EUROPEAN COMMISSION

Brussels, 9.7.2014
C(2014) 4480 final

PUBLIC VERSION

This document is made available for information purposes only.

Subject: **State aid SA.25338 (2014/C, ex E 3/2008, CP 115/2004 and CP 120/2006) – The Netherlands – Corporate tax exemption for public undertakings**

Sir,

The Commission wishes to inform The Netherlands that, having examined the information supplied by your authorities on the scheme referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU").

1. PROCEDURE

(1) In 1997 the Commission services launched a review of special tax rules applicable in Member States to public undertakings. In response to this questionnaire, the Dutch authorities provided information on the Dutch Corporate Income Tax Code (Wet Vennootschapsbelasting 1969 – "Wet Vpb") by letter of 23 January 1998.

(2) In the late nineties, the Dutch Government submitted a legislative proposal to subject public entities that were in competition with private-sector companies to

Zijne Excellentie de Heer Frans TIMMERMANS
Minister van Buitenlandse Zaken
Bezuidenhoutseweg 67
Postbus 20061
NL - 2500 EB Den Haag

corporate income tax.[1] However, on 9 April 2004, the Dutch Government withdrew the bill.

Ex-officio investigation CP115/2004 and complaint CP120/2006

(3) On 2 July 2004, the Commission services opened an ex-officio case, registered under number CP115/2004, on the exemption of corporate tax for Dutch public undertakings.

(4) On 4 May 2006 two Dutch waste management companies lodged a complaint with the Commission services, claiming that direct competitors – publicly owned companies – received state aid, inter alia, due to their corporation tax exemption and thus had an unjustified competitive advantage. The complaints were registered under number CP120/2006.

Article 17 letter of 9 July 2008

(5) The Commission services launched the cooperation procedure by letter of 9 July 2008 (the "Article 17 letter"), in accordance with Article 17(2) of the Procedural Regulation. The Commission services informed the Dutch authorities of their preliminary view that the exemption from corporate tax of public undertakings seemed to constitute incompatible State aid within the meaning of Article 107(1) TFEU. The Dutch authorities were invited to present their observations in accordance to Article 17(2) of the Procedural Regulation.

Further Complaints: SA. 31424 (2010/CP) – NL – Provincial Airport and SA.32217 (2011/CP) – NL – Tax exempt marina foundations

(6) After sending the Article 17 letter, the Commission received the following two complaints relating to the corporate tax exemption of public undertakings.

(7) The first complaint from September 2010 related to a provincial airport. In that respect, the complainant claimed that the airport, an entity incorporated as an NV, was not subject to corporate income tax. The complainant argued that, as the legal and factual situation was comparable with the Schiphol case, the airport also should have included in the list of taxable indirect public undertakings under Art. 2(7) Wet Vpb. The complaint was annexed to the cooperation procedure launched by the Commission services.

(8) In January 2011, the Commission services received a complaint by the owner of a yacht marina, complaining that a marina in the form of a "foundation" was exempt from corporate income tax in contrast to marinas in the form of corporations. Under certain conditions, such a foundation may be considered to be an indirect public undertaking, which is only subject to corporation tax if their activities fall within the list of activities in Art. 2(3) Wet Vpb. This complaint also was annexed to the cooperation procedure launched by the Commission services.

[1] See the final report of the "Markt en overheid" working party and the draft bill of "Regulations concerning market activities of government organisations and companies assigned a special position by the government", the so-called "Market and Government Bill".

Proposal for appropriate measures

(9) The Commission adopted a decision proposing appropriate measures on 2 May 2013 pursuant to Article 18 of the Council Regulation (EC) No 659/1999 with the aim of abolishing the current corporate tax exemption of public undertakings provided in the Dutch Corporate Tax Law, ensuring that for public undertakings that are involved in economic activities – within the meaning of EU law – the same corporate tax regime applies as for private undertakings.

