



EUROPEAN COMMISSION

Brussels, 10.05.2011  
C(2011)642 definitief

In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].

**PUBLIC VERSION**  
**WORKING LANGUAGE**  
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**Subject: SA.27187 (NN 68/2010) - The Netherlands: *Alleged State aid through a software-licensing agreement between Technical University Delft and Delftship B.V.***

Dear Sir,

## **1. PROCEDURE**

- (1) By letter of 12 December 2008, registered at the Commission on the same day, SARC B.V. ("SARC") filed a complaint against alleged illegal State aid to Delftship B.V. ("DS"). According to the complaint, the terms and conditions of a software-licensing agreement between Technical University Delft ("TUD"), that had developed ship-design software, and DS, that is using that software under license, constitute illegal State aid. The Commission initially registered the case under CP 369/2008.
- (2) A second complainant, MasterShip B.V. ("MS"), informed the Commission that it supports SARC's complaint, by letter dated 26 May 2009 which was sent to the Commission by E-mail of 2 June 2009. MS and SARC together will hereinafter be referred to together as "the complainants".
- (3) By letter of 20 February 2009, the Commission asked the Dutch authorities for information on the licensing agreement in question. By letter of 24 March 2009, the Dutch authorities asked for an extension of the deadline to respond to that letter. The Commission granted that extension. By letter of 17 April 2009, the Dutch authorities asked for an additional period, in order to obtain complete information from Technical University Delft; that extension was also granted. By letter of 13 May 2009, the Dutch authorities provided information in response to the Commission's letter of 20 February.

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- (4) After an initial assessment of that information, the Commission forwarded the non-confidential version of the Dutch authorities' arguments to SARC, by letter of 29 May 2009. By that letter, the Commission also indicated that the Dutch authorities had provided apparently cogent arguments for the absence of State aid and that these may probably clear away the complainant's assumption of illegal State aid.
- (5) By letter of 16 June 2009, SARC provided additional arguments with a view to counter the Dutch authorities' statements.
- (6) The Commission again asked the Dutch authorities for information, by letter of 17 July 2009. By letter of 13 August 2009, the Dutch authorities provided an incomplete response. In order to allow them to properly identify what information and documentation the Commission would need for the purposes of assessing the matter, a meeting between the competent Commission services and the Dutch authorities was held on 2 October 2009. Further to that meeting, and by letter of the same day, the Dutch authorities asked for an extension of the deadline to respond to the Commission's information request; the Commission granted that extension.
- (7) By letter of 20 November 2009, the Dutch authorities provided information in response to the aforesaid information request.
- (8) On the base of all information in hand, the Commission services again assessed the matter and, by letter dated 31 March 2010, informed both complainants of their preliminary view on the matter, namely that the software-licensing agreement does not seem to constitute State aid.
- (9) By letter dated 31 May 2010, a law firm, on behalf of SARC, explained SARC's standpoint on the matter and explicitly requested that the Commission resumes its investigation and adopts a decision in the matter. By the same letter, the law firm informed the Commission that SARC had commissioned an independent valuation of the software in question and would forward it to the Commission as soon as it would be available.
- (10) By letter of 1 September 2010, the law firm on behalf of SARC sent the aforementioned valuation report to the Commission.

## **2. PARTIES INVOLVED**

- (11) SARC is an engineering and software firm, based in Bussum, in the Netherlands. According to information provided by the enterprise, it provides ship-design support, carries out technical ship-design calculations, and provides software for ship design and loading.
- (12) MS is a shipbuilding-software firm, based in Eindhoven, in the Netherlands. MS offers software to model entire ship structures and on-board installations and to generate all necessary production information. MS supports SARC's action and considers that it is affected by the alleged State aid. MS did not provide information on substance.
- (13) TUD is a Dutch institute of higher scientific education, pursuant to the Dutch Higher Education and Scientific Research Act (*Wet op het hoger onderwijs en*

wetenschappelijk onderzoek). The Dutch authorities confirm that TUD provides scientific education and conducts scientific research, pursuant to Article 1.3 of that Act. The Dutch authorities further assert that TUD's goal is the dissemination of knowledge. TUD developed the software package and granted the license at issue to DS.

- (14) DS is based in Hoofddorp, in the Netherlands. DS develops and offers ship-design and load-calculation software. DS was established on 31 January 2007, by an engineer who is a former employee of TUD, and a TUD-professor who is the Head of the Ship-Design Section within TUD's '3mE'-Faculty and who supervised the aforementioned engineer. Both were significantly involved in the development of the software package. DS is marketing the software package under the license agreement at issue.

