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This EATLP national report was prepared for the 2016 EATLP Congress held in Munich, Germany, on 2-4 June 2016. The manuscript was finalized on 31 December 2015. On Monday 20 June 2016 at midnight, the EU Council reached political agreement on an Anti Tax Avoidance Directive. This paper addresses this EU BEPS development by means of an addendum to the original report. The addendum was finalized on 1 July 2016.

I. The Meaning of Avoidance and Aggressive Tax Planning and the BEPS initiative

I.1. The Meaning of Tax Avoidance in the Dutch tax system

I.1.1. The general approach towards tax avoidance in the Netherlands

This report deals with the phenomena of tax avoidance and tax planning by multinationals and the addressing of these in the Netherlands' corporation tax system. Nation states are sovereigns and hence autonomous in designing their company tax systems. The corporation tax systems of most countries, including the Netherlands', essentially seek to effectively tax business profits once at the location of investment. These systems generally subject multinational enterprises to corporate taxation by reference to their physical presences (permanent establishment, place of effective management) and legal presences (corporate entity taxation, separate entity approach) in the geographic territories of the taxing jurisdiction concerned. The Dutch tax system is no exception. National tax systems, however, mutually differ, creating disparities in taxable entity classification, taxable income qualification, tax base assignment and applicable tax rates. Such a non-alignment has created effective tax level differentials and mutual gaps and overlaps, and thereby the potential of initiating both double taxation and non-taxation. Furthermore, corporate tax laws are designed by reference to physical and legal presences creating potentials for disconnecting taxable base from those locations in which actual business is conducted.

The combination of these properties of countries corporation tax regimes have fuelled competition and planning responses. Globalisation, the opening-up of markets, the rise of the multinational firm, the internet and intangibles seemed to have sped up this process. Countries, it seems, have engaged into a tax-induced competition for corporate investment by reducing effective corporate tax burdens, and with that have initiated a 'rat race to the bottom'. Particularly those forms of a tax-induced competition for 'paper' profits is generally considered harmful, contravening general notions on good governance. Multinationals seem to have responded by engaging into a strategic optimisation of tax costs and after tax profits. Tax cost reduction strategies may involve a tax-induced shifting of real investment into comparatively lower-taxing countries. Such strategies however may also involve an assignment of 'paper' profits and taxable bases to places where these may effectively remain untaxed, or at least produce significant effective tax rate reductions. The latter raises some chief concerns and are addressed in this report.

A perceived undue 'gaming of the system' by countries and international firms has attracted media attention and political attention, and driven public discontent in recent years. The matter has now been widely debated, also in the Netherlands by policy-makers, scholars and in tax consultancy. A broad range of terms is used to address issues concerned. When it comes to undue country behaviours, terms used include 'harmful tax competition', 'aggressive' tax competition even, via 'beneficial' or 'preferential tax regimes', which are sometimes even labelled 'predatory regimes'. Discussions on multinationals involve a broad range of terms used as well, including 'tax evasion', 'tax avoidance', 'tax planning', 'aggressive tax planning', 'abusive tax planning', 'abuse', 'misuse', 'circumvention', 'fraud', 'improper advantage', and 'wrongful use'. In the end, common to all seems a dissatisfaction with non-taxation outcomes for contradicting a generally felt notion that multinationals should contribute to society also, paying their fair shares of corporation taxes.

The Dutch legal system lacks a concrete and readily available definition of 'tax avoidance'. Perhaps this is for the term being hard to interpret in a strict legal sense without rendering its subsequent use sensitive to manipulation. Perhaps also it is for the term tax avoidance having a more societal and moral feel. From an ethical and societal perspective the utilisation of business strategies to minimise effective tax burdens through artificial means – irrespective of these not being illegal – may be considered unethical, contravening moral duties to contribute to society. Broadly defined, corporate tax avoidance seems to involve an escaping by multinational firms, through artificial yet legal means, of their ethical responsibilities towards society to contribute their fair shares of taxation in accordance with their means to

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finance public expenditure from which everyone benefits. Tax avoidance does not equal illegal tax evasion or fraud.[1] It is legal albeit it may be felt immoral by society.

The absence of a legal definition of tax avoidance in the Dutch corporate tax system however does not mean that no rules or provisions would exist that seek to strike down undesirable tax outcomes. Indeed, a broad range of anti-abuse provisions applies throughout the Dutch corporation tax system, all having their own areas of applicability, eligibility tests, and all using individual definitions and terminologies. The corporate tax landscape in this area may be described as dispersed, fragmented and, indeed, technically intricately complex. A common denominator seems that all seek to counter some form of uncalled-for use of the Dutch corporation tax system, by means of a setting-up of contracts and/or legal arrangements or a series thereof having some more or less artificial or non-businesslike properties, for the purpose of dodging or deferring corporate taxation.

Regular fact-finding and interpretation approaches in Dutch taxation should be mentioned as a first measure to counter certain misuse, as these already come quite a long way in addressing undue tax effects. Fact-finding and interpretation in Dutch taxation for instance allows a filtering of guised transactions from influencing applicable tax law. Available doctrines also allow courts to proceed to a requalification of legal transactions for tax purposes – an autonomous qualification even. These further provide courts means to interpret tax legislation extensively and for instance in line with its object and intent. As an ultimum remedium interpretative tool, a national general anti-avoidance rule ('GAAR') applies in the form of the fraus legis doctrine. Fraus legis addresses legal arrangements typically lacking real practical meaning, which have predominantly been set-up to avoid tax in contradict with the intent of the tax legislation. The doctrine allows courts to eliminate legal facts or to substitute these for constructed ones to discover a tax outcome in line with the purpose of the law (see section II below for some details).

Second, the taxable profit calculation mechanism in Dutch business taxation, of which the arm's length standard ('ALS') forms an integral part, should be mentioned here as well.[2] The mechanism includes an assessment of whether a certain (non-)payment or (non-)receipt originates from the business operations carried on, or should be considered having non-businesslike motives. The assessment particularly addresses inter-affiliate transactions. Any advantages or disadvantages that originate from affiliation are considered non-businesslike and accordingly do not affect corporate profit for tax base determination purposes. That cancels out artificialities arising from inter-affiliation. Key is whether the transaction(s) undertaken are supported by reference to functions performed by the parties concerned, the assets used and risks assumed. Non-arm's length effects are transformed into businesslike outcomes for tax base calculation purposes. But even businesslike expenses may be non-deductible, i.e., under the so-called 'Cessna-costs doctrine', a dogma developed in case law that applies in the presence of excessive and unreasonable expenses.[3] Excessive expenses are non-deductible to the extent that these may objectively be considered unreasonable. Such unreasonableness is interpreted by reference to an objectified sensible entrepreneur accepting a certain expense-to-utility ratio from a business economics perspective (see sections II.1 and III.1-3 for details on tax base calculation). Worth noting at this place is that exit taxation in the Netherlands essentially forms part of the taxable profit calculation mechanism also.[4] Exit taxes secure a corporate taxation of unrealised accrued capital gains upon their extraction from Netherlands' tax jurisdiction, for instance in the process of a cross-border business reorganisation.

Third, the Dutch tax system contains a wide variety of specific anti-avoidance rules ('SAARs'), which share that all seek to protect Netherlands corporate tax base. The tax system includes provisions addressing artificial tax base erosion via interest payments,[5] non-resident corporate shareholder taxation for both equity income and debt receivable income,[6] provisions addressing dividend tax avoidance arrangements[7] and dividend stripping strategies,[8] undue tax deferral in cases of shareholding transfers,[9] mechanisms countering undue tax avoidance in the area of certain shareholding and asset transfers involving the tax consolation regime,[10] and undue tax avoidance and tax deferral relating to business

[1] Dividing lines between legal tax avoidance and illegal tax evasion and any legal consequences of crossing these lines are not discussed in this report.
[2] Article 8 Dutch Corporate Income Tax Act (CITA) in conjunction with Article 3.8 Dutch Personal Income Tax Act (PITA). Legislative references concern the CITA unless expressed otherwise.
[3] See Supreme Court, 9 March 1983, *BNB 1983/202* (*Cessna plane I*) and Supreme Court 8 March 2002, *BNB* 2002/210 (*Cessna plane II*) on the costs of the use and possession of a private plane used to travel to business appointments instead of using scheduled flights.
[4] Article 8 in conjunction with Article 3.8 PITA and in conjunction with Articles 15c and 15d. Exit taxation is not further discussed in this report, for the exit involving true transfers of operational business activities.
[5] Articles 10a, 10b, 13l and 15ad.
[6] Articles 17(3)(b) and 17a(c). Article 17(3)(b) has recently been amended to implement the GAAR as introduced in the Parent-Subsidiary Directive (PSD), see further section III.8.2.
[7] Article 1(7) Dutch Dividend withholding tax act (DWTA) relating to abusive transactions involving cooperatives, and Article 4(7) DWTA (in conjunction with related provisions) in which the national beneficial ownership test has been incorporated. Article 1(7) DWTA has recently been amended to implement the GAAR as introduced in the PSD, see further section III.8.6.
[8] Article 4(7) DWTA.
[9] Article 12a.
[10] Articles 15ai, and 15aj.

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restructurings – implementing the Mergers Directive.[11] In addition to that, the Dutch tax system contains some recapture mechanisms to neutralise certain deduction and no inclusion outcomes relating to specific arrangements involving inter-affiliate debt and equity financing and refinancing transactions,[12] and measures to counter certain types of double dipping in the area of cross-border loss utilisation involving permanent establishments and double tax relief.[13] Dutch corporate taxation also contains mechanisms that seek to counter strategies set-up to inflate effective (cross-border) loss utilisation possibilities involving a cessation of business activities.[14] Other provisions seek to strike down undue loss relief in cases involving holding and financing companies,[15] third-party shareholding transfers and business cessation,[16] and certain forms of profit and loss offset within the context of the application of the Dutch tax consolidation regime.[17] Moreover, Dutch taxation includes switch-over from exemption to credit mechanisms to counter a sheltering of passive income low-taxed abroad, both with a view to juridical double tax relief[18] and economic double tax relief.[19] The Dutch tax system also includes a CFC-like regime to address undue tax deferral via substantial shareholdings in passive, low-taxed subsidiaries.[20] Various targeted anti-mismatch provisions apply as well, addressing certain double deduction outcomes and deduction and no inclusion outcomes involving the use of hybrid entities,[21] transfer pricing ('TP') mismatches,[22] and hybrid income mismatches – implementing amongst others the latest amendments to the Parent Subsidiary Directive ('PSD').[23] In treaty scenarios the Netherlands have adopted a range of anti-treaty abuse rules in several of the tax treaties in its treaty network, ranging from general anti-abuse provisions[24] to targeted anti-treaty shopping rules in the form of principal purpose tests[25] and limitation on benefit clauses.[26] These apply on top of traditional beneficial ownership requirements, found in virtually all tax treaties in the Netherlands' tax treaty network. A selection of SAARs is discussed in sections III.4-8 and IV.

I.1.2. The presence of administrative regulations clarifying the meaning of tax avoidance

The questionnaire queried whether administrative regulations clarify the meaning of 'tax avoidance' in the Netherlands' tax system. No explicit guidance is available. Some indications however may be inferred from statements made and positions taken in several decrees and resolutions, a selection of which is forwarded in this section. The operation of the ALS and several of the SAARs in the Dutch tax system are supported by a range of specified administrative regulations. This also holds for the roll-over regimes facilitating business restructurings. Interpretative decrees issued by the State Secretary for Finance in its role as the executive can be legally relied upon by taxpayers. The tax administration is bound to such decrees applying the tax legislation. Legislative decrees and regulations issued by the State Secretary for Finance in its capacity as a quasi-legislator, mandated such a capacity to issue such decrees and regulations on the basis of a legislative tax act, have a force of law.

With respect to TP and profit attribution, the Netherlands to a large extent conforms to international concepts. The ALS is codified in Article 8b CITA (see section III.1.3. below). An autonomous approach is taken when it comes to the practical application the ALS in the national tax system. Several interpretative decrees and resolutions of the Ministry of Finance provide guidance on the interpretation and application of the ALS in certain specific situations, for instance with a view to intangibles and captives. The OECD Transfer Pricing Guidelines and the OECD Report on the Attribution of Profits to Permanent Establishments form points of departure.[27] TP and business profit calculation is discussed in sections II.1 and III.1-3.

Regarding the SAARs in the Dutch tax system (see sections III.4-8 and IV for a discussion of selected SAARs), some implicit clarification on the meaning of 'tax avoidance' and 'business-like motives' can be found in administrative

[11] Articles 13h, 13i, 13j, and 13k, and Articles 14, 14a, 14b, and 14b. And in connection thereto, Articles 3.54a, 3.55, 3.56, 3.57 PITA. For completeness sake, we also refer to Article 14c at this place (roll-over relief for restructurings from an incorporated business into a sole proprietor) though leave matters further unassessed.
[12] Articles 13b, and 13ba.
[13] Articles 33b, and 33d.
[14] Article 13d in conjunction with Article 13e, and Articles 15i and 15j.
[15] Article 20(4)-(6).
[16] Article 20 in conjunction with Article 20a.
[17] Article 15 in conjunction with Articles 15ae, 15af, 15ag, 15ah. Provisions involving currency exchange losses on participations (Article 28b) and the so-called compartmentalisation approach (Article 28c in conjunction with Articles 34c) is not discussed.
[18] Article 15e(7) in conjunction with Articles 15g, 15h and 23d, and see also Article 33c.
[19] Article 13(9)-(14) in conjunction with 13aa and Article 23c.
[20] Article 13a.
[21] Articles 15ac(4)-(6), and 13l(6)(a)-(b) .
[22] Article 10b.
[23] Article 13(17).
[24] See e.g. Article 23, paragraph 1 Double Tax Convention Netherlands-Germany.
[25] See e.g. Double Tax Convention Netherlands-United Kingdom, Double Tax Convention Netherlands-China and Double Tax Convention Netherlands-Switzerland.
[26] See e.g. Double Tax Convention Netherlands-United States, and Double Tax Convention Netherlands-Japan.
[27] See Decree of 14 November 2013 No. IFZ 2013/184 M, International Tax Law. Transfer pricing method, application of the arm's length principle and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines) ('TP Decree'). An official English translation of this decree is available at https://www.government.nl/documents/decrees/2014/03/25/ifz2013-184m-international-tax-law-transfer-pricing-method-application-of-the-arm-s-length-principle-and-the-transfer-pricing-g. See also Decree of 15 January 2011, No. IFZ2010/457 M, International Tax Law. Profit Attribution Permanent Establishments ('Profit Attribution Decree').

regulations. In a decree concerning the interpretation of the domestic beneficial ownership test targeting 'dividend stripping strategies' the State Secretary has noted that the anti-dividend stripping provisions in the Dividend Withholding Tax Act ('DWTA') are not aimed to target durably, non-tax driven, intra-group reorganizations. As a guiding principle, no 'dividend stripping' issues emerge in case of a durable restructuring and a regular dividend distribution policy.[28] The national beneficial ownership test and dividend stripping are discussed section III.8.7.

The decree on the interest deduction limitation regime in Article 10a CITA for instance provides examples of what the government understands under a 'non business-like re-routing of capital' on the basis of which the 'motive test' is interpreted as not been met in consequence of which interest deductibility is restricted.[29] The State Secretary for Finance forwarded for this purpose that as a characteristic of such a re-routing may be seen any creation of a mismatch between a deductible interest expense in the Netherlands and an exempt interest receipt, for instance by means of utilising hybrid entities or hybrid financial instruments.[30] Some guidance on the application of Article 10a can also be found in parliamentary history. Some occasions have been recorded whereby the legislator makes reference to 'permissible and non-permissible tax savings'.[31] Taxpayers seem to have some leeway in seeking optimal financial structuring of their business activities, some tax saving is permissible, as Article 10a is not meant to be applied to regular business transactions to which 'tax saving' is of marginal importance.[32] The presence of business-like motives however does not mean that the taxpayer has an unhindered free choice in the execution of the contemplated transactions; examples of businesslike motives, include consistent dividend policies or the taking-on of external debt.[33] The legislator does not forward an exact demarcation line between what may be considered 'permissible' and 'not permissible' for the purpose of application of Article 10a CITA. The operation of Article 10a is discussed in section III.7.2.

Some decrees have been put into place in support of the application of the roll-over relief regimes in the CITA, facilitating business restructurings such as mergers, exchanges of shares, and split-offs.[34] Roll-over relief is unavailable under the CITA if the restructuring is mainly aimed to escape or unduly defer tax. Loosely aligning with Merger Directive terminology a rebuttable presumption applies that any business restructurings of any kind are deemed to be based on tax avoidance objectives if the restructuring does not take place for valid commercial reasons, such as a restructuring or a rationalization of the active business activities of the parties involved in the restructuring transaction. The decrees add that any presence or absence of such a tax motive is discovered by reference to a comparison of scenarios before and after the business restructuring transaction(s). Taxpayers have the possibility to show proof in support of any positions taken on a presence of business reasons underlying the restructuring transaction(s). The operation of roll-over relief is further discussed in section III.8.4.

I.1.3. Tax rulings and horizontal monitoring – providing legal certainty; transparency

Corporate taxpayers may obtain legal certainty on their corporate tax positions in the Netherlands relating to their substantial business activities by means of a ruling.[35] Taxpayers may request the tax administration – i.e., the competent tax inspector in association with a specialist resource unit within the tax administration, the APA/ATR team – in the pre-tax return filing stage to conclude or provide a ruling in the form of an advance pricing agreement (APA) or an advance tax ruling (ATR). An APA provides for legal certainty on TP issues, and an ATR gives certainty on the tax implications in the Netherlands with regards to the legal organisation of contemplated business activities. In tax treaty scenarios, taxpayers may also request the competent authorities to commence mutual agreement procedures for the purpose of establishing bilateral or multilateral ATRs/APAs or to proceed to arbitration to the extent available under the treaty concerned. Rulings are regularly agreed in Dutch tax practice and often relate to TP, the application of the participation exemption, the presence or absence of a permanent establishment, the deductibility of an interest payment, or a combination thereof.

Tax rulings are administrative efficiency tools providing legal certainty in technically complex corporate tax cases. Rulings by no means are meant to facilitate tax avoidance. Cases lacking economic substance are ineligible for obtaining a ruling.[36] No rulings are issued in cases where taxpayers seek to artificially avoid Dutch taxation or foreign country source taxes in tax treaty scenarios. The same holds for scenarios involving arrangements set-up to erode foreign tax base in the event that the tax administration would try to strike down such arrangements in the reverse situation, for instance on the basis of Article 10a CITA. In cases lacking sufficient substance the tax administration proceeds to a spontaneous exchange of the relevant information with the treaty partner concerned.[37] In its treaty negotiations, the Netherlands government strives to agree with its treaty partners that these partners inform the Netherlands upfront in

[28] Decree of 21 November 2011, No. DGB 2011/6870M, sec. 5.
[29] Decree of 25 March 2013, No. BLKB2013/110M. Application of Article 10a CITA.
[30] *Ibidem*.
[31] See for example, Parliamentary Papers House of Representatives, 2005-2006, 30 572, No. 8, at 45-46.
[32] See for example, Parliamentary Papers Senate, 2007-2008, 31 205 and 31 206, No. C, at 27 to 29.
[33] See for example, Parliamentary Papers House of Representatives, 1995-1996, 24 696, No. 3, at 14-22.
[34] Decrees 27 January 2015, No. BLKB 2015/34M. CIT, Mergers, No. BLKB 2015/38M. CIT, Splits, and No. BLKB 2015/33M. CIT, Split-offs.
[35] See Decrees of 3 June 2014, No. DGB 2014/3098 (APA), No. DGB 2014/3099 (ATR), and No. DGB 2014/296M.
[36] Substance criteria have been issued to provide guidance on this matter; see Decrees 3 June 2014, No. DGB 2014/3101 and No. DGB 2014/3102.
[37] Article 3a Implementing Order to the Law on International Assistance.

the event these consider invoking an anti-abuse provision in the tax treaty concerned.[38] The Netherlands in return may proceed to spontaneously exchange relevant information regarding corporate entities through which hardly any functions are performed and which incur mere insignificant economic risks.

In addition to concluding rulings the Netherlands tax system also allows corporate taxpayers to gain legal certainty in the pre-tax return filing stage as to their overall tax position by voluntarily engaging into a so-called compliance covenant with the tax administration on the basis of "mutual trust, understanding and transparency" – 'horizontal monitoring' ('horizontaal toezicht'). Horizontal monitoring seeks to reduce administrative burdens and to provide legal certainty by settling tax uncertainties in the pre-tax return filing stage and is available for large and medium-sized multinational enterprises having solid tax control frameworks, or are willing to develop such a framework. A tax control framework is an internal control instrument focusing on a business's tax process and is part of a company's control framework drafted for the purpose of issuing in control statements to stakeholders. A compliance covenant basically is a contractual arrangement between the taxpayer and the tax administration on mutual cooperation. Taxpayers commit themselves to actively and timely submit current or impending tax positions of significant importance that may allow for differing legal interpretations. The tax authorities bind themselves to quickly decide on these matters. Tax positions and their consequences are then openly discussed and assessed. Tax returns are subsequently filed with due observance of the consensus reached earlier and the tax assessment is issued accordingly. Horizontal monitoring is generally seen as an administrative efficiency enhancement tool easing capacity pressures involving the use of traditional retrospective control instruments by the tax administration. The horizontal monitoring project is coordinated within the tax administration by a specialised resource unit.

Moreover, the Netherlands considers itself a front runner in the area of tax transparency and, amongst others, has joined recent international and European transparency initiatives involving a proceeding by countries to a spontaneous exchange of information on tax rulings (EU Administrative Cooperation Directive, OECD BEPS Action 5, and 14 July 2015 Agreement Netherlands-Germany – Memorandum of Understanding). It should be noted that the European Commission has recently decided that the Netherlands has granted selective tax advantages via an APA to an individual company in an incidental case in breach of EU state aid rules.[39] The European Commission currently views the Dutch ruling practice as a whole not problematic and without irregularities though.[40]

I.1.4. Case law on the meaning of tax avoidance

As noted, a sizeable range of anti-tax avoidance rules and anti-abuse provisions applies throughout the Dutch tax system. These have produced a vast body of case law, discovering applicable law with a view to addressing undue and tax-induced taxpayer behaviour in individual cases by reference to the individual merits of applicable rules and doctrines, their scopes of application, objectives, eligibility tests and terminologies. Applicable law for this purpose is discovered by reference to fact-finding and interpretation, fraus legis, tax base determination rules and doctrines, and the application of the body of specific tax avoidance regimes in domestic legislation and the tax treaty network. The system should meet EU law where applicable, generating sizeable bodies of case law also. A selection of relevant case law and doctrines is forwarded below, throughout sections II, III and IV.

