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**Subject: State Aid SA.34815 (2017/NN) (ex 2012/CP) – The Netherlands  
Dutch marina "Jachthaven Scharendijke"**

Sir,

#### **1. PROCEDURE**

- (1) By letter dated 9 May 2012, the Commission received a complaint concerning alleged aid granted by the municipality Schouwen-Duiveland ("municipality") to the Foundation Water Sports Association Scharendijke ("Watersport Vereniging Scharendijke" or "WVS") and/or the Foundation marina Scharendijke ("Stichting Jachthaven Scharendijke" or "SJS"). The complaint was submitted by the Stichting Loket Eerlijke Concurrentie Watersport<sup>1</sup> ("LEC"), on behalf of three marinas and one boat dealer situated in the region of the Southwestern Delta Zeeland/Zuid-Holland<sup>2</sup>. The complainant submitted further information on 29 August 2012.
- (2) The complaint was forwarded to the Dutch authorities on 12 September 2012, who submitted their comments on 23 November 2012 and 7 December 2012.
- (3) The complainant in the meantime provided additional information on 15 November 2012, 30 November 2012, 4 December 2012 and 20 December 2012.

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<sup>1</sup> The Stichting LEC Watersport was established in 2011 by the association of water sports undertakings HISWA. Its objective is to promote a level-playing field in the water sports sector and to oppose activities by governing authorities that distort competition or have a market distortive effect.

<sup>2</sup> Their identity is kept confidential, as requested.

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- (4) On 19 December 2012, the Commission services forwarded the comments of the Dutch authorities to the complainant. The complainant submitted a reaction to these comments on 1 October 2013. This reaction was again forwarded to the Dutch authorities, who submitted comments by letters of 30 January 2014 and 4 February 2014.
- (5) The Dutch authorities provided additional information on 23 May 2014. A meeting was held with the Dutch authorities on 7 July 2014. The Dutch authorities subsequently submitted additional information on 8 August 2014.
- (6) On 23 January 2015, the Commission services wrote to the complainant, expressing a preliminary view that the measure did not involve State aid.
- (7) On 12 May 2015, the complainant submitted a reaction to the preliminary assessment of the Commission services. On 9 October 2015, 26 January 2016 and 12 April 2016, the complainant submitted additional information.
- (8) On 11 July 2016, the Commission services forwarded the reactions of the complainant to the Dutch authorities together with a number of questions. The Dutch authorities replied on 30 September 2016.
- (9) Meanwhile, the complainant submitted additional information on 25 August, 26 October and 20 December 2016.
- (10) On 23 December 2016, the Commission services forwarded information submitted by the complainant to the Dutch authorities, who replied on 31 January 2017. On 1 May 2017 and 19 January 2018, the Dutch authorities submitted additional information.

## **2. DESCRIPTION OF THE FACTS**

- (11) The marina "Jachthaven Scharendijke", comprising circa 700<sup>3</sup> boat moorings, is situated in the municipality and is part of the larger grounds of the port "Haven Kloosternol". The water board "Waterschap Scheldestromen", a regional governmental office, is the owner of the grounds, which are the subject of a long leasehold<sup>4</sup> agreement with the municipality. In turn, the municipality rents out and sub-leases parts of the port Kloosternol.
- (12) Since the 1970s, the marina "Jachthaven Scharendijke" was operated by WVS on a non-profit basis, under joint operation with the municipality. WVS is an amateur water sports club representing the interests of its members, whose boats are moored in the marina.

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<sup>3</sup> The Dutch authorities have indicated that the marina has had approximately 700 mooring places, including fixed boxes as well as temporary moorings, since 2012. Some of the sources used by the complainant and/or the Dutch authorities put forward higher or lower numbers (roughly between 650 and 850 mooring places). According to the Dutch authorities, these differences are due to evolutions over time and varying calculation methods.

<sup>4</sup> According to article 5:85 of the Dutch Civil Code a "long leasehold" ("erfpacht") is a limited property right which gives its proprietor (the leaseholder) the right to hold and use an immovable thing of someone else. Article 5:93 of the Dutch Civil Code establishes that the immovable thing that is encumbered with the long leasehold may be encumbered, entirely or partially, by the leaseholder with a sub-leasehold ("ondererfpacht").