### 3. THE SOFTWARE PACKAGE AND LICENSE AGREEMENT

- (15) From 1997 until October 2006, TUD developed its 'DelftShip' ship-design software ("the software") According to the Dutch authorities, that software is a design tool for advanced and innovative ships. Throughout that development, TUD's students and employees used the software for teaching and R&D purposes. TUD owns the source code of that software.
- (16) In June 2006, the engineer who had developed the software announced that he would leave TUD. As TUD found that it would no longer have the capability to further develop 'Delftship', it started negotiating a license agreement with the engineer. The engineer and the professor who supervised him started establishing DS in October 2006.
- (17) On 31 October 2006 TUD froze the software's source code and stopped the development. With effect of 1 November 2006, the engineer left TUD.
- (18) The software-license agreement between TUD and DS was concluded on 22 January 2007 ("the agreement") Pursuant to the agreement DS is granted a global, non-transferrable, exclusive license to use the 'Delftship'-source code. DS is obliged to develop the software and to provide updated versions free of charge to the Ship-design Department of TUD (*sectie Ontwerpen van Schepen*), for teaching and R&D. DS has to pay an annual license fee to TUD, being [...] % of the annual turnover generated from the sale of sub-licenses for the use of the software, during a [...] period as from the first sale. Payment is due once a year. The duration of the agreement is five years, and DS has the right to unilaterally extend it for an undetermined duration.
- (19) The software package that was licensed to DS is available in two versions: 'Freeship', which is an open-source software that is downloadable free of charge from DS's website, and 'Delftship', which DS's customers can download for a fee ('sub-licenses').
- (20) After licensing, DS developed the 'Delftload' software (on-board load calculation), on the basis of the Delftship-core programme. 'Delftload' is a new development and did not exist in 2007, when the license agreement was concluded. As it is based on the

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\* Business secret

'Delftship' core programme, the license fee is also due for turnover generated with 'Delftload'.

#### 4. MAIN ARGUMENTS BROUGHT FORWARD BY THE COMPLAINANTS

- (21) According to the complaints<sup>1</sup>, TUD has granted State aid in the sense of Article 107 (1) of the Treaty on the Functioning of the European Union ('TFEU') to DS, through the agreement.
- (22) Due to the allegedly favourable conditions of the license agreement, namely a license fee below the market price, DS would be in a position to offer its 'Delftship' software on the global ship-design software market at low fees. The complainants submit that the alleged State aid to DS has a substantial impact on that global market and negatively affects them.
- (23) According to the complainants, the software package was fully functional and thus ready for commercial use when the license agreement was concluded. Therefore, its value would have been considerable at the time of licensing. The fact that possibly a number of codes had to be rewritten after licensing would not be an indicator for a lack of maturity, since permanent revision would be usual practice. To support their arguments, the complainants cite trade-journal articles and DS's website which would show that the software was in a very advanced and working state at the time of the transfer. According to an article of May 2000,<sup>2</sup> the software was nearing completion and TUD would welcome its commercial use. According to an article of September 2005,<sup>3</sup> the development was ongoing and TUD was working on 13 design contracts. Quotations from DS's website (e.g. of February and December 2007) indicate that the enterprise was then working on an increasing number of reference projects. An article of May 2007 states that the programme was currently in use by both yacht and merchant-ship designers.<sup>4</sup>
- (24) The complainants further believe that providing updated versions to universities for free as well as free maintenance is usual practice and therefore does not constitute a significant value. The complainants however also concede that fees up to 10% could be charged to universities and that maintenance for a university is carried out by at least one firm for 20% of the usual price.
- (25) The complainants assert that TUD did not establish a market fee for the license, as it did not open the contract for competition by holding an auction or organising a public procurement procedure, or by having an independent valuation or benchmark drawn up. They add that it must be determined whether the sale price could have been obtained by the purchaser under normal market conditions, with regard, in particular, to the information available and foreseeable developments at the date concerned. They also argue that the market price should have been established on the basis of full costs.

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<sup>1</sup> For ease of reference, in this part reference is normally made in plural to "the complainants", even if a point was only explicitly made by SARC, on the assumption that MS implicitly supports the allegations concerned. If a point is not necessarily shared by MS, that is indicated by only referring to SARC.

<sup>2</sup> *'Delft Ship' van TU delft verbetert het ontwerpproces*, in: *Schip en Werf de Zee*, issue of May 2000.

<sup>3</sup> *'Schepen kleien op de computer'*, in: *Maritiem Nederland*, issue of September 2005.

<sup>4</sup> *'Developer takes rights for rebranded Delftship'*, in: *The Naval Architect*, issue of April 2007.

