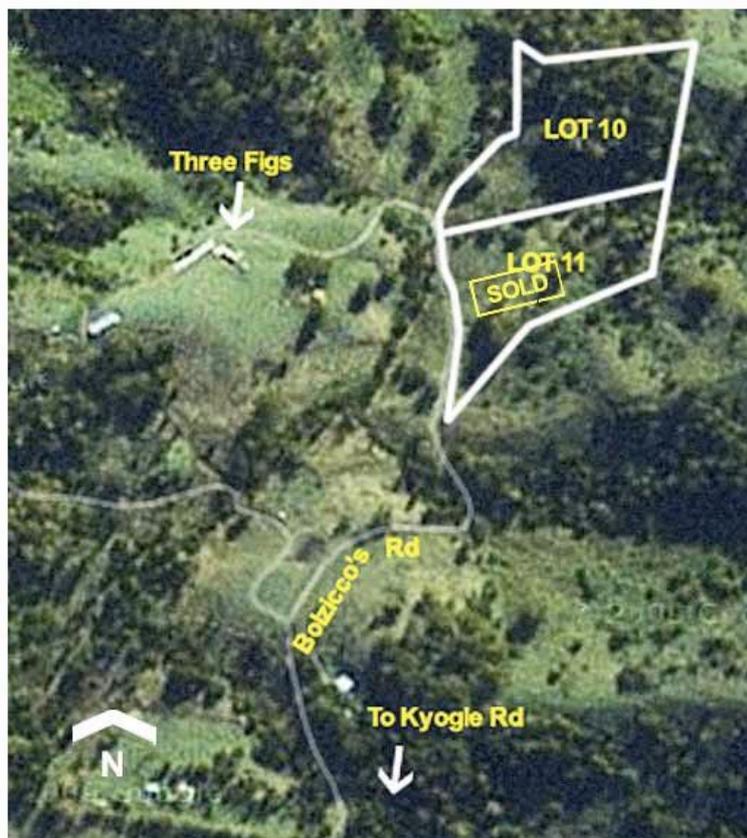


The Communication on state aid in sales of land

Simple but effective?



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Introduction

In 1997, the European Commission published its Communication on State aid elements in sales of land and buildings by public authorities (below: Communication) ¹. In this Communication, the European Commission explains how state aid can be avoided when a public authority sells land or buildings (below: only mentioned as 'land'). The guiding principle of the Communication is that land must be sold against the market price in order to avoid a potential advantage and therewith state aid for the buyer. The Communication mentions two methods to determine the market price. If one of these two methods was not used for a sale of land by a public authority, there is a suspicion of state aid that should be notified to the European Commission, the European Commission explains in its Communication.

This Communication stands out between the other state aid guidelines and communications of the Commission. First because of its long duration: it dates back 13 years while the Commission's policy is to update state aid rules every 5 years. And second because of the limited level of detail: where other state aid rules prescribe in detail the conditions to judge whether measures contain (compatible) state aid, the Communication mainly prescribes procedural conditions in general wordings.

The purpose of this thesis is to examine whether the Communication is (still) effective and up to date for adoption in the practice of land sale cases. Do the procedures and conditions described offer enough clarity to avoid state aid in land sales and reduce the number of land sale cases before the Commission?

For this purpose I will start with analyzing the Communication (Chapter 1), This is followed by an analysis of land sale cases that have been dealt with by national courts, the Commission and the European Court of Justice, focusing on how these institutions have interpreted and dealt with the provisions of the Communication (Chapter 2 and 3). Have these instances straightly applied the Communication or was a review based on other factors and principles necessary to judge individual land sale cases?

¹ Commission Communication on State aid elements in sales of land and buildings by public authorities (OJEC 1997, C209/03).

After that I will analyze whether other relevant rules of the Commission contain principles to determine the market value of a transaction and whether these could be useful for application in land sale cases (Chapter 4).

In chapter 5 I will conclude in how far the Communication is (still) effective.

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Chapter 1 The state aid rules regarding land sales: the Communication

Introduction

The definition of state aid as contained in Article 107 TFEU implies that an undertaking receives an advantage financed through public resources. State aid can take many forms, under which aid in the form of a price for an asset sold by a public authority which is lower than the price the undertaking would normally have to pay on the market. Member States' measures in any form that mitigate the burdens which undertakings should normally include in their budget, constitute benefits for the purposes of Article 107(1) TFEU². A price for land sold by a Member State to an undertaking beneath the price which that undertaking would normally have to pay on the market for this type of asset under the same conditions thus forms an advantage constituting state aid (of course the price *difference* constitutes the actual advantage and thus state aid).

The predominant criterion is therefore whether a sale by an authority was concluded on market terms. This is the so-called 'private seller' or 'private investor' test that can be applied to transactions of authorities that sell property or other assets.³

The Communication sets out two methods that in the opinion of the Commission are adequate to determine whether land was sold at a market price. The Commission does not refer to a private seller or investor principle in the Communication as such, but the Communication can be considered as laying down two private seller tests. The two methods are namely meant as tests to determine whether the land was sold at market value and 'market value' is referred to as meaning the price at which land could be sold under private contract between a willing seller and an arm's length buyer (thus a private seller situation).

1.2 Two methods for determining market value

The Commission aims to give general guidance in the Communication to Member States on the Commission's general approach regarding state aid in land sale cases and to reduce the

² See CoJ EC 29 March 2007, case T-366/00.

³ Hancher 2006, p. 79.

number of cases it has to examine. This guidance contains a simple procedure to allow Member States to automatically preclude state aid from the sale of land. The Communication does not explicitly exclude the possibility of other methods being suitable to determine the market value of land. The Commission even refers to the possibility that budgetary provisions of Member States may ensure that land is not sold below its value⁴. But the Commission only elaborates on the following two specific methods for determining the market value for land.

1. *Sale through an unconditional bidding procedure.* The Commission in its Communication states that a sale of land following a well-publicized, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid.
2. *Sale without an unconditional bidding procedure: an independent expert evaluation.* As an alternative to a bidding procedure, an independent evaluation should be carried out by an independent asset valuer prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. State aid is ruled out if the agreed purchase price is at minimum the market price as established by the independent expert valuation.

