Subject: SA.34357 (2012/NN) – Netherlands
Multiplier Giftenaftrek

Sir,

1. Procedure

(1) The Dutch authorities notified on 4 September 2012 an aid scheme providing for increased deductibility for personal and corporate income tax purposes of donations to cultural institutions. The measure is laid down in the “Wet van 22 december 2011 tot wijziging van enkelen belastingwetten (Geefwet)”, published in the Official Gazette of the Kingdom of the Netherlands on 29 December 2011 (Nr. 641) and entered into force as of 1 January 2012.

(2) The case was initially registered as a notified measure, but in view of the fact that the scheme was put into effect before the measure was approved by the European Commission under the EU State aid rules, the scheme has become unlawful and the case was transferred to the NN (not notified) register on 4 October 2012.

2. Description of Measure

(3) The measure, called “Multiplier Giftenaftrek – Multiplied Gift Deduction”, temporarily increases the amount of donations to “cultural institutions”, which is deductible from income tax. The measure concerns both the Personal Income Tax Act...
Under Dutch tax law donations are taken into account for both personal income tax of individuals and corporate income tax of corporate entities. Certain requirements have to be fulfilled for the deductibility of donations at the level of the donor for income tax purposes. In particular, only donations to charitable entities qualifying as a so-called “Algemeen nut beogende Instelling – ANBI” (Institution for General Benefit, see paragraph (11) below) can be deducted.

This decision is limited to the assessment of the Multiplier and is without prejudice to the assessment under the state aid rules of the tax treatment of ANBIs in general.

**Beneficiaries of the measure**

The direct beneficiaries of the measure are individuals and companies that make donations to cultural institutions and for whom the deductible amount for donations for the determination of the tax base is increased by 25% for individuals and 50% for companies, up to a maximum amount of EUR 5,000.

The measure may also benefit – indirectly – cultural institutions. Under the general tax deduction rules in the Dutch corporate tax system donations to cultural institutions and other ANBIs are treated equally. However, the increased deduction for donations to cultural institutions may direct more donations to these institutions, compared to other ANBIs.

**Position of the Dutch Authorities**

According to the notification, the Dutch authorities consider that the measure does not constitute aid according to Article 107(1) TFEU at the level of the direct beneficiaries. With regard to individual donors, the Dutch authorities consider that they do not carry out an economic activity and thus cannot be recipient of state aid. With regard to corporate donors, the Dutch authorities state that all corporations can benefit from the measure and therefore the measure does not benefit “certain undertakings”, i.e. the criteria of selectivity is not fulfilled. However, the Dutch authorities consider the measure to be indirect aid at the level of the cultural institutions, but which would be compatible with the internal market under the exception of Article 107(3)(d) TFEU (aid to promote culture and heritage conservation).

**Objective of the notified measure**

The deduction-multiplier for donations to cultural institutions is introduced to (temporarily) stimulate donations by individuals and corporations to cultural institutions. The multiplier therefore aims at increasing the fundraising of such institutions in times when such institutions are called for an increased responsibility to ensure the financing themselves. Furthermore, it appears that relatively few private donations go to cultural institutions. It is therefore the objective of the multiplier to increase the share of donations to cultural institutions.

This new approach towards the charitable / non-profit sector is accompanied by budgetary measures in the form of reduction of subsidies, of which in particular cultural institutions will be targeted. The total reduction of subsidies for cultural
institutions was EUR 30 million in 2011, EUR 50 million in 2012 and will be EUR 200 million annually, starting in 2013.

**ANBIs and cultural institutions**

(11) An ANBI is an institution pursuing charitable purposes. An ANBI is defined in Article 5b of the Dutch General Tax Code (“Algemene wet inzake rijksbelastingen – AWR”). An institution may only be designated as an ANBI if it fulfills, inter alia, the following legal requirements and conditions set by the tax authorities:

- The entity may not be a company whose capital is divided into shares, a cooperative, a mutual association or other body issuing rights of participation.
- An institution must commit at least 90% of its activities (exclusively or almost exclusively) for charitable purposes. Charitable activities are considered to be (a) well-being, (b) culture, (c) education, science and research, (d) protection of nature and the environment, including the promotion of sustainability, (e) health, (f) youth and the elderly, (g) development, (h) animal welfare, (i) religion, philosophy and spirituality, (j) the promotion of the democratic order, (k) a combination of the above objectives, as well as (l) the financial or otherwise supporting a public benefit organization.
- The institution with its entire charitable activities may not be profit-seeking.
- An ANBI may not hold more assets than reasonably necessary for the work of the institution. Therefore, the net assets need to be limited.
- An ANBI has a reasonable ratio between cost and benefit.
- Money that remains after liquidation is devoted to an ANBI with similar purpose.