- (26) SARC asserts that it would have been interested in the license but had not been given the opportunity to bid, as TUD had not offered the software package on the market. SARC alleges that TUD contacted it only once at an early stage of the development, in 1997 or 1998, however only briefly, informally and non-committal.
- (27) SARC also informed the Commission that it had filed an action against TUD and DS before the competent Dutch Court, the *Rechtbank Haarlem*. With the action, SARC demanded that the license agreement be terminated immediately and that he be paid damages. The *Rechtbank Haarlem* dismissed the action by judgment of 1 July 2009.<sup>5</sup>
- (28) SARC submitted its own estimate as well as two expert reports on the presumed value and market price of a software package such as the one subject to the license agreement in question. According to these estimates, such value would be considerable and the license fee paid would be below the presumed market price.
- (29) SARC demands that the Commission adopts a decision that declares the license agreement in question as unlawful State aid within the meaning of Article 107 (1) TFEU and enjoins the Netherlands to recover the aid with interests.

## 5. MAIN ARGUMENTS BROUGHT FORWARD BY THE DUTCH AUTHORITIES

- (30) The Dutch authorities reject the assertion that State aid in the sense of Article 107 (1) of the TFEU had been granted to DS through the license agreement with TUD.
- (31) The Dutch authorities provided information on the development and purpose of the software, the license agreement and the licensing policy applied by Dutch universities. In particular, the Dutch authorities reject the complainants' assertion that the license fee is below the market price.
- (32) The Dutch authorities pointed out that full cost is not an adequate basis for calculation. Firstly, the Dutch authorities assert that only economic activities such as e.g. contract research on behalf of enterprises should be subject to full-cost based prices. In particular, they argue that the development took approximately 10 years, including the development of the version that is available free of charge and therefore would not constitute any advantage to DS. Secondly, the development would have been conducted inefficiently and therefore costly, as it took place in a teaching and R&D-environment without any economic considerations.
- (33) The Dutch authorities provided confidential internal guidelines in order to illustrate how TUD and other universities establish IP-remuneration. According to these documents, license fees for exclusive licenses for patents are in the range of 2-7%, depending on their use in the market. These guidelines do not provide for a mandatory range of percentage points or set out specific conditions that should apply to exclusive software licenses. The Dutch authorities provided further data, from which they inferred that the royalty percentage for IP-use is usually in the range of 2-8% of sales.<sup>6</sup>

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<sup>5</sup> It is noted that an Appeals Court confirmed that judgment.

<sup>6</sup> *Parr, Russell L. Royalty Rates for Technology*, 4<sup>th</sup> ed, Table 1: Royalty rate distribution across all industries. That report covers IP-related pricing such as technology royalty rates, license fees and milestone payments, i.a. as for computer software.

- (34) The Dutch authorities rejected the assertion that the software was fully functional and thus ready for commercial use when the license agreement was concluded. The Dutch authorities provided DS's turnover figures that were generated by the software: 2007: EUR [...] (first year; ship-design only; load-calculation software not yet developed); 2008: EUR [...] ; 2009: [...] \*EUR; 2010: [...] \*EUR. According to the Dutch authorities, the fact that corresponding turnover in 2007 amounted to only EUR [...] while it almost tripled in the subsequent years illustrates that DS was not in a position to market the software immediately after the license had been granted.
- (35) The Dutch authorities further argue that in order to render the software more stable and easier to maintain, its numerous inefficient codes had to be eliminated and many codes had to be rewritten. At the same time, the current version would comprise more functionalities than the version initially provided by TUD. The Dutch authorities explained that at the time of the transfer, the software had no robust user interface, was not adapted to inexperienced users, had no user instructions and rather had an experimental character. For that reason, the five-year licence duration had been agreed. TUD considered [...] as a long duration, compared to other software contracts.
- (36) According to the Dutch authorities, approximately 30% of the 'Delftship' code consisted of the 'FreeShip' open-source programme that is available free of charge to everybody.
- (37) When TUD learned that it could no longer develop the software, it believed that offering the software to other enterprises than DS would not make much sense, as it had not received any actual offers for the software, after an article in a trade journal pointed out that some enterprises had shown interest in the software and that TUD would very much appreciate its commercial use, in 2000.<sup>7</sup>
- (38) The Dutch authorities further declared that TUD had approached SARC at a later stage of the development namely in 2001, i.e. several years before the license agreement was concluded, and had seriously enquired about his interest in commercialising the software. Then, SARC would not have shown any interest because the software's method deviated from the method he uses in his own software, and declined the offer. The Dutch authorities asserted that, should SARC at that time have shown interest, a similar arrangement as the one in question would have been possible. Given SARC's response of 2001, TUD in 2006 considered as unrealistic that it might respond positively to any renewed offer. Therefore, TUD did not approach SARC again.
- (39) The Dutch authorities asserted that at the time of the licensing, TUD considered the engineer and founder of DS as the only person having the firm intention to continue the development of the software, and being competent enough to do that. At that point in time TUD was moreover convinced that other shipbuilding software companies lacked interest in continued development. Further, according to the Dutch authorities, TUD believed that licensing the software to a third party instead of the person who had developed the software would constitute a bad precedent for future researchers and Ph.D students, as their motivation to further develop knowledge that could be put to future commercial use could be negatively affected.

