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**Subject: State aid SA.34646 (2014/NN) (ex 2012/CP) – The Netherlands
E-procurement platform TenderNed**

Dear Sir,

1. PROCEDURE

- (1) By letter dated 6 April 2012, the Commission received a complaint concerning alleged aid granted by the Dutch authorities for the creation and introduction of the electronic procurement ("e-procurement") platform TenderNed. The complaint was submitted on behalf of Stichting Crow, Negometrix BV, CTM Solution BV and Stillpoint Applications BV (ProjectNed), hereinafter referred to together as "the complainants". The complainants provide competing e-procurement platforms in The Netherlands.
- (2) The complaint was forwarded to the Dutch authorities, who submitted their comments on 27 June 2012.
- (3) The complainants submitted further information on 30 August 2012, 18 October 2012, 17 December 2012, 12 March 2013, 11 September 2013, 14 November 2013 and 6 June 2014.

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- (4) The Dutch authorities provided additional information on 31 August 2012, 4 October 2012, 21 November 2012, 8 October 2014, 24 November 2014 and 4 December 2014.
- (5) On 14 January 2013, the Commission services wrote to the complainants, expressing a preliminary view that the measure did not involve State aid. On 23 July 2013, the Commission services sent another preliminary assessment letter to the complainants, in which they also arrived at the provisional conclusion that, *a priori*, the measure did not constitute aid.
- (6) On 4 November 2014, the complainants sent the Commission a formal request to act, referring to Article 265 of the Treaty on the Functioning of the European Union ("TFEU"), asking the Commission to adopt a formal position on the measure within two months.

2. DESCRIPTION OF THE CONTESTED MEASURE

2.1. Background to the measure

- (7) Purchases made by a State or other public authorities are known as public procurement¹. The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by law ("contracting authorities") is subject to the respect of the principles of the Union Treaties and in particular to the fundamental freedoms and the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency².
- (8) For public contracts³ above a certain threshold⁴, contracting authorities⁵ must adhere to the provisions of the procurement directives on public works, public supply and public services contracts (Directive 2004/18/EC, succeeded by Directive 2014/24/EU), while procurement contracts⁶ concluded by contracting entities⁷

¹ Article 1 of Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65) defines procurement as "the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose."

² See e.g. recital 2 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114) and recital 1 of Directive 2014/24/EU.

³ "Public contracts" are defined in Article 1 of Directive 2004/18/EC (Article 2 in Directive 2014/24/EU) as "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive".

⁴ The current thresholds are published on the Commission website http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm.

⁵ Defined in Article 1 of Directive 2004/18/EC as "the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law". This definition is confirmed in Directive 2014/24/EU.

⁶ In this regard, Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1) defines (in Article 1) "supply, works and service contracts" as "contracts for pecuniary interest concluded in writing between one or more of the contracting entities (...) and one or more contractors, suppliers, or service providers." Directive 2014/25/EU of the European Parliament and of the Council on

operating in the water, energy, transport and postal services sectors ("special sector entities") are subject to the rules of a specific procurement directive (Directive 2004/17/EC, succeeded by Directive 2014/25/EU).

- (9) E-procurement refers to the replacement of traditional paper-based procurement procedures with ICT-based communications and processing throughout the procurement chain. In broad terms, it is understood to involve the introduction of electronic processes to support the different phases of a procurement process: the publication of tender notices, the provision of tender documents, the submission of tenders, the evaluation of tenders, the award of contracts, and ordering, invoicing and payment.⁸
- (10) The 2004 Procurement Directives encouraged contracting authorities to publish notices and additional information on the internet. More generally, the directives created the possibility for e-procurement by contracting authorities and special sector entities. A market for e-procurement platforms thus gradually took shape within the Union, with commercial offers developed in The Netherlands by eight companies. These include the offers developed by the complainants. The four complainants have set up e-procurement platforms that offer different functionalities, including the publication of notices, tendering documents, but also the submission of tenders and other more advanced functionalities (such as e-auctions, contract management, etc.). While the complainants offer some options for free (in particular to potential suppliers), various payment models are available to contracting authorities/entities and sometimes also economic operators⁹. At least some of the commercial offers also provide the possibility to publish procurement notices on the EU online version of the "Supplement to the Official Journal of the European Union", dedicated to European public procurement TED¹⁰ (Tenders Electronic Daily).
- (11) On 26 February 2014, the 2014 Procurement Directives were adopted. The rules were reformed, firstly, to make them simpler and more flexible, and secondly, to provide the best value for money for public purchases, while respecting the principles of transparency and competition, but the scope of those directives remain the same as the 2004 Procurement Directives. E-procurement remains one of the ways in which the 2014 Procurement Directives aim to improve public procurement.

procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243) uses a definition that mirrors the one of public contracts (see footnote 3).

