State aid for hazardous waste treatment: the case of AVR, the Netherlands

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On 22 June 2005, the European Commission has approved € 47.3 million operating aid in favour of AVR of the Netherlands for hazardous waste disposal. € 2.4 million — compensation for the cost of acquisition of the hazardous waste — was not approved and has to be recovered from the beneficiary. The interesting features of the case lay in the application of Article 86(2) of the Treaty, concerning services of general economic interest, in the field of waste management and environmental protection. This article explains in further detail the underlying principles the Commission applied in its assessment.

The beneficiary and the measures

AVR (Rotterdam) is a waste management company owned by the municipality of Rotterdam with some 2000 employees and an annual turnover of around € 500 million. It is one of the four main competitors in the Dutch waste market and like these competitors, it operates internationally, having establishments in various Member States.

In 2002, the Netherlands concluded a contract with AVR to operate two rotary kilns and a special landfill site for the disposal of hazardous waste for the period 2002-2006. A newly created subsidiary, AVR-Nuts, would receive aid equal to the estimated operating deficits on these activities, € 1.5 million and € 2.3 million for 2002 and 2003 respectively. The actual losses were much higher, but no further aid was granted.

As the aid for future years would be higher than originally foreseen, the Netherlands abandoned its policy and agreed with AVR to close the kilns. For 2004 the operating aid was calculated at € 8.9 million and in addition, AVR was granted € 36.5 million to compensate for past investment and additional costs due to the early closure of the installations. The Netherlands had calculated that continuing the contract until the end of 2006 would be even more expensive.

A guarantee that the state will bear 30% of the cost of removal and decontamination following the closure of the furnaces also constitutes aid.

A significant part of the aid was paid to the beneficiary without prior approval by the Commission.

Background

Community law lays down the objective for Member States to become self sufficient in waste disposal and to have appropriate treatment of the waste near the source (1). Member States may prohibit export of ‘waste for disposal’ and trade in such waste is subject to various controls. In contrast, Member States are not generally allowed to prohibit export to other Member States of ‘waste for recovery’.

In the early 1990s, with a view to these objectives, AVR constructed the special landfill site and invested in several rotary kilns. The site is used for the appropriate disposal of hazardous waste that cannot be burnt (‘C2-waste’); the rotary kilns are used for the appropriate disposal of hazardous waste that, despite a low burning value, still can be incinerated (‘RK-waste’). This incineration requires co-fuelling, and in practice the most cost-efficient fuel consists in hazardous waste with a high calorific value. In terms of turnover and aid, the rotary kilns are far more important than the site.

Rotary kilns involve high fixed cost and maximising capacity use is crucial to recoup this cost. For this reason, the Netherlands systematically prohibited exports of hazardous waste for disposal. Originally, the authorities also prohibited certain exports of hazardous waste for recovery and applied a wide definition of waste for disposal, but the European Court of Justice condemned these practices (2). At the same time, producers further minimised the creation of the waste and options to recover hazardous waste, e.g. in the cement industry or for filling closed mines, have further developed. As a consequence, the supply of RK-waste decreased dramatically. Overcapacity as regards disposal facilities has become a wider phenomenon, affecting as well e.g. the UK, Germany and


Belgium. In this situation, AVR wanted to close the site and the kilns. By means of the aid, the authorities tried to prevent this from happening.

**Affectation of trade, benefit for whom?**

Although Member States may prohibit export of waste for disposal, the measures affected trade between Member States. First of all, not all such exports are prohibited. Secondly, the major market participants operate internationally, competing e.g. in the international markets for turn-key clean-up projects. Thirdly, the market for waste for disposal is inextricably linked to the market for waste for recovery: the same waste may change definition depending where and for which purpose it is offered. So in fact, trade between Member States is common practice in both markets.

In this particular case, the measures did not favour the suppliers of hazardous waste. The gate fees for C2 and RK-waste were higher than those practiced in neighbouring States, which was possible due to the export restrictions. Raising the fees was not a feasible and realistic option under normal market conditions, as more waste would be exported, mixed into other waste streams or be disposed in other legal and illegal ways and therefore it would not increase AVR Nuts’ revenues. In fact, with the closure of the rotary kilns, it became easier for suppliers to benefit from the lower gate fees in Belgium and Germany.

