

Memorandum

To the Upper House of the States General

6 December 2010
Our ref. M9499713/2/20495153

Subject: Increase in VAT rates for performing arts

1 Summary

- 1.1** De Brauw Blackstone Westbroek N.V. and SEO Economic Research have offered the *Vereniging Vrije Theater Producenten* (Dutch theatre producers' association - "VVTP"), the *Vereniging van Schouwburg- en Concertgebouwdirecties* (Dutch theatre and concert hall management - "VSCD"), the *Vereniging Van EvenementenMakers* (Dutch event makers' association - "VVEM") and the *Vereniging Nederlandse Poppodia en - Festivals* (Dutch concerts and festivals association - "VNPF") to conduct an examination of the legitimacy and other consequences of the increase in the VAT rates for performing arts free of charge. The examination was conducted by Mr Drs Ruud Hermans and Prof. Dr. Barbara Baarsma. The examination resulted in the following findings:
- 1.2** The planned increase of the VAT rate for performing arts from 6% to 19% is in breach of the VAT directive. According to established case law of the European Court of Justice (ECJ), the principle of fiscal neutrality dictates that similar – and thus competing – goods or services bear the same burden from a VAT point of view, so that those goods or services must be subject to a uniform tax rate.
- 1.3** Since the performing arts compete with other cultural events and facilities that are taxed at a rate of 6%, such as museums, cinemas, amusement parks, fairs and circuses, unfair competition is involved, which means that the intended increase of the VAT rate for performing arts is in breach of the VAT directive.
- 1.4** If the VAT rate for performing arts is increased, the European Commission is expected to initiate infringement proceedings against the Netherlands, as the European Commission has also done on several occasions in the past against other Member States that introduced a different VAT rate for competing goods or services in breach of the principle of fiscal neutrality.
- 1.5** The policy objective that the government envisages with the VAT increase

(more opportunities for society and private initiatives) will not be realised.

- 1.6** The increase in the VAT rate to be implemented in just three months' time in the middle of the current theatre season is evidence of an extremely inconsiderate and arbitrary legislative process:
- The reduced VAT rate for performing arts was introduced in 1998 and received a positive evaluation in 2008. The cultural sector could take this evaluation to mean that the low VAT rate would be maintained. Relying on this, entrepreneurs in the sector entered into multi-year investments and other obligations which cannot possibly be revised or cancelled in the short term.
 - The parties in the cultural sector cannot absorb the consequences of the VAT increase in a term of a few months, in the middle of a theatre season. One of the reasons for this is that contracts have been concluded for the current season which cannot be renegotiated in the interim, or only at high costs.
 - Implementing a VAT increase halfway through the theatre season leads to unnecessary paperwork. The tickets for many performances scheduled after 1 January 2011, which specify the price, have already been printed; some of these tickets have already been sold. If the party offering these tickets wants to pass on the VAT increase to the consumer, these prices will have to be changed by hand. In addition, the theatres' administrative system is not set up to work with two different VAT rates to be applied depending on the time at which the tickets have been sold and paid for.
 - The implementation of a VAT increase without a proper transitional scheme is in breach of the principle of equality. In consultation with the travel industry, the government opted for implementation of the new VAT arrangements for the travel industry as of 1 April 2012 to give the industry the opportunity to prepare for the consequences of the new arrangements.
- 1.7** Due to substantially lower demand, the revenue from the increase of the VAT rate for performing arts will be much lower than estimated by the government. Since the parties offering tickets will be unable to pass on much of the VAT increase to the customers, a VAT increase on performing arts will also result in a decrease in corporation tax, wage tax and income tax revenue.
- 1.8** At least 1150 FTE jobs will be cut as a result of the VAT increase.
- 1.9** The cultural offering will decrease as a result of the VAT increase.

