STÁTNÍ PODPORA – SPOJENÉ KRÁLOVSTVÍ

Státní podpora C 13/2005 (ex NN 86/2004) – Investice společnosti Shetland Leasing and Property Developments Ltd.

Výzva k podání připomínek podle čl. 88 odst. 2 Smlouvy o ES

(2005/C 141/08)

(Text s významem pro EHP)

Dopisem ze dne 20. dubna 2005 uvedeném v závazném znění na stránkách následujících po tomto shrnutí oznámila Komise Spojenému království Velké Británie a Severního Irska své rozhodnutí zahájit řízení stanovené v čl. 88 odst. 2 Smlouvy o ES ve věci výše uvedené podpory/uvedeného opatření.

Zúčastněné strany mohou předkládat připomínky ve lhůtě jednoho měsíce po zveřejnění tohoto shrnutí a následujícího dopisu, a to generálnímu ředitelství pro rybářství, oddělení pro „právní otázky“, na adresu:

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Tyto připomínky se sdělí Spojenému království Velké Británie a Severního Irska. Zúčastněné strany, které připomínky podávají, mohou písemně požádat o zachování důvěrnosti ohledně své totožnosti, přičemž pro to uvedou důvody.

SHRNUTÍ

V lednu 2004 byla Komise informována o investicích, které se údajně týkaly protiprávní státní podpory. Tyto investice provedla obchodní společnost s ručením omezeným Shetland Leasing and Property Ltd. (SLAP) založená za účelem zisku, kterou zcela vlastní fond Charitable Trust, tedy svěřenecký fond Rady Shetlandských ostrovů (Shetland Islands Council, SIC). Fond Charitable Trust byl zřízen, aby jménem Shetlandského společenství přijímal a držel příjmy za narušení, které ropný průmysl platí za využívání přístavních zařízení. Komise v rozhodnutích ze dne 23. června 2003 [1] týkajících se dvou režimů podpory financovaných fondy Charitable Trust uvedla, že by se tyto fondy měly považovat za veřejné prostředky.

V roce 1999 investovala společnost SLAP do společnosti s názvem Shetland Seafish Ltd. Tato společnost vznikla 7. října 1999 v důsledku finančního spojení společností Williamson Ltd. a Ronas Ltd., které byly v té době ztrátové a považovány za platebně neschopné. Vytvořením společnosti Shetland Seafish Ltd. se měly zvýšit zisky a očekávalo se, že tato nová společnost bude do konce roku 2002 zisky vytvářet.

Společnost SLAP investovala do Shetland Seafish Ltd. a získala tak 156 250 kmenových akcií (62,5 %) o hodnotě 1 GBP a 1 000 000 preferenčních akcií (100 %) o hodnotě 1 GBP, a tudíž investovala celkem 1 562 500 GBP.

V červnu 2000 společnost SLAP ještě jednou investovala do Shetland Seafish Ltd., když se tato společnost rozhodla, že převezme činnosti společnosti Whalsay Ltd., ztrátové zpracovatelské společnosti rovněž usazené na Shetlandských ostrovech. Společnost SLAP toto převzetí financovala a následně tak získala další 2 000 000 preferenčních akcií v Shetland Seafish Ltd., které společnost SLAP upsala ve dvou kolech; v listopadu 2000 získala SLAP 1 200 000 preferenčních akcií a 16. února 2001 dalších 800 000 preferenčních akcií.

Preferenční akcie společnosti Shetland Seafish Ltd. zakládají právo na pevně stanovený nekumulativní preferenční dividend v sazbě 10 % ročně (po odečtení související daňové úlevy) z dosud vyplaceného kapitálu nebo z úlevy, jak byla vyplacena, který narůstá od okamžiku, kdy byly akcie upsány, a má být vyplácen (pokud je k dispozici zisk, který lze rozdělit) ročně 31. ledna, a to za posledních dvanáct měsíců, které k tomuto datu uplynou, a lze jej vyplatit v nominální hodnotě (tedy 1 na preferenční akcii), k níž se přičte jakýkoli nevyplacený preferenční dividend, a to podle výběru společnosti kdykoli po prvním výročí od data, kdy byly preferenční akcie přiděleny.

Veřejné investice se považují za státní podporu ve smyslu článku 87 Smlouvy o ES, pokud to jsou investice, o nichž nemohl rozhodnout soukromý investor za běžných tržních podmínek. S ohledem na informace, které Komisi předložily orgány Spojeného království o dotčených společnostech, tržní situaci v odvětví zpracování ryb na Shetlandských ostrovech, o prováděných projektech a o podmínkách pro investice, Komise v této fázi vážně pochybuje o tom, že jsou dané investice v souladu se zásadou tohoto soukromého investora.

[1] Rozhodnutí Komise 2003/611/ES a 2003/612/ES ze dne 3. června 2003, Úř. věst. L 211, 21.8.2003, s. 49 a 63.

