



EUROPEAN COMMISSION

Brussels, 06.03.2013
C(2013)1152 final

PUBLIC VERSION

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**Subject: State aid SA.33584 (2013/C) (ex 2011/NN) – The Netherlands
Alleged municipal aid to the professional Dutch football clubs Vitesse,
NEC, Willem II, MVV, PSV and FC Den Bosch in 2008-2011**

Sir,

1. The Commission wishes to inform the Kingdom of the Netherlands that, having examined the information supplied by your authorities on the aid/measures referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the support granted by the municipality of Nijmegen to NEC in 2010; the support granted by the municipality of Tilburg to Willem II in 2009/10; the support granted by the municipality of Maastricht to MVV in 2010/11; the support granted by the municipality of Eindhoven to PSV in 2011 and the support granted by the municipality of Den Bosch to FC Den Bosch in 2011.
2. The Commission has also decided that measures of the municipality of Arnhem in 2008 concerning Vitesse do not constitute State aid in the meaning of Article 107(1) TFEU.

I. PROCEDURE

3. The Commission has received a considerable number of letters from Dutch citizens alleging that municipalities in the Netherlands award State aid to professional football clubs facing financial difficulties. The first letters received concerned alleged aid awarded by the municipality of Arnhem in favour of Vitesse (registered as SA.25403). Later letters, from another citizen, complained about decisions of the municipalities of Maastricht and Tilburg in favour of, respectively, MVV and Willem II (registered as SA.31122). Yet other citizens alleged that the municipality of Nijmegen had awarded aid to NEC (registered as SA.31616 and SA.31767).

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4. In view of the accumulation of allegations concerning aid to Dutch professional football clubs, the Commission sent a request for information regarding all those cases to the Netherlands Permanent Representation on 14 March 2011. The Dutch authorities requested additional time for their reply in view of the need to coordinate with all the municipalities in question; this was agreed by the Commission. A bilateral meeting to discuss technical issues relating to the interventions took place on 7 June 2011. A formal reply from the Netherlands was received on 2 September 2011. Additional information concerning Vitesse was provided on 24 January 2013.
5. In May 2011, the Commission further learnt from press reports and through submissions from citizens that the municipality of Eindhoven was planning to support the football club PSV through a financial transaction (case registered as SA.33075). The Commission requested information from the Permanent Representation of the Netherlands by letter dated 27 May 2011; in its letter the Commission also reminded the Dutch authorities that all measures involving State aid should be notified to the Commission. No such notification was sent to the Commission. After a request for additional time, information concerning the transaction was, however, submitted to the Commission on 26 and 28 July 2011.
6. Finally, in June 2011 the Commission learnt from press reports and a submission from a citizen that the municipality of Den Bosch had decided to intervene financially in favour of FC Den Bosch; this matter was registered as SA.33304. A request for information was sent to the Netherlands Permanent Representation on 6 July 2011. After a request for additional time, which was agreed by the Commission, a reply was submitted on 1 September 2011.
7. All these complaints have since been bundled under one case number SA.33584, but are assessed separately in the present decision.
8. Before deciding to open a formal investigation, the Commission has collected information concerning the financing of European professional football through contacts with UEFA¹ and a request for information addressed to all Member States dated 1 October 2012.

II. DUTCH PROFESSIONAL FOOTBALL AND THE FOOTBALL CLUBS IN QUESTION

9. The national football federation **KNVB** (Koninklijke Nederlandse Voetbal Bond) is the umbrella organisation for professional and amateur football competition. KNVB represents Dutch football interests in UEFA and in FIFA², of which it is a co-founder.

¹ Union of European Football Associations

² Fédération Internationale de Football Association

10. Professional football in the Netherlands is organised in a two-tier system. It involves 36 clubs, equally divided in a top league (eredivisie) and a lower league (eerste divisie). For the competition in the season 2012/13, PSV, NEC, Willem II and Vitesse play in the top league, MVV and Den Bosch play in the lower league.
11. Each professional football club receives a licence from the KNVB, under which it has to comply with various obligations. This licensing system has evolved over the years; the current version was decided in 2008 and came into effect in 2010. One of the obligations under the current system applicable from 2010 relates to the financial sanity of the club. Each season, a club is obliged to submit financial reports by 1 November, 1 March and 15 June depicting *inter alia* its current financial situation, as well as the budget for the next season. On the basis of these reports clubs are scaled in three categories (I: insufficient, II: sufficient, III: good). Clubs in category I may be obliged to present a plan for improvement in order to reach categories II or III. If the club fails to comply with the plan, sanctions may be imposed by the KNVB, including an official warning, a reduction of competition points and – as ultimate sanction – withdrawal of the licence. The Commission notes that the system applied by the KNVB to a large degree mirror the *UEFA club licensing and financial fair play regulations*³. According to the Dutch authorities, the KNVB system is today one of the most demanding in Europe. It should also be noted in this context that a professional football club in the Netherlands, which is declared bankrupt, loses its licence. If a successor club is founded, it would not be admitted to the professional football leagues directly, but it would have to start in the second-highest amateur league.
12. Complaints concerning certain interventions in favour of the following professional football clubs are covered by the present decision:
13. Stichting betaald voetbal Vitesse (hereafter: **Vitesse**) was founded in 1892 and plays its home matches in the municipality of Arnhem. Vitesse is a private limited company [*besloten vennootschap*], the shares of which in 2008 were owned by the foundation Stichting brtaald voetbal Vitesse. In 2010 Vitesse's shares were bought by the Georgian businessman Merab Jordania. Vitesse currently plays in the top league, where it ended 15th in 2010/11 and 6th in 2011/12. It participates in the Europe League in 2012/13; before, 2002/03 was the latest season in which Vitesse played in a European football tournament (UEFA cup).
14. Nijmegen Eendracht Combinatie (hereafter: **NEC**) was founded in 1900 and plays its home matches in the municipality of Nijmegen. It is an association [*Vereniging*]. It currently plays in the top league, where it ended 11th in 2010/11 and 8th in 2011/12. 2008/09 was the latest season in which NEC played in a European tournament (UEFA cup).
15. Willem II Tilburg (hereafter: **Willem II**) was founded in 1898 and plays its home matches in the municipality of Tilburg. It is an association. It ended 18th and last in

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http://www.uefa.com/MultimediaFiles/Download/uefaorg/Clublicensing/01/50/09/12/1500912_D_OWNLOAD.pdf

the top league in 2010/11 and was, consequently, relegated to the lower league. The club was promoted again in 2012. 2004/05 was the latest season in which Willem II played in a European tournament (UEFA cup).

16. Maastrichtse Voetbal Vereniging, Maatschappelijke Voetbal Vereniging Maastricht (hereafter: **MVV**) was founded in 1908 and plays its home matches in the municipality of Maastricht. It is an association. It ended 10th in the lower league in 2010/11 and 8th in 2011/12. MVV has not played in a European tournament since 1970 (Intertoto cup).
17. Philips Sport Vereniging (hereafter: **PSV**) was founded in 1913 and plays its home matches in the municipality of Eindhoven. The commercial activities of PSV were grouped in a limited liability company [*Naamloze Vennootschap*] in the 1990s. It ended third in the top league in 2010/11 and in 2011/12. PSV regularly participates in European tournaments and has won both the European cup (1987/88) and the UEFA cup (1977/78).
18. FC Den Bosch '67 (hereafter: **FC Den Bosch**) was founded under its present name in 1967 and plays its home matches in the municipality of 's-Hertogenbosch (or Den Bosch). With the restructuring in 2011 it has become a limited liability company. It ended 8th in the lower league in 2010/11 and 6th in 2011/12. Den Bosch has in the past played in the Dutch top league, but not in a European tournament.

III. DESCRIPTION OF THE MEASURES COVERED BY THE PRESENT DECISION

III.1. Vitesse Arnhem

19. In 2007 Vitesse faced severe financial problems. Vitesse had made losses over the preceding 10 years, especially in the seasons 1999/2000 and 2003/2004, with a net total of €27.4 million. Its most important creditor was the municipality of Arnhem, which accounted for app. 45% of all claims.
20. In view of arrears in payment, the municipality pressed Vitesse to pay the sums due in December 2007, which Vitesse was unable to do. Vitesse started negotiations with its creditors in order to restructure its debts. A draft agreement was reached with all creditors except the municipality, which disagreed because it believed to have secured its claims on Vitesse in a contractual arrangement with a penalty clause dating from 2003. However, this arrangement and notably the penalty clause were disputed by Vitesse towards the municipality as being illegal under Dutch law, but the matter was not referred to a Court.
21. In March 2008, Vitesse was at its own request admitted to the temporary suspension of payments (*voorlopige surséance van betaling*) procedure, after which the municipality negotiated with the trustees (*bewindvoerders*) appointed by the Court.
The temporary suspension of payments procedure is laid down in the Dutch insolvency law (*Faillissementswet*) of 1893. It allows a Court to provide temporary protection to a company, which foresees that it will be unable to pay its

debts in the future, while an appointed trustee explores the possibility of finding an agreement with the creditors, that would allow the company to continue operations with a restructured balance sheet, if there is a perspective for profitability.

Given that the draft agreement of creditors had been accepted by all other creditors (60 out of 61), who furthermore represented more than half of the claims on Vitesse, the municipality's bargaining position was very weak. Article 268 of the insolvency law allows the official receiver (*rechter-commissaris*) to settle if the majority of the creditors representing more than half of the acknowledged and accepted claims are in favour. Article 268A allows to override one or more creditors opposing the settlement if 75% of the creditors are in favour and if, in view of what the proceeds would be in the case of bankruptcy, opposition is considered unreasonable. In the case of bankruptcy of Vitesse, the municipality was likely to receive nothing at all. Under those conditions, the municipality - after negotiations with the trustees and Vitesse - decided to settle as regards the penalty clause and to accept the agreement⁴. The agreement was executed on 3 April 2008. It is this agreement which is covered by the present Decision.

22. As a result of the agreement, the municipality received € 886,662, whereas its recognised claims amounted to €7,788,660.00. Other large creditors also received app. 12% of their recognised claims.
23. According to the Dutch authorities, by accepting the creditors' agreement, the municipality acted in conformity with the market economy creditor principle⁵. The action would therefore not entail State aid.

III.2. NEC Nijmegen

24. Since 2003 NEC is the main – but not the only - user of the multifunctional football stadium *Goffert stadion*, located in the large *Goffert park* in Nijmegen. This stadium had previously belonged to NEC as a pure football stadium, and was sold to the municipality in 2003.
25. Next to the stadium in the *Goffert park* a multifunctional sports block *De Eendracht* was built in 2003 by the municipality with the help of ERDF funds; the complex is let to NEC and it is also used by others for training purposes.
26. The municipality intends to develop a large part of the *Goffert park* into a Topsport and Innovation Park, with a multidisciplinary approach covering sports, education, health and science. The existing Goffert stadium and *De Eendracht* will be integrated into this approach. The future financing of the Topsport and Innovation Park was not notified to the Commission and is not covered by the present Decision.
27. In 2008 and 2009 NEC wrote to the municipal authorities that, according to a clause in the lease contract, it had a right to buy *De Eendracht* from the

⁴ Decision of the municipal council of 17.03.2008.

⁵ The Dutch authorities refer to the judgment of the CoJ in C-342/96, Tubacex.

municipality and it intended to exercise this right; however, it was willing to drop this claim in exchange for a payment of the difference between the book-value of *De Eendracht* (€ 750,000) and its real value based on outside expertise (€ 3,050,000 million), because – in NEC's view – this difference would accrue to it if it exercised its right of purchase. In 2010 the municipality, using outside legal expertise regarding the interpretation of the clause invoked by NEC and outside property valuation expertise, agreed to buy off the claim for €2.22 million. It is this transaction which is covered by the present Decision.

28. According to the Dutch authorities, no selective advantage was provided to NEC, because the transaction took place at market conditions. The transaction therefore, in the view of the Dutch authorities, does not entail State aid.

