

## **“EATLP REPORT FOR THE NETHERLANDS ON THE MUTUAL ASSISTANCE IN TAX AFFAIRS”**

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### **I. Introduction**

It has been a great pleasure for the authors to be able to prepare a report on the Netherlands regarding “The mutual assistance in tax affairs”, which topic will be discussed at the EATLP annual meeting in June 2009 in Santiago de Compostella. The report has been limited by us to such mutual assistance between the Member States of the European Union. The report is based on the general guidelines as prepared by our German colleague Prof. Dr Roman Seer of Bochum University. The questions and answers are focussed on the five main topics “Implementation”, “Use”, “Efficiency”, “Burden of proof” and “Legal protection”. Since the focus is on the actual use of mutual assistance in the different Member States, the report is rather factually and practically oriented. We did however, occasionally point at more in depth discussions and unclarities in this area.

As regards the implementation of various legal instruments, it can be concluded that it took a few years in the Netherlands before domestic legislation implementing the mutual assistance as included in the relevant EU Directives and tax treaties was introduced. This can probably be explained by the fact that initially it was felt that no such additional legislation was required. It did, however, turn out to be useful or even necessary to also provide a domestic legal base in which it is e.g. also made clear in which cases the Netherlands would make use of the possibilities not to provide assistance as allowed under the various instruments. In view of the various instruments which may be used and the developments within these instruments (e.g. changes in the model provisions which are used as a basis to conclude tax treaties), it is not easy to have an overview of which provisions apply in relation to specific countries. In this respect the implementing rules, instructions and guidance as published by the tax authorities are useful (albeit only in Dutch).

The Netherlands has been rather active in actually applying the instruments as can be seen from the figures on the actual data exchanged. The issues regarding effectiveness or efficiency are difficult to judge in view of lack of general criteria and also of relevant data. It is clear that there are major challenges in the automated processing of bulk information, whereas language problems may also cause difficulties. Although we have the impression that there is a continuous process of making this more efficient, it is in our view certainly an area which could and should be further developed.

As regards the burden of proof, in the Netherlands generally the system is followed that the party who is in the best position to deliver proof should do so. In cases of lack of cooperation, the law contains provisions where the burden of proof is fully shifted to the taxpayer. A rather special case in this respect is the provision in the General Taxes Act which can, in specific circumstances, put the obligation on a company to provide information which is held abroad by related group companies or other bodies.

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As regards the issue of legal protection in the Netherlands we would like to limit our remarks in this introduction to two aspects. Domestic law in the area of mutual assistance is increasingly challenged on general principles as included in human rights treaties, albeit so far not very successfully. Furthermore, it should be noted that the the Netherlands has a system of prior notification of taxpayers before information is exchanged (with exceptions for automatic exchange and cases of tax evasion). In such system it is important to find the right balance between efficiency of timely assistance and taxpayer rights. It may be interesting for other countries to reflect on this not only from the perspective of taxpayer rig and efficiency, but also from a perspective of safeguarding the state against claims and liabilities in case information was not accurate or even relating to a different person.

We hope you will enjoy reading the report ad that it may contribute to a fruitful discussion.

## II. Questions of implementation

**Question 1 and 2)** As far as the mutual assistance in tax affairs is concerned not only the tax assessment but also the collection of the taxes is of importance. Consequently several Council Directives are relevant for this topic.

When did your country implement the following Council Directives:

- “Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures”,
- “Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation”,
- “Commission Directive 2002/94/EC of 9 December 2002 laying down detailed rules for implementing certain provisions of Council Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures”,
- “Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments”?

In which legal rules can the implementation be found?

### **Answer 1 and 2)**

The date of implementation of the various relevant EC Directives in the area of mutual assistance in tax matters, and the laws and implementing decisions are as follows:

a. **Council Directive 76/308/EEC of 15 March 1976** on mutual assistance for the recovery of tax claims relating to certain levies, duties, taxes and other measures, by:

1. “Wet wederzijdse bijstand bij de invordering van belastingschulden en enkele andere schuldvorderingen”(Act on the mutual assistance in the recovery of tax claims and some other debt claims), Act of 24 October 1979, Stb. 572, as last amended by Act of 11 December 2002, Stb. 619;

2. “Uitvoeringsregeling wederzijdse bijstand bij de invordering van belastingschulden en enkele andere schuldvorderingen” (Implementing decision mutual assistance in the recovery of tax claims and some other debt claims), Decision of 27 May 2003, nr.WDB2003/157M, Stcrt. 2003, 102);

3.” Leidraad Invordering 2008” (Guidance recovery 2008, Decision of 12 June 2008 nr. CCP 2008/1137M. Of this large document, in particular Art. 78 on international recovery is relevant.

**b. Council Directive 77/799/EEC of 19 December 1977**, concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, by :

1. “Wet op de internationale bijstandsverlening bij de heffing van belastingen” (Act on the international administrative assistance in the levying of taxes), Act of 24 April 1986 , Stb. 249, as last amended by Act of 3 July 2008, Stb. 262;

2. “Uitvoeringsregeling internationale bijstandsverlening bij de heffing van belastingen”(Implementing decision on the international administrative assistance in the levying of taxes), a Decision of 17 December 2004, nr WDB04-748 as last amended on 25 February 2007. Stcrt. 2007, 39;

3.”Besluit Mandaatverlening bevoegde autoriteit inzake internationale uitwisseling van inlichtingen” (Decision on granting a mandate to act as competent authority for the international exchange of information), last Decision of 28 February 2006, nr. CPP2005/3241 M (Stcrt.2006, 48)

4.”Ondermandaatverlening internationale inlichtingenuitwisseling” (Granting subordinate mandate regarding the international exchange of information), most recent Decision of 28 February 2006, , nr. CPP 2005/3242M, Stcrt. 2006, 48;

5. “Voorschrift internationale inlichtingenuitwisseling inzake de belastingen waarop de Wet op de wederzijdse bijstand bij de heffing van belastingen van toepassing is” (Instruction international exchange of information regarding taxes which are covered by the Act on the international administrative assistance in the levying of taxes), Decision of 6 April 2006, nr. CPP2006/546M, Stcrt.76).

**c. Commission Directive 2002/94/EC of 9 December 2002** establishing practical measures necessary for the implementation of certain provisions of Council Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, by:

“Uitvoeringsregeling wederzijdse bijstand bij de invordering van belastingenschulden en enkele andere schuldvorderingen” (Implementing decision on the mutual assistance in the recovery of tax claims and some other debt claims) , a decision of 27 May 2003, nr. WDB03-157 M, Stcrt.2003 102.

**d. Council Directive 2003/48/EG of 3 June 2003** on the taxation of savings income in the form of interest payments, by:

“Wet tot wijziging van de Wet op de internationale bijstandsverlening bij de heffing van belastingen en de Wet op de inkomstenbelasting 2001”, (Act amending the Act on the international administrative assistance in the levying of taxes and the Income Tax 2001), Act of 18 December 2003, Stb. 531.

**Question 3)** Does your country's legislation provide a constitutional frame that rules the mutual assistance in tax matters? Are there any conflicts or inconsistencies among constitutional guarantees for the taxpayer and rules concerning mutual assistance? Are there any conflicts or inconsistencies among the rules of human rights treaties and those concerning mutual assistance?

**Answer 3)** There are no specific provisions in the Constitution of the Netherlands dealing with the international mutual assistance in tax matters. However, there is a general Constitutional framework regarding the legal position of treaties (including tax treaties and treaties relating to the European Union). These provisions relate e.g. to the ratification of treaties (article 91), the application of treaties (article 93), the supremacy of treaty provisions over provisions of domestic law where the provisions in the treaty are considered to be binding for every citizen ("eenieder verbindend") (article 94), and the way treaties are made known (article 95). There is some discussion concerning the question whether the treaty provisions on mutual assistance in tax matters are binding on the citizens as well. It is sometimes argued that they are just binding the states .

It can also be mentioned, that according to article 104 of the Constitution, state taxes can only be levied on the basis of a law. In this context it should also be mentioned that in the Netherlands it is not possible to challenge the provisions of domestic legislation (if properly enacted) or of treaties (if properly ratified) as such against the Constitution. Disputes regarding the interpretation of domestic or treaty provisions can be dealt with under the regular appeal procedures (see also under VI). Domestic legislation or treaties could be challenged under other treaties, e.g. if the provisions concerned would violate Human Rights treaties or European law. In this context it can be mentioned that supplementary assessments and related fines imposed on the basis of information on income from a Luxembourg bank account which information was exchanged by the Belgian tax authorities, have been challenged also with reference to the ECHR of 4 November 1950 (see e.g. Hof Amsterdam, MK I, 31 August 2006, nr. 05/00729, so called "KB-Lux" case). In the case referred to, these challenges were based on illegitimate acquisition of documents/ breach of privacy by the foreign authorities (article 8 ECHR; which claim was rejected) and undue delay in the appeal procedure (see article 6 of the ECHR Convention; the fine was reduced from 100% to 10%).

Also in a case decided by the Dutch Supreme Court (Hoge Raad, 13 May 2005, nr. C04/014 a few aspects relating to the abovementioned Act on the international administrative assistance in the levying of taxes and ECHR were dealt with. In this case it was decided that this Act did not oblige the Dutch Tax Authorities to inform the taxpayer of the name of the requesting state, before the taxpayer had to cooperate with an investigation to recover the requested info, and thus the argument of the tax payer that the fact that he could not appeal against that refusal of the Tax Authorities was contrary to article 6 ECHR, was not further considered in the verdict. Some other points related more to the general obligations to provide information then specifically to the international administrative assistance.

The final outcome of most KB Lux procedures is yet unclear because the Dutch Supreme Court (Hoge Raad 21 March 2008, no. 43.05) requested a preliminary ruling from the European Court of Justice (ECJ) on the compatibility of the Netherlands rules on issue of the additional assessment in the case of income maintained abroad or derived from foreign sources. In case of income maintained abroad or derived from foreign sources the tax authorities can issue additional assessments during a 12-years period starting from the time the tax liability arose, whereas in case of income derived from domestic sources the period is only 5 years. The Supreme Court requested, amongst others, a preliminary ruling from the ECJ on the compatibility of this distinction with the freedom to provide services and the free movement of capital of Arts. 49 and 56 of the EC Treaty.

For more details on the impact of human rights treaties, see the answers under VI below.

As regards the relation to the Constitution, it can also be mentioned that in several instances tax payers claimed that elements of the acquisition or use of information were in violation of the Constitution. Reference can be made to articles 10 (regarding privacy protection), 13 (regarding protection of privacy of letters, telephone and telegraph messages, unless determined otherwise by law) and article 68 (to provide information by the government at request to the Houses of Parliament). These were as far as we know, so far rejected. In the abovementioned Supreme Court case of 13 May 2005 it was e.g. challenged whether there was a violation of article 13 (the privacy of letters) in case of an investigation to acquire information of which it was at that time not yet sure whether it would be exchanged under the exchange of information provision.. This was rejected since the Court interpreted article 8 of the act mentioned under answer 1 and 2, letter b.1 above to also comprise the investigation which may a.o. be used to determine whether information can be exchanged and thus is covered by the exception made in article 13 of the Constitution. Thus it was not considered contrary to the Constitution.

