

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 21 October 2008

concerning an investment by the municipality of Rotterdam in the Ahoy complex (State aid measure C 4/08 (ex N 97/07, ex CP 91/07))

(notified under document C(2008) 6018)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2009/713/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 ⁽¹⁾, and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 20 December 2006 a meeting took place between the Commission and the Dutch authorities to discuss an investment by the municipality of Rotterdam in the Ahoy complex, before any formal notification of State aid. Following this meeting, the Dutch authorities formally notified the investment by a letter dated 22 February 2007, and which the Commission registered as incoming mail on the same day.

(2) On 22 March 2007, in a related case (CP 91/07), the Commission received a joint complaint from Mojo

Concerts BV (Mojo) and Amsterdam Music Dome Exploitatatie BV (Music Dome), which related to the planned investment in the Ahoy complex but which also concerned other transactions already carried out by the municipality, namely the privatisation of the operation of Ahoy Rotterdam NV (hereinafter also referred to as the operator) and the lease of the Ahoy complex to the operator after privatisation. Further submissions from Mojo and Music Dome were received on 14 September 2007 and 5 October 2007.

(3) By letter dated 16 April 2007 the Commission requested the Dutch authorities to comment on the above mentioned complaint. The Dutch authorities submitted their comments on 20 June 2007. The Commission wrote to the Dutch authorities requesting additional information on 10 August and 16 November 2007. The Dutch authorities provided additional information on 17 September, 15 November and 7 December 2007.

(4) By letter dated 30 January 2008, 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 notified measure.

(5) Commission staff met the Dutch authorities on 12 February 2008. By letter of 15 February 2008, the Dutch authorities confirmed that the Commission's decision of 30 January 2008 did not contain confidential

⁽¹⁾ OJ C 68, 13.3.2008, p. 14.

information. The decision was accordingly sent to the complainants via email on 18 February 2008 and published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measure.

- (6) By letter of 28 February, the Dutch authorities requested an extension to 1 April 2008 of the deadline for an answer to the Commission's initiating decision. The Commission agreed to this extension by letter sent and registered as outgoing mail on 12 March 2008.
- (7) In April 2008, as part of the investigation procedure, an independent consultant, ECORYS Nederland BV, was commissioned to review certain aspects of the case. The report prepared by the independent consultant was approved by the Commission on 30 May 2008 ⁽³⁾.
- (8) By letter registered as incoming mail on 1 April 2008, the Dutch authorities submitted their comments on the Commission's decision to initiate the formal investigation procedure.
- (9) Following the initiation of the procedure, the Commission received comments from three interested parties, namely Ahoy Rotterdam NV, the alleged recipient of State aid ⁽⁴⁾; Mojo and Music Dome, which submitted joint observations ⁽⁵⁾; and one individual person ⁽⁶⁾. A meeting with Ahoy Rotterdam NV took place on 17 April 2008. By letter registered as incoming mail on 15 May 2008, the Commission forwarded the third-party comments to the Dutch authorities. The authorities submitted their observations by letter dated 20 June and registered as incoming mail on 24 June 2008.
- (10) The non-confidential version of the report prepared by the independent consultant was forwarded to the Dutch authorities by letter registered as outgoing mail on 24 June 2008. The Dutch authorities commented in a letter registered as incoming mail on 14 July 2008.

II. BACKGROUND INFORMATION AND DESCRIPTION OF THE MEASURE

- (11) The Ahoy complex, comprising the Ahoy Arena (a name given in English to the *Sportpaleis* or 'Sports Palace'), six exhibition halls, and a large meeting and congress centre, is designed to host a wide variety of events, including exhibitions, conferences, trade fairs, shows, concerts, and sports and social events. The operator of the complex,

Ahoy Rotterdam NV, is also active on the international market, and exports its own trade fair titles ⁽⁷⁾.