(12) An ANBI that exclusively or almost exclusively, i.e. according to the Dutch authorities at least 90%, pursues cultural purposes, may request to be designated as a “cultural institution” (Article 5b paragraph 4 of the AWR). The designation by the tax authorisation as an ANBI or as a cultural institution is made on request of the respective entity. According to the Dutch authorities, the Dutch Tax Administration (“Belastingdienst”) has, in cooperation with the Ministry of Education, Culture and Science, designed a framework on the basis of which it is decided if an entity can be qualified as a cultural ANBI. If the entity meets the criteria, it does get the qualification; the Tax Administration does not have discretionary powers. The Tax Administration checks at random if (cultural) ANBI’s still meet the requirements. The possibility is provided (Article 5b paragraph 1b AWR) to grant the ANBI-status also to (cultural) institutions from another EU Member State or another country designated by the tax authorities (provided that they meet the eligibility criteria). According to an estimation of the Dutch authorities, there are currently about 63,000 ANBI's overall, of which about 7,300 cultural ANBI's. The list of entities considered to be ANBI's is

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1 See also the conditions for ANBIs according to various implementing circulars (e.g. *Uitvoeringsregeling inkomstenbelasting 2001*), Staatscourant Nr. 12737 of 22 June 2012, p. 1.

2 According to the Dutch authorities, currently 202 foreign ANBIs are registered in The Netherlands, of which 9 are cultural.
published on the website of the Tax Service. On this list, cultural ANBI's are tagged separately.

(13) Neither the AWR, the IB nor the Vpb contain a definition of “cultural institution”. The explanatory memorandum³ to the legislative act amending the IB and Vpb however defines culture⁴ as follows:

‘Culture concerns institutions that seek to provide a high quality cultural offer accessible for as many people as possible. Such institutions are, for example, active in visual arts, architecture, heritage (museums, monuments, archives), dance, film, literature, music, musical theatre, theatre, new media and design. These include theatre groups, theatres, libraries and museums. Also associations which go beyond private interest and institutions that strengthen the cultural sector fall hereunder. These are, for example, knowledge and (private) cultural funds such as the Prince Bernhard Culture. The term culture in practice often gives rise to discussion. There are many institutions involved in culture, but nevertheless are not considered to be an ANBI. This is particularly true for associations whose primary objective is to serve their members private interest, as for example associations organizing activities in which their members participate. This concerns (amateur) choirs, (amateur) theatre associations and literary reading clubs etc. These institutions would qualify under certain conditions as SBBI⁵ so that they are exempted from inheritance and gift tax for donations and inheritances.’

(14) Although ANBIs per se are not profit-seeking, a profit may arise as a side-product of its activities, which does not as such put into question the designation as an ANBI.⁶ This would, for example, be the case for a coffee-shop in a museum, provided that

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³ Tweede Kamer der Staten-Generaal, Wijziging van enkele belastingwetten (Geefwet), Memorie van Toelichting, Kamerstukken II, 33006 Nr. 3, p. 24.

⁴ The Dutch authorities also referred to the following definition of culture made for the legislative proceedings for the budget for 2013: "Bij culturele instellingen gaat het om instellingen die actief zijn in de beeldende kunst, bouwkunst, erfgoed (musea, archieven, archeologie, monumentenzorg), dans, film, letteren, muziek, popmuziek, muziektheater, theater, nieuwe media of vormgeving. Hieronder vallen bijvoorbeeld theatergroepen, schouwburgen, bibliotheeken, filmhuizen, poppodia, letterenfestivals, filmfestivals, architectuurcentra, presentatie-instellingen en musea. Kerken en kerkelijke instellingen vallen hier dus niet onder. Ook bepaalde verenigingen die het particulier belang overstijgen en instellingen die de culturele sector versterken komen in aanmerking, zoals kenniscentra cultuur en private cultuurfondsen, zoals het Prins Bernhard Cultuurfonds, het VSBfonds en het SNSreaalfonds." Kamerstukken I 33003, nr. G of 14 december 2011, p. 11.

⁵ ‘Sociaal belang behartigende instelling’, social interest serving institutions.

⁶ The Dutch authorities explicitly state that there are no examples of cultural ANBIs engaged in commercial recorded music or in commercial film production, as cultural ANBIs must have a charitable aim and may not be profit seeking. Furthermore, the Dutch authorities also confirmed that the Dutch provisions provide for sufficient conditions to safeguard that the gifts and donations received by ANBIs do not exceed the cost of the cultural activities.
these funds are again invested in the charitable purposes of the entity. The Dutch authorities clarified that donations to cultural ANBIs only may be used for the charitable activities and not, where applicable, for the non-cultural commercial activities.\(^7\) The Dutch authorities committed that this issue will be explicitly pointed out to ANBIs pointed out in the next mailing.

(15) The Dutch authorities furthermore confirmed that only very few cultural institutions will receive donations in an amount for which the share attributable to the increased deduction will exceed the de-minimis threshold of EUR 200,000 within 3 years. The Dutch authorities mentioned as examples for such cultural institutions the big museums, as for example the *Rijksmuseum*, or the bigger music and dance ensembles, as for example the *Nederlands Dans Theater* or the *Concertgebouworkest*.

(16) The Dutch authorities also committed to ensure that any aid benefitting film productions or cinemas will respect the relevant state aid rules.\(^8\)

The General Scheme for Deduction of Donations to ANBI's from Income Tax

For Individuals

(17) Chapter 6.9 “Aftrekbare giften – Deductible Donations” (Article 6.32 – 6.40) of the Wet Inkomstenbelasting 2001 provides the rules regarding the deduction of donations from the taxable base. Donations are defined in Article 6.33 IB as “bevoordelingen uit vrijgevigheid en verplichte bijdragen waar geen directe tegenprestatie tegenover staat”.\(^9\) Donations are only deductible if they fulfil the requirement of “periodical donations” or “other donations”. Other donations (“andere giften”) are defined as donations to institutions (“instellingen”) (Article 6.35 IB) and Article 6.33b IB defines such institutions as “algemeen nut beogende instellingen – ANBI”).

(18) According to Article 6.39 IB, the total amount of such other donations – “andere giften” – are deductible to the extent that they exceed both EUR 60 and 1 % of the total income with a maximum amount of 10 % of the total income.

For Corporations

(19) According to Article 16 of the Corporate Income Tax Act, deductible donations are donations to ANBIs. Such donations are deductible up to 50 % of profits with a maximum of EUR 100,000. The scope had been largely widened as of 2012, since for

\(^7\) The Dutch tax authorities state on their website: ‘Additional conditions for a cultural ANBI. Is your institution a cultural ANBI? Then the donations to your institution need to be registered separately in your records. The donations may only be spent for the charitable objectives of your institution.’ [http://www.belastingdienst.nl/wps/wcm/connect/blcontentnl/beldcontentnl/zakelijk/bijzondere_regelingen/goede_doelen/algemeen_nut_beogende_instellingen/culturele_anbi/](http://www.belastingdienst.nl/wps/wcm/connect/blcontentnl/beldcontentnl/zakelijk/bijzondere_regelingen/goede_doelen/algemeen_nut_beogende_instellingen/culturele_anbi/)

\(^8\) This will concern in particular the new "Cinema Communication" which had been announced to be adopted by the Commission in 2013 and which replaces the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication) of 26 September 2001, OJ C 43, 16.02.2002, p. 6-17, which expired at the end of the year 2012. The provisions of the Cinema Communication during its validity until end 2012 are also covered by the commitment given by the Dutch authorities.

