COMMISSION DECISION

of 7 December 2005

Investments of Shetland Leasing and Property Developments Ltd in the Shetland Islands (United Kingdom)

(notified under document number C(2005) 4649)

(Only the English text is authentic)

(Text with EEA relevance)

(2006/226/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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 third parties to present their observations, in accordance with the first subparagraph of Article 88 (2),

Whereas:

I PROCEDURE

(1) In January 2004 the Commission was informed by a citizen of the United Kingdom of investments made with the involvement of authorities of the Shetland Islands of the United Kingdom which possibly constituted State aid. By letters of 17 February 2004 and of 1 September 2004 the Commission requested the United Kingdom to provide information about these investments, to which the United Kingdom replied by letters of 30 April 2004 and 13 December 2004.

(2) The Commission informed the United Kingdom by letter of 20 April 2005 of the decision to initiate the formal investigation procedure under Article 88 (2) of the EC Treaty. The United Kingdom gave its comments on the case by letter of 19 May 2005.

(3) The Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* on 10 June 2005 [2]. The Commission invited any interested parties to submit their observations on the case. No comments were received.

II DESCRIPTION

(4) The Shetland Islands Council (SIC), a public authority in Shetland, set up two trusts, the Shetland Development Trust (Development Trust) and the Shetland Islands Council Charitable Trust (Charitable Trust).

(5) The Development Trust was established to serve as the main means for financing economic development projects in Shetland; it makes funding available through loans. The trustees are the councillors of SIC plus two independent trustees.

(6) The Charitable Trust is the trust fund of the SIC that grants loans for charitable purposes. The trustees of the Charitable Trust are the councillors of SIC, plus two independent trustees.

(7) The funding of both the Charitable Trust and the Development Trust is derived from a reserve fund set up by the 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 Sullum 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'.

(8) For commercial and development activities the SIC has set up Shetland Leasing and Property Ltd (SLAP), which is a trading company with limited liability, operating for profit and wholly owned by Charitable Trust. The tasks of SLAP are to take equity holdings in local businesses, to make loans to local industry at commercial rates and to construct industrial buildings for lease at commercial rents.

[1] OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

[2] OJ C 141, 10.6.2005, p. 12.

(9) As a commercial limited company wholly owned by the Charitable Trust, SLAP obtains the funding for its activities from the Charitable Trust and from its own profits. For some specific projects funds are also provided by the Development Trust.

(10) In 1999 the board of SLAP decided to invest in a company named Shetland Seafish Ltd This company was established on 7 October 1999 as a result of a financial merger between Williamson Ltd and Ronas Ltd. Both companies were loss-making at the time and were considered insolvent. By setting up Shetland Seafish Ltd and merging both loss-making companies it was expected that profits would grow and that the new company would be profit making within a short time. It was projected that by the end of 2002 Shetland Seafish Ltd would be generating a profit in excess of GBP 460 000.

(11) SLAP invested in Shetland Seafish Ltd by acquiring 156 250 shares (62,5 %) of the ordinary shares of GBP 1 each and 1 000 000 preference shares of GBP 1 each (100 %). The other shareholders of ordinary shares were the Shetland Seafish Producers Organisation Ltd (43 750 shares), Mr. L.A. Williamson (18 750 shares), Mr. R.A. Carter (18 750 shares) and the Shetland Fisheries Centre Ltd (12 500 shares).

(12) In June 2000 the board of SLAP decided to invest once more in Shetland Seafish Ltd when the company decided to take over the activities of Whalsay Ltd, a loss-making fish-processing company based in Shetland. The funding of this takeover by SLAP consisted in SLAP's acquiring 2 000 000 additional preference shares in Shetland Seafish Ltd, which were subscribed by SLAP in two tranches; in November 2000 SLAP acquired 1 200 000 Preference Shares and on 16 February another 800 000 Preference Shares.

(13) As from 16 February 2001, the issued shared capital of Shetland Seafish Ltd thus comprised 250 000 Ordinary shares and 3 000 000 Preference shares, held in the same proportions and by the same shareholders as at the initial issuing of shares in 1999.

