

COMMISSION DECISION (EU) 2016/1849**of 4 July 2016****on the measure SA.41613 — 2015/C (ex SA.33584 — 2013/C (ex 2011/NN)) implemented by the Netherlands with regard to the professional football club PSV in Eindhoven***(notified under document C(2016) 4093)***(Only the Dutch text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(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 Article 108(2) of the Treaty ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) In May 2011, the Commission learnt from press reports and through submissions from citizens that the municipality of Eindhoven was planning to support the professional football club Philips Sport Vereniging (hereinafter: 'PSV') through a financial transaction. In 2010 and in 2011 the Commission also received complaints concerning measures in favour of other professional football clubs in the Netherlands, namely MVV in Maastricht, Willem II in Tilburg, FC Den Bosch in 's-Hertogenbosch and NEC in Nijmegen. On 26 and 28 July 2011, the Netherlands provided the Commission with information on the measure concerning PSV.
- (2) By letter dated 6 March 2013, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the measures in favour of Willem II, NEC, MVV, PSV and FC Den Bosch.
- (3) The Commission decision to initiate the procedure (hereinafter: 'the opening decision') was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures in question.
- (4) Concerning the measure in favour of PSV, the Netherlands submitted observations by letter dated 6 June and 12 November 2013, and 12 and 14 January and 22 April 2016.
- (5) The Commission received observations from the following interested parties: from the municipality of Eindhoven (hereinafter: 'the municipality') on 23 May 2013, 11 September 2013 and 26 September 2013, and from PSV on 24 May 2013. The Commission forwarded them to the Netherlands, which was given the opportunity to react. The Netherlands provided comments by letter dated 12 November 2013.
- (6) Meetings with the Netherlands took place on 9 July 2013, 25 February 2015 and 13 October 2015.

⁽¹⁾ Commission Decision in Case SA.33584 (2013/C) (ex 2011/NN) — Netherlands aid to certain professional Dutch football clubs in 2008-11 — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 116, 23.4.2013, p. 19).

⁽²⁾ Cf. footnote 1.

- (7) On 17 July 2013, the municipality appealed against the opening decision of 6 March 2013 in the General Court ⁽³⁾.
- (8) Following the opening decision, and in agreement with the Netherlands, the investigations for the different clubs were pursued separately. The investigation concerning PSV was registered under the case number SA.41613.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The measure

- (9) The national football federation Koninklijke Nederlandse Voetbal Bond (hereinafter: 'KNVB') is the umbrella organisation for professional and amateur football competition. Professional football in the Netherlands is organised in a two-tier system. In the 2014/2015 season it consisted of 38 clubs, of which 18 played in the top league (*eredivisie*) and 20 in the lower league (*eerste divisie*).
- (10) PSV was founded in 1913 and plays its home matches in Eindhoven. In 1999, the commercial activities of PSV were grouped in a limited liability company (*naamloze vennootschap*). All shares but one are owned by the Foundation PSV Football. The remaining share is owned by the Eindhoven Football Club PSV. PSV plays in the top league and has been consistently competing for the top spots in the league. It ended first in the top league in 2014/2015 and in 2015/2016. PSV regularly participates in European tournaments and has won both the European cup (1987/1988) and the UEFA cup (1977/1978).
- (11) PSV owns its football stadium, the Philips stadium (hereinafter: 'the stadium'). Until 2011, it also owned the land under the stadium and the training block De Herdgang. In 2011, PSV was facing serious liquidity problems, for which it approached the municipality, Philips and several other companies in Eindhoven, as well as certain banks. Some of these companies did indeed agree to award new loans or to amend existing ones in order to help PSV bridge the difficult period.
- (12) At that time, the municipality and PSV negotiated a sale-and-lease-back transaction. They agreed that the municipality would buy the land under the stadium and the training block for EUR 48 385 000. The stadium land was valued at EUR 41 160 000. In order to finance this purchase, the municipality contracted a long-term loan of a similar amount at a fixed interest rate from a bank. The land under the stadium was then made available to PSV through a long lease (*erfpacht*) of 40 years, which may be extended if PSV so requests. The annual lease fee is EUR 2 463 030. This annual lease fee comprises the lease fee for the stadium ground (EUR 1 863 743), the ground under the training complex (EUR 327 151) and a car park (EUR 272 135). The contract contained a clause that the lease fee will be reviewed after 20 years.
- (13) The Netherlands did not notify to the Commission, pursuant to Article 108(3) of the Treaty, its intention to enter into this sale-and-lease-back construction.