- (12) Until 1 July 2006 the Ahoy complex was managed by Ahoy Rotterdam NV, in which the municipality was the sole shareholder. Following a decision to separate ownership and operations, the municipality kept the ownership of the complex, but on 1 July 2006 sold the operation of Ahoy Rotterdam NV, via a management buy-out, for EUR 1,7 million. In the absence of a public tender, the sale price was based directly on a market valuation performed by the independent consultant, Deloitte Financial Advisory Services BV, Real Estate Valuation in Rotterdam (Deloitte).
- (13) At the same time, the municipality leased the Ahoy complex to the now privatised Ahoy Rotterdam NV for a period of 15 years (with an option for extension), starting on 1 July 2006. The lease imposed strict obligations on the lessee regarding the preservation and promotion of the multifunctional nature of the Ahoy complex ⁽⁸⁾. The initial rent of EUR 2,6 million per year stipulated in the lease was based directly on the market valuation of rent for the Ahoy complex carried out by Deloitte ⁽⁹⁾.
- (14) As part of the lease, the municipality committed to invest up to EUR 42 million in the renovation and upgrading/expansion of the Ahoy Arena. This investment is the subject of the project notified. The municipality's investment was intended in part for the maintenance of the Arena and in part for its modernisation and expansion. The emphasis was on the modification of the following aspects of the Arena: improvement of the acoustics, the air conditioning system, the layout and accessibility, the strengthening of the roof construction in order to facilitate the suspension of sound equipment and video walls, the improvement of backstage facilities and the expansion of the number of seats. Originally, it was planned to expand the capacity of the Arena by an additional 5 000 seats. This has now been reduced to [...] seats.
- (15) The management considered that this investment was necessary to maintain the value of the complex, but that it would not lead to additional revenues for the operator. During the negotiations with the municipality, therefore, the management argued that this aspect should not be taken into account in establishing the price of the shares in Ahoy Rotterdam NV or the rent for the complex.

⁽²⁾ See footnote 1.

⁽³⁾ In a letter sent and registered as outgoing mail on 30 May 2008.

⁽⁴⁾ By letter registered as incoming mail on 30 April 2008, following an extension of the deadline for comments on the Commission decision to initiate the formal investigation procedure.

⁽⁵⁾ By letter registered as incoming mail on 21 April 2008, following an extension of the deadline for comments on the Commission decision to initiate the formal investigation procedure.

⁽⁶⁾ By letter registered as incoming mail on 27 March 2008.

⁽⁷⁾ [...] (*) (*): (The information omitted here is covered by the obligation of business secrecy).

⁽⁸⁾ Under clause 4.1 of the lease, the programme carried out in years 2003/2004 and 2004/2005 (public and trade exhibitions, events etc.) is to be continued for the duration of the contract.

⁽⁹⁾ The lease states that the rent is to be adjusted on the basis of the most recent monthly consumer price index published by the Central Statistical Office.

- (16) The municipality accepted this argument, and did not require an adaptation to the price of the shares in Ahoy Rotterdam NV or the rent fixed for the Ahoy complex. However, in order to ensure that after the planned investment the rent would be at a market level, the municipality had a profit-sharing mechanism included in the lease, whereby the operator, Ahoy Rotterdam NV, would pay a surcharge on the rent if its gross margin were to exceed a predetermined level. This surcharge would be due if the gross margin, less the rent payable for the relevant year, exceeded EUR 16,5 million. The surcharge would be determined in accordance with the following table:

Tranche	Gross margin (net of rent)	Surcharge
First tranche	EUR 16,5 to EUR 18,0 million	50 %
Second tranche	EUR 18,0 to EUR 21,0 million	35 %
Third tranche	EUR 21,0 to EUR 25,0 million	20 %

The three tranches are cumulative. If, for example, the gross margin achieved in one year, net of the rent paid to the municipality, is EUR 20 million, the rent will be subject to a surcharge consisting of 50 % of EUR 1,5 million (the first tranche) and 35 % of EUR 2 million (the remaining amount falling into the second tranche), giving a total surcharge of EUR 1,45 million.

III. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (17) On 30 January 2008 the Commission decided to initiate the formal investigation procedure because the Dutch authorities had not provided sufficient evidence to allow the Commission to conclude that the notified investment by the municipality of Rotterdam did not constitute State aid or that any such aid was compatible with the EC Treaty.
- (18) In particular, the Commission doubted whether the design of the profit-sharing arrangement stipulated in the lease concluded between Ahoy Rotterdam NV and the municipality was adequate to ensure that the operator of the Ahoy complex would not be granted an economic advantage beyond normal market conditions as a result of the notified investment.
- (19) The investigation also covered the sale of Ahoy Rotterdam NV and the lease of the Ahoy complex to the privatised operator, transactions which had been carried out by the municipality of Rotterdam but which had not been notified to the Commission by the Dutch authorities. Given that these transactions were closely interlinked with the notified investment, the

Commission considered it necessary to verify whether any of them comprised any element of State aid. The Commission also took account here of the fact that the Deloitte valuation reports used as a basis for these transactions were themselves to a certain extent based on the information provided by the management of Ahoy Rotterdam NV, which as a prospective buyer and lessee faced a conflict of interest.

- (20) Finally, the Commission also initiated the formal investigation procedure in order to give the Dutch authorities and third parties the opportunity to submit their comments on its provisional assessment of the measure described and to give the Commission any relevant information related to the measure.

