II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 20 May 2008

on the State aid implemented by the Netherlands in order to promote and facilitate the restructuring of the horticultural sector (C 74/03 ex N 450/01)

(notified under document number C(2008) 1847)

(Only the Dutch text is authentic)

(2008/875/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, in accordance with the provisions referred to above [1] and having taken those comments into account,

Whereas:

I. PROCEDURE

(1) By letter of 27 June 2001, registered on 4 July 2001, the Dutch Permanent Representation to the European Union notified the Commission, pursuant to Article 88(3) of the EC Treaty, of participation in a limited liability company purchasing land and premises in the greenhouse cultivation sector (registered under number N 450/01).

(2) Written details were submitted to the Commission by the Dutch authorities by letters dated 11 March 2002, 15 July 2002, 17 December 2002 and 21 October 2003, registered on 12 March 2002, 18 July 2002, 26 December 2002, and 25 October 2003 respectively.

(3) By letter dated 10 December 2003 [2] the Commission notified The Netherlands of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty with regard to the above-mentioned notification.

(4) The decision by the Commission to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments within one month. The Commission did not receive any comments from interested parties.

(5) Additional written information was submitted by the Dutch authorities by letter dated 11 January 2004, registered on 21 January 2004. During 2004 several meetings took place between the Dutch authorities and the Commission. The Dutch authorities also commented, by letter dated 18 May 2005, registered on 23 May 2005, on the initiation of the procedure.

[1] OJ C 15, 21.1.2004, p. 24.

[2] C(2003) 4477 final.

[3] See footnote 1.

II. **DESCRIPTION**

Background to the measure

(6) In 2001 Land- en Tuinbouw Organisatie Nederland, the Dutch Agricultural and Horticultural Organisation (LTO-Nederland) ([4]) and the private limited company Ontwikkelings- en Participatiebedrijf Publiek Private Sector BV (OPP) announced their intention to form a company, 'Stallingsbedrijf Glastuinbouw Nederland Beheer BV' (SGN). The company would be involved in the purchase, temporary management and sale of land and premises in the greenhouse cultivation sector in order to promote and facilitate restructuring within the horticultural sector.

(7) After SGN was set up, the Product Board for Horticulture (Productschap Tuinbouw, PT) ([5]), the Ministry of Agriculture, Nature and Food Quality, OPP and SGN would enter into a limited partnership. Within this limited partnership, SGN would act as managing partner, with the others as silent partners. The limited partnership would be involved in the purchase, temporary management and sale of land and premises in the greenhouse cultivation sector in order to promote and facilitate restructuring within the horticultural sector.

(8) In order to set up this limited partnership, start-up capital was required, as follows:

— Ministry of Agriculture, Nature and Food Quality (through the Bureau Beheer Landbouwgronden, the Land Management Service (BBL)): capital: EUR 2 268 500; junior loans, market value: EUR 2 268 500,

— PT ([6]): capital: EUR 2 722 500; junior loans, market value: EUR 2 722 500,

— OPP: capital: EUR 4 991 000,

— SGN: capital: EUR 150 000.

(9) The return on the capital invested in the partnership and the junior loans was set at 15 % per annum in cash for the duration of the project (15 years). The shareholders receive an annual dividend. The return and dividend are established on the basis of the market rate.

(10) The limited partnership and SGN were to be set up in order to promote spatial restructuring in the horticultural sector. The aim behind this was to concentrate horticulturists in specific areas, enabling the sector to adapt better to town and country planning and environmental sustainability requirements.

(11) According to its articles of association, the limited partnership cannot be involved in property development activities or in speculation that could influence the price of land. Its activities are limited to the acquisition, sale and temporary management of properties. The purchase, sale and temporary management and sale of land by the limited partnership and its managing partner SGN must be in line with market price; acquisition, sale or temporary management below market price is prohibited under the articles of association. Private undertakings in the sector are not obliged or encouraged by the government to cooperate (specifically) with the limited partnership.

(12) According to the Dutch authorities, horticulturalists will not benefit directly or indirectly from the measure in a way that will influence or limit competition, since the limited partnership will always have to sell the land or premises at market price if it wishes to maintain its profit margin and remain viable and continue its activities.

(13) The measure is valid for 15 years and may not be cumulated with any other aid measures. The total budget available to the aid measure will be EUR 15 123 000.

