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Subject: State aid SA.24123 (2012/C) (ex 2011/NN) – the Netherlands
Alleged sale of land below market price by the municipality of
Leidschendam

Sir, /Madam

The Commission wishes to inform the Netherlands that, having examined the information supplied by your authorities on the aid measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU").

1. PROCEDURE

- (1) By letter of 10 September 2007, registered on 19 September 2007, the Commission received a complaint concerning alleged grant of State aid in the context of a real estate project initiated by the municipality of Leidschendam (the Netherlands) in co-operation with a number of private parties.
- (2) Requests for information were sent to the Dutch authorities on 12 October 2007, 25 April 2008, 12 September 2008, 14 Augustus 2009, 12 February 2010 and 2 August 2011. The Netherlands replied on 7 December 2007, 30 May 2008, 7 November 2008, 30 October 2009, 12 April 2010, 29 September 2011 and 3 October 2011 respectively.

2. DESCRIPTION

2.1. The parties involved

- (3) The municipality of Leidschendam is located next to the Hague, the Netherlands ("the municipality").
- (4) Schouten-de Jong Bouwfonds (hereinafter "SJB") is a partnership set up by Schouten & De Jong projectontwikkeling BV and Bouwfonds ontwikkeling BV, both Dutch companies active in real estate project development.
- (5) A public private partnership ("PPP") was set up by the municipality of Leidschendam and SJB on a 50/50 base, each party will bear 50% of the costs and profit, decisions are taken by unanimity.

2.2. The measures

- (6) This decision concerns one transaction concluded in the framework of a real estate project. In 2004 the PPP sold land for construction to SJB for EUR 7.2 million (value 01.01.2004, this amount will be yearly adjusted until payment). At the same time it was agreed that SJB would pay a ground exploitation contribution fee of around EUR 1.1 million and a quality fee of around EUR 0.9 million to the PPP. In March 2009 the Leidschendam city council agreed that the PPP could lower the initially agreed sales price to EUR 4 million (value 01.01.2010). The PPP also agreed to waive the contribution and quality fee to be paid by SJB.
- (7) The real estate project covers the building of around 600 new houses, around 3000 square metre of shopping surface, a two layer underground parking and a primary school in Leidschendam. The whole public area and utilities will be renewed (sewers, cables, paving etc).
- (8) In order to develop this project the municipality of Leidschendam decided to work together with SJB as well as with three other private parties. The municipality signed to that end on 9 September 2004 a co-operation agreement with SJB and the three other parties.
- (9) The whole project is divided in two distinct phases, first the ground exploitation phase (i.e. the necessary infrastructure works to make the land ready for construction) and secondly the construction phase (i.e. construction of flats, houses, shopping area). For the ground exploitation the municipality set up the PPP. To this end, on 22 November 2004 both parties signed a ground exploitation/PPP agreement. The construction phase of the project will be realised by SJB and the three other private parties.
- (10) The project comprises various land sale transactions. First, the municipality will acquire all the land in the development zone. Second,

the municipality will sell the land to the PPP which will realise the ground exploitation phase. Third, once ready for construction, the PPP will sell the land to SJB (partner in the PPP) and the other private parties involved. The part of the land intended for public use will be returned to the municipality.

- (11) The project was delayed due to various national court proceedings initiated by the complainant.¹ In 2008/2009 the Dutch real estate market was affected by the financial crisis. As a result SJB was not able to pre-sell 70% of the projected houses as was required to obtain the necessary financing for the construction phase. In this context SJB requested the municipality to agree, by way of compensation, to a price decrease for the land sold by the PPP to SJB. According to the Dutch authorities the municipality feared further delays and considered it of general interest that the construction phase started as soon as possible. Therefore the municipality in its council meeting of March 2009 agreed that the PPP could lower the price agreed in 2004, for parts of the land to be bought by SJB from the PPP. The price decrease was formalised in an agreement concluded on 1 March 2010 between the municipality, the PPP and SJB. The price was decreased from EUR 8.6 million (value 01.01.10) to EUR 4 million (value 01.01.10), i.e. a retroactive decrease of EUR 4.6 million. The agreement also stipulated that previously agreed ground exploitation contribution fee and quality fee of around EUR 1.1 million and EUR 0.9 million respectively were no longer due.