**Waste treatment a service of general economic interest?**

Member States are free to define what they regard as services of general economic interest on the basis of the specific features of the activities, but this definition is subject to control for manifest error. For the following reasons, the Commission agreed with the Netherlands that the service constituted a SGEI:

— There is an obvious public interest in appropriate treatment when hazardous waste is disposed of. Moreover, there is the Community objective of self-sufficiency in the disposal of waste and given the limited domestic capacity, without AVR’s rotary kilns exports of waste for disposal would have been inevitable.

— Public intervention was necessary: without the aid AVR would have closed the C2-depot and the rotary kilns already by the end of 2001.

— The measures do not infringe the ‘polluter pays principle’: as explained above, the suppliers of the waste were not favoured by low gate fees.

— The qualification as a SGEI does not circumvent the rules that normally apply. The environmental aid guidelines (1) contain rules on operating aid to promote waste management (section E.3.1), but these rules are written in the first place with a view to operating aid granted to companies for dealing with waste that they produce themselves.

— By nature, the bulk of the C2 and RK-waste is being supplied by companies, but collection systems exist for hazardous waste from households, aiming at safe and easy disposal of any hazardous waste they may have, and part of the collected hazardous waste may be disposed of in the rotary kilns. So the service for which the aid is given had a general character and the aid did not favour a restrictive number of users of the services.

— There is no market failure to justify the SGEI, but the objectives of self-sufficiency in waste disposal and waste disposal close to the source of the waste are not less legitimate for that reason.

**Altmark criteria respected?**

The Netherlands argued that the measures would not constitute aid as they respected the criteria ensuing from the Altmark judgment (2). The Commission did not agree. AVR was not chosen pursuant to an open and transparent tender procedure. Moreover, the level of compensation was not determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with waste treatment capacity would have incurred. As a matter of fact, given the unique position of the C2-depot and the rotary kilns in the country, such a typical undertaking did not exist. The pre-calculation of the budgetary deficit rather reflected the particular conditions under which AVR Nuts operated these installations and the cost of similar installations abroad were not taken into account. Under such circumstances, the measures must be considered to provide a selective advantage in favour of AVR Nuts, and not merely a cost compensation that other companies in a similar situation could have received under similar conditions in case they would have been charged with the service obligation.

**Precise definition, absence of overcompensation, proportionality**

On the basis of a careful assessment of the usual criteria for aid for SGEIs, the Commission concluded

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(1) OJ C.37 of 3.2.2001, p. 3.

that most of the aid could be authorised. The definition of the service was sufficiently precise, which was not surprising as from the beginning the Dutch authorities intended to justify the aid on the basis of Article 86(2). They were assisted by consultancies to calculate the aid and to verify the transparency. Three particular issues can be highlighted.

The Commission accepted aid to compensate for the cost of closure. Without sufficient guarantees, one cannot expect an operator to engage into a multi-annual service contract that requires significant investments. The Commission also accepted aid to compensate for additional cost resulting from the closure of the rotary kilns earlier than foreseen. A Member State cannot be obliged to continue such a contract, especially if the Member State thus pays less than what it probably would have had to pay if the activities had been continued. For all these costs, however, the Commission required strict ex-post control.

The Commission considers that the measures adopted by the Netherlands for the major part complies with the requirement of proportionality. It is difficult to imagine by which other means the Netherlands could have ensured the availability of sufficient domestic capacity for disposing hazardous waste. The Commission examined in detail whether the Netherlands should have granted aid for one kiln only, instead of two. Did the second rotary kiln’s contribution to the realisation of the objectives weigh up against the aid it required and against the potential disadvantageous effects on competition resulting from this? Some flexibility for this assessment is unavoidable, as the flow of C2 and RK-waste to arise could not be foreseen with certainty and because of risks in the availability of the installations. The actual importance of the second kiln may have been limited, but the Commission expects that the effects on competitors have remained relatively limited as well: there is no indication that maintaining two rotary kilns resulted in larger quantities of RK-waste incinerated.