Grounds for initiating the procedure

(14) The Commission initiated the procedure in respect of the notified aid measure because the information provided was insufficient to enable it to assess the compatibility of the measure with Article 87 of the Treaty. In the decision to initiate the procedure, the Commission had explained what information was needed in order to assess whether the notified measure constituted State aid and, if so, whether the aid would be compatible with the internal market.

([4]) LTO-Nederland is a private business organisation in the agricultural sector.

([5]) Dutch agriculture and agro-industry have a series of 'product boards', organisations which provide a form of representation additional to non-governmental organisations, and which consist of one vertical public law organisation per sector. These product boards are mainly active in the areas of food safety, animal welfare, quality, promotion and working conditions. Their activities include the implementation of European legislation. The regulations issued by the Product Board for Poultry and Eggs that impose levies on producers and undertakings to achieve a specific goal mentioned in these regulations, need to be approved by the Minister for Agriculture, Nature and Food Quality.

([6]) The Product Board for Horticulture's involvement will be financed exclusively using its own resources; no parafiscal charges will be levied on the production, processing or marketing of horticultural products.

(15) The notification included information on the establishment of SGN, which would finance 50 % of its start-up capital using State resources ([7]). The government would also be the primary source of the limited partnership's initial capital. At the time that the procedure was initiated, the Commission was unable to ascertain whether the 'market economy investor' principle had been observed when establishing the Dutch authorities' involvement and if the scheme would be used to save companies in difficulty. Therefore the Commission maintained the view that the investment of public capital in SGN and the limited partnership could benefit the Dutch greenhouse cultivation sector and therefore constituted aid within the meaning of Article 87(1) of the EC Treaty.

III. COMMENTS FROM THE NETHERLANDS

(16) By letter dated 18 May 2005 the Commission received comments from the Dutch authorities on the initiation of the procedure. Additional information was also provided by letters dated 11 January 2004 and during various bilateral meetings held in 2004.

(17) In their letter dated 11 January 2004, the Dutch authorities provided the following information:

— SGN's management had specified that the sale and lease-back of land and premises was excluded and that this would be specifically stated in sales contracts,

— the feasibility study relating to sale and spatial restructuring had been carried out (by Deloitte & Touche, an audit company). This study included calculations on the economic viability of the investment policy and an indication of anticipated return,

— SGN's management had stated and guaranteed that the calculations and indications of return in the Deloitte & Touche report had formed the basis of the anticipated return of 15 % (in line with market expectations) as stated in the business plan.

(18) During the bilateral meetings the Dutch authorities explained that the 15 % dividend would be distributed according to the different levels of risk accepted by the various shareholders, i.e. 50 % in the case of OPP and 25 % each for PT and the Ministry of Agriculture, Nature and Food Quality.

(19) LTO-Nederland and OPP each have a 50 % share in SGN, the limited partnership's managing partner. In the event of SGN making a profit, this profit would also be distributed equally between LTO-Nederland and OPP.

(20) In their letter dated 18 May 2005, the Dutch authorities provided information on the limited partnership and its activities. They stated that the feasibility study had been carried out after LTO's initiative to start a land company and that the study had been used as the basis for the business plan and indication of anticipated return; all financial risks were included in the business plan. Both private and public partners had been asked to participate in the venture. The private investors asked to participate as a partner were unfamiliar with the modus operandi and approach of the activities suggested by SGN ([8]). In the end this was too great an uncertainty for these private investors and they chose not to invest in the limited partnership. However, since the feasibility report indicated return on investment for the activities to be carried out by the limited partnership, and these would not involve a risk higher than that found on the market, the public partners decided to participate in the project.

(21) The Dutch authorities confirmed that the limited partnership was the market 'player'. Since silent partners cannot by definition be involved in management, SGN as managing partner performs these activities and therefore acts on behalf of the limited partnership in these matters.

(22) The Dutch authorities explained that, in terms of the management of the limited partnership, the activities of SGN would almost only concern small- and medium-sized companies. The public partners only provide the limited partnership with capital and junior loans. Investment decisions must be taken based on the prospect of return and the business plan is used as a guide for investment. Since this would involve project-based activities, other private investors will participate in later stages as well. Apart from capital and junior loans no other aid can be granted for the same purpose.

