



EUROPEAN COMMISSION

Brussels, 25.9.2019
C(2019) 6821 final

SENSITIVE*: LIMITED

**Subject: State aid/Netherlands
SA.37964 (2013/FC)
Alleged State aid through compensation for the use of land for gas
pipe lines, power lines and other lines by network companies**

Sir,

1. PROCEDURE

- (1) On 16 October 2013, the Commission received a complaint from a landowner and land user (hereinafter, the "complainant"¹) concerning alleged State aid through compensation to landowners and land users for their cooperation regarding the use of their land for gas pipe lines, power lines or other lines by network companies. The complaint has been submitted by an interested party by means of the compulsory complaint form pursuant to Article 24(2) of the Procedural Regulation (hereinafter, "the Procedural Regulation"²). Supplementary information has been received by the Commission on 17 October 2013.
- (2) The Commission informed the complainant by letter of 19 December 2013 of its preliminary view regarding the complaint, finding no State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European

¹ The identity of the complainant is known and indicated in the complaint form. The complainant did not want his identity to be revealed. The complaint has been submitted on behalf of the complainant by a real estate agency, which represents the complainant.

² Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 99.

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Union (hereinafter, "TFEU") in his allegations and inviting the possible submission of new facts, to which the complainant replied on 18 January 2014.

- (3) The Commission forwarded the above-mentioned reply from the complainant of 18 January 2014 to the Netherlands together with a request for information by means of a letter sent on 5 March 2014, of which the complainant received a copy. The Netherlands replied by letter of 16 May 2014, of which the complainant received a copy. A second preliminary assessment letter confirming the finding that no State aid was apparent was sent by the Commission to the complainant, with copy to the Dutch authorities, on 29 July 2014, to which the complainant replied by letter of 28 October 2014. Additional information was sent by the complainant by e-mails of 20 August 2015, 26 August 2015 and 13 September 2015. With letter of 30 September 2015, the Commission services reiterated their preliminary view expressed in letters of 19 December 2013 and 29 July 2014 that the payments contested in the complaint do not constitute State aid in the meaning of Article 107(1) TFEU and informed the complainant of its intention to close the examination of the complaint, unless the complaint would be withdrawn within one month from the date of the letter (which has not occurred).
- (4) The Commission sent an additional request for information to the Netherlands on 7 April 2017, to which the Dutch authorities replied on 9 June 2017.

2. ISSUES RAISED IN THE COMPLAINT

2.1. Complainant /complaint

- (5) The complainant indicates he is an interested party, as a competitor of the landowners and land users, who have received payments ("cooperation indemnity", in Dutch: "*meewerkvergoeding*") from gas and electricity companies for the use of their land for the purpose of the installation of conduct pipes and cables. The complainant claims that these types of payments constitute illegal and incompatible State aid.

2.2. Background

- (6) On a regular basis, in the Netherlands, very large and smaller conduct pipes and cables are laid or renewed in, on or above mostly privately owned land. The conduct pipes and cables for gas and electricity serve the public interest. The national gas and electricity transmission networks are owned and managed by the network companies with limited liability of which the State of the Netherlands holds all the shares. The N.V. Nederlandse Gasunie (hereinafter, "Gasunie") is a gas infrastructure company providing the transport of natural gas by means of a high-grade gas transmission grid and constructing new gas infrastructure.³ TenneT⁴ builds and maintains the high-voltage grid that is used

³ The Dutch Gas Act appoints Gasunie Transport Services B.V. (GTS), a wholly owned subsidiary of N.V. Nederlandse Gasunie, as the national transmission system operator (TSO) in the Netherlands. GTS is the owner and operator of the national gas transmission network in the Netherlands and responsible for the management, operation and development of the gas transport system in the Netherlands. GTS is certified as TSO to perform its regulated activities independently as required by law.

⁴ TenneT (TenneT Holding B.V. and TenneT TSO B.V.) is a network company that owns and manages the national high voltage electricity transmission network. TenneT TSO B.V., a wholly owned subsidiary

to transport large quantities of electricity. The transmission system operators (TSO) operate independently in the regulated energy market. Gasunie and TenneT are separate legal entities under private law. Regional conduct networks are managed by undertakings in which Provinces and municipalities through share constructions hold the majority of the share capital.⁵

- (7) Land owners and land users can receive, in addition to a compensation for damages, a so called "cooperation indemnity" from the network companies if they agree to cooperate in order that conduct pipes or electricity cables are put in, on or above their land. This practice seems to exist in the Netherlands already since the fifties of last century. As far as known, the payments seem not to be part of any Dutch State aid scheme notified to the Commission. According to the complainant, the payments have increased considerably in recent years, also due to negotiations by organisations of farmers and landowners with Gasunie and TenneT.
- (8) The beneficiaries of the cooperation indemnity are landowners and land users in the Netherlands, whose rights for the land use are needed for the realisation of transport connections for gas, water, electricity, etc., which are works of common interest, and who conclude a "rights in rem" agreement with the network companies. The payments are not related to a particular type of beneficiary, undertaking, size or sector, although, according to the complainant, the large majority of connections are put in privately owned agricultural land.
- (9) The payments by Gasunie and TenneT to landowners and land users are made with regard to the following two types of payment:
 - 1) compensation for damages of property, exploitation and future damage, and
 - 2) one-off contractual payments for the conclusion of a "rights in rem" agreement and for the establishment of the construction site in an amicable manner (hereinafter referred to as "cooperation indemnity"⁶), namely for:
 - (a) establishing a "rights in rem" agreement ("*eigenaarvergoeding*" or "*afsluitvergoeding zakelijk recht overeenkomst (ZRO)*"), which is paid to the landowner,
 - (b) the cooperation with regard to the construction site to put installations in, on or above the land ("*werkstrookvergoeding* or "*meewerkvergoeding werkterrein*"), which is paid to the land user, and
 - (c) an additional amount for efficiency reasons, if the contract is signed within a short delay⁷ ("*efficiëntiepremie*" or "*efficiencypremie*").

of TenneT Holding B.V., has been appointed as network operator (TSO) under the Dutch "*Elektriciteitswet*" to perform the regulated tasks.

⁵ For instance: *Alliander NV*, regional electricity and gas network manager, *Cogas Kabeltelevisie B.V.*, *waterleidingbedrijven en waterschappen*.