\(^9\) Benefits out of generosity and compulsory contributions without a direct quid pro quo.
tax years until 2011, Article 16 Vpb provided for a deduction of donations up to 10 % of profits, however without limiting it to a certain maximum amount.

**The Multiplied Gift Deduction**

**For Individuals**

(20) With regard to Personal Income Taxation, a new Article 6.39a IB has been inserted stipulating that for donations to cultural institutions (“culturele instellingen”) the amount to be taken into account will be increased by 25 %, but not more than EUR 1.250. This means that besides the normal taking into account of donations for personal income taxation purposes, such donations to cultural institutions of up to EUR 5.000 benefit from this increase of 25 %. The effect of the measure is that for income tax purposes, if for example maximum EUR 5.000 has been disbursed, an amount of maximum EUR 6.250 will be deducted from the personal income tax base. Therefore, donations of up to EUR 5.000 are taken into account at 125 % of their amount for personal income taxation instead of the normal 100 %.

(21) The actual amount of relief from personal income tax depends from the individually applicable income tax rate. With an individual average income tax rate of 30 %, the normal relief amounts to EUR 5.000 x 0,3 = EUR 1.500. The extra income tax relief for the increase of the deductible amount of the donation amounts to EUR 1.250 x 0,3 = EUR 375. With an individual average income tax rate of 20 %, the normal relief would be EUR 5.000 x 0,2 = EUR 1.000 and the extra income tax relief EUR 1.250 x 0,2 = EUR 250.

**For Corporations**

(22) With regard to Corporate Income Taxation, in Article 16 Vpb a new paragraph 3 is inserted, stipulating that for donations to cultural institutions the amount to be taken into will be increased by 50 %, but not more than EUR 2.500. This means that besides the normal taking into account of donations for corporate income taxation purposes, such donations to cultural institutions of up to EUR 5.000 benefit from an increase of 50 %. In other words, donations of up to EUR 5.000 are taken into account at 150 % of their amount for corporate income tax purposes, instead of the normal 100 %.

(23) The effect of the measure is that for corporate income tax purposes, although, for example, only max. EUR 5.000 had been disbursed, an amount of EUR 7.500 will be deducted from the corporate income tax base. As currently the corporate income tax rate is 25 % (for profits of more than EUR 200.000), therefore the normal relief amounts to EUR 5.000 x 0,25 = EUR 1.250 and the extra relief for the increase of the deductible amount of the donation amounts to EUR 2.500 x 0,25 = EUR 625.

**Duration**
As announced by the Fiscal Agenda of the Dutch government, new tax expenditures may only be introduced temporarily. Therefore, the measure enters into force on 1 January 2012 and will be repealed as of 1 January 2017 after a duration of 5 years (Article 10b 1 IB and Article 35 Vpb).

**Amount of Aid and Budget**

The expected loss of revenue due to the measure is estimated by the Dutch authorities to amount to EUR 5 million per year, i.e. for the period 2012 – 2016 to EUR 25 million. The scheme is financed through the general budget of the State.

**Overlap with other state aid schemes**

The Dutch authorities indicated that the aid may be cumulated with aid from other local, regional, national or EU schemes. With regard to the mechanisms put in place to ensure that the cumulation rules are respected, the Dutch authorities state that the Dutch government aims for a smaller role for the government in the field of culture and, in this context reduces its grants to cultural institutions. The reception of subsidies is subject to a requirement of ensuring the financing themselves. The multiplier gift deduction is intended to stimulate charitable giving so that cultural institutions can obtain more funds themselves. Thus, there is no overlap with income from government grants. The State only finances deficits in form of a funding gap and therefore is not linked to certain eligible cost. This means that no subsidy is provided for eligible expenses already covered by other governments.

3. **ASSESSMENT OF THE MEASURE**

3.1. **Presence of Aid Pursuant Article 107 (1) TFEU**

According to Article 107 (1) of the 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market”.

It follows that in order to be qualified as State aid, the following cumulative conditions have to be met: (i) the measure has to be granted out of State resources, (ii) it has to confer a selective economic advantage to undertakings, (iii) the advantage has to distort or threaten to distort competition, and (iv) the measure has to affect intra-EU trade.

