

COMMISSION DECISION (EU) 2020/1827**of 26 May 2020****on the measures SA.39990 – (2016/C) (ex 2016/NN) (ex 2014/FC) (ex 2014/CP) – implemented by Belgium for Ducatt NV***(notified under document C(2020) 3287)***(Only the Dutch and French texts are authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(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) On 28 November 2014, the Commission received a formal complaint submitted by the German glass producer GMB Glasmanufaktur Brandenburg GmbH ('GMB') and its parent company Interfloat Corporation ('Interfloat Group'), registered in Liechtenstein (together 'the complainant'). The complainant alleged that its direct competitor Ducatt NV ('Ducatt') had received unlawful State aid that was incompatible with the internal market from the Flemish Region, Belgium.
- (2) By letter dated 19 May 2016, the Commission informed Belgium that it had decided to initiate the procedure laid down in the first subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the alleged State aid granted to Ducatt ('the Opening Decision').
- (3) The Opening Decision was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures described in the Opening Decision.
- (4) The Belgian authorities submitted their comments on the Opening Decision on 20 June 2016 ⁽³⁾ and 19 July 2016.
- (5) The Commission received comments from the complainant on 17 June 2016, 18 August 2016, 13 September 2016 and 6 October 2016. It forwarded them to the Belgian authorities, which commented on them by letter dated 23 January 2017.
- (6) The Commission requested additional information from Belgium on 30 January 2017, which was submitted by the Belgian authorities on 27 March 2017.
- (7) On 14 June 2017, the Belgian authorities informed the Commission of the bankruptcy of Ducatt as of 20 May 2017, following which the Commission met the representatives of Belgium on 23 June 2017.
- (8) On 5 July 2017, the Commission met the complainant and its legal representatives.
- (9) On 10 July 2017, the Belgian authorities submitted additional information to the Commission, which the latter had requested at the meeting on 23 June 2017.
- (10) The Commission requested further information from Belgium on 20 November 2017, 22 June 2018 and 31 January 2020. The Belgian authorities responded on 15 December 2017, 27 August 2018, 4 March and 12 May 2020.

⁽¹⁾ OJ C 369, 7.10.2016, p. 27.

⁽²⁾ See footnote 1.

⁽³⁾ At the meeting with the Commission of 20 June 2016.

- (11) The Commission also requested further information from the receivers of the Ducatt bankruptcy on 18 July 2017, 25 July 2017, 7 and 9 March 2018, 16 May 2018 and 28 January 2019. The receivers replied on 22 July 2017, 6 March 2018, 9 March 2018, 30 March 2018, 30 May 2018 and 29 January 2019.
- (12) The Commission also engaged in the following correspondence with the complainant: it received letters from the complainant on 3 April 2018, 2 April 2019 and 26 January 2020, to which it replied respectively on 24 April 2018, 6 May 2019 and 10 February 2020. The Commission also had two telephone conversations with the complainant on 26 July 2018 and 27 March 2019.
- (13) On 26 March 2020, the Commission received a letter from the complainant with a formal request to act pursuant to Article 265(2) TFEU.

2. BACKGROUND

2.1. The beneficiary

- (14) Ducatt is a spin-off from Emgo NV ('Emgo'), a 50/50 joint venture between Philips and Osram, which was established in 1966 as a producer of glass bulbs for the production of incandescent lamps and glass tubes for the production of fluorescent lamps. Ducatt was established in November 2010 by the (then) Innovation Manager at Emgo (via Vercundus BVBA) and the (then) Finance & Accounting Manager at Emgo (via ArsiCO BVBA).
- (15) Due to changes in European Union legislation, prohibiting the sale of incandescent lamps from 1 September 2009, Emgo's glass bulb business was split off and merged with Ducatt in January 2011 with the aim of safeguarding jobs and its know-how in the glass manufacturing sector. Ducatt's management aimed to enter the market for glass for solar panels and invested heavily as of 2011 in the necessary machinery.
- (16) In addition to the two founding companies, Vercundus BVBA and ArsiCO BVBA, Ducatt is or has been co-owned to various degrees by the following legal entities: Limburgse Reconversie Maatschappij ('LRM'), Participatie Maatschappij Vlaanderen ('PMV'), Capricorn Cleantech Fund ('CCF'), Quest for Growth ('QFG'), Belfius, VF Capital ('VFC'), VMF and Aro. In addition, parts of the shares of the company were, for some time, held by a natural person, namely [...]*.

2.2. The complaint

- (17) The complainant is a producer of glass for solar panels and a direct competitor of the alleged aid beneficiary Ducatt. The complainant alleges that Ducatt received around EUR 70 million of unlawful State aid incompatible with the internal market from the State-owned bank Belfius and LRM and PMV, which are two investment companies owned by the Flemish Region.
- (18) According to the complainant, the alleged aid took the form of loans granted and capital increases performed at non-market conditions dating back to Ducatt's establishment in 2011. They were used to set up the company and start up its production and continuously to cover its losses.