([7]) The resources in the form of capital and junior loans provided by the Product Board for Horticulture, Ontwikkelings- en Participatiebedrijf Publieke Sector b.v. (OPP) and the Dutch Ministry of Agriculture, Nature and Food Quality can be regarded as State resources. The Product Board for Horticulture is a public body. OPP is a subsidiary of a bank which is wholly owned by the government.

([8]) The private partners had never been actively involved in restructuring activities before and were not aware that they would only be able to purchase, sell and manage land and not permitted to be involved in other (investment) activities. They also preferred junior loans over the investment of capital. Capital was also required in order to set up the limited partnership. The public partners involved had sufficient experience in the reconstruction of land and premises and were familiar with the markets involved.

(23) The Dutch authorities explained that the purpose of the limited partnership was not to assist individual undertakings, but to support Dutch town and country planning policy and to promote sustainable development in the greenhouse cultivation sector in specific areas. In order to achieve this, the limited partnership would purchase and sell property in strategic areas ([9]). The sale and re-sale of the land and properties must be in line with market prices in order to ensure the partnership earns a return ([10]). The limited partnership does not invest in companies in difficulty and 'sale and lease-back' contracts are specifically excluded.

(24) Finally, the Dutch authorities gave assurances that procurement rules are complied with, given the involvement of certified appraisers in the purchase of land and property by the limited partnership, transfers will not exceed the EUR 206 000 limit laid down in Article 7 of Directive 2004/18/EC ([11]) and the appraiser has to be chosen in consultation with the other party involved in the purchase or sale of the property.

IV. **ASSESSMENT OF THE AID**

(25) The limited partnership and its managing partner SGN were to be active in the greenhouse cultivation sector in the purchase of land and property to be used for the production of horticultural products. It must first be established whether participation in the limited partnership and its managing partner SGN can be considered to be State aid within the meaning of Article 87(1) of the Treaty and if so, whether such aid would be compatible with the common market.

(26) Article 87(1) of the Treaty states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

(27) As indicated in the case-law of the Court of Justice of the European Communities, aid to an undertaking may adversely affect trade between Member States and distort competition, if that undertaking operates in a market open to intra-Community trade ([12]). The limited partnership and its managing partner SGN are active on the market in trade of land and, specifically, in land meant to be used for horticultural production. Active intra-Community trade is present within both these markets ([13]).

(28) The capital and the junior loans are financed using the budgets of the Dutch Ministry of Agriculture, Nature and Food Quality (via the Land Management Service (BBL), a total of EUR 4 537 000), the Product Board for Horticulture (PT) (EUR 5 445 000), OPP (EUR 4 991 000) and SGN (EUR 150 000). The PT is a public body established by law, OPP is a limited liability partnership, wholly owned by public bodies and SGN is a limited liability partnership in which OPP has a 50 % share (the other 50 % being owned by LTO-Nederland, a private organisation). Given the structure of the capital investment in the limited partnership, it can be concluded that the government has a share in the limited partnership and that this capital comes, indirectly in parts, from State resources.

(29) The measure in question is selective, given that the investment is made in order to purchase, temporarily manage and re-sell land and premises in the horticultural sector in order to promote and facilitate spatial restructuring in the horticultural sector. These activities promote development in the sector and therefore also horticultural production.

(30) However, in accordance with Article 87(1) of the Treaty, measures cannot be considered to be aid if no advantage is conferred, given that in such cases, the measure does not distort competition or adversely affect trade between Member States. The impact of the measure must therefore be examined in order to ascertain whether the sectors concerned have benefited as a result.

(31) According to the Commission Communication on the application of Articles 92 and 93 (now Articles 87 and 88) of the EC Treaty and of Article 5 of Commission

([9]) Strategic areas are those where all conditions for greenhouse cultivation (e.g. possibility of reconstruction, water and road infrastructure) are met. This would be achieved due to third parties, since the limited partnership and its managing partner SGN cannot be involved in such activities.

([10]) The return is achieved by acquiring different plots of land, restructuring them and selling them at a higher price. Any increase in value is not due to the supply of capital but merely to the location and local possibilities. Furthermore, changes in market price can usually be beneficial.

([11]) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

([12]) See in particular the Court's ruling of 13 July 1988 in case C-102/87, *French Republic* v *Commission of the European Communities* [1988] ECR I-4067.