- (13) A rental agreement between WVS and the municipality determined that WVS would pay the municipality a yearly "rent", equalling the operation costs of the marina (including capital costs, maintenance costs, ground rent etc.). Any rental surplus or shortage was to lead to an adjustment – increase or reduction – of the rent<sup>5</sup>. The Dutch authorities have explained that this increase or reduction of "rent" corresponds to an increase or reduction of the mooring charges. The most recent rental agreement dated from 2003: it foresaw an end date of 31 December 2007 while also stating the intention of both parties to the agreement to negotiate at that moment about a new rental agreement<sup>6</sup>.
- (14) In 2007-2008, the municipality decided to privatise the marina Jachthaven Scharendijke. WVS used the provisions of the rental agreement to act against the planned privatisation, in particular the provision related to the intention to extend the rental agreement. In this respect, the Dutch authorities have submitted several letters that the municipality received at the time from WVS' lawyers. Subsequent negotiations resulted in the establishment of guaranteed "rents" for WVS' members (see also (20)) and an exclusive negotiation position for WVS in view of acquiring the marina. As such, the municipality aimed to avoid the risk of WVS bringing legal proceedings aimed at prolonging the existing rental agreement, which it considered as realistic and which would have undermined the privatisation process. The fact that the different agreements between WVS and the municipality with regard to the marina dated back thirty years (recital (12)) strengthened WVS' position in this respect, according to the municipality.
- (15) On 6 February 2012 the municipality concluded a sub-leasehold agreement ("ondererfpacht"), including the right of superficies<sup>7</sup> ("recht van opstal"), with SJS for a period of 50 years. SJS is a foundation set up by WVS and operates on a non-profit basis as well.
- (16) Although formally concluded between the municipality and SJS, the sub-leasehold agreement (i.e. the sale of a limited property right) was negotiated by the municipality and WVS. According to the Dutch authorities, SJS was set up as a distinct entity for the acquisition of the sub-leasehold, in order to clearly separate the future commercial operation of the marina from WVS and its individual boat owners.
- (17) Under the sub-leasehold agreement, SJS made to the municipality a one-off payment of EUR 997 500 for the movable property as well as the existing buildings and structures on the land (the so-called "constructed immovable things" or "opstallen"<sup>8</sup>). Moreover a ground rent<sup>9</sup> ("erfpachtcanon") for the acquisition of the sub-leasehold from the municipality was established at EUR 58 481.10 per year.

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<sup>5</sup> Article 3.8 of the rental agreement.

<sup>6</sup> Article 16 of the rental agreement.

<sup>7</sup> According to Article 5:101 of Dutch Civil Law, the right of superficies ("recht van opstal") is a real property right which enables its proprietor - the superficiary - to have or acquire for himself buildings, constructions or plants (vegetation) in, on or above an immovable thing owned by someone else.

<sup>8</sup> According to article 6:174 of the Dutch civil code a "constructed immovable thing" is understood as a building, work or construction, permanently attached to the land, either directly, or by means of a connection with another building, work or construction. It is related to the "right of superficies" or "recht van opstal".

<sup>9</sup> According to article 5:85 of the Dutch Civil Code the notarial deed by which the long leasehold has been established may impose an obligation on the leaseholder to pay a sum of money, the "ground rent", at

- (18) The sub-leasehold agreement moreover determines that SJS receives the operating reserve that was built up during the period the marina was rented to WVS. Over the course of the years, the mooring charges collected by the WVS had indeed exceeded the costs of operating the marina and reserves had accumulated. Despite the provisions of the rental agreement, this did not lead to a reduction in the mooring charges. Instead this rental surplus was accumulated in an operating reserve, totalling a sum of EUR 583 891. The Dutch authorities explained that WVS was entitled to these built-up reserves on the basis of the provisions of the rental and operation agreement (see recital (13)). However, WVS requested the municipality to pay out the money to SJS.<sup>10</sup> In practice, the operating reserve was directly deducted from the sub-leasehold price in the context of the final settlement of accounts.
- (19) The sub-leasehold agreement obliges SJS to maintain and renew the marina as necessary. However, in derogation from this, the municipality will take care of certain specific maintenance tasks if the costs exceed EUR 130 000 (and only covering the unforeseen additional costs). This amount of EUR 130 000 corresponds to the estimated costs of the said maintenance tasks, as reflected in a strategic operation and management document of 2009 that was drafted in the context of the privatisation negotiations<sup>11</sup>.
- (20) The sub-leasehold agreement moreover obliges SJS to respect the so-called rental privileges of WVS. More specifically, SJS will guarantee during 10 years a sufficient number of boat moorings to WVS, at fixed prices based on the existing rents for WVS members. As noted (in recital (14)), these rental privileges were established during the negotiation process between WVS and the municipality that preceded the sub-leasehold transaction<sup>12</sup> (on the timeline, see also recital (72)). They find their basis in the long-term rental agreement that WVS had with the municipality and aim to protect the interests of WVS' individual members.
- (21) The ground rent as well as the sum paid for the movable and constructed immovable things (see recital (17)) were determined on the basis of external valuations. In particular, the marina was the subject of two independent valuations: Houdringe Recreatiemakelaars submitted its report in July 2009, whereas the report by Maas Recreatie Bedrijfsmakelaardij dates from March 2010. Houdringe Recreatiemakelaars valued the movable and constructed immovable things at EUR 1 345 000 and the ground rent at EUR 119 925. Maas Recreatie Bedrijfsmakelaardij arrived at a valuation of EUR 997 500 for the movable and constructed immovable things and a ground rent of EUR 58 481.
- (22) Given the differences between the two valuations, they were subsequently compared in a third report (by Muller, dated November 2010). This third report established that the difference between the values set out in the previous reports was due to the inclusion of the rental privileges to existing berth holders in the valuation done by Maas Recreatie Bedrijfsmakelaardij, which had a price depressing impact. The final sub-leasehold agreement includes the rental privileges and is based on the values from Maas Recreatie Bedrijfsmakelaardij's valuation report.

