What is the impact of the Dutch government’s tax policy agenda on the business climate in the Netherlands for FI and AM sectors

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Topics

- Legislation effective per 01 January 2018
- Impact Dutch ‘Coalition Agreement’
- Impact ATAD 1 in the Netherlands
- Impact ATAD 2: Hybrid mismatches
- MLI choices the Netherlands
- Impact CJEU C-398/16 and C-399/16 on Dutch fiscal unity regime
Dividend withholding tax - cooperatives:
- profit distributions by holding cooperatives to members that have an interest of 5% or more are subject to DWT at the standard rate (15%). Holding cooperatives are cooperatives whose activities consist of at least 70% in holding participations and/or financing related companies;
- Expansion of DWT exemption for ‘active business structures’ that are not abusive and where the shareholder is located in EU/EEA or count with which the Netherlands has concluded a tax treaty jurisdiction containing a dividend clause;
- Abuse is considered to be present, if: (i) the member holds the shareholding/membership interest in the Dutch cooperative with the main purpose or one of the main purposes of avoiding Dutch dividend withholding tax in the hands of another person (the “subjective test”) and (ii) there is an artificial structure or transaction or a series of artificial arrangements or transactions that have not been put in place for valid commercial reasons reflecting economic reality (the “objective test”).

Dividend withholding tax - companies:
- Part of the proposal is that a similar exemption will be introduced for NVs and BVs:
  - No DWT on distributions to shareholders that have an interest of 5% or more and are located in EU/EEA or treaty jurisdictions with a dividend provision in an non-abusive business structure.
Subjective test: it will have to be assessed whether the direct member/shareholder of the Dutch cooperative/company has been interposed with the main purpose or one of the main purposes to avoid dividend withholding tax.

Objective test: Valid commercial reasons reflecting economic reality are generally present if the direct member/shareholder conducts a business enterprise to which the interest in the Dutch cooperative/company is attributable. In case the direct member/shareholder is an intermediary holding company, valid commercial reasons are present if this company (i) performs a "linking function" between its shareholder that conducts the active business enterprise and the Dutch cooperative/company and (ii) this company meets the new substance requirements in the jurisdiction of which it is resident:

New (additional) substance requirements:
- The member/shareholder will need to incur wage costs of at least EUR 100,000 for employees that perform the linking function at the level of the member; and
- During a period of at least 24 months the member will need to have its own office space (equipped and used for the linking function) at its disposal in the jurisdiction where it is established.

Topic of discussion: can substance requirements be considered unlawful state aid? The bigger the company, the easier it may be to comply with substance requirements?
1. Active business in Jersey
   - No DTT between NL and Jersey so NL dividend WHT will be levied on direct dividend distribution to Jersey
   - DTT between UK and NL prevents the withholding of Dutch DWT
   - Therefore, the dividend WHT exemption only applies when the UK intermediary meets the substance requirements

2. Active business in Cayman
   - The US functions as regional headquarters (which is an active business)
   - HK functions as intermediary
   - For the subjective test the US entity is the relevant entity so that the DTT between NL and US applies and as a result the new dividend WHT exemption in principle applies
   - Consequently the HK entity is not interposed to avoid Dutch dividend WHT, so the subjective test is met. There is no need to apply the objective test
Dutch corporate income tax on income (including capital gains) derived by foreign member/shareholder in case:
- Member/shareholder holds 5% or more of the profit rights/share interest in a cooperative/company;
- the member/shareholder holds the membership/share interest in the Dutch cooperative/company with the main purpose or one of the main purposes of avoiding Dutch personal income tax in the hands of another person (the “subjective test”); and
- there is an artificial structure or transaction or a series of artificial arrangements or transactions that have not been put in place for valid commercial reasons reflecting economic reality (the “objective test”).
- Subjective and objective test are similar to subjective and objective test in respect of dividend withholding tax.
Impact Dutch ‘Coalition Agreement’ (1/5)

- On 10 October 2017, the Dutch Government published its Coalition Agreement (*regeerakkoord*). The Coalition Agreement does not include concrete legislative proposals, but instead sets out a large number of policy intentions of the new Dutch government. On 23 February 2018 the Government published a letter providing for further guidance in respect of its policy intentions.

