II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 20 May 2008

concerning aid granted by France to the Fund for the prevention of risks to fishing and fisheries undertakings (State aid C 9/06)

(notified under document number C(2007) 5636)

(Only the French text is authentic)

(Text with EEA relevance)

(2008/936/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 called on the parties concerned to submit their comments under that Article,

Whereas:

1. PROCEDURE

(1) The Commission was aware of information relating to the existence of a fund intended to compensate for the rise in the price of fuel affecting French fisheries undertakings since 2004. According to that information, the declared objective of the fund, called the Fund for the prevention of risks to fishing (FPAP), was to even out short-term variations in the price of fuel for the fishing industry, but in practice it enabled the undertakings to benefit from a fuel price much lower than the market price.

(2) Apparently it was planned, at the beginning, for the Fund to operate solely on the basis of contributions from the trade. The operating principle would have been simple: the Fund would have borne that part of the cost of fuel higher than a specified reference price per litre and, in return, the undertakings would have paid contributions to the FPAP when the price of fuel fell back to below the reference price. In this way, a balance for financing the system would have been struck without there being any contribution from public funds.

(3) However, since the market price for fuel always stayed very considerably above the reference price, the Commission took the view that operation of the FPAP was only possible as a result of the financial contribution from the State and that that financial contribution constituted State aid within the meaning of Article 87 of the EC Treaty.

(4) On 25 August 2005 the Commission requested France to inform it, by 5 September 2005, whether specific measures had been adopted or were envisaged by the State to counter the increase in fuel costs. The Commission also pointed out that if such measures involved State aid it had to be notified of them under Article 88(3) of the Treaty.

(5) In the absence of a reply, and in accordance with Article 10 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty [1], on 21 September 2005 the Commission requested France to provide it, within three weeks, with information on the Fund in order for it to be able to examine whether it actually involved State aid and, if so, whether or not that State aid was compatible with the common market.

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

(6) On 7 October 2005 France replied to the Commission's request of 25 August 2005, stating that 'no measure under the State aid scheme has been implemented in France to counter the difficulties due to the recent considerable increase in the price of fuel'. However, France pointed out that it had encouraged 'an initiative taken by the trade' consisting of the creation of a fund for the prevention of risks to fishing. No mentioned was made in that correspondence of the advance payments granted by the State. On the contrary, it was implicit from the French authorities' reply that the financing of the Fund, managed by the trade, was based exclusively on the pooling of the members' financial capacity.

(7) On 21 October 2005 the Commission reminded the French authorities of its formal request for information on the FPAP of 21 September 2005, granting them a new two-week deadline.

(8) In the absence of a reply from France within the time limit set, the Commission decided, in accordance with paragraph 3 of Article 10 as referred to above, to issue France with an injunction to provide the information necessary for the examination. That injunction, dated 5 December 2005, was sent on 6 December 2005 with a three-week deadline for reply.

(9) France replied by letter dated 21 December 2005 and received by the Commission on 27 December 2005. That letter referred back to a previous reply, dated 6 December and received on 8 December, sent in reply to the Commission's letter of 21 September 2005 (see recital 5 of this Decision). In those two letters France forwarded the Commission the FPAP's articles of association and the three agreements on the introduction of a repayable State advance to the FPAP.

(10) After examining these replies and the documents enclosed, on 8 March 2006 the Commission informed France of its decision to initiate the formal investigation procedure provided for in Article 88(2) of the EC Treaty and Article 6 of Regulation (EC) No 659/1999.

(11) The Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* of 19 April 2006 ([2]). The Commission called on interested parties to submit their comments on the measures in question within one month.

(12) France submitted its comments on 21 April 2006 in the form of a note from its authorities. That note is accompanied by a list of defensive points which seems to have been originally intended for internal use; the list explains the position to be taken vis-à-vis the Commission's arguments.

(13) On 17 May 2006 Ménard, Quimbert et associés, a law firm in Nantes ('MQA' in the following) sent a fax indicating their intention to make comments on behalf of the FPAP at a later date, and accordingly requested that they be granted time to do so. The Commission accepted an extension of two weeks. MQA then forwarded, by ordinary post dated 17 May received by the Commission on 23 May, a statement under the letterhead of Coopération Maritime signed by Mr de Feuardent, the Secretary-General of the FPAP, dated 18 May. A third letter from MQA, also dated 17 May and received by the Commission on 14 June, was 'a new version of [its] comments following correction of a number of clerical errors'. In reality these were documents not previously forwarded to the Commission comprising additional comments to the statement by Mr de Feuardent referred to above, accompanied by a number of documents relating to the operation of the FPAP (articles of association, rules of procedure, information notes, tax treatment of contributions, and a letter relating to a joint audit by the Inspectorate-General for Finance and the Inspectorate-General for Agriculture and Fisheries). Finally, the last letter from MQA, dated 12 June 2006 and sent to the Commission the same day by fax, following on from its letter of 19 May 'dated 17 May by mistake, sending [you] the comments made by Mr de Feuardent, Secretary-General of the Confédération de la Coopération, de la Mutualité et du Crédit Maritime, dated 18 May 2006' contained the same additional comments as those sent by the third letter of 17 May, but without the accompanying documents.

([2]) OJ C 91, 19.4.2006, p. 30.

(14) On 14 June 2006 the Commission sent France the third letter from MQA of 17 May 2006 (the version announced as correcting the clerical errors) and MQA's last letter of 12 June 2006, requesting France to send its comments to reach it within one month. On 12 July 2006 France requested an extension of the deadline to 1 September. On 18 July 2006 the Commission accepted an additional period of one month. On 26 September 2006 France replied that it had no particular comments to make, but pointed out that the MQA letter of 17/19 May 2006 did not tally with Mr de Feuardent's comments. On 9 October 2006 the Commission gave France details of the correspondence received from MQA and requested it to confirm within ten days that the French authorities had indeed been aware of Mr de Feuardent's statement. France replied on 23 October 2006 that it did not have the statement, which it had in fact only mentioned previously because the letter (from MQA) dated 12 June mentioned it. Since France stated that it had not received that letter, the Commission officially sent it a copy on 27 October 2006, requesting any comments that France had to be sent to it by 15 November.

(15) On 27 November 2006 France informed the Commission that it did not have any particular comments to make on the document.

2. DESCRIPTION

2.1. Presentation of the FPAP and its activities

(16) In accordance with the French act of 21 March 1884, as amended by the act of 12 March 1920, the FPAP is constituted in the form of a trade association. The draft articles of association were approved by the constituent assembly held on 10 February 2004 and the articles of association themselves are dated 9 April 2004.

(17) According to the articles of association (Article 4), the association has been set up for a period of 99 years. Its seat is in Paris at: 24, rue du Rocher, i.e. the same address as the Confédération de la Coopération, de la Mutualité et du Crédit Maritime ('Coopération Maritime' in the following).

(18) Under Article 7, the founding members are the Coopération Maritime, the central contracting and development agency Cecomer, the retail traders' cooperative society, which is in fact the central contracting agency of the maritime cooperatives whose function is, in particular, to supply equipment and operating material for fisheries undertakings, the Small-Scale Fishery Management Centre, and two persons active in the fishing industry. At the constituent assembly on 10 February 2004 these five founding members were appointed administrators of the FPAP until the ordinary general meeting to be held in 2007. Thus the FPAP appears to have been set up by the fisheries sector and organisations commercially involved in it (maritime cooperatives, central contracting agency and fisheries undertaking management centres).

(19) Applicants for membership must provide proof that they are active in the fishing industry. However, the association may take in 'any other person willing to give their moral support to the association', provided that the number of employees of this category of member does not exceed 5 % of the number of the association's members. In its letter of 6 December 2005 France points out that the FPAP has 2 013 members and 2 385 vessels, accounting for 30 % of the French fleet.

(20) Article 2 of the articles of association states that: 'The purpose of the association is to develop products so as to enable fisheries undertakings to cover the following risks: fluctuations in the price of diesel, maritime pollution or health risks linked to pollution, the closure of quotas or a significant reduction in fishing opportunities, and market risks. Its title shall be the Fund for the prevention of risks to fishing'. The FPAP is thus designed to be a mutual insurance company providing a number of benefits for its members in exchange for their contributions.

(21) France forwarded copies of three agreements concluded between the State and the FPAP relating to the introduction of repayable advances to the Fund by the State. The advances are paid via the Office national interprofessionnel des produits de la mer et de l'aquaculture (Ofimer). The first agreement, dated 12 November 2004, covers an amount of EUR 15 million; the second, dated 27 May 2005, an amount of EUR 10 million; and the third, dated 11 October 2005, an amount of EUR 40 million. According to these three agreements, an amount of EUR 65 million was therefore advanced to the FPAP.

(22) According to the list of defensive points enclosed with the note from France of 21 April 2006 (see recital 12 of this Decision), it is also possible that another advance of EUR 12 million was paid to the FPAP (see recital 40 of this Decision).

(23) According to Article 1 of these agreements, 'the FPAP shall operate on the basis of contributions paid by its members in order to cover the setting up of financial cover against the risks resulting from fluctuations in the price of oil and the associated administrative costs'. The agreements show that, although under its articles of association it is formally conceived as having quite a wide range of objectives as regards the benefits that it may provide (see recital 20 of this Decision), in reality the FPAP restricted its activity to providing financial cover for fisheries undertakings against the rise in the price of fuel.

(24) Under Article 2 of the agreement of 12 November 2004, 'the purpose of the advance shall be the setting up of a cover mechanism against fluctuations in international oil prices from 1 November 2004; the advance will enable financial options to be acquired on futures markets. The compensation paid to members of the Fund shall correspond to the difference in price between the maximum price covered and the average monthly price in the reference index for the month under consideration'. Article 2 of the agreement of 27 May 2005 is drafted almost identically: instead of the 'setting up' of a cover mechanism, it provides for the 'continuation' of this mechanism and it gives 1 March 2005 as the date from which cover will be provided for advances paid under this agreement. The same applies to the agreement of 11 October 2005; Article 2 provides that, for the advance paid, the Fund is to continue providing cover '… from 1 July 2005 and until 31 December 2005 at least, by buying financial options on the futures markets, up to 17 euro cent/l'. It states that 'the compensation paid to members of the Fund shall be equivalent, at most, to the difference in price between a price of 30 euro cent/l and the average monthly reference price for the month under consideration, where the latter is higher than 30 euro cent/l'.

(25) The detailed rules of procedure of the FPAP show that this cover mechanism operates by means of guarantee agreements between the FPAP and its member undertakings. Members pay a registration fee of EUR 150 plus a guarantee contribution based on an estimated quantity of fuel expressed in litres at a rate of 0,035 cent per litre of fuel. In return, the fisheries undertakings receive an allowance determined on the basis of the volume consumed, up to a maximum of the volume insured. The method of calculating the allowance is detailed in the rules of procedure.

(26) Article 3 of the agreements referred to in recital 21 states that advances may be paid by Ofimer only after certain supporting documents have been provided. These must include the minutes of the FPAP's governing body authorising management of the State advance and, in the case of the first two agreements, detailing the use to which the advance is to be put, and a forecast budget. In its note dated 6 December 2005 France confirmed that the amounts indicated, covering a total of EUR 65 million, were actually granted to the FPAP. That note specifies that these advances are granted 'to ensure the operation of the FPAP, as soon as possible, for the period November 2004 to the end of December 2005'.