(14) According to a special resolution adopted in 17 December 1999 by the board of Shetland Seafish Ltd the preference shares in Shetland Seafish Ltd have '*the right to a fixed non-cumulative preferential dividend at the rate of 10 % (net of associated tax credit) per annum on the capital for the time being paid up or credit as paid up thereon accruing from the date of subscription therefore and to be paid (to the extent that there are profits available for distribution) annually on 31 January in each year in respect of the 12 months ending on that date; and may be redeemed at par (i.e. at 1 per preference share) plus any unpaid preferential dividend, at the option of the Company at any time after the first anniversary of the date of the allotment of the preference shares.*'

(15) From the data provided it is clear that Shetland Seafish Ltd has been loss making since 1999.

(16) In its letters of 30 April 2004 and 13 December 2004, the United Kingdom stated that the investments should be considered as private investments, as SLAP is a private body and at the time of the investments both the SIC and SLAP had legitimate expectations that the monies involved should be considered as private funds.

(17) Secondly the United Kingdom stated that if the monies involved are considered to be public funds, the investments made by SLAP are investments which could have been decided upon by a normal private operator. To support this statement the United Kingdom had provided two reports issued with regard to the investments in question: the Shetland Seafish Merger Report and the Whalsay Report.

Shetland Seafish Merger Report

(18) The Seafish Merger Report of 27 September 1999 is a report by Mr. M. Goodlad and Mr. S. Gillani to the Directors of SLAP on 'A proposed restructure and merger of L.A. Williamson & Sons (Shetland) Limited & Ronas Fisheries Limited'.

(19) According to the figures and the prognoses in the report, the merger of L.A. Williamson & Sons (Shetland) Limited & Ronas Fisheries Limited, through the establishment of Shetland Seafish Ltd would begin to yield profits within three years.

Whalsay Report

(20) The Whalsay Report is a report by Mr. John Inkster, who at that time held the position of Managing Director of Whalsay Fish Processors Ltd, issued in June 2000. This report gives an analysis of the situation of the companies involved, the developments in the market and possible advantages for Shetland Seafish Ltd to acquire Whalsay Ltd.

Grounds of the formal investigation procedure

(21) The Commission considered that it could not be established from the figures and data contained in the reports submitted by the authorities of the United Kingdom whether these investments could be considered to be profitable investments and whether SLAP had acted like a normal private investor. As, furthermore, the investments were clearly for the benefit of the companies involved and those companies were in direct competition with other fish-processing companies both within the United Kingdom and in other Member States, the Commission considered that the investments appeared to be State aid within the meaning of Article 87 of the EC Treaty.

(22) As the investments were made in 1999 and 2000, they were assessed in the light of the 1997 Guidelines for the examination of State aid to fisheries and aquaculture ([1]). According to point 2.3 of those Guidelines, aid that does not fulfil the conditions laid down therein must be assessed on a case-by-case basis. According to point 1.2., State aid which is granted without imposing any obligation on the part of the recipients and which is intended to improve the situation of undertakings and increase their business liquidity and which has the effect of improving the recipient's income is, as operating aid, incompatible with the common market. According to the Guidelines, operating aid can only be declared compatible with the common market if such aid is linked to a restructuring plan compatible with the common market. As such a restructuring plan was not submitted, the Commission considered that the investments were incompatible with the common market.

III **COMMENTS FROM THE UNITED KINGDOM**

(23) In its reply of 19 May 2005, the United Kingdom contends that SLAP should be considered as a private body. It further states that all evidence concerning the case had already been forwarded to the Commission, that the information contained in the Seafish Merger Report is considered sufficient as a basis for the assumptions made, that the assumptions made in the report should be considered conservative and prudent, and that the original business case for the mergers as set out in the report was justifiable in the context of SLAP's capacity as a private investor.

(24) The United Kingdom maintains that if the Commission adopts a negative decision, recovery of the aid should not be required, as it would be contrary to the principle of the protection of legitimate expectations. With reference to Commission Decision 2003/612/EC of 3 June 2003 on loans for the purchase of fishing quotas in the Shetland Islands (United Kingdom) ([2]), the United Kingdom closes by saying that the UK authorities have consistently acted in such a way that it could reasonably be concluded that the fund is a private fund under the rules governing the Community Structural Funds.

IV **ASSESSMENT**

(25) It must be determined first whether the measure can be regarded as State aid and, if this is the case, whether this aid is compatible with the common market.

A. **Existence of State aid**

(26) According to 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, insofar as it affects trade between Member States, be incompatible with the common market'. Four conditions are required for classifying 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, must affect trade between Member States.

State resources

(27) The funds of SLAP which have been used for the investment are derived from funding by the Charitable Trust. The Charitable Trust was created by the SIC to receive and hold, on behalf of the Shetland community, disturbance receipts which the oil industry had agreed to pay.