- Starting point: the Dutch Government wishes to upgrade its image:
  - Abolition dividend withholding tax
  - Introduction ‘conditional’ interest, royalty and dividend withholding tax
  - Introduction thin cap interest deduction limitation rule for banks and insurance companies
  - Limitation carry forward period (9y to 6y)
  - Substance requirements for exchange of information and concluding ATR/APAs, and applying participation exemption
Impact Dutch ‘Coalition Agreement’ (2/5)

- Abolition dividend withholding tax per
  - Major resistance in Dutch parliament(s) and media
  - Abolition dividend withholding tax per 01 January 2020

- Introduction ‘conditional’ interest, royalty and dividend withholding tax
  - Intra-group payments to ‘low tax jurisdictions’ or jurisdictions included on the EU blacklist of non-cooperative jurisdictions
  - Dividends: per 01 January 2020 (legislative proposal end 2018)
  - Interest and royalties: per 2021 (legislative proposal in 2019)
Impact Dutch ‘Coalition Agreement’ (3/5)
Impact Dutch ‘Coalition Agreement’ (4/5)

- Introduction thin cap interest deduction limitation rule for banks and insurance companies
  - Due to the nature of their business, the announces EBITDA-rule will not impact banks and insurance companies. Therefore the Dutch Government intends to limit interest deduction if debt exceeds 92% of commercial balance total.
  - Expected to enter into effect per 01 January 2020

- Limitation losses carry forward
  - Currently 9 years
  - Announced 6 years
  - No guidance in respect of transitory law / effective date. Expected to become effective as from 01 January 2019 onwards.
Impact Dutch ‘Coalition Agreement’ (5/5)

- Additional substance requirements (EUR 100k wage criterion and own office space for at least 24 months) for:
  - for exchange of information
  - concluding ATR/APAs with the Dutch tax authorities
  - Expected to enter into effect soon

- Possible introduction substance requirements (including EUR 100k wage criterion and own office space for at least 24 months) at the level of Dutch parent for applying participation exemption in respect of dividends/capital gains derived from foreign subsidiaries. No further guidance expected before 2020.
Impact ATAD 1 in the Netherlands (1/4)

- Pursuant to ATAD 1, EU-Member States should implement:
  - EBITDA-based interest deduction limitation rule ("EBITDA-rule");
  - Exit taxation rule
  - GAAR; and
  - CFC rule.

- ATAD 1 does not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases.

- The mandatory implementation of the GAAR and exit taxation rule will not materially impact the Dutch tax regime.

- Implementation in Dutch tax law per 01 January 2019
Impact ATAD 1 in the Netherlands (2/4)

- On 10 October 2017, the Dutch Government published its Coalition Agreement. The Coalition Agreement does not include concrete legislative proposals, but instead sets out a large number of policy intentions of the new Dutch government including intentions regarding the implementation of the EBITDA-rule. On 23 February 2018 the Government published a letter providing for further guidance in respect of its policy intentions (the “Policy Letter”).

- On the basis of the Coalition Agreement and Policy Letter in respect of the EBITDA-rule, the Dutch Government intends to introduce:
  - interest deduction limited if net interest payable exceeds 30% of EBITD(A)
  - threshold of EUR 1m;
  - no ‘group-escape’;
  - no grandfathering.
Impact ATAD 1 in the Netherlands (3/4)

- As a result of the implementation of the EBITDA-rule, it is expected certain other specific interest limitation rules will be abolished (art. 10b, 13l and 15ad of the Dutch corporate income tax act (“CITA”).

- The Dutch Government intends the implement the mandatory CFC rule as follows:
  - Step 1a: interest of 50% or more in the foreign company? Yes > step 1b
  - Step 1b: income foreign company taxed at rate less than 50% of Dutch tax rate? Yes>step 2
  - Step 2: certain non-distributed (passive) income components of the foreign company are to be included in the tax base of the Dutch shareholder company.

- The Dutch government has recently confirmed the strict implementation of ATAD 1.
Impact ATAD 1 in the Netherlands (4/4)

- The implementation of the CFC rule as proposed by the Dutch Government may impact the Dutch participation exemption regime.

- However, the Dutch Government seems to suggest that the CFC rule will not impact the Dutch participation exemption regime if the foreign company conducts ‘real economic activities’. This will, amongst others, be the case if the foreign company meets the Dutch substance requirements (including EUR 100k wage criterion and own office space for at least 24 months).
Impact ATAD 2: Hybrid mismatches (1/4)

- Addresses mismatch situations which result from double deductions, the conflict in the characterisation of financial instruments, payments and entities, or in the allocation of payments.
- A hybrid mismatch could lead to double deduction (DD) or to a deduction without inclusion (D/NI)
- Art. 9 ATAD 2:
  - DD: (i) deduction denied investor jurisdiction, or (ii) deduction denied payer jurisdiction
  - D/NI: (i) deduction denied payer jurisdiction, or (ii) included in payee jurisdiction
- Certain exclusions may apply
Impact ATAD 2: Hybrid mismatches (2/4)

- Differences in tax outcomes that are solely attributable to differences in the value ascribed to a payment, including through the application of transfer pricing, should not fall within the scope of a hybrid mismatch.

