

## **Form for the submission of complaints concerning alleged unlawful State aid**

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The form sets out the information the Commission needs in order to be able to follow-up a complaint about alleged unlawful aid.

Please complete all the compulsory fields marked with a star (\*).

### **1. Information regarding the complainant.**

Stibbe (Marc van der Woude with right of substitution) representing two complainants (see below)  
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### **2. I am submitting the complaint on behalf of somebody (a person or a firm)**

Stibbe (Marc van der Woude with right of substitution) represents the following two organisations. Their contact details can be found on their respective websites

#### 1) Stichting Het Nationale Park de Hoge Veluwe

A private foundation exploiting the largest national park in the centre of the Netherlands

Contact person:  
Seger van Voorst tot Voorst, director  
+31 55 378 81 26  
vanvoorsttotvoorst@hogeveluwe.nl

[www.hogeveluwe.nl](http://www.hogeveluwe.nl)

#### 2) Stichting Linschoten

A private foundation exploiting a castle and estate in the centre of the Netherlands

Contact person  
Paul Kindt  
+ 31 488 474 444  
kindt@sight.nl

[www.landgoedlinschoten.nl/](http://www.landgoedlinschoten.nl/)

Powers of Attorney of the two complainants are enclosed (Annex I).

The complaint has the support of *Federatie Particulier Grondbezit*. A power of attorney of this association is also enclosed in Annex I.

If the complainant is an enterprise, a brief description of the complainant and its field (s) and place (s) of activity:

The two foundations are non profit organizations which exploit land and estates in various manners. Their activities focus on the conservation of nature, cultural heritage and scenery. In this context, they also exercise economic activities, such as the leasing of land, agriculture, forestry and tourism.

The complainants are members of the *Federatie Particulier Grondbezit* (FPG), an association representing private landowners which exploit land in various manners and for various purposes: agriculture, forestry, tourism and recreation, land leasing, investment, nature and scenery conservation, maintenance of cultural heritage. The association itself does not have economic activities, but is aware of the issue subject to the present complaint and fully supports the initiative of the complainants.

The identity of the complainants and their representative may be disclosed.

The present complaint does not contain confidential information.

### **3. Information regarding the Member State granting the aid\***

#### a) Country

The contested aid concerns the Netherlands.

#### b) Level at which the alleged unlawful State aid has been granted. Please specify which Ministry or institution if known:

The aid is granted both at central and provincial level.

At the central governmental level, the competent Ministry is the *Ministerie van Landbouw, Natuur en Voedselveiligheid* (in particular its Service on Rural Areas, *Dienst Landelijk Gebied*).

The provincial level involves each of the twelve provinces of the Netherlands (see section 4).

#### 4. Information regarding the alleged aid measure.\*

*Please be aware: the information provided under this point is regarded as non-confidential.*

a) To your knowledge when was the alleged aid given or granted?

The 1993 Regulation

The aid measures which are the subject matter of this complaint concern an aid scheme put in place in 1993 by a Regulation of the Ministry of Agriculture (“*Regeling subsidies particuliere terreinbeherende organisaties*”, see Annex II, hereafter referred to as Regulation). This Regulation finds its legal basis in the Framework Act on subsidies granted by the Minister of Agriculture (*Kaderwet LNV-subsidies*), in particular Articles 2 and 4 thereof (Annex III).

Article 2 of the Regulation empowers the Minister to grant subsidies for the acquisition of land. It follows from Article 7 that these subsidies may cover 100% of all acquisition costs of land that is of particular importance for the conservation of nature, scenery, forestry or cultural purposes. This includes land that will be modified to fit those purposes.

Access to this aid scheme is reserved to a limited group of beneficiaries listed under Article 3. These beneficiaries are twelve private foundations active in each of the twelve provinces of the Netherlands, as well as the Dutch nature protection association, *Vereniging Natuurmonumenten* (hereafter VNM). Details concerning these organizations can be found under Section 4C of the present form.

Under Article 4, paragraph 2, of the Regulation, a subsidy may be granted only to one of the beneficiaries, provided the land in question is located within the beneficiary’s sphere of influence. These spheres of influence are defined in a map (*de invloedssferenkaart*) drawn up jointly by the Minister and the Executive Bodies (*Gedeputeerde Staten*) of the Provinces.

In addition to this subsidy scheme, the thirteen organizations also directly receive land without having to participate in any bidding process. This situation occurs when the Ministry of Agriculture acquires the land itself through the Office for the Management of Agricultural Land (*Bureau Beheer Landbouwgronden*, hereafter BBL). After its acquisition, BBL transforms the land into nature or scenery and subsequently transfers the property to one of the thirteen beneficiaries, inter alia on the basis of the above mentioned map. This transfer occurs for free.