(10) The Dutch authorities were invited to inform the Commission in writing about their unconditional and unequivocal acceptance of the proposal for appropriate measures within one month, pursuant to Article 19 of the Procedural Regulation.

(11) In a letter of 24 May 2013, the Dutch authorities informed the Commission that *"[s]ubject to parliamentary approval, the Dutch Government intends to adopt legislation within 18 months to ensure that public undertakings that carry out economic activities will be subject to corporate tax in the same way as private companies. This legislation will enter into force in the following tax year, at the latest. This means in practice that the legislation will be enacted on 1 January 2015 and will come into force on 1 January 2016."*

(12) Since the letter only states a conditional intention to adopt the legislation, the Commission is of the opinion that the letter does not constitute an unconditional acceptance.

(13) By letter of 11 March 2014, the Commission services referred to the conditional character of the acceptance and asked the Dutch authorities to inform the Commission services within three weeks from receipt of the letter whether the Netherlands unconditionally and unequivocally accepts the appropriate measures. The Netherlands has not replied to this letter.

Draft legislative proposal modernising the Dutch corporate tax law

(14) On 14 April 2014 the Dutch authorities launched for public consultation a draft legislative proposal which aims to create a level playing field between public and private undertakings under the Dutch corporate tax law. The starting point of the draft is that public undertakings should in principle be subject to corporate tax; however, it contains a number of exceptions to that principle. Notably, the draft explicitly maintains the exemption from corporate tax for the five Dutch seaports.

(15) According to the Dutch authorities, the rationale behind the exemption of the five Dutch Seaports is that Dutch Ports compete with other European Seaports. Therefore, the Dutch authorities consider that all European Seaports that are in competition with each other should be effectively subject to a level playing field. The Dutch authorities claim that other European Seaports which are in competition with Dutch Seaports are not subject to corporate tax or enjoy other support measures which amount to State Aid. Therefore the Dutch authorities consider that until the European Seaports which are in competition with the Dutch Seaports are not subject to the same treatment, they shall maintain the exceptions. The Commission is currently looking also into possible support measures for Seaports in other Member States.

(16) The Commission notes that the draft legislative proposal, in its version launched into public consultation, does not (fully) ensure that for public undertakings that are involved in economic activities – within the meaning of EU law – the same corporate tax regime applies as for private undertakings. However, since the legislative proposal is at this stage only a draft it is not directly subject of the present decision, which merely addresses the fact that the current Dutch legislation grants State aid to public undertakings, which is not compatible with the internal market and which should be modified so as to remedy this incompatibility.

2. DESCRIPTION OF THE MEASURE

2.1. The Dutch Corporate Tax Law

(17) Pursuant to the Dutch Corporate tax law (Wet op de Vennootschapsbelasting 1969 (hereinafter "Wet Vpb") corporate entities in the Netherlands are subject to corporate income tax. The taxable income is subject to corporate income tax at the general rate of 25 %. However, private entities with a taxable income of less than EUR 200,000 are subject to a reduced corporate income tax rate of 20%.

(18) The Wet Vpb applies a different tax regime to private and public undertakings. Private undertakings are subject to corporate tax under the general regime. Legal persons governed by private law which are designated for operating a business, like "Naamloze Vennootschapen – NVs" and "Beperkte Vennootschapen – BVs" are fully liable to corporate tax on their overall income. Foundations ("stichtingen") and associations ("verenigingen") are subject to corporate tax insofar as they carry on a business (Art. 2(1)(e) Wet Vpb). Business is defined in Article 4 Wet Vpb as any activity through which an entity competes with other undertakings.

2.2. Exemption for public undertakings

(19) Public undertakings are subject to special corporate tax rules laid down in Articles 2(1), 2(3) and 2(7) of the Wet Vpb.[2]

(20) The Wet Vpb distinguishes between direct and indirect public undertakings. A direct public undertaking ("direct overheidsbedrijf") forms part of a legal person governed by public law ("publiekrechtelijke rechtspersoon"). Examples of direct public undertakings are a division of a municipality that is active in real estate development ("gemeentelijk ontwikkelingsbedrijf"), a unit of the municipality that collects waste etc.