2 Introduction

- 2.1** On 30 September 2010, the Christian Democratic Alliance (CDA) and the People's Party for Freedom and Democracy (VVD) presented the coalition agreement and parliamentary support agreement between these parties and the Freedom Party (PVV). In these agreements it was clear that the Cabinet intended to increase the VAT rate on admission to music and stage productions and performances by performing artists from 6% to 19%.
- 2.2** On 29 October 2010, the Cabinet presented the Second Memorandum of Amendment to the proposed amendment of a number of tax laws and a few other laws (the 2011 Tax Plan) to the Dutch Lower House, proposing amending the Dutch Value Added Tax Act 1968 such that admission to music and stage productions (such as operas, operettas, dance, musicals and lectures) and performances by performing artists will be subject to a VAT rate of 19% rather than 6% as of 1 January 2011 (Second Memorandum of Amendment, Article XIX B, opening lines and par. 2 and 3).¹
- 2.3** On 18 November 2010, the Dutch Lower House agreed to the 2011 Tax Plan; that same day, the adjusted bill was sent to the Dutch Upper House, including Article XIX.²
- 2.4** Currently, admission in the Netherlands to – competing – cultural events and facilities is taxed at a VAT rate of 6%.³ In addition to music and stage productions (for example operas, operettas, dance, musicals and lectures) and performances by performing artists, the 6% VAT rate applies to admission to circuses, zoos, public museums or collections, cinemas, sporting events, demonstration sports, amusement parks, playgrounds and pleasure gardens, and other, similar facilities primarily and permanently set up for entertainment and daily leisure.
- 2.5** This memorandum includes the following:
1. Summary
 2. Introduction
 3. History
 4. The proposed increase in the VAT rate for performing arts
 5. Increasing the VAT rate for performing arts is in breach of the VAT directive
 6. Increasing the VAT rate has disproportionately adverse effects for the industry

¹ Dutch Lower House, session year 2010–2011, 32 504, no. 9, p. 2-3.

² Dutch Upper House, session year 2010–2011, 32 504, A, p. 15.

³ Table I of the Dutch Value Added Tax Act 1968, part b, items 14, 15 and 17.

7. The term for implementation is so brief that it is in breach of the principle of legal certainty and the principle of equality
8. The estimated budgetary revenue from the VAT increase is too high
9. Conclusion

3 History

- 3.1 From 1 January 1979, a reduced VAT rate applies in the Netherlands for circuses and zoos. From 1996, the reduced VAT rate also applies to cinemas, sporting events, museums and collections. From January 1998, the reduced VAT rate also applies to amusement parks and from September 1998 to performing arts, as well.⁴
- 3.2 Initially, the legislative proposal for pumping back the revenue of the amendments to the VAT bill from 1995⁵ included the proposal to modify Table I to the Dutch Value Added Tax Act 1968. The proposed amendment provided for a reduction in the VAT rate from 17.5% to 6% for admission to museums, cinemas, sporting events and music and stage productions (including operas, operettas, dance, pantomimes, shows, musicals and cabaret).
- 3.3 Reducing the VAT rate on cinema tickets was part of an agreement with the industry. In exchange for reducing the VAT rate, part of the lost tax revenue would be channelled to the Netherlands Film Fund. This fulfilled the objective of the industry contributing to the funding of the Netherlands Film Fund; this funding is used to support Dutch film productions and gave the industry more financial room to make investments in the cinema sector.⁶
- 3.4 During the debate on the bill, the Dutch Lower House indicated that the start date for the reduction in the VAT rate for performing arts would be subject to the time at which a number of covenants could be concluded with entrepreneurs in the industry. To this end, the Dutch Lower House adopted an amendment for postponing the date on which the rate reduction would take effect.⁷ Since it was ultimately demonstrated that it was impossible to conclude these covenants for the performing arts industry, the reduction in the VAT rate for the performing arts was postponed.
- 3.5 The fact that it was impossible to conclude the covenants in the performing arts industry did not stop implementation of the lower VAT rate. In 1998, another possibility to remove two bottlenecks for reducing the VAT rate in the

⁴ Dutch Lower House, session year 2010–2011, 32 504, no. 20, p.2.

⁵ Dutch Lower House, session year 1995-1996, 24 428, no. 1, p. 2.

⁶ Dutch Lower House, session year 2008-2009, no. 31700 VIII, no. 147, p 4.

⁷ Dutch Lower House, session year 1995-1996, 24 428, no. 9.

performing arts industry presented itself.⁸ Those bottlenecks were the costs of the Dutch Working Hours Act and the ageing of those in the industry. Both bottlenecks demanded a financial sacrifice that could be compensated by implementing the VAT rate reduction.⁹ Following this, the reduced rate was implemented as of 1 September 1998.¹⁰ In 1998, the threat of a residual category of amusement parks occurred which would continue to be subject to the high VAT rate if this sector would not be included in the VAT rate reduction. The government felt that this was undesirable from the viewpoint of the competitive position of amusement parks.¹¹

