EUROPEAN COMMISSION

Brussels, 30.04.2020
C(2020) 2597 final

In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […]		PUBLIC VERSION This document is made available for information purposes only.

Subject: State aid SA.46470 (2017/C) – Netherlands

Possible State aid in favour of Inter IKEA – Extension of the formal investigation

Sir,

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

1. PROCEDURE

(1) On 18 December 2017, the Commission adopted a decision to initiate the formal investigation procedure in relation to the tax treatment granted by the Netherlands to Inter IKEA Systems B.V. ("*Systems*"), a legal entity of the Inter IKEA Group ("Inter IKEA") established in the Netherlands (the "Opening Decision")[1].

[1] OJ C 121, 6.4.2018, page 30

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(2) Several exchanges between the Commission, the Netherlands and Inter Ikea took place following the adoption of the Opening Decision. In particular, the Netherlands and Inter IKEA made submissions to the Commission in February 2018, in April 2018, in September 2018 ("the September 2018 submission"), in October 2018, in November 2018, in January 2019, in November 2019 ("the November 2019 submission"), and in January 2020 ("the January 2020 submission").

2. DESCRIPTION OF THE FACTS RELEVANT FOR THE EXTENSION OF THE INVESTIGATION PROCEDURE

2.1. The contested measures in the Opening Decision of 2017

(3) The Opening Decision was based on the information at the disposal of the Commission at the moment of its adoption. On that basis, the Commission provisionally concluded that the contested measures, which the Commission considers to include the 2006 Advance Pricing Agreement (the "2006 APA") and the 2011 Advance Pricing Agreement (the "2011 APA", collectively referred to as "the APAs"), on the one hand, and the annual tax assessments prepared on the basis of those APAs, on the other, conferred an advantage on *Systems* and constituted State aid within the meaning of Article 107(1) of the Treaty.

(4) Section 4 of the Opening Decision describes the contested measures. Sections 4.1 and 4.2 describe the APAs. Sections 4.1.2 (for the 2006 APA) and 4.2.2 (for the 2011 APA) describe the implementation of those APAs through the submission by *Systems* of its annual corporate income tax declarations.[2]

(5) The 2006 APA endorsed a transfer pricing arrangement for a licence I.I. Holding S.A. ("*Holding*") granted *Systems* to the right to exploit the IKEA Proprietary Rights (the "PRs") for the purposes of developing the IKEA Franchise Concept ("Licence Agreement")[3]. That arrangement resulted in an annual routine operating profit being attributed to *Systems* for tax purposes, which *Systems* used to determine, by subtracting it to its accounting operating profit, its annual royalty payment to *Holding.*

(6) The Commission provisionally concluded that the 2006 APA enabled *Systems* to employ transfer prices in the Licence Agreement that did not resemble prices charged between independent undertakings negotiating under comparable circumstances in conditions of free competition, thus leading to a reduction in its tax liability, as expressed in its annual corporate income tax declarations. That provisional conclusion was based on two lines of reasoning:

(i) First, by endorsing a transfer pricing arrangement based on the TNMM[4], the 2006 APA improperly considered *Systems* as not performing any valuable and unique contribution in its relationship with *Holding*. *Systems* was thus wrongly considered by the 2006 APA as a "routine" functions undertaking

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2 For a detailed description of those APAs and tax declarations, for a general description of the facts regarding Inter IKEA and for any terms not defined in the present decision, reference is made to the Opening Decision.

3 See 2006 APA, Section 2.

4 For the meaning of TNMM, reference is made to the Opening Decision.

and wrongly selected as the tested party for the purposes of applying the TNMM[5].