2.2. Grounds for initiating the procedure

- (14) In the opening decision, the Commission took the position that aid measures to professional football clubs are likely to distort competition and to affect trade between Member States within the meaning of Article 107(1) of the Treaty. The Commission also doubted the appropriateness of the determination of the sale price for the land under the stadium and the ground lease fee. It arrived at the preliminary conclusion that the municipality had provided a selective advantage to PSV with the use of state resources and had, hence, provided aid to the football club.
- (15) In particular, as regards the reliance of the Netherlands on the Commission's communication concerning aid elements in land sales by public authorities ⁽⁴⁾ (hereinafter: 'the land sales communication'), the Commission reiterated that the guidance provided by that communication, as stated in its introduction, only 'concerns sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements.'

⁽³⁾ Case T-370/13 *Gemeente Eindhoven v Commission*.

⁽⁴⁾ OJ C 209, 10.7.1997, p. 3.

- (16) Regarding the outside expertise relied on by the municipality, the Commission questioned the validity of the valuation experts' use of the price of land for mixed use rather than the price of land for a stadium for their calculations. The Commission also questioned whether the profit and risk margins used for calculating the value of the land for future development after the long lease has ended were realistic.
- (17) The Commission at that stage was not convinced that the municipality had had any intention of ensuring that the transaction was in conformity with the market economy investor principle (hereinafter: 'MEIP'). Rather, it had attempted to avoid making a loss; in other words, safeguards were introduced to make the transactions neutral to its budget. This would not have been acceptable for a typical market economy investor, even if it had based itself on outside expertise for the valuation of the grounds and the determination of the lease fee.

3. COMMENTS FROM THE NETHERLANDS

- (18) The Netherlands considers that the transaction does not constitute State aid for the following reasons: (a) the value of the land and the annual lease fee were established by outside experts in line with the land sales communication. This communication would provide the relevant framework to assess the State aid quality of the transaction; (b) PSV will pay the municipality under the long lease a rent which is higher than the amount of instalments the municipality pays to the bank, which ensures that the operation is not only financially neutral for the municipality; (c) PSV will provide a guarantee for those payments covered by the sale of season tickets; (d) if PSV goes bankrupt, the ground and the stadium will fall to the municipality; (e) the lease fee amount will be reviewed after 20 years on the basis of a new valuation report.
- (19) In the view of the Netherlands, with the acquisition of the land of the stadium site the municipality acted under market conditions, in conformity with the market economy investor principle and the market economy creditor principle. It requested an independent land valuation to determine the transaction price on the basis of the market value of the land.
- (20) Regarding the land evaluation as land for mixed use, the Netherlands notes that any evaluation in the context of the comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time. Therefore the expert was mandated to determine the value which the property has in its current state, in the case of a sale to the supposedly best offer, after a well-prepared bid following from the market, taking into account the development potential of the terrain.
- (21) Accordingly, the Netherlands refers to the independent valuation report which notes that the evaluation has to take into consideration possible realistic and foreseeable future developments affecting the land. The report considers the possible development of the stadium site and observes that, in the event of the stadium disappearing, the most likely use would be a mixed-use zone with office and apartment buildings. It would be appropriate to base the valuation on this prospect even if such a development might not occur for decades. The Netherlands and the valuation report underline that this assumption is realistic in particular because the land is situated in the centre of the town. For centrally situated plots of land the potential for a progressive value development is much higher than for those situated on the periphery. In the case at hand, the municipality is furthermore in the comfortable position that it itself decides about urban planning and thereby also about the potential future use of the stadium.
- (22) According to the Netherlands, the assumed prospective/possible mixed apartment/office use of the land is within the logic of the urban development in the recent past of the area in which the stadium is situated and with its further prospects. The direct surroundings of the land have evolved from a predominantly industrial area to a mixed residential and office area, in the centre of the city. The municipality has an own interest in the stadium area because the acquisition of strategic land is part of its urban development strategy as set out in its *'Interim-structuurvisie 2009'*. This document sets the scene for a redevelopment of abandoned industrial areas into central urban areas with a mixture of dwellings, creative activities, shops and offices. Declared part of this strategy is the early securing of strategic land as part of a long-term investment strategy to realise the plans. Within that logic, and because it cannot realise all single area plans simultaneously, the municipality also wants to combine acquisition of land (to secure it) with long leases. The stadium agreement is within that planning logic. The municipality found, having taken ownership, that this offered it a welcome opportunity that served its interests. At the same time this would secure a reliable inflow of revenues with the land acquisition for the duration of the long lease.
- (23) Therefore the valuation report considers, referring to a generally accepted standard that the value of land should be estimated on the basis of the highest and best use of the area, that the price should be based on land for mixed use. The valuation report includes also the expected costs of demolishing the existing buildings and

