

COMMISSION DECISION

of 4 April 2006

on State Aid No C 33/2005 (ex N 277/2004) which the Netherlands is planning to implement under the Marktpassageplan project in Haaksbergen

(notified under document number C(2006) 1184)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2006/746/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above,

Whereas:

1. PROCEDURE

- (1) By letter dated 23 January 2004, registered as received on 23 February, a complaint was sent to the Commission about possible aid concerning a building project in Haaksbergen in the Netherlands. By letter dated 15 April 2004, the Commission asked the Dutch authorities to provide clarification of the measure. By letter dated 18 May 2004, registered as received on 25 May, the Netherlands informed the Commission that the measure would be notified shortly.
- (2) By letter dated 25 June 2004, registered as received on 30 June, the Netherlands notified the Commission that the Haaksbergen municipal authorities were planning to grant aid to the construction companies involved in the Marktpassageplan project. By letter dated 12 July 2004, the Commission requested further information, which was provided at a meeting on 8 October 2004 and by letter dated 30 December 2004, registered as received on 10 January 2005. The Netherlands submitted additional information by letter dated 11 May 2005, registered as received on 18 May.
- (3) By letter dated 21 September 2005, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽¹⁾. The Commission invited interested parties to submit their comments on the aid. It received no comments from interested parties.
- (5) The response of the Netherlands to the initiation of the formal investigation procedure was submitted by letter

dated 29 December 2005, registered as received on 5 January 2006.

2. DESCRIPTION

2.1. The project

- (6) The municipal council of Haaksbergen, a municipality with 24 000 inhabitants located in the province of Overijssel close to the German border, had been hoping to regenerate its neglected centre since the beginning of the nineties. With the help of consultants, different construction plans were studied in order to provide quality housing and commercial premises. However, neither an initial construction company with which the municipality intended to carry out the project nor the municipality itself was able to acquire the necessary plots of land.
- (7) At the end of the nineties, six construction companies acquired the plots of land concerned and then joined forces. They drew up a building project consisting in the building of 58 apartments and 11 commercial premises. The project did not involve the construction companies in any public works, such as infrastructure, that would subsequently be handed over to the municipality. The project was for the construction of apartments and shops that were to be sold or leased to private investors. However, the calculations showed that the project would not be profitable.

2.2. Support from the public authorities

- (8) Given the great importance it attached to the project presented by the six construction companies for regenerating the centre of the municipality, the local authority, in the knowledge that it could count on receiving a financial contribution from the province, agreed to support the project, mainly by covering the expected losses. The municipality has already signed the cooperation agreement with the construction companies, but the aid provided for in the agreement has not yet been granted.
- (9) The public support will mainly take the form of a grant of €2,98 million from the municipality to the construction companies (Measure 1). This amount includes the financial support of €453 780 (NLG 1 000 000) granted by the province for this project and represents the expected project losses calculated on the basis of the anticipated costs and revenues.

⁽¹⁾ OJ C 333, 29.12.2005, p. 2.

(10) One provision of the cooperation agreement stipulates that, at the end of the project, an independent expert will calculate actual costs and revenues. If the actual losses calculated *ex post* by the expert turn out to be smaller than the expected losses on the basis of which the grant will be made available, only 50 % of the part of the grant in excess of the actual losses has to be paid back to the municipality. In other words, the project developers can keep 50 % of the part of the grant which does not cover actual losses. This provision will be referred to below as 'the partial repayment provision'. If the actual losses are greater than the expected losses, the grant from the municipality will not be increased.

(11) Besides support in the form of a grant (Measure 1), the Commission has also initiated proceedings in respect of three other measures which may include aid. The second measure is the transfer free of charge to the construction companies of some plots of land belonging to the municipality⁽¹⁾ (Measure 2). According to the notification by the Dutch authorities, the plots of land were worth €233 295, but the Commission did not receive any valuation report. In addition, the municipality will be liable for 35 % of the costs that could result from claims for damages under Article 49 of the Regional Planning Law (*Wet op de Ruimtelijke Ordening*) after completion of the project (Measure 3). Liability for the remaining 65 % will rest with the construction companies. Finally, it was not clear whether the municipality will sell a plot of land and a building to the project developers at their book value or at their market value (Measure 4).