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regular or irregular intervals to the owner of the immovable thing which is encumbered with the long leasehold.

<sup>10</sup> See Watersport Vereniging Scharendijke, *Brief aan het College van Burgemeester en Wethouders van de Gemeente Schouwen-Duiveland, betreft: Jachthaven Scharendijke*, 14 januari 2011.

<sup>11</sup> Grontmij/Marktplan (2009). *Document voor exploitatie en beheer*. Houten: Grontmij/Marktplan.

<sup>12</sup> They are for instance described in 2009 strategic document referred to in footnote 11.

### 3. THE COMPLAINT

- (23) The complainant alleges that the sale of the marina to SJS in 2012 occurred below market value. According to the complainant, the total sum of alleged State aid amounts to more than EUR 5 million. The complainant refers in this regard to the value of the operating reserve, as well as differences between the two valuations, including different calculations of the ground rent over the course of the 50-year duration of the sub-leasehold.
- (24) The complaint centres on:
- a) the rental privileges for existing berth holders and how they affect the sub-leasehold agreement;
  - b) the amounts set in the sub-leasehold agreement;
  - c) the transfer of the operating reserve.

Hereinafter these three are considered distinct sub-measures that play a role in the privatisation transaction.

- (25) Firstly, the complainant questions the *rental privileges* obtained by WVS in the context of the sale of the marina, which would explain the difference between the two valuation reports (recital (22)). As explained in recital (20), WVS has access, during 10 years, to a sufficient number of boat moorings at fixed prices based on the existing rents for their members (i.e. mooring tariffs). According to the complainant, the municipality forewent income by selling the marina on the basis of the privileges. The complainant considers that WVS and SJS form one economic unit because of the strong functional, economic and organisational ties between both entities. Therefore, according to the complainant, the privileges assigned to WVS have to be considered as assigned to SJS too, both being an undertaking in the sense of Article 107(1) TFEU.
- (26) In terms of organisational ties, the complainant argues that WVS retains influence over the activities of SJS. In particular, the complainant points to several ties between SJS and WVS, established with regard to the nomination and dismissal of Board Members in the context of the Statutes of SJS of 7 October 2011. Moreover, in terms of functional ties, the complainant argues that WVS and SJS act as one organisation and points towards examples of joint communication, billing and the existence of a common website in the period 2013-2014. In terms of economic ties, the complainant points out that WVS has put financial means at SJS' disposal, referring to a subordinated loan granted by WVS to SJS in view of acquiring the marina.
- (27) The complainant argues that the granting of a financial advantage to WVS, which has to be considered one economic entity with SJS, automatically constitutes a selective advantage for SJS.
- (28) The complainant moreover argues that, even if there was no direct advantage for SJS, SJS would indirectly benefit from the privileges granted to WVS. Because of the privileges, the marina's value was much lower and therefore SJS had to pay much less for it. According to the complainant, this enables SJS to ask lower tariffs for temporary moorings and still recover its investment. The complainant submitted data on the tariffs charged by marina Jachthaven Scharendijke and a number of commercial marinas in the area to show that marina Jachthaven Scharendijke's tariffs

are below market rate. The complainant moreover alleges that the existence of the privileges disincentivises the concerned boat owners from moving to another marina. This has a chilling effect on the market and therefore limits competing commercial marinas in their expansion plans, according to the complainant.

