

COMMISSION DECISION

of 19 July 2006

on the aid measure notified by the Netherlands for KG Holding NV

(notified under document number C(2006) 2954)

(Only the Dutch version is authentic)

(Text with EEA relevance)

(2006/939/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

The Commission invited interested parties to submit their comments on the measure.

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

- (4) By letter dated 7 September 2005, the Dutch authorities requested an extension of the deadline for submitting their comments on the Commission's decision to initiate proceedings, which the Commission granted by letter dated 15 September 2005.

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

- (5) The Netherlands submitted its comments and provided additional information by letters dated 29 September 2005, registered as received on 30 September 2005; 13 January 2006, registered as received on 18 January 2006; and 17 February 2006, registered as received on 23 February 2006.

Whereas:

1. PROCEDURE

- (1) By letter dated 26 January 2004, registered as received on 11 February 2004, the Dutch authorities notified the Commission that they intended to grant restructuring aid under the Community guidelines on state aid for rescuing and restructuring firms in difficulty (hereinafter 'the guidelines') ⁽²⁾ to KG Holding NV (hereinafter 'Kliq Holding' or 'KH'). Following this notification, the Commission asked the Netherlands to provide further information in April, August and November 2004. In December 2004, the Dutch authorities requested an extension of the deadline for providing a reply, explaining that the firm was still not performing well and that another firm was possibly interested in a takeover.

- (6) The Commission received no comments from interested parties.

2. DETAILED DESCRIPTION OF THE AID

2.1. Background

- (2) By letter dated 5 August 2005, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the notified measure.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾.

- (7) In 2002, KH was created through the transformation of the reintegration services of the Dutch Ministry of Employment and Social Affairs into a private limited liability company ⁽⁴⁾. By late 2003, KH had significantly reduced its headcount because of mounting losses due *inter alia* to adverse market conditions and poor management.

- (8) In November 2003, the Netherlands notified its plan to grant the company a EUR 45 million loan as rescue aid under the guidelines to enable the company to stay afloat whilst preparing a wide-ranging restructuring plan. In December 2003, the Commission authorised the rescue aid for KH ⁽⁵⁾ pending the notification of a detailed restructuring plan within six months.

⁽¹⁾ OJ C 280, 12.11.2005, p. 2.

⁽²⁾ OJ C 288, 9.10.1999, p. 2. Given that the aid was notified before 10 October 2004, these guidelines remain applicable by virtue of point 103 of the new Community guidelines on state aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

⁽³⁾ See footnote 1.

⁽⁴⁾ Upon incorporation the company's name was N.V. Kliq, and in the second half of 2003 it was changed to KG Holding NV.

⁽⁵⁾ OJ C 33, 6.2.2004, p. 8.

2.2. The relevant undertaking

- (9) KH is a holding company whose main activity is to provide labour reintegration services on the Dutch market. After having been a part of the Dutch government, with some 3 000 employees, it was incorporated on 1 January 2002. The Dutch State is the sole shareholder. KH currently employs about 700 people.
- (10) Besides the reintegration activity of the holding company, which was performed by the subsidiary Kliq Reintegratie (hereinafter 'Old Kliq' or 'OK') with 1 450 employees, there was one other main subsidiary called Kliq Employability (hereinafter 'KE') with 200 employees. In addition, KH owned equity stakes in six very small subsidiaries and joint ventures which together with KE are collectively referred below as 'OS' (other subsidiaries), ranging in size from 4 to 20 employees, namely: Kliq Experts, Brug and Instroom-projecten, Flexpay BV, Simnet BV, Kliq Match BV and Kliq Business School.
- (11) The core activities of the two largest subsidiaries were reintegration and employability services. These are services provided to people who are facing difficulties finding a job, including disabled people, but also to companies who are facing difficulties in finding the right people for certain jobs.