(27) In addition, the FPAP undertakes to keep accounts so that, on request, information on how the advances have been used and resources and expenditure have been allocated can be obtained. The accounting documents must be kept for ten years and must be made available to the various State bodies on request.

(28) Article 4 sets the interest rate at which the FPAP is to repay the advances to Ofimer at 4,45 %. The amount of EUR 15 million covered by the agreement of 12 November 2004 has to be repaid by 1 November 2006, the EUR 10 million covered by the agreement of 27 May 2005 by 1 May 2007, and the EUR 40 million covered by the agreement of 11 October 2005 by 1 July 2007.

(29) In view of the three (possibly four) agreements signed between the French State and the Fund, FPAP's activity within the framework of the first of the objectives set out in Article 2 of the articles of association (to enable fisheries undertakings to cover the risks relating to the fluctuation in the price of diesel) is therefore two-fold:

(a) to counter fluctuations in the price of oil by acquiring options on the futures markets in the petroleum products sector; and

(b) to partially compensate for the additional cost induced by high oil prices for the vessels of Fund members where the fuel price exceeds a certain threshold.

(30) As regards State aid, the Fund must be considered under these two aspects, on the one hand where it acts as an economic operator on futures markets, and on the other where it compensates fisheries undertakings for part of the costs incurred in fuel purchases with the aim of reducing their running costs.

2.2. **Reasons for initiating the formal investigation procedure**

(31) The reasons for initiating the formal investigation were as follows.

2.2.1. *Regarding the acquisition of options on futures markets*

(32) The advance paid to the FPAP can be regarded as a short-term loan at a rate of 4,45 %. However, the Commission notes that the Fund has no real estate and that its current assets are extremely small because they only come from its members' contributions. This is why a bank would never have granted such a loan.

(33) As a result, the Fund is at a financial advantage compared to other undertakings active on the same futures markets. That advantage constitutes State aid for the Fund. None of the provisions of Article 87 of the EC Treaty or the guidelines which the Commission has adopted for assessing State aid schemes allows it to be regarded as compatible with the common market.

(34) In addition, as a result of this activity, the FPAP's member fisheries undertakings can buy fuel at reduced prices. This constitutes aid which results in a reduction of running costs for the undertakings covered by the Fund. However, in accordance with paragraph 3.7 of the Guidelines for the examination of State aid to fisheries and aquaculture ([3]), this type of operating aid, which is not accompanied by any obligation, must normally be regarded as being incompatible with the common market.

2.2.2. *Regarding compensation for fisheries undertakings of part of the costs incurred in the purchase of fuel*

(35) Here also, the aid results in a reduction of running costs for the FPAP's member undertakings. In the same way, none of the provisions of Article 87 of the EC Treaty or the guidelines which the Commission has adopted for assessing State aid schemes allows it to be regarded as compatible with the common market. Likewise, in accordance with paragraph 3.7 of the guidelines for the fisheries sector, this type of operating aid, which is not accompanied by any obligation, must be regarded as being incompatible with the common market.

2.2.3. *Conclusion*

(36) In view of all the information in its possession, the Commission took the view that there were serious doubts about the compatibility with the common market of this aid scheme, which benefits both the FPAP itself and its member fisheries undertakings.

3. **COMMENTS MADE BY FRANCE AND THE PARTIES CONCERNED**

3.1. **Comments made by France**

(37) The comments made by France are set out in the reply of 21 April 2006. After that date no additional remark was made on the arguments developed by the FPAP and MQA.

(38) France points out that the Commission's analysis should concentrate on the nature of and the conditions for granting the advance authorised by the State and not on FPAP's activities.

(39) In this respect it observes that:

— the applicable rates are higher than the reference rates laid down by the Commission to establish the existence of State aid in soft loans,

— the scheme cannot be regarded as State aid as long as the repayment deadlines have not passed. In this respect France points out that these deadlines were set at 1 November 2006, 1 May 2007 and 1 July 2007 respectively,

— the Commission's argument, according to which no bank would have granted such an advance to the FPAP, has no foundation, because guarantee mechanisms could have been introduced. France also points out that the FPAP is the only French trade organisation made up of fisheries undertakings with the objective of acting on the oil futures market and that membership of the Fund is free.

([3]) OJ C 229, 14.9.2004, p. 5.

(40) The Commission also notes that, in the list of defensive points enclosed with its reply (see recital 12 of this Decision), France indicates that 'it does not appear necessary to point out that it was decided to pay an advance of EUR 12 million, since to date the agreement has not been signed. Nevertheless, we should not box ourselves into a corner. It is proposed that it should be pointed out that this is being considered'.

3.2. **Comments made by the FPAP**

(41) The Commission received several letters from MQA with various contents and sent in a disordered fashion (see details at recital 13 of this Decision), which may be summarised as follows: a statement under the Coopération Maritime letterhead dated 18 May 2006 signed by the Secretary-General of the FPAP, and additional comments by MQA on behalf of the FPAP, accompanied by a number of documents relating to the operation of the FPAP (articles of association, rules of procedure, information notes, tax treatment of contributions, and a letter relating to a joint audit by the Inspectorate-General for Finance and the Inspectorate-General for Agriculture and Fisheries).

(42) An analysis of the documents received from MQA shows that the FPAP endorses the arguments made by France, pointing out that one cannot prejudge 'the pure and simple cancellation of the debt on its expiry date' as long as no repayment default has been established. On the other issues, unlike France, the FPAP concentrates its arguments not on the nature of and the conditions for granting the aid, but on the Fund's articles of association and its activities.

(43) The main arguments put forward by the FPAP to dispute the claim that the advances granted by France constitute State aid and are incompatible with the common market may be summarised as follows:

— the FPAP is not an ordinary economic operator, because it is a trade association acting exclusively in the interest of its members with no profit motive and set up as a 'prevention group'. Thus, when it organises the pooling of risks with a compensation system based on a reference price, it is not acting as an ordinary commercial operator, 'but as a union of consumers of petroleum products seeking more to protect themselves against the market that to operate on it'. Initially it was designed to be self-sufficient in theory since it was envisaged that contributions paid in but not used could be reimbursed. The FPAP also points to the total transparency of its management: in this respect, since it does not carry out any economic activity for its own account, it cannot have any impact on the relevant futures market. The FPAP also points out that a joint audit is carried out by the Inspectorate-General for Finance and the Inspectorate-General for Agriculture and Fisheries,

— the FPAP does not act on a relevant market, because the market in fishery products is exposed to numerous other distortions of competition resulting from the various national policies for implementing the common fisheries policy. The market must therefore be seen as a 'mosaic of regional micro-markets'. This intervention therefore does not affect trade conditions. The FPAP also points out that the assessment of competition must be seen in context because a major part of the increase in and distortion of the costs affecting the fishing industry is due to 'tolls' or 'penalties' resulting in particular from Community measures, which is far from the image of a large, open market.

(44) In fact, the FPAP's intervention is aimed at facilitating the maintenance of fishing within a regional framework and preventing deep-sea vessels from falling back on closer grounds or trawlers from targeting more specific and less energy-consuming fisheries. Its aim is to protect resources, maintain balance and safeguard the diversity of the system by means of a phase of adaptation. In this way, the FPAP anticipated the recovery and restructuring plans and the planned raising of the ceiling for *de minimis* aid. For these reasons, the FPAP puts forward the following arguments:

— it is not accurate to say that the advances granted by the State were without any conditions attaching. On the contrary, they 'were subject to the condition that there was immediate transparent management [and] above all that a sustainable policy was laid down which was subject to general inspection',

— just above one third of its intervention (EUR 25 million out of EUR 65 million) related directly to advances to employees and can be regarded as direct social assistance,

— the aid is the result of an extraordinary situation since the Commission itself acknowledges the sector's exceptional economic and social difficulties,

— the FPAP points out that it bears civil liability under French law and that its liability is unlimited. For this reason, given the lack of default on repayment, the criterion applied by the Commission to regard this assistance as State aid is insufficient.

(45) Lastly, together with its comments MQA forwarded copies of two letters from the minister responsible for the budget to the FPAP showing that the FPAP and all its members benefit from tax schemes. In the case of the FPAP these consist of exemption from corporation tax and, probably, business tax and, in the case of fishermen-owners, the possibility of deducting the contributions paid to the trade association from their taxable income.

4. ASSESSMENT

(46) This Decision does not relate to the tax advantages referred to in recital 45, since the Commission was not aware of them at the time it decided to initiate the formal investigation procedure. Those tax advantages are the subject of a special assessment, under case number NN 38/07, to determine whether they constitute State aid and, if so, whether that aid is compatible with the common market.

(47) In relation to State aid, the objective of the FPAP has to be considered in two ways:

— firstly, it is aimed at acquiring financial options on the futures markets. Although this is not explicitly stated, those futures markets are obviously the markets for oil or oil by-products. Thus the FPAP, while being constituted as a trade association, operates on these futures markets by acquiring options, as any ordinary private company active on this kind of market and operating according to the rules of the market economy would do. The aid for the acquisition of options on the futures markets is assessed later on in Section 4.1 of this Decision;

— secondly, the FPAP is aimed at paying to its member fisheries undertakings the difference between the average monthly reference price and, according to the agreements of 12 November 2004 and 27 May 2005, the 'maximum price covered' or, according to the agreement of 11 October 2005, a price of 30 euro cent per litre if the average monthly price in the reference index is higher than that price. The average monthly reference price is laid down by the FPAP. The compensation paid by the FPAP to the fisheries undertakings for the purchase of fuel is analysed later on in Section 4.2 of this Decision.

4.1. Aid for the FPAP: aid for the acquisition of options on the futures markets

4.1.1. *Existence of State aid*

4.1.1.1. The FPAP is an undertaking within the meaning of Article 87 of the EC Treaty

(48) It is essential in the first place to establish whether the FPAP can be regarded as an undertaking. If that is not the case, Article 87(1) does not apply to the FPAP. On this question, the Commission points out that, as has been consistently held in case law, in the context of competition law the concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed ([4]). Any activity consisting in offering goods and services on a given market is an economic activity ([5]).

(49) Companies active on the futures markets for raw material products are usually private companies functioning according to the rules of the market economy. The aim of operations carried out on these futures markets is, for the operator, to bet on the expectation that the purchase price of the product, if it is acquired in the future at the normal market price, will be different from the price at which the option is subscribed. Thus, an operator active on such a market takes a risk because of the uncertainty of price changes. In the case in point, the FPAP actually acted as an operator on the futures markets for petroleum products. By doing this, it is also an economic operator in the fisheries sector, since it provides the Cecomer company, a founding member and administrator of the FPAP and the central contracting agency for maritime cooperatives, with fuel at a price different from that which that company would buy at the normal market price. If the operation to acquire options, which is an operation of a speculative nature, is successful, the price of the fuel resold to the cooperatives is lower than the market rate. The FPAP thus takes a risk, hoping that it will be able to draw financial advantage from it. The maritime cooperatives, for their part, then sell on their fuel to the fisheries undertakings at a price depending on the price at which they were able to acquire it from Cecomer. The

([4]) Judgment of the Court of Justice in Joined Cases C-159/91 and C-160/91 *AGF-Cancava* [1993] ECR I-637.