**Question 4)** Article 9 of the Council Directive 77/799/EEC allows Member States to make bilateral agreements on specific matters of fiscal cooperation (automatic exchanges of information, simultaneous assessments etc.). Has your country concluded this kind of agreements? If so, with which Member States?

**Answer 4)** Yes, such type of agreements have e.g. been concluded with

Belgium	2004
Czech Republic	2006
Denmark	1999
Estonia	2004
France	1996
Germany	1997
Lithuania	2004
Poland	2005
Spain	2006
Sweden	2004

The Memoranda of Understanding were concluded on the basis of both the Directive 77/799 and of the tax treaties with those countries, since the tax treaties also provide a legal basis for such cooperation. The tax tax treaties also contain rules determining which of the two countries is entitled to levy taxes on a specific category of income, which allocation may also influence the type of information a country may need.

**Question 5)** According to article 1 paragraph 4 of the Council Directive 77/799/EEC paragraph 1 should also apply to any identical or similar taxes imposed subsequently, whether in addition to or in place of the taxes listed in paragraph 3. This Council Directive has been amended by the “Council Directive 79/1070/EEC of 6 December 1979”, the “Council Directive 92/12/EEC of 25 February 1992”, the “Council Directive 2003/93/EC of 7 October 2003”, the “Council Directive 2004/56/EC of April 2004” and the “Council Directive 2004/106/EC of 16 November 2004”. Through these amendments more taxes became part of the scope of application of the Council Directive 77/799/EEC. Apart from these taxes did the scope of application of this legal rule increase in your country?

**Answer 5)** No, the scope of article 1, paragraph 4, of Council Directive 77/99/EEC did not increase beyond what was changed by previous amendments. Actually, with respect to the Netherlands the scope has effectively been reduced since the “Vermogensbelasting” (Net Wealth Tax for individuals) which is listed, was abolished in 2001. Moreover: it should be mentioned that not all the amendments mentioned in the question led to an *increase* of the scope of the Directive. In 2003/93 the VAT and in 2004/ 106 the excises were “taken out”.

**Question 6)** According to article 8 of the Council Directive 77/799/EEC a Member State’s competent authority has the right to refuse the provision of information in the cases named in article 8. How has this right been implemented in your country’s legal rules? For which of these reasons to refuse the exchange of information has a prohibition to provide information and for which the right (possibility) to refuse information been implemented in the national legal system? Why?

**Answer 6)** Article 8 of the Directive is creating room for the supplying States to weigh their interests against those of the other States. The grounds for refusal (or “exceptions”) are formulated as discretionary powers. In the Dutch Act on international administrative assistance in the levying of taxes, however, they have the character of prohibitions, except in case of the ground relating to business secrets.

Article 8, paragraph 1, of the Directive which states there is *no* obligation to investigate or provide information if the law or administrative practice does not allow the requested state to do so, has been implemented in article 13, paragraph 1, letter c, Act on the international administrative assistance in the levying of taxes. However in that Act it is even prohibited, since it might otherwise lead to a violation of the principle of legality, prescribing that the actions of the government should be based on the law, founded by means of a democratic process of legislation. The law itself should be comprehensible, predictable and stable.

Article 8, paragraph 2, of the Directive deals with the commercial, industrial or professional secrets. It has been implemented in a similar (discretionary -possibility to refuse) way in article 13, paragraph 3, Act on the international administrative assistance in the levying of taxes. However, as regards the international ground of “ordre public,” the implementation in article 13, paragraph 1, letter b of the before mentioned Mutual Assistance Act is more strict since it *prohibits* the exchange in those cases.

Article 8, paragraph 3, of the Directive, regarding the reciprocity requirement has been implemented in article 13, paragraph 1, letter e, of the Mutual Assistance Act. As regards that aspect, the Act contains a prohibition to exchange information in case of lack of reciprocity. The legislative history mentions the great importance of this principle.

It should be mentioned that article 2, paragraph 1 of the Directive contains another possibility for a requested state to refuse to provide information, if the requesting state appears not to have first endeavoured to acquire the information itself which it might have done without jeopardizing the result of it (the principle of subsidiarity).

A similar provision, albeit stricter, is included in article 13, paragraph 1, letter d of the abovementioned Act, which only requires that it is likely that the principle was violated as a ground for forbidding the exchange of information in such situations,

In this context it should, however, also be mentioned that in paragraph 4 of article 13 of the Act, it is stated that this article does not apply to certain information to be provided by the paying agent under the so-called Savings Directive.

Additional grounds for refusal to provide information under the abovementioned Act are:

- Article 1 and art. 13, par. 1 under a: a general prohibition of supplying of information in absence of an international obligation to exchange fiscal information, either under the Directive, the Council of Europe/ OECD Convention on the Mutual Administrative Assistance in Tax Matters (1988 Strasbourg), or other provisions of international or interregional law.
- Article 13, par. 2 also includes an additional prohibition derived from the exception to the obligation to provide information in the OECD/EU Convention on the Mutual Administrative Assistance in Tax Matters, in case the tax legislation in the other state is considered not to be in accordance with generally accepted standards of taxation, with a Tax Convention, or with the non discrimination principle regarding nationals in the same circumstances).

Why were these choices between either including a possibility to refuse to provide information, or a direct prohibition of doing so made?

The official explanatory note on the bill which led to the abovementioned Act as sent to Parliament does not in all cases provide clear reasons for this distinction. It generally refers to “international rules” (OECD rules, European rules). The prohibitive character of the ground based on “public order –” is explained by referring to the vital interests of the state being at stake there.

Possibly a reason can also be found in the system of the abovementioned Dutch Act, in which the taxpayer is offered the possibility to lodge an appeal against the decision of the authorities to supply information. The grounds for refusal for the states as included in the Directive or other agreements could in that context be functioning as legal grounds and arguments for the taxpayer to challenge the exchange in certain situations; in which situation it may be preferable to create more clarity already in the Act itself.

It could of course be argued that the prohibition to exchange information in case measures should be taken which are not permitted in the national tax-law is the obvious thing to do considering the importance of the principle of legality.

Finally, as stated in the explanatory note to Parliament, the discretionary character of the exception in case of “professional secrets” provides the possibility to weigh the interests of the taxpayer against those of the state.

**Question 7)** Between the Member States information can also be exchanged on the basis of double tax treaties. In some double tax treaties there are extensive information clauses (like in article 26 of the OECD model tax treaty) and in others petit information clauses.

- a) What kind of information clauses can be found in your country’s double tax treaties with the other Member States? In which of the double tax treaties are extensive information clauses and in which petit information clauses? (Please name for each double tax treaty with a Member State the kind of information clause that has been implemented.)
- b) In case there are extensive information clauses in the double tax treaties with some Member States and petit information clauses in the double tax treaties with other Member States please name the reasons for these distinctions. Is there a certain policy that defines with which countries what kind of information clause is arranged?
- c) The revised article 26 of the 2006 version of the OECD model double tax treaty includes a new paragraph 5 that prohibits to refuse the provision of information just because the information is held by a bank, a trustee etc. Is the new article 26 included in any of your country’s double tax treaties? Do laws on bank secrecy exist in your country that make some information not obtain-

able for your tax authorities? If so, please describe if there are situations in which the information can be obtained by the tax authorities anyway.

**Answer 7)**

a. Tax treaties containing an exchange of information article have been concluded with all Member States, except for Cyprus.

These provisions generally follow the pattern of the OECD model, which is the “extensive” obligation (including the application of the tax treaty as such, as well as the application of the domestic laws of the treaty partners.)

However, the treaties with the following countries do not explicitly refer to exchange in the context of the application of domestic law: Austria, Bulgaria, Czech Republic, Germany, Hungary, Ireland, Luxembourg, Slovakia, Spain.

There are also Dutch Tax Conventions mentioning under the purposes of exchange of information the application of domestic law as far as its concerns provisions against tax evasion. Furthermore, the treaties with the following countries have some kind of limitation with respect to the exchange of information regarding to banks: Austria, Czech Republic, France, Germany, Ireland, Luxembourg, Malta, Slovakia and Spain.

b. reasons: the reasons are not always made clear in the explanatory notes on the bills to approve treaties as sent the Parliament, but if they are mentioned, occasionally reference is made to “the lack of knowledge from Dutch side on the (tax) legislation of the other country.” This may for instance be a reason in case of conventions with relatively “new” treaty partners.

c. existence of tax treaties based on the 2006 version of OECD Model

This type of provision is e.g. included in the recently concluded treaties with Bahrain (2008), Ghana (2008), Qatar (2008), United Kingdom (2008), United Arab Emirates (2007) and the protocol to the South Africa Treaty (2005). None of these is yet effective, but it is already known that the one with Ghane will be effective as from 1 January 2009.

existence of bank-secrecy

There are no laws in The Netherlands regarding bank secrecy and thus information held by banks can generally be obtained by the Dutch Tax Authorities. There is an instruction called “Voorschrift informatie banken” (Instruction information of banks, Decision of 18 March 2002, nr. DGB2002/1499, Strct. Nr. 58, which describes in detail which procedure the tax authorities should follow to acquire information on third parties from banks (e.g. unless specific aspects of the investigation warrant to deviate, the tax authorities should first try to acquire the information from the third persons themselves before approaching the bank; the kind of information; deadline for submitting the information by banks; type of information the banks should automatically provide; possibility to put series of questions; at which level of tax authorities specific types of questions should be set).

Information regarding savings of residents of other EU Member States are automatically exchanged under the Council Directive of 3 June 2003 on taxation of savings income in the form of interest payments (2003/48/EC).

**Question 8)** In the 2002 version of the OECD model double tax treaty a new article 27 on the assistance in the collection of taxes has been included. Did your country adopt in some of its double tax treaties a rule identical or similar to the new Art. 27 OECD? If so, in which of the double tax treaties can such a regulation be found?



**Answer 8)** Article 27 OECD Model Convention on assistance in the collection of taxes. EU member states with which treaties have been concluded containing a provision similar to the new article 27 of the OECD model are: Belgium, Denmark, Estonia, Germany (separate treaty on mutual assistance in the recovery of taxes) Finland, Latvia, Lithuania, Luxembourg (separate Benelux treaty on the mutual assistance in the recovery of taxes), Poland, Portugal, and Sweden).

**Question 9)** Has your country ratified the joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters signed in Strasbourg on 25<sup>th</sup> January 1988?

**Answer 9)** The Netherlands has ratified the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters signed on 25 January 1988, by Act of 26 June 1996 (Stb. 1996, 382) and it entered into force as regards the Netherlands on 17 July 1996, and became effective from 1 January 1997. With respect to the Netherlands, the right was reserved:

- not to provide assistance in case of other taxes than the ones levied on income, profit, capital gains and capital (incl. succession duties and gift tax) at the level of *central* government
- not to provide assistance in the service of documents for all taxes. Statements were made as regards the possibility of notification of its residents or nationals before transmitting information and with respect to not allowing, as a general rule, the presence of foreign authorities in case of audits for social security.