2.3. The relevant markets

- (12) The main relevant market concerned is the market for labour integration services. Both public as well as private operators tender out contracts to undertakings offering labour integration services. However, for KH the public sector is the most important market. Local authorities and the UWV (an organisation responsible for the implementation of social regulations) offer contracts to undertakings like KH. KH had a market share of 16 % on the UWV market; Alexander Calder (12 %), Argonaut (10 %) and Randstad (9 %) are the other major players. The second most important market for KH is the market for contracts tendered by municipalities; there the market share of KH is about 38 %. Other important players on that market are Alexander Calder (25 %) and TMP (25 %).

2.4. The restructuring plan

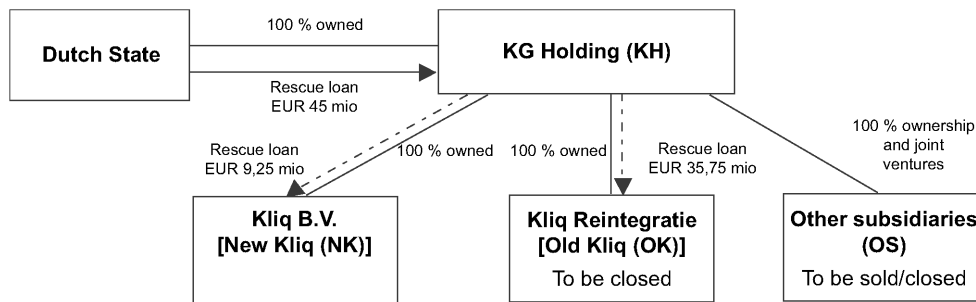
- (13) Under the restructuring plan, KH would wind up its largest and loss-making subsidiary OK, sell or liquidate all the

companies forming part of OS, and set up a new specially created subsidiary called Kliq BV (hereinafter 'New Kliq' or 'NK'), which would focus on continuing KH's core reintegration business ⁽⁶⁾. Under the restructuring plan, NK is the vehicle entrusted with the restoration of KH's long-term viability.

- (14) The key features of the base-case scenario of the restructuring programme are:
- *Key measures:*
 - NK would focus on the core reintegration business of KH, and KH would dispose of all its subsidiaries, except for OK — the largest and loss-making subsidiary — which would be shut down before the end of 2004;
 - the operational reorganisation of the company (staff reductions, reduction of the number of operation sites, improvement of the company's internal organisation, business procurement and execution, as well as the financial operations, etc).
 - *The targets:*
 - NK was to be profitable from 2004 onwards, and would pay out its profits to KH,
 - KH was to be viable from 2005 onwards, and would use NK's paid-out profit over time to reimburse the outstanding state loans of EUR 41 million by 2016.
 - *The restructuring aid:*
 - Extension by KH of the EUR 45 million state-granted rescue loan partly to NK (EUR 9,25 million) and partly to OK (EUR 35,75 million);
 - the transformation of the total rescue loan to KH, amounting to EUR 45 million, plus the interest due thereon provisionally estimated to some EUR 1,2 million, into restructuring aid by means of conversion into equity capital, possibly supplemented by additional state measures in the worst-case scenario (an overview of the measures is set out in Annex I to the Commission's decision to initiate the Article 88(2) procedure).

⁽⁶⁾ In order to perform this task, under the restructuring plan NK took over the assets, liabilities and part of the staff of OK whilst acquiring the outstanding reintegration contracts.

(15) The chart below provides an overview of KH's structure and ownership under the restructuring plan.



3. STATE OF PLAY OF THE RESTRUCTURING PLAN PRIOR TO THE INITIATION OF THE PROCEDURE

(16) Because of the persistence of severe difficulties, KH and OK filed for suspension of payments, which was granted to them on 20 January 2005 by the Rotterdam court and by the Utrecht court. On 7 February 2005, the receivers of KH and OK asked the above courts to change the suspension of payments into bankruptcy. On 8 February 2005, KH and OK were eventually declared bankrupt by the above Dutch courts.

