DECISIONS

COMMISSION DECISION (EU) 2016/649

of 15 January 2016

on the measure SA.24123 (12/C) (ex 11/NN) implemented by the Netherlands — Alleged sale of land below market price by the Municipality of Leidschendam-Voorburg

(notified under document C(2016) 85)

(Only the Dutch text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to 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 (Municipality of 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 cooperation 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 departments 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 (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* [2]. By way of this opening 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 departments on 12 March 2012 in the presence of the beneficiary of the measure.

[1] OJ C 86, 23.3.2012, p. 12.
[2] See footnote 1.

(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.

(6) On 23 January 2013 the Commission adopted a final decision, concluding that the contested real estate project contained aid within the meaning of Article 107(1) TFEU.

(7) The decision of 23 January 2013 was appealed against by the Netherlands, the Municipality of Leidschendam-Voorburg and the beneficiary Schouten & de Jong Projectontwikkeling BV. In its judgment of 30 June 2015 the General Court annulled the decision ([3]). Consequently, the Commission had to re-examine the measure and take a new decision on the contested real estate project.

2. **DESCRIPTION OF THE MEASURES**

2.1. THE PARTIES INVOLVED

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

(9) Schouten-de Jong Bouwfonds (hereinafter 'SJB') is a partnership 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 ([4]).

(10) 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.

(11) 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.

(12) 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

(13) 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

([3]) Judgment of the Court of 30 June 2015 in Joined Cases T-186/13, T-190/13 and T-193/13, *The Nederlands* (T-186/13), *Municipality Leidschendam-Voorburg* (T-190/13) and *Bouwfonds Ontwikkeling BV en Schouten & De Jong Projectontwikkeling BV* (T-193/13) v *Commission*, ECLI:EU:T:2015:447.

([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 kosten 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 was renamed Leidschendam Centrum Project in 2005. In this Decision 'Leidschendam Centrum Project' is used to describe the real estate project.

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, lighting, 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**

(14) On the basis of the Leidschendam Centrum Project, the Municipality concluded a cooperation agreement with a number of private project developers, including with SJB, on 9 September 2004 (hereinafter: 'the 2004 Cooperation Agreement'). The 2004 Cooperation 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, at their own risk and expense, the envisaged real estate.

(15) According to the 2004 Cooperation Agreement, the construction works would begin once the land had been made ready for construction (see recital 23 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 Cooperation 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.

(16) According to both the 2004 Cooperation 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 metres 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 be built on top of the underground parking garage.

(17) The Municipality, as also explicitly emphasised by the Dutch authorities in their 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 19 below).

2.2.2. **The ground exploitation phase**

(18) 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').

(19) 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

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

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 Cooperation 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 Cooperation Agreement).

(20) 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.

(21) 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).

(22) As follows from recitals 18 to 21 above, the costs of the ground exploitation phase of the project consisted essentially in the costs of the acquisition of the land in so far 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.

(23) 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 to the 2004 Cooperation Agreement. The 2004 Cooperation 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-compliant. 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 Cooperation Agreement).

(24) 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 at 2,5 % until payment.

(25) 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 Cooperation 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.

(26) 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 at 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.

([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.

([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 Cooperation 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.

(27) The 2004 Cooperation Agreement in its Article 6.6 ([12]) provides that, if the building permits are not delivered on schedule, the parties will renegotiate the agreement, including the calculation of the land prices and the data on which these need to be paid, staying as close as possible to the conditions of this agreement and of the bilateral agreements.

(28) Furthermore, Article 16 of the 2004 Cooperation Agreement stipulates that this agreement or the bilateral agreements can only be annulled totally or partly in the specifically listed situations. One of these situations is 'unforeseen circumstances as referred to in Article 6:258 of the Civil Code': if one of the parties is then of the opinion that the other parties cannot require from him an unchanged execution of the agreement, they have to enter into negotiations in order to arrive at mutually agreed modified terms.

(29) Article 18 of the 2004 Cooperation Agreement stipulates that, if disputes arise over this agreement or the bilateral agreements, these will be resolved as much as possible in good and faithful cooperation amongst the parties. If this is not possible the dispute has to be submitted to arbitration in accordance with the rules of the Dutch Arbitration Institute in Rotterdam. The place of arbitration is Den Haag.

2.3. THE RETROACTIVE PRICE DECREASE AND WAIVED FEES

(30) 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, owing to several national court proceedings, the building permits SJB needed to commence construction were delayed and eventually only obtained in November 2008.

(31) 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.

(32) In this context, SJB informed the Municipality that it would not start any of the construction works, relying on the clause in the 2004 Cooperation Agreement that allowed it to postpone construction of the housing units if less than 70 % of these units had been sold.

(33) In this regard SJB referred to the contractual provisions in the 2004 Cooperation agreement, in particular Article 6.6 of the 2004 Cooperation agreement which provides for the possibility of renegotiating the price and the delivery dates if the building permits were not delivered in time. According to SJB, since these permits were only delivered 3 years after the planned date, SJB could not be held to execute the Cooperation agreement unchanged. As a result the parties decided to renegotiate the initial arrangements.

