

DECISIONS

COMMISSION DECISION

of 23 June 2010

concerning tax aid granted by France to the *Fonds de prévention des aléas pêche et aux entreprises de pêche* (Fund for the prevention of risks to fishing and fisheries undertakings) (State aid C 24/08 (ex NN 38/07))

(notified under document C(2010) 3938)

(Only the French text is authentic)

(Text with EEA relevance)

(2010/569/EU)

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 ⁽¹⁾,

Having regard to the Agreement on the European Economic Area ⁽²⁾, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments ⁽³⁾ pursuant to the provisions cited above,

Whereas:

1. PROCEDURE

- (1) In the context of the investigation of the aid granted to the Fund for the prevention of risks to fishing (*Fonds de prévention des aléas pêche*, hereinafter: FPAP) and fisheries undertakings, which resulted in Commission Decision 2008/936/EC ⁽⁴⁾, the Commission became aware of the existence of a specific tax scheme in favour of FPAP and its members.
- (2) The tax regime was not investigated during the procedure resulting in the Decision of 20 May 2008, as this was new information of which the Commission had not been aware when the formal investigation procedure was opened ⁽⁵⁾.
- (3) Whereas, however, the information at the Commission's disposal was sufficient for it to identify the existence of

illegal aid, the Commission decided to carry out a preliminary investigation of the tax aid ⁽⁶⁾. Following this analysis, also by a decision adopted on 20 May 2008 ⁽⁷⁾, the Commission opened the formal investigation procedure with regard to this aid.

- (4) The Commission invited interested parties to submit their comments within one month of the date of publication. No comments were received from any third parties.

- (5) France submitted its observations on the initiation of the formal investigation procedure by letter dated 8 September 2008.

- (6) Furthermore, during the aid recovery procedure pursuant to Decision 2008/936/EC, France reported in a letter dated 29 November 2008 that the FPAP had been dissolved on 27 February 2008 and the balance of the advances received from the state had been repaid.

2. DESCRIPTION OF THE AID

- (7) The Commission refers to Decision 2008/936/EC for a detailed description of the operation and activities of the FPAP.
- (8) The specific tax regime in favour of the FPAP and its members is described in two letters from the French ministry responsible for the budget, which were sent to the Commission following the publication of the initiation of the investigation procedure which led to Decision 2008/936/EC ⁽⁸⁾.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty became Article 107 and Article 108 respectively of the Treaty on the functioning of the European Union (TFEU). The provisions laid down in the respective articles are identical in both cases. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88 respectively of the EC Treaty, where appropriate.

⁽²⁾ OJ L 1, 3.1.1994, p. 3.

⁽³⁾ OJ C 161, 25.8.2008, p. 19.

⁽⁴⁾ OJ L 334, 12.12.2008, p. 62.

⁽⁵⁾ OJ C 91, 19.4.2006, p. 30.

⁽⁶⁾ NN 38/07.

⁽⁷⁾ See footnote 3.

⁽⁸⁾ Copies of two letters from the ministry responsible for the budget demonstrating the existence of a specific tax regime in favour of the FPAP were attached to one of the letters sent to the Commission by the Nantes-based legal firm, Ménard, Quimbert et associés, acting as legal counsel for the FPAP, following the publication of the decision initiating the formal investigation procedure in the Official Journal. The first letter was signed by the Deputy Minister for the Budget and Budgetary Reform, Alain Lambert, and the second by the Minister of State for the Budget and Budgetary reform, Dominique Bussereau. Both letters were addressed to Mr Merabet, President of the FPAP.

(9) The first letter, dated 5 February 2004, relates to the creation of the FPAP, the articles of association of which were approved by the constituent assembly which took place on 10 February 2004. The letter states that:

‘— the fund set up in the form of a trade association will not be subject to corporation tax in respect of the contributions paid by the fishermen-owners and the financial income resulting from investment of its liquid assets;

— the contributions paid will be deductible from the fishermen-owners’ taxable results in respect of the year in which they were paid. As an exceptional measure, initial contributions paid by 30 March 2004 at the latest will be accepted as deductions in respect of the 2003 results.’

