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Subject: State aid No C 4/2007 (ex N 465/2006) – The Netherlands
Interest group box (Groepsrentebox)

Sir,

1. PROCEDURE

- (1) By letter dated 13 July 2006, the Dutch authorities notified the groepsrentebox scheme which provides for lower taxation/deduction of interests received/paid in the context of intragroup relations. The notification was made by the Dutch authorities only for the sake of legal certainty since they consider the scheme as a general measure.
- (2) The Commission requested additional information that was provided on 5 September 2006. A meeting between the Dutch authorities and the Commission took place on 20 October 2006. Following this meeting, further information was provided on 9 November 2006.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. OBJECTIVE OF THE MEASURE

- (3) The measure aims at reducing the difference in fiscal treatment between two instruments of intra-group financing, i.e. debt and equity.

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- (4) In the current situation, when a company injects capital into another, it receives as remuneration dividends which are tax exempted by virtue of participation-exemption rules, whereas, when it lends money, the interest received are taxed at the standard corporate tax rate (25.5%). At the level of the company which receives the funds, dividends paid in case of capital injection are not deductible, whereas interest paid in case of loan are deductible at the standard corporate tax rate. According to the Dutch authorities, the differences in terms of fiscal treatment create arbitrages between these two means of intra-group financing which are not economically desirable.
- (5) For the Dutch authorities, the notified scheme constitutes a measure of a purely technical nature. The Dutch authorities also indicate that, in the context of thin capitalisation rules, the measure will prevent artificial reduction of tax base in the Netherlands and is consistent with the *Bosal*¹ case law.

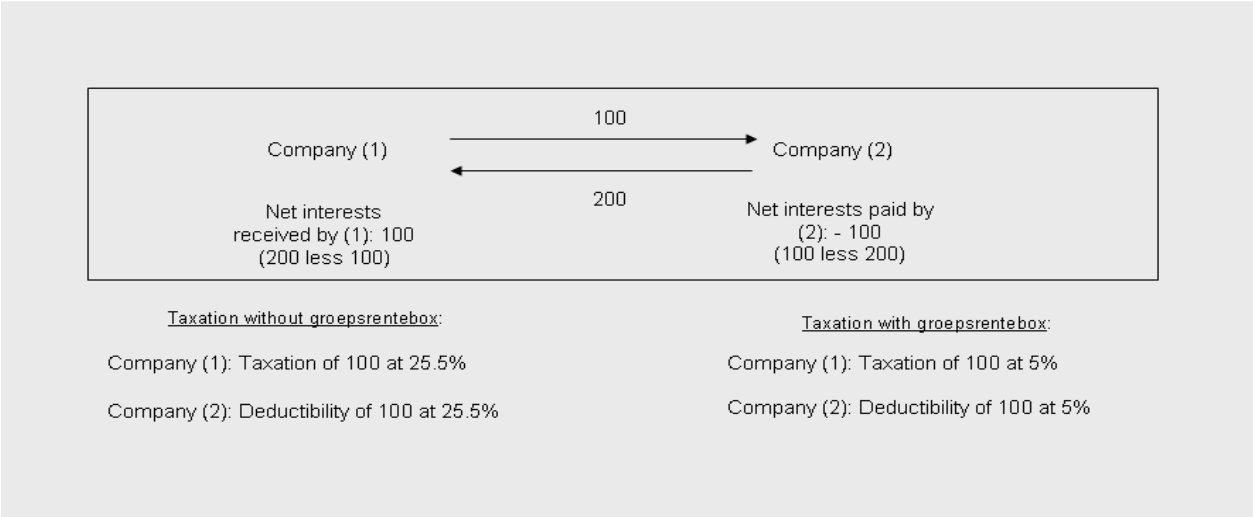
2.2. LEGAL BASIS

- (6) The scheme will be integrated in article 12 c of the law on corporate taxation 1969 (*vennootschapsbelasting wet 1969*).

