COMMISSION

COMMISSION DECISION

of 8 July 2009

on the groepsrentebox scheme which the Netherlands is planning to implement (C 4/07 (ex N 465/06))

(notified under document C(2009) 4511)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2009/809/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 13 July 2006, the Dutch authorities notified the *groepsrentebox* 'group interest box' scheme, which provides for lower taxation and deductability of interest received or paid in the context of intra-group relations. The notification was made by the Dutch authorities only for the sake of legal certainty since they consider the scheme to be a general measure. Further information was provided by letters dated 5 September 2006 and 9 November 2006.

(2) By letter dated 7 February 2007, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the part of the aid scheme related to lower taxation and deductibility of intra-group interest (measure A).

(3) In the same letter, the Commission also informed the Netherlands that it considered that the lower taxation on short-term deposits aimed at acquiring at least 5 % of a company (measure B) did not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(4) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission called on interested parties to submit their comments.

(5) The Dutch authorities provided their comments on the opening decision by letter dated 7 May 2007.

(6) The Commission received comments from interested parties. It forwarded them to the Dutch authorities, who were given the opportunity to react; their comments were received by letter dated 29 June 2007.

(7) Additional information was received from the Dutch authorities by letters dated 8 November 2007 and 29 January 2008.

[1] OJ C 66, 22.3.2007, p. 30.

[2] See footnote 1.

(8) On 7 October 2008, the Dutch authorities provided a legal opinion from Ms Leigh Hancher, professor of European Law at the University of Tilburg, on the question whether the notified measure involved State aid.

(9) By letter dated 18 December 2008, the Dutch authorities informed the Commission that they had decided to amend the tax scheme.

II. DETAILED DESCRIPTION OF THE MEASURE

II.1. Purpose

(10) According to the Dutch authorities, the measure aims at reducing the difference in tax treatment between two instruments of intra-group financing, i.e. equity and debt.

(11) In the current situation, when a company which is part of a group injects capital into another company which is part of the same group, it receives as remuneration dividends which are tax exempted by virtue of rules exempting shareholdings, whereas, when it lends money to a company which is part of the same group, the interest received is taxed at the standard corporate tax rate (25,5 %). At the level of the company which receives the funds, dividends paid on a capital injection are not deductible, whereas interest paid on a loan is deductible at the standard corporate tax rate.

(12) The Netherlands points out that the choice of an organisational structure of legally independent organisations is usually prompted by company-law or economic reasons. The differences in civil law between equity and debt (liability, terms of repayment, security, voting rights, etc.) are largely irrelevant to group financing, whereas the tax consequences are significantly different. Within groups, financing conditions are chosen to achieve the lowest tax burden under the applicable tax system. As a result, the decision to provide loan capital or equity capital within groups is guided primarily by tax considerations.

(13) In the legal opinion, Prof. Hancher underlines that the impact of the difference in the tax treatment of debt and equity at the corporate level, and the possible solutions to the adverse consequences this may have, are high on the policy agenda in many OECD countries. According to Prof. Hancher, calls for a fundamental reform of the Dutch corporation tax and for a neutral treatment of debt and equity financing within groups of companies have been repeatedly made in the Dutch tax literature.

(14) The Dutch authorities emphasise that the differences in terms of tax treatment create forms of arbitrage between these two means of intra-group financing which are not economically desirable. Within a group the choice between additional equity financing or (additional) debt financing is arbitrary, but the tax consequences of the two types of financing are different. This can lead to arbitrage which distorts the neutrality of the tax system. The measure therefore seeks to prevent arbitrage between debt and equity financing and to increase the neutrality of the Dutch tax system.

(15) The introduction of the group interest box will help to ensure that the financing method used in a group context is determined primarily by economic considerations. It brings the tax treatment of intra-group interest much more closely into line with the tax treatment of intra-group dividends, and therefore makes for greater neutrality between intra-group debt and intra-group equity financing.

(16) The arbitrage problem does not arise in the case of financing outside a group context. Here the different consequences arising in civil law are indeed important, so that this form of arbitrage does not occur. Given the inherent differences between the situations within groups and outside groups, tax neutrality for financing transactions outside groups is not a requirement. In the nature of things, therefore, the measure is limited to group loans.

(17) The Dutch authorities also point out that in recent times Dutch enterprises have been deducting more and more inordinate amounts of interest. The different tax treatment of group loans and equity is more and more being exploited by enterprises at the expense of the Treasury.

(18) The measure is designed to counter this erosion of tax revenues by encouraging companies to use equity instead of loans, and to limit the deduction of interest in the Netherlands. The scheme is thus complementary to the Dutch thin capitalisation rules that have a similar objective, in that it discourages excessive financing with loan capital and prevents artificial reduction of the tax base in the Netherlands.

(19) In the Dutch authorities' opinion, the notified scheme constitutes a measure of a purely technical nature.

II.2. Legal basis

(20) The legal basis of the measure is Article 12c of the 1969 Corporation Tax Act (*Wet op de vennootschapsbelasting* 1969). This provision was introduced with effect from 1 January 2007, but its entry into force has been postponed until the Commission has taken a position on compatibility with the State aid rules.

II.3. **How the measure will work**

(21) In the Netherlands, corporation tax generally applies to company revenues at a rate of 25,5 % [3]. The group interest box measure provides for different tax treatment for certain intra-group interest. Interest paid and received in the context of intra-group financing will not be subject to the standard corporate tax rate of 25,5 %. The positive balance between interest received and paid in the context of intra-group financing transactions will be taxed in a 'group interest box' at the rate of 5 %, instead of the 25,5 % standard corporate tax rate. If the balance of interest received and paid is negative it will be deductible, but at the reduced rate of 5 %, instead of the 25,5 % standard rate.

(22) The amount that can be taxed or deducted at the reduced rate is limited to a percentage of the taxpayer's net assets for tax purposes (*fiscale vermogen*). This limitation aims to prevent undercapitalised undertakings from abusing the measure and ensures that the reduced rate applies only where the yield on group loans has been financed with equity capital.

