



**Transparency
in sales
of publicly
owned land
and buildings**



RICS

Executive Summary

Competition is an integral part of the functioning of the European internal market. The EU's rules on competition are designed to ensure that similar criteria apply to all companies operating within the EU, whatever their size, while simultaneously encouraging innovation and unified standards. One issue the Commission closely monitors is State aid, or the amount of assistance national governments give to businesses.

In 1997, the European Commission published Communication 97/C 209/03 on the presence of State aid in sales of land and buildings by public authorities. State aid can include loans and grants, tax breaks, goods and services provided at preferential rates, or government guarantees which enhance the credit rating of a company. Undervaluation of land or property is one example of the type of distortion of competition this Communication aims to prevent.

The possibility of exceptions to the State aid rule, however, can complicate the picture. The Commission will sometimes allow exceptions for regional development: Aid to facilitate the development of certain economic areas, or aid to promote the economic development of areas with low standards of living, are two examples of cases where State aid could be declared compatible with the internal market.

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This paper specifically addresses the guidelines pertinent to valuation. The case history provided illustrates the importance of valuation methods in determining the presence of State aid in public land and property sales. The methods involved include valuations for agricultural and forestry land, developed land, and sales for planned housing and commercial developments. The different Member States mentioned hereafter demonstrate the need for EU-wide guidance.

We hope that this paper will be a useful guide for all RICS members wanting to know more of the EU rules surrounding the sale of public land and buildings

Valuation and the sale of property by public authorities



EU law restricts the presence of State aid where sales of publicly owned land are involved. The State is obliged to act as a private vendor in such transactions, meaning **the land or building concerned must be sold at market value**. The RICS and International Valuation Standards (IVS) definition of market value is ‘the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion’.

In Communication 97/C 209/03, market value is defined as ‘the price at which land and buildings could be sold under private contract between a willing seller and an arm’s length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale’. This is the definition provided in Directive 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings. These conceptions of the market value principle are for all intents and purposes the same, and should not lead to different outcomes.

In this Communication, The Commission lists two ways in which sales of public land can be effectuated without the presence of State aid:

- 1) Sale through an unconditional bidding procedure
- 2) Sale following a **valuation report** prepared by an independent expert

Should public authorities choose not to use an unconditional bidding procedure, a valuation should be carried out, before the sale negotiations, by one or more independent asset valuers in order to establish the market value. The price thus determined is the minimum purchase price that can be agreed on without granting State aid.

Conditions for a sale following a valuation report by an independent expert:

- An asset valuer is defined in the communication as a person of good repute who:
 - i) has obtained an appropriate degree at a recognised centre of learning or an equivalent academic qualification;

- ii) Has suitable experience and is competent in valuing land and buildings in the location and of the category of the asset.
- In Member States where there exist no relevant established academic qualifications, the asset valuer should belong to a recognised professional body concerned with the valuation of land and buildings and either:
 - i) Be appointed by the courts or an authority of equivalent status;
 - ii) have as a minimum a recognised certificate of secondary education and sufficient level of training with at least three years post-qualification practical experience in valuing land and buildings in that particular locality.
- State valuation offices and public officers or employees shall be considered as independent, **provided that immoderate influence on their results is definitively excluded.**
- If it becomes clear that the land and buildings cannot be sold at the value set by the valuer, even after a reasonable effort to sell said property at market value, a divergence of up to 5% from that value can be considered to be in line with market conditions. If after a further period of time it becomes evident that the sale of the land and buildings can still not be obtained, a new valuation may take place, reflecting the experience gained and the offers received.
- Special Obligations characteristic of the land and buildings and not of the purchaser or his economic activities may be included in the sale, provided that every potential buyer is required and able to fulfil them.
 - Economic advantages or disadvantages stemming from such obligations should be evaluated separately by independent valuers and may be factored in to the price
 - The economic burden related to normal obligations of all landowners (i.e. care and maintenance of the land and buildings, payment of taxes and similar charges) are not to be discounted from the purchase price.