- 3.6** In September 2008, an evaluation report on the reduced VAT rate for culture and media was published.¹² The evaluation was conducted by Aarts De Jong Wilms Goudriaan Public Economics B.V. (“**Ape**”) by order of the Minister of Education, Culture and Science (OCW). The evaluation was performed in conformance with the guidelines for evaluation research of the Ministry of OCW and was monitored by the Ministries of OCW and Finance.¹³
- 3.7** The evaluation shows that the demand for culture and media¹⁴ has risen as the result of the reduction in the VAT rates. According to the study, the (re-) introduction of the normal VAT rate would “certainly result in reduced demand”. Due to the positive effects on the demand, the loss in tax income was demonstrated to be less than it would have been without those effects. After all, if the price goes down, more people will buy a museum ticket, cinema ticket or book and this volume effect will raise the total VAT payment. In 2004, the loss of tax income was EUR 415 million instead of EUR 490 million, which the loss of tax income would have amounted to had the reduced demand not be taken into account.¹⁵
- 3.8** The generic objective of reducing the VAT rates for culture and media was (and is) twofold: (1) promoting culture and amassing knowledge and (2) supporting the relevant industries. As shown by the above, there were industry-specific objectives, as well. The Ape evaluation shows that the reduction of the VAT rates contributed to achieving these generic and industry-specific objectives.

⁸ Dutch Lower House, session year 1997-1998, 25 688, no. 3, p. 11.

⁹ Ibid.

¹⁰ Decree of 24 August 1998, Bulletin of Acts and Decrees. 1998, 520.

¹¹ Dutch Lower House, session year 1997-1998, 25 688, no. 3, p. 10.

¹² Dutch Lower House, session year 2008-2009, 31 700, VII, no. 147.

¹³ Dutch Lower House, session year 2008–2009, 31 700 VIII, no. 147, p. 1.

¹⁴ Culture and media in the Ape report comprise books, newspapers & magazines, libraries, museums, performing arts and cinemas.

¹⁵ Dutch Lower House, session year 2008-2009, 31 700, VII, no. 147, p. 2.

3.9 In contrast to specific culture subsidies, the VAT rate is a generic support measure for culture and media. As a result, reducing the VAT rate has three advantages compared to more specific instruments: (1) the measure is easy to implement (involving less administrative charges than specific support), (2) the measure has no legal demarcation problems (what is covered by the arrangements and what is not?), and (3) the measure prevents political interference in substantive aspects of culture and media (what is supported and what is not?).

4 The proposed increase in the VAT rate for performing arts

4.1 To substantiate the increase in the VAT rate for performing arts, the Cabinet submits that – as shown by the coalition agreement – it wants to offer more room to society and private initiatives in the area of culture and to limit government interference. The Cabinet wants to pay more attention to the earning capacity of culture and cultural institutions and to stimulate artists to be more entrepreneurial and acquire a larger part of their income themselves.¹⁶ The Council of State expressed serious criticism of this defective substantiation:

“The Division is of the opinion that this reference is insufficient substantiation, as the Coalition Agreement does not substantiate this choice and does not address the original intent of the rules to be abolished or changed or the anticipated effects of abolishing or changing the rules.”¹⁷

4.2 To date, this substantiation has not been given. It has been determined that the non-recurring expenditure in implementing the increase in the VAT rate as of 1 January 2011 are not known; see the Opinion of Dr S.R.A. van Eijck (Actal), which is included as an annex to the second Memorandum of Amendment.¹⁸ The government did not follow Actal's recommendation to chart the non-recurring administrative expenditure. Although the Cabinet did have the costs estimated (EUR 0.5 million), it immediately indicated that this estimate did not include the costs of, for example, reprinting brochures in connection with new prices.¹⁹ For this and other reasons that estimate is far too low. See paragraph 7.3 below.

4.3 By announcing the introduction of the VAT increase only three months before the envisaged commencement date, it is evident that the objective the government apparently has in mind in increasing the VAT rate for performing arts – giving society and private initiatives more room in the area of culture –

¹⁶ Dutch Lower House, session year 2010–2011, 32 504, no. 9, p. 4.

¹⁷ Dutch Lower House, session year 2010–2011, 32 504, no. 10, p. 4.

¹⁸ Annex to Dutch Lower House, session year 2010–2011, 32 504, no. 9, p. 1.

