

from the salaries tax and national insurance contributions to be paid. Insofar as this is not possible, there is a negative BIK rebate which results in the salary tax and national insurance contribution that is to be paid over the tax period in which the BIK adjustment statement was dated or to be paid over the subsequent tax period, being increased by that amount of negative BIK rebate.

Section 29i

1. In the event of an infringement of or pursuant to the provisions of Section 29g or if there is a case as meant in Section 29h (1) (a), Our Minister for Economic Affairs and Climate Policy may impose an administrative fine of up to €100,000 on the BIK withholding agent, or, if it is more, 20% of the amount established in the BIK statement as a tax rebate.
2. In the event of an infringement of or pursuant to the provisions of Section 29h (2) or (3), Our Minister for Economic Affairs and Climate Policy will impose an administrative fine of up to €2,500 on the BIK withholding agent.
3. Our Minister for Economic Affairs and Climate Policy stipulates the fines imposed by including them in a BIK adjustment statement. Section 29h (5) is accordingly applicable.
4. On imposing an administrative fine as meant in the second paragraph, Section 5:53 of the General Administrative Law Act (*Algemene wet bestuursrecht, Awb*) does not apply.

Section 29j

Rules may be laid down by Our Minister for Economic Affairs and Climate Policy on the grounds of which it is determined to what extent, on disruption of the facility as meant in Section 29e (3), there is excusability for exceeding the term of:

- a. an application as meant in Section 29e (1);
- b. a notification as meant in Section 29h (2).

Section 29k

1. The obligations imposed on the inspector in Sections 47 to 51, 53 (1) and (4), 53a to 56 of the State Taxes Act (*Algemene wet inzake rijksbelastingen, AWR*) also apply to the officials designated by Our Minister for Economic Affairs and Climate Policy with regard to applying this chapter.
2. Sections 68, 69 and 72 of the State Taxes Act are accordingly applicable.

Section 29l

To achieve as much balance as possible between the BIK rebate and the amount included in the national government budget for this purpose, the rates referred to in Section 29c may be increased, reduced or set to nil by a regulation from Our Minister for Economic Affairs and Climate Policy with effect from 1 January of any year. The new rates will apply to BIK statements relating to a calendar year, beginning on or after the date of entry into force of the amendment.

B

Section 30 (3), "and 'employee'" will be replaced by ", 'employee' and 'fixed asset'".

3

The following two sections will be inserted after **Section XXVIA**:

Section XXVIB

Chapter IX of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA) ceases to apply with effect from 1 January 2023, on the understanding that this chapter remains applicable for settlement of the tax rebate for job-related investments as meant in Section 29a (1) (d), of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA), as that reads on 31 December 2022.

Section XXVIC

With effect from 1 January 2023, the "national insurance contributions" in Section 3.29d will be replaced by "national insurance contributions as that chapter reads on 31 December 2022".

I Explanatory note - General

1. Job-related investment credit (BIK)

1.1 Introduction

This Memorandum of Amendment provides for the introduction of a new tax rebate, the job-related investment credit (*Baangerelateerde Investeringskorting*, [BIK]), which should help companies continue to invest during the current economic crisis. Under this scheme, businesses can deduct 3% of their investments up to €5 million per calendar year and 2.44% of their investments for amounts that exceed this from their payroll tax (salaries tax and national insurance contributions) payments. The government is making €2 billion per annum available for this. The scheme is temporary for the duration of the economic crisis. When the economic crisis is over, the measure is no longer necessary in this form. The scheme therefore does not apply to investments made after 31 December 2022. The scheme is therefore restricted to that time. As from 1 January 2023, the room for budgetary manoeuvre will be used for a measure with the same scope (reducing employers' costs).

1.2 Purpose of the scheme

The Dutch economy is suffering considerably because of the corona crisis. Investments are also expected to fall sharply. This leads to short-term economic damage, as spending recedes. A downswing in investments will also damage the economy in the long term, as companies do not expand their production capacity. The government considers it desirable that investments should be maintained as much as possible, even in a slump, so that the temporary economic downturn does not become structural. The cabinet already contributes to this by making additional investments as a government and by bringing forward planned investments. However, the government cannot do it alone. In the long term, 80 to 85% of all

investments in our country are made by the private sector. It is vitally important that these private investments also take place as much as possible.

By using the BIK scheme, the government reduces the costs for businesses that invest. This gives these businesses an incentive to acquire new fixed assets and to bringing forward planned investments. The BIK scheme has a positive impact on economic growth through two mechanisms by providing an incentive for business investments in 2021 and 2022. Firstly, the additional expenditure contributes to the safeguarding of jobs in the short term ("spending effect"). Secondly, these investments contribute to the expansion, renewal and adaptation of business revenue to changing circumstances ("capacity impact"). In this way they are ready to achieve a rapid economic recovery after the crisis and to prevent long-term damage to the economy as a result of the corona crisis.

The creation of a tax rebate in payroll taxes is that the compensation also benefits businesses with employees who do not make a profit, which is quite conceivable in times of crisis. The amount of the compensation does not actually depend, for example, on the (level of) profit that may (temporarily) be under pressure as a result of the crisis. As the BIK is linked to payroll taxes, businesses can only benefit from the rebate if they have employed sufficient personnel (involving a sufficient wage sum) to redeem the investment credit via payroll taxes.

1.3. Effectiveness

The Netherlands Bureau for Economic Policy Analysis (CPB) reports that (innovative) investments will lag behind for a long time because of the corona crisis.¹ That is why the government thinks it is of vital importance to introduce the BIK scheme. In creating the BIK scheme as a temporary, targeted incentive for new investments via a tax rebate, the government expects to achieve the maximum effect on private investments in the current crisis situation. The BIK scheme provides an incentive to bring investments forward rather than to postpone them. Based on available literature (see below), the government expects that the budgetary commitment for the BIK scheme will lead to additional private investments. As a result, the expected decline in investments of €10 billion is limited and the BIK scheme contributes to a faster recovery from this crisis.

International studies have shown various degrees of impact of fiscal investment schemes. House and Shapiro (2008)² and Zwick and Mahon (2017)³ find high elasticity of more than 6 for subsidising by means of accelerated depreciation on investments. For the USA, an elasticity of a fiscal investment grant of 3.4 was found for 2000-2013, including an economic crisis.⁴ For the UK, Criscuolo et al. (2019), an elasticity of 1.6 was found, albeit specifically for small businesses.⁵ Decramer and Vanormelingen (2016) have investigated an average subsidy of 10% among companies in Belgium and found a positive effect on companies with fewer than ten employees.⁶ In Germany, an elasticity of 2.8 was found in the period 1995-2004.⁷

¹ A. Elbourne et al. (2020) *Blijvende economische schade van de coronacrisis* [Sustained economic damage due to the corona crisis]. Available at <https://www.cpb.nl/blijvende-economische-schade-van-de-coronacrisis>

² C. House and M. Shapiro (2008). *Temporary Investment Tax Incentives: Theory with Evidence from Bonus Depreciation*. *American Economic Review*, 98(3): 737-768.

³ E. Zwick and J. Mahon (2017). *Tax Policy and Heterogeneous Investment Behavior*. *American Economic Review*, 107(1): 217-48.

⁴ Houndonougbo & Mohsin (2016). *Macroeconomic effects of cost equivalent business fiscal incentives*. *Economic Modelling*, Volume 56, 2016, pp. 59-65.

⁵ C. Criscuolo, R. Martin, H. G. Overman and John van Reenen (2019). *Some causal effect of industrial policy*. *American Economic Review*, 109(1): 48-85

⁶ S. Decramer and S. Vanormelingen (2016). *The effectiveness of investment subsidies: evidence from a regression discontinuity design*. *Small Business Economics* (2016) 47:1007-1032.

⁷ A. Lerche (2019). *Investment Tax Credits and the Response of Firms*. Working paper, available at: <https://www.econstor.eu/bitstream/10419/203526/1/VfS-2019-pid-26934.pdf>

With regard to the impact on employment, there are studies that show a positive impact of a fiscal investment scheme⁸ and other studies which did not find a significant impact. Guceri and Albinowski (2019)⁹ have also not seen any effect of an investment scheme in Poland (in a slump).

The aforementioned means that there are studies with differing rebate rates and studies that differ in terms of the economic context. There are also differences as to whether the scheme is temporary or structural. As most studies show a positive effect, and in a temporary scheme there is the effect that investments are brought forward, the government expects that the BIK scheme will contribute positively to investments in 2021 and 2022.

1.4 Emphasis on SMEs

The BIK scheme has been designed using a graduated scale, which is 3% of the total investment allowance up to and including €5,000,000 per calendar year per BIK withholding agent and 2.44% of the investment allowance exceeding €5,000,000 per calendar year. It is expected that approximately 60% of the BIK rebate will end up at SMEs.

The calculation of the BIK scheme rates is based on the annual macro-investments as recorded by Statistics Netherlands (CBS). Taking into account the conditions attached to the BIK scheme application, such as the limitation described below that investments for which the decision has already been taken before 1 October 2020 do not qualify for the BIK scheme, and the minimum amount set per application based on efficiency, the potential for investment for which the BIK scheme could be applied is estimated at an average of €75 billion in the years 2021 and 2022. Based on the available budget of €2 billion per annum for the BIK scheme, this results in rates of 3% and 2.44%.

The basis of the BIK scheme is based on statistics from Statistics Netherlands. The distribution in use of the BIK scheme among SMEs and large enterprises (LE) is based on the data of corporation tax returns. This method is in line with the reported figures of the Ter Haar Commission. Large enterprises include companies that employ more than 250 employees (in accordance with the definition by Statistics Netherlands) or with a worldwide turnover of more than €750 million.

Table 1 shows how the ratio between small and medium-sized enterprises (SMEs) and large enterprises (LEs) was calculated.

⁸ A. Lerche (2019). *Investment Tax Credits and the Response of Firms*. Working paper, available at: <https://www.econstor.eu/bitstream/10419/203526/1/VfS-2019-pid-26934.pdf>

- C. Criscuolo, R. Martin, H. G. Overman and John van Reenen (2019). *Some causal effect of industrial policy*. *American Economic Review*, 109(1): 48-85.

- Houndonougbo & Mohsin (2016). *Macroeconomic effects of cost equivalent business fiscal incentives*. *Economic Modelling*, Volume 56, 2016, pp. 59-65.

⁹ I. Guceri and M. Albinowski (2019). *Investment Responses to Tax Policy under Uncertainty*. Working paper Ministry of Finance Poland.