(34) 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 Cooperation Agreement and the damage suffered as a result of the delay of 3 years in delivering the building permits. 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.

(35) On 18 December 2008, the PPP and SJB agreed 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-compliant 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-compliant price for the land on the Damplein in 2010, taking into account the fact that SJB committed

([12]) Article 6.6 of the 2004 Cooperation Agreement of 2004 provides that: 'Indien de vereiste bouwvergunningen als gevolg van niet aan de aanvragende partij toe te rekenen planologische belemmeringen niet binnen de terzake in het ATS voorziene termijn verkregen worden, zullen Partijen dienaangaande — daaronder begrepen aangaande grondprijsberekening en grondprijsbetaaldata — nadere afspraken met elkaar maken die zo dicht mogelijk blijven bij de inhoud van deze SOK, respectievelijk de Bilaterale overeenkomsten.'

to sell the unsold housing units to an investor and had agreed to lower its initially planned 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.

(36) 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, at 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 make the necessary provision for 50 % of the losses. The proposal further mentions that owing to the financial crisis SJB was not able to obtain the necessary financing for the development of the Damplein.

(37) 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 Cooperation Agreement, the SJB Project Agreement and the GREX-agreement. Article 2.1.2, first paragraph, sub (i), of the Supplementary Agreement provides that, contrary to what was agreed to in the 2004 Cooperation agreement, the price of the land on the Damplein to be sold to SJB would be EUR 4 million. Article 2.1.2, first paragraph, sub (ii), 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 ([13]).

(38) 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 had to 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.

(39) Furthermore, on 13 July 2009, the PPP and SJB concluded a new agreement concerning the underground public parking garage ([14]). 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 ([15]); this amount would be fixed until delivery and would not be indexed.

(40) On 15 January 2010, SJB and Wooninvest Projecten BV, a company related to one of the project developers who signed the 2004 Cooperation 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 event 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 provides for 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).

3. **THE OPENING DECISION**

(41) 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.

([13]) Article 2.1.2 point 1 of the Supplementary Agreement provides as follows: '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 € 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.'

([14]) This new agreement refers to 208 parking spaces i.e. fewer than the 225 initially planned.

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

(42) 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.

(43) 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**

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

4.1. COMMENTS REGARDING THE FACTS

(45) 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 Cooperation 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 511 544 (value on 1 January 2003, which would represent a total value of EUR 719 400 on 1 January 2010). To substantiate their 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 Cooperation Agreement which allocates a ground exploitation and quality fee of EUR 511 544 to the Damplein.

(46) 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 owing to the fact that less commercial space could be constructed than initially planned, 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

Decrease Damplein	value 1.1.2010
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

(47) 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.

(48) 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 damage to the Municipality.

(49) First, to calculate the direct damage, the Municipality assumed that it would have taken SJB at least 2 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 2-year delay at EUR 2,85 million for the PPP of which 50 % would be borne by 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 damage 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 1.1.2009 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**

(50) 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.

(51) 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 damage resulting from a further delay in the project. At the same time, it obtained a guarantee that construction works on the Damplein would be undertaken.

(52) 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 Cooperation 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

(53) Should the Commission conclude 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**

(54) 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**

(55) 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**

(56) The Dutch authorities contend that SJB could not be forced to start construction works on the Damplein owing to the 70 % clause in the 2004 Cooperation 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 Cooperation 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**

(57) In order for the Municipality to obtain an immediate start of the construction works, SJB had to give up its 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-compliant.

(58) According to the Dutch authorities, the fact that the price is declared market-compliant 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.

(59) 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**

(60) Finally, the 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-compliant 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

(61) 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.

(62) 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.

(63) 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

(64) 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.

(65) 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.

(66) 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 owing 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.

(67) 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 WITHIN THE MEANING OF ARTICLE 107(1) TFEU

(68) 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'.

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

(70) 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 ([16]).

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

(72) 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.

(73) For the reasons set out in recitals 74 to 83 below, the Commission can agree with the Dutch authorities on this point, given the specific circumstances of the case and the particular context of the contested measures, including in particular the specific legal position of the Municipality on the basis of the 2004 Cooperation agreement and several bilateral agreements with SJB.

7.1.1. **The existence of an advantage**

(74) It is settled case law that economic transactions carried out by a public body or a public undertaking do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ([17]). In order to determine whether an economic transaction is carried out under normal market conditions, the behaviour of public authorities or undertakings should be compared with that of similar private economic operators under normal market conditions to determine whether the economic transactions carried out by such authorities or undertakings grant an advantage to their counterparts. This is known as the 'market economy operator principle' (MEOP).

([16]) As confirmed by the General Court in its judgment of 30 June 2015, see footnote 3, paragraphs 62-72.
([17]) Case C-39/94 *SFEI and Others* EU:C:1996:285,paragraphs 60-61.

(75) Therefore, to determine whether the Municipality, by agreeing to a reduction in the initially agreed sales price for the land sold to SJB and the waiver of fees, conferred an economic advantage on SJB, it needs to be examined whether the Municipality respected the MEOP. That is, whether 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.