¹⁹ Dutch Lower House, session year 2010–2011, 32 504, no. 9, p. 9.

cannot be achieved. The industry cannot possibly adjust to the VAT increase on such short notice and halfway through the theatre season. See paragraph 7 below.

4.4 The Dutch Lower House passed the bill on 18 November 2010.

5 Increasing the VAT rate for performing arts is in breach of the VAT directive

5.1 Pursuant to Article 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the “**VAT Directive**”), Member States may apply a reduced VAT rate on supplies of goods or services in the categories set out in Annex III to the VAT Directive.

5.2 Category 7 in Annex 3 comprises: admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities.

5.3 If the VAT rate for performing arts is increased from 6% to 19%, while a VAT rate of 6% is maintained for the other cultural events and facilities, this results in distinguishing between the events and facilities in category 7 of Annex III. According to the European Commission, this is initially permitted, provided that that this distinction does not lead to distortion of competition.²⁰

5.4 In a number of judgments regarding Article 98 (1) and (2) of the VAT Directive (formerly: Article 12 (3) a, third paragraph, of the Sixth Directive), the ECJ held that there is nothing in the text of this provision that requires the provision to be interpreted as requiring that the reduced rate can be charged only if it is applied to all aspects of a category of supply covered by Annex III to the VAT Directive, so that a selective application of the reduced rate cannot be excluded, provided that this does not constitute a risk of distortion of competition.²¹

5.5 Building on the findings mentioned above, the ECJ has inferred that, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, Member States may apply a reduced rate of VAT to concrete and specific aspects of a category of supply covered by Annex H to the Sixth

²⁰ COM (2003) 397 final, no. 44.

²¹ ECJ 8 May 2003, Commission/France C-384/01, ECR I-4395, point 27, ECJ 3 April 2008, Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien C-442/05, ECR I-1817, point 41 and ECJ 6 May 2010, C-94/09, point 25.

Directive (currently Annex III to the VAT Directive), provided that they comply with the principle of fiscal neutrality inherent in the common system of VAT.²²

- 5.6** According to the ECJ, the exercise of the possibility described in the previous paragraph is subject to the twofold condition, first, to isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of performances at issue and, secondly, to comply with the principle of fiscal neutrality. These conditions seek to ensure that the Member States make use of that possibility only under conditions ensuring the correct and straightforward application of the reduced rate chosen and the prevention of any possible evasion, avoidance or abuse.²³
- 5.7** The principle of fiscal neutrality is a basic principle of the common system of VAT,²⁴ which on the one hand precludes that similar – and thus competing – goods or services are treated differently for VAT purposes,²⁵ and, on the other hand, precludes that similar – and thus competing – economic transactions are treated differently for VAT purposes.²⁶
- 5.8** Based on the following reasons it is established that admission to shows, theatres and concerts competes with admission to circuses, fairs, amusement parks, museums, zoos, cinemas, exhibitions and similar cultural events and facilities.

The text of category 7 in Annex III shows that similar services are involved

- 5.9** The text of category 7 of Annex III to the VAT Directive, in which the words “and similar cultural events and facilities” are used, already shows that according to the directive itself, “admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas and exhibitions” are similar services.²⁷ Even though both the Commission and the ECJ have indicated that Member States may apply different VAT rates in the categories of Annex III to the VAT Directive (see nos. 5.3-5.5 above), this does not apply to the services

²² ECJ 3 April 2008, Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien C-442/05, ECR I-1817, point 43.

²³ ECJ 6 May 2010, C-94/09, point 30.

²⁴ See specifically ECJ 19 September 2000, Schmeink & Cofreth en Strobel, C-454/98, ECR I-6973, point 59.

²⁵ ECJ 11 June 1998, Fischer, C-283/95, ECR I-3369, points 21 and 27, and ECJ 3 May 2001, Commission/France, C-481/98, ECR I-3369, point 22.

²⁶ ECJ 23 October 2003, Commission/Germany, C-109/02, ECR I-12691, point 20; ECJ 16 September 2004, Cimber Air, C-382/02, ECR I-8379, point 24, ECJ 18 October 2007, Navicon, C-97/06, point 21 and ECJ 22 May 2008, C-162/07, VN 2008/25.20.

²⁷ Cf. ECJ 23 October 2003, Commission/Germany, C-109/02, ECR I-12691, point 12.

mentioned in category 7, since this is the only category in which the word “similar” is used.