⁷ The Directive 2004/17/EC applies (Article 2) to contracting entities which are contracting authorities or public undertakings and which pursue one of the activities referred to in Arts.3-7 of the Directive. It also applies to those entities that have as one of their activities one of the activities referred to (or any combination thereof) and which operate on the basis of special or exclusive rights granted by a competent authority of a Member State. A similar definition is used in Directive 2014/25/EU.

⁸ European Commission Green paper on expanding the use of e-Procurement in the EU (COM (2010) 571 final), Brussels, 18.10.2010, p. 3.

⁹ E.g. Aanbestedingskalender (owned and administered by Stichting CROW) offers access to economic operators to all procurements published on the platform for free, but charges a fee for additional search functionalities.

¹⁰ <http://ted.europa.eu/TED/main/HomePage.do>.

- (12) The Union Procurement Directives set out the minimum requirements that must be followed by each Member State in their national procurement legislation. National public procurement law may lay down requirements that go beyond harmonised Union procurement law provided this does not entail an infringement of the provisions of the Directives or Treaty provisions.
- (13) On 1 November 2012, the Dutch government adopted its new national law on public procurement by contracting authorities and special sector entities ("Aanbestedingswet"¹¹), which entered into force on 1 April 2013. According to the Dutch authorities, although Dutch procurement practice had made important progress over the years, distinct improvements were considered necessary to open up access to procurement for the business community, with particular attention paid to small and medium-sized enterprises. Various impediments to compliance with the procurement rules by contracting authorities and to access of companies to tendering procedures were identified, including a non-optimal implementation of the 2004 Procurement Directives. The adoption of the new national procurement law in 2012 aimed to remedy those impediments and ran in parallel with Union-level policy evolutions that ultimately resulted in the adoption of the 2014 Procurement Directives.¹²
- (14) The Dutch procurement law applies to any type of written procurement contract under pecuniary interest for the execution of works, the supply of products or the provision of services¹³. The scope of the Dutch procurement law is broader than that of the Union Procurement Directives. It includes provisions for a) contracts within the scope of the Union Procurement Directives, b) contracts partially covered by those Directives; c) contracts not covered by the Directives but with a clear cross-border interest and d) contracts not covered by the Directives without a cross-border interest (Contracts a), b) and c) are collectively referred to as "European procurements").
- (15) Article 4.13 of the law provides that the Minister of Economic Affairs, Agriculture and Innovation is responsible for setting up, maintaining, operating and securing an electronic system for public procurement, in order to:

¹¹ Wet van 1 november 2012, houdende nieuwe regels omtrent aanbestedingen (Aanbestedingswet 2012), Stb. 2012, 542.

¹² In particular, Union and Dutch policymakers both aimed to achieve the switch-over from paper based procurement procedures to e-procurement. As noted in the 2013 Commission Communication on end-to-end e-procurement, the transition to e procurement can generate significant savings, facilitate structural re-thinking of certain areas of public administration, and constitutes a growth enabler by opening up the internal market and by fostering innovation and simplification. It can also facilitate SME participation in public procurement by reducing administrative burden, by increasing transparency over business opportunities, and by lowering participation costs; see European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of Regions. End-to-end e-procurement to modernise public administration (COM (2013) 453 final). Brussels, 26.6.2013, p. 14.

¹³ The definition of public contracts used by the Dutch authorities aligns with the one of the Union Procurement Directives (see footnote 3).

- a) send procurement notices to the Commission for publication in the Official Journal;
 - b) publish tender notices and other data;
 - c) collect the data needed to fulfil statistical obligations to the Union; and
 - d) collect data for reporting to the Dutch Parliament.
- (16) Under the Dutch procurement law, the publication of notices of (pre-)¹⁴ announcements and awards should be done electronically, using "the electronic system for public procurement"¹⁵ (the name TenderNed does not appear in the law). The same system should be used to transmit these notices to the Commission when falling within the scope of the Union Procurement Directives¹⁶.

2.2. The contested measure

- (17) TenderNed is an e-procurement platform that was developed in-house as a project of the "PIANOO Expertisecentrum Aanbesteden", a sub-department of the Ministry of Economic Affairs, Agriculture and Innovation ("Ministry of Economic Affairs"). A ministerial decree explicitly entrusted PIANOO with the functional management of TenderNed. The technical realisation of the TenderNed platform was undertaken by a commercial market player on the basis of a tendering procedure within existing framework agreements of the Ministry's department.
- (18) TenderNed is aimed at supporting the public procurement process from the publication of the notice to the award of the contract. The functional requirements deriving from the (then-draft) 2014 Procurement Directives were already taken into account in the design and construction of the system.
- (19) TenderNed, as such, consists of a number of functionalities, made available to potential tenderers at no cost:
- A publication module, which can be used for the publication of tender notices as well as associated tender documents, at no cost.
 - A tendering (submission) module, offering functionalities such as the exchange of questions and answers, the uploading and downloading of tenders and bids. This module also includes a virtual company file in which enterprises can introduce and manage their data.
 - An e-guide, which supports contracting authorities in using TenderNed.
- TenderNed does not, at present, offer additional functionalities covering the post-award phase of procurements, such as contract management, ordering, invoicing or payment.
- (20) All contracting authorities and special sector entities may use the publication module for the announcement of contracts as of November 2011. As of September 2012, the other functionalities of TenderNed have been available. Taken as a whole, TenderNed forms a basic system for e-procurements. It also performs the reporting

¹⁴ A possibility under article 2.58 and 3.51.