(ii) Second, even if *Systems* had been correctly identified as a "routine" functions entity, the application of the TNMM endorsed by the 2006 APA appeared to contain methodological errors.[6]

(7) The 2011 APA concerns the arm's length valuation of the transfer price of the PRs at the time of their acquisition by *Systems* from the Interogo Foundation ("Interogo"), the owner of Inter IKEA. The 2011 APA is effective from 1 January 2012 and applies for a period of 12 years (i.e. until 31 December 2023). Through the 2011 APA, the Dutch tax administration endorsed a transfer price of EUR 9 billion for the acquisition of the PRs by *Systems*[7]. That price can be adjusted following a price adjustment mechanism ("PAM") if, at the expiration of the 2011 APA on 31 December 2023, the fair market value of the PRs differs from the EUR 9 billion initially agreed.

(8) The 2011 APA further confirmed that the interest generated by an intercompany loan provided by Interogo to *Systems* that financed 60% of the transfer price of the PRs ("the Loan") is tax deductible, since it is not subject to any interest deduction limitations included in the Dutch Corporate Income Tax Act of 1969 (the "CIT") or other legislation.[8] It further confirmed that *Systems* would also allocate on a yearly basis a provision for future interest payments due to a potential increase of the transfer price of the PRs in application of the PAM, such yearly allocations also being tax deductible.

(9) The 2011 APA was based on a number of facts and circumstances, namely (i) that *Systems* would not depreciate the PRs during the lifetime of the APA, and (ii) that the price of the PRs would not be subject to re-valuation during the lifetime of the 2011 APA.[9] Recital (71) of the Opening Decision recorded the fact that no amortisation of the PRs had been recorded by *Systems*.

(10) In its Opening Decision, the Commission provisionally concluded that the 2011 APA endorsed a tax treatment that did not reflect a reliable approximation of a market-based outcome in line with the arm's length principle. In particular, the Commission provisionally found:

(i) First, that the transfer price endorsed for the PRs did not reflect a market price. Consequently, due to the direct link between the transfer price of the PRs endorsed by the 2011 APA and the Loan, any reduction according to the arm's length principle in the transfer price of the PRs should necessarily lead to a corresponding reduction of the tax deductible interest.[10]

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5 See Opening Decision, subsection 7.2.1.1.
6 See Opening Decision, subsection 7.2.1.2.
7 2011 APA, Section 2.
8 2011 APA, paragraph 4.5.
9 2011 APA, paragraph 1.5.
10 Opening decision, section 7.2.2.1.

(ii) Second, that the deduction of the dotations to the provision for future interests payments for a potential price increase of the transfer price of the PRs are contrary to Dutch tax law.[11]

(11) Since the Netherlands did not invoke any compatibility basis under Article 107(2) or (3) of the Treaty, the Commission provisionally concluded that the contested measures gave rise to unlawful and incompatible State aid.

2.2. Modification of the contested measures after the adoption of the Opening Decision

(12) The Commission notes that some of the facts and circumstances underlying the 2011 APA, described in the Opening Decision, changed after the adoption of that decision.

(13) First, *Systems* decided, in contravention to what had been explicitly agreed in the 2011 APA,[12] to start amortising the PRs as from tax year [2012-2019] (i.e. retroactively) over a [23-55] year period using the initial transfer price of EUR 9 billion agreed in that APA. Under Dutch tax law, that yearly amortisation is tax deductible.[13] At the same time, *Systems* stopped setting aside allocations for the provision of future interest payments related to the PAM, reversing the allocations deducted in previous tax years on the basis of the 2011 APA.[14] In reflection of those changes, *Systems* filed revised corporate income tax declarations for tax years [2012-2019], [2012-2019] and for the tax period from 1 January 2016 to 22 August 2016. As from the latter date, *Systems* was included in a fiscal unity with Inter IKEA Holding B.V. ("Systems Holding")[15][16].

(14) In addition, *Systems* and Interogo decided, also after the adoption of the Opening Decision, to terminate the PAM and to increase the transfer price of the PRs as of 30 June 2018 to EUR 11.8 billion[17].