2.3. WORKING OF THE MEASURE

- (7) The scheme is open to any company subject to corporate tax in the Netherlands, i.e. any company established in the Netherlands, but also to any company established outside the Netherlands with a permanent establishment in the Netherlands. The scheme is optional for a period of minimum three years. If chosen by a company belonging to a group, the scheme will apply to all the other companies of the group located in the Netherlands. A group, in the sense of groepsrentebox scheme, must be composed of at least two companies, the mother controlling more than 50% of the shares of the subsidiary.
- (8) The scheme provides for two measures (A & B) which can be summarised as follows.
- (9) Interests paid and received in the context of intragroup financing will not be subject to the standard corporate tax rate of 25.5% (measure A – see figure 1 below). The positive balance between received and paid interests in the context of intra-group financing transactions will be taxed in an “interest group box” (groepsrentebox) at the rate of 5%, instead of the 25.5% standard corporate tax rate.

Figure 1: Taxation of interest flows in the case of intra-group loans



- (10) If the balance of interests received and paid is negative, it will be deductible but at the reduced rate of 5%, instead of the 25.5 % standard rate.
- (11) The amount that can be taxed/deducted at the reduced rate is limited to a percentage of the own funds (fiscale vermogen) of the taxpayer. This percentage is determined by reference to the Dutch statutory rate in force over the quarter where the financial year ends. This limitation aims at avoiding that undercapitalised undertakings abuse of the measure.
- (12) In addition (measure B), interests earned on short-term deposits can also be taxed at the 5% rate in the groepsrentebox, provided they are aimed at acquiring at least 5% of the shares of a company. This measure is also open to companies which do not belong to a group.

2.4. BUDGET

- (13) The annual budget of the measure is EUR 475 million.

3. ASSESSMENT

- (14) To be considered an aid, a measure must fulfil the four criteria set by article 87, paragraph 1, of the EC treaty. The measure must be financed through state resources provide a selective advantage and must affect competition and trade.

3.1. IMPUTABILITY AND PRESENCE OF STATE RESOURCES

- (15) Article 87, paragraph 1, of the EC Treaty aims at aid granted by the Member States and by means of State resources. In other words, the measure at stake must be imputable to the State and be granted by State resources.
- (16) In the case at hand, the notified scheme (measures A and B) is imputable to the Dutch State since it rises from a modification of a legal act. Moreover, the intervention of the Dutch State will take the form of a foregoing by the State of tax revenue which constitutes state resources.

3.2. PRESENCE OF A SELECTIVE ECONOMIC ADVANTAGE

3.2.1. MEASURE A: LOWER TAXATION/DEDUCTIBILITY OF INTRA GROUP INTERESTS

- (17) According to paragraph 16 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation², in order to determine whether a fiscal measure involves aid, it must be examined "*whether it provides an exception to the application of the tax system and, if this is the case, whether the exception is justified by the nature or general scheme of the tax system*".