## The decentralization of the scheme

In September 2008, the land acquisition subsidy scheme has been decentralized. The Regulation remains in force for specifically designated surfaces that stretch out across two or more provinces. The acquisition of other land is regulated at present by provincial rules. Annex IV contains the rules and regulations of the twelve provinces.

The provincial rules and regulations are based on the Act on the Organization of Rural Areas (*Wet Inrichting Landelijk Gebied*, see Annex V, hereafter referred to as WILG). The WILG allows the funding of provincial budgets by the State under two conditions, that is the provinces must: (i) make a development plan which has a duration of seven year (*Provinciaal Meerjarenprogramma*, PMJP) and (ii) adopt regulations laying down the conditions under which they will grant the subsidies. These regulations require, pursuant to Article 11, paragraph 3, WILG, the Minister's prior approval. It should be noted, however, that the subsidy conditions are not always exhaustively listed in the provincial regulations; additional conditions may be contained in the provincial plans (PMJP's) or supplementary policy documents. Article 7 WILG also specifies that the PMJP also allow the Minister and the provinces to conclude agreements (*bestuursvereenkomsten*) which define, inter alia, the conservation objectives and the investment budget made available by the Minister (*investeringsbudget*).

Although the regulations and plans may differ from one province to another, they share the same rationale as the Regulation. They allow the provinces to cover 100% of the purchase price of surfaces qualifying as nature and scenery (whether they are bought as such or will be made fit for those purposes). The subsidies are available for a limited list of beneficiaries only (i.e. usually the foundation of the province in question and the VNM), and are generally granted to the organisation entitled according to the map defining the areas which are reserved for those organizations.

As a rule, the beneficiaries are supposed to manage the nature and scenery in accordance with their statutory objectives. This suggests that they are not authorized to resell the land. However that possibility is not ruled out. Moreover, if this occurs, the maximum sanction that the beneficiaries face is the restitution of the acquisition subsidy (pursuant to article 4:49 of the General Administrative Law Act – *Algemene wet bestuursrecht*). It should also be noted that the subsidy will not be withdrawn if the sale is authorized by *Gedeputeerde Staten*.

## Relation with other subsidy schemes

In the correspondence with the Dutch authorities, the question was raised as to whether the preferential treatment granted to the thirteen beneficiaries could be justified by the fact that other private

organizations or persons, such as the complainants, can request subsidies pursuant to other subsidy schemes. Reference was made in particular to the Provincial Subsidy Regulations for Nature Conservation (*Provinciale Subsidieregelingen Natuurbeheer*, hereafter referred to as PSN). The PSN ultimately finds its legal basis in Regulation 1698/2005 (OJ 2005 L277/1).

The PSN subsidies, however, do not cover the acquisition of land. It therefore remains that, as mentioned above, land acquisition subsidies are reserved for a limited group of beneficiaries. These beneficiaries are also eligible for the PSN subsidies, on the same terms as other private organisations and persons. The only difference is that changing the destination of land (from agriculture to nature) by these limited group of beneficiaries will not be compensated when the acquisition of the land in question has already been subsidized pursuant to the acquisition subsidy scheme laid down in the Regulation or its provincial equivalents.

The differences between the PSN subsidies and the Regulation can be summarized as follows.

1) Purchase of existing nature from State:

Thirteen beneficiaries: 100% subsidy under Regulation

Others : no subsidy under PSN

2) Purchase of existing nature from third parties:

Thirteen beneficiaries: 100% subsidy under Regulation

Others : no subsidy under PSN

3) Purchase of agricultural land that will be changed in nature from State or third parties

Thirteen beneficiaries: 100% subsidy under Regulation

Others : no subsidy under PSN

4) Loss of value as a result of changing destination (e.g.: agriculture to nature)

Thirteen beneficiaries: approximately 80% under PSN, except for land that is eligible for the acquisition subsidy

Others : approximately 80% under PSN

5) Compensation for landscaping

Thirteen beneficiaries: maximum of 95% under PSN

Others : maximum 95% under PSN

6) Conservation of nature

Thirteen beneficiaries: PSN (amount of the subsidy is dependant upon the particular conservation measure)

Others : PSN (amount of the subsidy is dependant on the particular conservation measure)

It follows that the Regulation (and its provincial equivalents) and the PSN pursue two different objectives. That is why the authorities cannot rely on the PSN for justifying the discriminatory treatment under the Regulation. It should further be noted that one subsidy scheme cannot be justified by another subsidy scheme (see *Italy v. Commission*, 173/73 [ECR 1974] p. 709).