(28) As was already pointed out by the Commission in its decision of 3 June 2003 on loans for the purchase of fishing quotas in the Shetland Islands, these monies, which are directly related to the disturbance caused to the Shetland Islands population and not to the actual provision of the harbour facilities, cannot be regarded as private funds but must be regarded as 'State resources' for the purposes of Article 87 of the EC Treaty.

(29) The investments of SLAP currently under investigation are funded from the same type of funding. With regard to the conclusions of the Commission in its decision mentioned in paragraph (24) and the fact that the United Kingdom has not provided any additional evidence that these funds are private funds, the Commission considers that the investments must be regarded as funded from State resources.

([1]) OJ C 100, 27.3.1997, p. 12.
([2]) OJ L 211, 21.8.2003, p. 63.

Imputability

(30) In its decision mentioned above, the Commission also pointed out that the trustees of the Charitable Trust are the councillors of the SIC. Although these councillors act as trustees ex officio, the fact that they are nominated by the SIC means that the latter is able to exercise a dominant influence over the trust and SLAP as well as over the funds at their disposal. There is therefore a set of indicators showing that decisions cannot be taken without regard to the requirements of the public authority.

(31) Therefore, in the light of the *Stardust* case [1] and given the fact that the funds of SLAP are derived from public funding and that the public authority is able, directly or indirectly, to exercise a dominant influence over both the Charitable Trust and its funds, the decisions regarding those funds must be regarded as decisions imputable to the public authority and granted through State resources.

Advantage for the beneficiary and the Market economy investor principle

(32) Public investments are regarded as State aid if the investments are decided upon in circumstances which would not be acceptable to a private investor acting under normal market-economy principles.

(33) According to the United Kingdom, SLAP acted like a normal market-economy investor in investing in Shetland Seafish Ltd and the takeover of Whalsay Ltd by Shetland Seafish Ltd. This allegedly follows from two reports submitted to the board at the time of the investments: the Shetland Seafish Merger Report and the Whalsay Report.

(34) An investment can be considered to be in line with the market economy investor principle if the investment is made in circumstances that would be acceptable to a private investor operating under normal market economy conditions. An investment would not be considered in line with the principle where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return cannot be expected within a reasonable time from the investment.

Shetland Seafish Merger Report

(35) The prognoses of profit contained in the Seafish Merger Report of 27 September 1999 are based on a number of assumptions, for which insufficient arguments are provided. The report contains a projected profit–and-loss account, a projected balance sheet and a projected cash flow statement for 2000, 2001 and 2002. The data in those sheets show that Shetland Seafish Ltd would become profitable and that the turnover was expected to increase, relative to 2000, by more than 16 % in 2001 and by 26 % in 2002. However, the report does not contain sufficient figures and arguments to demonstrate the reliability of these projections, since the requisite figures on supply, prices and production needed to support these expectations are not contained in the report.

(36) Apart from the fact that the Commission is not able to establish the credibility of these projections and assumptions, even if they could be considered accurate and reliable, without such figures on supply, prices and production they would be insufficient for any normal private investor wishing to invest in such an operation.

(37) It is mentioned in the report that '*the new management organisation and production strategy have been carefully devised to address previous shortfall within the two companies concerned. But the core of the new philosophy is the recognition that only a market led approach will ensure success and continued whitefish processing in Shetland*', which according to the United Kingdom demonstrates that the intent at the time when the investments were made was to ensure that the companies were operating in a manner consistent with their market in order to ensure the long term viability of the companies.

(38) From the figures and data contained in the report the Commission observes that the UK's arguments have not been applied correctly and thoroughly. In absence of comprehensive data pointing to the decision to invest, the Commission considers, indeed, that the investment cannot be considered a profitable investment and thus that SLAP had not acted like a normal private investor.

Whalsay Report

(39) The Whalsay report was issued by the managing director of Whalsay Ltd and cannot be considered to be an independent report on Whalsay and on the possible acquisition of the company by Shetland Seafish Ltd In the report it is stated that both companies clearly suffer from the restrictive supplies of salmon on the market and that a merger between the two companies '*offers not only the best, but maybe the only chance of securing continued and sustainable employment in this industry*'.

[1] Case C 482/99 *France v Commission*, [2002] ECR I-4397.