([5]) Judgment of the Court of Justice in Case C-222/04 *Cassa di Risparmio* [2006] ECR I-289.

characteristics of the operations for transferring ownership of the fuel acquired by the FPAP to Cecomer, the retail traders' cooperative society, are not known. However, and although Cecomer is a founding member of the FPAP, this involves operations carried out between two independent entities. These fuel ownership transfer operations are of a contractual nature. This is because, although they probably display specific characteristics, the agreements under which these operations are carried out are nonetheless private-law agreements and consequently private-law contracts. The FPAP's activity, thus consisting of intervention on the futures markets for petroleum products in order to buy those products with a view to selling them on to Cecomer, a commercial company, is evidently an activity of an economic nature. Also, in its Decision to initiate the procedure, the Commission observed that: 'The purpose of the FPAP is to enable the acquisition of financial options on the futures markets. Although this is not explicitly stated, those futures markets are obviously the markets for oil or oil by-products. Thus the FPAP, while being constituted as a trade association, operates on these futures markets by buying and selling options, as any ordinary private company active on this kind of market and operating according to the rules of the market economy would do'. In their replies, France and the FPAP did not dispute the fact that the FPAP undertook such operations of buying and selling options. France does not make any comments on this. As regards the FPAP, it merely points out that 'the FPAP operated on the world commodities market with specialised brokers or financial institutions. It is difficult to imagine a more competitive, more extensive or more volatile market. Consequently, the Fund did not enjoy any tariff advantage, nor any special conditions vis-à-vis all the other operators on the market…. The question therefore comes down to the source of the funds advanced…'. It therefore does not question the Commission's claim that it acts as an ordinary operator on these futures markets. It should also be noted that the function of the FPAP is by no means that of a public fund administrator acting in the public interest. Neither can it be regarded as an instance of the exercise of public power prerogatives by the State or by a body under its responsibility.

(50) Therefore the FPAP must clearly be regarded as an undertaking within the meaning of Community competition law. There is no need to study its characteristics or articles of association. In particular, the fact that it may be non-profit-making is of no relevance. Also, even if were regarded, to use the FPAP's own terms, as a 'union of consumers of petroleum products seeking more to protect themselves against the market that to operate on it', these 'consumers' are in fact economic operators (maritime cooperatives and fisheries undertakings) seeking to reduce their running costs. However, this reaction, which is perfectly logical on the part of economic operators, means that the operators cannot be regarded as individual consumers within the meaning of Article 87(2)(a) of the Treaty, which authorises aid of a social character granted to them. Therefore, the arguments put forward by France or the FPAP itself relating to its articles of association, its rules of procedure, its objectives or its specific situation on the petroleum products market cannot be accepted.

4.1.1.2. The private creditor principle ([6])

(51) The Commission takes the view that, in this case, it is justified to assess the existence of State aid by applying the private creditor principle.

(52) The funds coming from the three advances, for which the grant conditions are known, had to be repaid at an interest rate of 4,45 %. As regards the possible fourth advance, of an amount of EUR 12 million, it may be assumed that it was granted under identical or very similar conditions. This State contribution therefore corresponds in practice to a loan granted at that rate. Admittedly, that rate is higher than the reference rate used by the Commission to determine the element of aid existing in a soft loan, which was 4,43 % in 2004 ([7]) and has been 4,08 % since 1 January 2005 ([8]). Consequently, in theory, it is possible that there was no State aid in the advances granted if it was granted on normal market-economy terms.

(53) However, the Commission takes the view that the advances were not granted on normal market-economy terms insofar as no private creditor would have agreed to grant the amounts in question in the absence of a guarantee of the viability of the FPAP's activity and the probability of recovery by the expiry date.

(54) The FPAP's start-up capital is made up of its members' contributions (see recitals 23 and 25). Neither France nor the FPAP have provided figures of the resources obtained from these contributions. Also, according to the list of defensive points enclosed with the reply of 21 April 2006, after stating that 'when the reply of 6 December 2005 was being drafted, this information was proposed in the draft but was deleted during the interministerial check', the French authorities take the view that 'it is not necessary to give a reply now'.

([6]) Judgment of the Court of Justice in Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459; judgment of the Court of Justice in Case C-256/97 *DMTransports* [1999] ECR I-3913; judgment of the Court of First Instance in Case T-152/99 *Andrès Molina* [2002] ECR II-3049.

([7]) OJ C 307, 17.12.2003, p. 11.

([8]) OJ C 220, 8.9.2005, p. 2.

(55) Nevertheless the Commission supposes that these are relatively modest amounts compared to the probable extent of the expenditure, since, on the basis of the information given in the statement signed by the Secretary-General of the FPAP, the 'Detailed Rules of Procedure of the FPAP' of November 2004 and the 'information note from the FPAP' of January 2006, a rough estimate can be made: approximately 2 500 members (the number of members of the FPAP according to the French authorities) pay a membership fee of EUR 150 each, i.e. EUR 375 000, to which the contributions covering the guarantee risk proper (see recital 25) must be added. Assuming that the entire volume of diesel consumed is covered, and based on the indicative consumption of a 24-metre trawler as reported by the FPAP (approximately 10 tonnes of fuel per week), and assuming activity for a maximum of 48 weeks a year, i.e. a consumption of 480 tonnes (although the number of weeks of activity is probably closer to 38 to 40 than 48), and the unit value of the contribution to the FPAP, i.e. EUR 0,0035 per litre, the figure arrived at for 2 500 vessels is a total of EUR 4 200 000 per year. The third source of contributions comes from the possibility, as provided for in the articles of association, for the association to take in 'any person willing to provide moral support for the trade association', up to a maximum of 5 % of the number of members. This is probably a marginal amount. In the absence of any indication of the number of such members willing to provide moral support and the amount that they contribute, we will assume, as a very generous estimate, additional revenue of about EUR 125 000 (125 members whose activities do not relate to fishing, i.e. the maximum permitted by the FPAP's articles of association (5 % of 2 500 members) × EUR 1 000).

(56) Thus the total revenue from the various contributions would amount to EUR 4 200 000 + EUR 375 000 + EUR 125 000, i.e. EUR 4 700 000 per year. This is an extremely optimistic assumption, calculated on the basis of an indicative consumption of a 24-metre trawler operating for 48 weeks a year, and on the assumption that all the fuel consumed is covered. The Commission is only taking it to find out what the theoretical maximum amount of revenue for the FPAP could be. However, if we consider that France indicates that the number of member vessels is 2 385, including a considerable proportion of coastal vessels of less than 12 metres, whose annual fuel consumption is closer to 200 tonnes that the 480 tonnes used in the above calculation, it is probable that the actual amount is significantly less. This is because, since the French fleet comprises approximately 1 500 vessels of more than 12 metres and 95,3 % of the vessels of that size are covered by the FPAP ([9]), i.e. approximately 1 400 vessels, it can be deduced that approximately 1 000 vessels of less than 12 metres are also covered by the FPAP. It is therefore highly certain that the total annual revenue is below this amount of EUR 4,7 million.

(57) Following calculation of this hypothetical revenue, the Commission observes that the FPAP, on the one hand, apparently has no real estate and that, in addition, its current assets, made up only of its members' contributions, are very small. For this reason, the Commission takes the view that, under normal market-economy conditions, a bank, such as Crédit Maritime, for example, which describes itself in its own terms as 'the natural partner of the fishing industry', would never have lent (or 'advanced' to use the terms of the agreements concluded between the State and the FPAP) the amounts in question (or even only part of the amounts) to the FPAP to operate on a futures market, without having obtained reasonable assurance beforehand of its probable solvency on expiry of the loan.

(58) France objects, claiming that this conclusion is 'an allegation not based on any precise survey of banking organisations, and that a system of securities could have been set up'. However, a survey carried out by the Chambre nationale des conseils et experts financiers (National chamber of financial advisers and experts) ([10]) at thirty-five banks provides a fairly accurate picture of the standards applied in French financial institutions when granting loans to their customers. To limit their credit risk vis-à-vis their customers, the management of financial institutions requires compliance with standard ceilings based on a number of ratios allowing the financial health of the undertaking and its ability to serve its debt to be assessed, according to various criteria such as its own funds, balance sheet, the level of long-term indebtedness, turnover and financial costs. It follows from this analysis in particular that a ratio of 'total banking debt to own funds' higher than 2,50 triggers a risk indicator which, although it does not totally compromise the granting of a loan

([9]) Contrary to what appeared in the Decision initiating the formal investigation procedure, vessels in this category (more than 12 metres) do not account for 95,3 % of FPAP member vessels. In fact they account for 95,3 % of the vessels in this category which are covered by the FPAP.

([10]) N. Coulon: The new business bank debt ratios, *BANQUE* No 511, December 1990, quoted by Alain Galesnes in '*Le diagnostic bancaire de l'entreprise* (Business banking diagnostics)' in *Editions du Centre d'Etudes et de Recherches Financières appliquées (CEREFIA)*, Rennes, 1994/2004.

leads the establishment to take increased securities. In the case of the FPAP, if the EUR 65 million in advances are set against the optimistic estimate of its own funds set out above (EUR 4,7 million, see recital 56), the ratio is 13,82, i.e. almost six times the maximum risk. Of course, if the actual amount of the advances were higher (EUR 77 million, taking into account the possible additional advance of EUR 12 million referred to in recital 22), or if the actual amount of own funds were appreciably smaller, this hypothetical ratio would increase further. With such a risk level, a bank would never have considered granting a loan, even though the use of real securities (such as pledging the purchase options or the fuel stocks acquired by the FPAP as collateral) or personal securities (taking out a mortgage on the members' personal assets and pledging their vessels as collateral) is in fact one of the methods used by banks to minimise the risk of insolvency. However, it will be observed that, if the personal securities of the members were liable to be claimed, the fisheries undertakings would probably have been more reluctant to become members of the FPAP. There are also other client risk transfer or sharing methods, such as part-financing the loan by several banks, the use of guarantee companies or subscribing to regional or departmental guarantee funds (as a rule themselves counter-guaranteed by guarantee companies) but, in all cases, a guarantee is generally extended only to basically healthy and potentially profitable undertakings, and only ever up to an amount not exceeding 50 % of the debt (i.e. in the case of the FPAP, an amount of slightly more than EUR 30 million, leaving a residual risk of almost three times the maximum risk).

(59) When France comments on these methods, saying that security systems 'could have been' set up, it implicitly admits that they were not set up in this case and that the State advance was granted without securities comparable to those in use by banks being sought. Under these circumstances, the Commission concludes that France did not behave like a private creditor and that it did not have any security that the FPAP was in a position to repay the funds placed at its disposal.

(60) In addition, the FPAP, through its Board, points out that it bears civil liability under French law and that this liability is unlimited, noting that trade association action may entail responsibility for large amounts. The Commission admits that very large amounts may be at stake, with an organisation like the FPAP where the operations undertaken on the futures markets present undeniable risks and may involve significant losses. That being so, there is nothing to say that the FPAP's liability in the event of significant losses will be covered by its members. None of the documents provided (articles of association, rules of procedure or information note) refers to such a mechanism. The only financial consideration appearing in these documents relates to the contribution, for which it is indicated that it is forfeited to the trade association when a member steps down (Article 10). The Commission also observes that the act of 21 March 1884, under which the FPAP was set up, is the act which has allowed the creation of trade associations in France. It is certainly not in the spirit of such an act to entail the commercial, and therefore financial, liability of the members of the trade association concerned. As a result, in the event of major financial losses, the Commission does not see how the losses can be compensated by its members.