**Question 10)** In 2002 the OECD developed the “Model agreement on exchange of information on tax matters”. The purpose of this model agreement is to serve as a basis for countries to conclude bilateral exchange of information agreements with third States considered as “tax havens”. What are your country’s criteria to declare another country as a “tax haven”? Did your country conduct negotiations with third States (“tax havens”) to adopt this OECD model agreement? Has your country concluded any bilateral or multilateral treaties on the exchange of information based on this model agreement? If so, please describe in which parts these treaties follow the model agreement and name the reasons for discrepancies if they exist.

**Answer 10)** Mutual Agreement OECD Tax-havens

In The Netherlands tax legislation there is no definition of the notion “tax haven”. Tax avoidance schemes are combated with tailored measures or general concepts of abuse of law (*fraus legis*). There are no blacklists mentioning countries considered as low tax countries. It can be mentioned however, that in the context of the participation exemption in the Corporate Income Tax (articles 13, paragraph 10, and article 13a, paragraph 1b) the criterion for low taxation is set at less than 10% tax on a tax base as determined under Dutch tax law. There has also been case law of the Supreme Court expressing that the Irish corporate income tax rate of 10% is reasonable (Hr 8 February 2002, nr. 36358, BNB 2002/118).

We have understood that the list of “committed tax havens” as used by the OECD, has been taken into account when determining with which tax haven countries treaties regarding mutual assistance in tax matters would be negotiated.

Treaties along the lines of the 2002 OECD Model agreement on the exchange of information in Tax Matters were signed with Isle of Man (12 October 2005), , Jersey (20 June 2007) and Guernsey (25 April 2008).. Those agreements are generally in line with the Model. The main deviation is that Art. 2 on jurisdiction is missing.

**Question 11)** Do rules exist in your country that oblige subsidiaries (e. g. in cases of transfer pricing issues) to provide information held by the parent company? If so, please describe what these rules look like and how they affect the (international) taxation.

**Answer 11)** Obligation on subsidiaries to deliver information available at their foreign parent or foreign sister companies.

Yes, such a provision exists in article 47a of the “Algemene Wet inzake Rijksbelastingen” (General Taxes Act), Act of 2 July 1959, Stb. 301, as amended.

Article 47a imposes legal obligations to provide information on a company of which the capital is divided into shares and on any other body, in case this company is more than 50% owned by a non-resident (parent) company or non-resident individual or in case of any other body the decision power in that body is held by the non-resident company or individual. The obligation relates to information or information carriers which are in the possession of that non-resident company or non-resident individual. This covers in fact non-resident parent companies and other bodies.

The same applies in case two or more bodies or individuals of which at least one is not resident in The Netherlands, have concluded a mutual agreement of cooperation under which they hold such majority shareholding or can exercise such decision power. Also covered is the case where the information is in the possession of other non-resident companies or bodies in which the in the previous paragraph mentioned non-resident company or non-resident other body has reactively more than 50% interest or can exercise the decision power (related companies and bodies of the foreign parent). This covers in fact the non-resident subsidiaries and other bodies, controlled by the foreign parent or other bodies (non-resident sister companies).

As explicitly mentioned in the General Taxes Act, the company or the body upon which this obligation is imposed, cannot successfully claim that it cannot provide the information because the non-resident company or individual is not prepared or willing to provide the information.

An exception to article 47a applies in case the non-resident company or individual is a resident of an EU Member State, or of a country with which a tax treaty was concluded which contains an extended obligation to exchange information (see above). The Minister of Finance may however allow the tax inspector to apply article 47a if it appears that the information cannot be acquired.

Generally speaking the effect of this provision seems to be that relevant information held by the non-resident parent or individual needs to be supplied. But in the cases where other EU Member States or Treaty Partners are involved, the competent authorities for the exchange of information will take over and will ask the competent authorities of the other state to intervene and to provide the requested information. If it cannot be acquired from the other EU Member State or Treaty partner, the requested company or body can be subject to the penalties imposed on not providing requested information.

We assume that this penalty provision can actually only be rightfully applied if sufficient indications exist that the non-resident does indeed avail of the information requested. It can also be expected that it will not be necessary to invoke the provision in case of residents of EU Member States. We do not avail of information whether it has ever been applied in relation to EU Member States.

**Question 12)** With which of the Member States have bilateral treaties concerning legal assistance on law regarding fiscal offences been concluded? What kind of exchange of information on tax crimes has been arranged in these treaties? How is this exchange organised?

**Answer 12)** As far as we are aware, no specific bilateral treaties have been concluded with other European states, besides the European Convention on Mutual Assistance in criminal matters.

**Question 13)** Has your country ratified the European Convention on Mutual Assistance in Criminal Matters and its additional protocol in tax matters? What is the definition of tax fraud/tax crime/tax offence in your country?

**Answer 13)** The European Convention on Mutual Assistance in Criminal Matters between Member States has been ratified by The Netherlands by Act of 18 March 2004, Stb 2004/106; also the Protocol of 16 October 2001 to that Convention has been ratified.

With respect to the question about the definition of tax crime versus tax offence, the following can be mentioned.

There is an elaborate enumeration in the “Algemene Wet inzake Rijksbelastingen” (General Taxes Act), Act of 2 July 1959, Stb. 301, as amended, of cases which are either considered to be an administrative offence (which are subdivided in categories of neglect in articles 67a-67c and in cases of willful default in article 67d-67f) or a criminal offence (articles 68-71; subdivided in crimes which are the cases where imprisonment can be imposed and criminal offences where this is not the case). In view of the detailed enumeration of cases which are considered as an administrative or criminal offence, it is not possible to give one short definition of each notion. To give you a bit better impression, the following illustration is provided of the kind of cases covered by each category.

Examples of an administrative offence are: no or late filing of a tax return and no or late payment of tax (Arts. 67a and c of the General Tax Act and Arts. 21, 23 and 24 of the Decree on administrative fines.

Examples of what are considered as criminal offences are: filing a formally incorrect tax return, providing the tax administration with incorrect information, maintaining falsified books and records, and failing to preserve books and records for a period of 7 years (Arts, 68-70 of the General Tax Act).

**Question 14)** What is the borderline between the application of administrative assistance on the basis of “tax treaties” and the administrative assistance on the basis of conventions for the assistance in criminal matters? In other words: When does your country see the necessity to stop the cooperation under tax treaties and continues the cooperation under treaties concerning legal assistance on law regarding fiscal offences?

**Answer 14)** This is a difficult question to answer since the borderline cannot always be clearly defined and also the legislative history does not provide much clarity in this respect. Generally, the approach seems to be that as long as the person involved is being looked at as a regular taxpayer, the regular administrative procedures will be followed as expressed in the General Taxes Act (regular authority to put questions and to do fiscal investigations, without e.g. coercive measures like searching the private home, detention, or the right to remain silent). If however, the person is considered to be a suspect of a criminal offence, that person has another legal position and then other penal law rules and procedures will be applied (Act on penal prosecution) and also conventions for the mutual assistance in criminal matters will be applied.

**Question 15)** How have the EU regulations influenced the design of the rules and practices in your country that should avoid tax fraud and tax circumvention? Please give examples and the state of the discussion in the scientific literature where possible and appropriate.

**Answer 15)** We are not aware of cases where these instruments for administrative assistance created by the EU influenced the design of rules and practices that should avoid tax fraud and tax circumvention.

As mentioned already under answer 11, article 47a of the General Taxes Act is not applied if the information can be acquired under EU instruments. We also point at the fact that not allowing for certain tax benefits in cross border situations out of fear for tax avoidance seems not to be accepted as a justification for obstacles in the EU if the information could be acquired e.g. under EU instruments (see answers under V, 3, hereafter). No doubt also the savings directive has had a great impact in combating tax fraud with savings.

**Question 16)** Which legal foundations with the other Member States concerning the collection of taxes exist in your country? Are there this-related clauses in your country's double tax treaties? If so, with which countries?

**Answer 16)** The legal foundations regarding the cooperation with other countries in the recovery of tax claims regarding direct taxation are in the EU instruments referred to above under question 1 and 2, the tax treaties and other specific treaties dealing with this matter and the Dutch laws dealing with recovery of tax claims and the mutual assistance in this matter. For an overview of the tax treaties which contain provisions in this respect reference is made to the answer under 8 above).

### III. Questions of use

#### Questions of use in relation to domestic law

**Question 1)** What activities are the tax officials generally authorized to use when assessing taxes in your country? Can the tax authorities request additional information from another person or institution than the taxpayer himself (e. g. banks, insurances or business partners)? If so, please name which other persons or institutions these are? What are the requirements to request them?

**Answer 1)** Officials can ask questions, investigate books and documents, visit (but not search) at the premises of the taxpayer, or of his employer, his bank, associate or business-partner, or everyone who has the legal obligation to keep books and records

**Question 2)** What are the measures available if a requested party fails to supply information (e. g. fines, penalties etc.)? Are the same domestic measures available when your country's tax administration has received a request for information from another State?

**Answer 2)**

If the requested party's own tax liability is at stake (for national taxation) then in case of refusal he can be punished by means of the so called reversion of the burden of proof. The tax inspector will assess the taxpayer and the taxpayer has to prove that the assessment is too high. This is an unfavourable position in Court.

In case a “third party” fails, he will get a fine, because there will be no assessment, and therefore there will be no use for the possibility to reverse the burden of proof. In special cases Civil Court can force the taxpayer to deliver the requested documents by charging a fine for every day the party refuses the documents.

The same measures are available in case of a request for information from another State.

**Question 3)** When your country’s tax administration as the requested State is not in the possession of the requested information has the tax administration the legal right to change or adjust a question in order to improve the answers before forwarding the question to the taxpayer or a third person/institution?

**Answer 3)** No. In that case it has to turn to the requesting state, insofar the question is about a foreign tax assessment of a third (legal) person. Moreover: the Netherlands competent authorities do not forward the request for information directly to the taxpayer who has to provide the requested information (third party), but to the tax official. The Netherlands consider the request for information as secret. However, it is of course possible that the information in the request will trigger the tax official to investigate the taxpayer concerned more deeply, and to extend the purpose of the investigation to the Dutch tax liability of this, or even another person. The foreign request for information will then have the function of a signal.

**Question 4)** Is the tax administration allowed to use the information obtained for the purpose of assisting another country in order to adjust the already assessed domestic tax?

**Answer 4)** This depends of the situation: If the request of the other country would reveal facts that the Netherlands tax administration was not, or could not have been aware of at the time of the assessment, then a new investigation could be started to “improve” the original assessment, and even impose a fine. But this is not allowed when the facts were already known to him, or when he could have been aware of them, reasonably speaking.

**Question 5)** In 2006 the OECD published the “Manual on the implementation of exchange of information provisions for tax purposes”. Does your country follow this manual? If not, please give reasons and describe where you see deficiencies in this manual.

**Answer 5)** No, the Netherlands do not follow the manual as such. However, the international obligation is in accordance with the spirit of the manual implemented in domestic legislation, by rules of application, and by instructions (manuals) for different methods of exchanging information (i.g. the presence of foreign tax officials at tax investigations, simultaneous audits etc.). They are widely available for the tax officials who have to work with them.