Table 1: Apportionment of the investment base ranked by LEs / SMEs

Investment allowance € x 1,000	Basis LE € x million	Basis SME € x million	LE share	SME share	Total € x million	% Total
0 to 30	-	360	0%	100%	360	0.5%
30 to 50	-	691	0%	100%	691	1.0%
50 to 100	3	1,364	0%	100%	1,367	1.9%
100 to 200	8	1,881	0%	100%	1,889	2.6%
200 to 500	41	3,605	1%	99%	3,645	5.1%
500 to 1,000	116	3,596	3%	97%	3,712	5.2%
1,000 to 2,000	315	4,103	7%	93%	4,418	6.2%
2,000 to 5,000	1,269	5,215	20%	80%	6,484	9.1%
5,000 to 10,000	1,926	3,550	35%	65%	5,475	7.7%
10,000 to 50,000	6,287	5,953	51%	49%	12,240	17.1%
Above 50,000	21,362	9,854	68%	32%	31,216	43.7%
Total	31,327	40,171	44%	56%	71,498¹⁰	100%

Table 2 shows the effect of the graduated scale in the BIK scheme. As a result, the share of the scheme relating to SMEs has shifted to 59% and for large enterprises to 41%.

Table 2: Apportionment to LEs / SMEs on a graduated scale

Rate band 1	Rate band 2	LE share	SME share
3%	2.44%	41%	59%

1.5 Supplementary to existing incentives

The BIK scheme is a temporary addition to existing incentives such as the Small projects investment credit (KIA), the Energy-saving investment credit (EIA) the Environmental investment tax scheme (MIA) and the Arbitrary depreciation of environmental investments (VAMIL). Where applicable, the various investment schemes can also be applied simultaneously, so that the benefit of the investment schemes for a fixed asset qualifies for both the BIK scheme and for example for the EIA, MIA or VAMIL. This is different from what was previously announced in the Addendums to the Budget Memorandum. No deliberate choice was made to exempt the BIK scheme from fixed assets that, by their very nature, qualify for the EIA, MIA or VAMIL. This ensures that the existing incentive to invest in a green fixed asset is upheld.

Implementation of the BIK scheme has been aligned as much as possible with the R&D tax rebate (*S&O-afdrachtvermindering*, WBSO). In addition, the BIK scheme has many similarities with the KIA. Under the KIA, a certain percentage of the amount of investments in fixed assets in a given year may be charged to the profit for that year. The scope of the KIA in terms of providing incentive for fixed assets, corresponds with the proposed scope of the BIK scheme. This likewise largely applies to the scope of businesses who qualify for the scheme, on the understanding that benefit of the BIK scheme is not gained in the same way as for the KIA through determination of profit in terms of income tax or corporation tax, but through the payment of payroll taxes. The BIK scheme is therefore reserved for

¹⁰ For simplicity and an overview, not all anticipation effects and markdowns are shown in the table. For more information on this, see the separately published explanation on estimate with certification document by Netherlands Bureau for Economic Policy Analysis (CPB). The basis of €71 billion shown, is a viewpoint on the level of investment and almost corresponds with the estimated average basis of €75 billion per annum.

withholding agents who operate a business in terms of wage taxes. The application of the BIK scheme has been aligned as much as possible with the common definitions used for the KIA. This means that the provisions that apply for the KIA in the 2001 Income Tax Act (*Wet IB 2001*) have been declared to apply as much as possible to the BIK scheme, which, according to the proposal, is included in the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA). The maximum amounts provided for in the KIA and the associated graduated scale do not apply to the BIK scheme. This means that the provisions of the 2001 Income Tax Act and the 1969 Corporation Tax Act that determine: which fixed assets qualify for the KIA, which companies qualify for the KIA, and which conditions apply in respect of the investment, are largely accordingly applicable to the BIK scheme.

1.6 New investments

The objective of the BIK scheme is to provide an incentive for private investments during the economic crisis. The BIK scheme therefore provides an incentive to invest, it prevents the postponement of investments, and brings investments forward. It would not be logical that the BIK scheme should also provide a compensation for investments for which commitments had been made before. It is for this reason that the BIK scheme only applies to investments for which the investment decision was made on or after 1 October 2020. The reference date of 1 October was chosen because this is the first date that can be clearly communicated after announcement of this proposal. An investment decision is deemed to have been taken on or after 1 October 2020, if it is made plausible that the contractual commitment (purchase agreement or otherwise) has been entered into on or after that date. Employers who make investments for which the decision was taken on or after 1 October 2020, which are paid in full by 2021 or 2022 and which have been put into service within six months of that payment, qualify for the tax rebate.

The temporary character of the scheme therefore provides an incentive to invest, it prevents the postponement of investments, and brings investments forward.

The BIK scheme will be discontinued with effect from 1 January 2023. For investments made in 2022 and clearly fulfil all the conditions, an application may be submitted up to three months after 2022.

1.7 Effectiveness minimum

The number of companies that can potentially make use of the BIK scheme is vast. Such a potential makes it necessary to set a minimum amount on the investment, not so much from a budgetary point of view but from a point of view of organisational effectiveness for both the companies themselves and for the implementing organisations. Mindful of the effectiveness and administrative burdens, the government considers achieving a minimal financial benefit of €600 to be reasonable. Combined with the 3% rate, this results in a minimum investment of €20,000 per application. As a minimum investment per fixed asset that may form part of an application, the government proposes to assume an amount of €1,500.

1.8 Budgetary manageability

The cumulative budgetary capacity of the BIK scheme is €4 billion (€2 billion per annum). Therefore, towards the end of 2021, based on the applications received so far by the Netherlands Enterprise Agency (RVO), an assessment is made of the extent to which the budgetary costs of the BIK scheme has been used up to that point and RVO will estimate the expected budgetary capacity for the whole of 2021. If this shows that the available budget of €2 billion for 2021 is (substantially)

exceeded or underspent, it may be necessary to adjust the parameters of the BIK scheme accordingly for the year 2022. This does not affect application of the BIK scheme for the year 2021. For investments in the year 2021, the compensation will continue to be based on the parameters prevailing on 1 January 2021. If the estimated exceedance for the year 2021 is so substantial that it is likely that the full budget for both 2021 and 2022 (total €4 billion) threatens to be exceeded (substantially), it cannot be ruled out that the rates for 2022 will be reduced to nil. A change in the parameters for the year 2022 will be announced by 15 December 2021 at the latest.

1.9 Lessons learned from the Investment Account Act (WIR)

The design of this proposal takes into account the lessons learned from the Investment Account Act (*Wet op de investeringsrekening*, WIR). There were a number of shortcomings in the design of the WIR that this cabinet wants to avoid. That is why the BIK scheme has a number of safeguards. A major problem with the WIR was that the fixed asset could have been used before, which could lead to a form of carousel fraud. The BIK scheme therefore only applies to new fixed assets. In addition, to redeem the rebate in the BIK scheme, a company must have payroll taxes to be paid for personnel, unlike in the case of the WIR. The BIK scheme can therefore not be applied by businesses who do not pay payroll taxes. Supplemental to this, businesses may apply the BIK scheme if the investments have been paid in full by 31 December 2022 at the latest and have been put into service within six months of full payment. Furthermore, the proposed BIK scheme prevents fraud as commitments regarding the improvement of a fixed asset and production costs in respect of a fixed asset do not qualify for the BIK scheme. The scope of such investments does not easily lend itself to be vetted. Moreover, the budgetary capacity of the BIK scheme is lower than that of the WIR and a form of budgetary manageability has been introduced, as described above.

1.10 Application and grant

The scheme will largely be implemented by the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*, RVO). This means that BIK scheme applications for approval must be submitted to RVO and that RVO will also perform the assessment of the application. If the application can be approved, RVO will issue a so-called BIK statement on the basis of which the withholding agent can apply the tax rebate in the payroll tax return. Based on the BIK statements issued by RVO, the Tax and Customs Administration can assess whether the withholding agent has justifiably applied the correct amount of tax rebate in the payroll tax return. This method of approval and offsetting corresponds with the existing method as it applies for the R&D tax rebate (WBSO).

The RVO needs some time for a thorough preparation of this new scheme. Although investments for which the commitment was made on or after 1 October 2020 may qualify for the BIK scheme immediately after the last payment on or after 1 January 2021 (if the relevant conditions are met), the application for a tax rebate based on the BIK scheme can only take place from 1 September 2021. The first so-called BIK statements from RVO to grant the tax rebate can then be issued within the near future. The maximum lead time for issuance of a BIK statement after receipt of the application by RVO, in principle, is twelve weeks. However, the Minister for Economic Affairs and Climate may, by means of a ministerial regulation in general or for groups of cases, establish a later date on which the decision on the application must be specified at the latest.

The tax rebate must be realised in the calendar year in which the BIK statement was issued by RVO. The tax rebate can be realised spread out over the year. The starting point is that realisation takes place by means of setoff in the remaining

payroll tax returns for that calendar year. The salaries tax and national insurance contributions to be paid cannot be reduced further than nil. It is possible that a withholding agent cannot implement the entire BIK rebate in the remaining payroll tax returns for the year, partly because it is conceivable that a withholding agent qualifies for several tax rebates. In that case, the withholding agent could still realise this by means of an adjustment of the payroll tax returns over previous periods in the year. The possibility of effectuating the tax rebate over a whole calendar year contributes to reducing the risk of not being able to redeem it. Since it is possible that personnel and investments are not equally represented within a tax group, it is being made possible that also investments of divisions within a tax group who do not have an obligation to withhold for payroll taxes, may qualify for the BIK rebate.

2. EU aspects

The BIK scheme is generic and does not actually favour certain companies in light of the state aid provisions of the Treaty on the Functioning of the European Union (TFEU).

3. Budgetary aspects

The budgetary expenditure of this measure amounts to €2 billion per annum for the years 2021 and 2022.

4. Implementation costs

For the impact assessment, a preliminary estimation has been made by both the RVO and the Tax and Customs Administration, of the consequences for implementation and execution costs. The implementation costs will be determined in the context of the feasibility study. The implementation costs incurred by RVO and the Tax and Customs Administration for the BIK scheme will be covered in general and will not be charged to the available budget of €2 billion per annum. In the framework letter of 2021, the implementation costs – which are still to be determined by the feasibility study – must be included as a general item still to be incorporated in the spring decision-making process.

5. Evaluation

The BIK scheme is a temporary measure that lasts for two years. In view of this, a sunset clause has been included which aims to discontinue the scheme from 1 January 2023.