(61) Taking all of the above factors into account, the Commission takes the view that the private creditor principle has not been complied with.

4.1.1.3. Existence of a financial advantage granted by means of State resources

(62) The Commission takes the view that, even in the case of the higher assumption, the estimated amount of revenue from the various member contributions would never have enabled the FPAP to operate on a futures market without the assistance of external funding. This external funding was provided by the State, via Ofimer, in the form of at least three advances spread out between November 2004 and October 2005, covering a total amount, according to the information forwarded by France, of EUR 65 million. A fourth advance of EUR 12 million was probably also paid, since the list of defensive points quoted in recital 22 implies that the agreement was in the course of being signed at that date.

(63) France has not submitted any evidence contradicting this assessment. The list of defensive points also states: 'As regards its funding, the FPAP is considered [by the Commission] not to be able to operate without the repayable State advance. No argument can be put forward against this'. In addition, for the Commission, the advances were granted under conditions which are not normal market conditions (see recitals 51 to 61 of this Decision).

(64) Also, the Commission observes that neither France nor the FPAP have given it any indication of the amount of funds invested by the FPAP on the futures markets, or of the result of the transactions carried out on them. Again, according to the list of defensive points, the French authorities deliberately chose not to submit this information, since it states that '… this information could be provided to the Commission. However, the advisability of providing such information now must be gauged'. The Commission notes that it did not receive such information, neither in that letter nor at a later date.

(65) Lastly, France and the FPAP and its Board take the view that the Commission cannot prejudge the existence of State aid as long as no repayment default has been established (France: 'the repayable advance cannot be regarded as State aid as long as the repayment deadline has not fallen'; FPAP: 'Can this amount be repaid or not? That is the main question being asked by the Commission'; MQA: 'None of the loans to the FPAP granted by France has expired. At this stage there is no repayment default nor any indication by the French government suggesting that the debt will be purely and simply cancelled on expiry'). The Commission would point out in this respect that regarding the aid to the FPAP as State aid is first and foremost the result of the French Decision to grant a loan to the FPAP that it would not otherwise have obtained, even if the repayment deadlines had been met. The Commission questions the solvency of the FPAP on expiry of the loan because this question is at the core of the assessment of its situation in relation to the normal conditions for granting a loan by a private bank and not because it suspects that a loan has been transferred into straightforward financial assistance.

(66) From this point of view, if it turned out that advances were not repaid within the time limits, or not repaid at all, this would confirm both that the FPAP was not in a position to perform the tasks provided for in its articles of association without external loans, and that it would never have been granted such assistance by a bank under normal market conditions. However, in this connection the Commission observes that France has not informed it of any repayment of advances granted to the FPAP. They had to be repaid on 1 November 2006 in the case of the advance of EUR 15 million covered by the agreement of 12 November 2004, 1 May 2007 in the case of the advance of EUR 10 million covered by the agreement of 27 May 2005 and on 1 July 2007 in the case of the advance of EUR 40 million covered by the agreement of 11 October 2005 (see recital 21). Regarding the fourth advance which the FPAP may have received (see recital 22), neither the date of the agreement nor the final repayment date are known.

(67) The three known expiry dates have now passed. The first had even already passed when France sent its last letter to the Commission on 27 November 2006, after the Decision to initiate the formal investigation procedure. The Commission takes the view that, if this advance had actually been repaid, France or the FPAP itself would have informed the Commission without delay since one of the arguments put forward to counter the Commission's assessment was that these advances could not be regarded as State aid as long as the repayment deadline had not fallen. There is no doubt that, if the first advance had been repaid, France would have informed the Commission of this in its letter of 27 November 2006 and would then have done the same for the second and third advances, which had to be repaid by 1 May and 1 July 2007, and for the possible fourth advance. What is more, the reports published in the trade press suggest that there has been no repayment up to now. Thus, the Commission takes the view that the aid initially granted in the form of an advance was transformed into aid in the form of a direct subsidy.

(68) Consequently, for all the reasons set out above, the Commission considers that the State advances represent a financial advantage granted by means of State financial resources.

4.1.1.4. Existence of a financial advantage imputable to the State

(69) The Commission observes that the three agreements concluded between the State and the FPAP expressly stipulate that the purpose of the public funds paid is the creation of a cover mechanism against fluctuations in international oil prices and that the mechanism will enable financial options to be acquired on the futures markets. However, it is obvious that the FPAP's initial liquid assets, which were supplied only by its members' contributions, could not have enabled it to undertake such operations, at least not on the scale to which they were. This is because the first agreement, dated 12 November 2004, indicates that the purpose of the advance of EUR 15 million was to 'enable the

mechanism to be started'. Therefore it was indeed thanks to these advances that the FPAP was in a position to undertake significant acquisition operations on the futures markets.

(70) In other words, it appears that the State actively supported the creation of the FPAP, constituted as a trade association, and its involvement on the futures markets for petroleum products, although such an activity does not reflect the normal activity of a trade association, and that that activity was conducted in competition with private operators under competition conditions which are not normal. Also, France recognised, as early as 7 October 2005, that 'the government has encouraged an initiative by the trade, i.e. the creation of a fund for the prevention of risks to fishing. This fund, managed by the trade, enables fishermen (…) to pool their financial capacity to buy financial options on the futures market to cover themselves against the risk of fluctuations in the price of fuel', while omitting to state that the fishermen's 'financial capacity' referred to was based on State resources, since two advances had already been paid by that date. However, there is no doubt that the FPAP had to take account of the requirements of the public authorities in deciding how to use the funds placed at its disposal. From this point of view, the introduction of an interministerial inspection with the remit of 'auditing the FPAP mechanism in its current operation and checking that the conditions for expenditure are satisfactory as regards public-expenditure law and rules, while complying with the commitments entered into by the managers of the funding' demonstrates the State's concern to ensure that the FPAP's funds were in fact used for the purpose laid down in the agreements.

(71) Consequently, taking all of the above factors into account, the Commission takes the view that the financial advantage represented by the advances granted to the FPAP for the acquisition of financial options on the oil futures markets is imputable to the State ([11]).

([11]) Judgment of the Court of Justice in Case C-482/99 *France* v *Commission* [2002] ECR I-4397, in particular paragraphs 53 to 56.

4.1.1.5. Existence of a financial advantage which distorts or threatens to distort competition

(72) The FPAP enjoys a financial advantage compared to the other companies operating on the futures markets, whether they are companies customarily active on these markets or companies which are or may be set up in the same way as the FPAP, in the form of a trade association in the other Member States or even in France itself.

(73) France argues that 'the FPAP cannot be regarded as receiving preferential treatment over other private organisations which could have played the same role because it is the only French professional organisation aimed at bringing together fisheries undertakings to buy options on the futures market'. In reply, the Commission observes that the FPAP's position as regards competition rules should not be assessed solely vis-à-vis other French organisations made up of fisheries undertakings and playing the same role as it, but vis-à-vis all French and European operators that may be active on the futures market for petroleum products.

(74) In addition, the FPAP disputes the claim that it enjoyed preferential conditions for carrying out its activity as investor on the futures market — in its own words: 'the FPAP operated on the world commodities market with specialised brokers or financial institutions (…) [It] did not enjoy any tariff advantage, nor any special conditions vis-à-vis all the other operators on the market'. The Commission does not claim that the FPAP's financial advantage arose from preferential treatment of the FPAP by the other actors of the market, but that the Fund could only operate on this market because it had a financial intervention margin granted by the State going beyond the FPAP's own financial capacity, while the State did not grant it under conditions similar to other companies which may have had the same interest as the FPAP in operating on this market (undertakings in other sectors affected by the rise in the cost of oil, for example) or which operate on this market for reasons linked to their economic or commercial strategies (oil companies, for example).

(75) Also, the FPAP recognises the existence of this advantage. In a document from the Confédération de la Coopération Maritime, not forwarded to the Commission but published on the website of the 'Assises de la pêche et de l'aquaculture de la Région Bretagne' ([12]), Mr de Feuardent, summarising the main points discussed at a meeting with the Region of Brittany on 24 May 2006, writes: 'The State has granted assistance of EUR 65 million to date. Also, the FPAP has made a profit of several million euro on options on the commodities market, which is an undeniable value added'. The Commission concludes from this that the FPAP was only able to acquire financial options on the petroleum products market thanks to the public funds at its disposal but not at the disposal of other organisations or undertakings, and that it drew direct benefit from that. Consequently, the advantage which it enjoyed distorts or threatens to distort competition.

4.1.1.6. Existence of a financial advantage affecting trade between Member States

(76) In having operated on the commodities market, as Mr de Feuardent indicates, the FPAP operated on the world oil market.

(77) Its activity therefore went beyond a strictly French framework, so that the advances granted must indeed be considered as affecting trade between Member States.

4.1.1.7. Conclusion

(78) Thus, the four requirements for establishing the existence of State aid are met: the advances paid to the FPAP come from State resources, they are imputable to the State, they distort or threaten to distort competition, and they affect trade between Member States. The aid enjoyed by the FPAP therefore does constitute State aid within the meaning of Article 87 of the EC Treaty as regards the part of its funding coming from State resources used for the acquisition of options on the petroleum product futures market.

([12]) http://pecheaquaculture.region-bretagne.fr

4.1.2. *Compatibility with the common market*

(79) As the agreements concluded between the State and the FPAP indicate, this State aid in the form of advances was aimed at enabling the FPAP to begin operating on the futures markets for oil and oil by-products and continue doing so. It is therefore operating aid for the FPAP. In its letter of 6 December 2005, France also recognises that the amounts indicated were advanced 'in order to ensure the operation of the FPAP'.

(80) Under Article 87(2) and (3) of the Treaty, certain categories of aid are or may be considered compatible with the common market. It should be examined whether the operating aid for the FPAP falls under one of these categories.

(81) The Commission observes that this aid does not match any of the cases provided for in Article 87(2).

(82) This is because it is not intended to make good damage caused by natural disasters or other exceptional occurrences. The Commission would point out in this connection that fluctuations in oil prices are inherent in economic activity. Fluctuations also affect other sectors of activity which consume petroleum products in all the Member States of the European Union and cannot be regarded as a natural disaster or an exceptional occurrence within the meaning of Article 87 of the Treaty. The aid is therefore not compatible with the common market under Article 87(2)(b) of the Treaty.

(83) Nor can the aid be considered compatible with the common market on the basis of direct application of Article 87(3) of the Treaty, with the various cases provided for.

(a) It is obviously not aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment (the case provided for in Article 87(3)(a)). The aid is in fact intended to enable the FPAP to operate on the relevant futures markets. It is therefore not related to the aid referred to in Article 87(3)(a).

(b) The FPAP cannot be regarded as an important project of European interest or aid to remedy a serious disturbance in the economy of a Member State (the cases provided for in Article 87(3)(b)). This is because the FPAP is specifically French and the other Member States did not express their intention to set up funds of the same kind. Therefore there is no European dimension to the Fund. As regards the consideration as to whether the aid is intended to remedy a serious disturbance in the economy of a Member State, the Commission observes that there is no evidence making it possible to say that providing money for a fund of this kind could bring about such a remedy. As regards the aid for the FPAP itself, the aid benefits only one economic entity and, even if it is linked to aid granted to fisheries undertakings, does not benefit the economy of a Member State as a whole. In addition, the Commission would point out that it has always taken the view that the public authorities should not intervene financially against the rise in the price of oil. On the contrary their role should be, in particular, pursuing incentive policies for undertakings so that they adapt to the new economic conditions created by the price increase. That is why aid aimed at making it possible for an economic entity to operate on the relevant futures markets does not match the desired objective.

