

COMMISSION DECISION (EU) 2016/2078**of 4 July 2016****on the State aid SA.41617 — 2015/C (ex SA.33584 (2013/C) (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club NEC in Nijmegen***(notified under document C(2016) 4048)***(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 2010, the Commission was informed by citizens that the Netherlands had implemented an aid measure for the professional football club NEC in Nijmegen. The complaints were registered under numbers SA.31616 and SA.31767. 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 PSV in Eindhoven. By letter dated 2 September 2011, the Netherlands provided the Commission with further information on the measure concerning NEC.
- (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) The Netherlands submitted observations within the framework of the procedure concerning the measure in favour of NEC by letter dated 6 June 2013, which included the comments from the municipality of Nijmegen (hereinafter: 'the municipality') as an interested party. A meeting with the Netherlands took place on 27 February 2015, in which the municipality also participated. Further information from the Netherlands was received on 10 April 2015, on 11 May 2015, on 13 May 2015 and on 16 July 2015. The Commission received no comments from other interested parties.
- (5) Following the opening decision, and in agreement with the Netherlands, the investigations for the different clubs were pursued separately. The investigation regarding NEC was registered under case number SA.41617.

2. DETAILED DESCRIPTION OF THE MEASURE**2.1. The measure and its beneficiary**

- (6) 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).

⁽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) Nijmegen Eendracht Combinatie (hereinafter: 'NEC') was founded in 1900 and plays its home matches in Nijmegen. The legal structure of NEC is as follows: the companies Nijmegen Eendracht Combinatie B.V., Explootatie-Maatschappij De Goffert B.V. and N.E.C. horeca B.V. are owned by the foundation Stichting Administratiekantoor N.E.C.. The company Explootatie-Maatschappij De Goffert B.V. is the beneficiary of the measure. According to the information submitted by the Netherlands, NEC is a medium-sized enterprise with 62,3 FTE employees in the year 2015 (69,5 FTE in 2010). In the period concerned by this investigation NEC played in the top league. It last played in a European tournament (UEFA cup) in the season 2008/2009.
- (8) Since 2003, NEC is the main — but not the only — user of the multifunctional stadium Goffert stadion, located in the large Goffert park in Nijmegen. Next to the stadium in the Goffert park, a multifunctional sports complex *De Eendracht* was built in 2003 by the municipality with support from the European Regional Development Fund (ERDF). The De Eendracht complex is let to NEC and it is also used by others for training purposes.
- (9) The relations between the municipality and NEC concerning De Eendracht are laid down in two contracts concluded in 2003: an intention agreement to develop the area where De Eendracht is located in the context of the municipality's broader sports policy vision as well as a lease contract for De Eendracht.
- (10) In 2008 and 2009, NEC wrote to the municipal authorities with regard to a clause in the contracts, according to which it was entitled to acquire De Eendracht from the municipality. Described as a 'purchase option', NEC wrote that it had been the intention for NEC to acquire the 'opstalrecht' or right of superficies⁽³⁾ to the complex. In its first letter NEC proposed to waive its purchase option in exchange for compensation of the sum of EUR 2,3 million, which it calculated on the basis of the estimated book value and the real value of the complex according to outside expertise. In NEC's view, the difference between both values corresponds to the benefit it would receive if it exercised its purchase option. In a second letter NEC informed the municipality that it wished to exercise its purchase option.
- (11) In 2010, the municipality received legal opinions from two law firms on this issue: one in January 2010, the other in September 2010. The first opinion noted a clause in the lease contract according to which the contract covered the period until De Eendracht would be acquired by the tenant (NEC) and noted that it had been the intention of the municipality and NEC that the complex would be acquired by NEC once there would be no objections to this from the ERDF. It concluded that NEC held a firm (hard) right to claim the purchase. The second opinion was requested at the insistence of the municipal council concerning the alleged solidity of NEC's claim. This opinion concluded that there was only an obligation for the municipality to negotiate with NEC, given that the clause in question does not stipulate a price or pricing mechanism.
- (12) The municipality agreed to buy the claim for EUR 2,2 million in September 2010. The Netherlands did not notify, pursuant to Article 108(3) of the Treaty, their intention to reimburse NEC for waiving its purchase option. It is in relation to this transaction that the formal investigation procedure was opened and as such it is the subject of the current decision.

2.2. Grounds for initiating the procedure

- (13) 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 moreover arrived at the preliminary conclusion that the municipality had provided a selective advantage to NEC with the use of State resources and had, hence, provided aid to the football club.
- (14) Firstly, with regard to the existence of a purchase option, the Commission concluded that by basing itself exclusively on the first legal opinion and disregarding the more elaborate second opinion, the Netherlands did not demonstrate that NEC had a purchase option at a price that had not been laid down in the contract and that had not been negotiated either.