III.3. Willem II Tilburg

29. Since 2004 the stadium used by Willem II is owned by the municipality of Tilburg, which leases the stadium to this football club. Under the contract, Willem II paid an annual rent of €1,001,731 plus VAT and certain variable cost; the rent was based on the investment cost, a depreciation period of 30 years and the interest rate of 5.5% used by the municipality at the time the contract was concluded.
30. In the football season 2009/10 Willem II fell behind with rent payments and on 17 May 2010 Willem II announced that it was on the brink of bankruptcy. Bankruptcy would have meant that the municipality would lose the outstanding rent of app. €1 million, that it would lose the tenant of the stadium and that it would lose the attraction of professional football in the city. The stadium would then have to be demolished at high cost. Under time pressure the municipality decided on 31 May to lower the rent, with retro-active effect till 1 July 2004, to €905,000 including certain variable cost. The difference with the rent decided in 2004 amounts to app. € 400,000 p.a., or € 2.4 million in total over 6 years. After deduction of the outstanding rent, the remainder of this sum served to pay Willem II's acute needs. It is this intervention of May 2010, as well as the decision of the municipality of 2009 to allow Willem II to suspend its payments of rent, which are covered by the present Decision.
31. According to the Dutch authorities, the rent was reduced to a level in conformity with current municipal calculation methods (depreciation period of 40 years on buildings and a lower interest rate) and, furthermore, the municipality acted rationally in line with the behaviour of a market investor as its losses would otherwise have been larger. The intervention therefore, in the view of the Dutch authorities, does not constitute State aid. However, if the Commission should nevertheless consider this intervention to constitute aid, the Dutch authorities believe that it is compatible with the internal market pursuant to Article 107(3)c) TFEU.

III.4. MVV Maastricht

32. In 2010 MVV faced severe financial difficulties, with a debt load of €6.5 million, 1.7 million of which to the municipality of Maastricht. An initiative to avoid bankruptcy was launched by supporters, companies and sponsors, to which the municipality adhered. Under a creditors' agreement (but not within a formal suspension of payments procedure), the municipality waived its claim of € 1.7 million. It also bought the stadium, which was owned by a foundation and only used by MVV, for €1.85 million, on the basis of an external valuation report. The Dutch authorities claim that the stadium is now multifunctional, MVV being one of several users. Other sport facilities are being constructed in the vicinity. The acquisition of the stadium and the remission of the claim in 2010 are covered by the present Decision. In the view of the Dutch authorities, neither of them constitutes State aid. It is claimed that the municipality acted rationally under the market economy investor principle (the acquisition of the stadium) and the market economy creditor principle (the remission).

III.5. PSV Eindhoven

33. Until 2011, PSV owned the Philips stadium and the training block *De Herdgang*, as well as the land under those buildings. In 2011 PSV was facing serious liquidity problems, for which it approached the municipality of Eindhoven, Philips and several other companies in Eindhoven, as well as certain banks. Some of those companies did indeed agree to award new loans or to amend existing ones in order to help PSV bridge the difficult period. The municipality entered into an agreement with PSV to buy the land referred to above for €48,385,000 and to lease it back to the football club. This agreement is covered by the present Decision.
34. The Dutch authorities believe that the agreement does not entail State aid. They refer to the Commission Communication on land sales and point out that the transaction is expected to be neutral for the municipal budget and that both the sales price and the annual lease are based on outside expertise.

III.6. FC Den Bosch

35. FC Den Bosch had been struggling with financial difficulties for several years, but at the end of 2010 it became clear that without an intervention by the municipality bankruptcy proceedings would be inevitable. FC Den Bosch had made a net loss of €1 million in 2009/2010, had a negative equity of €4.6 million and was expecting further losses of the same magnitude in 2010/2011. One of its creditors was the municipality of Den Bosch, to whom FC Den Bosch owed €1,650,000.
36. As part of a larger plan involving all creditors, supporters and sponsors and using external financial expertise, the municipality decided in 2011 to renounce to its claim of €1,650,000; the claim would be sold for €1 to the organised supporters of the club, who would then transform it into a shareholding of 60% in a new legal structure for FC Den Bosch. The other 40% would be held by other large creditors of FC Den Bosch who would swap equity for their claims. Smaller creditors would waive part of their claims. In addition to this debt/equity swap the municipality will acquire FC Den Bosch's training and youth block for €1,400,000, which the club will vacate.

37. The present Decision covers the waiver of the claim of €1,650,000 – including waivers of interest on the claim - and the purchase of the training and youth block for €1,400,000. The Dutch authorities are of the opinion that neither of the two interventions in 2011 constitutes State aid. The waiver of the claim would not procure an advantage to FC Den Bosch, because it could never have been repaid anyway inside or outside bankruptcy proceedings. Furthermore, there would be no effect on trade. As regards the sale of the training block, this took place at market prices on the basis of external expertise. The Dutch authorities do see an advantage for the club in the up front payment for this sale, which was needed in order to stem the club's acute financial problems, but this advantage would not exceed the *de minimis* ceiling⁶.

IV. ASSESSMENT UNDER ARTICLE 107(1) TFEU

38. For a measure to constitute State aid in the meaning of Article 107(1) TFEU, the following cumulative conditions needs to be fulfilled:

- there needs to be a selective advantage in favour of certain undertakings or the production of certain goods;
- there needs to be a use of State resources for this;
- the aid must distort or threaten to distort competition;
- the aid must affect trade between Member States.

39. It should firstly be noted that all of the football clubs in question are active in professional football, which must be qualified as an economic activity in line with the jurisprudence of the Court of Justice in this regard.⁷ Regardless of their legal forms, those football clubs must be deemed to constitute undertakings in the meaning of Article 107(1) TFEU.

40. In their reply to the Commission's request for information, the Dutch authorities questioned the impact of any aid on the internal market for clubs not playing football at European level. In this regard, the Commission would point out that each of the football clubs in question is a potential participant in European football tournaments. The Commission would further point out that professional football clubs deploy economic activities in several markets other than participating in football competitions, such as the transfer market for professional players, publicity, sponsorship, merchandising or media coverage. Aid to a professional football club strengthens its position on each of those markets, most of which cover several Member States. As regards the market for the transfer of players, according to the KNVB⁸ 509 players changed teams in the Netherlands between 9 June and 31 August 2011, 134 of which left Dutch football in favour of a foreign club and 103 arrived in the Netherlands. These figures do not distinguish between clubs in the EEA and third countries, but press releases from clubs on specific transfers

⁶ As provided for in Commission Regulation nr. 1998/2006, OJ nr. L 379 dated 28.12.2006.

