II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 July 2001

on alleged State aid for the American group Reebok in connection with its establishment in Rotterdam, the Netherlands

(notified under document number C(2001) 2383)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2002/64/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1], and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 31 July 1998, the Commission received a complaint according to which the American group Reebok had been induced to establish its new plant in the port of Rotterdam through illegal State aid. Pursuant to this complaint, the Commission requested information from the Dutch authorities on 23 September 1998. By letters dated 2 October 1998 and 7 January 1999, the Dutch authorities requested more time for their reply and finally provided the requested information by letter dated 2 February 1999.

(2) By letter dated 9 June 1999, the Commission informed the Netherlands of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. By letter dated 8 September 1999, the Dutch authorities submitted their comments and further information.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* on 14 August 1999 [2]. The Commission called on interested parties to submit their comments. It received comments from an interested party on 14 September 1999 and, in order to give the Dutch authorities the opportunity to react, forwarded them to the Netherlands, which replied within one month.

(4) Upon request the Dutch authorities submitted further information on the alleged aid by letters dated 7 July 2000, 17 July 2000, 6 December 2000, 15 December 2000, 8 February 2001, 9 April 2001, 22 May 2001, 27 June 2001 and 6 July 2001. Meetings with the Dutch authorities took place on 4 July 2000 and 25 October 2000.

II. DETAILED DESCRIPTION OF THE ALLEGED AID MEASURES

(5) The American group Reebok ('Reebok') is a leading worldwide producer of sports footwear in particular and operates in approximately 170 countries with net sales of approximately USD 2,9 billion (EUR 2,72 billion) in 1999. Reebok's products are manufactured in Asia and have to be shipped to Europe.

[1] OJ C 233, 14.8.1999, p. 39.

[2] OJ C 233, 14.8.1999, p.39.

(6) In the period 1993/94 Reebok reviewed its distribution network in Europe where it had at that time eight warehousing facilities. The idea was to restructure the logistics and to have one 'bulk' facility (distribution centre) for Europe, probably situated in the Benelux area, and two 'pick and pack centres'. For the location of the distribution centre Reebok received various offers. The company finally decided for a 11,4 ha site in the 'Distripark Maasvlakte' at the port of Rotterdam. According to the Dutch authorities, Reebok's decision was based on strategic considerations such as a reduction of transportation time and costs.

(7) The complainant alleged that Reebok received illegal State aid as an incentive to establish its new distribution centre in the port of Rotterdam, a non-assisted area. According to the complainant, the aid consisted of four measures:

— preferential rental conditions for a site in the Distripark Maasvlakte at the price of NLG 8,50 per m^2 per year,

— preferential conditions of access to a whole series of infrastructure facilities in the park,

— subsidisation of labour costs,

— customs advantages, i.e. facilitating of the installation and functioning of Reebok's activities by the Rotterdam district customs authorities.

(8) The Dutch authorities explained that the developer and operator of the relevant port site, the Rotterdam Port Authority (Gemeentelijk Havenbedrijf Rotterdam ('GHR')), is a public undertaking which, however, operates in accordance with the 'private investor principle' and required for its investment a return on capital of at least 7,5 % with an average depreciation period of 25 years.

(9) Furthermore, it was stated that Reebok's rent of NLG 8,50/m^2 (EUR 3,9/m^2) for a plot of 11,4 ha was a normal market price in the light of the profitability of the whole Distripark Maasvlakte project and that the rent was fully comparable with rents for competing sites at other European ports. With respect to the conditions of access to infrastructure, the Dutch Government considered that the laying down of such basic facilities was included in the total investment in the park and passed on in the rent. Moreover, every user has to finance the connection to the public services present, such as electricity, gas, water and telecommunications.

(10) As regards the alleged subsidisation of labour costs, the Dutch Government explained the funding through measures such as the Law on the reduction of income tax and national insurance contributions, the youth employment guarantee Law and the national framework arrangements on the training of persons seeking employment, which in their view are general measures and not aid within the meaning of Article 87 of the EC Treaty. It was furthermore underlined that Reebok would not receive any financial customs advantages.