⁽³⁾ According to Article 5:101 of Dutch Civil Law, a 'right of superficies' (Latin: *ius superficarium*) is a real property right which enables its proprietor — the 'superficiary' — to have or acquire for himself buildings, constructions or plants (vegetation) in, on or above an immovable thing owned by someone else.

- (15) Secondly, with regard to the market conformity of the price paid in exchange for waiving the alleged purchase option, the Commission reiterated that the guidance provided by the Commission Communication concerning aid elements in land sales by public authorities ⁽⁴⁾ (hereinafter: 'the land sales Communication'), which had been invoked by the Netherlands, 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, the Commission stated that operators in a market economy would arguably also look at the likelihood of a tenant exercising his purchase option, presuming it exists. They would, *inter alia*, look at the financial means at his disposal.
- (16) Thirdly, the Commission noted that NEC had been in financial difficulties at the time the aid was awarded, serious enough to endanger its future as a professional football club. The KNVB, when verifying NEC's business plan for 2010/2011, had asked NEC for an external guarantee for EUR 1 967 000 in July 2010, in the absence of which NEC would risk losing its license. This guarantee (which, according to the information available to the Commission, was provided by a private, commercial company and therefore not with State resources) was needed in addition to the EUR 2,2 million covered by the present Decision. NEC itself indicated in June 2010 that its financial position was worrying, with a negative equity, a negative operational result in 2009/2010 and a bad liquidity position. NEC had stopped paying rent in September 2009.
- (17) In order to assess the compatibility of the aid with the Guidelines on State aid for rescuing and restructuring of firms in difficulty ⁽⁵⁾ (hereinafter: 'the Guidelines'), the Commission requested information on the compliance with all requirements set out in the Guidelines.
- (18) The Commission was notably unable to verify whether the conditions set out in points 34-37 of the Guidelines concerning the nature and fulfilment of a restructuring plan had been respected. The Commission was also unable to verify whether adequate compensatory measures within the meaning of points 38-42 had been taken. It furthermore needed to be demonstrated that the aid had been limited to the minimum necessary, that the beneficiary itself had paid an adequate own contribution to its restructuring, that the Netherlands would provide monitoring reports and that the 'one time last time' principle would be respected.

3. COMMENTS FROM THE NETHERLANDS

- (19) The Netherlands disagrees that the measure constitutes State aid.
- (20) In this regard, the Netherlands firstly stresses the important context of the transaction. According to the Netherlands, the opening decision contained a few factual errors in this regard. Contrary to what was stated in the opening decision, the Goffert stadium had a multifunctional nature even before 2003. The municipality considers the use of De Eendracht (and the Goffert stadium) for non-sports purposes to be an important contextual factor.
- (21) In particular, the Netherlands stresses the interest the municipality had in the development of the top sport and innovation park (hereinafter: 'TIP') ⁽⁶⁾, which would integrate the existing Goffert stadium and De Eendracht. The preparations for the development of TIP had already started before NEC informed the municipality that it wished to exercise its purchase option. The De Eendracht complex played an important role in the plans with regard to TIP, which were led by the municipality. The Netherlands underlines that preparations for TIP continued until well after the transaction that took place in September 2010. Only in March 2012 did the municipal council decide to halt the TIP preparations. According to the Netherlands, the Commission should explicitly take into account the essential importance for the municipality at the time to retain full ownership over De Eendracht (including both the underlying land and the building on it) in order to enable the development of TIP.

⁽⁴⁾ OJ C 209, 10.7.1997, p. 3.

⁽⁵⁾ Communication from the Commission — Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2). The application of those guidelines was prolonged by the Commission communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004 (OJ C 296, 2.10.2012, p. 3).

⁽⁶⁾ The municipality intended to develop a large part of the Goffert park into a 'Topsport- en Innovatie Park' ('TIP'), with a multidisciplinary approach covering sports, education, health and science. This project has since been abolished. The future financing of the TIP was not covered by the opening Decision.

