

State aid and the effect on trade criterion

The Netherlands: measures in favour of non-profit harbours for recreational crafts

Melvin KÖNINGS, Directorate-General Competition, unit G-2

Following a complaint, on 5 February 2003 the Commission initiated the formal investigation procedure down in Article 88 (2) of the EC Treaty on the possible distortion of competition between the three following marinas in The Netherlands: *Enkhuizen*, *Nijkerk* and *Wieringermeer* ⁽¹⁾. On 29 October 2003 the Commission took a final decision on the cases.

Although this case does not involve very significant amounts of aid, the case is of interest for the analysis developed in order to decide whether the measure constitute state aid under Article 87(1) of the EC Treaty. In particular, the Commission had to decide if the aid was likely to have an effect on trade.

Dutch marinas are operated by both non-profit organisations (usually sailing clubs) and private undertakings. According to the complainant several non-profit marinas had received State aid to build or maintain their moorings. Herewith these marinas are able to offer a lower rental price of the moorings for tourists who are passing by with their recreational crafts.

The municipality Enkhuizen decided in 1998 to build a new harbour for large riverboats and tourist vessels. Because of the construction of this new harbour, the existing entrance of the sailing club *KNZ&RV* to the river was removed. Moreover, the sailing club *KNZ&RV* got the opportunity to purchase a water area (26.000 m²) of the municipality at the same price per m² as the municipality had paid for the same water in 1998 to the national authorities (i.e. 11.700). The price per m² was 0,45 per m² (one guilder). According to the complainant, the average purchase of this kind of water is approximately 15 per m². In the final decision, the Commission argues that it is not likely that the low value of the water area is appropriate. If the water area has a local destination of becoming a marina, this water area will have some market value and cannot be considered 'worthless'. The difference of opinion is on 378.300, which is most part of the alleged State aid. The Commission cannot therefore exclude the granting of an advantage to the Enkhuizen marina.

The municipality *Nijkerk* was the owner of a local marina, which was built in 1966. The marina was privatised in 2000 and sold to the tenant, the local sailing club *De Zuidwal*. In 1998 the marina was independently appraised at 417.477. This was the appraisal price for a marina without contamination, with maintenance in good order and when rented out (the marina without a tenant was appraised at 521.847).

The marina was contaminated and it had a lot of late maintenance. In the purchase agreement between the municipality and the club, the sailing club agreed on taking all costs for rehabilitation of the water and the late maintenance of the harbour facilities. The municipality estimated the costs for late maintenance and rehabilitation; the estimations were carried out by employees of the municipality, based on their practical experience. The municipality deducted these costs from the appraised value of the marina, resulting in a purchase price of 0,45 (one guilder) for the total marina.

Later on the Dutch authorities gave order for new independent appraisal reports on the costs for late maintenance and rehabilitation. As regards the costs for rehabilitation the Dutch authorities divided these costs to rehabilitate the nearby river (*Arkervaart*) and the marina. According to the Dutch authorities the marina is connected to the river and this river has many different polluting users who have no relationship with the marina. Hence, the Dutch authorities decided that the sailing club is not liable for any of the pollution, not even in the marina. Moreover, as the rehabilitation turned out to be very expensive in the course of 2002 the municipality decided to take 25% of the rehabilitation costs on its own account. Herewith, according to the Dutch authorities, the sailing club has even lost on the purchase agreement.

As regards the rehabilitation costs the Commission in its decision to initiate the procedure expressed doubts whether the purchase deal was carried out under the right application of the polluter pays principle. In principle the sailing club *De Zuidwal*

⁽¹⁾ OJ C 69, 22.3.2003, p. 4.

was responsible (and liable) for the contamination of their marina. Following this principle, the marina should have been sold for 217.477. The Dutch authorities did not deliver clear appraisal reports on the pollution in the Nijkerk marina and it is not clear to what extent the sailing club is or could be held responsible for (part of) the pollution. It seems rather doubtful that the sailing club is not liable at all. Secondly, the Commission does not agree with the Dutch authorities that the marina was sold to the tenant itself for a purchase price including a tenant. After all, due to the purchase, the *De Zuidwal* obtained full free use of the marina. The sailing club could have sold the harbour immediately and make a profit of 95.370 (i.e. the difference between the two appraisal prices, with and without tenant). The Commission cannot therefore exclude the granting of an advantage to the Nijkerk marina through the measure.

Finally, as regards the *Wieringermeer* marina, the Dutch authorities provided sufficient additional information in order to conclude that no advantage is at stake.

Application of State aid rules

In order for a measure to be considered as a State aid within the meaning of Article 87(1) of the EC Treaty, four criteria have to be simultaneously satisfied. The criteria of State resources and selectivity were clearly met. As regards the effect on trade criterion, a reference case is Commission's decision on the Dorsten Swimming Pool⁽¹⁾. In this case the Commission concluded that this amenity was used by the inhabitants of the town and the surrounding area. Moreover, the Commission distinguished a difference between this kind of support and aid to promote major theme parks targeted at the national or even international market and advertised far beyond the area where they are located. The Commission concluded that by its very nature, aid in favour of facilities aimed at attracting international visitors is likely to effect trade between Member States. For the swimming pool in Dorsten the Commission took the view that there was practically no likelihood of intra-Community trade being affected. Therefore, the

annual subsidy for the private operator of the pool in Dorsten does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

The Nijkerk marina has 200 moorings, of which on average only 0,25% is used by foreign tourists. The Commission concluded that the Nijkerk marina is used by the inhabitants of the town and the surrounding area and it is not aimed at attracting international visitors. The aid does not either refrain Nijkerk's inhabitants of using marinas outside the Netherlands. The support to the Nijkerk marina (if any) does not have an effect on trade and is therefore not State aid within the meaning of Article 87(1) of the EC Treaty.

In the Enkhuizen marina, on average 14% of the moorings are used by international tourists. The Commission made a distinction between *daily* moorings and *fixed* moorings. The effect on trade of support to daily moorings is by nature very limited. An (international) boat owner or tenant uses the marina which corresponds to the place where he is at a certain date and time and which appears to be appropriate given the size and depth of its hull. It is likely that an effect on trade of the support (if any) would primarily be related to the fixed moorings (permanent location of a boat). When choosing a fixed mooring the user has a choice between the Enkhuizen marina or a foreign one, as the (international) owner or long term tenant of the boat decides before or at the start of the season where to be in dock. It should be noted that the share of fixed moorings by international users is only 10% at Enkhuizen. In addition, the average annual turnover per fixed mooring (less than 1000) is rather low compared with the costs of maintenance, transport, financing and depreciation of pleasure boats and the additional costs of a water holiday. Therefore, the support to the Enkhuizen marina (if any) does not have an effect on trade and is therefore not State aid within the meaning of Article 87(1) of the EC Treaty.

The Commission therefore concluded that, even if some distortion of (local) competition is not excluded, the support (if any) to the alleged marinas has no effect on trade within the meaning of Article 87(1) of the EC Treaty.

⁽¹⁾ Commission decision of 21.12.2000, N 258/2000 — Germany (Leisure Pool Dorsten), OJ C 171, 16.6.2001, p. 16.