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Date
11 August 2014

Concerning: Case SA.27.301 – VGG/Kingdom of the Netherlands

Dear members of the case team,

During our meeting of 1 July we discussed the complaint of the *Vereniging Gelijkberechtiging Grondbezitters* ("VGG") concerning the aid granted by the Central Government and the provinces of the Netherlands to the *Terrein beherende organisaties* ("TBOs"). As promised we have composed a memorandum in which we embark on the main subjects that we discussed in the aforementioned meeting. In this memorandum we touch upon three subjects. First, we set out which economic activities the TBOs conduct and in which relevant market they operate. Second, we lay out the historic legal framework for the schemes which were used in the Netherlands to grant subsidies for the purchase of land by TBOs. We emphasize in this regard that aid was granted to the TBOs not only through subsidies, but also through the direct transfer of land from the Central Government and the provinces to the TBOs. However there was and is, unlike subsidies for the purchase of land, no legal scheme which regulates such transfer. Third we refute the claim of the Dutch authorities that the aid granted to the TBOs is not in breach of the state aid rules because (i) it constitutes existing aid, (ii) the Almark criteria are fulfilled, (iii) the requirements of the SGEI decision and the SGEI framework are met, and (iv) it benefits from the General Block Exemption Regulation. You will find the memorandum enclosed to this letter.

In addition to bringing the memorandum to your attention, this letter sets out to explain how the VGG has explored all other reasonable avenues to settle this dispute. The VGG has communicated to the Central Government, the provinces and the TBOs that the main goal of the VGG is twofold. On the one hand the VGG aims to have the illegally granted state aid to the TBOs restored, not because the VGG wants to "punish" the TBOs (an accusation frequently made by the TBOs), but rather because it seeks restore the balance in the market and to have a level playing field. On the other hand the VGG has as goal to make sure that the state aid rules and the principle of non-discrimination are upheld in the future. The (members of the) VGG had

talks with the relevant parties since 2007. From the summer of 2007 until December 2008 there were deliberations with the Ministry of Agriculture, Nature Management and Food Quality¹ about how the state aid rules and the principle of non-discrimination were not upheld in Dutch policy regarding nature conservation and creation. The Central Government and the provinces remained however passive and did not want to promise any substantial improvement. This led to the complaint dated 23 December 2008. Subsequently the VGG was founded. Even then the VGG initiated meetings with the relevant government entities. These meetings however never led to serious negotiations. After a series of judicial actions on the national level the Central Government (represented by the Ministry of Economic Affairs), the provinces and the TBOs were compelled to come to the negotiation table. This led to multiple meetings which did not lead to results that could reasonably satisfy the VGG since the Central Government and the provinces did not seem impartial but rather on the side of the TBOs. I will focus in this letter on deliberations and correspondence that took place in the year 2013 since they have led to intensive settlement talks which (unfortunately) did not lead to an agreement.

The position paper 2013

To make clear what every involved party (i.e. the Central Government, provinces and TBOs) needs to do in order to settle the dispute, the VGG drafted a so called position paper in the year 2013. This position paper contains four elements that, if fulfilled, will lead to the VGG withdrawing the complaint. These four elements are:

- (i) the payment of the (legal) costs of the VGG by the Central Government and the provinces;
- (ii) the transfer of substantial portions of lands by the TBOs (the VGG proposed 20% of the total amount of lands that the TBOs possess);
- (iii) ensuring that state aid rules and the principle of non-discrimination are upheld in the future when it comes to making and implementing policy concerning nature preservation and creation;
- (iv) a commitment from the Central Government and the provinces that the situation in which the TBOs were the illegal beneficiary of state aid and discriminatory policy will not arise again in the future.

The Ministry of Economic Affairs, which represented the Central Government, indicated that it does not see the elements listed under (i), (iii) and (iv) as an obstacle to reaching an agreement. However it made fulfilling these elements conditional on reaching an agreement with the TBOs about the transfer of lands by the TBOs. It was however not possible to come to an agreement with the TBOs nor were the Ministry of Economic Affairs or the provinces prepared to use their

¹ This ministry was called before 2003 the Ministry of Agriculture, Nature Management and Fisheries. In 2010 it merged with Ministry of Economic Affairs, which is therefore its legal successor.

legal powers to put pressure on the TBOs. I therefore will focus on the meaning of element (ii) and how the TBOs reacted to this proposition.