- (22) In this regard the Netherlands refers to the report on the expected economic effects of TIP, published by European and Regional Affairs Consultants in April 2009. According to this report, TIP was expected to have a positive impact on the municipality's economy, including an increase in employment and spending, but also various indirect positive economic effects in the areas of knowledge development, innovation, education and overall levels of activity. The report 'TIP Nijmegen Impact and Opportunities', prepared by the municipality and Buck Consultants, specifically points towards the exemplary function of De Eendracht in the development of TIP.
- (23) Secondly, the Netherlands underlines the solidity of NEC's claim. It has clarified the background that led to the establishment of the purchase option. The municipality has highlighted that this is linked to NEC waiving the right of superficies on the then-existing amateur complex, in order to enable the municipality to replace this complex through the realisation of the new complex De Eendracht. In 2000 the right of superficies of the existing amateur complex had been in the hands of NEC, whereas the municipality owned the land beneath it. As the complex no longer complied with the KNVB requirements to continue football activities at that location, the municipality — in consultation with NEC — decided in 2002 to realise a new multifunctional accommodation, De Eendracht. De Eendracht was realised with public money, partly funded with support from the ERDF. To be able to apply for support from the ERDF, the complex had to be realised by the municipality and the building could not be sold for a period of five years. NEC therefore relinquished its right of superficies on the complex, but acquired a purchase option to (the right of superficies of) the new complex De Eendracht. According to the Netherlands, it was the intention that NEC would be able to take over the De Eendracht complex once the ERDF requirements no longer prohibited this, even if the acquisition price was not determined at the time.
- (24) The Netherlands therefore refutes that the municipality has followed only one of the legal opinions (see recital 14). Instead, it emphasises that there has never been a conflict between the municipality and NEC about the claim, which was considered solid by both parties. The Netherlands refers here to Article 6:217 of the Dutch Civil Code, according to which a simple consensus between parties suffices to establish an agreement.
- (25) The purchase option can be deducted from the intention and lease contracts between the municipality and the company Exploitatiemaatschappij De Goffert B.V. (see recital 9). The fact that the clauses on the purchase option do not stipulate a price or price mechanism is not relevant according to the Netherlands. In the context of purchase agreements whereby the parties did not determine any price, Article 7:4 of the Dutch Civil Code provides that the buyer has to pay a 'reasonable price'.
- (26) In sum, the municipality claims that the decision not to follow the second legal opinion was based on solid and motivated grounds as it considered the arguments put forward in the second legal opinion to be unsound. This was reinforced as the writer of the first legal opinion reacted to the second opinion to maintain his advice. The municipality points out that the second opinion was clearly politically motivated as it was requested by the opposition parties in the municipal council. That the second opinion was more elaborate (recital 14) cannot lead to any conclusions about the validity of the arguments contained in it.
- (27) The municipality moreover notes in this regard that the agreement between NEC and the municipality is subject to national private law and as such any evaluation of the validity of NEC's claim is to be done by a Dutch judge.
- (28) Thirdly, concerning the determination of the value of the purchase option, the Netherlands has also provided further clarifications. The Netherlands points out that existence of an advantage (and hence State aid) cannot be supposed simply because the price is determined on the basis of negotiations. In the case of NEC, the price of the purchase option was determined on the basis of an independent valuation and is therefore market conform according to the Dutch authorities. Indeed, the Netherlands argues that the transaction was not selective and that it did not provide NEC with an advantage.
- (29) The Netherlands refers to the fact that a measure is not selective if it is based on a general national measure. In particular, the transaction is based on the Civil Code, which has a general scope and is applicable to all undertakings. The value of the transaction was based on the provisions of the Civil Code, which provide for the payment of a 'reasonable price'. According to the Netherlands, this was the case as an independent valuation was made in April 2009. They conclude that the transaction was non-selective.

- (30) Even if the transaction was considered selective, NEC would not have received an advantage, as the municipality was acting as a market investor and paying a market price. The Netherlands emphasises the decisional practice of the Commission of using the land sales Communication by analogy when cases relate to the valuation of other assets and property rights. As the transaction in this case is based on a valuation as set out in the land sales Communication, it can be considered market conform. Even if the land sales Communication was not applicable, the transaction would remain market conform as a private market investor would also have determined the value of the purchase option on the basis of an independent valuation.
- (31) The municipality emphasised that there is a close connection between the value of the transaction and the value of the De Eendracht complex. The independent valuation report (dated 7 April 2009) centres on two values. On the one hand, it determined the sales price that a seller could receive from selling the right of superficies (for a period of 30 years) in relation to the complex on the basis of the existing lease agreement between the municipality and NEC [...] (*). On the other hand, it determined the sales price that a seller could receive from selling the right of superficies in relation to the complex on the basis of existing sub-lease agreements between NEC and its sublessees, taking into account market rent evolutions. Indeed the complex was the subject of lease contracts between both NEC and the municipality and NEC and third parties (NEC acting as the operator of the complex), see also recital 8. This second value was set at EUR [...].
- (32) The two valuations are in other words based on the assumption that the complex would be sold in a rented state. The Netherlands argues that under Dutch legislation, a sales transaction does not alter the rental situation. The new owner of a property replaces the previous owner as the letting party. Therefore it is common to establish the sales value of a rented property on the basis of rental income.
- (33) The independent valuations show that the municipality could sell the De Eendracht complex in a rented state to a third party for a price of maximum EUR [...]. According to the Netherlands, this equals the maximum price that could be asked from NEC for the complex. Once NEC would acquire the right of superficies in relation to the De Eendracht complex, it could sell that right for a price of maximum EUR [...]. According to the Netherlands, this means that NEC was foregoing a potential advantage of maximum [...] EUR 2 064 000. During the negotiations with NEC, the final value of the purchase option was determined as [...] EUR 2 223 000. [...]. The Commission notes that the valuation did not explicitly take into account the concrete situation, i.e. where NEC would acquire the complex itself.
- (34) The Netherlands has provided further background information on the rent figures used in the valuation report to explain the important difference between both valuations. In particular, The Netherlands points out that a number of factors had a downward impact on the lease price as it was established for NEC:
- (a) Exploitatiemaatschappij De Goffert B.V. not only leased the complex, but also acted as the operating company to sublet parts of the complex to third parties. De Eendracht had a clear experimental character and the municipality used the realisation of this new complex to strengthen the link of the complex with societal activities, the economic environment and the surrounding neighbourhoods. It was not certain whether these socioeconomic projects would be successful in practice and it was not excluded that third parties would drop out. This increased the risk for Exploitatiemaatschappij De Goffert B.V.
 - (b) Exploitatiemaatschappij De Goffert B.V. also took care of the maintenance and replacement of the fields, which were previously maintained by the municipality.
 - (c) NEC was the only possible partner that could realise the socioeconomic objectives of the municipality.
 - (d) NEC had originally held a right of superficies to the complex, but waived this for free (see recital 23).

