COMMISSION

COMMISSION DECISION

of 13 November 2007

State aid C 37/2006 (ex NN 91/2005) — Fishing Vessel Modernisation Scheme implemented in the United Kingdom

(notified under document number C(2007) 5395)

(Only the English version is authentic)

(Text with EEA relevance)

(2008/153/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) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) 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 6(1) Article 14 thereof,

Having called on interested third parties to submit their comments pursuant to the provisions cited above [2],

Whereas:

I. PROCEDURE

(1) By letter dated 15 June 2004, the Commission was informed by a citizen of the United Kingdom that the *Shetland Islands Council*, the public authority in the Shetland Islands of the United Kingdom had implemented aid to the fisheries sector, which possibly concerned illegal state aid. By letters dated 24 August 2004, 4 February 2005, 11 May 2005 and 16 December 2005, the Commission requested the United Kingdom to provide information about such aid. By letters dated 10 December 2004, 6 April 2005, 8 September 2005 and 31 January 2006, the United Kingdom provided the Commission with further information.

(2) By letter dated 13 September 2006, the Commission informed the United Kingdom that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. The United Kingdom provided its comments on the aid by letters dated 16 October 2006 and 6 February 2007.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the aid.

(4) The Commission received no comments from interested parties.

II. DETAILED DESCRIPTION

(5) The *Shetland Islands Council* made payments to the fisheries sector under the scope of two general aid measures, named '*Aid to the Fish Catching and Processing Industry*' and '*Aid to the Fish Farming Industry*', which actually consisted of several different types of aid schemes in force since the 1970's. One such scheme was the '*Fishing Vessel Modernisation Scheme*' ('the scheme'). Under the scheme, which applied from at least the 1980's until 14 January 2005, aid could be granted for the modernisation of fishing vessels, related to a major improvement, such as, for example, better storage of catches, replacement of the engine, improvements in working conditions or to crew safety.

(6) Aid was granted up to 10 % of the total cost of the improvement project, with a maximum amount of GBP 40 000 per vessel. Only one application per year could be considered. Improvement projects which exceeded 50 % of the costs of a new vessel of the same type were not eligible, as well as work to vessels less than five years old. The works had to meet all the required standards specified by *Shetland Seafood Quality Control*.

[1] OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

[2] OJ C 293, 2.12.2006, p. 9.

[3] OJ C 293, 2.12.2006, p. 9.

(7) All applicants had to hold a *pressure stock licence* and other relevant certificates of competency and applicants had to become members of the *Shetlands Fishermen's Association*.

(8) The beneficiary of the aid had to undertake to operate the vessel full-time, to retain ownership of the vessel and to provide full-time employment for the vessel crew for a period of at least five years from receipt of the aid. Finally, beneficiaries had a yearly reporting obligation in order to prove that all conditions had been complied with and the scheme contained a provision for reimbursement of the aid in case of non-compliance with any of the conditions.

Grounds for initiating the procedure

(9) The Commission had serious doubts that the aid granted under the scheme after 1 July 2001 could be regarded as compatible with the requirements of the Guidelines for the examination of State aid to fisheries and aquaculture of 2001 ([1]) ('2001 Guidelines') in conjunction with Article 9 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 ([2]), in particular with the conditions that no aid may be granted for modernisation of fishing vessels if it concerns capacity in terms of tonnage or of power.

III. **COMMENTS FROM THE UNITED KINGDOM**

(10) In its letters dated 16 October 2006 and 6 February 2007, the United Kingdom provided further information on the individual aids granted under the scheme after 1 July 2001. In the period from August 2002 until June 2005, 23 aids were granted for vessel modernisation, concerning, amongst others, fish handling systems, fire fighting equipment, aid for winches or deck cranes and for engine replacement. The amount of aid granted varied between GBP 403 and GBP 7 090 per beneficiary.

(11) As regards compliance with the condition of Article 9 of Regulation (EC) No 2792/1999 that no aid may be granted when the modernisation concerns capacity in terms of tonnage or of power, the United Kingdom stated that none of the improvements facilitated by the grants of aid affected the gross tonnage or the power of any vessel.

(12) In addition, the United Kingdom provided information showing that none of the grants of aid exceeded 40 % of the eligible costs.