No clear-cut description can be derived from the courts' tax case law. The Dutch tax system, as said, does not provide for a general definition or interpretation of the term tax avoidance. Some general remarks on approaches in case law may nevertheless be forwarded at this place. In general terms, the courts seem willing to take a substance-over-form approach in line with the spirit of the law. Fact finding and interpretation seek to discover true facts and the object and intent of applicable rules. Fraus legis seeks to unveil predominant tax motives, for instance by reference to the artificiality of the legal arrangements. Tax base determination resorts to businesslike characteristics underlying inter-affiliate transactions and transfer prices. The ALS is interpreted by reference to substance and third party comparability. When it comes to applying SAARs courts for instance assess whether tax base is artificially eroded, or whether passive and mobile profits are sheltered in a low-tax jurisdiction abroad.

I.1.5. Judicial competence exercised by the courts rather than bodies that are not strictly judicial

The questionnaire queried whether the judicial competence is also exercised by bodies that are not strictly judicial, such as arbitration courts or economic-administrative instances. And if yes, whether the case law is consistent among the different bodies with judicial competence. In the Netherlands no arbitration courts or economic administrative instances have been put in place, at least not in the area of direct taxation. An assessment of the presence or absence of any consistencies or inconsistencies in approaches towards tax avoidance hence cannot be performed.

[38] Letter of 5 October 2015 from the State Secretary for Finance, to the House of Representatives presenting an assessment of the outcome of the BEPS Project and the outlook for the Dutch tax climate for businesses (available in English at https://www.government.nl/documents/letters/2015/10/19/letter-presenting-an-assessment-of-the-outcome-of-the-beps-project-and-the-outlook-for-the-dutch-tax-climate-for-businesses); Letter of the State Secretary for Finance, 5 October 2015, *Betreft Appreciatie uitkomst BEPS-project en vooruitblik Nederlands fiscaal vestigingsklimaat*, No. IZV/2015/657 M. (Letter of 5 October 2015).
[39] European Commission - Press release, 21 October 2015, IP/15/5880. The Netherlands appealed (see also section III.3.)
[40] European Commission - Press release, 11 June 2014, IP/14/663.

I.1.6. Influences of tax effects in other jurisdictions, OECD soft law and ECJ case law on tax avoidance

Dutch corporate tax law and the tax treaties in the Dutch international tax treaty network are interpreted and applied autonomously. Foreign tax implications generally do not affect Dutch taxation. This holds with regards to both the application of the domestic system and the treaties. It follows that mismatches arise where the operation of the Netherlands' tax system in a cross-border scenario differs from its equivalent's operation abroad. This renders the system sensitive to double (non-)taxation and tax avoidance. These remain unresolved unless explicitly dealt with by the legislature. To protect Dutch tax base from erosion the corporate tax code for instance contains a range of provisions rendering tax effects in the Netherlands – e.g., taxation, tax-deduction, non-taxation, loss offset – to be dependent on overseas implications, for instance by reference to a subject-to-tax clause,[41] a 'compensating levy test',[42] local tax-deductibility,[43] or local loss relief entitlements.[44]

OECD and EU soft law initiatives have a significance influence on corporate taxation in the Netherlands. The Netherlands for instance closely adheres to the OECD's interpretation of the ALS and third party comparability under the OECD TP Guidelines. When it comes to addressing harmful tax competition and undue planning responses the Netherlands keeps to international developments as well, for instance those involving recent transparency initiatives and the adoption of the modified nexus approach as recommended under Action 5 of the OECD's BEPS Package; i.e., to bring to an end any tax-induced artificial intangible asset shifting. EU soft law in addition, for instance in the area of harmful tax competition and the Code of Conduct on business taxation, has had significant impact on the Dutch tax system. The Netherlands considers that international mismatches should be resolved via cross-border tax coordination. The Netherlands therefore backs recent EU coordination initiatives to address base erosion and profit shifting, EU BEPS that is, via an EU instrument; see also section I.1.8.[45]

The case law of the Court of Justice of the European Union ('ECJ') on tax abuse has a profound impact on the Dutch tax system, for the Netherlands being a member state of the EU and for EU law having a direct effect in the Netherlands' legal order. In the law-making process for instance draft tax bills are consistently assessed as to their compatibility with EU law. The Netherlands has implemented anti-abuse provisions in the PSD and the Mergers Directive. A considerable body of case law exists on the compatibility or incompatibility with primary and secondary EU law of anti-avoidance provisions in the Dutch tax system. In this respect matters essentially and continuously revolve around artificiality, tax dodging motives, and the intent of the law (see further section II.).

I.1.7. Impact of the BEPS Package on Netherlands' international policies on tax avoidance

On 5 October 2015, the OECD published the final reports of the OECD/G20 'Base Erosion and Profit Shifting' ('BEPS') project, the BEPS Package. The package now is entering the transposition stage. It seeks to ensure a single taxation of business income at the location of value creation and is built on three pillars being transparency, substance, and coherence. That same day, the State Secretary for Finance sent a letter to the House of Representatives presenting an assessment of the BEPS outcomes and an outlook for the Dutch tax climate for businesses.[46] The State Secretary presented a follow-up letter on this matter on 19 November 2015.[47] The State Secretary welcomes the BEPS package and noted that some of the outcomes may be implemented directly in the Dutch tax system, whereas others require internationally coordinated actions, for instance within the context of the EU. BEPS measures should target tax avoidance through artificial structuring but leave the real economy unharmed.

The Netherlands supports the BEPS package and aims to strike a balance between an adequate addressing of BEPS issues and preserving the attractiveness of the Dutch investment climate. The Netherlands seeks to combat tax avoidance and simultaneously desires to maintain its attractiveness for corporate headquarters and other companies conducting real business activity. If concrete anti-BEPS measures would produce unwanted effective tax rate increases harming the real economy the State Secretary considers to compensate these with generic tax rate reductions. BEPS outcomes have been observed to correspond with the 'crown jewels' of the Dutch tax climate for business investment, i.e., the participation exemption, the absence of source taxes on outbound royalty and interest payments, the extensive tax treaty network and an efficient, professional and constructive tax administration that is prepared to provide corporate taxpayers legal certainty on their tax positions in the pre-tax return filing stage.

I.1.8 Concrete impact of the BEPS Package on addressing tax avoidance in legislation and case law

[41] Articles 13a, and 13aa.
[42] Article 10a(3).
[43] Articles 13(17) and 15ac(4)-(6).
[44] Articles 13d(9) and 15i(3).
[45] Letter of 5 October 2015, *supra note* 38, and Letter of the State Secretary for Finance, 19 November 2015, No. IZV/2015/936 U (Letter of 19 November 2015). See also Council of the EU, Council conclusions on corporate taxation – base erosion and profit shifting, Press Release 910/15, 8 December 2015 (Council press release).
[46] Letter of 5 October 2015, *supra note* 38.
[47] Letter of 19 November 2015, *supra note* 45.

When it comes to addressing tax avoidance and implementing OECD BEPS outcomes, the line taken by the Netherlands seems to match the OECD's. The Netherlands has been particularly active in transparency and information exchange. Country-by-Country Reporting (BEPS Action 13) has been implemented as per 1 January 2016.[48] A tradition exists of championing improvements in the area of international dispute resolution mechanisms, with a view to both mutual agreement and arbitration (BEPS Action 14). Moreover, the Netherlands, as said, has joined international and European initiatives in the area of information exchange, for instance on tax rulings (BEPS Action 5). On 14 July 2015 the Netherlands and Germany signed a Memorandum of Understanding introducing a spontaneous exchange of information on cross-border tax rulings.

Addressing tax avoidance via substantive rules, recent developments in the Netherlands have been focusing on substance. The Netherlands adheres to agreed-upon minimum standards for preferential regimes – involving the taxation of proceeds from intellectual property commercialisation under the innovation box regime[49] – requiring substantial activity as a threshold for granting beneficial treatment (BEPS Action 5; '(modified) nexus approach'). The Netherlands has been committed to include anti-abuse provisions in its tax treaties, which ties in with agreed-upon minimum standards on preventing treaty abuse (BEPS Action 6). The recommendations on preventing the artificial avoidance of permanent establishment status (BEPS Action 7) have been adopted and are now part of Dutch international tax treaty policy. In the area of TP (BEPS Actions 8-10), the State Secretary has noted that current policies and approaches correspond with the modified OECD TP Guidelines.[50] The Netherlands has joined the ad hoc Group devoted to develop a multilateral instrument to implement the treaty related BEPS outcomes.

The general thought towards coherence is that the tax climate for businesses should not be harmed by taking unilateral measures. BEPS effects that arise from a non-alignment of international tax systems should be addressed through internationally coordinated actions to preserve level playing fields. The State Secretary refers for this purpose to the recent activities undertaken at Commission and Council levels to achieve such a coordination by means of an EU instrument (EU BEPS).[51] Such an instrument would have the form of an 'anti-BEPS Directive' and would technically be lifted from the technical work been undertaken in the context of the proposal for a common consolidated corporate tax base ('CCCTB'). Such an anti-BEPS Directive would address OECD Actions 2 (mismatches), 3 (CFCs), 4 (interest deduction), 6 (treaty abuse/GAAR), 7 (permanent establishment), and 13 (Country-by-Country Reporting), as well as introduce an EU-wide exit taxation mechanism and a switch-over provision to secure effective minimum corporate tax rates. The Code of Conduct Group would have a complementary role with a view to providing guidance as to secure an effective transposition of the EU's anti-BEPS measures in the Member States' tax systems. On 15 December 2015 the Presidency of the Council published a consolidated text and accompanying explanatory notes of a possible split of the CCCTB proposal related to anti-BEPS aspects.[52] The European Commission is expected to submit a proposal for an anti-BEPS directive early 2016.The Dutch State Secretary for Finance noted that EU competitiveness considerations should not be overshadowed in pursuit of addressing BEPS issues via EU-wide coordinated measures.

Furthermore, the Netherlands has implemented recent amendments to the PSD. The PSD's GAAR has been implemented via the existing corporate income tax regime for non-resident shareholding companies,[53] and via the dividend withholding tax regime for Dutch resident cooperatives.[54] Both regimes focus on artificiality and tax-avoidance motives, and for instance do not apply in the presence of sufficient substance according to Dutch standards (see further sections III.8.2. and III.8.6.). The PSD's anti-mismatch provision has been implemented via the participation exemption regime.[55] Briefly put, the participation exemption is unavailable with regard to profit repatriations received from a participation if these are tax-deductible at the level of the distributing entity abroad (see further section III.6.).

The BEPS package has not affected Dutch case law at the time of writing of this report. The general view seems that for trias politica reasons and the primacy of the democratically legitimised legislature, any addressing of international mismatches is on the table of the legislature rather than on the judiciary's. The only room analytically available for addressing non-taxation as a consequence of international mismatches, it seems, would have to be sought in extending

[48] Articles 29b et seq.
[49] Article 12b.
[50] Letter of 5 October 2015, *supra note* 38.
[51] Letter of 5 October 2015, *supra note* 38, and Letter of 19 November 2015, *supra note* 45. See Council press release, *supra* note 45, European Commission, *5 Key Areas for Action*, 17 June 2015, (COM(2015) 302, Council of the European Union, *BEPS: Presidency roadmap on future work*, 8 July 2015, (10649/15), Note from Presidency to Permanent Representatives Committee/Council, *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) - State of play*, Brussels, 1 December 2015 (OR. en), 14509/15 LIMITE, FISC 169, ECOFIN 916, Note from Presidency to Working Party on Tax Questions - Direct Taxation, *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, Brussels, 2 December 2015 (OR. en), 14544/15, LIMITE, FISC 171 (Council Presidency draft of an anti-BEPS Directive), and Note from Presidency to Working Party on Tax Questions - Direct Taxation, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) - Explanatory notes, Brussels, 2 December 2015 (OR. en), 14544/15, ADD 1, LIMITE, FISC 171 (Council Presidency draft anti-BEPS Directive explanatory notes).
[52] Council Presidency draft of an anti-BEPS Directive, *supra note* 51, and Council Presidency draft anti-BEPS Directive explanatory notes, *supra note* 51.
[53] Article 17(3)(b).
[54] Article 1(7) DWTA.
[55] Article 13(17).

the scope of the fraus legis doctrine. To this date, however the Supreme Court has assessed the question of whether tax-induced taxpayer behaviour and artificial structuring contradicts the intent of the law by reference to the internal consistency of the Dutch tax system. So far no considerations have been recorded in case law with a view to applying fraus legis in cases involving non-taxation outcomes that emerged from the utilisation of disparities in the international tax regime (except for certain so-called 'profit drainage scenarios', see section II.1.6.). 'External inconsistency reasoning' is alien to fraus legis jurisprudence. Only time will tell whether the Supreme Court would be willing to further develop fraus legis into extending its scope of application to also address international mismatches, for instance in response to societal calls for such.

I.2. The Meaning of Tax Planning, Abusive Tax Planning and Aggressive Tax Planning in the Dutch tax system

I.2.1. The general approach towards tax planning in the Netherlands

The Dutch legal system not only lacks a concrete and readily available definition of 'tax planning', the same holds for the terms 'abusive tax planning' and 'aggressive tax planning'. Perhaps it is for also these terms seem to have a more societal and moral feel rather than a strict legal meaning. The terms share an element of tax-motivated behaviour, a steering of economic activity or the legal organisation thereof towards an advantageous outcome in terms of taxes payable. Notably, also governments use taxation as a macro-economic steering device, for the purpose of promoting or dissuading taxpayers from engaging in certain activity. The Netherlands for instance has introduced an innovation box regime some years back to attract real innovative activity. Tax planning as such does not seem to be considered problematic or immoral, though. Abusive tax planning or aggressive tax planning however is (the terms are considered interchangeable in this report). Any differences between 'fair' or perhaps 'cordial' tax planning and 'abusive' or 'aggressive' tax planning seem gradual ones. This begs the question where to draw a dividing line, a matter which has also been discussed in the Netherlands.

From an ethical and societal perspective the matter seems to revolve around an adhering to a moral duty towards society to contribute a fair share of taxation in accordance with one's means to finance public expenditure from which everyone benefits. One is not morally obliged to pay more than one should, however one is also not morally entitled to pay less. It follows that any contributions in terms of amounts paid less tax than morally should – regardless of such an outcome being legal in a strict juridical sense – may be felt as being unethical. Planning outside the current tax framework constitutes tax fraud and is illegal, and evenly unethical it seems. Seen from that perspective a broad dividing line may be drawn in a sense that tax planning may be considered not problematic, as long as one does not pay less tax than one should. If one tax plans and ends up paying less than should, albeit within the framework of applicable tax law, such tax planning may be considered abusive or aggressive, it seems – i.e., irrespective of such planning being legal. This said, voices have also been recorded that the liabilities of multinationals to pay tax do not extend beyond their strictly legal obligations to do so.

Company tax systems, as said, essentially seek to effectively tax business profits once at the location of value creation, whereby that location equals the location of investment. If the underlying objective of international corporate taxation is a single taxation of business income at the investment location, it follows that any tax planning that seeks an outcome in accordance with that objective should be considered ethically fair or cordial. This may be the case with regards to any planning through jungles of technical corporation tax complexities as long as such planning seeks to escape juridical and/or economic multiple taxation of business income. This may be considered to similarly hold with regards to any tax-induced shifting of real investment to benefit from effective tax rate differentials, for instance by making use of a country's beneficial regime that follows the internationally agreed-upon (modified) nexus approach (OECD BEPS Action 5). If such tax competition is considered fair the same would need to hold for any responses in terms of tax-induced shifting of real investment. In that same view any ensuing investment location distortions should then not be considered immoral.

From this perspective it also follows that aggressive or abusive planning may then be understood as any tax planning within the framework of applicable tax law that artificially seeks to disconnect corporate tax base from those locations in which actual business is conducted to arrive at an outcome of being subject to a less than single taxation. Aggressive tax planning in that view involves a legal yet substantively artificial assigning of taxable base to a place where it effectively remains untaxed, or at least produces a significant reduction in the effective tax burden. Such a tax-induced paper profit shifting contravenes widely felt moral notions on fair contribution. This seems to render aggressive and abusive tax planning equivalents of tax avoidance. As said, abusive planning outside the framework of current tax law constitutes fraud and hence is illegal. Such planning hence equals tax evasion.[56]

Aggressive tax planning accordingly involves a tax-driven legal structuring, a 'tax engineering' that is, of corporate activity to minimise tax costs and maximise after tax profits. Typically such planning strategies may involve a setting up of artificial transactions or series of transactions with the sole aim of avoiding taxation in line with the strict legislative

[56] As said, dividing lines between legal tax avoidance and illegal tax evasion are not discussed in this report.

texts concerned, however in contradict with the intent of the law. Such planning may also involve a legal shifting or sheltering of mobile resources available within the multinational firm, such as intangible assets or monetary assets, to low or no-taxing jurisdictions. Textbook profit-shifting arrangements include intra-group debt financing and licensing arrangements. Such arrangements generate in principle tax-deductible interest and royalty payments in the jurisdictions where real investment takes place. Corresponding receipts may then be steered towards group companies – such as cash box companies and IP box companies – in tax haven jurisdictions thereby initialling BEPS issues. Such intra-group income streams may be routed via intermediate group companies in favourable jurisdictions to sidestep source taxation ('treaty shopping'). Moreover, such planning may also involve a strategic use of differentials between at least to tax systems, i.e., the utilisation of disparities or mismatches in entity classification, income qualification or tax base allocation with the objective of reducing tax liability. Terms used in practice referring to such types of planning include 'Hybrid Instruments', 'Hybrid Entities', 'Hybrid Transfers', 'Dual Residence Entities', '(Double) Deduction and No Inclusion Transactions' and 'Foreign Tax Credit Transactions'.

Aggressive tax planning involving artificial arrangements set up to avoid tax in contradict with the law is addressed in the Netherlands' tax system by means of regular fact-finding and interpretation methods, including the fraus legis doctrine, and the taxable profit calculation mechanism (see section I.1.1. above and for details see sections II.1. and III.1-3. below). The Netherlands corporate tax base is protected against sheltering, shifting and base erosion strategies by means of SAARs (see section I.1.1. above and for details see sections III.4-8. and IV below). Aggressive planning using mismatch arrangements are addressed in the Dutch tax system on the basis of mechanical anti-hybrid rules (see section III.6. below).

I.2.2. The presence of administrative regulations clarifying the meaning of tax planning

Similar to the questionnaire's queries under section I.1.2. relating to the term tax avoidance, the questionnaire also queried whether administrative regulations clarify the meaning of 'tax planning', 'aggressive tax planning' or 'abusive tax planning'. The above paragraphs have analysed the term tax avoidance and aggressive tax planning to constitute conceptual equivalents. As noted in section I.1.2. no explicit guidance is available, although some inferences may be made from statements and positions in several decrees and resolutions. A selection of these are forwarded in section I.1.2. to which we kindly refer at this place.

I.2.3. Tax rulings – providing legal certainty; trias politica

Taxpayers, as said, may obtain legal certainty on their corporate tax positions by means of a ruling. Rulings as said aim at providing legal certainty in technically complex corporate tax cases. It is not possible to conclude rulings with the tax administration outside the framework of applicable law. So-called 'contra legem' rulings are ineffective and considered null and void for tax purposes. The ruling practice is generally considered as an administrative efficiency tool of the executive, rather than a means for international tax coordination. Dutch constitutional law does not provide room for the ruling system to be used as a unilateral tax coordination tool, i.e., for trias politica reasons and the primacy of the legislature. When it comes to addressing double taxation and double non-taxation outcomes due to any disparities the general view is that these cannot be resolved by the Netherlands unilaterally. Correspondingly these issues cannot be resolved through the Dutch ruling practice either.

I.2.4. Case law on the meaning of tax avoidance

It is established case law of the Supreme Court that taxpayers are allowed as a general rule to legally arrange their economic and business affairs in a manner that is most tax advantageous. Any escaping of tax imposts is allowed, provided that the means used for that purpose may be considered admissible and normal – which may be taken to mean non-artificial and having any real practical meaning. This notion forms part of the fraus legis doctrine discussed below in section section II.1.1. and is known in Dutch tax jurisprudence as 'verschillende-wegenleer', which may loosely be translated as 'admissible tax planning'.

Tax motivated and undue planning, for instance through artificial, non-businesslike or unreasonable means, however is addressed in the Dutch tax system via a broad range of means. These include the operation of fact-finding and interpretation methods including fraus legis, the taxable profit calculation mechanism including the ALS, and the operation of the SAARs and targeted anti-mismatch provisions in the Dutch corporation tax system. These have been noted in section I.1.1. and will be further elaborated upon in upcoming sections.

I.2.5. Relationships between tax avoidance, tax planning, and aggressive or abusive tax planning concepts

The Dutch corporation tax system, as noted, lacks concrete legal definitions of the terms tax avoidance, tax planning, and aggressive or abusive tax planning. It may be boiled down from above observations that the term tax avoidance addresses the societal phenomenon of an escaping, through artificial yet legal means, of any ethical duties towards society to contribute a fair share of taxation in accordance with one's means to finance public expenditure from which everyone benefits. Focusing on the perspective of the individual economic operator, cordial, ethically fair, or admissible

and normal tax planning seems to involve a tax planning by that operator in line with the essential objective of international corporate taxation of taxing business income once at the location of production. Tax planning may then be considered fair to the extent it involves any securing of a single corporate taxation of business profits at the investment location. The same seems to hold for and any shifting of real investment in response to a fair tax competition between countries. Aggressive or abusive planning may be understood as any planning within the framework of applicable tax law that seeks to artificially disconnect corporate tax base from those locations in which actual business is conducted to arrive at an outcome of being subject to a less than single taxation. Such planning involves a tax driven legal engineering of corporate activity to minimise tax costs and maximise after tax profits. Tax avoidance and aggressive tax planning seem analytical equivalents, at least from a Dutch corporate tax perspective that is.

