COMMISSION

COMMISSION DECISION

of 24 June 2003

on State aid which the Netherlands proposes to implement to assist NV Huisvuilcentrale Noord-Holland (HVC)

(notified under document number C(2003) 1909)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2003/879/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],

Whereas:

1. PROCEDURE

(1) By letter dated 27 November 2001, the Dutch authorities notified the Commission of the abovementioned aid in accordance with Article 88(3) of the EC Treaty which it proposes to implement for the construction of a container terminal. The notification was registered by the Secretariat-General of the Commission on 5 December 2001 under the reference N 840/2001. By letter dated 5 February 2002, the Commission requested further information. A technical meeting took place between Dutch representatives and the Directorate-General for Energy and Transport (DG TREN) on 26 March 2002. The replies from the Dutch authorities were received on 28 May 2002 and on 5 June 2002, registered respectively under numbers SG (2002) A/5441 and DG TREN A/59943.

(2) By letter dated 17 July 2002, the Commission informed the Netherlands of its decision to initiate the procedure in accordance with Article 88(2) of the Treaty with regard to the proposed aid. This procedure was registered as C 51/2002.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission called on interested parties to submit their comments.

(4) The Netherlands submitted its comments to the Commission by letter dated 11 October 2002, which was registered on 16 October 2002.

(5) The Commission received no comments from interested parties.

2. DETAILED DESCRIPTION OF THE AID

2.1. Objective

(6) By means of the construction of a container terminal at Alkmaar (province of North Holland), the aid is intended to promote household waste transport by inland waterways instead of by road. The terminal, primarily intended for the transshipment of household waste from the municipalities, is located in the immediate vicinity of a waste incineration plant at Alkmaar and has been operational since April 2001. The terminal will constitute an essential link in the chain of transport by water to Alkmaar coming from the municipality of Zaanstad and the province of Flevoland. The overall cost of constructing the terminal is EUR 7 714 262. The terminal consists of a quay wall along North Holland Canal, a travelling container crane and an area for the transfer of goods.

[1] OJ C 212, 6.9.2002, p. 2.

[2] See footnote 1.

2.2. **Beneficiary**

(7) The beneficiary of the aid is NV Huisvuilcentrale Noord-Holland, hereinafter referred to as 'HVC'. HVC operates a plant for the incineration of household waste for disposal. HVC is a limited liability company whose shares are owned by municipalities and collaborative groups of municipalities in the northern part of the province of North Holland and in the province of Flevoland and by a public electricity company ([1]). The municipalities established HVC for the disposal of the household waste they collect. HVC's core activity is operating a large waste incineration plant at Alkmaar. HVC processes about 465 000 tonnes of waste a year.

(8) The municipalities located at a short distance from HVC's incineration plant deliver their household waste themselves by road to the HVC plant, using refuse collection lorries. For the other municipalities, HVC runs transshipment stations in Almere, Den Helder, Lelystad, Noordoostpolder, Oudeschild, Zaanstad and Urk and is in charge of the transport from the transshipment stations to its Alkmaar incineration plant. For a period of five years from taking the terminal into service, HVC is obliged to supply at least 115 000 tonnes of waste a year by waterway from Lelystad and at least 35 000 tonnes from Zaanstad. If HVC fails to meet the conditions for the award of the grant, the Province may demand repayment in accordance with that General Administrative Law Act.

(9) HVC passes on all transport and transshipment costs to the municipalities through an equalisation payment. The municipalities defray these costs by imposing municipal waste charges. Transport by water involves an increase of the transport levy paid by the municipalities of about EUR 3,60 per tonne, a substantial sum in relation to the total amount of the levy (about EUR 12,90 per tonne in 2001), amounting to an increase of approximately 28 %.

(10) The investment aid will keep HVC's transport costs to the incineration plant lower, entailing a concomitant reduction in the cost to be paid by the municipalities. Accordingly, the transport costs to be borne by the municipalities will increase by only EUR 1,80 per tonne (about 14 % of the price), an amount which the municipalities may well be able to bear without introducing higher waste charges. The Dutch view is that without the province's contribution the project would not be viable and would have to be cancelled.