- (29) Furthermore, the complainant argues that the boat dealers and other commercial undertakings in the water sports market (sailing schools etc.), which are generally established in marinas, are also hurt by the alleged aid measure. On the one hand, a more limited "customer traffic flow" has a negative impact on the sales of boats and associated products in the marina. On the other hand, the lower tariffs for temporary moorings bring more passers-by to the marina of Scharendijke and thereby reduce the potential customer base of competing shops and sellers at other marinas.
- (30) Secondly and related to this, the complaint refers to the *sub-leasehold agreement*. The complainant distinguishes in this regard between the valuation of the movable and constructed immovable things and the ground rent. According to the complainant, both have been set at levels below market value.
- (31) With regard to the valuation of the movable and constructed immovable things, the complainant states that the conditions of the Communication on State aid elements in sales of land and buildings by public authorities<sup>13</sup> ("land sales Communication") are not fulfilled. According to the complainant, the municipality and WVS had started negotiations in 2008 and on 17 April 2009 WVS made its first offer. The first valuation report dates from July 2009. In other words and contrary to the land sales Communication, according to the complainant, valuations were not made before sales negotiations started. The complainant concludes that it cannot be guaranteed under these circumstances that the minimal sales price was established before the start of the negotiations. Moreover, the complainant states that the land sales Communication does not allow for the municipality to make the sale conditional on the respect of the rental privileges.
- (32) According to the complainant, the valuation of the ground rent, as it takes into account these same privileges, is not market-based either. According to the complainant the privileges do not reduce the marina's value for WVS/SJS and therefore should not have been taken into account.
- (33) Insofar as the valuation reports of 2009 and 2010 could be considered market conform, the complainant states that two further elements were not considered in the valuation reports whereas they have an impact on the value of the marina. The complainant argues that the valuation should have been redone because the municipality changed the following sales conditions after the valuation had already been made:
- a) The municipality decided, in December 2010, to remove sales conditions with regard to the innovation, renovation and enlargement of the marina. The complainant acknowledges that any buyer would in any case innovate, renovate and enlarge the outworn marina. However, with the municipality's requirements removed, this can be done according to the buyer's own preferences and timing. The absence of the requirements hence has a clear value increasing effect according to the complainant.

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<sup>13</sup> OJ C 209, 10.7.1997, pp. 3-5.

b) The municipality in 2010 and 2011 took care of overdue maintenance for an amount of EUR 166 000.

(34) The complainant lastly alleges that, under the agreement, the municipality will pay certain specific maintenance costs exceeding EUR 130 000, which it considers a non-market conform condition of the sub-leasehold agreement.

(35) Thirdly, the complainant raised concerns about the *transfer of the operating reserve* to WVS/SJS. It was not taken into account in the valuation reports, whereas it should, according to complainant, have resulted in an increase of the sub-leasehold value (in particular the sum paid for the movable and immovable constructed things) by the same amount (i.e. EUR 997 500 + EUR 583 891). Instead the marina was acquired for EUR 413 609 (i.e. EUR 997 500 – EUR 583 891, which corresponds to a deduction of the operating reserve from the sub-leasehold value). The complainant argues that the municipality was managing the operating reserve and that a municipal decision was necessary to determine what happened with the reserve. Therefore this transaction concerns forgone State resources imputable to the State.

(36) Lastly, the complainant underlines the effect on trade and competition of the measures. The complainant refers in this respect to the number of moorings, the percentage of foreign boat owners among those renting a fixed mooring (37% according to the complainant), the high alleged aid amount, the yearly turnover (forecasted to equal EUR 563 000 in 2014) and the touristic ambitions for the marina.

#### 4. ASSESSMENT OF THE MEASURES

##### 4.1. Existence of aid

(37) According to Article 107(1) TFEU, “*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*”.

(38) In other words, for a measure to be regarded as State aid within the meaning of Article 107(1) TFEU, it must fulfil the following cumulative conditions: a) it must involve State resources; b) it must result in an economic advantage to an undertaking; c) this advantage must be selective; and d) it must (threaten to) distort competition in so far as it affects trade between Member States. It suffices that one of these criteria is not fulfilled for the measure not to be regarded as State aid.

(39) In terms of the impact on trade between Member States, earlier Commission Decisions on Dutch marinas came to the conclusion that the measures did not affect trade between Member States<sup>14</sup>. The Dutch authorities have also argued that the alleged measures do not have an effect on trade. Therefore the Commission first assesses if the measures under assessment can be considered to have an impact on intra-Union trade.

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<sup>14</sup> C10/2003 – Netherlands, Non-profit harbours for recreational crafts, [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_C10\\_2003](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_C10_2003); State aid SA.39403 (2014/N) – Netherlands, Investment aid for Lauwersoog port, [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_39403](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39403).