On this basis The Netherlands considers the lease price paid by NEC, which forms the basis for the first value calculated in the taxation, to be market conform.

- (35) Moreover, The Netherlands has noted that the lease contract between NEC and the municipality has to be considered a lease agreement for a fixed term that could not be terminated by the municipality before its end date, which coincides with the transfer of the right of superficies to NEC. This explains why the taxation calculates the first value on the basis of a static rent, whereas the second value takes into account market rent evolutions.

(*) Confidential information.

- (36) The Netherlands emphasises that the sum of EUR 2,2 million due to NEC for the purchase option was not paid out, but rather used in part to cover outstanding claims on NEC and in part as an advance payment of the rent (guaranteed rent). At the same time, the lease agreement was prolonged until the end of February 2043 and the rent was increased [...]. Assuming that the original rent was market conform, The Netherlands claim that this increase puts the new rent above market levels. Alternatively, the new rent should be considered market conform according to The Netherlands.
- (37) Fourthly, the Netherlands argues that the municipality took the financial situation of NEC at the time of transaction into account. At the time of the transaction, the municipality had received information that made it presume that — despite its financial problems — it was possible that NEC would be able to exercise its purchase option. In particular, in one of its letters (see recital 10), NEC had explicitly informed the municipality of the interest a commercial party had in acquiring De Eendracht, possibly via NEC. Therefore any financial problems NEC was facing would not necessarily prohibit its purchase of De Eendracht. In addition, on 3 September 2010 the municipality was informed that NEC had received financing from a commercial party: a company [...] had pre-purchased a part of the (season) tickets for the seasons 2011/2012, 2012/2013 and 2013/2014. This is the transaction referred to by the Commission in the opening decision, but — contrary to what was stated in the opening decision — the financing did not take the form of a guarantee and the price paid was much higher than the EUR 1,9 million mentioned in the opening decision (i.e. circa EUR 4 million) (see recital 16). This indication of confidence in NEC's financial situation by a commercial investor was further reason for the municipality at the time to accept as a possibility the exercise by NEC of its purchase option on De Eendracht.
- (38) In conclusion, according to the Netherlands the municipality acted as a market investor, taking into account the (perceived) financial situation of NEC at the time.
- (39) Alternatively, the Netherlands argues that even if the measure were to constitute aid, it would be compatible with the internal market. According to the Netherlands, the conditions of the Guidelines are fulfilled and the measure could as such be considered compatible under Article 107(3)(c) of the Treaty. It provided factual information to support this.
- (40) With regard to the financial situation of NEC at the moment of the transaction, the Netherlands put forward further evidence demonstrating that NEC was a firm in difficulties. The municipality had requested a report on the financial position and future perspectives of the club, which was submitted by the accounting firm BDO ⁽⁷⁾ shortly after the transaction (on 29 October 2010). It refers to negative company results [...], negative equity [...] and a negative development of working capital [...]. The report shows that the company results of NEC had been negative and diminishing over a period of three years. While NEC managed to keep its net results positive over that same period (due to income from transfer rights and the selling of players), the report clearly demonstrates declining income levels, whereas NEC's cost patterns remained largely unchanged. Moreover, the own equity had been negative over the past three years and the solvency of NEC had decreased in that same period.
- (41) With regard to the restructuring plan, NEC set up a plan of improvement ('Plan van Aanpak') ⁽⁸⁾ to overcome its financial problems. This plan was submitted to the KNVB in August 2010. It includes a description of the circumstances of the financial situation, benchmark comparisons with similar football clubs and planned measures to achieve Category 2 status (i.e. indicating that the financial health of the club is 'sufficient', see also recital 75).
- (42) With regard to compensatory measures, the Netherlands notes that, if there is aid, it is limited in size and as such the negative effects on competition are relatively small. Nevertheless several compensatory measures were included in the KNVB restructuring plan.
- (43) Moreover, any support was limited to the minimum necessary. In this regard an important own contribution to the restructuring was made via the measure referred to in recitals 16 and 37, whereas a change in the repayment conditions of a loan led to a diminishing of fixed repayment costs with EUR 250 000 per year.
- (44) With regard to monitoring, the Netherlands has committed to submit the required reports to the Commission.