¹⁵ See Articles 1.18, 2.59, 2.62, 2.134, 3.51, 3.56, 3.78.

¹⁶ See Articles 2.60, 2.61, 2.65, 3.52.

functionalities towards the national parliament and the Commission. Links with other (commercial) systems are possible and other essential additions may be developed over time.

- (21) The electronic placement of associated tender documents on this platform (i.e. part of the publication module) and the submission of tenders (i.e. the tendering module) is not mandatory at the moment. However, the Dutch authorities indicated that the legal framework for TenderNed will be extended to also cover those functionalities of the system when implementing the 2014 Procurement Directives. In other words, the access to and submission of tender documents via TenderNed should become mandatory in the future as well.
- (22) The investment and operational costs for TenderNed, financed by the Ministry of Economic Affairs, were estimated by the complainants at EUR 34 million until December 2012. In the 2014 budget, however, the costs for TenderNed are estimated at EUR 6.4 million. All costs (100%) incurred by TenderNed are covered by the State. A motion was adopted by the Dutch House of Representatives ("Tweede Kamer der Staten-Generaal") on 12 November 2013, by which the Dutch Government was asked to research the costs made by TenderNed and to ensure that the budget allocated to TenderNed was limited to what is strictly necessary for the execution of its legal tasks. The audit services of the Ministry of Finances ("Auditdienst Rijk") concluded their research in September 2014, on the basis of which they found that the basic system offered by TenderNed is composed of modules that arise from legal obligations and tasks related to those obligations. The study concludes that TenderNed's budget is correctly established on this basis.

3. THE COMPLAINT

- (23) The complainants allege that the financing of TenderNed constitutes unlawful and incompatible State aid. Moreover, some of its characteristics (in particular the non-mandatory use of the tendering module) would allegedly conflict with the Public Procurement Directives and, as such, would infringe the principle of loyalty and sincere cooperation enshrined in Article 4 of the Treaty on the European Union. Finally, due to the exclusive publication rights granted to TenderNed and the active promotion by the Dutch government of all of TenderNed's activities, the complainants alleged that the platform would acquire an abusive dominant position in the market for its tendering module activities.
- (24) As regards the State aid aspect of their complaint, the complainants argue that TenderNed is an undertaking within the meaning of Article 107(1) TFEU as it offers services on the market in competition with services of third parties such as those offered by the complainants. TenderNed can, in other words, not be considered a Service of General Interest ("SGI").
- (25) First, the complainants argue that the Public Procurement Directives do not prescribe the creation of a central register or platform by the Member States. They refer, in particular, to the prescription in the 2014 Procurement Directives that contracting authorities publish contract announcements/awards electronically, transmit them electronically to the Commission and make tender documents

accessible through electronic means at no charge. In addition, the complainants refer to the obligation for Member States to ensure, after a transition period, that submission of tenders is done electronically. According to the complainants, Member States are, in other words, not obliged to designate a single service provider to perform this task. The institution of such a central platform can therefore be separated from the public law obligations deriving from the Public Procurement Directives and should be regarded as an economic activity. In support of this argument, the complainants also point to the absence of a sanction mechanism with regard to the public procurement obligations of the Public Procurement Directives and Dutch procurement law. The complainants further remark that no other Member State has taken a measure comparable to the Netherlands or has plans for such a measure.

- (26) Second, the complainants point to several activities performed by TenderNed and argue that it has not been demonstrated that the Dutch authorities need TenderNed to fulfil those tasks. On the one hand, the free offer of a publication module and tendering module is not necessary to fulfil the statistical reporting obligations, which have allegedly been adequately fulfilled in the past.
- (27) On the other hand, the complainants more generally distinguish between the mere (pre-) announcements of procurement needs on a central platform (a "notice board") and the publication and tendering modules. They argue that even if, *quod non*, a central platform could be regarded as a SGI with regard to the "notice board" functionality, this is not the case for the publication and tendering modules. The complainants consider that those functionalities are in any case separable from the execution of public authority activities and are therefore of an economic nature¹⁷. In the same vein, the use of TenderNed's services for other types of procurement, which do not fall within the scope of the Public Procurement Directives, cannot be considered a public task of general interest.
- (28) Third, the complainants argue that the stated objectives (a reduction of burden on undertakings and contracting authorities when it comes to public procurement) have already been largely achieved by the market, to the full satisfaction of contracting parties and companies, both in terms of quality of service and price.
- (29) Market providers have allegedly established reliable systems for e-procurement and can offer all the related advantages in terms of user-friendliness, reliability, efficiency and cost-savings, while TenderNed's functioning is hampered by recurrent malfunctions and is, in other words, less reliable than the commercial e-procurement platforms. In that context, the complainants doubt the added value of TenderNed. Instead, they argue that the fact that such activities are performed by the market, forms further proof that such activities are not linked to the execution of public authority, nor are inseparably connected to such public power activities.
- (30) According to the complainants, there are better alternatives to further complete the reduction of burdens and achieve the Dutch authorities' objectives. The introduction of TenderNed would be, moreover, disproportionate and not limited to the measures needed to achieve its objectives. The same goals can allegedly be achieved by