#### 4.1.1. Effect on trade and competition

- (40) Public support can be considered capable of having an effect on intra-Union trade even if the recipient is not directly involved in cross-border trade. For instance, the aid may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply,<sup>15</sup> or to exercise their right of establishment.
- (41) In establishing an effect on trade, it is not necessary to define the market or to investigate in detail the impact of the measure on the competitive position of the beneficiary and its competitors.<sup>16</sup>
- (42) However, an effect on intra-Union trade cannot be merely hypothetical or presumed. It must be established why the measure distorts or threatens to distort competition and it is liable to have an effect on trade between Member States, based on the foreseeable effects of the measure<sup>17</sup>.
- (43) It seems therefore appropriate to check in particular whether the beneficiary supplies goods or services to a limited area within a Member State and it is unlikely to attract customers from other Member States, and whether it can be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.
- (44) In the present case, as regards the area within which the alleged beneficiary is active, the Commission observes that boat owners typically look for a fixed mooring berth close to their home or near a popular water sports area.<sup>18</sup>
- (45) The Commission moreover observes that the marina represents a limited part of the water sports market. According to 2016 data from the tourism office of Zeeland, there are 48 marinas in the region representing 11 259 moorings<sup>19</sup>. According to data submitted by the Dutch authorities, there were approximately 168 000 moorings in The Netherlands in 2015<sup>20</sup>. Within the European Union the total number of moorings is circa 1 750 000<sup>21</sup>.
- (46) Compared to these numbers, the approximately 700 moorings of Jachthaven Scharendijke are small. They represent only around 6% of the regional, 0.4% of the Dutch and 0.04% of the European mooring market.

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<sup>15</sup> Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 67; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 78; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 78.

<sup>16</sup> Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209; Judgment of the General Court of 4 September 2009, *Italy v Commission*, T-211/05, ECLI:EU:T:2009:304, paragraphs 157 to 160; Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 95.

<sup>17</sup> Judgment of the General Court of 6 July 1995, *AITEC and others v Commission*, Joined Cases T-447/93, T-448/93 and T-449/93, ECLI:EU:T:1995:130, paragraph 141.

<sup>18</sup> PriceWaterhouseCoopers (2005). *Onderzoek naar de problematiek Markt en Overheid*. Den Haag: Ministerie van Economische Zaken en Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, p. 123.

<sup>19</sup> VVV Zeeland (2016). *Deltagids*. Domburg: VVV Zeeland, pp. 62-63.

<sup>20</sup> Source: <https://www.rabobankcijfersentrends.nl/index.cfm?action=branche&branche=Jachthavens> (consulted in September 2016).

<sup>21</sup> Source: <http://www.europeanboatingindustry.eu/facts-and-figures> (consulted in September 2016).



- (47) In addition, according to information provided by the Dutch authorities, the annual turnover of the marina amounts to less than EUR 500 000, more than 90% of which is derived from the rental of fixed moorings.
- (48) As a result, the Commission would expect the marina to have a limited geographical reach.
- (49) However, Jachthaven Scharendijke is characterised by a relatively high presence of non-Dutch boat owners. For the Zeeland region as a whole, a 2009 study by Waterrecreatie Advies<sup>22</sup> estimated the number of non-Dutch berth holders at 41% (compared to 40% in 2003). Almost all of the non-Dutch boat owners are from Belgium and Germany. A quick scan of approximately half of the marinas by Waterrecreatie Advies in 2015<sup>23</sup> estimated the number of non-domestic berth owners at 42%. These studies in other words point towards a relatively high, but stable, share of non-Dutch boat owners with a fixed mooring in the region's marinas.
- (50) Specifically for the marina Jachthaven Scharendijke, the complainant has provided data from a telephone survey it conducted in August 2012, estimating the percentage of non-domestic boat owners renting a permanent mooring in the marina at 37%. According to the most recent data submitted by the Dutch authorities (2016), 36% of the members that are permanently mooring their boat in marina Jachthaven Scharendijke are non-Dutch.
- (51) The Commission concludes that at least in terms of attracting customers from other Member States, the available evidence shows that the marina is already attracting boat owners from across the border.
- (52) Nonetheless, with regard to the effect on the conditions of cross-border investments or establishment, the Commission notes that the alleged measures will not lead to an increase in capacities or number of boat moorings. The Commission notes furthermore that the low boat tariffs (rental privileges) are not applicable to possible additional berths but only protect the existing situation of WVS' members for a period of up to 10 years.
- (53) As a result, the alleged measures itself would most likely at most have a "freezing" effect on the market, in particular the cross-border attractiveness of the marina. Therefore the expected effects on the conditions of cross-border investments or establishment are likely to remain very limited.
- (54) Overall, the Commission concludes that the alleged beneficiary's reach is not restrained to the local level. Even if the alleged aid measures likely will not significantly impact the international presence of the marina, nor the conditions of cross-border investment or establishment in this market, an effect on trade can therefore not be clearly excluded on the basis of the available information.
- (55) When further assessing whether the measure constitutes aid on the basis of the other elements ((a), (b), (c)) mentioned in recital (38)), the Commission will distinguish between:

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<sup>22</sup> Waterrecreatie Advies (2009). *Evaluatie watersportbeleid provincie Zeeland 2000-2008. Onderzoek in opdracht van de Provincie Zeeland*. Lelystad: Waterrecreatie Advies, p. 13.