(17) NK accumulated losses of some EUR 12 million between the end of 2003 and the end of 2004 against equity capital of EUR 5,75 million provided by KH when it was set up. Moreover, NK's future was highly uncertain as the company had failed to meet the targets set under the restructuring plan and faced more unfavourable market conditions as the market had shrunk in size in the wake of regulatory change, with municipalities no longer being required to earmark part of their budget for reintegration services.

4. GROUNDS FOR INITIATING THE PROCEDURE

(18) In its decision of August 2005 to initiate the procedure, the Commission concluded that the restructuring aid which the Netherlands intended to grant to KH, by means of transforming the EUR 45 million rescue loan and interest due thereon into equity capital, did not appear to fulfil the requirements of the Community guidelines on state aid for rescuing and restructuring firms in difficulty. Furthermore, the Commission doubted whether the aid was actually limited to the minimum required and in particular whether the beneficiary would make a significant contribution from its own resources. Consequently, the Commission expressed doubts as to whether the restructuring aid could be considered compatible with the common market pursuant to Article 87(3)(c) of the Treaty.

5. COMMENTS FROM THE DUTCH AUTHORITIES

(19) By letter dated September 2005 the Dutch authorities responded to the Commission's decision to initiate the procedure, providing further information concerning (i) the development of the bankruptcy proceedings of KH and OK;

(ii) the financial and operating performance of NK; and (iii) the development of the legal proceedings opposing NK and the Dutch state. The latter concerns specifically the legal application filed by NK to the competent Dutch court, in the wake of the bankruptcy of KH and OK, asking the court to order the state to convert into equity the EUR 9,25 million rescue loan facility extended by KH to NK following the authorisation of the rescue aid by the Commission. Notwithstanding the fact that, pursuant to the guidelines, such aid must be liquidity support and temporary in nature and may only be considered permanent after the Commission's approval of the restructuring aid, in the summer of 2005 the Dutch authorities informed the Commission that the competent Dutch court had ordered them to convert the above loan into equity.

(20) Further, by letter dated January 2006, the Netherlands informed the Commission of the bankruptcy of NK as of 14 December 2005 and the ensuing proceedings. Finally, by letter dated February 2006, the Netherlands provided updated information concerning the bankruptcy proceedings of KH and OK.

6. ASSESSMENT

6.1. Existence of aid

(21) According to Article 87(1) of the EC Treaty 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the common market'.

(22) Firstly, the restructuring aid is granted by means of transformation into equity capital of the state-granted rescue loan to KH plus interest due on the loan by the latter, and thus clearly constitutes state resources. The rescue loan granted to KH and its transformation into restructuring aid confer on it an advantage that an undertaking in such difficulties, close to bankruptcy, would not have obtained on the financial market.

(23) Although KH is operating only on the Dutch market, it is not excluded that granting an advantage to KH distorts or threatens to distort competition and has a potential effect on trade between Member States. In addition, as indicated by the Dutch authorities, there are smaller international players on the Dutch market such as TMP and Creyff's (subsidiary of Solvus, Belgium). Consequently, the advantage appears to favour a company over its competitors, thus distorting or threatening to distort competition and affect trade between Member States.

(24) Consequently, the notified measure for KH must be considered to constitute state aid within the meaning of Article 87(1) of the EC Treaty and has to be assessed accordingly.

6.2. Compatibility of the aid with the common market

(25) The aid falls to be assessed by the Commission as *ad hoc* aid. Article 87(2) and (3) of the EC Treaty provides for exemptions from the general incompatibility of aid stated in Article 87(1) of the EC Treaty.

(26) The aid measure in question clearly fails to qualify for the exemptions provided for in Article 87(2) of the EC Treaty. The notified aid measure does not have a social character, nor is it granted to individual consumers, nor does it make good the damage caused by natural disasters or exceptional occurrences, nor is the aid granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(27) Further exemptions are set out in Article 87(3)(a) to (d) of the EC Treaty. As the primary objective of the aid is not regional but concerns the restructuring of an undertaking in difficulty, only the exemption provided for in Article 87(3)(c) appears relevant in that it provides for the authorisation of state aid granted to promote the development of certain economic sectors, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(28) For its assessment of rescue and restructuring aid the Commission has issued the above mentioned guidelines. The Netherlands has requested the Commission to scrutinise the measure under those guidelines.