Case History



The case history detailed below includes both **judgements** from the Court of Justice of the European Union (CJEU) and the General Court (or the Court of First Instance) as well as Commission **decisions**. Two different types of cases can be brought before the Court of Justice: **references for preliminary rulings** and direct actions. References for preliminary rulings are requests made to the Court of Justice by national courts seeking clarification on the interpretation of EU law. This is done either to ensure that national legislation complies with EU legislation, or to question the validity of a particular aspect of Union law. References for preliminary rulings are initiated when national courts submit a question to the Court of Justice. CJEU preliminary rulings and interpretations of EU law are binding not only for the national courts of the Member State involved in the proceedings, but for all national courts of all Member States as well. The principle of State Liability is essential: since a CJEU ruling is a reasoned order rather than a simple opinion, any State seeking to depart from a consistent jurisprudence must refer the question to the CJEU or risk liability.

The second type of case referred to the Court of Justice is a **direct action**. Direct actions can apply to both Member States and EU institutions. These include, but are not limited to, actions for failure to fulfil obligations, where the Commission or Member State questions a particular State's fulfilment of EU law before the Court; actions for annulment, or requests by an EU Institution to annul another institution's measure; and actions for failure to act, or inquires by an Institution on another Institution's failure to act according to EU law. **The precedence of European law** over national law is absolute; in the event of a conflict of laws, any national laws contradictory to Union law cease to apply, and no new national legislation introduced may contradict Union law.

Although State aid cases are typically within the General Court's jurisdiction, the rulings made by the General Court may, within two months, be subject to an appeal, limited to points of law, to the CJEU. (See *Scott v. Commission*). The CJEU may set aside rulings by the General Court. If it does not decide the case itself, it will refer it back to the General Court, who is bound to respect the decision made by the CJEU on the appeal.

While a Commission decision is binding in its entirety, it is strictly individual in its application, meaning it applies only to the addressee(s).

The first three cases appeared before either the General Court, or the Court of Justice of the European Union. The subsequent three are Commission decisions.

Germany



Case

C-239/09 Seydaland
Vereinigte Agrarbetriebe

Synopsis

German authorities involved in the privatization of agriculture and forestry land used the VPS ('comparative') method of valuation, which calculates the market value of the land by drawing from an extensive database containing details on similar past transactions, then comparing them with the current sale and establishing the average price.

Ruling

The CJEU ruled that Article 107 TFUE forbidding the distortion of competition through State aid did not preclude the application by national law of a valuation method other than the one defined in the Commission Communication, as long as certain conditions are fulfilled. The CJEU stated that while it was clear the best bid and expert report methods of valuation were likely to furnish prices in line with actual market values, **it could not be ruled out that other methods also achieve the same result**. Any alternative method must, however, take into account the updating of prices so that the price paid by the purchaser reflects, as accurately as possible, the market value of the land.

Similarly, the Commission confirmed in Commission decision SA.33167 that the application of the VPS method of valuation by the public agency BVVG, insofar as it reflected the market value of the land sold, did not confer an advantage on the purchaser of the land and thus excluded the possibility of State aid in such a transaction. However, in cases where the VPS method may lead to a result below market value, the German authorities committed to refraining from applying that method.

France



Case

C-290/07 Scott v. Commission

Synopsis

This case addressed the problem of determining the market value of developed land granted at a preferential price.