The measure needs to be assessed on two levels. The direct beneficiaries of the measure are individuals and companies (“the donating entities”) granting donations to cultural institutions, as they receive an extra relief from their income tax charge by the increased deductibility of the donations. However, it also needs to be assessed, whether the cultural institutions may be regarded as an indirect beneficiary of aid, as the measure gives an incentive to channel more donations to such cultural institutions, contrary to non-cultural ANBIs for which the normal deductibility rules apply. Therefore, the measure may distort or threaten to distort competition between entities
engaged in culture which qualify as ANBI and those which do not, as well as between ANBI cultural institutions and non cultural ANBIs.

3.2. Assessment of aid at the level of the donors

3.2.1. Individual Donors

Assessment of Economic Activity

(30) State aid can only be granted to undertakings that are engaged in economic activity. According to the Court of Justice of the European Union (“CJEU”), the notion of an undertaking within the meaning of Article 107 TFEU, encompasses “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.10 The Court also has “consistently held that any activity consisting in offering goods or services on a given market is an economic activity”.11

(31) With regard to the measure applicable to individuals and the Wet Inkomstenbelasting 2001, although individuals also may carry out an economic activity within the meaning of state aid, the donations and the increase of the deduction is made outside the entrepreneurial sphere of the donors. The deduction of donations is dealt with under chapter 6 of the Wet Inkomstenbelasting titled “Persoonsgebonden aftrek – Personal Deductions”. The items mentioned under this chapter, i.e. also the “deductible gifts – aftrekbare giften” under Subchapter 6.9, are tax deductible independently from the kind of revenues (business income, capital income, rental income etc.) and thus are not linked to an economic activity.

Conclusion

(32) Individuals making donations to cultural institutions are deemed to grant the donations within their private sphere and not within the framework of an economic activity. Therefore, they cannot be considered as recipients of state aid, as one of the cumulative criteria for state aid is not fulfilled.

3.2.1. Corporate Donors

Selectivity of the Measure

(33) According to Article 107(1) TFEU, the measure, in order to be considered as aid, inter alia, must benefit “certain undertakings”. Where the measure does not benefit selectively to such “certain undertakings”, then measure has to be considered to be general in scope.

(34) With regard to the measure at hand, it is potentially accessible to any undertaking subject to corporate income tax, independently from sector, region or company size,


i.e. absence of de-iure selectivity. Furthermore, the measure is effectively open to all undertakings subject to corporate income tax and does not have the effect of benefitting essentially a pre-defined group of undertakings or specific sector(s) (absence of de facto selectivity).

**Conclusion**

(35) In the light of the above, the increased deduction for undertakings subject to Corporate income tax for donations to cultural ANBI is considered as not being selective. Therefore, corporate donors cannot be considered as recipients of state aid as one of the cumulative criteria for state aid is not fulfilled.

3.2.2. Conclusion

(36) As the requirements laid down in Article 107 (1) TFEU both for individuals falling under the *Wet inkomstenbelasting 2001* and for companies falling under the *Wet op de vennootschapsbelasting 1969* regarding the increased deductibility of donations to cultural institutions are not met, the Commission, at the level of the direct beneficiaries, considers the Multiplier Giftenaftrek not to entail State aid to the donating entities.

3.3. Assessment of state aid to indirect beneficiaries

(37) With regard to the determination of the beneficiary of a measure, it is established case law that “consideration needs to be given not only to the immediate recipient of the subsidy, but also to the effects of the subsidy extending beyond that relationship.”¹² This means that the beneficiary of the measure is any entity which actually benefited from it.¹³

(38) As a result of the increased deductibility for donations to cultural institutions, the behaviour of donors will be affected, other things being equal, to the extent that they are likely to make donations on terms more favourable to cultural institutions than they would have been without the introduction of the measure. In other words, by the introduction of the measure, the donating entities will be inclined to make donations which in the absence of the tax concession might not have been made or which might not have been as high.

(39) A change in the charitable behaviour and an increase in own revenues of cultural institutions are in fact the declared intentions of the Dutch legislation.