**Conclusion:** the Regulation and its provincial equivalents reserve purchasing subsidies to a limited list of thirteen private organisations.

b) What is the amount of the alleged aid, if known? In what form is it given (loans, grants, guarantees, tax incentives or exemptions etc)?

The contested aid concerns aid granted under an aid scheme. The scheme is triggered by individual and private real estate transactions. Therefore, the complainants do not know the amounts which are concerned by the aid scheme.

However, the total investment budget for rural areas ("*investeringsbudget landelijk gebied*", ILG), offers a basis for some estimates. For the years 2007-2013 the Minister has agreed with the Provinces (in "*ILG-overeenkomsten*") a budget of 3.2 billion euro's, increased with 450 million euro's from other governmental resources. From this budget over 2 billion euro's is designated for nature development. In 2007, a total budget of 565 million euro's was available for land acquisition purposes of which 160 million was spent (these numbers can be found in a letter from the Minister to the House of Representatives (*Tweede Kamer*) of 10 October 2008 concerning the progress of the ILG, Annex VI and the first progress rapport over the year 2007 on the project National Ecological Network (EHS), Annex VII).

The complainants assume that a substantial part of these amounts is or will be used to benefit the

thirteen organizations and therefore consider that the amount of the aid exceeds several millions of euros per annum.

The aid can be granted either by an *ex post* financial compensation granted by the State or the Province to the organisation in question of the purchasing price or by a transfer for free of the land that has been previously acquired by the BBL. This has recently happened for example as part of the Project on developing former military sites ("*Project Ontwikkeling militaire terreinen*", PrOMT). Several of these PrOMT-sites were transferred for free (or for a symbolic € 1,-) by the State (through its intermediary BBL) to one of the thirteen organizations. Military site '*de Dellen*' for instance was sold for € 1,- to '*Het Geldersch Landschap*' and site '*de Blauwe Kamer*' was transferred for free to '*Het Utrechts Landschap*' (the relevant deeds are attached as Annex VIII).

c) Who is the beneficiary? Please give as much information as possible, including a description of the main activities of the beneficiary/firm(s) concerned

The beneficiaries of the aid scheme are the VNM and the twelve private foundations listed under Article 3 of the Regulation, that is:

- (a) *Vereniging Natuurmonumenten* (<http://www.natuurmonumenten.nl>);
- (b) *Stichting Het Groninger Landschap* (<http://www.groningerlandschap.nl>);
- (c) *Vereniging It Fryske Gea* (<http://www.fryskegea.nl>);
- (d) *Stichting Het Drentse Landschap* (<http://www.drentslandschap.nl>);
- (e) *Stichting Het Landschap Overijssel* (<http://www.landschapoverijssel.nl>);
- (f) *Stichting Het Geldersch Landschap* (<http://www.mooigelderland.nl>);
- (g) *Stichting Het Utrechts Landschap* (<http://www.utrechtslandschap.nl>);
- (h) *Stichting Het Zuidhollands Landschap* (<http://www.zuidhollandslandschap.nl>);
- (i) *Stichting Het Landschap Noord-Holland* (<http://www.landschapnoordholland.nl>);
- (j) *Stichting Het Zeeuwse Landschap* (<http://www.hetzeeuwselandschap.nl>);
- (k) *Stichting Het Brabants Landschap* (<http://www.brabantslandschap.nl>);
- (l) *Stichting Het Limburgs Landschap* (<http://www.limburgs-landschap.nl>);
- (m) *Stichting Het Flevo-landschap* (<http://www.flevo-landschap.nl>).

Among these beneficiaries, a distinction should be made between two categories of organizations, which both pursue the objective of nature conservation and durable management of land. The first category contains the VNM is a private Dutch association, whose purpose is to preserve and manage land in the Netherlands that is of particular importance for the conservation of nature, scenery, forestry or cultural purposes.

The second category is composed of a series of twelve private foundations, which pursue nature conservation purposes similar to those of VNM on their respective territories, that is, the twelve provinces in the Netherlands.

Both categories of beneficiaries are private bodies and pursue statutory objectives which are identical or comparable to those pursued by the complainants. Their activities are also similar.