3. ARGUMENTS PUT FORWARD BY THE NETHERLANDS

- (12) The Dutch authorities contest that the project involves State aid and explained that the total value of the land ready for construction was estimated by the independent expert in March 2003. In view of the financial and economic crisis that occurred after the original sales agreement, the land sold by the PPP to SJB was re-evaluated by another independent expert in February 2009, who confirmed that EUR 4 million was a market conform price, on the basis of the residual value method. According to the Dutch authorities the adjustment of the price that was agreed subsequent to the 2009 re-evaluation does not constitute State aid as, in line with the Land sale Communication, an independent expert's evaluation has stated that the re-evaluated value is a market conform price.

4. PRELIMINARY ASSESSMENT

- (13) The Commission has *prima facie* grounds to believe that the retroactive price adjustment of 2009, described above, involves State aid within the meaning of Article 107(1) TFEU and doubts that this aid is compatible with the internal market according to Article 107 TFEU.

¹ The last judgment was issued on 14 July 2010 and rendered the decision of the municipality to start the project irrevocable.

4.1. Existence of State aid

- (14) Article 107(1) TFEU 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 internal market”*.
- (15) In order not to grant any State aid public authorities should, in line with the Market Economy Investor Test ("MEIT"), behave in the same way as private market investors would do in similar circumstances.
- (16) Potential State aid in land sale transactions should more specifically be assessed on the basis of the Commission Communication on State aid elements in sales of land and buildings to public authorities² (the Land sale Communication). The Land sale Communication describes two procedures which could be used to exclude State aid, i.e. by accepting either 1) the highest bid following an unconditional bidding procedure or 2) the price set by an independent asset evaluator prior to the sale negotiations. If one of these procedures is followed the transaction is considered to have taken place at market value. Member States are not obliged to follow one of the two procedures set out in the Land sale Communication.
- (17) In casu no unconditional bidding procedure was organised but in March 2003 an expert evaluation was made which was used to establish the sales prices agreed in the 2004 co-operation agreement. However the price agreed in 2004 was subsequently decreased in 2009. Therefore the Commission should assess whether a private vendor would have agreed to the same price reduction³.
- (18) First of all, SJB the potential beneficiary of the alleged State aid as well as the members of the partnership qualify as undertakings since they pursue economic activities offering goods and services on the market.
- (19) Second, the retroactive price decrease and waived fees are concluded by the PPP which means with the necessary agreement of the municipality which holds a 50% stake in the PPP. Therefore 50% of the price decrease and waived fees imply a corresponding loss of State resources. Had the municipality not agreed to the price decrease and waived fees the value of its stake in the PPP would have been proportionally greater. Furthermore, the decision to grant these price decrease and waived fees are imputable to the State as they were taken by the City council (the only other partner of the PPP being SJB, the potential beneficiary).

² OJ C 209, 10.7.1997, p. 3-5.

³ Decision T-366/00 Scott point 38 supra point 68; decision C-239/09 Seydaland Vereinigte Agrarbetriebe point 34; decision T-244/08 Konsum Nord point 61.