⁶ Named by Gasunie "*eigenaarvergoeding*", "*werkstrookvergoeding*" and "*efficiëntiepremie*" (annexes 06, L and M of complaint). Named by TenneT "*afsluitvergoeding zakelijk recht*", "*meewerkvergoeding werkterrein*" and "*efficiencypremie*" (annex E of complaint).

⁷ Efficiency premium, calculated as a supplement of 20% of the amounts mentioned in points 2)(a) (establishing of the rights in rem) and 2)(b) (cooperation indemnity) of recital (9), if the offer has been

- (10) The indemnities under point 2) of recital (9) are obtained by the landowner and the land user if they agree to cooperate with, and give the right ("rights in rem") to the network company to use (a part of) the land for putting the infrastructure and to conclude an agreement in mutual understanding concerning these aspects. These payments are not required by any law or public rules. The amounts are calculated based on the land surface used and vary from a minimum of one thousand euros to several tens of thousands euros or more per landowner or land user, depending on the surface concerned.
- (11) The interest of the network companies in such agreements is to facilitate a timely planning and execution of the infrastructure works without disputes and legal proceedings, which are often sizable, with a long lifetime and payback time.
- (12) If such an agreement between the landowners and land users and the network companies is not reached, the land concerned can become available for use following a decision of the Ministry of Infrastructure and Environment adopted on the basis of the National law "*Belemmeringenwet Privaatrecht*" ("Obstructions Act Private law", hereinafter, "BP"). In that case, the landowners and land users do not receive the contractual amounts for rights in rem and cooperation as mentioned under point 2 in recital (9) above, but may only receive compensation for damages following the provisions of the law.

2.3. Complaint

- (13) The complaint was submitted by a landowner and land user, represented by a real estate agency, who did not reach an agreement with Gasunie on the use of the land with regard to the construction of a natural gas pipeline⁸.
- (14) The objections raised by the complainant to the Dutch authorities in the case were:
 - (a) of formal nature (procedure, timing, numbers...),
 - (b) of material nature (the complainant deemed that there was no work of general interest, but of commercial interest to Gasunie; that there was no serious negotiation, because the amount of indemnity offered by Gasunie was considered too low; Gasunie only offered a one-off amount, refusing annual payments with a standard "take-it-or-leave-it-offer"), and
 - (c) of technical nature, regarding the construction site.
- (15) In the absence of a mutual agreement, Gasunie requested the Ministry of Infrastructure and Environment, by letter of 14 August 2012, to decide that the complainant (and the other landowners and land users concerned) was obliged to allow the construction and the conservation of the natural gas pipeline and additional work on their land.
- (16) Following, amongst others, the recommendations of the expert commission⁹ ("*deskundigencommissie*"), it was decided pursuant to the BP by Decision of 5

accepted and signed with six weeks after being presented. Source: Annex 26 of the complaint, "Presentatie TenneT en LTO NW380 aug sept 2013sheets A".

⁸ Offer made by Gasunie with registered letter PJW 12.1306 of 3 July 2012.

February 2013 of the Ministry of Infrastructure and Environment¹⁰ (hereinafter, "the Decision"), that the objections made by the right holders (landowners and land users) (recital (14)), who did not accept the offer and did not reach a mutual agreement to cooperate with Gasunie, were not justified. Therefore, the landowners and land users were obliged by law, on the basis of the BP, to allow their land to be used for passing of the gas pipeline ("duty of tolerance", in Dutch: "*gedoogplicht*"). The national law (BP) foresees the compensation of damages for this outcome, however, not with payments similar to the contractual "cooperation indemnity" offered by network companies as described in point 2 of recital (9).

- (17) In the complaint submitted to the Commission, the complainant claims that he and others have a disadvantage compared to landowners who did agree to the offer made and thus received the amount of the "cooperation indemnity" (as described in point 2 of recital (9) above) in return for the cooperation and the conclusion of the rights in rem agreement ("*opstalrecht*"). According to the complainant, the beneficiaries of the indemnity would have an economic advantage, which distorts competition. He finds the indemnity selective, as it is only offered to landowners and land users who sign a "rights in rem agreement" to cooperate. The complainant criticises that "cooperation indemnities" are not fixed by law and are only paid for signing a "rights in rem" agreement, in addition to the compensation payments for damages, as foreseen in the BP. He also challenges the calculation method of the cooperation indemnity, which has been agreed between the Dutch farmers' organisation (LTO Nederland¹¹) and the network companies, not accepting the calculation based on used ground surface and ground price: he finds that the amount represents "overcompensation".

2.4. Further information provided in the complaint

- (18) Filing an appeal at the State Council ("*Raad van State*"¹²) against the Decision would have been possible within a period of six weeks after the submission of the Ministerial decision. From the information submitted with the complaint, it seems that the complainant did not make use of the right of appeal.
- (19) In the replies made on 21 May 2012 to parliamentary questions¹³, the Dutch Minister of Economic Affairs mentioned, amongst others, that negotiations about the modification of the text of the framework contract with regard to the amounts of the indemnities and the conditions of a "rights in rem" for the use of land were ongoing between the network company TenneT, LTO Nederland and

⁹ The expert commission assesses the following requirements for imposing a "duty of tolerance", pursuant to the BP: (1) it is only applicable to right holders (landowners and land users) regarding real estate; (2) concerns works of general interest; (3) serious negotiations were carried out but did not result in an agreement; (4) interests of the right holders do not require expropriation and the work does not create more hindrance than necessary.

¹⁰ Decision RWSCD BJV 2013/473 of 5 February 2013. "*Beschikking ingevolge de Belemmeringenwet Privaatrecht houdende oplegging van de plicht tot het gedogen van de aanleg en instandhouding van de aardgastransportleiding Beverwijk-Wijngaarde, tracé A-803 in de gemeenten Haarlemmermeer en Velsen (cluster 2)*".

¹¹ Land- en Tuinbouw Organisatie Nederland (LTO Nederland).

¹² Appeal ("*beroepschrift*") at "*Afdeling bestuursrechtspraak van de Raad van State*".

¹³ Letter of the Ministry of Economic Affairs, Agriculture and Innovation of 21.05.2012 regarding "*Beantwoording vragen met betrekking tot het artikel "TenneT moet grondverbruik vergoeden"*".

the association of private landowners (FPG¹⁴). As it concerns an agreement of private law, the Minister considers that the negotiation is the business of the parties concerned and that it is up to them to reach an agreement.