(13) Finally, the United Kingdom maintained that if the Commission adopts a negative decision, recovery of aid granted prior to 3 June 2003 should not be required as it would be contrary to the principle of the protection of legitimate expectations. In that respect, the United Kingdom made 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) ([3]) and Commission Decision 2006/226/EC of 7 December 2005 on Investments of Shetland Leasing and Property Developments in the Shetland Islands (United Kingdom) ([4]), stating that until 3 June 2003, the *Shetland Islands Council* legitimately considered the funds used for such aid to be private rather than public.

IV. **ASSESSMENT OF THE AID**

(14) It must be determined firstly if the measure can be regarded as State aid and if so, if it is compatible with the common market. Aid has been granted to a limited number of companies within the fisheries sector, and is thus of a selective nature. The aid has been granted by the *Shetland Islands Council* from state resources. The aid benefited recipients which are in direct competition with other companies in the fisheries sector, both within the United Kingdom, and in other Member States. Therefore, the measures distort or threaten to distort competition and are to be considered State aid within the meaning of Article 87(1) of the EC Treaty.

(15) As regards State aid to the fisheries sector, State aid is deemed to be compatible with the common market if it complies with the conditions of the Guidelines for the examination of State aid to fisheries and aquaculture ([5]) of 2004 ('2004 Guidelines'). According to the second paragraph of point 5.3 of the 2004 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'. This is also in accordance with the general rules expressed in the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ([6]). The aid is thus to be assessed with regard to its compatibility with the 2001 Guidelines and the 2004 Guidelines.

([1]) OJ C 19, 20.1.2001, p. 7.
([2]) OJ L 337, 30.12.1999, p. 10. Regulation as last amended by Regulation (EC) No 485/2005 (OJ L 81, 30.3.2005, p. 1).
([3]) OJ L 211, 21.8.2003, p. 63.
([4]) OJ L 81, 18.3.2006, p. 36.
([5]) OJ C 229, 14.9.2004, p. 5.
([6]) OJ C 119, 22.5.2002, p. 22.

Compatibility of the scheme

Conditions under the Guidelines

2001 Guidelines

(16) According to point 2.2.3.2 of 2001 Guidelines, applicable to existing aid as from 1 July 2001, aid for the modernisation of commissioned vessels may be deemed compatible with the common market provided that it complies with the relevant requirements laid down in Regulation (EC) No 2792/1999.

Regulation (EC) No 2792/1999

(17) Articles 6, 7, 9 and 10 of Regulation (EC) No 2792/1999 and Annex III thereto require that any entry of new capacity is to be compensated by the withdrawal of a capacity without public aid which is at least equal to the new capacity introduced in the segments concerned. Until 31 December 2001, where the objectives for the size of the fleet were not yet respected, the withdrawal of capacity should at least have been 30 % more than the new capacity introduced.

(18) The aid may only be granted where the Member State has submitted the information concerning the application of the multiannual Guidance Programme ('MAGP'), has complied with its obligations under Council Regulation (EEC) No 2930/86 of 22 September 1986 defining characteristics for fishing vessels [1], has implemented the permanent arrangements for fleet renewal and modernisation under Article 6 of Regulation (EC) No 2792/1999, and has complied with the overall MAGP-objectives.

(19) In addition, the aid for the modernisation of fishing vessels can be granted only if the aid does not concern capacity in terms of tonnage or of power.

(20) Finally, the vessels have to be registered in the fleet register and any changes in vessels characteristics must be communicated to this register. The replacement of fishing gear is not eligible.

(21) As Shetland is an objective I region, aid may be granted up to 40 % of the total eligible costs.

Regulation (EC) No 2369/2002

(22) On 1 January 2003, the relevant Articles and Annex of Regulation (EC) No 2792/1999 were amended by Regulation (EC) No 2369/2002 [2]. In addition to the existing conditions of Regulation (EC) No 2792/1999, the aid for the modernisation of fishing vessels was further restricted in the sense that such aid may only be granted provided that the aid does not serve to increase the effectiveness of the fishing gear.

(23) As regards the condition regarding the fact that the aid may not concern capacity in terms of tonnage or of power, the amendments made by Regulation (EC) No 2369/2002 introduced an exemption to that restriction, allowing such types of aids when they are in line with Article 11(5) of Regulation (EC) No 2371/2002 [3], which allows capacity increases in the case of modernisation works over the main deck to improve safety on board, working conditions, hygiene and product quality.