⁽⁷⁾ 'Onderzoek naar financiële situatie en financieel toekomstperspectief N.E.C. Nijmegen', report of 29 October 2010 by BDO, Nijmegen.

⁽⁸⁾ Plan van aanpak NEC, August 2010.

- (45) Lastly, the Netherlands confirms that no other aid measures to NEC have been or will be implemented.

4. ASSESSMENT OF THE MEASURE

4.1. Presence of State aid according to Article 107(1) of the Treaty

- (46) 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 qualified as State aid all the conditions must be fulfilled.
- (47) The acquisition by the municipality of the alleged right of NEC to buy De Eendracht for EUR 2,2 million was financed with State resources, given that the money for the transaction in question was furnished by the municipality. This is not disputed by the Netherlands.
- (48) With regard to the potential impact on the internal market, the Commission points out that NEC has been a participant in European football tournaments. Furthermore, professional football clubs deploy economic activities in several markets other than participating in football competitions, 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 international markets. 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 ⁽⁹⁾.
- (49) The selectivity of the measure, which was specifically approved by the municipal council, cannot be doubted either. The Netherlands has argued that the measure was based on general national legislation (see recital 29) and was therefore not selective. However, the Commission considers that, even if the agreement between NEC and the municipality can be considered an agreement subject to general Dutch law, the specifics of the agreement are not based on general principles only, but also on the specific provisions of the contract(s) between NEC and the municipality. Hence it is clear that the measure targets a specific undertaking, NEC, and is therefore selective.
- (50) The Netherlands is of the opinion that no advantage accrued to NEC and that instead the transaction took place at market conditions. They notably point out that NEC had a solid purchase option for De Eendracht and that the price for buying that right was established according to an independent valuation.
- (51) With regard to the solidity of the claim, the Netherlands has submitted additional clarifications on the reasons why the first legal opinion was followed instead of the second. Moreover, the Netherlands underlined that the development of TIP was probably not possible if De Eendracht was sold to NEC. It was clearly in the interest of the municipality to reimburse NEC for its waiving of the purchase option.
- (52) It should be noted that it is unclear what price NEC would have had to pay the municipality if it had exercised the purchase option and acquired De Eendracht. The Netherlands have argued that where no price is agreed, under the Dutch Civil Code the buyer has to pay a reasonable price. To the extent that such a reasonable price approximates or equals the market value of the right of superficies pertaining to De Eendracht, the purchase option would appear to have only a limited economic value. In that situation, the compensation of EUR 2,2 million appears to be unreasonably high and would constitute an advantage to NEC.
- (53) Regardless of the question whether NEC in fact had a solid purchase option and other arguments pertaining to the interpretation of Dutch civil law, the Commission considers that the core question to assess is whether the transaction took place on market terms and the municipality acted as a private operator.

⁽⁹⁾ Commission Decisions regarding Germany of 20 March 2013 on Multifunktionsarena der Stadt Erfurt (Case SA.35135 (2012/N)), point 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, points 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)), point 28, Real Madrid CF (Case SA.33754 (2013/C)), point 20, and alleged aid in favour of three Valencia football clubs (Case SA.36387 (2013/C)), point 16, published in OJ C 69, 7.3.2014, p. 99.