- (20) The Minister also stated that mutual agreement between the individual landowners and land users and the network companies about the land use and the amounts should prevail over decisions of the Ministry of Infrastructure and Environment, on the basis of the BP, to make the land concerned available for use. However, if such an agreement cannot be reached, the BP allows for the use of the land. The latter's provisions aim to avoid further delays for the projects, which are of national importance.
- (21) The new system of calculation of indemnities agreed between Gasunie and LTO Nederland was implemented on 1 September 2010¹⁵. On 18 December 2012, TenneT and LTO Nederland reached an agreement on the level of the indemnities and the process regarding the construction of high-tension cables in the Netherlands. The FPG did not agree to this outcome of the negotiations, because no revisable annual amounts were included. They also considered that the construction of pipes and cables were not economic activities, but public works of general interest, and that the indemnities were not market conform.
- (22) The framework contracts agreed between LTO Nederland and the network companies (Gasunie and TenneT) serve as the basis for the conclusion of the individual agreements between the individual landowner and land user and the network company. These agreements refer to the right of the network company to use the land and the calculation of the indemnity to be paid to the landowner and land user.
- (23) As published on 30 March 2012 in the Official Journal of the Netherlands¹⁶, with regard to property owned by the State, the Dutch State (RVOB¹⁷) calculates by default, regardless of the public objective or the commercial interest, a market conform indemnity for the future use of State property (land or water) for the construction and conservation of the cables and conduct pipes in, on or above this State property. In such cases, the RVOB makes use of the same standard indemnity calculation as the one used by Gasunie and TenneT (following the new system as of 1 September 2010) in order to calculate the market conform indemnity¹⁸, which the State would receive as a landowner.

2.5. Supplementary information/clarification provided by the complainant

2.5.1. Information provided by the complainant on 18 January 2014

- (24) The complainant clarifies that the "cooperation indemnity" is not a payment for the compensation of damages or the use of the land. It is a one-time payment,

¹⁴ "Federatie Particulier Grondbezit" (FPG).

¹⁵ Indemnity "rights in rem agreement": "Eigenaarsvergoeding" EUR 0.93m² (price level 2010 until September 2010); "Eigenaarsvergoeding" EUR 2.44m² (price level 1 September 2010 - annex L of complaint); "Eigenaarsvergoeding" EUR 2.82m² (price level 2013 - annex M of complaint).

¹⁶ Kennisgeving Nr. RVOB/2012/153 of 14.03.2012, published in the *Staatscourant van het Koninkrijk der Nederlanden* Nr. 5821 of 30.03.2012. Annex O of the complaint.

¹⁷ RVOB, "Rijksvastgoed- en ontwikkelingsbedrijf, Directie Vastgoed".

¹⁸ The indemnity is EUR 2.56m² used (price level 2011 - 2012).

which is paid upon reaching a mutual cooperation agreement and made in addition to the compensation for damages.

- (25) The complainant also mentions that the amount of the "cooperation indemnity" is not objectively determined by experts, and provides in this respect examples and information on the increase of the indemnity agreed between TenneT and LTO Nederland from 2008 to 2013, from € 0.61/m² to € 2.16/m² (+255%), which is the result from the negotiations of the parties concerned. Thus, he claims that the payments represent "overcompensation" without counterpart and qualifies them as "unacceptable State aid". He also states that network companies TenneT and Gasunie use different prices/m².
- (26) The complainant reiterates that the indemnities are paid from State resources.
- (27) The complainant mentions that there are no laws or rules which provide for the payment of the indemnities concerned. He insists on the fact that these are just the consequence of reaching an agreement and signing of the contract, and constitute "overcompensation" and "inadmissible State aid".
- (28) The complainant reiterates that the calculation method of the indemnity is the result of negotiations and is not based on an objective valuation method. In his view, the indemnity cannot be "market conform", as the calculation is the outcome of the negotiation between only three parties (Gasunie, TenneT and LTO Nederland), of which the farmers' organisation LTO Nederland represents only 20% of the landowners and land users.

2.5.2. *Information provided by the complainant on 28 October 2014*

- (29) On 28 October 2014, the complainant sent his comments with regard to the point of view of the Dutch authorities (section 3 below), which in short are:
 - the indemnity should be a fixed equal amount per agreement, not based on ground surface;
 - a cost/benefit analysis of the indemnity is missing;
 - the "rights in rem"/cooperation agreement has in itself advantages for both parties, so a payment is not necessary;
 - the indemnity is an overcompensation, as no law provides for such a payment;
 - the regulation of the relation between parties under the BP and jurisprudence is more favourable than under the "rights in rem", as the compensation of capital damage in the cooperation agreement is limited to the first owners and their descendants (2nd grade), thus excluding new owners;
 - LTO Nederland represents only 20% of landowners and land users, which does not justify that the negotiated standard contract should be valid for all landowners and land users;

- the State has (financial) interests by means of VAT and income tax revenues on the payments to landowners and land users, corporate taxes paid by the network companies, and dividends received from the share capital;
- in 2010, a National court judgement overruled a Decision of the “*Autoriteit Consument en Markt*” for reason of involvement of the Ministry of Economic Affairs (hereinafter, EZ) with regard to the valuation of the transport networks;
- EZ facilitated negotiations and serves as arbiter in case of disputes.

2.5.3. *Supplementary information provided by the complainant on 20 and 26 August 2015 and 13 September 2015*

- (30) With e-mails of 20 and 26 August 2015, the complainant submitted additional information by e-mail, with which he reiterated and emphasised that, in addition to the full compensation of damage, a "cooperation indemnity" is offered and paid when an "agreement regarding rights in rem" ("*overeenkomst zakelijk recht*") is concluded and cooperation is agreed by the network utility companies (Gasunie, TenneT and others) and the landowners. He also reiterated his view that the payment of such "cooperation indemnities" should be considered as inadmissible State aid.
- (31) Eight annexes were enclosed to the e-mail of 20 August 2015, which concern documents in which the complainant highlighted text passages in order to point out that the cooperation indemnities are offered and paid on top of the compensation for damages. The documents are:
- copies of documents with regard to five national court cases¹⁹;
 - an example of the point of view of the Ministry of Infrastructure and Environment²⁰ following an appeal by a landowner and land user against a Ministerial decision with regard to the "duty of tolerance" under the BP;
 - an example of a decision of the Ministry of Infrastructure and Environment establishing a "duty of tolerance" ("*gedoogbeschikking*")²¹;

