COMMISSION DECISION

of 13 November 2007

State aid C 38/2006 (ex NN 93/2005) — Fish factory improvement scheme implemented in the United Kingdom

(notified under document number C(2007) 5397)

(Only the English version is authentic)

(Text with EEA relevance)

(2008/154/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) and 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 of unlawful aid granted by the *Shetland Islands Council*, the public authority in the Shetland Islands of the United Kingdom. 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. The United Kingdom provided the Commission with further information by letters dated 10 December 2004, 6 April 2005, 8 September 2005 and 31 January 2006.

(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. The United Kingdom provided its comments on the case by letters dated 16 October 2006 and 30 January 2007.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* on 28 November 2006 [3]. The Commission invited interested parties to submit their comments on the aid. No comments were received.

II. DETAILED DESCRIPTION

(4) 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, one such scheme was the so-called *'Fish Factory Improvement Scheme'*.

(5) Under the Fish factory improvement scheme (the 'scheme'), aid could be granted for the purchase of new processing machinery and equipment and for the construction, improvement or extension of fish factories. Repairs to machinery or buildings were, however, not eligible. Aid for second-hand equipment was only considered for assistance in special circumstances and was to be inspected or certified as fully serviceable by an independent engineer.

(6) Aid was granted up to a maximum of 20 % of the eligible costs, with a maximum amount of GBP 20 000 for factories with a turnover of less than GBP 1 000 000; GBP 25 000 for factories with a turnover of between GBP 1 000 000 and GBP 3 000 000; and GBP 30 000 for factories with a turnover of more than GBP 3 000 000.

(7) From 13 August 1993 until 15 December 2004, payments were made under the scheme in favour of Shetland Fish Products Limited, a company involved in the production of fish meal and fish oil, not intended for human consumption. The following grants were paid to that company:

(a) on 13 August 1997, GBP 24 800 was granted to assist with the purchase of an Alfa Laval Separator; the purpose of which is to separate fish oil from cooked press liquid;

[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 289, 28.11.2006, p. 10.
[3] OJ C 289, 28.11.2006, p. 10.

(b) on 3 September 1998, GBP 1 592 was granted to assist with the partial re-cladding of the factory building; this work was carried out as part of the factory's improvements to help it conform with requirements as to foul air emissions;

(c) on 7 January 1999, GBP 3 600 was granted to assist with the purchase of a new feeding screw for the factory's fish pits;

(d) on 25 February 1999, GBP 9 479 was granted to assist with the installation of a new de-watering system to reduce the amount of excess water entering fish storage pits;

(e) on 10 December 1999, GBP 19 480 was granted to assist with the replacement of decanters within the factory, thereby improving production and efficiency;

(f) on 19 January 2001, GBP 14 949,86 was granted to assist with the installation of a flash steam system to improve energy efficiency within the factory and production; and

(g) on 15 December 2004, GBP 19 700 was granted to assist with the purchase of a fish offloading crane to enable the factory to discharge larger vessels, improve reliability and increase availability of spares.

Grounds for initiating the procedure

(8) In its decision to initiate the procedure the Commission considered that the conditions of the scheme and the majority of the aid granted was compatible with the common market, as it complied with the provisions of Council Regulation (EC) No 3699/93 of 21 December 1993 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and the marketing of its products [1] and 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], applicable at the respective times of granting of aid.

(9) However, the Commission has serious doubts on the compatibility with the common market of the aid granted to Shetland Fish Products Limited, as that aid was granted for investments for processing and marketing of fishery and aquaculture products intended to be used and processed for purposes, other than for human consumption, which was not allowed under Regulation (EC) No 3699/93 and Regulation (EC) No 2792/1999.

III. **COMMENTS FROM THE UNITED KINGDOM**

(10) In its reply dated 16 October 2006, the United Kingdom provided further information on the aids granted to Shetland Fish Products Limited.

(11) It confirmed that the aid granted to that company cannot be regarded as complying with the conditions of Regulation (EC) No 3699/93 and Regulation (EC) No 2792/1999. The United Kingdom stated that those administering the scheme were not aware, at the time that the grants were authorised, that aid for the processing and marketing for fishery and aquaculture products intended to be used and processed for purposes other than for human consumption was precluded by those Regulations.