(23) The interest box measure has several other anti-misuse provisions. In particular, interest formally due to a third party (a bank), but actually paid to a group organisation, is deemed to be intra-group interest paid. This applies, for example, in the case of a back-to-back construction [4]. Interest that is due to a third party (a bank) is also deemed to be intra-group interest with limited deductibility, if the resources obtained by means of the loan are injected into the capital of used in a subsidiary so as to generate low-tax intra-group interest in the subsidiary.

(24) In their initial notification, the Dutch authorities indicated that the scheme would be optional for a period of minimum three years. If chosen by one company belonging to a group, the scheme would apply to all the other companies of the group located in the Netherlands. Eligible companies, as defined in the initial interest box scheme, are those that belong to the one group, as specifically defined in the scheme itself, which requires one company to hold more than 50 % in another company. In other words, a group must be composed of at least two companies, the parent company controlling more than 50 % of the shares of the subsidiary. Each company must be subject to corporate tax in the Netherlands. This means that the scheme applies to any company established in the Netherlands or any company established outside the Netherlands with a permanent establishment in the Netherlands.

II.4. **Amendments to the scheme**

(25) In the course of the proceedings, the Dutch authorities made it clear that they intended to make the scheme compulsory. This was confirmed by letter dated 18 December 2008. The group interest box would now apply to all entities subject to corporation tax in the Netherlands with respect to interest paid to group companies and interest received from group companies.

(26) In that letter, the Dutch authorities also informed the Commission of two additional amendments to the scheme. The first amendment concerns a broader definition of a group for the purpose of the interest box scheme. The definition of related entities is amended to cover all arrangements whereby one entity has, directly or indirectly, effective control over the financing of the other entity, or whereby a third individual or entity has effective control over the financing of the two entities involved in the loan arrangement [5]. The second amendment inserts a provision which would make it easier to step up a (second) company under Dutch civil law, so that the resulting group could benefit from the group interest box scheme. In particular, the current statutory minimum capital of EUR 18 000 for a limited liability company (*besloten vennootschap* — BV) would be abolished.

II.5. **Budget**

(27) According to the initial notification, the annual budget of the notified measure was to amount to EUR 475 million. At a later stage, the Dutch authorities indicated that the compulsory interest box would be neutral from a budgetary point of view.

III. **GROUNDS FOR INITIATING THE PROCEDURE**

(28) In its opening decision of 7 February 2007, the Commission expressed its doubts regarding the general nature of the measure. It stressed that only companies that were part of a group would take advantage of the lower taxation provided for by the scheme (*de jure* selectivity), and suspected that the scheme would benefit multinational groups, giving those groups a selective economic advantage (*de facto* selectivity).

[3] A rate of 20 % applies to taxable income up to EUR 40 000 and 23,5 % to taxable income between EUR 40 000 and EUR 200 000.

[4] There is a back-to-back construction if, from a legal point of view, a loan is issued by a bank, but the actual risk in respect of the debtors and the exchange rate is borne by a group company, for example via a guarantee issued to the bank in question.

[5] Effective control is in any case present if one entity holds the majority of voting rights in another entity or if a third individual or entity holds the majority of voting rights in both entities involved in the loan arrangement.

(29) The Commission indicated that in a purely national context, the measure would be likely to be neutral from a tax point of view. In the context of cross-border transactions, however, a Dutch company lending money to an affiliate established abroad would be subject to lower taxation at the rate of 5 %, while the affiliate abroad would not be subject to the Dutch rules limiting the deductibility of interest paid. The scheme would provide a *de facto* selective advantage, as only multinational groups of companies engaging in cross-border intra-group interest transactions in tax jurisdictions with a corporation tax rate superior to 5 % would have an incentive to use the scheme.

(30) In so far as the measure was meant to constitute an exception to the application of the tax system, the Commission also doubted whether it was justified by the nature or general scheme of the tax system.

(31) The Commission also considered that it could not be ruled out that the main beneficiaries of the scheme might be the former beneficiaries of the international financing activities scheme, which had been held to constitute incompatible State aid ([6]).

(32) The Commission therefore took the view that the interest box scheme could be regarded as constituting aid in the sense of Article 87(1) of the EC Treaty, and that none of the exemptions laid down in Article 87(2) and (3) applied.

IV. COMMENTS FROM THE NETHERLANDS

(33) The comments from the Netherlands on the opening decision were received on 7 May 2007 and were supplemented by additional notes in 2007 and 2008, including a legal opinion delivered by Prof. Hancher.

(34) The Dutch authorities submit that the approach taken by the Commission in its decision is incorrect on three points. Firstly, the Commission merges the separate 'advantage' and 'selectivity' criteria into one criterion, i.e. 'selective advantage'. This is not consistent with normal Commission practice or with the case-law, which prescribe that the two must be applied separately.

(35) Secondly, the Commission fails to assess the components of the group interest box separately. The possible aid component in a reduced rate for intra-group interest received and the possible aid component in a reduced rate for intra-group interest paid must be assessed separately.

(36) Thirdly, the Commission is wrong when it looks at the net effect on the payer and recipient together, and concludes that the net effect is probably neutral for national groups when both the payer and the recipient are established in the Netherlands, while a net advantage arises for multinational groups when the payer is a foreign group company and the recipient is a domestic one. According to the Dutch authorities an equation of this nature has no foundation in Dutch tax law. Dutch companies belonging to a group are consolidated for tax purposes only in the case of share ownership of 95 % or more.

(37) Furthermore, the Dutch authorities are of the opinion that the group interest box cannot be regarded as a deviation from the standard method of taxation. It is an adjustment in which an analytical element is added to the tax system. This results in a new standard taxation method and, consequently, no advantage is conferred.

(38) The Dutch authorities deny that there is any advantage for another reason too. The net variation caused by the group interest box to multinational groups by comparison with national groups can be to the advantage of the multinationals, but also to their disadvantage. A multinational with a Dutch affiliate may incur an advantage or a disadvantage depending on its objective position as debtor or creditor and the tax rates applicable in other Member States and in the Netherlands.

(39) Alternatively, if there is indeed an advantage, the Netherlands is of the opinion that the possible net advantage to multinational groups is the result not of a lower Dutch rate for intra-group interest received, but of unlimited deduction for intra-group interest paid abroad. This advantage is not imputable to the Dutch State and is not financed with Dutch State resources.