- As jurisdictions use different tax periods and have different rules for recognising when items of income or expenditure have been derived or incurred, these timing differences should not generally be treated as giving rise to mismatches in tax outcomes (unless the payment cannot reasonably be expected to be included in income within a reasonable period of time (1 year?)).  

- Implementation per 01 January 2020.
Impact ATAD 2: BV/CV structure (3/4)

- Article 9 bis (1) of ATAD 2 targets the use of reverse hybrids:
  - “Where one or more associated non-resident entities holding [...] an interest in 50% or more of the voting rights, capital interests or rights to a share of profit in a hybrid entity that is incorporated or established in a Member State, are located in a jurisdiction or jurisdictions that regard the hybrid entity as a taxable person, the hybrid entity shall be regarded as a resident of that Member State and taxed on its income to the extent that this income is not otherwise taxed under the laws of the Member State or any other jurisdiction.”

- Shall not apply to a collective investment vehicle.

- Implementation of Article 9 bis (1) of ATAD 2 will cause CV part of a ‘BV/CV-structure’ to become liable to Dutch CIT, unless the CV is subject to (US) tax.
Impact ATAD 2: BV/CV structure (4/4)

- Does US GILTI Tax constitute subject to tax as a result of which BV/CV structure can survive? Alternative: use of a non-hybrid, for example Barbados entity?
- Impact ‘conditional’ withholding tax on royalties
MLI choices the Netherlands

- MLI signed in July 2017; effective per 01 January 2019.

<table>
<thead>
<tr>
<th>MLI</th>
<th>Choice NL</th>
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<tbody>
<tr>
<td>art. 3 - hybride entities</td>
<td>Yes</td>
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<tr>
<td>art. 4 - double residency</td>
<td>Yes</td>
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<tr>
<td>art. 5 - not applying exemption method</td>
<td>Yes</td>
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<tr>
<td>art. 6 - PP</td>
<td>*</td>
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<td>art. 7 - no treaty abuse</td>
<td>*</td>
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<td>art. 8 - dividend stripping</td>
<td>Yes</td>
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<td>art. 9 - real estate companies</td>
<td>Yes**</td>
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<td>art. 10 - anti-abuse PE</td>
<td>Yes</td>
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<td>art. 11 - saving clause</td>
<td>No</td>
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<td>art. 12 - PE</td>
<td>Yes</td>
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<td>art. 13 - PE</td>
<td>Yes</td>
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<td>art. 14 - splitting contracts</td>
<td>Yes</td>
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<td>art. 16 - MAP</td>
<td>*</td>
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<td>art. 17</td>
<td>Yes</td>
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<tr>
<td>art. 18</td>
<td>Yes</td>
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</tbody>
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** The Netherlands does not opt to implement article 9(4)
Impact CJEU C-398/16 and C-399/16 on Dutch fiscal unity regime (1/3)
Impact CJEU C-398/16 and C-399/16 on Dutch fiscal unity regime (2/3)

- ECJ ruled that Dutch fiscal unity regime is non-compatible with EU fundamental freedoms on the basis of the ‘per-element-approach’.
- According to the ECJ, there is no justification that a specific interest limitations rule (Article 10a CITA) does not apply to companies part of a Dutch fiscal unity, while in other situations involving foreign companies, the formation of a fiscal unity is not possible as a result of which these specific interest limitations rule does apply.
Impact CJEU C-398/16 and C-399/16 on Dutch fiscal unity regime (3/3)

- In reaction to the CJEU decision, the Dutch Government has announced legislation to enter into retroactive effect as per publishing date of the opinion of the Attorney General in this case (25 October 2017, 11:00 AM CET)

- On the basis of the announced legislation, the benefits of the Dutch fiscal unity regime will be denied in respect of the following provisions:
  - Article 10a CITA (specific interest limitation rule)
  - Article 13 (9) – 13 (15) and 13 (17) CITA (participation exemption in respect of low taxed investments participations and hybrid entities);
  - Article 13l CITA (specific interest limitation rule); and
  - Article 20a CITA (no carry forward of losses in case of qualifying change in ultimate ownership).