- (54) In this regard, it is necessary that the Commission assesses whether a private investor would have entered into the transaction under assessment on the same terms. The attitude of the hypothetical private investor is that of a prudent investor whose goal of profit maximisation 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 purchase option was set at a higher level than the market price. The Commission considers that a number of elements in the valuation process show that it does not pass the MEIP test.
- (55) Firstly, it is not clear why the value of the purchase option would equal the difference between, on the one hand, the sales value of the complex on the basis of the lease agreement between the municipality and NEC and, on the other hand, the sales value on the basis of the lease agreements between NEC and its sub-letters, taking into account also the market rent evolutions. The Commission notes that the municipality requested the independent valuation of these two sales values, not the valuation of the purchase option as such. No further context or arguments are given as to why the difference between these values equals the value of the purchase option.
- (56) Secondly, the use of the two values to determine the worth of the purchase option seems to work on the assumption of a sale to any third party for one of the values, but not for the other. The first value [...] is indeed established on the basis of a sale by the municipality to any third party of the rights of superficies in a rented state, i.e. with the lease contract to NEC as a given 'constraint' for any buyer. In contrast, as the Netherlands argue that the lease agreement could not be terminated before the transfer of the right of superficies to NEC, only NEC would have been able to continue to operate the complex towards third parties. Therefore the second value [...] (the possible sales value in rented state on the basis of the sublease contracts) could only be realised by NEC and not by any third party. This 'mixed' approach reinforces the notion that the determination of the price of the purchase option on this basis would not have made sense for a market operator.
- (57) Thirdly and linked to this, if one takes as a starting point that the purchase option was to be waived by not any third party, but by NEC, the resulting price to be paid in exchange for NEC waiving its purchase option does not seem to correctly assess the 'foregone benefits' for NEC of waiving the option. According to the Netherlands, NEC was foregoing a potential advantage of EUR 2 million by waiving its purchase option (recital 33). However, the Commission notes that NEC could be expected to remain the operator of the complex even after waiving its purchase option. Therefore it would continue to receive the same rental revenues that formed the basis for the second value used in determining the price of the transaction [...]. The Commission considers that the actual advantage foregone by NEC by waiving its purchase option would instead equal the rents to the municipality that it would no longer have had to pay if it had acquired the complex.
- (58) In any case, fourthly, the municipality paid more than the amount it determined on the basis of the valuation report ([...] see recital 33). The Commission considers that at the very least the difference between both values constitutes aid. According to the Dutch authorities, the difference finds its origin in negotiations with NEC and, in any case, the full sum of EUR 2,2 million is being reimbursed. Indeed, the Netherlands has explained that the prolongation of the lease period and increase of the yearly rent ensures the budgetary neutral nature of the transaction for the municipality (recital 36).
- (59) With regard to this reimbursement, fifthly, the Commission notes that the use by NEC of the EUR 2,2 million sum to cover outstanding claims and rents that it was due the municipality cannot be considered a reimbursement. With regard to the increase of the rent paid on a yearly basis (recital 36), this can only be considered a reimbursement of aid if the increase fully represents above-market rent. The Netherlands did not provide evidence supporting the claim that the higher rent as of January 2011 can be considered a rent above market levels. In this respect, the Commission observes that the rent paid by NEC to the municipality for the entire complex is lower than the rent that NEC currently receives for sub-letting certain parts of the complex while the valuation report suggests that NEC could obtain even higher rents in the future.
- (60) The Commission notes moreover that, even if the original rent level were market conform taking into account the context at the time (recital 34), at least some of the factors that had a downward impact on the then-established lease price seem no longer of relevance at the time of setting the new rent level. In particular, the risks associated with operating the complex can be assumed to have changed now that it has been running successfully for more than 5 years. The waiving of the option to acquire the right of superficies no longer played

a role either as the transaction in question settled the question of ownership for the future. Therefore it could be expected that, in January 2011, market rent levels would be higher than in 2003, when the lease contract between the municipality and NEC was concluded. If this is the case, then the increased rent cannot be fully considered to correspond to a reimbursement of aid.

- (61) It should also be noted that the repayment takes place over a period of 33 years and that future payments have not been discounted.
- (62) Most importantly, The Netherlands did not provide any evidence that the municipality made a thorough assessment and calculation of market rent levels before establishing the increased rent rate. Instead, the budgetary neutral nature of the transaction was the starting point in order to calculate the new rent levels.
- (63) Sixthly, the benefits achieved by the municipality through this transaction and their proportionality to the direct cost of EUR 2,2 million are not clear. It appears that the municipality has paid much more than what it could ever have gained from selling the complex (in a rented state), simply to safeguard the ownership it already held. The municipality has argued that the economic stakes of developing TIP were very high given the expected effects of TIP on the economy of the municipality. The expected added value of remaining the owner of the complex might explain in part the willingness of the municipality to pay a higher price. However, the municipality has not explicitly made a cost-benefit assessment of the transaction that takes into account this long-term value of the TIP project. The Commission considers that a market operator would have made a more elaborate assessment of the expected return on investment of the acquisition of the purchase option.
- (64) Lastly, the Commission remains of the opinion that, on the basis of the information available at the time, the municipality did not sufficiently take into account the financial difficulties NEC was facing at the time and their influence on its capacity to buy the right of superficies to De Eendracht. Even if third parties had demonstrated an interest in partnering with NEC, the overall financial picture could not be ignored and could be expected to influence the negotiation position of NEC to the benefit of the municipality.
- (65) For all those reasons, the Commission considers that the municipality did not act like a market economy operator but rather granted aid to NEC by reimbursing NEC for waiving its purchase option for the sum of EUR 2,2 million. The exact aid amount cannot be determined on the basis of the information provided by the Netherlands. However, as long as the maximum amount of EUR 2,2 million can be considered necessary to fulfil the restructuring plan, the exact aid amount is irrelevant for the compatibility assessment.