(c) The existence of the FPAP cannot, in itself, meet the requirements of Article 87(3)(c), which stipulates that aid intended to facilitate the development of certain economic activities or of certain economic regions may be compatible with the common market where it does not adversely affect trading conditions to an extent that is contrary to the common interest. There is no evidence that the development of or increase in operating on the oil futures markets is desirable. Moreover, that activity is not linked to an economic region. That is why the aid cannot be considered compatible with the common market under Article 87(3)(c).

(d) Lastly, this kind of aid does not fall under the categories of aid which may be considered compatible with the common market by a Decision of the Council adopted in accordance with Article 87(3)(e).

(84) The Commission also notes that none of the guidelines that it has adopted for assessing State aid applies to this operating aid for the FPAP.

(85) In conclusion, therefore, the result is that the aid for the FPAP for the acquisition of options on the futures markets cannot be considered compatible with the common market under any of the exemptions permitted by the Treaty.

4.2. **Aid for fisheries undertakings: reduction of expenditure on fuel**

(86) Before analysing the aid which led to the formal initiation of the investigation procedure, the Commission must give an opinion on the FPAP's argument that the aid granted to itself and fisheries undertakings should be considered in the light of a raising of the *de minimis* threshold in the fisheries sector. According to the FPAP, the amounts in question (approximately EUR 16 000 per undertaking on average, excluding the aid which it regards as being direct social assistance for fishermen) is considerably lower than those which were in the process of being adopted at the time of payment of the compensation by the FPAP (EUR 30 000 per undertaking) ([13]). In their reply the French authorities also refer to the raising of the *de minimis* threshold but do not seek to apply it to this aid scheme.

(87) First of all, the Commission points out that, under Article 3 of Commission Regulation (EC) No 1860/2004 of 6 October 2004 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the agriculture and fisheries sectors ([14]), i.e. the provision in force at the time the aid was granted to fisheries undertakings, the maximum amount of *de minimis* aid was EUR 3 000 per undertaking over three years. The aid under consideration in this Decision considerably exceeds that amount and in its comments France did not mention any application of this ceiling to the undertakings which could have benefited from it. Moreover, even if the amount of EUR 30 000, which appears in Regulation (EC) No 875/2007 recently adopted by the Commission ([15]), is higher than the EUR 16 000 referred to above by the FPAP, that amount is only an average. In addition, France is wrong to arrive at this amount of EUR 16 000, since it excludes the part of the aid which it regards as social assistance and which has to be taken into account in the assessment (see recitals 122 and 123). Thus, given the differences in size of the FPAP's member fisheries undertakings, it is certain that the amount of the aid granted to some undertakings is greater than EUR 30 000. For

([13]) This is the threshold ultimately laid down in Commission Regulation (EC) No 875/2007 (see footnote 14).
([14]) OJ L 325, 28.10.2004, p. 4.
([15]) See footnote 14.

example, for trawlers from 20 to 25 metres, the annual amount of the allowance is around EUR 35 000, i.e. EUR 70 000 for the two years 2005 and 2006 ([16]). In any event, as indicated above, France did not seek application of the new *de minimis* ceiling and did not provide any evidence that it did so. Consequently, taking all of the above factors into account, in the context of the constant review of State aid schemes the Commission is obliged to verify compliance of this aid with the provisions of Article 87 of the Treaty.

4.2.1. *Existence of State aid*

(88) France takes the view that the Commission has no valid reason to extend its assessment of the existence of State aid to this aspect of the Fund's activities. According to France, 'recognition of aid as State aid must be based solely on an *ad hoc* assessment of the repayable State advance and not on an assessment of the FPAP's activities. Thus the French authorities request that only the first part (Part 3.1) of the assessment be developed. Part 3.2 amounts to a condemnation of the activities of the FPAP, which is a trade association purchasing options to cover its members against fluctuations in the price of diesel' ([17]).

(89) In reply, the Commission points out that, as has been consistently held in case law, aid is not characterised by its causes or objectives, but is defined according to its effects ([18]). In addition to acquiring financial options on the futures markets, the aim of the FPAP, according to the agreements concluded with the State, is to pay compensation to fisheries undertakings corresponding to the difference in price between the maximum price covered and the average monthly price in the reference index for the month under consideration. Consequently, the Commission takes the view that the fisheries undertakings enjoyed specific advantages as a result of the system set up by the FPAP and that it is necessary to analyse the effects of the advances granted by the State not only from the point of view of the advantage granted to the FPAP, but also from the point of view of the advantages granted to the fisheries undertakings.

4.2.1.1. Existence of a financial advantage granted through State resources

(90) The advantage drawn by fisheries undertakings from the FPAP's activities is two-fold: on the one hand it consists of the possibility of obtaining fuel at an advantageous price, and on the other of receipt of an allowance partially compensating for their expenditure on fuel.

(91) As regards the first aspect, the acquisition of options on the futures markets by the FPAP, which then passed on the forward-bought fuel to the Cecomer company, the maritime cooperatives' central contracting agency, enabled the FPAP's member undertakings to buy fuel acquired by those cooperatives at a price lower than that on the ordinary market. But, as indicated above (see recital 75 of this Decision), this was possible only because 'The State has granted assistance of EUR 65 million to date. Also, the FPAP has made a profit of several million euro on options on the commodities market, which is an undeniable value added'. The Commission therefore notes that the supply of fuel to fisheries undertakings at a price lower than that on the ordinary market was possible due to the advances granted by the State and the FPAP's own resources, i.e. the product of its members' contributions and the profits from speculative operations on the futures market for petroleum products.

(92) The funds used to finance the compensation paid to fisheries undertakings also came from two sources (State resources and resources from the FPAP's private activity).

(93) As described in recital 24 of this Decision, the FPAP bears the difference in price that exists, under the agreements of 12 November 2004 and 27 May 2005, between the 'maximum price covered' and the average monthly price in the reference index and, under the agreement of 11 October 2005, between 30 euro cent per litre and the average monthly reference price if the latter is higher than 30 euro cent.

([16]) Source: *Observatoire économique régional des pêches de Bretagne. 'Résultats des flottilles artisanales 2005/2006'* (Regional economic observatory of fisheries in Brittany, 'Results for craft fleets 2005/2006'), Summary.

([17]) The references to Parts 3.1 and 3.2 refer to the Decision initiating the formal investigation procedure mentioned in recital 11. Part 3.1 dealt with the aid for the acquisition of options on the futures markets and the resultant financial advantages for the FPAP and the fisheries undertakings; Part 3.2 dealt with the compensation for the purchase of fuel for those undertakings.

([18]) In particular: judgments of the Court of Justice in Case 173/73 *Italy* v *Commission* [1974] ECR 709; in Case C-241/94 *France* v *Commission* (known as 'Kimberly Clark') [1996] ECR I-4551; in Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717; and in Case C-5/01 *Belgium* v *Commission* [2002] ECR I-11991.

(94) The 'evening-out' mechanism provided for was originally based on the assumption that the additional costs exceeding a reference price in times of high prices could be compensated by means of the contributions paid by the members in times of lower prices. Thus the system would be self-financing. Referring to Mr de Feuardent's document already mentioned in recital 75 of this Decision, 'technically the FPAP was able to take the first options from April 2004 onwards; at that time, Cecomer's requirements (approximately 200 million litres) for 2005 could be met at 0,28 cent/litre, i.e. approximately EUR 4 million'. Thus, at the beginning of 2004 the FPAP could perhaps have covered the relatively modest needs of the 'diesel insurance' out of its own resources. It therefore appears that, as it was originally designed, the Fund could have been self-sufficient.

(95) However, since oil prices stayed at a very high level and the FPAP's membership expanded, it rapidly acquired a large number of members. The result was that the cost of this 'diesel insurance' exploded and could only be supported by using the advances granted to the FPAP by the State.

(96) If we attempt to estimate the appropriations necessary for the FPAP to cover the expenditure on 'diesel insurance' for 2005, we can start from the assumption that the level of fuel consumption for which compensation was claimed by the fisheries undertakings probably increased from 200 million litres (see recital 94) to a volume that can be estimated at almost 900 million litres. This is because, if we take the averages for annual consumption which served as the basis for the calculations in recitals 55 and 56, the consumption of 1 000 vessels of less than 12 metres would be 1 000 vessels × 200 tonnes/vessel, i.e. 200 000 tonnes, and the consumption of vessels of more than 12 metres would be 1 400 vessels × 480 tonnes/vessel, i.e. 672 000 tonnes, which is in total 872 000 tonnes (or 872 million litres). In reality, as indicated in recital 55, if we consider that vessels fish for 38 weeks a year rather than 48, consumption is probably closer to 700 000 tonnes (1 000 vessels of less than 12 m × 158 tonnes, i.e. 158 000 tonnes and 1 400 vessels of more than 12 m × 380 tonnes, i.e. 532 000 tonnes). Assuming a ceiling on compensation of 12 cent per litre, which was applied to the third advance ([19]), the annual financial requirements of the FPAP were thus about EUR 85 million. Considering the fact that the fisheries undertakings perhaps only insured part of their fuel consumption, the appropriations required were probably less, but the order of magnitude remains at several tens of millions of euro a year, as compared to the initial estimate of EUR 4 million for 2005. It is therefore obvious that the FPAP could not have coped with the cover guaranteed to its members, in exchange for their contributions, without receiving external funding, in this case the advances granted by the State.

(97) In this context, the FPAP received public funding to meet the needs of this 'diesel insurance', with the proviso that it managed the funds as efficiently as possible. The FPAP's liquid assets are thus composed of funds coming from the members' contributions, the State advances, and the potential profits of its activities on the oil futures markets. The part of the funding coming from the State advances is undeniably State resources. As regards the profits made on the futures markets which enabled the fisheries undertakings to be supplied with less expensive fuel, it was only possible for them to be made thanks to the existence of the State resources, which gave the FPAP the means to undertake financial transactions on the futures markets. In addition, although the exact characteristics of the agreements concluded between the FPAP and Cecomer are not known and cannot be deduced from any of the documents forwarded by France, the Commission supposes that the compensation paid to the member undertakings, consisting of the difference in price, was lower than if Cecomer and the maritime cooperatives had supplied fuel to the fishermen which had been bought on the ordinary market, i.e. without the FPAP's operations on the futures markets. Thus, the profit from the FPAP's operations on the futures markets was transferred to Cecomer, the supply cooperative of the maritime cooperatives, and ultimately to the fisheries undertakings which obtain their fuel from them. The practical effect was certainly that the FPAP could continue paying compensation for a longer period than if the FPAP had only been an intermediate body solely responsible for distributing the EUR 65 (or 77) million provided by the State under cover of the 'diesel insurance' mechanism.

([19]) See paragraph II of the speech by Mr D. Bussereau, the Minister for Agriculture and Fisheries, delivered on 30 June 2005 at the general meeting of the *Comité national des pêches maritimes et des élevages marins*, which can be found at the following Internet address: http://agriculture.gouv.fr/IMG/pdf/discours_300605_ag-cnpm.pdf.