(29) Section 3.2. (points 28 to 63) of the guidelines, and in particular points 30 to 47, describe the conditions which must be met in order for the Commission to authorise restructuring aid. The assessment is outlined in the paragraphs (30) to (55) below.

6.2.1. Eligibility of the company

(30) Pursuant to point 30 of the guidelines, the company must qualify as a firm in difficulty within the meaning of section 2.1 (points 4 to 8). According to point 6 of the guidelines the usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

(31) Point 5(a) of the guidelines specifically defines a company as being in difficulty where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months.

(32) According to the notification this is the case with KH. From the audited accounts of 31 December 2002 it can be concluded that the registered capital of the holding company (consolidated) amounted to approximately EUR 73 million on 1 January 2002. At the end of that year it amounted to only EUR 22 million. This equates to a reduction of approximately 70 %. In addition, there was a further significant decrease in the nine months to September 2003.

(33) The Dutch authorities plan to grant the restructuring aid to KH. KH will in turn extend this aid to its two subsidiaries, NK and OK, in order to complete the restructuring.

(34) The Commission considers that KH qualifies as a company in difficulties pursuant to the concept defined in points 4 to 8 of the guidelines and is consequently eligible for restructuring aid.

6.2.2. Restoration of viability

(35) The grant of aid is conditional on implementation of a restructuring plan which must be endorsed by the Commission in the case of individual measures such as the one under review. In particular, pursuant to points 31 to 34, the guidelines require *inter alia* that:

— 'the restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State concerned commits itself....'

— 'The plan should normally provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on

capital should be enough to enable the restructured firm to compete in the marketplace on its own merits'.

the minimum necessary and that the beneficiary make a significant contribution from its own resources.

- (36) It should first of all be noted that the notified restructuring plan was incomplete: the Dutch authorities did not, for example, submit up-to-date liquidity planning. The restructuring plan did not provide the Commission with the information it needed in order to be able to carry out a full assessment under the guidelines. The Commission had to ask for KH's liquidity costs and for a sensitivity analysis in respect of the various business scenarios. Because of the way KH's business was going, the Dutch authorities did not appear able at any point in time to provide all the required information.
- (37) The Commission doubted from the outset whether the restructuring plan could bring about the required turnaround because of the insufficient internal rate of return compared with the expected return on capital, because of NK's underperformance compared with the benchmarks of the restructuring plan, because of the persistence of the serious structural problems that had caused KH's difficulties, and finally because of the failure of the Dutch authorities to give a proper account of the beneficiaries' significant contribution to the restructuring from their own resources. The presence of these substantial problems impeded the fulfilment of the guidelines' requirements for the authorisation of the restructuring aid.
- (38) Furthermore, as stated in paragraph (16), the Commission notes that KH was declared bankrupt in February 2005. Since KH failed to achieve the required turnaround according to plan, it must therefore be noted that its long-term viability can no longer be restored by the present or any modified restructuring plan. Moreover, as pointed out by the Dutch authorities following the initiation of the formal investigation procedure, it should be noted that even NK, the specially created vehicle that was to have brought about KH's turnaround, has been declared bankrupt, thus confirming NK's serious difficulties highlighted in the decision to initiate the procedure and the inappropriateness of the restructuring plan.
- (39) Since the core conditions for the granting of restructuring aid pursuant to the guidelines are not met, the Commission cannot approve the restructuring plan, and the restructuring aid cannot therefore be authorised. Nor, by the same token, can the notified measure be considered to be compatible with the common market under Article 87(3)(c) of the EC Treaty.
- (40) In light of the foregoing, the Commission considers that it is not necessary to examine in detail the other conditions required for authorisation of the restructuring aid under the guidelines, including the requirement in point 40 of the guidelines that the aid amount and intensity be limited to

6.2.3. Further considerations

- (41) In line with the requirements set out in point 24 of the guidelines, the rescue aid for KH was initially granted for no more than six months. It is also noted that within six months of the authorisation of the rescue aid for KH, the Dutch authorities notified the restructuring plan for KH.
- (42) According to the terms of the restructuring plan notified by the Dutch authorities, KH transferred EUR 35,75 million from the rescue loan to OK and EUR 9,25 million to NK.