IV. COMMENTS BY THIRD PARTIES

- (21) Following the initiation of the procedure, the Commission received comments from three interested parties, namely Ahoy Rotterdam NV, the alleged recipient of State aid; Mojo and Music Dome, which submitted joint observations; and one individual person⁽¹⁰⁾.
- (22) According to Ahoy Rotterdam NV, the sale of Ahoy Rotterdam NV and the lease of the Ahoy complex were at worst on market terms and might even be more generous to the municipality. The alleged recipient drew attention to the restrictions and conditions included in the lease and price agreements, which considerably limited the value of the lease and the purchase price.
- (23) Ahoy Rotterdam NV stated that the investment in the Ahoy Arena related mainly to maintenance and renovation, and was aimed only to a limited extent at an increase in capacity⁽¹¹⁾. In so far as the increase in capacity would lead to better operating possibilities, Ahoy Rotterdam NV asserted, on the basis of the financial data supplied, that the profit-sharing arrangement would ensure that the municipality would benefit more than would be required by the market economy investor principle.
- (24) Mojo and Music Dome maintained the position they had put forward in the complaint they submitted before the initiation of the formal investigation⁽¹²⁾, to the effect that the planned investment in the Ahoy complex and the related transactions (the privatisation of the operation of Ahoy Rotterdam NV and the lease of the property) involved illegal State aid.

⁽¹⁰⁾ The comments submitted by the individual person were not directly relevant for the assessment of the measure, but focused instead on the motives behind the complaint lodged by Mojo and Music Dome. For this reason they are not considered further in this Decision.

⁽¹¹⁾ According to Ahoy Rotterdam NV, under the current plans maintenance and renovation accounted for 83 % of the cost of the investment, and the increase in capacity for 17 %.

⁽¹²⁾ See footnote 1.

- (25) Mojo and Music Dome argued that the planned investment conferred an advantage on the operator of the complex, in particular because the expansion of the capacity of the Ahoy Arena would increase the operator's revenues. Even if the operator's revenues did not increase, the improvement of the facilities would still confer a competitive advantage on Ahoy Rotterdam NV, as it would have the benefit of an improvement in the facilities free of charge, whereas any private undertaking would have had to pay the cost itself. The improvement would help the operator to consolidate its position in the market or even to improve it. Furthermore, the investment was not profitable for the municipality of Rotterdam and therefore could not satisfy the market economy investor test.
- (26) According to Mojo and Music Dome, the profit-sharing mechanism did not remove the operator's advantage. It was clear that the final profit-sharing arrangement had not been tested by any independent consultant. Furthermore, the mechanism would not be consistent with the market: even if the operator were to repay the investment in full under the profit-sharing mechanism, the operator would still receive an economic advantage, because the municipality of Rotterdam was to bear the entire economic risk of the investment. If the investment did not result in increased revenue, the municipality would get nothing at all. Only if there was indeed extra revenue would the municipality recover part of its investment. No private investor would have accepted such conditions.
- (27) As regards the price of shares in Ahoy Rotterdam NV and the rent for the Ahoy complex, Mojo and Music Dome argued that the conflict of interest faced by the management and prospective buyer when it submitted the information to Deloitte had resulted in a valuation of the shares in Ahoy Rotterdam NV that was too low. They again questioned the reliability of the forecasts by the management of Ahoy Rotterdam that were used by Deloitte to value the shares of the company.
- (28) According to Mojo and Music Dome, the management report accompanying the financial accounts for 2004/2005 suggested that there was a trend in Ahoy's turnover in which 'good' years alternated with 'moderate' years. The operator had indicated this trend to Deloitte as well, but in the light of the very small differences in the number of events scheduled each year the alleged trend could not be considered credible⁽¹³⁾. This trend did not correspond to the actual turnover either, because the financial year 2005/2006, which would have been expected to be 'moderate', had in fact turned out to be a 'good' year. It was not realistic to suppose that the operator could not have envisaged the high turnover in the year 2005/2006, especially given that the events organised in Ahoy were booked well in advance.
- (29) The theoretical series of future cash flows in the Deloitte report was artificial. The forecast in the Deloitte report began with a 'bad' year and ended with a 'good' year. If it had started with a 'good' year and ended with a 'bad' year, the present value of the future cash flow, and thus the value of the shares, would have been much more positive.
- (30) Finally, if Deloitte had made an accurate forecast of the expected result for the financial year 2005/2006, the value of the company would have been put considerably higher. It could be argued that other things being equal the difference between the actual EBITDA, EUR 5,745 million, and the forecast EBITDA, EUR 1,252 million, constituted extra cash flow in the first forecast year, which would result in an increase of EUR 4,493 million in the indicative value of the company⁽¹⁴⁾.