<sup>23</sup> Waterrecreatie Advies (2015). *Ontwikkeling watersport provincie Zeeland 2009-2015. Uitkomsten Quickscan*. Lelystad: Waterrecreatie Advies.

- a) The granting of rental privileges to the boat owners represented by WVS;
- b) The values established in the sub-leasehold agreement, taking into account the granted privileges;
- c) The transfer of the operating reserve.

#### 4.1.2. *Existence of aid with regard to the rental privileges*

- (56) The rental privileges are granted to individual boat owners/berth holders, represented by WVS. According to the Dutch authorities, the underlying objective was to protect these individuals' interests in the context of the termination of the long-standing rental agreement between the municipality and WVS (see recitals (14) and (20)). They claim that the rental privileges as such form a private law compensation to the individual boat owners. The rental privileges form a continuation of the rental conditions for WVS and its members. In this construction, WVS is simply a vehicle, passing on the rental privileges to the individual boat owners in the form of lower mooring charges.
- (57) The rental privileges prolong the situation set out in the initial rental agreement, according to which the mooring charges were to be equal to the operation costs. These rental privileges are not granted to an undertaking. The notion of economic activity has been defined as any activity consisting in offering goods and services on a given market<sup>24</sup>. The notion of undertaking is hereby understood in a functional manner. The concept of an undertaking covers any entity engaged in an economic activity regardless of its legal status or the way in which it is financed.
- (58) The Commission considers that the boat owners benefiting from the low tariffs (rental privileges) cannot be considered undertakings. These boat owners are individuals engaged in recreational or amateur sports activities. WVS unites and represents the boat owners and does not itself engage in economic activities related to the operation of the privatised marina either. However, since the individual boat owners and not WVS are to be considered as the beneficiaries of the rental privileges, whether or not WVS carries out economic activities is not relevant, as the individual boat owners themselves can in any case not be qualified as undertakings.
- (59) Therefore, the Commission considers that the conditions of Article 107(1) TFEU are not met as regards the rental privileges, which – hence – do not constitute State aid.

#### 4.1.3. *Existence of aid with regard to the sub-leasehold*

- (60) The operation of a marina may constitute an economic activity<sup>25</sup>. It is carried out by SJS as a result of the privatisation process. Therefore, it would appear that SJS qualifies as an undertaking in the sense of Article 107(1) TFEU. The Commission

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<sup>24</sup> Judgment of the Court of Justice of 12 September 2000, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined cases C-180/98 and C-184/98, ECLI:EU:C:2000:428, paragraph 75.

<sup>25</sup> See N582/99 – Italia – Aiuti a "Marina di Stabia S.p.A." per il progetto di sviluppo di un porto turistico; Beschikking van de Commissie van 29 oktober 2003 betreffende de door Nederland ten uitvoer gelegde steunmaatregelen ten gunste van jachthavens zonder winstoogmerk in Nederland, PB L 34, 6.2.2004, pp. 63-69.

will assess in the following whether SJS received a selective advantage in the context of the determination of the sub-leasehold value.

- (61) Economic transactions carried out by public bodies do not confer an advantage on their counterparts and therefore do not constitute aid if they are carried out in line with normal market conditions. Consequently, it falls to be determined whether the municipality, when selling the sub-leasehold to SJS, acted as a market economy operator.

#### 4.1.3.1. The rental privileges do not confer an advantage to SJS

- (62) First, this means determining whether the rental privileges (as discussed under section 4.1.2 above) confer an advantage to SJS. As already explained in recitals (57) and (58) above, the Commission considers the individual boat owners to be the direct beneficiaries of the rental privileges. It moreover considers that the granting of rental privileges to WVS and its members in no way constitutes an indirect advantage to SJS.
- (63) The granted privileges form a "rent protection" clause that is based on the long history of agreements between the municipality and WVS with regard to the rent and operation of the marina. As explained in recital (14), the privileges find their origins in negotiations between the municipality and WVS, which were started to avoid litigation by WVS against the privatisation process. It is because the municipality considered that WVS' legal claims posed a real threat for the privatisation process that the municipality agreed to engage in negotiations with WVS. These negotiations resulted in the insertion of the rental privileges as a condition to be respected by any potential buyer of the marina. Any market economy operator, faced with legal threats, would have assessed the risks of those claims and determined its actions on the basis of that assessment. It follows from the documents submitted by the Dutch authorities in the context of the procedure that the municipality at several moments in the period preceding the conclusion of the sub-leasehold agreement weighed the WVS actions against the long-term privatisation objectives with regard to the marina. This resulted in the granting of concessions towards WVS and its members through the inclusion of rental privileges in the sales transaction. This effectively corresponds to the sale of the marina as a rented property, whereby the buyer is required to respect certain obligations, limited in time, vis-à-vis the tenants.
- (64) None of the arguments raised by the complainant alter the conclusion that the municipality was acting as a market economy operator when it agreed to the inclusion of the rental privileges as a condition of the sub-leasehold transaction.
- (65) Firstly, the buyer of the marina is not an indirect beneficiary from the privileges. The privileges rather have a negative impact on the potential revenue that can be realised by operating the marina during the period that the rental privileges are in place. Indeed, the operator of the marina cannot remove existing berth holders from the marina, nor raise their rental tariffs.
- (66) Secondly, contrary to what the complainant alleges (see recital (28)), the rental privileges do not have any impact on the tariffs for passers-by. They do not incentivise the operator of the marina to lower these rates. According to the information submitted by the Dutch authorities, the rental privileges only apply to the existing fixed moorings made available to WVS. The customer base of the marina is limited by the size of the marina (number of berths).