(10) The letter also indicates the amounts which could be subject to the deduction mentioned: the annual contributions of member fishermen-owners, which would be deductible from taxable income, would be between EUR 1 000 and 15 000.

(11) The second letter, dated 28 November 2004, relates to the deduction from income of the contributions paid by members. The second letter was written in connection with an amendment of the guarantee agreement between the FPAP and its members, which would henceforth provide for the refund to members of contributions which had been paid but not used.

(12) The letter states that:

‘— contributions paid by members in application of the new agreement will be deductible in respect of the year in which they were paid, up to a limit of EUR 10 000 per year and per member, where this ceiling is increased by 25 % of the part of the profit between EUR 40 000 and 80 000;

— the contributions paid in excess of the limits set out above in respect of a guarantee project implemented by the Fund will be entirely deductible from members’ taxable income in respect of the year in which they were paid.’

(13) The letter indicates that ‘an assessment of this exercise’ would be produced at the end of 2006, and ‘any necessary amendments examined’. This is not therefore a tax scheme to be applied on a permanent basis.

(14) Moreover, although the letter of 28 November 2004 states that the contributions would be deductible from taxable income in respect of the year in which they were paid, there is no indication of any change with regard to the provision set out in the letter of 5 February 2004 regarding the deduction of contributions paid before the end of March 2004 from income in respect of 2003.

(15) It follows from the two letters mentioned above that the tax scheme granted by the Ministry of Finance to the FPAP and its members comprises two aspects:

— firstly, in respect of the FPAP, exemption from corporation tax,

— secondly, the option for FPAP members to deduct their contributions to the fund from their taxable result.

3. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(16) The Commission considered that the tax scheme granted by the French authorities in respect of the FPAP and its members should, as previously for case C-9/06, be analysed under the State aid scheme in relation to the advantages it conferred, on the one hand on the FPAP itself and, on the other hand, on its member fisheries undertakings.

3.1. Existence of State aid

3.1.1. State aid at the level of the FPAP

(17) As explained in Decision 2008/936/EC, the FPAP must be considered as an undertaking within the meaning of European Union competition law. The non-profit-making character of the FPAP and its association status are without relevance in this respect.

(18) Consequently, the Commission considered that the tax scheme granted by the French authorities conferred a double advantage on the FPAP in relation to other private investors active on futures markets for petroleum products:

— firstly, the exemption from corporation tax, described in recital 9, granted to the FPAP constitutes a mitigation of the charges which are normally included in the budget of undertakings operating in this field,

— secondly, the tax advantage granted to FPAP members, whichever form it may take, constitutes an incentive to contribute to the income of the FPAP; it thus enables the FPAP to increase its liquidity, whereas other undertakings operating in this sector do not have an equivalent mechanism at their disposal.

(19) After its preliminary investigation, the Commission considered that the advantage referred to in recital 17 had been granted by the state and that it involved the waiving of state resources.

(20) Lastly, as a result of the tax measures referred to in recital 17, the FPAP had benefitted from a financial advantage in relation to other companies operating on futures markets, both in France and in other Member States.

- (21) In its decision to initiate the formal investigation procedure, the Commission also indicated that it assumed that the legal basis which had enabled the FPAP to benefit from the exemption from tax on profits was Article 206(1a) of the General Tax Code⁽⁹⁾, which provides for exemption of trade associations under certain conditions. Under these circumstances, the FPAP may also have qualified for an exemption from business tax, as provided for under Article 1447 of the same Code for organisations which qualify for the exemption provided for under Article 206(1a) of the Code.

3.1.2. State aid in favour of fisheries undertakings

- (22) The financial advantage referred to under recital 17 enabled member fisheries undertakings to purchase fuel at a preferential rate as a result of the investments made by the FPAP on futures markets for petroleum products.
- (23) The effect of the option granted to fisheries undertakings of deducting their contributions to the FPAP from their income was to mitigate the charges which are normally included in their budgets. This deduction option was granted by the ministry responsible for the budget and is, therefore, imputable to the state.
- (24) The undertakings which have been able to apply the deduction referred to in recital 22 have benefitted from a financial advantage in relation to other fisheries undertakings in the Union. This advantage has thus affected trade between Member States and distorted or threatened to distort competition. For this reason, it constitutes State aid within the meaning of Article 107(1) TFEU.
- (25) Moreover, in its analysis of the information set out in the 'Detailed rules of procedure of the Fund for the prevention of risks to fishing' ('Mode d'emploi détaillé du Fonds de prévention des aléas pêche'), which were also forwarded to the Commission in connection with the formal investigation procedure C-9/06, the Commission found that, when contributions to the FPAP determined on a declarative basis in relation to projected fuel consumption for the year ahead were calculated on a basis which was higher than actual consumption, shipowners retained in full the tax deduction granted. The system appeared to constitute an incentive for shipowners to overestimate their cover requirements with the sole objective of benefitting from the tax deduction.
- (26) On the basis of the same document, the Commission also found that some members whose professional activities were not connected to fishing but who were 'prepared to provide moral support for the trade association' were also entitled to a tax deduction in

respect of their contributions to the FPAP, even though the latter were not linked to a guarantee risk.

3.2. Compatibility with the common market

- (27) With regard to this point, the Commission referred to the analysis presented in Decision 2008/936/EC. The Commission found that the aid in question was operating aid in respect of the FPAP and fisheries undertakings and that no provision of the TFEU or any State aid instrument adopted by the Commission constituted a basis for asserting that such aid was compatible with the common market.
- (28) Consequently, the Commission informed France of its serious doubts as to the compatibility of the aid measures with the common market.

4. COMMENTS FROM FRANCE

4.1. Tax measure in favour of fisheries undertakings

- (29) France considers that the tax measures in favour of fisheries undertakings are not State aid because the contributions paid to the FPAP by fisheries undertakings constitute part of these undertakings' overheads for the exercise of their professional activities. In application of Article 39 of the General Tax Code, these costs are deductible from taxable income. The deduction of these contributions therefore corresponds to the implementation of a general measure and, consequently, does not constitute State aid.
- (30) France recognises that the letters referred to under recital 7 did not contain any information on the scheme for the reimbursement of contributions. However, France emphasises that this does not mean that the reimbursement was without tax effect. In accordance with common law principles for determining taxable results, the reimbursement of the contributions to FPAP member fisheries undertakings constituted income subject to tax on the profit of these undertakings. France also states that, in the case where the price of fuel exceeded the threshold laid down in the guarantee agreement, the compensation received by FPAP member undertakings constituted a gain subject to tax on profits. Consequently, there was no incentive for member undertakings to overestimate their cover requirements, as this would have resulted in additional taxation.
- (31) In addition, France states that the selective nature of an aid measure may be justified on account of the nature and general scheme of the system. Consequently, there may be legitimate reasons which justify differentiated treatment and thus, where appropriate, the granting of the advantages which may ensue. However, in this case, France has not presented any information which could justify differentiated treatment in favour of fisheries undertakings.

⁽⁹⁾ Available online at the following address: <http://www.legifrance.gouv.fr/initRechTexte.do>

4.2. Tax measure in favour of the FPAP

- (32) France considers that the exemption from corporation tax granted to the FPAP is justified on account of its non-profit-making character and its trade association status.
- (33) France asserts that this is compliant with European Union law. The very objective of corporation tax is to levy a tax on profit-making activities. In application of this principle, France recalls that the Commission itself, in its communication on the application of the State aid rules to measures relating to direct business taxation⁽¹⁰⁾ (hereinafter: 'direct taxation communication'), considers that the nature of the tax system may justify exemption from business tax for not-for-profit organisations.

5. ASSESSMENT

- (34) The assessment set out in the decision to initiate the procedure must be reviewed and developed in the light of the information presented by France on 8 September and 29 November 2008 (see recitals 5 and 6).
- (35) The analysis examines the double objective of the FPAP, that is to say, on the one hand, to acquire financial options on futures markets for petrol and derivative products and, on the other hand, to pay the member fisheries undertakings a sum equal to the difference between the average monthly reference price and the 'maximum price covered' or the price of 30 euro cents per litre depending on the period.

