

COMMISSION DECISION

of 19 July 2006

concerning a measure taken by the Netherlands with regard to VAOP

(notified under document number C(2006) 3224)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2006/949/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

Having 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) By letter dated 12 June 2002, recorded as incoming mail on 17 June 2002, the Commission received a complaint against four allegedly irregular aid measures benefiting the Association of Suppliers of Waste Paper (*Vereniging van Aanbieders van Oud Papier* — 'VAOP'), namely partial exemption from corporation tax and from value added tax, the provision of a loan by Bank Nederlandse Gemeenten ('BNG'), and the provision of a subordinated loan by a number of municipalities (*gemeenten*). By letters dated 30 July 2002 and 6 December 2002, the Commission requested information from the Dutch authorities, which replied respectively by letters of 10 October 2002 and 10 February 2003. A meeting between the complainant and Commission staff took place on 29 April 2003. By letter dated 5 May 2003, the complainant informed the Commission that it intended to collect more information on the case from the Dutch authorities and that, on that basis, it would then focus its complaint on certain measures.

(2) By letter dated 13 September 2004, the complainant submitted additional information and announced its intention to limit its complaint to the loan provided by BNG to VAOP. On the basis of this new submission, the Commission requested additional information from the Dutch authorities, by letter of 21 October 2004; they replied by letter dated 17 December 2004. By letter dated 3 May 2005, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the loan granted

by BNG and the loan granted by the participating municipalities.

- (3) The Dutch authorities requested two extensions of the time allowed for a reply to the decision initiating the procedure, and ultimately replied by letter dated 29 August 2005. By letter dated 9 November 2005, the Commission requested additional information, which was submitted by letter of 8 December 2005. By email message of 4 May 2006, the Commission made an additional request for information, which was answered by letter of 2 June 2006 and by letter of 19 June 2006
- (4) The Commission's decision to initiate the formal investigation procedure was published in the *Official Journal* on 30 September 2005 ⁽²⁾. The complainant sent observations on this decision by letter dated 28 October 2005, and requested the Commission to attach the complainant's letters of 12 June 2002 and 13 September 2004 and the record of the discussions of 29 April 2003 to that submission and to consider them an integral part of the submission. A non-confidential version of the two letters was sent to the Netherlands by letter of 24 November 2005, and the Netherlands replied by letter of 16 December 2005.
- (5) By letter of 28 October 2005, the Commission received comments on the decision initiating the procedure from the alleged recipient, VAOP, which also requested a meeting. A meeting was held on 31 January 2006. By letter dated 27 March 2006, VAOP submitted further information to supplement the observations it had put forward at the meeting.

2. DESCRIPTION

2.1. The recipient

- (6) VAOP was set up in the beginning of the 1990s by a number of Dutch municipalities. It is a not-for-profit cooperative association with limited liability, which seeks to offer certain services to its members on terms as favourable as possible. More specifically, its object is to organise the optimal collection, initial treatment (sorting/pressing) and sale of waste paper from the municipalities which are its members. Its activities have subsequently been expanded to include waste glass and other recyclable waste.

⁽¹⁾ OJ C 240, 30.9.2005, p. 36.

⁽²⁾ See footnote 1.

- (7) VAOP is not a fully vertically integrated undertaking. It merely organises the tasks concerned for its members: most of the operational work, such as the transport of the waste, it subcontracts to other enterprises. This explains why it had only 20 employees in 2002 for a turnover of EUR 27,5 million. VAOP charges the local authorities for the cost of collection and initial treatment of the recyclable waste from their territory, and transfers to them the revenues generated by the sale of recyclable waste to producers of recycled material (e.g. recycled paper).
- (8) The Dutch tax authorities do not consider VAOP to be a branch of public administration.
- (9) The first entity that was set up was the cooperative association with limited liability *Coöperative Vereniging VAOP BV*. Over the course of the years, this parent body set up several subsidiaries to harbour the operational part of its activities. These subsidiaries are in the form of private limited companies. The Commission will consider all these companies as a group constituting one single economic entity ('VAOP'), because the parent holds majority stakes in all the subsidiaries. The subsidiaries are included in the consolidated accounts of the parent. In addition, BNG, which is VAOP's principal creditor, has concluded only a single loan contract with the group, and not one with each separate company, even though that contract lays down credit limits for some individual subsidiaries. Finally, the contract provides for cross-guarantees between the different companies of the group: each company is liable vis-à-vis BNG for the debts of any of the others.