² OJ C 384 of 10.12.1998

- (18) In the present case, a company receiving intragroup interests will be taxed at the reduced rate of 5%, instead of the standard rate of 25.5% applicable in 2007.
- (19) Although the Dutch authorities indicated that the measure will be open to all undertakings in the Netherlands subject to corporate tax, the Commission doubts, at this stage, that the measure constitutes a general measure for the following reasons.
- (20) First, at the level of the individual undertaking being part of a group that has opted for the Interest Group Box, only companies being part of a group can benefit from the lower taxation foreseen by the notified scheme.
- (21) Second, at the level of the group of companies taken as a whole that has opted for the Interest Group Box, the Commission suspects that the notified scheme will benefit to multinational groups, conferring to those groups a selective economic advantage.
- (22) In a purely national context, the measure is likely to be neutral from a tax point of view at the level of the group taken as a whole. Indeed, where the companies of a purely domestic group have opted for the Group Interest Box, the advantage taking the form of a reduced taxation of the interests received by a Dutch financing company will be annulled by the lower deductibility of the interests paid at the level of the Dutch financed company.
- (23) It appears that the scheme will be attractive mainly in the context of cross border transactions. In such cases, a Dutch company lending money to an affiliate company established abroad will be subject to lower taxation at the rate of 5%, but the affiliate company established abroad will not be subject to Dutch rules limiting the deductibility of paid interests. In such circumstances the scheme will provide a net advantage. The Commission considers at this stage that this feature renders the scheme *de facto* selective.
- (24) Only multinational group of companies engaging in cross border intra-group interest transactions with tax jurisdictions with a corporate tax superior to 5% will have an incentive to use the scheme. There will be no incentive to engage in cross border transaction with affiliated companies located in tax jurisdictions where the corporate tax rate is equal or inferior to 5%, because deduction of interests will be equivalent or lower to the one that would be authorised in the Netherlands under the *groepsrentebox* scheme. Thus the scheme will be only attractive for cross border transactions with tax jurisdictions that have a corporate rate higher than 5%.
- (25) The Commission considers at this stage that it cannot be ruled out that the main beneficiaries of the scheme will be the former beneficiaries of the so-called international financial activities (*concernfinanciering activiteiten*) scheme which appeared to constitute incompatible state aid³. Despite the limitative provisions foreseen by the latter scheme, it also provided for reduced taxation of revenue deriving from intra-group financing of multinational groups.
- (26) In the case the measure concerned would constitute an exception to the application of the tax system, the Commission has doubts that it is justified by the nature or general scheme of the tax system.

³

Commission decision of 17.2.2003, OJ L180, 18.7.2003, p 52.

3.2.2. MEASURE B: LOWER TAXATION OF SHORT TERM DEPOSITS

- (27) As far as the revenues from short term deposits aimed at acquiring at least 5% of a company are concerned, the Dutch authorities expressly confirmed that this provision applies to all companies liable to corporate taxes in the Netherlands, whether part of a group or not, regardless of their Member State of origin and the Member State of origin of the company of which they intend to acquire shares. The condition that the short term deposits are later used to acquire at least 5% of a company cannot be seen as a selective requirement. The 5% requirement is horizontal by nature and can be met by any company regardless of its size. There are no further requirements regarding the characteristics of company in which participation must be acquired. Therefore, the Commission does consider that the measure in question is a general measure.
- (28) The lower taxation on interest from short term deposits aimed at acquiring at least 5% of a company does not therefore constitute state aid in the sense of article 87 (1) of the EC treaty.

3.3. AFFECTATION OF COMPETITION AND TRADE

- (29) According to the European Court of Justice established case law⁴, when "*state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade the latter must be regarded as affected that aid*". Since the measure seems to be targeted mainly to multinational groups of companies, and since the measure is open to all sectors of the economy, it cannot be ruled out that competition and trade will be affected because the beneficiaries will have their position strengthened vis-à-vis their competitors.

4. COMPATIBILITY

- (30) Insofar as measure A constitutes state aid within the meaning of Article 87(1) EC, its compatibility must be evaluated in the light of the exceptions provided for in Articles 87(2) and 87(3) EC.
- (31) The exceptions provided for in Article 87(2), which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.
- (32) The exception provided for in Article 87(3)(a) provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. No region in the Netherlands is eligible to this derogation.
- (33) Measure A cannot be considered either, at this stage, to be a project of common European interest or to remedy a serious disturbance in the economy of a Member State, as provided for by Article 87(3)(b).
- (34) Measure A does not have as its object the promotion of culture and heritage conservation as provided for by Article 87(3)(d).

⁴ Case 790/79, ECR 1980, page 02671.