(40) The report furthermore concludes that *'The decision of the Board of SLAP, should it approve proposals to invest in the merger between Seafish and Whalsay, must therefore be to a background of ensuring that salmon supplies are secured on an enduring basis; the risk of not achieving this must make approval of the merger a highly risky decision and leave both SLAP and Seafish vulnerable.'*.

(41) The report clearly expresses doubts as to the profits following from the merger between the companies and the reference to securing employment in this industry. Furthermore, the report does not contain sufficient data to show the profitability of the investment in question. It shows that no additional information has become available and been used when deciding to invest; the United Kingdom has explicitly confirmed that the decision to invest was indeed taken solely on the basis of this report. Therefore, in particular having regard to the doubt expressed in the report and the lack of additional data proving otherwise, the Commission can only conclude that this investment would likewise not have been decided upon by a normal private investor.

(42) With regard to the foregoing, the Commission considers that the investments in Shetland Seafish Ltd made in 1999 and 2000 by SLAP are not normal commercial investments which could have been decided upon by any normal private investor.

(43) From the information available, the Commission concludes that the companies involved, L.A. Williamson Ltd and Ronas Ltd, merged into Shetland Seafish Ltd and Whalsay Ltd, would not have been able to continue operating without the investments concerned. In any case, the investments have strengthened their position on the market, which would not have occurred otherwise.

Selectivity and distortion of competition

(44) The investments are for the benefit of the companies involved, and these companies are in direct competition with other fish processing companies both within the United Kingdom and in other Member States; therefore they distort or threaten to distort competition.

Conclusion

(45) In the light of the foregoing the investments of SLAP in Shetland Seafish Ltd are regarded as State aid within the meaning of Article 87 of the EC Treaty.

B. **Compatibility with the common market**

(46) State aid can be declared compatible with the common market if it complies with one of the exceptions set out in the EC Treaty. As regards State aid to the fisheries sector, State aid measures are deemed to be compatible with the common market if they comply with the conditions of the 2004 Guidelines for the examination of State aid to fisheries and aquaculture [1]. According to point 5.3 of those Guidelines, an 'unlawful aid' within the meaning of Article 1(f) of Regulation (EC) No 659/1999 will be appraised in accordance with the guidelines applicable at the time when the administrative act setting up the aid has entered into force.

(47) As the investments made by SLAP took place in 1999 and 2000, the compatibility of the aid will have to be assessed under the Guidelines for the examination of State aid to fisheries and aquaculture of 1997 (hereinafter referred to as 'the Guidelines'; see point 22)), which were in force at the time.

(48) According to point 2.3 of the Guidelines, aid to investment in the processing and marketing of fishery products may be deemed compatible with the common market provided that the conditions for granting it are comparable with those laid down in Regulation (EC) No 3699/93 and are at least as stringent, and provided further that the level of the aid does not exceed, in subsidy equivalent, the overall level of the national and Community subsidies permitted under those rules. In addition, if the aid concerns investments that are, according to Regulation (EC) No 3699/93, not eligible for Community assistance, the Commission has to assess its compatibility with the objectives of the Common Fisheries Policy on a case-by-case basis.

(49) According to Article 11(1) of Regulation (EC) No 2468/98, which replaced Regulation (EC) No 3699/93 on 3 November 1998 [2], Member States may under the conditions of Annex II to that regulation take measures to encourage capital investment in the field of processing and marketing of fishery and aquaculture products. Point 2.4 of Annex II states that eligible investments for processing and marketing shall in particular relate to the construction and acquisition of buildings and installations, to the acquisition of new equipment and installations needed for the processing and marketing of fishery and aquaculture products between the time of landing and the end-product stage or to the application of new technologies intended in particular to improve competitiveness and add value.

[1] OJ C 229, 14.9.2004, p. 5.

[2] Council Regulation (EC) No 2468/98 of 3 November 1998 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products (OJ L 312, 20.11.1998, p. 19).

(50) The investments of SLAP cannot be considered to be investments relating to either of these issues and should thus in accordance with point 2.3 of the Guidelines be assessed on a case-by-case basis.

(51) As the investments have the effect of improving the general financial situation of Shetland Seafish Ltd, this aid should be viewed as operating aid.

(52) According to the general principles laid down in point 1.2 of the Guidelines, aid which is granted without imposing any obligations on the part of recipients and which is intended to improve the situation of undertakings and increase their business liquidity, or is calculated on the quantity produced or marketed, products prices, units produced or the means of production, and which has the effect of reducing the recipient's production costs or improving the recipient's income is, as operating aid, incompatible with the common market.

