COMMISSION DECISION

of 23 January 2013

on State aid SA.24123 (2012/C) (ex 2011/NN) implemented by the Netherlands Alleged sale of land below market price by the Municipality of Leidschendam-Voorburg

(notified under document C(2013) 87)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2013/247/EU)

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 the provisions cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 10 September 2007, the Stichting Behoud Damplein Leidschendam (hereinafter "the Stichting"), a foundation set up in 2006 to defend the interests of residents located in the vicinity of the Damplein in Leidschendam-Voorburg (the Netherlands), submitted a complaint to the Commission concerning the alleged grant of State aid in the context of a real estate project initiated by the municipality of Leidschendam-Voorburg in co-operation with a number of private parties.

(2) By letter of 12 October 2007, the Commission forwarded the complaint to the Dutch authorities for their consideration, along with a request to reply to a number of questions. The Dutch authorities submitted their reply by letter of 7 December 2007. The Commission sent further requests for information to the Dutch authorities by letters of 25 April 2008, 12 September 2008, 14 August 2009, 12 February 2010 and 2 August 2011. The Dutch authorities replied to these requests by letters of 30 May 2008, 7 November 2008, 30 October 2009, 12 April 2010, 29 September 2011 and 3 October 2011, respectively. On 12 March 2010, a meeting took place between the Commission services and the Dutch authorities and, as a result, additional information was submitted to the Commission by letter of 30 August 2010.

(3) By letter of 26 January 2012, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union [2] (hereinafter: "TFEU") in respect of a specific measure taken in the context of the real estate project. The Commission's decision to initiate the procedure (hereinafter "the opening decision") was published in the *Official Journal of the European Union* [3]. By way of this decision, the Commission invited interested parties to submit comments on its preliminary assessment of the measure.

(4) By letter of 18 April 2012, the Dutch authorities submitted their observations on the opening decision, after having received two extensions of the deadline to comment and after a meeting with the Commission services on 12 March 2012 in the presence of the beneficiary of the measure.

(5) By letter of 16 April 2012, the Stichting submitted its comments to the Commission on the opening decision. The non-confidential version of these comments was forwarded to the Dutch authorities by letter of 16 May 2012. By letter of 14 June 2012, the Dutch authorities submitted their reaction to the Stichting's comments.

2. DESCRIPTION OF THE MEASURES

2.1. The beneficiaries and the parties involved

(6) The beneficiary of the measures is the partnership Schouten-de Jong Bouwfonds (hereinafter "SJB"). This partnership was set up by Schouten & De Jong Projectontwikkeling BV (hereinafter "Schouten de Jong") and Bouwfonds Ontwikkeling BV (hereinafter "Bouwfonds") for the purposes of the contested real estate project and does not have legal personality under Dutch law.

[1] OJ C 86, 23.3.2012, p. 12.

[2] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108 of the TFEU, respectively. The two sets of provisions are, in substance, identical. For the purpose of this Decision, reference to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88 of the EC Treaty respectively, where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

[3] See footnote 1.

(7) As members of the SJB partnership, Schouten de Jong and Bouwfonds should also be considered beneficiaries of the measures ([4]).

(8) Schouten de Jong, established in Voorburg, the Netherlands, is active in real estate project development in the Netherlands, in particular in the Leidschendam area. Its turnover amounted to EUR 60 million in 2011.

(9) Bouwfonds, established in Delft, the Netherlands, and a subsidiary of Rabo Vastgoed, is the largest real estate developer in the Netherlands and among the top three largest players on the European real estate market. Bouwfonds is active, in particular, in the Netherlands, Germany and France. It had a turnover of EUR 1,6 billion in 2011.

(10) The municipality of Leidschendam-Voorburg (hereinafter: "the Municipality") is located in the province of South Holland, close to The Hague, in the Netherlands.

(11) A public-private partnership in the form of a *vennootschap onder firma* (hereinafter: the "PPP") was set-up by the Municipality and SJB to undertake the ground exploitation phase of the contested real estate project. Each party to the PPP was to bear 50 % of the costs and the risks associated with the ground exploitation phase of the project. The decision-making of the PPP was to be by unanimity. According to the information provided by the Dutch authorities, Schouten de Jong and Bouwfonds are each jointly and severally liable ("*hoofdelijk aansprakelijk*") for the fulfilment by SJB of its obligations under the PPP agreement ([5]).

2.2. **The real estate project**

(12) On 6 April 2004, the Council of the Municipality adopted a Concept Ground Exploitation Masterplan Damcentrum and a Concept Masterplan Damcentrum laying down a framework agreement aimed at revitalising Leidschendam's city centre (hereinafter: the "Leidschendam Centrum Project") ([6]). The Leidschendam Centrum Project concerns an area of approximately 20.7 hectares and consists of demolishing approximately 280 mainly social housing units, renewing public spaces and utilities (sewerage, paving, lightning, etc.) and constructing approximately 600 new housing units – both social housing and free sector housing – as well as approximately 3 000 square metres of commercial (shopping) space, a two-level underground parking garage, and the relocation and rebuilding of a school. The Leidschendam Centrum Project was divided into various sub-projects, one of which is the real estate project concerning the Damplein (hereinafter: the "Damplein Project").

2.2.1. *The construction phase*

(13) On the basis of the Leidschendam Centrum Project, the Municipality concluded a co-operation agreement with a number of private project developers, including with SJB, on 9 September 2004 (hereinafter: the "2004 Co-operation Agreement"). The 2004 Co-operation Agreement stipulates that the private project developers would, for each of the specific sub-parts of the Leidschendam Centrum Project assigned to them, construct and sell, for their own risk and expense, the envisaged real estate.

(14) According to the 2004 Co-operation Agreement, the construction works would begin once the land had been made ready for construction (see recital (22) below) and the necessary building permits had been obtained. However, as regards the construction of the free sector housing units, the private developers were allowed to postpone construction until 70 % of these units, whether or not in combination with social housing units, in the sub-project area concerned had been pre-sold (Article 7.5 of the 2004 Co-operation Agreement, hereinafter: the "70 % clause"). This 70 % clause is commonly found in construction contracts in the Netherlands and seeks to limit the risks for project developers of constructing real estate which might not be sold. The agreement did not, however, provide for any possibility to postpone construction as regards the commercial premises and the underground parking garage.

(15) According to both the 2004 Co-operation Agreement and a further project agreement concluded on 22 November 2004 (hereinafter: the "SJB Project Agreement"), SJB would build a total of 242 housing units, of which 74 were initially planned to be built on the Damplein ([7]). SJB would also build approximately 2 400 square meters of commercial space on the Damplein and construct the underground parking garage, which apart from a private section (75 parking spaces) also included a public section (225 parking spaces). The commercial premises and the housing units would both be built on top of the underground parking garage.

([4]) References to SJB throughout the remainder of this decision should therefore also be considered as constituting references to both Schouten de Jong and Bouwfonds.

([5]) Article 4.1 of the Ground exploitation/PPP agreement of 22 November 2004 provides the following: "Gemeente en SJB vormen met ingang van de datum van ondertekening van deze overeenkomst een VOF. Als zodanig dragen zij met ingang van die datum gezamenlijk op basis van separaat te sluiten project-gronduitgifteovereenkomsten, in goed overleg, zorg voor de uitvoering van de grondexploitatie. De daaraan verbonden kosen en risico's komen voor 50 % voor rekening van SJB en voor 50 % van de Gemeente. Schouten en Bouwfonds zijn ieder hoofdelijk aansprakelijk voor de nakoming door SJB van haar verplichtingen ingevolge deze Overeenkomst (de Sok en de projectovereenkomst)."