In merger control notifications, admission to the cultural events and facilities specified in category 7 is designated as similar

- 5.10** In assessing mergers, the relevant competition authority will determine whether the intended merger significantly restricts competition in the relevant market by forming or strengthening an economic position of power. This market comprises all products and/or services that the consumer perceives as interchangeable or substitutable based on their features, prices and designated use.²⁸
- 5.11** In the past, in the scope of merger control the European Commission looked at the relevant market for parties active in granting admission to leisure attractions, museums (Madame Tussauds) and theme parks.²⁹ The market survey conducted by the European Commission in response to this merger notification showed that competitors agreed with the merging parties that a broad market comprising all leisure attractions was involved.
- 5.12** In the case referred to above, the merging parties followed the approach adopted by the UK’s Office for National Statistics (“**ONS**”) in analysing UK household expenditure. The ONS starts from a single category of cultural services on which households spend money.³⁰ The cultural services category includes: cinemas, theatres, concerts, shows, circuses, clowns, video hire and performers. Customers of cultural services can indeed choose from all these options when they want to do something in their free time. The mere fact that market parties indicated that a broad market definition should be used rather than a narrow one already shows that the various cultural events and facilities from category 7 compete.

In assessing the permissibility of state aid, the European Commission designates admission to the cultural events and facilities set out in category 7 as similar, as well

- 5.13** More recently, the European Commission again addressed the definition of the relevant market in the scope of a Hungarian state aid measure.³¹ In that scope, the European Commission found that the cultural centre which was to receive state aid and which inter alia provided theatre performances and concerts was competing with private cultural centres, theatres, music clubs and providers of other substitutable services such as cinemas.

²⁸ Commission notice concerning agreements of minor importance falling outside Article 85(1) of the EC Treaty, OJ 1997, C-372/13 (09/12/1997).

²⁹ Decision of 26 April 2007, COMP/M.4615 Merlin/Tussauds.

³⁰ Office for National Statistics, *Consumer Trends*, No 57, Quarter 2 2010, p. 256.

³¹ State aid decision of 26 November 2008, N 293/2008 – Hungary.

In the past, the Dutch legislator used equal competitive conditions as an argument to reduce the VAT rate for amusement parks

- 5.14** In the tax structure enhancement bill, the legislator mentioned equal domestic (and also foreign) competitive conditions as an argument for reducing the VAT rate for amusement parks:

“We feel that making admission to amusement parks subject to the reduced VAT rate is especially desirable due to equal competitive conditions, both at home and abroad. For example, the reduced rate already applies to zoos, museums and fairs. In addition, many of the countries with which we compete apply a reduced VAT rate for amusement parks.”³²

It should be noted that this was done in the same bill in which the VAT rate for performing arts was reduced from 17.5% to 6%.

Various economic studies show that considerable substitution effects occur between leisure activities, including participating in social and cultural events and facilities, which shows that these are competing

- 5.15** In the Netherlands, the Netherlands Institute for Social Research ("**SCP**") studies the way consumers spend their free time. The SCP takes account of the following activities on which consumers spend their limited free time: reading printed media, use of other media (audio, TV, PC and the Internet), social contacts, social participation, going out, sports and exercise, and (other) hobbies. Studies conducted by the SCP show that since 1985, the number of hours available per week for free time has been constantly decreasing.³³ On average, people aged 12 years and older have almost 45 hours of free time per week. This ever increasing time restriction increases competition between the available possibilities for using one's free time.
- 5.16** Despite the fact that in the period from 1975 available income has increased dramatically, the number of hours spent 'going out' each week has remained virtually constant, namely 2½ hours. For the SCP, going out covers the hotel, restaurant and catering sector, culture and events (sporting events, etc.). In 2005, half an hour was the average time spent on culture. This relatively limited time budget for culture means that the competition between cultural activities is quite fierce.
- 5.17** Apart from being restricted in terms of time, leisure spending is also restricted in terms of budget, of course. The choices consumers make based on this

³² Dutch Lower House, session year 1997-1998, 25 688, no. 3, p. 10.

³³ Breedveld, K., A. van den Broek, J. de Haan, L. Harms, F. Huymans & E. van Ingen (2006). *De tijd als spiegel*. October. The Hague: The Netherlands Institute for Social Research.

restriction also indicate the goods and services that compete. The extent of competition can be measured by looking at the extent to which customers will switch from one product to another if the price for the first product is increased. For example, an increase in the VAT rate for performing arts means that visiting a pop concert becomes more expensive compared to going to the cinema or a football game. Or that matinee performances become more expensive compared to going to a museum, circus or amusement park.