Another subsidiary, AVR IW, executed much of the administration, but competed at the same time with other suppliers of hazardous waste. The Netherlands explained that AVR IW has not been able to abuse this position and the Commission, despite the third parties comments, neither came to this conclusion.

**Aid for the acquisition of waste: disproportional**

€ 2.4 million of the operating aid was earmarked for the cost of acquisition of the waste. This acquisition was also carried out by AVR IW, to whom this part of the aid was passed on. The Commission found that this aid was not justified: the sole beneficiary was AVR IW and its competitors did not receive similar compensation for their cost of acquisition. Moreover, the acquisition activities did not directly fall within the public interest that justified the aid, certainly not where it concerned waste acquired abroad. It may actually have encouraged disposal in the Netherlands over recovery in the Netherlands or elsewhere and under specific circumstances this may have been contrary to the principle of treatment near the source.

The Commission consequently ordered the Netherlands to recover this part of the aid from AVR IW.
State aid and ‘private litigation’: practical examples of the use of Article 88(3) EC in national courts

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Introduction

This contribution is about Article 88(3) EC Treaty which can be invoked directly by undertakings in national courts. In that sense it is a unique provision under State aid law. Recently, two applicants in the Netherlands went to court to request that the authorities respect the so-called standstill obligation under Article 88(3) EC and that State aid measures be suspended. Both requests were granted by the courts although the requests did not always advance smoothly. These two cases illustrate the difficulties judges and undertakings encounter but they also show to what extent Article 88(3) EC can be used by undertakings affected by State aid.

Background

Article 88(3) EC reads that a Member State must notify the Commission of any plans to grant or alter aid. Following a notification, the Commission conducts an assessment of the planned aid during which the aid cannot be implemented. This is the ‘standstill obligation’.

According to the case law of the European Court of Justice (hereinafter: ECJ), the national courts must ensure compliance with this standstill obligation. More precisely, the role of the national court is to safeguard rights enjoyed by individuals due to the direct effect of the prohibition expressed in the last sentence of Article 88(3) EC. Moreover, the initiation of the formal investigation procedure by the Commission under Article 88(2) EC does not relieve national courts of their duty to safeguard rights of individuals, should there be a breach of the requirement of prior notification.

As a result of Article 88(3) EC competitors may first of all attempt at obtaining an injunction from a national court thus preventing the actual granting of the aid. The national court can, however, be of help in several other situations as well. It is not excluded that competitors who can prove that they have suffered loss as a result of the unlawful implementation of aid may have an action for damages in a national court against the Member State that granted such aid. A national court may also be required to declare prematurely granted aid unlawful and order the recovery of such aid, without being it necessary the court ruling on its compatibility. Finally, even where the Commission finally finds that the aid unlawfully put into effect is compatible under Article 86(2) EC or 87(3) EC, the national court should declare measures adopted before such finding unlawful and order the State to recover the aid with interest.

National courts might have to interpret and apply the concept of State aid under Article 87 EC in order to determine whether the aid has been granted without observing the standstill obligation. In doing so, the courts can ask the Commission for information (1) in line with the ‘Notice on cooperation between national courts and the Commission in the State aid field’.

Recent cases in the Netherlands

The two courts rendered judgement in cases related to the development of an infrastructure. The first case is about the financing of a glass fibre network in Appingedam. The second case is related to the financing of a football stadium in Alkmaar.

Glass fibre network Appingedam

In the first case (2), a cable operator requested the competent district court to suspend a measure consisting of the financing of the roll out of a glass fibre network in Appingedam, until the Commission had taken a decision on the basis of Article 4 of the Procedural Regulation. The cable operator claimed that the municipality would grant money for the roll out of a glass fibre network and that it was likely that the municipality would provide other advantages such as loans and guarantees. The operator further argued that the measure distorted competition and had an effect on trade.

First, the district court affirmed that the foreseen measure had not been notified to the Commission. Secondly, the court is of the opinion that it has to be assessed by the Commission, whether the aid measure is compatible with the common market. The court concluded that in view of the facts and given the arguments brought forward by the applicant, it cannot be excluded that the measure concerned is free from any elements of unlawful State aid. While referring to the jurisprudence of the

(2) The judgements can be found at www.rechtspraak.nl. This case is referred to as LJ-N AQ8920.