([6]) The project was initially called Dam centrum project but renamed to Leidschendam Centrum Project in 2005. In this decision "Leidschendam Centrum Project" is used to describe the real estate project.

([7]) The final plans for the Damplein only foresaw the construction of 67 housing units by SJB.

(16) The Municipality, as also explicitly emphasised by the Dutch authorities in its submissions, was not involved in the construction phase of the project and bore no risks in relation to the sale of the housing units and commercial premises. Profits from these sales, if any, would accrue directly to the private developers. The construction phase of the project should be distinguished from the so-called ground exploitation phase of the project, where the Municipality was involved through the PPP with SJB and bore 50 % of the risks (see recital 18 below).

2.2.2. *The ground exploitation phase*

(17) Before construction works in each part of the real estate project could commence, the land had to be acquired, the public infrastructure had to be re-arranged and the land had to be made ready for construction. Since this "ground exploitation phase" of the project was expected to entail high costs (estimated at the time at approximately EUR 30 million) and significant risks, the Municipality decided to set up a PPP with SJB to carry out these works ([8]). To this end, the Municipality and SJB signed a ground exploitation/PPP agreement on 22 November 2004 (hereinafter: the "GREX").

(18) In return for its participation in the ground exploitation phase of the project, SJB would obtain a share of the revenues of the PPP and receive the development rights on plots of land previously allocated to the Municipality ([9]). According to the GREX, both the Municipality and SJB would make a direct financial contribution to the PPP to carry out the ground exploitation works ([10]). The GREX further provides that the Municipality and SJB would each bear 50 % of the costs and the risks of the ground exploitation phase (Article 4.1 of the GREX) and that the final revenues/losses of the ground exploitation would be divided according to the rules laid down in the 2004 Co-operation Agreement (Article 14.3). This stipulated that at the end of the ground exploitation phase a negative or positive result of up to EUR 1 million would be equally divided between the Municipality and SJB, whereas the portion of a positive result exceeding EUR 1 million would be divided between the Municipality, SJB and the other private parties taking part in the construction phase of the real estate project (Article 10.9 of the 2004 Co-operation Agreement).

(19) Besides making the land ready for construction, the ground exploitation phase also covered the construction, temporary exploitation and reselling of the public part of the underground parking garage and the building of the school (Article 4 of the GREX). To this end, the PPP agreed with SJB that SJB would construct the underground public garage, which was considered to be intrinsically linked to the private section of the parking garage (article 9 of the GREX), for which SJB would receive a maximum amount of approximately EUR 4,6 million (value on 1 January 2003) from the PPP (Article 6 of the SJB Project Agreement). The construction of the private section of the parking garage would be financed by SJB itself. The PPP intended to sell the entire parking garage to a third party and the revenues from that sale were to flow to the PPP, which would share them between the Municipality and SJB.

(20) Finally, the PPP would also contribute 50 % of the costs for the construction of a school in another plan area of the Leidschendam Centrum Project. The remaining 50 % would be financed directly by the Municipality (Article 8 of the GREX).

(21) As follows from recitals 17 to 20 above, the costs of the ground exploitation phase of the project consisted essentially in the costs of the acquisition of the land insofar as it was not already owned by the Municipality, the costs of making the land ready for construction, the costs for the public section of the underground parking garage and 50 % of the construction costs for the school.

(22) The PPP would generate revenues from the ground exploitation phase, first and foremost, through the sale of the land to private project developers, including SJB, after the PPP had made the land ready for construction. Each project developer was to purchase the part of the land assigned to it to construct housing units and commercial premises. The prices for the land were laid down in Article 10 and Annex 3a of the 2004 Co-operation Agreement. The 2004 Co-operation Agreement explicitly stated that these prices were minimum prices, which could be increased if more than the planned floor space was constructed. These prices were based on an independent expert valuation report, dated 11 March 2003, which considered the prices to be market-conform. Payment of the land price was due at the moment the private developer concerned obtained the necessary building permits and would take place, at the latest, at the moment of the legal transfer of the land (Article 10.5 of the 2004 Co-operation Agreement).

(23) The price of the land sold by the PPP to SJB for the overall Leidschendam Centrum Project was determined at minimum EUR 18,5 million (value on 1 January 2003). The land in the Damplein area sold by the PPP to SJB was determined at minimum EUR 7,2 million (value on 1 January 2003), yearly indexed with 2,5 % until payment.

([8]) No public procurement procedure was carried out in this regard. This decision is without prejudice to any analysis the Commission could make concerning public procurement aspects related to the project.

([9]) Point 5.1.2 of the Ground Exploitation Masterplan Damcentrum of 10 February 2004.

([10]) According to the Ground Exploitation Masterplan Damcentrum of 10 February 2004 the Municipality would contribute EUR 7,3 million while SJB would contribute EUR 2,6 million.

(24) Second, the PPP was to collect additional revenues by charging each private project developer a ground exploitation fee and a quality fee pursuant to Article 10.3 of the 2004 Co-operation Agreement ([11]). These fees were calculated on the basis of the number of housing units to be built by the private project developer and could be increased or decreased depending on the number of units actually constructed. These fees were due on 1 July 2004 at the latest and needed to be paid in a single instalment for all housing units constructed in the Leidschendam Centrum Project by the private developer concerned.

(25) As regards SJB, the total ground exploitation fee was determined at approximately EUR 1,1 million and the quality fee at approximately EUR 0,9 million (value on 1 January 2003), indexed yearly by 2,5 % until payment, for all the housing units it planned to build in the Leidschendam centrum area. The final ground exploitation fee and quality fee due would depend on the number of housing units actually built.

2.3. **The retroactive price decrease and waived fees**

(26) According to the timeline which was set up in March 2004, construction works on the Damplein were initially planned to start in November 2005. However, due to several national court proceedings, the building permits SJB needed to commence construction were delayed and eventually only obtained in November 2008.

(27) SJB started with the pre-sale of housing units in February 2007, but experienced difficulties selling these and eventually managed to pre-sell only 20 of the 67 planned units. Because of the delays encountered in obtaining the necessary building permits, these pre-sale contracts were annulled in September 2008 so that, when SJB finally obtained the permits to start construction works in November of that year, none of the housing units SJB was required to build on the Damplein had been pre-sold. In the meantime, the financial crisis had started and affected the Dutch real-estate market in particular.

(28) In this context, SJB informed the Municipality that it would not start any of the construction works, notwithstanding the fact that the 2004 Co-operation Agreement only allowed it to postpone construction of the housing units if less than 70 % of these units had been sold. As explained in recital 14 above, the 70 % clause did not cover the construction of the commercial premises or the underground parking garage.

([11]) According to the "Exploitatieverordening Gemeente Leidschendam-Voorburg 2009", the Municipality may ask private parties to contribute to the costs of infrastructure works. To this end, the 2004 Co-operation Agreement stipulates that the private parties will pay a ground exploitation fee and, as the Municipality decided to use high quality products to develop the public area, a quality fee to the PPP, on top of the price for the land.