The Strategic Evaluation Agenda (SEA) includes the monitoring and evaluation of the corona crisis measures. The BIK scheme is also a temporary crisis measure and will therefore also be taken into account in these programmes. In this, the effectiveness, efficiency and feasibility of the BIK scheme will be examined.

For the effectiveness; the impact of the measure where it concerns additional and brought forward investments, will also be examined. This effect will be compared to the costs of the measure – the total budget of €4 billion, plus the implementation costs – and the feasibility of the measure.

In accordance with the planning included in the SEA, the corona measures will be continuously monitored and/or evaluated from 2020 to 2025. The BIK scheme runs until 1 January 2023. The aim of the plan is therefore to evaluate the effects of this measure in 2023.

6. Impact on business community and citizens

The impact on businesses and citizens, as is the case for the implementation aspects, are still being mapped out. The design of the proposed statutory scheme has been aligned as much as possible with the R&D tax rebate. This also applies to subordinate legislation and the vetting by RVO.nl that still needs to be designed. Because the design of the subordinate legislation determines the administrative burden, the administrative burden of the BIK rebate in subordinate legislation will be mapped out.

7. Advice & Consultation

The VNO/NCW and Dutch Federation of Small and Medium-Sized Enterprises (*MKB Nederland*) have conferred on this investment credit.

II Explanatory note - per Part

Part 1

Section I, part Aa (Section 3.29d of the 2001 Income Tax Act)

To prevent the so-called tax rebate for a job-related investment (BIK rebate) from being considered as a kind of object-related subsidy that reduces the cost price of a fixed asset for application in income tax and corporation tax, Section 3.29d of the 2001 Income Tax Act (*Wet IB 2001*) is proposed. This stipulates that for application of Section 3.2 of the 2001 Income Tax Act, the BIK rebate and the negative BIK rebate, as meant in Chapter IX of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (*WVA*), are not included in the acquisition costs of a fixed asset and neither in the investment allowance of a fixed asset. Section 8 (1) of the 1969 Corporation Tax Act (*Wet Vpb 1969*) also provides for this proposed provision to be extended to the corporation tax. Due to the proposed provision, the BIK rebate and the negative BIK rebate have no impact on, for example, the depreciation base of a fixed asset (Section 3.30 of the 2001 Income Tax Act), neither on Section 3.34 (discretionary depreciation), Section 3.40 (investment credit: Small projects investment credit (KIA), Energy-saving investment credit (EIA), and Environmental investment credit (MIA)) and Section 3.41 of the 2001 Income Tax Act (investment allowance).

Part 2

Section XXVIA, part A (Chapter IX of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act)

Section 29a of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29a (1) of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (*WVA*) contains some definitions that are of importance for the tax rebate reduction for job-related investment (BIK rebate).

This first paragraph defines the concepts of BIK rebate, BIK withholding agent, BIK statement and job-related investment. These definitions are included in this separate chapter because of the temporariness of the BIK rebate and are supplementary to the definitions in Sections 1 and 2 of the WVA.

The proposed paragraph 1 (a) defines the BIK rebate. The BIK rebate is the tax rebate for job-related investment.

The proposed paragraph 1 (b) defines the BIK withholding agent. A BIK withholding agent is a withholding agent for levying tax on wages and salaries insofar as he is also deemed to be a tax payer for the purposes of the 2001 Income Tax Act, or of the 1969 Corporation Tax Act or forms part of it, and insofar as this tax payer – in relation to the job-related investment credit – can or could make use of the KIA as meant in Section 3.41 of the 2001 Income Tax Act if the graduated scale of Section 3.41 (2) of the 2001 Income Tax Act did not apply. This means, for example, that a body that qualifies as a fiscal investment institution and is excluded from application of the KIA in Section 8 (9) of 1969 Corporation Tax Act, cannot be a BIK withholding agent and can therefore not invoke the BIK scheme. Also, those withholding agents who are not liable for tax in terms of Income Tax and Corporation Tax, cannot invoke the BIK scheme. The BIK withholding agent is the withholding agent who can submit the application for the BIK rebate.

The proposed paragraph 1 (c) defines the BIK statement. The BIK statement will be issued by the Netherlands Enterprise Agency (RVO) on behalf of the Minister for Economic Affairs and Climate Policy and will be issued on application by the BIK withholding agent. The proposed Section 29f of the WVA further elaborates what is included in the BIK statement.

The proposed paragraph 1 (d) describes which investments qualify as job-related investments. In this, alignment has been sought with the concept of investments as they apply for the Small projects investment credit (KIA) and the limitations imposed on it, as set out in Sections 3.45 (1) and (2) and 3.46 of the 2001 Income Tax Act and Section 8 (8) of the 1969 Corporation Tax Act. All investments excluded from income tax and corporation tax are therefore not job-related investments. This means, inter alia, that the following investments are excluded from the BIK rebate:

- investments in certain fixed assets, such as housing, land, animals, sailing vessels for representative purposes, securities, receivables, goodwill and public licenses;
- investments in passenger vehicles not intended for road haulage;
- investments in fixed assets intended for rental;
- investments for which commitments are made to persons belonging to the same household, blood relatives and relatives by marriage in the direct line, persons belonging to their household or associated bodies.

Section 3.45 (2)(b) of the 2001 Income Tax Act states that fixed assets, of which the investment allowance is less than €450 per fixed asset, are excluded from the Small projects investment credit (KIA). For the purposes of feasibility of the BIK rebate, a higher amount applies: fixed assets of which the investment allowance is less than €1,500 per fixed asset, are excluded from the BIK rebate.

The proposed paragraph 1 (d) provides that this must concern a fixed asset that has not previously been used, which, for the sake of completeness, it is noted that

this must be assessed on the basis of the fixed asset. In other words, it must concern a fixed asset that has not been used by anyone or at all. Furthermore, a requirement is that the obligation is incumbent upon the BIK withholding agent, in which the term "incumbent upon" is associated with the concept of "incumbent upon" as also applies for Section 1 (1) (t) and (u) of the WVA.

The proposed Section 29a (2) of the WVA relates to the situation in which a partnership qualifies as a withholding agent. For the purposes of this chapter, in such a situation the investments made by the partners in the context of that partnership, will qualify as investments by the partnership. Due to the formulation "in the context of that partnership", the investments by a partner in non-company assets may be taken into account. In addition, irrespective of the size of the investments made by the partners (within the partnership and in the non-company assets) that qualify for the KIA as meant in Section 3.41 of the 2001 Income Tax Act, for the purposes of this chapter, are allocated to the partnership. This means that, if the other conditions are met, the partnership withholding agent may apply the BIK rebate for the investments made by the partners in the context of the partnership.

The proposed Section 29a (3) of the WVA relates to the situation of a tax group within the meaning of the 1969 Corporation Tax Act. Where a tax group, as a whole, makes job-related investments, for which it – irrespective of the size of such investments – qualifies for the Small projects investment credit (KIA) as meant in Section 3.41 of the 2001 Income Tax Act in conjunction with Section 8 of the 1969 Corporation Tax Act, at the applicant's discretion, a single withholding agent who forms part of the tax group will be designated as the BIK withholding agent in relation to the job-related investments of the tax group. This means, for example, that investments in fixed assets intended to primarily be made available, directly or indirectly, to another company within the tax group for the tax group as a whole, may qualify as job-related investments.

The proposed Section 29a (4) of the WVA contains additional conditions for qualifying investments that are partly associated with the temporariness of the BIK rebate. This primarily relates to the requirement that the BIK withholding agent should be able to make it plausible that the commitment relating to the acquisition of the investment was entered into on or after 1 October 2020, for example with a signed contract. Aside from this requirement, pursuant to the paragraph 1 (d), it is required that the commitment is incumbent upon the BIK withholding agent or upon a company within the tax group, in which the term "incumbent upon" is associated with the concept of "incumbent upon" as this also applies for Section 1 (1) (t) and (u) of the WVA. If no signed contract has been concluded, then the applicant must make it plausible in another way that the investment was not entered into before 1 October 2020. The burden of proof has no prescribed form. This reference date is included because the tax rebate is intended to boost investments. Upholding this reference date prevents the tax rebate from being used for investments of which it had already been decided to make these investments before this scheme was announced. The proposed fourth paragraph states further that the final payment for a job-related investment must be made by 2021 or 2022. By requiring full payment, implementation is significantly simplified. The Netherlands Enterprise Agency (RVO) can already request information in the initial application to show that full payment has taken place. If only the commitment to invest were to be taken into account, an additional monitoring or notification period would have to be put in place, which would not benefit the feasibility of the scheme. The aforementioned reference date of 1 October 2020, in combination with the full payment requirement, in many cases, effectively excludes

substantial and multiannual investments from the scheme. In general, the duration of the scheme will be too short for such investments. Finally, this paragraph requires that the entire fixed asset must be put into full service within six months of the full payment.

The proposed Section 29a (5) of the WVA excludes, in addition to the investments already excluded from the investment credit, commitments relating to the improvement of a fixed asset and the production costs of a fixed asset for the BIK rebate. This is for purposes of feasibility for the RVO. The vetting of commitments in relation to the improvement of a fixed asset and production costs, is very complicated. For example, for production costs there are often no invoices available and, besides, the moment of payment of available invoices on which the production costs are based could be much later than the moment of payment of the fixed asset itself, which is determinative for the time of application.

Section 29b of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29b of the WVA stipulates that the withholding agent may reduce the amount of the salaries tax and national insurance contributions to be paid by the amount of BIK rebate. To prevent the deduction from leading to an amount to be paid out by the Tax and Customs Administration, it is stipulated that the amount of salaries tax and national insurance contributions to be paid, on balance, cannot be negative. This provision is derived from Section 3 of the WVA and must be explained in accordance with application of the R&D tax rebate. The wage withholding tax facilities for the shipping industry mentioned in Section 3 of the WVA and the R&D tax rebate cannot lead to a Tax and Customs Administration refund either. This means that if a withholding agent qualifies for several tax rebates, then too the amount of salaries tax and national insurance contributions to be paid, cannot be reduced further than nil. Withholding agents may possibly not be able to effectuate the entire BIK rebate. With effect from 2022, the withholding agents will use the BIK rebate category in the payroll tax return to reduce the amount of payroll tax by the amount of BIK rebate. This category is not yet available in 2021. For BIK statements dated in the calendar year 2021, the withholding agents must use the category for wage withholding tax facilities for the shipping industry.