¹⁷ The complainants refer in this regard to C-138/11 *Compass-Datenbank* EU:C:2012:449.

introducing much less far-reaching measures, such as establishing an ICT platform which would collect the information published and placed by the private sector, in view of the national and statistical reporting obligations to the Union. This would enable the private sector to continue offering its services.

- (31) By contrast, the set-up of TenderNed will allegedly drive the private sector out of the market and lead to an irreversible monopoly situation. The continued offering of commercial e-procurement platforms is a theoretical one, according to the complainants, which is *de facto* rendered impossible by the Dutch authorities. As a result of its established monopoly, TenderNed will have no incentive to innovate and invest in customer satisfaction. The introduction of TenderNed will discourage entrepreneurship and innovation.
- (32) The complainants do not consider TenderNed a SGI due to its alleged economic nature, but following similar arguments also identify problems with the potential classification of TenderNed as a Service of General Economic Interest ("SGEI"). All TenderNed services are already offered by market participants on the market. Setting up TenderNed therefore does not serve the interests of society as a whole and does not focus on citizens. The creation of TenderNed in its present form is not necessary and considerably less far-reaching methods suffice to achieve the same objectives. In addition, according to the complainants the conditions laid down by the Court of Justice of the European Union ("CJEU") in its *Altmark* judgment¹⁸ are not met, which means that the eventual compensation of TenderNed as a SGEI would also constitute State aid. Accordingly, either the conditions of the SGEI exemption decision¹⁹ or the conditions of the SGEI framework²⁰ would have to be met. As the first three conditions of the *Altmark* ruling have been incorporated into the exemption decision and the framework regulations, the complainants conclude that the classification of TenderNed as a SGEI is problematic.

4. COMMENTS OF THE DUTCH AUTHORITIES ON THE COMPLAINT

- (33) In response to the complaint, the Dutch authorities have emphasised that TenderNed fulfils services of general interest, performing activities which fall

¹⁸ Case C-280/00 *Altmark* EU:C:2003:415. The CJEU found that government compensation of the costs of an undertaking for the performance of a public service obligation does not constitute favouring of this undertaking (and therefore does not constitute State aid), when the following four cumulative conditions are met:

- 1) The undertaking is required to discharge clearly defined public service obligations;
- 2) The parameters on the basis of which the compensation is calculated are established beforehand in an objective and transparent manner;
- 3) The compensation does not exceed what is necessary for the discharge of the public service obligations;
- 4) The undertaking should be chosen in a public procurement, or the level of compensation should be determined on the basis of an analysis of the costs for a typical well-run undertaking.

¹⁹ Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, Official Journal L7, 11.01.2012, pp. 3-10.

²⁰ Union framework for State aid in the form of public service compensation (2011), Official Journal C8, 11.01.2012, pp. 15-22.

within the exercise of public authority. They therefore consider that TenderNed does not constitute an undertaking within the meaning of Article 107(1) TFEU so that the State aid rules do not apply to the manner in which it is financed.

- (34) The Dutch authorities refer to the principles of equal treatment, transparency and the effective functioning of Union and Dutch public procurement rules, which are all of fundamental importance. To safeguard those principles and to improve their compliance by contracting authorities is a matter of public order. By setting up TenderNed, the Dutch authorities aim to protect the general interest by fostering full compliance with the Union's public procurement rules. The obligations imposed by the Union with regard to public procurement are inherently linked to the exercise of public authority and public powers.
- (35) The Dutch authorities point to the sub-optimal e-procurement take-up in The Netherlands and emphasise that the existing commercial platforms did not offer the conditions of price, objective quality characteristics, continuity and access to the services that would be necessary to fulfil the objectives of general interest defined by the Dutch authorities.
- (36) The Dutch authorities emphasised that the set-up of a uniform electronic system will ensure the correct and improved compliance with the Public Procurement Directives as it guarantees the continued availability of a reliable system for contracting authorities. TenderNed has been specifically designed to improve the correct implementation of the principles of equal treatment, transparency and the Union and Dutch public procurement rules. Notably, the commercial e-procurement platforms are primarily aimed at the purchase of works, supplies and services and not the fostering of the aforementioned objectives of general interest.
- (37) The Dutch authorities have highlighted that TenderNed's *publication module* explicitly serves a number of established legal objectives in the area of:
- The publication of tender announcements (notices);
 - The statistical reporting obligation towards the Commission;
 - The reporting on procurement procedures to the national parliament.
- (38) The legal obligation to publish all notices on TenderNed gives companies certainty that all tenders are publicly available. TenderNed is linked to e-government databases such as the commercial register. It offers a higher security level than commercial platforms. Moreover, the commercial e-procurement platforms are not able to fulfil the statistical reporting obligations to the Commission²¹.
- (39) With regard to the *tendering module*, including the virtual company file, the Dutch authorities have highlighted that it facilitates compliance with the 2014 Procurement Directives, which oblige Member States to ensure the electronic submission of tenders. They explained that it increases the accessibility of the