([1]) Energie Noord West (ENW) has a 15 % minority interest in HVC.

(11) In order to receive the subsidy, HVC had to build and operate the container terminal in Alkmaar (operational since April 2001) which can also be used for transshipment activities of interested third parties. HVC will become the owner of the terminal and will be able to provide transshipment services in accordance with its own commercial criteria. There is no obligation on how to operate the terminal. HVC pursues various types of activities: waste incineration, transport and operation of transshipment stations.

2.3. **Eligible costs and aid intensity**

(12) The aid consists of a once-only investment subsidy from the province of North Holland. The eligible costs consist of a direct investment in the construction of the multifunctional container terminal in Alkmaar. The investment costs for the terminal are EUR 7 714 262. The subsidy amounts to EUR 5 309 226. The percentage of aid is therefore 68,82 %.

2.4. **Grounds for initiating the procedure**

(13) The Commission's decision to initiate the procedure in accordance with Article 88(2) of the Treaty and to ask the Netherlands for additional information resulted from an initial examination of the notified intention to grant aid. There was particular concern about the proportionality of the aid. The Commission normally considers State aid with an aid intensity exceeding 50 % for transport infrastructure as not compatible with the Treaty, unless it is shown that the main beneficiary of the facilities is not capable of financing a higher amount without State intervention ([2]) and that the project would not be realised without the envisaged aid.

(14) The Commission expressed doubts in particular on the following issues:

(a) the necessity and proportionality of 68,82 % aid intensity for the realisation of the project, as the container terminal has already been built and has been operational since April 2001;

(b) the possible impact of the terminal on other inland waterway terminals;

(c) the possible impact of the terminal on the waste disposal and recovery market;

(d) the method of operating the terminal after the first five years.

([2]) Commission Decision of 31 January 2001, N 597/2000, Netherlands (OJ C 102, 31.3.2001, p. 8); Commission Decision of 14 September 2001, N 208/2000, Netherlands, SOIT (OJ C 315, 4.11.2000, p. 22); Commission Decision of 15 November 2000, N 755/1999, Italy, Bozen (OJ C 71, 3.3.2001, p. 71).

3. COMMENTS FROM THE NETHERLANDS

(15) The Netherlands indicated it was because the province of North Holland was prepared to contribute towards the costs of waterborne transport via the notified subsidy that the municipalities cooperating in the HVC framework opted exclusively for waterborne transport and hence for the construction of a container terminal.

(16) Since all transport and transshipment costs are borne by public entities, the Netherlands considers that HVC does not derive a direct or indirect advantage from the subsidy. If the subsidy is regarded as aid, the aid intensity would vary from 68,8 % (if the subsidy is related only to Alkmaar) to 27,3 % (if the subsidy is related to the entire project which includes facilities at Zaanstad and Lelystad).

(17) Because of its location, the Alkmaar terminal does not affect other inland waterway terminals. Attention is drawn to the fact that the regional demand for terminal capacity exists almost exclusively at locations along the Noordzeekanaal (North Sea Canal) between IJmuiden and Amsterdam. This is because for goods supplied by seagoing vessels it is much cheaper to transport them in the Netherlands by road rather than by inland waterway vessels. In the case of transport by inland waterway vessel, goods would normally have to be transshipped twice (first from a seagoing vessel to an inland waterway vessel and next from that vessel to a lorry to take them to their final destination) whereas goods carried by road need to be transshipped only once (from the seagoing vessel onto the lorry). This is also clear from the fact that since the Alkmaar terminal started operating in April 2001 no goods of third parties have been transshipped.

(18) The subsidy will be used exclusively to mitigate the costs of transport and transshipment of household waste from the municipalities and not for HVC's activities in the field of waste incineration. Moreover, it is highly unlikely that any waste other than the household waste from the shareholders that is incinerated in the HVC plant will be supplied by inland waterway vessel. Consequently, the terminal does not give HVC any advantage compared with other waste incineration plants. Moreover, the Netherlands has stated that HVC at any rate is not active on the market for incinerating waste intended for recovery.