⁷ Judgments in C-415/93 (Bosman) and C-325/08 (Olympique Lyonnais).

⁸ KNVB statement 1.09.2011

show that at least part of the international transfers took place inside the EEA. Therefore, if State resources are used to provide a selective advantage to a professional football club, regardless of the league in which it plays, such aid is likely to have the potential of distorting competition and to affect trade between Member States. Even a club like FC Den Bosch, which so far has never participated in a tournament at European level, expected income from future transfers of its most successful players⁹. The Commission also notes that several sponsors of the clubs in question deploy activities outside the Netherlands.

41. Therefore, at this stage of the investigation, the Commission takes the view that aid measures in favour of the football clubs in question are likely to distort competition and to affect trade between Member States. In the following paragraphs, the Commission will examine each of the transactions covered by the present Decision in order to determine whether they imply the use of State resources and whether they procure a selective advantage to the football club in question and, hence, to constitute State aid in the meaning of article 107(1) TFEU.

IV.1. Vitesse Arnhem

42. As described in section III.1 above, Vitesse was admitted to a formal temporary suspension of payments procedure in March 2008, after the municipality had rejected earlier proposals for a creditors' agreement. The Dutch authorities have submitted the report of the trustees appointed by the Court to the Commission. The report dated 20 March 2008 shows that of all creditors the municipality of Arnhem had by far the largest claim on Vitesse: € 7,788,660 out of a total amount of recognised claims of €20,967,479; the report does not include in those figures the contractual fines amounting to €4,461,305.07. These fines had been challenged by Vitesse as being unreasonable and based on a clause that was, in its view, illegal under Dutch law. Under the suspension of payments procedure, the trustees negotiated with the municipality and Vitesse that this claim should not be part of the recognised claims and that it should be settled outside of the formal procedure; a copy of this settlement agreement was also submitted to the Commission. In the report, the trustees indicate that the contractual fines clause was disputed between Vitesse and the municipality; the trustees also indicate reservations regarding the legality of that latter clause. Furthermore, the trustees conclude that 60 out of 61 creditors representing more than 50% of the sum of all claims had agreed to the settlement. Under Dutch law¹⁰ the official receiver (*rechter-commissaris*) could, in case the municipality had continued to disagree, have decided to declare the settlement binding on all, because the municipality – as the only opposing creditor - would receive less without the agreement and its opposition could therefore be regarded as unreasonable.

43. The Dutch authorities are of the opinion that the municipality of Arnhem did everything it could possibly do to realise the most of its claims, in line with the market economy creditor principle. In this regard, the Commission concurs that the municipality seems to have acted like a hypothetical private creditor within the possibilities and constraints of Dutch law would have done. If the municipality had rejected the settlement and presuming that the official receiver would not have

⁹ FC Den Bosch had actually hypothecated the expected income from transfers to a creditor.

¹⁰ Articles 268 and 268a Faillissementswet.

declared the settlement binding, a bankruptcy of Vitesse would have meant that all creditors realise less of their claims. The trustees indicate in their report that the sum of payments under the settlement exceeds the sum of the assets on Vitesse's balance sheet. Furthermore, the trustees state that in a situation of bankruptcy the KNVB would have withdrawn Vitesse's professional football license and all its players could then freely transfer to other clubs; however, the potential indemnities concerning these players accounted for most of the immaterial assets on Vitesse's balance sheet, €1,982,000 of €2,854,000.

44. The Commission therefore concludes that the municipality of Arnhem did not confer an advantage on Vitesse when it accepted the settlement of creditors within the suspension of payments procedure, but rather behaved in the way a hypothetical private creditor in a same position would have done. Therefore, this agreement does not entail State aid in the meaning of Article 107(1) TFEU.

IV.2. NEC Nijmegen

45. The acquisition by the municipality of Nijmegen of the alleged right of NEC to buy *De Eendracht* for € 2.2 million, as described in section III.2 above, was undoubtedly financed with State resources, given that the money for the transaction in question was furnished by the municipality; this is not disputed by the Dutch authorities.
46. As regards the question whether NEC received a selective advantage, the selectivity of the measure, which was specifically approved by the municipal council, cannot be doubted either. However, the Dutch authorities are of the opinion that no advantage accrued to NEC, because the transaction took place at market conditions. They notably point out that NEC had a solid right of purchase for *De Eendracht* and that the price for buying off that right was established in line with market prices. The Commission has serious doubts whether this view can be shared for the following reasons.
47. Firstly, as regards the existence of a right of purchase, the Commission notes that the relations between the municipality and NEC concerning *De Eendracht* are laid down in two contracts concluded in 2003: a contract of intention to develop the area where *De Eendracht* is located into a topsport and innovation park and a lease contract for *De Eendracht*. The municipality took its decision on the basis of legal opinions provided by two law firms, one in January 2010, the other in September 2010. The first opinion noted a clause in the lease that this contract covered the period until *De Eendracht* would have been acquired by the tenant (NEC) and concluded in a concise manner that this clause constituted a solid (*hard*) right for NEC to claim the purchase. The second opinion was requested at the insistence of the municipal council concerning the alleged solidity of NEC's claim. This opinion is more detailed and concludes that the right of purchase is non-existent, given that the clause in question does not stipulate a price or price mechanism. There would, hence, only be an obligation for the municipality to negotiate with NEC at the latter's request. The Commission concludes that by basing itself exclusively on the first opinion and disregarding the more reasoned second opinion, the Dutch authorities have not demonstrated that NEC had a right of purchase at a price which was not laid down in the contract and which was not negotiated either.

Where an authority bases its decision on one of two conflicting legal opinions, it should be capable of explaining why it disregards the other¹¹. In this regard, the Dutch authorities have not submitted a convincing explanation to the Commission.