6.2.3.1. Conversion into equity of the EUR 9,25 million rescue loan transferred to NK

- (43) The Dutch authorities informed the Commission that the competent Dutch court had ordered them to convert the EUR 9,25 million loan into equity on the basis of Articles 53 and 69 of the Dutch Bankruptcy Law. The conversion took place on 22 August 2005. The conversion can therefore be regarded as partial implementation of the notified measure.
- (44) The Commission would remind the Dutch authorities that, in accordance with the principle that Community law takes precedence over national law, the implementation of the decision of the national court referred to in paragraph (43) is in breach of the ban on implementing any state aid measure before the Commission has approved it under Article 88(3) of the EC Treaty. The conversion of the rescue loan into equity for the purposes of restructuring ranks as unlawful restructuring aid. Since, moreover, the notified aid does not meet the requirements of the guidelines, a measure which constitutes partial implementation thereof is also incompatible. The fact that the measure was implemented by order of a national court is irrelevant in this context, since national courts, like other state bodies, are required to comply with the provisions of the Treaty.
- (45) Consequently, the conversion of the EUR 9,25 million rescue loan transferred to NK pursuant to the judgment of the national court is deemed to amount to the granting of unlawful and incompatible restructuring aid to NK. Since this restructuring aid cannot be approved, it is incompatible with the common market.
- (46) Pursuant to Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽⁷⁾, where negative decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned has to take all necessary measures to recover the aid from

⁽⁷⁾ OJ L 83, 27.3.1999, p. 1. Regulation amended by the Act of Accession of 2003.

the beneficiary. However, the Commission may not require recovery of the aid if this would be contrary to a general principle of Community law. In the case being examined here, no such principle can be invoked. Consequently, the aid granted in the form of conversion into equity of the rescue loan amounting to EUR 9,25 million must be recovered in full.

6.2.3.2. Concerning the EUR 35,75 million rescue loan transferred to OK

- (47) Pursuant to the notified restructuring plan, in order to restore KH's long-term viability, KH transferred EUR 35,75 million from the total EUR 45 million state rescue loan to OK for the latter's closure. Contrary to the EUR 9,25 million rescue loan transferred to NK, this loan was not converted into equity. Therefore, the measure continues to rank as rescue aid.
- (48) According to point 23(d) of the guidelines, the Member State concerned has to communicate to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full.
- (49) In this case, the companies concerned went into bankruptcy soon after the communication of the restructuring plan. The Commission was, therefore, not in a position to authorise such plan.
- (50) However, the Dutch authorities informed the Commission that the formal bankruptcy and liquidation proceedings had commenced. This is in line with point 25(d) of the guidelines, which, as an alternative to the full reimbursement of the loan or the presentation of a restructuring plan, requires the communication of a liquidation plan. The Commission authorises such liquidation plan provided that the following two conditions are met:
- the Netherlands registers its EUR 35,75 million claim on KH and/or OK as a creditor in the bankruptcy proceedings with the curator; and
 - the Netherlands ensures that the company is liquidated in a manner that would put an end to the distortion of competition, i.e. the activities of the undertakings concerned should end and their assets should be sold on market terms as soon as possible. It is generally speaking the case that the sale of an undertaking as a whole involves the risk of the aid that has been granted being transferred to whoever acquires the undertaking. That risk is reduced if only the undertaking's assets are sold.

