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## **The Adoption of the BEPS in the Netherlands**

Mosquera Valderrama, I.J.; Sadiq, K.; Sawyer, A.; McCredie, B.

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## THE ADOPTION OF THE BEPS IN THE NETHERLANDS

*Irma Johanna Mosquera Valderrama<sup>1</sup>*

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## 1. Short introduction to your country

The Netherlands is a sovereign state and constitutional monarchy with a population of approximately 17,100 million people. The Netherlands is a developed country, member of the OECD and of the European Union (“EU”), but not of the G20.<sup>2</sup> It is also a capital export country with an open economy and the 9<sup>th</sup> largest export economy in the world, ranked 55 from the 94 Financial complexity Index ranking<sup>3</sup> and 32 from 190 in the World Bank Ease of Doing Business ranking.<sup>4</sup>

The tax system in the Netherlands has specific tax features that have contributed to its attractiveness to investors. Among these features<sup>5</sup> are advanced rulings to provide certainty<sup>6</sup>, extensive tax treaty network<sup>7</sup>, no statutory withholding tax on outgoing interest and royalty payments<sup>8</sup>, and participation exemption. Due to these features, the Netherlands has been also regarded as an attractive location to locate holding companies and to structure international transactions worldwide.

These features have resulted in several civil society reports<sup>9</sup> and parliamentary discussions<sup>10</sup>

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<sup>2</sup> The European Union is a member of the G20, and therefore, the Netherlands in principle participates in the G20 but not as member on its own. Unlike Germany and France which are members of the European Union and of the G20.

<sup>3</sup> The Financial Complexity Index 2017 TMF Group. <http://www.tmud.org.tr/Files/Arsiv/FinansalRaporlama.pdf>

<sup>4</sup> Doing Business Guide 2018. A World Bank Group flagship report.

<http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf>

<sup>5</sup> Another feature that will not be discussed is the Fiscal Unity Regime providing tax consolidation for Dutch activities within a corporate group. This Regime is currently under review following two recent judgments of the CJEU since some of the features of the Regime have been regarded by the CJEU as contrary to the freedom of establishment. Judgment of 22 February 2018, C-398/16 and C-399/16

<sup>6</sup> Rulings are written statements, issued to a taxpayer by tax authorities, that interprets and applies the tax law to a specific set of facts. The OECD Glossary available at <http://www.oecd.org/ctp/glossaryoftaxterms.htm>  
These rulings can be advanced tax rulings (to seek clarity in the application of tax law) or advanced pricing agreements (to seek clarity on the use of an appropriate transfer pricing methodology).

<sup>7</sup> The Netherlands has 92 treaties which apply to 94 jurisdictions since “the Netherlands still continues to apply the 1986 treaty with the former USSR to Tajikistan and the 1982 treaty with former Yugoslavia to Bosnia and Herzegovina, Montenegro and Serbia”. Only 2 tax treaties are not yet in force i.e. tax treaty with Kenya and tax treaty with Malawi. Peer review action 14, footnote 1 and 2 at 14.

<sup>8</sup> As of 2018, the 0% withholding tax rate is only applicable if the payment of royalty of interest is not made to a tax haven.

<sup>9</sup> See for instance the 2006 and 2013 reports elaborated by SOMO (Centre for Research on Multinational Corporations). The 2006 Report addressed the Netherlands as tax haven <https://www.somo.nl/nl/the-netherlands-a-tax-haven/>. The 2013 report analyze the question: Should the Netherlands sign tax treaties with developing countries? <https://www.somo.nl/wp-content/uploads/2013/06/Should-the-Netherlands-sign-tax-treaties-with-developing-countries.pdf>

<sup>10</sup> Documents of the Second Chamber of Parliament, 2017-2018, no. 794. In these documents, the State Secretary of Finance replied to some questions from the member of the Second Chamber regarding the news articles (the Guardian UK, and the NOS Dutch news) on the role of the Netherlands in treaty shopping. <https://www.theguardian.com/world/2017/jul/25/netherlands-and-uk-are-biggest-channels-for-corporate-tax-avoidance> and <https://nos.nl/artikel/2206095-nederland-ligt-nog-altijd-dwars-bij-eu-aanpak->

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where the role of the Netherlands in tax avoidance has been addressed. Therefore, the Dutch government has introduced some changes to their domestic and international tax policy. One of these changes was the decision in 2013 of the Dutch Government to introduce treaty abuse provisions in tax treaties with at least 23<sup>11</sup> countries including some African and some Eastern European countries.<sup>12</sup>

More recently, in 2018 (February), the State Secretary of Finance published two Policy Letters one to introduce the Tax Policy Agenda and the another one to introduce measures to tackle tax avoidance and tax evasion.<sup>13</sup> The Dutch government has proposed in the Tax Policy Agenda several measures to counteract tax avoidance including the adoption of the EU Anti-Adoption Tax Directives, and the further enhancement of transparency including exchange of information. The Dutch government states the priority of the government to tackle tax evasion and tax avoidance and to ensure that the “Netherlands’ image as a country that makes it easy for multinationals to avoid taxation”<sup>14</sup> is overturn by appropriate measures. However, to keep the Netherlands attractive for companies, the Dutch government has proposed to the Second Chamber (Legislative) several measures that will benefit companies in general. The first one is the elimination of the Dutch dividend withholding tax and the second one is the reduction of corporate income tax (currently 20-25%<sup>15</sup>). As of April 2018, these measures are still under discussion.

Another discussion that has been also initiated by civil society is the use of the letter box companies located in the Netherlands.<sup>16</sup> These letter box companies benefit from the ruling practice in the Netherlands and are also used for treaty shopping. Following the discussions in the Second Chamber<sup>17</sup>, the Dutch government has stated in the Tax Policy Agenda that substance requirements to apply for a ruling will be introduced for letter box companies. The Dutch government has also decided to introduce a withholding tax for dividend, interest and royalties paid to low tax jurisdictions (see further section 7 below).

## **2. What has been the response of your government to the G20/OECD BEPS program of tax reform?**

The Netherlands has committed to the BEPS Project since its origins. In addition, as a member of

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[belastingontwikking.html](#)

<sup>11</sup> Some of these treaties have been signed but are not yet in force or other treaties are still in the process of negotiation. These 23 countries have been also included in the BEPS MLI. See Section 2. below.

<sup>12</sup> Letter from the Minister for Foreign Trade and Development Cooperation and the State Secretary of Finance of 30 August 2013 to the Second Chamber. Documents of the Second Chamber 2012-2013 25087 nr. 60..

<sup>13</sup> Available at <https://www.government.nl/topics/tax-avoidance/documents/policy-notes/2018/02/27/policy-letter-on-tackling-tax-avoidance-and-tax-evasion>

<sup>14</sup> See Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018. P. 2. See also Documents of the Second Chamber of Parliament, 2017-2018, 32140, no. 33 at 5.

<sup>15</sup> As of 2019 to be progressively reduced until 2021 where it will be 16-21%. *Herziening Belastingstelsel. Brief van de Staassecretaris vna Financien naar de Twede Kamer*. Documents of the Second Chamber of Parliament, 2017-2018, no. 32140 at 11.

<sup>16</sup> Letter box companies are companies without any substance. The 2015 report from SOMO (Centre for Research on Multinational Corporations) addressed the tax avoidance in Greece by using letter box companies in the Netherlands. How Canadian firm Eldorado Gold destroys the Greek environment and dodges tax through Dutch mailbox companies. <https://www.somo.nl/wp-content/uploads/2015/03/Fools-Gold-Eldorado-Gold.pdf>

<sup>17</sup> For instance, in the parliamentary discussion of the Paradise papers and the ruling practice. Documents of the Second Chamber of Parliament, 2017-2018, 25087, no. 180

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the BEPS 44 group,<sup>18</sup> the Netherlands has participated actively in the drafting of the BEPS Actions. The Netherlands has also committed to the G20/OECD BEPS Project including the BEPS Inclusive Framework and to the BEPS Multilateral Instrument (BEPS MLI).