(76) In this connection all relevant aspects of the contested measures and their context should be taken into account ([18]), in particular the legal position of the Municipality and SJB in view of the 2004 Cooperation agreement and the different bilateral agreements, as well as the complexity of the project, which was part of a wider real estate project.

(77) The Dutch authorities submit that the Municipality acted in accordance with the MEOP, as the non-realisation of the Damplein Project would have had an effect on the entire Leidschendam Centrum Project and would have caused damage to the Municipality. In this regard the Dutch authorities submitted in essence the following. 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 damage for the Municipality and this damage would be higher than the cost to the Municipality of agreeing to the contested measures. Because of this financial interest the Municipality decided to review the agreements that were made with SJB. 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 Cooperation Agreement in return for the contested measures.

(78) The Commission notes in this regard the following. In the case at hand it is not contested, as stated in recital 30 above, that the construction works on the Damplein, which were initially planned to start in November 2005, were delayed since owing to several national court proceedings the necessary building permits could only be obtained in November 2008. In these circumstances SJB was no longer willing to implement the 2004 Cooperation agreement as initially agreed and, on the basis of contractual provisions, it requested the Municipality to renegotiate the initial arrangements.

(79) Indeed it follows from the contractual provisions of the 2004 Cooperation agreement that the delay in the building permits required the parties to re-negotiate the arrangements agreed in 2004. In particular, Article 6.6 of the Cooperation agreement provides that the parties in case of a delay of the building permit should re-negotiate the initially agreed price for the land and the payment dates. Furthermore, Article 16 of the same agreement stipulated that the agreement can only be annulled totally or partly in the specifically listed situations. One of the situations listed is 'unforeseen circumstance as referred to in Article 6:258 of the Civil Code': if one of the parties is then of the opinion that the other parties cannot require from him an unchanged execution of the agreement, they have to enter into negotiations in order to arrive at mutually agreed modified terms. Finally, Article 18 of the Cooperation agreement stipulates that disputes are to be resolved by mutual agreement or be the subject of arbitration.

(80) It follows from these contractual provisions that it was the intention of the parties to maintain their cooperation and limit a possible annulment of the cooperation to situations where no agreement could be reached or the parties failed to fulfil their obligations in such a way that re-negotiations would no longer be possible. In this light it should also be taken into account that the project was complex, consisted of several sub-projects that were linked to each other and that the wider real estate project involved several parties that were connected to the 2004 Cooperation agreement.

(81) Furthermore, although 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 expense of the private developers concerned, including SJB, it is established that in 2008, when SJB communicated to the Municipality that it was not willing to start with the construction works, the project was still at the ground exploitation phase. In this phase the municipality was financially involved in the project, since it bore 50 % of the costs and risks. The costs of the ground exploitation phase of the project included 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 of the school. Therefore it was in the financial interest of the Municipality that the ground exploitation works were carried out promptly so that the land could be delivered and the sales price of the land was paid, pursuant to Article 10.5 of the 2004 Cooperation agreement. In these particular circumstances, the Commission accepts that, while the public authority considerations of the Municipality in the realisation of the project are not relevant for the MEOP, a hypothetical private operator, who would have been in a similar contractual and financial position, would have sought to renegotiate the price rather than immediately annulling the agreement and putting out a call for tender,

([18]) Case T-244/08 *Konsum Nord* v *Commission* EU:T:2011:732, paragraph 57 and the case-law cited.

especially as the contract for the construction of the parking garage had already been awarded to SJB. The Commission also notes in this regard that, at the time of the re-negotiations, the financial crisis had started and affected the Dutch real-estate market in particular.

(82) The renegotiations between the parties resulted in the Autumn of 2008 in a proposal by SJB to the PPP to pay EUR 4 million for the land, whereby SJB would start the construction works in April 2009 regardless of whether the housing units had been pre-sold. In addition, SJB was willing to waive its right to invoke the 70 % clause contained in the 2004 Cooperation agreement. Furthermore, half of the reduced costs of the sales price would be borne by SJB itself, through its participation in the PPP.

(83) An independent expert, Fakton, commissioned by the Municipality concluded in its report of 11 February 2009 that the EUR 4 million (value on 1 January 2010) agreed as the new price for the land could be considered as a market-compliant price for the land concerned, taking into account also the further commitments by SJB.

(84) Under these circumstances, the Commission has no reason to believe that the behaviour of the Municipality, in agreeing to a price of EUR 4 million in the particular circumstances, is not in line with normal market conditions.

(85) In the light of the above, the Commission considers that the decrease of the sales price of land and the waiver of the ground exploitation fee and quality fee agreed in the Supplementary Agreement between the Municipality, the PPP and SJB does not contain State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The decrease of the sales price of land and a waiver of the ground exploitation fee and quality fee agreed on 1 March 2010 by the Municipality of Leidschendam-Voorburg in favour of Schouten-de Jong Bouwfonds, a partnership consisting of Schouten & De Jong Projectontwikkeling BV and Bouwfonds Ontwikkeling BV, does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 15 January 2016.

For the Commission

Margrethe VESTAGER

Member of the Commission