6.2.3.3. Concerning the old loans granted to KH upon incorporation

- (51) Despite the fact that the old state loans granted to KH are outside the scope of the restructuring aid package and of the present procedure⁽⁸⁾, the Commission wishes to make its position clear in order to help prevent any further conflicts arising in the present case between the Community rules on state aid and the application of national law by the competent courts, as happened with regard to the measure outlined in paragraphs (43) to (46) above. Its position is being made clear more specifically in relation to the legal proceedings brought before the Dutch court outlined in paragraphs (52) to (55) below.
- (52) Under the notified restructuring plan, by 2016 KH was to repay in full old loans amounting to EUR 41 million, including a conditional EUR 17 million current account credit facility (hereinafter 'credit facility'), which had been granted on market terms by the state in 2002 in the wake of KH's incorporation and is outside the scope of the restructuring aid package.
- (53) By letter of February 2006, the Netherlands informed the Commission that, in the context of KH and OK's bankruptcy proceedings, the curators had asked the competent national courts to order the state to pay in full the credit facility, which had been frozen by the state in the wake of the suspension of payments pending the bankruptcy of KH and OK in February 2005.
- (54) The Commission notes that the above matter is under the jurisdiction of the competent national court, which will have to establish whether the state's decision was in line with the terms and conditions set forth in the credit facility termination agreement.
- (55) The Commission takes the position that if the state's decision was in line with the agreement, then the competent court must uphold the state's decision and dismiss the curators' claim. If, however, the court should decide that, despite the fact that the state complied with its contractual rights and obligations, the state still must pay the full amount of the credit facility to the curators, in the framework of the said bankruptcy proceedings, such a decision could be deemed to be tantamount to granting new state aid to KH's creditors, and it would have to be notified to the Commission in accordance with Article 88 (3) of the Treaty.

7. CONCLUSIONS

- (56) In the light of the foregoing, the Commission has found that the measure under review constitutes state aid within the meaning of Article 87(1) of the Treaty. The information submitted by the Dutch authorities, whether or not during the formal investigation, has confirmed that the restructuring aid which the Netherlands intends to grant to KH, by

⁽⁸⁾ All the old loans were granted on market terms.

means of transforming the EUR 45 million rescue loan and interest due thereon into equity capital, does not fulfil the requirements of the Community guidelines and is therefore not in accordance with Article 87(3)(c) of the Treaty.

(57) In so far as the aid measure has already been implemented through conversion of the EUR 9,25 million loan transferred to NK into equity capital, this must be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The state aid measure in the form of restructuring aid for KG Holding NV amounting to EUR 45 million does not fulfil the requirements of the Community guidelines on state aid for rescuing and restructuring firms in difficulty and is therefore incompatible with the common market.

Article 2

1. The Netherlands shall take all necessary measures to recover from KG Holding NV and Kliq BV that part of the aid referred to in Article 1 that was transferred as a EUR 9,25 million rescue loan by KG Holding NV to its subsidiary Kliq BV, plus any interest.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective implementation of this Decision.

3. The amount to be recovered shall bear interest from the date on which the individual parts thereof were first put at the

disposal of the beneficiaries until the date of their actual recovery.

4. The interest to be recovered pursuant to paragraph 3 shall be calculated in accordance with the methods set out in Articles 9 and 11 of Commission Regulation (EC) No 794/2004 ⁽⁹⁾.

Article 3

The Netherlands shall register its claim of EUR 35,75 million on the KG Holding NV and/or Kliq Reintegratie as a creditor in the bankruptcy proceedings with the curator. The Netherlands shall ensure that the undertakings are liquidated in a manner that will put an end to the distortion of competition, with the activities of the undertakings concerned being terminated and their assets sold on market terms as soon as possible.

Article 4

The Netherlands shall inform the Commission, within two months of notification of this Decision, of the measures planned and already taken to comply with it.

Article 5

This Decision is addressed to the Netherlands.

Done at Brussels, 19 July 2006.

For the Commission

Neelie KROES

Member of the Commission

⁽⁹⁾ OJ L 140, 30.4.2004, p. 1.