V. POSITION OF THE DUTCH AUTHORITIES

- (31) By letter registered as incoming mail on 1 April 2008, the Dutch authorities submitted their comments on the Commission's decision to initiate the formal investigation procedure. The Dutch authorities also replied to the third-party observations on the decision to initiate the procedure, and commented on a non-confidential version of the ECORYS NV report.
- (32) Throughout their submissions, the Dutch authorities maintained the position they had put forward before the formal investigation was initiated⁽¹⁵⁾, to the effect that neither the investment in the Ahoy complex by the municipality of Rotterdam nor the sale of Ahoy Rotterdam NV and lease of the complex constituted State aid.

⁽¹³⁾ Mojo and Music Dome referred to Annex 3 to the lease (years 2003/2004 and 2004/2005) and provided an overview for the period 2003/2004–2007/2008.

⁽¹⁴⁾ The complainants submitted the calculations leading to this result. They also provided other calculations using different multiples to show that if Deloitte had carried out an accurate forecast of the expected result for the financial year 2005/2006, the value of the company would have been considerably higher.

⁽¹⁵⁾ See footnote 1.

Comments on the decision to initiate the procedure

- (33) The Dutch authorities for the most part referred back to information submitted before the decision to initiate the procedure, and maintained their position that the planned investment did not contain any State aid component. They reiterated that the investment should be regarded as an investment in public infrastructure, which did not confer a selective advantage on any undertaking and which guaranteed the multifunctional character of the complex. The contractor who would carry out the investment was to be selected through an open tender procedure. The investment, including the expansion of capacity, was needed to maintain the value of the Ahoy complex; of the total EUR 42 million, only EUR 7 million was to be used to increase the capacity of the Ahoy Arena.
- (34) The rent and share price calculated in the Deloitte reports would ensure a price consistent with the market. The Dutch authorities said that Deloitte confirmed that it undertook its own analyses of the available information, and that its conclusions differed from those of the management on a number of points. The Deloitte reports consequently provided a firm basis for drawing conclusions regarding a rent and share price consistent with the market.
- (35) The profit-sharing mechanism was an effective way of ensuring that no undue advantage was conferred even after the completion of the investment. The threshold triggering the profit-sharing mechanism was set in nominal terms, and was not subject to indexation. If the latest results of Ahoy Management NV were simply increased by an expected annual inflation rate of 2 %, additional rent would be received under the profit-sharing mechanism from 2010/2011 onwards. From 2013/2014, in that scenario, the rent paid by Ahoy Management NV would be higher than the rent calculated by the complainants Mojo and Music Dome. The profit-sharing mechanism was thus an effective tool for ensuring that the rent was consistent with the market.

Comments on the third-party observations and the independent consultant's report

- (36) The Dutch authorities specifically reaffirmed that, contrary to the views of Mojo and Music Dome, there was indeed a trend in the year-to-year turnover of Ahoy Rotterdam NV. The number of events was not an indication of the existence of such a trend, because it did not take into account the commercial value of the individual

events. A significant proportion of the events were organised on a two-yearly basis, and some of them produced substantial additional income⁽¹⁶⁾. In addition, the turnover of an event could easily differ from expectations. The Dutch authorities therefore rejected the view put forward by Mojo and Music Dome.

- (37) As regards the independent consultant's report, the Dutch authorities noted that the observations in the report were largely in line with the Deloitte reports. In particular, the report concluded that the profit-sharing mechanism ensured that the operator would not derive an economic advantage from the planned investment. The report thus confirmed that the agreements concluded were consistent line with market conditions.

VI. THE INDEPENDENT CONSULTANT'S STUDY

- (38) As part of the investigation, the Commission selected an independent consultant, ECORYS Nederland BV, to carry out a review of the valuation reports prepared by Deloitte⁽¹⁷⁾, which had served as a basis for the municipality when it sold the operation of Ahoy Rotterdam NV and leased the Ahoy complex. The consultant was also requested to review the valuation report of DTZ Zadelhoff (DTZ) that had been submitted by the complainants before the initiation of the investigation⁽¹⁸⁾, and to assess whether the profit-sharing arrangement stipulated in the lease between Ahoy Rotterdam NV and the municipality was consistent with the market. For all of these valuation reports, the consultant was requested to state a view on the correctness of the methodology applied.
- (39) The consultant found that in the Deloitte reports valuing the shares in Ahoy Rotterdam NV and determining the rent for the Ahoy complex, the methodology applied was correct. It was reasonable for Deloitte to make use among other things of the information provided by the management, but Deloitte had based its final valuation on its own forecasts, which differed from the management's expectations.

⁽¹⁶⁾ Examples being Europort Maritime, Industrial Maintenance and InfraTech.

⁽¹⁷⁾ One report, entitled 'Project Nadal', valued the shares in Ahoy Rotterdam NV at EUR 1,7 million; the other, 'Waardering Ahoy', put the market level of rent for the Ahoy complex at EUR 2,6 million.

⁽¹⁸⁾ DZT's 'Taxatiereport' valued the market level of rent for the Ahoy complex at EUR 3,9 million.

- (40) According to the consultant, the discrepancy between the valuations of the rent for the Ahoy complex arrived at by Deloitte and DTZ resulted from the different methods they had applied. The consultant approved of the approach taken by Deloitte⁽¹⁹⁾. Underlining the close relation between Deloitte's valuation of the shares in Ahoy Rotterdam NV and the determination of the rent for the complex, the independent consultant confirmed that given that Deloitte's valuation of the shares was fair the method Deloitte had followed provided the most accurate estimate of the market level of the rent for the Ahoy complex.
- (41) The independent consultant's report confirmed that the assumption in the Deloitte report that an increase in the capacity of the Ahoy Arena as a result of the intended investment would not automatically produce additional value for the operator was a defensible one⁽²⁰⁾. As regards the profit-sharing arrangement, the consultant concluded that the mechanism guaranteed a reasonable rent increase in conformity with market conditions in return for the planned investment by the municipality of Rotterdam. As the thresholds set in the profit-sharing arrangement were not subject to indexation, the municipality, as the lessor, might well secure a windfall profit even if the operator, as the lessee, did not exploit the investment in the complex.

VII. ASSESSMENT IN THE LIGHT OF THE STATE AID RULES

State aid within the meaning of Article 87(1) of the EC Treaty

- (42) The Commission has considered whether the measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty, which provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.
- (43) It will be seen that if it is to be classed as State aid the notified investment by the municipality of Rotterdam must meet all of the following conditions: (1) the measure must be funded out of State resources; (2) it must confer an economic advantage on undertakings; (3) the advantage must be selective and distort or threaten to distort competition; and (4) the measure must affect trade between Member States.

⁽¹⁹⁾ The consultant did not accept that the DTZ report provided a better indication, because in the consultant's view the Ahoy complex could not be classed as 'easily marketable' (*goed courant*) and the methods used by DTZ were based on unclear comparisons and less appropriate or less developed assumptions.

⁽²⁰⁾ The independent consultant's report took account of the forecasting period, the dynamics of the events market, the possibility of new competitors and the related uncertainties and risks. The independent consultant also indicated that as a defensive strategy the renovation and expansion of the complex was not unique.

1. State resources

- (44) The municipality of Rotterdam plans to invest up to EUR 42 million in the renovation and expansion of the Ahoy Arena, which forms part of the Ahoy complex. Since a municipality is a public authority, the investment must be considered an investment using State resources within the meaning of Article 87(1) of the EC Treaty.
- (45) The other transactions carried out by the municipality, namely the sale of the operation of Ahoy Rotterdam NV to the management and the lease concluded with the private operator, may thus likewise have involved State resources within the meaning of Article 87(1).

2. Advantage

Economic advantage to the operator

- (46) As was pointed out in the decision initiating the procedure, the sale of the operation of Ahoy Rotterdam NV and the lease of the Ahoy complex would confer an economic advantage on the buyer/lessee only if the price of shares in Ahoy Rotterdam NV or the rent for the Ahoy complex were set below their market level. In the decision initiating the procedure the Commission noted that the price for Ahoy Rotterdam NV and the level of rent for the Ahoy complex had been determined directly on the basis of valuation reports prepared by an independent valuer, Deloitte. However, in view of the close link between these transactions and the notified investment, the Commission considered it necessary to verify the terms of the transactions, and to do so to take account of the fact that Deloitte's reports were to a certain extent based on information provided by the management of Ahoy Rotterdam NV, which as a prospective buyer/lessee faced a conflict of interest.
- (47) As part of the investigation, the Commission decided to obtain an independent consultant's opinion on the reliability of the Deloitte reports, which had served as a basis for the municipality when it carried out these transactions. As has been explained in recitals 38, 39 and 40, the study carried out by this independent consultant confirmed that the methodology followed in the reports was correct, and that Deloitte had based its final valuation on its own forecasts⁽²¹⁾. The Dutch authorities have also indicated that Deloitte has confirmed that it undertook its own analysis of the available information and that its conclusions differed from those of the management on a number of points.

⁽²¹⁾ The independent consultant also observed that it was reasonable for Deloitte to make use among other things of information provided by the management. Deloitte had not relied on this information only, but also used independent market research.

- (48) The Commission has carried out its own in-depth assessment of these reports, and finds that Deloitte correctly applied the discounted cash flow method⁽²²⁾ to guide it in valuing the shares in Ahoy Rotterdam NV and the income approach to guide it in determining the rent for the complex. The Commission likewise finds that the reports correctly took into account the special features of the operating company that made it difficult to draw a proper comparison with other companies and transactions. Finally, the Commission finds that in its valuations Deloitte took proper account of the close link between the sale of the operation and the lease of the Ahoy complex. On the basis of its own assessment and of the findings of the independent consultant, the Commission takes the view that there are no reasonable grounds to challenge Deloitte's reports.
- (49) Both before and after the formal investigation was initiated Mojo and Music Dome argued that the results of the Deloitte reports were vitiated because Deloitte had applied the wrong methodology and because it had used biased information provided by the management; the Commission finds that these arguments have not been properly substantiated. As has been explained, the Commission has concluded that Deloitte applied the correct methodology and that it based its valuation on its own forecasts, which differed from the management's expectations.
- (50) Mojo and Music Dome further contend that some of the results actually achieved by Ahoy Rotterdam NV differ from the results forecast in Deloitte's valuation of the shares in Ahoy Rotterdam NV⁽²³⁾, and that if these forecasts were to be updated the result of the valuation, and thus the price for the shares in Ahoy Rotterdam NV, would be significantly higher. It should be pointed out that the valuation was based on forecasts made by Deloitte on the basis of the information available at the time. There is no evidence that Deloitte used incorrect information to assess the market value of Ahoy Rotterdam NV. The fact that some financial indicators turned out to be different from what had originally been forecast did not affect the circumstances and the information available to Deloitte at the time when it drew up its valuation report, and therefore could not affect the outcome of that valuation. The Commission finds, therefore, that the differences between the forecasts and the actual financial indicators supplied *ex post* by Mojo and Music Dome do not vitiate the correctness of the valuation carried out by Deloitte.
- (51) On the basis of this assessment, the Commission considers that Deloitte's market valuation reports presented a reliable basis for the prices that were set for purposes of the sale of the operation of Ahoy Rotterdam NV and the lease of the Ahoy complex by the municipality. Taking into account the relevant obligations imposed by the municipality in the lease, the Commission concludes that these transactions were carried out in conformity with market conditions and did not confer an undue economic advantage on the operator of the complex.
- (52) As regards the part of the notified investment relating specifically to the upgrading and expansion of the capacity of the Ahoy Arena, in the decision initiating the procedure the Commission said it could not rule out the possibility that this investment might confer a selective advantage on the operator of the complex going beyond normal market conditions, even when account was taken of the safeguard provided by the profit-sharing mechanism laid down in the lease concluded between the municipality and Ahoy Rotterdam NV.
- (53) In particular, according to the Commission's initial assessment, the arguments put forward by the Dutch authorities did not show that the design of the profit-sharing arrangement was such as to ensure that the rent would be at a market level following the investment; those arguments consequently did not show that there would be no economic advantage to the operator of the complex after the completion of the investment.
- (54) As part of the investigation, the Commission carried out an in-depth analysis of the profit-sharing mechanism in the light of the additional information provided by the Dutch authorities and the third parties. The Commission also asked the independent consultant to assess whether the profit-sharing arrangement laid down in the lease was in line with market conditions.
- (55) As explained in recitals 15 and 16, the privatisation of the operation of Ahoy Rotterdam NV and the lease of the complex were based on the assumption that the planned investment⁽²⁴⁾ was necessary to maintain the

⁽²²⁾ The discounted cash flow (DCF) method is a commonly used method of valuing a project, company or asset by calculating the present value of a future cash flow, taking into account both the risk and the time expected to elapse before the cash is received.

⁽²³⁾ The complainants argue that given that the valuation was carried out in the middle of the financial year 2005/2006, the forecast should have been more accurate.

⁽²⁴⁾ In particular the expansion of the capacity of the Arena by the addition of extra seats.

value of the complex but would not produce any additional revenues for the operator ⁽²⁵⁾. In this respect, the Commission would point out that the independent consultant has confirmed that the assumption made in the Deloitte report that an increase in the capacity of the Ahoy Arena as a result of the intended investment would not automatically produce additional value for the operator was a defensible one, in view of the dynamics of the events market, possible new competitors, and the related uncertainties and risks. The Commission agrees with the findings of the independent consultant, and concludes that this assumption was justified, taking into account among other things Ahoy's unique market position, the presence and behaviour of other operators in the market ⁽²⁶⁾, and the fact that the operation of the complex could be hampered by the renovation work for a fairly long time.

(56) The Commission would also point out that the municipality included a profit-sharing mechanism in the lease as a safeguard. This arrangement was designed to ensure that the level of the rent for the complex would rise if the notified investment were to increase the value of the complex to the operator. According to the independent consultant the profit-sharing arrangement guarantees a reasonable rent increase in conformity with market conditions in return for the planned investment by the municipality of Rotterdam. The independent consultant has confirmed that both the degressive structure of the mechanism and the differentiation of the pace of the rent increase are reasonable. The independent consultant has also pointed out that as the thresholds set in the profit-sharing arrangement are not subject to indexation, the municipality, as the lessor, may well secure a windfall profit even if the operator, as the lessee, does not exploit the investment in the complex.

(57) The mechanism increases the rent once the operator's gross margin, as defined for this purpose, exceeds the threshold of EUR 16,5 million. In order to assess whether this threshold is appropriate, the Commission has compared it over the period of the lease with the operator's gross margins as forecast in the Deloitte report ⁽²⁷⁾, after deducting, as the mechanism provides, the rent payable to the municipality in a given financial year.

[...]

⁽²⁵⁾ This assumption was used in the Deloitte report determining a market rent for the Ahoy complex.

⁽²⁶⁾ According to the independent consultant, Amsterdam RAI, for example, was investing up to EUR 105 million in upgrading its complex in the period 2003–2008.

⁽²⁷⁾ These gross margins are based on the assumption that the investment will only maintain the value of the complex to the operator, and will not produce additional revenues.

(58) [...] Over the period of the lease, the gross margins forecast by Deloitte (less the rent) are on average higher than the EUR 16,5 million threshold in the financial years following the projected completion of the investment, even when no account is taken of possible additional gross margin generated by the increase in value of the complex. The Commission concludes that the threshold is at a level likely to capture potential increases in the operator's gross margin that might arise if the investment were to increase the value to the operator, rather than merely preserving it.

(59) Once the gross margin threshold of EUR 16,5 million is exceeded, the additional rent for the municipality substantially increases, although at a decreasing pace, until the operation is achieving a gross margin of EUR 25 million ⁽²⁸⁾. At that point the rent received by the municipality is EUR 5,2 million, double the figure determined by Deloitte ⁽²⁹⁾. As the effect of the upgrading/expansion of the Ahoy Arena on the operator's revenues cannot be expected to be unlimited, the Commission takes the view that it is justified in this case to differentiate the pace of the rent increase and at the same time to put a cap on the maximum rent surcharge ⁽³⁰⁾.

(60) The Commission therefore accepts the independent consultant's opinion and concludes that the design of the profit-sharing mechanism laid down in the lease is in line with market conditions and provides an effective safeguard to ensure that the rent for the complex following the planned investment is at a market level.

(61) Mojo and Music Dome have argued that even if the investment (and in particular the expansion of the Ahoy Arena) did not increase the operator's revenues, the improvement of the facilities would still confer a competitive advantage on Ahoy Rotterdam NV, as it would have the benefit of an improvement in the facilities free of charge, whereas any private undertaking would have had to pay the cost itself; the Commission does not consider this argument convincing. In its valuations Deloitte itself worked with a scenario according to which the investment would not generate additional revenues but was nevertheless necessary in order to preserve the value of the complex. When the price for Ahoy Rotterdam NV and the rent for the complex were set, the investment was taken into account. Thus the investment does not confer an economic advantage on the operator.

⁽²⁸⁾ See recital 16.

⁽²⁹⁾ The additional rent is calculated as follows: 50 % × EUR 1,5 million + 35 % × EUR 3 million + 20 % × EUR 4 million = EUR 2,6 million.

⁽³⁰⁾ The independent consultant's report confirms that it is reasonable to structure the mechanism in this fashion.