2.2. The market

- (10) In the 1990s VAOP's activities grew strongly. Its share of the Dutch market for waste paper collection reached between 25 and 30 % by the beginning of the present decade. It is also an important player on the market for waste paper initial treatment (sorting/pressing). It entered the Dutch market for waste glass collection, where it became one of the market leaders. Some of the companies active on these markets are subsidiaries of foreign companies.
- (11) Dutch law requires local authorities to collect waste paper separately and to offer it on the market for recycling, but the way in which these operations have to be performed is not defined. Most Dutch municipalities put the work out to tender. VAOP has tendered for such work, thus competing directly with private-sector companies offering the same services⁽³⁾. VAOP also tries to attract new members by approaching municipalities and suggesting that they should

join. Here too VAOP can be considered to be in competition with private sector companies⁽⁴⁾ seeking to attract the same customers.

2.3. The two measures

- (12) Firstly, in March 1998, BNG granted VAOP a credit facility of NLG 16,3 million (EUR 7,4 million, 'the first measure'). On 31 December 1997, VAOP's consolidated balance sheet indicated that its equity amounted to NLG 0,8 million (EUR 0,4 million) and its balance sheet total amounted to NLG 17,3 million (EUR 7,9 million). One year later, after the provision of the loan, the equity was NLG 0,09 million (EUR 0,04 million) and the balance sheet total was NLG 29,1 million (EUR 13,2 million).
- (13) Secondly, in the course of 2001, the local authorities agreed to convert debts that VAOP owed them for the supply of waste paper into a loan of NLG 3 million (EUR 1,3 million, 'the second measure'). VAOP had undergone heavy losses at the end of 2000, following the insolvency of one of its subsidiaries. On 31 December 2000, the consolidated accounts of VAOP showed negative equity of NLG 3,4 million (EUR 1,5 million). At the same date, the balance sheet total was NLG 32,1 million (EUR 14,5 million). VAOP's main creditor, BNG, had obtained liens (*pandrecht*) on nearly all the assets, so that this unsecured loan could be considered subordinate to BNG's claims. It was therefore referred to as 'the subordinated loan' (*achtergestelde lening*).

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (14) As regards the first measure, the Commission initiated the formal investigation procedure because it doubted whether a normal market economy investor would have acted in the same way. At the material time VAOP had nearly no equity. In addition, the size of the new loan seemed very high in comparison with the borrower's balance sheet total. In short, the risk involved seemed too big for a normal market economy investor.
- (15) Regarding the second measure, the Commission doubted whether a normal market economy creditor would have agreed to convert its claim into a subordinated loan of this kind. The loan seemed to present a high degree of risk, as the borrower's financial situation was bad and all its assets appeared to be subject to a lien in favour of BNG. Finally, the Commission wondered whether a market economy creditor would not have requested a higher interest rate.

⁽³⁾ VAOP has tendered successfully only once. In recent years, VAOP has decided not to participate in such tenders any more.

⁽⁴⁾ Private sector companies may be vertically integrated to a greater degree than VAOP, but that does not mean they are not in competition with it.

- (16) In conclusion, the Commission suspected that the two measures might constitute state aid to VAOP falling under the prohibition laid down in Article 87(1) of the EC Treaty.

the municipalities a claim against it, and that was what the management of VAOP had decided to do.

4. COMMENTS FROM INTERESTED PARTIES

- (17) The Commission has received the following comments from the complainant. Regarding the first measure, the complainant asserts that the general policy and practice of BNG is to offer financial products to public bodies and associated institutions on terms that are not in line with the market. The complainant analyses the size of VAOP's equity, and concludes that at the time its balance sheet structure was far from healthy. There was a significant lack of equity. The complainant also points to the scale of debt. In these circumstances, the BNG financing allowed VAOP to expand its business despite its lack of equity and at low cost. The complainant reckons that a high-risk loan of that kind would not have been provided by a private bank, and constitutes state aid within the meaning of Article 87(1) of the EC Treaty.
- (18) The complainant also argues that given that VAOP's financial situation did not improve over the years, BNG should have not continued to finance it.
- (19) Turning to the second measure, the complainant argues that this subordinated loan carried a very high degree of risk, given the scale of the debts owed by VAOP that would have to be reimbursed first in the event of insolvency. The margin on the loan was not sufficient to compensate for that risk. This loan therefore constitutes state aid too.
- (20) The Commission has received the following comments from the alleged recipient, VAOP. VAOP claims that the first measure was a purely commercial transaction, in accordance with the market investor principle. VAOP says that at the time it was also in contact with several private banks, which were proposing to provide financing on terms closer to those offered by BNG. VAOP has provided a copy of a signed offer of financing made by [a private bank] (*) on 7 January 1998.
- (21) Regarding the second measure, VAOP asserts that it was not obliged to enter into the loan arrangement with the municipalities. On the basis of its constitution (*statuten*) and its supply contracts with the municipalities, VAOP cannot be required to pay its paper suppliers more than its liquidity position allows. In addition, VAOP is entitled to impose obligations on its members in the form of a 'yearly contribution', which may be used to cover operating charges or may be regarded as risk-bearing capital. VAOP's contract with the municipalities also allowed VAOP to give

5. COMMENTS FROM THE NETHERLANDS

- (22) Regarding the first measure, the Netherlands argues that the granting of the credit facility by BNG was not a matter for the State. BNG is a public limited company. The Dutch authorities acknowledge that BNG's shares are owned entirely by the State, the provinces and the municipalities. They also acknowledge that some members of the supervisory board are appointed by these authorities, but they argue that the supervisory board is not involved in the bank's day to day business, which is the responsibility of the management. There is no provision in the constitution of the bank requiring the management to comply with the directions of the supervisory board when offering financial products. There was no provision requiring that the supervisory board be consulted or that it give its authorisation for the loan concerned, which was the responsibility exclusively of the management. Finally, the Dutch authorities assert that there is nothing else to suggest that this transaction was attributable to the State.
- (23) Even if the loan was imputable to the State, the Netherlands submits that its terms would be acceptable to a market economy investor. A higher level of equity would indeed have been desirable, but the risk of loss to BNG was limited, thanks to several forms of security, notably a first-rank lien on VAOP's receivables, which had to amount to 100 % of the loan. The loan was granted at a time when the firm was not in difficulty and its prospects were good. The very serious deterioration in its financial situation could not have been foreseen.
- (24) With regard to the second measure, the Netherlands recalls that VAOP is a not for profit body that transfers to its members the net revenues generated from the sale of the recyclable waste collected on their territory. In the beginning of 2001, VAOP was in a difficult financial situation as a result of the insolvency of a subsidiary engaged in the recycling of glass; it decided not to pay to the participating municipalities a small part of the revenues generated by the sale of the waste in 2000 ⁽²⁾, and to convert it instead into a five-year subordinated loan. BNG was threatening that without additional resources such as this subordinated loan it would not continue to finance VAOP, which would then have been insolvent itself. The Netherlands asserts, first, that on the basis of its constitution and its contracts with the participating municipalities VAOP was not obliged to pay this NLG 3 million (EUR 1,3 million) to the municipalities, because the amount exceeded the resources it had available. VAOP

(*) covered by the obligation of professional secrecy.

⁽²⁾ In the year 2000, VAOP paid the local authorities a total of NLG 40,7 million (EUR 18,5 million).

nevertheless decided to give the municipalities a corresponding claim against it in the form of an interest-bearing loan. Second, from the point of view of the local authorities this conversion of part of their claims into a loan represented a more favourable option than insolvency. At that time they had claims against VAOP amounting to NLG 5,7 million (EUR 2,59 million) which were not secured. The Dutch authorities have calculated that, in the event of insolvency, the municipalities would have recovered around NLG 1,2 million (EUR 0,5 million), resulting in a net loss of NLG 4,5 million (EUR 2,05 million). The municipalities acted as market economy creditors would have done by accepting the conversion of NLG 3 million (EUR 1,3 million) of their claims against VAOP into a loan, which enabled VAOP to continue in business in the knowledge that BNG would continue to finance it.

6. ASSESSMENT

6.1. Existence of aid

The first measure

- (25) Article 87(1) of the EC Treaty indicates that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.'
- (26) The Court of Justice has held that 'It should also be noted that, pursuant to the principle that the public and private sectors are to be treated equally, capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid ... Therefore, in accordance with equally settled case-law, it is necessary to determine whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size ... having regard in particular to the information available and foreseeable developments at the date of those contributions' ⁽⁶⁾.
- (27) In order to determine whether the grant of the credit facility by BNG constituted aid, the Commission has therefore to verify whether the transaction respects the market economy investor principle as expounded by the Court in the judgment referred to.
- (28) At the request of the Commission, in addition to a copy of the loan agreement of March 1998 itself, the Dutch authorities have provided a copy of the internal documents of BNG relating to each step of the decision-making process that led to the provision of this financing to VAOP: the proposal by the account managers, dated 21 January 1998, the opinion of the credit analyst, dated 22 January 1998, and the positive decision by the credit committee, dated 26 January 1998. These papers show that BNG identified and analysed the risks associated with the loan, including the very limited equity. On the basis of this analysis, BNG gave VAOP a low rating ('C-'). To offset the risks identified, BNG decided to impose strict conditions and to require substantial security. Among other things, BNG insisted that all the parties (VAOP and its subsidiaries) should be jointly and severally liable for all the liabilities of the other members of the group. It also demanded a first rank lien on various commercial claims held by VAOP. VAOP was to provide BNG with a monthly list of liens on commercial claims, the value of which had to amount to at least 100 % of the sum lent by the bank. The credit committee decided that the loan could be granted provided that the loan agreement comprised these various conditions and forms of security for BNG. The new loan agreement also included an existing NLG 5 million (EUR 2,2 million) financing. It increased BNG's potential claim on VAOP from the existing maximum of NLG 5 million (EUR 2,2 million) to NLG 16,3 (EUR 7,4 million). The net increase was therefore NLG 11,3 million (EUR 5,1 million).
- (29) These documents show that BNG conducted the lending operation in accordance with its normal procedures, and asked for substantial security for the loan.
- (30) The Commission also notes that in January 1998 [...] (*) proposed to grant VAOP a loan. This would have come on top of the existing NLG 5 million facility provided by BNG. The size of the loan offered by [...], at NLG 7,3 million (EUR 3,3 million), was not as large as the additional financing ultimately offered by BNG, which amounted to NLG 11,3 million (EUR 5,1 million), but did correspond to a large part of it. The interest rate margins which [...] planned to charge in this firm proposal, at 125bps and 150bps, are below those that applied for lending to a company in difficulty or for equity provision. This shows that contrary to the doubts expressed by the Commission when it decided to launch the formal investigation procedure a private bank might have agreed to grant a large loan to VAOP despite its very limited equity ⁽⁷⁾.
- (31) The Commission has compared the interest rate on BNG's loan with the rate proposed by [...] ⁽⁸⁾. BNG's interest rate is slightly smaller. However, the Commission notes, first of

(*) Business secret

⁽⁷⁾ As already indicated, this can be explained among other things by the securities available to the potential lender and by the fact that at that time the firm was considered to be an expanding enterprise with a stable and cost covering core business.

⁽⁸⁾ Both credit facilities comprise loans of different kinds. The Commission has compared those with similar maturities and conditions.

⁽⁶⁾ Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035, paragraphs 37 and 38.

all, that BNG had (and still has) very low operating costs, much lower than [...]’s⁽⁹⁾. Second, the loan agreement between BNG and VAOP included various commissions to be charged in the event that VAOP actually called upon certain loan facilities. The offer made by [...] explicitly excluded the payment of such charges. Finally, it is likely that the existence of [...]’s offer encouraged BNG to make the very best offer it could (within the limits of its lending guidelines and subject to substantial security), in order not to lose the business of an existing client with what appeared at the time to be real prospects of expansion. On the basis of the foregoing, the Commission concludes that even though BNG provided financing at an interest rate lower than the one proposed by a private bank, BNG, when it granted the loan in 1998, was acting as a market economy investor. The loan consequently does not constitute state aid within the meaning of Article 87(1) of the EC Treaty.

(32) The complainant also asserts that a market economy creditor would not have continued to finance VAOP given the poor financial situation of the enterprise in the succeeding years. The Commission has therefore analysed how BNG has dealt with the deterioration of VAOP’s financial situation.

(33) In 1999, when the financial situation of VAOP Glas BV and REVA deteriorated, BNG negotiated a new agreement, which was signed on 9 July 1999. First, the security was expanded to include liens on inventories, plant and other assets. Second, it was agreed that there would be a strict screening of the monthly list of claims subject to a lien. Third, no long-term loans would any longer be granted for investments in fixed assets. Any such loans would have to take the form of short-term financing instruments known as ‘cash drawings’ (*kasgeldtrekkingen*). Fourth, the price of the credit facility was increased.

(34) In October 2000 REVA became insolvent, and a new agreement was negotiated and signed on 19 January 2001. The credit facility was reduced to NLG 13,2 million (EUR 6 million) (the effective lending to VAOP at that point was NLG 15,2 million (EUR 6,9 million)); the credit facility was to be reduced further in accordance with a timetable laid down. A penalty premium of 3 % would be applied to the amount exceeding that credit limit. At the same time, the security was expanded further. On the basis of the liquidation value of VAOP’s assets BNG calculated that it stood to lose almost NLG 5,8 million (EUR 2,6 million) out of its total claim of NLG 15,2 million (EUR 6,9 million). In September 2002, a new contract was signed, modifying the previous timetable for the reduction of the size of the credit facility.

⁽⁹⁾ In the banking sector, the level of operating costs is often measured by the *efficiency ratio*, which is defined as operating expenses divided by total revenue. In 1997, [...]’s Netherlands division had an efficiency ratio of 64,8 %. In 1998 and 1999, it was respectively 65,2 % and 62,9 % (source: [...]). BNG’s efficiency ratio is one third of that level, indicating a very low cost base. This is explained in part by the fact that it does not have a large network of offices.

(35) From this account it will be clear that BNG could not simply stop financing VAOP or ask for the immediate reimbursement of the amount lent. This would have rendered VAOP insolvent, causing considerable loss to BNG. BNG sought to measure the potential loss against VAOP’s chances of recovery. Given the stability of VAOP’s core business (waste paper) and its ability to generate cash flow, BNG decided not to push VAOP into insolvency, and to go on financing it. The Commission has not found any manifest error in this assessment or the decision it led to. Nor has the complainant brought forward any convincing argument showing why this decision would have not been acceptable to a private bank.

(36) In conclusion, the Commission considers that BNG’s conduct in this case is in accordance with the market economy creditor principle, and consequently does not constitute state aid to VAOP.

(37) On the question whether BNG’s lending can be attributed to the State the Commission will not take a position, because in the light of the foregoing even if the lending could be attributed to the State it would not constitute state aid. Moreover, the Commission cannot and will not take a position on the question whether all lending by BNG in other cases conforms to the market economy investor principle.

The second measure

(38) At the beginning of 2001, VAOP was unable to pay the participating municipalities the NLG 3 million (EUR 1,3 million) it owed them for the supply of waste paper. It did not have sufficient liquidity available. As a condition for further financing of VAOP, BNG was demanding that there be positive resources available for guarantee purposes, defined as capital and reserves, provisions plus long-term subordinated loans. Paying the money to the municipalities would have pushed VAOP into insolvency. The Commission observes that the difficult financial situation was caused mainly by a one-off event, namely the insolvency of REVA in 2000. VAOP had invested in that company because it was active in the treatment of waste glass.

(39) The Commission would point out that the municipalities’ net claims on VAOP amounted to NLG 5,7 million (EUR 2,6 million)⁽¹⁰⁾. These claims were unsecured, because another major creditor, BNG, had a first-rank lien on important assets. If VAOP had become insolvent and its assets had been liquidated, the local authorities would have been unable to recover a large part of their claims. The

⁽¹⁰⁾ Financial situation at the end of 2000.

Commission has reviewed the calculation submitted by the Dutch authorities: from the creditors' point of view, it was on the optimistic side ⁽¹¹⁾. The Commission takes the view, therefore, that in the event of an insolvency the municipalities could have expected to recover no more than NLG 1,2 million (EUR 0,5 million) out of their claims of NLG 5,7 million (EUR 2,6 million). In addition, the money would have been recovered only after the substantial delay inherent in a liquidation. Instead of taking this loss of NLG 4,5 million (EUR 2 million), the members preferred to convert NLG 3 million (EUR 1,3 million) into an interest-bearing loan and to recover the balance. This second option was a more favourable solution. When it initiated the procedure, the Commission also doubted whether a market economy investor who did accept such a conversion would not have demanded a higher interest rate. These doubts have been allayed: the municipalities' bargaining position vis-à-vis BNG was not in fact such that they could have demanded a higher interest rate. In the longer term higher interest rate charges would have reduced VAOP's ability to repay its loan to BNG. BNG was in a position to resist such a demand on the part of the municipalities, by threatening to trigger the insolvency of VAOP, which, as indicated, would have been a less favourable outcome for the municipalities. Indeed even if the municipalities had had the bargaining power necessary, it would not have been in their interest to increase the interest rate, because that would simply have increased the VAOP's financial burdens over the next five years. As the members pay VAOP for the costs of the services they receive, the higher interest rates they would have obtained would have been offset by higher payments to VAOP during that period.

- (40) It can be concluded that for purposes of Article 87(1) of the EC Treaty the conversion of the debt into a subordinated loan does not constitute state aid granted by the local authorities to VAOP.

7. CONCLUSION

- (41) On the basis of the foregoing, the Commission concludes that neither of the measures constitutes aid,

HAS ADOPTED THIS DECISION:

Article 1

The measures taken by the Netherlands and Bank Nederlandse Gemeenten with regard to the Association of Suppliers of Waste Paper (Vereniging van Aanbieders van Oud Papier), for amounts respectively of NLG 3 million (EUR 1,3 million) and NLG 16,3 million (EUR 7,4 million), do not constitute aid within the meaning of Article 87(1) of the Treaty.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 19 July 2006.

For the Commission

Neelie KROES

Member of the Commission

⁽¹¹⁾ The calculation submitted by the Dutch authorities is optimistic from the municipalities' point of view among other things because it does not deduct the costs of settling the insolvency. It has already been seen that BNG, which as a financial institution has greater expertise in such calculations, is more prudent regarding the capacity of the liquidated assets to cover the creditors' claims.