(40) A possibly more advantageous net effect for multinational groups in comparison with national groups is not the consequence of the selective scope of the Dutch group interest box, but of a disparity resulting from different rules on the deductibility of group interest within the EU. The Netherlands is free to increase or decrease this difference by amending its tax system, as long as the amendments are generally applicable to all Dutch taxpayers who in the light of the objective pursued by the amendment in question are in a comparable legal and factual situation.

([6]) Commission Decision 2003/515/EC (OJ L 180, 18.7.2003, p. 52).

(41) According to the Dutch authorities, the overall effect of tax amendments on multinational groups engaging in cross-border transactions will always be different from the effect on domestic groups conducting only domestic transactions. For purposes of State aid, this is of relevance only if the differences are caused by the measure of the Member State itself, e.g. where there is a lower tax rate only for foreign group interest income. It is not relevant in the case of a general measure applicable to all group interest income, domestic and foreign, which leads to cross-border differences.

(42) The mere co-existence of non-harmonised tax systems can result in a situation where the net tax implications of cross-border transactions differ from the net effect of purely domestic transactions. This effect can be both disadvantageous (economic double taxation) and advantageous (economic non-taxation).

(43) In the EC Treaty, Articles 94 and 95 offer a basis for directives or regulations aligning the existing arrangements if that is necessary for the establishment or the proper operation of the common market. Furthermore, Article 96 offers the Commission the opportunity to take action if a difference between the legislation in force in different Member States seriously distorts competition conditions in the common market.

(44) In the further second alternative, the Dutch authorities are of the opinion that there is no selectivity. By assessing selectivity via a comparison of the foreign debtor and domestic creditor combination with the domestic debtor and domestic creditor combination, the Commission is choosing an incorrect reference framework. When assessing the selectivity of Dutch tax arrangements, the reference framework cannot extend beyond all Dutch taxpayers. In settled Commission practice, the reference framework cannot include companies that are not subject to tax in the Netherlands.

(45) The Dutch authorities stress that the tax scheme is not restricted to certain undertakings, or certain activities or functions, or particular regions. In the scheme there is no distinction between resident and non-resident groups of companies. For qualification for the interest box, no eligibility thresholds linked to particular activities or functions apply.

(46) In addition, in the light of the objective of the group interest box, only undertakings that form part of a group are in a comparable legal and factual situation. Only these undertakings would have the arbitrage problem described in section II.1.

(47) The Netherlands points out that, within groups, financing decisions are designed to minimise the tax burden under the applicable tax system. The commercial distinction between equity and debt financing (terms of repayment, liability, security), as opposed to the tax distinction is largely irrelevant. Outside groups, the commercial differences between equity and debt financing are very relevant indeed, and may well overrule tax-driven motives.

(48) The Dutch authorities insist that measures limited to groups are tax measures of a purely technical nature not constituting State aid: in a decision on a French taxation provision, they say, the Commission accepted that a measure which set aside the general rule that interest payments were deductible expenditure in inter-company loans was a general measure, but considered a further exception to that rule in favour of central corporate treasuries set up in France by multinational companies to be a selective advantage [7].

(49) The Dutch authorities contend that broadening the scope for the group interest box would actually lead to selectivity. If interest received from third parties were also to be taxed at a reduced rate, this would result in an advantage to financial institutions.

(50) It is also submitted that the assumption that specific tax rules for interest by themselves involve selectivity is incorrect. Financing within a group of organisations cannot be characterised as an economic activity, but simply an economic reality. Interest flows as such are not a separate economic activity or a line of business; they serve only to fund an economic activity or a line of business. Debt financing is a distinct activity in itself only in the case of financial institutions whose business consists of financing third parties. In addition, with respect to interest earned on short-term deposits aimed at acquiring at least 5 % of the shares of a company (measure B), the Commission itself considered in the opening decision that a lower tax rate for such interest did not by itself cause selectivity, since it was considered to be a general measure.

(51) Furthermore, the Dutch authorities argue that there is no conceptual difference between dividends and interest. Both constitute compensation for using or granting funds, either equity or debt. In both situations, these funds are used by the recipient to finance business activities. Every tax system contain rules under which dividends and interest paid are deductible, or partly deductible, or not deductible, and rules under which dividends and interest are taxable, partly taxable or exempt. There is no international tax standard which determines how these components should be treated for tax purposes.

(7) Commission Decision 2003/883/EC (OJ L 330, 18.12.2003, p. 23).

(52) In the further alternative, limited taxation prevents an internal disparity within the Dutch system and, as such, is justified by the nature and purpose of the system. Limited taxation of interest received within a group is justified by the limited deduction of interest payments within the group. This allows undertakings organised as a group to avoid suffering the disadvantage of limited deduction and full taxation, while undertakings organised as a single entity have no internal interest payments, and therefore do not suffer any such disadvantage.

(53) A fundamental principle of Dutch tax law is that income and expenses are treated symmetrically. Under the internal logic of the Dutch tax system, income and expenses are two sides of the same coin. To avoid double taxation, limited taxation is the logical consequence of limited deduction.

(54) The proposed measure aims at ensuring the application of the neutrality principle in the Dutch tax system by eliminating arbitrage between debt and equity financing within groups. The measure reduces the difference between two types of intra-group financing, thereby enhancing the neutrality of the tax system. The limitation to group interest is therefore based on an economic rationale and is necessary and functional for the effectiveness of the tax system.

(55) The Dutch authorities point out that the circle of undertakings that will utilise the group interest box will be much broader than the 87 undertakings that utilised the former international financing activities scheme. They further argue that the limiting conditions of that scheme, such as the two-continents or four-country requirement, are all absent from the group interest box. The interest box is a purely tax measure, which regulates tax pressure on capital as a factor of production. In addition, it applies to any incoming or outgoing group loan, and is completely separate from the business carried on the company in question. For all these reasons, the scope of the measure is completely impossible to compare with the scope of the international financing authorities scheme.

(56) The compulsory nature of the measure for all taxpayers paying or receiving interest from affiliate companies underlines the objective of the interest box: enhancing the neutrality of the tax system, thereby reducing arbitrage and increasing Dutch corporation tax revenues. It also eliminates the element that might cause a selective benefit as a result of the interest box.