(15) Table 1 below presents the revenue declared by *Systems* from 2012 to 22 August 2016 and the taxable profit and the corporate income tax due according to the tax returns provided by the Netherlands, including the revised corporate income tax declarations filed for tax years [2012-2019], [2012-2019] and for the period from 1 January 2016 to 22 August 2016. The tax return for the taxable period from 23 August 2016 to 22 August 2017 was submitted by Systems Holding, with which *Systems* formed a fiscal unity as from 22 August 2016. Table 1 incorporates the

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11 Opening decision, section 7.2.2.4.

12 See 2011 APA, paragraph 1.5.

13 See Article 8, paragraph 1, CIT 1969 (that refers to Article 3.30 of the Wet Inkomstenbelasting 2001)

14 Such annual tax assessments confirmed the corporate income tax declarations prepared by *Systems* on the basis the basis of the 2006 APA without performing any adjustment

15 Systems Holding is the controlling entity in the Netherlands of *Systems* (formerly called Inter IKEA Systems Holding B.V, see letter from the Netherlands of 28 February 2018). *Systems* submitted tax returns covering its taxable position until it was included in the fiscal unit. As of 23 August 2016, its tax obligations are covered by the tax return of Systems Holding.

16 Those tax returns contain the amortisations of the PRs and a reversal of the dotations to the provision for future interest payment set up and deducted in years 2012 to 2016 (for years [2012-2019] and [2012-2019], *Systems* reversed the dotation in the [2012-2019] corporate income tax return).

17 See letter of the Netherlands of 31 October 2018. See also letter of *Systems* of 19 July 2019. Consequently, from 1 July 2018 *Systems* started amortising the PRs based on a value of EUR 11.8 billion.

amortisation of the PRs deducted as of tax year [2012-2019] and does not include the dotations to the provision for future interest payments initially allocated, which were reversed in the revised declarations.

Table 1. – *Systems*' revenue, taxable profit and tax due according to tax returns provided by the Netherlands

Figures in kEUR	**31/12/12**	**31/12/13**	**31/12/14**	**31/12/15**	**1/1/16 - 22/8/16**
Total income	[1 000 000 - 2 000 000]	[1 000 000 - 2 000 000]	[1 000 000 - 2 000 000]	[1 000 000 - 2 000 000]	[700 000 - 1 500 000]
Depreciation PRs	[0-300 000]	[0-300 000]	[0-300 000]	[0-300 000]	[0-300 000]
Interests Loan	324 000	324 000	324 000	[200 000-400 000]	[200 000-400 000]**
Taxable profit	[150 000-350 000]	[150 000-350 000]	[400 000-600 000]	[400 000-600 000]	[150 000-325 000]
Taxation according to standard rate	[45 000-100 000]	[45 000-100 000]	[90 000-190 000]	[90 000 - 190 000]	[45 000-100 000]
Tax payable*	[40 000-60 000]	[40 000-60 000]	[80 000-140 000]	[80 000-140 000]	[40 000-60 000]

(*) After deduction of tax credits and tax reliefs.
(**) May include limited interests related to other liabilities.

(16) The Netherlands have informed the Commission that the revised corporate income tax returns corresponding to tax years [2012-2019] and [2012-2019] were assessed by the Dutch tax administration[18]. The revised tax declaration for the period from 1 January 2016 to 22 August 2016 and the tax declaration for the tax year ending on 22 August 2017 have not yet been assessed by that administration. The Commission is not aware of any corporate income tax declarations having been filed by *Systems* or by the fiscal unity to which it belongs (Systems Holding) after 22 August 2017.

(17) In light of the all the foregoing, the Commission considers that the contested measures, as identified in the Opening Decision, have been modified since the adoption of that decision, in particular as regards the amortisation of the PRs and their revised transfer price. Consequently, the Commission has decided to extend the scope of its investigation to include both the APAs and *Systems'* annual tax assessments for tax years 2006 and following, including those annual tax assessments in which the 2011 APA was not properly applied ("the contested measures").

3. ASSESSMENT

3.1. Existence of aid

(18) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the internal market, in so far as it affects trade between Member States.

(19) According to settled case-law, for a measure to be categorised as aid within the meaning of Article 107(1) of the Treaty, all the conditions set out in that provision

[18] In the November 2019 submission, the Netherlands provided copies of the letters through which it communicated to *Systems* that the revised tax declarations submitted for the tax years [2012-2019] and [2012-2019] were assessed and that no adjustments were performed.

must be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on its recipient. Fourth, it must distort or threaten to distort competition[19].

(20) As regards the condition of imputability, recital (102) of the Opening Decision explains that both the 2006 and the 2011 APA were issued by the Dutch tax administration, which is an organ of the Netherlands. Those rulings entail the acceptance by that administration of transfer pricing arrangements. *Systems* prepared its annual corporate income tax declarations on the basis of the provisions of the APAs, which were assessed by the Dutch tax administration. Those annual assessments constitute interventions imputable to the Netherlands, including those assessments in which the APAs were not properly applied.

(21) To the extent that the amount declared by *Systems* in its annual tax returns and assessed by the Dutch tax administration is below an arm's length level of profit, those interventions also give rise to a loss of State resources. This is also the case where the terms of the APAs have not been respected, as is the case for *Systems'* tax returns starting with fiscal year [2012-2019], in which *Systems* amortised the PRs, although that was not permitted under the 2011 APA. Dutch tax law distinguishes between the moment of a taxpayer's material tax liability and the moment of its formal tax liability. A taxpayer's material tax liability arises at the end of a given tax period, which is generally twelve months, often equal to a calendar year.[20] A taxpayer's formal tax liability arises at the moment of the annual tax assessment by the Dutch tax administration.[21] It is the Commission's provisional conclusion that a loss of State resources occurs on an annual basis when *Systems'* material tax liability arises or, at the latest, when the Dutch tax administration formalises *Systems'* substantive tax debt through a tax assessment.[22]

(22) As regards the second condition for a finding of State aid, the Commission maintains its provisional conclusion in recital (104) of the Opening Decision that any State intervention in *Systems'* favour is liable to affect intra-Union trade. That is also the case for the annual tax assessments by the Dutch tax administration, including those assessments for those fiscal years in which terms of the APAs were not respected. The same holds true for the Commission's provisional finding that the contested measures are liable to distort competition. As explained in recital (105) of the Opening Decision, to the extent that those measures relieve *Systems* of corporate taxes it would otherwise have been obliged to pay in their absence, the aid granted as a result of those measures constitutes operating aid, which is considered to distort competition. Thus, the Commission provisionally concludes that the third condition for a finding of aid is also fulfilled in relation to the annual tax assessments, including those assessments in which terms of the APAs were not respected.

(23) As regards the third condition for the finding of aid, Sections 7.2 and 7.3 of the Opening Decision contain the Commission's provisional conclusions as to the

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19 Joined Cases C-20/15 P and C-21/15 P, *Commission* v *World Duty Free*, EU:C:2016:981, paragraph 53 and the case-law cited.

20 See Article 8 CIT.

21 See Article 11(1) *Algemene Wet Inzake Rijksbelasting* ("AWIR"). Assessments must be issued within three years of the date on which the material tax debt arises, i.e. three years from the end of the relevant period (see Article 11(3) AWIR).

22 Case C-385/18, *Arriva Italia*, EU:C:2019:1121, paragraphs 36 to 41.

selective advantages arising from the application of the APAs in the annual tax declarations. Those same provisional conclusions apply to *Systems'* annual tax assessments. As regards those assessments in which *Systems'* annual tax declaration was accepted despite the fact that the terms of the APA were not respected, Section 3.2 below explains why those assessments give rise to an economic advantage. Section 3.3 then provides an additional ground supporting the Commission's provisional conclusion in Section 7.2.2.2 of the Opening Decision that the endorsement of the deduction of the interest of the Loan ("the Loan interest deduction") confers an economic advantage on *Systems*.

3.2. Provisional finding of an economic advantage in relation to the amortisation of the PRs

(24) As explained in recital (13) above, after the adoption of the Opening Decision *Systems* decided to start amortising the PRs over a [23-55] year period using the transfer price of EUR 9 billion endorsed in the 2011 APA. Under Dutch tax law, that yearly amortisation is tax deductible. The amortisation was applied retroactively, starting from tax year [2012-2019]. The deductibility of each annual amortisation amount has been endorsed in the annual tax assessments carried out by the Dutch tax administration of *Systems*' corporate income tax declarations, starting from tax year [2012-2019], all of which included those amortisations.[23]

(25) In Section 7.2.2.1 of the Opening Decision, the Commission provisionally concluded that the EUR 9 billion value attributed to the PRs and accepted by the 2011 APA was higher than the transfer price that independent operators under comparable circumstances would have agreed to pay at arm's length. As explained in recital (188) of that decision, the value of the PRs was determined taking into account the estimates of the consolidated future operating profits of the franchise business. As explained in recitals (189) to (191) of that decision, the Commission took the provisional view that the remuneration of *Systems* for the functions it performs in relation to the PRs and the IKEA Franchise Concept should have been subtracted from the expected profits of the franchise business to determine the arm's length transfer price of the PRs.

(26) The Commission does not contest *Systems*' right to deduct the amortisation of the PRs, since such a deduction appears to be in line with Dutch tax and accounting laws. However, as is the case for the Commission's provisional findings in relation to the Loan in Section 7.2.2.2 of the Opening Decision, there is a direct correlation between the transfer price of the PRs and the amounts allocated each year to the amortisation of those rights. Like the Loan interest deductions, the Commission provisionally concludes that the Dutch tax administration's acceptance of the amortisation of the PRs through the annual tax assessments confers an economic advantage on *Systems*, because the transfer price of the PRs was determined without subtracting *Systems'* contribution in relation to the PRs and to the IKEA Franchise Concept. Any reduction in the arm's length transfer price of the PRs following those subtractions should necessarily lead to a corresponding reduction in the amount of the amortisation deducted each year by *Systems*. Consequently, the amortisation of the PRs in an amount higher than their arm's length transfer price results in an unjustified tax base reduction for *Systems*.

(27) For those reasons, the Commission provisionally concludes that the deduction of the annual amounts of the amortisation of the PRs, corresponding to the transfer

[23] See Sections 2.2.2 and 2.3 of the Opening Decision.

price of EUR 9 billion endorsed by the 2011 APA and claimed by *Systems'* in its revised corporate income tax declarations for tax years [2012-2019] and [2012-2019] and accepted by the Dutch tax administration in the annual tax assessments, confers an economic advantage on *Systems* by reducing its corporate income tax base and thus its corporate income tax liability in those tax years. That provisional conclusion equally applies to subsequent deductions claimed by *Systems*, provided the Dutch tax administration accepts its revised tax declarations for the period from 1 January 2016 to 22 August 2016 and for the tax period ending on 22 August 2017. It also applies to subsequent annual tax assessments which will accept that amortisation based on the revised transfer price of EUR 11.8 billion.

3.3. Additional ground in support of the provisional conclusion that the endorsement of the Loan interest deduction confers an economic advantage on *Systems*: misapplication of Article 10a CIT

(28) In Section 7.2.2.2 of the Opening Decision, the Commission provisionally concluded that by endorsing the Loan interest deductions, the Netherlands granted a tax treatment to *Systems* that departs from a reliable approximation of an arm's length outcome.[24] Based on its further investigation into the tax consequences of the Loan, the Commission provisionally concludes that the Dutch tax administration's endorsement of the Loan interest deduction is also contrary to Article 10a CIT.[25]

(29) As a general rule under Dutch tax law, interest payments made by a Dutch corporate taxpayer are deductible from its taxable income.[26] Notwithstanding that general rule, an interest deduction is subject to a number of statutory and non-statutory restrictions. Among the statutory restrictions, Article 10a CIT sets out the so-called "anti-base erosion rule". According to Article 10a, paragraph 1, letter a. CIT,[27] the deduction of interest is denied if it concerns debt attracted from a related

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24 Opening Decision, Section 7.2.2.1.

25 Article 10 CIT (version of 10 December 2011), reads:
"1. In determining the profit, interests – as well as costs and currency results – on debts, legally or de facto, directly or indirectly, owed to an associated entity or to an associated natural person, are not deductible to the extent that those debts are legally or de facto, directly or indirectly, related to one of the following legal actions:
a distribution of profits or a refund of paid-in capital by the taxpayer or by an associated entity subject to Dutch Corporate Income Tax, to an associated entity or to an associated natural person.
[…]
3. Paragraph 1 does not apply:
a. if the taxpayer demonstrates that the debt as well as the related legal action have predominantly been entered into for business reasons, irrespective of whether that debt is effectively due to an entity that is not an associated entity or to a natural person that is not a natural person, or
b. if the taxpayer demonstrates that the person to whom the interest is directly or indirectly, legally or factually due, is effectively subject to a profit or income tax that is reasonable according to Dutch standards and that that person is not entitled to offset losses or make other similar claims related to years previous to that in which the debt was entered into, as a result of which effectively no taxation at said reasonable standards has occurred, unless the inspector demonstrates that the debt was incurred with the purpose of offsetting losses or making similar types of claims that arose in the same year or that will arise in the short term, or he demonstrates that the debt or the related legal action are not primarily based on business considerations. For the purpose of this paragraph a tax levied on profit is reasonable according to Dutch standards if it results in a levy at a rate of at least 10% on a taxable base determined according to Dutch standards, disregarding Article 12b and 12c." (translated by the Commission).

26 See Article 8, paragraph 1, CIT 1969 (that refers to Article 3.8 of the Wet Inkomstenbelasting 2001)

27 Article 10a CIT, (version of 10 December 2011).

party[28] in connection with certain categories of transactions (so-called "tainted transactions"). Tainted transactions include distributions of profit or repayments of capital by the taxpayer (or certain related entities) to related parties.[29] The Commission understands that, under Dutch tax law, the concept of profit distributions not only includes formal dividend distributions, but also "hidden dividend distributions". This concept refers to transactions where a company supplies goods or services at a price below an arm's length price or it purchases goods or receives services at a price above an arm's length price from its parent company. In such cases, the difference between the price actually paid/charged and the price at arm's length is considered a hidden profit distribution from the subsidiary to the parent company.[30]

(30) At the present stage, the Commission has reasons to consider that the Dutch tax administration misapplied Article 10a CIT by allowing the Loan interest deduction under the 2011 APA and in its assessment of *Systems'* annual tax declarations. In the Opening Decision, the Commission provisionally concluded that the transfer price of the PRs did not reflect its market value.[31] Accordingly, the difference between the transfer price of the PRs (EUR 9 billion) and its market value should be considered a hidden profit distribution. Since the Loan (of EUR 5 400 million) aims at financing 60% of the transfer price of the PRs in line with the intention of the parties, the Commission provisionally considers that the Loan similarly financed 60% of the hidden profit distribution. Therefore, the interest calculated on the part of the Loan that finances the hidden dividend distribution, i.e. the part of the transfer price above its arm's length price, should not be tax deductible according to Article 10a CIT.

(31) It is true that, as an exception of the general rule, Article 10a, paragraph 3, letters a and b CIT allow the deductibility of that interest under certain circumstances. In particular, the interest paid by *Systems* could have been deductible provided one of the following two conditions were met: (i) the taxpayer (*Systems*) demonstrated valid business reasons both for entering into the tainted transaction and for funding the transactions with debt; or (ii) the taxpayer demonstrated that at the level of the

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28 A related party in this respect is (i) a company in which the taxpayer has an interest of at least 1/3; or (ii) a company that has at least an interest of 1/3 in the taxpayer; or (iii) a company in which a third party has an interest of at least 1/3 whilst this third party also has an interest of at least 1/3 in the taxpayer; or (iv) a company with which the taxpayer forms a fiscal unity (see article 10a, paragraph 4, letter a, b, c and d CIT).

29 Article 10a, paragraph 1, letter a, CIT.

30 See the Transfer Pricing Decree (*Besluit verrekenprijzen*) of 30 March 2001, IFZ2001/295M, that, under paragraph 4, referring to the 1995 OECD TP Guidelines, clarifies that a transfer pricing adjustment may take the form of, a distribution of income or so-called hidden dividend distribution (i.e. as a consequence of a transfer pricing upward tax adjustment) or an informal capital payment (i.e. as a consequence of a transfer pricing downward tax adjustment). See Parliamentary history on Article 10a VPB ("Wijziging van de Wet op de vennootschapsbelasting 1969 met het oog op het tegengaan van uitholling van de belastinggrondslag en het versterken van de fiscale infrastructuur, Nota naar aanleiding van het Verslag", Tweede Kamer der Staten-Generaal, Dossier 24 696, nr. 5,paragraph 8): "*The members of the VVD, D66, GPV and RPF political groups request a further explanation of the terms "in law or in fact, directly or indirectly" and "entitled party" in the first paragraph. […] The term "in fact" refers to, for example, the situation in which the subsidiary does not actually pay dividends under civil law, but supplies services or goods at the instigation of the parent without charging an arm's length price (a so-called hidden profit distribution). If, for example, the subsidiary purchases goods at an excessive price from the parent and the purchase price remains indebted, the loan relating to the over-charged price will be covered by the first paragraph*."

31 See Opening Decision, Section 7.2.2.1.

related party to whom the interest was ultimately due, that interest (income) was subject to an effective tax of at least 10% established on a taxable base determined according to Dutch standards. As regards the first condition, the Commission has been unable to identify any valid business reason for the transfer price of the PRs exceeding its arm's length value. For the same reason, it provisionally concludes that there are no valid reasons for the Loan financing that price. As regards the second condition, even in cases where the Dutch taxpayer is able to demonstrate that the interest on the debt is subject to an effective tax of at least 10%, that interest cannot be deduced if the Dutch tax administration can establish that the tainted transaction or the party-related debt was not predominantly entered into for valid business reasons. Therefore, it is sufficient for the Dutch tax administration to demonstrate that the tainted transaction or the party-related debt was not predominantly entered into for valid business reasons for the purposes of denying the interest deduction. In any event, the Commission has assessed the information provided in the January 2020 submission in the context of the formal investigation. Although an assessment of that information is unnecessary, due to the lack of a valid business reasons, the Commission's provisional conclusion is that the second condition is also not fulfilled in the present case. There are indeed no indications that the interest deducted by *Systems* was effectively taxed at any level of the Inter IKEA group at the 10% rate as established on a taxable base determined according to Dutch standards.

(32) For the foregoing reasons, the Commission's provisional conclusion in relation to the 2011 APA and the Dutch tax administration's assessments of the Loan interest deductions in *Systems'* annual tax declarations is that they do not respect the conditions laid down by Article 10a CIT. That conclusion further supports the provisional conclusion of the Commission, set out in Section 7.2.2.2 of the Opening Decision, that by endorsing the Loan interest deduction in the 2011 APA, the Netherlands granted an economic advantage to *Systems,* since the nominal amount of the Loan is above its arm's length amount, and that, therefore, part of the Loan is financing an overvalued transfer price of the PRs.

3.4. Closure of the investigation with regard to the deduction of provisions for future interest payment

(33) Since the PAM has been terminated and the allocation to the provisions for future interest payments related to that PAM have been reversed, the provisional findings in Section 7.2.2.4 of the Opening Decision regarding the existence of an economic advantage in relation to the PAM have become without object and will not be further investigated.

3.5. Conclusion on the existence of aid

(34) The Commission considers, at this stage, that the contested measures constitute State aid within the meaning of Article 107(1) of the Treaty. In the absence of any notification of those measures pursuant to Article 108(3) of the Treaty, they should be provisionally considered to constitute unlawful aid.

3.6. Compatibility with the internal market

(35) State aid is deemed compatible with the internal market if it falls within any of the grounds listed in Article 107(2) of the Treaty[32] and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the grounds listed in Article 107(3) of the Treaty.[33] It is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Article 107(2) or (3) of the Treaty.[34]

(36) Neither the Netherlands nor Systems have alleged that the aid granted through the contested measures, as modified, are compatible with the internal market under any of the grounds listed in those provisions. At this stage, the Commission has also not found any indications that that aid could be deemed compatible. In particular, the Commission considers that the contested measures appear to result in a reduction of charges that should normally be borne by the entity concerned in the course of its business, and that the exemption of those charges should therefore be considered to constitute operating aid. According to the case law, such aid cannot normally be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.[35]

CONCLUSION

In the light of the foregoing considerations, the Commission's provisional conclusion is that the Advanced Pricing Agreement concluded between the Dutch tax administration and Inter IKEA Systems B.V. on 9 March 2006, the Advanced Pricing Agreement concluded between the Dutch tax administration and Inter IKEA Systems B.V. on 19 December 2011, and *Systems'* annual corporate income tax assessments for the tax years 2006 and following constitute State aid within the meaning of Article 107(1) of the Treaty granted by the Netherlands to Inter IKEA Systems B.V. and to the Inter IKEA group as a whole. The Commission provisionally concludes that that State aid is not compatible with the internal market. The Commission has therefore decided to extend the procedure laid down in Article 108(2) of the Treaty with respect to those APAs and *Systems*' annual corporate income tax assessments starting from tax year 2006, to the extent they were not already covered by its opening decision of 18 December 2017.

The Commission requests the Netherlands to submit its comments on this Decision and to provide all such information as may help to assess the contested measures, within two months of the date of receipt of this letter. In particular, the Commission wishes to receive the information listed in the annex to this decision.

The Commission requests the Netherlands to forward a copy of this letter to the potential beneficiary of the aid identified herein immediately.

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32 The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

33 The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

34 Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* EU:T:2007:253 paragraph 34.

35 Case T-308/11, *Eurallumina* v *Commission*, EU:T:2014:894, paragraphs 85 and 86.

The Commission wishes to remind the Netherlands that Article 108(3) of the Treaty has suspensory effect, and would draw its attention to Article 16 of Council Regulation (EU) No 2015/1589,[36] which provides that all unlawful aid may be recovered from the recipient of that aid.

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 to it. 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 should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President

[36] OJ L 2015 L 248/9.

ANNEX

(1) Provide a copy of the tax declaration submitted by Inter IKEA Holding BV (with which *Systems* formed a fiscal unity as from 22/08/2016) for the tax period 22/08/2016 - 22/08/2017.

(2) Indicate if Inter IKEA Holding BV submitted any tax declaration for the tax period starting from 22/08/2017. If yes, provide to the Commission a copy of each tax declaration.

(3) Indicate if the Netherlands tax authorities issued a note of assessment concerning the tax declarations submitted by *Systems* and Inter IKEA Holding BV for the tax periods starting from 01/01/2016. If yes, provide to the Commission a copy of each note of assessment.

(4) Provide the notes of assessment concerning the tax declarations submitted by *Systems* for the tax years 2006 to 2013.