The Commission in one of the last paragraphs of the Communication puts forth that the primary costs to the public authorities of acquiring the land is an indicator for the market value unless a significant time period has elapsed. This however does not constitute an extra option (by way of a third method next to the abovementioned two methods) for determining the sale price, but an extra condition to the method of determining the market value by an independent expert. Namely, the market value may not be set below the primary costs that the public authorities bore for the acquisition of the land if this has taken place within three years preceding the sale. A lower price is however permitted if the independent valuer indentified a general decline in market prices for land in the relevant market. The Communication does not mention other causes that may lead to the situation that the market value is lower than the primary costs. This provision in the Communication

⁴ See Part I (Introduction) of the Communication.

must mainly be seen as a condition for the private seller principle that is applied in the Communication, although the Communication does not expressly state this as a guiding principle. This provision however seems to be redundant. An independent expert will take into account the necessary factors to determine the present market value of the land. The primary costs of the land may be one of these factors, but are not necessarily a decisive indicator of the market value in all cases.

The Communication permits certain deviations from the market value determined by one of these two methods. The first possible deviation is a divergence of up to 5% from the market value if after reasonable time and effort to sell the land, the value set by the valuer cannot be obtained. And the second is a divergence amounting to the economic disadvantage of special obligations that relate to the land, as evaluated separately by an independent valuer.

The question is whether these two methods are the only methods to exclude state aid and if these methods provide enough guidance to actually exclude state aid and assess the market value in specific land sales/

1.3 Notification obligation

Art. 108(3) TFEU states the notification obligation of state aid: ‘The Commission shall be informed (...) of any plans to grant or alter aid’. This provision obliges Member States to notify any state aid in order for the Commission to decide whether this aid is compatible with the internal market. In case of land sales, this means that when state aid is present in a sale of land when it is sold by a public authority below its market value, it should be notified to the Commission so the Commission can decide if the aid is compatible.

In paragraph 3 of its Communication, the Commission specifies which land sales should be notified. The Communication states the following:

‘Member States should consequently notify to the Commission, without prejudice to the de minimis rule, the following transactions to allow it to establish whether State aid exists and, if so, to assess its compatibility with the common market.

- a) any sale that was not concluded on the basis of an open and unconditional bidding procedure, accepting the best or only bid; and*

b) any sale that was, in the absence of such procedure, conducted at less than market value as established by independent valuers.'

With this text, the Communication seems to go further than the notification obligation of art. 108(3) TFEU. The transactions to be notified to the Commission are in fact all transactions where the (market) value has not been established by an open and unconditional bidding procedure or by an independent valuer. Where art. 108(3) TFEU states that Member States should notify state aid so that the Commission may decide whether the aid is compatible, the Communication states that Member States should notify certain transactions so that the Commission can assess whether there is state aid involved in the first place and after that if any possible state aid is compatible. The notification in the Communication thus not only covers state aid, but also any suspicion of state aid.

The question is whether this notification obligation is justified and whether transactions that have not been based on one of the two methods and are also not notified to the Commission are per definition unlawful – since these transactions have not taken place in conformity with the Communication.

The Communication is a policy instrument of the Commission and as such falls under the category of recommendations and opinions as stated in article 288 TFEU. Recommendations and opinions do not have binding force. With the Communication the Commission aims to give general guidance to Member States regarding the Commission's policy towards land sales and state aid. When a Member State does not act in conformity with this Communication (that is, does not follow the procedures of the Communication), that does not mean it acts unlawfully. Not acting in conformity with the Communication may lead to legal uncertainty (does the transaction constitute state aid?), but not per definition to unlawfulness. Possible unlawfulness will result from a conflict with article 108(3) TFEU, namely granting state aid without a prior notification to the Commission. Important is what the consequences are of this notification obligation as stated in the Communication. How is it interpreted in the practice of (Dutch) national courts?

In the next chapter I will go into these questions concerning the notification obligation and the questions concerning methods for determining market value.

1.4 Conclusion

The Communication gives a short and clear guiding principle for Member States to avoid state aid in land sale cases. It could however be questioned whether these methods are the only methods, whether they offer enough guidance and whether the notification obligation is justified.

In chapter 2 and 3 I will analyze cases before the European Court of Justice and Dutch courts regarding land sale cases to see how the courts look at methods for determining market value and at the notification obligation.

In chapter 4 I will analyze methods for determining market value in areas other than land sales and examine whether there are other methods or principles that could be useful for determining market prices for land.

Chapter 2 Land sale cases in Dutch national courts

In this chapter I will analyze land sale cases before (Dutch) national courts. I will study how the courts have dealt with methods used by the authorities in these cases to determine the (market) value of land and how they have applied the Communication or possible other methods for determining the market value.

2.1 Dutch national court cases on the Communication

2.1.1. Zoning plan 'Rijswijkseplein'

In 2006, the Dutch Department of Administrative Jurisdiction of the Council of State (hereafter: Council of State or: Council) judged in the case of a zoning plan of the municipality of The Hague regarding the 'Rijswijkseplein', where housing corporation Vestia planned to build houses and commercial property⁵. Appellants appealed against the zoning plan, including in their arguments a state aid argument⁶. Appellants stated that the zoning-plan was not financially feasible because the municipality provided the land to Vestia for free, which constituted illegal state aid. Without this state aid, Vestia would not be able to realize the building plan, appellants stated.

Before analyzing this argument, the Council states that it can annul the decision of the municipality approving the zoning plan when the municipality has exceeded its margin of discretion or otherwise applied the law incorrectly. Regarding the state aid argument, the Council quotes the state aid definition of (former) art. 87(1) EC and the notification obligation of (former) art. 88(3) EC and then goes into the Commission Communication. That is: the Council only mentions the notification obligation as stated in the Communication. The Council then judges that the Communication was not adhered to and that the transaction where land was provided for free should have been notified to the European Commission. Since such a notification has not taken place, the Council judges that it cannot be ruled out that this transaction constitutes illegal state aid, making it unsure whether the municipality may make this contribution to Vestia and thus making it unsure whether the financing of the plan is guaranteed to this extent. It was not proven that Vestia had insufficient financial

⁵ ABRvS 26 July 2006, LJN: AY5061.