3. DESCRIPTION OF THE MEASURES AND CONTENT OF THE OPENING DECISION

- (19) The Commission opened the formal investigation procedure to assess whether the following measures in favour of Ducatt constituted State aid within the meaning of Article 107(1) TFEU and, if so, if they were compatible with the internal market.

3.1. Capital increases

- (20) The Opening Decision expressed doubts as to whether the following capital increases subscribed by LRM and PMV amounting to EUR [...] were granted on market terms:
 - (a) EUR [...] from a capital increase on 28 February 2014 by LRM (EUR [...]) and PMV (EUR [...]);
 - (b) EUR [...] from a capital increase on 4 July 2014 by LRM (EUR [...]) and PMV (EUR [...]);

* Confidential.

- (c) EUR [...] of loans which were subsequently converted into equity:
- (i) EUR [...] of loans (interest of [...] %) granted on 21 December 2012 by LRM (EUR [...]) and PMV (EUR [...]) which were converted into equity with interest on 5 December 2013 ('loan 4');
 - (ii) EUR [...] of loans (interest of [...] %) granted on 27 September 2013 by LRM (EUR [...]) and PMV (EUR [...]) which were converted into equity on 13 December 2013 ('loan 5');
 - (iii) EUR [...] of loans (interest of [...] %) granted on 28 November 2013 by LRM which were converted into equity on 28 February 2014 ('loan 6');
 - (iv) EUR [...] of loans (interest of [...] %) granted on 16 December 2013 by LRM (EUR [...]) and PMV (EUR [...]) which were converted into equity on 28 February 2014 ('loan 7');
 - (v) EUR [...] from the EUR [...] bridging loan granted in mid-September 2015 by LRM (part of 'loan 13');
- (d) EUR [...] due to stock warrants, exercised on:
- (i) EUR [...] on 30 September 2014 by LRM (EUR [...]) and PMV (EUR [...]);
 - (ii) EUR [...] on 27 October 2014 by LRM (EUR [...]) and PMV (EUR [...]);
 - (iii) EUR [...] on 28 November 2014 by LRM;
 - (iv) EUR [...] on 28 January 2015 by LRM.

3.2. Loans

- (21) The Opening Decision expressed doubts as to whether, in addition to the loans converted to equity as stated in recital (20) above, the following loans granted by LRM and PMV amounting to EUR [...] were granted on market terms:
- (a) EUR [...] bridging loan on 10 and 19 February 2014 by LRM repaid on 28 February 2014 ('loan 8' and 'loan 9');
 - (b) EUR [...] loan on 16 May 2014 by LRM (EUR [...]) and PMV (EUR [...]) ('loan 10');
 - (c) EUR [...] loan on 29 April 2015 by LRM ('loan 11');
 - (d) EUR [...] bridging loan granted during July and August 2015 by LRM ('loan 12');
 - (e) EUR [...] bridging loan granted in the middle of September 2015 by LRM (part of 'loan 13').

3.3. Recapitalisation round of November 2015

- (22) The Opening Decision furthermore expressed doubts as to whether the capital increase and restructuring of shareholder loans of November 2015 were carried out on market terms. This included, on the one hand, the capital increase subscribed by LRM in cash of EUR [...] (beside the conversion of EUR [...] from loan 13) and, on the other hand, the takeover of the outstanding parts of loan 10 from other parties by LRM, as well as the write-off of parts of the principals and interest of loans 10, 11 and 12 by LRM.

4. BANKRUPTCY OF THE BENEFICIARY

- (23) On 11 May 2017, the insolvency of Solarworld, Ducatt's main customer, sales to which generated approximately 30 % of Ducatt's revenues, was made public.
- (24) Subsequently, on 20 May 2017, the board of Ducatt decided to initiate the bankruptcy procedure for Ducatt. Ducatt was declared bankrupt as of 20 May 2017 by the bankruptcy order issued by the Commercial Court of Hasselt on 23 May 2017, which also appointed three bankruptcy receivers.

4.1. Cessation of business activity and disposal of beneficiary's assets

- (25) In July 2017, all business activity at Ducatt had definitively ceased after the termination of the contracts of all its employees and the halting of production ⁽⁴⁾.
- (26) In August 2017, after no bids for the sale of Ducatt's business as a going concern were received, the bankruptcy receivers sold Ducatt's non-production-related assets (furniture, computers, spare parts, transport equipment, inventory, packaging materials, cleaning machines, etc.) via an online auction to a number of different buyers.
- (27) Ducatt's main production-related assets were leased by Ducatt from third parties, which repossessed these production assets as a result of Ducatt's bankruptcy. In particular, the premises and part of the machinery (production hall with the glass furnace, offices and logistics premises) were repossessed by the lease company LRM Lease NV, whereas the glass treatment lines (for glass coming out of the glass furnace) were repossessed by the lease companies ING Equipment Lease, KBC Lease and ES Finance.
- (28) Based on information provided by Belgium, the production premises and offices are currently empty, whereas parts of the logistics premises are rented out to various logistics companies as storage space. The plan is to tear the production hall down along with the offices, to redevelop the underlying land and to keep the premises currently rented out to logistics companies. The glass furnace has been removed from the production hall and has been dismantled, with the stone parts of the furnace having been sold via an online auction to the highest bidders, and other components of the furnace having been scrapped after failed attempts to sell them via an online auction.