In case NN 277/2003, *Deutschland (Übertragung von Naturschutzflächen)* of 26 April 2006 the Commission decided that non-profit organizations, comparable to the VNM and the foundations, must be considered as undertakings within the meaning of Article 87 EC (see also cases N 709/99, *Versterking van natuur- en bosbeheer* of 12 September 2000; N 33/2005, *Groenfonds Midden-Delfland* of 27 February 2006; N 283/2005, *FIIF, Portugal*; and *mutatis mutandis* case NN 76/2005, *NV Monumenten Fonds Brabant*, of 16 May 2006):

*“Begünstigte sind Naturschutzstiftungen oder Verbände in den Ländern Brandenburg, Mecklenburg-Vorpommern und Sachsenanhalt.*

*Es entspricht ständiger Rechtsprechung des Gerichtshofs, dass der begriff des Unternehmens jede eine wirtschaftliche Tätigkeit ausübende Einheit, unabhängig von ihrer Rechtsform und Art der Finanzierung, umfasst. Die Verwaltung der unentgeltlich übertragenen Flächen unterliegt naturschutzrechtlichen Auflagen, die eine wirtschaftliche Nutzung nur sehr eingeschränkt zulassen. Naturschutzstiftungen oder -verbände üben jedoch eine, wenn auch geringfügige, wirtschaftliche Tätigkeit aus (insbesondere Beratungsdienste, Holzverkauf, Verpachtung von landwirtschaftlichen Flächen und Tourismus). Die Begünstigten sind daher als Unternehmen im Sinne von Artikel 87 Absatz 1 des EG-Vertrags zu betrachte” (grounds 32 and 33).*

To conclude, the beneficiaries of the contested aid scheme are undertakings.

d) For what purpose was the alleged aid given (if known)?

The aid scheme provides financial support (either through subsidies or transfer in kind) for the acquisition of land that is of particular importance for the conservation of nature, scenery, forestry or cultural purposes. Such aid is also available for land which could be made fit for these purposes after landscaping.

## 5. Grounds of complaint.\*

**Please explain in detail the grounds for your complaint. If known, what rules of community law you think have been infringed by the granting of the alleged aid.**

*Please be aware: the information provided under this point is regarded as non-confidential.*

The State and provincial regulations underlying the present complaint open the right for subsidies to a limited group of beneficiaries for the acquisition of land. More precisely, the Dutch public authorities grant certain specific foundations subsidies covering the entire purchasing price of land that becomes

available for nature conservation purposes. In addition, financial support is also given to these selected organizations by other means such as transfer of land in kind.

Clearly, this aid scheme involves the transfer of State resources, whether it is through subsidies or transfer in kind.

These subsidies procure obvious and selective economic advantages to a limited group of beneficiaries. Further, the subsidy scheme allows the beneficiaries to outbid other private organisations when land is sold by public bodies or by private landowners. There are several instances where the beneficiaries have acquired land at a price substantially above the market price.

The disputed aid scheme distorts competition between its beneficiaries and other parties, such as the complainants, which likewise pursue land conservation purposes but are deprived from subsidies. The fact that this competition takes place between non-profit organizations does not change the picture. In that regard, complainants refer to grounds 27 and 28 of the ECJ's judgment in *MOTOE* (C-49/07 of 1 July 2008):

*"As regards the effect that the fact that ELPA does not seek to make a profit may have on that classification, it should be noted that, in Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraphs 122 and 123), the Court stated that the fact that the offer of goods or services is made without profit motive does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit.*

*That is the case of activities engaged in by a legal person such as ELPA. The fact that MOTOE, the applicant in the main proceedings, is itself a non-profit-making association has, from that point of view, no effect on the classification as an undertaking of a legal person such as ELPA. First, it is not inconceivable that, in Greece, there exist, in addition to the associations whose activities consist in organising and commercially exploiting motorcycling events without seeking to make a profit, associations which are engaged in that activity and do seek to make a profit and which are thus in competition with ELPA. Second, non-profit-making associations which offer goods or services on a given market may find themselves in competition with one another. The success or economic survival of such associations depends ultimately on their being able to impose, on the relevant market, their services to the detriment of those offered by the other operators"*

The scheme also affects economic activities for which there is trade between Member States (such as trade in agricultural and forestry products) or which attract recipients of tourist services to the Netherlands (such as the operation of sites of interest for tourists). In addition, the subsidy scheme curbs the acquisition of Dutch land by investors from other Member States.

On these grounds, all the conditions of Art. 87(1) EC are fulfilled since the subsidies:

- 1) involve state resources;
- 2) procure a selective advantage to a limited group of beneficiaries;

- 3) distort competition between the beneficiaries and other private land owners;
- 4) affect cross border trade flows of goods, services and capital.