(40) It therefore has to be assessed, whether the measure as regards the indirect beneficiaries, i.e. cultural institutions that qualify as an ANBI, could be considered to fulfil the cumulative conditions of state aid mentioned in section 3.1.

*Economic activity*

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Some cultural institutions, such as museums, theatres, operas etc., although established on a non-profit basis, normally offer their services on a market as outlined under paragraph (27) and compete with other EU undertakings that are also active in the same market. Therefore, they must be considered to be involved in an economic activity. However, other cultural institutions such as libraries or charitable foundations may not be considered as undertakings within the meaning of Article 107(1) TFEU, as they do not carry out normally an economic activity consisting in offering goods or services on a given market. However, to the extent that such institutions are engaged in economic activities such as the exploitation of a cafeteria or a museum shop, they also qualify as undertakings in the meaning of Article 107 (1) TFEU.

**Advantage**

In the present case, the tax scheme confers a direct advantage on certain natural and legal persons, who are the direct beneficiaries, to encourage them to grant donations to cultural institutions, who are the indirect beneficiaries. The economic advantage conferred on the recipients of the donations is the presumably increased amount of donations as compared with the legal situation before the introduction of the increased deductibility of donations to cultural institutions. Donors, the direct beneficiaries, are likely inclined to increase their donations to cultural institutions on terms more favourable to those institutions than the terms which would have been obtained if the measure had not been introduced. As a result, the volume of the donations to cultural institutions will rise.14

The measure is accordingly likely to confer an economic advantage on the indirect beneficiaries under the *Multiplier Giftenaftrek*, i.e. cultural institutions, which they would not have enjoyed without that measure.

It should be noted that in assessing whether a measure constitutes State aid the Commission need not refer to each individual case. The Court of Justice of the European Communities held in Case 248/84 Germany v. Commission that in the case of an aid programme the Commission could confine itself to examining the characteristics of the programme in question in order to determine whether by its nature the scheme was caught by state aid rules.15 In the case at hand, it must be concluded that by its nature the *Multiplier Giftenaftrek*-scheme has the effect of

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conferring an economic advantage on an ascertainable class of entities, namely the cultural institutions.

**Transfer of State resources**

(45) For a measure to qualify as state aid it needs to be granted through State resources. In analogy to case C-156/98, *Germany v. Commission*, which also concerned the granting of an indirect advantage as in the present case, the Court of Justice held that the origin of the advantage indirectly conferred on the cultural institutions was the renunciation by the Netherlands of tax revenue which it normally would have received, in as much as it was this renunciation which enabled donors to make donations on conditions which were in tax terms more advantageous. The fact that the donation was the independent decision of the donors did not mean that the connection between the tax concession and the advantage given to the undertakings in question had been eliminated since, in economic terms, the alteration of the market conditions which gave rise to the advantage was the consequence of the public authorities' foregoing of State revenue. Therefore, as it was confirmed by the CJEU in case C-156/98, also the indirect benefit to cultural institutions entails a transfer of state resources.16

**Selectivity of measure in favour of cultural institutions**

(46) The measure favours certain undertakings: it is confined to cultural institutions within the group of institutions for General Benefit (ANBI). It is admittedly not possible to identify these companies individually in advance, but a category of advantaged entities can be determined – within the entities qualifying as ANBI's a sub-group, the cultural institutions – which is sufficiently well-defined to allow it to be said that these are the companies on which the advantage is conferred. The scheme is therefore sufficiently specific to distinguish it from general measures that confer an advantage on all economic operators in a Member State, and which consequently fall outside the scope of Article 107(1) TFEU.17

**Distortion of competition and effect on intra-EU trade**

(47) The measure threatens to distort competition, as it favours undertakings in the form of cultural ANBIs compared with other undertakings. This concerns, in particular, musea

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and theatres in the art sector. In several cases, the activities of the indirect beneficiaries supported by the notified scheme are of a local nature (e.g. local museum or small theatre) and the probability that they would affect trade, in particular by attracting an international audience and therefore impact cross-border tourism is very low. At the same time, although several activities related to the titles of the aid do not necessarily affect trade between Member States, it cannot be excluded that certain projects, e.g. aid to important, well-known museums, theatres, orchestras or operas, which are known also abroad, may attract international tourism, so that the aid granted could have an impact on intra-EU trade.