V oblasti rybolovu je nutné zkoumat dané opatření podle Obecných pokynů Společenství ke zkoumání státní podpory v oblasti rybolovu a akvakultury ([2]). V souladu bodem 2.3 musejí být případy podpory, která nesplňuje podmínky stanovené v pokynech, posuzovány jednotlivě. Podle bodu 1.2 těchto obecných pokynů je státní podpora, která je udělena, aniž by příjemcům ukládala jakékoli povinnosti, a která je určena ke zlepšení situace podniků a zvýšení jejich obchodní likvidity a která vede ke zvýšení příjmu příjemců, jakožto provozní podpora neslučitelná se společným trhem. Podle obecných pokynů lze operační podporu prohlásit za slučitelnou se společným trhem pouze tehdy, souvisí-li tato podpora s plánem restrukturalizace slučitelným se společným trhem. Pokud takový plán neexistuje, jsou investice považovány za neslučitelné se společným trhem.

Podle článku 14 nařízení Rady (ES) č. 659/1999 může být od příjemce požadováno vrácení všech protiprávních podpor.

ZNĚNÍ DOPISU

„(1) The Commission wishes to inform the United Kingdom of Great Britain and Northern Ireland that, having examined the information supplied by your authorities on the aid/measure referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

1. **PROCEDURE**

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

2. **DESCRIPTION**

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

(4) The Development Trust has been established to be the main means of financing economic development projects in Shetland and makes funding available through loans. The trustees are the councillors of SIC plus two independent trustees.

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

(6) The funding of both the Charitable Trust and the SDT are both derived from a reserve fund set up by the SIC. This reserve fund itself is funded from an agreement concluded on 12 July 1974 between the SIC and oil companies using the harbour facilities of Sullum Voe. This agreement states that fees are paid by these companies ‚in respect of the import of crude oil and as compensation for disturbance caused thereby'.

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

(8) As a commercial limited company wholly owned by the Charitable trust the funding for SLAP's activities is mostly provided by funding from the Charitable Trust and by its own profit. For some specific projects funds are also provided by the SDT.

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

(10) SLAP invested in Shetland Seafish Ltd by acquiring 156 250 shares (62,5 %) of the ordinary shares of GBP 1 each and 1 000 000 preference shares of GBP 1 each (100 %), investing a total amount of in total GBP 1 562 500. The other shareholders of ordinary shares were the Shetland Seafish Producers Organisation Ltd (43 750 shares), Mr. L.A. Williamson (18 750 shares), Mr. R.A. Carter (18 750 shares) and the Shetland Fisheries Centre Ltd (12 500 shares).

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

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

([2]) Na dotčený režim lze použít obecné pokyny z roku 1997, Úř. věst. C 100, 27.3.1997, s. 12.

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

(14) From the data provided it shows that Shetland Seafish Ltd has been loss making since 1999.

Comments from the United Kingdom

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

(16) Secondly the United Kingdom states that if the monies involved are considered to be public funds, the investments made by SLAP are investments which could have been decided by a normal private operator. To support this statement the United Kingdom has provided 2 reports issued with regard to the investments in question: the Shetland Seafish Merger Report and the Whalsay Report.

Shetland Seafish Merger Report

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

(18) According to the figures and the prognoses in the report, the merger of L Williamson & Sons (Shetland) Limited & Ronas Fisheries Limited, through the establishing of Shetland Seafish would become profit making within 3 years.

Whalsay Report

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

3. **ASSESSMENT**

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

Existence of State aid

State resources

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

(22) As was already pointed out by the Commission in its decision of 3 June 2003 on loans for the purchase of fishing quotas in the Shetland Islands (United Kingdom) ([3]), these monies, which are directly related to the disturbances caused to the Shetland Islands population and not to the effective supplying of the service of the harbour facilities, cannot be considered as private funds, but must be regarded as State resources for the purposes of Article 87 of the EC Treaty.

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

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

Market economy investor principle

(25) Public investments are regarded State aid if the investments are decided under circumstances which would not be acceptable for a private investor acting under normal market economy principles.

([3]) 2003/612/EC, OJ L 211 of 21.8.2003, p. 63.

(26) According to the United Kingdom, SLAP acted like a normal market economy investor in investing in Shetland Seafish Ltd and the take over of Whalsay Ltd by Shetland Seafish Ltd. This would follow from two reports submitted to the board at the time of the investments: the Shetland Seafish Merger Report and the Whalsay Report.

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

Shetland Seafish Merger Report

(28) The prognoses of profit laid down in the Seafish Merger Report of 27 September 1999 are based on a number of assumptions, for which insufficient arguments are provided. The report contains a projected profit and loss account, a projected balance sheet and a projected cash flow statement for 2000, 2001 and 2002. The data in these sheets show that Shetland Seafish Ltd would become profitable and that the turnover is expected to increase in comparison to 2000, with more than 16 % in 2001 and with 26 % in 2002. However, the report does not contain sufficient data and arguments to establish the reliability of these projections as the necessary data on supply, prices and production to support these expectations are not contained in the report.