- 5.18** Estimates from the Ape report mentioned before show that if the price of substitutes goes down by 1%, the number of visitors of performing arts goes down by 1.49%. The price of substitutes is approximated with the price index of culture and recreation³⁴ (excluding audio and video carriers). Such positive cross-price elasticity means that substitutes are involved (a negative elasticity indicates complements). If the cross-price elasticity is greater than 1, this indicates an elastic demand: there is considerable sensitivity regarding the substitute's price. Thus, if the cross-price elasticity is 1½, this indicates strong substitution effects. This demonstrates fierce competition between performing arts and its substitutes. This indicates a broad market in which performing arts face fierce competition from other cultural and recreational services.
- 5.19** Ape also made estimates for the cross-price elasticity of cinema tickets and the price of substitutes (again approximated with the index figure for culture and recreation, but this time including audio and video carriers and DVD players). If cultural and recreational activities become 1% more expensive, the number of cinema visitors increases by 1.68%. Finally an example from the Ape report: the cross-price elasticity of museum visits and substitutes is 1.49.
- 5.20** This cross-price elasticity between different cultural and recreational activities shows that substitutes are involved: if the price of one of the goods goes up, the demand for the other good increases. Consumers make a choice from different cultural and recreational activities that they can embark on in their free time; thus, these leisure activities compete. The Dutch Association of Tax Advisers has also pointed out that the providers of performing arts will find themselves in a more adverse competitive position.³⁵

Conclusion: unequal treatment is in breach of the VAT Directive

- 5.21** Because the performing arts compete with other cultural events and facilities that are subject to a rate of 6%, such as museums, cinemas, amusement parks and circuses, unfair competition is involved if the VAT rate for performing arts is

³⁴ According to the CBS (Statistics Netherlands), the term 'culture and recreation' covers visits to stadiums, amusement parks, fairs, circuses, museums, zoos, cinemas, the theatre, etc.

³⁵ Letter from the legislation committee of the Dutch Association of Tax Advisers dated 4 November 2010 to the Standing Parliamentary Committee on Finance of the Dutch Lower House.

increased. Consequently, the unequal treatment in VAT rates is in breach of European law.

- 5.22** If the Netherlands were to implement the increase in the VAT rate for performing arts, the European Commission may initiate infringement proceedings against the Netherlands by virtue of complaints from the industry or otherwise. In the past, the European Commission has conducted infringement proceedings against Member States on several occasions if the Commission felt that those Member States were acting in breach of the principle of fiscal neutrality.

Distinction between high-rate and low-rate services is not unambiguous

- 5.23** The distinction that is made as a result of increasing the VAT rate for performing arts is expected to give rise to problems for cultural activities that are not clearly covered by one of the classes from category 7. Cirque du Soleil is an example that illustrates this point. According to their own statements, a "mix of circus arts and street entertainment".³⁶ Does the service offered by Cirque du Soleil qualify as admission to a circus or admission to a show? In the first case, this is a service that will continue to be taxed at the low VAT rate, while in the second case the high VAT rate will apply. The Dutch Association of Tax Advisers also anticipates many qualification problems.³⁷

Distortion of the competition on the event hall rental market

- 5.24** As explained in the above, the distinction that is made between the various activities constitutes direct distortion of competition. In addition, this may also lead to a distortion of the competition at another market level. Locations presenting both performing arts and, for example, circus shows charge a fixed amount for location rental, plus a variable amount. Examples of such locations are Ahoy, Carré and the Utrecht City Theatre. The variable part depends on the number of visitors – the utilisation rate – at the performance.
- 5.25** As has become clear from the calculated cross-price elasticity, the utilisation rate of performing arts comes under pressure if, comparatively speaking, the performing arts become more expensive than other cultural services. The moment a show in the area of performing arts competes with, for example, a circus show, it will be more attractive for the location to rent out the venue to the circus show. After all, due to the lower VAT rate, it is reasonable to expect that the utilisation rate for the circus show, and thus the related income, will be better.

³⁶ www.cirquedusoleil.com

³⁷ Letter from the legislation committee of the Dutch Association of Tax Advisers dated 4 November 2010 to the Standing Parliamentary Committee on Finance of the Dutch Lower House.

5.26 The increase in the VAT rate for performing arts will distort the competition for locations, which also constitutes breach of European law.