([13]) Land is a tradable asset; the high value of land and the possibilities to invest and develop land makes its sale attractive for investors operating in a Europe-wide or international scale. There is a high level of intra-Community trade in horticultural products: in 2005, intra-EU trade in fruit and vegetables amounted to EUR 7 099 million for vegetables and EUR 5 899 million for fruits (*Source:* Eurostat).

Directive 80/723/EEC to public undertakings in the manufacturing sector [14] (referred to below as 'the 1993 Communication'), a capital injection is considered to be aid if it is made under circumstances unacceptable to a private investor operating under normal market conditions. Therefore, in order to ascertain whether this measure confers advantage, the market economy investor principle (MEIP) must be applied [15].

(32) The Commission notes that this decision in no way anticipates or prevents further analysis by the Commission on the subject of public procurement and legislation governing this area.

(33) The effects of the measure must be examined on the following levels: the capital injection and the participation of public authorities in the limited partnership, the benefit for SGN, the other associates in the limited partnership and any future interested parties and advantage for third parties [16].

Capital injection and public participation in the management of the limited partnership

(34) A conservative planning approach has been used when preparing the models of the limited partnership's business plan. The first model was produced on the basis of planning over 10 years and the second model using a period of 15 years. On the basis of the calculations in the business plan and the financial risks identified, an investment period of 15 years was chosen.

(35) The business plan covers an average land supply of 140 hectares, to be purchased gradually. In the first three years no land would be sold, only purchase and rental activities would be used to secure the investment (as collateral; a minimum level of available land would be guaranteed). After this initial period, the rate of sale would be restricted to 50 hectares per year. A minimum of EUR 27 million is set as ownership equity. In order to reduce risks, own capital is set slightly higher. However, this is done through junior loans rather than direct investment of capital. According to the calculations provided, the net present value of the investment is positive.

(36) It has also been found necessary for the undertaking to be as flexible as possible and that it should work using a project-based approach in order to be able to respond to the economic cycle. The business plan refers to a return on investment of 17,13 % per annum. Taking into account market risks, final return on investment is 15 % per annum for a total investment period of 15 years.

(37) In case T-296/97 (*Alitalia* v *Commission*) [17], it was established that the conduct of a private investor in a market economy is guided by prospects of profitability.

(38) The Court of First Instance, in its ruling in case T-228/99 (*Westdeutsche Landesbank Girozentrale* v *Commission of the European Communities*) [18] held that the average rate of return cannot be an automatic criterion for determining the existence and amount of State aid. The use of an average return must be consistent with the notion that an informed private investor, in other words, an investor wishing to maximise profits but without running excessive risks in comparison with other participants in the market, would, when calculating the appropriate return to be expected for the investment, in principle require a minimum return equivalent to the average return for the sector concerned. In its ruling in case C-305/89 (*Italian Republic* v *Commission of the European Communities*) [19], the Court took the view that a private investor, whose involvement must be compared with that of a public investor pursuing economic policy aims, will not necessarily behave like an ordinary investor laying out capital with a view to seeing a return in the (more or less) short term, but must at least behave like a private holding company or a private group and undertakings pursuing a structural policy and is guided by the prospects of longer-term profitability.

(39) Since the government has a share in a limited partnership, the State, as owner of (some of) the share capital will only be liable for the partnership's debts up to the liquidation value of the assets. The financial risk of the investment the government participates in would therefore be limited.

(40) The business plan is well thought out and is based on moderate expectations. The limited partnership and SGN are both working on the basis of a long-term vision with a moderate growth model. The financial risks that depend on the economic cycle are therefore removed in order to enhance the possibility and the size of return on investment. The plan contains policy objectives, expected rates of return and financial risk calculations. On the basis of the conclusions of the Deloitte & Touche feasibility report, the project can be regarded as being viable. The reluctance within the private market to finance the project's start-up phase was caused by unfamiliarity with the restructuring of land and the specific features of the agricultural and greenhouse cultivation market.

[14] Commission Communication — Application of Articles 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3).

[15] See the 1993 Communication.

[16] Participants are individuals from whom property or land is bought and who manage or purchase this property or land.

[17] Case T-296/97, *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 84.

[18] Case T-228/99, *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, see in particular paragraphs 251 and 255.

[19] Case C-305/89, *Italy* v *Commission* [1991] ECR I-1603.