(29) In the Autumn of 2008, SJB made a proposal to the PPP to pay EUR 4 million for the land on the Damplein, instead of the EUR 7,2 million (value on 1 January 2003) originally agreed, whereby SJB would start the construction works in April 2009 regardless of whether the housing units had been pre-sold. In return for this decrease in price, SJB was therefore willing to waive its right to invoke the 70 % clause contained in the 2004 Co-operation Agreement. SJB further proposed to contact an investor who would guarantee to buy the unsold housing units. According to the Dutch authorities this resulted in a price lower than that expected from a direct sale to private persons.

(30) On 18 December 2008, the PPP and SJB decided in principle to the price decrease, but before seeking approval from the Municipality's Council, the Municipality contacted an independent expert to determine whether the price calculated by SJB was a market-conform price. In its report of 11 February 2009, the expert concluded that EUR 4 million (value on 1 January 2010) could, on the basis of the residual value method, be considered a market-conform price for the land on the Damplein in 2010, taking into account the fact that SJB committed to sell the unsold housing units to an investor and had agreed to lower its initially foreseen profit and risk margin from 5 % to 2 %. The report did not take into account the lowering of the ground exploitation fee and quality fee.

(31) On the basis of this report and because, according to the Dutch authorities, the Municipality feared further delays and considered it of general interest that the construction phase was started as soon as possible, the Municipality's Council, in its meeting of 10 March 2009, decided that the PPP would agree to lower the price and fees originally agreed in 2004 with SJB for the land located on the Damplein. A proposal of 18 February 2009 from the Municipality, which was sent to the members of its Council, refers to a decrease in price for the land and a decrease in the ground exploitation and quality fees. The proposal further states that this decrease would turn the ground exploitation phase, which was budgeted to be break-even, into a loss-making project. The proposal also requested the Municipality to foresee the necessary provision for 50 % of the losses. The proposal further mentions that due to the financial crisis SJB was not able to obtain the necessary financing for the development of the Damplein.

(32) The price decrease was formalised in an agreement concluded on 1 March 2010 (hereinafter: the "Supplementary Agreement") between the Municipality, the PPP and SJB. This agreement amended the 2004 Co-operation Agreement, the SJB Project Agreement and the Municipality Project Agreement of 22 November 2004. Article 2.1.2, first paragraph, of the Supplementary Agreement provides that, contrary to what was agreed to in the 2004 Co-operation Agreement, the price of the

land on the Damplein to be sold to SJB would be EUR 4 million. Article 2.1.2, second paragraph, of the Supplementary Agreement provides that the previously agreed ground exploitation fee and quality fee were no longer due. No reference is made in that second paragraph to the land on the Damplein in particular ([12]).

(33) The Supplementary Agreement also states that SJB started the construction works on the Damplein on 7 July 2009 and that it had to undertake those works without interruption. The works should be finished by December 2011. In case of late delivery, SJB was to reimburse part of the decreased price. Delivery of the land would take place at the latest in mid-March 2010 and payment would take place at the latest on the day of delivery.

(34) Furthermore, on 13 July 2009, the PPP and SJB concluded a new agreement concerning the underground public parking garage ([13]). According to this agreement, SJB would start the construction works on the public parking garage during the second quarter of 2009 and would complete these within a fixed period of time. The PPP would pay SJB EUR 5,4 million (value on 1 April 2009) for the construction of the public parking garage ([14]); this amount would be fixed until delivery and would not be indexed.

(35) On 15 January 2010, SJB and Wooninvest Projecten BV, a company related to one of the project developers who signed the 2004 Co-operation Agreement, signed a purchase/construction agreement (*"koop/aannemingsovereenkomst"*) for the purchase of 43 housing units, which would be rented out to private persons by Wooninvest. In the case that SJB found a private purchaser for some of these housing units before 29 January 2010, the parties agreed that these units would not be sold to Wooninvest. The agreement also foresees a period between 29 January 2010 until the delivery of the units to Wooninvest during which SJB can repurchase the units sold to Wooninvest under the same conditions as they were sold to Wooninvest, plus compensation of the costs borne by Wooninvest and an interest of 6 % per year for the period between payment by Wooninvest to SJB and the redelivery of the units from Wooninvest to SJB (article 24).

([12]) Article 2.1.2 point 1 of the Supplementary Agreement provides the following: "In afwijking van het bepaalde in een of meer van de in de considerans genoemde overeenkomsten (i) wordt de koopsom van het Verkochte, welke koper bij levering verschuldigd is aan Verkoper, onder de in deze overeenkomst opgenomen voorwaarden nader bepaald op EUR 4 000 000,- (zegge: vier miljoen euro) exclusief btw kosten Koper Vermeerderd met 5 % rente vanaf 1 januari 2010. (ii) zijn de oorspronkelijk overeengekomen grex en kwaliteitsbijdragen niet verschuldigd, (iii) wordt de grond bouwrijp geleverd. De koopsom is gebaseerd op prijspeil 1 januari 2010 en is niet verrekenbaar."

([13]) This new agreement refers to 208 parking spaces i.e. less than the 225 initially foreseen.

([14]) This corresponds to the earlier agreed EUR 4,6 million (value on 1 January 2003) indexed by 2,5 % up to 1 January 2010.

3. THE OPENING DECISION

(36) By way of the opening decision, the Commission initiated the formal investigation procedure laid down in Article 108(2) TFEU in respect of the retroactive price decrease of the land and the waiver of the ground exploitation and quality fees by the PPP in favour of SJB (hereafter: the "contested measures") on the grounds that these measures could entail State aid within the meaning of Article 107(1) TFEU and the Commission had doubts as to their compatibility with the internal market.

(37) In particular, the Commission considered it unlikely that a hypothetical private vendor in a situation similar to that of the Municipality would have agreed to the same price reduction and waiver of fees as required by the market economy investor test (hereinafter: "MEIT"). By retroactively decreasing the sales price of the land it sold to SJB, the PPP and, therefore, the Municipality decided to carry the risk of a declining housing market. This behaviour is contrary to the Dutch authorities' own assertion that the construction phase of the project was to be entirely at the risk and the expense of the private project developers, including SJB. Since the PPP, as the seller of the land, had no financial involvement in this phase of the project, there was no reason to believe that a hypothetical private seller in a similar situation as the Municipality would agree to retroactively lower an agreed sales price for a plot of land because the intended buyer had problems selling housing units it planned to build on that land. Nor did the waivers granted for the ground exploitation and quality fees seem to conform with the MEIT, as it was unlikely that a private investor would retroactively waive an agreed contribution to its costs without any consideration in return.

(38) Finally, the Commission expressed its doubts as to whether the contested measures could fall within the scope of any of the exceptions laid down in Article 107 TFEU.

4. COMMENTS FROM THE NETHERLANDS

(39) By letter dated 18 April 2012, the Dutch authorities submitted their comments to the Commission's opening decision.

4.1. Comments regarding the facts

(40) The Dutch authorities specified that, contrary to what was suggested by the wording of Article 2.1.2 of the Supplementary Agreement, the Municipality had not waived the full amounts of the initially agreed ground exploitation fee and quality fee under the 2004 Co-operation Agreement, but rather only those fees that were due by SJB for the housing units to be built on the Damplein. According to the Dutch authorities, those fees amounted together to EUR 551 544 (value on

1 January 2003, which would represent a total value of EUR 719 400 on 1 January 2010). To substantiate its position, the Dutch authorities referred to a proposal concerning the price decrease sent by the Municipality to its Council on 18 February 2009 and to a building programme annexed to the 2004 Co-operation Agreement which allocates a ground exploitation and quality fee of EUR 551 554 to the Damplein.