(19) Finally, the Netherlands pointed out that after the first five years the terminal would be operated in the same way. The sole difference is that HVC will no longer be obliged to transport particular quantities of household waste by water. However, there is no reason to assume that HVC's shareholders will after five years decide to abandon the use of water transport. There will be no change with regard to possible use by third parties.

4. ASSESSMENT OF THE MEASURE

4.1. Existence of aid within the meaning of Article 87(1) of the EC Treaty

(20) Article 87(1) of the Treaty provides 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, in so far as it affects trade between Member States, be incompatible with the common market'.

(21) The provisions of the Treaty on State aid apply exclusively to undertakings. The concept of undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed [1]. Activities consisting of offering goods and services on a particular market must be regarded as economic activities [2].

(22) The Community rules on State aid apply exclusively to measures meeting all of the criteria laid down in Article 87(1) of the Treaty.

4.1.1. *Transfer of State resources*

(23) Under the notified measure, HVC will receive a State grant for the construction of a terminal at Alkmaar. Consequently, it is clear that the notified measure involves a transfer of State resources.

4.1.2. *Favouring certain undertakings*

(24) The subsidy does not confer an advantage on HVC with regard to the transport and transshipment of household waste coming from the municipalities because the subsidy is used exclusively to reduce the price paid by the municipalities.

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[1] Judgment of the Court of Justice of 23 April 1991, *Höfner and Elser* v *Macrotron*, C-41/90, [1991] ECR I-1979, point 21; judgment of the Court of Justice of 18 June 1998, *Commission* v *Italy*, C-35/96, [1998] ECR I-3851, point 36.

[2] Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, 118/85, [1987] ECR 2599, point 3.

(25) However, providing a container terminal gives HVC a quantifiable economic advantage over its competitors on the market for terminal operations (offering transshipment services to interested third parties), even though the subsidised infrastructure will be open to all potential users under normal market conditions. Under the proposed measure, HVC receives a State contribution towards costs arising from the investment in a terminal for combined transport whereas other domestic undertakings or undertakings from other Member States which are active in this field do not receive such a contribution.

4.1.3. *Selectivity*

(26) The aid measure favours a particular undertaking (HVC) and is therefore selective in nature.

4.1.4. *Effects on trade and distortion of competition*

(27) Pursuant to Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community [1], as last amended by Commission Regulation (EC) No 2557/2001 [2], the Member States have, with regard to waste intended for disposal, particular powers to limit cross-border transport in order to implement the principles of proximity, priority for recovery and self-sufficiency. These principles do not apply to the transfer of waste for recovery that may be effected by another undertaking in the Community. Consequently, HVC's activities with regard to waste intended for disposal (transport, transshipment and incineration) at the most have a very limited impact on trade between the Member States.

(28) The Alkmaar container terminal will also be open to transshipment activities of interested third parties. Accordingly, HVC will become active on the market for operating container terminals, a market which has been liberalised in accordance with the general rules governing the freedom of establishment and the freedom to provide services laid down in Articles 43 and 49 of the Treaty. Consequently, it cannot be excluded that there will be an impact on trade between the Member States.

(29) In view of the above, the Commission concludes that the notified aid measure is aid within the meaning of Article 87(1) of the Treaty and is incompatible with the common market unless the aid qualifies for one of the derogations provided for in the Treaty. Moreover, the Commission also takes the view that Article 87(1) refers to the fact that other provisions of the Treaty (e.g. Article 73) can allow aid under particular circumstances.

4.2. **Legal basis for the assessment**

(30) Article 73 of the Treaty declares aid to be compatible with the Treaty if it meets the needs of coordination of transport. The concept of coordination as used in Article 73 implies more than facilitating the development of an industry, it involves some form of planning by the State.

(31) In general, providing infrastructure for inland shipping is a task for the State within its responsibilities for land planning and the development of an integrated and sustainable transport system. Investment in transport infrastructure therefore entails more than only commercial considerations by an undertaking operating on the market for providing transport infrastructure. Accordingly, the Commission takes the view that there may be a need for State intervention for coordinating measures in the field of investment in inland waterway transport infrastructure, as it is unlikely that the market forces will come up with the necessary investment on the basis of purely commercial considerations.