¹⁹ The said documents include text passages stating that the cooperation indemnities are offered and paid in addition to the compensation for damages: (1) *Raad van State RvS Harnasch Polder uitspraak* 30-05-2012. ECLI:NL:RVS:2012:BW6968; (2) *Raad van State uitspraak* 201204476/1/A3 dd 03-07-2013 *Burgerweeshuis Gasunie*; (3) *Raad van State Uitspraak* 201407796/1/R1 dd 12-08-2015. ECLI:NL:RVS:2015:2592; (4) *Uitspraak Raad van State* ECLI:NL:RVS:2013:CA3668 dd 19-06-2013; (5) *MinI&M Divis-Stein. Verweerschrift Variohippique B.V. vovo (F 7 770) (201407796/2/R1)* dd 06-10-2014.

²⁰ This document states, amongst others, that that the cooperation indemnities are offered and paid in addition to the compensation for damages. In the letter *Rijkswaterstaat* of 10.03.2014 with reference ALK 14/372 WET, the Ministry expressed its opinion that, despite the fact that preceding, meaningful and reasonable negotiations between the parties concerned had been held, an agreement to establish a "rights in rem" had not been reached. According to the Ministry, the absence of an agreement does not lead to the conclusion that the request to impose the "duty of tolerance", based on the BP, should have been rejected.

²¹ *Gedoogbeschikking RWS-2015/27815. HHNK* dd 30-07-2015.

- an example of an offer to conclude an agreement regarding rights in rem and indemnities ("*aanbieding overeenkomst zakelijk recht en vergoedingen*") made by TenneT to a landowner²².
- (32) The example of the offer made by TenneT shows in detail that a "cooperation indemnity" is paid for:
- the cooperation (with the execution of the agreement) for the establishment of the "rights in rem" to put installations in, on or above the land ("*afsluitvergoeding zakelijk recht*");
 - the set up of a construction site for the execution of the utility (here electricity) infrastructure works ("*meewerkvergoeding werkterrein*");
 - the conclusion of the agreement within six weeks after the date of the offer ("efficiency premium" of 20% of the indemnity calculated according to the first two bullet points referred above).
- (33) The e-mail of 26 August 2015 concerns e-mail correspondence between LTO Nederland and the complainant regarding the existence of cooperation indemnities on top of the compensation for damages.
- (34) The e-mail of 13 September 2015 encloses a newspaper article of NRC Next of 12.09.2015, with regard to the active role of the government's commissioner(s) in the supervisory boards ("*Raad van Commissarissen*") of State holdings.

3. CLARIFICATION FROM THE DUTCH AUTHORITIES, SUBMITTED ON 16 MAY 2014 AND 9 JUNE 2017

3.1. Advantage

- (35) The Dutch authorities are of the opinion that the cooperation indemnity does not constitute State aid, as there is no advantage in the meaning of Article 107(1) TFEU. In the Netherlands, there are two possible scenarios for the execution of works of public nature: firstly, the agreement between the constructor and landowner and land user to execute the works; secondly, in case of no agreement, the obligation imposed by law that the landowner and land user have to allow the works on their land, the so called "duty of tolerance" pursuant to the BP.
- (36) Contrary to the opinion of the complainant, the Dutch authorities submit that the fact that a landowner and land user accept the contractual offer made by the network companies, thus avoiding the "duty of tolerance", represents an economic value for the network companies, because:
- the land is made available quickly;
 - no lengthy and costly procedures before National courts are necessary with regard to the "duty of tolerance" and damage compensation;

²² Offer TenneT with reference GS-REM 15-0914 of 10.03.2015.

- the agreement and the right to put installations in, on or above the land ("*recht van opstal*") determine the rights and obligations of the parties and thus avoid costly and lengthy procedures;
- the agreement creates a sustainable and long-term relationship and is important for a positive attitude of both parties.

(37) The Dutch authorities further submit that the cooperation indemnity:

- is indeed no compensation for damage for government actions, but an indemnity from the constructor of the works of public interest to the landowners and land users, to allow for the construction of the conduct pipes and cables on or in their land;
- is negotiated by the private parties concerned and, in the negotiations, it is up to the private parties themselves to determine what the criteria and the counter value for the cooperation by landowners and land users should be;
- is based on an objective calculation method, by means of a transparent, accountable and uniformly applied systematic approach;
- also includes a value element for avoiding "red tape" ("*rompslomp*"): an element which is difficult to quantify, even by experts (the value of the cooperation can therefore not merely be established by an expert);
- has to be effective, as network companies (TenneT and Gasunie) are under the surveillance of the Dutch national regulatory authority (hereinafter, NRA)²³, which also controls the effectiveness of the costs of the network activities - disproportionately high amounts would not fit in this context.

(38) Also, the complainant's argument that negotiating party LTO Nederland represents only 20% of the landowners and land users and that, therefore, a market conform price could not be obtained, is not clear. On the contrary, it is not expected that a higher participation of landowners and land users would lead to a lower cooperation indemnity.

(39) Taking into account all of the above, the Dutch authorities consider that the cooperation indemnity does not constitute an advantage. In addition, the fact that landowners and land users, in certain individual cases, refuse to agree to the conclusion of rights in rem agreements ("*opstalovereenkomst*"), or disagree on the amount offered, is a strong indication that there is no question of advantage.

3.2. Selectivity

(40) The offer of the cooperation indemnity is calculated on the basis of an objective and standardised calculation method, which is available at the same conditions to all landowners and land users in a comparable situation, including those represented by the complainant, who, however, have refused to accept the

²³ The Dutch national regulatory authority is the Autoriteit Consument en Markt, which is a separate and distinct legal entity from any other Ministry or government body. The NRA is independent and takes autonomous decisions.

offer. Landowners and land users are free to accept or to refuse the offer made. No landowner or land user is benefiting more than another, they can all decide to equally benefit, meaning that there is no selectivity.