(41) Furthermore, the Dutch authorities informed the Commission that price decreases with regard to SJB were discussed within the PPP already in 2006 and 2008. In 2006, the PPP apparently decided to lower the land sales price for the commercial premises due to the fact that less commercial space could be constructed than initially foreseen, whereas in 2008 the PPP apparently decided to grant SJB compensation for the delay in the delivery of the building permit. These decreases would be granted under the condition that SJB would receive a valid building permit by 1 October 2008. As this was not the case, the parties decided to re-negotiate the decrease again. According to the Dutch authorities, the decrease in price for the land on the Damplein as well as the waived fees should be calculated as set out in Table 1 below.

Table 1

Calculation of the decrease in price and waived fees proposed by the Dutch authorities

Decrease Damplein	value 1.1.2010
Value land	8 622 480
Ground exploitation fee and quality fee	719 400
Total land and fees	9 341 880
Decreases agreed in 2006 and 2008	– 1 734 245
Reduced value	7 607 635
Value supplementary agreement March 2010	– 4 000 000
Total decrease	**3 607 635**

4.2. **Comments regarding the existence of State aid**

(42) The Dutch authorities disagree that the contested measures qualify as State aid within the meaning of Article 107(1) TFEU. In essence, the Dutch authorities hold the view that the contested measures did not confer an advantage on SJB that it would not have obtained under normal market conditions.

(43) Instead, the Dutch authorities are of the opinion that the Municipality acted in accordance with the MEIT, as the non-realisation of the Damplein Project would have had an effect on the entire Leidschendam Centrum Project and would have caused direct and indirect damages to the Municipality.

(44) First, to calculate the direct damages, the Municipality assumed that it would have taken SJB at least two years to sell 70 % of the housing units during the crisis period and start the construction works in the absence of the Supplementary Agreement. The Municipality budgeted the direct damage of a further two-year delay at EUR 2,85 million for the PPP of which 50 % would be for the expense of the Municipality. Furthermore, it estimated an extra direct cost of EUR 50 000 for the Municipality alone to maintain the deteriorated area (see Table 2).

Table 2

Direct damages calculated by the Dutch authorities

Direct damages during 2 years	PPP	municipality (50 %)
Interest cost over a credit facility (5 % during 2 years outstanding amount on 01.01.2009 EUR 17 million)	1 800 000	900 000
Temporary provision of fences, road signs and maintenance	60 000	30 000
Provisions cost increase (indexation of 2.5 %)	385 000	192 500
Extra planning costs i.e. costs related to the project office such as financial administration, insurance, etc.	600 000	300 000
Maintenance deteriorated area		50 000
Total	**2 845 000**	**1 472 500**

(45) In addition, the Dutch authorities claim that the Municipality would have suffered indirect damage from such a delay consisting in the further deterioration of the public space, loss of confidence in the area by its inhabitants and future purchasers of real estate, costs for the re-destination of shops, damage claims from enterprises, maintenance costs, and changes of plans for the other sub-projects. Such delay could also mean the end of shopping facilities in the development area whose presence contributes to the habitability of the entire area. Already before the start of the project, around 23 % of the shops were vacant and, by 2010, 27 % were out of business. Without the necessary revitalisation, the entire area would further deteriorate.

(46) The Dutch authorities are therefore of the opinion that the Municipality acted as a market economy private investor would, by taking into account the financial forecasts and trying to limit, in its own interest, the direct and indirect damages resulting from a further delay of the project. At the same time, it obtained a guarantee that construction works on the Damplein would be undertaken.

(47) Second, the Dutch authorities submitted that the Municipality had acted as a private investor would by granting the contested measures in return for a commitment from SJB that it would waive its right to invoke the 70 % clause. The fact that SJB could no longer invoke the 70 % clause had an implication on the assumptions made in the initial valuation of the land in 2003 and the price agreed in the 2004 Co-operation Agreement. According to the Dutch authorities, the decrease in the sales price for the land and the waiver of the fees was the consideration which the Municipality had to pay so that SJB would agree to waive its right to invoke the 70 % clause. Without the Supplementary Agreement, SJB would not have started construction on the Damplein.

4.3. **Comments regarding the compatibility of the State aid**

(48) Should the Commission concludes that the contested measures qualify as State aid, the Dutch authorities contend that this aid would be compatible with the internal market, in accordance with Article 107(3)(c) TFEU.

4.3.1. *General interest*

(49) The Dutch authorities claim that the Municipality had a public interest in the realisation of this project. As a large part of the land on the Damplein lay fallow and the area was deteriorating, the Municipality considered starting the constructions works on the Damplein as crucial not only for the development of the Damplein, but for the entire Leidschendam city centre. In particular, delaying the construction of the underground parking garage could jeopardise the realisation of the other sub-projects.

4.3.2. *Objective of common interest*

(50) According to the Dutch authorities, the revitalisation of Leidschendam city centre contributes to the objective of economic and social cohesion, as laid down in Articles 3 and 174 TFEU. The revitalisation of the city centre makes efficient use of the scarce space available for new housing units, commercial facilities and underground parking in Leidschendam, while the amelioration of the public infrastructure contributes to the cohesion of the entire city centre.

4.3.3. *Appropriateness of the Supplementary Agreement*

(51) The Dutch authorities contend that SJB could not be forced to start construction works on the Damplein due to the 70 % clause in the 2004 Co-operation Agreement. By the time SJB received a valid building permit, the credit crisis had had its effect on the Dutch real estate market, which made it even more unlikely that SJB would swiftly pre-sell 70 % of the free sector housing units. The 2004 Co-operation Agreement was therefore re-negotiated, since the Municipality considered it of the utmost importance to start the construction works on the Damplein. The Supplementary Agreement was therefore appropriate and necessary for the Municipality to achieve its goal of revitalising the Damplein.

4.3.4. *Proportionality*

(52) In order for the Municipality to obtain an immediate start of the construction works, SJB had to give up it right to invoke the 70 % clause and had to start the construction works with the risk that the housing units might not be sold. Therefore, the previously agreed price was recalculated by SJB. Subsequently, this calculation was verified by an independent expert who declared the agreed price as market-conform.

(53) According to the Dutch authorities, the fact that the price is declared market-conform by an independent expert indicates that the price decrease is proportionate. This would also imply that no overcompensation of SJB has taken place. The decrease in the price was the consideration which the Municipality had to pay so that SJB would agree to waive its right to invoke the 70 % clause. Without the Supplementary Agreement, SJB would not have started construction on the Damplein.

(54) Furthermore, through its participation in the PPP, SJB will itself bear 50 % of the risks and the costs of the ground exploitation, thereby participating in the agreed decrease of the sales price. In order to arrive at break-even for the ground exploitation, it was decided that SJB should contribute EUR 2,6 million to the PPP (point 5.2.1 Ground Exploitation Masterplan Damcentrum) and, as the PPP bore 50 % of the costs of the school, 25 % of those costs is at the expense of SJB (EUR 0,7 million).

4.3.5. *Distortion of competition*

(55) Finally, he Dutch authorities claim that the retroactive price decrease concerns the building of 67 housing units and 14 commercial premises which will be sold at market-conform prices valued by an independent expert. Therefore, the distortion of competition would be of a very local nature and would not outweigh the positive effects of the completion of the project.