[2] It is noted that Articles 5 and 6 of the Wet Vpb, in combination with Uitvoeringsbesluit Vennootschapsbelasting 1971, have exonerated certain bodies that pursue a social purpose or are of a non-profit nature or have a limited profit-generation aim, from corporate tax. Exonerated are for example hospitals, care for the elderly, funeral services and libraries. As the Commission already noted in its Article 17 letter, since under EU competition law, profit-making is not a criterion to be taken into account when deciding whether or not an entity is an undertaking, the exonerations in Article 5 and 6 Wet Vpb could in certain cases also constitute state aid. These provisions are however not further examined in this decision, which is confined to the exemption of corporate tax for public undertakings contained in Articles 2(1), Article 2(3) and Article 2(7) Wet Vpb.

(21) An indirect public undertaking is a private law company (usually an NV, BV or stichting) that is under the control of a public institution. This is the case where (a) the Dutch public institutions are the only shareholders of the undertaking or (b) in the case of other private law entities, whose capital is not divided into shares (foundations and associations), the directors can be appointed and dismissed only by public institutions and the assets are exclusively assigned only to public institutions in case of liquidation.

(22) According to Article 2(1)(g) of the Wet Vpb undertakings of public legal entities ("ondernemingen van publiekrechtelijke rechtspersonen") are only subject to corporate tax insofar as they carry out one of the activities listed in Article 2(3) of the Wet Vpb. This exhaustive list comprises:

(1) farms ("landbouwbedrijven");

(2) industrial Undertakings ("nijverheidsbedrijven"), unless they supply only water or little else than water;[3]

(3) mining undertakings ("mijnbouwbedrijven");

(4) commercial undertakings ("handelsbedrijven") that do not deal exclusively or nearly exclusively in real estate or rights related to real estate;[4]

(5) transport undertakings, with the exception of undertakings dealing exclusively or nearly exclusively with the transport of passengers within a municipality;

(6) building societies ("bouwkassen").

(23) The list of activities in Article 2(3) Wet Vpb has remained basically unaltered since the introduction of the Wet Vpb in 1969, which inherited corporate tax rules existing since 1956. Notably, the list does not cover public undertakings that provide services. For example, public undertakings active in waste management services, catering services, municipal credit institutions, ports, airports and the foundation involved in the exploitation of casinos (Holland Casino) are exempted from corporate tax according to Article 2(1)(g).[5]

(24) Direct and indirect public undertakings are subject to the Dutch corporate income tax if the criteria of Article 2(1)(g) in conjunction with Article 2(3) Wet Vpb are fulfilled. In other words, both direct and indirect public undertakings are liable to

---

[3] According to the Wet Vpb the term "industrial enterprises" should also comprise enterprises that produce, transport or deliver gas, electricity or warmth, as well as enterprises that construct or manage networks for the transport of gas, electricity or warmth.

[4] This refers to enterprises having trading activities (buying and selling goods) and not generally to enterprises pursuing economic activities within the meaning of the EU rules. Article 2(1)(g) Wet Vpb, as confirmed by the Dutch authorities, does not cover the provision of services.

[5] The Note to the OECD from 2002 also notes higher education (the hiring out of halls and meeting rooms,, the unfair combination of education and research and commercial activities, e.g. in market research), the contracting out of construction and installation work, provincial and municipal engineering offices, the hiring out of conference and meeting rooms, para-commercialism in municipal buildings, subsidised child care, commercial exploitation of yacht harbours, fire services and recreations and housing associations. See OECD, DAFFE/COMP/WD(2002)54 of 19 September 2002, para. 7.

corporate tax if they carry out the activities exhaustively listed in Article 2(3) Wet Vpb.