Ruling

The land in question, sold to Scott Paper Company by the city of Orleans and the department of Le Loiret in France, was neither sold through an unconditional bidding procedure nor independently valued; neither was the sale notified to the Commission as it should be under State aid rules. Upon receiving a complaint, the Commission determined the market value of the land sold to Scott in order to establish the required repayment of the unlawful aid to be recovered. In retroactively assessing the value of the land, the Commission used the **costs-based method**: Comparing the market price of a similar parcel of land with the price paid by Scott, then considering the costs incurred by the City of Orleans in acquiring and developing the land, then checking the amount against the meeting minutes of the City of Orleans Council. The Commission maintained that the costs-based method was especially appropriate in determining market value for a transaction consisting of the sale of land with improvements adapted to the needs of the aid recipient. While the General Court found fault with the Commission for failing to consider other methods of valuating the land at issue, in the appeal the CJEU emphasized that it was necessary for the Commission to apply the **private investor test** to determine whether the price paid by the recipient of the aid corresponds to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed. Such a test requires a complex economic assessment, and any valuation of land done 13 years after the sale would naturally lead to nothing more than a rough estimate of the market value of the land. The CJEU also confirmed the Commission's decision to ignore a valuation established by the French tax authorities for the purposes of a tax audit in 1993, stating that the value of the land used in the context of a tax audit did not necessarily show the market value of that land. The judgement of the General Court stating that the Commission had acted in breach of duty was then set aside.

Sweden



Case

T-244/08 Konsum Nord ekonomisk förening v. Commission

Synopsis

This case before the General Court followed the adoption of a Commission decision condemning Swedish authorities for unlawful State aid in the sale of land to Konsum Nord ekonomisk förening, a consumer goods chain, at a price deemed to be far below market value.

Ruling

The Commission pointed out that a higher offer made by one of Konsum Nord's competitors, Lidl, better reflected the actual market value of the terrain than did the valuation that had been conducted. The Commission also argued that the update of the valuation, done four years later, seemed a retrospective justification of the sale price. Additionally, doubt was expressed as to whether the valuation was performed according to generally accepted valuation criteria by taking into account reduced future revenue. The General Court, however, gave credence to Konsum Nord, granting the Swedish municipal authorities' argument that even though Lidl was interested in the land for sale, its offer had neither the same synergy, nor the same quality for community development as did the program envisioned with Konsum Nord. The terrain in question was, in fact, part of a larger delocalization plan within the community; the municipal authorities explained that Lidl's offer had qualitative differences with that of Konsum, and that Lidl was judged less able to contribute to the overall scheme of the project. While the Commission believed that Lidl's offer should have been considered independently of the larger program, the Court agreed with Swedish authorities that Lidl's offer did not take into account the particularities of the real estate market, and that the sale was effectuated by the community as part of a long-term project. Accordingly, the Commission Decision declaring the sale of land to Konsum Nord as unlawful state aid was annulled.

The Netherlands



Case

Commission Decision
SA.31877 Netherlands
Land sale and housing
development Apeldoorn

Synopsis

Dutch authorities notified the Commission of an aid measure in favour of a pilot project concerning the urban redevelopment of a city area in Apeldoorn.

¹ European Commission, Community Guidelines on State Aid for Environmental Protection 2008/C 82/1 §132.

Ruling

Here, the Commission ruled that municipal and provincial financial contributions to an urban redevelopment project in the Netherlands constituted compatible state aid under Article 107(3)(c) TFUE. In this case, the municipal and provincial authorities concluded a co-operation agreement with two housing corporations on the conversion of former industrial land to residential property. Because the development costs greatly exceeded the expected revenues, the co-operation agreement laid out a tripartite payment plan between the municipality, the province, and the corporations in order to cover the deficit. The market value was calculated on the basis of the top-down **residual value method**, in which the transfer price is the remainder of the expected revenue, all costs deducted and profit and risks added. **The valuation reports of the land to be transferred to the corporations thus took into account the cleaning costs needed for the decontamination of certain sites, and deducted the cost from the initial estimate accordingly.** This is in line with EU guidelines on state aid for environmental protection and is thus compatible with the internal market¹. However, the Commission verified that other important criteria were satisfied when making its final decision on the compatibility with the internal market:

- 1) that the measure taken by the Dutch authorities supported the realisation of Union objectives because ‘physical, economic and social regeneration of urban areas is clearly an EU objective pursuant to Articles 3TEU and 174 TFEU’;
- 2) that granting aid to corporations was an appropriate measure in achieving the goal set out by the municipality, given the high project costs inherent to regeneration plans;
- 3) that the measure was proportionate since the corporations were only compensated as far as was necessary to complete the project, thus ruling out overcompensation; and
- 4) that while such aid could be construed as distortion of competition, the partial compensation of project losses characteristic of the redevelopment project neither exceed a market conform level, nor provided the corporations with resources that they could use for future individual projects.

