DECISIONS

COMMISSION DECISION (EU) 2015/320

of 27 January 2015

on SA.26547 (11/C) (ex- NN 49/10 and CP 241/2008) — Belgium — Foundation for the sustainable development of fisheries — Misuse of aid N 274/03

(notified under document C(2015) 321)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union and in particular the first subparagraph of Article 108(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 26 June 2003, Belgium notified to the European Commission a State aid scheme aiming at the financing and establishment of the *Stichting Duurzame Visserij Ontwikkeling* (hereinafter SDVO), a non-profit organisation aiming at the sustainable development of fisheries in Belgium. The notified provisions relate to the financing of the SDVO and include SDVO's articles of association. The Commission subsequently approved the scheme on 16 December 2003 ([2]).

(2) On 9 September 2008, the Commission received a complaint (registered as CP 241/2008), denouncing the misuse by SDVO of part of the aid paid under the scheme.

(3) By letter dated 17 November 2008, the Commission requested clarification from the Belgian authorities. By letter dated 18 December 2008, the Belgian authorities asked for a deadline extension of one month, which was granted. By letter dated 16 January 2009, the Belgian authorities provided the Commission with information.

(4) By letter dated 10 September 2009, the Belgian authorities transmitted to the Commission the annual report (2008) of the SDVO in accordance with Article 21 of Council Regulation (EC) No 659/1999 ([3]) ('the Procedural Regulation').

(5) By letter dated 19 January 2010, the Commission requested further clarification from the Belgian authorities. By letter dated 18 February 2010, the Belgian authorities asked for a deadline extension, which was granted until 9 April 2010. By letter dated 12 April 2010, the Belgian authorities provided the Commission with information.

(6) By letter dated 19 January 2010, the Commission asked the complainant whether he wanted to maintain his complaint given that the *cvba Schelpdier en vis*, a subsidiary created by SDVO, had ceased its activities.

(7) By letter of 18 February 2010, the complainant indicated the reasons why it wished to maintain his complaint.

([1]) OJ C 149, 20.5.2011, p. 10.
([2]) OJ C 28, 31.1.2004, p. 3.
([3]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

(8) On 22 October 2010 the file was registered as an NN file.

(9) By letter dated 23 March 2011, the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.

(10) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([4]). The Commission invited interested parties to submit their comments on the aid.

(11) By letter dated 7 June 2011, the Commission received comments relating to the Decision to open the formal investigation procedure from the beneficiary of the scheme, transmitted by the Belgian authorities. The Commission did not receive any further comments from the complainant or from any other interested party.

2. **DESCRIPTION**

(12) The original scheme was notified by letter dated 26 June 2003. It was registered under number N 274/03.

(13) The scheme provided for a yearly payment of around EUR 2 million from State resources to SDVO in order to enable SDVO to work towards the sustainable development of fisheries through various actions or projects, in accordance with its articles of association.

(14) The scheme is funded from national resources consisting of a portion of the advance tax payment (pay roll tax) by employers in the fishing sector.

(15) The scheme was considered compatible with the internal market by the European Commission on the basis of Article 107(3)(c) TFEU, in particular due to the fact that the information provided in the notification as well as SDVO's articles of association showed that SDVO would engage in short-term projects of collective interest corresponding to the measures listed in Article 15 of Council Regulation (EC) No 2792/1999 ([5]).

3. **THE COMPLAINT**

(16) According to the complainant, SDVO and the *cvba Schelpdier en vis* have used State aid, which was initially intended to help the fisheries sector as a whole, to launch a commercial aquaculture project relating to mussels, thereby distorting the competition on the market.

(17) The complainant added that by being commercially active on the market and subsequently by establishing a commercial subsidiary, SDVO was acting contrary to its articles of association and in contradiction with its legal status of non-profit association.

(18) To support his claim, the complainant pointed out that SDVO had developed a commercial brand, launched a large publicity campaign and had engaged in the sale of mussels. All of these activities and measures were seen as typical components of a commercial activity.

(19) Concerning the distortion of competition, the complainant indicated that he had been experimenting with the cultivation of offshore mussels along the Belgian coast since 1994. The complainant had developed his own brand (the *Belgica mussels*). The harvest was sold for the first time in 2008.

(20) The complainant concluded that since SDVO is disturbing competition on the market, it cannot be considered as acting in the collective interest of the fisheries and aquaculture sector.