(12) On completion of the project, the municipality will receive free of charge a number of plots of land that, according to the building permit, will be developed as public spaces. The notification did not provide a precise valuation of the plots concerned (Measure 2a).

2.3. The beneficiaries

(13) The beneficiaries of the aforementioned measures are the construction companies involved in the project.

(14) The first direct beneficiary, Rabo Vastgoed B.V., belongs to a large group which is active at international level, mainly in the financial sector. It is responsible for 25 % of the project.

(15) On the basis of the cooperation agreement, the second direct beneficiary is Centrum Haaksbergen B.V., which is the undertaking set up by five construction companies to carry out this project. These five companies will perform all the construction operations entrusted to Centrum Haaksbergen B.V, which is therefore mainly an *ad hoc* legal vehicle without any 'real' economic activities of its own. Accordingly, it can be concluded that the aid granted to Centrum Haaksbergen will be transferred to these five companies.

⁽¹⁾ The six construction companies have now acquired about 90 % of the necessary plots from the previous private owners.

According to the Dutch authorities, each of the companies is responsible for 15 % of the project. The Netherlands has also indicated that RoTij Bouwontwikkeling Oost B.V. is active at national level, whereas the other four companies (Besathij B.V., Bouwbedrijf Assink Eibergen B.V., Bouwbedrijf Deeterink B.V. and Bouwburo Jan Scharenborg B.V.) are regional or local players.

(16) Even if the beneficiaries are referred to as 'construction' companies in this decision, their activities are not limited to mere construction work. They cover the entire range of real estate project development.

2.4. The relevant markets

(17) The relevant markets concerned are the markets for the construction and sale of residential housing and the market for the construction and renting of commercial premises. As Haaksbergen is located close to the German border, it is likely that certain Dutch and German suppliers and customers active on these markets also operate in the neighbouring country.

3. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(18) The Commission initiated the formal investigation procedure as it had doubts as to whether some measures that the municipal council was planning to implement did not constitute state aid and whether the aid could be considered compatible with the common market.

(19) Regarding the classification of the public measures as aid, the Commission indicated in particular that the 'partial repayment provision' conferred an advantage on the construction companies.

(20) Regarding possible exemptions from the general prohibition on state aid in Article 87(1), the Commission first noted that the automatic exemptions provided for in Article 87(2)(b) and (c) were not applicable to the present aid measures. Nor could the aid be deemed under Article 87(2)(a) to support a project having a social character, among other things because the purchase of the newly built apartments is not reserved for disadvantaged persons.

(21) As regards the exemptions in Article 87(3), the Commission noted that the municipality of Haaksbergen is not located in an assisted area and does not therefore qualify for regional aid on the basis of Article 87(3)(a) and (c). The derogation in Article 87(3)(b) is obviously not applicable. The Commission has laid down various guidelines and frameworks setting out rules for aid that may be covered by the exemption provided for in Article 87(3)(c). None of these guidelines appear to apply in the present case. The

exemption for deprived urban areas ⁽¹⁾ was also considered. However, the project is not eligible for that exemption because, among other things, Haaksbergen is not an urban area within the meaning of the Commission notice. Logically, the area is not covered either by the European URBAN II programme. Finally, the cultural exemption in Article 87(3)(d) does not apply as this project consists in the construction of new buildings and not in the renovation of existing buildings or some other cultural purpose.

4. COMMENTS FROM INTERESTED PARTIES

- (22) The Commission has received no comments from interested parties.