#### Questions of use in general

**Question 6)** According to article 1 paragraph 1 of the Council Directive 77/799/EEC the exchange of information takes place between the “competent authorities” that are defined for each country in article 1 paragraph 5. What does the organisation of the exchange of information from your country’s competent authority to the competent authority of the Member State that made a request look like? Which authorities and agencies are involved in answering the request? Do (administrative) rules exist that regulate how the organisation to answer a request has to be like? If so, what is their content?

Are there any differences in this organisation concerning the automatic exchange of information according to article 3 of the Council Directive (77/799/EEC) or the spontaneous exchange of information according to article 4 of the Council Directive (77/799/EEC)?

**Answer 6) A) Organisation: supplying and receiving of information on request**

*Supplying information on request*

- The foreign request has to be sent to the competent authorities. These are in a special central department of the Tax Administration, working under the shared responsibility of the Ministry of Finance (international aspects) and the Tax Administration (internal processes of information gathering). The Department consists of about 20 officials, only a few of whom are entitled to sign the correspondence with the other states (answers and requests).
  - Answering a request: this is the responsibility of the Tax Administration in the different regions (the tax inspectors).
  - Rules: The competent authorities first scrutinize the incoming requests on the *basis of the criteria of the international obligation* (tax treaty or EC Directive):
    - the scope of this obligation (object and subject),
    - observation of the principle of exhausting the own sources first,
    - existence of limitations to be taken into account, and which are already visible in this stage (reciprocity, risk in respect to public order, )
  - On the basis of our domestic law:*
    - does the domestic law enable the Netherlands to gather the requested information,
    - is the request proportional in terms of required efforts and expected results
  - On practical issues:*
    - is the request comprehensible for the tax-administration?.

- The request is sent to the tax region where it is to be answered, with an accompanying letter, stating the term of response. The tax-official in the field has to decide for himself if, and what kind of, an investigation is needed. He can get in touch with the competent authorities, but not directly with his counter-part in the other country. He has to send his answer to the competent authority, which, after scrutinizing it, sends a prior notification to the taxpayer who delivered the information. This taxpayer can enter into a discussion with the competent authorities, and even go to Court before the answer is sent to the other country, except when there is reason for a presumption of fraud. (See also part VI)

From January 2009 on the role of the central competent authorities has been changed as far as *European* mutual assistance is involved. The responsibility for the quality and speed of this assistance is now put in the hands of the 13 Tax Regions the Netherlands tax administration is divided in. One of the reasons for this reorganization is the desire to make international exchange of information less bureaucratic.

*Receiving information on request*

- The foreign answer is sent to the central competent authorities, where it is registered, judged globally and passed on to the tax inspector who had made the request. This tax inspector is asked to give feed back (by way of a standardized form) on the effectiveness of the answer. This feed-back however can sometimes be given only after a long period, in cases where the assessment as a result of the foreign evidence has been challenged in Court.

B) Supplying and receiving information in **automatic** exchange

*supplying information*

The Netherlands has concluded so called Memoranda of Understanding with 10 European countries, primarily concerning information which is available in databases. However, may be differences in the size or scope of these databases in the countries involved (no factual reciprocity). In that case some of the categories are labelled as “spontaneous” information.

For supplying the information to the different countries, the central ITC department of the Netherlands tax administration queries the databases, (e.g. wages and pensions) and the competent authorities send the results to the other states, using the OECD format.

*receiving information :*

The data files received from the other country are sent to the competent authority, which after registration sends it to the ICT-department. There the files are read, and put to the disposal of the risk management department. After a process of weighing this information against other (domestic) information, decisions will be taken about what will be done with the data. There are three possibilities:

- the most valuable information will be put into the computerized assessment system as one of the elements to establish the assessment of a taxpayer by the central computer.(i.e. information about wages or pensions received from other countries).
- other valuable information will be sent to the regional risk management departments to work with it actively. There the information can serve as an indication that some investigation is needed on certain branches of commerce.
- other information is put in a database, and made available to the tax administration more as an *accessory* source of knowledge when the central computer has already decided that a certain taxpayer has to be scrutinized by an individual tax official because of some other item.

C) supplying and receiving information in **spontaneous** exchange.

*supplying information*

This is information without a request, but which is found by the tax officials in doing their regular work in assessing Dutch taxpayers, and which in their opinion may be of relevance for another state. So this information is “produced” by the tax officials, and sent by them to the competent authorities. There it is scrutinized along with the criteria of the applicable international and domestic law. Before it is sent to the other state, a notification is sent to the taxpayer the information came from (see part VI). This is individual information. From 2009 on this notification of the taxpayer/informant is done by the tax regions as far as European Member States are involved.

*receiving information*

Information received concerning individual Dutch taxpayers is sent to the central competent authorities, where it is registered, judged globally and forwarded to the appropriate tax region, with a standardized request for feed back about the result of the information.

Information received in larger quantities is sent to the risk management department, where conclusions can be drawn regarding the possible existence of structural fraud – or evasion patterns and supplementary investigations can be started.

The processes of exchange on request and spontaneous exchange are described in a Ministerial Decree containing the elements of the international rules applicable, the instruction for the tax official how to proceed in answering a request or to send in spontaneously information, or to work together with foreign officers in a investigation.

**Question 7)** What do the administrative procedures in your country generally look like when the requested information is not in the hands of the requested authority?

**Answer 7)** See above: the tax inspector decides whether it is necessary to ask questions to the taxpayer concerned, or refer the question to another region for more information, or to investigate the books or even the premises of the taxpayer.

**Question 8)** Do special bilateral treaties concerning the administrative assistance in tax matters exist that shorten this bureaucratic way of answering requests? If so, please name these treaties and describe how the bureaucratic way is arranged there.

**Answer 8)** In the Regulation 1798/2003 about Mutual Assistance on VAT matters, the possibility of decentralized competent authorities is created (on a regional level, or even on an individual level). However the competence to exchange information must always be assigned explicitly and formally. There is also the possibility that these tax officials visit each other's offices to gather (VAT) information they need. The Netherlands are developing these methods in an experimental setting, with neighbouring countries.

**Question 9)** What does the organisation of the exchange of information look like when the request is based on articles 5 et seq. of the Council Regulation (EC) No 1798/2003 of 7 October 2003 in the field of value added tax? Which authorities and agencies are involved in these cases?

**Answer 9)** The Regulation obliges the Member States to establish a Central Liaison Office. There the requests and answers on VAT are processed in the same way as described above (unless one or more individual tax officials have been specifically assigned to do this). The difference is however that the taxpayer is not notified previously of the fact that information coming from him is going to be sent abroad.

**Question 10)** Which are the authorities and agencies that deal with incoming requests for recovery according to the "Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures"? How is the collection organised in your country when a Member State requests for recovery? Is a judgement of a national court required to collect another Member State's tax?

**Answer 10)** A. regarding authorities and agencies and organization:  
In the Netherlands the assistance in the field of recovery is dealt with by a special unit of the central department of Competent Authorities.

Involved are: a) central authorities, b) tax collectors of the regional offices, c) bailiffs or process-servers of the Dutch Tax Administration, d) administrative service.

Ad a) The special recovery-unit of the central competent authorities is responsible for receiving and administrating the requests, forwarding them to the regional tax collectors, inserting them in the general records of taxes debtors, monitoring the terms of dispatching, communication with the foreign central authorities if necessary.



Ad b) Tax collectors are responsible for starting the collection process similarly to the national cases, eventually for enforcing measures, including notification of warrants for the execution, for the administration of (clearance) payments, for giving instructions to forward payments to the other state, for issuing declarations of irrecoverability of certain debts, for decisions on requests for remission of (national) tax-debts.

Ad c) the bailiffs are responsible for notification of the warrants, seizure of goods (conservatory seizure) and the executing of goods.

B. regarding whether a domestic judgement is required to collect for another Member State No. To collect another Member State's tax the Netherlands tax administration does not require a judgement of a domestic judge. The title of execution from the *foreign* authorities is crucial. It must be added to the request. It is transformed in a warrant which can serve for the use of recovery by the Dutch tax-collector.

**Question 11)** In case bilateral treaties concerning legal assistance on law regarding fiscal offences exist: How is the exchange of this information organised in your country?

**Answer 11)** As mentioned in answer 12 under chapter II of this report, no such specific bilateral treaties have been concluded with other European Member States. Mutual assistance regarding fiscal offences is provided on the basis of a number of multilateral treaties, like the European Convention on Mutual Assistance in Criminal Matters of 20.4.1959 with supplementary Protocol of 17.3.1978, and the Schengen Implementation Agreement of 19.6.1990 as regards excises, VAT and customs duties.

**Question 12)** According to opinions a request for information can only be based on one legal instrument. Does your country follow this or does it refer to all instruments available? What is the tax authorities' opinion on conflicting rules in different instruments? What does the relationship between the double tax treaties and the Council Directive 77/799/EEC look like? Which is the preferred way to exchange information and why?

**Answer 12)** No, the Netherlands do not follow the opinion that one legal basis has to be chosen. Only the OECD-Council of Europe Convention of 1988 prescribes this choice. On the basis of that Convention Member States of the EU are obliged to choose for the Directive 77/799. Neither this Directive itself, nor the OECD Model Convention prescribes this. In case of a conflict between a treaty-rule and EU-legislation in the Dutch view European rules have priority, on the basis of Art. 5 of the EC Treaty (obliging Member States to do the utmost to implement as faithfully as possible the aims of the European Treaty) along with article 234 of that EC Treaty (obliging the Member States to renegotiate previous conventions which are conflicting with European law).

The Netherlands do not see many differences in the scope of most of our treaties with that of the Council Directive, except in some "old" treaties concluded on the basis of the 1963 Model. So there is no need to choose, except when the OECD- Council Convention is obliging the Netherlands to do so.

**Question 13)** Which precautions are taken in your country to make sure that no information containing commercial, industrial, business or professional secrets or details about commercial processes are provided?

**Answer 13)** This protection is (implicitly) included in the general confidentiality-rule of our domestic tax law, which is also applicable to the information received from other countries. Misuse of taxpayers' information or failure in maintaining secrecy is

severely punished. In the case of international exchange, normally the taxpayer who has delivered information is notified previously that “his” information will be sent to another State. The taxpayer can object to this decision, e.g. because of commercial secrets being involved and he can even go to court to challenge the decision (see part VI).

**Question 14)** Which precautions are taken in your country to guarantee that the information conveyed is kept confidential in the requesting Member State?

**Answer 14)** The Netherlands Minister of Finance is only allowed to establish obligations for mutual assistance in tax matters with countries possessing legislation on the subject of secrecy and confidentiality in tax matters (art. 14 of the Law on the mutual assistance in tax matters). But of course: there the Netherlands (like any other country) have very much to put trust in the integrity of the tax administration of the other countries. This can be risky in situations where a tax treaty is mainly concluded because of economic reasons, while on the other hand there may be limited knowledge of and experience with the legislation in respect to rights and safeguards of the citizens in that country. In those cases the Netherlands may decide not to conclude a tax treaty or to establish a limited obligation to exchange information. With co-Member States this is however not possible. On the other hand the Directive 1977/79 offers the requested state the possibility to ask for special measures for protection of his taxpayer, if that requested state is not sure about the level of protection in the requesting state. Nevertheless there is always a risk there from the point of view of the protection of the taxpayer, especially because neither OECD nor the Council of Europe designed rules for establishing an obligation for mutual agreement procedures on state responsibility in cases of violation of this secrecy provisions.