(53) With regard to such operating aid, it is pointed out in that point of the Guidelines that the Commission is required to assess it on a case-by-case basis where it is linked to a restructuring plan considered to be compatible with the common market.

(54) The United Kingdom has not provided any restructuring plan for the Commission to assess. Since, according to the Guidelines, operating aid can only be declared compatible with the common market if such aid is linked to a restructuring plan compatible with the common market, the investments do not comply with the Guidelines.

C. **Recovery of the aid.**

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

(56) On 3 June 2003 the Commission, by Decision 2003/612/EC, took a negative decision regarding loans granted for the purchase of fishing quotas in the Shetland Islands [1]. In its decision the Commission stated that whilst there was no necessary link between actions and decisions of the Commission in relation to the Community Structural Funds in the context of Council Regulation (EC) No 1260/1999 [2] and Commission decisions on State aid, in the specific circumstances in the case in question, legitimate expectations as to the private nature of the fund in question may have been created through the combination of a number of events.

(57) The Commission found that both it and the United Kingdom government had consistently acted in such a way as to suggest that the fund was a private fund for the purposes of the rules governing the Community Structural Funds, and that even if, legally speaking, there was 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 did not fall under the rules on State aid, thus creating legitimate expectations in this respect.

(58) In addition, it considered in its Decision that, in the European Regional Development Fund (ERDF) under the Highlands and Islands Objective I programme 1994-1996, the funding from SLAP was regarded as a private contribution. Furthermore, given the close links between Orkney and Shetland, the Shetland Islands authorities were probably aware of the fact that the parallel Orkney Reserve Fund (Case C 87/2001 [3]) 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).

(59) Accordingly, the Commission took the view that those elements, taken together, had created a legitimate expectation among the Shetland authorities and the bodies involved, as well as among the fishermen; the Commission concluded that, in view of that, they might have wrongly assumed that the State aid rules of the Treaty did not apply, even if legally speaking there was no automatic link between the two issues.

[1] OJ L 211, 21.8.2003, p. 63.
[2] OJ L 161, 26.6.1999, p. 1.
[3] OJ C 38, 12.2.2002, p. 2.

(60) The investments of SLAP currently under investigation are funded from the same type of funding, during the same timeframe. Just as in that case, the actions of SLAP were considered to be the actions of a private company, concerning private funding from the Shetland Islands Charitable Trust. In addition, given the circumstances and the specific features of the Shetland community, Shetland Seafish Ltd must have been aware of the loan scheme for the purchasing of fishing quotas and in particular the explanatory leaflet referred to in paragraph 68 of Decision 2003/612/EC, stating that the grants and loans from the Charitable Trust would be regarded as private contributions.

(61) It is established case law that there can be no legitimate expectations in favour of the beneficiary of an aid deriving from the behaviour of a national authority when the procedure laid down in Article 88 of the Treaty had not been followed (judgment of the Court in *Alcan Deutschland* [1]). However, since the Commission has also consistently acted in such a way as to suggest that the fund is a private fund, the Commission considers that, given the circumstances of the case and the decision of the Commission referred to above, both SLAP and Shetland Seafish Ltd, the beneficiary of the aid, could assume that only private funds are involved and that, therefore, the State aid rules of the Treaty did not apply.

(62) On those grounds and on the basis of Article 14(1) of Regulation (EC) No 659/1999, since the principle of protection of legitimate expectations is a 'general principle of Community law', recovery of the aid from which Shetland Seafish Ltd has benefited will not be required.

V **CONCLUSION**

(63) In the light of the assessment made in Section IV, the Commission finds that the United Kingdom has, in breach of Article 88(3) of the EC Treaty, unlawfully granted aid to Shetland Seafish Ltd by acquiring shares in the company under circumstances and conditions that would not have been acceptable to a normal private market-economy investor.

(64) The Commission considers that these investments are not compatible with the common market inasmuch as they cannot be considered normal commercial investments which could have been decided upon by any normal private investor,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted in 1999 and 2000 by way of investments made by Shetland Leasing and Property Ltd in Shetland Seafish Ltd is not compatible with the common market.

Article 2

The aid mentioned in Article 1 does not have to be recovered.

Article 3

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

Done at Brussels, 7 December 2005.

For the Commission

Mariann FISCHER BOEL

Member of the Commission

[1] Case 24/95, *Land Rheinland-Pfalz v. Alcan Deutschland* [1997] ECR I-01591.