(21) Regarding the liquidation of the *cvba Schelpdier en vis*, the complainant indicated that in his view the distortion of competition had not ceased with the liquidation of SDVO's subsidiary given that SDVO remained active in the mussel business after the liquidation of the *cvba Schelpdier en vis*.

4. **GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE**

(22) In its decision to open the formal investigation procedure, the Commission manifests its doubts regarding the conformity with the articles of association notified to and approved by the Commission of some of the projects carried out by SVDO. The Commission thus suspects that SDVO has misused aid under the scheme.

([4]) See footnote 1.

([5]) Council Regulation (EC) No 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector (OJ L 337, 30.12.1999, p. 10).

(23) The projects at stake are the following:

— The **mussel project**: SDVO has launched an extensive publicity campaign for its mussels. Instead of organising the promotion of mussels in general, the publicity material is based around a particular commercial brand (*Flanders Queen Mussel*), targets a particular undertaking (SDVO) and contains several references to the geographic origin of the products (Flanders). Furthermore, it has expanded the mussel project, by acquiring and exploiting 87 additional cages, thus making a long-term investment.

— Finding **new stocks of shellfish**: SDVO seems to have acted as promoter of an experimental fishing campaign aiming at identifying the presence of commercially exploitable shellfish stocks on the Belgian continental shelf.

— ***Dagverse Vis*** promotion campaign: This campaign aims at strengthening the image of the Belgian fishery by promoting freshly caught popular, and less known species of fish, caught by inshore fishermen, to the general public. This action involves the participation of top chefs, who offer less well-known species of fish in their restaurants. It is hoped that if top chefs offer those fish sorts in their restaurants, the inshore fishermen will be able to get a reasonable price for these species of fish, so that every link in the fishing industry gets fair remuneration for its product.

(24) Concerning the **mussel project**, the Commission considered that SDVO has acted in contravention with its articles of association (and thus the scheme) which explicitly indicate that SDVO will reinforce the image of the sea fishery but without targeting any particular firm and without referring to the geographical origin of the products and prohibit promotion measures based around commercial brand and/or referring to the geographic origin of the products. Furthermore, the Commission expressed its doubts that by exploiting 87 additional cages, SDVO has acted in conformity with its articles of association and Decision N 274/03, since it can hardly be viewed as a short-term action but rather corresponds to a long-term investment that is hard to reconcile with the concept of short-term action.

(25) On the project consisting in **finding new stocks of shellfish**, the Commission observed that it is not listed amongst SDVO's missions in its articles of association. In particular, it does not seem to correspond to the missions described under the heading (c) 'Improving the management of the living aquatic resources and the control on fisheries'. Indeed, finding new commercially exploitable stocks of shellfish does not correspond to the permanent monitoring of the quality and quantity of the living aquatic resources nor to the monitoring of the socioeconomic situation in the fisheries sector or to advising the government on the control on fishing effort. Identifying the presence of commercially exploitable shellfish stocks on the Belgian continental shelf does not seem to aim at the conservation of those stocks but rather at their exploitation.

(26) Finally, on the ***Dagverse vis* promotion campaign**, the Commission noted that by praising the Belgian origin of the products (fish caught by the Belgian coastal fleet) in contrast to fish caught by foreign vessels, SDVO has made reference to the geographic origin of the products and has acted in contravention to its articles of association and to Decision N 274/03. Nevertheless, the Commission took note of the fact that the *Dagverse vis* campaign has been adapted and had already stopped making reference to the geographical origin of the products at the time of the adoption of the opening decision.

5. **COMMENTS FROM INTERESTED PARTIES**

(27) In response to the publication in the Official Journal of the 2011 decision to open the formal investigation procedure, the Commission received observations from the beneficiary of the scheme, *Stichting Duurzame Visserij Ontwikkeling* (SDVO), transmitted by national authorities.

(28) No additional comments were received from the complainant.

(29) SDVO reiterated its position, as follows:

5.1. **The mussels project**

(30) The mussel project was undertaken in two steps. In the first phase 13 prototype mussel cages, developed to meet the climatological and nautical requirements of the Belgian coast, were deployed. In a second phase an additional 87 mussel cages were deployed.

(31) In order to assess whether the project was economically viable, it was necessary to go through the entire production and commercialisation process. The various steps of the process had effectively to be followed, including the promotional activities.

(32) The publicity campaign was carried out in 2007, 2008 and 2009 and was, contrary to the arguments of the Commission, of a limited duration and extent.