48. As regards the price for which the alleged right of purchase was bought off, the Dutch authorities invoke the Commission's Communication on land sales¹². In that regard, the Commission notes that in its introduction, this Communication limits itself to the sales of publicly owned land and buildings. It does not concern the situation of buying off a right of purchase, let alone a disputed right of purchase. Furthermore, operators in a market economy would arguably also look at the likelihood of a tenant exercising his right of purchase, presuming it exists. They would, *inter alia*, look at the financial means at his disposal.
49. In this regard, the Dutch authorities argue that NEC was not a firm in difficulty in 2008/09. However, the Commission notes that KNVB, when verifying NEC's business plan for 2010/11, asked NEC for an external guarantee for €1,967,000 in July 2010, in the absence of which NEC would risk losing its license. This guarantee (which, according to the information available to the Commission, was provided by a private, commercial company and therefore not with State resources) was needed in addition to the €2.2 million covered by the present Decision. NEC itself indicated in June 2010¹³ that its financial position was worrying, with a negative equity, a negative operational result in 2009/10 and a bad liquidity position. These facts, as well as the fact that NEC had stopped paying rent in September 2009, would rather indicate that NEC was facing financial difficulties, serious enough to endanger its future as a professional football club.
50. For all those reasons, the Commission takes the view - on the basis of the information available to it - that the transaction concluded between NEC and the municipality in 2011 provided a selective advantage to NEC, financed with State resources and, hence, constitutes State aid in the meaning of Article 107(1) TFEU.

IV.3. Willem II Tilburg

51. As described in section III.3, the municipality of Tilburg was confronted with Willem II's acute financial problems in May 2010. At that point in time, Willem II had not paid rent for the stadium for a year with the consent of the municipality. The Commission notes that both the decision of the municipality in 2009 to allow Willem II to postpone payments of rent and the decision of May 2010 to modify the parameters for the calculation of the rent were not foreseen in the lease concluded in 2004. Indeed the parameters agreed at the time guaranteed that Willem II paid a rent covering all cost, thus avoiding any operating aid to the football club. By modifying the parameters with retroactive effect till 2004, the municipality provided a selective advantage to Willem II with the use of public resources.

¹¹ See in analogy the judgment of the General Court in *Valmont v Commission* (T-274/01)

¹² Commission Communication concerning aid elements in land sales by public authorities (OJ nr. C 209 dated 10.07.1997).

¹³ Letter to the municipality dated 28 June 2010.

52. The Dutch authorities point out that the principles of the 2004 lease are still adhered to, given that both the interest rate and the depreciation period applied by the municipality have changed over time; the rent is merely adjusted to those new principles. They furthermore point out that according to an external study¹⁴, which was provided to the Commission, the rent paid by Willem II since 2004 was higher than the average rent paid by other clubs for comparable facilities and, thus exceeded the market price. The Commission notes in this regard that the depreciation period applied by Tilburg for municipal buildings was adjusted from 30 years to 40 years in 2007, the same year as used for the adjustment of the interest rate; this would thus in any case not justify the retroactive application till 2004. As regards comparisons with other football stadiums in the Netherlands, the Commission would firstly point out that the exploitation of a stadium is an economic activity, which needs to cover all investment cost and operational cost. The Commission notes that the study referred to by the Dutch authorities shows that the rent paid by Willem II on the basis of the 2004 lease was within the bandwidth of rent paid by others, albeit above the average. The new rent, established in 2010 with retroactive effect, is at the bottom of the bandwidth. Furthermore, the variable cost Willem II had to pay in addition to the rent was decreased with retroactive effect as well, and this to a level below the cost for maintenance that had actually taken place in the period 2004 – 2010. Finally, it cannot be excluded that other stadiums belonging to municipalities are not financed at market conditions but receive operating aid; therefore, an adjustment to the rent paid by others does not exclude the existence of State aid¹⁵.
53. For all those reasons, the decisions of the municipality of Tilburg in 2009 and 2010 covered by the present decision conferred a selective advantage on Willem II with the use of State resources. These decisions therefore entailed State aid in the meaning of Article 107(1) TFEU.

IV.4. MVV Maastricht

54. As described in section III.4, in 2010 the municipality waived a financial claim on MVV of €1.7 million and acquired the stadium in which MVV plays for €1.85 million. The two interventions are closely linked and were decided together; both involve the use of State resources and had the intention and effect to strengthen the financial position of MVV. However, the Dutch authorities consider that neither of the two interventions constitutes State aid, because they consider that the waiver is in conformity with the market economy creditor principle and the acquisition with the market economy investor principle.
55. As regards the remittance of debt, the Commission takes note of the agreement of major creditors (having claims on MVV of more than € 50,000) which was submitted to it. This agreement was concluded outside of a formal procedure and therefore does not seem comparable to the situation described in section IV.1. (Vitesse). The Commission notes that the claim of the municipality was of a subordinated nature; the municipal council was informed that in case of bankruptcy

¹⁴ Huurconstructies Tilburg – Willem II, Hypercube, December 2009.

¹⁵ This also follows from the valuation report established for the Maastricht stadium, which notes that several municipalities have lowered the rent of "their" football club and which concludes that there is no market for football stadiums, unless these are to be used for different purposes than football.

the municipality would receive nothing at all. The Commission also notes that, whereas the municipality as the most important creditor waived its claim completely, as did some other creditors, three large creditors transformed their claims amounting to € 1,135,000 into a claim on future income for MVV from transfer payments for players. Some of the less important creditors, all of which were asked to waive 50% of their claims, have objected to the agreement. On the basis of the available information, the Commission cannot conclude that the behaviour of the municipality was that of a typical private creditor but considers that it rather may have conveyed a selective advantage to MVV with the use of State resources.