**Question 15)** How can in your country be guaranteed that only the persons or agencies named in article 16 of the “Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures” have access to the documents and information given to your country by another Member State?

**Answer 15)** See the answer to question 13.

**Question 16)** Which precautions are taken in your country to ensure that the information stored in electronic data bases is treated confidentially as required in article 23 of the “Commission Directive 2002/94/EC of 9 December 2002 laying down detailed rules for implementing certain provisions of Council Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures”?

**Answer 16)** Encryption of the data bases, limited access, only for a special group of tax officials (including e.g. IT technicians working with the data).

**Question 17)** Do the authorities of your country make investigations on their own when they are the requested authority or do they (just) work with the existing files?

**Answer 17)** They make investigations of their own, when necessary. This is to be decided by the tax administration.

**Question 18)** On which occasions does your country take part in simultaneous tax examinations? How often are permanent establishments in your country affected by a simultaneous tax examination? Do your country’s legal rules allow foreign tax officers to take part in tax examinations?

**Answer 18)** In the opinion of the Netherlands' tax authorities it is important that the tax administration participates in simultaneous tax examination in cases where investigating a specific taxpayer would be very interesting for other countries as well: e.g. when the taxpayer is part of a multinational, or is belonging to a group of cooperating enterprises, or is a permanent establishment of an enterprise resident in another country, or is steady business partner of another (independent) enterprise resident in another country. The Netherlands accepts to be involved in simultaneous tax examinations at the request of other countries, if this is not contrary to the Netherlands' interest and participation could attribute to the result aimed at by the requesting country. Simultaneous tax examinations are carried out several times a year, both at the Netherlands' initiative as well as on request of other countries, and they are dealt with by a specific department responsible for the decision making and the carrying out of Dutch or foreign initiatives in this field.

It is not known how often permanent establishments situated in the Netherlands are affected by these simultaneous examinations.

- Our legal rules allow foreign tax officers to take part in tax examinations, in the following cases, where:

- a considerable tax interest is involved
- the matter is highly specific or complicated, and the presence of the foreign officer would really be an extra help
- when a real risk of tax evasion or fraud is present
- under the condition of reciprocity.

**Question 19)** Are there cases in which the usage of a certain kind of evidence is allowed though it is normally forbidden in your country just to make the mutual assistance easier? If so, please describe this kind of evidence and name reasons for the exception.

**Answer 19)** No.

**Question 20)** Is there a tendency in which situations the tax authorities use which kind of method (the exchange on request, the automatic exchange of information and the spontaneous exchange of information) to get the information they need?

**Answer 20)** Use of either of these methods of exchange depends from the nature of the information needed. The Netherlands try to improve the use of automatic exchange of information, but the applicability of this method seems restricted to bulk information stored in databases. Efforts are regularly made to improve the awareness of the existence of international risks with our tax officials, and to encourage them to ask questions to the treaty partners and other EU Member States in individual cases, and to improve the awareness of the fact that books and records of taxpayers can contain information which can be of use for another country, and that in such cases the Netherlands are obliged to send this information to the other state.

**Question 21)** How does the exchange of information influence the possible restrictions to the free movement of capital with third countries?

**Answer 21)** It seems no harm is done by the exchange of information to the free movement of capital, as it contributes to taxes due being paid. States should be open and transparent regarding their tax laws and even about their tax-incentives. It seems that in the opinion of the European Council and Commission and the OECD international transparency and exchange of tax information are the best ways to win the battle against harmful tax competition. If every

country observes this recommendation there will be a level playing field for the free movement of capital.

**Question 22)** What does the relationship and influence between criminal and tax proceedings and judgements in your country look like?

**Answer 22)** We do not see the relevant of this question here, unless it is about the possibilities for using information received by means of mutual exchange in tax matters in criminal proceedings. Dutch criminal Courts accept evidence from the tax administration. When it comes from abroad as a result of exchange of information in tax matters, it depends on the secrecy-provision in the international rules if it can be used.

*Quantities and figures*

**Question 23)** How many requests from other Member States does your country get per year? How many requests to other Member States does your country make per year? How many spontaneous and automatic exchanges of information does your country transfer to the other Member States and how many of these exchanges of information does your country get per year? If possible, please give statistical figures of the last ten years.

**Answer 23)** From the statistics available we could not conclude how often the Netherlands tax administration receives and makes requests in each particular year. The figures on information received in a particular year could also represent information relating to requests from previous years. This can also be the case for information which is sent to other countries. In the tables below, you also find information under the heading “terms” with respect to the average time needed for exchanging the information both for the Netherlands and for the other Member States. These are averages. No record is kept about each specific country, nor about the different ways of exchange.

The following data are related to **direct** taxes.

**Survey of supplied information**

	1998	1999	2000	2001	2002	2003	2004		
Request.	373	451	475	582	658	1024	895		
Spont.	11.231	20.372	13.860	16.403	13.751	54.396	267		
Aut.	13.436	27.209	134.720	75.838	88.979	20.753	128.793		
Terms	7 months	6 months	6 months	6 months	7,5/7,7 months	7,5/7,5 months	6,6/6,8 months		

	2005	2006	2007
Request	983	1191	1553
Spont.	1.615	4.932	764
Aut.	593	177.243	280.145
Terms	7,5/8,0 months	6,5/8,6 months	6,1/7,1 months

**Survey of received information**

	1998	1999	2000	2001	2002	2003	2004
Request.	9.26	1.302	1.537	1.633	1.450	1.035	1.142

Spont.	11.591	7.027	30.438	4.764	26.880	54.379	40.885
Aut.	22.632	48.115	40.968	27.533	29.552	20.753	19.842
Terms	8 months	3 months	3,5 months	3 months	4,5 / 9 months	3,6/8.2 months	4,9/6,8 months

	2005	2006	2007
Request	818	743	793
Spont.	7.535	34.189	40.403
Aut.	190.078	144.851	318.788
Terms	4,4/6,9 months	6,7/8,8 months	5,9/6,5 months

Since 2002 the time needed to exchange the information is represented in two numbers, to make a distinction between two types of operational workflows being used by the Netherlands tax administration:

- one is the normal one, by way of correspondence (letters with annexes),
- the other is by way of short requests (and answers) by fax on matters such as VAT – identification or other requests that do not need special investigations in the requested countries, but only the consulting of databases. It is used for the struggle against volatile carousel-fraude structures. The latter is a speedy procedure, already known for more than 10 years, but only accounted for specifically from 2002.

**Question 24)** How often does your country’s competent authority get information on basis of the “Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments” per year? If possible, please give statistical figures of the last ten years.

**Answer 24)** Please, see the answer on question 5 in part IV.

**Question 25)** Does your country request information more often from certain Member States than from the other Member States? Do certain Member States request more often information than the other Member States? If so, please name these countries.

**Answer 25)** From the statistic material available it is difficult to distinguish the exact volume of the exchange of information with each specific country. It is clear however that the highest intensity in information exchange is between the Netherlands and its direct neighbouring – countries Belgium and Germany. Also France and the United Kingdom are important partners. More than 90% of the exchange is with these countries.

**Question 26)** How long does it take your country to answer a Member State’s request? How long does it take until a Member State answers your country’s requests? If possible, please name for both questions the number of requests that took under three months and that took over three months to answer or to be answered. Please give statistical figures of the last ten years.

**Answer 26)** Please see the answer on question 23.

**Question 27)** Do the incoming requests and the requests made by your country and the automatically and spontaneously exchanged information mainly focus on certain types of direct taxes? If so, please name the tax type and the quantity of the requests.

**Answer 27)** No specific information is available on this item.

**Question 28)** According to article 8 of the Council Directive (77/799/EEC) it is possible to refuse the provision of information. How often does your country refuse to answer incoming requests because of the reasons named in article 8 per year? How often do other Member States refuse to answer your requests because of the reasons named in article 8 per year? What is the most frequent reason to refuse the exchange of information? If possible, please give statistical figures of the last ten years. Are there any other instruments available in your country to refuse the provision of information? If so, please describe them.

**Answer 28)** It hardly ever happens that requests are refused by the Netherlands. If one of the grounds for refusal seems to be present, the Netherlands competent authorities are getting into contact with the other member States, and supplementary information is asked to make a further judgement.

**Question 29)** How many times per year does your country exchange information with other Member States on the basis of a double tax treaty? If possible, please give statistical figures of the last ten years.

**Answer 29)** As the Netherlands will generally choose as wide a legal basis for the exchange of information as is available, (which can go up to three legal basis) there is no distinction made in the statistics on that item.

#### IV. Questions of efficiency of the mutual assistance in tax affairs

**Question 1)** It was the Council Directive's (77/799/EEC) aim to reduce tax evasion and tax avoidance across the frontiers of Member States by strengthening the collaboration between the Member States. Comparing the exchange on request, the automatic exchange of information and the spontaneous exchange of information: Do you think one of them is more efficient to achieve these aims than the others. If so, please give reasons for your opinion.

**Answer 1)** It depends on the kind of information, the purpose of the request and the way it can be handled both by the requesting country and the country giving the information. For example, *automatic exchange* of information might be more efficient for bulk information which can be easily handled and processed by computers in both states, for example interest received (at a domestic level, in the Netherlands banks have to give automatically information on the amounts held on accounts and interest received by individuals, which seems to work quite efficient because this process is highly computerized). In 2007 391,000 data were automatically exchanged and 451,000 data were automatically received.<sup>4</sup> However, the setting up of suitable databases and computer systems in order to make the data available to tax inspectors requires a lot of initial investments and can be difficult. Fitting in the received bulk information in a process of (computerized) assessment of taxpayers can be difficult for reasons of timing. The Dutch experience is that the foreign records often come too late for being embedded in this procedure, and so the use of it requires special efforts. If information requested is more specific, more 'made-to-measure' or aimed at a relatively small group of tax payers, or if the software both states use to handle the information is not compatible, or if the systems of one of the states cannot handle bulk information, exchange on request is probably more efficient to ensure the requesting country gets the information it

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<sup>4</sup> Report of the Dutch tax authorities 2007, p. 29 <http://www.minfin.nl/dsresource?objectid=48127&type=pdf> .

needs. For example, information for which the Dutch tax authorities have to investigate the administration of the tax payer is not suitable for automatic exchange of information.

The following table gives an overview of the number of cases of mutual assistance on request in which the Netherlands was involved:<sup>5</sup>

	2004	2005	2006	2007
Information provided by the Netherlands	2872	1822	3815	3999
Information received by the Netherlands	2473	2457	3386	2844

**Question 2)** In case in your country a taxable person has larger or more duties to cooperate when the facts and circumstances affect a foreign country (cp. question V.2): Do you think they are more efficient to reduce tax evasion and tax avoidance than the possibilities to exchange information given by the Council Directive 77/799/EEC or the other instruments of cross-border information exchange?