(25) Apart from the indirect public undertakings that carry out one or more of the activities listed in Article 2(3) Wet Vpb, a number of indirect public undertakings have been made liable to corporate tax on a case-by-case basis. These undertakings are exhaustively listed in Article 2(7) of the Wet Vpb and comprise:

(a) het Nederlands Meetinstituut NV;

(b) de N.V. Nederlands Inkoopcentrum (NIC);

(c) de Stichting Exploitatie Nederlandse Staatsloterij;

(d) de Koninklijke Nederlandse Munt N.V.;

(e) bodies in which a legal person that owns a distribution undertaking in the sense of the Law on Energy Distribution ("Wet energiedistributie") is a shareholder, and bodies that together with such a legal person form a group in the sense of Article 24b of book 2 of the Code of Private Law ("Burgerlijk Wetboek"), insofar that these bodies conduct activities that such a legal person may not conduct itself pursuant to Article 12(1) of the Law on Energy Distribution, unless these bodies exclusively or nearly exclusively supply water;

(f) bodies having an industrial activity as stated in Article 2(3), second indent, with the exception of bodies that only supply water or little else than water.

(g) NOB Holding N.V.;

(h) de N.V. Luchthaven Schiphol;

(i) de N.V. KLIQ;

(j) de N.V. Bank Nederlandse Gemeenten;

(k) de Nederlandse Waterschapsbank N.V.;

(l) Fortis Bank (Nederland) N.V.;

(m) ASR Nederland N.V.;

(n) ABN AMRO Group N.V.;

(o) de Nederlandse Investeringsbank voor Ontwikkelingslanden N.V.;

(p) Ultra Centrifuge Nederland N.V;

as well as any bodies in which the abovementioned undertakings are shareholder and bodies whose directors are appointed and dismissed by the abovementioned undertakings, with the exception of bodies that only supply water or little else than water.

(26) In the past, this list had regularly been modified and certain indirect public undertakings had been inserted. Otherwise, these indirect public undertakings would not have been subject to corporate income tax, as they did not perform activities within the meaning of Article 2(3) Wet Vpb. For example, the following companies were inserted:

(a) NOB Holding NV (1999);

(b) Weerbureau HWS BV (2002);

(c) Luchthaven Schiphol NV (2002) – in response to the Commission decision in case E45/2000 proposing appropriate measures;

(d) KLIQ NV (2002);

(e) Bank Nederlands Gemeenten (2005);

(f) Nederlandse Waterschapsbank NV (2005).

(27) Indirect public undertakings that are neither listed in Article 2(7) Wet Vpb nor covered by any of the activities listed in Article 2(3) Wet Vpb are not liable to corporate tax. Examples of these undertakings are De Nederlandse Bank NV, Havenbedrijf Rotterdam NV, NV Luchthaven Maastricht, Twinning Holding BV, NV Noordelijke Ontwikkelingsmaatschappij, NV Industriebank LIOF, NV Brabantse Ontwikkelingsmaatschappij, Ontwikkelingsmaatschappij Oost Nederland NV and Holland Casino.[6]

3. PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

(28) Under Article 107(1) TFEU, 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 is incompatible with the internal market if it affects trade between Member States.

3.1. The Presence of Undertakings

(29) According to settled case-law, "*the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*".[7] The fact that an entity does not aim at making profits is not decisive to establish if it is an undertaking or not.[8] An economic activity is any activity consisting in offering goods and services on a market. Also non-profit entities can offer goods and services on a market.[9]

(30) It has not been contested by the Dutch authorities that public undertakings, apart from their usual public authority tasks, may offer services and goods on the market. The Dutch authorities have acknowledged that public undertakings increasingly carry out economic activities. Therefore, public undertakings that carry out economic activities qualify as undertakings within the meaning of Article 107(1) TFEU.

---

6 Belastingplicht overheidsbedrijven – Inventarisatie van de gevolgen van de ondernemingsvariant, 11 mei 2012, Kamerstukken II 31213, nr. 7, p. 26 and 46.