(57) A compulsory interest box not only rewards the retention of capital in the Netherlands but at the same time provides a disincentive — similar to thin capitalisation rules — to the inflow of debt financing into the Netherlands. The Dutch thin capitalisation rules discourage an excess of loan capital financing within groups by limiting the deductibility of intra-group interest, while the group interest box offers a reduced rate for intra-group interest received, provided that it is financed by equity capital. The group interest box strengthens the Dutch tax base by encouraging a higher ratio of equity capital to loan capital, and contributes to preventing the outflow of equity capital, and thus of the tax base, from the Netherlands.

(58) The interest box is a purely technical measure that changes the system's treatment of intra-group interest by increasing the tax burden on certain taxpayers and reducing the tax burden on other taxpayers, on the basis of horizontal and objective facts and circumstances. Once the possibility of opting out is removed, the interest box does not confer any economic advantage, as it merely shifts the tax burden between taxpayers on purely horizontal and objective criteria.

(59) The Dutch authorities underline that *de facto* selectivity can arise only if there is a risk that, although the measure is general in nature, the effect in practice would be that it would always benefit an identifiable group. This type of selectivity might arise if the measure was optional, but not if the measure is made compulsory. Taxpayers that suffer a disadvantage in one year may enjoy an advantage in the next, and vice versa. The scheme therefore does not benefit a homogeneous category of taxpayers.

(60) The Dutch authorities are also of the opinion that the new definition of group based on effective control is better aligned with the purpose of the scheme. If one company has effective control over the financing of another company, the latter company is no longer free to choose between financing via internal or external debt, nor is it free to choose between financing via debt or equity. The central management of the group decides how externally attracted funds — either external debt or external equity — are to be allocated within the group, either by internal debt or by internal equity. The fact that the tax consequences of the two instruments of intra-group financing are different provides an incentive to choose a particular instrument solely because of its tax implications.

(61) Finally, the change in the law on limited liability companies will make it easy in future for a taxpayer to reorganise its legal structure in the form of a group, as the administrative burden and the capital requirements will be abolished or drastically alleviated.

V. COMMENTS FROM INTERESTED PARTIES

(62) Comments were received from the Dutch confederation of industry VNO-NCW ([8]), from Belgium and Hungary. Comments from another party were received after the deadline and therefore could not be taken into account in the proceedings. The comments received from the third party in question would not in any event have affected the assessment and conclusions in this Decision.

V.1. Comments from the Dutch Confederation of Industry

(63) The VNO-NCW considers that the scheme at issue cannot be an incompatible State aid in the meaning of Article 87(1) of the EC Treaty for the following reasons.

(64) Firstly, the VNO-NCW considers the group interest box to be a general, tax-neutral and technical measure, because the objective of the scheme is to reduce tax arbitrage between equity financing and debt financing within a group of companies. Given the neutrality of the measure, the scheme does not result in favourable treatment of certain companies or production of certain goods within the meaning of Article 87(1) of the EC Treaty.

(65) Secondly, the tax advantage to a multinational group of companies results from the disparities between Member States' tax treatment of intra-group interest, and cannot be ascribed to the Netherlands. A tax advantage is created because the interest can be deducted in another Member State at a tax rate higher than the one applicable to the interest box, whereas in a domestic situation the rate that applies is the group interest box rate, but this is a direct result of the disparities between the Member States' legal rules on the tax treatment of group interest. Should the Commission wish to abolish distortions that might result from the group interest box, the VNO-NCW suggests it use Article 94 or 96 of the EC Treaty.

(66) Thirdly, the VNO-NCW considers that, in the light of the objective of the scheme at issue, which is to reduce tax arbitrage between equity and debt, companies belonging to a group are not in the same *de jure* and *de facto* situation as are companies not belonging to groups. The difference in tax treatment of equity and debt causes distortions particularly inside groups, since the parent company exercises some control over its subsidiaries, so that it can to a considerable extent determine their financing options, a choice often largely decided by tax considerations. In dealings with third parties the funding option is often determined largely by factors other than tax considerations. As a consequence, it cannot be said that the scheme at issue is selective within the meaning of Article 87(1) of the EC Treaty. In addition, according to the VNO-NCW, if the mere fact that a tax facility is to a greater or lesser extent confined to group companies prompts the conclusion that this is a State aid measure, Member States' corporation tax systems will be at odds with Article 87(1) of the EC Treaty in many respects.

V.2. Comments from the Hungarian authorities

(67) The Hungarian authorities consider that the scheme is not an aid measure, and put forward two arguments. Firstly, the fact that a scheme is confined to groups does not make it selective. In (international) taxation matters, rules for groups of companies are common practice and unavoidable. Many rules whose scope is limited to groups have been brought forward by the OECD (transfer pricing) and the Commission (e.g. the Interest and Royalty Directive). Secondly, Hungary recalls that direct taxation is a matter for Member States. Setting tax rates in relation to certain taxable events is within their domestic competence. Finally, Hungary finds it difficult to see how the Netherlands can be held responsible for the higher deduction generated by higher tax rates in other countries, in a situation where direct taxation has not been harmonised. The advantage described by the Commission is clearly a result of a disparity between tax systems.

V.3. Comments from the Belgian authorities

(68) The Belgian authorities also support the view that the scheme is not State aid, and put forward arguments similar to those from other interested parties with regard to the absence of selectivity. Belgium underlines that it is logical that an undertaking that is not part of a group cannot by definition have intra-group financing activities. The Belgian authorities also argue that State aid rules are not applicable in situations where disparities between national tax systems exist due to the absence of harmonisation at EU level. As a consequence, the group interest scheme is a general measure not covered by the State aid rules, and in pursuing the case the Commission is using its powers improperly.

VI. REACTION FROM THE NETHERLANDS TO THIRD PARTIES' COMMENTS

(69) The Dutch authorities note that the comments of all three parties support its point of view. Both Hungary and Belgium emphasise that in attempting to tackle disturbances that are the consequence of disparities between tax systems that have not been harmonised the Commission is abusing its State aid powers. This reinforces the Dutch view that the group interest box does not constitute an aid measure prohibited by Article 87 of the EC Treaty.