I.2.6. Absence in the Netherlands of tax arbitration courts or economic administrative instances

Similar to the questionnaire's queries under section I.1.5. relating to the term tax avoidance, the questionnaire also queried with a view to tax planning whether the judicial competence is also exercised by bodies that are not strictly judicial. And if yes, whether the case law is mutually consistent. As noted, no arbitration courts or economic administrative instances have been put in place in the area of direct taxation in the Netherlands. The queried assessment therefore cannot be performed.

I.2.7. Influences of tax effects in other jurisdictions, OECD soft law and ECJ case law on tax planning

Similar to the queries under section I.1.6. relating to the term tax avoidance, the questionnaire also sought to assess the influences on the meaning of the terms tax planning, aggressive and abusive tax planning in the Dutch tax system by their meaning in other jurisdictions, OECD soft law or the case law of the ECJ. As noted in section I.1.6. Dutch corporate tax law and the tax treaties in the Dutch international tax treaty network are interpreted and applied autonomously. This renders the system sensitive to double taxation and double non-taxation and provides planning opportunities. OECD and EU soft law initiatives addressing tax avoidance have a significance influence. The case law of the ECJ on tax abuse has a profound impact on the Dutch tax system. Matters revolve around artificiality, tax dodging motives, and the intent of the law.

I.2.8. Impact of the BEPS Package on Netherlands' international policies on aggressive tax planning

Similar to the queries under section I.1.7., the questionnaire also sought to assess the repercussions of BEPS on the meaning of tax planning, abusive tax planning or aggressive tax planning in the Dutch tax system. As noted in section I.1.7., the Netherlands supports the BEPS package and seeks to strike a balance between an adequate addressing of BEPS issues and preserving the attractiveness of the Dutch investment climate.

I.2.9. Concrete impact of the BEPS Package on addressing aggressive tax planning in legislation and case law

Similar to the queries under section I.1.8., the questionnaire sought to assess the types of repercussions BEPS had in legislative amendments, in the exercise of competence by the tax administration, and/or in the judicial interpretation by courts. As noted in section I.1.8., the BEPS Package has already had some significant impact on addressing aggressive tax planning. The line taken by the Netherlands seems to match the OECD's. In the area of transparency and information exchange the Netherlands, as said, has been particularly active. Developments in the Netherlands have further focused on substance. Considering further coherence in direct taxation to be achieved through international coordination, the Netherlands has implemented recent amendments to the PSD, focusing on artificiality and tax-avoidance motives.

II. The Reaction to Avoidance and Aggressive Tax Planning in the BEPS Context

II.1. Domestic General Anti-Avoidance Rules (GAARs)

II.1.1. National GAAR; fraus legis

II.1.1.1. Fraus legis as ultimum remedium interpretative tool

In its ruling of 26 May 1926, the Dutch Supreme Court introduced a GAAR in the Netherlands' domestic tax system: 'fraus legis'.[57] The fraus legis doctrine has been a part of Dutch jurisprudence since. Fraus legis serves as an ultimum remedium interpretative tool for legal discovery and may be invoked by the tax authorities to counter evidently dubious misuse by taxpayers of applicable legislative acts. As an ultimum remedium fraus legis constitutes a lex specialis. It may only be applied if the applicable law in a particular tax case cannot be discovered in accordance with its purpose and intent by reference to the consideration of regular methods of fact-finding and interpretation in Dutch taxation. These regular methods serve as legi generali in this respect.

[57] Supreme Court 26 May 1926, *NJ* 1926, 723 (*Three days*).

Next to fraus legis a GAAR can be found down in the Dutch tax legislation, 'richtige heffing', a concept which may be loosely translated as 'correct taxation' and has been laid down in Article 31 et seq of the Dutch General Law on Taxation ('GLT').[58] The provisions on richtige heffing however have rarely been invoked and not any more since the 1980s in consequence of developments in case law in the area of fraus legis. Today, fraus legis is generally considered to encompass richtige heffing. Both share the substantive conditions for application, i.e. the aim of securing a tax advantage which defeats the object or purpose of the law. Fraus legis however allows courts to either ignore or substitute legal arrangements whereas the application of richtige heffing only allows these arrangements to be set aside. Moreover, richtige heffing may only be invoked in a separate procedure. Although fraus legis seems the more encompassing and efficient anti-abuse tool, no plans exist at this time to abolish Article 31 et seq GLT – although the State Secretary for Finance has stated that Article 31 et seq GLT will not be invoked anymore in practice.

II.1.1.2. Regular fact-finding and interpretation methods already come a long way in addressing abuse

The regular fact-finding and interpretation methods preceding the application of fraus legis may also be seen as instruments addressing certain forms of unwanted use or misuse of the Dutch tax system. These as said already come quite a long way in addressing tax avoidance and aggressive planning, as it for instance filters guised transactions from influencing applicable tax law,[59] allows courts to proceed to a requalification of legal transactions for tax purposes,[60] an autonomous qualification even,[61] and provides courts means to extensively interpret tax legislation in line with its object and intent. This makes it perhaps worthwhile to first address these general methods before proceeding to an assessment of the fraus legis doctrine.

Legal discovery in Dutch taxation under the application of regular methods takes place in two steps. The first step includes an autonomous qualification of facts and circumstances for tax purposes. This for instance allows tax courts to disregard guised legal transactions and arrangements created by taxpayers for tax purposes, if these do not reflect actual legal realities ('simulation'). For not reflecting legal reality, such arrangements are disregarded for tax purposes as well. Moreover, an autonomous facts discovery in taxation also allows courts to move away from legal realities in qualifying these for tax purposes, if these legal realities do not align with economic reality. This area of tax law is of relevance for instance when it comes to the characterisation of financial instruments either as debt capital or as equity capital for tax law purposes, since a growing number of instruments incorporate elements of both. A subordinated profit participating loan that is issued under a term exceeding 50 years for instance is requalified into equity for Dutch corporate tax purposes on the basis of established Supreme Court case law.[62] Such a requalification for tax purposes holds regardless that such a loan legally constitutes debt.[63] Interest payments on such hybrid loans are not deductible in the Netherlands, accordingly putting to an end any risks of creating deductions in the Netherlands for payments akin, economically that is, to non-deductible dividend payments. To preserve the internal consistency of the Dutch tax system interest receipts on such hybrid loans may be exempt from corporate taxation pursuant to the participation exemption regime, provided that the applicable eligibility criteria are met.[64] Also so-called 'loss-financing loans' ('bodemloze-putleningen'), i.e. a loan granted of which it has been clear from the outset that the amount would never be repaid because of the financial position of the debtor, and so-called 'sham loans' ('schijnleningen'), i.e. a loan agreement but with the actual intent of making a capital contribution, are requalified for tax law purposes as equity capital. Notably, such sham loans also constitute equity for civil law purposes, perhaps rendering such loans examples of guised legal transactions – sham loans however are typically listed in Dutch doctrine as one of the common three examples of (re)qualification. Worth noting at this place also is that the Supreme Court has held that equity for civil law purposes cannot be requalified into debt for corporate tax purposes, amongst others, for legal certainty reasons, regardless of whether the financing arrangement involved economically has debt-like characteristics.[65]

The second step in regular fact-finding and interpretation involves an assessment of applicable tax rules and the interpretation and application of these to the present case. A broad range of interpretative aids are available to the courts in this respect. The principal of legality found in Article 104 of the Dutch Constitution requires the literal text of the legislative act to form the point of departure ('grammatical interpretation'). If the text is technically complex and detailed, somewhat indistinct, or ambiguous, a broad range of interpretation methods are available to interpret the legislative acts involved. Interpretation aids range from interpretation by reference to the legal system from which the

[58] See for a case the concept was applied Supreme Court 2 March 1988, *BNB* 1988/135 (*Diamond Construction*).
[59] See Supreme Court 21 March 1984, *BNB* 1984/235, Supreme Court 10 August 2001, *BNB* 2001/364.
[60] See for instance Supreme Court 27 January 1988, *BNB* 1988/217 (*Unilever*), Supreme Court *BNB* 1998/208, and Supreme Court *BNB* 2006/82 (*Prêt participatif*).
[61] See Supreme Court 15 December 1999, *BNB* 2000/126, and Supreme Court 15 June 2012, *BNB* 2012/239. It has been argued in literature that the concepts of requalification and autonomous qualification is not about interpretation of the law. This is not further discussed at this place.
[62] See for instance Supreme Court 27 January 1988, *BNB* 1988/217 (*Unilever*), Supreme Court *BNB* 1998/208, and Supreme Court *BNB* 2006/82 (*Prêt participatif*).
[63] Under Dutch civil law the (provisional) obligation to repay the principal amount upon the expiry of the terms under the loan agreement constitutes a key criterion to qualify a financing arrangement as a loan for civil law purposes. See for instance Supreme Court 8 September 2006, *BNB* 2007/104.
[64] Article 13.
[65] Supreme Court 7 February 2014, *BNB* 2014/79 (*Redeemable preference shares*) and *BNB* 2014/80 (*Banks syndicate*).

legislative texts are part of ('systematic interpretation'), by reference to the parliamental proceedings under which these acts and terms involved have been created ('historical interpretation'), or interpretation by reference to the object and intent underlying the relevant legislative texts and terms at hand ('teleological interpretation'). Traditionally, the grammatical interpretation was dominant in Dutch taxation. Some recent developments in case law however show that the Dutch Supreme Court seems willing to resort to teleological reasoning to a greater extent than it used to be, and proves prepared to even move away from a crystal clear legislative text to close doors for any potential misuse.[66]

II.1.1.3. Requirements for fraus legis: motive requirement and norm requirement

Fraus legis can be successfully invoked in court by the tax authorities in cases where a taxpayer (i) having the predominant aim of avoiding taxation enters into a transaction or series of transactions which has that sought-after effect pursuant to applicable the tax legislation under the regular methods of fact-finding and interpretation ('motive requirement'), (ii) whereas such an effect as sought after by the taxpayer contravenes with the purpose and intent – i.e., the spirit – of the applicable tax legislation ('norm requirement').[67] In such cases the fraus legis doctrine allows courts to interpret and apply the tax law on such a transaction or series of transactions in accordance with the spirit of the tax law. For this purpose, courts may eliminate the legal facts of the case or substitute these for a set of constructed facts akin to these legal facts to arrive at an outcome in which the tax effects accordingly established are in line with the purpose and intent of the tax law (i.e., the doctrines of 'substitution'[68] and 'elimination'[69]).

Fraus legis applies only as an ultimum remedium for its application involves a reconstruction of legal facts and circumstances that contravenes with actual legal realities, i.e., to arrive at an outcome in line with the spirit of the law. Tensions accordingly created with the principle of legality and legal certainty renders the application of fraus legis to be subject to strict justification requirements, i.e., the requirement of a presence of a predominant tax avoidance motive and the contradiction with the intent of the law.[70] As noted in the above section I.1.2.4, as a general rule, taxpayers are allowed to legally arrange their economic and business affairs in a manner that is most tax advantageous.[71] Any escaping of tax imposts is allowed, provided that the means used for that purpose may be considered admissible and normal – which may be taken to mean non-artificial and having any real practical meaning ('verschillende-wegenleer'/ 'admissible tax planning').[72] But even transactions having a practical meaning in terms of a business outcome sought after, these may still be targeted on the basis of fraus legis if the legal routing towards such an outcome may be considered having a predominant tax avoidance motive. A mere disconnect of the applicable tax legislation with its purpose and intent is not sufficient. Also a mere moral discontent with the legal arrangement set-up by the taxpayer, for instance from the side of the fisc, is not sufficient to successfully invoke fraus legis. The doctrine is seen as not meant to serve as a correction mechanism for sloppy tax law drafting from the part of the tax legislator. Fraus legis for instance cannot be invoked, it seems, in cases in which the tax legislator was aware of the tax avoidance risks at the time of drafting of the legislative text and/or afterwards – or perhaps should have been aware of these risks for these being too obvious – but failed to properly address these.[73] That holds, although some occasions have been recorded, particular involving some more recent cases, in which the Supreme Court provided the tax legislator that did not address a tax avoidance opportunity while explicitly pointed to that a helping hand.[74] This seems to render any drawing of an exact dividing line between the role of the judiciary and that of the legislature in tax avoidance cases in the Netherlands a somewhat elusive affair.

Any presence of artificiality in the transaction or series of transactions does not seem to constitute a necessary condition for applying fraus legis. This holds, although any absence of a real practical meaning supporting the legal constructions created by the taxpayer is generally seen as being supportive to observe any outcomes in terms of tax effects under normal fact-finding and interpretation methods to contravene the purpose and intent of the applicable tax legislation.[75]

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[66] See Supreme Court 6 November 2015, V-N 57.12.
[67] Supreme Court 15 September 1982, *BNB* 1982/298, Supreme Court 7 December 1983, *BNB* 1984/21, Supreme Court 16 May 1984, *BNB* 1984/199, and Supreme Court 13 July 2001, *BNB* 2001/398.
[68] Supreme Court, 11 June 1986, *BNB* 1986/283 (*'Semigrants'*).
[69] Supreme Court, 22 July 1982, *BNB* 1982/245, Supreme Court 20 March 1985, *BNB* 1985/171, and Supreme Court 14 June 1989, *BNB* 1989/240. Also a partial elimination of transactions seems feasible, see Supreme Court 21 September 1983, *BNB* 1983/316 and Supreme Court 20 March 1985, *BNB* 1985/148. Substitution and elimination may even have a third-party effect, see Supreme Court 11 May 1988, *BNB* 1988/290 and Supreme Court 23 November 1988, *BNB* 1989/10.
[70] See Supreme Court 21 November 1984, *BNB* 1985/32, Supreme Court 29 January1986, *BNB* 1986/130, and Supreme Court 9 February 1994, *BNB* 1994/231.
[71] Supreme Court 12 October 1955, *BNB* 1955/360, Supreme Court 21 November 1984, *BNB* 1985/32, Supreme Court 19 January 1994, *BNB* 1994/87, Supreme Court 13 March 2009, *BNB* 2009/123, and Supreme Court 5 June 2015, V-N 2015/27.16. See also Supreme Court 11 July 1990, *BNB* 1990/293, Supreme Court 6 September 1995, *BNB* 1996/4, Supreme Court 13 July 1994, *BNB* 1994/269 and Supreme Court 27 November 1996, *BNB* 1997/98.
[72] Supreme Court 13 March 2009, *BNB* 2009/213.
[73] See Supreme Court 17 June 1987, *BNB* 1987/289, Supreme Court 11 May 1988, *BNB* 1988/289, Supreme Court 27 June 1990, *BNB* 1990/317, Supreme Court 8 July 1992, *BNB* 1992/308, Supreme Court 12 April 2002, *BNB* 2002/187-189, and Supreme Court 10 July 2009 *BNB* 2009/237. See also Supreme Court 6 November 1991, *BNB* 1992/97, and Supreme Court 15 July 1997, *BNB* 1997/296-297 (*Turbo arrangement*).
[74] See for instance Supreme Court 15 March 2013, *BNB* 2013/151, and Supreme Court, 23 May 2014, *BNB* 2014/171, *BNB* 2014/172, *BNB* 2014/173, *BNB* 2014/176, *BNB* 2014/178. See also Supreme Court 8 June 1983, *BNB* 1983/236.
[75] Supreme Court 9 February 1994, *BNB* 1994/231, Supreme Court 21 October 2005, *BNB* 2006/114, Supreme Court 10 February 2012, *BNB* 2012/127.

The same holds for instance for the likelihood of repetitiveness or circularity as a property of the set-up legal arrangement, i.e., the prospect of a tax-carrousel.[76] Artificiality may also be seen as an argumentative support to observe the taxpayer's intent to avoid taxation.

II.1.1.4. No fraus tractatus except for treaty cases under principal purpose test

Under Dutch tax law as it currently stands, fraus legis can only be applied with regards to the interpretation of domestic laws. This extraordinary method of interpretation is unavailable when it comes to the interpretation of the tax treaties that the Netherlands has concluded. According to case law of the Supreme Court the interpretation of treaty terms under the application of fraus legis – fraus tractatus, fraus pacti, or fraus conventionis – may constitute a treaty override for such an interpretation conflicts with the context of the convention.[77] Fraus legis accordingly falls outside the available room for tax treaty interpretation, it seems.

This observation holds, perhaps save for scenarios involving the application and interpretation of double tax conventions in the Dutch tax treaty network containing a general anti-abuse provision. The State Secretary for Finance has forwarded that treaty abuse can only be targeted on the basis of explicit anti-abuse provisions in the double tax treaties, for instance on the basis of a principal purpose test similar to those as promoted by the OECD in the context of the outcomes of its BEPS project relating to Action 6 (preventing treaty abuse).[78] It may be argued that fraus legis (i.e., to target abuse of domestic law via the treaty system) fraus tractatus (i.e., to target treaty abuse) may be applied in such scenarios pursuant to a principal purpose test. No case law, however, has been delivered yet in support of this position. The Supreme Court has yet to rule on this matter and no cases in this area are pending at this time. The Netherlands has proved willing to include a general anti-abuse provision in its tax treaties. An example can be found in Article 23, paragraph 1, of the Double Tax Convention Netherlands-Germany. The Netherlands, notably, is also willing to introduce limitation on benefits provisions in its double tax conventions (see section III.4.).

II.1.1.5. Fraus legis counterpart for taxpayers having upright intentions

Worth noting is that the Dutch tax system also provides for a conceptual counterpart of fraus legis, being the doctrine of a 'fair application of the tax law' ('leerstuk van de redelijke wetstoepassing'). Also that doctrine applies if the applicable law in a particular tax case cannot be discovered in accordance with its purpose and intent by reference to regular interpretation methods. The fair application of the tax law doctrine applies in cases involving taxpayers having upright intentions however being confronted with a harsh tax outcome in contradict with the intent of the law in a sense that these taxpayers are subjected to a more burdensome tax than they should have by reference to the spirit of the law. Tax judges may resort to the doctrine in such cases to preserve the integrity and internal consistency of the Dutch tax system to arrive at an outcome in a particular case at hand which the tax effects accordingly established are in line with the purpose of the law. Hence, a doctrine similar to fraus legis, yet applied for the benefit of the taxpayer rather than to its detriment. Courts apply the doctrine prudently to not to breach the trias, for shortcomings in the tax legislation primarily being considered a matter for the legislature to resolve. A conceptual equivalent of the 'fair application of the tax law' doctrine available for the executive to be employed is the so-called 'hardship clause' ('hardheidsclausule') in Article 63 GLT. This provision allows the Finance Minister to resolve unreasonable tax outcomes to the detriment of taxpayers in individual cases.

II.1.2. Similarities fraus legis and EC GAAR as proposed in 2012 EC Recommendation

II.1.2.1. EC Recommendation GAAR: objectified intention, subjective test, objective test

On 6 December 2012, the European Commission issued a Recommendation on aggressive tax planning.[79] The communication defines aggressive tax planning as 'any taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability'. The Commission considers aggressive tax planning to include the creation of double deductions whereby an expense or loss is deducted in more than a single country. Aggressive tax planning, according to the Commission, also includes the creation of double non-taxation whereby an item of cross-border income escapes taxation altogether.

The Recommendation proposes Member States to adopt a GAAR in their domestic tax system that would read as follows: "An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance". This GAAR undoubtedly echoes case law of the ECJ on abuse

[76] Supreme Court 22 July 1982, *BNB* 1982/243, Supreme Court 15 September 1982, *BNB* 1982/298, Supreme Court 27 January 1993, *BNB* 1993/111, Supreme Court 19 January 1994, *BNB* 1994/87, and Supreme Court 8 October 2002, *BNB* 2004/433.
[77] Supreme Court 5 December 1993, *BNB* 1994/259.
[78] Letter of 5 October 2015, *supra note* 38 and Letter of 19 November 2015, *supra note* 45.
[79] Commission Recommendation on aggressive tax planning, Brussels, 6 December 2012, c(2012) 8806 final (2012/772/EU) ('Commission Recommendation').

(see section II.1.3. below).[80] The provision essentially refers to 'artificial arrangements' ('objectified intention') set-up 'for the essential purpose' ('subjective test') to avoid taxation, i.e., a seeking of a reduction of tax liability, which however contradicts the intent of the law ('objective test').

II.1.2.2. Similarities in fraus legis and EC Recommendation GAAR

The GAAR as recommended by the Commission is similar to the fraus legis doctrine. Both the recommended provision and fraus legis resort to the essential or predominant objective pursued by the taxpayer to reduce its tax liability ('subjective test', 'motive requirement') in contradiction with the intent of the applicable law ('objective test', 'norm requirement').

Moreover, the Commission provision refers to artificiality as an objectification of the taxpayer's intention. The anti-abuse provision proposed by the Commission would therefore apply only in the presence of an artificial arrangement or an artificial series of arrangements. Under the fraus legis doctrine artificiality however does not seem to constitute a necessary condition for establishing fraus legis, although artificiality generally is considered to be of supportive argumentative value with a view to the application of both the motive requirement and the norm requirement. Moreover, artificiality, at least to a certain extent, seems an implicit component of the fraus legis doctrine since the tax implications in cases involving genuine and substantive economic activity would seem to be eligible to be discovered by reference to the regular methods of fact-finding and interpretation. Furthermore, the Supreme Court's fraus legis consistently involved cases in which a transaction or series of transactions had been undertaken that encompassed a certain degree of artificiality.

As to the discovery of the legal effects under the application of the anti-abuse approaches under the Recommendation and in Dutch taxation, effects are quite similar as well. Under the recommended GAAR, any artificial arrangements set up to avoid tax in breach of the law's intent will be taken into consideration by reference to their economic substance. Fraus legis does something alike, in effect that is, as the doctrine allows the tax court involved to proceed to a reconstruction of the facts of the case with a view to its substance to arrive at an application of the tax law in accordance with its spirit.