developing the area and the expected price of the construction of apartments and offices. The valuation compares the possible value of the offices and apartments by reference to neighbouring recent developments. As an additional risk buffer, the valuer assumes a floor space index of only 80 % compared with similar projects.

- (24) For the determination of the annual lease fee amount, the land valuation report takes as a basis the assumed value of the ground under the stadium and the training complex (valued together at EUR 48 385 000) and in addition of a car park which was already owned by the municipality (valued at EUR 6 010 000). It uses as a reference the interest rate for long-term Dutch government bonds in 2011 of 3,54 %. To this it adds a premium of 1,5 % to cover the risk of land value decrease and/or default of payment. The lease fee is thus determined so as to provide for the municipality a return of 5,04 %.
- (25) The valuation by the outside expert assumes an increase in the land value over the 40 years in line with expected average annual inflation of 1,7 %. On that basis the valuation finds appropriate that PSV pays an annual lease fee of EUR 2 463 030. The Netherlands claims that this amount is in line with the rent paid elsewhere in the country by professional football clubs for stadium rent and that it therefore was in conformity with market conditions. Regarding the assumed land value increase of 1,7 %, the study allows after 20 years for a reduction in the accumulated value of the land of 22,5 % as a safety margin and determines the annual estimated lease fee from year 21 on that lower base. Given the safety margin of 22,5 %, the actual appreciation rate used in the valuation amounts to 1,01 % for the whole 40 years (0,4 % for the first 20 years).
- (26) The report acknowledges that a long-term lease of more than 15 years may include certain risks. From the perspective of a market investor, the long period during which it cannot yet realise the value of a property situated in a mixed-use zone is, however, offset by the lease fee rate which is already based on the assumed value of a mixed-use plot of land. It will be fully reviewed after 20 years, on the basis of a new valuation report. This review would cover the value of the land and the appropriate return on that value. This lease provides income during the lease term, with the subsequent possibility of realising the potential of the land.
- (27) The risks for the municipality would be limited also by further factors. Regarding the land zoning risk, the assumption of the valuation report on the zoning is based on the fact that the areas around the stadium have already been re-zoned from industrial use to mixed use. In one case, that re-zoning was obtained by the investor within eight weeks. Therefore the valuation experts took that assumption as a realistic one. It did not factor in the municipality's power to influence the planning process but looked at development in the surrounding areas and the administrative practice of delivering permits and re-classifications to private developers. The planning laws allow for flexible re-designation. To further reduce the risks in the calculation, the valuation report assumed a lower construction density than in neighbouring plots.
- (28) Even if the zoning for the stadium is maintained in its current state, that would not constitute a high risk. The current zoning is for stadium and commercial use. This zoning, if maintained, may lead to an only moderately lower land value. According to the Netherlands, it would allow any commercial use on the premises and developing profitable commercial activities. The independent valuer found that a mixed use was the appropriate basis for valuation. It was not suggested by the municipality.
- (29) The long-lease contract provides that, should PSV fail to pay the lease fee or go bankrupt, the ground and the stadium will be at the full disposal of the municipality, which may develop the land's potential. The buildings on the land will become the property of the municipality. As indicated above, the transaction price of EUR 48 385 000 already takes into account the expected demolishing and development costs and the lease fee amount will be fully reviewed after 20 years. Furthermore, PSV pledged the proceeds of its season tickets to guarantee the lease fee payment and made a deposit equal to two years' ground rent (for an initial period of 10 years).
- (30) At the end of the lease contract the municipality will not only have collected the interest but will still be the owner of the land under the stadium with a supposedly higher value than today and have various possibilities for its use. The buildings on the land will also be at the disposal of the municipality, without any compensation for PSV.