**Answer 2)** As the duties to cooperate in domestic situations are already quite broad, the duties to cooperate when the facts and circumstances affect a foreign country are similar. Duties of cooperation normally will relate to situations in which fiscal authorities of a State want to assess the tax liability of its taxpayer. In cases of cross border income, the information which is given by the taxpayer cannot be fully controlled or checked, no matter how heavy the domestic cooperation-duties are. A request for information to the other Member State or treaty partner will then be the (necessary) supplement, the missing part of the puzzle.

Many times, the Dutch tax authorities do not request information from the tax payer himself, but from a third person obliged to maintain books and records (for example, companies and employers). Such persons have very broad information obligations regarding the taxation of third persons as well under Dutch law. However, where in national situations such persons have broad obligations to automatically pass on information to the tax authorities, in international situations such obligations are limited to interest from savings.

**Question 3)** Do you see any differences in the efficiency to reduce tax evasion and tax avoidance between the double tax treaties and the relevant Council Directives? If so, can you say what these differences are and where they result from?

**Answer 3)** In general the Council Directives give more possibilities to exchange information than existing bilateral tax treaties. A few examples:

a) Exchange of information based on double tax treaties is only possible insofar as this is necessary for carrying out the provisions of the treaty or/and the domestic laws of the contracting states concerning taxes covered by the convention. Such taxes are usually limited to only taxes on income and capital.

Other taxes are not covered in many existing bilateral tax treaties. On the other hand, gift and inheritance taxes are not covered in the Directives, but in the bilateral tax treaties regarding these taxes (only a few in the case of the Netherlands) usually an exchange of information clause is included. Since the 2000 version of article 26 of the OECD- Model Convention on income and on capital, in some more recent treaties the possibility to exchange information is

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<sup>5</sup> Report of the Dutch tax authorities 2007, p. 29 <http://www.minfin.nl/dsresource?objectid=48127&type=pdf> .

broadened to all domestic taxes (for example all taxes are included in the tax treaty with South Africa (2005), Slovenia and Albania, but not in South Africa (1971) and the recently concluded treaty with Saudi Arabia).

“Efficiency“ relates to the aim for the Conventions or Directives or Regulations, which are more or less specific. The obligations for the supplying states do not differ a great deal.

b) Under the Council Directives information may be used for other purposes than taxation if the other state allows this and the other state also allows this in its own laws. This is not the case in many Dutch tax treaties. Some Dutch tax treaties with a limited exchange of information clause include the option to request information for the purpose of imposing national legislation provided the information is used to prevent fraud.

c) In most tax treaties it is allowed to disclose the information in public court proceedings, whereas under the Council Directives this is only possible if the other state does not object to such disclosure. This might be an incentive for some member states to exchange more information under the Directive than under a tax treaty.

However, from an efficiency perspective one may wonder whether it is generally more efficient to have more possibilities to exchange information. For example, if countries would exchange a lot of information automatically and/ or spontaneously, whereas their internal organization and resources are insufficient to cope with this, such increase might lead to an information overload which might not be efficient in combating tax evasion.

Finally, tax treaties based on the OECD Model Tax Convention 2008 may provide for more possibilities to exchange information than the Directive, as the new paragraphs 4 and 5 of article 26 provide that, notwithstanding the exceptions in paragraph 3 (for example, regarding business secrets) a lack of domestic tax interest, domestic bank secrecy rules or the fact that the information relates to ownerships interests in a person do not limit the obligation to exchange information.

**Question 4)** How efficient is the exchange of information via the electronic database VIES as regulated in articles 22 et sqq. of the “Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax”? Which potential problems do you see and which problems already did occur when using VIES?

**Answer 4)** When this Directive was published, it was expected that it would make the fight against tax evasion more efficient, as it would extend the possibilities to exchange and to use information, it would partly remove bureaucratic hurdles and it would enforce more commitment of the member states.<sup>6</sup> Furthermore, as it includes time limits, it will probably result in more timely exchange of information. There is no research known to us on the effectiveness of the system.

**Question 5)** How efficient is the exchange of information as regulated in articles 8 and 9 of the “Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments” in your opinion? Did any problems occur? Which potential problems do you see?

**Answer 5)** Although no information is available on the costs of this exchange of information and information regarding the comprehensiveness of the data is lacking, which precludes a

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<sup>6</sup> Editors of Vakstudie Nieuws in VN 2003/57.23.



final judgement, we have the impression that this type of exchange is quite efficient. In answer to questions of members of Parliament the Dutch undersecretary of Finance stated in the summer of 2007 that the Netherlands received about 96.000 data concerning payments of interest in the second half of 2005.<sup>7</sup> About 4000 data were incomplete which made it impossible to identify the receiver of the interest. These data were returned to the country of origin. The other data were used in the tax assessments. In 2007, again most information was exchanged because of the Savings Directive: 207,000 data on interest payments to 33 countries were exchanged and 165,000 data from 31 countries were received.<sup>8</sup> These numbers are included in the total numbers of data exchanged automatically as mentioned under answer 1 of this part IV above, relating to 2007. Taking into account that only about 2,4% of this large bulk of information could not be used, it seems that this automatic exchange of information seems to be relatively efficient.

**Question 6)** How efficient is any kind of the exchange of information to avoid tax frauds and connected problems in the EU?

**Answer 6)** We do not have information on the costs of exchange of information, but exchange of information seems to have contributed to an improvement of the taxation of such income. Successes have been reported by the tax authorities in the Netherlands especially in relation to spontaneous information e.g. from a large quantity of *spontaneous* information on bank accounts held by Dutch taxpayers in German banks. This resulted in assessments of many millions of Euro's in total. Also automatic exchange of information from Belgium concerning pensions and salaries, and the cooperation by means of simultaneous audits seem to have been successful. Furthermore, the fact that the media have reported on spontaneous exchange of information regarding bank accounts held in Luxembourg (information exchanged by Belgium) and Liechtenstein (information exchanged by Germany) has probably caused many tax payers to voluntarily report bank accounts which they previously did not report (the usual fine for not reporting bank accounts did not apply in these cases of voluntary reporting). Since 2001 the Dutch tax authorities received an additional amount of tax of almost EUR 135 million of about 4500 individuals who reported their savings or other wealth held abroad. In 2007 the tax authorities received an additional amount of tax of almost EUR 21 million of almost 350 individuals. The fact that tax payers are more aware that information may be and will be exchanged might therefore in itself result in less attempts to avoid taxation.<sup>9</sup> There also have been reported results from automatic exchange of information on Belgian pensions and wages in 2004. For the individual requests of information there is no routine of reporting of results developed yet.

**Question 7)** Article 8 of the "Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments" enumerates the information that the paying agent has to report to the competent authority of the Member State where the beneficial owner is resident. Do you think this minimum amount of information named in article 8 is sufficient to ensure effective taxation of savings income? If not, which additional information would be necessary in your opinion?

**Answer 7)** It seems to be sufficient for the Netherlands as long as the country of origin does not omit information (please refer to the answer on question 5). However, the fact that the

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<sup>7</sup> Letter to the Second chamber dated 4 June 2007, DGB 2007-02235M, page 11 and Report of the Dutch tax authorities 2006

[http://download.belastingdienst.nl/belastingdienst/docs/beheersverslag\\_belastingdienst\\_2006.pdf](http://download.belastingdienst.nl/belastingdienst/docs/beheersverslag_belastingdienst_2006.pdf) .

<sup>8</sup> Report of the Dutch tax authorities 2007, p. 28 <http://www.minfin.nl/dsresource?objectid=48127&type=pdf> .

<sup>9</sup> Report of the Dutch tax authorities 2007, p. 28 <http://www.minfin.nl/dsresource?objectid=48127&type=pdf> .

systems for exchange of information are effective, does not mean that the Directive is perceived to be effective as it only includes savings of which individuals are the beneficial owner and several products which are perceived to be similar to savings are not included. Thus the level of exchange of information does not seem to limit the effectiveness of the Directive, but rather its scope.

**Question 8)** Do you see possibilities to amend the way information is exchanged on basis of the “Council Directive 2003/48/EC of June 2003” to ensure effective taxation of savings income and to remove undesirable distortions of competition? If so, please describe what these amendments may look like.

**Answer 8)** It seems to work well for the Netherlands, however, as mentioned under 7, the limited scope of the Directive is perceived to limit the effectiveness of the Directive.

In any case, the regular increase of taxes flowing from the application of this Directive will be only a one- time matter. Once the “startling effect” of the Directive is over, and the compliance of the taxpayer is improved, the results will structurally stabilize, hopefully on a higher level than before.

**Question 9)** One of the problems of the mutual assistance in tax affairs between the Member States may be that misunderstandings occur because of the different languages involved. What do you think the linguistic quality of the information given to your country is mainly like? (“understandable in a good and easy way” or “understandable in bad way”) How much of the information your country gets per year is understandable in a bad way? If possible, please give statistical figures of the last five years.

**Answer 9)** This is not perceived as an issue in the Netherlands. The Netherlands competent authorities have a translating department (for French, Spanish and German) in case the Dutch tax officials would not understand these languages. However, translating is time consuming. The language problem could be solved if the EU would adopt English as the common language for the exchange of information and the various non-native English countries would be prepared to improve the level of English language skills throughout the relevant positions in the tax administration, but this is obviously a sensitive issue.

**Question 10)** How many times per year do you have to address additional or further enquiries concerning information already given by a Member State? How many times per year does a Member State make additional or further requests concerning information your country has already given to that Member State?

**Answer 10)** The only information available dates from the years 1994 and 1995.<sup>10</sup> In those years the Dutch tax authorities received all information which was requested from other member states.

In 1994 the Dutch tax authorities did not comply with seven requests and in 1995 with five requests. The main reasons for not complying with the request were the lack of juridical basis for the exchange of information, the requesting authority not being authorized to request the information and the fact that the requested information was not available.

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<sup>10</sup> Joint research of the National Audit Offices of 12 member states of the European Union on mutual assistance regarding direct taxes, report on the Netherlands (October 2007).

We have understood that additional requests are rarely made, sometimes they have been made as a reminder regarding a pending requestor as a result of new developments which had taken place in the requesting country.

**Question 11)** Are there any differences between the Member States concerning the quality of the answers your country gets? What do you think the reasons (e. g. differences in the material domestic tax law, administrative tax law or bank secrecyes) for these problems are?

**Answer 11)** No information available, but it seems likely that the various relevant factors determining the possibilities to effectively cooperate in this area are different amongst the countries concerned.

**Question 12)** Do you think the official channels of answering incoming requests are reasonable or do you think they are too circumstantial?

**Answer 12)** The official channels seem to work reasonably well, but using them is often felt by tax officials as too time-consuming, especially in the field of direct taxes, where no European computernetwork (CNN) is in operation. If such system would be developed for direct taxes as well, loss of time by the written procedure could be avoided.

Perhaps the solution of the Regulation 1798/2003 could be adopted for the Directive as well. On the other hand: also Member States could perhaps themselves make greater efforts to improve the speed of the internal contacts between the central Competent Authorities and their tax officials in the field, this of course without jeopardizing the protection of the rights of citizens/taxpayers. On the other hand: the issue of speed should not be overstressed. Recently the Netherlands tax authorities have started a pilot with the neighbouring regions of countries Belgium and Germany in which the function of competent authority to exchange information is decentralised in order to reduce delays and misunderstandings caused by communication over different levels and to have more direct communication between the officials asking and collecting the information.