6 Increasing the VAT rate has disproportionately adverse consequences for the industry

6.1 The decreasing numbers of visitors and decreasing income as the result of the increased VAT rate involve a number of disadvantages for the market, which can be characterised as disproportionately large. First of all, the increase undermines the industry's earning model and entrepreneurial capacity. Secondly, as the result of a decrease in proceeds, the loss of demand results in lower income for the treasury (income and corporation tax). In addition, the VAT increase results in shrinkage of the industry in terms of employment. One potential risk is that the offer decreases if providers of performing arts leave the market because they cannot generate sufficient income. The disadvantages will be worked out below.

6.2 One adverse effect of the VAT increase is that the earning model of the performing arts will be undermined. Especially in a time during which the income is under pressure from spending cuts at the central government and municipal level and by a lagging demand as a result of the economic crisis, it is essential that the industry is given the opportunity to strengthen its earning model and compensate for the loss of income.

6.3 The government expects the sector to mitigate the effects of the spending cuts through private initiatives. In so doing, the government is relying on the entrepreneurial and innovative capacity of the performing arts. A stable regulation environment is essential for the development of entrepreneurship and innovation. Any uncertainty regarding regulations is disastrous. By increasing the VAT rate now, the government increases uncertainty regarding the regulations, precisely at a time when certainty is so important. This is unseemly for a reliable government.

6.4 The VAT increase will result in a considerable decrease in the proceeds in the performing arts sector. The Dutch theatre producers' association ("VVTP"), the sector organisation for commercial theatre producers, instructed research and consultancy bureau Ape to conduct a study into the consequences of the VAT increase among the free theatre producers ("**the VVTP study**").³⁸ The Dutch

³⁸ R. Goudriaan, "Effecten van de BTW-verhoging bij de vrije theaterproducenten", Aarts De Jong Wilms Goudriaan Public Economics B.V., The Hague, 15 November 2010.

event makers' association ("VVEM"), the sector organisation for concerts and festivals, had a similar study conducted by EIM B.V. ("the VVEM study").³⁹

- 6.5** According to the VVTP study, the VAT increase will result in a decrease in the number of visitors by 13.5%, which will result in a substantial drop in proceeds. An estimated 250 FTE jobs will be cut.⁴⁰
- 6.6** According to the VVEM study, the VAT increase will result in a 10% decrease in the demand, with the proviso that the researchers assume that it will not be possible to pass on the full VAT increase to the consumer. Employment in the event sector is expected to decrease by some 900 FTE jobs.⁴¹
- 6.7** The Dutch theatre and concert hall management ("VSCD") did not study the employment effects of the VAT increase. The reactions from individual members of the association show that they expect to let people go in order to absorb the consequences of the VAT increase.
- 6.8** These employment effects of the VAT increase contrast sharply with the objective of the VAT decrease implemented in 1998. Where, at the time, the decrease was specifically intended to compensate for higher labour costs (as a result of the Working Hours Act and the ageing population) and in this way retain jobs, today the adverse employment effects are not a consideration in increasing the VAT rate.
- 6.9** A final disadvantage of the VAT increase to be mentioned here is that the increase will be detrimental to a diverse offering of performing arts. The VAT increase may decrease this offer. Due to the decreasing numbers of visitors and proceeds, the number of troupes will go down and providers (performers and their support) will have to leave the market. This goes against the objectives of the cultural policy. As shown by various reports, this objective also has an economic component: investing in culture and in the diversity of the cultural offering has positive economic effects.⁴²

³⁹ K. Bangma *et al.*, "BTW-verhoging in de evenementenbranche", EIM B.V., Zoetermeer, 16 November 2010.

⁴⁰ R. Goudriaan 2010, loc. cit., p. 11.

⁴¹ K. Bangma *et al.*, loc. cit., p. 16.

⁴² Joost Poort (SEO), Floks Laverman (SEO) and Gerard Marlet (Stichting Atlas voor Gemeenten) (2007). *De kunst van investeren in cultuur*, Amsterdam: SEO Economic Research. Study ordered by the Ministry of OCW for the OCW knowledge institute. Henri de Groot, Gerard Marlet (Atlas voor Gemeenten), Coen Teulings and Wouter Vermeulen (2010). *Stad en Land*. Special Publication 89. The Hague: CPB Netherlands Bureau for Economic Policy Analysis.

7 The term for implementation is so brief that it is in breach of the principle of legal certainty and the principle of equality

- 7.1** Apart from the principal objections that can be made to an increase in the VAT for performing arts, the period within which this increase is implemented – just three months, in the middle of the current theatre season – is so short that this constitutes breach of the principle of legal certainty. Among other places in the Harmonisation Act ruling, the Netherlands Supreme Court held that the legislator must comply with the principle of legal certainty.⁴³ The Dutch Upper House in particular has an important task in guaranteeing that this principle is maintained.
- 7.2** Implementation of the VAT increase in a term of three months, halfway through the current theatre season, means that the industry will be faced with a VAT increase at a time at which it has already entered into obligations and consequently can no longer reduce its cost price. Many of the artists contracted for concerts and festivals demand that the consumer price for admission to the event is stipulated in the contract. This means that the event organiser can no longer raise the admission price and thus must bear the costs of the VAT increase itself. For the theatre producers, the cost price of current shows is fixed and can no longer be reduced, since all artists and other employees have firm contracts for the duration of the show. These providers must choose to either maintain the same ticket prices and pay the costs of the VAT increase themselves, which will come at the expense of their margin, or pass on the VAT increase in the consumer prices and accept the related administrative expenses and decrease in the demand.
- 7.3** The administrative expenses of a VAT increase halfway through the theatre season are substantial and disproportionately high. The tickets for many performances scheduled after 1 January 2011, which specify the price, have already been printed; some of these tickets have already been sold. If the party offering these tickets wants to pass on the VAT increase to the consumer, these prices will have to be changed by hand. In addition, the theatres' administrative system is not set up to work with two different VAT rates to be applied depending on the time at which the tickets have been sold and paid for.
- 7.4** This constitutes breach of the principle of equality. In addition to the performing arts sector, the travel industry is also confronted with new VAT arrangements. To prevent transitional problems similar to the problems facing the performing arts sector, the government decided to use a broad transitional scheme for the travel industry:

⁴³ HR 14 April 1989, NJ 1989, 468, legal ground 3.1.

“In consultation with representatives of the travel industry, the increase will take effect as of 1 April 2012. This will give the industry the opportunity to anticipate the modified regime for determining the prices, contracts, IT and the brochures to be printed in a timely manner. Placing the effective date during the course of the year is related to the transition from the winter season to the summer season that is customary in the travel industry. This will prevent the use of two systems in one and the same travel season, which would be the case in the event of implementation at the start of a calendar year.”⁴⁴

8 The estimated budgetary revenue from the VAT increase is too high

- 8.1** According to the coalition agreement, the Cabinet estimated the expected revenue as a result of the VAT increase on performing arts, art objects and antiques at EUR 90 million.⁴⁵ According to the memorandum in response to the further report, the increase in the VAT rate for performing arts will result in revenue of EUR 48 million.⁴⁶
- 8.2** The Ape report “Evaluation of the reduced VAT rate for culture and media”, which was prepared at the behest of the Ministry of Education, Culture and Science and presented to the Dutch Lower House⁴⁷, shows that the tax revenue from an increase in the VAT for performing arts would amount to no more than EUR 21.7 million in the reference year 2004, including behavioural effects. In this light, the estimated revenue of EUR 48 million for 2011 seems to be much too high.
- 8.3** In addition to the fact that the estimated budgetary revenue from the VAT increase is too high, the VAT increase has adverse effects on the corporate tax, wage tax and income tax revenues. Regardless of whether the industry will pass on the VAT increase to the public, this will lead to lower profits since the costs of the VAT increase will have to be borne by the industry or the profits will go down due to a decrease in demand. Laying off staff will lead to lower wage tax and income tax revenues and extra benefits. Although no quantitative data are available regarding the scope of these reduced revenues from other taxes, the question arises regarding whether the VAT increase will have any positive effect at all on government income.

⁴⁴ http://belastingplan.prinsjesdag2010.nl/belastingplan-2011/aDU1080_8-Btw-regeling-reisbureaus.aspx

⁴⁵ “Vrijheid en Verantwoordelijkheid”; VVD-CDA coalition agreement, Annex: begrotingsbeleid, p. 27.

⁴⁶ Dutch Lower House, session year 2010–2011, 32 504, no. 20, p. 2.

⁴⁷ Annex to Dutch Lower House, session year 2008–2009, 32 500 VIII, no. 147.

9 Conclusion

9.1 The conclusion is included in the summary under 1.

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