdom authorities to enable them to inform the Commission of their own comments on those observations. The United Kingdom authorities replied by letter of 3 May 2002, saying in substance that the issues raised had already been dealt with in the previous replies.

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 38, 12.2.2002, p. 7.

(5) By letter of 7 August 2002, the Commission requested documents to which reference was made in the letter of 12 March 2002 of the Shetland Development Trust. Those documents were received on 27 August 2002.

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, however, 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 record, or FQA units, can be sold from one vessel to another under certain conditions. This situation is relatively specific to the United Kingdom. Except in the Netherlands, where a system of individual transferable quotas is in place, fishing quotas, or track record 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, so they 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, fishermen or POs who have bought such track records are allowed to let them.

(10) It is within this context that the Shetland authorities decided in 1998 to set up the Scheme. According to the United Kingdom authorities, this quota purchase scheme was established in order to ring-fence the quota for the benefit of fishing vessels in the fisheries dependent area of the Shetland Islands since, owing to escalating costs, the Shetland fleet had great difficulty in finding sources of commercial financing for the purchase of quotas and, also, because quotas were intangible assets which could not always be used as security.

(11) The bodies involved in the Scheme are:

— The Shetland Islands Council (SIC);

— Shetland Development Trust (SDT), which is a discretionary trust. SDT was set up to foster economic development in Shetland and is operated with funding from the SIC. The trustees are the councillors of the SIC plus two independent trustees. The principal source of funds is the Reserve Fund, established and operated by SIC; the Reserve Fund is funded from the surplus revenues of the Council's harbour undertaking;

— Shetland Leasing and Property Ltd (SLAP), which is a commercial limited company operated for profit. The company's shares are wholly owned by the Shetland Islands Council Charitable Trust (SICCT), the trustees of which also are the councillors of the SIC plus two other persons. The funds of this trust originate from oil companies;

— Shetland Fish Producers' Organisation Ltd (SFPO), which is a Producers' Organisation as defined in Community Legislation ([3]).

([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). This Regulation is now replaced by Regulation No 104/2000 of 17 December 1999 (OJ L 17, 21.1.2000, p. 1).

(12) The quota purchasing scheme operates in the following manner. To assist SLAP in the purchase of track records, SDT procured, in 1998, a loan of GBP 2 million for SLAP at a rate of interest equal to the return required by SLAP from SFPO for the lease of quotas to fishermen (on average 9 %). The purchases were made during the years 1998 and 1999. The track records acquired cost a total of GBP 2 million.

(13) There is an agreement, dated 11 September 1998, between SLAP and SFPO. Under this agreement, SFPO acts on behalf of SLAP, both for the acquisition and rental of track records. This agreement contains the following statements:

— 'SFPO shall submit to SLAP from time to time notification of track record or quota which SFPO considers would be suitable for SFPO to acquire on SLAP's behalf …' (point 2.1),

— 'Upon payment of the purchase price … and the acquisition on behalf of SLAP of the relevant Track Record, the ownership of all such Track Record … shall vest in SLAP and SFPO hereby assigns to SLAP its whole right title and interest to the Track Record absolutely such that the same shall vest absolutely in SLAP and, to the extent that the Track Record shall fail to vest effectively in SLAP as aforesaid, SFPO shall hold the Trust Property in trust for the benefit of SLAP' (point 2.4),

— 'SFPO … shall be entitled to a management fee of all Rental Income received by it' (point 5),

— 'SFPO shall only lease the Track Record, or any part of it, pursuant to a Rental Agreement the terms of which have first been approved by SLAP and no lease of Track Record shall be entered into with a party who is not a member of SFPO or is not a PO' (point 3.9),

— 'In determining to whom the Track Record shall be leased SFPO shall observe the following order of priority in entering into Rental Agreements: (i) preference shall be given to persons, partnerships or companies newly established and actively operating in the fishing industry in Shetland over persons or partnerships already established in the fishing industry in Shetland, (ii) preference shall be given to persons, partnerships or companies who own and are actively operating fishing vessels registered with a port letter in Shetland, (iii) persons, partnerships or companies already established and actively operating in the fishing industry in Shetland shall be given preference to POs' (point 3.10),

— 'SFPO shall use its best endeavours to obtain via Rental Income a minimum net return (i.e. after deduction of the Management Fee) of 9 % par annum on payments made by SLAP.' (point 3.14).