²¹ The complainants dispute all of these alleged differences and conclude that the added value of TenderNed is therefore not sustained. To the contrary, they claim that the market parties offer several additional services not offered by TenderNed. Moreover, they consider that even if TenderNed would offer a better product, it would not make this activity non-economic in nature.

procurement process and ensures better knowledge of the procurement rules, thus reducing the margin for errors and relieving the burden for all parties involved. As a result, TenderNed contributes to improving compliance of public procurement rules.

- (40) With regard to the *e-guide*, the Dutch authorities explained that its advisory and informative function is in line with the obligation of the 2014 Procurement Directives to offer information and assistance to contracting authorities and companies.
- (41) Finally, as regards *additional functionalities*, the Dutch authorities have emphasised that TenderNed supports the standard procedures in a procurement process, but offers no extra functionalities, as sometimes offered by commercial players (examples include auction modules or modules that help contracting authorities with the formulation of tender criteria). At the same time, the TenderNed system provides generic links to other (commercial) e-procurement platforms, making it possible to offer notices that are made in another system to TenderNed for publication. Through the interoperability of TenderNed, connections can be made with commercial systems that offer additional and innovative services in addition to the TenderNed basic system²².
- (42) The Dutch authorities further emphasise that all the functionalities of TenderNed (publication module, tendering module, e-guide), taken as a whole, contribute to achieving the objectives of general interest.
- (43) More generally, the Dutch authorities indicate that TenderNed complies with all Union standards and was developed in line with the European project PEPPOL²³ for cross-border e-procurement²⁴.
- (44) The Dutch authorities refer to similar government-run central e-procurement systems in other Member States (such as Belgium) and the Commission's own activities in this field through the TED e-tendering platform²⁵.
- (45) The decision to establish an electronic basic service under the direct authority of the Minister of Economics fits under the freedom of policy a Member State enjoys regarding the choice of the form and methods to achieve the objectives of a Directive.
- (46) As regards the complainants' claim that Tender Ned will occupy a dominant position on the market, the Dutch authorities explained that the publicity activities on TenderNed aim only to provide information linked to the introduction of a legally binding system while the set-up of the tendering module fits within the on-

²² The complainants dispute this argument and state that the scope of TenderNed's tasks/services seem subject to change and not clearly delineated. The establishment of links with market players has moreover been constantly delayed and was allegedly realised only after TenderNed's launch. They consider this part of a strategy by the Dutch government to position TenderNed on the market at the expense of other providers.

²³ See <http://www.peppol.eu/peppol-project>.

²⁴ The complainants contend that there are no established European standards yet and that the complainants also participate in the PEPPOL project.

²⁵ <https://etendering.ted.europa.eu>

going developments ultimately leading to the adoption of the 2014 Procurement Directives. By communicating early on this extension, the Dutch authorities aim to give e-procurement platform operators the opportunity to prepare and possibly adapt their business models.

5. ASSESSMENT OF THE MEASURE UNDER ARTICLE 107(1) TFEU

- (47) According to Article 107(1) TFEU, State aid is 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, in so far as it affects trade between Member States. The conditions laid down by that provision for a finding of State aid are cumulative.
- (48) On the basis of that provision, the State aid rules only apply where the beneficiary of the measure is an “undertaking”. The case law of the Court of Justice of the European Union (“CJEU”) defines an undertaking for the purposes of Article 107(1) TFEU as any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed. The classification of a particular entity as an undertaking thus depends entirely on the economic or non-economic nature of its activities.
- (49) It is therefore appropriate, in the present case, to begin by examining whether TenderNed may be said to be an undertaking, i.e. an entity which carries out an economic activity. Since the notion of undertaking must be understood in a functional manner, if the activities of the PIANOo, a sub-department of the Ministry of Economic Affairs, as the operator legally responsible for TenderNed, can be classified as economic in nature, the State aid rules could apply to any funding granted to conduct that activity.
- (50) The notion of economic activity has been defined as meaning any activity consisting in the offering goods and services on a given market²⁶. The question whether a market exists for certain services may depend on the way those services are organised in the Member State concerned and may thus vary from one Member State to another.²⁷
- (51) Activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Union's competition rules²⁸. Therefore, Article 107 TFEU does not apply where the State acts "by exercising public power"²⁹ or where authorities emanating from the State act "in their capacity as public authorities"³⁰ or if the activities carried out are connected to the functions of

²⁶ Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* EU:C:2000:428, paragraph 75.