Section 29c of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29c of the WVA stipulates that the amount of BIK rebate amounts to 3% of the total investment allowance up to and including €5,000,000 per calendar year per BIK withholding agent and 2.44% of the investment allowance exceeding €5,000,000 per calendar year. The question whether an investment has taken place in the calendar year 2021 or 2022 is linked to the calendar year in which the last payment was made and thus full payment has taken place. For each application, account must be kept of the minimum allowance of €1,500 per investment of the proposed Section 29a (1)(d)(1°) of the WVA, and the minimum investment allowance of €20,000 per application of the proposed Section 29e (5) of the WVA.

Section 29d of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

Pursuant to the proposed Section 29d (1) of the WVA, the BIK withholding agent may apply the BIK rebate in a tax period if he is in possession of a BIK statement dated in the relevant calendar year. This means that the tax rebate is effectuated in the tax period in which the BIK statement is dated or in subsequent tax periods in that calendar year. Prior to 2021, the BIK rebate is effectuated by using the category for wage withholding tax facilities for the shipping industry. The proposed first paragraph also stipulates that the total amount of the tax rebate does not exceed the amount specified in the BIK statement or BIK statements dated in the relevant calendar year.

The proposed second paragraph concerns the allocation of the amount or amounts mentioned in the BIK statement or BIK statements over the tax periods in which that amount qualifies to be taken into account. In contrast to the R&D tax rebate, the BIK withholding agent may decide at his own discretion to what extent the granted BIK rebate can be effectuated in a certain tax period. In a given tax period, the amount of BIK rebate granted at that point in time may be deducted from the payroll tax due, in which the total of the amounts deducted may amount to the total granted amount of the BIK statement or BIK statements.

Example 1: The BIK statement is issued for the calendar year 2021 which is dated 26 March 2022. In the tax returns over the months of March to December 2022, the withholding agent who submits the monthly returns, may deduct the tax rebate from the payroll tax due. How he allocates the tax rebate over these tax periods is at his own discretion.

Based on Section 29b of the WVA, application of a tax rebate cannot lead to the amount of payroll taxes to be paid over a tax period to reduce further than to nil. Hence it may occur that the payroll tax due for the current tax period and the remaining tax periods in the relevant calendar year, are insufficient to redeem the BIK rebate granted for that calendar year. The proposed third paragraph involves a scheme on the basis of which the BIK rebate not yet redeemed can retrospectively be carried back to the expired tax periods of the calendar year in which the BIK statement is dated, obviously within the limits of what is provided for in Section 3 of the WVA and proposed Section 29d of the WVA. The proposed third paragraph further stipulates that the tax return over the tax period to which non-redeemed tax rebate has been carried back will qualify as an incorrect tax return. The latter only applies for application of Section 28a of the 1964 Wages and Salaries Tax Act (*Wet op de loonbelasting 1964*). As a result, this does not have to be done by means of a notice of objection, but the withholding agent can suffice by submitting an adjustment return. This provision is derived from Section 21 (3) of the WVA and must be explained in accordance with processing the R&D tax rebate.

Example 2: The BIK statement is issued for the calendar year 2022 which is dated 4 November 2022. The withholding agent maintains a tax period of a calendar month. To effectuate the BIK rebate, the tax periods available on the basis of paragraph 1 are November and December 2022. Suppose that the payroll tax due per month amounts to €5,000 and the total BIK rebate for 2022 is €24,000. In the months of November and December, €5,000 can be effectuated twice. For the remaining amount of €14,000, adjustment returns may be submitted over the remaining months of 2022. The withholding agent may submit this adjustment return or these adjustment returns in the tax return for the last tax period of the calendar year.

Section 29e of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29e of the WVA describes the way in which an application can be made for a BIK rebate. The proposed first paragraph defines the number of applications. An application can be made simultaneously for several job-related investments. A BIK withholding agent may apply for a maximum of four BIK statements in one calendar year, but not more than one per quarter of a calendar year. This means that a BIK withholding agent can opt to submit an application after the end of each quarter but can also opt for a longer period over which to submit the application. It could opt for a longer period, for example, to meet the minimum investment allowance per application of the proposed fifth paragraph or to reduce the administrative burden. Based on this, a BIK withholding agent could, for example, apply for a BIK statement in January 2022 for its investments in the period 1 January to 31 December 2021 and then, in February 2022, apply for a BIK statement for its investments in the period 1 January up to the time of submission in February 2022. This is possible because it concerns applications for different calendar years. It may then only apply for another BIK statement in the following calendar quarter, i.e. from 1 April 2022 to 30 June 2022. This application may include all investments until that point in time in 2022, except for the investments already included in its previous application for 2022. In accordance with the proposed third paragraph of this Section, the instructions indicate that it is not possible to include investments in a single application of which the last payment has not taken place in the same calendar year. If the last payment of investment A took place in December 2021 and the last payment of investment B in January 2022, then the BIK withholding agent has to submit two applications for this purpose.

The proposed second paragraph stipulates several matters for companies who form part of a tax group as meant in Section 15 of the 1969 Corporation Tax Act. This means that the BIK rebate works equally effectively irrespective of whether a large enterprise is operated in a single legal entity or in the form of a tax group consisting of several smaller companies. Under the proposed scheme, the various companies of a tax group can only apply jointly for a BIK statement. This means that the BIK statement can be applied for by a single withholding agent within the tax group. It means that a tax group consisting of various companies or withholding agents can also apply for a maximum of four BIK statements per calendar year. In the applications, the applicant may include the job-related investments of all companies within the tax group. In the application, the applicant withholding agent requests an allocation of the tax rebate for the withholding agents within the tax group. If this withholding agent does not indicate an allocation, the tax rebate can only be applied by the withholding agent who submitted the application. The entire BIK rebate in the relevant application will be allocated to this withholding agent. To ensure the feasibility and enforceability of the scheme, only this withholding agent can redeem the BIK rebate. The proposed scheme makes it possible for investments made by companies within a tax group who have no obligation to withhold, to qualify for the BIK rebate. In addition, this makes it possible for the withholding agent who only pays very little payroll tax, to redeem the tax rebate at another withholding agent within the tax group. By allowing the application only for a single withholding agent within the tax group, it is prevented that an investment by another company within the tax group is included in the application by several withholding agents.

The proposed third paragraph states that the application for a BIK statement can only be made online in an environment designated by the Minister for Economic Affairs and Climate Policy in a manner specified by him. He will mandate RVO for the implementation. RVO will open a digital portal for this purpose. As long as this digital portal is not available yet, it is not possible for BIK withholding agents to submit an application for the BIK rebate. Until such time as the digital portal has

been opened, withholding agents cannot claim the BIK rebate. Due to the speed with which the BIK scheme is being proposed, the digital portal will not be available when this amendment enters into force as of 1 January 2021, but as of 1 September 2021.

As provided for in the proposed first paragraph of this Section, a BIK withholding agent can collate its investments for an application over a tax period of more than one quarter. However, the proposed fourth paragraph provides that the application must be made no later than three calendar months after the end of the calendar year in which the job-related investments have been fully paid.

For reasons of efficiency, the proposed fifth paragraph contains a minimum of job-related investments per application. This minimum investment allowance per application is €20,000. Based on an amount of BIK rebate of 3% of the investment allowance of the proposed Section 29c of the WVA, this means that only BIK statements that result in a tax rebate of at least €600 can be applied for. This minimum will result in fewer applications for a BIK statement, because not all withholding agents who do qualify for the BIK rebate can meet the minimum investment allowance every quarter.

In conformity with the proposed sixth paragraph, RVO will take a decision to issue a BIK statement on behalf of the Minister for Economic Affairs and Climate Policy by no later than twelve weeks after the application. This paragraph provides for the possibility of extending this term, if necessary or preferred, by ministerial regulation. This will be used, for example, for a situation in which the applicant has filed an objection to a previously issued BIK statement.

Section 29f of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29f (1) of the WVA stipulates that a BIK statement applied for by a BIK withholding agent, is issued to such BIK withholding agent by RVO on behalf of the Minister for Economic Affairs and Climate Policy.

The proposed second paragraph contains an itemisation of the elements of the BIK statement. This itemisation contains four parts. The first part relates to the total investment allowance of the job-related investment or investments included in the application. The second part relates to the calendar year covered by the BIK statement. This is the year in which the last payment has taken place, with which the job-related investment has been paid in full. This year is important for the minimum investment allowance per application of the proposed Section 29e (5) of the WVA and for the applicable rate. The third part concerns the amount of BIK rebate with a calculation of that amount. The fourth part concerns the allocation of the BIK rebate over the various withholding agents within a tax group as meant in Section 15 of the 1969 Corporation Tax Act, if the BIK withholding agent has requested this in the application. From the proposed Sections 29a (3) and 29e (2) of the WVA, it follows that a tax group, de facto, is treated as a single BIK withholding agent and that the companies that form part of a tax group can only jointly submit applications. One of the withholding agents within the tax group may submit the application. This withholding agent may include a preferred allocation of the tax rebate in the application. This may be preferred, for example, if the withholding agent who submits the application cannot redeem the allocated BIK rebate in its entirety. The BIK statement states which amount of tax rebate is allocated to each RSIN (Legal Entities and Partnerships Identification No.) or payroll tax number. The applicant who is part of a tax group is not obliged to provide an allocation. If the BIK withholding agent does not request this, the entire

amount of BIK rebate will be granted to the BIK withholding agent who submits the application.

Section 29g of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29g of the WVA stipulates that the BIK withholding agent who is in possession of a BIK statement is obliged to maintain an administration in respect of the BIK rebate. The scheme by the Minister for Economic Affairs and Climate Policy also includes the need for the BIK withholding agent to administer proof that the investment commitment was entered into on or after 1 October 2020, for example, with a signed contract. In addition, the administration must show when the investment has been fully paid, refer to the proposed Section 29a (4) of the WVA. For this purpose, all payments and payment dates relating to the job-related investment are of importance. Furthermore, the administration must show that this relates to a not previously used fixed asset, which also complies with the other conditions of the proposed Section 29a (1) (d) of the WVA. RVO will carry out audits of these administrations and, if necessary, it issues a BIK adjustment statement. RVO may also request additional information, such as an Auditor's Report for major investments.

Section 29h of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29h of the WVA deals with cases in which a so-called BIK adjustment statement must or may be issued by RVO.

