COMMISSION

COMMISSION DECISION
of 18 July 2001
on the State aid implemented by the Netherlands in favour of Valmont Nederland BV

(notified under document number C(2001) 2231)

(Only the Dutch version is authentic)

(Text with EEA relevance)

(2002/142/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) In the spring of 1998 the Commission became aware of press articles alleging that between 1993 and 1995 municipalities had misused money of the province of North Brabant in various ways in order to attract companies [2]. It requested information by letter of 1 April 1998 (D/51488). The Netherlands authorities replied by letter of 2 July 1998, registered as A/35148 on 6 July. The Commission asked for further information and reminded the Netherlands Government of these requests by letters of 29 October 1998 (D/54414), 21 December 1998 (D/55299), 31 March 1999 (D/51425), 2 August 1999 (D/63284), 6 September 1999 (D/63682), 27 October 1999 (D/64481), 24 January 2000 (D/50335) and 30 August 2000 (D/54456). The Netherlands authorities provided the requested information by letters of 19 January 1999 (registered as A/30448 on 19 January 1999), 23 August 1999 (registered as A/36473 on 25 August 1999), by e-mail of 29 November 1999 and by letters of 10 February 2000 (registered as A/31270 on 15 February 2000), 22 August 2000 (registered as A/36991 on 24 August 2000) and 5 September 2000 (registered as A/37421 on 13 September 2000). At two meetings on 14 April 1999 and 23 May 2000 the Netherlands authorities provided further information.

(2) After being contacted by the parent company of the Netherlands recipient, the Vice-Chairman of the Committee on International Relations of the United States House of Representatives intervened in the case. In his letter of 11 July 2000 to the Head of the Commission Delegation in Washington and to the Netherlands Ambassador in the United States, he sought assistance in resolving the matter as the land sale at issue had been concluded six years previously, in 1994. The Commission replied by letter of 11 August 2000, commenting on the need for control of State aid by the European Commission and stressing the importance of the principle that unlawful aid is recovered from the recipient by the competent authorities.

(3) By decision of 18 October 2000, the Commission initiated the procedure laid down in Article 88(2) of the EC Treaty with respect to the aid measures. By letter dated 7 November 2000 (D/108153), it informed the Netherlands of this decision. After asking for a two-week extension of the deadline (letter of 5 December 2000, registered as A/40420 on 11 December 2000), which was granted by letter of 18 December 2000 (D/56227), the Netherlands reacted to the decision by letter of 12 December 2000 (registered as A/30329 on 8 January 2001). The decision was published in the *Official Journal of the European Communities* [3], inviting interested third parties to submit their comments on the aid.

[1] OJ C 37, 3.2.2001, p. 44.

[2] 'Gedeputeerden werkten mee aan U-bocht', Brabants Dagblad, 6 March 1998; 'U-bocht rammelde flink', Brabants Dagblad, 10 March 1998; 'U-bocht strijdig met regels EU', Brabants Dagblad, 10 March 1998.

[3] OJ C 37, 3.2.2001, p. 44.

(4) The Commission received one comment from an interested party, namely the recipient of the aid (letter of 20 February 2001, registered as A/31474 on the same date). It forwarded the comment to the Netherlands by letter of 13 March 2001 (D/51072). This letter also contained several questions with regard to the aid measures. After asking for a six-week extension of the deadline (letter of 17 April 2001, registered as A/33188 on 20 April 2001) and after the Commission granted a shorter extension by letter of 30 April 2001 (D/51755), the Netherlands authorities sent their reaction and the answers by letter of 14 May 2001 (registered as A/33915 on 17 May 2001).

2. DETAILED DESCRIPTION OF THE AID

2.1. The recipient

(5) Valmont is a subsidiary of Valmont Industries Inc., a United States-based company manufacturing mechanised irrigation equipment, posts for lighting, transport, utility and communication applications, and custom coated and fabricated products for various industrial uses. It operates 21 manufacturing plants in four continents. Its annual turnover in 2000 was USD 846 million. The company has about 5 500 employees. Within the EU it operates production sites in the Netherlands, France, Spain and Germany ([1]).

(6) In 1991 Valmont Industries Inc., bought the Netherlands company Nolte BV, which since the 1940s had produced poles for public lighting and for traffic signs. The company now operates under the name of Valmont Nederland BV and its current product range includes several types of steel or aluminium posts between 3 m and 80 m high or even higher, to be used for all kinds of traditional and modern purposes ([2]). In 1994 the company bought 3 ha of land on which a new production site was set up.