5. COMMENTS FROM THE NETHERLANDS

- (23) In its response to the initiation of the formal investigation procedure, the Netherlands provided additional information on the transfer of plots of land free of charge by and to the municipality (Measure 2 and Measure 2a) respectively. The transfer of plots of land free of charge to the construction companies (Measure 2) will represent a surface area of 674m². In turn, the municipality will receive 1 077m² (Measure 2a). The Dutch authorities have provided an expert report according to which the value of the land concerned was €135 per m².
- (24) Regarding the sale to the construction companies of another plot of land and a building belonging to the municipality (Measure 4), the Dutch authorities have provided information showing that the transaction price was significantly above the price paid by the municipality for these properties a few years earlier.

6. ASSESSMENT OF THE AID

6.1. Existence of aid within the meaning of Article 87 (1) of the EC Treaty

State resources

- (25) The five measures examined clearly involve state resources. The grant (Measure 1) is a direct transfer of municipal resources. The transfer of ownership of plots of land and buildings modifies the total value of the assets owned by the municipality (Measures 2, 2a and 4). Lastly, by granting a guarantee which involves a payment in the future and by not requesting the payment of an appropriate guarantee premium, Measure 3 also involves municipal resources.

Benefit

- (26) The grant from the municipality (Measure 1) confers a benefit on the companies since they receive funds which they would not have received on market conditions.
- (27) The transfer free of charge of land by the municipality (Measure 2) is compensated for by the transfer in the opposite direction of a larger surface area (Measure 2a), as

stipulated in the same agreement. On the basis of the expert valuation submitted by the Netherlands, the municipality will receive in net terms land worth €54 405 ⁽²⁾. Accordingly, these two measures, taken together, do not confer a benefit on the construction companies.

- (28) The municipality will also be responsible for 35 % of the costs that could result from claims for damages consecutive to the project (Measure 3). Point 2.1.2 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽³⁾ states that: *'The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. This carrying of a risk by the State should normally be remunerated by an appropriate premium. Where the State forgoes such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if no payments are ever made by the State under a guarantee, there may nevertheless be a State aid under Article 87(1). The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment the guarantee is given.'* In the present case, the Commission notes that the risk of compensation payments resulting from claims for damage is carried in part by the State and that the municipality does not receive any premium for this partial guarantee. This measure therefore relieves the companies of costs they would normally incur in the case of a construction project, either in the form of a guarantee/insurance premium or, if they do not take out insurance, in the form of provisions for possible payments to compensate for damage. Consequently, it confers a benefit.

- (29) Regarding the sale of plots of land and property by the municipality to the construction companies (Measure 4), the additional information provided by the Dutch authorities on the price paid by the municipality to acquire these assets is sufficient to dismiss the doubts raised in the decision to initiate proceedings regarding the possible sale at the book value. Indeed, the additional documents demonstrate that the municipality has made a significant capital gain over a short period of time. Consequently, it has not forgone potential revenues. The transaction therefore confers no benefit on the construction companies.

- (30) In conclusion, two measures confer a benefit on the construction companies (Measures 1 and 3), whereas the others do not (Measures 2, 2a and 4). The latter therefore do not constitute state aid and will not be further examined.

- (31) The preceding paragraphs examine the potential benefit for the construction companies. The Commission must also investigate whether the benefit is not partially transferred to the buyers or tenants of the apartments and commercial

⁽¹⁾ Commission notice on the expiry of the guidelines on State aid for undertakings in deprived urban areas (OJ C 119, 22.5.2002, p. 21).

⁽²⁾ Transfer to the construction companies: 674m² × €135 = €90 990; transfer to the municipality: 1 077m² × €135 = €145 395.

⁽³⁾ OJ C 71, 11.3.2000, p. 14.

premises. This is because they can buy or rent apartments or commercial premises that would otherwise probably not have existed or at least would have been more expensive. However, this benefit would be indirect and diffuse. In any case, any benefit for the 58 households is not likely to fall under the state aid rules for the indirect aid recipients carrying out economic activities. For the economic operators, such as the 11 retail shops, any benefit would be very small and, in any case, below the level defined by the *de minimis* rules. The Commission will therefore limit its analysis to potential state aid for the construction companies.