([8]) Verbond van Nederlandse Ondernemingen — Nederlands Christelijk Werkgeversverbond.

(70) The Netherlands underlines that it fully agrees with the analysis drawn up by VNO-NCW. It attaches particular importance to the detailed argument concerning the institutional framework, which clearly explains the various disturbances in the single market that can be caused by national measures taken by Member States and the instruments available under the EC Treaty to eliminate such disturbances where necessary.

(71) Finally, the Dutch authorities support the confederation's view that in order to establish whether there is selectivity, it must be ascertained whether certain undertakings or the production of certain goods are favoured over others that are *de jure* and *de fact*o comparable in the light of the objective of the measure concerned. The restriction to group loans does not lead to selectivity, because the objective of the group interest box is to prevent arbitrage between financing from capital and financing from loans within groups. In financing between companies that are not connected in a group arbitrage plays no role whatsoever. The restriction to group loans is thus logical in the light of the scheme's objective, so that the relevant frame of reference consists of all companies that are part of a group.

VII. **ASSESSMENT OF THE SCHEME**

(72) In order to ascertain whether the measure at hand constitutes aid within the meaning of Article 87(1) of the EC Treaty, the Commission has to assess whether it favours certain undertakings or the production of certain goods by granting an advantage of an economic nature, whether any such advantage distorts or threatens to distort competition, whether the advantage is granted through state resources, and whether the advantage affects trade between Member States.

(73) To be considered State aid, a measure must be specific or selective, in that it favours only certain undertakings or the production of certain goods.

(74) The Dutch authorities argue that the measure at issue is not limited to certain sectors, certain types of companies, or certain parts of Dutch territory. There are no further restrictions regarding the turnover, the size, the number of employees, membership of a multinational group, or the nature of the operations that the beneficiaries are authorised to perform.

(75) According to the applicable case-law, in order to determine whether a measure is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation ([9]). It may thus be that a taxation regime does not constitute State aid even though it does not correspond in all respects to the general system of corporate taxation of the Member State. The Court has also held on numerous occasions that Article 87(1) of the EC Treaty does not make a distinction according to the causes or aims of State aid measures, but defines them according to their effects ([10]). In particular, tax measures which do not represent an adaptation of the general system to meet particular characteristics of certain undertakings, but have been put forward as a means of improving their competitiveness, are caught by Article 87(1) of the EC Treaty ([11]).

(76) The concept of State aid does not apply, however, to state support measures which differentiate between undertakings where that differentiation arises from the nature or the overall structure of the system of which they form part. As explained in the Commission's notice on the application of the State aid rules to measures relating to direct business taxation ([12]) (the taxation notice), 'some conditions may be justified by objective differences between taxpayers'.

(77) Firstly, it should be clarified at which level (group level or undertaking level) the assessment is to be made. In the opening decision, the Commission indicated its preliminary view that this assessment should be made at group level, arguing that where the companies of a purely domestic group had opted for the group interest box, the advantage of a reduced taxation of the interest received by a Dutch financing company would be cancelled out by the lower deductibility of the interest paid by the Dutch-financed company ([13]).

([9]) See, inter alia, Case C-487/06 P *British Aggregates* v *Commission*, 2008, not yet reported, paragraph 82; Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 47; Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 54; and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others*, 2008, not yet reported, paragraph 46.

([10]) See, for instance, Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 79; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20; Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 25; and Case C-409/00 *Spain* v *Commission* [2003] ECR I-10901, paragraph 46.

([11]) See, for instance, Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 101.

([12]) OJ C 384, 10.12.1998, p. 3, paragraph 24.

([13]) Paragraph 22 of the opening decision.

(78) The Dutch authorities consider that, because the measure is symmetric and would merely shift the tax burden between taxpayers, some companies will enjoy an advantage while others will suffer a disadvantage, depending on their objective position as debtor or creditor. Thus the group interest box does not involve aid.

(79) As the Dutch authorities pointed out in their letter of 18 December 2008, where one company has effective control over the financing of another, the latter company is no longer free to make decisions about its financing, or to choose between financing by means of debt or equity. The group's central management decides how externally attracted funds are to be allocated within the group, either by internal debt or by internal equity.

(80) The Commission notes, however, that the measure relates to a specific operation (the financing of related companies), and not to a consolidation at group level. Any reduced tax rate will be applied individually to companies on the basis of the balance of their interest boxes. Even if financing decisions can be expected to be taken in the best interest of the group as a whole, an analysis at the level of the group has no foundation in Dutch tax law, as the Dutch authorities have pointed out. Under Dutch law, tax consolidation occurs only in the case of a share ownership of 95 % or more. In other words, Dutch corporation tax is levied on individual entities, not on groups. To that extent, the name given to the 'group interest box' does not properly reflect the fact that it applies to individual entities, engaged in specific financing operations. The measure does not concern a cost/revenue balance consolidated at group level.

(81) Therefore, the Commission is of the opinion that the assessment of the scheme should be made at the level of individual companies. The scheme, as amended by the Dutch authorities, can be described as a reduced rate on a specific type of revenue (or cost) in the form of interest on a loan, when the transaction takes place between related companies ([14]).

(82) Furthermore, the Commission considers that the symmetry of the measure and its neutral impact at the level of the group is not sufficient to exclude the possibility of an advantage to individual companies. Similarly, taxing the interest of one entity in the group at a lower rate cannot be justified by taxing another company — through reduced deductibility of interest — at a higher rate ([15]).

Analysis of the selective nature of the measure

(83) The Commission considers that, for the taxation of specific types of revenue, it may be important to determine whether a scheme covers broad categories of transactions in a non-discriminatory manner. Any discrimination that cannot be justified by objective differences between taxpayers may lead to a distortion of competition.

(84) In this regard, it is worth noting that it is a typical feature of many tax systems that there are analytical elements to complement the synthetic nature of the tax system. This is particularly the case where specific types of revenue such as interest or dividends are subject to differentiated tax treatment.