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<sup>7</sup> Article provided by the complainant; also referred to by the Dutch authorities: *Veltman, Jan, Van Horssen, Wim*; 'Delft Ship' van TU delft verbetert het ontwerpproces, in: *Schip en Werf de Zee*, issue of May 2000.

- (40) The Dutch authorities explained that TUD also believed that, due to technical characteristics of the software in question, enterprises that are already offering ship-design software should attribute little value to TUD's software. TUD believed that existing enterprises would rather consider additional methodology as an innovation, and to a much lesser extent additional functionality. In the light of similar experience with software-transfer in the ship-design area,<sup>8</sup> the Dutch authorities therefore consider the transfer of the license to DS as a logical step. According to the Dutch authorities, DS' existence is building on TUD's 'DelftShip' software and could be regarded as an extension of TUD's teaching, R&D and knowledge-dissemination activities. Therefore, although DS was founded on an individual employee's own initiative and without active knowledge management by TUD, the knowledge-transfer in question would comprise spin-off elements.

## 6. ASSESSMENT OF THE MEASURE

### 6.1. REGULATORY FRAMEWORK

- (41) The subject matter of the complaint is alleged State aid in the sense of Article 107(1) of the TFEU, through the conditions of a license agreement between a university (TUD) and an enterprise (DS). The object of the license is a software package that had been developed by TUD and transferred at a later stage to DS by way of the license agreement in question. Hence, the Commission had to examine whether the license agreement between TUD and DS contains State aid in the sense of Article 107 (1) of the TFEU.
- (42) Pursuant to Article 107 (1) of the TFEU, which sets forth objective criteria to define State aid, in order to qualify as state aid, a measure has to have a number of cumulative characteristics. One of them is the characteristic that the measure must **confer an advantage** on the undertaking(s) concerned. The Commission will start by examining this point in the light of the aforementioned article.
- (43) Before doing so, the Commission notes, however, that none of the additional guidance on the presence of State aid in situations typically arising in the field of Research, Development and Innovation, as provided by Chapter 3 of the Community Framework for State aid for Research and Development and Innovation<sup>9</sup> (hereinafter 'the Framework'), directly applies.<sup>10</sup> That is because
- the complainants do not allege that any subsidisation that TUD may have received for the development or licensing of the software at issue constitutes illegal and incompatible state aid, and therefore must be recovered (thus, para. 3.1 of the Framework is not directly relevant);

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<sup>8</sup> The Dutch authorities mentioned, firstly, the University of Southampton with its 'Ship Shape' software that is marketed by its Wolfson Unit, and secondly NAPA, which spun off from the Wärtsilä shipyard and offers ship-design software.

<sup>9</sup> OJ C 323, 30.12.2006, p. 1.

<sup>10</sup> Therefore, it does not need to be decided in this decision whether TUD qualifies as a "research organisation" in the sense of the guidelines (although the Commission considers it very likely that it should qualify as such).

- this is not a case of research on behalf of an undertaking as the license agreement in question was not subject to any contract research by TUD on behalf of DS (thus, para. 3.2.1 of the Framework is not directly relevant);
  - this is not a case of collaboration of undertakings and research organisations (thus, para. 3.2.2 of the Framework is not directly relevant).
- (44) Nevertheless, the Commission underlined the need to assess situations which would appear closest to the one in question, i.e. some types of licensing of knowledge created by the research organisation (see point 3.1.1 last sentence of the Framework), on a case-by-case basis.<sup>11</sup> The Commission will do so, for this case, below.

## 6.2. EXISTENCE OF STATE AID

- (45) The Commission carefully examined all elements of the file, with a view to finding whether the complainants have provided sufficient evidence to lead the Commission to have reasonable doubts as to whether DS may have received an advantage in the sense of Article 107(1) of the TFEU through the agreement. The Commission concludes that the complainants have not provided sufficient evidence to lead it to have such doubts. In this context, it notes the following.