Notwithstanding the commitment of the Netherlands to BEPS, it is important to keep in mind that the position of the Dutch government is towards the adoption of the BEPS measures by means of binding instruments mainly in the EU Directives and the BEPS MLI. For instance, at EU level, the Netherlands has advocated for the implementation of the BEPS Project measures in the EU Directives.<sup>19</sup> For the Dutch government, the EU Directives are hard law measures that can safeguard the principles of equality and certainty for the taxpayer.<sup>20</sup> Two of the Directives that have implemented some of the BEPS (Action 2,3 and 4) measures are the Anti-Tax Avoidance Directives (ATAD 1 and ATAD 2).<sup>21</sup> See for the content of these Directives, section 4.2 below

Another binding instrument that has been used by the Netherlands is the BEPS Multilateral instrument (BEPS MLI).<sup>22</sup> The Dutch government is in favour of including in the scope of the MLI to almost all of its tax treaties (82 treaties), except for the treaties which are currently under (re) negotiation (9 treaties).<sup>23</sup> However, one exception are the 23 developing countries which are currently being re-negotiated to include a treaty anti-abuse clause. The Netherlands has decided to include these countries as covered by the MLI.<sup>24</sup>

### **3. Has your country signed up to the BEPS inclusive framework (4 minimum standards) and what does this mean for your country?**

<sup>18</sup> BEPS 44 group are the members of the OECD, G20 and the OECD accession countries during the adoption of the BEPS Project.

<sup>19</sup> Even more important during the time that the Netherlands was in charge of the EU Presidency (which ended in June 2016), the Netherlands stated that the adoption of the ATAD 1 was one of the main goals of the Dutch Presidency. Documents of the Second Chamber of Parliament, 2014-2015, 25087, no. 102 and 2017-2018, 25087, no. 182

<sup>20</sup> Documents of the Second Chamber of Parliament, 2017-2018, no. 794

<sup>21</sup> ATAD 1 should be transposed into domestic law by 1 January 2019 and ATAD 2 by 1 January 2020.

<sup>22</sup> The BEPS MLI applies to the Netherlands and to countries within the Kingdom of the Netherlands that have chosen to apply the MLI. From Curacao, Sint Maarten and Aruba, only Curacao has made use of this option, and therefore, the BEPS MLI will apply to almost all tax treaties concluded by the Netherlands (82 tax treaties) and to all tax treaties concluded by Curacao (2 tax treaties: 1 tax treaty concluded by Curacao with Malta and 1 tax treaty concluded by the (then) Netherlands Antilles with Norway) has chosen to be included in the BEPS MLI. The Netherlands Antilles included Curaçao, Sint Maarten, Aruba, Saba, Sint Eustatius and Bonaire. As of 2010, the Netherlands Antilles does not exist, instead, the Netherlands, Curaçao, Aruba and Sint Maarten are countries within the Kingdom of the Netherlands, and Saba, Sint Eustatius and Bonaire are now municipalities (BES Islands).

<sup>23</sup> In Letter of 21 March 2017 to the Dutch Parliament, the State Secretary of Finance stated that the countries that are currently under (re) negotiation are Belgium, Germany, France, Denmark, Poland, Spain, Ireland, Bulgaria and Brazil. For these countries, the provisions of BEPS MLI will be taken into account during the negotiation. Documents of the Second Chamber 2016-2017 25087 nr. 148 at 16. See also Section 2.2.2. Documents of the Second Chamber 2016-2017, 25087 nr. 135 at 4.

<sup>24</sup> In Letter of 21 March to the Dutch Parliament, the State Secretary of Finance stated that the main reason is that in case that the re-negotiations to introduce a treaty anti-abuse rule (main purpose test) are not successful, then, the MLI can be an alternative way to include the treaty anti-abuse rule (principal purpose test). For the Netherlands, both rules are similar. From the 23 countries, the countries which are still in the re-negotiation process are: Bangladesh, Egypt, Georgia, India, Kirgizia, Morocco, Moldavia, Uganda, Pakistan, Sri-Lanka, and Vietnam. Documents of the Second Chamber 2016-2017 25087 nr. 148 at 17.

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The Netherlands has committed to the implementation of the 4 BEPS Minimum Standards. In addition, the position of the Dutch government is that all countries could benefit from participating in the BEPS Project. Therefore, the Netherlands has since 2015 actively supported the participation of developing countries in the discussions regarding the adoption of the BEPS Actions.<sup>25</sup>

In addition to supporting the participation of developing countries, the Netherlands is in favour of capacity building for instance through the Platform for Collaboration on Tax<sup>26</sup> and it is currently participating in a pilot (twinning) project with Georgia for the implementation of BEPS.<sup>27</sup>

Regarding the adoption of the minimum standards, the Dutch government is currently working on the adoption of these standards in their domestic law. In two of the four minimum standards i.e. BEPS Action 13 (country by country reporting) and Action 5 (spontaneous exchange of rulings and preferential regimes (innovation box)), the Netherlands has already adopted legislative measures. These measures include the drafting of templates that makes possible the exchange of country by country reporting, the exchange of rulings with several countries and the amendment of its Innovation Box in accordance to OECD guidelines (new innovation box). The other two minimum standards i.e. Action 6 (prevention of treaty abuse) and Action 14 (more effective dispute resolution mechanisms) have been also adopted by the Netherlands mainly in its commitment to the BEPS Multilateral Instrument.

### **3.1.BEPS Action 5**

#### **3.1.1. Spontaneous exchange of rulings**

The Netherlands is one of the countries that has been reviewed regarding the standard on exchange of information of certain rulings (BEPS Action 5).<sup>28</sup> The peer review contains the input of 10 countries<sup>29</sup> and it refers to the ruling practice of the Netherlands until 31<sup>st</sup> December 2016

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<sup>25</sup> For instance, the Netherlands was one of the initiators in the OECD to invite 14 developing countries and some representative of regional tax organizations in Africa and Latin America to participate in several BEPS discussion groups. See Letter from the State Secretary of Finance to the Second Chamber dated 5 October 2015 p. 2. Reference IZV/2015/657 M

<sup>26</sup> In order to assist developing countries, and to coordinate the cooperation regarding international tax issues for low-income countries, in April 2016, the IMF, WB, UN and the OECD launched the Platform for Collaboration on Tax. One of the Platform's main tasks is to develop toolkits to assist developing countries in implementing efficiently BEPS Action items. These toolkits containing reports, guidance, model legislation, train-the-trainers materials and other tools which are designed to support capacity building.  
<http://www.worldbank.org/en/programs/platform-for-tax-collaboration>

<sup>27</sup> As explained by the Ministry of Finance of Georgia “On June 20, 2017, the Ministry of Finance of Georgia and the Ministry of Finance of the Netherlands signed a bilateral twinning programme within the Inclusive Framework on BEPS. The twinning programme seeks to strengthen the capacity of new members of the Inclusive Framework on BEPS to participate effectively in its work. The following topics were outlined as working areas as within this project: - Transfer Pricing and Country -by-country reporting; Application of Double Tax Conventions; BEPS policy issues; Inclusive Framework on BEPS reviews. P2017 Presentation by the Ministry of Finance of Georgia at p. 15 available [https://mof.ge/images/File/angarishebi/Progress-report-2017\\_MoF-final.pdf](https://mof.ge/images/File/angarishebi/Progress-report-2017_MoF-final.pdf)

<sup>28</sup> The first batch of countries reviewed are the countries that participated in the BEPS 44 group. Harmful Tax Practices - Peer Review Reports on the Exchange of Information on Tax Rulings Inclusive Framework on BEPS: Action 5 DOI:<http://dx.doi.org/10.1787/9789264285675-en>

<sup>29</sup> The peer review does not mention which 10 countries.

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(this included the review of exchange of approximately 2180 rulings).<sup>30</sup> Following the peer review, the Dutch government expressed its commitment to follow all recommendations and to exchange all past and current rulings<sup>31</sup> by 31 December 2017.<sup>32</sup>

The peer review states that in general, the Netherlands exchange of information takes place with the correct format and the information provided is complete; however, 7 countries mentioned delays in respect of exchange of rulings (mainly past rulings). Therefore, the Netherlands was recommended to (i) complete its information gathering process on past rulings as soon as possible; (ii) to continue to ensure that all information on past rulings is exchange as soon as possible, and to fulfil its commitment to complete the exchange of information on past rulings by no later than 31 December 2017 (delays) and (iii) to ensure that all information on past rulings, including rulings on new entrants to the IP regime, is exchanged as soon as possible.<sup>33</sup>

The Netherlands has not only exchanged rulings with the OECD and G20 countries, but it has also decided to exchange rulings with members (by 2016) of the BEPS Inclusive Framework and also with countries that are not members of the Inclusive Framework but with which the Netherlands has a treaty that makes possible spontaneous exchange of information.<sup>34</sup> In total, the Netherlands network of agreements makes possible to spontaneous exchange rulings with 142 jurisdictions.