(98) The Commission therefore takes the view that it was indeed by means of State resources, irrespective of whether they were fed directly into the FPAP's liquid assets or they were used to make profits further increasing those assets, that the fisheries undertakings were able to enjoy a financial advantage, on the one hand by having the possibility of obtaining supplies of fuel at an advantageous price, and on the other by receiving a compensatory allowance calculated on the basis of a reference price.

4.2.1.2. Existence of a financial advantage imputable to the State

(99) The three, or possibly four, agreements concluded between the State and the FPAP provide that the ultimate purpose of the public funds paid in the form of advances is to partially compensate fisheries undertakings for the cost of fuel. The compensation paid to the fishermen in the form of an allowance equivalent to the difference between a reference price and a price at the pump comes in addition to a reduction in the price of diesel at the pump of the supplier, who is, as a rule, the maritime cooperative.

(100) The FPAP's liquid assets, originally made up of its members' contributions then supplemented by an initial advance by the State, enabled it to operate on the futures markets and make profits, although those profits were not sufficient to enable it to simultaneously pay the compensatory allowance guaranteed to the fisheries undertakings in return for their contributions. However, two, or possibly three, additional advances enabled it to continue its activities before it gradually had to reduce its holdings in order to have the liquidity required to pay the allowances. The Commission observes that the Decisions on the operations on the futures markets were taken by the President of the FPAP. They were actually implemented by commissioning brokers and specialised financial institutions (see recital 74), and the amount of remuneration paid to them by the FPAP is not known to the Commission. However, although the FPAP's articles of association provide that the President must consult the Board of Directors 'to decide on proposed cover plans', the State is not represented on that Board. Thus, although the FPAP was generally required 'to keep accounts so that, on request, information on how the advances have been used and the Fund's resources and expenditure have been allocated can be obtained', the State did not have any part in the Decision on the strategy to be followed by the FPAP for acquiring these financial options or on the level of the financial compensation to be paid to the undertakings. Consequently, although, as was demonstrated in paragraph 4.1.1.4, there is no doubt that the aid consisting of the granting of the three, or possibly four, advances is imputable to the State, that is not the case for the additional advantages enjoyed by the fisheries undertakings resulting, on the one hand, from their contributions and, on the other, from the prudent management of the FPAP's liquid assets as a whole. This is because, although the aid ultimately paid to the fishermen was higher than the public funds originally received by the FPAP thanks to the operations undertaken on the futures markets, the part of the aid exceeding the amount of the public funding advanced did not result from a State Decision. Thus, even if it is not possible, from an accounting point of view, to identify precisely what came from State resources and what came from the Fund's own resources, since it was the liquid assets as a whole which were used to operate on the oil futures markets and pay the compensatory allowance, in the Commission's view the advantage resulting from the difference between the total amount of aid paid to the fisheries undertakings and the total amount of the State advances transferred to the fisheries undertakings is not imputable to the State.

4.2.1.3. Existence of a financial advantage which distorts or threatens to distort competition

(101) The Commission considers that the reduction in fuel expenditure enjoyed by the FPAP's member fisheries undertakings favours those undertakings because they are the only ones able to benefit from the reduction. Their position is strengthened in relation to other undertakings competing with them on the Community market, irrespective of whether they are other fisheries undertakings or undertakings in other sectors of economic activity with an interest in reducing their running costs as regards fuel expenditure. Moreover, since the cover mechanism is targeted only at fisheries undertakings, the advantage thus granted to those undertakings must be regarded as a sectoral advantage not accessible to other sectors. But, by favouring a particular sector, any form of aid distorts or threatens to distort competition (see Commission Decision 2006/269/EC of 8 February 2006 on tax deductions for professional fishermen (Sweden) ([20]), recitals 31 and 35).

([20]) OJ L 99, 7.4.2006, p. 21.

(102) France objects that this aid did not favour the FPAP's member undertakings insofar as 'membership of the FPAP is free and open to all fisheries undertakings provided that they pay their contribution'. MQA adds that membership is open 'without consideration of the structure or nationality of the recipient'. Lastly, the FPAP points out that 'the FPAP's member undertakings are held by French capital, but also by Spanish and Dutch capital'.

(103) In reply, the Commission observes that the only fisheries undertakings which may join the FPAP are those which have vessels registered in metropolitan France or the overseas departments. Therefore undertakings with Dutch or Spanish capital holding French vessels may indeed become members of the FPAP. It is certainly those vessels to which France and the FPAP allude in their replies. But other Community vessels may not become members.

(104) All the undertakings enjoying the compensation paid by the FPAP compete on the Community market with undertakings whose vessels fly the flag of the other Member States and which also have an interest in reducing their running costs as regards fuel expenditure, but which do not have at their disposal any compensation system of the kind set up by the FPAP. For that reason, the advantage enjoyed by the member fisheries undertakings or fisheries undertakings which have not yet become members but which are able to do so, i.e. all the undertakings having fishing vessels flying the French flag, is clearly a distortion of competition.

(105) The FPAP also takes the view that the factors distorting competition must be sought elsewhere. Referring to the existence of major additional costs which, according to it, are not economically justified, such as costs resulting from the management of the multiannual guidance plans for the fishing fleet, i.e. management of the fleet's overall capacity, or costs relating to management of 'production rights', the FPAP points out in particular that 'The "rights" attaching to national "policies" represent (…) the real factor distorting European competition [and] they result mainly from the economic field'.

(106) In this connection the Commission observes that these costs, whether or not they are higher or lower in France than in the other Member States, are the result of the constraints of the regulatory framework in which fishing is carried out today. In its communication of 26 February 2007 on rights-based management tools in fisheries ([21]), the Commission points out that the Community fisheries sector is characterised by a multiplicity of management instruments and mechanisms and that comparable situations are treated in sometimes very different ways, depending on the Member State. The result is, in particular, that selling and buying are current practice in some Member States, either within established markets or indirectly. The costs mentioned by the FPAP are the costs with which the fleets of the various Member States are confronted and correspond to the level of economic development of the fisheries sector. They result from the implementation at national level of the management measures which the common fisheries policy lays down or makes necessary. This implementation does not justify the introduction of specific aid in an individual Member State. For that reason, contrary to what the FPAP argues, the distortion of competition must not be assessed within the confines of a 'relevant market', for example a 'regional micro-market', a concept to which it refers, but, as is provided for under the Treaty, within the common market as a whole. Thus, if the effect of the FPAP's aid is to facilitate the maintenance of fishing within a regional framework and protect resources by preventing deep-sea vessels from falling back on closer grounds or trawlers from targeting more specific fisheries, as is argued by the FPAP, it perfectly matches aid which distorts or threatens to distort competition and therefore, in this respect, State aid.

(107) Also, for all the reasons set out above, the Commission considers that the funds advanced by the State and enjoyed by the fisheries undertakings, via the FPAP, distort or threaten to distort competition.

4.2.1.4. Existence of a financial advantage which affects trade between Member States

(108) The FPAP disputes the fact that the aid granted to the association's member fisheries undertakings affects trade between the Member States. Thus, according to the FPAP, these undertakings carry out their activities in 'a market which is by no means unique, but which is based more on a "mosaic" of regional micro-markets'.

([21]) COM(2007) 73 final.

(109) In reply, the Commission notes that the total value of French exports of fishery and aquaculture products to the rest of the world was EUR 1 290 million in 2005, 80 % of which went to the Member States of the European Union. Similarly, the total value of imports of this category of products to France in 2005 was EUR 3 693 million, 40 to 60 % of which, according to sources, came from the Member States of the European Union ([22]). By comparison, the total value of French production was EUR 1 868 million. Consequently, without going into a detailed quantified economic analysis ([23]), it is clear that, regardless of the price variations for each species recorded each day in French or European ports, the volume of trade in the supply balance of fishery and aquaculture products between France and the rest of Europe is considerable. Measures aimed at favouring a significant number of French fisheries undertakings (more than 30 % of the fleet) by reducing their running costs necessarily have an impact on trade between Member States in the fisheries sector.

(110) It is therefore clear that the advantage enjoyed by fisheries undertakings by bearing part of their running costs affects trade between Member States.

4.2.1.5. Conclusion

(111) The four requirements for establishing the existence of State aid are only partially met. The advantage enjoyed by fisheries undertakings does result from the use of State resources, it distorts or threatens to distort competition and it affects trade between Member States. On the other hand, it is imputable to the State only up to the amount of the advances, since those advances constitute only a part of the FPAP's liquid assets and the State did not intervene in the choices made by the FPAP to make profitable use of the funds placed at its disposal. Thus, the Commission concludes that State aid within the meaning of Article 87 of the EC Treaty exists only to the extent of the public funding provided, i.e. EUR 65 or 77 million.

(112) Finally, the Commission observes that the French authorities, notwithstanding their replies of 7 October 2005 and 21 April 2006, do not actually dispute the Commission's conclusions on the existence of State aid. This is because, during the examination of the draft finance act for 2007 by the national parliament, the Minister for Agriculture and Fisheries, questioned on the future of the FPAP, replied: 'the FPAP has been operational since 1 November 2004, but the European Commission is monitoring it closely, because it involves State aid' ([24]).

([22]) *Source*: Ofimer, *Les chiffres-clés de la filière pêche et aquaculture en France* (Key figures for fishing and aquaculture in France), 2006 edition. Also, Eurostat and Global Trade Information Service.

([23]) Judgment of the Court of First Instance in Case T-241/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 67.

([24]) National parliament — Minutes of the session of 25 October 2006, hearing of Mr Dominique Bussereau, Minister for Agriculture and Fisheries.

4.2.2. *Compatibility with the common market*

(113) Under Article 87(2)(3) of the Treaty, certain categories of aid are or may be considered compatible with the common market.

(114) The Commission observes that this aid does not match any of the cases provided for in Article 87(2) of the Treaty.

(a) In arguing that the FPAP acted as 'a consumer defence organisation' or as a 'union of consumers of petroleum products', MQA seems to suggest that aid for fisheries undertakings could be treated as 'aid having a social character, granted to individual consumers' as provided for in Article 87(2). In this respect, the Commission would only observe that that paragraph refers specifically to 'individual consumers' and not undertakings, and that, consequently, it cannot apply to the present case (see also recital 50 of this Decision). This aid is therefore not compatible with the common market under Article 87(2)(a) of the Treaty.

(b) The aid is not aid intended to make good damage caused by natural disasters or other exceptional occurrences, since fluctuations in oil prices are inherent in economic activity. They also affect other sectors of activity which consume petroleum products in all Member States of the European Union and cannot be regarded as a natural disaster or an exceptional occurrence within the meaning of Article 87(2)(b). However, MQA objects to this analysis, arguing that the aid does result from an exceptional situation 'since the Commission itself admits the sector's exceptional economic and social difficulties'. It is certainly true that the fisheries sector has to cope with particular difficulties which the Commission analysed in detail in its communication of 9 March 2006 entitled 'improving the economic situation in the fishing industry' ([25]). In this communication, the Commission showed that the sources of the sector's economic and social difficulties lie in its inadequate structural adjustment to the constraints to which its activity is subject. It also set out various proposals for overcoming the fisheries sector's economic difficulties. Examining the compatibility of certain operating aid, it points out very clearly:

([25]) COM(2006) 103 final.