The total amount of revenues forgone in three years is estimated at EUR 15 million, while about 7,300 cultural ANBI's are potential beneficiaries. Therefore, on average the advantage for cultural ANBIs would only be about EUR 2000 in three years. However, it cannot be excluded that certain indirect beneficiaries, such as the aforementioned important national museums, theatres, orchestras and operas, receive aid above the de minimis threshold and that the aid granted could have an impact on trade between Member States.

**Conclusion**

In view of the above, the Commission concludes that a certain part of the support through the increased deductibility of donations to cultural institutions may not constitute State aid within the meaning of Article 107(1) TFEU, either because the indirect beneficiaries are not considered undertakings performing an economic activity, because there is no effect on trade between Member States and no distortion of competition, or because the aid would fall under the de minimis Regulation. However, in respect of the activities not falling under these categories, the increased deductibility of donations to cultural institutions constitutes State aid within the meaning of Article 107(1) TFEU.

**3.4. Compatibility of the Measure on the Basis of Article 107(3)(d) TFEU**

As the measure may constitute aid under Article 107 (1) TFEU, its compatibility has to be assessed.

Article 167 (1) and (4) TFEU provide “The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”. “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”

According to Article 107(3)(d) TFEU, aid to promote culture and heritage conservation may be considered compatible with the internal market where such an aid

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does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

(52) Therefore aid may be compatible if it has a genuine cultural objective, it is necessary for that objective and finally it represents a proportional way of achieving this objective ("does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest"). These conditions have to be examined individually.

**Genuine cultural objective**

(53) The Commission considers that the scheme serves cultural purposes. It concerns tax incentives to attract private investment in the arts sector and to stimulate cultural production in this field, and it encourages business to engage with the arts sector. Furthermore, it helps to maintain, consolidate and develop a wide range of cultural activities as evidenced by the variety of cultural institutions eligible for tax deductible donations under the scheme.

(54) The genuine cultural objective is also ensured by the fact that the tax privilege under assessment is only available for ANBI’s, registered charities with a purpose that qualifies as a public benefit, focusing exclusively or almost exclusively (at least 90 %) on culture and that have been labelled as such by the tax authorities. The information submitted by the Dutch authorities shows that the measure benefits cultural institutions seeking to offer high quality cultural activities, accessible to as many people as possible, such as museums, libraries, theatre, monuments, archives, dance, art house film, literature, music, musical etc. Moreover, the scheme contains provisions for the verification concerning the fulfilment of the requirements to qualify as a cultural institution eligible for tax deductible donations.

(55) The Commission is therefore of the opinion that the notified aid is directed towards activities with a truly cultural content and, therefore, falls within the scope of Article 107(3)(d) TFEU.

**Necessity and proportionality**

(56) The Commission recalls that the beneficiaries in question are non-profit entities and need to pursue cultural purposes to receive the status of an ANBI. Therefore, commercial, profit seeking music or film productions do not qualify as an ANBI. The ANBIs lack capital and their own resources and ticket revenues are insufficient to ensure their survival. Although in some instances the beneficiaries are in competition with operators that rely completely on the market, the market supply is insufficient to guarantee the quantity and quality of cultural offer deemed desirable by the Dutch authorities.

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19 These principles have been applied to similar cases, e.g. Commission Decision of 28 October 2009, N 464/2009 - Hungary, Indirect state aid for the performing arts organizations.

20 Should cultural ANBIs engage in arthouse cinemas and/or non-commercial film producing, the Dutch authorities committed to ensure that any aid benefitting film productions or cinemas will respect the relevant state aid rules. Please refer to footnote 8.
The Dutch authorities consider that the present measure is necessary to protect, foster and disseminate cultural activities in an economic climate in which severe cuts in the government funds have affected cultural budgets. The measure is likely to encourage more natural or legal persons to provide more or more valuable contributions to the development of culture and arts, and the preservation of cultural heritage. An increased deduction of donations to cultural institutions for income tax purposes will increase their net revenues, thus helping them to continue their activity and in this way aiding to disseminate culture.