Element (ii)

The VGG realises that if the recovery of aid would take place by payment of money, this would lead to grave financial consequences for the TBOs as they have been beneficiary of a large amount of state aid. That is why the VGG proposed – in element (ii) – that the TBOs would transfer substantial portions of their lands to other private parties since large parts of these lands were acquired either by purchase subsidies or were received directly from the Central Government or the provinces. The transfer to interested private parties would take place against market value. The money that the TBOs receive from the transfer of lands would in the vision of the VGG go, at least partially, to the State or the provinces in order to (partially) restore the aid that was granted to the TBOs.

It is to be noted at this point that in the VGG's view bringing portions of land acquired by means of illegal state aid back on the market, may be considered indeed a legitimate instrument to re-establish the situation preceding the grant of the illegal aid. Such approach would therefore appropriately fulfil the purpose of restoring the previous situation, which, according to standing case law, underlies the obligation to recover illegally granted aid from the beneficiaries.

Negotiations with the TBOs

Near the end of 2013 the Ministry of Economic Affairs appointed, after consultation with the TBOs and the VGG, two senior political figures, who did not work for the ministry, to serve as mediators. They aimed to compose a covenant to which both the VGG and the TBOs could agree before 1 February 2014.

During the negotiations the TBOs constantly repeated that they 'received the aid in good faith', that 'recovery of aid is punishment' and that they 'do not want to qualify aid received as illegal state aid'. The VGG did not oppose drafting the covenant in a way which did not portray the TBOs as parties who knowingly received aid that was in breach of the state aid rules. However it upheld its demand that a substantial part of the granted aid be recovered.

Ultimately a draft of the covenant was proposed by the mediators. However that draft did not specify (due to the rigid attitude of the TBOs during the negotiations):

- how much lands the TBOs had to transfer. They did not consent to a figure of 20,000 hectare that was proposed by the VGG nor did they, even though the VGG insisted they did, name an amount of hectares that they would be willing to put on the market;
- a destination for the money that the TBOs would receive due to the transfer of lands. The VGG proposed that at least a part of the money should go back to the State or the provinces;

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- a timeframe during which the lands had to be transferred. The VGG proposed a timeframe of ten years to transfer 20,000 hectare. This meant that Vereniging Natuurmonumenten – which currently owns approximately 105,022 hectare – would sell 1000 hectare a year during a period of ten years and that the twelve foundations of the 12LANDSCHAPPEN, which collectively own more than 100,000 hectare, would have to sell 83 hectare a year per foundation for a period of ten years;

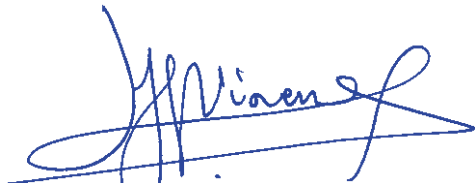
In order to make signing an agreement easy for the TBOs the VGG also proposed to phrase the terms of the covenant in a way that would require the TBOs to make a reasonable effort to sell a specific amount of lands (i.e. if the lands could not be sold within a period of ten years, despite reasonable efforts on behalf of the TBOs, the VGG would not seek further action against the TBOs). Despite this proposition, the TBOs did not want a covenant which in any way specifies that a specific amount of lands would be sold within an agreed upon timeframe.

The negotiations thus came to a stalemate. At a meeting on 7 April 2014 the Minister of Agriculture, S. Dijkema (part of the Ministry of Economic Affairs), proposed that the TBOs and the VGG start (without signing any covenant) with a project aimed at the transfer of lands in order to create more trust between the TBOs and the VGG. Both parties consented to that plan at the meeting. After the meeting the appointed mediators sent a draft of a letter and requested the VGG and the TBOs to sign it in order to confirm that they want to participate in this project and to ask the Minister to supply the recourses that are needed to make the project a success. The VGG signed the letter, the TBOs however refused to do so. This surprised the VGG. Later the board members of the VGG read a newsletter of the 12LANDSCHAPPEN in which is stated that the TBOs do not want to transfer land, that they have said so to the mediators on multiple occasions and that their dissatisfaction about the focus on the transfer of land is the reason why they did not sign the letter. This was the last straw for the VGG as this newsletter – again – demonstrated the unwillingness of the TBOs to reach a solution.

Conclusion

In the past years the VGG has tried to reach a solution without taking recourse to legal remedies. However it has been proven time and again that the TBOs will not recovery any of the received state aid voluntarily. Therefore it is time for the European Commission to take action. If you have any questions do not hesitate to contact me.

Yours sincerely,



Hendrik Viaene°

Enclosure