**Question 13)** Do you think there are any possibilities to make the mutual tax exchange easier and quicker? What would they be?

**Answer 13)** In 1992 on average it took the Dutch tax authorities 13.6 months to answer a request. In 1995 this was reduced to 6.6 months.<sup>11</sup> This turned out to be the average period for our treaty partners as well (internal data from the Dutch Competent Authorities). The tax authorities informed the National Audit offices that the time was not too long from the perspective of the time period beyond which the tax authorities would loose the right to assess the tax liability under domestic law. However, it is a continuous process of improvement and it is hoped that the process of decentralisation of the exchange process will decrease bureaucratic delays (as would use of English and in case of some countries improvement of English language skills). It is standard procedure that the Dutch tax authorities send a reminder to the foreign authorities after six months have passed since the request was lodged. In special cases the reminder is sent at an earlier date, if necessary within two months. In those cases the reasons are mentioned why the request is urgent.

**Question 14)** According to article 18 of the “Commission Directive 2002/94/EC of 9 December 2002” a Member State should inform the other Member State immediately if a request for recovery or precautionary measures becomes devoid of purpose as a result of payment of the

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<sup>11</sup> Joint research of the National Audit Offices of 12 member states of the European Union on mutual assistance regarding direct taxes, report on the Netherlands (October 2007).

claim or of its cancellation for any other reasons or if the claims' amount changed. What are the experiences with this rule in your country? How well does the exchange of this kind of information between the Member States work in your opinion?

**Answer 14)** No information available.

**Question 15)** According to article 11 of the “Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures” the requested authority has to inform the applicant authority *immediately* about all of the measures taken that concern the request for recovery. Do you think that the exchange of information meets these requirements in practice?

**Answer 15)** We do not avail of any information regarding this issue.

**Question 16)** How effective is the “European Convention on Mutual Assistance in Crime Matters” to solve cases that affect tax crimes in your opinion?

**Answer 16)** The scope of such assistance is more limited since there has to be a criminal tax case, whereas regular exchange of information requests can also be lodged if there is not (yet) a criminal tax case. In case of assistance in criminal cases, the protection of the legal position of the person concerned is also stricter. On the other hand, the scope of the exchange of information under the Penal Code is broader: it has no exhaustive list of taxes regarding which information can be requested. Also for an exchange of information under the Dutch Penal Code, the fact concerned does not have to be an offence in the Netherlands, unless a request is made for the seizure of documentary evidence. Also the way of gathering the information can be more effective in criminal tax cases. There are the instruments of searching of houses and premises, and seizure of goods which can serve as evidence. On the other hand the taxpayer involved has the right to remain silent.

The following table gives an overview of requests for mutual assistance in criminal matters in which the Netherlands was involved:<sup>12</sup>

	2004	2005	2006	2007
Foreign requests for assistance	162	148	235	236
Dutch requests for assistance	798	958	1067	1409
Completed foreign requests	226	225	203	174

**Question 17)** How effective are common audits to inhibit tax avoidance and to solve cases that affect tax crimes in your opinion?

**Answer 17)**

In the Report of the Dutch tax authorities 2006 (p. 27) it is mentioned that following an inquiry of Parliament regarding fraud in the building sector, the tax authorities started extra audits in this sector and related sectors like property developers . Since the start of this project, 783 audits were started of which 640 have been completed. These audits resulted in an amount of tax retrieved of about 147 million Euro. Furthermore 52 possible instances of fraud have been reported, which resulted in a criminal inquiry. Generally speaking: tax audits cer-

<sup>12</sup> Report of the Dutch tax authorities 2007, p. 29 <http://www.minfin.nl/dsresource?objectid=48127&type=pdf> .

tainly can be effective, but as they are time consuming, the problem is to pick the “right” persons or enterprises. This is a matter of risk–analysis.

The Dutch tax authorities aim to have more simultaneous audits with other member states as these are perceived to be effective by them. In 2007 the Netherlands participated in 28 of such audits.<sup>13</sup>

**Question 18)** Are there any national reforms to facilitate the usage of evidence held by banks or other institutions in the tax procedure?

**Answer 18)** There are no reforms necessary as regards the use of information held by banks in the tax procedures. Already currently the tax authorities have very broad powers to demand information from banks. In the context of the regular assessment process, banks are obliged to automatically give information on accounts to the tax authorities and can be obliged to give information on request, in case of foreign requests. This information can subsequently be used for the purposes of tax procedures. Reference is also made to answer 13 under part VI of this report.

**Question 19)** How efficient is in your opinion the collection of taxes as regulated in the Council Directive 76/308/EEC, on the basis of double tax treaties and on basis of bilateral treaties if they exist? If possible, please name reasons for differences in the efficiency between these different legal foundations. How efficient is the “Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters” here?

**Answer 19)** In a Decree of 6 April 2006 the Dutch undersecretary of Finance stated that the tax authorities are obliged to first use the domestic means and instruments to obtain information.<sup>14</sup> If it is not possible to get the information using the domestic instruments a request based on bilateral tax treaties or on the European Directive will be made. However, if the inquiry would be jeopardized by attempts to get the information in the Netherlands or if this would take much more effort, a request for exchange of information can be lodged without first using the domestic regulations. This policy seems to indicate that there are cases in which it is more efficient to use international regulations than domestic regulations.

The Dutch tax authorities may use the regulation which gives most possibilities to obtain the information.<sup>15</sup> The Netherlands only concluded one bilateral treaty with Germany just for the purpose of mutual assistance in collection of taxes. Furthermore assistance is provided on the basis of article 27 of (some) tax treaties or on the basis of the Directive 1976/308 EEC or the Council of Europe/OECD Convention. There is no difference in the efficiency of the assistance provided on these legal foundations.

**Question 20)** Do you see the reasons why foreign tax administrations fail to supply information?

**Answer 20)** The most common reason is probably that certain information is not available, or that it turns out to be too burdensome for the requested state to acquire the information. It is difficult to establish the fact of “failure”, because when a Member State invokes one of the arguments of article 8 of the Directive, or of article 26 of the OECD Model Tax Convention, this is not “failure” but just a choice the other country is entitled to make. Differences in tax law may result in the fact that certain information is not collected by a country, because it is

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<sup>13</sup> Report of the Dutch tax authorities 2007, p. 28 <http://www.minfin.nl/dsresource?objectid=48127&type=pdf>.

<sup>14</sup> Decree (*Besluit*) of 6 April 2006, nr. CPP2006/546M, Government Gazette (*Staatscourant*) 76.

<sup>15</sup> Decree (*Besluit*) of 6 April 2006, nr. CPP2006/546M, Government Gazette (*Staatscourant*) 76, paragraph 3.

not relevant for assessing the tax liability under the legislation of that country. However, as of 2006 this should not be a valid reason anymore for countries which concluded a tax treaty to fail to supply information.

## **V. Questions of burden of proof**

**Question 1)** Who does generally bear the burden of proof in your country when relevant evidence for the taxation is concerned?

**Answer 1)** In tax cases the Netherlands uses the so-called doctrine of “free distribution of proof”: the party which is in the best circumstances to prove something has to provide the evidence. In general, this means that the burden of proof regarding items resulting in a reduction of tax, like deductions and exemptions rests with the tax payer and the burden of proof regarding items resulting in an increase of tax rest with the tax inspector. However, if a tax payer does not fulfil his obligations towards the tax authorities, for example he does not give information upon request, the full burden of proof may shift to the tax payer. This means that the tax inspector no longer has to prove items which increase the tax, but that the tax payer has to prove that these items did not occur. This is a very heavy burden of proof and the tax payer many times fails to meet it.

**Question 2)** Has your national tax system special or different rules for tax-relevant transactions that affect a foreign country compared to tax-relevant transactions that only affect the home country when it comes to duties to cooperate?

a) Does a taxable person have larger or more duties to cooperate when the facts and circumstances affect a foreign country? If so, please name and illustrate them. Do they influence the law of evidence? What are the legal consequences when the taxable person doesn't meet the enlarged duties to cooperate? Who does bear the risk if relevant evidence is missing?

b) What does the relationship between the enlarged duties to cooperate and the mutual assistance in the European Union in your country look like? E. g.: Is a taxable person asked to meet the enlarged duties to cooperate first before the competent authority of your country requests the competent authority of another Member State to forward information on the basis of the Council Directive (77/799/EEC)? Are the enlarged duties to cooperate used without using the possibilities to exchange information on the basis of the Council Directive (77/799/EEC) (additionally)?

**Answer 2)** Generally, the duties to cooperate in providing information are the same. As you can see in the answers under a) and b), some differences exist as regards the duties to cooperate or the possible penalties in situations involving another country.

a) there are no additional duties to cooperate if information is involved which is of importance to the levying of taxes by another country. There is a difference in the position of the taxpayer/informant, in case there is no cooperation. Since in case of a foreign tax interest, there is no assessment in the Netherlands involved, the before mentioned possibility of reversal of the full burden of the proof to a taxpayer who does not cooperate is not possible. In that situation recourse needs to be taken to fines, like in domestic cases, in certain circumstances. More effective is to acquire an order to provide the information from a civil court with a penalty imposed on a periodic basis in case of continued non-compliance. As regards the situation where information is needed for Dutch tax purposes which is held

abroad, or which relates to income which is derived from abroad, reference is made to the answers 3 and 11 under chapter II dealing with the longer period available to tax authorities to make additional assessments (which is now challenged at the ECJ) and the specific cooperation required from a company if information is held abroad by parent- or sister-companies or other bodies.

b) generally speaking not relevant in the Dutch situation in view of the answer under a). In case of the last mentioned issue of increased cooperation duties if information is held abroad by parent- or sister-companies or other bodies, an exception to the obligation is made in case the related group company or other related body is resident in an EU Member State or a country with which a tax treaty was concluded containing a satisfactory provision on exchange of information. However, if it turns out that the information cannot be acquired via the official exchange of information, the extended obligation may be applied (see answer 11 under Chapter II).

**Question 3)** In various European Court of Justice procedures in tax matters Member States tried to justify an unequal treatment or regulation between facts and circumstances that affect a foreign country and the ones that affect the home country e. g. with a lack of control (cp. law suit “Danner” C-136/00). In general the European Court of Justice doesn’t accept this and similar reasons because of the existence of the “Council Directive 77/799/EEC” which would allow each Member State to get the relevant information that is necessary for a correct assessment of taxes. Did this European Court of Justice’s jurisdiction concerning the exchange of information between the Member States change the burden of proof in your country? If so, please describe how.

**Answer 3)** No.

## **VI. Questions of legal protection**

Taxable persons have in most jurisdictions certain rights in the situation of an information exchange. Describe the legal rights of a taxpayer affected by an information exchange.

### Legal protection against incoming requests

**Question 1)** What kind of legal protection does exist for the taxable person if another Member State makes a request concerning him or her? Does he or she get to know that a Member State made a request concerning him?