²⁷ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 16 to 20

²⁸ See, to that effect, Case C-138/11 *Compass v Austria (Compass Datenbank)*, paragraph 35; Case 107/84 *Commission v Germany* EU:C:1985:332, paragraphs 14 and 15; and Case T-347/09 *Germany v Commission* EU:T:2013:418, paragraph 27..

²⁹ Case C-118/85 *Commission v Italy* EU:C:1987:283, paragraphs 7 and 8.

³⁰ Case C-30/87 *Bodson/Pompes funèbres* EU:C:1988:225, paragraph 18.

the State through their nature, aim and the regulation to which those activities are subject³¹.

- (52) Whether the activities carried out by TenderNed are economic in nature, so that the funding provided to ensure its set up and operation can be considered to constitute State aid within the meaning of Article 107(1) TFEU, must be examined in light of these principles.
- (53) TenderNed's activities consist of providing an electronic platform to contracting authorities and special sector entities for the publication of procurement announcements (the publication module), organising and carrying out tendering procedures for public procurements (the tendering module) and supporting contracting authorities and special sector entities in using TenderNed (the e-guide). In addition, TenderNed also ensures statistical reporting to the Commission and the Dutch parliament concerning public procurements.
- (54) The Commission observes, in this regard, that TenderNed was set up and carries out its activities in light of the Dutch procurement law. That law lays down certain obligations with which contracting authorities and special sector entities in the Netherlands must comply when entering into written procurement contracts under pecuniary interest for the execution of works, the supply of products or the provision of services and which flow, in part, from the Union Procurement Directives.
- (55) As already noted in recital (7) above, the award of contracts concluded in the Member States on behalf of contracting authorities and special sector entities is subject to the respect of the principles of the Union Treaties and in particular to the fundamental freedoms and the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency³².
- (56) According to the 2004 and 2014 Public Procurement Directives, the award of public contracts, provided they meet certain thresholds, must be made on the basis of a Union-wide tendering procedure. Those directives also include coordinating provisions to ensure that purchases by contracting authorities and special sector entities are made in the most rational, transparent and fair manner. For the procurement activities falling within their ambit, common provisions ensure that tenders are received and treated in a transparent, careful and non-discriminatory manner.
- (57) In particular, the 2004 and 2014 Procurement Directives require contracting authorities and contracting entities to treat economic operators equally and in a non-discriminatory manner, and to act in a transparent way³³. They, moreover, impose the following specific obligations on Member States for public procurement

³¹ See Case C-364/92 SAT/Eurocontrol EU:C:1994:7, paragraph 30.

³² See e.g. recital 2 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114) and recital 1 of Directive 2014/24/EU.

³³ Article 2 of Directive 2004/18/EC and Article 10 of Directive 2004/17/EC; Article 18 of Directive 2014/24/EU and Article 36 of Directive 2014/25/EU.

contracts falling within their scope, which are of relevance in light of the activities TenderNed carries out³⁴:

- To announce public procurements and the results of the award procedure by means of notices. These must be sent by the contracting authorities and contracting entities to the Publications Office.³⁵
- To make specifications, additional documents and information accessible to economic operators (the modalities varying according to the type of procurement procedure).³⁶
- To supply statistical information to the Commission through reports addressing public supply, services and works contracts awarded by contracting authorities and contracting entities³⁷.

(58) The Commission further notes the obligation upon the Member States, under the 2014 Procurement Directives, to ensure that contracting authorities and economic operators are offered free of charge guidance and information on the interpretation and application of Union public procurement law, as well as to support contracting authorities with regard to planning and carrying out procurement procedures³⁸.

(59) The obligations laid down in the Union Procurement Directives have been implemented into Dutch law through the Dutch procurement law³⁹. In particular, the Dutch procurement law mandates that contracting authorities and special sector entities tender contracts which fall within the scope of the Union Procurement Directives as well as those contracts with a clear cross-border interest. In addition, the Dutch procurement law allows for contracting authorities and special sector entities to voluntarily tender contracts not covered by the Union Procurement Directives without a cross-border interest. In that case, the rules of the Dutch procurement law apply to those contracts as well.

(60) The Dutch procurement law obliges contracting authorities and special sector entities to make procurement choices regarding the type of procedure to be used and the selection of economic operators allowed to tender on the basis of objective criteria, which should be provided upon request to economic operators⁴⁰. Contracting authorities and special sector entities should, moreover, ensure as much societal value for public resources when concluding a procurement contract⁴¹. The

³⁴ In general, the contracting entities covered by Directive 2004/17/EC are subject to less extensive obligations compared to the contracting authorities under Directive 2004/18/EC.