(11) The Dutch Government stated, however, that the GHR was granting, on an ad hoc basis, an amount of NLG 4,25 million (EUR 1,9 million) as an incentive, to be paid in instalments depending on the number of additional jobs to be created ('cash incentive').

Grounds for initiating the procedure

(12) The Commission came to the conclusion that the subsidies for labour costs and the alleged customs advantages did not prima facie constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(13) However, the Commission could not rule out that the cash incentive and the rental terms, including access to infrastructure facilities [1], granted by GHR to Reebok, constituted aid within the meaning of Article 87(1) of the EC Treaty and initiated the procedure with respect to these two measures.

(14) The cash incentive of NLG 4,25 million (EUR 1,9 million) seemed to constitute aid because it was granted through State resources, the public GHR, and favoured one specific group, Reebok. It seemed to have been granted on an ad hoc basis with the sole aim of attracting Reebok to establish its new plant in the Distripark Maasvlakte. This view was supported by the fact that the Dutch authorities called it an 'incentive to be paid in instalments depending on the rate of investment and the number of additional jobs to be created'. No other justifications or commercial reasoning as used by private investors were given. Finally, by strengthening Reebok's financial position, the cash incentive threatened to distort competition and to affect trade in the single market for footwear in the EEA.

[1] The Commission accepted the reasoning of the Dutch Government that Reebok's alleged preferential rental conditions and its alleged preferential conditions of access to infrastructure facilities in the park should be seen as one measure because the cost of the basic infrastructure is included in the total investment in the park and passed on in the rent.

(15) The rent of NLG 8,50/m² (EUR 3,9/m²) Reebok is paying for the 11,4 ha plot was assessed to be approximately 30 % lower than the average expected rent. The Commission stated that, in principle, a private or public undertaking could charge different prices, but that such differences must be non-discriminatory and justified on commercial grounds, namely, taking competitive measures to attract a customer, whilst covering the cost and generating a reasonable return on invested capital.

(16) However, the Commission found it unlikely that a private investor would have given such favourable conditions, in particular as the discount did not seem to reflect any savings in the form of economies of scale. This seemed to involve an issue of price discrimination and, moreover, not to be in line with the private investor principle. In that context it also had to be taken into account that a total of over 60 % of the whole Distripark Maasvlakte was not yet let at that time, and the Commission found it questionable whether the higher expected future rents could be achieved. It calculated that the GHR would suffer a loss on its invested capital if for the remaining plots only the Reebok rent of NLG 8,50/m² (EUR 3,9/m²) could be achieved. Lacking detailed information, the Commission could also not examine whether Reebok's rent was fully comparable with the rental prices of other European ports, as the Dutch Government claimed.

(17) Consequently, the Commission could not at that stage exclude the possibility that the preferential rental terms, including access to infrastructure facilities, also constituted aid under Article 87(1) of the EC Treaty. The rental terms were granted by the GHR, a public undertaking. They appeared to favour Reebok in comparison with other sports footwear producers in the European Union and threatened to distort competition as well as affecting trade, not only in the EU sports footwear market, but also in the market for industrial parks. The Commission asked the Dutch Government to provide further information with respect to the economic and legal status of the GHR, the precise criteria governing the granting of the cash incentive, the rental contracts of other tenants and evidence of rental terms for equivalent pieces of land in other European ports.

III. **COMMENTS FROM THE NETHERLANDS**

(18) The Dutch authorities submitted information regarding the economic and legal status of the GHR. According to that information, the GHR forms part of the statutory body of the municipal corporation of Rotterdam and has no separate corporate personality. It was confirmed that the GHR is a public undertaking within the meaning of Article 86 of the Treaty. The GHR was created to develop, manage and operate the docks and industrial dock lands including the Distripark Maasvlakte. From a financial viewpoint, it is a separate entity from the rest of the municipality of Rotterdam, which finds formal expression in the fact that an annual balance sheet and profit-and-loss account is drawn up for the GHR. It also has to recoup all its investment in and expenditure on personnel, goods and services from the operation of the port facilities. The Dutch authorities stated that in performing its tasks the GHR acts in accordance with the market investor principle.