5. **COMMENTS FROM THIRD PARTIES**

(56) Only the Stichting provided comments in response to the opening decision. The Stichting welcomes the opening decision, but is of the opinion that the contested measures described in this decision are part of a much wider aid operation and refers to its complaint and additional submissions. In particular, the Stichting refers to the alleged free transfer of land by the Municipality to the PPP.

(57) The Stichting is of the opinion that the delay in the project was not due to the national court proceedings initiated by them, nor that the financial crisis delayed the sales of the housing units on the Damplein. According to the Stichting, there has been no market demand for the kind of housing units proposed for the Damplein ever since the beginning of the project in 2004.

(58) According to the Stichting, the land was not valued by an independent expert, neither in 2003, nor in 2009.

6. COMMENTS FROM THE DUTCH AUTHORITIES ON THIRD PARTY COMMENTS

(59) The Dutch authorities stated that the set-up of the project by the Municipality has been transparent and described in the "Concept Masterplan Damcentrum", approved on 6 April 2004. Only financially sensitive agreements or parts thereof were kept confidential.

(60) Concerning the free transfer of land by the Municipality to the PPP, the Municipality explained that this is not part of the opening decision and referred to its submissions to the Commission in 2009, in which it explained that that transfer was not free of charge since the PPP provided services in return for it. In its earlier submissions, the Municipality stressed that the works carried out by the PPP should normally have been borne by the Municipality.

(61) According to the Dutch authorities, both the different legal procedures initiated by the Stichting, which generated a lot of negative publicity for the project, and the credit crisis had a negative effect on the sales of housing units on the Damplein. However, when initial sales started in 2007, almost a third of the housing units were sold. These sales agreements were later cancelled due to the late delivery of the necessary building permits. It can therefore be concluded that there was a demand for these units at the beginning of the project.

(62) The Dutch authorities further note that the independent experts were selected by the Municipality, which had no interest in obtaining a low value for the land.

7. ASSESSMENT OF THE CONTESTED MEASURES

7.1. The existence of State aid under Article 107(1) TFEU

(63) Article 107(1) TFEU provides that: *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"*.

(64) First, it has not been challenged that SJB as well as Schouten de Jong and Bouwfonds, the members of this partnership, qualify as undertakings for the purpose of this provisions, since they pursue economic activities offering goods and services on the market, as indicated in the opening decision.

(65) Second, the contested measures were granted by the PPP, which means with the necessary agreement of the Municipality, which holds a 50 % stake in the PPP. Since the decision-making of the PPP is by unanimity and these measures could not have been agreed to without the express approval of the Municipality's Council, the decision to grant the contested measures by the PPP are imputable to the State. Furthermore, had the Municipality not agreed to grant the contested measures, the extent of its financial exposure resulting from the PPP would have been proportionally lower. Therefore, the price decrease and waived fees agreed to by the PPP imply a loss of State resources.

(66) Third, since the measures benefit only SJB and, ultimately, Schouten de Jong and Bouwfonds, the members of this partnership, they must be considered as selective in nature.

(67) However, the Dutch authorities have challenged the contention that the Municipality, by agreeing to a reduction in the initially agreed sales price for the land sold to SJB and a waiver of fees, conferred an economic advantage on SJB which it would not have otherwise obtained under normal market conditions. It also challenges the contention that the contested measures distort competition and affect intra-Union trade.

(68) For the reasons set out in recitals 69 to 89 below, the Commission disagrees with the Dutch authorities on these points.

7.1.1. *The existence of an advantage*

(69) According to settled case law ([15]), the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity may constitute State aid, in particular where it is not made at market value, that is to say, where it is not sold at the price which a private investor, operating in normal competitive conditions, would be likely to have fixed.

(70) The Commission notes, in this regard, that land sale transactions should, in principle, be assessed under the Commission Communication on State aid elements in sales of land and buildings by public authorities ([16]) (hereinafter: "the Land Sale Communication"), which provides a set of guidelines for Member States to ensure that the sale of land and buildings by public authorities is free of State aid. The Land Sale Communication provides two methods to exclude the presence of aid from such transactions: first, a sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid; and, second, an *ex-ante* valuation report prepared by an independent expert. These methods seek to ensure that the price at

([15]) Case C-239/09 *Seydaland Vereinigte Agrarbetriebe* [2010] ECR I-13083, paragraph 34 and Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraph 68; Case T-244/08 *Konsum Nord ekonomisk förening v Commission* [2011] ECR II-0000, paragraph 61.

([16]) OJ C 209, 10.7.1997, p. 3.

which land is sold by a public authority adequately reflects, as much as possible, the market value of that land, thus conforming to the MEIT, so as to rule out that that sale confers an economic advantage on the purchaser of the land. It cannot be excluded, however, that other valuation methods may also be applied in such instances so long as it is assured that the price actually paid by the purchaser on the basis of those methods reflects, in so far as possible, the market value of that land ([17]).

(71) In the present case, no unconditional bidding procedure was organised. While an expert valuation was made in March 2003 to establish the sales prices laid down in the 2004 Co-operation Agreement, the price agreed with SJB for the purchase of the land on the Damplein was subsequently decreased and the fees earlier agreed were waived in 2010 as a result of the Supplementary Agreement.

(72) As regards the expert valuation of February 2009 referred to in recital (30) above, the Commission considers the residual value method used in that *ex post* assessment inappropriate to calculate the market value of the land sold to SJB, since the expected decrease in revenues from the sale of the housing units would be entirely absorbed by the price of the land. To calculate the value of land, the residual value method starts from the sales price of the housing units. From this price, the construction costs and a profit and risk provision are deducted. What is left is the residual value of the land. It is clear that in a declining housing market such as that *in casu* the residual value method shifts the deceasing value of real estate entirely to the value of the land. In theory, this could even result in a negative value for the land.

(73) Finally, the Dutch authorities claim that the Municipality, by agreeing to the contested measures, acted in accordance with the MEIT; that is, that a hypothetical private vendor in the same situation as the Municipality would have agreed to the same price reduction and fee waivers, so as to preclude the existence of an advantage as a result of the contested measures. First, according to the Dutch authorities, the Municipality had an important financial and social interest in starting the construction works on the Damplein as soon as possible, since further delays would lead to direct and indirect damages for the Municipality and these damages would be higher than the costs for the Municipality to agree to the contested measures. Second, the Dutch authorities contend that the Municipality behaved as a private investor by accepting a commitment from SJB to waive its right to invoke the 70 % clause of the 2004 Co-operation Agreement in return for the contested measures.

(74) The Commission does not accept this reasoning. As a preliminary matter, the Commission recalls that the Municipality was only involved in the ground exploitation phase of the real estate project, while the construction phase of the project was at the risk and the expense of the private developers concerned, including SJB (see recitals 13 and 16 above). It is unlikely that a private investor, operating in normal competitive conditions, would have decided to take on the risk of a declining housing market from SJB, which it was previously not exposed to, by agreeing to a reduction in the initially agreed sales price for that land and a waiver of fees, without a clear financial compensation that would outweigh the losses stemming from that decision. As explained in recitals 75 to 86 below, neither the fact that the Municipality would suffer damages as a result of further delays, nor the fact that SJB decided to waive its right to invoke the 70 % clause, leads the Commission to a different conclusion in its application of the MEIT to the Municipality's actions.