³⁵ See Articles 35-36, 58, 64, 69 and Annexes VII-VIII of Directive 2004/18/EC; Articles 41-44, 63 and Annexes XIII-XX of Directive 2004/17/EC; Articles 48-50, 75, 79 and Annex VIII of Directive 2014/24/EU; Articles 67-72, 92, 96 and Annex IX of Directive 2014/25/EU.

³⁶ See e.g. Article 39 of Directive 2004/18/EC; Article 46 of Directive 2004/17/EC; Article 53 of Directive 2014/24/EU; Article 73 of Directive 2014/25/EU.

³⁷ See Article 75 of Directive 2004/18/EC; Article 67 of Directive 2004/17/EC; Article 85 of Directive 2014/24/EU; Article 101 of Directive 2014/25/EU.

³⁸ Article 83(4) of Directive 2014/24/EU and Article 99 (4) of Directive 2014/25/EU.

³⁹ The definition of public contracts used by the Dutch authorities aligns with the one of the Union Procurement Directives (see footnote 3).

⁴⁰ Article 1.4.

⁴¹ *Ibid.*

contracting authorities that envisage concluding a procurement contract should further ensure that the related administrative burden is limited as much as possible⁴².

- (61) For contracts falling within the scope of the Union Procurement Directives, as well as those that have a clear cross-border interest, Article 1.9 of the Dutch procurement law lays down the obligation that the contracting authority or special sector entity must behave in a transparent manner. More specifically, Article 1.9.2. of the Dutch procurement law obliges contracting authorities and special sector entities to ensure sufficient publicity for the procurement announcement. The transparency obligation also applies in the context of national procurement, not falling within the scope of the Union Procurement Directives, but for which the contracting authorities and special sector entities have voluntarily decided to make a procurement announcement (Articles 1.11 and 1.12⁴³). For all contracts subject to obligatory or voluntary announcement⁴⁴, the notice of announcement of procurement must be published⁴⁵. For contracts that fall within the scope of the Union Procurement Directives, an award notice must also be published⁴⁶. Finally, for all procurement contracts, the contracting authorities and special sector entities are obliged to make available the related procurement documents for free⁴⁷.
- (62) It is in this context that the setup of TenderNed and the activities which it carries out must be considered under Article 107(1) TFEU. TenderNed's publication module ensures that contracting authorities and special sector entities comply with the transparency obligation under the Union and Dutch public procurement rules⁴⁸ and TenderNed's tendering module ensures that public procurement contracts are appropriately tendered under those rules,⁴⁹ while the e-guide fulfils the obligations of The Netherlands under the Union Procurement Directives to offer information and support to contracting authorities and economic operators⁵⁰ and the supply of statistical information to the Commission is also laid down by those Directives.⁵¹ As such, TenderNed's activities find their origin entirely in supporting the procurement activities of the Dutch public authorities and the obligations of the Dutch State under the Procurement Directives.
- (63) Those activities are not economic in nature, but constitute the means by which contracting authorities and special sector entities in the Netherlands fulfil their statutory obligations under the national public procurement rules, which flow from the Union Procurement Directives, and the means by which The Netherlands fulfils its obligations under those Directives. The public procurement rules set up specific contract award procedures to ensure that public purchases are made in the most rational, transparent and fair manner. They seek to ensure the greatest number of

⁴² Article 1.6.

⁴³ Contrary to Article 1.9, there are no specific conditions set out for the application of this principle.

⁴⁴ However, in specific cases listed in Article 2.32 and following, an announcement notice is not necessary.

⁴⁵ See Articles 1.18, 2.62, 3.56.

⁴⁶ See Article 2.134, 3.78.

⁴⁷ See Articles 1.21, 2.66, 3.57.

⁴⁸ Recital (57) and (61) above

⁴⁹ Recitals (56) and (59) above.

⁵⁰ Recital (58) above.

⁵¹ Recital (57) above.

economic operators is informed of procurements, to prevent preferential treatment that could favour specific economic operators over others and seek to guarantee sound competition between economic operators, so as to ensure that contracting authorities get the best value for taxpayers' money. Contracting authorities and special sector entities must comply with these public procurement rules precisely because they are considered part of local, regional or central government and are therefore presumed to not only consider pure industrial or commercial reasons in their purchasing behaviour.