(33) This publicity campaign can be considered of general interest. It was always intended that, after the research stage, the project would be transferred to a cooperative opened to all, including the complainant.

(34) It was the intention of the SDVO to develop the commercial brand *Flanders Queen* for the specific purposes of the project. The commercial brand was to be used only once. At the end of the project, the commercial name was to disappear. However, upon transfer of the project to the VSVC apparently the decision was made to continue sales of the mussels under this name.

(35) The development of the project and the promotional campaign should not be considered as expenses in the course of a normal production process. The project went further than would have been done by a private undertaking as the associated costs would be very high. A private undertaking would simply not be prepared to make the investments needed merely to test out the best method to be applied or merely to identify areas suitable for the cultivation of mussels.

5.2. **Finding of new shellfish stocks**

(36) SDVO is of the opinion that the finding of new shellfish stocks falls within the scope of its articles of association; as such activity is to be considered as control and conservation measures as defined by category (c) of its articles of association.

(37) Additionally, the project is part of a conversion of the fishing fleet necessitated, among others, by the loss of fishing grounds as a result of the installation of offshore windmill parks.

5.3. ***Dagverse Vis* promotion campaign**

(38) SDVO pointed out that promotion campaign had been revised and the reference to geographical origin initially used had been taken out.

6. **ASSESSMENT**

6.1. **The *mussel project*: development of a commercial name and publicity**

(39) As described above, SDVO launched an extensive publicity campaign for its mussels. Instead of organising the promotion of mussels in general, the publicity material is based around a particular commercial brand (*Flanders Queen Mussel*), targeting a particular undertaking (SDVO) and containing several references to the geographic origin of the products (i.e. Flanders).

(40) In consequence thereof, SDVO has acted in contradiction with its articles of association (and thus the scheme) as these articles explicitly indicate that SDVO will reinforce the image of the sea fishery, but without targeting any particular firm and without referring to the geographical origin of the products and prohibit promotion measures based around commercial brand and/or referring to the geographic origin of the products. Furthermore, the SDVO has acted in contradiction with Decision N 274/03 which explicitly indicates that no geographical reference is permitted.

(41) The Belgian authorities have claimed that the commercial brand was developed only for the pilot project. It would only be used once and thereafter be phased out and disappear at the completion of the project.

(42) The Commission, however, observes that the commercial brand has remained in use also after the end of the pilot project. As a matter of fact, upon the transfer of the mussel project to the VSVC, the sale of the mussels continued under the name of *Flanders Queen Mussel*. Furthermore, the SDVO website provided information as to where *Flanders Queen Mussel* could be obtained.

(43) The Commission also notes that SDVO organised a number of promotional and publicity events for the *Flanders Queen Mussel* during 2007, 2008 and 2009. The fact that these activities have taken place repeatedly during a number of years indicates that this was not a campaign that was small or temporary, and consequently cannot be considered as a limited promotion in time and scope. Moreover, part of the publicity activities (2008 and 2009) were in fact done after the studies commissioned in the framework of the pilot project had already been delivered. Indeed, the final report concerning the economic feasibility of the mussel project was delivered on 22 November 2007 and the results of the evaluation of the implementation of the marketing plan were presented on 21 February 2008.

(44) In any event, the Commission notes that the prohibition to promote particular brands and make reference in publicity operations to the geographical origin of the products applies to all operations. Thus, even short-term projects (financed through public funds) are not allowed to aim at promoting particular brands or make references to geographical areas. The scheme and Decision N 274/03 do not foresee any exception to this rule and could not have foreseen such an exception, as it would have been contrary to the 2001 Fisheries Guidelines.

(45) In addition, the Commission finds it unlikely that such an extensive publicity campaign can reasonably be considered as an action of collective interest in particular as it not to general but targeted on a specific commercial brand. This is even more so since there was a competing undertaking developing its own brand.

(46) Finally, the development of a commercial name for a product that will be sold on the market and the launching of a publicity campaign correspond to expenditures which occur in the normal production process and were thus not allowed under the scheme.

(47) For these reasons, the Commission considers that by developing the commercial name and launching the publicity and promotion campaign for the *Flanders Queen Mussel*, SDVO was acting outside the scope of its articles of association and Decision N 274/03.

(48) For the above reasons, the Commission considers that SVDO has been misusing the aid authorised under the Scheme as far as the development of a commercial name and publicity is concerned.

6.2. ***The mussel project*: exploitation of 87 additional cages**

(49) The Commission is aware of the fact that the mussel project consists of different parts. As such, the first part of the project is not called into question whereas its concerns relate to the investments made after the completion of the pilot project. The Commission is of the opinion that by acquiring and exploiting the 87 additional mussel cages, SDVO did not act in conformity with its articles of association and Decision N 274/03.

(50) The Belgian authorities are of the opinion that the exploitation of the additional 87 cages was a short-term operation with a focus on collective interest. Furthermore they argue that expanding the number of cages had a broader scope than operations normally undertaken by private businesses would have as a private business simply would not invest on such a large scale without knowing that the operation can be profitable on a large scale.

(51) However, the Commission doubts that the acquisition and exploitation of 87 additional cages can be viewed as a short-term action.

(52) First, the Commission find that the acquisition of 87 additional cages corresponds to a long-term investment that is hard to reconcile with the concept of short-term action.

(53) Second, the Commission observes that SDVO does not seem to have conceived the acquisition of the 87 additional cages as a short-term action that would exclusively serve the purpose of making the study possible. SDVO has treated the acquisition of the cages as an investment and has looked for ways to have a return on the investment. Indeed, already in 2008 it had plans to continue the business through a newly established subsidiary. Also in 2009, when SDVO officially stopped selling the *Flanders Queen Mussel*, it actually continued, nonetheless, to exploit the 87 additional cages. As a matter of fact, it leased and rented its infrastructure and harvesting services to another company and thus carried out a commercial activity. The fact that a commercial subsidiary was established to exploit the mussels project seems to confirm that indeed there was no genuine intention on behalf of SDVO to simply deliver the results for the benefit of the sector.

(54) In this context the Commission notes that the agreements concluded in 2009 between SDVO and VSVC contained provisions designed at protecting the commercial interests of VSVC (e.g. guarantee arrangement, provisions for the prevention of any conflict of interests between VSVC and other producers). Such types of arrangements and provisions would seem to confirm that the exploitation of the additional cages was a commercial activity and was not in the collective interest.

(55) In the Commission's opinion, the 87 additional cages correspond to expenditures belonging to normal production. Indeed, the Commission believes that once the economic and biological feasibility of a product has been tested and confirmed, it belongs to the normal production and business development process of a firm to acquire and expand its production means.

(56) The Commission does not agree with the Belgian authorities' argument, according to which no firm would invest in additional production means without having beforehand guarantees that the production on a larger scale will be profitable. In fact, firms do invest in production on a larger scale also in situations when no other firm has already tried to produce at the same scale. They rely on their past experience with producing at a smaller scale and on future forecasts. It is a principle of general economics that due to economies of scale, what is possible and profitable at a small scale is also possible and even more profitable at a larger scale since fixed costs will be spread over a larger quantity of products.

(57) Finally, the Commission does not consider that, by expanding its production means, SDVO has undertaken an action in the interest of the sector. As there was already another operator established in this sector that had been developing a business on a real scale, the acquisition and exploitation of 87 additional cages indeed had a direct impact on the market and on competition. This is further demonstrated by the fact that the SDVO appeared as a competitor rather than an entity undertaking an experiment.

(58) For the above reasons, the Commission considers that SVDO has been misusing the aid authorised under the Scheme as far as the exploitation of 87 additional cages is concerned.

6.3. ***Dagverse vis* promotion campaign**

(59) The Commission notes that by praising the Belgian origin of the products (fish caught by the Belgian coastal fleet) in contrast to fish caught by foreign vessels, SDVO has effectively made reference to the geographic origin of the products and has as such acted in contravention to its articles of association and to Decision N 274/03.

(60) The Commission however takes note of the fact that the *Dagverse vis* campaign has been adapted and stopped making reference to the geographical origin of the products.

(61) For the above reasons, the Commission considers that SVDO has been misusing the aid authorised under the Scheme as far as the promotion campaign making reference to the geographic origin is concerned.

6.4. **Finding new stocks of shellfish**

(62) The Commission observes that finding new stocks of shellfish is not listed amongst SDVO's missions in its articles of association. In particular, it does not seem to correspond to the missions described under the heading (c) 'Improving the management of the living aquatic resources and the control on fisheries'. Indeed, finding new commercially exploitable stocks of shellfish does not correspond to the permanent monitoring of the quality and quantity of the living aquatic resources nor to the monitoring of the socioeconomic situation in the fisheries sector or to advising the government on the control on fishing effort.