3.3. State resources and imputability to the State

- (41) The Dutch authorities submit that the financial resources at stake cannot be qualified as State resources, as the State acts as a mere shareholder and has no controlling influence on the companies concerned. They assert that these are structured companies, where the influence of the shareholders on the company policy is transferred to the Supervisory Board. They conclude that, according to this structure, the State cannot dispose of the financial means of the companies, from which the cooperation indemnities are paid. The means are generated by the customers' energy bills and do not originate from State resources.
- (42) The Dutch authorities further submit that, even if the network companies would be deemed to be under State control, this would not be sufficient to impute the transactions in this concrete case to the State. This is because the influence of the Dutch State (as a shareholder of Gasunie and TenneT) on the company policy and on the nomination of the Managing Board has been transferred to the Supervisory Board ("*Raad van Commissarissen*"). The network companies decide with regard to the acquisition of the rights to use the land and to procure the related cooperation indemnities at their own risk and for their own account. The State does not issue instructions and does not exercise a controlling influence on these companies in this regard. They argue that decisions are not imputable to the State and, therefore, do not amount to State aid.
- (43) The Dutch authorities have provided further clarification with regard to how the appointments of the Managing Board and the Supervisory Board are made and the extent to which public authorities are involved in these appointments, and with regard to the role of the NRA:
- The Managing Board of NV Nederlandse Gasunie is appointed by the State (through the general meeting as a shareholder) on the proposal of the Supervisory Board. The Supervisory Board is, in turn, appointed by the State as a shareholder. The supervisory directors are appointed by the State as a shareholder in the general meeting, on the basis of the Supervisory Board's nomination.²⁴
 - As to Gasunie Transport Services B.V. (GTS) and Gasunie Grid Services (GGS), who conclude the rights in rem agreements with the individual landowners since 2014, NV Nederlandse Gasunie, as a shareholder, appoints their managers. These companies do not have a Supervisory Board.
 - With regard to TenneT TSO B.V., who concludes the agreements on cooperation indemnities, the members of the Managing Board are nominated and appointed by shareholder TenneT Holding B.V. TenneT TSO B.V. has no Supervisory Board. In turn, the members of the Managing Board of

²⁴ Article 27 of the Articles of Association of N.V. Nederlandse Gasunie states: "*1. The company has a supervisory board consisting of at least three members to be determined by the general meeting*" [...] *4. The supervisory directors shall be appointed by the general meeting on the basis of the supervisory board's nomination [...]*"

TenneT Holding B.V. are nominated by the Supervisory Board and appointed by the State as a shareholder. Finally, the Supervisory Board is appointed by the State, as a shareholder. The supervisory directors are nominated by the Supervisory Board and appointed by the State as a shareholder.²⁵

- The NRA does not set any guidelines with regard to the agreements on cooperation indemnities; these are a purely private matter. EZ and the regulator have no specific intervention in the cooperation indemnities. The network operators are only encouraged to work efficiently and not to make unnecessary costs. The monitoring by the NRA does not prescribe how resources are used. Global ex post controls are made by the NRA in order to ensure that the network operators have not incurred any inefficient costs.

4. ASSESSMENT OF EXISTENCE OF STATE AID

(44) According to Article 107(1) of the Treaty, "*[s]ave as otherwise provided in the Treaties, 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*".

(45) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an economic advantage to an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.1. Notion of undertaking

(46) It should be assessed whether the payment of cooperation indemnities by network companies to landowners and land users meet the conditions for constituting State aid, mentioned above in recital (45).

(47) Firstly, it should be noted that two types of beneficiaries could be seen as potentially enjoying State support in this case, landowners and land users who are undertakings, and landowners and land users who are private individuals.

(48) State aid rules only apply where the recipient of an aid is an "undertaking", that is, any entity engaged in an economic activity, regardless of whether the body is established under public or private law, or the way in which it is financed; and any activity consisting in offering goods or services on a given market is regarded as an economic activity.²⁶

(49) In so far as the measures at hand concern landowners and land users who are private individuals, and hence do not constitute undertakings within the meaning of

²⁵ Article 26 of the Articles of Association of TenneT Holding B.V. states: "*1. The company has a supervisory board consisting of at least three members; the number of members is determined by the general meeting [...] 4. The supervisory directors are appointed by the general meeting pursuant to a recommendation from the supervisory board, with due observance of section 2:252a of the Dutch Civil Code [...]*"

²⁶ Case C-222/04, *Cassa di Risparmio di Firenze*, ECLI:EU:C:2006:8, paras 107–8; Case C-288/11 P, *Mitteldeutsche Flughafen v Commission*, ECLI:EU:C:2012:821, para 50.

Article 107 TFEU, and said measures do not procure an indirect advantage to specific undertakings²⁷, they fall outside the scope of State aid rules.

4.2. State resources

- (50) To be considered aid in the meaning of Article 107(1) of the Treaty, a measure must be granted directly or indirectly from State resources.
- (51) In accordance with case law, resources of an undertaking are to be considered State resources if the State is capable, by exercising its dominant influence over the undertaking, to direct the use of its resources.²⁸
- (52) In the case at hand, the Commission observes that the indemnities are paid by the network companies from their own financial resources, which stem from revenues obtained from their customers. However, as already indicated in recital (6), the national gas and electricity transmission networks are owned and managed by the network companies, whose shares are fully held by the State of the Netherlands.
- (53) Even when the Dutch Authorities state that the influence of the shareholders on the company policy is transferred to the Supervisory Board (recitals (41) to (43)), given the State's position as the sole shareholder and its power to appoint the members of the Supervisory Board, as well as the possibility for it to exercise influence on the use of network companies' financial resources, even if only indirectly, the financial resources of the network companies may be considered to be State resources.²⁹
- (54) Nonetheless, the case law of the Court of Justice of the European Union has also established that the mere fact that the State is the sole shareholder of an undertaking does not lead to the conclusion that it can exercise a dominant influence that enables it to direct the use of the resources of such undertaking.³⁰
- (55) Along the same lines, the fact that the Dutch authorities have an indirect influence on the use of network companies' financial resources does not automatically lead to the conclusion that they have control over these resources themselves, as it should be proven that the State holds a power of disposal.³¹
- (56) In light of the above, taking into account the presence of indicators in both directions with regard to the existence or not of State resources, and that the conditions to be fulfilled under Article 107(1) TFEU for a measure to qualify as State aid are cumulative, the Commission considers it is not necessary to take a definitive position on this issue at this point.

4.3. Imputability to the State

- (57) The national gas and electricity transmission networks are owned and managed by the network companies, which are separate legal entities under private law, of which the State of the Netherlands holds all the shares (recital (6)). In this regard, it

²⁷ Case C-403/10 P, Mediaset, ECLI:EU:C:2011:533, para 81.