7 See case C-41/90 *Höfner c. Macroton GmbH* [1991] ECR I-1979, paragraph 21.

8 See case C-49/07 *MOTOE* [2008], ECR I-4863, paragraphs 27 and 28.

9 Joined cases 209/78 to 215/78 and 218/78 *Van Landewyck* [1980] ECR 3125, paragraph 21, case C-244/94 *FFSA and others* [1995] ECR I-4013; case C-49/07 *MOTOE* [2008] ECR I-4863, paragraphs 27 and 28.

3.2. The Use of State Resources

(31) Article 107(1) TFEU requires that the measure be granted by a Member State or through State resources *in any form whatsoever*. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.

(32) As the European Court of Justice held in case *Banco Exterior de España*, a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a cash transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, fulfils the notion of "state resources" within the meaning of Article 107(1) TFEU.[10]

(33) Hence, by exempting public undertakings engaged in economic activities from corporate taxation – unless they carry out the activities listed in Article 2(3) Wet Vpb or are named in Article 2(7) Wet Vpb – the Dutch authorities forego revenues which constitute State resources. Therefore, the Commission takes the view that the measure at issue involves a loss of State resources and is consequently granted by the State through State resources.

3.3. The Presence of an Advantage

(34) In addition, the measure has to confer a financial advantage on the recipient. The notion of advantage covers not only positive benefits but also interventions which, in various forms, mitigate the charges normally borne by an undertaking's budget.[11]

(35) Under the Wet Vpb public undertakings are in principle exempt from corporate tax while private undertakings are in principle subject to corporate tax. Therefore, public undertakings involved in economic activities, which are not included in the exhaustive list of activities in Article 2(3) Wet Vpb nor included in the limited list of companies in Article 2(7) Wet Vpb, benefit from a clear tax advantage. The tax exemption reduces the charges that are normally included in the operating costs of an undertaking carrying out an economic activity. It provides an economic advantage to public undertakings in comparison to private undertakings, which could not benefit of this tax advantage. The measure involves an advantage for public undertakings that carry out economic activities on the market, but that are not taxable under either Article 2(1)(g) in conjunction with Article 2(3) Wet Vpb or Article 2(7) Wet Vpb.

3.4. Distortion of competition and effect on trade

(36) Under Article 107(1) TFEU, the measure must affect trade between Member States and distort or threaten to distort competition in order to qualify as State aid. In the present case, public undertakings that carry out economic activities and that benefit from the tax exemption may be involved in intra-Union trade. For example, Havenbedrijf Rotterdam NV is tax exempted under the current law and is clearly public undertaking involved in trade between Member States.

---

10 Case C-387/92, judgment of 15.03.1994, ECR [1994] p-I-00877, paragraph 14.

11 Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* [1961] ECR 3, p. 19. Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 38.

Consequently, the Wet Vpb, which provides for a tax exemption of public undertakings, necessarily affects trade between Member States and distorts or threatens to distort competition.

3.5. Selectivity of the measure

(37) To be considered State aid, a measure must be selective[12], in the sense that it favours certain undertakings or the production of certain goods. According to established case-law[13], the assessment of the material selectivity of a measure consists of three stages: first it is necessary to identify the common or "normal" regime ("system of reference") applicable in the Member State concerned. Second, it is in relation to this common or "normal" tax regime that it is necessary to determine if any advantage granted by the tax measure at issue may be selective. This has to be done by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators that, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. Third, if such derogation exists, it is necessary to examine whether it results from the nature or general scheme of the taxation system and whether it could be justified by the nature or logic of that taxation system. In this context, it is for the Member State to show that the differentiated tax treatment derives directly from the basic or guiding principles of that system.[14]

System of reference

(38) In the present case, the reference system should be defined as the Dutch system for corporate taxation, as laid down in the Wet Vpb. It follows from this law that according to the normal rules undertakings established in the Netherlands are subject to corporate tax on their profits.