4. COMMENTS FROM INTERESTED PARTIES

- (31) The municipality and PSV submitted observations under the procedure which were identical with the observations submitted by the Netherlands. In addition, the municipality described the procedure leading to the

decision to buy the stadium land and the motives which guided it. According to the municipality, in January 2011 deliberations started to enter into a sale-and-lease-back agreement with PSV. The underlying objective was to help PSV with a budgetary neutral transaction which would not confer a financial advantage on the club that it might not have obtained under market conditions.

- (32) For that purpose and with this objective in mind, the municipality asked the independent land valuation firm Troostwijk Taxaties BV (hereinafter: 'Troostwijk') to determine the market price for the land concerned and a reasonable amount for the annual lease. In March 2011, Troostwijk provided a valuation of the stadium land and other plots of land which PSV wanted to sell to the municipality. It determined as the market price for the land under the stadium in its then state and in consideration of its development prospects a price of EUR 41 160 000. The methodology of the land value determination and the lease fee was approved by an external accountancy firm working for the municipality. The lease fee would be higher than the interest the municipality has to pay for the loan it took to finance the land acquisition.
- (33) Following the receipt of an information request from the Commission on the planned transaction in May 2011, the municipality put particular emphasis on ensuring that the measure follows market terms and will not affect its budget. The municipality underlined that the land acquisition is interesting for it also because it fits into its land acquisition and development strategy. The municipality would have an own interest in buying this land which may constitute for it a higher value than for another possible investor.

5. ASSESSMENT OF THE MEASURE — PRESENCE OF STATE AID ACCORDING TO ARTICLE 107(1) OF THE TREATY

- (34) According to Article 107(1) of the Treaty, State aid is aid awarded 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 in so far as it affects trade between Member States. The conditions laid down in Article 107(1) of the Treaty are cumulative and therefore for a measure to be classed as State aid all the conditions must be fulfilled.

5.1. State resources and imputability to the state

- (35) The measure to buy the land under the stadium and the training complex De Herdgang for EUR 48 385 000 and subsequently to lease it back to PSV was decided on by the municipality. This measure involves the budget of the municipality and thereby the use of state resources. Hence it is imputable to the state.

5.2. Possible effect of the aid on trade and competition

- (36) The Netherlands has questioned the impact of possible aid on the internal market for clubs not playing football at European level. However, professional football clubs are considered to be undertakings and are subject to State aid control. Football takes the form of gainful employment and provides services for remuneration; it has developed a high level of professionalism and thereby increased its economic impact ⁽⁵⁾.
- (37) Professional football clubs carry on economic activities in several markets, other than participating in football competitions, which have an international dimension, such as the transfer market for professional players, publicity, sponsorship, merchandising or media coverage. Aid to a professional football club strengthens its position on each of those markets, most of which cover several Member States. Therefore, if State resources are used to provide a selective advantage to a professional football club, regardless of the league in which it plays, such aid is likely to have the potential of distorting competition and to affect trade between Member States within the meaning of Article 107(1) of the Treaty ⁽⁶⁾.

⁽⁵⁾ Case C-325/08 *Olympique Lyonnais* ECLI:EU:C:2010:143, paragraphs 27 and 28; Case C-519/04 P *Meca-Medina and Majcen v Commission* ECLI:EU:C:2006:492, paragraph 22; Case C-415/93 *Bosman* ECLI:EU:C:1995:463, paragraph 73.