II.1.2.3. Differences between fraus legis and EC Recommendation GAAR

Some differences may be observed, though. A key difference between the Commission recommendation and the fraus legis doctrine emerges when it comes to addressing non-taxation as a result of international mismatches in entity classification, income qualification or the division of tax base. The GAAR in the Commission proposed seeks to counter aggressive tax planning, amongst others, consisting in a "taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability".[81] The Commission's recommendation accordingly includes any non-taxation outcomes that results in consequence of international mismatch arrangements. The Dutch Supreme Court however has been taking a more precautious approach to this day, placing the matter of addressing international mismatches to a great extent on the table of the Dutch tax legislator, also for trias politica reasons. This holds, although the Supreme Court has held fraus legis to apply in so-called 'profit drainage scenarios' involving artificial intra-group financing arrangements set-up to erode Dutch corporate tax base without a so-called 'compensating levy' on the intra-group interest payments in the hands of the group creditor. Fraus legis case law in that area is discussed in some detail in section II.1.6. below.

II.1.3. Compatibility of fraus legis with the EU/EEA concept of abuse

II.1.3.1. Fraus legis and EU/EEA concept of abuse: near identical concepts

Fraus legis seems compatible with the EU/EEA's concept of abuse of law. The EU/EEA's concept of abuse of law has been developed by the ECJ in its case law since the mid-1970s.[82] The concept applies both in primary and secondary EU law. Similar to the Supreme Court the ECJ allows taxpayers to legally arrange their economic affairs to mitigate tax bills, upholding the principle of legal certainty.[83] Under its application however, EU law, and similar to the fraus legis doctrine, does not allow taxpayers, either individuals or entities, to improperly or fraudulently circumvent the national tax legislation of the Member State involved to which these taxpayers are subject to. EU law cannot be misused for that purpose, and does not protect taxpayers that intend to reduce their tax bills through artificial means in breach of the purpose of the applicable rules.

[80] See for instance ECJ 9 March 1999, C-212/97 (*Centros*), ECJ 14 December 2000, C-110/99 (*Emsland-Stärke*), ECJ 21 February 2006, C-255/02 (*Halifax*), ECJ 12 September 2006, C-196/04 (*Cadbury Schweppes*), ECJ 5 July 2007, C-321/05 (*Kofoed*), ECJ 10 November 2011, C-126/10 (*Foggia*).
[81] Commission Recommendation, *supra note* 79.
[82] ECJ 3 December 1974, 33-74 (*Van Binsbergen*).
[83] See for instance ECJ 12 May 1998, C-367/96 (*Kefalas*), ECJ 9 March 1999, C-212/97 (*Centros*), ECJ 14 December 2000, C-110/99 (*Emsland-Stärke*), ECJ 21 February 2006, C-255/02 (*Halifax*), ECJ 12 September 2006, C-196/04 (*Cadbury Schweppes*), ECJ 5 July 2007, C-321/05 (*Kofoed*), ECJ 22 December 2010, C-103/09 (*Weald Leasing*), ECJ 10 November 2011, C-126/10 (*Foggia*).

The EU's concept of abuse of law is founded on elements essentially akin to those on which also fraus legis has been built. Both seek to establish an equilibrium between allowing legitimate tax bill mitigation and inter-Member State tax competition without providing taxpayers a shield for abuse. The ECJ does not allow taxpayers to engage into abusive tax practices under a protective umbrella of EU law. Similar to the GAAR proposed by the Commission in its 2012 Communication, also the ECJ has developed an objective test and a subjective test supported by an objectified intention test. Under the concept of abuse under EU law, the Court discovers abuse by reference to, first "a combination of objective circumstances in which, despite formal observance of the conditions laid down by the rules, the purpose of those rules has not been achieved", and second, "a subjective element consisting in the intention to obtain an advantage from the rules by creating artificially the conditions laid down for obtaining it."[84]

II.1.3.2. Utilisation of disparities allowed if economic activities are genuine

Under established case law of the ECJ in the field of direct taxation, taxpayers may use tax disparities to their benefit. The Member States however may justify a restrictive national tax measure countering such a disparity utilisation under the fundamental freedoms where such a tax measure "specifically relates to wholly artificial arrangements (i.e., the 'objectified intention test') aimed at (i.e., the 'subjective test') circumventing the application of the legislation of the Member State concerned (i.e., the 'objective test')". In Cadbury - the well-known EU direct tax case concerning the compatibility of UK CFC legislation with the freedom of establishment – the ECJ observed that "(…) in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory."[85] A wholly artificial arrangement could for instance include the use of a 'letter box' or 'front' entity. No hard rules however can be drawn from the ECJ's case law though, to decide in which circumstances a wholly artificial arrangement exactly is present or absent. Sufficient economic activity, substance, or the absence thereof differs per individual situation and would need to be assessed on a case-by-case basis.

Whereas it is clear that the EU's abuse concept requires contradict with the intent of the law, some discussion exists as to the relationship between the subjective test ('tax motive') and the objectified intention test ('artificiality'). Is either one of the two decisive, or should both tests be met simultaneously? Is it the subjective intention of the taxpayer that is of predominant relevance, or is the presence or absence of an objective factor key – i.e., the presence or absence of a genuine economic activity, real substance that is, supporting the transactions and arrangements concerned? If the subjective intention of the parties involved would be decisive, abuse may perhaps be discovered also in the presence of substance. If the existence of objective factors suffice, abuse may be considered absent in the presence of substance, regardless of the presence of a subjective tax avoidance motive. Or should matters indeed be seen in the sense that both tests simultaneously apply, implying that abuse would only be present if both the subjective test and the objectified intention test have been met? If so, abuse would then be absent in the presence of substance, regardless of whether the taxpayer involved has a tax avoidance motive.

II.1.3.3. Artificiality as a constituent test in both EU law and fraus legis

In Cadbury the Court has forwarded that "(…) there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by (…) law, the objective pursued by [the] freedom of establishment has not been achieved [i.e., the actual pursuit of a genuine economic activity, MdW-CW]". It may be inferred from this that both tests simultaneously apply and both need to be met to observe the presence of abuse, which can be taken to mean that abuse is absent if substance is present "despite of the existence of tax motives".[86]

The approach taken in EU law slightly differs from that in fraus legis it seems, since in fraus legis, as said, next to the norm requirement the subjective intention of the taxpayer is key, whereby the artificiality of the transactions or arrangements serves a more supportive function to discover the intention of the taxpayer and the contradiction with the intent of the law. However, as said, artificiality seems implied in fraus legis cases for the discovery of tax implications in cases involving genuine economic activity would seem to be eligible to be discovered by reference to regular methods of fact finding and interpretation in Dutch tax law. Fraus legis, at least implicitly, seems eligible to be invoked by the Dutch tax authorities only in cases in which legal arrangements have been set-up that lack substance.

The abuse of law concept in EU law in the field of direct taxation seems quite strict. Only wholly artificial arrangements constitute abusive practices that can successfully be targeted under the abuse of law concept. It seems that the ECJ allows taxpayers to make use of available tax advantages, for instance those that follow from the disparities in the tax systems of the Member States, as long as these taxpayers carry on a genuine economic activity. Abuse of law cannot be

[84] ECJ 14 December 2000, C-110/99 (*Emsland-Stärke*).
[85] ECJ 12 September 2006, C-196/04 (*Cadbury Schweppes*).
[86] ECJ 12 September 2006, C-196/04 (*Cadbury Schweppes*).

invoked by reference to tax-induced motives only. At this point the concept seems to go hand in hand with fraus legis, for the latter only being eligible to be invoked as a last resort means in cases where taxpayers have a predominant motive to obtain a tax advantage. Also the Supreme Court as said allows any escaping of tax imposts, provided that the means used for that purpose may be considered admissible and normal. Should those means be interpreted as carrying on genuine activity, the concepts analytically match in full.[87]

Matters boil down to the observation that fraus legis and the EU's abuse of law concept are near identical doctrines. Fraus legis accordingly seems not to contradict EU law. The Supreme Court has ruled on some occasions that taxpayers cannot escape fraus legis by invoking EU law protection; the Court held that it is not open to reasonable doubt that taxpayers are ineligible to effectively rely on EU law when their tax positions have been assessed by reference to the application of the fraus legis doctrine.[88] Also literature to our knowledge does not record any positions of fraus legis not being in line with the abuse of law concept in EU law.

II.1.4. The elements of fraus legis further assessed from an EU anti-abuse perspective

The questionnaire included the question as to whether the following elements (tests) are part of the national GAAR, i.e., the fraus legis doctrine in the context of Dutch taxation:

- main objective test (the accrual of a tax advantage the grant of which is contrary to purpose of the legal provision);
- the obtaining of a tax advantage as the essential aim of the transactions concerned;
- complementary business purpose test (under international tax law) or the genuine economic activity test (under EU law);
- subjective element, consisting of the intention to obtain a tax advantage;
- the principle of proportionality.

As noted above, for the fraus legis doctrine to be of application, the case at hand would need to involve a taxpayer, having the predominant aim of avoiding taxation, enters into a transaction or series of transactions which has that sought-after effect under the application of the tax legislation under the regular methods of fact finding and interpretation ('motive requirement'), whereas such an effect as sought after by the taxpayer contravenes with the purpose and intent of the tax legislation involved ('norm requirement'). The EU's concept of abuse of law basically makes reference to a setting-up of a 'wholly artificial arrangement' ('objectified intention test') 'for the purpose to avoid taxation' ('subjective test') in contradict with the intent of the law ('objective test'). Indeed, both concepts seem near identical.

Essentially all elements of fraus legis match those bulleted in the above. The norm requirement in fraus legis corresponds with the main objective test in EU law, indeed calling for the accrual of a tax advantage the grant of which is contrary to object or purpose of the applicable legal provision. Also fraus legis targets tax outcomes that contravene the intent of the law. Moreover, the motive requirement in fraus legis neatly aligns the test in the second bullet, the obtaining of a tax advantage being the essential aim – or predominant aim in fraus legis terms – of the transactions engaged into.[89] As mentioned, the listed 'complementary business purposes test', or the EU law equivalent 'genuine economic activity test' may be recognised to be implicitly part of fraus legis for the doctrine to effectively apply as an ultimum remedium, and effectively only applies it seems in scenarios lacking substantive economic activity in support of the legal arrangements set-up by the taxpayer involved. The fourth bulleted element, the subjective test, seems to be included as part of fraus legis also. The presence of a predominant intention to obtain a tax advantage is an explicit component of fraus legis under the motive test. Both essentially are in search of the same, namely the taxpayer's objective to avoid taxation.

Worth elaborating is the principle of proportionality under the abuse of law concept in EU law when it comes to the division of the burden of proof among tax administration and taxpayer. To be justified under EU law an anti-avoidance rule in the domestic tax system of the member state involved needs to be suitable to achieve the objective for which it

[87] Perhaps some room may exist for recognizing a slight difference, i.e., where fraus legis perhaps applies in cases of transactions undertaken having a practical meaning in terms of business outcomes sought after, however making use of legal routings towards such outcomes predominantly for tax avoidance motives. Perhaps such cases constitute genuine activity for EU abuse of law purposes rendering the abuse of law concept not to apply (see e.g. ECJ 22 December 2010, C-103/09 (*Weald Leasing*). These remarks should be seen as forwarded quite tentatively, though.
[88] See Supreme Court 23 January 2004, *BNB* 2004/142, and Supreme Court 1 June 2012, *BNB* 2012/213.
[89] In EU VAT the abuse of law concept may be seen to have a somewhat broader scope than its equivalent under the fundamental freedoms in direct tax cases. In EU VAT abuse of law case law such as ECJ 21 February 2006, C-255/02 (*Halifax*) and ECJ 21 February 2008, C-425/06 (*Part Service*) the Court of Justice noted that the *essential* aim of the transaction may be interpreted as the *principal* aim of the transactions rather than for instance the *sole* aim. In EU VAT, it seems, an arrangement may accordingly constitute abuse also in the presence of economic objectives, or at least objectives other than strictly tax motives. Under the freedoms in EU direct tax law, only a wholly artificial arrangement may constitute an abusive practice. The reference in *fraus legis* to a predominant motive to escape tax and the absence of a test explicitly referring to the artificiality of the arrangement(s) involved leaves open the potential of an outcome similar to that in EU VAT. From that perspective, perhaps, *fraus legis* may be considered to have, like in EU VAT, a somewhat broader scope than the EU abuse of law concept has under the application of the fundamental movements. This however has not been explicated in the Supreme Court's direct tax case law.

was adopted and not go beyond what is necessary to achieve that purpose.[90] The Member States for instance need to allow taxpayers the possibility to provide evidence that the arrangements set-up are supported by real economic substance. EU law also allows Member States to provide for a rebuttable presumption in their tax codes, deeming a transaction or arrangement or a series of transactions or arrangements to be tax-induced. Such a reversal of the burden of proof shifting the burden to provide evidence on the genuineness of the transactions and arrangements undertaken to the taxpayer is admissible, provided that these transactions and arrangements are specified in the applicable legislative act involved.[91]

The ECJ refers for this purpose to domestic procedural rules of evidence.[92] In tax litigation procedures in the Netherlands, courts are flexible in assigning the responsibility to show evidence to either the taxpayer or the tax authorities – whichever of the parties involved is best placed for that purpose. The courts are called upon to divide the burden of proof in an equitable manner ('redelijke bewijslastverdeling'). This is generally taken to mean that the tax administration will have to provide evidence with regards to any elements that would result in an increase of the tax burden, whereas the taxpayer involved is required to show evidence with regards to any elements that point to the opposite. In fraus legis cases this means that it will be first up to the tax authorities invoking fraus legis to show proof, for instance of the artificiality of the tax structure. The court typically proceeds by requiring the taxpayer involved to subsequently show evidence of the presence of a genuine activity, or of having motives other than tax reasons for engaging into the transaction or series of transactions – for instance by illustrating that the transaction would also have been undertaken if the tax effects would have been absent.[93] The approaches taken in Dutch tax proceedings involving fraus legis and burden of proof division are accordingly fitted to adhere to and correspond with EU proportionality requirements.

II.1.5. Fraus legis case law leaves international mismatches untouched – a matter for legislature

II.1.5.1. The intent of the law revealed by reference to the internal consistency of the Dutch tax system

Fraus legis does not seem eligible to be invoked to address international mismatches, though. To this day, the Supreme Court has rendered non-taxation outcomes that result from international mismatches a matter for the legislature to resolve. This holds for non-taxation due to hybrid entity mismatches, hybrid income mismatches, and TP mismatches. The Dutch tax authorities have tried a number of cases, however have not been very successful in their attempts to strike down international mismatches on the basis of fraus legis. It should be noted at this place that the tax legislator responded to this by introducing specific anti-hybrid mismatch legislation, discussed in some detail in sections III.6., III.7., and III.8.5. below.

In its case law the Supreme Court has constantly interpreted the intent of the law by reference to the internal consistency of the Dutch tax system. When it comes to international non-taxation due to the utilisation of international mismatch arrangements the Supreme Court has consistently held such outcomes ineligible to be addressed by invoking the fraus legis doctrine. This generally holds regardless of whether it is the Dutch corporate tax base or the foreign tax base that is subject to profit shifting and base erosion. The Supreme Court did not only uphold mismatches in cases where the Netherlands was at the recipient end of the mismatch transaction, it did the same in cases involving payments from the Netherlands to abroad. The court accordingly does not seem to see much room for applying fraus legis to address the disparities and mismatches in the international tax regime and ensuing non-taxation outcomes. This said, however, the Supreme Court did allow the tax authorities some room to successfully invoke fraus legis in certain tax base erosion cases involving taxpayers engaging into intra-group financing transactions to artificially create interest expenses with the objective of deducting these from the tax base in the Netherlands. This case law known as the 'anti-profit drainage case law' and is discussed below after first forwarding some notes on the Supreme Court's fraus legis case law involving mismatch arrangements.

II.1.5.2. Supreme Court case law on hybrid mismatches

An example of a case involving a hybrid entity mismatch that the Supreme Court left in place is 'Sarakreek'.[94] In Sarakreek the Supreme Court left untouched the so-called 'Sarakreek tax planning arrangement', basically a hybrid entity mismatch utilisation arrangement. The case concerned a Dutch resident corporate taxpayer parent company that financed its foreign business operations carried on through a permanent establishment that was operated by its tax-consolidated Dutch subsidiary company with a loan issued to that subsidiary. The foreign operations were exempt from corporate taxation in the Netherlands under the Dutch double tax relief system. Under the Dutch tax consolidation regime laid down in Article 15 CITA the loan was eliminated for tax purposes, as the consolidated subsidiary effectively

[90] ECJ 12 September 2006, C-196/04 (*Cadbury Schweppes*).
[91] ECJ 17 July 1997, C-28/95 (*Leur-Bloem*), par. 38 and 39, and ECJ 5 July 2007, C-321/05 (*Kofoed*), par. 37.
[92] ECJ 14 December 2000, C-110/99 (*Emsland-Stärke*), par. 54.
[93] See Supreme Court 8 June 1983, *BNB* 1983/236, Supreme Court 4 May 1988. *BNB* 1988/254, and Supreme Court 11 October 2000, *BNB* 2001/121.
[94] Supreme Court 4 June 1986, *BNB* 1986/239. See also Supreme Court, 20 December 2002, *BNB* 2003/286.

is treated tax-transparent for Dutch corporate tax purposes under the application of this regime.[95] The interest payments from the subsidiary to the parent company however were tax-deductible in the foreign tax jurisdiction for purposes of calculating the taxable profit of the permanent establishment, for the subsidiary company was considered non-transparent from that jurisdiction's perspective. The Supreme Court nevertheless upheld the non-recognition of the internal interest receipt rendering it tax-free in the Netherlands regardless of the tax-deductibility abroad, accordingly leaving the mismatch in place. The Court did not resort to fraus legis to neutralise the mismatch. The tax legislator responded by including a SAAR[96] to address the 'Sarakreek mismatch' (see section III.8.5.).

The Supreme Court uphold the application of the participation exemption in some hybrid income mismatch cases. A known mismatch case is 'Prêt participatif'.[97] Prêt participatif concerned the tax implications of an interest receipt in the hands of a Dutch corporate recipient on a hybrid loan that qualified as equity under Dutch tax law and would accordingly be eligible for exemption under the participation exemption regime. The Supreme Court qualified the hybrid loan as an equity financing arrangement for Dutch corporate tax purposes and left the application of the participation exemption untouched. The Court did so, regardless of the deductibility for tax base calculation purposes at the level of the foreign debtor entity in which the Dutch creditor held a substantive shareholding. The Supreme Court did something similar as it did in Prêt participatif in a recent case known as the 'Redeemable preference shares' case. Again, the Court did not resort, explicitly even, to fraus legis to address an international income qualification mismatch.[98] The case concerned a scenario of a cross-border issuance of redeemable preference shares with respect the payments of which were deductible abroad at payor level whereas the receipts would be exempt in the Netherlands under the participation exemption in the hands of the Dutch shareholding company. The Court upheld the qualification of the shareholding issuance as equity for Dutch corporate tax purposes and applied the participation exemption, regardless of the deductibility abroad. The Court held the qualification of the redeemable preference shareholding as equity for Dutch tax purposes and the application of the participation exemption not to contradict the intent of the Dutch tax system. It observed that under Dutch tax law an equivalent payment from the Netherlands to abroad would qualify as a dividend and would accordingly not be tax-deductible in the Netherlands. The non-taxation of the receipts would be consistent with a view to the internal consistency of the Dutch tax system not subjecting dividend distributions to economic double taxation. The qualification of the payment as an exempt dividend receipt hence did not contradict the spirit of Dutch tax system. The Court upheld the application of the participation exemption and with that maintained the deduction and no inclusion outcome, essentially by resorting to the internal consistency of the Dutch tax system. As a follow-up to secondary EU law developments involving the PSD the tax legislator has now responded and recently introduced legislation addressing these types of income qualification mismatches. This is further discussed in section III.6.

II.1.5.3. Supreme Court case law on TP mismatches

The Supreme Court has also left TP mismatches in place. It for instance left untouched interest deductibility in the Netherlands in such mismatch cases.[99] Already in 1978 in a case known as 'Swedish ultimate parent', the Supreme Court upheld tax-deductibility in the Netherlands of a businesslike interest rate for corporate tax purposes on a contractually interest-free loan taken on from an affiliate entity.[100] The Supreme Court maintained the at arm's length correction in the Netherlands to a businesslike interest, and with that the recognition for Dutch tax purposes of a business expense that is in principle tax-deductible – save for the application of a deduction limitation provision – regardless of the fact that no interest was recognised in the hands the foreign creditor, for the loan being contractually interest free. To substantiate its ruling the Court observed that the reasons underlying the interest-free loan rested in shareholders motives rather than business reasons; the benefit from the interest-free loan did not originate from the taxpayer's business operations. Under Dutch tax law a similar correction would materialise in the hands of the recipient, which would be subject to tax on a businesslike interest regardless of the contract providing for an interest-free loan or a non-arm's length interest rate. In 2004, the Supreme Court delivered an analytically parallel ruling in a similar case in which the loan was taken on to finance a third-party shareholding acquisition. Again the Court upheld tax-deductibility, regardless of the fact that the interest-free loan did not attract taxation in the hands of the foreign creditor.[101] The Supreme Court held fraus legis not to apply. Recently, the Supreme Court ruled on a similar matter again, in a case known as 'Mauritius'. This time however the court was not asked to rule the respective case by reference to fraus legis but rather under the interest-deduction limitation rules covering these types of scenarios today, laid down in Article 10a CITA. Article 10a and Mauritius are discussed section III.7.2.