(67) Thirdly, the fact that the individual boat owners, and not SJS, benefit from the rental privileges is not affected by the question whether or not SJS and WVS form one economic unit because of the functional, economic and organisation ties between them (see recital (26)), as argued by the complainant, or whether the economic marina operation activities of SJS are strictly separated from the non-economic activities of the WVS as an amateur water sports club, as argued by the Dutch authorities.

4.1.3.2. The price-setting of the sub-leasehold did not result in an advantage for SJS

(68) Second, it could be considered that SJS was granted an advantage if the price-setting of the sub-leasehold itself was done in a way so as to lead to a below-market price. However, the municipality determined the impact of these conditions on the selling price on the basis of various expert reports. The price paid by SJS for the sub-leasehold was based on an external valuation that explicitly took into account the impact of the privileges. The privileges in this context constitute an external factor that has a negative impact on the value of the marina for any buyer, not just SJS. The solidity of this external valuation was backed up by a second expert report (see recital (22)).

(69) The Commission notes in this regard that it recently clarified its view on the conditions determining the presence or absence of aid in the Commission Notice on the notion of aid<sup>26</sup>. More generally, both the land sales Communication and the Notice on the notion of aid offer guidance for the assessment whether the State acted as a market economy operator in the context of land transactions.

(70) In this respect, recital 103 of the Commission Notice on the notion of aid provides that, "*in the cases of sales of land, an independent expert evaluation prior to the sale negotiations to establish the market value on the basis of generally accepted market indicators and valuation standards is in principle satisfactory*".

(71) This transaction concerns the sale by way of a sub-leasehold (a limited property right) together with the movable and constructed immovable things connected to it. In the case at hand, the Commission considers that the municipality indeed acted as a market economy operator, by establishing the value of the marina through independent valuation. As shown hereinafter, the specific objections raised by the complainant with regard to the land sales Communication (see recitals (31) and following) do not alter this conclusion.

(72) Firstly, with regard to the timing of the valuation (see recital (31)), the Commission considers that the crucial requirement to establish that a land transaction took place on market terms is that the valuation is truly independent and that it formed the basis for the sales transaction. In this respect, the Commission notes that the negotiations between WVS and the municipality started in 2008. The Dutch authorities have explained that they initially focused on setting the groundwork for the marina's privatisation, of which WVS was the long-term tenant. WVS was granted an exclusive negotiation position on that basis. Three relevant valuation reports were drafted in the period 2009-2010. The last one, evaluating the differences

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<sup>26</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50.

between the first two valuation reports, was completed in March 2010. The Maas valuation, which took into account the granted privileges to WVS, was the one retained as the basis for the agreement. In 2011, the municipality accepted the offer made by WVS and the sub-leasehold agreement was signed in 2012. This time line supports the Commission's conclusion that the valuations formed the basis for the agreement.

- (73) Secondly, the complainant has argued that it is not possible to make the transaction conditional on the respect of rental privileges to existing berth holders (recital (31)). The Commission notes that the rental privileges were explicitly part of the Maas valuation that formed the basis for the transaction. Muller has confirmed in its report that the difference between the two valuation reports corresponds to the economic disadvantage of the obligation to keep mooring tariffs at a reduced level for 10 years. As already explained (see recitals (62) and following), the municipality considered that it was necessary to make concessions to the water sports association and its members, with which it had engaged in rental agreements for thirty years and which were making concrete legal threats that in the eyes of the municipality risked undermining the privatisation plans for the marina. Therefore the municipality, when taking the rental privileges (by themselves not an advantage to an undertaking (see section 4.1.2)) into account in the context of the sub-leasehold transaction, acted as a normal market economy operator.
- (74) Thirdly, the complainant has argued that the valuation does not take into account the fact that the sale conditions changed after the valuation was made, firstly because the requirements in terms of improving the facilities were removed (see recital (33)a)).
- (75) In this regard, the Dutch authorities have explained that the initial requirements with regard to the improvements correspond to elements that in any case needed to be addressed in view of operating the marina. Regardless of whether they would be obliged to do so, any market operator would make these investments in the marina. This is not disputed by the complainant, who nevertheless claims that the absence of the specific requirements comes with additional freedom (e.g. in terms of timing), having a value-increasing effect.
- (76) The Commission notes that the Maas valuation report that formed the basis for the transaction is consistent in describing the marina's state as outdated and in need of renovation. Moreover, the valuation report also mentions that improvements will have an upward impact on the mooring tariffs. In other words, should the buyer not invest in the marina, the mooring tariffs will also remain lower, whereas the ground rent to be paid remains the same. As such, the removal of explicit details on the improvements from the agreement is not expected to have had an influence on the value of the long lease.
- (77) Fourthly, with regard to maintenance tasks (for an amount of EUR 166 000) done by the municipality in 2010 and 2011 (see recital (33)b)), the Dutch authorities have explained that the allegations of the complainant relate to regular maintenance costs that are not relevant to the present case. There is no indication in the relevant available documents<sup>27</sup> that these costs are of relevance to the sub-leasehold