**Answer 1)** The taxpayer about whom a request is made by another state may be in two different positions:

The person is probably liable to taxes in the requesting state, and the request may serve to conclude if this is true. But in the requested state the person is in the position of the “informant”, the person who has to provide the information meant for the other state. If the requested state is the Netherlands, this person will be notified of the fact that the tax authorities intend to supply information to the other state. This will be done after the requested information has been gathered.. In normal cases (where no fraud is suspected) this notification is given before the information is supplied to the requesting state.

However, since the coming into force of Regulation 1798/2003 about VAT –assistance, this previous notification included in the Act on the international assistance in the levying of taxes is abolished for the supplying of information of European VAT.

**Question 2)** Does there have to be a hearing before information concerning him or her is transferred to another Member State? Does provisional/temporary legal protection exist in these cases?

**Answer 2)** The notification is in writing, and the taxpayer is entitled to a hearing, if the person so wishes. This hearing has to take place before the decision to actually supply the information is taken.

**Question 3)** Does the taxable person have the right to bar the requested state from giving fiscal information concerning him or her to another Member State?

**Answer 3)** After having worked with the fiscal authorities on the gathering of the requested information, the informant receives a notification of the decision of the competent authorities to supply information to the other state. The person can object to this decision on the basis of the grounds incorporated in the relevant international law for states to refuse to provide the information (e.g. since the information is not falling within the scope of the tax treaty, or of the Directive, or since the way the gathering of the information has taken place was not in accordance with to our domestic law, since there is no reciprocity, since the information is not correct, or since there is a business or professional secret at stake, so that the person will suffer damage if the information is provided. The competent authorities weigh the interests of the receiving state and of the taxpayer (and the Netherlands State) against each other, and take a final decision.

**Question 4)** Has an objection a suspending effect? Has the taxable person the right to appeal and has an appeal any suspending effects?

**Answer 4)** The taxpayer has a period of 10 days after having received the notification, to decide whether an objection is made. After this 10 days' period the taxpayer can only postpone the supplying of information by requesting the Court to decide in a speedy procedure on the grounds of the objection, because the taxpayer expects to suffer damages, should the information be supplied.

#### Legal protection against making a request

**Question 5)** What kind of legal protection does exist for the taxable person in cases where his or hers country of residence intends to request another Member State about his or hers fiscal situation in this Member State? Does the taxable person get informed about this intention and does there have to be a consultation with the taxable person?

**Answer 5)** In the Netherlands there is no special protection for this. The inspector has the competence to address the other state. However, normally questions will first be asked or investigations undertaken at the level of the taxpayer himself, or another Dutch taxpayer, before the other country is involved, (except in the case this exhaustion of national sources – principle would harm the result).

**Question 6)** Does the taxable person have the right to bar his or hers country of residence from requesting a Member State concerning him or her? Does provisional/temporary legal protection exist in these cases?

**Answer 6)** In the Netherlands this is not possible.



**Question 7)** Has an objection a suspending effect? Has the taxable person the right to appeal and has an appeal any suspending effects?

**Answer 7)** No. See at answer 6 above.

Legal protection in general

**Question 8)** Did this kind of legal protection exist before the Council Directive 77/799/EEC was implemented or has it been developed as a consequence of the implementation? Did the Council Directive 2004/56/EC bring any amendments in domestic law concerning this topic?

**Answer 8)** The Netherlands Act on the international assistance in the levying of taxes dates from 1986, and was meant to implement both the Directive and the bilateral (OECD) treaties on that point.

Council Directive 2004/56/EC did not bring any amendments in domestic law concerning this topic, but the Regulation 1798/2003 on VAT-assistance did. See above under answer 1.

**Question 9)** If the information can be obtained from a third person or institution (e. g. insurance company, business partner) does that person or institution have any specific rights?

**Answer 9)** These (legal) persons are considered as the parties who had to deliver the information which is meant for the other State, (they are the so-called informants) and so normally they will receive the previous notification, and have the rights of objection and appeal.

**Question 10)** Is the taxpayer also protected by human rights treaties? If so, please describe what this protection looks like.

**Answer 10)** Yes the taxpayer/informant is protected by human rights legislation on privacy. Although no mention is made of it explicitly in the Act on the international assistance in the levying of taxes, the previous notification and the rights originating from it are very much in line with the principles of openness and participation established in the European Data Convention (1981) and the OECD Guidelines on the Protection of Privacy and Transborder Flow of Personal Data (1981), as well as in article 8 of the European Human Rights Convention, (all resulting in 1995 in the "Privacy Directive"). They are also coherent with the more general principles and ideas about the relationship between the State and its citizens from which the European legal system originates.

So, a taxpayer can go to Court on the basis of these rights. An issue is, however, that in order to be able to appeal with the Court, the person must at least be *aware* of the fact that information is to be transferred to the other State. So a notification is essential. These notification rights are therefore an essential part of the Privacy Directive.

**Question 11)** What does the legal protection of the taxpayer look like when the Member States cooperate to collect the tax? What are the limits to the obligation to provide assistance in your country?

**Answer 11)** In article 78 of the Guidance on Tax Recovery 2008 (*Leidraad Invordering 2008, Annex to the Decree of 12 June 2008, nr. CPP2008/1137M VN 2008/37.3*) the Dutch policy regarding international tax collection is included. The Netherlands will not comply with a request to collect foreign tax if the amount due is less than €227, unless a lower threshold has been agreed on by the Netherlands and the other state. The Dutch tax collector will not require international assistance in the collection of Dutch tax debts if the amount due is less than €

2269, unless specific circumstances justify a lower threshold. However, if more than one international arrangement for assistance of the collection of taxes applies, the arrangement which gives the broadest possibilities will be applied. In the same way as a resident taxpayer may object to national measures to collect tax, the person involved may object to the collection of foreign tax by the Dutch tax authorities at the Dutch lower Court. The other party in such proceedings before the Court is the Dutch tax collector. Furthermore, the taxpayer may request postponement of payment in the same way as for Dutch tax debts. If such request is denied, the person may file an objection. Postponement will not be granted in cases of fraud.

**Question 12)** Can the information exchanged under the Council Directive 77/799/EEC be used in a criminal trial? Is the requesting State's tax administration obliged to ask the requested State for permission to use this information in criminal trials? Does the tax administration of the Member State that has obtained the information need a specific authorization by the national judge?

**Answer 12)** This is only allowed when it concerns a *fiscal* crime, and on the condition of previous consent of the other Member State, as included in article 7 of the Directive. As regards the second question on permission required from the requested state, in the Netherlands' opinion this requirement can be read in article 7, par. 1 of the Directive, which confines the disclosure of the information to the taxpayer, the officials of the tax administration, and the persons and authorities concerned with the assessment of taxes and the Court proceedings on that subject. No mention however is made of the "prosecution" concerning taxes. So, art.7, par. 3 has to be invoked, which makes it possible for the receiving state to use the information for other purposes, if the supplying state has agreed to that.

Generally, the tax administration of the Member State that has obtained the information does not need a specific authorization by the national judge. Only in cases where there is or was some criminal law-suit in the Netherlands in the same (or an adherent) case.

**Question 13)** From a more general point of view, which is the relationship and influence between criminal and tax proceedings and judgements in your country? Are there any national reforms to facilitate the use of bank or financial information as evidence in tax law cases?

**Answer 13)** There is no bank secrecy in the Netherlands. Banks have to automatically provide certain information on bank accounts to the tax authorities. Furthermore, similar to other corporate income tax payers, banks are obliged to provide information on request of the tax authorities if this information is necessary for the levying of taxes of third parties (e.g. customers of the bank). The tax authorities may use this information as evidence in tax law cases. As the use of bank or financial information as evidence in tax law cases is already possible, no reforms are expected in this regard. Recently, a discussion has started on the special position of banks in providing bulk information on their clients. This position was of course, already affected by the obligations under the Savings Directive, but in the opinion of the Netherlands tax administration it would be an improvement if banks would be obliged to provide bulk information on the payments of dividends for the exchange of such information. This information could then also be included in the Memoranda of Understanding for automatic exchange of information, the Netherlands have concluded with other Member States.

**Question 14)** Is there a claim for damages for a taxable person if a state discloses his or hers commercial, industrial or professional secret by giving information to another Member State? If so, what does the claim for damage look like?

**Answer 14)** It is possible for the taxpayer to claim that the supplying of certain information would involve a violation of his business secret, and would cause harm and damage to the taxpayer who delivered the information. In that case, the taxpayer would have to prove that there is such a secret, that damage is to be expected if the information is used in the other state. The judge will decide how the interest of the taxpayer is to be weighed against the interests of the other state. This will be done on the basis of the limitations to the obligation to exchange information, which are mentioned in the Act on the international assistance in the levying of taxes and which are in their turn derived from those mentioned in the Directive and in the relevant tax treaties. If the judge follows the arguments of the taxpayer/informant, the information will not be supplied. It is of course also possible that the judge decides that the information nevertheless has to be supplied.

If the secrecy-provision would have been violated in the *receiving* state, and this has caused harm or damage to the taxpayer who delivered the information, then international law entitles this taxpayer/informant to go to Court in the other state, along with the secrecy protection of that state. This is however very burdensome and full of uncertainties. In view of that some authors have stated that there ought to be an international provision in the Directive and in the OECD Model Convention about responsibility for failure in observing the secrecy obligation in the receiving state.

**Question 15)** Does the taxable person get informed when information concerning him or her is exchanged on basis of the “Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments”? Does legal protection exist in these cases? If so, please describe what the legal protection looks like.

**Answer 15)** There is no individual information right in this case, because this is automatic exchange of information, drawn from databases, which are filled by the banks on the basis of their obligation under European law, and because of the fact that the Directive has been published. Their interests have already been largely discussed in a European context during the process of negotiation and dialogue about the Directive between the Member States and the EC, and also in the domestic context.

**Question 16)** If there is an infringement during a tax examination in State A (under request of State B) is the taxable person able to contest this infringement and the following tax assessment by State B’s tax authority?

**Answer 16)** In most of the cases of mutual assistance the person in State A, who has to deliver the requested information (the informant), is someone else than the person in State B whose tax liability is to be determined with the help of this information. So if there would be some infringement of the domestic law in the requested country, it should be possible for the person in State A (the informant) to challenge this infringement there. In the Netherlands the investigated taxpayer can object to this infringement while objecting against the decision to supply information announced (or communicated) to him in the (previous) notification. Once the information is transferred, the requesting country will generally consider it as being properly acquired, and thus it can possibly lead to an assessment.

If the infringement had concerned a matter of *international* law, the taxpayer B in the receiving country will be able to challenge it in Court when he is challenging the assessment (as illegitimate evidence).

**Question 17)** Have problems of a potential infringement of privacy legal rules deriving from the mutual assistance occurred in your country?

**Answer 17)** As a receiving country, the Netherlands did not have problems on the matters of secrecy or confidentiality of foreign information, as far as we are aware of. However: there is a discussion going on concerning Freedom of Information legislation with respect to inter-state correspondence. The competent authorities consider this communication as confidential and so do not disclose this to the taxpayer at the time of the investigation. Our “Raad van State” (State Council for administrative proceedings) agrees with that position.