²⁸ Case C-482/99, French Republic v Commission (Stardust Marine), ECLI:EU:C:2002:294, para. 38.

²⁹ Case C-278/00, Hellenic Republic v Commission, ECLI:EU:C:2004:239, para. 54.

³⁰ Case C-329/15, ENEA, ECLI:EU:C:2017:671, para. 32, and Opinion of Advocate General Saugmandsgaard Øe in Case C-329/15, ENEA, ECLI:EU:C:2017:233, paras. 91 to 100.

³¹ Case C-405/16 P, Germany v Commission, ECLI:EU:C:2019:268, paras. 80-86.

has to be assessed whether or not the activities referring to cooperation indemnities are imputable to the State.

- (58) In the *Stardust Marine* case³², the Court of Justice pointed out that even if the State is in a position to control a public undertaking and to exercise dominant influence over its operations, actual exercise of that control for a particular measure cannot be automatically presumed. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of the measure concerned. This was further developed, *inter alia*, in the ‘SACE’ case, where the General Court stated that proof of such involvement could be provided on the basis of ‘*sufficiently precise and convergent indicators of the exercise of actual influence or control by the State*’³³, which was later confirmed by the Court of Justice³⁴. The General Court recognised that it may not always be possible to demonstrate in a particular case that measures taken by such an undertaking were in fact adopted on the instructions of the public authorities. It therefore established certain indicators that can be used to assess imputability³⁵, including (without being exhaustive or prescriptive):
- a) the extent to which the public undertaking (in this case the network companies) can take the decision without taking into account the requirements of the public authorities;
 - b) the extent to which directives (guidance) provided by the authorities are to be taken into account by the public undertaking (in this case the network companies);
 - c) the extent to which the public undertaking (in this case the network companies) is integrated in the structures of the public administration;
 - d) the nature of the activities and the exercise of them on a market in normal conditions of competition with private operators;
 - e) the legal status of the public undertaking (in this case the network companies) in the sense of its being subject to public law or ordinary company law;
 - f) the intensity of the supervision of the public authority on the decisions taken by the public undertaking (in this case the network companies).
- (59) The Commission takes note of the replies made in 2012 by the Dutch Minister of Economic Affairs to parliamentary questions, which refer to the fact that the negotiations of the framework contracts of cooperation indemnities concern an agreement of private law, which is the business of the parties concerned and that it is up to them to reach an agreement (recital (19)). It follows from recitals (21) and (22) that the conditions and amounts of the framework contracts of cooperation indemnities are set by the private parties concerned and not by the State. The Commission finds therefore that the State has not exercised influence in this regard.

³² Case C-482/99, *French Republic v Commission (Stardust Marine)*, ECLI:EU:C:2002:294, para. 52.

³³ Case T-305/13, *SACE and Sace BT v Commission*, EU:T:2015:435, para. 51.

³⁴ Case C-472/15 P, *SACE and Sace BT v Commission*, ECLI:EU:C:2017:885, paras. 34-37.

³⁵ These indicators were confirmed by the Court of Justice in *Ibidem*, paras. 39-44.

- (60) It also follows from recital (20) that it is up to the individual landowners and land users and the network company to reach an agreement about the land use and the indemnities. The Commission finds therefore that the State has not exercised its influence with regard to these transactions.
- (61) With regard to the type of company, both Gasunie and TenneT are limited liability companies 100 per cent owned by the State of the Netherlands. Gasunie and TenneT are separate legal entities under private law, who engage in their activities without any liability on the part of the Dutch State.
- (62) The Dutch Authorities have also stated that the influence of the shareholders on the companies' policy and on the nomination of the Managing Board is transferred to the Supervisory Board (recitals (41) to (43)). The clarifications offered by the Dutch authorities show that the Supervisory Board of these companies is appointed by the State as a shareholder (recital (43)). The right to appoint members of the Supervisory Board gives the State influence over the general operation of these companies, even when only indirectly.
- (63) Nonetheless, the Commission notes that the mere fact that the State has influence over its general operation is a reflection of its ownership and does not in itself indicate the State's involvement in any specific measure adopted by the network companies. This was confirmed by the General Court in the SACE case, where, after observing that the selection by the Italian State of the Managing Board shows a special link to the public authorities, the Court states that '*such organic links [...] are not sufficient in themselves to establish the specific involvement of the State in the adoption of the measure at issue*'.³⁶
- (64) As mentioned in recital (42) the decisions with regard to the acquisition of the rights to use the land and to procure the related cooperation indemnities are made at the account and at risk of the network companies and not made or influenced by the State. The State does not issue instructions and does not exercise a controlling influence over the activities and resources of these companies in this regard.
- (65) It should also be mentioned that the TSOs operate the networks in the regulated energy markets (recitals (6) and (37)). The activities with regard to the cooperation indemnity are executed by the network companies in their capacity of independent TSOs, which are designated, certified and monitored by the National Regulatory Authority. This NRA is a separate and distinct legal entity from any other Ministry or government body. The NRA takes autonomous decisions. Following the Electricity and Gas Directives³⁷, the Member State shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently.
- (66) Notably, the NRA and the Ministry of Economic Affairs have not issued any guidelines that should be followed when concluding the above-mentioned agreements. The EZ and the NRA have no specific intervention in setting the cooperation indemnities. The agreements on these fees are a purely private matter.

³⁶ Case T-305/13, SACE and Sace BT v Commission, EU:T:2015:435, para. 63.

³⁷ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211/55, 14.8.2009, p.55 and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94, 14.8.2009, p. 94.

The network operators are only encouraged to work efficiently and not to incur unnecessary costs. In this regard, the NRA only takes effective costs into account when setting the rates that the network operators may charge to their customers (recital (43)).