5.1. Tax measure in favour of fisheries undertakings

- (36) The tax measure in question involves the option of deducting the contributions paid by fisheries undertakings to the FPAP from taxable income.
- (37) France considers that this deduction does not constitute State aid since the contributions constitute part of the overheads of the undertakings and the French tax system provides for the deduction of such expenses from taxable income. Consequently, it is claimed that the measure constitutes the implementation of a general measure and that the deduction does not constitute State aid.
- (38) The Commission notes that overheads are deductible from undertakings' results in application of Article 39 of the General Tax Code. This is a general measure which applies to all undertakings, irrespective of their field of activity. The deduction option therefore falls under the category of tax measures open to all economic operators referred to under point 13 of the 'direct taxation communication'. Accordingly, a measure of this kind which applies without distinction to all undertakings and the production of all goods does not constitute State aid.
- (39) France argues that the eligibility of charges for deduction as overheads is determined on the basis of the object of

the charges. If the charges were incurred in the company's interest, they are in principle deductible. Accordingly, contributions paid to professional bodies (associations, chambers of commerce, etc.) by definition constitute expenditure committed in the interest of the professional activity in question and are always eligible for deduction from the taxable result. As the FPAP is a trade association, the eligibility for deduction of its members' contributions follows the same principle.

- (40) Moreover, the Commission stated in recital 20 of Decision 2008/936/EC that 'the FPAP is thus designed to be a mutual insurance company providing a number of benefits for its members in exchange for their contributions'.

- (41) Insurance contributions form part of the charges borne by undertakings to protect themselves against various risks. The risk of fluctuations in the cost of oil may constitute one of these risks. These charges are directly linked to the carrying out of the professional activity and do not increase the assets of the undertaking; they are also deductible from taxable income as overheads. It can therefore be considered that the contributions to the FPAP used to offset the risk of fluctuations in the price of oil are deductible from undertakings' results in application of Article 39 of France's General Tax Code. Under these conditions, the measure corresponds to the implementation of a general measure. The deduction option does not therefore constitute State aid.

5.2. Tax measure in favour of the FPAP

- (42) The Commission notes that the FPAP was dissolved on 27 February 2008. The tax provisions in respect of the FPAP lapsed on the same date.
- (43) The Commission also observes that, following the liquidation procedure, the FPAP ceased all economic activity. The activities and assets of the FPAP have not been transferred to any other undertaking. Moreover, the funds which were still available to the FPAP on the date of its disbandment were transferred to the state, via OFIMER, a state-funded public body.
- (44) For these reasons, the Commission considers that, even supposing that the tax measures in favour of the FPAP had constituted an advantage for the FPAP and a distortion of competition, such distortion came to an end when the FPAP ceased to operate and when the measures relating to it came to an end. Under these circumstances, a decision by the Commission on the existence of such tax aid and its potential compatibility with the common market would be devoid of practical effect.
- (45) Consequently, the formal investigation initiated under Article 108(2), TFEU no longer serves any purpose with regard to the FPAP.

⁽¹⁰⁾ OJ C 384, 10.12.1998, p. 3, paragraph 25.

6. CONCLUSION

(46) On the basis of the analysis set out in section 5.1, the Commission notes that the tax advantages conferred upon the members of the FPAP do not constitute State aid within the meaning of Article 107(1) TFEU.

(47) On the basis of the considerations set out in section 5.2, the Commission finds that the procedure against the FPAP has no purpose,

HAS ADOPTED THIS DECISION

Article 1

The tax measures granted by France in respect of fisheries undertakings do not constitute State aid within the meaning of Article 107(1) TFEU.

Article 2

The formal investigation initiated under Article 108(2) TFEU with regard to tax measures in respect of the FPAP is closed.

Article 3

This Decision is addressed to France.

Done at Brussels, 23 June 2010.

For the Commission

Maria DAMANAKI

Member of the Commission