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[95] Please note that the question whether and to which extent notional loans between head offices and permanent establishments may be recognised for Dutch corporate tax purposes upon the 2010 modifications to the OECD Model Tax Convention will be left unassessed. The same holds for any tax implications of the utilisation of tax-transparent or hybrid entities in this respect outside those explicitly covered.
[96] Article 15ac(4)-(6).
[97] Supreme Court 25 November 2005, *BNB* 2006/82 (*Prêt participatif*).
[98] Supreme Court 7 February 2014, *BNB* 2014/79 (*Redeemable preference shares*). That same day the Court issued a similar ruling in a comparable case involving a purely domestic situation, Supreme Court *BNB* 2014/80 (*Banks syndicate*).
[99] Supreme Court 3 April 1957, *BNB* 1957/165, Supreme Court 31 May 1978, *BNB* 1978/252 (*Swedish ultimate parent*), Supreme Court 17 December 2004, *BNB* 2005/169.
[100] Supreme Court 31 May 1978, *BNB* 1978/252 (*Swedish ultimate parent*).
[101] Supreme Court 17 December 2004, *BNB* 2005/169. See for a comparison Supreme Court 27 September 1995, *BNB* 1996/6.

As noted, by resorting to some internal consistency reasoning the Supreme Court has consistently upheld the recognition of businesslike expenses for tax purposes under an autonomous assessment of the ALS. The Court adopted a consistent approach regardless of whether the facts of the case involved a domestic or cross-border scenario and regardless of whether the taxpayer in the Netherlands was payer or recipient. Of no relevance was the question whether the Dutch approach corresponded with TP views abroad at the other end of the transaction. The Court does not consider international TP mismatches to contradict the intent of Dutch tax law, for the Dutch approach towards TP is internally consistent. It follows that the Court's approach may lead to both international double taxation and non-taxation, dependent on whether the interpretation abroad results into a higher or lower transfer price relative to the transfer price as recognised for tax purposes in the Netherlands. From the Courts reasoning it may be inferred that this leaves room for a strategic utilisation of TP mismatches to optimise after tax business profits. Any resolving of disparities in this area is a matter for the legislature. The tax legislator has responded to this by introducing a SAAR limiting interest deductibility[102] which is discussed in section III.7.3.

Relatively new is the body of case law that the Supreme Court developed that has become known as the 'dogma of the non-businesslike loan' ('onzakelijke lening').[103] The phenomenon essentially involves the Supreme Court's interpretation of third-party comparability in related party financing transactions to qualify certain inter-affiliate receivables as 'non-businesslike loans' for the purpose of subsequently restricting tax-deductibility of amortisation losses realised on such loans and to establish criteria to set businesslike interest rates. Under the Court's case law a loan granted to an affiliated party can be qualified as a non-business motivated loan, or a non-businesslike loan that is, if such a loan is granted under such conditions and circumstances that the debtor carries a risk that an independent third party would not have been willing to take. In the view of the Court such a non-businesslike loan appears if the agreed upon interest rate is not at arm's length, whereas the rate cannot be adjusted to a fixed rate under which a third party would have been willing to extend a similar loan without modifying the nature of the financial instrument, i.e., altering it into a profit participating loan and requiring a businesslike guarantee to be taken into consideration. In such a case the Supreme Court held such a loan taken on to be non-business motivated; an impairment loss suffered on such a loan is not tax-deductible.

In the view of the Supreme Court, the arm's length interest rate on such an inter-affiliate non-businesslike loan may be set on the basis of a rule of thumb. The interest rate may be determined by reference to an interest rate that would have been agreed upon by a third-party creditor under an equivalent third-party loan agreement in the presence of a guarantee granted by a group company affiliate of the debtor involved. Accordingly, the interest rate on a non-businesslike loan recognised for Dutch tax purposes to a great extent corresponds with an interest rate on a low-risk bearing bond. It follows that the interest rate agreed upon in the loan agreement is of hardly any relevance. The modification also applies in the presence of agreed upon non-interest bearing loans.[104]

The interest rate as modified under the non-businesslike loan dogma seems to be of application with a view to both the debtor and the creditor to the non-businesslike loan. It may be likely that other tax jurisdictions would adopt a dissimilar reasoning in cases involving such financing transactions. This may initiate TP mismatches, producing double taxation and non-taxation outcomes. Non-taxation outcomes may arise in cases involving foreign debtor affiliate entities taking on non-businesslike loans from Dutch creditor affiliate entities, whereby the debtor deducts the agreed-upon interest rate, whereas only a risk-free rate is taxed in the Netherlands. Such a mismatch does not seem to be eligible to be neutralised on the basis of fraus legis for the non-businesslike loan dogma being internally consistent.

II.1.6. Countering 'profit drainage' via fraus legis –Supreme Court 'anti-profit drainage case law'

Whereas the attempts undertaken by the Dutch tax inspectorate to address international mismatches via fraus legis have not been all too successful, the tax authorities did achieve successes in countering artificial Dutch tax base erosion by invoking the fraus legis doctrine in tax litigation in an area that has become known in Dutch taxation as 'profit drainage' ('winstdrainage'). The tax authorities have successfully invoked fraus legis in the past to put to an end tax base erosion through artificial structuring involving a setting-up of intra-group debt financing arrangements, producing a body of case law known as 'anti-profit drainage case law' ('anti-winstdrainagejurisprudentie'). The case law of the Supreme Court on fraus legis in this area and its subsequent codification and accompanying tightening of interest deductibility possibilities in Article 10a CITA is very sizeable (see for an overview section III.7.2.).

The transactions that the tax authorities targeted by invoking fraus legis involved the setting-up of artificial and circular inter-affiliate legal arrangements to erode Dutch tax base by artificially creating interest payments with the purpose of deducting these as interest expenses for corporate tax calculation purposes. These arrangements amongst others involved the creation of group-interest payments via intra-group debt financing of intra-group dividends, capital

[102] Article 10b.
[103] See Supreme Court 9 May 2008, 2010, *BNB* 2010/32, Supreme Court 25 November 2011, *BNB* 2012/37, Supreme Court 25 November 2011, *BNB* 2012/38, Supreme Court 25 November 2011, *BNB* 2012/78 and amongst other Supreme Court 9 March 2012, *BNB* 2012/133, Supreme Court 15 March 2013, *BNB* 2013/149 and Supreme Court 20 March 2015, *BNB* 2015/141.
[104] See Supreme Court 15 March 2013, *BNB* 2013/149.

contributions or internal shareholding transfers or other types of internal business reorganisations. The Supreme Court held that interest-deductibility under these arrangements contradict the purpose and intent of the Dutch tax law, save for those cases where the interest receipt would be subject to a 'compensating levy' ('compenserende heffing') that is reasonable according to Dutch tax standards.[105] The Court held that the arrangement did not contradict the intent of the law in such cases. The compensating levy escape applied, regardless of whether the levy involved a Dutch tax or a foreign tax levied on the interest payments in the hands of the recipient.[106] The Supreme Court considered a compensating levy present also in cases where the creditor was not effectively taxed because of the application of loss compensation rules except for those cases – it seems - where the utilisation of loss compensation possibilities constituted the predominant motive for the transactions undertaken.[107]

Despite successes of the Dutch tax authorities invoking fraus legis in these profit drainage scenarios, the Dutch tax legislator considered taxpayers to still have too much leeway to erode Dutch tax base. Therefore, as per 1 January 1997, the legislator decided to codify the fraus legis doctrine in Dutch tax legislation and proceeded to further narrow down room for interest deductibility. The interest deduction limitation regime can be found in Article 10a CITA, and is further discussed in section III.7.2.

II.1.7. Fraus legis has not been replaced and will not be replaced by EC Recommendation GAAR

The questionnaire that was forwarded to us and which constitutes the basis of this report further queried whether the national GAAR has been or will be replaced by the GAAR proposed by the EC. The answer is in the negative. The fraus legis doctrine as it has been developed since its introduction by the Supreme Court in 1926 forms an integral part of the Netherlands' tax system. Its properties conceptually are near identical to the EU's abuse of law doctrine. No plans exist at this time to abolish fraus legis or to codify it as a GAAR in the Dutch tax legislation.

Indeed, fraus legis moves away from the GAAR as recommended by the EC for not addressing international mismatch arrangements. To this day the Supreme Court has considered this a matter for the legislature to resolve. The tax legislator has responded and addresses a range of international mismatch risks through SAARs in the tax legislation. In his letter to the House of Representatives of 11 January 2013 the Minister for Foreign Affairs forwarded the position of the Netherlands government on the Commission recommendation to introduce a GAAR in the Dutch tax system.[108] The Netherlands government noted that Dutch tax practice already aligns with the Commission recommendation at this point by reference to the doctrine of fraus legis. Recently, the Dutch State Secretary for Finance voiced the same view.[109] He does not acknowledge the necessity for introducing a GAAR in the Dutch tax system at this time. Referring amongst other to the fraus legis doctrine and the SAARS, all of which are available to be invoked by the tax administration to target abuse, the State Secretary considers the Dutch tax system to be sufficiently robust in addressing tax avoidance.[110]

II.1.8. The Netherlands implemented the GAAR in the PSD per 1 January 2016

Leaving fraus legis untouched, the Netherlands has implemented the GAAR in the amended PSD per 1 January 2016 in the Dutch tax system. The Directive's GAAR has been implemented in existing SAARs, i.e., via the corporate income tax regime for non-resident shareholding companies,[111] and the dividend withholding tax regime for Dutch resident cooperatives.[112] Both focus on artificiality and tax-avoidance motives. These provisions are further discussed in sections III.8.2. and III.8.6.).

II.2. EC Recommendation on introduction of subject-to-tax rule

II.2.1. EC Recommendation: proposal for subject to tax requirement in national rules and tax treaties

In its Recommendation on aggressive tax planning of 6 December 2012, the EC Commission not only suggests the Member States to introduce a GAAR in their tax systems, it also recommends the Member States to introduce a 'subject-to-tax rule' in both their domestic tax systems and double tax treaty networks. The purpose of such a subject-to-tax rule is to deal with double non taxation outcomes. In treaty scenarios it would read as follows: "Where this Convention provides that an item of income shall be taxable only in one of the contracting States or that it may be taxed in one of the contracting States, the other contracting State shall be precluded from taxing such item only if this item is subject to

[105] See e.g., Supreme Court 17 June 1987, *BNB* 1987/289, Supreme Court 10 March 1993, *BNB* 1993/194, Supreme Court 10 March 1993, *BNB* 1993/196, Supreme Court 23 August 1995, *BNB* 1996/3, and Supreme Court 20 September 1995, *BNB* 1996/5.
[106] See e.g., Supreme Court 20 September 1995, *BNB* 1996/5, Supreme Court 8 February 2002, *BNB* 2002/118, and Supreme Court 23 January 2004, *BNB* 2004/142.
[107] See e.g., Supreme Court 10 March 1993, *BNB* 1993/197, and Supreme Court 30 June 1999, *BNB* 1999/323. The Supreme Court differentiated for this purpose between scenarios involving losses that were already present at the time of the legal arrangements concerned and scenarios involving structuring predominantly set-up to acquire loss compensation possibilities. Fraus legis may effectively be invoked in such latter scenarios.
[108] Parliamentary Papers House of Representatives, 2012-2013, 22 112, No. 1545, at 6.
[109] Parliamentary Papers House of Representatives, 2015-2016, 34 306, No. 8.
[110] Parliamentary Papers House of Representatives, 2015-2016, 34 306, No. 3.
[111] Article 17(3)(b).
[112] Article 1(7) DWTA.

tax in the first contracting State." The proposed text has been derived from the OECD Commentary to the OECD Model Tax Convention. With a view to the provision of double tax relief under national rules, the recommendation suggests Member States to subject an exemption for foreign income to a subject to tax requirement. Pursuant to such a requirement no relief would be made available if the respective income is not treated as taxable by the local jurisdiction concerned, for instance by reason of the application of an exemption, a full credit, or a zero tax rate.

II.2.2. No subject to tax gateway requirements in the Netherlands for exempting foreign source active income; a credit regime applies for passive income

In the Netherlands foreign source active income is exempt from corporation tax, regardless of whether the income involved is subject to an effective profit taxation in the source jurisdiction. This holds with regards to both juridical and economic double tax relief, and also in both tax treaty scenarios and cases in which no tax treaty applies. The Netherlands double tax relief system roughly distinguishes between active income (business income) and (low-taxed) passive income (portfolio investment income). An exemption applies with regards to the former and an ordinary credit regarding the latter. Switch-over provisions and a CFC-like regime apply to counter undue tax deferral. In the past, a subject to tax requirement applied as a gateway rule for juridical tax relief purposes in non-tax treaty scenarios. That requirement however was repealed as of 1 January 2012. Notably, the 'compensating levy test' as part of the eligibility criteria for interest deductibility under Article 10a CITA may be considered to form some sort of a subject-to-tax rule as well; see further section III.7.2. The same may be considered to hold for Article 13l CITA – see section III.7.4.

Tax policy considerations for exempting active income from foreign sources are founded on a combination of import neutrality and tax sovereignty arguments. Notions of sovereign prerogatives to tax business income in the investment jurisdiction are well established in the Netherlands. A key policy consideration on top of that form level playing field considerations, i.e., the view that Dutch business enterprises should be enabled to carry on overseas business affairs under the same tax conditions as their local competitors. The credit mechanisms for foreign source passive income in the Dutch international tax system seeks to promote export neutrality – i.e., an equal treatment of Dutch portfolio investors in the Netherlands regardless of where the portfolio investment has been undertaken geographically – as well as to make sure that passive income is not sheltered abroad in a low-taxing jurisdiction. The switching over from exemption to the credit method in cases involving low-taxed foreign source portfolio investment income – see also section III.5 – illustrates these underlying anti-avoidance considerations.

II.2.3 No plans to introduce a subject-to-tax rule as proposed by the EC Recommendation

The Netherlands is not planning at this time, to introduce a subject-to-tax rule in the Dutch tax system as recommended by the Commission. In his letter to the House of Representatives of 11 January 2013 the Minister for Foreign Affairs forwarded the position of the Netherlands government on the Commission recommendation to introduce such a rule.[113] The government noted that the recommendations of the Commission already align with Dutch international tax policies and considers the recommendations to be supportive of these. With a view to the Commission's recommendation to introduce a provision in the tax treaties to deal with double non-taxation and tax avoidance, the government noted that such a provision would encroach upon the competences of the Member States in the area of direct taxation and double tax conventions. Substantively though, the Commission recommendations have been part of a long-standing tradition of Netherlands' international tax policies, for these have been seeking to not only avoid double taxation but also to address double non-taxation outcomes and tax avoidance. Furthermore, the Netherlands does not conclude tax treaties with countries that do not live up to certain minimum tax standards, the government noted. The Netherlands government further noted in this respect that the Commission does not explicate which modes of tax avoidance would exactly be countered upon the introduction of such a subject-to-tax provision. In the view of the Dutch government this renders unclear why the proposal for a subject-to-tax clause would resolve the issues of double deduction and non-taxation as identified in the Commission Recommendation. The suggestion is made that the Commission further elaborates on its suggestions and makes these more concrete by clearly formulating which types of double deductions and non-taxation would exactly be covered by the recommendation. The Netherlands could for this purpose resort to its knowledge and experiences gained on addressing tax treaty abuse by means of the anti-treaty abuse provisions that have already been included in a number of tax treaties in the Netherlands tax treaty network, or those which are currently in the process of being renegotiated.

III. TP Rules, GAARs, SAARs, and Linking Rules

III.1. National TP rules

III.1.1. Taxable profit calculation and the ALS as an integral part thereof

[113] Parliamentary Papers House of Representatives, 2012-2013, 22 112, No. 1545, at 3, 6.

The ALS forms an inherent and integral part of taxable profit calculation in Dutch business income taxation. The operation of the principle is explicated in the CITA.[114] The mechanism incorporates common TP methodologies and prevents and counters certain tax avoidance possibilities involving transactions and arrangements between related parties. Any advantages or disadvantages that originate from affiliation rather than from the business conduct, and the parties to the transaction being aware of that, are considered non-businesslike. Any non-businesslike elements in (non-)payments or (non-)receipts are excluded from the taxable base. The analysis includes an assessment of whether the inter-affiliate transfers and transfer prices involved have originated from shareholder motives, or personal motives if the business enterprise is privately held. The Supreme Court has for instance held that expenditures made by a corporate entity lack a businesslike character, if and to the extent those expenditures are made for the fulfilment of the personal benefits of its shareholder.[115] The approach taken accordingly cancels out artificialities arising from inter-affiliation from the tax base determination process.

In its established case law the Supreme Court seeks to discover the true nature of the transaction, amongst others by reference to the underlying motives of the parties engaging into the transaction concerned. The Court distinguishes for this purpose between costs and proceeds arising from business activities, i.e., businesslike elements, on the one hand and non-businesslike elements on the other hand, which are referred to in Dutch taxation as 'constructive dividend distributions' and/or 'informal capital distributions'. Only those expenditures that are considered to be made with a view to the commercial interests of the business enterprise constitute 'costs' for tax purposes and are eligible for deduction, provided that no deduction limitation provision applies – see section III.7. To preserve the internal consistency of the system, only those receipts are considered 'proceeds' and hence eligible to be taxed if these arise from the business activities as such. Non-businesslike, i.e., non-arm's length payments, both inward and outward bound, are adjusted to an arm's length amount. Non-arm's length outcomes are accordingly transformed into businesslike outcomes for tax base calculation purposes. Any differences between arm's length prices and contractually agreed upon prices as said are considered constructive dividends or informal capital contributions for tax purposes, dependent on which of the affiliate entities involved favours the other. Such a labelling for tax purposes as a dividend or capital contribution upholds, even if not considered a dividend or capital contribution for civil law or commercial accounting purposes.

The tax administration may only invoke the non-businesslike nature of a transaction or transfer price. Worthy of note is that the tax inspectorate is not authorised to judge whether a certain business decision that initiated a loss or profit would be wise or sensible, i.e., from a business economics perspective. To the extent that a certain expenditure has been made for businesslike reasons, such an expenditure is considered a cost for tax purposes and hence in principle deductible. The tax authorities may not disallow a tax-deduction for a cost incurred on the argument that the underlying decision that initiated such a cost may be considered imprudent from a business economics perspective. In Dutch taxation, as a general rule no one other than the entrepreneur may interfere with or judge any businesslike decisions as to their utility in the business process.[116]

This said however, as an important exception to this rule, the tax administration does have the authority for a limited judicial review with respect to the amount of the costs, i.e., under the 'Cessna-costs doctrine', a dogma developed in case law that applies in the presence of excessive and unreasonable expenses.[117] Established case law of the Supreme Court provides that excessive expenses are non-deductible to the extent that these may objectively be considered unreasonable. Such unreasonableness is interpreted by reference to an objectified sensible entrepreneur accepting a certain expense-to-utility ratio from a business economics perspective. On that basis costs are non-deductible insofar there is a discrepancy between the amount of costs and the usefulness thereof for the business to such an extent that a sensible and rational entrepreneur may not maintain that those costs are made in consideration of the businesslike interests of the business. Only the amount of reasonable costs is tax deductible in such cases. The excess is not.

III.1.2. ALS included in the definition of 'profits'

Under the operation of the ALS associated parties are deemed to interact as if they are unrelated. Approaches taken in the Netherlands to come to a businesslike profit in this respect are built on third party comparability and substance. Any preferential conditions based on the affiliation of the parties to the transaction are adjusted to arrive at a taxable corporate profit that is similar to an amount of profit which independent businesses would derive performing comparable transactions in comparable circumstances. The businesslike or non-businesslike nature of the transaction or series of transactions undertaken is assessed by reference to the functions performed by the parties concerned, the assets used in the business process and the question as to whether economic risks have actually been assumed. Of relevance regarding risk assumption is whether the persons involved in carrying on the business processes are actually

[114] Article 3.8 Dutch PITA and Article 8. The ALS is explicated in Article 8b.
[115] See for example Supreme Court, 14 June 2002, *BNB* 2002/290, (*Racehorses*) and, Supreme Court, 18 April 2008, *BNB 2008/139* (*Fleet of cars*).
[116] See for example Supreme Court 18 March 1998, *BNB* 1998/159, in which the Supreme Court held that the manner in which a business is conducted, in principle, is determined by the entrepreneur and that it is within its discretion to decide which expenditures will benefit the business.
[117] See Supreme Court, 9 March 1983, *BNB 1983/202* (*Cessna plane I*) and Supreme Court 8 March 2002, *BNB* 2002/210 (*Cessna plane II*) on the costs of the use and possession of a private plane used to travel to business appointments instead of using scheduled flights.

responsible and capable of managing the risks assumed involving the asset utilisation and whether the equity at risk is sufficient to actually bear these risks.[118] A substance-over-form-approach applies.

Several decrees and resolutions have been issued by the Ministry of Finance to provide guidance on the interpretation and application of the TP legislation in certain specific situations.[119] The Netherlands closely adheres to the OECD's interpretation of the ALS and third party comparability under the OECD TP Guidelines. The State Secretary noted that current policies and approaches in Dutch taxation correspond with the modified OECD TP Guidelines under the BEPS package (BEPS Actions 8-10).[120] The State Secretary has for instance noted that any contractual allocation of risks incurred is recognised for tax purposes only if such a risk assignment is supported by actual business reality. Contractual risk allocation is subject to the assessment of whether the entity or entities that contractually bear the risks concerned are actually capable to manage and control these risks. Cash box entities within which no functions are performed may only be remunerated with a risk-free amount, or less even if the cash box concerned lacks any commercial rationality.[121] Synergy benefits are divided among group companies by reference to their functional contributions to these benefits.

III.1.3. Codification ALS and TP documentation requirements

The operation of the ALS in the Dutch tax system has been explicated through its codification in Article 8b CITA as per 1 January 2002. Article 8b has been drafted in line with Article 9 OECD Model Tax Convention.

In addition to explicating the operation of the ALS in Dutch taxation, Article 8b sets forth the basics of TP documentation requirements. Pursuant to Article 8b corporate taxpayers are required to maintain 'sufficient documentation' with regard to their TP arrangements with associated enterprises. Association is established by reference to 'any participating, directly or indirectly in the management, control or capital of another company'. The TP documentation should at least consist of a description of the comparability analysis by reference to the comparability factors forwarded by the OECD TP Guidelines, the choice of TP method used and a substantiation of the conditions which have been agreed upon in the associated transactions undertaken.[122] The operation of Article 8b CITA shifts the burden of proof regarding the arm's length nature of inter-affiliate transactions to the corporate taxpayer. Taxpayers have the possibility to obtain certainty on whether the documentation requirements have been complied with.[123]

The Netherlands has recently extended TP documentation requirements implementing OECD BEPS outcomes in the area of Country-by-Country Reporting (BEPS Action 13).[124] The Netherlands has introduced Country-by-Country Reporting legislation with effect as per 1 January 2016.[125] The new documentation obligations are in line with OECD minimum standards and include the requirement for eligible taxpayers to produce a country-by-country report, a master file and a local file. The new standards for TP documentation serve as a tool for the tax authorities to better analyse potential risks with respect to TP and tax base calculation.