4.2. Assessment under Article 107(3)(c) of the Treaty

- (66) The Commission must assess whether the aid measure in favour of NEC can be considered to be compatible with the internal market. As regards the derogations provided for in Article 107(3) of the Treaty, the Commission notes that none of the Dutch regions falls under the derogation provided for in Article 107(3)(a) of the Treaty. The aid measure in question does not promote an important project of common European interest, nor does it serve to remedy any serious disturbance in the Dutch economy within the meaning of Article 107(3)(b). The aid measure can also not be said to promote culture or heritage conservation within the meaning of Article 107(3)(d) of the Treaty.

4.2.1. Applicable guidelines

- (67) As regards the derogation in Article 107(3)(c) of the Treaty in favour of aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, the Netherlands has argued that this derogation could be applied if the Commission, contrary to the opinion of the Netherlands, should find that the measure in question constitutes State aid.
- (68) In its assessment of the notion of 'development of economic activities' in the sports sector, the Commission takes due account of Article 165(1) and the last indent of Article 165(2) of the Treaty, which provide that the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

- (69) For its assessment of aid measures under Article 107(3)(c) of the Treaty, the Commission has issued a number of Regulations, Frameworks, Guidelines and Communications concerning aid forms and horizontal or sector purposes for which aid is awarded.
- (70) The Commission believes that it is appropriate to assess whether the criteria laid down in the Guidelines⁽¹⁰⁾ might apply. In this regard the Commission notes that the Guidelines do not exclude professional football. This economic activity is, hence, covered by the Guidelines.
- (71) In July 2014, the Commission published new Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty⁽¹¹⁾. They are, however, not applicable to this non-notified aid granted in 2010. According to point 137 of the new guidelines, this would only be the case for any rescue or restructuring aid granted without prior authorisation if some or all of the aid is granted after the publication of those guidelines in the *Official Journal of the European Union*. According to point 138 of the 2014 guidelines, in all other cases the Commission will conduct the examination on the basis of the guidelines which applied at the time the aid was granted, and therefore, in the present case, those applicable before 2014.

4.2.2. *NEC as company in difficulty*

- (72) According to point 10(c) of the Guidelines, whatever the type of company concerned, it is considered to be in difficulty if it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings. Point 11 of the Guidelines indicates that, in the absence of these circumstances, a firm may still be considered to be in difficulties where the usual signs are present, such as increasing losses, mounting debt, declining cash flow and so on. A firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources.
- (73) The Netherlands had initially argued that NEC was not a firm in difficulty in 2008/2009. However, the facts outlined in recital 16 rather indicate that NEC was facing financial difficulties, serious enough to endanger its future as a professional football club. NEC therefore clearly was a company in difficulty according to the Commission. In their reaction to the opening decision, the Netherlands acknowledged that NEC was a company in difficulty and had been at the time of the transaction. It submitted further evidence in this regard (see recital 40), which notably showed that NEC's company results had been negative and diminishing over time. Therefore, the compatibility of the State aid to NEC must be assessed under the Guidelines.

4.2.3. *Restoration of long term viability*

- (74) In section 3.2, the Guidelines require that the granting of the aid must be conditional on the implementation of a restructuring plan (see points 34-37 of the Guidelines), which must restore the long-term viability of the firm within a reasonable time-scale. The Commission notes that such conditions were set within the context of the plan drawn up by NEC for the KNVB in August 2010.
- (75) In this regard the Commission recalls that each Dutch professional football club receives a licence from the KNVB, under which it has to comply with various obligations. One of the obligations under the current system applicable relates to the financial health of the club. Three times per season, a club is subject to a financial rating on the basis of financial reports depicting, inter alia, its current financial situation, as well as the budget for the next season. On the basis of these reports, clubs are scaled in three categories (1: insufficient, 2: sufficient, 3: good). Clubs in category 1 may be obliged to present a plan for improvement in order to reach category 2 or 3 within a period of three years. If the club fails to comply with the plan, sanctions may be imposed by the KNVB, including an official warning, a reduction of competition points and — as the ultimate sanction — withdrawal of the licence. It should also be noted in this context that a professional football club in the Netherlands, which is declared bankrupt, loses its licence. If a successor club is founded, it would not be admitted to the professional football leagues directly, but it would have to start in the second-highest amateur league.

⁽¹⁰⁾ See footnote 5.