(29) Without further argumentation for these projections and assumptions, it is impossible to establish their credibility, both for the Commission at this stage, as well as for any normal private investor wishing to invest in such an operation.

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

(31) From the figures and data contained in the report the Commission can however not established if these arguments have been correctly applied and in absence of further data leading to the decision to invest, the Commission can not establish that indeed the investment could be considered to be a profitable investment and that SLAP has acted like a normal private investor.

(32) With regard to this the Commission at this stage has doubts on the prognosis laid down in the report and is of the opinion that the information laid down in the report would be insufficient for a normal investor in the private market to decide on the investment made by SLAP.

Whalsay Report

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

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

(35) With regard to the doubts expressed in the report on the profits to follow from the merger between the companies, the reference to securing employment in this industry and the fact that the report does not contain sufficient data to show the profitability of the investment in question, the Commission at this stage has serious doubts in considering the investment of SLAP in the acquisition of Whalsay Ltd a decision that could have been decided by a normal private investor.

State aid

(36) With regard to the foregoing, the Commission has found insufficient evidence to establish that both investments made by SLAP are normal commercial investments, which could have been decided by any normal private investor.

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

(38) As the investments are clearly in the benefit of the companies involved and these companies are in direct competition with other fish processing companies both within the United Kingdom as in other Member States, at this stage the Commission is of the opinion that these investments appear to be State aids in the sense of Article 87 of the EC Treaty.

Compatibility with the common market

(39) State aid can be declared compatible with the common market if it complies with one of the exceptions foreseen in the EC-Treaty. As regards to State aid to the fisheries sector, State aid measures are deemed to be compatible with the common market if they comply with the conditions of Guidelines for the examination of State aid to fisheries and aquaculture ([4]). According to point 5.3 of the Guidelines ‚an unlawful aid' within the meaning of Article 1(f) of Regulation (EC) No 659/1999 will be appraised in accordance with the guidelines applicable at the time when the administrative act setting up the aid has entered into force.

(40) As the investments made by SLAP have taken place in 1999 and 2000, the compatibility of the aid shall have to be assessed under the Guidelines for the examination of fisheries and aquaculture of 1997 ([5]) (further referred to as Guidelines), which were in force at the time.

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

(42) According to Article 11(1) of Regulation (EC) No 3699/93 Member States may under the conditions of Annex III to that regulation take measures to encourage capital investment in the field of processing and marketing of fishery and aquaculture products. Point 2.4 of Annex III states that eligible investments for processing and marketing shall in particular relate to the construction and acquisition of buildings and installation, to the acquisition of new equipment and installation needed for the processing and marketing of fishery and aquaculture products between the time of landing and the end-product stage or to the application of new technologies intended in particular to improve competitiveness and increase value added.

(43) The investments of SLAP can not be considered as investments related to one of these issues and must thus in accordance with point 2.3 of the Guidelines be assessed on a case-by-case basis.

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

(45) According to the general principles laid down in point 1 of the Guidelines, aid which is granted without imposing any obligations on the part of recipients and which is intended to improve the situation of undertakings and increase their business liquidity, or is calculated on the quantity produced or marketed, products prices, units produces or the means of production, and which has the effect of reducing the recipients production costs or improving the recipients income is, as operating aid, incompatible with the common market.

(46) According to point 1 of the Guidelines, the Commission shall assess such operating aid on a case-by-case basis where it is linked to a restructuring plan considered to be compatible with the common market.

(47) The United Kingdom has not provided any restructuring plan for the Commission to assess. According to the Guidelines operating aid can only be declared compatible with the common market if such aid is linked to a restructuring plan compatible with the common market. Therefore the investments are considered not to comply with the Guidelines.

(48) With regard to the above and on the basis of the information available to the Commission at this stage, the Commission has doubts on the compatibility of the aid with the EC-Treaty.

4. **DECISION**

(49) The Commission observes that there exist, at this stage of the preliminary examination, as provided for by Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty, serious doubts on the compatibility of this aid scheme with the Guidelines for the examination of State aid to Fisheries and aquaculture and, therefore, with the EC Treaty.

(50) In the light of the foregoing considerations, the Commission requires the United Kingdom of Great Britain and Northern Ireland, within one month of receipt of this letter, to provide all documents, information and data needed for assessment of the compatibility of the aid/measure. Otherwise the Commission will adopt a decision on the basis of the information in its possession. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

(51) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty and Article 6 of Regulation (EC) No 659/1999, requests the United Kingdom of Great Britain and Northern Ireland to submit its comments and to provide all such information as may help to assess the aid scheme, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the recipients of the aid immediately.

([4]) OJ C 229, 14.9.2004, p. 5.
([5]) OJ C 100, 27.3.1997, p. 12.

(52) The Commission wishes to remind the United Kingdom of Great Britain and Northern Ireland that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

(53) The Commission warns the United Kingdom of Great Britain and Northern Ireland that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication."