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The Future of Cross-Border Tax Planning: the continuing role of The Netherlands 40 years on

Speech presented at the 40th Anniversary Conference of the International Tax Planning Association, Amsterdam, 7th - 9th June 2015.

By Dr Mr Hans J. Hoegen Dijkhof, Attorney-at-Law (Advocaat),
Hoegen Dijkhof Attorneys & Tax Counsellors, Amsterdam.

“A king brings stability to a land by justice, but one who exacts tribute, tears it down.”¹

¹ Proverbs 29: 4, Net Bible translation.

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PART A. DUTCH INTERNATIONAL TAX PLANNING

1. Introduction

On 03 November 2014, I received an email from Elizabeth Husband. I succumbed to her well known charm in an unguarded moment. Then I started to panic. I was flattered by the honour to be allowed to address you, distinguished and expert audience. But then I started to think. How in the hell can somebody predict what will be going on forty years from now? Who came up with this crap? I vaguely remember a saying from Generaldirektor Heinrich Nordhoff, the man who built the Volkswagen concern up from 1948 in the fifties and sixties of the last century.² He did not do badly. General Nordhoff seems to have used to say: *At Volkswagen we look five years ahead, then ten years and then fifteen years but the longest we can look ahead is twenty years.* So forty years is an extremely long period. But *Impossible* is a word to be found only in the dictionary of fools.³ So we will give it a try.

2. Tax planning, tax avoidance, tax evasion and aggressive tax planning

To look ahead and to predict, you need first to look back. It's the same with history. You study it trying to predict the future. But first, what is tax planning and what is Dutch tax planning? I give you a definition of tax planning from Investopedia:⁴ *Tax planning is logical analysis of a financial situation or plan from a tax perspective, to align financial goals with tax efficiency planning. The purpose of tax planning is to discover how to accomplish all of the other elements of a financial plan in the most tax-efficient manner possible. Tax planning thus allows the other elements of a financial plan to interact more effectively by minimizing tax liability. Tax planning encompasses many different aspects, including the timing of both income and purchases and other expenditures, selection of investments and types of retirement plans, as well as filing status and common deductions. However, while tax planning is an important element in any financial plan, it is important to not let the "tax" tail wag the financial "dog." This can ultimately be counterproductive, as virtually all courses of financial action will have some tax consequences, and they should not be avoided solely on this basis.*

There is a clear difference between tax planning and tax avoidance and tax evasion. Tax avoidance is, according to Investopedia again: *The use of legal methods to modify an individual's financial situation in order to lower the amount of income tax owed. This is generally accomplished by claiming the permissible deductions and credits. This practice differs from tax evasion, which is illegal.*

² Heinrich Nordhoff, 06 January 1899-12 April 1968, died in Wolfsburg, of a heart attack.

³ Napoleon Bonaparte.

⁴ www.investopedia.com See also inter alia D.J. Hessing, H. Elfers, J.H. Christiaanse, *Belastingontduiking: Juridische, economische en psychologische aspecten van belastingweerstand*, Kluwer: Deventer 1989; P.F.E.M. Merks, *Belastingontduiking, -ontwijking en planning (deel 1)*, MBB 2006/09; R.E.C. M. Niessen, *Wat is er mis met fiscale grensverkenning*, WFR 2005/1473.

Tax evasion is: *An **illegal practice** where a person, organization or corporation intentionally avoids paying his/her/its true tax liability. Those caught evading taxes are generally subject to criminal charges and substantial penalties. There is a difference between tax minimization/avoidance and tax evasion. All citizens have the right to reduce the amount of taxes they pay as long as it is by legal means. Most taxpayers use some forms of tax avoidance. For example, individuals who contribute to employer-sponsored retirement plans with pre-tax funds are engaging in tax avoidance because the amount of taxes paid on the funds when they are withdrawn is usually less than the amount that the individual would owe today. Furthermore, retirement plans allow taxpayers to defer paying taxes until a much later date, which allows their savings to grow at a faster rate.*⁵

Aggressive tax planning according to the OECD Base erosion and profit shifting (BEPS) concept refers to tax planning strategies that exploit gaps in the architecture of the international tax system to **artificially** shift profits to places where there is **little or no economic activity or taxation**.⁶

3. Conclusion on the legality and legitimacy of tax planning

The conclusion clearly is that tax planning and tax avoidance are always both in principle perfectly legal and legitimate, but of course tax evasion is in principle illegal and usually always also illegitimate. But please remember for example that one of the major causes of the Eighty Years' War of independence⁷ of The Netherlands against the might of the Spanish Habsbourg monarchy, was the heavy level of taxation imposed on the population introduced by the Spanish Duke d'Alva. Especially a sort of VAT of 10 %. We came a long way as it is now 21%. He also introduced a tax of 1 % on net wealth which is now 1,2 %, not counting cars or works of art and a transfer tax of 5 % on transfer of real property which is now 2 %, respectively 6 % for business buildings.

4. What is Dutch international tax planning? Looking back on its development.

Before being able to make predictions about its future development, we need to have a picture what Dutch tax planning is about. What has the Netherlands been doing the last 40 years in terms of this legal and legitimate tax planning? I should rather say the last 60 years. At any rate, from at least World War II, Dutch international tax law is based on the idea that The Netherlands, being a small country, had to create a level playing field for Dutch businesses with world wide activities. I say at least from World War II, because for example the sea wars we had with the British, were also all about

⁵ That not everybody is able to grasp the difference, often not even very intelligent people, becomes clear from this Franklin Delano Roosevelt quote: "Tax avoidance means that you hire a 250.000-fee lawyer, and he changes the word evasion into the word "avoidance". See also Scott D. Michel and Sae Yin Yoon, "The Tax Planner's Tightrope, Morality and Politics now in Play", IFC Economic Report, Spring 2015. pp. 17-20 and Allison Christians, "Avoidance, Evasion and Taxpayer Morality", ibidem, p. 22.

⁶ Think of Starbucks, the Dutch Sandwich, the Double Irish Dutch Sandwich (Irish-Dutch-Irish (in low tax jurisdiction), etc.

⁷ 1568-1648.

maintaining a level playing field. In that context of creating a level playing field after World War II, double taxation of Dutch companies had to be avoided. This aspiration of creating a level playing field ties in nicely with the overall concept of double taxation treaties which aim at preventing or mitigating double taxation. Anyway, in the framework of creating this level playing field for Dutch companies and double taxation treaties, concepts came up which enabled players to successfully, in terms of mitigating taxation, deal with transfer pricing, interest streams, royalties and license fees streams and dividend streams and these concepts were steadily refined. Think of the much imitated Dutch participation exemption, active and passive participations, the Dutch sandwich, the Dutch limited partnership, the Dutch co-op, the Dutch Stak foundation, spreads, degressive rates or lump sums, patent boxes, Think also particularly of the famous Dutch tax rulings, ATR and APA. ATR= Advance Tax Ruling, while APA = Advance Pricing Agreement.

5. Generations of Dutch and other professionals earning a living with Dutch international tax planning

A crude definition of Dutch tax planning: it was - and mostly still is - playing by Dutch and other global players within the described definition of tax planning with the mentioned concepts (the participation exemption, active and passive participations, dividend streams, the Dutch sandwich, the Netherlands-Switzerland alternative, the simple Dutch finance BV, the Dutch finance or treasury centers, interest streams, the licensing or royalty BV, royalty and license fees streams, the cost-plus BV, transfer pricing, innovation boxes, the Stak foundation,⁸ etc.), *to accomplish all of the other elements of a financial plan in the most tax-efficient manner possible*. At least four generations of tax lawyers and notaries and attorneys have been playing with these concepts up till now. They advise on the tax planning aspects together with foreign correspondents, they apply for tax rulings where desirable (APA, ATR and other Rulings) and contact the specialist tax authority to obtain these rulings, they implement the structures, domicile them, manage them, coordinate activities, act as intermediary with other advisers, administrate them, maintain them in good legal standing and close them down correctly when desired. A big difference is that this is now all done under the strict supervision of the Dutch central bank (DNB), under the Act Supervision Trust offices, effective since December 2003.⁹ Another very big difference is that the emphasis has strongly shifted to highly increased *due diligence* and increased *substance*.

6. The overall framework; number of Dutch purpose entities and BFI's

Corrected for the number of inhabitants, The Netherlands in 2008 stood second as far as concerns the establishment of global head offices and fifth where it concerns European head offices. In 2009, The Netherlands belonged to the top 10 of the

⁸ See my article on www.arcanummanagement.com "The Dutch foundation (with emphasis on the Stak foundation and with FAQ)".

⁹ Wet van 17 december 2003, houdende het toezicht op trustkantoren (Wet toezicht trustkantoren).

Fortune Global 500 establishment countries. The reasons for attracting these head offices are the presence of clusters of similar businesses or activities, the desires of the highly educated internationally orientated staff of these companies, the vicinity of Schiphol Airport and the attractive fiscal and legal framework.¹⁰ Think of the instruments I already mentioned and inter alia of the 30 % arrangement for staff¹¹ and of the Flex BV, requiring a symbolical capital of only one EURO and allowing various types of shares, also non voting stock. I give you about 23 other Dutch attraction bullet points:

01. The Netherlands are a high-tech country and the Dutch economy is performing relatively well.
02. In North-western Europe, the Netherlands have fantastic geographical advantages and are very close to London, Paris, Brussels and Frankfurt and Amsterdam is one of the best business locations in Europe.
03. Practically the entire population speaks English as a second language.
04. The Netherlands are a founder member of the EU.
05. The Netherlands are a very stable country with a good legal system.
06. The Netherlands have concluded an extensive network of bilateral double taxation treaties (OECD Model) and bilateral investment protection treaties.¹²
07. The Netherlands exempt dividends received by Dutch BV's and also capital gains realised on the alienation of shares in Dutch BV's are exempt.
08. Due to the extensive network of bilateral tax treaties, the Netherlands enjoy favourable foreign withholding rates on royalties, interest and dividends paid to Dutch BV's.
09. There is no Dutch withholding on interest and royalties paid by Dutch B.V.'s.
10. The patent box.
11. The R & D deduction.
12. There is a wide possibility to obtain advance tax rulings which are concentrated with the Tax Inspectorate at Rotterdam.
13. There are no exchange controls.
14. Rulings avoiding doubt about the correct behaviour and spreads to be earned are inter alia possible for holding, financing, licensing, preparatory and auxiliary or support activities and for intra-group pricing.
15. The corporate income tax is 20 to 25 %.
16. The fiscal unity, allowing intra-group set off of losses and profits and reorganisations without any direct fiscal implications, within a group filing a consolidated tax return.
- 17 Carry forward of losses for nine years. Carry back of losses for one year.
18. Large number of possible deductions and subsidies.

¹⁰ "Uit de schaduw van het bankwezen", SEO Economisch onderzoek, Amsterdam, juni 2013, p. 64.

¹¹ Applying an allowance of 30 % in practice means one is taxed on 70 % of actual earnings, without prejudice to the other possible deductions.

¹² See my article on www.arcanummanagement.com "Dutch double taxation treaties and Dutch bilateral investment protection treaties: a lucky combination indeed".

19. Books can be drawn up in a foreign currency and taxable income can be reported in a foreign currency.
20. Unilateral relief from double taxation if no treaty recourse available, under a Unilateral Relief Decree.
21. A good anti-money laundering system. Little or no corruption.
22. Piercing the corporate veil in case of evident mismanagement of companies.
23. A well educated and well trained army of advisers ready and eager to serve you.

So everything has to be seen in the light of creating a level playing field for Dutch companies – whatever a Dutch company may be nowadays - and in the light of attracting foreign investment to the Netherlands. What are the results of this system in terms of number of Dutch entities attracted? Practically always involved in Dutch tax planning, is the Dutch closed limited liability company, the Dutch BV. But what matters is the - somewhat misleading - overall concept of *doelvennootschap* (*purpose company*). A BV is a purpose company and we distinguish between normal purpose companies and those who are also *BFI's* which is the abbreviation for *bijzondere financiële instellingen* (*special financial institutions*). There were about **23,549** purpose companies in 2012. There are about **12,000** BFI's which means that many purpose companies are not BFI's. ¹³ BFI's are entities with a foreign participant which receive funds from abroad and pass these on to abroad. ¹⁴

7. The Dutch tax ruling concept; ruling subjects and number of rulings

Nationally and internationally operating businesses, individuals and small entrepreneurs are entitled to ask security in advance but within the law and regulations, the case law and fiscal policies, to obtain certainty in advance about the fiscal qualification of intended legal acts. They can agree Advance Pricing Agreements (APA) and Advance Tax Rulings (ATR). The *Algemene Rekenkamer* (*General Accounting Chamber*) researched the APA/ATR practice at the request of the Second Chamber of Parliament. It concluded that the evaluation and handling of requests is taking place carefully and in conformity with the framework. The conditions for making these agreements have been laid down in a clear way. ¹⁵ The present practice originates from 30 March 2001, when, in reaction to pressure from other EU member states, the Dutch Ministry of Finance released eight decisions establishing a new ruling policy. These policy decisions mainly intended to (1) assure that Dutch transfer pricing rulings comply with the OECD transfer pricing guidelines;

¹³ Annual *Instelling Specifieke Informatie (ISI) rapportage* from DNB.

¹⁴ The precise DNB definition is (translated) “businesses or institutions, irrespective of the legal form, which are resident and in which non-residents, directly or indirectly, participate via share capital or otherwise and whose purpose is, or who are occupied in an important measure with, the receiving of means from non-residents and the paying on thereof to non-residents.”

¹⁵ Decree of 3 June 2014, DGB 2014/3098 (APA); Decree of 3 June 2014, DGB 2014/3099 (ATR); Decree of 3 June 2014, DGB 2014/3101 (Service rendering bodies without a real presence); Decree of 3 June 2014, DGB 2014/296M (Advance pricing agreements (APA's); Advance tax rulings (ATR's); Financial service rendering activities; (Intermediate) holdings; Potential foreign investors desk (APBI). Organisation and jurisdiction arrangement). The author just finished an extensive article about the Dutch tax ruling practice.

(2) to avoid that companies with little or no Dutch substance and or incurring little or no risk, obtain financing and royalty rulings and (3) to avoid issuance of rulings which might violate the principle of good faith governing relationships between treaty partners. The European Commission recently investigated the ruling practice in various member states and concluded about the Dutch APA-/ATR-practice as follows: *In particular, the Commission notes that The Netherlands seem to generally proceed with a thorough assessment based on comprehensive information required from the tax payer. The Commission therefore does not expect to encounter systematic irregularities in tax rulings.* The APA-/ATR-practice of The Netherlands therefore is a solid and transparent implementation of the Dutch law and regulations.

The Starbucks case is an individual APA case which does not prejudice this judgment.¹⁶

What can be the subject of a ruling according to the decrees? Think of the participation exemption, dividend tax and anti-abuse measures; compliance with substance requirements; dividend distributions to abroad by Dutch co-ops; questions about permanent establishments; substantial interest (*aanmerkelijk belang*) of a private person in a Dutch company; qualification of a financing arrangement as own capital or as loan; qualification of an entity¹⁷ as transparent or not; the correct application of the arm's length principle in connection with distribution, production, intellectual property and think of transfer pricing.

The number of rulings issued or rather agreed, is as follows in the period 2010-2014: total ATR's agreed: 2,101 and total APA's agreed 1,131, **grand total rulings agreed 3,232**. This is no small number. Rejected were 334 ATR's and 217 APA's, grand total rejected 551. Withdrawn were 198 ATR's and 128 APA's, grand total withdrawn 326. The ATR rulings agreed mainly had to do with a) participation exemption; b) foreign tax duty; c) hybrid legal forms; d) hybrid loans and e) negative permanent establishments, etc.

8. Financial aspects of Dutch BFI's; contribution to the Dutch economy

The balance sheet total of the Dutch BFI's in 2010 was **EUR 2,900 billion**. Dividends are the most important *derived money streams (afgeleide geldstromen)*. In 2010, Dutch BFI's received **EUR 107 billion of dividend** from foreign subsidiaries. This is almost double the EUR 56 billion of 2006. In 2010, the pay-out to the foreign shareholders of these BFI's was EUR 76 billion. Incoming interest was **EUR 24 billion** and outgoing interest was EUR 13 billion. Incoming royalties were **EUR 16 billion** and outgoing royalties were EUR 14 billion. Interest paid to external third parties is substantial compared to interest paid intra group.¹⁸ It goes too far to deal

¹⁶ FD 07 November 2014: "Niets mis met fiscale regelgeving".

¹⁷ Besluit kwalificatie buitenlandse samenwerkingsverbanden

¹⁸ See for further details and explanations "Uit de schaduw van het bankwezen", SEO Economisch onderzoek, Amsterdam, juni 2013, pp. 72 - 75.

with this in more detail here, but it suffices to give you an impression of the magnitude of things we are dealing with here.

What is the contribution of this sector to the Dutch economy? BFI's contribute for about **EUR 3 to 4 billion annually** to the Dutch economy in the form of taxes, wage costs and services bought from local service providers. They provide direct and indirect employment to appr. **8,800 to 13,000 full time employees**. The total tax paid by BFI's in 2011 amounts to appr. **EUR 2,3 billion**. The total fees paid for services rendered and general costs in 2011 was appr. **EUR 400 to 600 million**. There are also indirect streams of turnover for third parties like the airlines, the airports, the hotel and restaurant business, etc. There are also numerous favourable side effects.

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PART B. WORLD WIDE EFFORTS TO CHANGE THE INTERNATIONAL FISCAL BATTLE FIELD

9. World wide efforts to change the international fiscal battle field

It is no wonder that The Netherlands wants to maintain this system. But there are world wide efforts going on to change the international fiscal field. The main roles are played by the US, with FATCA, the United Nations, the G 20, the Financial Action Task Force (FATF), the OECD, with Gatca, particularly with the automatic exchange of bank data and BEPS and by the EU.

10. The Convention on Mutual Administrative Assistance in Tax Matters

It was developed jointly by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010. The Convention is the most comprehensive multilateral instrument available for all forms of tax cooperation to tackle tax evasion and avoidance, a top priority for all countries. The Convention was amended to respond to the call of the G20 at its April 2009 London Summit to align it to the international standard on exchange of information on request and to open it to all countries, in particular to ensure that developing countries could benefit from the new more transparent environment. The amended Convention was opened for signature on 1st June 2011. Given the Convention provides the ideal instrument to swiftly implement automatic exchange, Competent Authorities from 51 jurisdictions have signed a multilateral agreement under Article 6 of the Convention, which provides for the automatic exchange of information. The competent authority agreement implements the Standard for automatic exchange, specifying the details of what information will be exchanged and when. While the agreement is multilateral, the actual exchanges are bilateral.²⁰

¹⁹ Ibidem, pp. 111-121.

²⁰ From OECD, www.oecd.org

11. The Action Plan on Base Erosion and Profit Shifting (BEPS)

As far as BEPS is concerned:

9/07/2013 - National tax laws have not kept pace with the globalisation of corporations and the digital economy, leaving gaps that can be exploited by multinational corporations to artificially reduce their taxes.

The OECD's Action Plan on Base Erosion and Profit Shifting (BEPS) offers a global roadmap that will allow governments to collect the tax revenue they need to serve their citizens. It also gives businesses the certainty they need to invest and grow. Produced at the request of the G20 and introduced at the G20 Finance Ministers' meeting in Moscow, the Action Plan identifies 15 specific actions that will give governments the domestic and international instruments to prevent corporations from paying little or no taxes. "This Action Plan, which we will roll out over the coming two years, marks a turning point in the history of international tax co-operation. It will allow countries to draw up the co-ordinated, comprehensive and transparent standards they need to prevent BEPS," said OECD Secretary-General Angel Gurría. "International tax rules, many of them dating from the 1920s, ensure that businesses don't pay taxes in two countries – double taxation. This is laudable, but unfortunately these rules are now being abused to permit double non-taxation. The Action Plan aims to remedy this, so multinationals also pay their fair share of taxes."

The Action Plan recognises the importance of addressing the digital economy, which offers a borderless world of products and services that too often do not fall within the tax regime of any specific country, leaving loopholes that allow profits to go untaxed.

The Action Plan will develop a new set of standards to prevent double non-taxation. Closer international co-operation will close gaps that, on paper, allow income to 'disappear' for tax purposes by using multiple deductions for the same expense and "treaty-shopping". Stronger rules on controlled foreign companies would allow countries to tax profits stashed in offshore subsidiaries.

Domestic and international tax rules should relate to both income and the economic activity that generates it. Existing tax treaty and transfer pricing rules can, in some cases, facilitate the separation of taxable profits from the value-creating activities that generate them. The Action Plan will restore the intended effects of these standards by aligning tax with substance – ensuring that taxable profits cannot be artificially shifted, through the transfer of intangibles (eg patents or copyrights), risks or capital, away from countries where the value is created.

Greater transparency and improved data are needed to evaluate, and stop, the growing disconnect between the location where financial assets are created and investments take place and where MNEs report profits for tax purposes. Requiring taxpayers to report their aggressive tax planning arrangements and rules about transfer pricing documentation, breaking-down the information on a country-by-

country basis, will help governments identify risk areas and focus their audit strategies. And making dispute resolution mechanisms more effective will provide businesses with greater certainty and predictability.

The actions outlined in the plan will be delivered in the coming 18 to 24 months by the joint OECD/G20 BEPS Project, which involves all OECD members and G20 countries on an equal footing. To ensure that the actions can be implemented quickly, a multilateral instrument will also be developed for interested countries to amend their existing network of bilateral treaties. ²¹

Keep in mind abbreviations such as the **AEOI** of 15 July 2014, Global Standard for automatic exchange of information, going live in 2016, the **CAA**, Competent authority Agreement and the **CRS**, Common Reporting Standard.

The OECD has subsequently undertaken a review and identified 15 actions that need to be considered to meet the objectives of the mandate. This review is ongoing, and over the next year will be reported on further. The main thrust of the debate revolves around substance of transactions, permanent establishment and treaty abuse. The OECD areas of review will have a fundamental impact on corporate management and tax advice for international businesses and for society as a whole.

Most low tax jurisdictions have submitted freely to the common reporting principle, all be it, on occasion, to achieve a reporting standard. An area that will be highlighted and actioned will be the onshore jurisdictions that are currently ignoring reporting on tax structures: Delaware, Panama, etc. The OECD has been given an open brief to review this matter and it will be interesting to see if, as a side effect, any problems are also created for some of the G20 countries. ²²

A working party of the OECD, Working Party 11 (*Aggressive Tax Planning*), is working in relation to four of the items under the BEPS Action Plan. These are:

- Action 2, on Neutralising the Effects of Hybrid Mismatch Arrangements;
- Action 3, on Strengthening CFC rules;
- Action 4, on Limiting Base Erosion via Interest Deductions and Other Financial Payments;
- Action 12, on Requiring Taxpayers to Disclose their Aggressive Tax Planning Arrangements.

The report on Action 2 was published in September 2014 and the reports on Actions 3, 4 and 12 are due to be published in September 2015.

²¹ Ibidem.

²² Dixcart Newsletter, March 2015.

12. EU Actions; the Beneficiary Register and the Tax Transparency Package

The EU adapted the Parent Subsidiary Directive in July 2014,²³ particularly to counter abuse by hybrid loans and recently concentrated on illegal state aid²⁴ and thoroughly investigated the Lux Leaks pages on situations which might be qualified as illegal state aid. The Luxembourg ruling practice came under attack. The EU also came up with the Entity register. In the Financial Action Task Force (FATF) global agreements have been made against money laundering and finance of terrorism.²⁵ The agreements have been laid down in a standard to which the member states have to comply. The Netherlands is a member state. The European Union adopted the FATF-recommendations. It is expected that early 2016 the new Fourth anti-money laundering regulation²⁶ will be applicable. One of the points which draw the attention is Chapter III, "Beneficial Ownership Information", which contains the following article.

Article 29

1. Member States shall ensure that corporate or legal entities established within their territory obtain and hold adequate, accurate and current information on their beneficial ownership.

2. Member States shall ensure that the information referred to in paragraph 1 of this Article can be accessed in a timely manner by competent authorities and by obliged entities.

The above provisions imply an obligatory registration of shareholders / ultimate beneficial owners, with an interest of 25% or more.²⁷ In The Netherlands a bill to amend the applicable law is already pending and the Dutch Minister of Justice has opened an *internet consultation*²⁸ to take notice of the reactions of the people. This consultation will end on 05 March 2015. The bill still has to be adopted by both chambers of the Dutch Parliament. It should be effective 2017. The (draft) bill mentions it has been decided there will be a central ultimate beneficiaries register. This would be a change from the so-called *intermediary option* to the *up*

²³ Directive 2014/86/EU, of 08 July 2014. Should be implemented latest 31 December 2015.

²⁴ Apple, Amazon, Starbucks cases, etc.

²⁵ "International standards on combating money laundering and the financing of terrorism & proliferation", February 2012, www.fatf-gafi.org.

²⁶ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, Strasbourg, 5.2.2013 COM(2013) 45 final 2013/0025 (COD).

²⁷ The new definition of a *UBO* (Ultimate Beneficial Owner) might in future read as follows: the natural person (persons) who is (are) the ultimate owners of or has (have) the say over the client and /or the natural person or persons for whose account a transaction or activity is performed. This is at least the case where someone has 25 % or more from the proceeds of a legal person or has this percentage of say.

²⁸ <http://www.internetconsultatie.nl/handelsregister>

frontoption.²⁹ Also, the bill mentions that that part of the register containing specific data about registered shares and shareholders, usu-fructuaries and holders of a pledge on registered shares, will be strictly limited to *authorized parties*. The entities involved are BV companies and other entities not registered on the stock exchange. Who these authorized parties will be and what requirements they have to meet, will be decided later through a decree. Earlier, the Dutch Government mentioned that these parties will at least be the Dutch Tax authorities, the Dutch national security agencies, the Dutch Special crime research agency, the Police, the public prosecutor and the Dutch civil law notaries. It is still unclear which data are going to be exposed. The press mentioned this will concern names, birth month and year, nationality and country of residence. According to the press, Dutch business families want to protect themselves. They see the registration as a threat to their privacy and their personal safety when the registration is mentioned in a public register. In combination with the public accessibility of the annual accounts of the entities concerned, outsiders (including criminals) can easily calculate the value of an individual shareholder. Only children younger than 18 years having an interest of 25% or more, will be exempt from exposure in the register. Of course, various thoughts have been made to avoid exposure. The first option is to spread the interest in such way that it never reaches 25%. For family shareholders this will mean a loss of connection with the company which may cause financing troubles. Another option is to re-route dividend payments into the company in the form of a loan. The third option mentioned is to change the company to non-EU resident company, but that will not solve the problem.³⁰

On 18 March 2015, a Tax Transparency Package was introduced by the EU.

European Commission - Press release

Combatting corporate tax avoidance: Commission presents Tax Transparency Package

Brussels, 18 March 2015

The European Commission today presented a package of tax transparency measures as part of its ambitious agenda to tackle corporate tax avoidance and harmful tax competition in the EU. A key element of this Tax Transparency Package is a proposal to introduce the automatic exchange of information between Member States on their tax rulings.

²⁹ On the basis of the Edwards Report 1998, the KPMG report 2000 and the OECD report "Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes" (OECD May 2001), the Dutch Wet Toezicht Trustkantoren, the Wtt (Act on Supervision of Trust Offices) opted for the intermediary system.

³⁰ Jordans, International Focus Newsletter, March 2015.

Corporate tax avoidance is thought to deprive EU Member States' public budgets of billions of euros a year. It also undermines fair burden-sharing among tax-payers and fair competition between businesses. Companies rely on the complexity of tax rules and the lack of cooperation between Member States to shift profits and minimise their taxes. Therefore, boosting transparency and cooperation is vital in the battle against aggressive tax planning and abusive tax practices.

Today's Tax Transparency Package aims to ensure that Member States are equipped with the information they need to protect their tax bases and effectively target companies that try to escape paying their fair share of taxes.

"Everyone has to pay their fair share of tax. This applies to multinationals as to everyone else. With today's proposal on the automatic exchange of information, tax authorities would be able to better identify loopholes or duplication of tax between Member States. In the coming months, we will put forward concrete actions to tackle such loopholes or overlaps. We are committed to following up on our promises with real, credible and fair action," said Vice-President Valdis Dombrovskis, responsible for the Euro and Social Dialogue.

Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs, said: *"Tolerance has reached rock-bottom for companies that avoid paying their fair share of taxes, and for the regimes that enable them to do this. We have to rebuild the link between where companies really make their profits and where they are taxed. To do this, Member States need to open up and work together. That is what today's Tax Transparency Package aims to achieve."*

Transparency on Tax Rulings

The central component of today's Transparency Package is a legislative proposal to improve cooperation between Member States in terms on their cross-border tax rulings and it aims to mark the start of a new era of transparency.

Currently, Member States share very little information with one another about their tax rulings. It is at the discretion of the Member State to decide whether a tax ruling might be relevant to another EU country. As a result, Member States are often unaware of cross-border tax rulings issued elsewhere in the EU which may impact their own tax bases. The lack of transparency on tax rulings is being exploited by certain companies in order to artificially reduce their tax contribution.

To redress this situation, the Commission proposes to remove this margin for discretion and interpretation. Member States will now be required to automatically exchange information on their tax rulings. The Commission proposes to set a strict timeline: every three months, national tax authorities will have to send a short report to all other Member States on all cross-border tax rulings that they have issued. Member States will then be able to ask for more detailed information on a particular ruling.

The automatic exchange of information on tax rulings will enable Member States to detect certain abusive tax practices by companies and take the necessary action in response. Moreover, it should also encourage healthier competition, as tax authorities will be less likely to offer selective tax treatment to companies once this is open to scrutiny by their peers.

Other Tax Transparency initiatives

Today's Package also contains a communication outlining a number of other initiatives to advance the tax transparency agenda in the EU. These are:

- **Assessing possible new transparency requirements for multinationals**

The Commission will examine the feasibility of new transparency requirements for companies, such as the public disclosure of certain tax information by multinationals. The objectives, benefits and risks of any such initiative need to be carefully considered. Therefore, the Commission will assess the impact of possible additional transparency requirements to help inform a decision at a later stage.

- **Reviewing the Code of Conduct on Business Taxation**

The Code of Conduct on Business Taxation is one of the EU's main tools for ensuring fair corporate tax competition. It sets out the criteria that determine whether a tax regime is harmful or not and it requires Member States to abolish any harmful tax measures that go against the Code. Member States meet regularly to assess their compliance with the Code. But over the past years, the Code has become less effective in addressing harmful tax regimes as its criteria do not take into account more sophisticated corporate tax avoidance schemes. The Commission will therefore work with Member States to review the Code of Conduct as well as the mandate of the Code of Conduct Group in order to make it more effective in ensuring fair and transparent tax competition within the EU.

- **Quantifying the scale of tax evasion and avoidance**

The Commission, along with Eurostat, will work with Member States to see how a reliable estimate of the level of tax evasion and avoidance can be reached. There is growing evidence that evasion and avoidance are pervasive and cause significant revenue losses. However, a precise quantification of the scale and impact of these problems has not been determined up to now. Reliable statistics of the scale and impact of these problems would help to better target policy measures against them.

- **Repealing the Savings Tax Directive**

The Commission is proposing to repeal the Savings Tax Directive, as this text has since been overtaken by more ambitious EU legislation, which requires the widest scope of automatic information exchange on financial accounts, including savings related income (IP/13/530). Repealing the Saving Tax Directive will create a streamlined framework for the automatic exchange of financial information and will prevent any legal uncertainty or extra administration for tax authorities and businesses.

Next Steps

The two legislative proposals of this package will be submitted to the European Parliament for consultation and to the Council for adoption. Member States should agree on the Tax Rulings proposal by the end of 2015, so that it can enter into force on 1 January 2016. Given that the European Council in December 2014 called on the Commission to make this proposal, full political commitment on reaching a timely agreement should be expected.

The next milestone will be an Action Plan on Corporate Taxation which will be presented before the summer. This second Action Plan will focus on measures to make corporate taxation fairer and more efficient within the Single Market, including a re-launch of the Common Consolidated Corporate Tax Base (CCCTB) and ideas for integrating new OECD/G20 actions to combat base erosion and profit shifting (BEPS) at EU level.

More information

The Communication

The Proposal on automatic exchange of information

Memo/15/4609

Website

IP/15/4610

General public inquiries:

Europe Direct by phone 00 800 67 89 10 11 or by email

13. Other Dutch implementation of OECD and EU action points and own Dutch initiatives

As far as the Dutch are concerned, the following other OECD and EU action points are important.³¹

³¹ Letter of the Dutch Ministry of Finance to the Second Chamber of Parliament of 02 February 2015.

1. OESO/BEPS: Action point 5, Revival of the Forum on Harmful Tax Practices, which aims at improving transparency in connection with preferential regimes. In this framework it was decided that states should spontaneously exchange rulings concerning preferential regimes. So far *innovation boxes* have been indicated as preferential regimes. In a letter of 01 December 2014, the Dutch cabinet already announced to start exchanging information about rulings with other states. A pilot project was already started with Germany.
2. OESO/BEPS: Action point 13, Country by Country-reporting. In this framework a template has been developed on which basis multinationals will annually report by country about their profits and tax contributions. In this framework, one is also working on making APA's understandable to other tax authorities.
3. EU: Model instruction for the spontaneous exchange of rulings and unilateral APA's. The Committee on Administrative Cooperation for Taxation (CACT) and the EU joint Transfer Pricing Forum, by assignment from the EU Code of Conduct Group (Code of Conduct for business taxation), drew up a model instruction with regard to the spontaneous exchange of information about ATR's and unilateral APA's.
4. EU: Code of Conduct documentation obligations. In 2006 the EU Joint Transfer Pricing Forum developed a code of conduct for transfer pricing documentation in which was taken up a documentation obligation for transfer pricing. Multinationals can supply a master file with a list of APA's affecting member states. The Netherlands have implemented this code of conduct in the *Settlement price decree (Verrekenprijbesluit)*.³²
5. EU: Directive proposition for the automatic compulsory exchange of information about cross border rulings, announced in the working program of the European Commission for 2015.
6. EU: the European Commission is considering rules for the contents of rulings and for the procedure in granting tax rulings. The idea is to force the EU states to an automatic regular exchange of tax rulings in a standardised way, with copy to the European Commission, or in case of suspicions of losing taxes, in an extensive way.³³

³² Besluit IFZ 2013-184M (Stcrt. 2013, 32854), para 14.