(85) This being said, it must be determined whether loan transactions between related companies may be objectively entitled to a reduced taxation rate. The Dutch authorities and the VNO-NCW have argued that it is only groups that there can be arbitrage between financing through capital injection and lending. In contrast to companies that are not part of a group (stand-alone companies), group companies are confronted with arbitrage between equity capital and loan capital within their group. Such an arbitrage is for the most part influenced by tax considerations rather than economic considerations.

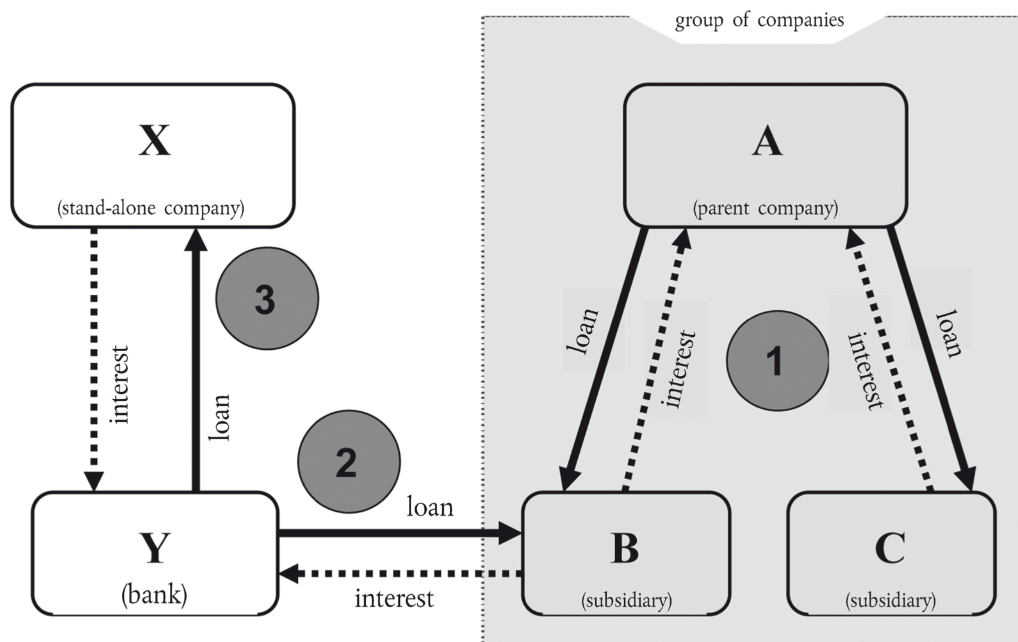
(86) The Commission is of the opinion that the measure at issue will have the effect of reducing this arbitrage (in a domestic situation), as the difference between the taxation of intra-group interests and the taxation of intra-group dividends will be reduced, thus reinforcing the technical neutrality of the tax system.

([14]) The expressions 'related companies' and 'group' are used throughout this Decision to refer, for convenience, to companies related through joint control, whether directly or indirectly — see recital 98.

([15]) In this regard, it must be observed that, in its assessment of the tax regime for coordination centres established in Belgium (see joined Cases C-182/03 and C-217/03 *Belgium* v *Commission* [2006] ECR I-5479, paragraphs 86 to 118), the Court of Justice considered that the flat-rate assessment of income under the cost-plus method constituted an economic advantage for the purposes of Article 87 of the EC Treaty and that 'that analysis cannot be called into question either by the fact that the inclusion of the financial charges could, in some cases, lead to a tax base that was unduly high or by the scale of the tax burden that might be imposed on the group, nor can it be called into question by the fact that a centre may be taxed when it has not made any profits'. The Court also considered that exempting the coordination centres from property tax gave them an economic advantage. 'The fact that only 5 % of the coordination centres benefit from it in practice, as all the others hold their buildings under lease, does not affect that assessment, since the choice between owning a building and leasing it is a matter entirely at the discretion of the centres.'

(87) To illustrate this point, it is necessary to distinguish between three different types of situation (see figure 1 below) involving related companies and stand-alone companies (including financial institutions in their relations with independent third parties). Suppose that A-B-C is a corporate group, where A controls the financing of B and C; X is an entity that is not part of a group ('stand-alone' company), and Y is a credit institution, providing loans to independent parties.

Figure 1



(88) The first situation is that of financial transactions between related companies. The parent company A provides liquidity to its subsidiaries B and C through either a loan or equity. These financial transactions will result in the payment (by B and C) of either interest or dividends.

(89) The choice between loan and equity financing is made at the level of the parent company A in the best interest of the group of related companies as a whole. As a consequence, when the parent company A finances one of its subsidiaries (or affiliates), thee will indeed be an arbitrage between loan and equity on the basis of several criteria. While a need for liquidity in the long term or an investment will generally require a capital injection, short-term financial requirements will require only the provision of a (short-term) loan. However, tax considerations may influence these economic considerations.

(90) By reducing the difference in the tax treatment of intra-group loan revenues (interest) and intra-group capital revenues (dividend), the measure will have the effect of narrowing the tax arbitrage between the two types of transaction in a domestic situation. The second type of transaction is that of a loan transaction between a financial institution (bank Y) and one of the companies belonging to a group (company B). Such a situation arises in principle when financial requirements cannot be satisfied by the provision of liquidity within the group. In such a situation, there is no arbitrage for Y, as a capital injection into B is not an alternative for Y, which is simply carrying on its business of granting credit to third parties. Nor is there any arbitrage between loan and equity at the level of B (or at group level).

(91) Financial institutions (that grant loans to independent parties) may be distinguished from group companies (providing liquidity to their affiliates) for another reason also. In the case of financial institutions, revenues from such loan transactions are generated by the institutions' regular business and may constitute a major part of their revenues. In the case of group companies, such revenues are recycled from transactions with independent market players and transformed into intra-group revenues, without generating any revenues at the level of the group. The interest paid by company B to the bank will constitute additional costs not only for company B but also for the group as a whole, while, in the first situation, the interest paid by company B (or C) to its parent will not constitute additional costs or revenues for the group.

(92) In this respect, it is worth noting that financial institutions did not complain nor present any observations following the publication of the opening decision in the *Official Journal of the European Union* about the scope of the interest box scheme.

(93) If we consider the situation from the debtor's point of view (B vis-à-vis Y), the company may be more readily compared to a stand-alone company such as company X when it concludes a loan with bank Y.