56. As regards the purchase of the stadium, the Dutch authorities emphasize that this decision was of a strategic nature, as it would allow the municipality to control and develop the area in question; this would indicate that the terms of the decision may have been based on other factors than the market price. They also stress that the stadium has since the purchase become a multifunctional installation, of which MVV is merely one, albeit important, user. They furthermore submitted the external report on the basis of which the purchase price for the municipality was established. The report in question notes that there is no such thing as a market price for stadiums and has therefore established the estimated price on the basis of replacement value. The Commission notes in this regard that the market price is not the same thing as the replacement value. The Commission furthermore notes that investing in a football stadium depending on one captive user entails high risk, even if that user would agree to pay a price covering all investment cost (which is not the case here). This risk can be reduced by making the facility multifunctional, as the municipality of Maastricht intends to do. However, a high risk remains, the more so as other users in the sports sector have limited financial means for paying a rent covering all cost. Given that no business plan demonstrating a profitable exploitation has been submitted to it, the Commission cannot conclude that the purchase of the stadium was in line with the behaviour of a typical market economy investor. Finally, the purchase of the football stadium was presented to and discussed by the municipal council on 26 May 2010 together with the remittance of debt in the context of a plan to save MVV.
57. The Commission also notes that according to the debates in the municipal council on 26 May 2010 and statements made there by the responsible alderman (*wethouder*), the € 1.85 million paid to the owner of the stadium will in fact be used to finance preferential claims on MVV, such as taxes and pensions. This important information was not provided to the Commission by the Dutch authorities; the Commission therefore requests complete clarity on this point and recalls that it may enjoin the Netherlands to provide the requested information pursuant to Article 10(3) of Regulation nr. 659/1999¹⁶. The Commission concludes at this stage that the purchase is likely to constitute State aid in the meaning of Article 107(1) TFEU and that MVV may well be a beneficiary of the aid.

¹⁶

Council Regulation nr. 659/1999 of 22.02.1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ nr. L 83 dated 27.03.1999.

IV.5. PSV

58. As described in section III.4, PSV faced severe financial problems in the season 2010/11 and asked the municipality of Eindhoven – and others - for help. At the time, PSV was one of a few professional football clubs in the Netherlands - and the only one in the top-league – which still owned its own football stadium; it also owned the land under the stadium and the training block *De Herdgang*. The municipality and PSV negotiated the following transaction: the municipality buys the land under the stadium and the training block for €48,385,000; in order to finance this purchase, the municipality contracts a long-term loan of a similar amount at fixed interest rate (for a long part of the loan's duration) from a bank. The land is then made available to PSV through a long-lease (*erfpacht*) for 40 years. The Dutch authorities consider that these transactions do not constitute State aid for the following reasons: a) the value of the land was established by outside experts in line with the Commission's Communication on land sales; b) PSV will pay the municipality under the long-lease at least the amount of the rent the municipality pays to the bank, which ensures that the operation is financially neutral for the municipality; c) PSV will provide a guarantee for those payments covered by the sale of season tickets; d) if the income from the long-lease should exceed the interest payments, the municipality will use this difference to constitute a buffer for any risk of default for PSV; this would then constitute an additional guarantee for the municipality that it will continue to receive payments of interest.
59. The Commission is not convinced by these arguments and at this stage rather considers that the transactions, taken together, constitute State aid to PSV.
60. As regards the reliance on the Commission's Communication regarding land sales, which is also referred to above in section IV.2 concerning NEC, the Commission reiterates that the guidance provided by that Communication, as stated in its introduction, only "concerns sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements." Regarding the outside expertise relied on by the municipality, the Dutch authorities are requested to justify why the experts used the price of land for miscellaneous use rather than the price of land for a stadium for their calculations. The Commission would also wish to see a justification for the profit and risk margins that are used for calculating the value of the land for future development after the long-lease has ended. At this stage, the Commission is not convinced that the assumptions used are realistic; it would welcome opinions of interested parties in this regard, as well as a more thorough demonstration by the Dutch authorities.
61. In any case, a more appropriate yardstick to test the transactions is the question whether a private investor operating in a market economy, seeking at least long term profitability on his investment¹⁷, would have acted in the same way as the municipality. The Dutch authorities have not demonstrated that this is the case. The information submitted to the Commission does not show that the municipality had any intention of making a profit on the transactions, but that it rather attempted to avoid making a loss; in other words, it introduced safeguards to make the

transactions neutral to its budget. This would not have been acceptable for a typical market economy investor, even if he had based himself on the outside expertise.

62. The transactions are financed with State resources and provide a selective advantage to PSV. The municipality has a better credit rating than the football club and can therefore obtain a loan from a bank at a relatively low interest rate, which PSV – especially in a period of financial difficulties – could not possibly have obtained directly. Through the sale and the long-lease, PSV is able to repay mortgage and other loans with a much higher interest rate in exchange for the relatively low interest rate it pays to the municipality. The Commission therefore concludes at this stage that the municipality of Eindhoven has provided State aid in the meaning of article 107(1) TFEU to PSV.

IV.6. FC Den Bosch

63. As described in section III.5, FC Den Bosch faced severe financial difficulties at the end of 2010, for which it requested support by the municipality. The municipality at the time was a major creditor of FC Den Bosch. According to an external audit in February 2011, its claims totalled €2,288,000. Part of the claims were held by the municipal investment company of Den Bosch *Bosche Investeringsmaatschappij*, which owns the stadium used by FC Den Bosch. The most important part, amounting to € 1,650,000, was held directly by the municipality.
64. As regards the decision in 2011 to sell the claim of €1,650,000 for €1, the Dutch authorities argue that this did not confer an advantage given that the loan would never be repaid anyway. The Commission cannot agree with this point of view. Through this decision, FC Den Bosch was enabled to set up a new legal structure and continue its operations with a clean balance sheet; it thus received an advantage. The Dutch authorities cannot argue either that the municipality acted in the way a private creditor in a same position would have done. The Commission notes that other large creditors transformed their claims into shareholdings in the new legal structure, whereas the municipality sold its claims for nought to organised supporters, who then became shareholders. Whilst the Commission can understand that the municipality did not wish to remain involved in Den Bosch as a shareholder, its decision was not identical to that of the other major creditors.
65. As regards the acquisition of the training and youth block for € 1,400,000, this price was estimated by an outside expert as being the replacement value for the block. The Commission firstly notes that the replacement value of a building is not the same thing as its market price. It furthermore notes that the price paid exceeds the value of the block in FC Den Bosch's accounts (€1 million). The difference seems to be connected to the need to invest in artificial grass training fields at the stadium in order to accommodate FC Den Bosch's needs after vacating the complex. On the basis of the information available to it, the Commission considers that the purchase seems to convey an advantage to FC Den Bosch with the use of State resources. In addition, as regards the up front payment mentioned by the Dutch authorities, which they concede does provide an advantage to FC Den Bosch, but for which they invoke Commission Regulation nr. 1998/2006 on *de*

minimis aid, the Commission would point out that Article 1(h) of said Regulation excludes undertakings in difficulty from its scope.