(19) As to the cash incentive, the Dutch authorities declared in their submission of 8 September 1999 that the GHR wanted Reebok to share in the savings made as a result of the size of the rented plot. Moreover, it was stated: 'Payment of the incentive to Reebok is dependent on progress with job creation. As soon as a previously agreed level is reached, part of the incentive is to be paid out. Reebok has now announced that it has reached the level at which the full amount is payable.' In a subsequent submission, the Dutch Government explained that the GHR stopped payment of the outstanding incentive amounts following the initiation of the proceedings by the Commission and that the GHR until then had paid out NLG 1,625 million (EUR 0,7 million). Following discussions in the course of which the Commission questioned the justification of the cash incentive, the Dutch authorities announced the withdrawal of the cash incentive and the recovery of the amount already paid out plus interest. By letter of 27 June 2001, the Dutch Government sent the Commission proof of the recovery of NLG 1,872 million, i. e. the present value of the NLG 1,625 million, in the form of a copy of the account statement and the GHR's decision to waive the cash incentive and the undertaking that no further payments would be made in relation to the cash incentive.

(20) As to the rental conditions, the Dutch authorities explained that the rental charges in the Distripark Maasvlakte in the port of Rotterdam, are high compared to similar sites in other European ports. They submitted a comparative study carried out by consultants in this respect. Furthermore, the Dutch authorities explained that the rental charge of NLG 8,50/m² agreed with Reebok was within the range of rates for the customer category 'European distribution centres' which is not bound to a seaport and could move further inland where the rents are generally cheaper. However, there was no evidence of rental charges of such sites further inland. Therefore, upon request, the Dutch authorities in December 2000 submitted a second study carried out by independent consultants on the current average rental charges for comparable sites further inland. The Dutch authorities also submitted copies of two other offers Reebok received in the course of its search for a location.

(21) Furthermore, the Dutch authorities explained that the level of the rent charged by the GHR is dependent on criteria such as the time of the agreement, the size of the plot or the attractiveness of the customer for the GHR, for instance, with respect to the flow of goods and the resulting yield for the GHR. In the view of the Dutch authorities these are objectively justified criteria and do not imply discriminatory treatment. Furthermore, Reebok's rent did not entail losses on the GHR investment in the Distripark Maasvlakte and was therefore in line with the market investor principle. As evidence of this, the Dutch authorities submitted detailed calculations of the individual cost and income components, including discounting methods. They also submitted the spreadsheets used by the GHR containing the raw data of expenditures, income and savings in order to allow the Commission to make its own assessment.

(22) Furthermore, they submitted the rental contracts of all current tenants showing that the rents already agreed vary between […] (*) and […] (*). According to the information submitted, only 33,7 ha of the total area of 86,6 ha of the Distripark Maasvlakte [1] is rented out; a further […] (*) is under negotiation, and […] (*) is still without candidates.

(23) The Dutch authorities also submitted detailed calculations of the cost savings achieved due to the larger size of the plot Reebok rented [2]. Due to the three to four times larger size Reebok occupies, an originally planned interconnecting road between the areas normally occupied by four tenants did not have to be built. Furthermore, costs for drainage and fire networks connecting the different tenant buildings as well as for entrances were saved. Upon request by the Commission, the Dutch authorities submitted a calculation of these savings carried out by a construction company which confirmed the above.

IV. COMMENTS FROM INTERESTED PARTIES

(24) Following the publication of the Commission decision to initiate proceedings, the United Kingdom Government [3] submitted comments which are summarised as follows: the Government welcomes the Commission's investigation into the granting of this aid to Reebok. There are important implications for the British footwear industry, and aid to such a large company would have a negative impact on other sports footwear companies that did not enjoy such subsidies. Since footwear, particularly, sports footwear, is very price sensitive, aid of this size to one player would have an extremely distortive effect on competition in this sector. One particular sports footwear company situated in the United Kingdom would suffer serious adverse effects if this aid were granted to Reebok. It was considered that if the aid given to Reebok were not recovered, it would have a distorting effect on competition in the European footwear industry, with particular implications for the United Kingdom.