'The current difficulties in the fishing industry have been aggravated by the recent increase in fuel prices. This has led to calls from the fishing industry for public intervention to compensate for this sudden increase in costs. Such aid would constitute operating aid which is incompatible with the Treaty. The Commission would not approve any aid notified for this purpose'. Referring to a guarantee scheme comparable to that initially thought of when the FPAP was set up, it adds 'The Commission could approve such a scheme only if it were to provide guarantees of reimbursement of all public aid under commercial conditions, which, in the current economic circumstances, seems very unlikely'. Fluctuations in the cost of inputs, including fuel, are inherent in economic activity and cannot in themselves constitute an exceptional occurrence.

In view of the foregoing, the Commission considers that the State aid in question enjoyed by the fisheries undertakings is not compatible with the common market under Article 87(2)(b) of the Treaty.

(115) Nor can the aid be considered compatible with the common market on the basis of Article 87(3) of the Treaty and the various cases which it provides for.

(a) It is not aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment (the case provided for in Article 87(3)(a) of the Treaty). This aid is intended to reduce the running costs of fisheries undertakings. Admittedly, the FPAP points out that the aid is intended to facilitate the maintenance of fishing within a regional framework. However, the Commission notes that the aid is granted to fisheries undertakings regardless of their registered place of business or the home port of the vessels that they operate. It therefore bears no relation to the aid referred to in Article 87(3)(a).

(b) Nor can the aid be regarded as aid intended to promote the implementation of an important project of common European interest or as aid to remedy a serious disturbance in the economy of a Member State. It bears no relation to an important project of common European interest. Nor can it be described as aid intended to remedy a serious disturbance in the economy of a Member State. This is because the aid granted to fisheries undertakings is aimed at remedying the difficulties of undertakings in an individual economic sector and not undertakings in the French economy as a whole. The sectoral nature of this aid is undeniable since the rise in the cost of oil not only affected undertakings in the fisheries sector but all undertakings across all sectors of activity. And, in this respect, the Commission has always taken the view that the public authorities should not intervene financially to compensate for the rise, but on the contrary provide incentives for undertakings to adapt to the resultant new economic conditions. Thus, in view of all these factors, the Commission considers that the FPAP for fisheries undertakings cannot be considered compatible under Article 87(3)(b).

(c) As regards Article 87(3)(c), the reduction of fuel expenditure cannot, in itself, meet the requirements it lays down, according to which aid intended to facilitate the development of certain economic activities or of certain economic regions may be compatible with the common market where it does not adversely affect trading conditions to an extent that is contrary to the common interest. This is because the aid in question is not aimed at encouraging the development of fishing activities towards sustainable fishing, in accordance with the objectives of the common fisheries policy. On the contrary it maintains the level of fishing effort without providing fisheries undertakings with any incentive to reduce their fuel expenditure. Consequently, their effect is to slow down the necessary adaptation of fisheries undertakings to the constraints resulting from the rise in the price of oil. Moreover, this activity is not linked to a particular economic area. That is why the aid cannot be considered compatible with the common market under Article 87(3)(c).

(d) Lastly, this type of aid obviously does not fall under aid to promote culture and heritage conservation or aid considered compatible with the common market by Decision of the Council adopted in accordance with Article 87(3)(e).

(116) The result of all these factors is that the State aid granted to fisheries undertakings to reduce their fuel expenditure is not covered by any of the derogations provided for in Article 87 of the Treaty.

(117) Since this is aid for fisheries undertakings, it must also be assessed in the light of the Guidelines for the examination of State aid to fisheries and aquaculture ('Guidelines' in the following).

(118) The effect of the aid is to reduce the running costs of fisheries undertakings. It displays the characteristics of operating aid.

(119) First of all the Commission would point out that, under point 3.5 of the Guidelines, 'State aid may not be protective in its effect: it must serve to promote the rationalisation and efficiency of the production and marketing of fishery products. Any such aid must yield lasting improvements so that the industry can develop solely on the basis of market earnings'.

(120) However, as set out in recital 115(c) of this Decision, the reduction in fuel expenditure is not aimed at developing fisheries activities towards sustainable fishing, in accordance with the objectives of the common fisheries policy, but the continuation of the fisheries undertakings' activity unchanged. This is why the Commission takes the view that this aid is indeed protective in its effect, as referred to in point 3.5 of the Guidelines, and therefore cannot be considered compatible with the principle laid down by the Guidelines.

(121) It is true that, in its replies to the initiation of the formal investigation procedure, France indicated that 'the actions of the FPAP anticipated useful measures which the recovery and restructuring plans, once ratified, will only illustrate and confirm'. However, it was only much later, in January 2008, that France informed the Commission of the implementation of measures presented as being aid schemes for the rescue and restructuring of fisheries undertakings, registered by the Commission under number NN 09/08 and currently in the process of being assessed. Nevertheless, even if France's argument, i.e. that the action taken by the FPAP anticipates to a certain degree the aid schemes for rescue and restructuring, is accepted, that does not affect their compatibility with the common market as a result of the fundamental differences between the measures implemented by the FPAP and the requirements which the aid schemes for the rescue and restructuring of undertakings must meet, which are described in the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([26]). This is because, contrary to what is required in those guidelines, the aid resulting from the action taken by the FPAP was granted indiscriminately to all fisheries undertakings and not only to undertakings in difficulty. Moreover, rescue aid may not exceed a period of six months and must take the form of a repayable loan or a guarantee. As regards restructuring aid, it must be granted under specific conditions and for a limited duration. However, the aid granted by France via the FPAP does not meet any of the conditions laid down: fisheries undertakings have been receiving this aid since 2004, it is not granted in the form of a loan or guarantee, and no provision has been made for its repayment under a restructuring plan.

([26]) OJ C 244, 1.10.2004, p. 2.

(122) The FPAP also considers that the aid granted is justified by the fact that in reality it is aid for employees' income. In this connection the FPAP writes: 'The FPAP is set up as a "prevention group" constituting a legal safety perimeter for its 2 500 member undertakings within the meaning of the French Act…. In this connection, the aid for employees' income within the restructuring perimeter is authorised. It does not affect the competition rules in any way. On the contrary, it is in line with the Community principles guaranteeing employees a fair minimum income'. The FPAP goes on to state that the system of payment for fishermen in France by giving them a share of the crew's profit has had the effect of depriving the employees of fisheries undertakings of their wages or even putting them in debt to the shipowners. Lastly, it points out that 25 million of the 65 million advance granted by the State 'directly relate to advances to employees and must be regarded as direct social assistance'. MQA adds: 'If the loans are regarded as aid, not for the FPAP, which is transparent, but for its member fisheries undertakings, it really would be social assistance, since the financial assistance thus granted would be directly linked to the sailors' pay'.

(123) These statements prompt the Commission to make a few comments:

1. First of all, it is surprised to read that almost 40 % (25 million out of 65 million) of the cash advances granted by the State in order, according to the three agreements described above (see recital 21 of this Decision), to enable the acquisition of financial options on the petroleum product futures markets, 'directly relate to advances to the employees and must be regarded as direct social assistance'.

2. The Commission supposes that this is a rhetorical shortcut on the part of the FPAP, designed to show that the action taken by the FPAP reducing the running costs of fisheries undertakings, given the system of payment by giving employees a share of the profit, ultimately benefits the employees of these undertakings. In that sense the action could be regarded as 'direct social assistance'. In fact nothing in the file indicates that there has been any direct social assistance, i.e. aid paid by the FPAP directly to the employees of these undertakings. What is more, the FPAP's articles of association make no provision for this at all (see recital 20 of this Decision).

3. However, that may be, i.e. whether the aid may have been paid directly to the employees or the effect of the action taken by the FPAP was to provide a benefit for those employees, enabling them to supplement their income based on the system of a share of profits, the Commission points out that, according to settled case-law ([27]), the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking. In this sense, wages are indisputably a part of such charges and an undertaking cannot count on public funding to bear them. Consequently, the fact that the advantages enjoyed by fisheries undertakings in the form of the possibility of buying fuel at preferential prices and partial compensation for their fuel expenditure did in reality, according to the FPAP and MQA, benefit the employees of those undertakings is of no relevance for assessing the compatibility of this aid with the common market. It is sufficient to establish that the effect of the advantages granted to fisheries undertakings out of public funds was a reduction of the charges which normally have to be paid out of those undertakings' budgets.

4. Similarly, the Commission cannot accept the claim that the aid for employees' income is authorised, on the one hand because it is in line with the Community principles guaranteeing employees a fair minimum income and on the other because the system of payment by means of a share of profits is particularly unfavourable to French sailors. This is because, under the principle of subsidiarity, the rules on minimum wages fall entirely within the jurisdiction of the Member States. In France, as regards sailors' wages, this obligation is laid down in Articles L.742-2, D.742-1 and D.742-2 of the Labour Code. As recalled by a judgment of the Rennes Court of Appeal of 16 June 1998 ([28]), those provisions, which apply generally, apply to employees covered by the Maritime Labour Code, whatever the method of remuneration adopted. The fact that the shipowner and his or her employees agreed at the start that sailors would be paid a share of the (potential) profits does not exempt the shipowner from guaranteeing the sailors' remuneration at least equal to the minimum wage for the period in which they are on board. In other words, the share of profits in the fishing industry must be at least equivalent to the remuneration calculated in accordance with the growth-indexed minimum wage. In this respect Article 34 of the Maritime Labour Code ([29]) refers to 'a national trades agreement or extended branch agreements [for laying down], independently of the actual time worked, the period(s) for calculating the growth-indexed minimum wage for share-fishermen'. The branch agreement, Article 9(1) of which guarantees a minimum gross annual remuneration for share-fishermen, was signed on 28 March 2001 ([30]). This provision was made compulsory, for all employers and employees covered by this agreement, by an interministerial decree of 3 July 2003 ([31]). The wage cost produced by this legal obligation is thus part of the running costs of fisheries undertakings, the same as expenditure on fuel. Under these circumstances, the Commission therefore cannot accept the argument that the French State is justified in intervening financially because shipowners are failing to meet their legal obligation to ensure a minimum wage for their employees, even where they are share-fishermen.

([27]) Judgment of the Court of Justice in Case C-251/97 *French Republic* v *Commission* [1999] ECR I-6639, paragraph 35.

([28]) Judgment of the Rennes Court of Appeal of 16 June 1998 *Marziou* v *Louzaouen*, in *Le Droit Maritime Français*, No 588, December 1998, p. 1201 et seq. (*Editions Lamy*).

([29]) Available at www.legifrance.gouv.fr/

([30]) Official bulletin of the Ministry of Infrastructure No 13 of 25 July 2003, available at www2.equipement.gouv.fr/bulletinofficiel/fiches/BO200313/Une.htm

([31]) Published in the *Journal officiel de la République française* 203 of 3 September 2003, p. 15051.

(124) According to MQA, the measures in question may also be socioeconomic measures: 'the guidelines (…) state that socioeconomic measures may be declared compatible. In this particular case, the FPAP is completely transparent and the schemes classified as aid by the Commission have an obvious socioeconomic character'.

(125) The Commission notes that MQA has not provided any evidence enabling the aid in question to be examined under point 4.5 of the Guidelines, which provide that, on a case-by-case basis, direct aid for workers equivalent to socioeconomic measures may be considered compatible with the common market. This is because that point specifies that they may only be considered compatible 'provided that it forms part of socioeconomic back-up measures compensating income losses linked to measures designed to achieve an adjustment of capacity adopted pursuant to Article 11(1) of Regulation (EC) No 2371/2002' (Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy ([32])). However, the creation of the FPAP is not part of an overall plan for the adjustment of fishing capacity adopted under Regulation (EC) No 2371/2002. Therefore in no way does the argument put forward by MQA justify the grant of such operating aid.