- (64) Contracting authorities and special sector entities are therefore acting in their capacity of public authorities when complying with those statutory obligations so that TenderNed should be considered, by extension, to act in a similar capacity when providing them with the means to ensure those obligations are complied with. Indeed, the Court of Justice has already accepted that the activity of a public authority consisting "in the storing, in a database, of information which undertakings are obliged to report under statutory obligations (emphasis added), does not constitute an economic activity"⁵². The Commission considers the same reasoning to hold where the activity consists of ensuring that contracting authorities and special sector entities comply with their statutory obligations to publish tender announcements and tender public procurement contracts, as well as the Dutch State's obligations to ensure statistical reporting obligations to the Commission and the reporting obligations to the Dutch parliament. TenderNed's activities should therefore not be considered economic in nature, so that its funding does not constitute aid for the purposes of Article 107(1) TFEU.
- (65) None of the arguments the complainants advance in their complaint alter that conclusion.
- (66) First, while the applicants correctly observe that the Union Procurement Directives do not prescribe the creation by the Member States of a central platform for the organisation of tenders, they also do not proscribe the creation of such a platform. The 2014 Procurement Directives require that the electronic communication tools used should be non-discriminatory, generally available, and interoperable and they should not restrict economic operators' access to the procurement procedure⁵³. They do not, however, forbid the Member State from creating a single e-procurement platform to attain these goals. Moreover, the 2014 Procurement Directives gradually make the use of e-procurement mandatory,⁵⁴ specifically the publication of notices, the access free of charge to associated procurement documents and the electronic submission of tenders⁵⁵, and Member States are free under the directives to go even further in this regard⁵⁶. To the extent the means chosen ensures that purchases by contracting authorities and special sector entities are made in the most rational, transparent and fair manner, the provisions of the 2014 Procurement Directive

⁵² Case C-138/11 *Compass v Austria* (*Compass Datenbank*), paragraph 51.

⁵³ Article 22 of Directive 2014/24/EU and Article 40 of Directive 2014/25/EU.

⁵⁴ The 2014 Procurement Directives must be implemented by the Member States by 18 April 2016, although a longer implementation period – until 18 October 2018 - is foreseen for mandatory electronic communication, including the electronic submission of offers, for all contracting authorities and entities (until 18 April 2017 for central purchasing bodies).

⁵⁵ See Articles 22, 53 of Directive 2014/24/EU and Articles 40, 73 of Directive 2014/25/EU.

⁵⁶ See recital 52 of Directive 2014/24/EU.

should not be considered to stand in the way of TenderNed. The objective of transparent and efficient public procurement may be better fulfilled if potential suppliers can find all the necessary information in one central platform. The Commission notes, in this regard, that the setup of TenderNed resembles to some extent the Commission's own central portal for the publication of procurement notices known as TED as well as a centralised e-procurement portal through which documents related to the Commission's own procurement procedures are made available free of charge.

- (67) As regards the complainants' second argument, that TenderNed's activities could be limited to that of a "notice-board" functionality, the Commission observes that limiting TenderNed's activities in that way would not ensure contracting authorities and special sector entities fully comply with their statutory obligations under the Dutch procurement law, particularly the obligation to carry out a tendering procure which ensures that purchases by contracting authorities and special sector entities are made in the most rational, transparent and fair manner. For instance, the requirement to publish all notices electronically extends to the notices of small contracting authorities who may not be sufficiently profitable to private operators. As such, any activities performed by TenderNed can be considered non-economic in nature so long as they ensure compliance by the Dutch public authorities of their statutory obligations set by the Dutch procurement law and the Union Procurement Directives. The same holds for functionalities offered by TenderNed which assist those public authorities in attaining the objectives laid down by that legislation.
- (68) Third, the complainants' argument that the market already provides for the services TenderNed offers does not adequately take into consideration the progressive evolution and availability of e-Procurement. It should be noted in this regard that the services which the complainants offer, like those of TenderNed, find their origin entirely in the procurement activities of the Dutch authorities. Such services might have previously been needed because of the complexity of legislation, the lack of user-friendliness of analogue or digital tools offered by the government services, or because companies find it more convenient to outsource such activities. However, the State does not forego the right to carry out an activity that it deems necessary to ensure its public bodies comply with their statutory obligations by acting at a point in time when private operators – perhaps due to lack of prior action by the State – have already taken the initiative to offer services to the same end.⁵⁷ Ensuring public authorities comply with their statutory obligations by channelling public procurement may be an economic activity for the complainants. It is not, however, an inherent economic activity, but rather a service of general interest, which can be commercially exploited only so long as the State fails to offer that service itself.
- (69) In any event, while contracting authorities and special sector entities may ultimately be obliged to publish their offers via TenderNed, they are not prohibited from using other platforms like those of the complainants in parallel. Likewise, the Dutch authorities have emphasised that private e-procurement platforms can export TenderNed notifications on their own portal as well as import their notices to TenderNed. Commercial operators are, in other words, free to develop a

⁵⁷ See Commission Decision of of 2 May 2013 on German national website for insolvency auctions, summary notice in OJ C 167, 13.6.2013, p. 1.

differentiated offer of public procurement-related services in terms of quality or added value.

6. CONCLUSION

- (70) The Commission has decided, on the basis of the foregoing assessment, that the measure does not involve State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

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: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu, by registered letter or by fax to:

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Yours faithfully,
For the Commission

Margrethe VESTAGER
Member of the Commission