III.1.4. No specific 'TP-GAAR'

The questionnaire queried whether the Dutch tax legislation provides for a 'specific GAAR' in the area of TP. Such a provision has not been put in place. Current dogmas and concepts are considered sufficient to address any misuse. The absence of a GAAR in the Dutch tax legislation however does not mean that the tax administration would not be inclined to counteract any tax-induced and non-businesslike profit shifting through a strategic TP of inter-affiliate transactions. The tax inspectorate does, or the Dutch 'TP Coordination Group' that is – a specialist resource unit within the tax administration devoted to TP –, and particularly in scenarios involving intangibles, procurement activities and captives.[126] The TP Coordination Group typically seeks to counteract such tax avoidance scenarios in association with other specialist resource units within the tax administration, including the 'Tax Havens and Group Financing Coordination Group' and the 'Construction Counteraction Coordination Group'.

III.2 TP disputes

TP disputes may arise with a view to establishing the businesslike nature of the transactions undertaken, the methods used for the determination of the arm's length conditions and the question as to whether the documentation

[118] Supreme Court 8 August 2008, *BNB* 2008/256 and Supreme Court 20 December 2002, *BNB* 2003/246). And see Decree of 21 November 2011, No. DGB 2011/6870M, sec. 4.
[119] See, e.g., TP Decree, *supra note* 27, Profit Attribution Decree, *supra note* 27, and Decree of 21 November 2011, No. DGB 2011/6870M, sec. 4.
[120] Letter of 5 October 2015, *supra note* 38.
[121] A similar approach may be held to be found in Article 8c. This provision applies to interest and royalty flow-through companies with contractual earnings from intragroup back-to-back debt financing and/or asset licensing arrangements. Such earnings are excluded from the corporate tax base in scenarios where the taxpayer concerned does not bear sufficient economic risks on its debt financing and/or asset licensing arrangements. No credit is available for foreign source taxes levied in such cases. A handling fee is included in the tax base. Substance requirements apply. The Netherlands may proceed to a spontaneous exchange of information.
[122] TP Decree, *supra note* 27.
[123] See also the Decision of 11 August 2004, No. DGB2004/1339M on the establishment of a coordination group TP.
[124] Parliamentary Papers, 2015-2016, 34 305, No. 3, at 8 et seq. and 33 et seq.
[125] Articles 29b et seq.
[126] TP Decree, *supra note* 27.

requirements have or have not been met. Most TP discussions however are resolved in practice by the taxpayer and the tax authorities in the (pre-)tax return filing stage. Relationships between taxpayers and the tax administration in the area of TP are generally build on constructive cooperation and transparency. This particularly holds when it comes to deciding on applicable TP methods, the performing of comparability assessments, the establishing of arm's length ranges and prices and the preparing of TP documentation. As noted in section I.1.3. the tax administration is willing to conclude unilateral, bilateral and multilateral APAs and/or to proceed to horizontal monitoring. The Netherlands is also generally willing to proceed to making corresponding adjustments in response to TP adjustments abroad to ensure a single taxation of business income at the location of value creation. As noted the Netherlands considers itself a front runner in the area of transparency, also with a view to TP. The efficient, professional, and constructive tax administration is considered one of the crown jewels of the Dutch tax climate for business and investment.

III.3. Case law on TP

Case law on TP is scarce since most TP discussions are resolved in practice by negotiation rather than through litigation. This particularly holds when it involves the question as to which TP method should be applied in a particular case and whether the transfer price agreed upon is at arm's length. TP cases that have been brought before the court are quite case-specific.[127] Courts have typically resolved matters in these cases either by reference to establishing whether the burden of proof to establish the arm's length character of the transfer price has or has not been met, or by establishing the arm's length price in 'good justice'. A Dutch TP case that is currently attracting a great deal of attention does not concern a dispute between the tax administration and the taxpayer, but concerns a decision of the European Commission in which it considers an individual APA concluded between the Dutch tax authorities and a certain multinational involving the application of the transactional net margin method to reward a Dutch group company performing manufacturing functions to constitute illegal state aid.[128] The Commission considers the pricing not at arm's length, i.e., too low. The Commission considers the Netherlands to have aided the respective multinational, which is not allowed under EU state aid rules. The Netherlands disagrees with the Commission decision and appealed.[129] The matter is currently pending.

Some guiding TP case law exists when it comes to establishing whether inter-affiliate conditions and prices agreed upon are businesslike or arise from shareholder relations, and as to whether tax implications abroad should be taken into account for this purpose. A selection of Supreme Court case law on these matters has been forwarded in section II.1.5.3. Worth addressing are the lines in the Supreme Court's case law involving, first, a doctrine known in Dutch taxation as 'non-businesslike profit transfers and profit capacity transfers' ('Winstgemis'), and, second, the treatment of so-called 'umbrella credit facilities'. Winstgemis basically involves any non-businesslike intra-group transfer of business profit – for instance by contractually transferring profit capacity to an affiliate entity or by contractually shifting profitable transactions or arrangements to that entity – whereby such a transfer rests on shareholders motives.[130] In such cases any legal arrangements undertaken for that purposes are de facto disregarded for tax base calculation purposes. Second, the Supreme Court dealt with the question of whether an at arm's length compensation is feasible in the presence of an inter-affiliate arrangement that may only rarely be found between independent entities in a case that has become known as 'Umbrella guarantee'.[131] The case involved a group of affiliated entities that engaged into an 'umbrella credit facility'. Such a facility basically concerns a cross guarantee agreement under which a group of affiliated entities jointly accept a liability exceeding the liability that would have been agreed upon if the capital concerned would have been borrowed by these entities independently. The Supreme Court held that no at arms' length conditions could be established in such a case, because of the underlying reason for the group companies to enter into such an agreement lied in their corporate interrelationships. The Court ruled that a loss suffered under such an agreement hence was not deductible. The State Secretary for Finance has provided some guidance on the Dutch tax treatment of 'guarantee fees' for TP purposes.[132]

III.4 Tackling avoidance through anti-abuse clauses in Dutch tax treaties

III.4.1 Policy on inclusion of anti-abuse clauses in tax treaties

The Netherlands adheres to the outcome of the BEPS package on Action 6,[133] and acknowledges the need to prevent treaty abuse and treaty shopping. The Netherlands is willing to include a 'Limitation on Benefits' ('LOB') and/or a

[127] Some examples are Supreme Court 9 November 2001 *BNB* 2002/10 (*Costs Bank Guarantee*), Supreme Court 28 June 2002, *BNB* 2002/343 (*Car importer*), and Supreme Court 23 April 2004, V-N 2004/27.17 (*Procurement office*).
[128] European Commission - Press release, 21 October 2015, IP/15/5880.
[129] Letter of 27 November 2015 from the State Secretary for Finance, to the House of Representatives, No. AFP/2015/948 M.
[130] Supreme Court 4 January 2013, *BNB* 2013/77 (*Swiss Paper Trade case*), and see Supreme Court 21 March 1962, *BNB* 1962/139 (Supreme Court 26 June 1963, *BNB* 1963/291), Supreme Court 12 April 1967, *BNB* 1967/167, Supreme Court 28 January 1970, *BNB* 1970/63, Supreme Court 16 January 1974, *BNB* 1974/44, Supreme Court 11 December 1991, *BNB* 1992/69, Supreme Court 2 June 1993, *BNB* 1994/79, Supreme Court 2 March 1994, *BNB* 1994/290-291, Supreme Court 26 March 1997, *BNB* 1997/219, Supreme Court 17 August 1998, *BNB* 1998/385, Supreme Court 14 April 1999, *BNB* 1999/326, and Supreme Court 25 June 1969, *BNB* 2010/93.
[131] Supreme Court, 1 March 2013, *BNB 2013/109* (*Umbrella guarantee*).
[132] TP Decree, *supra note* 27.
[133] BEPS Action 6, Letter of 5 October 2015, *supra note* 38, and Letter of 19 November 2015, *supra note* 45.

'Principal purpose test' ('PPT') in its bilateral double tax treaties. The Dutch government considers that room exists for such clauses if treaty abuse risks are present considering the interaction between the national tax systems involved.[134] LOBs focus on the eligibility to treaty benefits of persons, and PPTs on treaty benefits eligibility with respect to certain transactions.

The Netherlands has adopted a wide range of anti-treaty abuse rules in several of the tax treaties in the Dutch tax treaty network. Provisions adopted include both general anti-abuse provisions, and targeted anti-treaty shopping rules, such as PPTs and LOB clauses. A general anti-abuse provision can for instance be found in the tax treaty with Germany.[135] References to treaties in which PPTs and LOBs are included are forwarded in the section directly below. PPTs and LOBs apply on top of traditional beneficial ownership requirements, which are present in virtually all tax treaties in the Netherlands' tax treaty network, as well as in the Dutch domestic tax system. Recently, the Netherlands has entered into tax treaty (re)negotiations with 23 developing countries, amongst other, concerning the inclusion or enhancing of anti-abuse clauses.[136]

When it comes to the actual design of anti-treaty abuse clauses, the Netherlands takes a tailor-made approach. Provisions and clauses are designed on a treaty-by-treaty basis with a particular focus on treaty shopping and abuse risks in the relationship with the treaty partner concerned and the mutual interaction of the respective tax systems. An example of an anti-abuse rule specifically designed to suit the interests of the treaty partner concerned is the 'remittance-clause'[137] in the tax treaty between the Netherlands and the United Kingdom. This clause prevents the granting of relief for international double taxation in cases where the taxpayer concerned is only taxed in the other state on a remittance base. In such cases, the Netherlands only grants relief if the income is remitted to or received by the taxpayer concerned in the other state.

III.4.2. Limitation on Benefits provisions

LOB clauses have been included for instance in the double tax treaties with the United States and Japan.[138] Pursuant to the application of an LOB-provision a resident of a contracting state that derives income from the other contracting state is eligible to be granted tax treaty benefits if such resident is considered a 'qualified person'. LOBs accordingly are 'person-based' or 'entity-based'. Eligibility for receiving treaty benefits essentially depends on the nature of the recipient and its activities. The LOB-clause in the Netherlands-United States tax treaty limits all treaty benefits to qualifying residents, whereas the scope of application of the LOB-clause in the Netherlands-Japan tax treaty is limited to dividends receipts, interests, royalties, capital gains, and other items of income. Because of its relatively limited scope, the Netherlands-Japanese LOB-provision is referred to in practice as 'LOB-light'.

LOB-clauses are extensive, detailed and technically complex. Broadly put, the LOB-clause in both the treaties with the United States and Japan establish that tax treaty benefits are limited to residents of one of the contracting states deriving income from the other state, provided that the resident involved is an individual, a State, or a political subdivision or local authority thereof, or a company meeting some additional tests. The treaty with Japan also labels the Bank of Japan and the Central Bank of the Netherlands as qualified persons. The additional tests for companies include amongst others a 'listing and trading on a recognised stock exchange test' and a 'share ownership test'. A resident may also be entitled to the benefits of the treaty if the person involved is engaged in the 'active conduct of a trade or business' (NL-US) / 'carrying on of business' (NL-JP) in the other country, provided that some additional criteria are met. Multinational headquarter companies may also be eligible, provided that some additional conditions are met. Under the treaty with Japan some specific rules apply regarding withholding taxes.[139] For details reference is kindly made to the respective treaty texts.

Recently, the European Commission has asked the Netherlands to amend the LOB-clause in the tax treaty with Japan.[140] According to the European Commission the current phrasing of the clause contradicts EU law to the extent the Netherlands agreed on an effectively better treatment for shareholders resident in its own territory than for shareholders resident elsewhere in the EU/EEA. The same holds for the conditions agreed on for companies, traded on Dutch stock exchange and those traded on stock exchanges elsewhere in the EU/EEA. Such a 'reversed most-favoured nation approach' as currently taken by the Commission in this matter bears a potential of having a significant influence on the double tax treaty networks of the EU Member States.

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[134] The Ministry of Finance has explicitly stated this in its memorandum on Dutch tax treaty policy: *Notitie Fiscaal Verdragsbeleid 2011*.
[135] See e.g. Article 23, paragraph 1 Double Tax Convention Netherlands-Germany.
[136] See Letter of the State Secretary for Finance, 20 April 2015, No. IZV/2015/292, and see Letter of 19 November 2015, *supra note* 45.
[137] Article 22 Double Tax Convention Netherlands-United Kingdom.
[138] Respectively Article 26 Double Tax Convention Netherlands-United States, and Article 21 Double Tax Convention Netherlands-Japan. The tax treaties with Hong Kong and Panama contain an LOB-like provision in Article 10 (dividends) which applies in combination with a main purpose test.
[139] Article 21(4) Double Tax Convention Netherlands-Japan.
[140] European Commission, 19 November 2015, Memo 15-6006, Case No 2014-4233. The EC refers to ECJ 15 January 2002, C-55/00 (Gottardo) and ECJ 5 November 2002, Case C-466/98 (*Open skies*).

III.4.3. Principal purpose test

PPTs can be found for instance in the tax treaties with the United Kingdom, China, Hong Kong, Switzerland, and the United Arab Emirates. PPTs essentially are 'transaction-based'. Eligibility for receiving treaty benefits with regards to a transaction or series of transactions depends essentially on an objectified intention test. Under the tax treaty with the United Kingdom no relief is available with respect to dividends, interest, royalties, and other income, if the main purpose or one of the main purposes of any person concerned is to take advantage of the distributive provisions relating to these types of income.[141] Similar provisions are included in the treaty with China with respect to dividend, interest and royalty payments.[142] Treaty benefits under the tax treaty with China are unavailable if the main purpose or one of the main purposes of any person concerned with the creation or assignment of the shares, debt-claim or rights in respect of which the remuneration is paid, was to take advantage of the provisions by means of that creation or assignment. Under the tax treaty with Hong Kong the provided dividend withholding tax exemption for intercorporate dividends does not apply if the establishment, acquisition or maintenance of the recipient company has as its main purpose or one of its main purposes to secure the benefits of the treaty provision on dividends.[143] The Protocol to the tax treaty with Switzerland establishes that the distributive provisions for dividends do not apply if the relation between the company paying the dividends and the receiving company has been established or maintained mainly for purposes of taking advantage of the treaty benefits concerned.[144]

III.5 Provisions in CITA resembling CFC-rules

III.5.1 No general CFC-regime in the Dutch tax system

The questionnaire queried whether the Dutch tax system contains a general Controlled Foreign Company (CFC)-regime. Strictly seen, the Netherlands system does not contain such a provision. However, rules have been adopted in the corporate tax code that show, at least to some extent, some resemblance to internationally widely known approaches towards CFCs. Adverse tax deferral is countered in the Netherlands via a mark-to-market valuation rule for passive, low-taxed subsidiaries. The Dutch State Secretary for Finance acknowledges the importance to address undue tax deferral. The State Secretary however considers a CFC-regime unconstructive with a view to maintaining an attractive climate for business and investment, because such a regime may introduce uncertainties for taxpayers on their tax positions and may likely increase administration costs.[145] He considers SAARs to be more efficient in this regard.[146]

III.5.2 Double tax relief and addressing undue tax deferral

The Netherlands double tax relief system roughly distinguishes between active income (business income) and (low-taxed) passive income (portfolio investment income). An exemption applies with regards to the former and an ordinary credit regarding the latter. Juridical double tax relief is available in corporate taxation for taxpayers having eligible foreign source income. Relief is provided in both treaty scenarios and non-treaty scenarios. A mechanism akin to a base exemption applies for foreign source income derived from carrying on a permanent establishment abroad.[147] A switch-over to a direct tax credit applies in cases involving 'low taxed and passive foreign enterprises', i.e., unless the Netherlands is required to grant relief by means of an exemption under the applicable tax treaty.[148] An ordinary credit mechanism applies for foreign source passive income.[149]

Economic double tax relief is provided in corporate taxation for proceeds from substantial equity investments under the participation exemption regime and the participation credit regime – the latter being an indirect credit mechanism.[150] Eligible for relief are proceeds from an equity investment of 5 per cent or more, i.e., a 'participation', in the paid-up capital of the company in which the corporate taxpayer holds its shareholding investment. Exempt from the tax base under the participation exemption are proceeds from actively held participations, and proceeds from passively held participations that are subject to a reasonable tax according to Dutch tax standards which is interpreted as a profit tax at an effective tax rate of at least 10 per cent.[151] A switch-over to an indirect credit applies with regard to passively held

[141] Articles 10(3), 11(5), 12(5), and 20(4) Double Tax Convention Netherlands-United Kingdom.
[142] Articles 10(5), 11(9), 12(7) Double Tax Convention Netherlands-China.
[143] Article 10(3) Netherlands-Hong Kong.
[144] Article 10(2) Netherlands-Switzerland and Article VIII of the Protocol thereto.
[145] Parliamentary Papers House of Representatives, 2005-2006, 30 572, No. 3.
[146] Parliamentary Papers House of Representatives, 2009-2010, 32 128, No. 52, at 34.
[147] Article 15e. The regime is referred to as 'base exemption for foreign business profits'. The regime is available for Dutch resident corporate taxpayers and Dutch fiscal unities that derive profits from foreign sources, e.g. profits attributable to foreign permanent establishments. Under this mechanism, the taxpayer's worldwide earnings are reduced with an amount equal to the sum of the foreign sourced income items as determined according to Dutch tax standards on a per country basis.
[148] Article 15e et seq, and Article 23d.
[149] Article 36 Unilateral Decree for the avoidance of double taxation (Unilateral Decree).
[150] These regimes are laid down respectively in Article 13, and Articles 13aa and 23c.
[151] Article 13(11-15). Passively held participations from which the proceeds are eligible for relief under the participation exemption are referred to in Dutch taxation as 'qualifying portfolio participations'. The participation exemption applies to participations held as a portfolio investment in the event that a 'subject to tax-test' or the so-called 'asset-test' are met. The subject to tax-test is fulfilled if the company in which the participation is

participations which are subject to a profit tax at an effective rate of up to 10 per cent.[152] No relief is available if the passively held participation effectively remains untaxed locally.

Adverse tax deferral, as said, is addressed by reference to a CFC-like mark-to-market valuation rule that applies to passively held shareholdings of at least 25 per cent in corporate bodies whose assets 'exclusively or almost exclusively' consist of low-taxed portfolio investments.[153] The phrase 'passively held' is interpreted by reference to the intention of the taxpayer of holding the assets as a portfolio investment. The phrase 'low-taxed' refers to the corporate body concerned being subject to an effective corporation tax at a rate of at least 10 per cent. Similar to CFC-rules the mark-to-market valuation rule prevents taxpayers from obtaining an exemption for income from mobile capital sheltered in a low taxed entity. [154] Contrary to common CFC-rules however, there is no direct attribution of profits derived by the company concerned to the shareholder/taxpayer. Instead the regime resorts to the shareholding value and includes any value fluctuations, both increases and decreases, in the taxable base. Since both realised and unrealised profits of the underlying company are reflected in the fair market value of the shares, the income resulting from this may in certain cases be higher than under general CFC-rules. Notably, also the Dutch personal income tax system provides for CFC-like regimes, having the objective of countering adverse tax deferral arrangements engaged into by high net worth individuals.[155]

III.6. Linking rules relating to hybrid financial instruments – PSD

The Netherlands recognises the need to implement measures to address hybrid mismatch arrangements, for example by introducing linking rules. The Netherlands however firmly stresses the importance of an internationally coordinated approach in this area, for instance at EU level.[156] The recommendations in the final BEPS package concerning BEPS Action 2 are considered too noncommittal to proceed to unilateral actions. The State Secretary for Finance calls for international consensus on binding rules and a multilateral introduction to ensure a level playing field and to preserve the attractiveness of the Dutch tax climate for business and investment.

As per 1 January 2016, the Netherlands has implemented recent amendments to the PSD involving the adopted anti-mismatch provision[157] by introducing a specific linking rule in the Dutch participation exemption regime.[158] Pursuant to the linking rule, a corporate taxpayer will not be eligible to apply the participation exemption with respect to received profit repatriations to the extent that these are deductible by the subsidiary. This might be the case for certain hybrid financial instruments. Any payments on such instruments are taxed in the hands of the recipient Dutch taxpayer. The linking rule operates mechanically, the aim or intention of the taxpayer is irrelevant. Similar to some other Member States, the Netherlands has chosen to have its linking rule to operate globally and not only regarding intra-EU payments on financial instruments.

The newly introduced linking rule addresses deduction and no inclusion outcomes in a similar manner as the OECD's specific recommendation on hybrid financial instruments (BEPS Action 2). Both the OECD recommendation and the anti-mismatch provision in the PSD aim to secure a balanced outcome in tax effects in this area. Either the payments are tax deductible and taxed, or non-deductible and eligible for double tax relief. Via the Directive an EU wide coordination of tax treatments of financial instrument payments is secured, and level playing fields in this area within the EU accordingly.

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held is subject to a tax on profits which results in a 'reasonable taxation according to Dutch tax standards', i.e., an effective tax rate of at least 10 per cent. The asset-test is fulfilled if the assets of the company in which the participation is held generally for less than 50 per cent consist of so-called 'low-taxed free portfolio investments'.

[152] Articles 13(9), 13aa and 23c. Passively held participations from which the proceeds are ineligible for relief under the participation exemption are referred to in Dutch taxation as 'non-qualifying portfolio participations'. Benefits connected with such 'non-qualifying portfolio participations' are included in the corporate income tax base and taxed at 25 per cent. However, an indirect tax credit of generally 5 per cent is available as a relief from double economic taxation if the company in which such shareholding is held, is subject to an effective tax rate between 0 per cent and 10 per cent.

[153] Article 13a. The legislative refers to a so-called portfolio shareholding of at least 25 per cent in a company which is not subject to an effective tax rate of at least 10 per cent and whose assets consist for at least 90 per cent of low-taxed free portfolio investments. Such a portfolio shareholding must be annually valued at fair market value.

[154] Parliamentary Papers House of Representatives, 2009-2010, 32 129, No. 3, at 15-16.

[155] Two regimes have been adopted in the personal income tax act for this purpose. First, a SAAR in Article 2.14a PITA counters any tax-induced separation of privately held assets, for example through a trust. The regime provides for an attribution of any assets and income derived from such a 'separated estate' to the contributor (*afgezonderd particulier vermogen*). It accordingly seeks to tackle any creation of 'non-taxable and floating' assets (Parliamentary Papers House of Representatives, 2008–2009, 31 930, No. 3, at 50 et seq). Second, the SAAR found in Articles 4.13 and 4.14 PITA counters any hoarding of portfolio investments in non-taxed or low-taxed entities (Parliamentary Papers House of Representatives, 1998-1999, 26 727, No. 3, at 204).To tackle possibilities to hoard portfolio investment proceeds in a non-taxed or low taxed entity, a specific rule applies in the substantial shareholder regime. A taxpayer which has a substantial shareholding, i.e. a shareholding of at least 5 per cent, in a Dutch exempt investment fund (Article 6a CITA) or a low-taxed foreign portfolio investment entity, is required to annually include at least a fictitious return of 4 per cent of the fair market value of the shares in its taxable income which is subsequently subject to the general individual income tax rate for any proceeds from substantial shareholdings of 25 per cent (*forfaitaire rendementsregeling*).

[156] Letter of 5 October 2015, *supra note* 38 and Letter of 19 November 2015, *supra note* 45.

[157] Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

[158] Article 13(17).

III.7. Limitations on the deduction of interest

III.7.1. Objective interest deduction limitation provisions is a preservation of corporate tax base

Netherlands' corporate tax legislation contains several provisions limiting the deduction of interest expenses. The deduction of businesslike interest can be limited in certain situations, either by the application of a legal provision or on the basis of fraus legis. The Dutch tax system as noted allows for a requalification of debt instruments having equity-like properties into equity for corporate tax purposes. Interest payments on such hybrid financial arrangements qualify as a constructive dividend and hence are not tax-deductible. In cases of excessive non-arm's length interest, the excess qualifies as a constructive dividend also and is therefore not deductible either. It follows that the deduction limitation provisions in the Dutch tax system apply with regards to an arm's length interest on a debt instrument that qualifies as such for purposes of corporate taxation.

The interest deduction limitations in the Dutch tax system share the objective of protecting Dutch corporate tax base from erosion through financing arrangements. Some provisions focus on specific transactions, and some on the financing structures incorporated by the taxpayer concerned. Some interest deduction limitations resort to the motives of the taxpayers concerned whereas others apply mechanically, i.e., irrespective of whether the taxpayer concerned has a tax-induced reason for engaging into the debt financing arrangement concerned. Interest deduction limitation provisions in the Dutch tax system, i.e., Article 10a, 10b, 13l and 15ad, apply in their order of insertion in the CITA. The same notably holds for the roll-over relief rules for business restructurings.

III.7.2. Anti-profit drainage – Article 10a CITA

A long standing tradition exists in the Netherlands of countering tax base erosion strategies utilizing an artificial and tax-induced creation of interest payments under intra-group financing transactions and arrangements. Traditionally, such 'profit drainage' was countered by the tax administration by invoking fraus legis, sparking a development in case law known as the 'anti-profit drainage case law', see section II.1.6. above. As discussed the tax authorities achieved some success in addressing profit drainage via that means. The Dutch tax legislator nevertheless desired to further limit interest deductibility, beyond fraus legis scenarios, and proceeded to codify fraus legis case law in this area per 1997 for legal certainty reasons[159] and to further limit the deductibility of group interest payments by broadening the scope of the regime's application. The meant interest deduction limitation regime has been modified into its current form in 2007 and is found in Article 10a CITA.

Article 10a CITA basically is a SAAR addressing certain types of tax-induced profit drainage scenarios, i.e., a base erosion via certain intra-group financing transactions. Pursuant to Article 10a any deduction of interest on debts, including expenses and foreign exchange results, owed to 'affiliated' parties may be denied in the event that the debts involved relate to the financing of 'tainted transactions'. The provision covers any debts that are either by law or in fact, directly or indirectly owed to an affiliated company or individual, and which relate to the financing of any tainted transactions. 'Tainted transactions' covered by the SAAR include any debt financing that – either by law or in fact, and either directly or indirectly – relates to: (i) a profit distribution or a repayment of capital to an affiliated company or person; (ii) a capital contribution into an affiliated company, or; (iii) an acquisition or an extension of a shareholding interest in an affiliated company including an acquisition from a third-party of a shareholding interest in a company that becomes an affiliate of the taxpayer upon its acquisition. Such tainted transactions may either be concluded by the taxpayer or an affiliated party to address some undesired structuring possibilities. Emphasis lies on the substance rather than on the form of the transactions undertaken. The provision defines an 'affiliated' party as (i) a company in which the taxpayer, directly or indirectly, owns an interest of at least one third; (ii) a company that, directly or indirectly, owns an interest of at least one third in the taxpayer; (iii) a company in which a third party, directly or indirectly, owns an interest of at least one third, while that third party, directly or indirectly, owns an interest of at least one third in the taxpayer. Also corporate entities forming part of a Dutch fiscal unity for corporate tax purposes are considered affiliated.[160]

To secure a non-effectuation of the deduction limitation under Article 10a, the taxpayer is provided the possibility to demonstrate that there is no intention of misuse. As Article 10a essentially is a codification of pre-existing fraus legis case law, the motives of the taxpayer for engaging into the debt financing transactions are of pivotal importance to arrive at any deductibility or non-deductibility of group interest under this provision. Interest deduction is not limited if the taxpayer demonstrates that both the transaction and the debt-financing thereof are predominantly based on sound business-like motives ('motive test'), or the interest at the level of the recipient is subject to a reasonable taxation according to Dutch tax standards – interpreted as tax payable at an effective tax rate of at least 10 per cent ('compensating levy test'). If the taxpayer opts to base its arguments on the 'compensating levy test', the tax authorities have the possibility to prove that there are no overriding sound business-like motives for the transactions as well as the opportunity to prove that the transactions are set-up for the reason of future loss compensation. Matters accordingly boil down to the motive of the taxpayer, whereby the burden to proof the presence of business motives – i.e., motives

[159] Parliamentary Papers House of Representatives 1995-1996, 24 696, No. 3 at 9-12.
[160] Article 10a(4).

other than tax motives – rests at the taxpayer if the effective tax rate at the recipient end is lower than 10 per cent and whereby the tax administration has to show proof if the tax rate concerned effectively exceeds 10 per cent. Essentially, the approach taken resorts to some sort of subject-to-tax test used as a burden of proof distribution tool.

The operation of Article 10a CITA and fraus legis in this area has given rise to a large amount of case law.[161] The body of case law perhaps is too extensive to be discussed in detail in this report. Nevertheless worth addressing is a recent case ruled by the Supreme Court which has become known as 'Mauritius'.[162] In Mauritius the Court clarified that the 'motive test' under Article 10a also applies with regards to an external acquisition. Taking a group-wide approach the Court stated that the motives of 'all parties involved' in the undertaken transactions concerned need to be taken into account for the purpose of assessing whether the motive test is fulfilled, i.e., rather than the motive of the respective taxpayer/debtor on a stand-alone basis. Moreover, the Court elaborated on what is referred to in Dutch tax practice as a 'non-business like re-routing' ('onzakelijke omleiding') of capital within the affiliated group (see on re-routing also section I.1.2.). In the presence of such a re-routing of capital it is not possible to successfully call upon the 'motive test' to shake-off a limitation of interest deductibility. Matters must be assessed by taking into account a broad perspective. The Court did not answer the question whether a motive to avoid foreign taxation constitutes a business motive under the motive test for Article 10a purposes. Furthermore, currently pending before the Supreme Court is 'Italian Listed Company' which potentially may have significant impact on the interpretation and application of Article 10a.[163] This case involves a Swedish multinational wishing to de-list its Italian subsidiary company a minority shareholding of which is listed on an Italian stock exchange. For acquiring the minority shareholding from the market, the multinational incorporated a Dutch intermediate holding company funded with intra-group debt, which subsequently made the funds obtained available as a capital contribution into its incorporated subsidiary company, 'BidCo'. BidCo subsequently proceeded to acquire the 'floating shares' from the stock exchange. The structuring accordingly left a group debt situated at the level of the Dutch intermediate holding company seeking to deduct the interest paid from its corporate tax base, yet being confronted with the interest deduction limitation in Article 10a CITA. One of the questions at hand as brought before the Supreme Court is whether and how the motive test should be interpreted and applied in the present case. It is now up to the Supreme Court to decide on the operation of Article 10a in this case.

III.7.3. Interest deduction limitation to counter international TP mismatches – Article 10b CITA

It has been forwarded in section II.1.5.3. that the fisc has not been too successful in addressing TP mismatches via fraus legis. To counter certain base erosion strategies involving intra-group debt financing the tax legislator has adopted a SAAR in Article 10b CITA. The provision is designed to address international mismatches involving the issuing of long-term debts between associated companies on which no interest is due, or with respect to which an interest rate has been agreed upon that is significantly – i.e. at least 30 per cent – lower than the at arm's length interest rate. Any debt with no term or with a term of at least 10 years is considered to be long-term within the context of this provision. The term 'associated' is interpreted in the same way as its equivalent under Article 8b CITA (see section III.1.3.). Pursuant to Article 10b, any interest – i.e., including both the amount paid and the at arm's length amount – is not deductible for corporate tax base calculation purposes, regardless of the tax treatment of the interest in the hands of the recipient affiliate creditor. The legislator finds the economic double taxation risks accordingly initiated justifiable because it considers the provisions to be aimed at providing a disincentive for associated companies to conclude such long-term debts on non-arm's length conditions.[164] Notably, the State Secretary for Finance has forwarded to be willing to resolve any such double taxation in domestic scenarios.[165] EU law compatibility issues are left unassessed.

III.7.4. Tax base protection by limiting deduction of interest related to participations – Article 13l CITA

A third interest deduction limitation regime, i.e., next to Articles 10a and 10b, is Article 13l CITA. This SAAR seeks to safeguard corporate tax base by limiting the deduction of interest on debts that are deemed to be related to the financing

[161] Relevant cases include Supreme Court, Supreme Court 9 February 1955, *BNB* 1955/127, Supreme Court 27 December 1967, *BNB* 1968/80, Supreme Court 17 June 1987, *BNB* 1987/289, Supreme Court 26 April 1989, *BNB* 1989/217, Supreme Court 7 June 1989, *BNB* 1990/72, Supreme Court 10 March 1993, *BNB* 1993/194, Supreme Court 10 March 1993, *BNB* 1993/196, Supreme Court 10 March 1993, *BNB* 1993/197, Supreme Court 23 August 1995, *BNB* 1996/3, Supreme Court 6 September 1995, *BNB* 1996/4, Supreme Court 20 September 1995, *BNB* 1996/5, Supreme Court 27 September 1995, *BNB* 1996/6, Supreme Court 17 March 1999, *BNB* 1999/325, Supreme Court 18 April 2001, *BNB* 2001/345, Supreme Court 13 July 2001, *BNB* 2001.398, Supreme Court 10 August 2001, *BNB* 2001/399, Supreme Court 8 February 2002, *BNB* 2002/118, Supreme Court 7 June 2002, *BNB* 2002/361, Supreme Court 6 December 2002, *BNB* 2003/183, Supreme Court 23 January 2004, *BNB* 2004/142, Supreme Court 9 July 2004, V-N 2004/35.11, Supreme Court 8 October 2004, *BNB* 2005/51, Supreme Court 17 December 2004, *BNB* 2005/169, Supreme Court 17 June 2005, *BNB* 2005/304, Supreme Court 16 November 2007, V-N 2007/55.23, Supreme Court 25 November 2005, *BNB* 2006/86, Supreme Court 11 July 2008, *BNB* 2008/266, Supreme Court 19 March 2010, *BNB* 2010/215, Opinion Advocate General Wattel 30 November 2010, V-N 2011/3.19 Supreme Court 8 April 2011, *BNB* 2011/156, Supreme Court 24 February 2012, *BNB* 2012/229, Supreme Court 16 March 2012, *BNB* 2012/149, Supreme Court 1 June 2012, *BNB* 2012/213, Supreme Court 1 March 2013, *BNB* 2013/137, Supreme Court 27 February 2015, *BNB* 2015/125, Opinion Advocate General Wattel, 6 August 2015, V-N 2015/51.12, and Supreme Court 14 August 2015, *BNB* 2015/165.
[162] Supreme Court 5 June 2015 and the textual corrected version of 14 August 2015, *BNB* 2015/165.
[163] Case No. 15/00194, see also Opinion Advocate General Wattel, 6 August 2015, V-N 2015/51.12.
[164] Parliamentary Papers House of Representatives, 30 572, No. 8, at 84.
[165] Letter of 14 June 2007 from the State Secretary for Finance, No. BCPP2007-00826. See also the pending case No. 15/00707, and the Opinion Advocate General Wattel, 14 October 2015.

of both domestic and foreign participations. This provision was introduced per 1 January 2013 and may be seen as an extended response of the Dutch tax legislator to the outcomes in the widely known ruling of the ECJ in Bosal in 2003.[166] In Bosal the ECJ held incompatible with EU law a former interest deduction limitation in the Dutch corporate tax legislation of which a property was that it effectively allowed a deduction for interest relating to the financing of domestic participations while it denied an equivalent deduction for interest expenses relating to foreign participations. In response to this ruling, the Dutch tax law was amended to allow a deduction for all interest expenses relating to participations. As of 1 January 2004, thin capitalisation rules were introduced in Article 10d CITA to limit the gap between deductible expenses and exempt profits and to protect the tax base. Article 10d was subsequently abolished per 1 January 2013, and replaced by Article 13l CITA which is currently operational.

Article 13l aims to limit the gap between deductible expenses and exempt profits related to participations. Interest expenses are not deductible in a taxable year to the extent that the interest is deemed to relate to the financing of participations – referred to in Dutch taxation as 'excessive participation interest' – provided such excessive participation interest exceeds EUR 750,000. The amount of excessive participation interest is calculated mathematically and equals the fraction of the annual average 'participation debt' and the annual average 'total debt' as multiplied with the total sum of interest expenses that year. Temporary changes induced by tax avoidance motives are ignored. The 'participation debt' is determined mathematically. It is calculated as the total cost price of the participations minus the equity for tax bookkeeping purposes – the taxpayer is deemed to have financed its participations with equity first – with a minimum of nil and with a maximum of the amount of the taxpayer's 'total debt'. The 'total debt' includes all debts which are recognised as such for tax law purposes, both intra-group and external debt that is, but only to the extent the arm's length interest is deductible, i.e. not restricted otherwise – under Articles 10a and 10b. Debts related to so-called 'intra-group active financing activities' and the interest thereon are excluded from the operation of Article 13l.[167] Specific rules apply to make sure that Article 13l and other provisions do not concurrently apply.

Article 13l is intended to only apply in improper or non-business-like scenarios. Genuine businesses should not be affected too much by the interest deduction limitation provision. On that basis, the cost price of participations is not taken into account for the calculation of the participation debt if and to the extent the participation involved qualifies as an 'expansion investment', i.e. to be interpreted as an expansion of the operational activities of the group. The exception however does not apply in situations of improper use. Again, taxpayer motives are of relevance. An improper use is considered at hand in three distinguished scenarios – i.e., regardless of the presence of an expansion of operational activities. First, interest deduction is unavailable if the debt structuring concerned would otherwise produce a double deduction outcome, i.e., a deduction of interest at the level of both the taxpayer concerned and an affiliate, for instance in case of a hybrid entity arrangement. Second, interest deduction is unavailable if the debt arrangement concerned has been structured for instance as a hybrid financial instrument within the group as a result of which the interest expense would otherwise be deductible whereas the receivable would not be taxed or taxed at an effective rate of less than 10 per cent, i.e., if the tax structuring would produce a deduction and no (effective) inclusion outcome. Some sort of subject-to-tax-test may be recognized at this place. Third, interest deduction is unavailable in the event that the taxpayer would not have engaged into the structuring concerned in the absence of the availability of such an interest deduction. In the event that the interest is taxed in the hands of the creditor, the interest is deductible at the level of the taxpayer/debtor if the taxpayer concerned shows evidence that the structuring has been based predominately on business motives. This may be the case if the taxpayer is engaged in the active and strategic management of the participation concerned. These anti-abuse rules are applied on a continuous basis. No case law on Article 13l has been produced yet, for the provision being relatively new to the Dutch tax system.

III.7.5. Tax base protection by limiting deduction of interest on 'acquisition debts' – Article 15ad CITA

A fourth and final interest deduction limitation is Article 15ad CITA. Article 15ad targets the deductibility of interest – including expenses and currency exchange results – on so-called 'acquisition debts'. The provision applies to interest on all debts that either by law or in fact, directly or indirectly relate to the acquisition or extension of a shareholding interest in a corporate entity– i.e., an acquired company –, which subsequently joins a Dutch fiscal unity with the taxpayer under the Dutch tax consolidation regime.[168]

To prevent tax base erosion, interest on such 'acquisition debts' may not be offset against the taxable profits of the acquired company within the fiscal unity. A deduction applies insofar the profits of the fiscal unity – i.e., those outside the profits that have been produced by the acquired company – are insufficient to offset the interest expenses incurred relating to the acquisition debt. The limitation equals the lesser amount of (i) the amount of interest that is ineligible to be offset minus a threshold of EUR 1 million, and; (ii) the amount of so-called 'excessive acquisition interest'. The excessive acquisition interest equals the amount of interest expenses incurred that relates to the so-called 'excessive acquisition debt', i.e., the acquisition debt to the extent considered excessive. The acquisition debt is considered excessive in so far the acquisition debt exceeds 60 per cent of the acquisition price in the year of acquisition. This

[166] Court of Justice, 18 September 2003, C-168/01 (*Bosal*).
[167] Specific conditions apply as to decide on whether the group financing activities are considered passive or active.
[168] Similar rules apply in equivalent cases involving mergers and split-offs, Articles 14a(12) and 14b(9).

percentage is subsequently annually reduced by 5 per cent to 25 per cent in 7 years. The limitation is calculated annually. Temporary changes induced by tax avoidance motives that may influence the calculated amount of acquisition debt are ignored for the purpose of application of the interest deduction limitation provision. The provision covers all debts which are recognised as such for tax law purposes, both intra-group and external debt that is, but only to the extent the arm's length interest is deductible, i.e. not restricted otherwise. No case law on Article 15ad has been produced yet, for the provision being relatively new to the Dutch tax system. The regime has been introduced as per 1 January 2012.

III. 8. Other SAARs in the Dutch tax system

III.8.1. Various additional SAARs in the Dutch tax system

The Dutch tax system includes a broad range of SAARs in addition to aforementioned regimes and provisions on interest deductibility. This report mentions some, including the substantial holding regime, loss offset limitations, anti-deferral rules relating to business restructurings, anti-mismatch rules involving hybrid entities, and the anti-avoidance rules in the area of dividend taxation involving Dutch cooperatives and dividend stripping strategies. Worth noting is that a draft legislative bill has been proposed in October 2015,[169] bringing the Dutch tax consolidation regime in line with primary EU law in response to the rulings of the ECJ in the joined cases 'SCA Group Holding BV', 'X AG' and 'MSA International Holdings BV'.[170] The draft legislation contains some provisions that seek to secure the internal consistency of the Dutch tax system and to prevent certain forms of potential misuse. This however remains unassessed.

III.8.2. The substantial holding regime – Article 17(3)(b) CITA, Parent Subsidiary Directive

Pursuant to Article 17(3)(b) CITA, an entity resident outside the Netherlands that holds a substantial shareholding, i.e., a shareholding of at least 5 per cent, in a Dutch resident company will be subject to Dutch corporate income tax if the holding is held with Dutch dividend tax or personal income tax avoidance as the main purpose or one of the main purposes and if the holding has not been put into place with valid commercial reasons which reflect economic reality ('substantial holding regime'). Non-resident corporate tax liability accordingly arises if the non-resident taxpayer/shareholding company has been interposed: (i) for tax avoidance reasons, and; (ii) if the legal structuring is artificial. Both tests need to be met for the regime to apply. The legislator noted that valid commercial reasons may exist if the foreign entity: (i) has sufficient substance; (ii) conducts business activities and the substantial holding is attributable to that business; (iii) is the ultimate holding company, or; (iv) is an intermediate holding company linking between the ultimate holding company and the business and in addition meets certain substance requirements. The legislator has forwarded that for the purpose of assessing whether the structure is supported by sufficient substance, current substance requirements for intermediate holding companies that wish to seek a Dutch ATR will be taken into account.

Via this regime as it reads per 1 January 2016 the Netherlands has implemented the GAAR in the PSD into its corporate income tax legislation. The Netherlands has also amended its dividend tax legislation for this purpose, see section III.8.6. below. Implementing the adopted GAAR in the PSD to its literal wording, the phrasing of the substantial holding regime has been slightly altered in comparison to its wording prior to 1 January 2016. The textual alterations however have not been intended to produce significant substantive changes to the operation of the regime in comparison to existing practice. As to the relationship between the substantial holding regime and the tax treaty obligations of the Netherlands, the State Secretary for Finance has forwarded that treaty obligations prevail.[171] The Dutch constitution does not allow domestic law to override any obligations that the Netherlands has shouldered on the basis of an instrument of international public law.[172] Any relationships with EU law obligations are left unassessed.

III.8.3. Loss offset limitation regimes – Articles 20a and 20(4) CITA

Taxpayers have quite liberal loss compensation possibilities under the Dutch tax system. The corporate tax code provides for vertical loss compensation by reference to a carry-back of one year and a carry-forward of nine years.[173] The tax code however forwards two SAARs striking down perceived misuse of loss offset utilisation entitlements. These regimes are laid down in Articles 20(4) and 20a CITA. In addition to these regimes, a range of extensive and detailed profit-loss offset restriction rules apply in the context of the Dutch tax consolidation regime. [174] These however are not discussed in this report.