2.2. Aid via the land sale

(7) In 1993 and 1994 the Province of North Brabant invested NLG 20 million (EUR 9,1 million) in strengthening the economic structure and improving the business climate in the province. The financial resources were used to tackle infrastructure bottlenecks on industrial estates in the province. The projects were carried out by the municipalities, which received money from the province for this purpose. In fact, some municipalities had already earmarked resources of their own for these projects. The provincial money consequently enabled them to use these resources for other purposes. This practice was labelled the 'U-turn' ('U-bocht'). The province had stipulated that the municipalities must not use these resources for direct (financial) aid to companies.

(8) In 1994 the Province of North Brabant made available NLG 400 000 to the municipality of Maarheeze (now part of the municipality of Cranendonck) for the infrastructure project 'Philipscomplex/Den Engelsman'. The project involved expansion and improvement of the infrastructure of the industrial estate at a total cost of NLG 1 469 000 (EUR 666 000). The municipality had already earmarked financial resources for this project which were subsequently used for other purposes. In this case the municipality used the provincial money to write off the accumulated losses of the municipal department responsible for managing the industrial estate, enabling the land to be sold at a lower price. In 1994 the municipality of Maarheeze subsequently sold 3 ha of land to Nolte BV, now Valmont Nederland BV (hereinafter 'Valmont'), for NLG 900 000 (EUR 408 402); this works out at NLG 30 (EUR 13,61) per m^2.

(9) The Netherlands Government provided a land valuation report by an independent expert dated 4 December 1998. According to the report, the price of land in Maarheeze at the time was NLG 42,50 (EUR 19,29) per m^2. On the basis of this price, the value of the land would be NLG 1 275 000 (EUR 578 570). The Commission therefore assumed that the land sale contained an aid element of NLG 375 000 (EUR 170 168). Following the meeting with the Commission on 14 April 1999, the Dutch authorities requested the company to pay back the supposed aid element (after subtracting the *de minimis* amount of EUR 100 000 ([3]), however). The company has so far refused to do so.

2.3. Aid via the construction of a car park on the premises of Valmont

(10) In addition, the municipality paid NLG 250 000 (EUR 113 445) for the construction of a public car park on the premises of Valmont.

2.4. Grounds for initiating the procedure of Article 88(2) of the EC Treaty

(11) As the municipality of Maarheeze was not located in an assisted area within the meaning of Article 87(3)(a) or (c), the Commission doubted whether the measures were compatible with Community legislation. No other justifications seemed applicable. The Commission also had doubts regarding the public nature of the car park.

([1]) www.valmont.com.
([2]) www.valmont.nl.
([3]) Commission notice on the *de minimis* rule for State aid (OJ C 68, 6.3.1996, p. 9). This notice has been replaced by Commission Regulation (EC) No 69/2001 (OJ L 10, 13.1.2001).

3. COMMENTS FROM THE NETHERLANDS

(12) The Netherlands authorities submitted a land valuation report from 1994. Unfortunately, this report was not made available earlier. It was commissioned by Valmont in order to obtain bank financing secured by the valued property. The valuation in fact relates to both the buildings and the land. According to this report, the value of the land would be NLG 1 050 000 (EUR 476 000), which corresponds to NLG 35 (EUR 15,88) per m^2. The valuer for the 1994 report commented on the difference with the 1998 report in a new note that was attached to the submission by the Netherlands. The difference would be attributable in part to the fact that this report gives a valuation of the land when it was no longer undeveloped, resulting in a lower value. The 1994 report also contains a correction for conveyancing costs. Moreover, the valuer for the 1994 report maintains that the 1998 report does not take into account the fact that about one third of the land is not directly accessible from the public highway.

(13) The Netherlands authorities also submitted declarations by three companies that regularly use the car park and maintained that it was available for use by other companies as well. This would be confirmation that the car park is a public one. The municipality and Valmont had concluded a 'gentleman's agreement' on the public use of the car park and this agreement is strictly enforced. The municipality has the powers to enforce the agreement as the land use plan does not allow buildings on this part of the land. If Valmont wished to use the car park for buildings, it would have to seek an exemption from the land use plan from the local administration, something which would be refused by virtue of the agreement. In this way, continued use of this part of the land as a public car park would be ensured.