⁶ ABRvS 26 July 2006, LJN: AY5061, paragraph 2.8.

means for carrying out the plan without the municipal contribution, so this does not result in annulment of the decision to this extent.

Analysis of this case. Striking in this ruling is that this seems to be a clear case of state aid, but the Council does not explicitly decide as such but only argues that the notification obligation of the Communication was not followed and because of that mere fact, state aid cannot be ruled out. That this seems to be a clear state aid case, can be derived from the fact that the land was provided by the municipality for free. It is thus hard to imagine that the land was 'sold' against a market price. The court, nor the appellants or the defendants mention how the transaction 'price' was valued: after a bidding procedure, after a prior independent expert valuation or otherwise. The Council only concludes that the transaction should have been notified to the Commission on the basis of the notification obligation as stated in the Communication. Besides that it is hard to imagine that the transaction took place at a market price since it concerns land in a densely populated and commercially attractive area. The Council could have analyzed whether there was state aid involved. Art. 107(1) TFEU is directly applicable and therefore national courts may judge whether a transaction is state aid as in art. 107(1) TFEU) and whether this should have been notified in conformity with art. 108(3), which is also directly applicable. The Council does however not even begin to analyze the market conformity of the land price but only relies on the statement that state aid cannot be ruled out because of the mere fact that the notification obligation of the Communication was not adhered to. The Council seems to be led by the principles of the Communication instead of the directly applicable provisions of art. 107(1) and 108(3) TFEU.

2.1.2. Zoning plan 'Zorgcentrum Hintham'

In the case 'Zorgcentrum Hintham'⁷, the municipality of 's Hertogenbosch adopted a zoning plan that provided for the development by housing corporation DKM of a care center.

Appellants argued that the financial feasibility of the plan was not guaranteed and one of the

⁷ ABRvS 9 August 2006, LJN: AY5874.

reasons they put forward for this, was that the sale of land of the municipality to DKM included state aid⁸.

As relevant law for analyzing this case, the Council mentions (former) art. 87(1) and art. 88(3) EC and the Commission Communication. Regarding the Communication, the Council shortly goes into the procedure as described therein for ruling out state aid when land is being sold and the notification obligation described in the Communication. The Council states that according to the Communication, if an unconditional bidding procedure is renounced, an evaluation of the market value of the land must be done prior to the sales negotiations. In this case the sale price at which the land was sold DKM, was already agreed on in 2001, while the land was valued only in 2005. The Council considers that not applying a bidding procedure and valuating the land only after the sales negotiations, does not comply with the Communication and that because of that a suspicion of state aid cannot be ruled out⁹. Therefore, the land sale should have been notified to the European Commission. However, the Council rules that even with this omission, the financial feasibility of the plan is still guaranteed since DKM stated that the plan can be carried out even when DKM has to pay a higher price for the land when the land sale turns out to be contrary to the EC Treaty. The Council in the end does annul the zoning plan, but for other reasons than state aid.

Analysis of this case. The Council in this case only looks at procedural aspects of the land sale. The fact that the valuation only took place 4 years after the sale negotiations is enough for the Council to conclude that the municipality acted contrary to the Communication. The Council does not investigate the valuation report at all and neither the other factors pointing to whether the land price in 2001 was the actual market value. It cannot be ruled out that the land price as arranged in 2001 was actually the market price (unclear is if the valuation in 2005 confirmed that it was). If it was, the land sale may not have been in conformity with the Communication procedures, but there would have been no state aid involved and therefore no notification obligation according to (former) art. 88(3) EC. The Council could to a certain extent have investigated the market conformity of the land price as arranged in

⁸ ABRvS 9 August 2006, paragraph 2.5.

⁹ ABRvS 9 August 2006, paragraph 2.10.

2001. For example by comparing the market price as laid down in the valuation of 2005 with the price arranged in 2001. The Council seems to go 'the easy way' by limiting its analysis to the procedural principles and notification obligation of the Communication (notification obligation when there was no bidding procedure or valuation before sale negotiations), instead of analyzing whether the land sale actually included state aid.

2.1.3 Zoning plan 'Leens-Winkelcentrum'

The case of zoning plan 'Leens-Winkelcentrum' has been dealt with in three instances before the Council of State until now¹⁰. The case concerns the municipality De Marne, that adopted the zoning plan 'Leens-Winkelcentrum', encompassing the development of a new shopping center in the village of Leens. Appellants stated that the financial feasibility of the plan was not guaranteed because the sale of land by the municipality to the relevant private party possibly constituted state aid because it did not take place in conformity with the Communication.

In December 2008, the Council discussed this case in summary proceedings¹¹. The municipality argued against the abovementioned statements of the appellants that the land was valued by PAS B.V., an independent expert on spatial planning economics and exploitation agreements that can be seen as equal to a valuer of intangible assets as intended in the Communication. The sale price of the land as thus established can therefore be seen as the market price, the municipality states¹². The Council does not go into the status of the independent expert or the value of the land, but states that it has not studied the valuation report. The Council only states that it is sufficiently plausible that the private party would realize the plan even if it would incur higher costs because of recovery of unlawful state aid. The Council in the end judges that it does not see any motives (also not in other arguments of the appellants) that the zoning plan would be annulled in the substance proceedings.

¹⁰ Until the moment of finishing this thesis: 7. June 2010.

¹¹ ABRvS 24 December 2008, LJN: BG8616.

¹² ABRvS 24 December 2008, paragraph 2.3.1.

The substance proceedings followed in June 2009¹³. In these proceedings, the parties repeated the arguments regarding the independent expert valuation. Now, the Council looked in more detail into the provisions of the Communication containing the description of an asset valuer. The Council states that, since it was not allowed access to the valuation report, it cannot judge if the valuation was in conformity with the Communication. The Council also did not receive any information in order to judge whether the valuation was done by a valuer as meant in the Communication. Because of this the Council judges that it cannot be ruled out that the sale of land should have been notified to the Commission. The Council judges that also other state aid measures may be present. This time the Council judges that it is *not* plausible that the plan will be feasible when the possible state aid measures turn out to be unlawful and these amounts have to be financed by the private party and annuls the zoning plan decision to this extent.