Since 2016, the Dutch government is in the process of introducing several changes to the ruling practice including the automatization and centralization of the rulings collection point in one office i.e. the Central Liaison Office,<sup>35</sup> the review of the ruling practice and the recruitment of additional staff dedicated to the exchange of information on rulings (from 5 in 2016 to 15-20 full

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<sup>30</sup> In total, 10000 rulings should be exchanged by countries members of the BEPS 44 group. From these 10,000, the Netherlands has approximately 2180 rulings to be exchanged. The number of rulings to be exchanged was one of the reasons for the Netherlands why the Netherlands could not comply with the timely exchange of information. Other reasons were also the manual search of rulings given by local tax inspectors. See also footnote 38 above. Letter from the State Secretary of Finance to the Chairman of the Second Chamber, dated 4 December 2017. Reference: 2017-0000227792 at 3.

<sup>31</sup> Past rulings are rulings given in the period between 1-01-2010 and 1-04-2016 and new rulings after 1 april 2016.

<sup>32</sup> Letter from the State Secretary of Finance to the Chairman of the Second Chamber, dated 4 December 2017. Reference: 2017-0000227792. The Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 stated that “as at 31 December 2017, the Netherlands had shared information on 4,462 ‘past’ rulings” at 16.

<sup>33</sup> Country profile the Netherlands Harmful Tax Practices - Peer Review Reports on the Exchange of Information on Tax Rulings Inclusive Framework on BEPS: Action 5 DOI:<http://dx.doi.org/10.1787/9789264285675-en> P 13 and P. 203

<sup>34</sup> In addition to the treaty network it also includes the countries signatories of the OECD- Council of Europe Convention on Mutual Administrative Assistance in Tax Matters. Para. 16 Country profile the Netherlands Harmful Tax Practices - Peer Review Reports on the Exchange of Information on Tax Rulings Inclusive Framework on BEPS: Action 5 DOI:<http://dx.doi.org/10.1787/9789264285675-en> P. 206

<sup>35</sup> Before only some rulings were kept at the Central Liaison Office, and other rulings were kept at the office of the local tax inspector. This resulted in several delays since the rulings need to be searched manually by each local inspector office, and in case that the information in the ruling was not complete to fill in the template for the exchange, the template need to be sent to “the taxpayer or the tax adviser to ask them to complete any missing information including on the relevant related parties”. This also generated delays in the exchange of past rulings. Peer review report para. 7 and Documents of the second chamber 2017-2018 25087 nr. 180 at 1.

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time employees in 2017).<sup>36</sup>

For the ruling practice, the goal of the Dutch government is to have the revised tax ruling practice in place by 1 January 2019 considering “the forthcoming legislative changes and social, economic and practical considerations”.<sup>37</sup> Therefore, two reviews and wider consultations have been scheduled. The two reviews have already taken place being (i) the review by a commission consisting of members of the tax administration and Ministry of Finance on the quality of the ruling practice (report submitted in 2017) and (ii) the review by a commission of independent experts from the academia and the tax administration and Ministry of Finance<sup>38</sup> that the ruling practice is in accordance to the law, regulations, and case law and to provide recommendations to the ruling practice (report submitted on 10 April 2018).

The first commission concluded that in general the administrative procedures for exchange of rulings have been followed, except for few rulings.<sup>39</sup> The second commission concluded that the rulings (a representative number of the rulings were analysed<sup>40</sup>) are in accordance to the law, regulations and case law.<sup>41</sup> Regarding the recommendations, the commission stated that the publication of all rulings is not desirable. However, transparency is necessary and therefore the commission recommended a periodical reporting of the number of rulings given and also the policy regarding the granting of the rulings (addressing questions such as who and under which conditions a specific taxpayer can be granted a ruling). Furthermore, for the Commission more openness is necessary on the way the specific (tax) concepts or terms are being interpreted in the ruling practice.<sup>42</sup> These two reviews will be followed by wider public consultations and discussions in the Parliament in the following months.

### 3.1.2. Preferential tax regimes

Regarding the preferential tax regimes including IP regimes covered by BEPS Action 5, the Netherlands has introduced several changes to the innovation box to comply with BEPS and EU requirements. In 2016, the innovation box was changed regarding the introduction of the double requirement to apply for the preferential regime<sup>43</sup> and the introduction of the “modified nexus

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<sup>36</sup> Peer review para. 18 and also

<sup>37</sup> Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 16.

<sup>38</sup> 6 members were appointed, 2 from the academia, and 4 from the Tax Administration and/or Ministry of Finance. In order to guarantee the independence, these 4 members are not members of the APA-ATR Team and have not been involved in the rulings analyzed by the commission. Annex to the 21st Midyear report dated 18 April 2018- Tax Administrations, identified “blg-839374” Annex to the Documents of the Second Chamber 2017-2018 34651;31066 nr. E At 30. At 1

<sup>39</sup> See report Documents of the Second Chamber 2016-2017, 25087, nr. 153 and 2017-2018, 25087, nr. 187.

<sup>40</sup> 31 of 488 rulings given in 2017. Annex to the 21st mid-year report dated 18 April 2018- Tax Administrations, identified “blg-839374” Annex to the Documents of the Second Chamber 2017-2018 34651;31066 nr. E At 30. at 2.

<sup>41</sup> Documents of the second chamber 2017-2018 25087 nr. 180 at 2. The report of the commission is available in the Annex to 21<sup>st</sup> Mid-year report.

<sup>42</sup> Annex to the 21st mid-year report dated 18 April 2018- Tax Administrations, identified “blg-839374” Annex to the Documents of the Second Chamber 2017-2018 34651;31066 nr. E At 30. at 9.

<sup>43</sup> Accordingly, several rules were introduced that also make a distinction between large and small taxpayers (with less than UER 37.5 million in gross revenue over a five-year period from all IP assets). AS rightly described by Hemels “as of 2017, the innovation box can only be applied to software, a patent or a plant variety right granted to the taxpayer or for which the taxpayer has applied, a license to distribute medication and IP assets for which a

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approach”<sup>44</sup> that limits the application of such regime.<sup>45</sup> These changes were introduced taking into account the EU developments<sup>46</sup> and following a public internet consultation by the Government in 2016 for all stakeholders<sup>47</sup>, and several discussions between the government and the Dutch Parliament.<sup>48</sup> The legislation to comply with the BEPS Action 5 entered in force on 1<sup>st</sup> January 2017 (with a grandfathering period until 2022 for certain intangible assets). Later on, in 2017, an increase on the effective rate from 5 to 7% was proposed by the government. This new rate entered into force on 1<sup>st</sup> January 2018.

The peer review report on exchange of rulings above also stated that the Netherlands “offers an intellectual property regime that is subject to the transparency requirements under the Action 5 Report”.<sup>49</sup> Nevertheless, some outstanding issues regarding the exchange of these rulings were addressed by the peer review report mainly the delays in the completion of the exchange on past rulings regarding all new entrants (benefiting from the grandfathering IP regime) from 6 February 2015 to 31 March 2016.

### 3.2.BEPS Action 6

Regarding Action 6, the Netherlands has committed in the BEPS Inclusive Framework regarding mainly the application of art. 6 and art 7 of the MLI to its tax treaties. Art. 6 (1) MLI provides as minimum standard that the countries shall introduce modifications to the preamble of their tax treaties to include the prevention of double non-taxation (art. 6 MLI<sup>50</sup>). In addition, in art.

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utility model or a supplementary protection certificate has been granted or an exclusive license for the limited use of these assets. Furthermore, having a R&D-statement is obligatory for all of these assets. This is called the double entrance-requirement. Small taxpayer may apply the innovation box to any IP asset for which they have obtained an R&D statement: a single entrance requirement”. S. Hemels, The Netherlands. High-level Conference Implementing Key BEPS Actions: Where do we stand?, 29 June to 1 July 2017, Rust, Vienna. A book of this topic is forthcoming in 2018.

<sup>44</sup> On the nexus approach and the subsequently modified nexus approach. See BEPS Action 5 October 2015 report and Action 5: Agreement on Modified Nexus Approach for IP Regimes (the Action 5 Paper)

<http://www.oecd.org/ctp/beps-action-5-agreement-on-modified-nexus-approach-for-ip-regimes.pdf>

<sup>45</sup> The nexus approach limits the benefits of the regime in case R&D activities are outsourced to related parties.

<sup>46</sup> These EU developments were mainly related to the EU political agreement regarding the “modified nexus approach for beneficial tax regimes for IP rights, i.e. IP regimes on 20 November 2014. According to the EU’s political agreement the modified nexus approach should be implemented by 30 June 2016, with the possibility of applying transitional rules until 30 June 2021”. IFA NL BEPS p. 559.

The Code of Conduct Group agreed in November 2014 that all existing patent box regimes should be assessed according to the modified nexus approach which ensures that they present sufficient economic substance with the Member State concerned. In this context, the Code of Conduct Group concluded that all existing patent box regimes were not compatible with the modified nexus approach and should be put in line with the latter (doc. 16553/1/14 REV 1). As of 2018, almost all (but France) have made changes to comply with EU requirements. See for the developments regarding the patent box regime in Europe the Report by the Code of Conduct Group to the Council of the European Union: Report dated 3 November 2016

<http://data.consilium.europa.eu/doc/document/ST-13924-2016-INIT/en/pdf> pp. 1-4 and Report dated 24

November 2017 <http://data.consilium.europa.eu/doc/document/ST-14784-2017-INIT/en/pdf> pp. 5-7

<sup>47</sup> Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at p 22.

<sup>48</sup> The policy documents regarding the changes to the innovation box have been made available in 2017 at the government website to comply with the request of a taxpayer in accordance to the Dutch Transparency Law WOB (*Wet Openbaarheid van bestuur*). Therefore, 47 documents (approx. 500 pages) were made available (in Dutch) at <https://www.rijksoverheid.nl/documenten/wob-verzoeken/2017/08/25/besluit-op-wob-verzoek-innovatiebox>

<sup>49</sup> Peer review the Netherlands Action 5 at 208.

<sup>50</sup> Art. 6 states that the text to be introduced in the preamble should be: “Intending to eliminate double taxation

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6(3), an optional choice is given to countries to include also in the preamble the “desire to further develop their economic relationship and to enhance their co-operation in tax matters”. The Netherlands has adopted the text of the preamble in their tax treaties and has also chosen to introduce the additional text of art. 6(3). This new preamble will also influence the interpretation and application of tax treaties.<sup>51</sup>

Art. 7(1) MLI provides the minimum standard of principal purpose test to prevent treaty abuse.<sup>52</sup> On 20 December 2017, a legislative proposal to the Second Chamber to approve the multilateral instrument was presented. In the explanatory letter to the proposal, the State Secretary stated the principal purpose test will be offered to all treaty partners including the ones that have signed the MLI and the ones who have not yet signed the MLI. In this way, the Netherlands goes further than the commitments in the BEPS Inclusive Framework.<sup>53</sup> The Netherlands has chosen to apply the principal purpose test with the discretionary relief provided in art. 7(4).<sup>54</sup>

Furthermore, for the Dutch government, the principal purpose test agrees with the provision of main purpose test introduced in some tax treaties, since the way that the test is applied is the same in both provisions. Therefore, the Netherlands does not make reservations to the tax treaties that include the main purpose test. However, the Dutch government also mentions one difference between both provisions. In the main purpose test, the intentions of the taxpayer are relevant for the application of the provision<sup>55</sup> whereas in the principal purpose test states that “one of the

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with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions). Art. 6(1) MLI available at <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>

<sup>51</sup> The Netherlands has expressed its intention to use the text of art. 6(1) for the interpretation and application of tax treaties taking also into account the Vienna Convention on the Law of the Treaties mainly art. 31(1) containing the principle of good faith and art. 31(2) stating that the preamble belongs to the context of the treaty. Documents of the Second Chamber 2017-2018 25087 nr. 184, at 17.

<sup>52</sup> Art. 7(1) states that “*Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement*”.

<sup>53</sup> The Netherlands has committed to the following anti-abuse measures of the MLI and offered to all treaty partners: Limit treaty benefits in case of hybrid mismatches (with some specific reservations), one year minimum holding period to counteract dividend stripping, one year lock-back period for interests in immovable property entities; no treaty benefits for passive income in low tax permanent establishments, anti-abuse measures regarding permanent establishment (mainly regarding commissionaire arrangements, limit scope of exception for preparatory or auxiliary activities, measure against fragmentation to avoid permanent establishment status, measures against splitting up contracts (with some specific reservations). Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 11

<sup>54</sup> See the Netherlands BEPS position at <http://www.oecd.org/tax/treaties/beps-mli-position-netherlands.pdf>  
See also documents to the second chamber 2017-2018 25087 nr. 184 at 19 and 65.

<sup>55</sup> The main purpose test has been applied to tax treaties mainly in respect of dividends, interest and royalties (art. 10, 11 and 12) and also taking into account the discussion by civil society regarding the Netherlands and developing countries. One example is the tax treaty between the Netherlands and Malawi (amended in 2015), art 10, 11 and 12. Art. 11(9) introduces the following wording: *No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment. The competent authority of the Contracting State which has to grant the benefits shall consult with*

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principal purposes” is to obtain the tax treaty benefit. This means that even if the tax purpose is not decisive, still the principal purpose test will apply.<sup>56</sup> According to the Dutch government, the reason for addressing “one of the principal purposes” in the principal purpose test is to prevent that the test does not work when there is a rang order of different purposes of the taxpayer (e.g. commercial, business, tax purpose).<sup>57</sup>

### 3.3.BEPS Action 13

In 2016, the Netherlands introduced legislation in the Corporate Income Tax Act<sup>58</sup> on country by country reporting (“CbCR”) to comply with the minimum standard in OECD BEPS Action 13 including the CbCR rules, and the transfer pricing documentation of the master file and local file. The tax administration has developed specific tools for the filing of country by country reporting<sup>59</sup>, and it has also engaged in dissemination of the rules mainly through presentations to companies and tax advisors. In addition, the tax administration has also engaged in discussions with companies and tax advisors regarding the implementation of the CbCR.<sup>60</sup> In 2017, the Netherlands introduced some changes to comply with EU reporting rules including the automatic exchange of information.<sup>61</sup>

The Netherlands has also advocated in favour of making public country by country reporting of multinationals.<sup>62</sup> In addition, the Dutch government mainly following the recommendations of

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*the competent authority of the other Contracting State before denying the benefits under this paragraph.* Tax treaty available at <http://wetten.overheid.nl/BWBV0006497/2015-04-19>

See also the United Kingdom-the Netherlands tax treaty that introduces the main purpose in art. 10, 11 and 12. For instance art. 11(5) states “*No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the assignment of the interest, or with the creation or assignment of the debt-claim in respect of which the interest is paid, or with the establishment, acquisition or maintenance of the company that is the beneficial owner of the interest and the conduct of its operations, to take advantage of this Article. In any case where a Contracting State intends to apply this paragraph, its competent authority shall in advance consult with the competent authority of the other Contracting State*” Tax treaty available at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/500333/2008-netherlands-uk-dtc\\_-\\_in\\_force.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/500333/2008-netherlands-uk-dtc_-_in_force.pdf)

<sup>56</sup> See on an analysis of the application of the principal purpose test, L. De Broe & J. Luts, BEPS Action 6: Tax Treaty Abuse, 43 Intertax 2, p. 132 (2015); M. Lang, BEPS Action 6: Introducing an Anti-Abuse Rule in Tax Treaties, 74 Tax Notes Intl. 7 (14 May 2014) and D. Weber, The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law, Erasmus L. Rev. 8 (2017).

<sup>57</sup> Letter of the State Secretary of Finance 21 March 2017. Documents of the Second chamber 2016-2017, 25087 nr. 148 at 23.

<sup>58</sup> Art. 29b-29h Corporate Income Tax (*Vpb*) 1969

<sup>59</sup> These tools are available at the website of the tax administration: For instance: *2016 Handleiding - Gegevensaanlevering van landenrapporten* (“Country by-Country Reporting”)

[https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/internationaal/vermogen/country\\_by\\_country\\_reporting/](https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/internationaal/vermogen/country_by_country_reporting/)

<sup>60</sup> 20th Mid-year report Dutch Tax Administration, identifier “blg-826046”. Annex to the Documents of the Second Chamber 2017-2018 31066 nr. 389 at 12.

<sup>61</sup> Mainly the extension of the Directive on Administrative Cooperation to Country by Country reporting. Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. See also [https://ec.europa.eu/taxation\\_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation\\_en#by\\_country](https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en#by_country)

<sup>62</sup> The Policy Letter on Tackling Tax Evasion and Tax Avoidance also addresses the EU proposal stating that the

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the Legislator (Second Chamber) has advocated for complete transparency of countries information, thus not aggregated data but per country.<sup>63</sup> However, the adoption of this initiative has encountered some problems at EU level, “since a small group of member states think the matter should be treated as a tax proposal (where voting must be unanimous) and not as an accounting proposal (where voting is by qualified majority)”.<sup>64</sup>

In general, as rightly stated by Roelofsen and Lukkien, “the Netherlands rules on CbCR and on master and on master and local files are very close to the text included in the OECD Report on Action 13”.<sup>65</sup> However, it is important to keep in mind that the features of the Dutch tax system also influence the way the CbCR will work in the Netherlands. For instance, one feature is the application of the general anti-avoidance doctrine of *fraus legis* and the defensible position of the taxpayer addressed by this author elsewhere.<sup>66</sup> In case that if there is a *fraus legis* and the position of the taxpayer is regarded as a defensible position of the taxpayer, then, the penalty will not be imposed. This may also consequences for the CbCR since the taxpayer can argue in the explanation of the CbCR, master file and local filing, that the choices made by the taxpayer were based on a defensible position and that therefore, there will be no penalty. So far as this author is aware, this feature does not exist in other countries. For the position to be defensible, it is required that the taxpayer use the legislation available at that moment for the transaction or for the tax structure, and there were not precedents in case law that could have resulted in *fraus legis*.

Finally, some estimations regarding the country by country reports for the 2016 tax year have been already provided by the tax administration. In the 2017 mid-year report by the Dutch tax administration to the Legislative (Second Chamber), the tax administration stated that it was expected to receive approximately 3150 country reports for the 2016 tax year (i.e. 150 from

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proposal would require multinationals with global annual turnover of more than EUR 750 million to publish information on the nature of their activities, number of employees, net turnover, profit or loss before tax, corporation tax obligations, corporation tax paid and accumulated profit. This information would be broken down by EU Member State and by third country on the list of non-cooperative tax jurisdictions and aggregated in respect of other countries”. Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 19.

<sup>63</sup> The Policy Letter on Tackling Tax Evasion and Tax Avoidance also addresses that the Netherlands taking into account the Dutch Chamber (mainly motion by Parliament member Merkies) recommendations “suggested during the negotiations that information from third countries should also be specified by country rather than aggregated”. Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 19. See also Documents of the Second Chamber, 2015-2016 21501-07 nr. 136 and nr. 1385

<sup>64</sup> Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 19. See also the questions and answers by the European Commission of 12 April 2016. The European Commission states in item 5 that the legal basis is the Accounting Directive, and that the measure refers to financial reporting obligation. According to the EU Commission “This Directive does not propose the harmonisation of taxes, but instead refers to financial reporting obligations as regards income tax information. This is why Article 50 of the Treaty on the Functioning of the Union, which concerns the right of establishment and is the regular legal basis for initiatives in the area of company law, accounting and corporate financial reporting has been determined to be the appropriate legal basis. Today’s legal proposal amends the Accounting Directive (2013/34/EU) and is therefore based on the same legal basis. This means that this proposal is subject to qualified majority voting, not unanimity as is the case for legislation dealing with the harmonisation of tax rules”. [http://europa.eu/rapid/press-release\\_MEMO-16-1351\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1351_en.htm)

<sup>65</sup> M.E. Lukkien & A. Roelofsen, The Netherlands, in *Assessing BEPS: Origins, standards, and responses* (IFA Cahiers vol. 102A, IBFD 2017), Online Books IBFD at 569.

<sup>66</sup> R. Kok and I. Mosquera. The Netherlands in *Anti-avoidance measures of general nature and scope GAAR and other rules*. Report prepared for the forthcoming IFA Conference 2018 (Seoul, South Korea).

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parent companies located in the Netherlands, and 3000 via exchange of information with other countries).<sup>67</sup>

### 3.4.BEPS Action 14

The Netherlands was also one of the first batch of countries to be peer reviewed regarding Stage 1<sup>68</sup> of Action 14 (September 2017). The peer review contains the input of 21 countries<sup>69</sup> and it refers to the MAP cases from 1 January 2014.<sup>70</sup> In general, the (peers) countries emphasized the good working relationship with the Netherlands with regard to MAP. Furthermore, the peer review report concluded that overall, the Netherlands tax treaties meets most of the elements of the Action 14 minimum standard<sup>71</sup>, however, there are some areas for improvement for some of the treaties.

The main recommendations were (i) to amend the remaining treaties to include a provision requiring implementation of mutual agreements reached notwithstanding any time limits imposed by domestic law; (ii) to include in the remaining treaties<sup>72</sup>, the full equivalent of art. 25(1) as amended by BEPS Action 14 in order to make possible taxpayers to present their MAP cases “either to the competent authorities of both contracting states or to the competent authority of which they are resident or national in case of application of the no-discrimination provision”<sup>73</sup>; and (iii) to ensure that the competent authority functions independently from the tax

<sup>67</sup> 20<sup>th</sup> mid-year Dutch Tax Administration, identifier "blg-826046". Annex to the Documents of the Second Chamber 2017-2018 31066 nr. 389 at 11

<sup>68</sup> According to the OECD peer review documents of Action 14 “The Assessment Methodology establishes detailed procedures and guidelines for a two -stage approach to the peer review and monitoring process. Stage 1 involves the review of a Member’s implementation of the minimum standard based on its legal framework for MAP and the application of this framework in practice. Stage 2 involves the review of the measures taken by the Member to address any shortcomings identified in its Stage 1 Peer Review”. BEPS Action 14 on More Effective Dispute Resolution Mechanisms Peer Review Documents October 2016 <http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf> at 5

<sup>69</sup> The 21 countries are Australia, Austria, Belgium, Canada, Denmark, France, Germany, Greece, India, Ireland, Italy, Japan, Korea, Norway, People’s Republic of China, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States. For the peer review, “these peers represent approximately 80% of post-2015 MAP cases in the Netherlands, inventory on 31 December 2016. Furthermore, the peer review also asked input from taxpayers, but taxpayers did not provide any input. Peer review Action 14, the Netherlands at 12.

<sup>70</sup> The peer review report stated that “while the review of “the minimum standard commitment only starts from 1 January 2016, the Netherlands opted to provide information on a period starting from 1 January 2014 (‘the look back period’ and also requested peer input relating to the look back period”. Peer review Action 14, the Netherlands at 12.

<sup>71</sup> According to the peer review report, all 92 treaties concluded by the Netherlands “provide for a mutual agreement procedure for resolving disputes on the interpretation and application of the provisions of the tax treaty. In addition, 42 of these treaties provide for an arbitration procedure as a final stage to the mutual agreement procedure” Peer review action 14, the Netherlands at 11.

<sup>72</sup> According to the Netherlands peer review report: From the 92 treaties, 71 treaties contain the wording of art. 25(1) and therefore only 21 treaties do not contain the provision of art. 25(1), but 9 of the 19 treaties are considered to be in line mainly due to the interaction of art. 25(1) with the application of the non-discrimination provision. Therefore, only 10 should be amended. The final 2 treaties require either double taxation not in accordance with the convention (in contrary the art 25(1) requires taxation not in accordance with the convention) and the other treaty does not allow the filing of a MAP request irrespective of domestic remedies. Peer review Action 14 the Netherlands, at 22.

<sup>73</sup> Peer review Action 14, the Netherlands at 9 and 22.

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administration personnel directly involved in the adjustment at issue.<sup>74</sup>

The Netherlands also committed to (i) introduce in their 92 treaties, “a bilateral notification and/or consultation procedure for cases in which its competent authority considered the objection raised in a MAP request not to be justified”<sup>75</sup>; and (ii) to include in the practical information on MPA information on the relationships between MAP and audit settlements in order to clarify that audit settlements do not preclude access to MAP.<sup>76</sup>

One important element of the MLI that has also received the attention of the Netherlands is the introduction of mandatory arbitration in tax treaties. For the Dutch government, the use of arbitration can contribute to solve disputes in a reasonable time, since countries will be encouraged to reach an agreement. The position of the Dutch government is that 2 years should be enough time (which is also the starting position from the MLI)<sup>77</sup>; however, in the MLI countries can also replace the 2 years term for a 3 years term.<sup>78</sup>

#### **4. Has your country adopted/responded to the other BEPS Actions (1,500 words)?**

The Netherlands has followed the EU developments mainly regarding BEPS Action 1, 2, 3, 4, and 12. In respect of Action 8 -10 the Netherlands is following the OECD developments and in respect of Actions 7 and 15 the Netherlands has adopted most of the anti-abuse provisions of the BEPS MLI including also the ones dealing with permanent establishment (except for the splitting- up contracts provision). The following paragraphs will briefly describe some of these developments as of April 2018. The following months, more work will be done mainly regarding Action 2, 3, and 4 due to the transposition of the Anti-Tax Avoidance Directives into domestic legislation.

##### **4.1.BEPS Action 1**

As of April 2018, BEPS Action 1 is still work in progress mainly due to the OECD and EU work that has not been finished. Following the work by the OECD on BEPS Action 1, the OECD has published on 16 March 2018, an interim report addressing the tax challenges of the digital economy. As stated by the OECD, this report sets out the Inclusive Framework’s agreed direction of work on digitalisation and the international tax rules through to 2020”. According to the OECD press release, the countries member of the inclusive framework has agreed to work on the implications of digitalisation for taxation.<sup>79</sup> However, while countries agree that there

<sup>74</sup> Peer review Acton 14, the Netherlands at 10.

<sup>75</sup> Peer review Action 14, the Netherlands at 9 and 26.

<sup>76</sup> Although in practice, as stated in the peer review report “the Netherlands has granted access to the MPA in eligible cases, even if there was an audit settlement between the tax authority and a taxpayer”. Peer review action 14, the Netherlands at 10 and 30.

<sup>77</sup> Documents of the Second chamber 2016-2017 25087 nr. 148.

<sup>78</sup> Art. 19(1) b provides for a term of 2 years, but art. 19(11) gives the party the right to replace the 2 years term for a 3 years term. MLI Text available at <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>

<sup>79</sup> <http://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-more-than-110-countries-agree-to-work-towards-a-consensus-basedsolution.htm>

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should be a long term solution, there are still some differences regarding the adoption of interim measures.<sup>80</sup> Therefore, the following months will be also relevant for the discussion of the OECD initiatives and also the impact of the EU proposals of Directive in these discussions.

On 21 March 2018, the EU Commission proposed new rules (i.e. Directives) to ensure the fair taxation of the digital economy. The first proposal is for a common reform of the EU tax rules for digital activities including the introduction of the concept of a virtual permanent establishment. The second proposal is the introduction of an interim tax on certain revenue from digital activities.<sup>81</sup> These two proposals will be submitted to the EU Council for adoption prior consultation with the European Parliament, and therefore, it is expected that these proposals will be further discussed by the EU Member States in the following period.

The State Secretary of Finance in the Tax Policy Letter stated that most of the EU states agree that the digital economy should be addressed in the OECD/G20 developments since the digital economy is a worldwide phenomenon that it is not limited to EU countries only. The Dutch government has also stated that it will engage in a dialogue with scientists, civil society and representative of technology companies and digital platforms to get a better picture of the business as well as to see in what way the value creation in modern technologies differs from the traditional business models, and which short and long-term solutions are desirable.<sup>82</sup>

#### **4.2.BEPS Actions 2, 3 and 4**

The BEPS Actions 2, 3 and 4 are implemented in the Netherlands by transposing the Anti-Tax Avoidance Directives (ATAD 1 and ATAD 2). In general, ATAD 1 implement the OECD developments of Actions 2, 3 and 4 dealing with interest limitation, hybrid mismatches, and CFC rules<sup>83</sup>). However, ATAD 1 also goes beyond the BEPS by introducing two provisions i.e. exit taxation and a general anti-avoidance GAAR.<sup>84</sup> These two provisions will also be implemented by the Netherlands. ATAD 2 addresses hybrid mismatches with third countries.<sup>85</sup>

The Netherlands is currently in the process of transposing the ATAD 1 and ATAD 2 into its domestic legislation. The legislative proposals are expected to be submitted to the Second Chamber before the summer of 2018 (ATAD 1) and by 2019 (ATAD 2).<sup>86</sup> The process of

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<sup>80</sup> The press release states that “While agreeing to work towards a long-term solution by 2020, some countries believe that there is a strong imperative to act quickly and are in favour of the introduction of interim measures, while other countries are opposed to them and consider that such measures will give rise to risks and adverse consequences. Those countries in favour have identified a number of considerations that they believe need to be taken into account to limit the possible adverse side-effects”.

<sup>81</sup> See for the content of the proposals and official documents, the information available at the website of the EU Commission [https://ec.europa.eu/taxation\\_customs/business/company-tax/fair-taxation-digital-economy\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en)

<sup>82</sup> Tax Policy Agenda letter of 23 February 2018 Documents of the Second Chamber 2017-2018, 32140 nr. 33 at 19.

<sup>83</sup> BEPS Actions 2, 3 and 4 respectively

<sup>84</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. Paras 10 and 11 and art. 5 and 6 of the Directive. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1164&from=EN>

<sup>85</sup> BEPS Action 2. Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries. [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2017.144.01.0001.01.ENG&toc=OJ:L:2017:144:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.144.01.0001.01.ENG&toc=OJ:L:2017:144:TOC)

<sup>86</sup> As of April 2018, the Netherlands is in the process of preparing the legislative proposal to implement ATAD 1

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implementation has also included a public internet consultation regarding the measures of ATAD 1 and the impact of businesses<sup>87</sup>. The implementation of ATAD 2 will also include an internet consultation which will take place as soon as possible in 2018 (most likely after the summer)<sup>88</sup>, and thereafter, the legislative proposal will be submitted to the Second Chamber (most likely at the beginning of 2019).

In general, the Netherlands follows the provisions of ATAD 1, but in respect of the general interest deduction rule (Action 4)<sup>89</sup>, the Dutch government has decided (i) not to include a group exemption, (ii) lower the threshold from EUR 3 million to EUR 1 million up to which net interest may always be deducted, and (ii) not to apply the grandfathering rules to existing loans. These changes will result in a stricter rule than the minimum standard of ATAD 1.

In respect of CFC rules provided in ATAD 1, the Dutch government has chosen to adopt Model A, since the position of the Dutch government is that Model A is stricter than Model B. In model A it needs to be assessed whether the CFC carries on a substantive economic activity.<sup>90</sup> For the Dutch government, the use of Model A and the criterion of substantive economic activity will also apply “to tackle tax avoidance through entities or permanent establishments in a country with a low statutory rate or a country on the EU list of no-cooperative countries”.<sup>91</sup> The CFC needs to satisfied the substantive economic activity requirements, which includes a payroll of EUR 100,000 and office space that is available for at least 24 months.<sup>92</sup>

In general, one could argue that the interest deduction rule in ATAD 1 could be the rule that will impact more business, since the other measures already exist in the Netherlands (substance requirements, exit taxation, and GAAR) or tax advisors are already considering other alternatives for tax structuring (mainly regarding ATAD 2 that will no longer make possible the use of hybrid mismatches in the CV/BV structures).

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which is expected to be submitted before the summer 2018 to the Dutch Second Chamber.

<sup>87</sup> Results of the consultation available at

<sup>88</sup> One of the reasons given by the Dutch government is the complexity of the issue of hybrid mismatches mainly due to the different types of mismatches and the interface between different legal systems. See Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018. At 8.

<sup>89</sup> This rule is also called a earning stripping rule, and as stated in the Policy Letter of 28 February “it will limit the deduction of net interest owed by a taxpayer on bank and intra-group loans. The deduction of the net interest owed is limited to a maximum of 30% of the gross operating result” See Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 4.

<sup>90</sup> “Under the Model A, the amount of income is determined on the basis of several specific categories of income (dividends, interest, financial leasing, royalties, etc). Under model B the income is determined on the basis of the arm’s length principle. This means that non-arm’s length transactions within a group are adjusted as if they were transactions between independent parties”. Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 6.

<sup>91</sup> Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 6. This list has already been published by the EU since 2017, and the most recent change has taken place. See [https://ec.europa.eu/taxation\\_customs/tax-common-eu-list\\_en](https://ec.europa.eu/taxation_customs/tax-common-eu-list_en)

<sup>92</sup> The Dutch government has also stated that this substance requirements have been also introduced for the purposes of the dividend tax withholding exemption. In addition, the Letter states that “the government will consult the business community in order to establish a clearer picture of the administrative burden imposed by the government’s decision and if, possible, further reduce it”. Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 7.

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### **4.3.BEPS Actions 8-10**

The Netherlands has adopted the new OECD transfer pricing guidelines that introduce the BEPS Actions 8 to 10. The new rules of transfer pricing aim to “prevent the shifting of profits to countries where the value is not created”.<sup>93</sup> For the Dutch government, the profits should be allocated to and taxed in the countries where the important functions have been or are being performed”.<sup>94</sup> Therefore, the State Secretary of Finance has expressed its intention to amend the Transfer Pricing Decree in 2018 in line with the new OECD guidelines.<sup>95</sup>

### **4.4.BEPS Action 12**

At EU level, the Netherlands has committed to the proposal Directive for automatic exchange of information regarding reportable cross-border arrangements<sup>96</sup> (implementing BEPS Action 12). The proposal would require financial intermediaries e.g. tax advisors, lawyers, civil-law notaries and TCPS (service providers such as trust offices) to notify the tax authorities of potentially aggressive cross-border tax planning schemes.<sup>97</sup>

### **4.5.BEPS Actions 7 and 15**

In general, the Netherlands has committed to the BEPS MLI including also the introduction of almost all of the BEPS MLI anti-avoidance measures<sup>98</sup> with only 4 (partial or full) reservations<sup>99</sup> For the Netherlands, the BEPS MLI anti-abuse provisions are an effective instrument to tackle tax avoidance also for developing countries.<sup>100</sup> These MLI anti-abuse provisions are dealing mainly with hybrid entities, permanent establishment and with treaty abuse (i.e. the minimum standards of principal purpose test).

According to the Dutch Government, the anti-abuse provisions of the MLI will prevent that the extensive treaty network of the Netherlands will be used for undesired tax structures (for instance by using empty shell companies without real economic reality). In addition, the anti-abuse provisions make possible for countries to tax the activities taking place in their own territory.<sup>101</sup> However, the Dutch Government has noted that not all countries are willing to adopt these anti-

<sup>93</sup> Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018. At 12

<sup>94</sup> Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018. At 13

<sup>95</sup> Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018. At 13

<sup>96</sup> See COM (2017) 335 final

<sup>97</sup> See COM/2016/0198 final

<sup>98</sup> Letter of the State Secretary of Finance of 28 October 2016 section 2.2.1. Documents of the Second Chamber 2016-2017, 25087 nr. 135 at 3 and Letter of the State Secretary of Finance of 28 October 2016 Documents of the Second Chamber 2016-2017, 25087 nr. 148 at 18

<sup>99</sup> The reservations are: (i) limited reservation to some tax treaties with detailed rules regarding hybrid entities art. 3 MLI; (ii) full reservation to the saving clause art. 11(3)(a) MLI (iii) limited reservation to some tax treaties regarding the splitting-up of contracts provision art. 14 MLI and (iv) limited reservation to some tax treaties that already contain a binding arbitration clause (art. 18 to 26) MLI. See Section 4, Documents of the Second Chamber 2017-2018 34853 (R2096) Nr. 3 at p. 8

<sup>100</sup> Legislative Proposal to approve the BEPS MLI. Documents of the Second Chamber of Parliament, 2017-2018, 25087, no. 184

<sup>101</sup> Tax Policy Letter to the Dutch Parliament p. 1 Number: 2017-0000237466

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abuse provisions, but only the ones that are regarded as the BEPS 4 Minimum Standards. This means then, from the MLI, mainly the preamble to the treaties and the anti-abuse provision of principal purpose test (art. 6 and 7 MLI- Action 6 BEPS Project) will be in place since it is a minimum standard, but other provisions will only depending on the approach of the countries. This may create an inconsistent application of the MLI and the mismatching of choices made by countries may result in multiple mini treaty negotiations.<sup>102</sup>

Regarding permanent establishment, one reservation to the BEPS MLI deals with the splitting up of contracts in the exploration for or exploitation of natural resources.<sup>103</sup> The main reason for this reservation is that the Netherlands has tax treaties that include periods of less than 30 days in the counting of days for the existence of a permanent establishment for these activities.<sup>104</sup> However, the provision of art.14 of the BEPS MLI does not take into account periods that are less than 30 days. The explanatory statement to the BEPS MLI states that the provisions regarding permanent establishment are not considered a minimum standard and that since the provisions regarding natural resources have been carefully negotiated by countries, therefore, a reservation to the splitting up of contracts would seem justified.<sup>105</sup>

## 5. Has your country adopted any unilateral BEPS measures?

For the Dutch Government, the BEPS Project is a multilateral solution, and it is the best solution to tackle tax avoidance. The Netherlands is against unilateral solutions, and therefore, the approach of the Dutch government is to implement the BEPS Actions in the domestic law and to transpose the EU Directives (e.g. ATAD 1 and ATAD 2).<sup>106</sup>

Notwithstanding the above, the Netherlands continues applying its domestic anti-abuse measures including the application of the general anti-avoidance rule (GAAR) of *fraus legis*<sup>107</sup> that aims to tackle tax-avoidance situations that contravene the object and purpose of the law<sup>108</sup> and of specific

<sup>102</sup> For a discussion of the MLI, the mismatches and the reservations, see R. García Antón, Untangling the role of reservations in the OECD Multilateral Instrument: the OECD legal hybrids. Bulletin for international taxation, Vol. 71 (2017), no. 10 p. 544-552 Journals IBFD and N. Bravo, The Multilateral Tax Instrument and Its Relationship with Tax Treaties, 8 World Tax J. 3 (2016), Journals IBFD

<sup>103</sup> As stated in the position of the Netherlands to art. Pursuant to Article 14(3)(b) of the Convention, the Netherlands reserves the right for the entirety of Article 14 not to apply with respect to provisions of its Covered Tax Agreements relating to the exploration for or exploitation of natural resources.

<http://www.oecd.org/tax/treaties/beps-ml-position-netherlands.pdf>

<sup>104</sup> Documents of the Second chamber 25087 nr. 184 at 27

<sup>105</sup> “A Covered Tax Agreement could contain anti-contract splitting rules that are specifically addressed to the exploration for or exploitation of natural resources, and that these provisions are frequently carefully negotiated, paragraph 3(b) allows a Party to reserve on the application of Article 14(1) only with respect to the existence of a permanent establishment relating to the exploration for or exploitation of natural resources”.

Explanatory statement to art. 14(3) at p. 46. <https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>

<sup>106</sup> As rightly stated in the 2017 Dutch IFA report the Dutch government “has acknowledged the role that Dutch companies play in international structures and at the same time emphasized that the vast majority of BEPS concerns cannot be resolved by taking unilateral measures, which runs the risk of unnecessarily harming the investment climate”. M.E. Lukkien & A. Roelofsen, The Netherlands, in Assessing BEPS: Origins, standards, and responses (IFA Cahiers vol. 102A, IBFD 2017), Online Books IBFD at 549

<sup>107</sup> On the application of *fraus legis* to BEPS mainly to Action 13 (CbCR) see section 3.3. above.

<sup>108</sup> See for a recent analysis of *fraus legis* in the Netherlands including also the EU and BEPS developments. .R. Kok and I. Mosquera. The Netherlands in anti-avoidance measures of general nature and scope GAAR and other rules. Report prepared for the forthcoming IFA Conference 2018 (Seoul, South Korea).

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anti-avoidance rules (SAARs) such as limitation interest deductions among others.<sup>109</sup>

## **6. Tax administration in relation to international tax reform in your jurisdiction?**

The Netherlands is currently working on the implementation of the BEPS Actions including in the EU Directives (e.g. ATAD 1 and ATAD 2). Some of the OECD BEPS Minimum Standards such as amendments to the Innovation box (Action 5) and country by country reporting (Action 13) have been already introduced in domestic legislation and are now in force (see sections 3. 1. and. 3.3. above).

The Dutch government has stated that in general the BEPS or the BEPS MLI does not require more staff or has created an extra administrative burden. The only concern has been regarding the exchange of rulings which has required amendments to the Dutch tax rules and drafting of specific guidelines for the tax administration in charge of issuing the rulings. Therefore, specific budget changes have been estimated for the enforcement and supervision of the ruling practice, as well as for the hiring of additional staff.<sup>110</sup> Some of the problems identified in the ruling practice have been explained in item 3 above.

## **7. What do you believe is the future of international tax reform for your country?**

The approach of the Netherlands towards BEPS and the need to introduce additional measures to tackle tax evasion and tax avoidance has changed from 2015 to 2018. In 2015, when the BEPS Project was introduced, the Dutch government committed to the BEPS but also stated it had to be done with the tax policy approach of the Netherlands mainly regarding the strong points of the Dutch Tax system<sup>111</sup> including the approach to equal treatment of Dutch companies and international companies (resulting in the 0% withholding tax rates in royalty and interest flows,

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<sup>109</sup> have been addressed in the EATLP Dutch report, which includes (amongst others), in addition to the limitation on interest:

- provisions addressing non-resident corporate shareholder taxation for both equity income and debt-receivable income,
- provisions addressing dividend tax-avoidance arrangements and dividend-stripping strategies;
- provisions to prevent undue tax deferral in cases of shareholding transfers;
- mechanisms countering undue tax avoidance in the area of certain shareholding and asset transfers involving the tax consolidation regime; and
- mechanisms countering undue tax avoidance and tax deferral relating to business restructurings.

M. de Wilde and C. Wisman. Chapter 19: The Netherlands, in Tax Avoidance Revisited in the EU BEPS Context. A. P. Dourado ed., IBFD 2017. 2016 European Association of Tax Law Professors (EATLP Congress Munich 2-4 June 2016 pp. 458-459.

<sup>110</sup> The costs for enforcement are estimated at EUR 300,000 (incidentally) and EUR 250,000 (structurally) and for additional staff fte 3,0 incidentally, and fte 2,5 structurally. P. 40. Dutch Second Chamber documents 2017-2018 34853 no. 3

<sup>111</sup> The State Secretary of Finance stated in Letter of October 2015, that “The government considers the main strong points of our tax system to be our extensive treaty network, the participation exemption, absence of withholding tax on interest and royalties, our efficient Tax Administration and our efficient dispute resolution procedures. These elements help to create a transparent, clear and attractive tax climate for international businesses”.

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and the participation exemption).<sup>112</sup>

In addition, the Dutch government stated that the introduction of BEPS measures should be proportional, and therefore, for instance in case of exchange of rulings (Action 5), the Dutch government stated that “steps must be taken to ensure that the implementation costs remain proportionate to the expected benefits”.<sup>113</sup>

Since 2015, there have been several discussions at the Dutch Parliament including the implementation of ATAD 1 and ATAD 2, the publication of the Panama and Paradise papers, and the civil society and political discussion regarding the image of the Netherlands as a country facilitating tax avoidance (see section 1 above) Some of these discussions have resulted in the Netherlands introducing stricter requirements for BEPS and changes to two of its main features that have until now being regarded as important for the investment climate (i.e. ruling practice and the treatment of interest and royalty payments).

In the Policy Letter of the State Secretary of Finance to the Parliament regarding the implementation of measures to tackle tax evasion and tax avoidance (February 2018<sup>114</sup>), the Dutch government announced that to tackle tax avoidance, the Netherlands will go beyond the BEPS standards regarding interest deduction and treaty abuse Actions 4 and 6 (see section 4.2. and 3.2 respectively).

The Dutch government will be also introducing a withholding tax on dividend, interest and royalty flows to low-tax jurisdictions. The introduction of this withholding tax may result in a different treatment of companies in the Netherlands mainly for the outgoing dividend, interest and royalties and changes to the long-term tax treaty policy of the Netherlands.<sup>115</sup> However, the government justifies this measure in order “to prevent the Netherlands from being used primarily to erode the tax base of other countries”.<sup>116</sup>

In the same Policy Letter and in respect of the ruling practice, the Dutch government stated that “businesses will have to meet stricter requirements regarding their presence in the Netherlands before they can obtain certainty in advance”.<sup>117</sup> In addition, it also expressed its commitment to

<sup>112</sup> See Letters 2 June 2015 and Letter 5 October 2015 (number 25087 nr. 102. *Brief regering: Internationale belastingen en belastingontwijking – Internationaal fiscaal (verdrags) beleid* (p. 1)

<sup>113</sup> This statement was made in relation to the automatic exchange of rulings (BEPS Action 5) but also in relation to treaty abuse measures (Action 6). The government stated that “disproportionate countermeasures could have major consequences for the Dutch tax climate for businesses”. Letter of 5 October 2015 from the State Secretary for Finance to the Second Chamber presenting an assessment of the outcome of the BEPS and the outlook for the Dutch tax climate for businesses. English translation of the letter available at [www.government.nl](http://www.government.nl) In Dutch reference IZV/2015/657 M.

<sup>114</sup> Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018. at 2.

<sup>115</sup> The memorandum on Dutch tax treaty policy of 2011 published by the Ministry of Finance stated the position of the Netherlands in respect of withholding tax on interest and royalties. Accordingly, “The Netherlands seek to agree on exclusive resident state taxation for interest and royalties. On request of the treaty partner, the Netherlands is willing to consider reasonable anti-abuse provisions”.

<sup>116</sup> Policy Letter of the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 2.

<sup>117</sup> In the Policy Letter of 23 February 2018, the State Secretary of Finance announced that the substance requirements “are the same as the substance requirements introduced in the Holding Cooperative Withholding Obligation and Withholding Exemption Extension Act, that is to say a payroll of EUR 100,000 and office space

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exchange of rulings to create transparency for foreign tax authorities. However, and unlike the approach of 2015, no appeal by the Dutch government has been made to proportional consideration of the implementation costs of a new ruling practice vis-à-vis the expected benefits were made. So far as the author is aware, no impact assessment on the changes to the ruling practice has been made. The developments in the exchange of rulings and the ruling practice has been further elaborated in section 3.1. above.

### **Final remarks**

In light of the description of the Netherlands policy and adoption of BEPS measures, it can be concluded that the Netherlands has committed to BEPS, but it has also decided to go further by introducing stricter requirements regarding interest deduction and treaty abuse (BEPS Action 4 and 6). One interesting best practice in the adoption of these changes is that the Dutch government involves the participation of relevant stakeholders (business, business associations, civil society and scholars) in these discussions, and therefore, the changes to the tax system receive input from all relevant parties.

Finally, the Dutch government has decided to make changes to its long-term tax treaty policy (treatment of outgoing interest and royalties) and to introduce stricter substance requirements for companies operating in the Netherlands. The objective is to prevent that the Netherlands is being used to erode the tax base of other countries. Neither the withholding tax, nor the substance requirements for companies were part of the BEPS project. Nevertheless, it can be safely argued that these measures will not represent an obstacle on the BEPS Project but on the contrary it will reinforce the measures to tackle BEPS and the objective of the Netherlands to overturn its image as tax haven or a country used for treaty shopping.

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that is available for at least 24 months". Policy Letter the State Secretary of Finance on Tackling Tax Avoidance and tax Evasion 23 February 2018 at 17.