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<sup>27</sup> See notably Gemeente Schouwen-Duiveland, *Programmarekening 2010*; Gemeente Schouwen-Duiveland, *Programmarekening 2011*.

transaction. Instead, the Commission considers that these maintenance tasks are part of regular maintenance, ensuring that the value of the marina is maintained at the levels described in the valuation reports.

(78) Fifthly, with regard to the provisions included in the agreement on maintenance exceeding EUR 130 000 (see recital (34)), the Dutch authorities have explained that they refer to certain specific tasks only, for which the costs are estimated to remain below EUR 130 000. Only if, due to unforeseen circumstances, the costs would exceed these estimations, the municipality will step in. Even then, only the unforeseen additional costs would be covered by the municipality and on the condition that the municipality gives its agreement for the execution of the works in advance. The estimated value of the specific tasks is taken from detailed reports (see recital (19)) and was excluded from the valuation report by Maas Recreatie Bedrijfsmakelaardij. The Commission considers that the provision, which can be expected to remain without practical effect, does not affect the market character of the sub-leasehold transaction.

(79) In conclusion, when concluding the transaction consisting of the sub-leasehold agreement, the municipality acted in accordance with the market economy operator principle. Accordingly, the transaction does not entail an economic advantage to an undertaking.

#### *4.1.4. Existence of aid with regard to the operating reserve*

(80) The operating reserve (recital (18)) was accumulated within the context of the rental agreement between WVS and the municipality, on the basis of the rents collected for (temporary and fixed) boat moorings in the marina. The funds were earmarked for the maintenance of the marina. The municipality managed the fund but its powers were limited by the rental agreement with WVS, which determined that neither WVS, neither the municipality would make a profit from the operation of the marina. Any rental surplus or shortage was to lead to an adjustment of the mooring charges of the subsequent year.

(81) The Dutch authorities have argued that the accumulated reserve belonged to the WVS, not the municipality. It corresponds to rent that WVS paid in excess of what was agreed. According to the Dutch authorities, the municipality was obliged, given the provisions of the rental agreement, to transfer the unused reserve to WVS, to the advantage of its members.

(82) The sum due to WVS was deducted directly from the sales price charged to SJS. According to the Dutch authorities, WVS requested that the sum that was due to its members would be transferred to SJS in the context of the sub-leasehold agreement (see recital (18)). The Commission notes that the 2011 document outlining WVS' offer<sup>28</sup> explicitly mentions that the operating reserves are due to WVS but that this sum can be used to offset the acquisition fee to be paid to the municipality.

(83) Therefore, it can be concluded that the transfer of the operating reserve did not confer any advantage from State resources to SJS, since that reserve belonged to WVS, which had requested the municipality to transfer the funds to SJS.

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<sup>28</sup> Watersport Vereniging Scharendijke, *Brief aan het College van Burgemeester en Wethouders van de Gemeente Schouwen-Duiveland, betreft: Jachthaven Scharendijke*, 14 januari 2011.

#### 4.1.5. *Conclusion on the presence of aid*

(84) It can be concluded that the impact of the alleged aid on trade and competition is limited. The granting of the rental privileges prolongs the existing rental conditions for individual boat owners and does not constitute an advantage to an undertaking. The sale of the long leasehold did not confer an advantage to SJS since the municipality acted as a market economy operator. The transfer of the operating reserve to SJS does not involve the conferral of an advantage from State resources since the municipality was not entitled to that reserve. None of the alleged measures therefore constitute aid under Article 107(1) TFEU.

### 5. CONCLUSION

The Commission has decided, on the basis of the foregoing assessment, that the measures taken in the context of the privatisation of the marina "Jachthaven Scharendijke" do not constitute aid.

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For the Commission

Margrethe VESTAGER  
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