4.2. Balance of assets and liabilities of the beneficiary and its liquidation

- (29) Belgium has shown that the liabilities of Ducatt in bankruptcy amount to around EUR 33,8 million, of which Ducatt's liabilities to preferential creditors (mostly personnel, social security, banks and leasing companies) amount to EUR 14,3 million, whereas the assets of Ducatt in bankruptcy amount to around EUR 3,6 million.
- (30) Furthermore, in the event that the Commission found that unlawful State aid that was incompatible with the internal market had been granted to Ducatt by Belgium and ordered the recovery of such State aid, Belgium's claim for the recovery of State aid in Ducatt's bankruptcy procedure would not be preferential under Belgian insolvency laws. Since the assets are, by far, insufficient to repay the preferential creditors, there is no realistic chance of non-preferential claims being satisfied, even partially.
- (31) Ducatt's inevitable liquidation is delayed only by a number of legal procedures pending, which are related to claims from creditors and from some of its employees. The outcome of these procedures will not change the fact that preferential claims exceed Ducatt's assets.

5. CONCLUSION

- (32) The Commission notes that, according to Articles 107 and 108 TFEU, the powers of the Commission are designed to avoid the granting of aid incompatible with the internal market. As far as recovery is concerned, the Court has consistently held that the Commission's power to order Member States to recover aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the situation prior to granting of State aid that is incompatible with the internal market ⁽⁵⁾.
- (33) In other words, one of the goals of State aid control is to prevent the granting of unlawful or incompatible State aid. The other goal is to ensure that the situation prior to the distortion of competition caused by State aid incompatible with the internal market is restored.
- (34) In the present case, no aid can be granted any longer to Ducatt. A decision declaring that the measures already granted constitute State aid incompatible with the internal market and ordering their recovery would, in any event, not result in a recovery (such recovery being manifestly impossible), and would not have any influence on the payment of the claims of other creditors.

⁽⁴⁾ Owing to the specific characteristics of the functioning of the glass furnace, it could not be switched off immediately and had to undergo a gradual cooling-down procedure, which required the involvement of part of the staff. That is why certain members of Ducatt's staff were employed until the cooling-down was completed in early July.

⁽⁵⁾ Judgment of the Court of 14 September 1994 in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission*, ECLI:EU:C:1994:325, para 75.

- (35) More precisely, the Commission notes that Ducatt's business activity has definitively ceased due to (i) the termination of all contracts with Ducatt's employees, who are now mostly employed by other employers; (ii) the dismantling of Ducatt's production facilities and the sale of all non-production-related assets of Ducatt to a number of different buyers.
- (36) Furthermore, the Commission notes that Ducatt's main production asset, the glass furnace repossessed by LRM Lease, has been dismantled and therefore may not be offered to any market operator anymore, whereas the premises repossessed by LRM Lease have not been used for purposes related to Ducatt's business activity. Finally, the Commission notes that the glass treatment lines are owned by private undertakings, independent of Ducatt and the Flemish Region, the business strategy of which is to lease the assets and not to conduct any production activity comparable to that of Ducatt. For the above reasons, the Commission considers that any chance of another undertaking continuing Ducatt's business activity can be ruled out.
- (37) The Commission further notes that a recovery order would not have any impact on the payment of the State aid claims, nor of any other claim. Under Belgian bankruptcy law, the claim for recovery of State aid in the event of a negative Commission decision involving recovery would be registered as a non-preferential creditor claim in the schedule of liabilities of Ducatt. The preferential claims by Ducatt's creditors in the bankruptcy proceedings significantly exceed the amount of Ducatt's assets in bankruptcy. Therefore, even if the Commission were to find that Ducatt had received illegal and incompatible State aid, the recovery based on such a decision would be impossible and would not influence the outcome of the reimbursement of the claims of the non-preferential creditors of Ducatt in any way.
- (38) The sole rationale for Ducatt's continued existence, without any business activity, is to await the outcome of several pending legal procedures related to claims from creditors and former employees. Once these procedures have been terminated, Ducatt will be inevitably liquidated and removed from the company register.
- (39) Under these circumstances, a Commission decision on the qualification of the measures in question as incompatible aid would have no practical effect, and the formal investigation procedure initiated under the first subparagraph of Article 108(2) TFEU in respect of the measures in question no longer serves any purpose,

HAS ADOPTED THIS DECISION:

Article 1

The proceeding initiated under the first subparagraph of Article 108(2) TFEU on 19 May 2016 in respect of Ducatt NV is hereby terminated.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 26 May 2020.

For the Commission
Margrethe VESTAGER
Executive Vice-President