- (35) Finally, measure A must be examined in the light of Article 87(3)(c), which provides for the authorisation of aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent that is contrary to the common interest. The tax advantages granted by the groepsrentebox scheme (measure A) are not related to investments, to job creation or to specific projects. They simply constitute a reduction of charges that should normally be borne by the undertakings concerned in the course of their business and must therefore be considered as operating State aid, the benefits of which cease as soon as the aid is withdrawn. According to the constant practice of the Commission, such aid cannot be considered to facilitate the development of certain activities or of certain economic areas under Article 87(3)(c). Operating aid may only be granted in exceptional circumstances or under special conditions which do not appear to be met in the present case.

5. DECISION

- (36) In the light of the foregoing considerations, the Commission has decided to consider that the lower taxation on short term deposits aimed at acquiring at least 5% of a company (measure B) does not constitute state aid in the meaning of article 87, paragraph 1, of the EC treaty.
- (37) As far as the lower taxation/deductibility of intra-group interests (measure A) is concerned, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests the Netherlands to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.
- (38) The Commission wishes to remind the Netherlands that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns the Netherlands that it will inform interested parties by publishing this letter and a meaningful 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
Directorate-General for Competition
State aid greffe
B-1049 Brussels

Fax No: +32.2.296.12.42.

Yours faithfully,
For the Commission

Neelie KROES
Member of the Commission

NOTICE FOR PUBLICATION IN THE OJ, C SERIES
(decisions to initiate the formal investigation procedure)

STATE AID – The Netherlands

STATE AID No C .../.... (ex N 465/06)
- Interest Group Box

Invitation to submit comments pursuant to Article 88(2) of the EC Treaty

Text with EEA relevance

By means of the letter dated [date to be inserted by originating department] reproduced in the authentic language on the pages following this summary, the Commission notified The Netherlands of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning part of the abovementioned measure.

The Commission decided not to raise any objections to certain other measure, as described in the letter following this summary.

Interested parties may submit their comments on the measure in respect of which the Commission is initiating the procedure within one month of the date of publication of this summary and the following letter, to:

European Commission
Directorate-General for Competition
State aid greffe
B-1049 Brussels

Fax No: +32.2.296.12.42

These comments will be communicated to The Netherlands. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

Summary

1. Procedure

- (1) By letter dated 13 July 2006, the Dutch authorities notified the groepsrentebox scheme. Additional information from the Dutch authorities was provided on 5 September 2006 and on 9 November 2006.

2. Description of the measure

- (2) The groepsrentebox scheme provides for lower taxation/deduction of interests received/paid (5% instead of 25.5% standard corporate tax rate) in the context of intragroup relations (measure A) and for lower taxation of interest earned on short-term deposits (5% instead of 25.5% standard corporate tax rate), provided the latter are aimed at acquiring at least 5% of the shares of a company (measure B).

3. Assessment of the measure

- (3) To be considered an aid, a measure must fulfil the criteria set by article 87, paragraph 1, of the EC treaty. The measure must be financed through state resources provide a selective advantage and must affect competition and trade.
- (4) As far as measure A, is concerned, the Commission considers, at this stage, that it constitutes a selective measure. Although it appears to be open to all companies, the Commission considers that it is likely to attract only multinational groups of companies, and may for this reason be considered as a selective measure. The Commission also considers that measure A fulfils the other criteria set by article 87, paragraph 1.
- (5) As far as measure B is concerned, DG COMP considers that the lower taxation on interests from short term deposits aimed at acquiring at least 5% of a company does not confer a selective advantage because this provision applies to all companies.
- (39) Insofar as measure A constitutes state aid within the meaning of Article 87(1) EC, its compatibility must be evaluated in the light of the exceptions provided for in Articles 87(2) and 87(3) EC. At this stage, none of the derogations foreseen by the EC Treaty seems to apply at the case at hand.
- (40) In the light of the above considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, has decided to open the formal investigation procedure as regards measure A.

In accordance with Article 14 of Council Regulation (EC) No 659/1999, all unlawful aid can be subject to recovery from the recipient.

[Text of letter]