(14) Thus, under the Scheme, SFPO, which manages the track records, was entitled to charge an extra 1 % to meet its running costs; the average minimum rental had to be 10 % so that the 9 % return could be achieved. However, in their letter of 17 October 2000, the United Kingdom authorities informed the Commission that, by a Decision adopted at a meeting of the SFPO board on 30 January 1999, this rental cost had been replaced for SFPO members by an additional levy to the normal membership levy. This normal membership levy is 1 % of the vessel's gross earnings; the additional levy was up to 4 % at the beginning of the scheme and was increased to up to 5 % from October 1999. The additional levy depends on the quantity of quota leased by a vessel from the quotas allocated in respect of the track record acquired under the scheme. A rate of 5 % applies for vessels with zero track record and a progressively reduced rate applies for vessels with an incomplete track record, this incomplete track record being measured with reference to normal track record membership criteria.

(15) According to the United Kingdom authorities, for the track records acquired under the Scheme (GBP 2 million), the minimum 9 % return to SLAP was obtained from leasing quotas to vessels other than those in the membership of SFPO. In 1999, 77 % of the minimum return was obtained in that way.

Grounds for the formal investigation procedure

(16) The Commission considered that the loan granted by SDT to SLAP to buy track records was made on preferential terms, in particular due to the fact that vessel owners were not able to borrow money on the terms available because track records could not be used as securities. In addition, the operation of the Scheme has had the effect of lowering the rental cost of the quotas allocated in respect of the track records acquired, as compared with normal lease costs under normal market conditions. Through the system of additional levies, the conditions offered to vessels in the membership of SFPO were preferential to the conditions offered to non-member vessels. On those grounds, the Commission considered that the Scheme resulted in an economic advantage to the fishing undertakings benefiting from it.

(17) As the 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 are by nature not 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. As operating costs in the fisheries sector are allowed only in specific circumstances which did not exist in this case, that aid did not appear to be compatible with the common market. In addition, the Commission considered that the 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 ring-fencing track records rather than letting the market forces work is protective in the context which the industry faces 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 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 rather than by the producers' organisation 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 producers' organisation could not justify lending it GBP 2 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 Shetland put the local fishermen in an economically advantageous position.

(19) The SFO also indicates that it was the intervention of the Shetland authorities which caused the cost of quota to escalate and the development of the market for quota. Furthermore, it believes that the provision requesting via rental income a minimum net return of 9 % per annum is not a legally binding commitment; many, in the industry, think that the GBP 2 million loan was interest-free and would eventually be written off.

(20) The SFO maintains that the Scheme was designed from the outset to benefit Shetland fishermen. Enquiries were made whether mainland fishermen could join the Shetland producers' organisation and, to this day, no vessel outwith the Shetland Islands has been admitted; for the SFO, that is a clear indication that the loan was made to benefit only Shetland fishermen. In addition, when quotas have been leased to fishermen outwith Shetland, they have been made at prevailing market rates which would certainly be higher than the rate required to achieve a 10 % return. In a real sense, fishermen outwith Shetland have been subsidising the Shetland fishermen by paying higher prices and helping the Shetland organisation to achieve the 10 % return figure, but at the expense of being less competitive themselves. For example, in the case of cod, it is likely that the SFPO was able to purchase cod quotas at prices ranging from GBP 1 000 to GBP 2 000 per tonne and a leasing price no higher than GBP 200 would have been sufficient to meet the 10 % return criteria. By comparison, the normal price paid to lease cod in the year 2001 would have not been less than GBP 350 per tonne, and the average price was in the region of GBP 450 per tonne.

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

(21) This clearly distorts competition. As the return required on fish leased is considerably lower than elsewhere in mainland Britain, due to the absence of commercial considerations, the Scheme is clearly an aid for reducing the operating costs of the vessels participating in it. Indeed the SFO states that the Scheme has led to a considerable expansion in the fishing capacity of the Shetland fleet.

The Aberdeen Fish Producers' Organisation Ltd (AFPO)

(22) By its letter, the AFPO explains that it considered it appropriate to inform the Commission of its experiences in relation to the quota market. Its understanding of the situation is that, whenever fishermen are interested in selling their quota entitlement, they contact the Shetland PO as a matter of course. One of its members had offered the AFPO the opportunity to purchase his North Sea and West Coast quota entitlement in 2001 on the basis of five annual payments without interest, but the AFPO did not have the finances to accept that offer and, within days, the quota entitlement had been sold to Shetland. In addition, the AFPO relates that it had meetings with the local city council and asked for preferential loans to enable it to purchase quota entitlement, but was advised that such assistance would be in breach of Community rules.

Mrs Sherryl Murray, Torpoint, Cornwall

(23) Mrs Murray is a member of Cornwall County Council and mentions 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 makes further comments on the fixing of production opportunities available to each United Kingdom vessel, which should be contrary to the common organisation of the market in fisheries products if the scheme is, in itself, contrary to this common organisation.

The Shetland Development Trust (SDT)

(24) By its letter, the SDT sent information on the bodies involved in the Scheme, on their status, their objectives and their functions.

(25) The SDT was established in 1997 in order to apply funding by investing in local industry using monies from a fund known as the Reserve Fund, which was established in the early 1980s. This Reserve Fund received surplus funds after the harbour undertaking of Sullom Voe came into profitability. The object of the trust is to assist local businesses in the Shetland Islands. According to the SDT, this trust can be described, in Scots law, as a public trust, not in the sense that it discharges public authority functions but because the potential beneficiaries are geographically linked to the Shetland Islands. However, the private source of funding and the obligation to account to private beneficiaries and third parties indicate the independent and discretionary nature of the activities of the trust. Thus, the commercial loan by the SDT to SLAP for the purchase of quota is a private transaction with no State aid implications. The SDT refers to a recent Decision adopted by the Commission Directorate-General Agriculture which considered that a similar fund operated by the Orkney Islands Council could be regarded as a private contribution.

(26) The SICCT, which is the sole shareholder of SLAP, was created in 1976. Its first function was to receive and hold on behalf of the Shetland community disturbance receipts which the oil industry agreed to pay on a voluntary basis. This payment was structured to run for an initial period up to 31 August 2000; payments ceased on that date. The letter asserts that the SICCT is both a charitable and a public trust, and, as in the case of the SDT, the term 'public trust' must be understood not in the sense that such a trust fulfils the functions of a public authority but as indicating that the potential beneficiaries are geographically linked to the Shetland Islands. The SDT letter refers also to projects approved by the European Regional Development Fund (ERDF) under the Highlands and

Islands Objective 1 Programme 1994-1996, where the funding from SLAP was considered as being a private contribution. In addition, an explanatory leaflet, enclosed with the SICCT's letter and prepared by the Scottish Executive to facilitate 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 ([5]), clearly indicates that grants and loans from the SICCT will not be counted as national grant, which means that it was regarded as a private contribution.

IV. **COMMENTS FROM THE UNITED KINGDOM**

(27) In its first reply, dated 6 February 2002, the United Kingdom forwarded comments made by the SDT in a letter to the Scottish Executive dated 31 January 2002, with appendices attached to that letter, including in particular the documents attached to the United Kingdom authorities' letter sent to the Commission on 17 October 2000. In its second reply, dated 8 March 2002, the United Kingdom sent its own comments, saying that these might also 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 2002.

Comments from the Shetland Development Trust (SDT)

(28) The SDT emphasises that it invests funds at a commercial rate, in a commercial quota purchase scheme developed by SLAP, the main purpose behind which was to obtain a commercial return for SLAP whilst at the same time allowing the fishing fleet access to quota at commercial rates. The Scheme does not favour local fishermen over others; each is required to pay the same commercial return to SLAP.

(29) In the documentation attached to its letter, the SDT describes how the Scheme works, both in the case of vessels in the membership of SFPO, through the system of an extra levy in addition to the normal membership levy ([6]) and in the case of those who are not. This documentation includes a spreadsheet which compares the financial implications for a vessel (a) if that vessel rented its entire quota outside Shetland at prevailing market rates and (b) if it obtained its quota through SFPO via the levy system, and which shows that vessels under the levy system would actually be paying slightly more per annum than they would if they went out on the market place to rent their quotas. A comparison is made for a 22-metre seiner-trawler, a member of SFPO whose track record was lodged within SFPO and whose turnover was GBP 385 000 in 1999. The comparison shows that this vessel would have paid 2,2 % per annum more under the levy system than if it had rented its fish on the open market. The SDT also gives the example, which, in its view, is not an isolated case, of the lease of 232 tonnes of haddock on 2 July 1999 to an English PO while, by September, SFPO was running short of this species and had to introduce a very tight quota for its own members; in that case, Shetland fishermen were placed at a disadvantage in comparison with other British fishermen.

Comments from the United Kingdom

(30) The United Kingdom contends that the SDT should be regarded as a private body. It disputes any suggestion that the position of the councillors of SIC ex officio as trustees of SDT should alone result in the assimilation of the actions of SDT with the actions of a public body. According to the United Kingdom, the SDT, as initiator of the Scheme, had reasonably assumed that it would not be considered as setting up a State aid scheme.

([5]) OJ L 376, 31.12.1986, p. 7.
([6]) See recital 14.

(31) The United Kingdom notes that commercial lending was already available for the purchase of fishing quota at the time of the inception of the scheme. A copy, enclosed with the comments, of a letter of 7 March 2002 from the Royal Bank of Scotland to SFPO indicates that the interest rate applicable to borrowing in the name of SFPO between 5 November 1998 and the end of the same year was more than 2 % above the bank's base lending rate. The loan agreement between the SDT and SLAP with a borrowing rate of 9 % was concluded in November 1998, when the base interest was 6,75 %. Thus, the United Kingdom maintains that no aid element was included in the loan granted by the SDT to SLAP in November 1998.

(32) The United Kingdom has attached a table comparing quota rental costs for vessels when subject to direct billing and for the same vessels when subject to percentage of turnover charging. From the three examples given (a 24-metre wooden seiner-trawler, a 18,25-metre steel twin-rigger and a 24-metre steel trawler), it concludes that there was no presumption in favour of vessels subject to charging by percentage of turnover; in fact, the figures show they would have paid slightly more per annum under the levy system than if they had rented quota on the market.

(33) However, the United Kingdom acknowledges that the existence of two separate charging systems may have made it more difficult to assess whether preferential treatment was being accorded to SFPO members. It indicates that SFPO has already taken the first steps towards introducing a system under which SFPO vessels would be charged using the same method as that applied to non-PO vessels, that is to say, on a price per tonne basis. In addition, the United Kingdom contends that the rental charges did not represent preferential treatment when compared with other prices charged by other lenders of quota in the same period. Therefore, the Scheme did not distort or threaten to distort competition and does not fall within the scope of Article 87 of the Treaty. Furthermore, according to the United Kingdom, the costs of quota leasing published from time to time in *Fishing News* cannot be considered a useful standard against which to measure the cost of leasing quotas; rates published so infrequently are not a true reflection of this volatile market.

(34) The United Kingdom considers that, in order for the Commission to conclude that trade between Member States exists and is affected, fishing opportunities, rather than fish, would have to constitute the traded commodity. As trade in United Kingdom fishing opportunities is, by definition, not possible with other Member States, the Scheme falls outside the scope of Article 87 of the Treaty.

(35) According to the United Kingdom, track records and quota entitlements should be considered assets. Commercial lenders now consider the track record purchased as security. Track records are included within the annual accounts of many vessels and permanent transfers of quota are regarded by United Kingdom Customs and Excise as a capital item for the purposes of Capital Gains Tax and related Rollover Relief. The United Kingdom considers that the Commission's view that FQA units are raw products is misplaced; while they represent, year on year, a variable level of fish quota, the FQA units themselves remain as a permanent share of available fishing opportunities. On that basis, any aid granted should not be considered as operating aid; rather, it is analogous with investment aid. Thus, the United Kingdom suggests that any aid should be considered on a case-by-case basis in line with Section 1.2 of the Guidelines.

(36) The Scheme resulted in the buying and pooling of track record at a time of decreasing fish stocks. Such pooling can be considered to be rationalisation, since the quota resulting from it was made available, at market prices, to existing fishermen whose catch entitlement had been eroded through decreasing fish stocks. The development of viable fishing enterprises was thereby assured. Thus, the Scheme accelerated the adaptation of the industry to the new situation it faces. Such limited market intervention simply resulted in some of those smaller fishermen continuing in business in heavily fisheries dependent areas where little alternative economic activity exists. That could equally be considered consistent with the socioeconomic dimension of the Common Fisheries Policy as required by Article 159 of the Treaty.

(37) Finally, if the Commission adopts a negative decision, the United Kingdom indicates its willingness to amend the scheme as required to ensure future compliance. 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**

(38) Under Article 87(1) of the EC Treaty, '(save) 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

(39) The Scheme was set up because, according to the United Kingdom, the Shetland fleet had great difficulty in finding sources of commercial funding due to the escalating costs of quotas. The track records acquired have enabled vessels from the Shetland fleet to fish against quotas to which they would not otherwise have been entitled. Consequently, at first sight, the Scheme has enabled these vessels to increase their production in conditions that would not otherwise have been possible. As an aid exists whenever an intervention results in favouring specified beneficiaries, whatever the form of intervention, there is a presumption that the Scheme corresponds to an aid system to fishermen to whom quotas are rented. And, if aid does exist, the Scheme has conferred an advantage on those fishermen.

(40) According to the United Kingdom, as well as to the information provided by the SDT and sent through the United Kingdom authorities, the existence of two separate charging systems did not lead to preferential conditions in favour of fishermen in the membership of SFPO ([7]).

(41) The Commission considers that the figures given in this information are not accurate. In the case of the 22-metre seiner-trawler, quoted by the SDT ([8]), it is indicated that it would have paid GBP 10 680 for the leasing of quotas on the market while it would have paid GBP 19 250 under the additional levy system. The amount is calculated for quotas of different species for a global quantity of 350 tonnes, the leasing prices of which are GBP 34 per tonne for haddock, GBP 13 per tonne for whiting, GBP 38 per tonne for cod, GBP 11 per tonne for saithe, GBP 61 per tonne for monkfish and GBP 63 per tonne for 'others'. A global quantity of 350 tonnes that such a vessel needs for fishing during a whole year seems to be normal. However, from the copies of invoices addressed to vessels not in the membership of SFPO for the quotas they had leased ([9]), it appears that the real leasing prices were approximately 10 times higher than those indicated in the example of the 22-metre seiner-trawler, that is to say, GBP 300 per tonne for haddock in April 2000, GBP 260 and GBP 300 per tonne for haddock in June and July 2000, and GBP 450 per tonne for monkfish in July 2000. The prices quoted in *Fishing News* are at comparable levels: GBP 350 per tonne for haddock in April 2000, GBP 250 per tonne for cod in June and July 2000 and GBP 400 per tonne for monkfish in July 2000 ([10]). Consequently, the figures provided are not accurate; they do not show that vessels in the membership of SFPO paid more for lease of quotas under the additional levy system than they would have paid at market prices, as the United Kingdom contended;

([7]) See recitals 29 and 32.
([8]) In Appendix 3 of the letter of the SDT sent through the letter of the United Kingdom dated 6 February 2002.
([9]) In Appendix 2(a) to 2(e) to the same letter.
([10]) The fact that the prices quoted in *Fishing News* and those specified in the invoices are comparable shows that those quoted in *Fishing News* can be considered as a useful reference, contrary to what the United Kingdom authorities claimed (see above, point 33).

they in fact show that, if the real leasing prices are taken into account (by multiplying the prices indicated by around 10), vessels in membership of SFPO have to pay much less than those outwith SFPO; for example, the overall lease of quotas for the 22-metre seiner-trawler, if it were not in the membership of SFPO, would not cost GBP 10 680 but GBP 106 800, that is to say, far in excess of the cost of the lease under the additional levy system (GBP 19 250).

(42) The same criticism can be applied to the other figures quoted by the United Kingdom. In the spreadsheet ([11]) concerning a vessel requiring quotas for 365 tonnes of various species and comparing the financial implications (a) if it rents its quotas from outside Shetland at prevailing market rates or (b) if it obtains them through the SFPO via the levy system, the leasing prices quoted are also inaccurate: except in the case of haddock, for which the leasing price indicated could be accurate although lower than the abovementioned price (GBP 240 per tonne), the other prices are not reliable (GBP 10 per tonne for cod, GBP 70 per tonne for saithe, GBP 10 per tonne for whiting, GBP 10 per tonne for monkfish and GBP 10 per tonne for mixed species). The figures quoted in the table enclosed with the United Kingdom's letter of 8 March 2002 are just as inaccurate; for rental in 1999, the leasing prices were GBP 200 per tonne for haddock and GBP 200 per tonne for cod, but GBP 10 per tonne for whiting, GBP 10 per tonne for monkfish and GBP 10 per tonne for 'others'. Thus, given the inaccuracy of the figures provided, the United Kingdom has failed to provide any proof that no advantage exists in favour of fishermen who obtain quotas through the additional levy system; on the contrary, such lack of proof suggests that advantage to those fishermen does exist.

(43) The existence of such an advantage is confirmed by the fact that, as indicated by the United Kingdom authorities in their letter of 6 March 2000, SFPO was able to produce, in 1998, 100 % of the minimum 9 % required return to SLAP from the leasing of quotas to vessels not in the membership of SFPO. Consequently, this leasing of quotas resulted in SFPO obtaining income which was not accounted for by the quotas leased through the additional levy system to the vessels in its membership. Thus, the effect of the Scheme is that aid existed in the year 1998 in favour of vessels in the membership of SFPO. For the year 1999, approximately 77 % of the minimum 9 % was provided by quotas leased to vessels not in the membership of SFPO. Consequently, in order for the conditions offered to those in the membership of SFPO not to be preferential, the proportion of quotas acquired under the Scheme and leased to those not in SFPO membership would have to have been more than 77 %, or the proportion leased to those in its membership less than 23 %. The Commission does not know the proportion of quotas leased to vessels in the membership of SFPO and the proportion leased to vessels not in its membership. However, as the Scheme was set up with the aim of providing quotas to SFPO's vessels, the Commission assumes that the proportion leased to SFPO's vessels was certainly more than 23 %, and aid therefore existed in their favour for the year 1999.