Last, the aid scheme has been put into place in 1993 and has never been approved by the European Commission and, thus, has been implemented in violation of Art. 88(3) EC. As a result, the aid granted under this subsidy scheme is illegal.

The complainants also submit that the aid scheme violates other Treaty provisions. First, the subsidy schemes are contrary to Articles 43 and 52 EC, because they impede the freedom of establishment and the free circulation of capital. Foreigners cannot acquire land on similar conditions as the beneficiaries (*Konle*, C-302/97, 1 July 1999). Second, under the contested scheme, the acquisition of land is subsidised on the basis of a map that designates which beneficiary is entitled to financial support. This eliminates competition between the beneficiaries when they seek to acquire land. The complainants consider that this may fall foul of Article 81 EC.

**6. Please summarize briefly to what extent the award of the alleged aid affects.\***

a) your commercial interests / commercial interests of the person/firm you represent

Where the complainants must bear the full cost of the land they acquire, their counterparts receive subsidies covering 100 % of this cost or have this land transferred in kind without charge. This affects the interests of the complainants in several ways.

First, nature protection necessarily implies the possession and management of large areas of land. The protected areas should constitute a coherent and sufficient large ecological system so as to allow the species to develop in an undisturbed or traditional manner. In order to achieve an optimal scale, nature protection organizations such as the beneficiaries and the complainants generally seek to acquire additional land. This competition is distorted, especially where the subsidies are used to buy land above market prices or when the public authorities transfer the land to the beneficiaries without giving other parties a chance to bid. Often the complainants find out about the transfer *post factum*.

Second, the costs of land acquisition represent a significant part of the budget of the complainants. Money spent for these purposes cannot be used for other investments. This implies on its turn that the complainants are compelled to request higher rental or entry fees or higher prices for their products than the thirteen organizations benefitting from the scheme. Moreover, this (financial) necessity to ask an entry fee for their land makes it impossible for the complainants to receive a conservation subsidy ("*beheerssubsidie*"), because the granting conditions specify that the land should be open to the public free of charge.

b) the market(s) in which the beneficiary(ies) of the alleged aid operate.

Much like the complainants and other parties, the beneficiaries engage in several economic activities, regardless of their legal status or nature conservation purposes. These activities include the sale of agricultural and forestry products, the rental of parcels of land, income of tourist shops, rents of castles and mansions for parties and ceremonies and collecting entry fees.

#### 7. Information on other procedures.\*

a) Have you already approached the Commission's services or any other European or national institution concerning the same issue?

Yes

The complainants have requested the Dutch authorities to cease the unequal treatment. Copies of correspondence are attached (see Annex IX).

b) Approaches already made to national authorities or recourse to national courts or other procedures.

Yes No If yes, indicate whether there has already been a decision or award and attach a copy

No, apart from the correspondence mentioned under Section 7.

**8. I understand that for a faster treatment of the complaint the information provided above in point 3, 4 and 5 are non-confidential and can be sent to the Member State in question.\***

Yes No

#### 9. Supporting documents

Please list any documents and evidence which is submitted in support of the complaint and add annexes if necessary

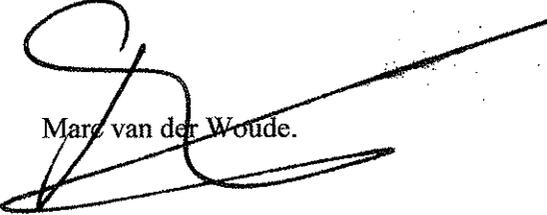
- Whenever possible, a copy of the national law or other measure which provides the legal basis for the payment of the alleged aid should be provided
- If the complaint is submitted on behalf of someone else (a person or a firm) please attach proof that you as a representative are authorized to act
- If the complainant is an enterprise, please feel free to attach a brief description of the complainant and its field(s) and place (s) of activity
- Copies of previous correspondence with the European Commission or any other European or national institution concerning the same issue
- If the issue has already been dealt with by a national Court, a copy of a judgement if available.

#### LIST OF ANNEXES

- I. Powers of Attorney of the two complainants and the federation
- II. The Regulation
- III. The Framework Act
- IV. The Provincial Regulations
- V. The WILG Act

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| VI.   | A letter from the Minister of Agriculture to the House of Representatives, dated 10 October 2008                   |
| VII.  | First progress report over the year 2007 on the major project National Ecological Network (EHS)                    |
| VIII. | The deeds regarding the transfer of title of military terrains ' <i>de Dellen</i> ' and ' <i>de Blauwe Kamer</i> ' |
| IX.   | Correspondence with Dutch authorities  |

Brussels, 23 December 2008.



Marc van der Woude.