The proposed first paragraph contains situations in which a BIK adjustment statement is issued. In the first place, this is the case if it is made plausible that incorrect or incomplete information or documents have been provided in an application, which has led to an incorrect assessment and, secondly, if it is made plausible that a fixed asset has not been put into service within six months of full payment, as stated by the BIK withholding agent in the application. If fixed assets have not been put into service within six months, the amount of the BIK adjustment statement is established on the total amount of the tax rebate in relation to that fixed asset. If an application includes several fixed assets, the adjustment will only be reflected on the fixed assets that have not been put into service in good time.

The proposed second paragraph states that BIK withholding agents are obliged to notify RVO if it is clear, or if a withholding agent reasonably suspects that incorrect information has been provided in the application. In the second place, a BIK withholding agent is obliged to submit a notification if a fixed asset for which an amount of BIK rebate has been included in a BIK statement has not been put into service within six months of full payment. The BIK withholding agent must submit this notification within three calendar months after the aforesaid has become known or that this could reasonably have been suspected. The notification takes place via the RVO digital portal. An investigation into whether the contents of the notification is correct, does not necessarily take place at that time. The RVO may also make an assessment on this in a later inspection.

The proposed third paragraph states that the notification in the proposed second paragraph – in the case of a withholding agent who has applied that BIK rebate ceases to be a withholding agent – must be made within one calendar month after the obligation to withhold has ended.

The proposed fourth paragraph provides that if the BIK withholding agent does not comply with the administrative requirements, a BIK adjustment statement may be issued. Unlike in the proposed first and second paragraphs, this relates to an authority to issue a BIK adjustment statement. Whether a BIK adjustment statement will in fact be issued will depend on the circumstances of the case.

The proposed fifth paragraph sets out what the consequences of a BIK adjustment statement would be for the BIK withholding agent. The amount of the BIK adjustment statement must be deducted as much as possible from the amount of the BIK statement to which the BIK adjustment statement relates, insofar as it has not yet been deducted from the payroll tax due. Insofar as this is not possible, the amount of the BIK adjustment statement will be regarded as an adjustment of the amount on the BIK statement already deducted from the payroll tax due. At that stage too much BIK rebate has been applied and this must be adjusted in the tax return over the tax period in which the BIK adjustment statement is dated or in a subsequent tax period, by applying a negative BIK rebate. As a result, in relation to the already expired tax periods, for this purpose there is no obligation to submit adjustment returns. This provision is derived from Section 25 (4) of the WVA and must be explained in accordance with processing the R&D adjustment statement.

If a BIK adjustment statement is imposed on a BIK withholding agent of a tax group in which the BIK rebate is allocated over various withholding agents, RVO will take into account the administrative burden of the withholding agents within the tax group when imposing the allocation of the amount to be adjusted.

Section 29i of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29i of the WVA makes it clear in which cases an administrative fine is to be imposed. The design of the BIK rebate aims to keep implementation costs and administrative costs as low as possible. To be able to achieve this particularly attractive development for entrepreneurs, it is necessary to rely far more on the entrepreneur's own responsibility. If, in practice, it appears that such trust is breached, then a firm financial penalty is appropriate.

In order to simplify the implementation by RVO, the system for imposing fines is also followed, as it applies for the R&D tax rebate implemented by RVO. The proposed Section 29i of the WVA has therefore been drawn up in accordance with Section 26 of the WVA and differs from corresponding provisions in the Dutch Criminal Code (*Wetboek van Strafrecht*) and prevailing general legislation.

The proposed Section 29i (1) of the WVA is a so-called "can provision". It provides the occasion to impose an administrative fine based on the severity of the facts and circumstances observed, if the regulations relating to the administration to be carried out have not been correctly complied with or if there is a case as meant in the proposed Section 29h (1) (a) of the WVA. This concerns the case where it is likely that the application for a BIK statement contains incorrect information.

The proposed Section 29i (2) of the WVA provides for a special regulation. It gives the Minister for Economic Affairs and Climate Policy the authority to impose an administrative fine if, on inspection, it appears that the BIK withholding agent has not complied with the obligation to notify. Since the right to a BIK rebate only arises on grounds of the BIK statement, major importance is attached to compliance with the obligation to notify. If this obligation is not complied with, which risks that the tax rebate is applied despite incorrect information being provided, or not putting into service a fixed asset within six months of full

payment, a fine that severely impacts businesses should be imposed. The major importance of proper compliance with the obligation to notify is not only reflected in the granted authority for establishing an administrative fine, but also expressed in the fact that the maximum amount of the administrative fine is clearly shown. Obviously, there is a possibility of reducing the fine because of the minimal severity of the infringement. An example of minimal severity could be a minor overrun of the term within which the notification should have taken place.

The proposed third paragraph stipulates that the administrative fines are established by the Minister for Economic Affairs and Climate Policy, but that collection takes place entirely via the BIK adjustment statement.

The proposed fourth paragraph stipulates that Section 5:53 of the General Administrative Law Act (*Algemene wet bestuursrecht, Awb*) does not apply to administrative fines as meant in the proposed second paragraph. This Section is about the preparation of a report or official report in the event of heavy administrative fines.

The chapter relating to the BIK rebate is a chapter in the WVA. The sections in other chapters of that law also apply to the BIK rebate, including Section 30 of the WVA, which provides, inter alia, that the tax system of submitting objections and lodging appeals does not apply, but to automatically fall back on the General Administrative Law Act's system of rules. This section further stipulates that the hardship clause of Section 63 of the State Taxes Act (AWR) may be applied and that the fiscal duty of confidentiality of Section 67 (1) of the State Taxes Act (AWR) remains applicable. Finally, this section stipulates that of the ruling by the Trade and Industry Appeals Tribunal (CBb), for certain aspects an appeal to the Supreme Court remains open.

Section 29j of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29j of the WVA includes the possibility of laying down further rules in relation to the excusability of exceeding the term in the situation of a disruption of the RVO digital portal. This provision is derived from Section 27a of the WVA and must accordingly be explained.

Section 29k of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29k (1) of the WVA stipulates that a number of obligations that apply to the inspector pursuant to the State Taxes Act (AWR) also apply in relation to RVO officials. It concerns the provision of information and the duty to keep records. Pursuant to this provision, the authority of officials who are not from the Tax and Customs Administration, who are charged with implementation of the WVA, have the same authority as the officials of the Tax and Customs Administration. In the proposed second paragraph, Sections 68, 69 and 72 of the State Taxes Act (AWR) are declared accordingly applicable. This Section is derived from Section 28 of the WVA and must accordingly be explained.

Section 29l of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA)

The proposed Section 29l of the WVA includes the possibility of adjusting the rates for calculating the amount of the tax rebate by ministerial regulation for budgetary reasons. This provision is derived from Section 29 of the WVA. The budgetary importance of the BIK scheme amounts to €2 billion per annum for the years 2021 and 2022. At the end of 2021, an estimate of the budgetary importance of the BIK scheme over 2021 will be made based on the applications received so far. If this estimated amount exceeds €2 billion per annum, the estimated exceedance can be deducted from the budget for 2022. If this estimated amount is lower than €2 billion per annum, the estimated underspending can be added to the budget for 2022. To this end, the rates will be adjusted for 2022.

Section XXVIA, part B (Section 30 of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA))

Section 30 (3) of the WVA provides that an appeal to the Supreme Court against the ruling by the Trade and Industry Appeals Tribunal (CBb) in the context of the tax rebate, remains open with regard to the interpretation of certain definitions. It is proposed to add the definition 'fixed asset' to these definitions, which is an important definition particularly for the BIK rebate. The description of this definition contained in Section 1 of the WVA is also reflected in the new chapter on the BIK rebate. As a result, interested parties can bring proceedings to the same highest court as in the case of appeal proceedings in a tax case. The provision is included to safeguard uniformity of the definitions derived from tax legislation.

Part 3

Section XXVIB

The proposed Section XXVIB states that Chapter IX of the WVA will be discontinued with effect from 1 January 2023. However, this chapter remains applicable for settlement of the tax rebate for job-related investments made in 2021 and 2022. This means that administrative requirements, where necessary, will continue to apply and that, for example, BIK adjustment statements as meant in the proposed Section 29h of the WVA may still be issued and fines as meant in the proposed Section 29i of the WVA may still be imposed. An application for the BIK rebate can only be submitted for investments made on or after 1 October 2020 with a final payment in the calendar year 2021 or 2022. The BIK rebate can still be effectuated in the payroll tax return with a BIK statement that is dated 2023 in 2023.

Section XXVIC

In view of the fact that the proposed Section XXVIB provides that Chapter IX of the WVA will be discontinued on 1 January 2023, with regard to the proposed Section 3.29d of the 2001 Income Tax Act, arrangements must be made that the reference to that chapter must be amended in the sense that, as from 1 January 2023, reference must be made to "Chapter IX of the Salaries Tax and National Insurance Contributions (Reduced Remittances) Act (WVA), as that chapter reads on 31 December 2022".

State Secretary for Finance,

To: [redacted] (AFP/EDA) [redacted]@minfin.nl; [redacted] (AFP/ANALYSE) [redacted]@minfin.nl;
[redacted] (AFP/EDA) [redacted]@minfin.nl
From: [redacted] (AFP/EDA)
Sent: Mon 1/18/2021 2:46:16 PM
Importance: Normal
Subject: RE: Exchange on Baangerelateerde Investeringskorting (BIK)
MAIL_RECEIVED: Mon 1/18/2021 2:46:16 PM

.....
Maar geldt ook alleen, als je de kosten maakt...

Ik vraag mij af of we in ons uitleg misschien iets meer moeten ingaan op de doelstelling van de LB. [redacted] lijkt te worstelen met het idee dat we voor investeringen een korting geven in de LH. Hij vindt het niet passen bij de doelstelling van de loonheffing, namelijk het belasten van de lonen.

Maar onze loonbelasting heeft op zich niet tot doel belasting te heffen over de lonen. Dat doet de inkomstenbelasting. Loonheffing is alleen een voorheffing. De doelstelling is de heffing over de lonen veilig te stellen. De heffing drukt ook niet op de werkgever, toch?. Ze houden alleen in op het loon dat ze uitbetalen. De werknemer betaalt belasting over zijn loon.

Ik durf niet te stellen dat hiermee ons probleem verholpen is, maar wellicht goed voor het begrip van [redacted] [redacted]
[redacted] 10.2.a

Een lastige discussie dit...

[redacted] 10.2.a

Misschien dat bij [redacted] [redacted] dan een belletje gaat rinkelen.