(126) MQA also points out that it is not correct to state that the aid was granted unconditionally. According to MQA, 'as a condition for granting these loans the State required the FPAP to produce various supporting documents so as to be able to ensure proper management of funds and establish that the Fund and its members were determined to implement sustainable solutions for the new production conditions in the fisheries sector'. MQA points to this transparent accounting requirement and the State Decision to request that an interministerial audit be carried out.

(127) The Commission notes the transparency and monitoring requirement, but observes that this would appear to be an elementary requirement, since this is assistance financed out of public funds. However, it regrets that, in such a context of transparency, the French authorities did not send it all the detailed figures and information on the Fund's activities, despite the requests made during the procedure. Lastly, it notes that it was never informed of the audit mentioned by MQA, nor *a fortiori* of its conclusions, which the French authorities were requested to provide by mid-November 2005.

(128) Consequently, the Commission considers that the advances granted by the State do in fact fall under the category of operating aid referred to in point 3.7 of the Guidelines, according to which: 'State aid which is granted without imposing any obligation serving the objectives of the Common Fisheries Policy on the part of recipients and which is intended to improve the situation of undertakings and increase their business liquidity (…) is, as operating aid, incompatible with the common market'. These advances are therefore incompatible with the common market.

5. **CONCLUSION**

(129) The Commission holds that France, in breach of Article 88(3) of the Treaty, has unlawfully implemented the various aid schemes which are the subject of this Decision.

(130) On the basis of the analysis developed in part 4.1 of this Decision, the Commission considers that the FPAP's additional business liquidity resulting from the granting of three, or possibly four, advances totalling EUR 65 million, or possibly EUR 77 million, constitutes State aid incompatible with the common market under Article 87(2) and (3) of the Treaty. This is because, since no bank would have granted advances such as those granted to the FPAP and, according to the information available, the advances have not been repaid, the advances have become a direct subsidy (see recital 67) and therefore State aid covering the amount in question.

(131) On the basis of the analysis developed in part 4.2 of this Decision, the Commission considers that the aid granted in the form of advances to the FPAP and which enabled fisheries undertakings to buy fuel at an advantageous price and to benefit from a compensatory allowance under the diesel insurance, constitutes State aid incompatible with the common market under Article 87(2) and (3) of the Treaty.

([32]) OJ L 358, 31.12.2002, p. 59.

6. **RECOVERY**

(132) The amount of State aid paid by France is EUR 65 million, or EUR 77 million if a fourth agreement existed. In accordance with Article 14(1) of Regulation (EC) No 659/1999, where negative Decisions are taken in cases 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 purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it ([33]). The purpose of the recovery will therefore be achieved when this amount of EUR 65 or EUR 77 million has been repaid.

(133) In order to determine what has to be recovered from the FPAP on the one hand and the fisheries undertakings on the other, account should be taken of the fact that the objective of the FPAP, although it acts as an economic operator on the futures markets, is to grant allowances to fisheries undertakings under the diesel insurance system which it set up, and to provide them with fuel at an advantageous price. The analysis made in this Decision of the general operation of this particular system shows that the FPAP fulfilled its mission by gradually transferring the aid granted by the State. For that reason, the aid to be recovered from the FPAP is the part of the EUR 65 or EUR 77 million which was not transferred to the fisheries undertakings, and the aid to be recovered from the fisheries undertakings is therefore the part which was transferred to them.

(134) The Commission is not aware of the amount which was actually transferred by the FPAP to the fisheries undertakings. In this connection the Commission observes that, despite an injunction addressed to France to provide all the necessary information on the FPAP's operation, it has not forwarded any details of how the Fund's financial resources were used or of its accounts. In the absence of this information and in order to take account of the Court's Decisions ([34]), the Commission thinks it useful to provide guidelines on the methodology to be used for determining the amount of aid to be recovered.

(135) In laying down these guidelines, the Commission took into account the fact that, under the agreements, the FPAP is required to keep accounts so that information on how the advances have been used and resources and expenditure have been allocated can be obtained, and undertook to keep the accounting documents for a minimum period of ten years, and make them available to the various State bodies on request (see recital 27). On the basis of this information, the authorities or bodies instructed to apply the recovery Decision will be able to obtain information on the FPAP's liquid assets and the cash situation at the time the Decision has to be implemented. Also, since the fisheries undertakings' accounts are normally kept by management groups belonging to the Centre de gestion de la pêche artisanale (Small-Scale Fishery Management Centre), which is represented on the FPAP's Board of Directors, it is also possible to identify the allowances paid by the FPAP in the undertakings' accounts.

6.1. **Recovery from the FPAP**

(136) The amount of incompatible aid to be recovered from the FPAP is equivalent to that part of the State aid which was not ultimately transferred to the fisheries undertakings, i.e. the amount of the advances which funded the operating costs of the FPAP and the amount of the advances that it kept as liquid assets. It will be possible for the authority instructed to implement recovery to find out the total amount of the operating costs from the FPAP's accounts. Given the fungible nature of money and the impossibility of knowing what money is used where, the Commission takes the view that the proportion of State advances which financed these operating costs is the total amount of those expenses multiplied by the ratio of the advances to the sum of the advances and the FPAP's own funds (its members' contributions). In the same way, the amount of the advances kept as liquid assets can be determined by multiplying the remaining liquid assets by the same ratio.

6.2. **Recovery from the fisheries undertakings**

(137) As indicated above, the aid to be recovered from the fisheries undertakings as a whole is equivalent to the EUR 65 or 77 million of advances, less the amount to be recovered from the FPAP in accordance with the details given in recital 136. As regards the State aid to be recovered from each one of those undertakings, account must be taken of the fact that it is not possible, from an accounting point of view, to make a distinction between aid which is classified as State aid and aid which is not imputable to the State (see paragraph 4.2.1.2 of this Decision).

(138) The Commission takes the view that the State aid to be recovered from each undertaking can be calculated on the basis of the allowance received by each undertaking under the diesel insurance.

([33]) Judgment of the Court of Justice in Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 75.

([34]) Judgment of the Court of Justice in Case C-480/98 *Spain* v *Commission* [2000] ECR I-8715, paragraph 25.

(139) By taking this allowance as the basis for calculation, the Commission leaves aside the subsidy-equivalent of the saving made by each fisheries undertaking as a result of the purchase of fuel at a price lower than the market price. The Commission considers that it is justified to do so because the undertakings which benefited from preferential prices for their fuel are the same as those which benefited from the allowances under the diesel insurance. They did this in completely comparable respective proportions since the more one undertaking bought fuel at a preferential price the more allowances it obtained, and vice versa. By choosing this basis, no element of distortion is thus introduced between the undertakings concerned in relation to the repayment obligations which they will have to meet. Also, the Commission notes that, if these subsidy-equivalents were to be taken into account in the basis for calculation, it would be necessary for this purpose to calculate, for each purchase of fuel carried out in the FPAP's period of activity on the oil futures markets, the difference between the expenditure which would have resulted from purchase during the day in question and the cost actually invoiced by the cooperative after having determined what the price on the day applicable would have been for the type of fuel bought at the particular place of supply. This method would have been more difficult to implement. That is why the Commission thinks it preferable to recommend a basis for calculation which will facilitate the task of the authorities and bodies instructed to implement the recovery Decision.

(140) Consequently, the Commission considers that the State aid to be recovered from each undertaking can be calculated on the basis of the allowance received by each undertaking under the diesel insurance. The State aid to be recovered must be calculated by multiplying that allowance by a percentage corresponding to the ratio of the overall amount of the State aid to be recovered from the fisheries undertakings to the overall amount of the allowances paid to the fisheries undertakings by the FPAP under the diesel insurance.

(141) The amount to be recovered from each fisheries undertaking must thus be calculated according to the following formulas:

$$R * Und = I \times \frac{(Advances - R * FPAP)}{Total\ I}$$

Where:

*R*Und* = amount to be recovered from the fisheries undertaking

I = amount of the allowance received by the fisheries undertaking under the diesel insurance

Advances = EUR 65 or 77 million

*R*FPAP* = amount to be recovered from the FPAP in accordance with the details given in recital 136

Total I = total amount of the allowances paid by the FPAP to the fisheries undertakings under the diesel insurance

(142) This formula takes account of the supposition that the FPAP made profits on the futures markets which were then passed on completely to the fisheries undertakings. As described in this Decision, that is the most plausible case. However, consideration should also be given to the theoretical case in which the FPAP made losses on the futures markets, with the result that the fisheries undertakings would have received an overall amount of allowances lower than the amount of the advances less the amount to be recovered from the FPAP. In such a case, the quotient (Advances − R*FPAP)/Total I would generally be greater than 1, in particular if the amount 'R*FPAP' is small. Application of the above formula would therefore mean that the overall amount to be recovered from the fisheries undertakings would be higher than that which they received. For that reason, in this particular case, the amount to be recovered from each undertaking should be the amount of the allowance received by the undertaking under the 'diesel insurance'. In this particular case, the balance of the State advances and the allowances paid to the fisheries undertakings would have to be recovered from the FPAP, which would actually have retained that difference.

(143) State aid for the fisheries undertakings cannot be made subject to recovery if, on the date on which it was granted, it meets the conditions of Regulation (EC) No 1860/2004 or Regulation (EC) No 875/2007 on *de minimis* aid,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted to the Fund for the prevention of risks to fishing (FPAP) for the acquisition of financial options on the oil futures market and implemented unlawfully by France in breach of Article 88(3) of the Treaty is incompatible with the common market.

Article 2

The aid granted to fisheries undertakings in the form of a reduction of their fuel expenditure and unlawfully granted by France in breach of Article 88(3) of the Treaty is incompatible with the common market.

Article 3

Individual aid granted to a fisheries undertaking under Article 2(1) of Council Regulation (EC) No 994/98 ([35]) shall not be subject to recovery if, at the time it is granted, it meets the conditions laid down by the regulation adopted under Article 2 of Regulation (EC) No 994/98 applicable at the time the aid was granted.

Article 4

1. France shall recover the incompatible aid referred to in Articles 1 and 2 from the beneficiaries.

2. The sums to be recovered shall bear interest from the date on which they were placed 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 Commission Regulation (EC) No 794/2004 ([36]).

4. France shall cancel all outstanding payments of the aid referred to in Articles 1 and 2 with effect from the date of adoption of this Decision.

Article 5

1. Recovery of the aid referred to in Articles 1 and 2 shall be immediate and effective.

2. France shall ensure that this Decision is implemented within four months of the date of its notification.

Article 6

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

(a) the total amount (principal and recovery interests) to be recovered from the FPAP;

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

(c) documents demonstrating that the FPAP has been ordered to repay the aid.

2. France shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information 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 FPAP.

Article 7

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

(a) a list of fisheries undertakings that have received aid as referred to in Article 2 and the total amount of aid received by each of them;

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

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

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

2. France shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information 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 8

This Decision is addressed to the French Republic.

Done at Brussels, 20 May 2008.

For the Commission

Joe BORG

Member of the Commission

([35]) OJ L 142, 14.5.1998, p. 1.
([36]) OJ L 140, 30.4.2004, p. 1.