Derogation from the system of reference

(39) Under the Wet Vpb public undertakings are – contrary to private undertakings – in principle exempt from corporate taxation. Public undertakings are only tax liable if they carry out the activities listed exhaustively in Article 2(3) Wet Vpb or are listed individually in Article 2(7) Wet Vpb.

(40) The list of activities in Article 2(3) Wet Vpb has not been materially changed since 1956. The list does not take into account that since 1956 (direct and indirect) public undertakings have increasingly offered goods and services on the market, in competition with private companies which are liable to corporate tax. In particular, there is a discrepancy between the activities that are listed in Article 2(3) Wet Vpb and made liable to tax and the notion of economic activity within the meaning of EU law. The current law allows a substantial number of public undertakings that are involved in economic activities to be tax exempt, while they are in the same factual position as privately owned undertakings.

---

12 See case C-66/02 *Italy v. Commission* [2005] ECR I-10901, paragraph 94.

13 See, *inter alia*, case C-88/03 *Portugal v. Commission* [2006] ECR I-7115, paragraph 56; joined cases C-78/08 to C-80/08 *Paint Graphos*, not yet published, paragraph 49.

14 See case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 42.

(41) The fact that the Dutch authorities have, on a case-by-case basis, decided to make certain limited indirect public undertakings liable to corporate tax, does not remove the selective nature of the present tax scheme. The Dutch authorities acknowledge that this case-by-case approach does not guarantee that all public undertakings that carry out economic activities will also be liable to corporate tax. The present law clearly favours public undertakings that carry out economic activities and which are not included in the list.

(42) Hence, a large range of public undertakings – that compete with private undertakings – are corporate tax exempt. This constitutes a derogation from the general corporate tax system applicable in the Netherlands and grants a selective advantage to public undertakings which carry out economic activities.

Justification by the logic of the system

(43) Given that the Commission considers that the tax exemption at issue is *prima facie* selective, it will have to determine, in accordance with the case-law of the European Courts, whether this exemption can be justified by the nature or general scheme of the system of which it forms part. A measure which constitutes an exception to the application of the general tax system may be justified if the Member State can show that the measure results directly from the basic or guiding principles of its tax system.

(44) The Dutch authorities have not provided any arguments that would justify the exemption by the logic of the Dutch corporate tax system. The Commission has also not been able to identify such justification. The logic of the corporate tax system is to tax profits. Treating public undertakings involved in economic activities more favourable than private undertakings does not fit into this logic.

3.6. Conclusion

(45) Therefore, the Commission concludes that the difference in the treatment of public and private undertakings engaged in an economic activity, pursuant to Article 2(g) in conjunction with Article 2(3) and Article 2(7) Wet Vpb, gives public undertakings a selective advantage that cannot be justified by the nature and logic of the Dutch corporate tax system. Furthermore, such more favourable treatment is capable of distorting competition and trade between Member States. Therefore, the tax exemption granted to public undertakings constitutes State aid within the meaning of Article 107(1) TFEU. [15]

4. COMPATIBILITY

4.1. Article 107(2) and Article 107(3) TFEU

(46) Since the scheme under review appears to constitute State aid within the meaning of Article 107(1) EC, it should be examined whether it is compatible with the internal market under the exceptions laid down in Article 107(2) and 107(3) TFEU.

[15] In a similar case, concerning a three-year exemption from corporate tax granted to certain Italian public enterprises set up by local authorities, the Commission adopted a negative decision with recovery in 2002 (Decision C27/99 of 5 of June 2002), which was confirmed by the ECJ in case C-318/09 P of 21 December 2011.

(47) The Dutch authorities have provided no arguments regarding the applicability of the exceptions described in Article 107(2) or 107(3) TFEU to the general exemption from corporate tax granted to public undertakings.