V. REACTION OF THE NETHERLANDS TO THE COMMENTS FROM INTERESTED PARTIES

(25) The Dutch authorities denied that the agreements between the port authority and Reebok constituted State aid; nor would these arrangements affect in particular the position of the company to which the United Kingdom referred. This company would focus predominantly on the American market, and only to a small extent on the British market. Moreover, any producer of sports shoes and other sports gear needs a distribution centre. The same arrangements could be agreed if such companies were to settle in Rotterdam. Furthermore, the Rotterdam distribution centre has so far resulted in financial losses for Reebok. The arrangements between the port authority and Reebok concern a very limited amount when calculated per pair of sports shoes. Therefore, one cannot expect substantial effects for the company the United Kingdom referred to.

VI. ASSESSMENT OF THE AID MEASURE

(26) Due to the withdrawal and recovery of the paid amount of the cash incentive (see recital 19), the proceedings under Article 88(2) of the EC Treaty can be closed in this respect.

(27) Regarding the rental terms, it is not contested that they were granted by the GHR, which forms part of the municipality of Rotterdam and therefore is a public investor. However, the legal status of the investor alone does not answer the question of whether the rental conditions for Reebok contain an element of State aid within the meaning of Article 87(1) of the Treaty. The

(*) Confidential information.
(1) The original figure of 85,2 ha has been slightly adjusted by the Dutch authorities due to the additional terrain originally planned for part of an interconnecting road within the Distripark.
(2) A map shows that the standard size of a plot is 3,4 ha but can vary depending on the location within the rectangular or triangular clusters connected by roads.
(3) The United Kingdom Government is not the original complainant mentioned previously.

key factor is whether or not the conduct of the public investor is comparable with the conduct of a private investor (market investor principle), as the Court held in *Tubacex* [1].

(28) Private investors are, however, not active in the business in which the GHR operates, i.e. investing in the preparation or indeed creation of land for private customers in a port (draining of land formerly covered by water, providing infrastructure such as roads, pipelines and other networks). This is normally carried out by port operating companies either belonging to the State/municipality or by the municipalities directly. Private investors are also not active in the preparation of ground and infrastructure for business further inland.

(29) Lacking the possibility of comparing the GHR's conduct with the conduct of private investors, the Commission, as a first step, identified the level of rents for similar sites at other European ports or further inland in order to compare these 'market rents' with the rent Reebok pays at the Distripark Maasvlakte. Secondly, the Commission analysed whether Reebok's rent brings a net profit for the GHR and can thus be regarded as a market rent. Thirdly, the Commission has to establish whether the relatively low rent Reebok pays is objectively justified, for instance, by cost savings.

(30) The studies submitted by the Dutch authorities and carried out by two independent consultants show that the rent prices for 'dry land' in other northern European ports, are considerably lower than in Rotterdam. The study submitted earlier (including the ports Le Havre, Dunkirk, Zeebrugge, Antwerp, Hamburg, Bremerhaven, Moerdijk, Vlissingen, Amsterdam and Rotterdam) shows average rents for 1993/98 ranging from NLG 4,75/m^2 to NLG 9,75/m^2, with the latter, highest average rent being for Rotterdam. The second study, actually focusing on another issue (see recital 31), gives an overview of maximum rents for the six largest ports (Rotterdam, Antwerp, Hamburg, Bremen/Bremerhaven, Dunkirk and Le Havre) varying between roughly NLG 14/m^2 and 4/m^2. Rotterdam in that study also shows the highest maximum rent.

(31) Due to the fact that the Dutch authorities stated that Reebok was not dependent on a harbour site and could have established its distribution centre further inland where land is generally cheaper, another study was submitted. This study compares rents for 'inland' (non-harbour) sites in northern France (Pas-de-Calais), Belgium and the Netherlands so as to take account of the theoretical alternatives available to Reebok having regard to its requirement for low transportation costs. The average annual rents for inland sites in this study vary between NLG 0,6/m^2 and NLG 8,3/m^2 and are in general, apart from the peaks, significantly cheaper than harbour sites.