³³ Proposal launched by Euro Commissioner Pierre Moscovici, of Wednesday 18 March 2015.

PART C. EFFECTS OF THE MEASURES ON DUTCH INTERNATIONAL TAX PLANNING

14. Effects of the measures on Dutch international tax planning

So far I have explained to you the main lines of the development and the present practice of Dutch international tax planning. I have given you the motives for the Dutch system, i.e. creating a level playing field for Dutch companies in the world but mainly to attract foreign investment to the BV Netherlands. I have given you an insight into the importance of this system for the Dutch economy. I have given you a summary of the main actions carried out by the US and various supranational institutions to change the international fiscal battle field. I now proceed to discussing the influence of these actions. But first I want to say something on competition between states.

15. Competition between states

Obviously there is a big tension between the legitimate desire of a sovereign state to attract foreign investment and the desire of other states to have a level playing field in connection therewith. But one may wonder why competition between states would not be a sound idea. For example, the success of the Swiss economy is often said to be based on strong internal competition to attract investment between each of the 26 individual Swiss cantons, which each are fiscally sovereign individual states. This competition has led to lean and efficient cantonal public administrations. But it seems that under EU and other pressure not only bank secrecy became abolished but also the traditional well oiled system of holding, domicile and mixed companies will be replaced in the whole of Switzerland by one uniform low rate of taxation for all companies.³⁴ This may have an adverse effect on the internal competition between the 26 Swiss cantons with all negative consequences thereof. Increased government spending, increased bureaucracy, increased deficits and state debts.

It is also not directly comprehensible why for example European states should not be competing with each other. Competition is sound and very human. It cannot be suppressed. The concept of unfair competition is also rather vague. We probably find guidelines in WTO and other treaties. At any rate Europe is competing with the US and with Japan and a currency war seems to be going on right now between the USD, the Yen and the EURO. Also China is not resting on its laurels. It was for example recently announced that the concept of free trade zones will be expanded. *Following the constant development of the Shanghai Free-Trade Zone (FTZ), the barriers for investing in companies have once again been lowered, as reforms aiming to encourage further foreign investment continue. A typical example is removing the entry restrictions for e-commerce companies, whereby allowing foreign investors to*

³⁴ Unternehmenssteuerreform III.

provide call centre, domestic multi-party communication and internet access services.³⁵

16. The measures not yet clear, finalised or effective

We have to take into account all measures taken or proposed are not yet clear and finalised or effective. We have to take into account that it is not at all easy to close all loop holes, let alone globally. There still is a large number of states who have not (yet) acceded to the *Convention on Mutual Administrative Assistance in Tax Matters*. But apparently it is an ongoing process, like globalisation. You cannot stop it easily, if you would want to stop it. The EU Parliament and also most national parliaments seem intent on pushing things through. On 10 March 2015, the Dutch Second Chamber of Parliament accepted a motion the government should strive to within the EU framework introduce a harmonised base for the levy of profit tax on businesses. They believe that the possibilities to avoid paying corporate tax, will thereby diminish.³⁶

17. Lacking democratic national control no hindrance

The lacking democratic national control of all these measures or the strong human rights doctrine and treaties seem to make no difference for the acceptance by governments of these measures which are another massive invasion on peoples' privacy.. Sure, there are internet consultations. But there are no referendums. And even when there is a referendum once in a while, the outcome is not binding. Let alone if the governments believe that the population would be able to understand what is going on and make a rational choice. President François Hollande referred to the *sens dents* (*toothless*). You let them vote but you decide and think for them. The loud minority of the population also seems to have been indoctrinated³⁷ and nowadays almost all seem to be possessed by a *Robin Hood* or *Piketty* complex. The general attitude is that (translated): *The Netherlands obviously apply different rules for billion dollar companies than for normal citizens. Multinationals may freely break the law in The Netherlands and pay little or no tax. Bankers are saved with tax money in the event they mess up things, or make a settlement if they violate the rules.*³⁸ But these modern Robin Hoods obviously have understood they do best not to rob the rich and fight the sheriff, but to join the sheriff and together rob the rich.³⁹ The OECD recently concluded that the percentage of tax paid by residents of prosperous industrial countries has never been

³⁵ Vistra News, March 2015.

³⁶ Plenair debat, 10 March 2015, 25087.

³⁷ For example, see Koen Caminada, Kees Goudszwaard, Marike Knoeff, "Belasting aan de top: geen spoor van groeiende ongelijkheid", *Me judice*, 14 maart 2015 (Taxation at the top: no trace of growing inequality). Also published in FD 15 March 2015 under "Leyden economists see no growing inequality".

³⁸ Het Financieele Dagblad ("FD"), Friday 13 March 2015, reader opinion, Ruud Zandvliet.

³⁹ Tito Tettamanti, "I dati bancari e i moderni Robin Hood", *Il Commento*, Corriere del Ticino 20 febbraio 2015, p. 1.

higher than in the last six years. The OECD shows that governments have used taxation to remedy shortages arisen in the wake of the financial crisis.⁴⁰

18. Effects of the measures on the various players

So what will the effects of all these actions and measures be and on whom? There is already a big impact on the most important players, i.e. sovereign states who exploit or basically are offshore centers. Some have a lot less business, like Liechtenstein, or a lot less business from Europe, like Switzerland. Others, like Dubai, are not hurt by them at all and are doing very well. We know the effects on banks, which are increasing costs, going out of business or consolidating. But looking ahead at the future of Dutch international tax planning is not the same as looking ahead at the future of international tax planning generally. The first subject to be discussed in the framework of the future of Dutch international tax planning is the impact on the ruling system of the *BV Netherlands* itself. In this context, I remark that the non-purely tax benefits the Netherlands have to offer, will probably remain, also in the long term. But nothing is certain. Think for example of continued mass immigration and of increased terrorism. Secondly, I remark that the Dutch Under Minister for Finance, in his nine pages letter of 02 February 2015 to the Second Chamber, confirmed that the Dutch ruling practice is sound and very useful for an attractive Dutch investment climate. He admitted confidential democratic control by Parliament on the ruling system should be possible. Then he took a flight ahead in that he said The Netherlands wanted to fulfil a pioneering role in providing information on rulings issued to other states. Obviously this was a prudent decision in view of the recent move of the EU in presenting the earlier mentioned Tax Transparency Package. He will take further flights ahead. The Dutch ruling system will however obviously remain in place and it is not the first time that it was attacked. Smaller states who have their long developed specific systems, like The Netherlands, Belgium, Luxembourg, etc., see these ruling systems under attack, but are not really willing to give these up. There is also a communicating vessel effect here, like Dutch companies using Belgian PvbA's. There may be alterations though.⁴¹

What about the other Dutch international tax planning instruments mentioned, such as the participation exemption, the finance BV, the licensing BV, transfer pricing, innovation boxes, the Stak foundation, etc.? The effective use of these instruments increasingly depends on the right substance (except with the simple Stak which is transparent) with which the various entities are endowed and on the substance of transactions undertaken. I foresee no great changes here except if it would become

⁴⁰ FD 09 December 2014, "Belastingen in Oeso-landen stijgen".

⁴¹ EU Commissioner Margrethe Vestager, of Competition, predecessor Joaquin Almunia, is investigating Luxembourg (Luxleaks: Fiat and Amazon), Ireland (Apple) and the Netherlands (Starbucks) and is now also looking at Belgium, FD 04 februari 2015: "Europese Commissie neemt nu ook Belgische tax rulings op de korrel".

compulsory internationally to raise the percentage of dividend withholding taxes or to introduce a Dutch interest or royalty withholding tax.

What is the effect of the measures on big and small corporate clients and their providers? There will probably be a big impact on corporate clients such as multinationals, SME's and on their management, on their advisers and their service providers. Aggressive tax planning is out. Substance based transactions are in. Clients wanting to outsource services to another jurisdiction, will have to consider a number of valid commercial reasons before dealing with tax efficiency. Corporate clients need operational business solutions and managed office support through business centres. There is an increased move to combine company administration with providing business support, advisory and facilitator services. Not every service provider is able to do that but the future of international administration is real substance. Traditional offshore directors will have to act in a more commercial manner. Due diligence and resolutions need to always document the plausible commercial reasons why a low tax jurisdiction location is preferred. The documenting and ongoing cost benefit analysis will need to be constantly reviewed. Clients will need service providers who understand these issues, who can provide a solution for substance requirements and who can provide qualified directors.⁴² One thing seems for sure. The formation and annual costs will go up everywhere, more or less in line with the FATCA cost effects. So the irony is that Dutch international tax planning will become more expensive, but also less prone to successful attacks.

There will be a big impact on private clients, such as *HNWI's*, *Very HNWI's*, *Ultra HNWI's*⁴³ and their families and their advisers and service providers. Their privacy is gone through the *Convention on Mutual Administrative Assistance in Tax Matters* and the introduction of a *Beneficiary register*. The consequence may well be an increase in the emigration of Dutch HNWI's, super HNWI's and Ultra HNWI's, to well connected and mundane offshore centers, such as Dubai, or Monaco, or states with a remittance base system, if they will be able to maintain this system. Not that that will help much, but due to the measures there will probably be an ongoing internationalisation, also of wealthy families. That is not good for the Dutch economy and society in the long run. There may also well be an increased impetus to achieve a change of citizenship, which we have already seen in the case of US nationals resident outside the US.

In recent years the heightened Government reporting expectations around the world have increased the need for transparency and the flow of information from jurisdictions. This is largely as a result of the openness of information required under tax information exchange agreements, double tax agreements and the EU Savings

⁴² With thanks to Dixcart, March 2015.

⁴³ HNWI: more than USD 1 million; Very HNWI: at least USD 5 million; Ultra HNWI: more than USD 20 million.

Tax Directive, as well as the increased reporting obligations demanded from qualified intermediaries. The historic acceptance by some that banking secrecy and a less than complete regard for tax compliance in the home country of an individual were acceptable in achieving tax savings has rapidly been brought to an end.

The changes and pressures that remain are generating an increasing need for international tax structuring advice. An element of tax competition between countries will always exist and should always exist, to secure national investment and local taxable activity from both corporations and individuals. Opportunities to enhance tax efficiencies will therefore remain available.⁴⁴

19. Predictions

In the Dutch Financial Times⁴⁵ of Friday 13 March 2015 it was reported that Klaas Knot, President of the Dutch Central bank said that The Netherlands and other Eurozone states should help each other out in times of economic trouble. The Euro states should give up even more powers to Brussels (translated): *In the event there would be a recession in Greece again, we would indeed contribute to Greek unemployment grants. And vice versa.* The European Commission according to Mr Knot should have its own tax domain. The trend will go on. We have to remember the central power of the state historically grew in tandem with population growth and technical advances. Population growth is abundant. Technical advances have been and are enormous. When the world economy is low and the inflow of tax money decreases and money is lacking to continue playing the devastating Santa Claus games which have been going on already way too long and states spend more and more and call spending less quickly saving, the motto is bound to remain *grab what you can*. Terrorism and money laundering accusations are also a handy excuse for controlling everybody and terrorism will increase. In late medieval Spain even custom offenses were prosecuted under the Spanish inquisition trial rules. It seems to be an inexorable development. What the outcome will be in the long run is hard to predict but I expect the future to be gloomy. I refer to George Orwell's 1984 and Aldous Huxley's Brave New World, with its eight controllers and with Schopenhauer, I am saying: *Das schlimmste wird noch kommen. (The worst is yet to come).*

Amsterdam, 9 June 2015

⁴⁴ Ibidem.

⁴⁵ Het Financieele Dagblad, Amsterdam.