The Commission hence considers that the scheme at hand is indeed necessary and suitable to achieve its objective of promotion of culture and national heritage preservation.

Furthermore, the amount of the aid consisting in an increased deduction of donations to cultural institutions for income tax purposes is only a proportion of the contribution received from the donor (see paragraphs (18) and (20)). Although the Dutch government cannot exactly control/indicate how much tax revenue it will forsake because the supporters of the cultural institutions determine the amount, the ceilings limit the amount of tax deductions that a private person or an individual company may claim, and therefore also the amount of aid. The Dutch authorities have also indicated that they expect the incentive effect of the measure (i.e. multiplier) to be rather limited (not exceeding approximately EUR 25 million for the duration of the scheme) and they do not anticipate that private and legal persons will donate substantially more than before. Furthermore, the Dutch authorities also confirmed that the Dutch provisions provide for sufficient conditions to safeguard that the gifts and donations received by (cultural) ANBIs do not exceed the cost of the charitable (cultural) activities (see footnote 6).

Moreover, appropriate arrangements have been put in place to guarantee that the donations are actually used for cultural purposes. ANBI's must submit a financial statement to the tax authorities each year and the tax authorities conduct regular individual inspections of organisations with ANBI status. Furthermore, ANBIs cannot use donations to finance non-cultural commercial activities. They may only be used for the cultural charitable purposes of the cultural ANBI's. The fact that, in order for cultural institutions to remain qualified as an ANBI eligible to receive deductible tax donations it is not allowed to make profits, i.e. to receive more than is spent, acts as an additional safeguard for the aid to genuinely serve the purpose of conservation of cultural heritage. As a consequence thereof, spill-over effects are kept to the minimum and the objective of supporting culture is achieved with as little extra distortion as possible.

The Commission hence considers that the scheme at hand is indeed necessary and suitable to achieve its objective of promotion of culture and national heritage preservation.

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21 See above paragraph 0 and footnote 7 referring to the Dutch Tax authorities' website.
Effect on trading conditions and competition

(62) As highlighted above, the distortion of competition arising from the measure and its effect on trade are likely to be limited for most of the activities.

(63) The Dutch authorities have confirmed that a big proportion of the indirect beneficiaries of the tax benefit are likely to receive low donations and therefore low amounts of state support, which reinforces the conclusion on the limited effects on intra-EU trade and on competition of the aid scheme.

(64) The Commission also notes that in view of the often local character of most of the (approximately 7,300) assisted cultural institutions; the aid is unlikely to produce a disproportionate negative effect on intra-EU trade. Additionally, the scheme is not seeking to support cultural activities that will or could generate profit: the cultural institutions involved are not allowed to seek profits.

(65) Therefore, the Commission considers the positive effects of the measure outweigh its negative impact in terms of distortions of competition.

(66) The European Union interest is also ensured by the eligibility and equal treatment of applicants based in other Member States. In this respect it should be noted that also cultural institutions from other EU Member States could qualify as an ANBI and therefore benefit from the deductible tax donations.22

(67) On the basis of the above, the Commission has concluded that the aid scheme at hand promotes culture and preserves national cultural heritage without adversely affecting trading conditions and competition in the EU to an extent contrary to the common interest.

Conclusions on the compatibility of the aid

(68) The Commission has come to the conclusion that the aid scheme at hand promotes culture and preserves cultural heritage without adversely affecting competition and trading conditions in the Union to an extent contrary to the common interest. It is hence compatible with the internal market under Article 107(3)(d) TFEU.

4. CONCLUSION

The Commission regrets that the Netherlands put the Multiplier Giftenaftrek into effect, in breach of Article 108(3) of the Treaty on the Functioning of the European Union (TFEU).

However, it has decided, on the basis of the foregoing assessment:
– to consider that the measure partly does not constitute aid and
– to consider the aid compatible with the Treaty on the Functioning of the European Union.

22 See above paragraph (12).
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Your request should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
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B-1049 Brussels  
Fax No: (+32)-2-296.12.42

Yours faithfully,  
For the Commission

Joaquín ALMUNIA  
Vice-president of the Commission