- (62) Mojo and Music Dome also argue that the arrangement cannot be in line with the market, since even if the operator were to repay the investment in full under the profit-sharing mechanism, the operator would still receive an economic advantage, as the entire economic risk of the investment would be borne by the municipality of Rotterdam. According to Mojo and Music Dome, the municipality will receive nothing if the investment does not generate additional income: it will recover its investment only if extra income is indeed generated. With regard to the argument put forward by Mojo and Music Dome here, the Commission cannot exclude the possibility that in its decision to invest in the project the municipality did not behave as a profit-maximising private investor. The conditions imposed on the operator regarding the multifunctionality of the complex and the types of events that are to take place there in effect reduce the value of the investment. However, the Commission's assessment has demonstrated that the operator did not receive any undue advantage from its contractual relationship with the municipality, taking into account the restrictions imposed in the contracts. As explained above, the level of the rent and the price of the shares in Ahoy Rotterdam NV were in line with market conditions. The profit-sharing mechanism presents is an additional safeguard to rule out any potential undue advantage if the investment, rather than merely preserving value, were to generate additional value for the operator.
- (63) Accordingly, taking into account the uncertainty of the potential advantage to the operator resulting from the upgrading/expansion of the Ahoy Arena, as well as the effective safeguard in the form of the profit-sharing arrangement implemented by the municipality, the Commission concludes that the planned investment does not confer on the operator an economic advantage going beyond normal market conditions.

An economic advantage conferred on the undertaking carrying out the project

- (64) The Dutch authorities have given a commitment that the undertaking or undertakings carrying out the investment project will be selected by public tender in full compliance with Parliament and Council Directive 2004/18/EC⁽³¹⁾. As it said in its decision to initiate the investigation procedure, if this commitment is met the Commission can rule out the possibility that an economic advantage going beyond normal market conditions might be conferred on any such undertaking or undertakings.

Economic advantage conferred on undertakings using the complex

- (65) It must be concluded that the investment will not confer any economic advantage beyond normal market

conditions on undertakings using the services provided by the operator of Ahoy. Since the investment is focused on the renovation and development of the Ahoy Arena, the undertakings concerned will be organisers of concerts, festivals, and sports and social events. Given that the operator of the Ahoy complex is a private undertaking, there is no reason to doubt that its clients will be charged a market price.

Economic advantage conferred on specific economic activities

- (66) In the decision initiating the procedure, the Commission made an initial finding, on the basis of the information in its possession, that no selective advantage would be conferred on any specific undertaking or group of undertakings or on any specific activity, given the multi-purpose layout of the complex and the obligations imposed on the operator in the lease regarding the nature and promotion of its multifunctional character.
- (67) The comments submitted by the Dutch authorities in the course of the investigation have confirmed the multifunctional nature of the Ahoy complex and the variety of activities carried on there. The lease requires the operator to guarantee that the facility will continue to be available for different users and activities. The Commission would observe that the investment in the Ahoy Arena aims at maintaining the multifunctional character of the complex, so as to provide facilities for various types of activity which are not for the benefit of specific undertakings or specific activities. In addition, the investment in the Arena is intended to provide a venue at which activities will take place that are aimed at the general public. The provision of a sports venue of this type can be regarded as a matter for which the authorities are responsible to the general public, provided its multifunctional character is maintained. In addition, there is nothing to suggest that with regard to other activities and events the Ahoy complex would not be operated on market terms.
- (68) The Commission takes the view, therefore, that the investment will not favour specific undertakings or economic activities, and is consequently not selective.

Conclusion on economic advantage

- (69) The Commission accordingly finds that neither the planned investment in the Ahoy complex nor the related sale of the operation and lease of the Ahoy complex by the municipality confer an economic advantage going beyond normal market conditions on the operator of the complex or on any other undertaking. The Commission also finds that the investment does not selectively favour specific undertakings or economic activities.

⁽³¹⁾ OJ L 134, 30.4.2004, p. 114.

VIII. OVERALL CONCLUSION

- (70) Since the initiation of the formal investigation procedure, the doubts that the Commission expressed in the initiating decision have been addressed in a satisfactory manner by the Dutch authorities and the independent consultant. In particular, further information has been provided with respect to the design of the profit-sharing arrangement, which has enabled the Commission to assess the mechanism in depth. Furthermore, the Commission has assessed the reliability of the Deloitte valuations which served as a direct basis for the sale of the operation of Ahoy Rotterdam NV and the lease of the Ahoy complex, and has confirmed that these transactions were consistent with the market.
- (71) The Commission concludes, therefore, that neither the notified investment in the renovation and upgrading/expansion of the Ahoy complex, nor the related sale of the operation of Ahoy NV and lease of the complex, constitutes State aid within the meaning of Article 87(1) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The investment by the municipality of Rotterdam in the Ahoy complex, notified to the Commission by letter of 22 February 2007, with subsequent amendments, does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

The measure may accordingly be implemented.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 21 October 2008.

For the Commission
Neelie KROES
Member of the Commission