- (20) Third, since the contested transaction benefited only SJB this transaction has to be considered as a selective measure.
- (21) Finally, the Commission has to ascertain whether the transaction confers an advantage to the beneficiary and is capable of distorting competition and trade.
- (22) The sales prices of the sales of land by the PPP to the private parties, as laid down in the 2004 co-operation agreement, are based on an ex ante evaluation by an independent expert and can therefore be considered as market prices in line with the Land sale Communication.
- (23) It should be recalled that the municipality was only involved in the ground exploitation phase and not in the construction phase. By retroactively decreasing the sales price of the land the PPP and therefore partly the municipality, decided to carry the risk of a decreasing housing market. This is contrary to the Dutch authorities own statements that the construction phase of the project was to be entirely at the risk and account of the private project developers (SJB and the other three private developers). This retroactive reduction of an agreed sales price does not seem in line with the MEIT. There is no reason to believe that a private seller would retroactively lower an agreed sales price of a plot of land because the buyer has problems selling the house which he planned to build on it (and the seller has no financial involvement in this phase of the development project).
- (24) The Dutch authorities consider that the decrease would not include State aid elements since the decreased price is based on a new expert evaluation, made by another independent expert in 2009. However the Commission has serious difficulties to accept this argument. First the sale agreement of the land was concluded in 2004 and the value of the land should be - and has been - determined before that date as it would do any private seller. Second, the method used in the ex post expert report of 2009 (i.e. the residual value method) seems questionable in the given circumstances since the expected decreased revenues from the sales of houses would be entirely absorbed by the price of the land.⁴ Therefore it is difficult to see how the ex post evaluation could set aside the ex ante evaluation.
- (25) Furthermore, it is noted that apart from SJB, also the other private parties concerned asked the municipality to decrease the agreed sales prices for the land because of difficulties they faced on the real estate market. However, the municipality, rather than deciding to retroactively decrease the agreed prices for the other parties as well, is apparently considering amendments in the initial planning and development provisions to adapt to the changed demand on the market.

⁴ To calculate the value of land the residual value method starts from the sales prices of the houses, from this price the building costs and profit and risk provision are deducted what is left over is the value of the land. It is clear that in a decreasing housing market this method shifts the decrease in real estate entirely to the value of the land.

This shows that the local authorities can use measures that may not entail State aid, should they wish to take account of the change in the economic circumstances.

- (26) Finally, the measure frees SJB of a cost that it would have borne otherwise, as it agreed to it in the context of a freely concluded commercial transaction. Therefore, it reinforces its competitive position vis-à-vis that of other estate developers and consequently is capable of affecting competition. Since there is cross-border trade within the EU in both the construction sector and in property development, the aid is capable of having an effect on trade.
- (27) Concerning the ground exploitation phase, the municipality can ask private parties to contribute to the costs of infrastructure works⁵. To this end the 2004 co-operation agreement stipulates that the private parties will pay to the PPP a ground exploitation fee and a quality fee on top of the land price. The municipality agreed to use high quality products to develop the public area therefore the private parties are requested to contribute in these extra costs via a quality fee. According to the 2004 co-operation agreement SJB should have paid a total ground exploitation fee of around EUR 1.1 million and a total quality fee of around EUR 0.9 million. After re-negotiation the PPP decided to waive these fees. Also these retroactive waivers do not seem to be in line with the MEIT as no private investor would retro-actively waive an agreed contribution to its costs without any consideration in return. These waivers involve a loss of resources that the municipality would have otherwise received and therefore they are granted through State resources. For the same reasons indicated above in paragraph 26, they are capable of affecting competition and trade.
- (28) In view of the foregoing considerations the Commission, after a preliminary assessment, considers prima facie that State aid in the sense of Article 107(1) TFEU was conferred to SJB as a result of the retroactive decrease of the sales price of the land, the ground exploitation fee and the quality fee.

4.2. Compatibility of potential State aid

- (29) The Dutch authorities have not provided any reasons why the State aid would be compatible under Article 107 TFEU and the Commission can at this stage not see any manifest grounds for compatibility.
- (30) Therefore, at this stage the Commission has no information that would allow it to conclude that the possible aid would meet the compatibility criteria laid down in Article 107 TFEU. The Commission therefore raises doubts as to the compatibility of the possible aid with the internal market.

⁵ See "Exploitatieverordening gemeente Leidschendam-Voorburg 2003".

5. DECISION

- (31) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests the Netherlands to submit its comments and to provide all such information as may help to assess the measure and in particular the compatibility with the internal market, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.
- (32) The Commission wishes to remind the Netherlands that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.
- (33) The Commission warns the Netherlands that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, 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 publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
B-1049 Brussels
Fax (32-2) 296 12 42

Yours faithfully,
For the Commission

Joaquin Almunia
Vice-President of the Commission