(12) However, the United Kingdom pointed out that at least one of the investments which had been made, namely the grant of GBP 1 592 of 3 September 1998, related to environmental improvements, being the re-cladding of one of the company's buildings, the purpose of which was to 'seal' the building and thereby reduce foul air emissions. According to the United Kingdom this aid could be regarded as compatible with paragraph 2.0(b) of Annex III to Regulation (EC) No 3699/93.

(13) Finally, the United Kingdom maintained that, should the Commission adopt a negative decision, recovery of aid granted prior to 3 June 2003 should not be required as that 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.

[1] OJ L 346, 31.12.1993, p. 1. Regulation as last amended by Regulation (EC) No 25/97 (OJ L 6, 10.1.1997, 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.

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.

(15) Aid has been granted to a company in the fisheries sector, and is thus of a selective nature. The aid has been granted by the *Shetland Islands Council* from state resources and benefited Shetland Fish Products Limited, which operates in direct competition with other companies in the fisheries sector, both within the United Kingdom and in other Member States. Therefore, the aid distorts or threatens to distort competition and appears to be State aid within the meaning of Article 87 of the EC Treaty.

Legality

(16) According to the United Kingdom, the two general schemes have been applied before the accession of the United Kingdom to the European Economic Community. In any event, due to the absence of past records, the United Kingdom has been unable to provide evidence that the aid measures already existed before the United Kingdom joined the Community. In addition, the United Kingdom confirmed that the aid schemes have been changed over the years and that these changes were never notified to the Commission in accordance with Article 88(3) of the EC Treaty (former Article 93(3)). As a result, the aid measures have to be considered as new aid.

Basis for the assessment

(17) Council Regulation (EC) No 659/1999 does not lay down any limitation period for the examination of 'unlawful aid', as defined in Article 1(f) thereof, namely aid implemented before the Commission is able to reach a conclusion as to its compatibility with the common market. However, Article 15 of that Regulation stipulates that the power of the Commission to require the recovery of aid is subject to a limitation period of ten years and that the limitation period begins on the day on which the unlawful aid is awarded to the beneficiary and that that limitation period is interrupted by any action taken by the Commission. Consequently, the Commission considers that it is not necessary in this case to examine the aid covered by the limitation period, namely aid granted more than ten years before any measure taken by the Commission concerning it.

(18) The Commission considers that in this case the limitation period was interrupted by its request for information sent to the United Kingdom on 24 August 2004. Accordingly, the limitation period applies to aid granted to beneficiaries before 24 August 1994. Consequently, the Commission has limited its assessment to the aid granted by decisions taken after 24 August 1994.

(19) State aid can be declared compatible with the common market if it complies with one of the exceptions provided for in the EC Treaty. 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 [1] of 2004 ('2004 Guidelines'). According to the second paragraph of 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.' The aid thus needs to be assessed on the basis of its compatibility with the Guidelines for the examination of State aid to fisheries and aquaculture [2] of 1997 ('1997 Guidelines') and the Guidelines for the examination of State aid to fisheries and aquaculture [3] of 2001 ('2001 Guidelines').

Conditions under the Guidelines

(20) According to point 2.3 of the 1997 and 2001 Guidelines, aid to investments in the processing and marketing of fishery products may be deemed to be 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 Regulation (EC) No 2792/1999 respectively and are at least as stringent and the level of the State aid does not exceed, in subsidy equivalent, the total rate of national and Community subsidies fixed in Annex IV to those Regulations.

(21) According to both Article 11 of Regulation (EC) No 3699/93 and point 2.4 of Annex III thereto, and Article 13 of Regulation (EC) No 2792/1999 and point 2.4 of Annex III thereto, eligible investments are to relate in particular to the construction and acquisition of buildings and installation, the acquisition of new equipment and installations needed for the time of landing and the marketing of fishery and aquaculture products between the time of landing and the end-product stage and the application of new technologies intended in particular to improve competitiveness.