(48) The Commission considers that none of the exceptions under Article 107(2) TFEU apply, as the measure in review is not aimed at any of the objectives listed in this provision. More specifically, the measures under review do not appear to relate to aid having a social character which is granted to individual consumers or aid to make good the damage caused by natural disasters or exceptional occurrences or aid granted to the economy of certain parts of the Federal Republic of Germany.

(49) Article 107(3) TFEU further states that: (i) aid to promote the development of certain areas, (ii) aid for certain important projects of common European interest, (iii) aid to develop certain economic activities or areas, (iv) aid to promote culture and heritage conservation and (v) aid specified by a Council decision may be found compatible with the internal market.

(50) As to the possible application of the exceptions provided for by Article 107(3) (a) to (e) TFEU, the Commission notes that the tax exemption for Dutch public undertakings is granted without making a distinction as to the goals pursued by the undertakings in question. Consequently, the Commission considers that generally the exceptions of Article 107(3) TFEU will not apply. Furthermore, the Dutch authorities have not provided information demonstrating that these exceptions would be applicable in certain specific cases. As a result of the foregoing, the Commission has come to the conclusion that none of the grounds of Article 107(3) TFEU is applicable.

4.2. Article 106(2) TFEU

(51) In addition to the grounds of Articles 107(2) and 107(3) TFEU, where the recipient of aid has been entrusted by the State with the operation of services of general economic interest ("SGEI"), the aid may also be compatible in application of Article 106(2) TFEU.

(52) The Dutch authorities have not provided any information from which it can be concluded that the exemption from corporate tax for (certain) public undertakings could be justified under Article 106(2) TFEU. The Commission notes in this regard that, in any event, in the case at stake the corporate tax exemption for Dutch public undertakings is granted without making a distinction as to the goals pursued by the undertakings in question. Furthermore, the Dutch authorities have not even provided information that would make possible the application of Article 106 (2) TFEU to specific cases. Consequently, as for the application of Article 107(3) TFEU, the Commission has come to the conclusion that Article 106(2) TFEU is not applicable.

5. EXISTING AID

(53) Pursuant to the classification of the exemption from corporate taxation of public undertakings as incompatible State aid, the Commission has to determine whether these measures would have to be considered new or existing aid.

(54) Existing aid, as defined in Art. 1(b) of the Procedural Regulation, would be either a measure that was in place before the entry into force in the Netherlands of the EC Treaty, a measure that has been authorised, a measure that is deemed existing aid pursuant to Article 15 of the Procedural Regulation, or a measure that was not aid when it was put into effect, but became aid due to the evolution of the internal market. Any aid not falling under the definition of existing aid would be considered new aid pursuant to article 1(c) of the Procedural Regulation.

(55) The Dutch authorities have submitted that if the current tax exemption for corporate enterprises would be aid, this would be existing aid.

(56) The Commission shares this position. Indeed, it follows from the information provided by the Dutch authorities that the essence of the tax exemption for public enterprises, as laid down in Article 2(1)(g) and Article 2(3) Wet Vpb, existed before the entry into force of the EC Treaty in the Netherlands. In fact, the Wet Vpb, which was introduced in 1969, had taken over the provisions already present in the tax code of 1956 (thus before the entry into force of the Treaty) and no new derogation was created afterwards. The measure would thus fall under the existing aid provision of Article 1(b) of the Procedural Regulation.

6. CONCLUSIONS

(57) In light of the above, the Commission provisionally concludes that the exemption from corporate tax for public undertakings constitutes existing State aid that cannot be declared compatible and should therefore be abolished.

(58) Furthermore, the Netherlands have not unconditionally and unequivocally accepted the appropriate measures proposed on 2 May 2013.

(59) The Commission has therefore decided to open the formal investigation procedure under Article 108(2) TFEU. The Commission, requests the Netherlands to submit its comments and to provide all information that may help to assess the aforementioned measure, within one month of the date of receipt of this letter.

(60) The Commission 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 Registry
B-1049 Brussels
Fax (32-2) 296 12 42

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President