Regulation (EC) No 1421/2004

(24) With regard to conditions concerning the replacement of fishing gear, Regulation (EC) No 2792/1999 was later amended by Regulation (EC) No 1421/2004 [4], which entered into force on 26 August 2004. Pursuant to Regulation (EC) No 2792/1999, as thus amended, replacement of fishing gear could be considered eligible if the vessel is subject to a recovery plan and is required to end its participation in the fishery concerned and fish for other species with different fishing gear. In such a case, the Commission may decide that the first replacement of fishing gear, where fishing possibilities are significantly reduced by a recovery plan, may be considered eligible.

2004 Guidelines

(25) The 2004 Guidelines should be applied to all existing schemes as from 1 January 2005. With regard to the aid for modernisation of fishing vessels, these guidelines refer to the Articles 9 and 10 of, and point 1.4 of Annex III to, Regulation (EC) No 2792/1999 and thus the same conditions continue to apply.

Compatibility

(26) From the information provided by the United Kingdom, it can be deduced that, during the period from August 2002 until June 2005, 23 aids were granted for vessel modernisation, including five for replacements of engines and one for a project regarding the auxiliary engine, pump and clutch unit.

(27) According to the United Kingdom, none of those improvements facilitated by the grants affected the gross tonnage or the power of any vessel and therefore the aids were compatible with the conditions of the respective guidelines.

[1] OJ L 274, 25.9.1986, p. 1. Regulation as amended by Regulation (EC) No 3259/94 (OJ L 339, 29.12.1994, p. 11).
[2] OJ L 358, 31.12.2002, p. 49.
[3] OJ L 358, 31.12.2002, p. 59. Regulation as amended by Regulation (EC) No 865/2007 (OJ L 192, 24.7.2007, p. 1).
[4] OJ L 260, 6.8.2004, p. 1.

(28) As regards the 17 grants for vessel modernisations, other than the replacement of engines and the project concerning the auxiliary engine, pump and clutch unit, the United Kingdom has provided information showing that the aid complies with the conditions under the Guidelines applicable at the time the aid was granted.

(29) However, as regards the remaining six grants, according to Article 9(1)(c)(i) of Regulation (EC) No 2792/1999, the aid may not 'concern capacity in terms of tonnage or power'. The replacement of an engine of a fishing vessel concerns the capacity of the vessel in terms of power and thus no aid may be granted for such purpose. This was also been confirmed to all Member States by letter dated 5 May 2003 (Reference D(2003)37148) from Mr. Holmquist, Director-General for fisheries. In the same line, the aid for the project concerning the auxiliary engine, pump and clutch unit cannot be allowed.

(30) As regards the amendments to Regulation (EC) No 2792/1999, referred to in Recital 23, those six modernisation projects have all taken place below deck and can therefore not be regarded as falling within the scope of Article 11(5) of Regulation (EC) No 2371/2002.

(31) In view of the foregoing Recitals 26 to 30, the Commission considers that the aid granted under the scheme for the six modernisation projects concerning the capacity of the vessel in terms of tonnage or power is incompatible with Article 9(1)(c)(i) of Regulation (EC) No 2792/1999 and therefore incompatible the 2001 and 2004 Guidelines. The other aid granted under the scheme is, however, compatible with those conditions.

Recovery of the aid

(32) Under Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in case 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.

(33) The United Kingdom has raised the issue that the Commission is not to require recovery of the aid if that would be contrary to the principle of the protection of legitimate expectations and claims that this principle applies to this case.

(34) The funds used for the financing of the scheme are the same funds used for the aids subject to the negative decisions taken by the Commission in Decisions 2003/612/EC and 2006/226/EC, as referred to in Recital 13 of the present Decision. In those cases, the Commission considered that these funds must be regarded as State resources for the purposes of Article 87 of the EC Treaty. At the same time, the Commission acknowledged that in the specific circumstances of the cases in question, legitimate expectations as to the private nature of the fund in question had been created on the part of the *Shetland Islands Council* and bodies involved through the combination of a number of elements taken together which precluded recovery of the incompatible State aid.