(22) According to those provisions, investments are not be eligible for assistance when they concern fishery and aquaculture products intended to be used and processed for purposes other than for human consumption, with the exemption of investments exclusively for the handling, processing and marketing of fishery and aquaculture wastes.

[1] OJ C 229, 14.9.2004, p. 5.
[2] OJ C 100, 27.3.1997, p. 12.
[3] OJ C 19, 20.1.2001, p. 7.

Compatibility

(23) The United Kingdom has confirmed that all aid granted to Shetland Fish Products Limited concerned aid for the processing and marketing of fishery and aquaculture products intended to be used and processed for purposes other than for human consumption. The aid, therefore, does not comply with the provisions mentioned under Recital 22 and consequently with the conditions of the 1997 Guidelines and 2001 Guidelines and is therefore incompatible with the common market.

(24) However, the United Kingdom has stated that the grant of GBP 1 592, of 3 September 1998, concerned aid for investments related to environmental improvements, which would be compatible with paragraph 2.0(b) of Annex III to Regulation (EC) No 3699/93.

(25) According to paragraph 2.0(b) of Annex III to Regulation (EC) No 3699/93, aid in the spheres referred to in Title III for physical investment intended to improve conditions of hygiene or human or animal health, to improve product quality or reduce pollution of the environments is to be eligible. One of the spheres of Title III is 'processing and marketing of fishery and aquaculture products' (point 2.4 of that Title). Investment aid for processing and marketing, even though it concerned a company active in the processing and marketing of products not intended for human consumption, could thus indeed be regarded compatible if the investment is intended to reduce pollution of the environment.

(26) Aid was granted to assist the re-cladding of one of the company's buildings, the purpose of which was to 'seal' the building and thereby reduce foul air emissions. The Commission considers that this type of aid may be deemed compatible with paragraph 2.0(b) of Annex III to Regulation (EC) No 3699/93 and that this particular grant of GBP 1 592 is thus compatible with the common market.

Recovery of the aid

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

(28) 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.

(29) 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. In those cases, the Commission considered that those funds had to be regarded as State resources for the purposes of Article 87(1) 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 authorities and bodies involved through the combination of a number of elements taken together which precluded recovery of the incompatible State aid.

(30) The Commission considers, however, that in this case the elements taken into account in Decisions 2003/612/EC and 2006/226/EC 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.

(31) 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 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 posed 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'.

(32) With 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 a general principle of Community law. Thus, in accordance with Article 14(1) of Regulation (EC) No 659/1999 the Commission considers that United Kingdom must take all necessary measures to recover the aid from the beneficiary of the scheme, without prejudice to cases falling within the scope of 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.

(33) 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].

(34) The Commission would ask United Kingdom to return to it the attached questionnaire concerning the current status of the recovery procedure.

V. **CONCLUSION**

(35) 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 Fish Products Limited under the Fish factory improvement scheme.

(36) The Commission considers that this aid is not compatible with the common market, as far as it concerns the aid granted on 13 August 1997, 7 January 1999, 25 February 1999, 10 December 1999, 19 January 2001 and 15 December 2004, amounting to a total amount of GBP 92 009.

(37) The aid granted on 3 September 1998 amounting to a total of GBP 1 592 is considered compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

1. The aid granted to Shetland Fish Products under the Fish factory improvement scheme is compatible with the common market as far as it concerns the amount of GBP 1 592, granted on 3 September 1998.

2. The aid granted to Shetland Fish Products under the Fish factory improvement scheme is incompatible with the common market as far as it concerns the amount of GBP 92 007, granted on 13 August 1997, 7 January 1999, 25 February 1999, 10 December 1999, 19 January 2001 and 15 December 2004.

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 recover the incompatible aid granted under the scheme referred to in Article 1(2) from the beneficiary, other than that referred to in Article 2.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until 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(2) 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) total amount (principal and interests) to be recovered from the beneficiary that does not fulfil the conditions laid down by Regulation (EC) No 875/2007;

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

(c) documents demonstrating that the beneficiary has 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(2) 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 beneficiary.

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