(44) Fishermen who benefit from the 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 not otherwise have been entitled. The track records acquired have thus enabled them to increase their production in conditions that could not otherwise have been possible. The Scheme, which is selective in character, has conferred an advantage on those fishermen.

(45) In its preliminary examination, the Commission also raised doubts as to the compatibility of the Scheme with the common market because of the rate of the loan granted by the SDT to SLAP (9 %) for the purchase of track records. Referring to its notice on the method for setting the reference and discount rates ([12]), since the United Kingdom reference rate for the year 1998 was 7,77 % and since, according to the information available to the Commission at that time, track records could not be used as securities, the Commission considered that a premium of 4 % must be added. Thus, the 9 %

([11]) In Appendix 2 to the same letter of the SDT sent through the letter of the United Kingdom dated 6 February 2002.
([12]) OJ C 273, 9.9.1997, p. 2.

rate should not be compared to 7,77 % but to 11,77 %. The Commission therefore assumed that an aid of 2,77 % existed for the purchase of the track records. However, with the information provided afterwards ([13]) and according to which the interest rate applied by the Royal Bank of Scotland for this purchase was 2 % above the bank's base lending rate and taking also into consideration the fact that the market in track records was just beginning, the Commission can accept that a rate of 9 % does not entail State aid. Thus, there is no advantage to SLAP or to SFPO when it acts on SLAP's behalf for the acquisition of track records.

State resources

(46) The United Kingdom contends that the SDT should be regarded as a private body ([14]). That does not prove that there is no State aid. Article 87 of the Treaty states that such an aid exists when it is granted either by the State or through State resources. Consequently, State aid could also exist when an aid measure is implemented by a body which can be categorised as private. Thus, the Commission does not need to examine the nature, private or public, of the SDT. It is the origin of the resources, the way they are used and the effect they have in the field of competition which enables it to class a measure as a State aid measure.

(47) The Scheme was set up after the SDT procured a loan of GBP 2 million for SLAP. The SDT is funded by the Reserve Fund established by Shetland Islands Council (SIC). This Reserve Fund itself is funded from an agreement concluded on 12 July 1974 between the SIC and oil companies using the harbour facilities of Sullom Voe. This agreement states that fees are paid by these companies 'in respect of the import of crude oil and as compensation for disturbance caused thereby'. Under this agreement, the SIC must provide jetty structures and harbour facilities. There is an arbitration clause in case of any dispute between the parties. There is another agreement, dated 15 March 1978, between the SIC and the same companies which deals with the provision of jetties and their maintenance.

(48) The 1974 agreement could be compared to an agreement concluded between two undertakings since the SIC agreed 'to provide jetty structures and appropriate harbour facilities' (Clause 6) in return for fees paid by oil companies. Since Article 295 of the Treaty is without prejudice to the rules in Member States governing the system of property ownership, a public authority may act as a private company. Thus, at first sight, in so far as it deals with the management of the harbour facilities, the SIC could be regarded as acting as a private company and the income earned as private income.

(49) On the other hand, however, the Commission observed two things: first, fees received under this agreement also correspond to 'compensation for disturbance', namely the disturbance caused to the Shetland community and, second, there is some overlapping with the 1978 agreement as they both deal with the question of jetties. The documents sent to the Commission do not disclose exactly how this overlapping works. Nevertheless, the Commission observes that the 1974 agreement was sent by the United Kingdom, in its transmission of 23 August 2002, as the 'Disturbance Agreement'. Thus, this agreement seems to be specifically related to the disturbance caused by oil companies; that corresponds to the statement made by the United Kingdom itself in its letter of 6 March 2000: 'Oil companies in relation to the disturbance, which their use of the Islands and their resources has brought about, have applied a charitable gift to Shetland Island Council' (point 5). Thus, by receiving such monies which are directly related to the disturbances caused to the Shetland Islands population and not to the effective supplying of the service of the harbour facilities, the SIC does not act as a private company operating under normal market conditions. It acts for the general interest of the population affected by the disturbances.

([13]) See recitals 31 and 35.
([14]) See recital 30.