(32) Consequently, as the Commission already noted in its decision of 17 July 2002 to initiate the procedure in accordance with Article 88(2) of the Treaty, Article 73 of the Treaty is the appropriate legal basis for analysing investments in infrastructure for transshipment facilities for inland shipping and evaluating its compatibility with the common market.

[1] OJ L 30, 6.2.1993, p. 1.
[2] OJ L 349, 31.12.2001, p. 1.

(33) Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway ([1]), as last amended by Regulation (EC) No 543/97 ([2]), implements Article 73 of the Treaty and provides for specific exemptions for aid deemed to meet the needs of coordination of inland transport. For inland shipping, however, these exemptions expired on 31 December 1999 and are no longer applicable in accordance with Council Regulation (EC) No 2255/96 of 19 November 1996 amending Regulation (EEC) No 1107/70 ([3]). At this stage, the Commission considers that, in the absence of secondary legislation Article 73 may be applied directly to investment aid for inland shipping ([4]).

(34) Consequently, the Commission will apply Article 73 directly in evaluating the notified aid to be granted for the construction of a container terminal at Alkmaar.

(35) According to the Commission's normal practice, three requirements must be fulfilled so that the aid meets the needs of coordination of transport within the meaning of Article 73 of the Treaty ([5]):

(a) the State contribution to overall financing is necessary for achieving the project or the activity in the interest of the Community;

(b) access to the subsidised infrastructure must be possible on non-discriminatory terms;

(c) the aid must not give rise to distortion of competition to an extent contrary to the common interest.

(a) *Necessity and proportionality of the aid*

(36) The Community has for some time pursued a policy of promoting the development of a balanced intermodal transport system and fostering the transfer of goods from road to other more environmentally friendly transport modes ([6]). The Commission's White Paper on transport policy ([7]) states that transport by water is less harmful to the environment than transport by road. Moreover, the new Marco Polo proposal ([8]) seeks to shift the expected increase in international goods transport of 12 billion tonnes/kilometre a year from congested roads to short sea shipping, rail and inland waterway transport.

(37) The Commission takes the view that an intermodal and sustainable transport system for the future can be brought about only if priority is given to investment in infrastructure. Freight transport by water may require costly and specialised equipment which road transport would not require. By contributing to the costs of such facilities, inland waterway transport will be able to compete financially with road transport. However, if infrastructure for intermodal terminals were not co-financed by the public sector, operators pursuing economic activities would not invest in them as there would be no guarantee of viability without State funding. In the case under consideration here, the construction of a container terminal is not a particularly viable commercial option, given the relatively low density of industry in the Alkmaar region.

(38) Transport of household waste by water instead of by road involves higher operating costs, most of them connected with the construction of the Alkmaar terminal. Even with the provincial subsidy, the municipalities concerned would still have to bear substantial extra costs each year for transport by waterway. Without the subsidy, waste transport to HVC would continue to take place by road.

(39) The Netherlands argue that if all investment needed to enable transport by waterway (facilities in Zaanstad and Lelystad) is taken into account, the aid intensity would be only 27,3 %. The Commission does not share this view as the subsidy granted by the province of North Holland exclusively relates to the construction of the Alkmaar container terminal which has been operational since April 2001 and was notified as an individual project. Consequently, the aid level is 68,8 % of the costs of the terminal.