Alleged damages

(75) As regards the direct damages the Municipality would allegedly suffer from further delays to the Damplein Project, the Commission notes that the costs estimated by the Dutch authorities in Table 2 above all relate to the ground exploitation phase of the entire Leidschendam Centrum Project. Assuming it would take at least another two years for SJB to start construction, the Dutch authorities estimated the reduced revenues for the PPP from the sale of the land to SJB, as well as assumed similar delays for the rest of the Leidschendam Centrum Project, to result in interest costs of approximately EUR 1,8 million on an outstanding loan of the PPP for the ground exploitation phase of the entire Leidschendam Centrum Project. A two year delay would also lead to extra planning and other costs of approximately EUR 1 million for the entire Leidschendam Centrum Project.

(76) However, as the Dutch authorities themselves acknowledge, it is the contested measures which contributed to the loss resulting from the ground exploitation phase of the project, since the PPP received a lower price for the land from SJB than that originally agreed under the 2004 Co-operation Agreement and waived certain fees ([18]). A private investor, operating under normal market conditions and seeking to maximise its return on the sale of its land, would not have likely agreed to the contested measures which contributed to a loss on the ground exploitation phase of the project, for which the private investor himself would be liable for 50 %. Rather, a private investor with only a financial participation in the ground exploitation phase of the project would have made sure the ground exploitation works were carried out promptly so that the land could be delivered to the project developers and would have requested the private developers to pay the sales price of the land and the fees as foreseen in the freely negotiated contracts.

([17]) Case C-239/09, *Seydaland Vereinigte Agrarbetriebe & Co. KG v BVVG Bodenverwertungs- und -verwaltungs GmbH*, ECR [2010] p. I-13083, point 39.

([18]) In its reply to the opening decision, the Municipality calculated a loss on the ground exploitation project of EUR 4,5 million (value on 1 January 2011), which was said to be caused, among others, by the price decrease and the waiver of the fees.

(77) In any event, even if the alleged direct costs referred to by the Dutch authorities could be taken into account to support the Municipality's decision to grant the contested measure, which the Commission contests, its calculations of these costs are nevertheless flawed. First, the interest costs are calculated in relation to a credit facility granted to the PPP covering the entire Leidschendam Centrum Project and not just the Damplein Project, which is but one of eight sub-projects. Similarly, the extra planning costs are calculated for the entire Leidschendam Centrum Project. It can therefore not be assumed that in the case that the Damplein Project would have been realised, all the other sub-projects would also have been realised, and thus that none of these interest costs would have been incurred.

(78) Second, the 5 % interest rate is not an actual interest rate, but a rate used for internal calculations. The actual interest to be paid on the credit facility agreed for the Leidschendam Centrum Project is considerably lower than this rate ([19]) so that the interest costs suffered by the Municipality through the PPP would have been lower than those alleged by the Dutch authorities.

(79) Third, the outstanding credit facility, and therefore the interest costs, would have been much lower in the case that payment would have been made on the date and for the amount as foreseen in the 2004 Co-operation Agreement.

(80) Fourth, it is clear that, even in the calculations submitted by the Dutch authorities, the financial consequences of granting the contested measures for the PPP, estimated at approximately EUR 3,6 million, outweigh the alleged direct costs of further delaying construction of the real estate on the Damplein by SJB, estimated by the Dutch authorities at approximately EUR 2,8 million.

(81) Finally, as regards the alleged indirect costs of delaying the project by a further two years, the Dutch authorities have not quantified these damages so that it is impossible for the Commission to verify them.

The 70 % clause

(82) As regards SJB's commitment to waive its right to invoke the 70 % clause, the Commission notes at the outset that this clause, which also applied to the other private developers involved in the Leidschendam Centrum Project, is not uncommon in the Netherlands. By agreeing to this clause, the Municipality accepted that the start of the actual construction of the free sector housing units would be determined by the success of the private project developers, including SJB, in pre-selling the housing units. This follows from the fact that the Municipality was only involved in the ground exploitation phase of the project, whereas the construction phase was carried out at the risk and the expense of the private developers. If the Municipality had indeed had an interest in a prompt start of the construction works, it was free, when negotiating the sale agreements with private developers in 2004, either not to agree to the 70 % clause in the contract or to incorporate penalties in case the construction phase would not be started and/or finished at a defined date.

(83) It should also be noted that the 70 % clause in the 2004 Co-operation Agreement was limited to the free sector housing units and did not include the construction of the commercial premises or the underground parking garage, whereas SJB refused to start any construction on the Damplein. In those circumstances, it is quite likely that a private investor, operating in normal competitive conditions and having an interest in the completion of the entire real estate project, would have requested SJB to fulfil its contractual obligations as regards the construction of the commercial premises and the underground parking garage. Even if the claim of SJB that these works could not be started because the different components of the real estate project would be technically linked was correct, this risk would be for SJB to bear, since it was solely responsible for the construction phase of the project. There is therefore no reason to believe that a private investor, operating in normal competitive conditions, would take over this risk from SJB.

(84) In this regard, it should further be recalled that, as regards the construction of the public part of the underground parking garage, the PPP had already decided to grant these works to SJB in 2004 for the lump sum of maximum EUR 4,6 million (value on 1 January 2003), without organising a public tender. There were therefore no financial reasons for SJB to refuse to start construction works on the parking garage and therefore no reasons for a private investor, operating in normal competitive conditions, to accept any further delays by making the construction of the parking garage dependent on the sale of the free sector housing units by SJB.

(85) It is therefore unlikely that a private investor, operating in normal competitive conditions, would have agreed to the contested measures in the manner the Municipality did without having first explored other commercially more attractive options, such as annulling the 2004 Co-operation Agreement, and claiming damages for the delay from SJB and putting out a call for tender. The Dutch authorities have provided no evidence that the PPP made any such assessment of its options.

([19]) According to the 2008 annual report of the PPP, the interest rate to be paid on the credit facility is the Euro OverNight Index Average (EONIA) plus 0,14 %. On the first day of 2009, the EONIA rate stood at 2,2 % and dropped steadily over the year; on the first day of 2010, the EONIA rate stood at 0,3 % and never exceeded 1 % during 2010. Therefore, the actual interest rate to be paid over the outstanding credit facility was well below 5 % during 2009 and 2010.

(86) It can therefore be concluded that the contested measures confer an advantage on SJB and that they are not in line with the MEIT, as the Dutch authorities have not established that a hypothetical private seller, operating under normal market conditions, would have agreed to these measures.

7.1.2. *Distortion of competition and effect on intra-Union trade*

(87) As the contested measures free SJB of costs it would otherwise have borne under the 2004 Co-operation Agreement, these measures reinforce its competitive position vis-à-vis that of other real estate developers operating on a market open to competition and trade at Union level and, by this very fact, are capable of distorting competition and affecting intra-Union trade. Indeed, any grant of aid to an undertaking pursuing its activities in the internal market is liable to cause distortions of competition and affect trade between Member States ([20]).

(88) As regards the alleged limited scope or local nature of the project, the fact that subsidies are granted to an undertaking which provides only local or regional services and does not provide any services outside its Member State of origin does not in itself prevent those subsidies from having an effect on trade between Member States ([21]). The Commission recalls in that regard that since there is cross-border trade within the Union in both the construction sector and in property development, and since real estate developers from other Member States or their subsidiaries could have taken part in the Leidschendam Centrum Project while SJB, which as a result of the contested measure is freed from a financial burden, can operate in Member States outside the Netherlands, the contested measures should be considered as capable of affecting intra-Union trade. Finally, the Commission notes that Bouwfonds, one of the companies in the SJB partnership, does indeed operate outside the Netherlands, in particular in France and Germany. Bouwfonds is the largest real estate developer in the Netherlands and among the top three largest players on the European real estate market. By favouring SJB, the contested measures also benefit Bouwfonds and are therefore liable to reinforce its position on the European real estate market.

(89) Since the contested measures meet all the criteria of Article 107(1) TFEU, the Commission concludes that these measures constitute State aid within the meaning of that provision. Moreover, since this aid was granted to the beneficiaries without the prior notification to and authorisation from the Commission as required by Article 108(3) TFEU, the contested measures constitute unlawful aid.

7.2. **Compatibility Assessment**

(90) Having established that the contested measures constitute State aid within the meaning of Article 107(1) TFEU, it is necessary to examine the Dutch authorities' claim that these measures are compatible with the internal market on the basis of Article 107(3)(c) TFEU.

(91) Article 107(3)(c) TFEU provides that aid may be considered compatible with the internal market where it facilitates the development of certain economic activities or of certain economic areas, so long as it does not adversely affect trading conditions to an extent contrary to the common interest.

(92) When examining whether aid is compatible under Article 107(3)(c) TFEU, the Commission thus takes into account whether the aid is aimed at a well-defined objective of common interest, as well as whether it is appropriate and proportionate to achieve that objective, and whether it causes undue distortions of competition.

7.2.1. *Objective of common interest*

(93) According to the Dutch authorities, the revitalisation of Leidschendam city centre contributes to economic and social cohesion, as laid down in Articles 3 and 174 TFEU, and without the contested measures SJB would not have started the construction works on the Damplein and the entire Leidschendam Centrum Project would have been jeopardised.

(94) The Commission, however, is not convinced by this line of reasoning. On the one hand, the Dutch authorities have not established that the Damplein is a deprived urban area which suffers from market failure and that the market alone would not have decided to undertake the envisaged reconstruction of the Damplein. On the contrary, when the project was launched, several private developers, including SJB, were apparently willing to participate in the construction phase of the project at their own commercial risk and expense, as laid down in the 2004 Co-operation Agreement.

(95) On the other hand, by concluding the 70 % clause in the 2004 Co-operation Agreement, the Municipality subordinated its interest in achieving the alleged objective of revitalising Leidschendam city centre to the commercial interest of SJB in case it would not be able to pre-sell 70 % of the planned housing units in advance of construction. The Municipality is therefore no longer in a position to argue that the contested measures, agreed to in 2010 on the condition that SJB committed to waive its right to invoke this clause, sought to attain a common interest objective.

([20]) Case 730/79 *Philip Morris v Commission* [1980] ECR-2671, paragraphs 11 and 12; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 47-48; Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717, paragraphs 48-50, Joined Cases T-92/10 and T-103/00 *Diputación Foral de Álava/Commission* [2002] ECR II-1385, paragraph 72 Case T-222/04 *Italy v Commission* [2009] ECR II- 1877, paragraph 43.

([21]) Case C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg and Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, paragraphs 77-78.

7.2.2. *Appropriateness of the aid*

(96) Even if it could be accepted that the contested measures sought to achieve the revitalisation of Leidschendam city centre, the Dutch authorities have not shown that those measures were an appropriate means to achieve that objective.

(97) Indeed, it appears from the information provided that the other private developers involved in the Leidschendam Centrum Project also asked the PPP to decrease the initial sales price agreed for the land because of the difficulties they faced on the declining real estate market, but that the Municipality, rather than agreeing to such a decrease or a waiver of fees, considered amendments in the initial planning and development provisions to adapt to the changed demand on the market.

(98) This demonstrates that other, more appropriate measures, which are better suited and less distortive of competition, were available to the Municipality to achieve the intended objective of revitalising Leidschendam city centre in light of the changed economic circumstances.

7.2.3. *Proportionality of the aid*

(99) The Dutch authorities consider the contested measures proportionate to the intended objective of revitalising Leidschendam city centre since, in return for a price decrease and waiver of the fees, SJB agreed to waive its right to rely on the 70 % clause. Furthermore, the Dutch authorities consider the contested measures proportionate since SJB contributed financially to the ground exploitation phase. In particular, SJB paid a financial contribution of around EUR 2,6 million to the PPP and bore, via the PPP, 25 % of the costs for the school to be built in another sub area of the Leidschendam Centrum Project.

(100) The Commission cannot follow this reasoning. Article 107(3)(c) requires that the aid measures must be proportionate to the intended objectives, not that there must be adequate trade-off between the aid that is granted and any concessions made by the beneficiaries to acquire that aid. Thus, the fact that SJB agreed to waive its right to rely on the 70 % clause in return for the price decrease and the fee waivers is of no relevance for the assessment into the proportionality of the contested measures. The same goes for any financial contributions SJB might have made to the ground exploitation phase.

(101) The Dutch authorities have therefore failed to demonstrate that the contested measures were proportionate to the intended objective of common interest.

7.2.4. *Undue distortions of competition*

(102) Finally, the Dutch authorities contest that the contested measures unduly distorts competition, arguing that the positive effects of promptly completing the project outweigh the negative effects of the contested measures.

(103) The Dutch authorities have, however, not substantiated this argument. On the contrary, as stated in recital 80 above, according to the Dutch authorities, a further delay in the contested real estate project would result in a cost of EUR 2,8 million for the PPP, while the agreed price decreases would amount to EUR 3,6 million. The Commission therefore concludes that the Dutch authorities have not demonstrated that the positive effects of completing the contested real estate project outweigh the negative effects of granting the contested measures.

7.2.5. *Conclusion*

(104) Based on the considerations set out in recitals 93 to 103 above, the Commission concludes that the aid granted by the Municipality in favour of SJB by way of the contested measures is not compatible with the internal market on the basis of Article 107(3)(c) TFEU.

8. QUANTIFICATION AND RECOVERY OF THE AID

(105) As explained in the section above, the contested measures constitute State aid within the meaning of Article 107(1) TFEU and cannot be considered compatible with the internal market. Moreover, since this aid was granted to the beneficiaries without the prior notification to and authorisation from the Commission as required by Article 108(3) TFEU, the contested measures constitute unlawful aid.

(106) Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [22] provides that: *"where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary"*.

(107) While there is no provision of Union law that requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered [23], it may include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty.

[22] OJ L 83, 27.3.1999, p. 1.

[23] See, in particular, Case C-480/98 *Spain v Commission* [2000] ECR I-8717, paragraph 25, and Case C-441/06 *Commission v France* [2007] ECR I-8887, paragraph 29

8.1. **Quantification of the aid**

(108) As a result of the contested measures, SJB paid a lower price for the land on the Damplein than it had initially agreed under the 2004 Co-operation Agreement and was no longer required to pay the ground exploitation and quality fees it had also agreed to. Thus, to quantify the amount of illegal aid received by SJB, it is necessary to determine the amount of the price decrease and the value of the fees waived.

8.1.1. *Quantification of the price decrease*

(109) As explained in recital 23 above, the price of the land on the Damplein sold to SJB by the PPP was set at EUR 7,2 million, indexed annually at 2,5 % until payment, by the 2004 Co-operation Agreement. This price was determined by an independent expert valuator. According to the Dutch authorities, the market value of this same plot of land on 1 January 2010 was EUR 8,6 million ([24]). The price which SJB had to pay for this land was subsequently reduced by the PPP by way of the Supplementary Agreement to EUR 4 million.

(110) The advantage accruing to SJB as a result of the reduction in sales price for the land on the Damplein therefore corresponds to approximately EUR 4,6 million.

(111) The claim of the Dutch authorities that the decrease of the sales price was less than EUR 4,6 million because the PPP had already decreased the initially agreed sales price of EUR 7,2 million in 2006 and in 2008 (see Table 1 above) cannot be accepted, as no evidence has been provided that these reductions were formalised by way of an agreement or that they led to an amendment of the initial sales price in the 2004 Co-operation Agreement.

(112) The Commission further notes that the alleged 2006 reduction would run counter to the 2004 Co-operation Agreement, which clearly lays down minimum land prices and only foresees in an additional payment where more floor space could be achieved.

(113) Finally, the Commission notes that both the alleged reduction in 2006, which was said to be due to the fact that less commercial space could be realised than initially foreseen, and the alleged reduction in 2008, which apparently related to delays in the construction permit for SJB, were granted under the condition that SJB would receive a building permit by 1 October 2008. This condition was apparently not fulfilled since, according to the Dutch authorities, SJB received the building permit only in November 2008.

([24]) Letter of the Dutch authorities of 12 April 2010.

(114) The Commission therefore concludes that the amount of the aid granted to SJB by the PPP as a result of the decrease in the sales price originally agreed in the 2004 Co-operation Agreement amounts to approximately EUR 4,6 million (see amount in Table 3 below).

8.1.2. *Waiver of the fees*

(115) As explained in recital (25) above, the fees SJB was required to pay under the terms of the 2004 Co-operation Agreement amounted to approximately EUR 2 million in total (value on 1 January 2003), indexed yearly by 2,5 % until payment. However, these fees were based on the number of housing units planned for construction ([25]) and the 2004 Co-operation Agreement stipulates that if fewer units are built than planned, these amounts would be adjusted accordingly.

(116) Under the terms of the 2004 Co-Operation Agreement, SJB was required to build 74 housing units on the Damplein. However, according to the final agreement, only 67 housing units were in fact constructed. The fees should therefore be accordingly reduced, which leads to an amount of approximately EUR 1,9 million (value on 1 January 2003) ([26]). On 1 January 2010, these fees represented a value of approximately EUR 2,3 million.

(117) As a result of the Supplementary Agreement, the fees as agreed under the 2004 Co-operation Agreement were no longer due as regards SJB. Thus, the amount of aid granted to SJB as a result of the waiver by the PPP of these fees amounts to approximately EUR 2,3 million (see Table 3 below).

(118) The Dutch authorities contend that, in spite of the wording of the Supplementary Agreement, the PPP had only waived the fees related to the Damplein Project, representing a total amount of approximately EUR 0,6 million (value on 1 January 2003). To substantiate their position, the Dutch authorities refer to the building programme annexed to the 2004 Co-operation Agreement which allocates a ground exploitation fee and a quality fee of approximately EUR 0,6 million (value on 1 January 2003) to the Damplein and mentions a total ground exploitation fee and quality fee of approximately EUR 2 million (value on 1 January 2003) to be paid by SJB for the entire Leidschendam Centrum Project. Reference was also made to a proposal from the Municipality sent to its Council on 18 February 2009, which mentioned that the lowering of the fees would have a negative effect, at that moment in time, of approximately EUR 0,7 million on the result of the ground exploitation project.

([25]) Ground exploitation fee: EUR 4 587 per housing unit; quality fee EUR 3 645 per housing unit.

([26]) Reduction ground exploitation fee (74 – 67) × 4 587 = EUR 32 109. Reduction quality fee (74 – 67) × 3 645 = EUR 25 515.

(119) The Commission does not consider it possible, however, to conclude on the basis of the building programme or on the basis of the proposal sent to the Council that the waiver of the fees related exclusively to the Damplein Project. In any event the wording of the Supplementary Agreement does not limit the waiver of the fees to the Damplein Project. The Dutch authorities have also not been able to provide any evidence that SJB actually paid all fees due for all housing units of the Leidschendam Centrum Project on 1 July 2004, as it was obliged to do under Article 10.3 of the 2004 Co-operation Agreement.

8.1.3. *Total State aid amount*

(120) On the basis of the calculation set out in Table 3 below, the amount of State aid granted to SJB amounts to approximately EUR 6,9 million.

Table 3

	Co-operation agreement 2004		Supplementary agreement March 2010	Decrease
	Value 1.1.2003	value 1.1.2010	value 1.1.2010	value 1.1.2010
Land price	7 253 793	8 622 480	4 000 000	4 622 480
Ground exploitation fee	1 077 941	1 281 333	0	1 281 333
Quality fee	856 667	1 018 308	0	1 018 308
Total	**9 188 401**	**10 922 121**	**4 000 000**	**6 922 121**

8.2. **Recovery of the aid**

(121) Given that the contested measures constitute unlawful and incompatible aid, that aid must be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid. Recovery shall thus be ordered from the partnership SJB, set up by Schouten de Jong and Bouwfonds, as well as from these two companies, which are each jointly and severally liable for the fulfilment of SJB's obligations under the PPP agreement ([27]).

(122) As explained in Table 3 above, the incompatible aid element of the measures should be calculated as EUR 6 922 121, consisting of the retroactive decrease of the sales price of the land (EUR 4 622 480), and the waiver of the ground exploitation fee (EUR 1 281 333) and the quality fee (EUR 1 018 308).

(123) The aid was granted to SJB on 1 March 2010. The aid to be recovered shall bear recovery interest for the period between 1 March 2010 until the date at which it will be effectively repaid.

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 6 922 121, unlawfully granted by the Netherlands on 1 March 2010, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Schouten-de Jong Bouwfonds, a partnership consisting of Schouten & De Jong Projectontwikkeling BV and Bouwfonds Ontwikkeling BV, in the form of a retroactive decrease of the sales price of land and a retroactive decrease of the agreed ground exploitation fee and quality fee agreed by the municipality of Leidschendam-Voorburg, is incompatible with the internal market.

Article 2

1. The Netherlands shall recover the incompatible aid referred to in Article 1 from Schouten-de Jong Bouwfonds and/or Schouten & De Jong Projectontwikkeling BV and/or Bouwfonds Ontwikkeling BV.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of Schouten-de Jong Bouwfonds and/or Schouten & De Jong Projectontwikkeling BV and/or Bouwfonds Ontwikkeling BV, namely 1 March 2010 until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([28]).

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. The Netherlands shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

([27]) Article 4.1 Ground exploitation/PPP agreement of 22 November 2004.

([28]) OJ L 140, 30.4.2004, p. 1.

Article 4

1. Within two months following the date of notification of this Decision, the Netherlands shall submit the following information:

(a) the total amount (principal and recovery interests) to be recovered from the beneficiaries;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. The Netherlands shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries referred to in Article 1.

Article 5

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 23 January 2013.

For the Commission

Joaquín ALMUNIA

Vice-president