(41) The capital injections were in this case based on reasonable anticipated rates of return in the medium to long term. The different parties required a return on their investment of 15 % per annum over a period of 15 years. This return was in line with average rates of return in the sector concerned ([20]). The investors used the same criteria as providers of capital under normal market conditions.

(42) The Commission does not see why a market economy investor should not provide capital, if it can be expected that these initial investments would help the company become profitable in the future.

(43) It can therefore be considered that, by providing the start-up capital of EUR 15 123 000 the Dutch authorities did not confer an advantage on SGN and acted like a market economy investor and lender.

The benefit for SGN, the other partners in the limited partnership and any future interested parties

(44) According to the information provided by the Dutch authorities, the purchase, management and re-sale of the land and premises took place at market price. The decision to participate in a partnership was based on the essential need for flexibility within the venture and the possibility of working on a project basis. This working method enables private investors to participate in individual projects, which reduces financial risk and ensures a return on the initial investment ([21]). The regulations establishing the limited partnership and SGN ensure that the market position of the limited partnership itself and SGN (acting on its behalf), does not differ from that of other investors and that they are only involved in the activities referred to above (with investing in the development of the sites concerned being expressly excluded). Furthermore, the market price for the land and property that the limited partnership and SGN (acting on its behalf) wish to purchase is that established with the help of independent appraisers appointed by the selling and buying parties. SGN, as the managing partner, can be held liable for all the shortcomings of the limited partnership.

(45) According to the information provided by the Dutch authorities only the start-up capital was provided using State resources and no other aid or State resources were made available to the limited partnership or its managing partner SGN.

(46) As the limited partnership has to pay a normal rate of return to its investors, does not enjoy a beneficial or privileged market position and operates on the basis of freely-established market prices, the Commission is unable to establish the existence of a competitive advantage which the limited partnership could not have had under normal market conditions. The Commission takes the view that no advantage was conferred upon the limited partnership itself or its partners (LTO-Nederland) or any future interested parties.

Advantage for third parties

(47) According to the information provided by the Dutch authorities, the purchase, management and re-sale of the land and the glasshouses on it take place at market rates. The market rates for land and property apply to land and property purchased by the limited partnership and are established with the help of independent assessors appointed by the various parties.

(48) The regulations establishing the limited partnership and its managing partner SGN ensure that no other activities can be engaged in and that the limited partnership must strive towards a maximum return. The conferring of advantage to certain third parties is not in keeping with the objective laid down in these provisions. The possibility of the limited partnership purchasing, selling and managing property obtained at prices other than market price is excluded, which ensures that no help is given to companies in difficulty.

(49) In order to establish the price of the land, certified appraisers are appointed. By using these and other services, the provisions of Directive 2004/18/EC are adhered to.

(50) According to the information provided by the Dutch authorities, the limited partnership and SGN (acting on its behalf) behave like any other market player towards its clients (the individuals from whom the property or land is purchased, who maintain this property or land or who buy the property or land). It can therefore be concluded that the third parties involved in the activities of the limited partnership and its managing partner SGN do not have an advantage and therefore do not receive any form of aid.

V. **CONCLUSION**

(51) On the basis of the above, the Commission's doubts, which prompted it to initiate the procedure and led to the provisional conclusions found in the decision initiating the procedure, have now been removed.

([20]) Investments in land; the different private investors (NBM Amstelland, Arcadis, Grontmij, Groenfonds, ING, Fortis, Nationale Investerings Bank, Locatie Ontwikkelingsbedrijf, ABN AMRO, Rabobank) that were approached to participate in the project stated that investment in land would generally take place in the medium term (10 to 20 years) and that a profit of 15 % should be available for the investors when compared to generally comparable or similar investments in land.

([21]) These private investments will be made on a project basis and be related to the different phases of the project.

(52) The Commission therefore concludes that the involvement of the Dutch authorities in the limited partnership and SGN through the supply of capital and junior loans is in keeping with the market economy investor principle and does not therefore constitute State aid within the meaning of Article 87(1) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The involvement of the Dutch authorities in the limited partnership in order to promote and facilitate the restructuring of the horticultural sector, amounting to a capital and junior loans of EUR 15 123 000, does not constitute aid within the meaning of Article 87(1) of the Treaty.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 20 May 2008.

For the Commission
Mariann FISCHER BOEL
Member of the Commission