(32) The data show that Reebok's rent in Rotterdam is not only in line with but in the top range of rents charged in the 'market', i.e. for plots at northern European ports or inland sites. The decision to opt for a site with a relatively high rent also indicates that Reebok did not base its decision mainly on land costs, but on more general strategic criteria such as the impact of the location on transportation. This is further supported by the fact that Reebok did not take up an offer of land completely free of charge for 99 years. However, this also indicates that locations at other ports or further inland were not fully comparable in Reebok's view. Moreover, the sites at other ports or further inland are also offered and managed by municipalities or public companies and not by private investors. For these reasons, the Commission requires, as an additional criterion to be fulfilled for accepting it as a 'market rent', that Reebok's rent should result in a net profit for the GHR.

(33) The Commission therefore, as a second step, assessed whether the GHR's investment in the Reebok project was profitable. Lacking private investors in that type of business, a market rate of return on such investments is not available for comparison. The minimum requirement therefore is that the deduction of the project's costs (present value as at 1 January 1998) from the income (present value as at 1 January 1998) should result in a positive net present value for the GHR.

(34) The Dutch authorities submitted the GHR's calculations of the income and cost components over 25 years. According to these calculations, the present value of the rental income from Reebok as at 1 January 1998 was […] (*), the present value of Reebok's share of the total costs [2] minus the cost savings generated by Reebok was […] (*) million resulting in a positive net present value of […] (*) [3].

[1] ECR [1999] I-2459.

[2] Reebok's share of the total costs was calculated on the basis of the proportion of square metres Reebok occupies in Distripark Maasvlakte: 13,2 % of 86,6 ha.

[3] It appears that the Dutch authorities in their calculations of the present values of costs and income used discounting rates varying between 5 % and 6 %. The Commission when discounting the figures by a reference rate of 5,95 % (applicable for the Netherlands in the beginning of 1998) arrives at a rather similar result, i.e. a positive net present value of […] *. Considering that the payment of the rent in general only starts one year after signing the contract, i.e. in Reebok's case in 1999, one could also argue for a reference rate of 4,76 %. However, the Commission takes the view that for the calculation of present values of income and costs, the contract time is decisive. Moreover, if profitability is given with a reference rate of 5,95 %, it is even higher with a lower reference rate.

(35) Finally, the Commission addressed the issue of price differentiation, i.e. the fact that other tenants at the Distripark Maasvlakte pay higher rents. In this context the question arose of whether the GHR was granting particularly favourable treatment to Reebok. Private or public undertakings can, in principle, charge differentiated prices provided that the pricing policy does not generate losses on the invested capital and that there is no discrimination against the other customers. The first criterion has been analysed above and is fulfilled (see recital 34). For the second criterion to be met, price reductions must correspond to the savings achieved on the costs, for instance savings caused by larger volumes bought or other economies of scale [1].

(36) The weighed average of the annual rents [2] already agreed in the Distripark Maasvlakte and proven by the submitted contracts is […] (*). This results in a discount for Reebok of […] (*) or approximately 15 %. The present value of the total amount of this discount over 25 years as at 1 January 1998 is according to the Commission's calculation […] (*), which is less than the present value of the cost savings of […] (*) [3] achieved due to the larger plot Reebok rented (see also recital 23). Consequently, it can be said that the rent discount for Reebok is justified by the cost savings.

VII. **CONCLUSION**

(37) The Commission finds that the rental conditions described above are in line with the market investor principle and therefore do not constitute State aid or contain aid elements within the meaning of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The formal investigation procedure was closed with regard to the amount of NLG 4,25 million (EUR 1,9 million) granted as an incentive, the Netherlands having provided convincing evidence that the incentive had been withdrawn and that the amount already disbursed, inclusive of interest up to the date of repayment, calculated on the basis of the reference rate, had been repaid.

Article 2

The rent Reebok is paying for its plot at the Distripark Maasvlakte, in the Port of Rotterdam, according to the contract signed by Reebok and the Gemeentelijk Havenbedrijf Rotterdam on 25 June 1998, does not constitute aid or contain aid elements within the meaning of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 25 July 2001.

For the Commission

Mario MONTI

Member of the Commission

[1] See ECR [1990] I-3083.
[2] Weighed by total size per price/m².
[3] For the calculation of the present values the reference rate of 5,95 % was applied.