After this annulment, the municipality decided on a new zoning plan with a new planning arrangement. In new summary proceedings in March 2010¹⁴, appellants argued that the financial feasibility of this new plan is not guaranteed because of possible state aid since again it is not sure that the land sale was valued in conformity with the Communication and was also not notified to the Commission. Unlike the earlier proceedings, the Council now was allowed access to the experts' reports: a quick scan of the exploitation and a valuation report of two brokers. The Council then states that the question whether the quick scan can be seen as a valuation as meant in the Communication and the question whether there is a notification obligation when a valuation took place after the sales negotiations should be judged in the substance proceedings and suspends the execution of the plan¹⁵. The substance proceedings have not taken place yet.

Analysis of these cases. In these cases, like in the aforementioned cases, the Council based its judgments solely on the procedural methods of the Communication. The leading questions of the Council are whether or not the valuation was in line with the

¹³ ABRvS 10 June 2009, LJN: B17245.

¹⁴ ABRvS 10 March 2010, LJN BL7739.

¹⁵ ABRvS 10 March 2010, paragraph 2.5.2.

Communication and whether this lead to an unlawfulness, namely non compliance with the notification obligation of the Commission. The questions that according to the Council should be answered in the second substance proceedings are also of a procedural nature: the questions are whether the Communication was adhered to and not whether the sale price may have constituted the actual market value. Striking is that the appellants also do not argue whether the price was too low, they just argue that the procedures of the Communication have not been followed. In this way, the procedural provisions of the Communication become the key test of unlawfulness of a transaction.

2.1.4 Koppenhinksteegh

In January 2010, the 'stichting Koppenhinksteeg' demanded in summary proceedings the suspension of the sale agreement between the municipality of Leiden and property developer Atrium, stating that the sale constituted illegal state aid¹⁶. The case concerned the sale of several buildings to Atrium. Specific aspects in this case are that the buildings are in use by illegal occupants ('krakers') and need thorough renovation.

Appellants state that the municipality did not follow a unconditional bidding procedure and neither a sale based on an independent valuation report and also did not notify the transaction. The municipality contested this with detailed arguments that the municipality held a procedure which was comparable to the unconditional bidding procedure as meant in the Communication. The court analyses the details of the procedure held by the municipality and states that it does not seem to be contrary to the Communication¹⁷. The court also goes into the argument of appellants that state aid appears from the fact that the sale price was lower than earlier valuations of the buildings. The court judges that earlier valuations may have been higher, but that these apparently have not taken into account the complex situation of the buildings, discouraging potential buyers. The court judges that it is not sufficiently plausible that Atrium received an advantage, denying the claim of the appellants.

Analysis of this case. In this case, the court does actually go into the question whether the sale price constituted the market price. The court does not limit itself to the procedural

¹⁶ Rb DH 8 January 2010, LJN: BK8654.

¹⁷ Rb DH 8 January 2010, paragraph 5.7.

aspects of the Communication, but looks at the transaction in more detail. The court considers these details as aspects influencing the market conformity of the market price. In the end, the court does not judge whether the sale price actually constituted the sale price, but did analyze whether a suspicion of state aid was justified on the basis of the contents of the transaction instead of solely relying on the procedural principles of the Communication as we have seen in the abovementioned cases before other courts (council of state).

This was in fact the only judgment I could find where a Dutch court made a certain analysis of the state aid content of a sale price. The factors the court takes into account as influencing the market price are however factors which are not explicitly mentioned in the Communication. One can at best derive these factors indirectly from or analogical to the provisions of the Communication where the future owner is to assume special obligations (paragraph II.1(c) and II.2(c) of the Communication). The Communication could thus not give complete guidance in this case.

2.2 Concluding analysis

The following conclusions can be taken from the land sale cases before Dutch courts.

When the Courts apply the Communication, the Dutch courts give decisive weight to the notification obligation of the Communication. Instead of analyzing whether a sale price constitutes the market value, the courts are predominantly lead by the notification obligation of the Communication. This even leads to judgments where the sole fact of not following the Communication's notification obligation, leads to suspicion of state aid. The procedural provisions become the key test of unlawfulness of the transaction instead of an actual test of the state aid content of the transaction or rather: the market value of the land. In the only case I could find where a Dutch court actually made an analysis of the market value, this analysis was not straightly based on the Communication. One can conclude that the Communication did not give sufficient guidance in analyzing the market price of land, but only procedural aspects which possibly only leads to more suspected state aid and more cases to be examined by the Commission.

Chapter 3 Land sale cases before the Commission and European Court of Justice

In this chapter I will analyze how the Commission and the European Court of Justice have dealt with land sale cases. How did these institutions assess the market value in land sales? Did they apply the provisions of the Communication or was the application of other factors and principles necessary?

3.1. Decisions of the European Commission on land sale cases

3.1.1 FMC Delfzijl

One of the first land sale case the European Commission handled after the publication of the Communication, concerns the construction of a hydrogen peroxide plant in Delfzijl in the Netherlands, for which the Dutch authorities sold land at NLG 1 per square meter in 1994¹⁸, which was too low according to complainants. In 1994 a valuer reported the market price at 10 NLG per square meter (the decision does not mention whether this was before or after the sale). The Dutch authorities stated that the land was offered to other firms, but not one was interested in buying the land on the basis of cost price. Even when the price was set at NLG 1 per square meter FMC was the only party that accepted. The Dutch authorities also argue that Belgian and French regions offered sites at prices comparable to this. The fact that no buyer was found for the site over a very long period is in its opinion sufficient proof that the price paid by FMC corresponds to the market value.

In analyzing these arguments, the Commission repeats the principles as laid down in the Communication. The Commission then analyzes the valuer's report and considers that it is sufficiently detailed and in arriving at a final valuation takes account of a range of factors (geographic location, proximity of waterways and railways, the state of the property and valuations carried out in the past). No considerations other than economic ones are considered in the report, the Commission states. The Commission also considers that the same valuer had valued the site in 1987 and that in the meantime the land was cleared from dumped silt and could in 1994 be used as industrial site. The Commission is satisfied that the valuer took account of all relevant factors in valuing the property. From this, the Commission

¹⁸ Commission Decision C 232/1998(OJEC 1998, L 171/36).

concludes that the market price for the land was NLG 10 per square metre, as laid down in the valuer's report and that the land sale at NLG 1 per square metre thus contained state aid.