Van: [redacted] (AFP/EDA)
Verzonden: maandag 18 januari 2021 14:45
Aan: [redacted] (AFP/ANALYSE); [redacted] (AFP/EDA); [redacted] (AFP/EDA)
Onderwerp: RE: Exchange on Baangerelateerde Investeringskorting (BIK)

[redacted] 10.2.a

Wij begrijpen dit nog niet zo goed, maar gaan nog overleggen met andere staatssteunexperts.

[redacted] (AFP/ANALYSE) <[redacted]@minfin.nl>
Verzonden: maandag 18 januari 2021 14:44
Aan: [redacted] (AFP/EDA) <[redacted]@minfin.nl>; [redacted] (AFP/EDA) <[redacted]@minfin.nl>; [redacted] (AFP/EDA) <[redacted]@minfin.nl>; [redacted] (AFP/EDA) <[redacted]@minfin.nl>
Onderwerp: RE: Exchange on Baangerelateerde Investeringskorting (BIK)

Maar zouden ze dit bezwaar dan ook niet bij de wbo moeten hebben?

Van: [redacted] (AFP/EDA) <[redacted]@minfin.nl>
Verzonden: maandag 18 januari 2021 14:41
Aan: [redacted] (AFP/ANALYSE) <[redacted]@minfin.nl>
Onderwerp: FW: Exchange on Baangerelateerde Investeringskorting (BIK)

Ter info, voor zover nog niet door [redacted] of [redacted] doorgestuurd. Ik ben geen staatssteunexpert maar –als ik zo vrij mag zijn- krijg toch de indruk dat we in een moeras terechtgekomen zijn.

Met vriendelijke groet, [redacted]

[redacted] 10.2.e
[redacted] 10.2.e
[redacted] 10.2.e
dubbel

Nadere uitwerking 10.2.a **BIK nav het overleg met de EC op dinsdag 15 december jl**

Reactie Nederland 10.2.a

10.2.a

10.2.a

Nederlandse visie op reikwijdte van artikel 107, lid 3, onderdeel c van het VWEU

Tijdens het overleg op dinsdag 15 december jl is ook de reikwijdte van artikel 107, lid 3, onderdeel c van het VWEU aan de orde geweest. De Nederlandse autoriteiten lichten hier nog even kort hun standpunt hierover toe,

10.2.a

10.2.a

Op grond van artikel 107, lid 3, onderdeel c van het VWEU kunnen als verenigbaar met de interne markt worden beschouwd steunmaatregelen om de ontwikkeling van bepaalde vormen van economische bedrijvigheid of van bepaalde regionale economieën te vergemakkelijken, mits de voorwaarden waaronder het handelsverkeer plaatsvindt daardoor niet zodanig worden veranderd dat het gemeenschappelijk belang wordt geschaad.

Volgens de Nederlandse autoriteiten is economische bedrijvigheid niet alleen beperkt tot bepaalde economische sectoren, maar kan het doen van investeringen gezien worden als een vorm van economische bedrijvigheid die binnen de kaders van artikel 107, lid 3, onderdeel c van het VWEU valt.

Sommige sectoriële steunkaders (zoals zeescheepvaart) zijn gebaseerd op artikel 107, lid 3 onderdeel c) VWEU, maar ook veel brede horizontale steunkaders (bijv. milieu en energie, onderzoek & ontwikkeling & innovatie, risicokapitaal). Investeringssteun zou onder de categorie horizontale steun kunnen vallen.

Toelichting op voordeel van de BIK voor een onderneming

In de bespreking van 15 december 2020 kwam de relatie tussen investeren en loonheffingen aan de orde. We maken graag van de gelegenheid gebruik om aan de hand van een kort voorbeeld het voordeel van de BIK voor een onderneming te laten zien.

Voorbeeld

Een onderneming investeert in 2021 voor € 1 miljoen in kwalificerende bedrijfsmiddelen. De onderneming heeft een loonsom van € 500.000, waarop hij een bedrag van € 175.000 inhoudt aan loonheffingen.

Voor de investeringen krijgt hij een BIK-verklaring van € 39.000 (3,9% van 1 miljoen, omdat voor investeringen tot 5 miljoen 3,9 % in aanmerking genomen wordt). Daardoor is hij niet verplicht om het gehele ingehouden bedrag aan loonheffingen van € 175.000 af te dragen aan de Belastingdienst, maar slechts het bedrag van € 136.000 (saldo € 175.000 en € 39.000).

Dat slechts € 136.000 afgedragen dient te worden, betekent een verlaging van de loonkosten van de onderneming en dat leidt tot een extra winst (of minder verlies) van € 39.000.

Dit voorbeeld laat zien dat de BIK leidt tot een voordeel voor de onderneming in de vorm van extra winst (of minder verlies) door een verlaging van de loonkosten in verband met gedane investeringen.



TER BESLISSING

Aan

10.2.e

Directie Algemene
Fiscale Politiek

Inlichtingen

10.2.e

10.2.e

T 10.2.e

F 10.2.e@minfin.nl

www.minfin.nl

Datum

20 november 2020

Notienummer

2020-0000229251

Auteur

10.2.e

10.2.e

Van

Kopie aan

Bijlagen

4

notitie

Template BIK

Aanleiding

Bij de behandeling van het Belastingplan heeft de Staatssecretaris aangegeven de BIK bij de Europese Commissie te gaan melden ter goedkeuring als staatssteun.

Inmiddels is hierover telefonisch contact geweest met (onder andere) 10.2.e

10.2.e

Nederland werd

geadviseerd zo spoedig mogelijk contact te zoeken met ambtelijke diensten om het proces te starten.

Beslispunt

- Gaat u ermee akkoord dat de bijgesloten template, inclusief de oplegger en de bijlagen zo spoedig mogelijk bij de Europese Commissie ingediend wordt?

Kernpunten

- Met de bijgesloten template wordt het eerste informele contact gelegd tussen Nederland en de ambtelijke diensten van de Europese Commissie over de BIK.
- De template wordt via EZK en vervolgens de PV per mail bij de Europese Commissie aangeleverd.
- Op basis van de template wordt bij de Europese Commissie een caseteam samengesteld dat vervolgens weer contact opneemt met Nederland over de vervolgstappen.
- De template wordt gebruikt voor aanmeldingen van maatregelen die onder de tijdelijke Covid-kaders vallen. Omdat de BIK aan deze Covid-kaders niet voldoet, hebben we een oplegger opgesteld waarin dit nader wordt toegelicht en waarin voorgesteld wordt om eventuele, alternatieve manieren van aanmelding, zoals op basis van artikel 107, lid 3, onder c van het VWEU met de Europese Commissie op korte termijn te bespreken. Daarna zal het formele traject van de aanmelding kunnen beginnen.



TER INFORMATIE

Aan
de minister
de staatssecretaris van Financiën – Fiscaliteit en

10.2.e

notitie

BIK: EU-risico

**Directie Directe
Belastingen**

Inlichtingen

10.2.e

10.2.e

10.2.e@minfin.nl

www.minfin.nl

Datum

30 oktober 2020

Notitienummer

2020-0000210856

Auteur

10.2.e

Van

Kopie aan

Aanleiding

Naar aanleiding van de bespreking over de vragen bij het pakket Belastingplan ontvangt u hieronder nadere informatie over een mogelijk EU-risico dat lijkt te spelen bij de BIK. In deze notitie informeren we u voorzover we in deze fase kunnen alvast over dit mogelijke risico, en beschrijven we de stappen die we nemen om het risico beter in beeld te brengen, de eventuele consequenties –die substantieel zouden kunnen zijn– beter te kunnen inschatten en ook een eventuele oplossing nader te onderzoeken. Op dit moment zijn er nog veel onduidelijkheden en onzekerheden, en daarom hebben we een aantal acties in gang gezet zodat u op korte termijn beter geïnformeerd kan worden.

Informatiepunt: baangerelateerde investeringskorting

buiten verzoek

buiten verzoek

Reëel EU-risico voor weglek als moeder-, zuster- of dochtervennootschap in een andere EU-lidstaat is gevestigd

- De BIK-regeling staat toe dat als twee vennootschappen deel uitmaken van een fiscale eenheid (voor de vennootschapsbelasting), de éne de investering doet terwijl de ander de korting (afdrachtvermindering) op de loonheffing krijgt. Dit is mogelijk gemaakt omdat het veelvuldig voorkomt dat binnen een groep (fiscale eenheid) het personeel bij één van de vennootschappen op de loonlijst staat en een andere vennootschap binnen de groep investeringen in bedrijfsmiddelen doet.
- Echter, alleen in Nederland gevestigde vennootschappen (of buitenlandse vennootschappen voor zover zij een vaste inrichting in Nederland hebben) kunnen deel uitmaken van een fiscale eenheid. Daardoor kunnen concerns waarbij een moeder-, dochter- of zustervennootschap in de EU is gevestigd **geen** beroep doen op de hiervoor beschreven situatie waarbij een van de vennootschappen de investering doet en een andere vennootschap waar personeel op de loonlijst staat de BIK-af trek claimt.
- Het risico bestaat echter dat het concern met een elders in de EU gevestigde moeder, dochter of zuster op basis van het EU-recht eenzelfde fiscaal voordeel zal claimen voor loonkosten dan wel investeringen in een andere EU- of EER-lidstaat. Hun argument zal in dat geval waarschijnlijk zijn dat de BIK-regeling investeringen vanuit Nederland in het buitenland minder aantrekkelijk maakt dan binnenlandse investeringen, dan wel dat bedrijven met een buitenlandse moeder minder goed af zijn dan bedrijven met een in Nederland gevestigde moeder. Belastingplichtigen zullen mogelijk aanvoeren dat dit een beperking van de vrijheid van vestiging is. Uitgaande van de bestaande jurisprudentie van het Hof van Justitie van de EU geeft een eerste inschatting aan dat er een reëel juridisch risico is dat bedrijven in het gelijk gesteld worden. Echter, dit is complexe materie waarvoor we om een beter oordeel te kunnen geven een beroep willen doen op de Landsadvocaat omdat we specifieke expertise nodig hebben.
- Dit risico kan zich in verschillende situaties voordoen en zal zich mogelijk op korte termijn al publicitair manifesteren. Waarschijnlijk zal in de fiscale vakliteratuur de strijdigheid namelijk worden beschreven. Dan zal vervolgens

de start van eventuele daadwerkelijke juridische procedures afhankelijk zijn van de situatie. De strijdigheid met het EU-recht kan afhankelijk van de situatie óf door een belanghebbende worden opgeworpen bij de weigering van een positieve beschikking van RVO, óf bij het niet accepteren van een vermindering van de loonheffing door de Belastingdienst. Belanghebbenden zullen mogelijk ter behoud van rechten met een beroep op het EU-recht aanvragen doen en afdrachtverminderingen toepassen. Vervolgens zal dit kunnen leiden tot juridische procedures waarin er dus een risico is dat de Nederlandse rechter door toepassing van rechtstreekse werking van het EU-recht tot een beslissing in het voordeel van belanghebbenden zal komen. Als er voor wordt gekozen om dit tot in de hoogste instantie uit te procederen, waarbij ook vragen worden gesteld aan het Europees hof, kan het enkele jaren (denk aan een termijn van mogelijk 5 jaar of zelfs meer) duren voordat de uitkomst definitief vaststaat.

EU-risico weglek als hoofdvestiging of filiaal in andere EU-lidstaat kleiner.

- Daarnaast is de vraag gerezen of het voordeel van de BIK niet kan weglekken naar een hoofdvestiging of filiaal in het buitenland die niet in een aparte vennootschap zit, waarbij alle vestigingen deel uitmaken van dezelfde vennootschap. Op basis van de wettekst kan dat niet. Het zou mogelijk zijn dat dit wel geclaimd wordt op basis van het EU-recht, maar daar lijkt – bij de huidige formulering van de wettekst – de mogelijkheid om een beroep te doen op de rechtvaardigingsgrond evenwichtige verdeling van de heffingsbevoegdheid wel aanwezig, en is het juridische EU-risico van een weglek dus kleiner.

Geen EU-risico als andere vennootschap of filiaal buiten de EU.

- Een juridisch risico van een weglek naar derde staten –buiten de EU/EER dus– is er op grond van het EU-recht niet. Zowel claims gerelateerd aan fiscale-eenheidsvoordelen, als claims in relatie tot filialen worden uitsluitend getoetst aan de vrijheid van vestiging binnen de EU of de EER. Die geldt alleen voor EU- en EER-lidstaten, niet voor “derde landen”.

buiten verzoek

even bewaren



Ministerie van Financiën

10.2.e - 2/14 12h30

**HEDEN
TER INFORMATIE**

Aan

de staatssecretaris van Financiën – Fiscaliteit en Belastingdienst

Ter info: de minister van Financiën

notitie

BIK: Stand van zaken nav gesprekken in Brussel

**Directie Directe
Belastingen**

Inlichtingen

1 10.2.e

T 10.2.e

10.2.e@minfin.nl
www.minfin.nl

Datum

15 april 2021

Notitienummer

2021-0000061018

Auteur

10.2.e

Van

Kopie aan

Aanleiding

Naar aanleiding van de gesprekken over de BIK met de Europese Commissie (Commissie) vindt er op maandag 19 april een bewindspersonenoverleg tussen u (staatssecretaris F&B) en de Minister van EZK plaats. Ter voorbereiding informeren wij u over:

- stand van zaken van de gesprekken met Commissie;
- scenario om de BIK in stand laten zonder formele goedkeuring door de Commissie;
- andere door de Commissie gesuggereerde scenario's;
- alternatieve scenario's.

Stand van zaken van de gesprekken met Commissie

Ter info voor minister

We zijn in contact getreden met de Commissie om een uitspraak te krijgen over fiscale eenheid. Middels een uitspraak van de Commissie was de verwachting dat we duidelijkheid zouden krijgen over de vraag of de faciliteit voor de fiscale eenheid binnen de BIK wel of niet toegestaan was gelet op de Europese vrijheden.

Vooralsnog heeft de Commissie zich over het punt van de fiscale eenheid niet al te druk gemaakt maar heeft tot onze verrassing vragen gesteld bij een heel ander punt, namelijk of de BIK ten principale wel verenigbaar is met staatssteun. Wij zien bij de BIK geen staatssteun en weten ons daarin gesteund ook door advies van door ons ingehuurde advocatenkantoor NautaDutilh; zie toelichting hieronder.

Staatssecretaris:

U heeft als laatste gesproken met 10.2.e en weet dus haar positie.

In de ambtelijke gesprekken zijn de volgende signalen naar voren gekomen.

10.2.a
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Overigens is die lijn niet door 10.2.e uitgedragen in haar gesprek met u.

Wij zijn het niet eens met deze invalshoek van de Commissie en we worden daarin gesteund door advocatenkantoor NautaDutilh, zie bijlage. 10.2.a

10.2.a

Een procedure om tot een definitieve uitkomst te komen met de Commissie kent echter een lange doorlooptijd. Dat moet in verhouding worden gezien met het feit dat de BIK al van kracht is en slechts voor 2 jaar geldt. 10.2.a

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Scenario om de BIK in stand laten zonder formele goedkeuring door de Commissie

Het in stand houden van de BIK zonder een formeel (positief) oordeel van de Commissie kent risico's. Op basis daarvan geeft RVO aan dat zij gelet op deze risico's de BIK niet uitvoerbaar acht.

De huidige BIK zonder formele goedkeuring van de commissie voortzetten, kent risico's, omdat er een kans is dat iemand een klacht bij de Commissie indient over vermeende staatssteun van/in de BIK. Indien je belanghebbende bent, zal de commissie een klacht in behandeling nemen en een onderzoek starten. Het is mogelijk dat Nederland dan wordt gelast de BIK in afwachting van de uitkomst van het onderzoek on hold te zetten.

Indien de klacht zou worden toegewezen en -na de procedures die zoals hierboven beschreven lange tijd in beslag kunnen nemen- in rechte vast komt te staan dat de BIK is aan te merken als onrechtmatige en ongeoorloofde staatssteun, is volgens de huidige staatssteunsystematiek de consequentie dat reeds vanaf de inwerkingtreding uitgekeerde tegemoetkomingen moeten worden teruggevorderd inclusief rente. Behalve de gevolgen voor de getroffen bedrijven trekt dat proces een enorme wissel op de uitvoering (Belastingdienst en RVO) en vergt waarschijnlijk een handmatig proces dat nog op de uitvoerbaarheid moet worden beoordeeld.

Een tweede risico is dat een belanghebbende een procedure kan starten bij de nationale rechter om de BIK als onrechtmatige staatssteun aan te merken. In zo'n scenario, zou de rechter kunnen oordelen dat de BIK onrechtmatige steun is die alsnog formeel voorgelegd moet worden aan de Commissie ter goedkeuring. Ook dan is de uitkomst mogelijk dat alle vanaf de inwerkingtreding verstrekte tegemoetkomingen door de Belastingdienst zouden moeten worden teruggevorderd inclusief rente.

De kans op een procedure, de onzekerheid over de uitkomst daarvan en de mogelijke ultieme consequentie dat dit zou kunnen leiden tot terugvorderingen, levert dus risico's op voor uitvoering en onzekerheid voor het bedrijfsleven.

Andere door de Commissie gesuggereerde scenario's

DGComp deed de suggestie om de BIK aan te passen aan het tijdelijke Covid-steunkader of aan de Algemene Groeps Vrijstellings Verordening (AGVV). Om de BIK aan te passen aan een van deze kaders, zou een ingrijpende aanpassing van de huidige BIK vergen, waarvoor een wetgevingstraject zal moeten worden doorlopen.

Aanpassing van de regeling aan het Covid-steunkader zal de effectiviteit van de regeling naar verwachting beperken. Het generieke karakter van de BIK zal dan namelijk de facto vervallen. Om te voldoen aan het Covid-steunkader moet de BIK beperkt worden tot ondernemingen die na 31 december 2019 in moeilijkheden zijn gekomen. Een vereiste is voorts dat het voordeel uiterlijk 31 december 2021 moet worden toegekend. Het is zeer onwaarschijnlijk dat RVO in dit scenario binnen deze tijd in staat is de aanvragen te beoordelen en beschikkingen af te geven. De regeling zou immers nog aangepast moeten worden middels een wetwijziging en alle bijbehorende doorlooptijden (waaronder een toetsing van een aangepaste regeling op uitvoerbaarheid).

Om te voldoen aan de AGVV zou de BIK beperkt moeten worden tot een select soort investeringen door het MKB die aantoonbaar leiden tot extra banen. Bovendien zal het voordeel van de BIK per onderneming moeten worden beperkt. Ook hier geldt dat de moet worden aangepast middels een wetwijziging en alle bijbehorende doorlooptijden (waaronder een toetsing van een aangepaste regeling op uitvoerbaarheid).

Beide scenario's lijken niet eenvoudig te bewandelen.

Alternatieve scenario's

Gelet op de geschetste risico's is ook bezien of er nog een scenario mogelijk is om de BIK in te trekken.

Ook voor intrekking van de BIK is wetgeving noodzakelijk. Die wetgeving zou dan het beste kunnen worden aangekondigd in een brief aan het parlement. Daarbij moet ook worden aangegeven of de intrekking per direct of met terugwerkende kracht tot 1 januari 2021 plaats zal vinden.

We hebben een advies hierover gevraagd van NautaDutilh, zie bijlage. Zij geven aan dat intrekking met terugwerkende kracht tot 1 januari de voorkeur heeft om alle risico's –ook voor bedrijven zelf- weg te nemen. Desondanks is deze benadering ons inziens wel een benadeling van bedrijven die bij hun investeringen in de afgelopen periode rekenden op de per 1 januari wettelijk in werking getreden BIK. Uiteraard is het aantal bedrijven dat al investeerde gerelateerd aan de tijd dat de BIK openstaat; als de BIK langer openstaat, zullen meer bedrijven op basis van deze regeling investeringen hebben gedaan.

In een scenario van stopzetting van de BIK zou uiteraard idealiter ook moeten worden aangegeven op welke wijze de voor de BIK gereserveerde gelden op een andere wijze ten goede zouden kunnen komen aan het bedrijfsleven.

Spreeklijn BIK telefonisch overleg Stas met
donderdag 25 maart 2021, 9.00 uur

10.2.e

Achtergrond

10.2.a

De BIK is afgelopen dinsdag nog voor de tweede keer besproken tussen DGFZ en DC Comp. Het heeft niet tot nieuwe inzichten geleid. De EC blijft bij haar standpunten.

Onderstaande punten zijn ook gebruikt in eerdere overleggen met de Commissie op DG-niveau (zoals recentelijk op 23 maart 2021).