⁽⁶⁾ Commission Decisions regarding Germany of 20 March 2013 on *Multifunktionsarena der Stadt Erfurt* (Case SA.35135 (2012/N)), paragraph 12, and *Multifunktionsarena der Stadt Jena* (Case SA.35440 (2012/N)), summary notices in OJ C 140, 18.5.2013, p. 1, and of 2 October 2013 on *Fußballstadion Chemnitz* (Case SA.36105 (2013/N)), summary notice in OJ C 50, 21.2.2014, p. 1, paragraphs 12-14; Commission Decisions regarding Spain of 18 December 2013 on possible State aid to four Spanish professional football clubs (Case SA.29769 (2013/C)), paragraph 28, Real Madrid CF (Case SA.33754 (2013/C)), paragraph 20, and alleged aid in favour of three Valencia football clubs (Case SA.36387 (2013/C)), paragraph 16, published in OJ C 69, 7.3.2014, p. 99.

5.3. Selective advantage

- (38) In order to constitute State aid, a measure needs to bestow an economic advantage on the recipient undertaking which it would not have obtained under normal market conditions. The acquisition of land from PSV and the subsequent lease to it would constitute such an advantage if the terms were more advantageous for PSV than justified by market conditions.
- (39) The typical interests for the investor/landlord in a commercial sale-and-lease-back operation are a fair return on the investment in the form of rent during the lease term and ownership of an asset already occupied by a reliable tenant. The investor/landlord will hold a long-term, fully leased asset with a steady income stream.

5.3.1. Application of the land sales communication

- (40) The Netherlands refers for this assessment to the land sales communication. According to that communication, a sale of land and buildings by a public authority does not constitute aid, first, where the public authority accepts the highest or only bid following an unconditional bidding procedure and, second, where in the absence of such a bidding procedure the sales price is set at least at the value established by an independent expert valuation.
- (41) The Commission reiterates that the guidance provided by the land sales communication, as stated in its introduction, only 'concerns sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements.' Furthermore, in the case at hand, the land value determination is in itself not sufficient. The sale-and-lease-back operation also contains a lease fee. The market conformity of this fee also needs to be established.
- (42) In any case, the mechanisms in the land sales communication are only tools to establish whether the state acted as a market economy investor and are therefore specific examples for the application of the MEIP test to land transactions between public and private entities (⁷).

5.3.2. Observance of the market economy investor principle

- (43) The Commission therefore has to assess whether a private investor would have entered into the transactions under assessment on the same terms. The attitude of the hypothetical private investor is that of a prudent investor whose goal of a normal expected return is tempered with caution about the level of risk acceptable for a given rate of return. The MEIP would not be respected if the price for the land was set at a higher level than the market price and the fee for the lease at a lower level.
- (44) The Netherlands and the municipality claim that the municipality acted on the basis of an (*ex ante*) independent expert valuation and therefore in compliance with the MEIP. The transaction was made on the basis of the market value of the land and, hence, did not provide an advantage to PSV.
- (45) The Commission considers that compliance with market terms can in principle be determined by independent expert valuation.
- (46) Regarding the market conformity of the results of the outside expert's valuation relied on by the municipality, the Netherlands was requested in the opening decision to justify why the experts used the price of land for mixed use rather than the price of land for a stadium for their calculations. The Commission also wished to see a justification for the profit and risk margins that are used for calculating the value of the land for future development after the long-term lease has ended.
- (47) On the basis of the information supplied by the Netherlands and the municipality, the Commission observes that the land acquisition by the municipality was preceded by a valuation of the land carried out by Troostwijk, an independent land valuation firm. When in January 2011 deliberations started on entering into a sale-and-lease-back agreement with PSV, the underlying objective was to help PSV with a transaction which would not confer

⁽⁷⁾ According to the MEIP test, no State aid would be involved where, in similar circumstances, a private investor, operating in normal market conditions in a market economy, could have been prompted to provide to the beneficiary the measures in question.

a financial advantage on the club that it might not have obtained under market conditions. Therefore the municipality asked Troostwijk to determine the market price for the land concerned and a market-compliant amount for the annual lease fee.