([1]) OJ L 130, 15.6.1970, p. 1.
([2]) OJ L 84, 26.3.1997, p. 6.
([3]) OJ L 304, 27.11.1996, p. 3.
([4]) Commission Decision of 14 September 2000, N 208/2000, Netherlands, SOIT (OJ C 315, 4.11.2000, p. 22), Commission Decision of 20 June 2001, N 219/2001 Austria, Pilotprogramme Donau (OJ C 244, 1.9.2001, p. 2) and Commission Decision of 31 January 2001, N 597/2000, Netherlands, Subsidieregeling bedrijfsgebonden vaarwegaansluitingen (subsidy scheme for inland waterway sidings) (OJ C 102, 31.3.2001, p. 8).
([5]) Ibid. See also COM(2000) 5 final of 26 July 2000, Commission proposal for a regulation of the European Parliament and of the Council concerning granting of aid for the coordination of transport by rail, road and inland waterway.
([6]) See the Commission's Green Paper on fair and efficient pricing, COM(1995) 691 of 20 December 1995, the Commission's White Paper on fair payment for infrastructure use, COM(1998) 466 of 22 July 1998 and the Council Resolution of 14 February 2000 on the promotion of intermodality and intermodal freight transport in the European Community (OJ C 56, 29.2.2000, p. 1).
([7]) *European transport policy for 2010: time to decide*, COM(2001) 370 of 12 September 2001.
([8]) COM(2002) 54 final of 4 February 2002.

(40) Nevertheless, the Commission considers that such a high planned level of subsidy level is necessary to realise the project and is justified by the environmental benefit of the measure which serves the common Community interest. In this connection, it is also important to note that the subsidy will lead to a lesser increase of the transport levy which HVC charges to the municipalities. The actual support to HVC is therefore less, because a significant part of the subsidy is passed on to the municipalities in the form of a lesser increase of the transport levy. With regard to this aspect, the Commission asks that the Netherlands send it a report each year showing that the subsidy has been effectively passed on in accordance with the provisions of recitals 9 and 10 of the present Decision.

(b) *Access to the subsidised infrastructure on non-discriminatory terms*

(41) The container terminal will be destined mainly for the transshipment of household waste from the municipalities in order to promote its transport by inland waterways instead of by road. Nevertheless, it will also be suitable for the transshipment of cargo belonging to third parties on non-discriminatory terms and at going market rates. In particular, according to the notified conditions for granting the subsidy, HVC has to ensure that transshipment is offered to interested third parties at competitive rates and at a competitive speed, with sufficient storage and transshipment capacity and opening times in accordance with what is required by the market.

(42) HVC will be under an obligation by the province of North Holland for five years to transport specified quantities of household waste by water. There is, however, no reason to assume that HVC's shareholders will decide after this period to abandon the system.

(c) *No inadmissible distortion of competition*

(43) Regarding the possible activity of HVC on the market of container terminals, it has to be noted that although no other facilities for the transshipment of containers exist in the Alkmaar region, there has been little or no interest shown by third parties to use the Alkmaar terminal since April 2001. Therefore it can be concluded that the possible impact of the Alkmaar terminal on other terminals would be very limited.

(44) The Netherlands argues that the beneficiary does not operate on the market for waste intended for recovery. In light of the information provided on HVC's website [1], a certain amount of interest on the part of the beneficiary in this market cannot be completely excluded.

(45) However, no comments have been received from interested third parties. Consequently, the Commission assumes that competitors operating existing terminals or operating on the market for waste intended for recovery do not consider the planned aid as a threat to their competitive position on the market.

(46) Accordingly, the Commission considers that the environmental benefit of the project will be considerably higher than a potential impact on competition and that the subsidy will therefore not distort competition to an extent contrary to the common interest.

(47) It follows that the initial doubts raised by the Commission on the opening of the procedure no longer exist.

5. **CONCLUSION**

(48) In view of the above, the Commission concludes that the aid measure is compatible with the EC Treaty in accordance with Article 73 thereof,

HAS ADOPTED THIS DECISION:

Article 1

The notified aid which the Netherlands is planning to implement for HVC is compatible with the common market within the meaning of Article 73 of the Treaty.

Article 2

The Netherlands shall submit an annual report to the Commission showing that the province's subsidy is effectively used to reduce the extra costs of municipalities resulting from the transport of household waste by water.

The report should also indicate the transshipment services provided by HVC to third parties as well as the eventual profits obtained with this activity.

[1] http://www.huisvuilcentrale.nl
'Our products are compost, renewable energy (in the form of electricity and heat), ferrous and non-ferrous metals, bottom ash and fly ash (...)'.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 24 June 2003.

For the Commission
Loyola DE PALACIO
Vice-President