4. COMMENTS FROM INTERESTED PARTIES

(14) Following publication of the decision to open the procedure, the Commission received comments only from the recipient company, Valmont. In its letter Valmont endorses the arguments put forward by the Netherlands authorities. In particular it stresses the new information in the land valuation report prepared in 1994 and states that the amount of aid calculated on this basis would remain below the *de minimis* threshold of EUR 100 000. Valmont also confirms that the car park is used by several companies in Valmont's vicinity. It does not receive payments from any of the users for their use of the car park. It concludes that the car park meets the definition of 'public' or 'semi-public' property for the purposes of Community State aid rules.

5. ASSESSMENT OF THE AID

5.1. The aid element in the price of the land

(15) Sales of land and buildings by public authorities may contain State aid in favour of the buyers. The Commission communication on State aid elements in sales of land and buildings by public authorities [1] sets out a general approach that is to be used to establish whether there is such an element of State aid. Although the land sale took place before the communication was adopted, the same principles apply since the communication clarifies a policy that, at the time of the adoption, had already existed for more than ten years [2]. However, the Commission is aware that the case law on this point was still limited at the time of the land sale and it does not expect the transaction to have complied with the precise content of the communication.

(16) Point 2(a) of the communication gives public authorities the option of using an independent evaluation of the land price prior to the sale negotiations in order to establish the market value. The market price thus established is the minimum price that can be agreed without granting State aid. In the present case, there are two valuation reports. Both reports were drawn up after the sale.

(17) In this case, the Commission cannot rely on the 1994 report. This report gives an evaluation of the complete premises, including the building. It does not give an estimate of the value of the land as sold by the municipality, i.e. undeveloped. This is illustrated by the method by which the land value is arrived at: the value is calculated by taking the total value at sale minus building costs. The fact that the report makes a correction for conveyancing costs also shows that it does not relate to the situation in which Valmont bought the land but to the theoretical situation in which Valmont would sell it.

[1] OJ C 209, 10.7.1997, p. 3.
[2] The Commission already declared in 1963 that Article 92 was applicable to the sale of land and buildings for free or on particularly favourable conditions. See the answer to Written Question No 48 by Mr Burgbacher (OJ 125, 17.8.1963, p. 2235/63).

(18) The 1998 report bases its calculation on the 1994 prices of other land sales by the municipality concerned and of land sales by other parties. In his subsequent comment, the valuer for the 1994 report maintains that the 1998 report does not take into account the fact that about one third of the land is not directly accessible from the public highway. However, this claim is not supported by evidence. The 1998 report explicitly states that the valuers visited the site in order to get an impression of the location, accessibility, quality and marketability of the land. Therefore, on the basis of the information available, the Commission can rely on this report. As it concludes that the market price for the land sold to Valmont was NLG 42,50 (EUR 19,29) per m^2, the aid element in the land sale amounts to NLG 375 000 (EUR 170 168) in favour of the buyer.

(19) In the Commission's view, this benefit is caught by the prohibition under Article 87(1). It is specific to the buyer, Valmont. It is granted through State resources as the land is sold directly by the local authorities. It can be expected to affect trade between Member States as Valmont and its parent company Valmont Industries Inc. are active in sectors where the products are traded internationally.

5.2. **The aid element in the car park**

(20) Generally, the Commission assumes that the provision of a public car park does not represent any benefit for a particular company since the costs of such investment are usually financed out of local taxes, to which the companies and private persons benefiting themselves contribute. In this case, however, Valmont must be regarded as the main beneficiary of the car park. It is probable that Valmont is the main user of the car park on its own premises. Moreover, if the municipality had not constructed the car park, Valmont would itself have had to finance the provision of sufficient parking space. Given the kind of activities in which Valmont is engaged, namely the manufacture of various types of aluminium and steel posts between 3 m and 80 m high, it is clear that Valmont needs substantial parking space. In addition, the car park is separated from the street by a fence, with the result that an occasional passer-by does not have the impression that it is a public car park. Apart from the three letters from firms that use the car park, the Netherlands authorities have not produced any proof of the public use of the car park. The 'gentleman's agreement' on the use of the car park by other firms is not sufficient for it to be regarded as a public car park.

(21) Valmont is, it is true, the main beneficiary but three letters from firms in Valmont's vicinity confirm that they make regular use of the car park free of charge for parking their trailers, and the Netherlands authorities confirmed that it is available for use by other firms as well. One of these letters shows that the alternative for this company would be for its trailers to be parked near drivers' homes. Furthermore, the municipality can strictly enforce its 'gentleman's agreement' with Valmont and guarantee that this part of the land will continue to be used as a car park by means of its powers under the land use plan. Accordingly, the car park has to be regarded as 'partly private' or 'semi-public'.