- (48) The assumptions underlying the valuation appear to have been reasonable. In its valuation report of March 2011, Troostwijk assessed the market price for the land under the stadium on the basis of its then state and in consideration of its development prospects and determined a price of EUR 41 160 000. The methodology of the determination of the land value and the lease fee was approved by the external accountancy firm working for the municipality.
- (49) The valuation report by Troostwijk takes into consideration possible realistic and foreseeable future developments affecting the land. The report considers the possible development of the stadium site and observes that, in the event of the stadium disappearing, the most likely use would be a mixed-use zone with office and apartment buildings. The valuation report underlines that this assumption is realistic in particular because the land is situated in the centre of the town. For centrally situated plots of land the potential for a progressive value development is much higher than for land on the periphery. The valuation report also refers to a general valuation standard whereby the basis for determining the value of the land is the highest and best use of the area.
- (50) The future use as described by the Netherlands also fits within the longer term urban development strategy of the municipality for the entire area where the stadium is situated, as described in recital 22. As described by the municipality, the likelihood of obtaining the re-zoning of the land would be very high for any owner of the land in question.
- (51) In any event, according to the Netherlands the current zoning of the land for stadium and commercial use also has a substantial economic potential.
- (52) It can therefore be concluded that it seems acceptable that the expert valuation values the land on the basis of mixed use. The Commission has already accepted that a municipality may base the valuation of land on the long-term prospect of the development of the value of a plot of land in an area which may be subject to expected improvements in line with a business planning strategy ⁽⁸⁾.
- (53) PSV will pay the municipality a long-lease rent determined by the independent valuation firm and calculated on the basis of the price assumed for the land in view of its later possible use for apartments and offices and with reference to the interest rate for long-term government bonds in 2011 plus a risk premium of 1,5 %.
- (54) Thus, the lease fee already reflects the price estimated for the land for a purpose other than sport use. It is therefore higher than a lease fee calculated on the basis of the current use of the land.
- (55) The report acknowledges that a long-term lease of more than 15 years may include certain risks in terms of fluctuation of the land value. Those risks are, however, limited by several factors, which will be discussed further in recitals 56 to 59.
- (56) The assumptions of the valuation report can be considered conservative. The valuation report determines the expected possible value of the offices and apartments by reference to neighbouring recent developments and inserts as an additional risk buffer on the possible sale price of the apartments a floor space index of only 80 % compared with similar projects.
- (57) Regarding the assumed land value increase of 1,7 %, taken as the assumed inflation rate, the valuation includes a correction mechanism: after 20 years a deduction from the accumulated value of the land of 22,5 % is included as a safety margin. Combining both assumptions together, the expected increase is estimated to be 1,01 % per year over the 40 years lease period and 0,4 % per year for the first 20 years. Thus, the initial assumption of 1,7 % in combination with the safety margin appears reasonable given that the asset concerned is land which can be expected to retain its value or increase in value and that it is located in the town centre (although the land is currently classified for commercial use, the lease fee rate is already based on the assumed value of a mixed-use plot of land). Furthermore, the 2011 inflation rate for the Netherlands was 2,3 % ⁽⁹⁾, while the ECB has an inflation target of 2 %. Both these values are significantly above the expected growth rates for the ground value which the valuer has used.

⁽⁸⁾ Commission Decision 2011/529/EU of 20 April 2011 on measure C-37/04 (ex NN 51/04), implemented by Finland for Componenta Oyj (OJ L 230, 7.9.2011, p. 69), recitals 68 to 74.

⁽⁹⁾ <http://data.worldbank.org/indicator/FP.CPI.TOTL.ZG/countries/NL?display=graph>