### 6.2.1. *The negotiations between TUD and DS, and some related points on the method used and final content of the agreement*

- (46) Firstly, according to information provided by the Dutch authorities, the licence agreement was prepared and concluded in several steps:
- When in mid June 2006 the employee who had a leading role in developing the software package announced that he intended to give notice, TUD commenced negotiations on a software license with that employee and the professor who supervised him. In a first meeting, in July 2006, both parties negotiated the possibilities of further developing and commercialising the ship-design software in question, as well as the main items of a license agreement, namely compensation in terms of a percentage of turnover and the agreement's maximum duration.
  - Under discussion were:
    - [...]\*;
    - [...]\*;
    - [...]\*.
  - The results of that first meeting were noted and discussed with a third person, the Head of Department of Transport and Marine Technology, Prof. Lodewijks.

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<sup>11</sup> See footnote 26 of the Framework. The footnote is not directly applicable, since it concerns technology transfer of a potential economic character "receiving" State funding. It is not alleged that TUD is a recipient of State aid.



- One week after, an oral agreement of principle was reached in a second meeting, on the basis of the items previously discussed.
  - On the basis of that agreement of principle, the employee gave notice with effect of 1 November 2006. On 31 October, TUD froze the software's source code.
  - Negotiations on the definite license agreement continued, as TUD sought to withdraw the cap either on the duration of, or the fee for, the licence. A settlement was reached on 22 January 2007, when the license agreement was concluded. Eventually, DS agreed to withdraw the EUR [...] \* cap initially discussed.
- (47) Above described negotiations were conducted on behalf of TUD by Prof. Waas who headed both TUD's competent faculty '3mE' and the 'Knowledge-Exploitation ('Valorisatie') and Spin-off creation Department. As Dean of faculty, Prof. Waas had authority over Prof. Aalbers, who is the co-founder of DS and supervised the engineer who took leave. Hence, the professor who co-founded DS and who had supervised the engineer who was about to leave TUD, did not negotiate on TUD's behalf.
- (48) The Commission has no reason to doubt the veracity of the above-mentioned description of the negotiations. This description shows that TUD aimed to improve its position in the contract – in particular by removing the cap - and that it achieved this.<sup>12</sup>
- (49) Secondly, according to the information provided by the Dutch authorities, TUD considered a number of factors when negotiating the licence fee with DS. The most important of these factors will be mentioned and commented upon below
- The engineer who had developed the software for approx. 10 years had the best skills for further developing and upgrading it for the teaching and research purposes of TUD;
  - without the necessary human resources, TUD is no longer able to continue the development activity;
  - TUD needs upgraded versions of the software package for teaching and R&D-activities.

On these three points, there is no reason for the Commission to doubt that the engineer concerned was one of the most qualified persons, if not the most qualified person at all, to further develop and upgrade the software in the manner best suited for TUD's purposes. Moreover, the Commission notes that SARC has not mentioned any specific companies that would i) have been interested in obtaining the software license or ii) have one or more employees with the same qualifications. In this context, the Commission also notes that SARC alleges that TUD could have offered the software to companies that do not have nor market such software yet, but which are in the maritime sector, close to the ship-design

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<sup>12</sup> Although footnote 29 of the Framework is not directly applicable since the present case does not refer to collaboration of undertakings and research organisations, the Commission notices that TUD as seller thus seems to have negotiated in order to obtain the maximum benefit at the moment when the contract was concluded, which can in principle be considered as an indication that it receives compensation equivalent to the market price.

market, and therefore would be interested in adding it to their range of products.<sup>13</sup> However, it would appear unlikely that such companies would have personnel with the same competencies as the engineer concerned.

- The software package was not ready for immediate commercialisation given the lack of user-friendliness, of a robust user-interface and of user instructions.

On this point, the Commission notes the following. On the one hand, the fact that DS immediately generated [between [...]]\*€ turnover with the software in 2007 indicates that the software could be commercialised relatively shortly after the granting of the license. On the other hand, the turnover became substantially higher in later years, which could indicate that in the first phase, marketability was problematic. In any case, even if, as SARC argues, the software was ready for immediate commercialisation, that would have only increased the expected return for TUD under the agreement, (since that was a function of turnover, without any cap), and would support the conclusion that TUD made a rational business decision by entering into the agreement.

- The market would show little interest, given the lack of concrete offers after the publication of abovementioned trade-journal article of May 2000, according to which the software was nearing completion and TUD would welcome its commercial use; this was considered as indication that enterprises would rather be interested in additional methods than in additional functionality;
- Potential buyers other than DS would rather have an interest in ending the development of Delftship and in keeping the software out of the market.

On these two points it must be noted, on the one hand, that TUD did not, around the time that it negotiated with DS, specifically contact any other company with a view to exploring whether it would be interested in the software. On the other hand, as explained above, none of the complainants has mentioned any specific company that is likely to have been interested in the software, and which also would have had the capacity for its further development that TUD desired. It is indeed likely that those companies that already possessed similar software would have had no interest in marketing and further developing the software at issue. Implicitly, SARC appears to accept this when it argues that TUD should have contacted companies that did not possess similar software yet. However, as explained above, it seems unlikely that any such company could have further developed the software in line with TUD's needs.

- (50) Thirdly, regarding the various allegations which have been put forward regarding allegedly "normal" license fees in the IP-sector, the Commission notes the following. The Dutch authorities argue that the [...]">% of turnover is in line with the percentages that TUD had used in the same period years for patent-licenses to start-up companies (In fact, of the five such licenses which are mentioned, only one was also at a [...]">% rate; all four others were at a lower rate). Again, the Commission has no reasons to doubt the veracity of this statement. At the very least this indicates that TUD has not applied a much lower rate for the license to DS than it has done in other cases. Regarding the study on the matter of license fees charged by universities mentioned in

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<sup>13</sup> SARC's letter of 15 June 2009, p. 3, third bullet point.

the third expert report, it can be noted that this study was done in another period (2003) and does not include Dutch universities but only UK and US universities. That third expert report also in no way explains why the technology transferred by those licenses would be of a similar value to the technology at issue in this case.

- (51) The Dutch authorities moreover informed the Commission that they could not obtain further relevant data about usual market fees for comparable licenses, since the enterprises concerned did not disclose such data and attribute great importance to treating their contracts confidentially.

*6.2.2. Estimates and reports on the presumed value and market price of the software package in question*

- (52) SARC submitted three different estimates of the software's value. In some of them, it also estimated the amount of alleged State aid to DS. These three estimates will first be briefly described, and then discussed.
- (53) Firstly, SARC submitted its own estimate of the value of the 'Delftship' software, based on historic full costs based on its own experience: personnel costs (1 engineer; 1 professor) and overhead (a 50%-margin on top of personnel costs that, according to the complainant, is customary for Dutch aid schemes), incurred over an estimated 10-year development phase. Accordingly, the total cost incurred was estimated to be EUR 743,000. Consequently, according to SARC, the value of the software must be at least that amount. Based on an estimated turnover of DS, being 50% of the turnover that SARC shows with its ship-design software, the complainant estimates that license fees due (being [...] % of the [...] pursuant to the license agreement) would amount to EUR [...]. According to this estimate, State aid to DS would amount to at least EUR 711,125, being the difference between the presumed value of EUR 743,000 and presumed fees due of EUR [...].
- (54) As regards the value of licensing software from DS back to TUD and the provision of free maintenance services, the complainant asserts that he had provided software for free to a research organisation in the nineties, against compensation in kind of a few percent of the commercial value. He further asserts that usually, fees in the range between 0-10% would be charged, but that one enterprise had e.g. provided software to a research organisation for free and provided maintenance at 20% of the usual price.
- (55) Secondly, the complainant later submitted an expert report, established by a corporate-finance consultancy, on the presumed market price of the software package and allegedly resulting State aid to DS. That report is based on SARC's turnover and profits in the period concerned, namely between 2007 (when DS entered the market and 2009 (when the report was written). According to that report, the value of both SARC and DS would be equal to the value of the software they offer on the market, as this would be both enterprises' exclusive activity.
- (56) That report did not take development costs into consideration. Rather, its estimate was based on assumptions of how a prudent investor would act in comparable cases. For the purposes of that report, an acceptable return on investment would be in the range

of 15-20%, according to risk, for SMEs in the ICT-domain. The report finds that SARC was an established player on the market while DS strived to acquire a share of the market. A comparison of prices shows that prices asked by DS are far lower than those asked by SARC and two other competitors for allegedly comparable software. The prices charged by one of these competitors are however still significantly lower than SARC's (50% lower for ship-design and 40% lower for load calculation); prices charged by the second one are comparable (2% lower for ship-design, and marginally higher – 1% for load-calculation). According to the report, DS charges fees for using its software that are only a fraction of those charged by SARC (150 EUR for ship-design instead of SARC's [...] \*EUR, and 3,950 EUR for load calculation instead of SARC's [...] \*EUR).

- (57) The report finds that DS is dumping its products and assumes that prices charged by DS would not result in a profitable business if DS would have incurred usual development costs or would have bought the software at a market price. The value of the software would be its potential to generate cash flow, which would be significantly higher than the cash-flow generated by the prices actually asked by DS. On that base, the report estimates the value of DS' software to be in the range of EUR 1.7 million and 2.2 million, taking into account the different market positions and values of DS and SARC.
- (58) Finally, the complainant submitted a third expert report, established by a consultancy that is specialised in intellectual-property issues. That report aims at determining, firstly, the typical market value of the software in question and secondly typical licensing arrangements between universities and industry and related royalties.
- (59) That third report is based on the estimated number of software copies sold annually, the average price and other sources of revenue, such as maintenance, upgrades and support. For the purposes of the report, the consultancy estimated the number of ship-and loading design copies worldwide, the average weighted prices charged for using them and the total annual revenue of the ship-design and loading software industry. On that basis, the report allegedly estimates the revenue DS could generate by diligent execution.
- (60) According to the report's assumptions, DS could generate revenues of up to EUR 31.6 million over 10 years. The report also assumes that very few types of software exist as such for a long duration and that accretive value in 'out-years' beyond 10 years would usually be minimal. From that base, the report calculates a net present value of the software over 10 years, discounted for risk with 30%, in the range of EUR 2.2 million to 5 million.
- (61) As regards, license fees (royalties), the report examines publicly available information on royalties charged by universities or technology-transfer offices, for most recent "bleeding-edge" technology or "more standard technology". According to the report, the software in question belongs to the latter category. On that basis, the report establishes an average royalty of 55% for patents and copyrighted software alike.
- (62) As regards the provision of free updated versions and maintenance of the software by DS to TUD, the report finds that software is usually heavily discounted or given away for free to academic institutions. Hence, the monetary value of such licenses back to

universities would be negligible. The report cites one example in the ship-design sector, however for less sophisticated software for the design of smaller ships.

- (63) As a result, the report concludes that TUD had foregone license revenues in the range of EUR 1.1 million to 2.5 million over 10 years, given a 55%-royalty instead of the [...]%-rate as stipulated by the license agreement in question.
- (64) The Commission considers that none of the reports can be accepted as showing that TUD granted an advantage to DS by concluding the agreement at issue.
- (65) Firstly, as a general point with regard to all estimates, it must be underlined that each estimate concludes with a very different value of the software (and therefore of the amount of aid allegedly granted to DS);
- the first estimate results in a value of at least 743.000 € and an aid amount of at least 711.125 €
  - the second estimate results in a value of between €1,7 million and €2,2 million (without, however, estimating the amount of state aid granted);
  - the third estimate results in a value of between €2,2 million and €5.0 million, and an alleged amount of state aid granted between 1.1 and 2.5 million €
- (66) The internal inconsistency amongst these three estimates is clear evidence that none of them can be taken as solid proof that an advantage was granted to DS. This is all the more so since the second and third estimate allege to rely on the same valuation method, namely the NPV of revenue that allegedly could be generated with the software, but nevertheless result in totally different ranges of value.
- (67) Regarding the first estimate, the Commission notes that SARC based its estimate on full costs. However, firstly, it is clear that, as the Dutch authorities rightly argue, the software was developed in an educational setting without having as a first priority that the amount involved to develop it should be equivalent to (or preferably even lower than) its later market value. Moreover, even in a fully commercial setting, the amount spent on developing a certain asset does not necessarily coincide with its market value later on. Finally, even though SARC itself concedes that licensing software to educational institutions may involve fees of up to 10% of the software's commercial value, in this estimate of the alleged state aid at issue, no value is attached to the fact that TUD can continue to use the software, plus upgrades, for free.
- (68) With regard to the second and third estimate, it can be noted that both take as a basis very optimistic expectations as to the amount of turnover and profit that may be generated with the software. However, the reliability of these very optimistic expectations is doubtful. In particular, SARC has always emphasised that i) dozens of companies in the world furnish similar software and ii) the Delftship-software was, therefore, in no way new or unique, but rather standard software which was already available in the market from many suppliers. In particular, in the third estimate, a list of 12 major suppliers is given, which does not appear to include MS, and regarding which it is moreover added that there may be more minor suppliers. Moreover, in that report, it is stated that in the Netherlands, SARC has a market share of [...]-%.