Analysis of this case. Interesting in this case is that the Commission looks at the valuer's report in detail. The Commission explicitly mentions factors it considers important in determining the market value of land. The Commission does not take the outcome of the valuer's report for granted, but judges the report and the methods the valuer used for determining the market value in detail. In doing this, the Commission gives some more insight in what it considers as appropriate factors in valuing land as compared to what the Communication has to say about this. Factors mentioned in this Decision such as the location and state of the property are important indications for the value of land, that could be applied more general in estimating land sale valuations in the light of the Communication. The Communication does not give indications like these, but these could be helpful for national courts and authorities to consider whether a market value evaluation is based on a sufficiently founded analysis of the land.

3.1.2 Deawoo Electronics Manufacturing España (Demesa)

Also soon after the publication of the Communication, the Commission dealt with the case of Deawoo Electronics Manufacturing España (Demesa)¹⁹. Demesa bought land (and received several grants) from the Spanish authorities. The Spanish authorities referred to a price for this land that was comparable to a neighboring industrial estate²⁰.

In the Decision to initiate the procedure of former art. 93(2) EC (now: art. 108(2) TFEU), the Commission suspected that Demesa received an advantage because the selling price did not seem to be in line with market prices. The Commission considers that the Spanish authorities have not followed the procedures of the Communication²¹. Above that the Commission received information from the complainants that the selling prices in the area were much higher (ESP 6.000 to 7.000/m²) than the selling price to Demesa (ESP 4.125/m²).

¹⁹ Commission Decision C 76/1997(OjEC 1998, C 103/3).

²⁰ Commission Decision C 76/1997, paragraph 4.3.1.

²¹ Commission Decision C 76/1997, paragraph 5.2.2.

In February 1999, the Commission decided that the difference between the market price and the price paid by Demesa constituted state aid that was incompatible with the common market²². The Spanish authorities had argued that the prices mentioned by the complainants were for much smaller plots of land and that it was reasonable to assume a lower price per square meter for a plot of land 10 times larger. To support this, the Spanish authorities submitted two independent experts' reports and an audit report stating a market price between ESP 4.000 and 5.000/m²²³. The Commission however notes that Spain did not fulfill the criteria of the Communication and that it therefore cannot be presumed that there is no aid. The Commission examines whether the price paid by Demesa corresponded to the market price, on the basis of the two expert reports and the audit report, stating that these reports cannot carry the same weight as a valuation carried out before the sale. The Commission looks into the reports in detail, judging whether the factors (the costs for servicing a large plot of land pulls down the sale price) taken into account in these reports to influence the price, are justified. In estimating the price as stated in the audit report, which was carried out before the sale and comparing this to the price in the other reports, the Commission comes to the conclusion that ESP 4.481/m² is the market price and that the difference between this price and the sale price constitutes state aid²⁴.

Demesa brought an action for annulment of this decision before the Court of First Instance of the EU²⁵. The Court notes that the Commission received various valuation reports, but attached decisive weight to the price given in only one report because that valuation was made before the sale while the other reports were carried out after the sale. The Court judges that it is not reasonable to use the date of the report as a basis for attaching decisive weight to the report. The Commission should have compared the price paid by Demesa with the prices in the other reports. The price paid by Demesa is close to the minimum value in two of the reports, the Court states. The calculation of the Commission, taking an average of the values in the reports was bound to result in an alleged market price higher than the price

²² Commission Decision of 24 February 1999 (OjEC 1999, L 292/1).

²³ Commission Decision of 24 February 1999, paragraph III.2.I.

²⁴ Commission Decision of 24 February 1999, paragraph V.2.2.

²⁵ CoFI EU 6 March 2002, Cases T-127/99, T-129/99, T-148/99.

paid by Demesa, while the same reports confirm that the price paid is a market price. The Court judges that the calculation of the Commission is arbitrary and also contained some factual errors. Therefore, the Court annuls that part of the decision where the Commission considers the land sale to contain state aid²⁶.

Analysis of this case. The Commission in this case does not limit itself to judging whether the two procedures of the Communication were followed, but goes on by assessing whether the paid price actually constituted the market price – a necessary assessment of course for the Commission in investigating whether there is state aid involved. The Commission also does not state that there is a notification obligation, but concludes that it cannot be presumed that there is no aid when the two procedures of the Communication have not been followed. Where the national courts have automatically concluded a notification obligation, the Commission only takes this as a stepping stone to a further analysis of the market conformity of the price. In analyzing the market value, the Commission assesses the factors taken into account, accepting that these have a downward effect on the price. The Commission in its analysis attach more significance to a report carried out before the sale, apparently in line with the Communication which prescribes a prior valuation. The court however does not follow the EC's analysis completely, stating that also other valuations, even carried out after the sale, may result in a market value of the land.

3.1.3 SCI-Systems

In December 1998, Dutch authorities sold land to SCI Systems at a price of NLG 5 per m² which was valued as the market price by an independent expert. The expert based this price on a comparison with the average price of industrial land (NL 60/m²), adjusting it with factors that have a downward effect on the price: the buyer will incur considerable land preparation costs and because of environmental and planning regulations only part of the land can be used and sets the land price at NLG 5/m². The Commission doubts whether this evaluation was in accordance with generally accepted market indicators and valuation standards and in conformity with the Communication²⁷. The Commission assesses the

²⁶ CoFI EU 6 March 2002, paragraph 90.

²⁷ Commission Decision of 9 March 1999 C11/99 (OjEC 1999, C144/4).

evaluation in detail, mentions that the evaluation took place after the negotiations had started and goes into factors:

- which influence the price upwards: proximity to important roadways and airport Schiphol;
- which should have no effect on the price : the preparation costs should be borne by SCI as its own investment costs and the fact that only part of the land can be used may not lead to a disproportionate price reduction;
- which form an indication of the value: the primary costs to the authorities to develop the land should be taken into account to calculate the market price.

Based on this, the Commission calculates a much higher price: NLG 54,7/m²²⁸.