- (67) The monitoring by the NRA does not prescribe how resources are used. The NRA only performs a global ex post control to establish if the network operators have incurred any inefficient costs (recital (43)). The fact that the NRA monitors the effectiveness of the management costs of the networks cannot be seen as an element of imputability to the State with regard to the cooperation indemnities.
- (68) The foregoing considerations seem to indicate that the TSOs are not integrated into the structures of the public administration –even when there are ownership links to the State–, and that the Member State has no possibility to intervene in the transactions regarding the cooperation indemnity, since it does not issue any guidance in this regard. At the same time, the State is indirectly involved in the nomination of the Managing Board and Supervisory Board members.
- (69) In light of the above, with regard to the indicators of State involvement, the Commission notes that there are indicators in both directions. In principle, after careful consideration of all the elements that have been described, it seems that the measure at hand is not likely to be imputable to the State. However, although the network companies have a high degree of independence, the State of the Netherlands is in a position to exercise certain influence over the general operation of the company, even if only indirectly.
- (70) In any case, taking into account that the conditions to be fulfilled under Article 107(1) TFEU for a measure to qualify as State aid are cumulative, it is not necessary to take a definitive position on the issue of State resources and imputability at this point. Therefore, the Commission also assessed whether, in case the measures at hand were considered to involve State resources and deemed imputable to the State of the Netherlands, the advantage criterion would be met in this case.

4.4. Advantage

- (71) In order to determine whether a State measure constitutes aid for the purposes of Article 107(1) TFEU, it is necessary to establish whether the recipient undertaking receives an economic advantage, which it would not have obtained under normal conditions.³⁸ In this respect, the Commission must analyse whether the TSOs acted as market economy operators when signing the cooperation indemnity agreements with landowners and land users. That is to say, the Commission has to compare the conduct of the TSOs to that of a market economic operator (MEO) who is guided by prospects of profitability in the long-term.³⁹
- (72) More recently, as regards the applicability of the market economic operator principle (MEOP), the Court held the following:

³⁸ Judgment of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60, and judgment of 29 April 1999, *Kingdom of Spain v Commission of the European Communities*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

³⁹ Judgment of 21 March 1991, *Italy v Commission*, C-305/89, ECLI:EU:C:1991:142, paragraph 23; Judgment of 12 December 2000, *Alitalia v Commission*, T-296/97, ECLI:EU:T:2000:289, paragraph 84.

"78. However, it is also clear from settled case-law that the conditions which a measure must meet in order to be treated as 'aid' for the purposes of Article 87 EC are not met if the recipient public undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources. In the case of public undertakings, that assessment is made by applying, in principle, the private investor test.

79. In particular, it is clear from case-law that, in order to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder — to the exclusion of those linked to its situation as a public authority — are to be taken into account.

80. It follows that the roles of the State as shareholder of an undertaking, on the one hand, and of the State acting as a public authority, on the other, must be distinguished (...).

81. The applicability of the private investor test ultimately depends, therefore, on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it.

86. If the Member State concerned provides the Commission with the requisite evidence, it is for the Commission to carry out a global assessment, taking into account — in addition to the evidence provided by that Member State — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority. In particular, as the General Court held in paragraph 229 of the judgment under appeal, the nature and subject-matter of that measure are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject."⁴⁰

- (73) The Commission, in the following recitals, will set out the reasons why it believes, in light of the principles established by settled case law, that the TSOs acted as market economic operators and that the parties that conclude cooperation indemnity agreements with them do not benefit from an advantage that they could not have received under normal market conditions.
- (74) Firstly, the "cooperation indemnity" is paid for the conclusion of a contractual agreement between the parties concerned, to co-operate and to establish "a right in rem" (in Dutch: "*opstalrecht*") allowing for the use of land for the construction and maintenance of works of general interest. The calculation method is applied in a uniform, transparent and accountable manner, following the agreed result of negotiations between the parties concerned, on the basis of which the individual cooperation indemnities are calculated, offered and, when an agreement is reached, paid to the landowners and land users concerned (recitals (22), (23) and (37)). The cooperation indemnity is paid in addition to the compensation of damages, as pointed out by the complainant (recitals (7), (9), (24), (30) and (31)) and as mentioned by the Dutch authorities (recital (37)).

⁴⁰ Case C-124/10 P, Commission v EDF, ECLI:EU:C:2012:318, paras. 78-81 and 86.

- (75) The acceptance by a landowner and land user of the "cooperation indemnity" offered by network companies for the long term cooperation of landowners and land users represents an economic value for the network companies (recitals (36) and (37)), which is the result of a mutually agreed transaction and therefore constitutes the market price of such a transaction. It falls within the logic of the national law governing the "duty of tolerance" ("*gedoogplicht*") that those affected by that obligation are merely compensated for damages within the margins fixed by the legislation and do not receive a market value. In contrast, land operators who agree to enter into a contractual agreement to establish the "rights in rem", and to cooperate with the network company, receive the price of the "cooperation indemnity" following the negotiated formula and conditions. The amounts are in fact calculated on the basis of used ground surface and a ground price that has been agreed after negotiation.
- (76) The Dutch State submitted that this amount constitutes the market value for such an operation and that private market operators would also enter into such cooperation indemnities. In particular, the contractual offers represent a profitable agreement for the network operators:
- a) the network operators avoid lengthy and costly procedures before National Courts. These are mandatory with regard to the "duty of tolerance", since the damage compensation is fixed by civil courts. The agreement to establish "a right in rem", allowing for the use of land for the construction and maintenance of works of general interest, also determines the rights and obligations of the parties and thus avoids lengthy disputes;
 - b) as a result of this first point, land is made available quickly;
 - c) the agreement creates a sustainable and long-term relationship between the parties.
- (77) The Commission considers that it falls within the scope of the negotiations of the parties concerned to agree upon the formula, its parameters and the conditions to determine the pricing of the cooperation indemnity, to conclude the contracts concerned, as well as to conclude, or to refuse, the individual agreements between landowners and land users and the network companies, with regard to the cooperation indemnity, on the basis of the agreed pricing method.
- (78) Network companies construct and maintain large infrastructure works of general interest. The large-scale investments have a long lifetime and a long payback period. Payments of cooperation indemnities are part of the regular operations and cost structure, and made from the financial resources of these companies, in order to allow for the investments on the basis of economic principles (recitals (81) to (84)). Even if these transactions cannot easily be compared with similar ones made by other undertakings on a market, as they are specific to the network companies and to the tasks they perform, the Commission is of the opinion that they are made on the basis of economic principles and that they are considered to constitute transactions in line with normal market conditions.
- (79) In that respect, it should be recalled that TSOs are independent and regulated, as they operate the networks in the regulated energy markets (recitals (6) and (37)). Cooperation indemnities are concluded by network companies in their capacity of independent TSOs, and are calculated on market terms.