- (69) In no way do the second and third estimate explain why, in spite of this apparently saturated market with strong positions by incumbent competitors, it is so likely that Delftship will, within a matter of years, generate substantial profits.
- (70) Regarding the 2<sup>nd</sup> estimate, it can be noted that the rate of return chosen is one which, according to the report, is one for investment in SMEs in the sector concerned "with a proven track-record." However, DS did not have any track-record when the agreement was concluded. Moreover, it applies, for market access difficulty, an adjustment of 2.5%. However, no explanation for choosing this percentage is given, which is unsatisfactory in particular in light of the very strong market position in the Netherlands of SARC. (The Commission infers from the report that SARC is a well-established market player, and that its turnover has increased considerably in the first quarter 2007, when DS entered the market, and until approx. the second quarter of 2008 inclusive. Its profits have also increased considerably in the first two quarters of 2007 and from then on remained stable with very little growth until the second quarter of 2008 inclusive. Only in the third quarter of 2008 until the second quarter of 2009 inclusive (end of period covered), both turnover and profits are pointing downwards and decrease to approx. the level of early 2007).<sup>14</sup>
- (71) With respect to the 2<sup>nd</sup> estimate, the Commission furthermore notes that, firstly, also DS's and SARC's load-calculation software are taken into account. However, load-calculation software did not exist when the license agreement was concluded but has only afterwards been developed by DS on its own, on the basis of the same core-programme as the Delftship ship-design software that had been licensed. In other words, this is not an element that TUD could have taken into account when negotiating the agreement.
- (72) Also, the 2<sup>nd</sup> estimate gives no indication as to what, assuming all its assumptions were correct, the license fee should have amounted to. In fact, it does not clearly explain which turnover would be required to make the average 385.000 €profit which it is based on. Therefore, it also does not explain which proceeds TUD would receive under the estimate's assumptions ([...]\*).
- (73) Concerning the fact that the 2<sup>nd</sup> estimate alleges that since DS would sell at "dumping" prices, it must necessarily have received the software at less-than-market value, the Commission notes the following. Assuming that Appendix A to the third estimate is correct, it shows that various vendors charged extremely different prices, some apparently quite low. In other words, the fact that DS may charge relatively low prices does not constitute evidence that it obtained the software at a below-market price, since other companies appear to charge low prices as well. Moreover, the coherence between the 2<sup>nd</sup> and 3<sup>rd</sup> estimate is hard to establish. In particular, in the 2<sup>nd</sup> estimate certain prices are mentioned as used by Maxsurf and Autoship. However, in the 3<sup>rd</sup> estimate, quite different prices are mentioned.
- (74) The Commission would like to make one final point regarding the 2<sup>nd</sup> estimate. That is that the value of licensing software back from DS to TUD, and of maintenance services provided by DS, is not considered. In that context, it can be added that the fact that the engineer is no longer on the University payroll also constitutes an advantage

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<sup>14</sup> Figures shown in the report cover approx. 3<sup>rd</sup> quarter 1999 until 3<sup>rd</sup> quarter 2009.

for TUD; it gets the (improved) software back for its use, but no longer has monthly salary costs for further developing and maintaining it.

- (75) With respect to the third estimate, the Commission notes the following: also this report takes into account ship-loading software, which however had only been developed by DS on its own after licensing, on the basis of the same core-programme as Delftship. Like the second estimate, it therefore takes into account a factor that TUD could not have known, or at least could not be sure about, at the time of negotiating the agreement. Furthermore, also this report is based on extremely optimistic assumptions of the income that DS could have generated with a market share comparable to those of its 8 closest competitors, under the assumption of what the consultancy defined as diligent behaviour. However, as explained above, SARC's own earlier allegations about the number of competitors offering similar software on the market and the alleged lack of novelty of the Delftship software raise doubts as to the probability of these assumptions. (The Commission recalls that according to the report, the complainant SARC is one of the 8 major ship-design software vendors in the high-end market and its customer base is significantly larger than that of DS. SARC's market share in the Netherlands would be about [...]\*)
- (76) Finally, like the 2<sup>nd</sup> estimate, although the report asserts that revenues of about 10 million € could be generated in year 5 and about 33 million € in year 10, it does not take into account that in that scenario, with a [...]\*) share of that turnover for TUD, TUD would receive substantial proceeds (moving up progressively to about [...]\*) in year 5 and further to about [...]\*) in year 10). It thus does not explain why the NPV of the proceeds which TUD would receive under the report's assumptions would be less than the estimate it makes of the NPV of the software (between €2.2 and €5 million).

### 6.2.3. Conclusion on the existence of State aid

- (77) The Commission therefore finds that there is no evidence that TUD provided an advantage to DS in the sense of Article 107(1) of the TFEU by concluding the agreement.

## 7. DECISION

- (78) Based on above considerations, the Commission concludes that the conditions of the license agreement in question do not constitute State aid and therefore do not fall within Article 107 (1) of the TFEU.

If this letter contains confidential information, which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

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Yours faithfully,

For the Commission

*Joaquín ALMUNIA*

Vice-President of the Commission