- (58) Apart from those safeguards regarding the lease fee, the lease contract negotiated by the municipality contains various other provisions to cover possible risks, in particular the risk of default by PSV. The football club will provide a guarantee for the rent payments with its income from the sale of season tickets. PSV has also provided a surety of EUR 5 million corresponding to about two years' rent, which is taken from the purchase price and kept by the notary involved for 10 years.
- (59) The parties have agreed that the lease fee amount can be fully reviewed after 20 years at the request of either party. This review will be based on a new valuation report. The ground value at that time together with an appropriate return on government securities and a risk premium will determine the new ground lease fee. As a further safeguard for the municipality, the parties have agreed that the rights of use of the land and of the stadium would fall to the municipality if PSV failed to honour its lease fee payments or fell into bankruptcy. This clause constitutes a deviation from the standard consequence under Dutch civil law, according to which a leasehold right would become part of the bankruptcy estate and hence escape control by the land owner. In the current case, at the end of the lease, the municipality will remain the owner of the land and control its use.
- (60) Whilst the assumptions in the valuation report appear to be reasonable as indicated in recitals 48 to 57, a comparison with other commercial transactions remains difficult since the lease agreements presented by the Netherlands for benchmarking purposes may concern different sectors (such as the Amsterdam housing sector). Therefore, in assessing whether the current transaction is MEIP compliant, the Commission has ascertained whether a different basis for a commercial transaction — based on a loan transaction by Eindhoven to PSV, with the land as collateral — would have served as a benchmark.
- (61) The Commission observes that the lease fee to be paid by PSV is higher than the market rate of such a loan, once the differences between a sale-and-lease-back transaction and a loan are taken into account. The most significant difference relates to the fact that, if PSV were to default after obtaining a loan from the municipality, the municipality would at best receive back the notional amount of the loan. It would not be able to benefit from any increase in the value of the land beyond the notional amount of the loan. In the sale-and-lease-back agreement, the municipality becomes owner of the land at the start of the lease contract and will have full ownership rights in case of default. The municipality put emphasis on that aspect when deciding on the measure, given in particular that the guaranteed full disposal over the land after a potential default by PSV deviates in the municipality's favour from the general provisions of Dutch law (recital 59). Any increase in the value of the land (after fixing the loan terms) will hence only benefit the municipality.
- (62) Thus, one would expect a sale-and-lease-back transaction to have a priori a lower expected return than a loan. The rate of return of a loan with high-quality collateral given to a company with a rating similar to PSV football club would thus constitute an upper bound for a benchmark.
- (63) In the absence of reliable market proxies ⁽¹⁰⁾, the market reference rate for the alternative scenario of a loan to PSV would have to be established on the basis of the Communication from the Commission on the revision of the method for setting the reference and discount rates ⁽¹¹⁾. That calculation would be done, in order to be conservative, considering that PSV exhibited a poor credit quality in 2011 and assuming high collateralisation for the loan (i.e. the land). The resulting reference rate would amount to 6,05 %.
- (64) A loan investor thus expects a 1,01 % higher return than the municipality in the sale-and-lease-back transaction. However, the municipality still acts as a market economy investor if the loan investor is willing to forgive a return of 1,01 % in exchange for a possible increase in land value (see recital 61). Based on the characteristics of the transaction, such an upside potential is worth at least 1,01 % and the return expected by the municipality in the sale and leaseback transaction therefore appears in line with market benchmarks.
- (65) Therefore, it appears that the sale-and-lease-back construction does not result in an undue advantage for PSV and provides the municipality with a return that falls within the MEIP.
- (66) Last, it should be noted that the annual lease fee, according to the Netherlands, is comparable with the rent paid elsewhere in the country by professional football clubs for stadium rent. While any such comparison remains difficult because of different locations, it should be emphasised that these other clubs pay the annual rent not only for the land under the stadium but for the entire stadium complex. In comparison, PSV owns the stadium, carries the costs of its operation and maintenance and pays in addition a lease fee for the land under it.

⁽¹⁰⁾ In this case, there were insufficient data to construct a market proxy for the benchmark rate.

⁽¹¹⁾ OJ C 14, 19.1.2008, p. 6.

6. CONCLUSION

- (67) The Commission therefore concludes that the doubts expressed in the opening decision have been sufficiently dispelled. The municipality, when it bought the stadium land and leased it back to PSV, behaved in the way a hypothetical private investor in a comparable position could have done. Therefore, the transaction does not entail State aid within the meaning of Article 107(1) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The measure which the Netherlands has implemented in favour of the football club PSV in Eindhoven does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 4 July 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission
