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For more details, please contact:

Hein Vermeulen – PwC EUDTG Netherlands
+ 31 6 20 94 10 31
hein.vermeulen@pwc.com

Vassilis Dafnomilis – PwC Netherlands
Knowledge Center
+31 6 13 99 87 29
vassilis.dafnomilis@pwc.com

Bob van der Made – PwC EUDTG
Netherlands | Brussels
+ 31 6 1309 6296
bob.vandermade@pwc.com

Jonathan Hare - PwC EUDTG UK
+44 20 7804 6772
jonathan.hare@pwc.com

Emmanuel Raingard - PwC EUDTG France
+33 155 574 014
emmanuel.raingard@pwcavocats.com

Or contact any of the other members of
[PwC's State Aid Working Group](#)

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EU Direct Tax Newsalert

Non-confidential version of the EC's State aid decision to extend proceedings in Inter IKEA

On 2 July 2020, the public version of the State aid decision of the European Commission (EC) to extend the State aid investigation into the Netherlands' tax treatment of Inter IKEA Systems BV (Systems) was made available. The decision follows the EC's opening decision of 18 December 2017, in which the EC explained the reasons for the initiation of the formal investigation and requested additional information from the Netherlands and potentially Systems or any other company of the Inter IKEA Group, in order to reach a final conclusion. We refer you in that regard to the [EUDTG Newsalert](#) of 28 March 2018.

The EC's opening decision focused on two Advanced Pricing Agreements (APAs) granted by the Netherlands to Systems in 2006 and 2011, respectively.

EC's decision to extend proceedings

The EC considered that the 2006 and 2011 APAs have been modified since the adoption of its opening decision, in particular as regards the amortisation of the IKEA Proprietary Rights (PRs) and their revised transfer price. More specifically, according to the EC, Systems decided to start amortising the PRs. At the same time, Systems stopped setting aside allocations for the provision of future interest payments related to the price adjustment mechanism (PAM), reversing the allocations deducted in previous tax years. In addition, Systems and Interogo Foundation (that owned the PRs) decided to terminate the PAM and to increase the transfer price of the PRs to EUR 11.8 billion. In reflection of those changes, Systems filed revised corporate income tax (CIT) declarations.

Consequently, the EC 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, in EC's view, not applied (collectively the contested measures).

EC's preliminary State aid assessment

The EC considers, at this stage, that the contested measures constitute State aid. Apart from the grounds mentioned in its opening decision, the EC puts forward two additional grounds.

Amortisation of the PRs

Although the EC 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), the EC is of the view that such amortisation in this particular case took place for an amount higher than the arm's length transfer price. This resulted, according to the EC, in an unjustified tax base reduction for Systems given that the transfer price of the PRs was determined without subtracting Systems' contribution in relation to the PRs and the IKEA Franchise Concept. Any reduction in the arm's length transfer price of the PRs following those subtractions should thus necessarily lead to a corresponding reduction in the amount of the amortisation deducted each year by Systems.

Misapplication of Article 10a CITA

Based on its further investigation into the tax consequences of the intercompany loan provided by Interogo to Systems, the EC provisionally concludes that the Dutch tax administration's endorsement of the interest deduction arising from the loan is contrary to Article 10a of Dutch CIT Act. More specifically, in its opening decision, the EC provisionally concluded that the transfer price of the PRs did not reflect its market value. Accordingly, the difference between the transfer price of the PRs and its market value should under Dutch law be considered a hidden profit distribution. Since the loan was aimed at financing 60% of the transfer price of the PRs in line with the intention of the parties, the EC 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 deductible under Article 10a of Dutch CIT Act.

Takeaway

In its decision to extend proceedings, the EC preliminarily concludes that the contested measures (the 2006 and 2011 APAs *and* the annual CIT assessments) constitute State aid. It will be necessary to wait for the final decision to see whether the EC confirms this position.