⁽¹¹⁾ Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

- (76) NEC was scaled in category 1 on the basis of the financial data of the 2009/2010 season. Its restructuring plan set out measures to obtain the category 2 status after three seasons (by 2012/2013).
- (77) The restructuring plan identified the problematic relation between turnover and costs as the main cause of NEC's financial problems. High personnel costs were in particular to blame, whereas reductions in media income also contributed to the negative results. The focus of the restructuring plan lay on cost reductions and savings were mainly sought in the area of players' costs. Measures included a reduction of personnel (including a reduction of the number of registered players), a salary freeze and cuts in the salaries for new players as well as a reduction in bonuses. Within three years, the ratio of personnel costs compared to turnover was to be brought under [...] % (compared to [...] % in March 2010). Cuts in several other expenses were foreseen, such as the costs of the youth training (football academy). Any investments in immaterial or material fixed assets of more than EUR [...] had to be agreed by the KNVB licence commission, which actually meant that NEC could not do any transfers.
- (78) The Commission finds that the restructuring plan tackles the causes of the financial difficulties of NEC, especially the cost of personnel and players in the form of wages and transfer payments. A professional football club cannot be expected to diversify into other markets in the sense of the Guidelines; it can, however be expected to make savings on its core activity and this NEC has done. The restructuring plan does not rely on external factors which NEC can pursue but not entirely control, such as finding additional sponsors or an increase in the number of spectators.
- (79) In the budget for the season 2010/2011, NEC foresaw to improve its company results [...] by reducing its costs [...]. The end results were even better than foreseen: whereas the income declined (lower match revenue due to a bad cup season; lower media revenue; reallocation of barter revenues), the costs diminished [...] as well (decline in personnel costs, savings in the football academy, reduction of commercial costs). In December 2011, the KNVB awarded NEC the category 2 status.
- (80) The Commission concludes that the restructuring plan of August 2010 sufficiently addressed the causes of NEC's financial difficulties in view of making the club viable again in the long term.

4.2.4. *Avoidance of undue distortions of competition*

- (81) Points 38-42 of the Guidelines require that compensatory measures be taken by the beneficiary in order to minimise the distortive effect of the aid and its adverse effects on trading conditions. In the decision opening the procedure the Commission noted the peculiar nature of professional football in this regard, and suggested a number of measures that could in professional football be interpreted as compensatory measures within the meaning of the Guidelines, such as the limitation of its registered players within the limits allowed by the national association, the acceptance of a cap on wages below the usual standards in the sector, a ban on paying transfer costs for new players for a certain period, or an increase in activities to the benefit of society.
- (82) As explained in recital 77, NEC has indeed reduced the number of employees and the number of registered players, as well as the wages paid to them. The cost of wages was to be brought under 60 % of the turnover level. No transfer payments for new players could be made during the restructuring period. The Commission concludes that the compensatory measures required by the Guidelines were taken, which had the effect of weakening NEC's competitive position in professional football.

4.2.5. *Aid limited to a minimum*

- (83) Points 43-45 of the Guidelines state that the amount and intensity of the aid must be limited to the strict minimum. Aid beneficiaries are expected to make a significant contribution to the restructuring plan from their own resources.
- (84) The Commission notes that the restructuring plan is to a considerable extent based on financing by external private entities in addition to the internal savings made. The [...] transaction (recital 37) provided NEC with circa EUR 4 million in external financing. In addition, the conditions of repayment on a loan by [...] were changed in 2010. Instead of a yearly repayment obligation [...], repayments were from then on based on transfer income, which had a positive effect on NEC's liquidity (See recital 43). External and own contributions in other words equal more than EUR 4,25 million and thus the aid, which amounts to maximum EUR 2,2 million, in any case

does not amount to more than circa 35 % of the overall restructuring effort. This meets the requirement in point 44 of the Guidelines that for a medium-sized company like NEC at least 40 % of the cost of the restructuring should be met by the own contribution of the beneficiary, including external financing demonstrating a belief in the viability of the beneficiary.

4.2.6. *Monitoring and annual report*

- (85) Point 49 of the Guidelines requires that the Member State communicates on the proper implementation of the restructuring plan through regular detailed reports. Point 51 sets out less stringent conditions for small and medium-sized enterprises, where the transmission of yearly copies of the balance sheet and profit-and-loss accounts is normally considered sufficient. The Netherlands has committed to submit these reports.

4.2.7. *One time, last time*

- (86) Points 72-77 of the Guidelines refer to the 'one time, last time' principle, according to which restructuring aid should be granted only once in a period of 10 years.
- (87) The Netherlands committed to respect the 'one time last time' requirement in the Guidelines. They have confirmed that they did not award any rescue or restructuring aid to NEC during a period of 10 years preceding the transaction. Market conformity will also be the basis for any current or future negotiations with NEC.

5. CONCLUSION

- (88) The Commission finds that the Netherlands has unlawfully implemented the aid measure in favour of NEC in breach of Article 108(3) of the Treaty. However, the aid can be considered compatible with the internal market as restructuring aid within the meaning of the Guidelines, as all conditions for such aid set out in the Guidelines are met.

HAS ADOPTED THIS DECISION:

Article 1

The State aid which the Netherlands has implemented in favour of the football club NEC in Nijmegen is compatible with the internal market within the meaning of Article 107(3)(c) 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