(63) Consequently, the Commission considers that such measures do not belong to the type of measures approved by the Commission in its Decision N 274/03. This is neither a control nor a conservation measure. On the contrary, the measure aims at the commercial exploitation of the stocks to be found and eventually will result in an increased fishing effort.

(64) The Commission notes, further, that the finding of new commercially exploitable stocks of shellfish could not have belonged to the measures approved by the Commission in its Decision N 274/03 because, according to Article 17 of Regulation (EC) No 2792/1999 to which the 2001 Fisheries Guidelines refer, experimental fishing can be supported by the FIFG ([6]) only when it aims at the conservation of fishery resources.

(65) As already mentioned, identifying the presence of commercially exploitable shellfish stocks on the Belgian continental shelf does not seem to aim at the conservation of those stocks but rather at their exploitation.

([6]) Financial Instrument for Fisheries Guidance, see Council Regulation (EC) No 1263/1999 of 21 June 1999 on the Financial Instrument for Fisheries Guidance (OJ L 161, 26.6.1999, p. 54).

(66) Moreover, searching for new exploitable stocks corresponds to an operation normally undertaken by private businesses and expenditures relating to such an operation correspond to normal production costs and can thus not be financed under the scheme.

(67) For the above reasons, the Commission considers that SVDO has been misusing the aid authorised under the Scheme as far as the initiative to find new stocks of shellfish is concerned.

7. **CONCLUSION**

(68) The Commission finds that by engaging in projects mentioned under paragraphs 6.1 to 6.4, SDVO did not act in conformity with the articles of association notified to and approved by the Commission in its Decision of 16 December 2003. The Commission therefore considers that SDVO has misused part of the aid granted under the scheme.

(69) In this context the Commissions wants to emphasise that it is long-established practice, in accordance with Article 107, to require recovery from the recipient of aid that has been misused. This practice is confirmed by Article 14 of the Procedural Regulation.

(70) Belgium must therefore take all necessary measures to recover the misused aid from the beneficiary. Belgium should recover the entire amounts spent on the development of the projects mentioned in paragraphs 6.1 to 6.4. To that end, Belgium must require the beneficiary to repay the aid within four months from the date of notification of the Decision.

(71) Article 14(2) of the Procedural Regulation states that the aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the misused aid was at the disposal of the beneficiary until the date of its recovery.

(72) The interest is to be calculated in conformity with Chapter V of Commission Regulation (EC) No 794/2004 ([7]). The Commission asks Belgium to require the beneficiary to repay the aid including interest within four months of this Decision as specified below.

(73) The Commission asks Belgium to provide the information requested using the questionnaire attached in Annex I to this Decision, indicating clearly the measures planned and the measures already taken to obtain immediate and effective recovery of the misused State aid. Within two months of the Decision the Commission asks Belgium to submit all documents giving evidence that recovery proceedings have been initiated against the beneficiary of the misused aid, circulars, recovery orders, etc.,

HAS ADOPTED THIS DECISION:

Article 1

By engaging into the projects consisting in the development of a commercial name and publicity, the exploitation of 87 additional cages, the *Dagverse vis* promotion campaign and the finding of new stocks of shellfish, SDVO did not act in conformity with Commission decision of 16 December 2003 on State aid N 274/03. Aid thus misused by the beneficiary is incompatible with the internal market.

Article 2

1. Belgium shall recover from SDVO the misused aid concerning the projects consisting in the development of a commercial name and publicity, the exploitation of 87 additional cages, the *Dagverse vis* promotion campaign and the finding of new stocks of shellfish.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the recipients until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 ([8]) amending Regulation (EC) No 794/2004.

([7]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (currently Article 108 TFEU) (OJ L 140, 30.4.2004, p. 1).

([8]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

Article 3

1. Recovery of the aid granted referred to in Article 1 shall be immediate and effective.

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

Article 4

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

(a) documentation relating to the aid referred to in Article 1 showing the total amount of aid related to the projects mentioned in Article 2. The information shall be provided using the questionnaire attached in Annex I to this Decision;

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

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

(d) documentation demonstrating that the recipient has been ordered to repay the aid.

2. Belgium 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, upon 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 interest already recovered from the recipient.

Article 5

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 27 January 2015

For the Commission

Karmenu VELLA

Member of the Commission