In the Decision after closing the investigation procedure, the Commission goes into the method of a second evaluation of the land²⁹. This valuation calculates the benefits that would accrue to a commercial developer if the land were sold into smaller plots and then makes several adjustments to result in a net sales price of EUR 2,54/m². The valuer used this method because there were no comparable land sales of this size in the area. The Commission however states that the market price is not the price a commercial developer would pay, but rather the price at which a commercial developer would sell the same plot to a buyer such as SCI. Certain deductions should therefore not be included in the calculations since a commercial developer would pass on these costs to its buyer. The Commission also states that the expected rise in value due to the planned change in the public land use plan should be taken into account. With the data of the second evaluation, the Commission calculated the market price between EUR 6,58 and ERU 14,51/m² at which a theoretical developer would sell the land. Since the cost price of the land was EUR 7,42/m², falling within the aforementioned price range, the Commission takes this as the decisive indicator of the market price. This relatively low price is justified because SCI is a 'launching customer' in an area where it was difficult to attract large investments and the investment of SCI could

²⁸ Commission Decision of 9 March 1999, paragraph 4.2.

²⁹ Commission Decision of 13 February 2001 (OjEC 2001, L186/43).

attract more investments. The Commission decides that the difference between the market price calculated by the Commission (EUR 7,42/m²), and the price paid by SCI constitutes state aid incompatible with the common market.

Analysis of this case. In these decisions, the Commission gives detailed insight in the factors that should be taken into account in valuating the market price of land. These are factors that could be applied more generally in land sale cases but are not set out in the Communication as such. These factors can however be very helpful in the assessment of the market price valuations of individual cases. The Commission makes its own calculation of the market price, using the data of the two valuation reports and other relevant information. The result of an independent valuation report is thus not decisive; the calculation method of the valuation has to comply with certain valuation standards and market indicators. This is a condition of the Communication as such, but the Commission in this case elaborates on *what* valuation standards and market indicators should be taken into account. Although these decisions concern a casuistic application of these standards and indicators, a more general formulation of these standards and indicators can be derived from this:

- The market value is the price at which a commercial developer would sell a comparable plot of land to a comparable buyer.
- This implies that the cost price is the least price at which the land should be sold.
- Market indicators influencing the price are amongst others: the proximity to road and airport infrastructure.
- An expected change in the price due to planned change in the land use plan should be taken into account.
- Costs that should be borne by the buyer as its own investment costs – such as preparation costs - may not be taken into account for the calculation of the market price.

3.1.4 Ojala-Yhtymä Oy

The Finnish municipality Piipola sold land to Ojala-Yhtymä Oy at a price (FIM 10.000) which was not based on a bidding procedure or an independent valuation. The Finnish Authorities stated that the selling price constituted the market price, quoting two reference purchases of land in the area by the

municipality of Piipola. The Commission raised doubts to this, since the conditions of the Communications are not met and the land sale should thus have been notified to the Commission³⁰. The Commission notices that the two reference purchases concerned transactions with public authorities. The first concerned a land sale by the Finnish state, of which is unclear whether the price was set on the basis of a bidding procedure or an independent valuation. In the second transaction the buyer was the municipality of Piipola and here it was unclear whether the sale came with other obligations for the municipality attached to it.

The Commission goes on to assess other factors to assess if the price constituted the market price. The relevant factors were the specific market indicators of the Finnish market, namely that the value of a plot of forestland (as concerned in this case) depends mainly on the value of the trees growing in the area in question. Forest ground without trees is basically worthless, particularly when it is close to a swamp and rubbish dump as in this case. The Commission eventually takes the value of the trees on the land (FIM 232.836) as the market value, resulting in an advantage of FIM 222.836 constituting state aid.

Analysis of this case. Also in this decision the Commission gives more insight in factors used for calculating the market price of land. Also in this case the factors concern a casuistic application, but the following general formulations can be derived from this:

- A comparison with land sales in the area may indicate the market value of a plot of land, but important conditions are that:
 - o the reference sales have taken place by a private seller and buyer, or
 - o when the seller is a public authority, this transaction must have taken place in conformity with the Communication, or
 - o when the buyer is a public authority, there must be evidence that the sale did not come with other obligations for the authority attached to it

- A market indicator may be that the value of land is solely based on the crop yields of the land, if other economic use is virtually impossible.

³⁰ Commission Decision of 21 December 2000 (OJEC 2001, L105/19). I will discuss this Decision only to the extent that gives additional insights in market valuating factors compared to cases discussed above.

3.1.5 Scott Paper/Kimberley Clark

After receiving a complaint, the Commission investigated the sale by the French authorities of 48 ha of land to the US company Scott Paper (which was later taken over by Kimberley Clark). In its Decision to open the formal investigation procedure³¹, the Commission states that if a sale takes place after an unconditional bidding procedure or is based on a survey by an independent expert state aid is automatically excluded. Taken that in this case no such procedure took place, the Commission states that the price at which the land was sold could still be justified if:

1. it covers at least the cost incurred by the authorities or,
2. in the event of an excessive supply of similar sites bringing prices down, it corresponds at least to the market price.

Regarding the first point, the Commission doubts whether the sale covered all relevant costs. Regarding the second point, the Commission states that it is unable to conclude whether the sale price corresponded to the market price.

In its final Decision, the Commission explains that the sale of land is not a selective advantage if the land is sold at its market value and that the Communication was aimed at clarifying this³². The Commission further considers that the sale of land does not constitute an advantage if a private investor, on the basis of a forecast of potential profitability and not on any social, regional or sectoral policy considerations³³. The Commission then analyses all the costs, losses and yields in this case, assessing whether these would be acceptable for a private investor:

- a private investor aims not only to maximize its profits but also to limit its losses. A private seller may sell land at a loss instead of not selling at all. However in this case the authorities go further and (next to the original costs of the land) invest FRF 80 million in the land while aware that the price Scott was willing to pay was only FRF 31 million. A

³¹ Commission Decision C38/98 (OjEC 1999, C301/4).

³² Commission Decision of 12 July 2002 (OjEC 2002, L12/1).

³³ Commission Decision of 12 July 2002, paragraph 150.

private investor would not have gone ahead with an investment, knowing it would result in a loss of some FRF 60 million³⁴.