66. As both the waiver of the loan¹⁸ and the purchase of the training facility are part of the same operation to transform FC Den Bosch into a viable undertaking with a new legal structure, the Commission considers that both operations need to be seen together. In this connection it is unclear how these operations are linked to the repayment of the remaining claims of the municipality and BIM mentioned above. The Commission would request the Netherlands to provide specific information on this point, given that any waiver of those claims or a lowering of the rent for the stadium may constitute additional aid. However, if the proceeds from the purchase of the training facility are reserved for paying the claims of BIM, this should be taken into account when assessing the operation on the basis of the market economy creditor principle. At this stage the Commission takes the view that the operation as a whole constituted an award of State aid to FC Den Bosch in the meaning of Article 107(1) TFEU.

V. LEGALITY

67. The Commission regrets that none of the aid measures described in chapter IV was notified in advance to the Commission pursuant to Article 108(3) TFEU. In the case of PSV, the Commission would remind the Kingdom of the Netherlands of its request dated 27 May 2011, before the award of the aid had been finalised. In spite of that request, no notification was submitted to the Commission.

68. The aid to NEC, Willem II, MVV, PSV and FC Den Bosch was therefore awarded illegally. Where the Commission finds that aid awarded illegally is also incompatible with the internal market, the Commission will decide that such aid must be recovered from the beneficiary, including interest payments over the period during which the aid was available to the beneficiary.

VI. ASSESSMENT OF COMPATIBILITY

69. The Commission must assess whether the aid measures identified in section IV can be considered to be compatible with the internal market. According to the jurisprudence of the Court, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met¹⁹.

70. None of the derogations mentioned in Article 107(2) applies to the aid measures in question; the Dutch authorities have also not claimed that this would be the case.

71. As regards the derogations provided for in Article 107(3), the Commission notes that none of the Dutch regions falls under the derogation in Article 107(3)a). The aid measures in question do not promote an important project of common European

¹⁸ Including waivers of interest on the loan.

¹⁹ C-364/90, Italy v Commission, point 20.

interest, nor do they serve to remedy any serious disturbance in the Dutch economy. The aid measures can also not be said to promote culture or heritage conservation in the meaning of article 107(3)d), nor have the Dutch authorities argued that this would be the case.

72. As regards the derogation in Article 107(3)c) in favour of aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, the Dutch authorities have argued that this derogation could be applied if the Commission, contrary to the opinion of the Dutch authorities, should find that one of the measures in question constitutes State aid.
73. In its assessment of the notion of "development of economic activities" in the sports sector, the Commission takes due account of Article 165 (1) and the last indent of Article 165 (2) TFEU which provide that the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.
74. For its assessment of aid measures under article 107(3)c) the Commission has issued a number of Regulations, Frameworks, Guidelines and Communications concerning aid forms and horizontal or sector purposes for which aid is awarded. Given that all of the football clubs in question faced financial difficulties and that the aid was awarded by the municipalities in question to address those difficulties, the Commission believes that it is appropriate to assess whether the criteria laid down in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty²⁰ might apply.
75. In this regard the Commission firstly notes that the Guidelines do not exclude professional football; this economic activity is, hence, covered by the Guidelines. Of course, professional football is a highly regulated activity, both at national level by the KNVB and at European level by UEFA. In particular, the Commission takes note of the initiatives of UEFA and the national associations to ensure sound finances in professional football.
76. In its section 2.1, point 9, the Guidelines regard a firm as being in difficulty when losses, which it is unable to stem itself, will almost certainly condemn it to going out of business in the short or medium term. In this regard the Commission notes that Willem II, MVV and FC Den Bosch were on the brink of bankruptcy when the municipalities decided to intervene in the period 2008-2010; they were certainly firms in difficulty. As regards PSV, the Dutch authorities have provided information showing heavy losses for PSV in 2009/10 and expected further losses in 2010/11, liquidity shortage and the threat of a negative equity; according to the proposal to the municipal council, there was a threat of discontinuity after the season 2010/11. As regards NEC, its unhealthy financial position was described in section IV.2. The Commission also notes in connection with PSV and NEC that the assessment by KNVB of the financial soundness of professional football clubs at

the end of each season, as explained in section II of the present Decision, determines whether those clubs can expect to keep their license. In such a situation, "going out of business" in the meaning of the Guidelines can be said to be reached when the license is withdrawn and the club is relegated to amateur status. Therefore, based on the available information, the Commission considers that all of the clubs in question may well have been firms in difficulty in the meaning of the Guidelines when the aid was granted. Given that the Dutch authorities have taken the position that none of the measures in question constitutes State aid, they have not attempted to argue compatibility under the Guidelines, with the exception of FC Den Bosch. The Commission therefore invites the Dutch authorities to provide detailed information on the financial situation of each of the clubs in question at the time the municipality decided to intervene. This information should allow the Commission to conclude for each of the beneficiaries whether, at the time of the intervention, it could be considered as a firm in difficulty. This information should also comprise the exact legal status of each of the beneficiaries, including ownership and liability for their financial results. For clubs having a separation of activities between an association and other forms, such as a limited liability company, the Commission wishes to be informed of the exact nature of the activities falling within each legal form.

77. The Dutch authorities are furthermore invited to provide all useful information allowing the Commission to decide whether the aid measures can be considered compatible with the Guidelines.
78. The Guidelines distinguish between rescue and restructuring aid. None of the aid measures examined fulfils the conditions to be considered rescue aid, as they were not provided in the form of loan guarantees or loans as set out section 3.1 of the Guidelines. In the following sections, the Commission will therefore only assess whether the aid measures would comply with all conditions for restructuring aid set out in sections 3.2 and 3.3 of the Guidelines.
79. In section 3.2, the Guidelines require that the grant of the aid must be conditional on the implementation of a restructuring plan (see points 34-37 of the Guidelines), which must restore the long-term viability of the firm within a reasonable time-scale. The Commission is aware that each of the aided football clubs has developed a plan for the future in order to obtain the aid from the municipality; however, the Commission needs the commitment of the Dutch authorities to each of those plans (see point 35 of the Guidelines), which for each football club must be submitted to the Commission with all details. At this stage, the Commission cannot conclude that adequate plans for the restoration of the clubs' viability have been set up and implemented.
80. Section 3.2 of the Guidelines also provides for the need of compensatory measures (see points 38-42 of the Guidelines), which should be in proportion to the distortive effects of the aid and, in particular, to the relative size and importance of the firm on its markets. In professional football, such compensatory measures in favour of competitors, who do not receive aid, should respect the existing regulations for that sector. Where the KNVB has imposed sanctions for not meeting the standards it has set for financial soundness, such as a reduction of points, those sanctions can be taken into consideration as compensatory measures. In professional football, other compensatory measures might, for example, be the following:

a) Limiting the club's number of registered players for a season or several seasons. Clubs need to register with the national football league all players that are allowed to play in the national championships. By accepting a cap on the number of players they can choose from, they have a disadvantage compared to non-aided clubs.