Selectivity

- (32) The measure is clearly selective since it is restricted to the companies involved in this project.

Distortion of competition

- (33) Thanks to the state aid, the companies will undertake an otherwise loss-making project consisting in the construction and sale or rental of apartments and commercial premises. Consequently, the aid directly distorts competition since new apartments and commercial premises add to the supply on the market.
- (34) There may be an additional distortion if the state aid exceeds the losses incurred by the companies in connection with the present project. With this 'excess' grant, they could, for example, quote lower prices in *future* construction projects and/or use it for other activities. The Commission points out that this additional distortion would not exist if, on the basis of the actual losses calculated by the expert at the end of the project, the companies had to repay in full the part of the grant in excess of the actual losses. It notes that the 'partial repayment provision' allows the companies to keep 50 % of the part of the grant exceeding the losses. This additional distortion can therefore not be ruled out.

Effect on trade between Member States

- (35) The Commission notes that Haaksbergen is located close to the German border. Therefore, some German construction companies are present on the market for the construction and sale or rental of apartments and commercial premises. However, it also notes that a number of the companies concerned are active at international level. Consequently, there is a potential effect on trade.
- (36) The grant (Measure 1) and the partial guarantee (Measure 3) thus qualify as state aid pursuant to Article 87(1) of the EC Treaty. The net transfer of plots of land free of charge (Measures 2 and 2a taken together) as well as the sale of a plot of land and a building (Measure 4) do not constitute state aid.

6.2. Compatibility with the common market

- (37) In its notification, the Netherlands did not refer to any special exemption from the general prohibition on state aid under Article 87(1) on the basis of which the aid could be authorised.
- (38) As previously indicated, the Commission expressed doubts in the decision to initiate the formal investigation procedure as to whether the aid can be found to be compatible in the light of the exemptions in Articles 87(2) and (3)(a), (b), and (d) or the guidelines and frameworks drawn up on the basis of Article 87(3)(c). In their response to the decision, the Netherlands made no comments on the compatibility of the aid. Further analysis undertaken by the Commission has not brought any new elements to light in this regard either. Therefore, the Commission concludes that the aid cannot be considered compatible with the common market by virtue of the aforementioned legal basis.
- (39) Regarding possible compatibility on the basis of Article 86(2), the Commission considers that the economic activity facilitated by the aid in question, namely the construction and sale or rental of high-quality apartments and commercial premises access to which is not restricted to any particular social category can certainly not be deemed to constitute a service of general economic interest. Nor has the Netherlands claimed that this is the case. Accordingly, Article 86(2) is not applicable to the aid.
- (40) In this connection, the Commission will examine whether the aid contained in Measures 1 and 3 cannot be found to be compatible directly on the basis of Article 87(3)(c), which stipulates that '*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*' may be considered to be compatible with the common market.
- (41) When examining whether aid is compatible directly under Article 87(3)(c), the Commission, firstly, takes into account the Community's objectives and, secondly, analyses whether the proposed aid measure is appropriate and proportionate to its intended objectives and does not have disproportionate effects on competition and trade.
- (42) Regarding the objectives to which the assisted project contributes, the Commission notes the following: The Dutch authorities indicated that, according to a 2001 survey, 65 % of the inhabitants of Haaksbergen felt insecure and thus avoided the centre of the municipality. This feeling of insecurity is borne out by police records of offences

committed. The project, with commercial premises on the ground floor and apartments above and with new residential buildings on what was until now waste ground, is designed in particular to tackle that feeling of insecurity. The Dutch authorities also indicated that three shopping streets have been successfully developed around the centre, which is still though underdeveloped commercially and forms a barrier of sorts in the midst of those three economically successful areas. The project is designed to make the centre more attractive and therefore to prevent further squalor and abandonment of the existing shops. Accordingly, it can be concluded that the project has positive repercussions on the common interest, as claimed by the municipality in support of the aid.