(50) The agreement shows that the monies received cannot be considered as a true gift to that population. This agreement contains provisions relating to the payment of fees, to its review and to arbitration in case of dispute ([15]). These provisions show that the commitment to pay these sums in return goes beyond what could be characterised as a voluntary contribution. If renegotiation of the agreement is possible, it follows that the agreement was the result of a negotiation in the course of which each party upheld its own interests; the payments made under this agreement cannot be considered as true gifts. This agreement cannot be classed as a voluntary agreement in the sense of being merely the result of goodwill on the part of the oil companies towards the County of Shetland and its inhabitants. Therefore, these monies cannot be considered as private money, but public money. They must be regarded as State resources for the purposes of Article 87 of the EC Treaty.

(51) In addition, the trustees of two trusts involved in the scheme (the SDT, and the SICCT which is the parent trust of SLAP) are the councillors of the SIC ([16]) (there are only two other trustees who are not councillors). Although the councillors act as trustees ex officio, the fact that they are nominated by the SIC means that the latter is indeed able to exercise a dominant influence over the trusts and over SLAP, as well as over the funds at their disposal. There is therefore a set of indicators showing that the decisions for the operation of the Scheme cannot be taken without regard for the requirements of the public authority.

(52) It is clear from the foregoing that the resources used for the Scheme must be considered as attributable to the State and are State resources for the purposes of Article 87 of the Treaty.

(53) That finding is not undermined by the fact that SLAP funding was considered as a private contribution for projects approved by the European Regional Development Fund (ERDF) under the Highlands and Islands Objective 1 Programme 1994-1996 ([17]); first, as SLAP is a limited company, the fact that it is always referred to as such in ERDF documents precluded the Commission from assuming that SLAP was funded by State resources; second, as Article 295 of the Treaty in no way prejudices the rules in Member States governing the system of property ownership, SLAP could be considered as making a private contribution to a project if it acted as a private investor operating under normal market economy conditions; the question to be addressed in that case did not concern the origin of the funds used by the owner but how it used them, that is to say, whether or not it behaved as a private investor. Nor may the finding that the Scheme is funded from State resources be called in question by the indication, in an explanatory leaflet, not dated, concerning the implementation of Council Regulation No 4028/86 of 18 December 1986 ([18]), that SICCT funds were not 'national grants', and were therefore to be considered as private funds; first, it does not appear that the Commission had knowledge of that leaflet and, second, as in the case of ERDF and SLAP, it could not assume that the SICCT was funded by State resources.

([15]) 'Clause 1: General. (b) This agreement sets forth the fees to be paid in respect of the import of crude oil into Shetland by pipeline and as compensation for disturbance caused thereby.
Clause 5: Review: The parties recognise that the payments set out in this agreement have been agreed to as fair and equitable in the light of the circumstances as presently known to or anticipated by the parties including the circumstances that the terminal is intended to be used so far as practicable, for all imports of crude oil by pipeline into Shetland. If in the future there should be any change to these circumstances such as materially to alter the financial or economic effect to the parties of the arrangements between them, then they will meet together and renegotiate the parts of the agreement 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 9 hereof.
Clause 9: Arbitration: Any dispute between the parties touching the construction, meaning or effect of this agreement or the rights or liabilities of the parties hereunder, or any matter arising out of the same or connected therewith shall be referred to an arbiter to be agreed upon by the parties or, in default of such agreement, nominated on the application of either party by the President for the time being of the Law Society of Scotland. Any such reference shall be deemed to be a reference to arbitration within the meaning of the provisions of the Arbitration (Scotland) Act 1894 or any statutory modification or re-enactment thereof which may for the time being be in force.
Clause 10: Applicable law: The construction, validity and performance of this agreement shall be governed by Scots Law.'

([16]) See recital 11.

([17]) See recital 26.

([18]) Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ L 376, 31.12.1986). This Regulation was replaced in 1994 by Council Regulation (EC) No 3699/93 of 21 December 1993 (OJ L 346, 31.12.1993).

Distortion or threat to distort competition

(54) The quotas from which the fishing enterprises have benefited under the Scheme have reinforced their position with regard to other fishing enterprises, whether registered in the United Kingdom or in the other Member States. They have been enabled to land and sell more products than they could have done if they had not benefited from those quotas.

(55) The implementation of the 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 ([19]). Thus, the Scheme has affected competition within the Community market.

(56) In addition, the comments made by the Scottish Fishermen's Organisation ([20]) suggest that it was the intervention of the Shetland authorities in setting up the Scheme that triggered the escalation of the cost of quotas. The United Kingdom authorities have not countered this statement.

Impact on trade between Member States

(57) The impact on trade must not be assessed with regard only to fishing opportunities, as the United Kingdom contends ([21]). An aid scheme must be assessed in relation to all the effects that it could have on trade within the Community. Consequently, the 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.