b) Accepting a cap on the relation between salaries and turnover. Under FFP rules the cost of salaries should not exceed 70% of turnover. UEFA considers this to be the upper limit, the European average is at 64% and the average is only 55% in Germany. It would therefore make sense that beneficiaries of restructuring aid accept a temporary limit well below these percentages.

c) Banning the payment of transfer fees for a certain period. This would still allow beneficiaries of restructuring aid to recruit "free" players on the market as well as promising amateurs, but would prevent them from contracting (more expensive) players which still have a contract with another club.

d) Offering additional expenditure on "pro bono" activities to the benefit of the community and training of amateurs. Such measures would force a club that has received aid to divert resources that it would otherwise have been able to use for its competitive activities, and would furthermore serve the goals set out in Article 165 TFEU.

81. Concerning "pro bono" activities, the Dutch authorities have submitted information to the Commission on various activities deployed by the football clubs in question and their players in the interest of the municipality, education and amateur sports²¹. The Commission is also aware of the existence of the foundation "*Stichting Meer dan Voetbal*", which stimulates and co-ordinates the use of professional and amateur football in favour of society as a whole. However, the information available to the Commission does not allow it to establish whether the activities deployed by the clubs falling under the present decision are remunerated or not, nor in all cases to quantify their importance in comparison with the activities deployed before the aid was granted. Therefore, the Commission cannot determine whether the activities mentioned by the Dutch authorities are genuinely additional, non-remunerated measures constituting a compensatory measure for the aid received, nor is it able to assess the value of those measures in relation to the aid received and to the importance of the beneficiary on the various markets where it deploys economic activities.

82. Section 3.2 also demands that the aid should be limited to the minimum necessary and should not be used for financing new investment that is not essential for restoring the firm's viability. Beneficiaries of aid should themselves contribute to the restructuring plan, including the use of external financing. In this regard, the Commission notes that for all football clubs in question other interested parties, such as private creditors, sponsors and supporters have contributed to the respective plans. However, for each of the football clubs in question, the Commission expects a demonstration that the aid was limited to the minimum necessary and was not used for the acquisition of new players or other investment that is not essential for restoring its viability. Furthermore, it should be

²¹ Examples are: Maatschappelijk Convenant Willem II 2010-2014, Samenwerkingsovereenkomst Cruyff Court NEC, Beleids- en activiteitenplan MVV.

demonstrated that the clubs themselves, including their sponsors, supporters and the local business community contributed to a large extent to the financing of the restructuring plan. Point 44 of the Guidelines states that the Commission will normally consider as appropriate the following contributions to the restructuring: at least 25% in the case of small enterprises, at least 40% for medium-sized enterprises and at least 50% for large firms.

83. Section 3.2 furthermore requires regular monitoring reports to the Commission on the implementation of the restructuring plans. The Dutch authorities are requested to commit themselves to submitting annual reports to the Commission until the restructuring of each football club has been completed. If the restructuring has already been completed, one report covering each of the issues raised in the present decision will suffice.

84. Section 3.3 of the Guidelines sets out that for firms having received restructuring aid, the Commission will usually not allow further rescue or restructuring aid unless 10 years have elapsed ('one time, last time' principle). The Commission believes that this principle is especially important for the relations between municipalities and professional football clubs. The repeated interventions in favour of most of the clubs, as described in section III of this decision, underline the importance of a scrupulous respect for this principle in the future. The Commission is aware that some of the municipalities in question have issued declarations that they will not intervene again in case of new difficulties of the football club. However, in such a situation there will nevertheless be temptations, political and social pressure, to intervene again, especially if the municipality owns the stadium or other facilities used by the football club. Sections III and IV of the present decision also show that in such a situation municipalities may try to argue, often against better judgment, that their intervention does not constitute State aid at all. The Commission therefore requests the Netherlands to provide clear commitments for respecting the 'one time, last time' principle in section 3.3 of the Guidelines for each of the football clubs in question.

VII. CONCLUSIONS AND DECISION

85. The Commission concludes that no State aid in the meaning of Article 107(1) TFEU was awarded to Vitesse in 2008.

86. The Commission also concludes that State aid in the meaning of article 107(1) TFEU was awarded to NEC in 2010, Willem II in 2009 and 2010, MVV in 2010, PSV in 2011 and to FC Den Bosch in 2011. Based on the information at its disposal, the Commission nourishes serious doubts whether the aid measures in question can be considered compatible with the internal market pursuant to Article 107(3)c) in the light of Article 165 TFEU and the Community Guidelines on State aid for rescuing and restructuring firms in difficulty.

87. Therefore it has decided to initiate the procedure laid down in Article 108(2) TFEU regarding the aid. Acting under this procedure, the Commission requests the Kingdom of the Netherlands to submit its comments and to provide all such information as may help the Commission to assess the measures and, more

specifically, the information referred to in the preceding paragraphs within one month from the date of receipt of the present letter. The Commission also requests your authorities to forward a copy of this letter to the beneficiaries of the aid measures immediately.

88. The Commission advises the Kingdom of the Netherlands that it will inform interested parties by publishing this letter and a summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Competition Directorate-General
Directorate C
Place Madou 1 / Madouplein 1
B-1210 Brussels

Fax No: +32 2 29 61242

Yours faithfully,
For the Commission

Joaquín Almunia
Vice-President