- the costs of a public sewer is excluded from the valuation of the aid, because this served the whole community and did not exclusively benefit Scott

The Commission concludes that the preferential price constituted incompatible state aid.

Scott brought an action for annulment of this decision before the Court of First Instance³⁵. The Court of First Instance noted that the private investor principle applies when assessing aid in the form of a sale of property³⁶. The Court defines this as follows: the value of the aid is equal to the difference between what the recipient in fact paid and what it would have had to pay in an arm's length transaction on the open market to buy an equivalent property from a vendor in the private sector at the time of the relevant transaction. The Court however denies the Commission's reasoning that the sale price must cover the original costs of the property to the authorities in question. The Court states that these costs incurred in purchasing and improving land may be a secondary or indirect indication of the market value, but these factors are not the best proof of that value. The private investor principle requires the Commission to assess the open-market sale value of the property and that price is not necessarily determined by the costs incurred by the vendor. The price is in fact influenced by various factors, including supply and demand on the market at the time of the sale (1987). This is underlined by considerations regarding a much later sale of the property by Scott to another company in 1998 at an even lower price than Scott paid in 1987. The Court states that the Commission should not only have looked at the original costs, but should have looked at the circumstances in which the land was originally purchased by the authorities. It could be possible that the purchase price included compensation for disturbance of the original owners as well as other purchase costs for the state which exceed the true market value of the land³⁷. The Commission should at least have looked at the

³⁴ Commission Decision of 12 July 2002, paragraph 153-167.

³⁵ CoFI EU 29 March 2007, Case T-366/00

³⁶ CoFI EU 29 March 2007, paragraph 105.

³⁷ CoFI EU 29 March 2007, paragraph 119.

valuations that were carried out after the time of the sale. And it was in the Commission's power to obtain an expert report by itself. The Court judges that there was significant uncertainty with regard to the value of the land and annuls the part of the decision regarding the aid granted in the sale of the land.

Analysis of this case. The Commission clarifies that the condition that the market price may not be below the original costs of the land. The Court however states that original costs may be a secondary indication of the market value, but emphasizes this is not the best of proof and that other factors should be looked at. Those other factors mentioned by the Court can be seen in the light of the private investor principle, namely the situation of supply and demand in the market. Factors that typically concern public tasks, such as compensation for disturbance do not have to be included in the calculation of the market price.

The Court does not deny that a valuation that is carried out after the sale can be accepted as offering the market value. If these are based on generally-accepted valuation standards, they should be examined.

3.2 Concluding analysis

The Commission and the Court in their decisions go in much more detail regarding the factors affecting the market value of land than the Communication provides for. From these decisions, a more general formulation of factors can be derived that can be taken into account in calculating the market price:

- supply and demand on the market at the time of the sale;
- geographic location;
- proximity of waterways, road and airport infrastructure;
- the state of the property;
- the market price as stated in valuations carried out in the past;
- expected change in the price due to planned changes in the public land use plan;
- costs that should be borne by the buyer as its own investment costs, may not be taken into account for the calculation of the market price;

- a comparison with reference land sales in the area may indicate the market value, but important conditions are that:
 - o the reference sales have taken place by a private seller and buyer, or
 - o when the seller is a public authority, this transaction must have taken place in conformity with the Communication, or
 - o when the buyer is a public authority, there must be evidence that the sale did not come with other obligations for the authority attached to it.

The original purchase and investment costs incurred by the authorities may be a secondary but not decisive indication for the market price. This is actually contrary to the Communication which states that the market price may not be below the original costs. The original costs can be corrected by costs the authorities incurred concerning public tasks such as compensation for disturbance to other parties.

The Commission gave decisive weight to prior valuations, but the Court does not justify this (ex post valuations can result in a market price also), feeding suspicion that the Communication should be nuanced at this point. The Communication prescribes a prior valuation as nearly obligatory, attaching a notification obligation to not carrying out a prior valuation (when there was also no bidding procedure).

The Commission and the Court in their decisions apply the market investor (or seller) principle. The Communication does not mention this as a guiding principle as such, although its procedures can be seen as market investor tests. However, these tests of the Communication proved insufficient for judging certain cases where the prescribed procedures have not been followed. The Commission and the Court give a casuistic interpretation of the private investor principle focused on the characteristics of land sales.

Chapter 4 Other methods for determining market value

4.1 Commission rules determining market value

In the preceding chapters, I analyzed methods and factors related to determining the market value of land. In this chapter I will analyze other documents in which methods and factors are discussed related to determining the market value in other types of transactions, or somewhat broader: related to calculating whether the transaction does not give an advantage to the receiver/buyer. There are a few guidelines and frameworks setting out methods for calculating a certain value regarding a transaction by a Member state. Examples are the Commission documents regarding services of general economic interest (SGEI) and the guidelines on state aid to promote risk capital investments. In my opinion, these documents do not offer better or additional insights in procedures or methods for calculating the market price of a transaction by a public authority and I will therefore not discuss these documents in this thesis. The risk capital guidelines are aimed at valuating the market failure and thus the necessity of aid and do not contain methods for determining the market value of risk capital. The documents regarding SGEI contain guidance for preventing overcompensation but these do not offer better understanding regarding calculating market value compared to the Communication. These documents rather contain factors to be taken count of when calculating all costs and revenues relevant for carrying out an SGEI. The Notice on State aid in the form of guarantees does explicitly focus on determining market value, and is therefore discussed in this chapter.

4.1 Commission Notice on guarantees

The Notice³⁸ on State aid in the form of guarantees³⁸ aims to give guidance about the principles the Commission applies in cases of State guarantees. In this Notice, the Commission states that the fulfillment of four conditions will be sufficient to rule out the presence of State aid, in short:

1. The borrower is not in financial difficulty;
2. The extent of the guarantee can be properly measured when it is granted;

³⁸ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (*OJEU* 2008, C155/10).

3. The guarantee does not cover more than 80% of the outstanding loan;
4. A market-oriented price is paid for the guarantee;

A remarkable difference with the Communication on lands sales is that the Commission in the Notice is more lean on the consequences of not complying with any one of these conditions, stating that this does not mean that the guarantee is automatically regarded as State aid. If there is doubt, the guarantee should be notified. The Communication on land sales gives more binding consequences: when a transaction does not comply with the prescribed procedures, it should be notified.