Poland



Case

Commission Decision SA. 33114 Poland Alleged aid to Crist Shipyard

Synopsis

This decision concerned suspected State aid to shipyards in Poland under a special sales procedure, with the Commission seeking to clarify whether the State-owned Industrial Development Agency (IDA) had granted a loan to Crist S.A. for the purchase of certain assets of one of the shipyards.

Ruling

The Commission was not originally provided evidence on Crist's company rating or collateral level, nor had it received the expert evaluations of Crist's shares. The Commission also expressed concern at the rate at which credit was granted, the benchmark used by the IDA, and the business plan submitted by Crist. As to the collateral (which included a mortgage on real estate within the shipyard), Polish authorities confirmed that expert valuations were performed using two methods: 1) the asset-based valuation method (adjusted net assets method), and 2) the income-based valuation method, or APV method. The results of the two methods differed considerably. An independent expert valuation was also provided for the mortgage on the real estate. The Polish authorities used the various valuations as a basis for the total value of collateral on the loan, declaring that the loan could be classified as 'high collateralization'. They submitted that the collateral value was strengthened by the varied nature of its components, which included real property, moveable property, and financial assets. They also provided a report verifying the valuations available to IDA at the time of the transaction, indicating that it arrived at an amount similar to that of the income-based valuation method. When applying the private investor test, the Commission noted that the concern over the Crist loan stemmed mostly from the assets-based valuation method, which omitted a number of important factors and thus resulted in the underestimation of the value of Crist equity. The independent valuation experts confirmed that the income-based/APV method was a more reliable indicator. The Commission, using the report to take into account the information available to IDA at the time of the transaction, concluded that: Expert recommendations had indicated that the collateral was sufficient to cover the credit risk; that IDA had carried out a full ratio analysis of Crist covering liquidity ratio, turnover, assets-to capital structure and profitability ratio, cash flow analysis, investment effectiveness and financial forecasts; and that IDA had acted as private creditor would have done and applied an interest rate corresponding to a market rate. Thus the loan granted by IDA to Crist did not constitute State aid.

Germany



Case

Commission Decision 2005/664/EC concerning the acquisition of land belonging to Aircraft Services Lemwerder by the municipality of Lemwerder

Synopsis

When the Commission originally expressed doubts as to the price of the land paid by the Lemwerder municipality, a new land valuation was submitted by the German authorities clarifying the value of the bare land (the initial valuation had calculated the value of the land after the necessary infrastructure had been put in place).

Ruling

In the absence of a valuation of the bare land, the Commission had made an estimate by subtracting the cost of development from the value of the developed land, taking into account expected delays, financial costs of the projects, and land required for infrastructure. Their calculation led them to believe that the value of the undeveloped land was significantly below the price paid by the municipality. The new valuation provided by Germany used the **comparative method**, making direct comparisons with other plots of bare land within an 80 kilometre radius while taking into account the differing quality of the plots. When German authorities asserted that the relevant market price was the price of the bare land, the Commission agreed, and qualified the comparative method used by the independent expert valuer as appropriate.

The Commission carefully assessed the size and nature of the plots used in comparison, the way in which potential contamination was taken into account, the independent nature of the expert, the meaning of specific references to infrastructure links, the type of soil, and the method used for calculating the final result. German authorities argued that since the value reached by the expert was higher than the price paid by the municipality, there could be no State aid. The Commission, while noting that the calculation of the final result was perhaps not entirely correct, acknowledged that any alternative calculation would have given a higher value. The basis of the valuation permitted the Commission to rule out the possibility that the market value was lower than the actual price for which the land was sold.

Complaints relative to infringements of EU law may be addressed to the European Commission. Procedural guidelines and details on grounds for a complaint may be found [here](#)

- To find the official texts of the case histories detailed above, please consult [the Eur-Lex website](#)
- A link to the [Commission Communication](#)

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