- (43) With regard to the proportionality of the aid, the Commission notes that the aid is intended to cover the losses incurred by the companies in carrying out the project, which would not otherwise be undertaken. To the extent that it covers actual losses incurred by the six companies, which will sell or rent the apartments and premises at prices corresponding to the customary prices for comparable property in that area, the aid is proportionate. However, the project also contains potential 'extra' aid as a consequence of the 'partial repayment provision'. That provision of the cooperation agreement between the municipality and the construction companies means that the actual project losses will be calculated at the end of the project by an expert on the basis of the realised costs and revenues. If the actual losses are smaller than the estimated losses on the basis of which the grant (Measure 1) is to be awarded during the course of the project, only 50 % of the part of the grant which is in excess of the actual losses needs to be repaid to the municipality. The construction companies can therefore retain 50 % of the part of the grant not covering actual losses. For instance, if the actual losses were around zero instead of the expected €2,98 million, the companies would repay €1,49 million and retain a similar amount for themselves. The amount of state resources in excess of the actual losses is not necessary for the execution of the project. It can therefore be concluded that only a provision stipulating repayment in full of the part of the subsidy in excess of the actual losses could restrict the aid to the minimum necessary and, in so doing, render it proportionate. The Commission also notes that such a 'full repayment provision' must also cover the aid included in the partial guarantee (Measure 3), and not only the grant (Measure 1), as is the case with the present 'partial repayment provision'.

- (44) With regard to the extent of the distortion of competition and of the effect on trade, the Commission notes that the aid increases the supply on the market by 58 apartments and 11 commercial premises, which will be offered at prices corresponding to the prices customarily observed for similar property in that area. It would point out that the

distortion of competition and the consequent effect on trading conditions generated by such a local, limited project are small and do not outweigh the positive effects identified earlier.

- (45) As already indicated in connection with the additional distortions of competition, the Commission considers that the aid, to the extent that it covers losses actually incurred, does not provide the six companies with resources that they can use for future projects in order to distort competition and affect trade. However, this conclusion does not hold for the aid granted in excess of actual losses. As stated above, the 'partial repayment provision' leaves the door open for such 'extra' aid.
- (46) The Commission concludes that the part of the aid that covers the actual project losses calculated *ex post* by an independent expert facilitates the development of certain economic activities or of certain economic areas without adversely affecting trading conditions to an extent contrary to the common interest. It also concludes that the part of the aid in excess of the actual project losses calculated *ex post* by an independent expert is not necessary for the realisation of the project and, at the same time, adversely affects trading conditions.

7. CONCLUSION

- (47) On the basis of the foregoing considerations, the Commission concludes that the part of the aid that covers the actual project losses calculated *ex post* by an independent expert, up to a maximum of €2,98 million (Measure 1), plus an appropriate guarantee premium (Measure 3), is compatible with the common market on the basis of the Article 87(3) (c). The part of the aid in excess of the actual project losses calculated *ex post* by an independent expert is not compatible on the basis of Article 87(3)(c) or on the basis of any another exemption. It is therefore incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The transfer of plots of land free of charge (Measure 2) that the Netherlands is planning to implement in favour of the construction companies involved in the Marktpassageplan project in Haaksbergen does not constitute state aid as it is accompanied by a large transfer free of charge in the opposite direction (Measure 2a).

The sale of a plot of land and a building to those companies (Measure 4) does not constitute state aid either.

Article 2

The grant of €2 984 000 (Measure 1) and the 35 % coverage of potential payments resulting from claims for damages (Mea-

sure 3) that the Netherlands is planning to award to the companies involved in the Marktpassageplan project in Haaksbergen constitute state aid.

Article 3

The part of the aid mentioned in Article 2 that covers the actual project losses as calculated *ex post* by an independent expert is compatible with the common market.

The part of the aid mentioned in Article 2 that exceeds the actual project losses as calculated *ex post* by an independent expert is incompatible with the common market.

Article 4

The Netherlands shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 5

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 4 April 2006.

For the Commission

Neelie KROES

Member of the Commission