(35) It is considered, however, that in this case the elements taken into account in those two Commission Decisions cannot be applied in the same way and the legitimate expectations have not been created. The Commission notes, in particular, the actions and statements from the United Kingdom, clearly showing that, at the respective times of granting of aid, the responsible authorities were convinced that the scheme was, in fact, a State aid scheme and that the rules on State aid were applicable.

(36) To reach that conclusion, the Commission observes that, unlike the aids subject to Decisions 2003/612/EC and 2006/226/EC, the scheme in question has been set up as a normal aid scheme and concerns direct grants to fishermen, granted directly by the *Shetland Islands Council*. In addition, the specific circumstances of this case clearly show that the United Kingdom authorities themselves considered the State aid rules to be applicable, as they have continuously included the expenditure under the scheme in the annual UK State aid reports submitted to the Commission in accordance with Community obligations. In fact, in response to questions raised by the Commission, the United Kingdom stated in its letter dated 10 December 2004 that: 'payments under the schemes have been included in the Annual State Aid Inventory and sent to the Commission annually, as required, for many years' and in its letter dated 6 April 2005 that: 'My authorities have, over many years, acted in good faith and in the belief that the Schemes were compliant with the State aid guidelines'.

(37) Having regard to those statements, and the circumstances of the case, the Commission considers that requiring the recovery of the aid cannot be considered to be contradictory to the general principle of Community law. Thus, in accordance with Article 14(1) of Regulation (EC) No 659/1999, the Commission considers that the United Kingdom must take all necessary measures to recover the aid from the beneficiaries of the scheme, without prejudice to cases falling within the scope of Commission Regulation (EC) No 875/2007 of 24 July 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the fisheries sector and amending Regulation (EC) No 1860/2004 [1].

[1] OJ L 193, 25.7.2007, p. 6.

(38) In that respect, it should be pointed out that in accordance with Article 14(2) of Regulation (EC) No 659/1999, in order to ensure that effective competition be restored, the recovery should include interest. This interest should be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 [1].

(39) The Commission asks the United Kingdom to return to it the attached questionnaire concerning the current status of the recovery procedure and to draw up a list of beneficiaries to which the recovery of aid relates.

V. **CONCLUSION**

(40) 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 under the Fishing Vessel Modernisation Scheme.

(41) The Commission considers that the aid granted under that scheme is compatible with the common market, with the exception of the aid granted for modernisation projects concerning capacity in terms of tonnage or power,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid which the United Kingdom has implemented on the basis of the Fishing Vessel Modernisation Scheme is compatible with the common market, as far as it concerns aid granted for modernisation projects not concerning capacity in terms of tonnage or power.

2. The State aid which the United Kingdom has implemented on the basis of the Fishing Vessel Modernisation Scheme is incompatible with the common market, as far as it concerns aid granted for modernisation projects concerning capacity in terms of tonnage or power.

Article 2

Individual aid referred to in Article 1(2) of this Decision does not constitute aid if it fulfils the conditions of Regulation (EC) No 875/2007.

Article 3

1. The United Kingdom shall take all necessary measures to recover the incompatible aid granted under the scheme referred to in Article 1(2) from the beneficiaries, other than the aid referred to in Article 2.

2. The aids to be recovered shall include interest from the date on which they were put at the disposal of the beneficiaries until the date of their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

4. The United Kingdom shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this Decision.

Article 4

1. The recovery of the aid granted under the scheme referred to in Article 1(2) shall be immediate and effective.

2. The United Kingdom shall ensure that this Decision is implemented within four months following the date of its notification.

Article 5

1. Within two months following the date of notification of this Decision, the United Kingdom shall submit the following information to the Commission:

(a) the list of beneficiaries that have received aid referred to Article 1(2) of this Decision that does not fulfil the conditions laid down by Regulation (EC) No 875/2007, and the total amount of aid received by each of them;

(b) the total amount (principal and interest) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision; and

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. The United Kingdom shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed.

[1] OJ L 140, 30.4.2004, p. 1. Regulation as last amended by Regulation (EC) No 1935/2006 (OJ L 407, 30.12.2006).

It shall immediately submit any information which the Commission requests on the measures already taken and planned to comply with this Decision.

It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 6

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

Done at Brussels, 13 November 2007.

For the Commission
Joe BORG
Member of the Commission