Article 20(4) essentially aims to counter any offsetting of operational profits and losses with losses and profits derived from shareholding and group-financing activities. The regime applies for holding and group financing entities, i.e.,

[169] Parliamentary Papers House of Representatives, 2015-2016, 34 323, Nos. 2, 3.
[170] ECJ 12 June 2014, joined cases C-39/13 (SCA Group Holding BV), C-40/13 (X AG) and C-41/13 (MSA International Holdings BV).
[171] Parliamentary Papers House of Representatives, 2015-2016, 34 306, No. 3, at 5.
[172] Article 93-94 Dutch Constitution.
[173] Article 20.
[174] Article 15 in conjunction with Articles 15ae, 15af, 15ag, 15ah, and accompanying decrees. Provisions involving currency exchange losses on participations (Article 28b) and the so-called compartmentalisation approach (Article 28c in conjunction with Articles 34c) are not discussed.

companies whose activities for at least 90 per cent of the time involve the holding of participations or direct or indirect intra-group financing. Pursuant to Article 20(4), holding and financing losses can only be offset against holding and financing profits.

Article 20a seeks to counteract trade in corporate bodies with vertical loss compensation entitlements and limits for this purpose vertical loss compensation possibilities in cases of third-party shareholder ownership transfers. Pursuant to Article 20a, any carry-over of losses is restricted if there is a significant change in ultimate shareholders, i.e., a change of the ultimate share ownership of at least 30 per cent. Subsequent to such a change, any (existing) losses may only be offset against (future) profits arising from the respective corporate body's original business activities. The provision accordingly seeks to prevent any undue inflation of loss compensation possibilities. The loss carry-over is not limited if the losses have arisen in a year in which the assets of the entity consisted for less than 50 per cent of portfolio investments and the business activities have not been reduced with 70 per cent or more. The provision accordingly seeks to allow a loss-offset in the event that the shareholding transfer involves a transfer of substantial operational activity. Currently a case is pending before the Supreme Court concerning the interrelationship between this provision and fraus legis (see section IV.2. below).

III.8.4. Anti-deferral rules relating to business restructurings – Articles 13h-13k and 14-14b CITA

The Dutch corporation tax system has implemented the Mergers Directive facilitating corporate business restructurings and reorganizations, such as mergers, demergers (i.e., splits and split-offs c.q. divisions and partial divisions), asset deals, transfers of assets and exchanges of shares, by providing roll-over relief, i.e., a tax deferral, on accrued hidden reserves, goodwill and tax reserves.[175] Relief is available if no significant liquidities become available in the restructuring process. Tax collection is deferred in such cases until realization. As a general rule, business restructurings give rise to taxation in the Netherlands on any accrued capital gains in the business enterprise. Roll-over relief is available as an exception to this general system in both domestic and cross-border scenarios. Relief is granted automatically or upon request, dependent on facts and circumstances. Eligibility criteria apply. A request for instance is required if the corporate taxpayers involved in the business restructuring have vertical loss offset entitlements. CITA language loosely aligns with Merger Directive terminology. Provisions are nevertheless interpreted in conformity with the Directive.[176]

Roll-over relief is unavailable if the restructuring is aimed to 'escape tax or unduly defer tax' ('*ontgaan of uitstellen van belastingheffing*').[177] A motive test applies, requiring a weighing of business motives and tax motives. The Supreme Court has held that of relevance for such an assessment amongst others is whether the business restructuring would also have been engaged into absent roll-over tax effects.[178] A legal separation of liquidities from the operational business enterprise through a business reorganisation for civil liability reasons may suffice for being granted roll-over relief.[179] A business restructuring to optimize the legal structure in preparation for sale may be seen as not constituting a main tax motive; this however may be different if a party interested in acquiring the business enterprise has already appeared.[180] Matters should be assessed at the time of which the legal arrangement to set-up the business restructuring is concluded.[181] Furthermore, from parliamentary history in combination with Supreme Court case law it may be inferred that an undue deferral is at hand if the reorganization transaction is engaged into to defer a somewhat immediate tax liability.[182] Any motives to escape Dutch real estate transfer tax do not interfere with being granted roll-over relief for corporate taxation.[183]

As noted in section I.1.2. above, a rebuttable presumption applies that any business restructurings of any kind are deemed to be based on tax avoidance objectives if the restructuring does not take place for valid commercial reasons, such as a restructuring or a rationalization of the active business activities of the parties involved in the restructuring transaction. A rebuttable presumption of the presence of a tax avoidance motive applies in the area of asset deals and demerger transactions. A tax motive is deemed present if the shareholding obtained is disposed of within 3 years after the finalization of the restructuring process. Taxpayers however have the possibility to show evidence of any present valid commercial reasons in such cases to be granted roll-over relief regardless of such a disposal within 3 years.

III.8.5. SAAR neutralizing 'Sarakreek mismatch' – Article 15ac(4)-(6) CITA

[175] Articles 13h, 13i, 13j, and 13k, Articles 14 (asset merger), 14a (legal split), and 14b (legal merger); and, Article 3.55 (share merger), 3.56 (legal split), 3.57 (legal merger) PITA.
[176] ECJ case law on the Netherlands transposition of the Mergers Directive include ECJ 17 July 1997, C-28/95 (*Leur-Bloem*) and ECJ 20 May 2010, C-352/08 (*Zwijnenburg*). Another ECJ ruling on tax avoidance involving the Merger Directive is ECJ 10 November 2011, C-126/10 (*Foggia*).
[177] The Supreme Court has judged that also an undue tax deferral constitutes tax avoidance under the business restructurings legislation implementing the Mergers Directive; Supreme Court 29 June 2012, *BNB* 2012/261.
[178] Supreme Court 1 December 1999, *BNB* 2000/111.
[179] *Ibidem*.
[180] Supreme Court 10 October 2008, *BNB* 2009/28. Also Supreme Court 2 June 2006, *BNB* 2006/282.
[181] *Ibidem*
[182] Parliamentary Papers House of Representatives, 1998- 1999, 26 7272, No. 3, at 115, and Supreme Court 29 June 2012, *BNB* 2012/261.
[183] Supreme Court 11 July 2008, *BNB* 2008/245, and *Zwijnenburg*, *supra note* 176.

A SAAR applies to neutralise the mismatches that resulted from the 'Sarakreek tax planning arrangement' which the Supreme Court left untouched in the Sarakreek case – discussed in section II.5.2. The regime is laid down in Article 15ac(4)-(6) CITA and applies to fiscal unities operating a permanent establishment abroad via a tax-consolidated Dutch subsidiary company. Pursuant to this provision, internal loans granted by the fiscal unity's parent company to finance the permanent establishment's operations are recognised for juridical double tax relief purposes if the financing expenses have been recognised as a tax-deductible item abroad. In consequence, any interest payments on such internal loans are effectively taxed in the Netherlands in such cases. The provision does not apply if the taxpayer demonstrates that these expenses are not tax-deductible abroad. In effect the Netherlands recognises and taxes such intra-firm interest receipts if the corresponding interests payable are deductible abroad, neutralizing the 'Sarakreek mismatch' accordingly.

III.8.6. Dividend tax anti-avoidance rules for Dutch cooperatives – Article 1(7) DWTA; Parent Subsidiary Directive

Pursuant to Article 1(7) DWTA, a cooperative that is resident in the Netherlands is obliged to withhold dividend tax on profit distributions to its members if the cooperative has been put into place with dividend tax or foreign tax avoidance as the main purpose or one of the main purposes, and the arrangement is not supported by valid commercial reasons which reflect economic reality. Dividend tax should hence be withheld if the cooperative has been interposed: (i) for tax avoidance reasons, and; (ii) if the legal structuring is artificial – whereby both tests need to be met for the tax to be levied. The legislator has noted that valid commercial reasons may exist if the cooperative has a sound economic relevance. This may be the case in the event that it conducts operational business activities. Valid reasons may also exist if the membership in the cooperative is attributable to the member's business enterprise; and also when the member operates as an intermediate holding company, provided that certain substance requirements are met.

Via this regime as it reads per 1 January 2016 the Netherlands has implemented the GAAR in the PSD into its dividend tax legislation. The Netherlands has also amended its corporate income tax legislation for this purpose (see section III.8.2. above). Implementing the adopted GAAR in the PSD to its literal wording, the phrasing of the dividend tax regime has been slightly altered in comparison to its wording prior 1 January 2016. Alike the amendments to the substantial holding regime, the textual alterations however have not been intended to produce significant substantive changes to the operation of the regime in comparison to existing practice. The State Secretary for Finance noted that the regime's operation cannot override treaty obligations (see also section III.8.2.).

III.8.7. National beneficial ownership test, dividend stripping – Article 4(7) DWTA

Article 4(7) DWTA incorporates a national beneficial ownership test in the dividend tax legislation ('uiteindelijk gerechtigde') to prevent dividend tax avoidance strategies, including 'dividend stripping'.[184] Dividend stripping typically involves scenarios in which a shareholder engages into a legal arrangement with another party having a more favourable title to dividend withholding tax relief, e.g., by means of a lower tariff, tax credit, exemption or dividend tax refund. On the basis of such an arrangement any legal rights to dividend proceeds are (temporarily) transferred to that other party in return for a consideration while the original shareholder maintains its beneficial interest in the shares and shareholding proceeds concerned.[185] The legislative act basically forwards above noted elements in its description of beneficial ownership, however by means of a negative definition to avoid manipulation – forwarding criteria on the basis of which a dividend recipient is not considered beneficial owner of the profit distributions concerned.

IV. Application of GAARs, TP Rules and SAARs

IV.1. The interaction of fraus legis, TP rules, SAARs and linking rules

The interaction of the fraus legis doctrine, the Netherlands' TP approaches and the application of the SAARs in the Dutch tax system may be characterised as somewhat elusive, or at least fiercely complex. All doctrines and regimes simultaneously apply on their individual merits, though interrelate and mutually interact as well.

The taxable profit calculation mechanism of which the ALS forms an integral part, applies independently from the SAARs and linking rules in the Dutch tax system. The determination of taxable profit precedes the application of SAARs and linking rules and is not affected by their operation. A payment that qualifies as an expense for tax base calculation purposes for originating from the taxpayer's business conduct is in principle tax-deductible, save for the application of a deduction limitation. The same notably holds for a receipt that qualifies as a taxable income item by the same token and consequently is subject to taxation, save for the application of an exemption like the participation exemption. Losses that qualify as such for tax base calculation purposes may be offset against past and future taxable profits under the available loss carry back and carry forward rules, save for the application of an anti-loss offset utilisation provision.

The same holds for the interaction between profit calculation methodologies and fraus legis. Tax base calculation as noted in the above involves the question as to whether a certain (non-)payment or (non-)receipt originates from the

[184] Article 4(7) DWTA and related provisions. Similar provisions are included in the Unilateral Decree.
[185]) Parliamentary Papers House of Representatives, 2000-2001, 27 896, No. 3 and Supreme Court 6 April 1994, *BNB* 1994/217 (*Marketmaker*).

business operations and should accordingly be recognised as an in principle tax-deductible expense or taxable income item. Of relevance is whether the advantage or disadvantage of the (non-)payment or (non-)receipt is businesslike or originated from the shareholding relationship. Any advantages or disadvantages that originate from affiliation, for instance ensuing from a shareholding relationship, are considered non-businesslike and do not affect the profit for tax base determination purposes. The businesslike or non-businesslike nature of the transaction or series of transactions undertaken is assessed by reference to functions performed, assets used and risks assumed. This property renders the ALS an inherent and integral part of tax base calculation in the Dutch tax system.

Any inclusion or exclusion of non-businesslike elements from the taxable base should be seen as a process analytically separate from the application of fraus legis. Fraus legis involves the substitution or elimination of legal facts to arrive at an application of the law according to its intent, in cases involving taxpayers engaging into predominantly tax-motivated legal arrangements in contradict with the spirit of the law. Taxable profit determination on the contrary is neutral. Any references to tax-avoidance motives are alien to taxable profit calculation methodologies. That holds regardless of any awareness of non-businesslike elements underlying the inter-affiliate transactions forming an argument to arrive at the elimination of these elements from the taxable base.

IV.2. Interrelationships of applicable rules in terms of hierarchy, coordination or overlapping of measures

No explicit hierarchy exists when it comes to the interrelationships between applicable rules and regimes in the Dutch tax system. That holds although there is an order of application and coordination measures have been taken to address issues of concurrent application. In effect, the model boils down to an approach on the basis of which, first, the taxable base of a corporate taxpayer is determined by reference to profit determination approaches and the ALS. Second, the SAARs are applied in their order of insertion in the legislative act and subject to mutual coordination rules. The fraus legis doctrine constantly applies on top of that, metaphorically hovering on and affecting, if necessary, the process of the determination of the Dutch tax implications in a certain set of facts and circumstances.

The SAARs and linking rules in the Dutch corporation tax system explicitly coordinate the modes of their interactive application for those scenarios in which these rules would concurrently apply. The interaction of these rules in concurrent scope of application cases – both mutually and in relation to the other tax regimes in Dutch corporate taxation such as the participation exemption regime, the double tax relief mechanism, and the tax consolidation regime – forms the technically most complex part of the Dutch tax system. This particularly holds in cross-border scenarios. The technicalities in these areas are not further discussed in this report. The same holds for any EU law compatibility issues.[186]

Fraus legis seems to apply in any case, regardless of applied taxable profit calculation approaches, TP, or the presence, absence or application of a SAAR or linking rule. Recently, after long being uncertain, the Dutch Supreme Court has held that fraus legis can effectively be invoked by the tax administration both aside and simultaneous with the application of a SAAR. The Court ruled the fraus legis doctrine for instance to apply in cases involving the operation of the interest deduction limitation regime in Article 10a CITA that codified fraus legis in that area and further narrowed down interest deductibility regarding certain intra-group financing arrangements (see on this provision section III.7.2. above).[187] Another example is a recent series of cases in which the Supreme Court has held fraus legis eligible to be invoked by the tax administration aside a specific anti-deferral provision,[188] which targets perceived abuse involving specific tax-induced arrangements set-up to defer taxation on hidden reserves realised upon capital asset disposals in cases of third-party shareholder ownership transfers.[189] The cases concerned a set-up arrangement which the anti-deferral provision did not explicitly cover – and the tax legislator being aware of that upfront – whereby the Supreme Court nevertheless held fraus legis to apply to annul the tax effects as sought after by the parties involved that entered into the planning arrangement. The tax legislator notably has amended the provision in the meanwhile.

Any application of SAARs accordingly does not cancel out fraus legis, it seems. Currently a case is pending before the Supreme Court on, amongst others, the question of whether some room exists to effectively invoke fraus legis aside a SAAR, this time being the anti-loss offset utilisation provision discussed in section III.8.3. above.[190] This provision targets perceived abuse involving certain specific tax-induced arrangements set-up to utilise loss carry-back and loss

[186] The operation of a range of provisions discussed in this report may for instance effectively be shaken-off in domestic scenarios by having the corporate bodies involved to join a fiscal unity under the operation of the Dutch tax consolidation regime. As the Dutch tax system however does not allow for a cross-border tax consolidation any such shaking-off is infeasible in cross-border scenarios. On the basis of the ruling the Court of Justice in C-386/14 (*Groupe Steria*) it seems that a per-element approach needs to be adopted, rendering a variety of these provisions and regimes potentially subject to EU law compatibility issues.
[187] Supreme Court 11 July 2008, *BNB* 2008/266 and Supreme Court 1 June 2012, *BNB* 2012/213. Room for invoking fraus legis however seems limited to exceptional scenarios; Parliamentary Papers House of Representatives, 2005-2006, 30 572, No. 8, at 45.
[188] Article 12a.
[189] Supreme Court, 23 May 2014, *BNB* 2014/171, *BNB* 2014/172, *BNB* 2014/173, *BNB* 2014/176, *BNB* 2014/178.
[190] Amsterdam Court of Appeals, 8 October 2015, V-N 2015/53.10. The case is pending before the Supreme Court at the time this national report was drafted.

carry-forward entitlements in cases of third-party shareholder ownership transfers.[191] In the case at hand the parties involved set-up a legal arrangement, near to an arrangement that was targeted under the anti-loss utilisation rules concerned, though which was not explicitly covered by this provision. The arrangement was set-up to avoid the application of the anti-loss utilisation measure to ensure an offset of 'pre-shareholder transfer profits' with 'post-shareholder transfer losses'. Similar to the proceedings mentioned above on the anti-deferral provision, the legislator had been made aware of the anti-loss utilisation rules not covering these specific types of arrangements beforehand.

An element that makes this case interesting is that the Supreme Court has already interpreted the respective anti-loss utilisation provision on some earlier occasion. The court did so by reference to a strict textual interpretation.[192] That earlier case concerned a scenario in which the provision operated to the detriment of the respective taxpayer in contradict with the intent of the law. The uncalled-for effective tax burden increase lead Advocate General Wattel to resort to a teleological interpretation of the law by reference to its spirit rather than on the basis of a strict textual interpretation.[193] The Supreme Court however resorted to a strict textual interpretation, leaving the burdensome outcome for the taxpayer in place. The case that is now pending may be seen as an analytical equivalent to that earlier case, however having as a key difference that the tax implications under the facts and circumstances of the current case would be detrimental for revenue under such a strictly grammatical interpretation – forming a reason for the tax administration to invoke fraus legis. So far, both the Court of first instance and the Court of appeals have struck down the arrangement by reference to the fraus legis doctrine.

IV.3. Procedural rules underlying application of the national GAAR, TP rules and SAARs

The questionnaire forwarded as a final question whether specific procedural rules exist for the application of fraus legis, TP rules and SAARs. No such procedural rules exist other than those discussed above. General administrative rules and approaches apply. In the Netherlands the tax authorities assess corporate tax liability; no self-assessment procedure has been put into place. Taxpayers are required to have a properly organised financial administration and TP documentation available,[194] Taxpayers also are required to annually file a corporate tax return electronically, and in good time. In their tax return taxpayers should state their tax position in a clear and firm manner, without any reservation and taking into account all relevant aspects.[195] Deductions, exemptions and relief for instance are claimed by filling in the relevant subject fields in the tax return filing computer programme. The return as filed with the tax authorities is subsequently subject to a computerised compliance assessment. The tax assessment typically is formalised accordingly and issued to the taxpayer. In the event that the computer assessment or any findings of a tax administrative officer call for some further inquiry, the tax inspectorate typically proceeds by issuing questionnaires or requests for further information, for instance on the substance supporting the transactions engaged into, the passive or active nature of the income items concerned, or the question of whether in relation to a particular deduction claimed the corresponding receipt is subject to sufficient taxation. Taxpayers are required to fully cooperate and submit all information relevant to assess tax liability, save for tax advice.[196] If necessary the tax authorities may further inquire or proceed to commencing a tax audit. Extremely non-compliant taxpayers may be faced with an estimation of their corporate tax liability. When it comes to a court proceeding in such cases the burden to provide conclusive evidence in support of positions taken to the contrary shifts to the taxpayer concerned. The tax authorities may be able to call in additional corporation tax subsequent to the issuance of the tax assessment for a period of 5 to 12 years.[197]

Addendum (1 July 2016) – Anti Tax Avoidance Directive

On Monday 20 June 2016 at midnight, the EU Council, under the Presidency of The Netherlands, reached political agreement on an Anti Tax Avoidance Directive. A preliminary agreement was reached on 17 June 2016. The Directive is expected to be formally adopted in a forthcoming Council meeting. The measures taken can be seen as a provisional synthesis of developments in international (G20/OECD) and EU corporate taxation with a view to addressing BEPS concerns. The Directive provides for a set of EU wide de minimis approaches in corporate taxation towards interest deductibility, exit taxation, controlled foreign companies, hybrid mismatch arrangements, and a general anti abuse rule. The original Commission proposal of 28 January 2016 also included a switch-over provision. That provision however was excluded from the Directive text during political deliberations at Council level. The Directive provisions have to be transposed into domestic law as per 1 January 2019 except for those involving exit taxation and interest deductibility. The first-mentioned needs to be transposed into domestic law as per 1 January 2020. EU Member States having interest deduction limitation rules already in place in their corporate tax system that are 'equally effective to' the equivalent provision in the Directive may postpone transposition of the Directive provision until 1 January 2024.

[191] Article 20a.
[192] Supreme Court 21 November 2008, *BNB* 2009/42.
[193] Opinion Advocate General Wattel 25 June 2008, *BNB* 2009/42.
[194] Article 52 GLT, and Article 8b (see section III.1.3.).
[195] Article 8 GLT.
[196] Article 47 GLT.
[197] Article 16 GLT.

As extensively elaborated upon in this report, the Netherlands' corporation tax system forwards a broad range of anti abuse approaches addressing BEPS concerns, many of which echo those now agreed upon at EU Council level. Approaches taken in The Netherlands greatly overlap those in the Anti Tax Avoidance Directive although do not seem completely identical, at least not in technical terms. The Anti Tax Avoidance Directive provides for a broad EBITDA based interest deduction limitation provision, whereas the Netherlands' system so far deals with interest deductibility issues by means of targeted measures. The Netherlands' tax system deals with company exits similar to the equivalent Directive provision. Although the Netherlands' corporation tax system lacks a CFC measure in a strict sense, it does operate a CFC-like mechanism – as discussed above. Moreover, with the operation of its TP system, The Netherlands already seems to have an instrument available covering at least some of the issues dealt with under the CFC regime in the Directive text. Hybrid mismatch arrangements are targeted in The Netherlands' corporation tax system via specific means rather than on the basis of a generic approach as provided for in the Directive text. Tax abuse, as discussed, is addressed by reference to the fraus legis doctrine which broadly aligns with current approaches in ECJ case law and the PSD. The general anti-abuse rule now agreed upon within the context of the Anti Tax Avoidance Directive for its part greatly corresponds with these approaches too. It will be interesting to see as to whether, and if yes to which extent – both technically and analytically – The Netherlands will transpose the Directive texts in its domestic corporation tax system. An answer to that latter question lies in future.