For the assessment whether a guarantee complies with the first condition, reference is made to the definition of a firm in difficulty as set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty³⁹.

For the assessment whether a guarantee complies with the fourth condition (whether a market price is paid), the Notice prescribes that the price paid for the guarantee must not be lower than the price paid for a corresponding guarantee premium benchmark that can be found on the financial market. If no corresponding benchmark can be found, the total financial costs of the guaranteed loan has to be compared to the market price of a similar non-guaranteed loan. To this end, the Communication from the Commission on the method for setting reference and discount rates⁴⁰ can be consulted. In this Communication a methodology is set out for setting reference rates, starting with the 1-year IBOR rate⁴¹ as a calculation basis (which is translated by the Commission in the reference rate which the Commission publishes every year), adding to this a margin depending on the rating of the undertaking concerned and the collateral offered (which is set out in a clear table with the relevant margin rates).

³⁹ *OjEU* 2004, C244/2.

⁴⁰ Communication from the Commission on the revision of the method for setting the reference and discount rates (*OjEU* 2008, C14/6).

⁴¹ IBOR = interbank offered rate, defined as: interest rate at which banks lend to and borrow from one another in the interbank market. IBORs serve as an indicator of levels of demand and supply in all financial markets. Source: www.businessdictionary.com.

Regarding guarantees, the Commission thus sets out a detailed method on the basis of which a calculation of the market rate can be calculated. That this is an effective method can be illustrated by the following case before a Dutch Court.

In May 2005, the Court of Maastricht judged the case of guarantees of Dutch authorities to the Orbis hospital⁴². The applicant alleged that Orbis was in financial difficulty and that it did not pay a market rate for the guarantee (condition one and four as mentioned above). Orbis and the Dutch authorities denied this by proving with detailed figures that Orbis was not in difficulty as meant in the Community guidelines on State aid for rescuing and restructuring firms in difficulty and that it paid a market rate as calculated on the basis of the Communication from the Commission on the method for setting reference and discount rates. The applicant did not disprove this with figures or benchmarks underpinning the financial difficulty or the non-conformity with the Communication on reference and discount rates. The Court refused a suspension of the guarantee by judging that it is sufficiently plausible that Orbis was not in financial difficulties and paid a market rate and it was not established that the guarantee contained state aid.

4.3 Concluding analysis

A remarkable procedural difference is that the Notice on guarantees does not bind a notification obligation to not following the methods described in the Notice, while the Communication does in fact bind a notification obligation to not following its procedures.

Although the Notice on guarantees combined with the Communication on the method for setting reference and discount rates offer an auxiliary method for member states to determine the market value of a transaction, this cannot be translated directly to land sales. The methods are typical for assessing financial products as guarantees, focusing on market tariffs of financial institutions and on risk calculation. These factors can be calculated relatively objectively for guarantees of all member states, but land sales are much more influenced by specific qualitative factors (such as location and state of the land) and it is more difficult to prescribe generally valid calculating methods as in the guarantees Notice. This Notice does however show that better detailed procedures offer better guidance to member states for assessing the market price of sale cases.

⁴² Court Maastricht 3 May 2010, *LJN: BM3162*.

Chapter 5 Conclusion

The purpose of this thesis was to examine whether the Communication is (still) effective for adoption in the practice of land sale cases. My conclusion is that it is not sufficiently effective in all cases. This is based on the following findings from my analysis.

The Dutch court cases make clear that the notification obligation of the Communication mostly is of decisive importance in judging state aid aspects in land sales. Instead of analyzing whether a sale price constitutes the market value, the courts are predominantly lead by the notification obligation of the Communication, leading to judgments where the sole fact of not following the Communication's notification obligation, leads to suspicion of state aid.

This is caused in the first place by the wordings of the notification obligation: if the two methods have not been used, the Communication obliges member states to notify the sale to the Commission to establish whether state aid exists. The Notice on guarantees formulates this differently and in my view, correctly. Where the guarantees Notices states that when state aid is involved in guarantees, these should be notified, the Communication on land sales states that when a suspicion of state aid is involved in land sales, this should be notified. This formulation only leads to more cases to be examined by the Commission, which is opposite to what the Commission stated as a purpose of its Communication (reduce the number of cases it has to examine).

The second cause in my view is that the provisions in the Communication are not sufficiently detailed and not exhaustive for the purpose of dealing with all land sale cases in practice. The Communication did not give sufficient guidance in analyzing the market price of land in the cases I have analyzed. In these cases it was not sufficient to rely on the mere methods of the Communication, assuming that a bidding procedure or prior valuation automatically resulted in the market price of land and in that way avoiding state aid. The national and European courts and the Commission all needed additional methods and factors in calculating the market value in land sale cases. In the conclusion of chapter 3 I have listed factors that occurred in land sale cases as affecting the market value of land and that can be

more generally applied in land sale cases and could offer better guidance when they would be included in (an updated version of) the Communication.

The Communication even contains provisions that in the meantime before the Court of Justice have proven unjustified. The first provision is the disqualification of ex post valuations for determining the market value of land (already sold). The Court has made clear that it is not reasonable to let the dates of valuation reports be decisive in judging which report contains the accurate calculation of the market value. These findings of the Court make the provisions of the Communication stating that expert valuations should be carried out prior to the sale (and implicitly excluding valuations carried out after the sale) difficult to maintain.

The second provision of the Communication which is difficult to maintain after a judgement of the Court, is the condition that the market value should not be set below the primary costs to the authorities of acquiring land. The Court has judged that original costs can be a secondary indication of the market value, but that these are not the best of proof of that value. The market value is influenced by various factors and the original costs may include costs in the light of a public task of the authority.

Finally, it can be seen as a shortcoming of the Communication that it does not mention the principles behind its provisions. The background of the Communication can be clarified by stating that it is based on the idea that the sale of land does not contain state aid when it does not offer a selective advantage if the land is sold at its market value. This can be further clarified by stating that this means that a land sale should be in conformity with the private investor principle. This can give a better methodological understanding of the procedures as prescribed in the Communication and therewith better guidance for national courts to judge land sales not only on the strict procedures, but also on an individual interpretation of the private investor principle in land sale cases.

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