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■

BIJLAGE 1 – terugwerkende kracht intrekking BIK

Voor intrekking van de BIK is wetgeving noodzakelijk, waarvoor een voorstel moet worden gedaan die kan volgen op de brief aan het parlement. De wetgeving zelf zal na het wetgevingstraject bij plaatsing in het staatsblad pas van kracht worden. Maar aan die wetgeving zal terugwerkende kracht moeten worden verleend. In deze bijlage wordt ingegaan op de vraag tot welk moment die terugwerkende kracht verleend moet worden, te weten; naar 1 januari 2021 óf het moment van aankondigen.

Het advies is om aan de intrekking van de BIK terugwerkende kracht te verlenen tot 1 januari 2021.

Samenvatting

Dit advies is in hoofdlijnen gebaseerd op de het volgende

- De ambtelijke signalen van de Europese Commissie (EC) indiceren dat er bij hen vragen zijn of de BIK geen ongeoorloofde staatssteun behelst en de Commissie zou Nederland kunnen vragen om de toepassing van de BIK op te schorten. Dat is ook voor de minister van EZK en u aanleiding geweest om te verkennen of de BIK niet beter kan worden stopgezet.
- Deze onzekerheid geldt dus ook voor die eerste maanden. In bovenstaande situatie geldt dan dat wellicht beter niet tot uitkering kan worden overgegaan en zelfs als er wel tot uitkering kan worden overgegaan kan niet worden uitgesloten dat deze uitkering op termijn (met rente) moet worden teruggevorderd door de Belastingdienst.
- Een BIK-regeling die een paar maanden van kracht is, kent per definitie een selectiever karakter omdat immers slechts een deel van de bedrijven – namelijk alleen bedrijven die in die beperkte periode van openstelling investeringen doen – er gebruik van kan maken. Een dergelijke, tijdelijke regeling zal waarschijnlijk als zeer oneerlijk beschouwd worden door de inhoudingsplichtigen die (net) buiten de boot vallen doordat ze de investeringsbeslissing nog niet genomen hebben ten tijde van het intrekken.

Intrekking per publicatiedatum brief komt feitelijk neer op gedeeltelijk/tijdelijke toepassing van de BIK waarvoor (weliswaar voor een kortere periode) dezelfde juridische en praktische c.q. uitvoeringstechnische nadelen gelden als waarom besloten zou worden om de BIK in te trekken.

Intrekking met terugwerkende kracht tot 1 januari 2021 zou tot gevolg kunnen hebben dat een belanghebbende bij de rechter een beroep doet op het beginsel van opgewekt vertrouwen. De slaagkans van een dergelijke procedure is echter heel klein, omdat de staatssteunregels en Europese jurisprudentie met zich meebrengen dat een beroep op opgewekt vertrouwen niet kan worden ingewilligd door een Nederlandse rechter.

We hebben ook advies hierover ingewonnen bij NautaDutilh; zij achten stopzetting per 1 januari beter.

Toelichting

Hieronder wordt toegelicht waarom wij adviseren om aan de intrekking terugwerkende kracht tot en met 1 januari 2021 te verlenen in plaats van terugwerkende kracht tot moment waarop de intrekking wordt gecommuniceerd.

Inleiding/achtergrond

- Nederland heeft de BIK informeel voorgelegd bij de Europese Commissie (EC) met als doel het verkrijgen van een goedkeuring als "geoorloofde staatssteun" omdat alsdan de strijdigheid met het EU-recht (vrijheid van vestiging) van de begunstigende bepaling voor de fiscale eenheid niet kan worden ingeroepen bij de (nationale) rechter.

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Verplichtingen ingeval van twijfel over al dan niet geoorloofde staatssteun

- In het kader van deze discussie speelt het beginsel van Unietrouw een rol, ook wel aangeduid als het beginsel van loyaliteit van artikel 4, derde lid, van het Verdrag betreffende de Europese Unie (VEU). Dat beginsel vereist dat lidstaten alle algemene en bijzondere maatregelen treffen die geschikt zijn om de nakoming van de uit de Verdragen of uit de handelingen van de instellingen van de Unie voortvloeiende verplichtingen te verzekeren.
- Uit de jurisprudentie blijkt ten aanzien van al dan niet geoorloofde steun dat een lidstaat bij twijfel over de vraag of een maatregel als steun kan worden bestempeld gehouden is tot het niet invoeren van de maatregel tot die duidelijkheid is verkregen. Indien de maatregel toch is ingevoerd is de lidstaat ten minste gehouden tot het stopzetten van de ten uitvoerlegging van de BIK (de zogenoemde stand still).
- Hoewel het standpunt was (en is) dat de BIK als zodanig geen steun is, heeft Nederland wel de BIK (weliswaar informeel en met een ander doel) voorgelegd bij de EC met het oog op het verkrijgen van het oordeel geoorloofde staatssteun.
- Een mogelijke onrechtmatigheid/onverenigbaarheid van de staatssteun betekent ook dat eventuele reeds verleende beschikkingen en uitbetalingen zouden moeten worden herzien. Dat is overigens op dit moment niet aan de orde omdat het loket nog niet open is, maar het illustreert wel hoever de verplichtingen reiken.
- Deze laatstgenoemde verplichtingen zijn ook neergelegd in de Nederlandse wetgeving inzake terugvordering van staatssteun.

10.2.a

- Doorgaan en aanvechten van een eventueel besluit van de EC is een te onzeker traject, dat langer duurt dan de voorziene geldigheid van de BIK en dat leidt tot een grote mate van onzekerheid bij de ondernemer die daardoor terughoudend zal zijn om op basis van de BIK tot investeren over te gaan.
- Dat geldt zeker in de situatie van de feitelijk verplichte stopzetting die mogelijk een aantal jaren kan duren en waarbinnen geen tegemoetkomingen kunnen worden uitgekeerd. De BIK die was vormgegeven via een afdrachtvermindering om de tegemoetkoming zeer snel uit te kunnen betalen, verliest daarmee zijn beoogde en verwachte effectiviteit – de BIK jaagt dan geen investeringen aan en haalt ook geen investeringen naar voren. Daar komt bij dat het allerminst zeker is of de BIK uiteindelijk wel het predicaat “geoorloofde staatssteun” krijgt.
- Het lijkt bovendien niet verantwoord om de BIK door te zetten terwijl er serieuze twijfels zijn over de Europeesrechtelijke houdbaarheid daarvan. Daarmee worden verwachtingen gewekt naar de ondernemer die mogelijk niet kunnen worden waargemaakt of pas op de langere termijn indien Nederland na een gerechtelijke procedure alsnog in het gelijk wordt gesteld.

buiten verzoek

Redeneerlijn en argumentatie terugwerkende kracht tot 1 januari 2021

Hoewel er strikt genomen op basis van EU-wetgeving en EU-jurisprudentie voldoende aanleiding/noodzaak is tot intrekking van de BIK met terugwerkende kracht tot en met 1 januari 2021, dient de argumentatie voor de intrekking wel zorgvuldig te worden verwoord in de brief aan beide Kamers waarin de intrekking wordt aangekondigd. De argumentatie voor een terugwerkende kracht, in het bijzonder de terugwerkende kracht tot en met 1 januari 2021 hangt ook nauw samen met de in de brief opgenomen redeneerlijn. In de redeneerlijn staat centraal dat met de intrekking is beoogd om grote mate van onzekerheid bij de ondernemer als het gaat om investeren te voorkomen en dat we het de ondernemer ook niet kunnen aandoen hem gedurende lange tijd het eventueel terugvorderen boven het hoofd te laten hangen.

De lijn van de brief samen met de argumentatie waarom aan de intrekking terugwerkende kracht tot 1 januari 2021 wordt verleend, is als volgt.

- Nederland heeft de BIK informeel voorgelegd bij de EC met als doel het verkrijgen van de goedkeuring "geoorloofde staatssteun" omdat alsdan de (mogelijke) strijdigheid met het EU-recht (vrijheid van vestiging) van de begunstigende bepaling voor de fiscale eenheid niet kan worden ingeroepen bij de (nationale) rechter.

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- Na een eventueel negatief besluit van de EC staat Nederland nog de weg open naar een gerechtelijke procedure, maar ook als Nederland in die rechtsgang in het gelijk wordt gesteld, zal die uitkomst dan zeer waarschijnlijk enige jaren op zich laten wachten.
- Om verschillende redenen verliest de BIK dan zijn beoogde en verwachte effectiviteit. Gezien de dan ontstane onzekere basis van de BIK zullen ondernemers terughoudend zijn om onder die omstandigheden nog te investeren op basis van het onzekere te behalen voordeel van de BIK – we jagen dan geen investeringen aan en we halen ook geen investeringen naar voren.
- Daarnaast is het niet fair tegenover de ondernemer en dus ook niet verantwoord om een regeling in stand te houden waarvoor het onzeker is of deze uiteindelijk stand zal houden en op termijn ook tot uitkering komt.
- In dat licht past het ook om aan de intrekking terugwerkende kracht te verlenen tot en met 1 januari 2021. Een eventueel negatief besluit van de EC zou ook terugwerkende kracht hebben. Net zomin als dat het niet verantwoord is de BIK door te zetten, is het eveneens niet verantwoord om die regeling wel voor investeringen die zijn gedaan of investeringsbeslissingen die zijn genomen in de eerste maanden in stand te houden. Ook voor die eerste maanden geldt dat niet tot uitkering kan worden overgegaan en zelfs als er wel tot uitkering kan worden overgegaan kan niet worden uitgesloten dat deze uitkering op termijn (met rente) moet worden teruggevorderd door de Belastingdienst.
- Indien geen terugwerkende kracht tot en met 1 januari 2021 wordt toegekend aan het intrekken van de BIK gelden voor een kortere periode dezelfde uitvoeringsaspecten als in het geval dat we doorgaan met de BIK. De uitvoeringskosten zullen in verhouding met de duur van de regeling toenemen, voor de vaste uitvoeringskosten geldt immers dat die gemaakt worden voor een kortere periode.
- Om die reden ligt het voor de hand de regeling in te trekken met terugwerkende kracht tot en met 1 januari 2021.

Second opinion

We hebben een second opinion van NautaDutilh gevraagd op bovenstaande analyse over tot welk moment de intrekking moet terugwerken, zie bijlage. Zij hebben geconcludeerd dat terugwerkende kracht tot 1 januari de voorkeur heeft, omdat anders vergelijkbare risico's zich voordoen als bij het scenario doorgaan met de BIK. Alleen terugwerkende kracht tot 1 januari 2021 neemt deze risico's weg.