(94) The third situation is that of a loan transaction between a financial institution (bank Y) and a stand-alone company (X). As in the previous situation, Y is not confronted with any arbitrage, as a capital injection into B is not an alternative for Y.

(95) Although, in some circumstances, the financial requirements of company X might be satisfied through the provision of a loan or capital injection from individual shareholders, this situation is not comparable with the first one, as the potential liquidity providers (natural persons) are not subject to corporate taxation. In addition, incorporating such transactions with private investors into the scope of the measure (by reducing the deductibility of interest paid by company X to its shareholders and by simultaneously reducing the taxation of such interest at the level of the individual shareholder) would be extremely difficult, as individual taxation does not follow the same logic as corporate taxation ([16]).

(96) If, from a debtor's perspective, company X's financial requirements can be satisfied only by having recourse to borrowing from a financial institution, the resulting transaction with Y will be similar to the loan transaction between company B and Y.

(97) Since stand-alone companies that are not credit or financial institutions are in principle not engaged in the regular business of granting loans to independent parties, they are not discriminated against with regard to loan transactions, as compared with related companies granting loans to affiliated companies.

(98) Finally, the Netherlands have changed the definition of 'group' for the purpose of the interest box measure. The Dutch authorities argue that this change is the result of a refining of its approach to avoid tax arbitrage.

(99) In the new proposal, entities will be related, entitling them to enter interest in the interest box, where one entity directly or indirectly has effective control over the financing of the other entity. The Commission considers this change important, since if one company has effective control over the financing of the other company, the latter is no longer free to choose between financing via internal or external debt, nor is it free to choose between financing via debt or equity. The arbitrage is carried out by the central management in the best interest of the group as a whole.

(100) The relationship between A and B has to do with the allocation of funds within the group of related companies, whereas the relationship between Y and B (or X and Y) has to do primarily with commercial financing.

(101) The Commission is therefore of the opinion that the notion of 'direct or indirect effective control' over the financing of the other entity (or effective control by a third entity) of the two entities involved in the loan transaction is relevant determination of the aid character of the measure, having regard to the aim of reducing incentives for arbitrage between financing through a capital injection and a loan, and ensuring tax neutrality in this regard.

(102) Turning to the question whether any advantage is conferred by the measure in question, it is clear that a distinction has to be made between different situations at the level of the individual companies. First of all, any taxpayer in the Netherlands involved in a debt financing transaction with unrelated companies is treated in exactly the same manner, and taxed at the same rate (25 %). This includes companies that are part of a group. Secondly, when a company obtains a loan from a related company, it actually suffers *less* advantageous tax treatment than a company engaged in a loan relationship with a non-related company (deduction at only 5 %). Thirdly — and this is the only situation where there may be any tax advantage — a company providing a loan to a related company will be taxed on the ensuing interest payments at a rate lower than the rate charged on a transaction with a non-related company.

([16]) For example, the payment of dividends, while not being deductible at the level of the paying company, is subject to taxation at the level of individual shareholders.

(103) In terms of the measure's consequences, however, the advantage conferred on a company providing a loan to a related company cannot be considered discriminatory, since a loan to a related company cannot be compared with a loan to an unrelated company. With respect to debt financing activities, related companies are not in a legal and factual situation comparable to that of unrelated companies. The reason is that related companies, unlike unrelated companies, are not engaged in a merely commercial transaction when they try to obtain loan or equity financing within the group. The parent and the subsidiary share the same interests, which is not the case in a commercial transaction with a third-party provider of finance, where each party tries to maximise its profits at the expense of the other. There is no competitive pressure from company Y on company A when providing a loan to company B, for the simple reason that company A controls any decision of company B as regards financing.

(104) The requirement that control be exercised over another company is thus criterion that applies across the board to all companies regardless of size, sector or any other distinction. A different rate of taxation for debt financing between related companies merely reflects objective differences and does not affect tax neutrality.

(105) While, in the design of tax rules, Member States are bound by the rules on free movement of goods, services and capital and freedom of establishment, by the prohibition of discrimination on grounds of nationality, and by State aid rules, the Commission has to acknowledge that Community law leaves the Member States considerable scope for manoeuvre in the field of taxation. As underlined at paragraph 13 of the taxation notice, State aid rules do not restrict the power of Member States to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the different factors of production.

(106) In this context, the restriction of the existing arbitrage between intra-group debt and equity financing (as well as the prevention of any abuse of the deduction of intra-group interest) may well be a legitimate concern for Member States. In particular, the Commission observes that arbitrage between equity and debt may lead to situations where a company is forced by its parent to take an intra-group loan instead of equity, and thereby to have its leverage increased, in order to minimise its corporation tax. However, from an economic point of view, high debt leveraging or the obligation to pay interest, rather than benefiting from longer-term financing in the form of capital, may not always be desirable. In addition, the Netherlands seems to have lost tax revenues as a result of debt/equity arbitrage.

(107) The measure is open to any company subject to corporation tax and receiving or paying interest in the context of intra-group relations, and does not include any discriminatory element such as a limitation regarding the country in which the transaction is to take place.

(108) The fact that the scheme introduced is to be compulsory ensures that it will apply to all group companies (with intra-group loan transactions) without any possibility of opting out and without any differentiated treatment between group companies. In addition, the new definition of group companies for the purpose of the measure, based on control rather than a minimum stake), reduces potential elements of *de jure* selectivity by broadening the scope of the measure.

(109) In this respect, the Commission notes that following the publication of the opening decision it did not receive any complaints or observations from representatives of Dutch employers complaining that small and medium-sized enterprises would not be able to take advantage of the measure.

Cross-border versus national context

(110) In its opening decision, the Commission made a distinction between a purely national situation where all the companies belonging to a group were established in the Netherlands, and a cross-border situation where a Dutch company lent money to an affiliate established abroad. In a purely national context, the Commission said the measure would be likely to be neutral from a tax point of view. But, in cross-border transactions, the Dutch company would be subject to lower taxation at the rate of 5 %, while the affiliate company established abroad would not be subject to Dutch rules limiting the deductibility of interest paid. The Commission concluded that the scheme could provide a *de facto* selective advantage, as only multinational group of companies engaging in cross-border intra-group interest transactions in tax jurisdictions with a corporate tax superior to 5 % would have an incentive to use the scheme.