- (80) The agreed pricing of the cooperation indemnity is transparent and accountable (recital (37)), has been negotiated (recitals (19), (21) and (22)) and agreed between the private parties concerned. The negotiating process can be considered constituting the market for the transaction concerned and the agreement reached on the amount as the market price established on the basis of offer and demand, thus in line with market conditions.
- (81) Along the same lines, network companies TenneT and Gasunie are under the surveillance of the NRA, which controls the effectiveness of the costs of the network activities. As it has been detailed *ut supra* (recitals (66) and (67)), this monitoring does not prescribe how resources are used. The network companies are legally bound to only invest efficiently in sufficient network capacity in order to be able to satisfy the total market needs. Therefore, new investments must be deemed efficient by the NRA and excessive expenditure would therefore be unlikely (recital (37)). In this way, the regulatory monitoring ensures that the prices paid in cooperation indemnity agreements are not unreasonable and limit the profits made by landowners and land users.
- (82) With regard to the regulatory framework, the annual report of 2015 of TenneT mentions, amongst others: "*The allowed regulatory revenue set by the respective regulators comprises the regulatory reimbursement of the efficient capital and operational expenditure. The reimbursement for capex consists of a rate of return on investment as well as a depreciation allowance. The regulators use benchmarks (or similar techniques) to estimate efficient costs. TenneT is allowed to earn a return on the capital invested in its regulatory asset base. In the Netherlands, the return rate is based on a weighted average cost of capital*".⁴¹
- (83) Thus, the surveillance by the NRA contributes to the efficient and effective use of capital and operational expenditure, also by using efficiency benchmarks, which should allow for transactions in line with normal market conditions. In 2015, the return on investment on capital generated by TeneT was 12.7% and by Gasunie 6.7%.⁴²
- (84) The network companies are managed as corporations with limited liability on the basis of economic business principles of efficiency, effectiveness, solvency and profitability. Excessive payments or overcompensation would not be in line with these principles. The cooperation indemnity reflects the agreed economic value of the counterpart provided by the landowners and land users (point 2 of recital (9) and recital (36)). The cooperation indemnity agreed upon in the contracts, therefore, cannot be considered to confer an advantage on its recipients, as it is in line with normal market conditions.
- (85) Calculation examples submitted by the complainant, which suggest another calculation method (recital (29)) and result in other values, are not considered relevant with regard to State aid, as they are not agreed by the parties concerned and therefore do not represent the established market price. The suggestion that the

⁴¹ Integrated Annual Report 2015, TenneT Holding B.V., page 47 (English version).

⁴² Financial results Gasunie 2015: Revenues of € 1,631 million (2014: € 1,651 million). Net profit of € 553 million (2014: € 603 million). Return on invested capital: 6.7% (2014: 7.4%). Proposed dividend payment of € 332 million to the Dutch State (2014: € 362 million). Source: Annual report 2015 Gasunie. Financial results TenneT 2015: Revenues of € 3,290 million (2014: € 2,315 million). Net profit of € 681 million (2014: € 418 million). Return on invested capital: 12.7 % (2014: 11.0%). Source Annual report 2015 TenneT Holding B.V., page 41.

indemnity should be a fixed equal amount per agreement, and not be based on a negotiated formula taking account of the ground surface, does not reflect the specific characteristics of each investment, such as the size of the land needed for the execution of investments. The financial and economic interests of the energy infrastructure investments also depend on and vary with the size, the costs and the related ground surface of these investments. The amount of the cooperation indemnity calculated based on a negotiated formula, taking account of the ground surface, better reflects the added value of the agreement than a fixed amount. Along the same lines, the fact that no law provides for the cooperation indemnity does not qualify this amount *per se* as an overcompensation. As thoroughly explained, the agreement between the parties for the cooperation indemnity represents an added value for the network companies, as it facilitates a timely planning and execution of the infrastructure works without disputes and legal proceedings.

- (86) Considering the fact that the steps undertaken by TSOs correspond to the behaviour of a rational market economy participant (the cooperation indemnity agreements facilitate a timely planning and execution without disputes and legal proceedings on the infrastructure works) and that the negotiating process reflects a prudent approach towards achieving a reasonable price, the cooperation indemnity agreements are in principle a reasonable decision of a private market operator and as such are not liable to confer an advantage on landowners and land users.
- (87) In fact, this cooperation indemnity was also offered to the land users represented by the complainant, but they decided to decline the offer. Landowners and land users are free to accept or to refuse the offer made. No landowner or land user is benefitting more than another, they can all equally benefit if that is their choice.
- (88) In view of all of the above, it appears that the transactions regarding cooperation indemnities were carried out in line with market terms and Gasunie and TenneT acted as prudent market operators. In this way, the final beneficiaries, the landowners and land users, did not receive an economic advantage that could not have been obtained under normal market conditions.
- (89) The Commission therefore concludes that Gasunie and TenneT acted as prudent market operators, and that the cooperation indemnities do not confer an advantage on landowners and land users capable of being categorised as aid within the meaning of Article 107(1) of the Treaty.
- (90) As stated in recital (45), the criteria for determining State aid are cumulative. Since the economic advantage criterion is not fulfilled, i.e. the transactions at hand do not constitute an economic advantage to the landowners and land users concerned, it is not necessary to examine whether the remaining criteria are fulfilled.

5. CONCLUSION

In view of the above, the Commission has accordingly decided that the transactions regarding the payment of cooperation indemnities, as described in the complaint, do not constitute State aid in the meaning of Article 107(1) TFEU.

If any parts of this letter are covered by the obligation of professional secrecy according to the Commission communication on professional secrecy in State aid

decisions⁴³ and should not be published, please inform the Commission within fifteen working days of notification of this letter. If the Commission does not receive a reasoned request by that deadline, the Netherlands will be deemed to agree to the publication of the full text of this letter. If the Netherlands wishes certain information to be covered by the obligation of professional secrecy, please indicate the parts and provide a justification in respect of each part for which non-disclosure is requested.

Your request should be sent electronically via the secured e-mail system Public Key Infrastructure (PKI) in accordance with Article 3(4) of Commission Regulation (EC) No 794/2004⁴⁴, to the following address: agri-state-aids-notifications@ec.europa.eu.

For the Commission

Phil HOGAN
Member of the Commission

⁴³ Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 9.12.2003, p. 6.

⁴⁴ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).