(22) In view of the foregoing observations, the Commission regards half of the costs of constructing the car park as normal business costs. The fact that the municipality paid the full costs of the car park constitutes a specific benefit for the company which, like the land sale, is caught by the prohibition in Article 87(1). This benefit must be considered to amount to at least NLG 125 000 (EUR 56 723).

5.3. **Appraisal of the compatibility of the aid**

(23) The Commission has assessed whether the exemptions set out in Article 87(2) and (3) of the EC Treaty apply. Aid may be deemed compatible with the common market under Article 87(2). However, the aid measures (a) do not have a social character and are not granted to individual consumers, (b) are not designed to make good the damage caused by natural disasters or exceptional occurrences and (c) are not required in order to compensate for the economic disadvantages caused by the division of Germany. The exemptions in Article 87(3)(a), (b) and (d), which relate to the promotion of the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, to projects of common European interest and to the promotion of culture and heritage conservation, do not apply either.

(24) Nor did the Netherlands authorities attempt to justify the aid on the grounds enumerated above.

(25) The first part of the exemption in Article 87(3)(c), which refers to aid to facilitate the development of certain economic activities, does not apply since the aid did not serve such purposes as research and development, the environment or investment by small and medium-sized enterprises. The aid does not relate to a specific project to be carried out by the recipient that could be seen as promoting the common interest. The Commission has

based its assessment on the fact that the proposed aid was designed to ensure investment in the municipality of Maarheeze. Thus, it scrutinised the aid in the light of the regional guidelines that are based on the second part of the exemption in Article 87(3)(c), namely aid to facilitate the development of certain economic areas. However, the municipality of Maarheeze was not located in a region eligible for regional aid at the time of the land sale. Consequently, the exemption in Article 87(3)(c) does not apply.

(26) Since none of the exemptions in Article 87 apply, the aid measure is incompatible with the common market.

(27) If the aid proves incompatible with the common market, the Commission is required, in accordance with the ruling given by the Court of Justice in Case 70/72 [1], upheld in Cases 310/85 [2] and C-5/89 [3], to require the Member State to recover from the recipient all aid granted unlawfully. This measure is necessary in order to restore the previous situation and to remove all the financial benefits which the firm receiving the unlawful aid has improperly enjoyed since the date on which the aid was paid. Recovery of the incompatible and unlawful aid is an obligation imposed on the Commission by Council Regulation (EC) No 659/1999 [4].

(28) The aid must be repaid without delay in accordance with the procedure laid down by Netherlands law provided that it allows the immediate and effective execution of the Commission Decision. The aid includes interest calculated from the date on which it was granted to the date on which it is actually recovered. Interest is calculated on the basis of the commercial rate, with reference to the rate used to calculate the grant equivalent of regional aid.

6. **CONCLUSIONS**

(29) The sale of 3 ha of land in 1994 by the local authorities contains a State aid element of NLG 375 000 (EUR 170 168).

(30) The construction of the car park on the premises of Valmont, which was financed by the municipality, contains a State aid element of NLG 125 000 (EUR 56 723).

(31) The Netherlands has breached Article 88(3) of the EC Treaty by implementing the measures without proper notification.

(32) Both aid measures are incompatible with the common market and the aid has to be recovered from the recipient,

HAS ADOPTED THIS DECISION:

Article 1

The land transaction and the construction of the car park on the premises of the company contain elements of State aid within the meaning of Article 87(1) of the EC Treaty in favour of Valmont. These aid elements amount to NLG 375 000 (EUR 170 168) and NLG 125 000 (EUR 56 723) respectively.

Article 2

The aid elements referred to in Article 1 are incompatible with the common market.

Article 3

1. The Netherlands shall take all necessary measures to recover from the recipient the unlawful aid referred to in Article 2.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipient until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

The Netherlands shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 5

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 18 July 2001.

For the Commission

Mario MONTI

Member of the Commission

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[1] Case 70/72 *Commission* v. *Germany* [1973] ECR 813.
[2] Case 310/85 *Deufil GmbH und Co. KG* v. *Commission* [1987] ECR 901.
[3] Case C-5/89, *Commission* v. *Germany* [1990] ECR I-3437.
[4] OJ L 83, 27.3.1999, p. 1.