(111) The Commission considers that its final assessment should not make any distinction between purely national situations and cross-border situations.

(112) Firstly, the specific provisions of the scheme remain the same in both national and cross-border situations. The scheme does not contain any provision that differentiates between domestic and foreign revenues or costs.

(113) Secondly, as rightly pointed out by the Dutch authorities and the interested parties, any advantage obtained in a cross-border context that beyond the advantage obtained in a national context is the result not of the lower Dutch rate for intra-group interest received, but the result of unlimited deduction for intra-group interest paid abroad.

(114) Corporate tax rates are not harmonised in the EU, and the Netherlands are not in control of the rates applied by other countries. If undertakings manage to take advantage of the difference in tax rates, i.e. of the lack of harmonisation, the Netherlands is not responsible. As confirmed by the Court of Justice ([17]), undertakings are free to take advantage of differences in taxation levels in Member States.

(115) The Commission agrees that any advantage resulting from an international context owing to a low taxation rate in the Netherlands which is not mirrored by a low rate of deduction in the Netherlands but instead corresponds to a normal deduction rate abroad, is not imputable to the Netherlands ([18]).

(116) It should also be underlined that the advantage resulting from deduction at the normal rate abroad will not be financed through Dutch resources, and, in the country concerned, the deduction at the normal rate will stem only from the application of the normal tax system (and not from a specific measure departing from it).

(117) As a consequence, the Commission considers that any advantages at the level of a multinational group that would result from a cross-border situation, as described in the opening decision, are the result of tax disparities between different tax jurisdictions and should therefore be excluded from the scope of the State aid assessment.

The financial sector

(118) In general, and as for any tax measure, it cannot be ruled out that companies belonging to a group that are operating in specific sectors may benefit more from the measure because of the higher intensity of financial transactions in their sector. This is particularly true for companies in the financial sector, whose main activity is lending, and which might well increase lending to related companies as a result of the measure. However, it must be noted first that in order to avoid any abuse of the measure the Dutch measure includes a provision limiting the amount that can be taxed or deducted at a reduced rate (see section II.3). This limitation will apply in particular to companies in the financial sector, thus limiting any risk of abuse. Furthermore, the Commission's taxation notice indicates that 'the fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid' ([19]).

Comparison with the scope of the former international financing activities scheme

(119) In the opening decision, the Commission considered that it could not be ruled out that the main beneficiaries of the scheme might be the former beneficiaries of the international financing activities scheme, which had been held to constitute incompatible State aid.

(120) It must be noted that in order to qualify for the international financing activities scheme, companies had to meet the following conditions, among others:

— the company benefiting had to carry out financing activities for parts of the group in at least four countries or on at least two continents,

— only financing operations that could be conducted independently of the Netherlands were eligible,

— no more than 10 % of the total capital (debt and equity) used by the company for its financial activities could be applied, directly or indirectly, in group companies based in the Netherlands.

(121) In view of these requirements, and the limited number of beneficiaries (87), the Commission considered the international financing activities scheme to be a selective measure.

([17]) Case C-196/04 *Cadbury Schweppes* v *Commissioners of Inland Revenue* [2006] ECR I-7995, see in particular paragraphs 36 and 37.

([18]) See, also, the judgment of the Court of First Instance in Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933, where the Court held that comparison of the tax rules applicable in all of the Member States, or even some of them, would inevitably distort the aim and functioning of the provisions on the monitoring of State aid.

([19]) Footnote 8, paragraph 14.

(122) As pointed out by the Dutch authorities, there are no such requirements in the interest box measure. In addition, the body of undertakings that will benefit from the group interest box will be much broader than the 87 undertakings that utilised the international financing activities scheme.

(123) In this respect, it cannot be argued that large (multinational) companies will have easier access to the scheme than small and medium-sized enterprises (SMEs) and will thus benefit disproportionally from it. According to the statistics provided by the Dutch authorities, which draw an unambiguous distinction between SMEs and large enterprises, 200 000 enterprises (out of 335 000) have one or more group affiliates, and thus can receive or pay intra-group interest. 50 000 of these enterprises have one or more companies belonging to the group abroad, of which 47 000 (95 %) are SMEs. This clearly indicates that SMEs will not be discriminated against by the measure.

Conclusion on the State aid character of the measure

(124) It has been demonstrated in paragraphs 83 to 123 that the measure does not confer an advantage in a discriminatory manner on undertakings in similar situations, and should in fact enhance tax neutrality.

(125) It has also been found that the *de facto* advantage for multinational companies that may result from the existence of disparities between tax systems in a cross-border situation falls outside the scope of the State aid rules, because such disparities are not imputable to the Netherlands.

(126) In any event, the Commission considers that the measure is genuinely open to any undertaking in the Netherlands, since there are no legal or economic obstacles to the establishment of a group.

(127) The last amendment introduced by the Dutch authorities will make it easier to create a company in the Netherlands, by abolishing the statutory capital requirement of EUR 18 000 for a limited liability company. This will allow any company easily to create a (second) company in the Netherlands, and hence a group. As a consequence, the interest box measure will be accessible to any individual company without requiring a certain economic strength or significant capital resources. As the creation of a group will become a mere matter of organisation, without disproportionate costs, the requirement that it must be part of a corporate group will no longer constitute an obstacle for any undertaking wishing to benefit from the group interest box.

VIII. **CONCLUSION**

(128) The Commission finds that the group interest box measure that the Netherlands is planning to implement does not confer a selective advantage that may be imputable to the Netherlands on companies established in the Netherlands that are part of a group or on foreign companies belonging to a group with a permanent establishment in the Netherlands, and accordingly does not constitute State aid within the meaning of Article 87(1) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The ‘group interest box’ which the Netherlands is planning to implement with respect to the taxation of intra-group flows of interest does not constitute aid within the meaning of Article 87(1) of the Treaty.

Implementation of the scheme is accordingly authorised.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 8 July 2009.

For the Commission

Neelie KROES

Member of the Commission