(58) According to the official United Kingdom sea fisheries statistics for 1999 and 2000 ([22]), trade in fisheries products between the United Kingdom and the other Member States is very significant. Landings in 2000 were just slightly 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. These figures clearly show the importance of the trade in fishing products between the United Kingdom and the other Member States.

(59) As the Scheme has reinforced the position of the beneficiary fishing enterprises by comparison with that of other fishing enterprises, the latter must be regarded as having been affected by it. The Scheme has allowed the beneficiary fishing enterprises to maintain a share of the market that competitors could otherwise have seized. Thus, trade between the Shetland fleet and producers from other Member States is affected.

Conclusion

(60) The four criteria for classing the Scheme as a State aid measure for fishermen for the purposes of Article 87 of the EC Treaty are met. Since the Scheme concerns the fisheries sector, it 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]), it must be examined under the Guidelines in force at the time of the grant of the aid. Consequently, it is examined under the 1997 Guidelines ([24]).

(61) On the contrary, as stated above ([25]), there is no State aid in the loan granted by the SDT for the purchase of track records.

([19]) 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 of 31.12.1992, p. 1), which has been replaced on 1 January 2001 by Council Regulation (EC) No 104/2000 of 17 December 1999 (OJ L 17, 21.1.2000, p. 22).
([20]) See recital 19.
([21]) See recital 34.
([22]) Available on the website http://www.defra.gov.uk/
([23]) OJ C 19, 20.1.2001, p. 1.
([24]) See footnote 4.
([25]) See recital 45.

B. **Compatibility with the common market**

(62) The Commission's doubts as to the compatibility of the Scheme with the common market were based on the assumption that quotas and track records are, by nature, not durable goods. The aid granted under the Scheme therefore appeared to be aid related to operating costs. Since aid of that kind is, in principle, not compatible with the common market and since no acceptable justification was provided, the Commission raised doubts about the Scheme.

(63) 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 United Kingdom 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 as being an investment.

(64) 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, the rental represents in any case an operating cost. An aid, the effect of which is on the amount of the rental, is therefore an operating aid.

(65) According to point 1.2, fourth indent, third dash, of the Guidelines, aid related to operating costs, where no obligation is imposed on the 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 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.

(66) In addition, the United Kingdom authorities have indicated that, in so far as the 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**

(67) Under Article 14(1) of Regulation 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.

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 1260/99 ([27]) and Commission decisions on 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.

([26]) OJ C 288, 9.10.1999, p. 2.
([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.

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.

(68) First, an explanatory leaflet by the Scottish Executive for the implementation of Council Regulation (EEC) No 4028/86 on Community measures to improve and adapt structures in the fisheries and aquaculture clearly indicates that grants and loans from the Shetland Islands Council Charitable Trust (SICCT) will not be counted as national grant, which justified the conclusion that they would 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.

Third, given the close links between Orkney and Shetland, the Shetland Islands authorities were probably aware of the fact that the parallel Orkney Reserve Fund (see State aid case C-87/2001) was considered in practice by the United Kingdom authorities and the Commission as being of a private nature, thus making it permissible to provide a private co-financing contribution in the context of financing from the European Agriculture Guidance and Guarantee Fund (EAGGF).

(69) The Commission considers that these elements taken together have created a legitimate expectation on the part of the Shetland 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 co-financing 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.

(70) On those grounds and on the basis of Article 14(1) of Council Regulation No 659/19999, 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.

(71) However, as has been determined in this Decision, the funds involved must actually be considered as 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 leased under the additional levy system. Since that aid is not compatible with the common market, it must be put to an end. With that aim, all provisions which lead to preferential renting conditions must be repealed and replaced by provisions which show that the renting is made under normal market conditions, as is already the case for vessels not in membership. At the same time, it must be ensured that, under any new arrangements, the SFPO does not benefit from State aid.

VI. **CONCLUSION**

(72) The Commission finds that the United Kingdom has implemented, in breach of Article 88(3) of the EC Treaty, the aid scheme entitled 'Loans for the Purchase of Fishing Quotas in the Shetland Islands'.

(73) In the light of the assessment made in paragraph V, the Commission considers that this aid scheme is not compatible with the common market to the extent that it concerns the renting of quotas to vessels which are in the membership of SFPO. On the contrary, the Commission considers that there was no State aid involved in the loan made by the SDT to SLAP.

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme entitled 'Loans for the Purchase of Fishing Quotas in the Shetland Islands', implemented by the United Kingdom, is not compatible with the common market.

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

Article 2

The United Kingdom shall inform the Commission, within a period of two months from 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