Exchange of Information and Cross Border Cooperation between Tax Authorities

The Netherlands

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1. Introduction

The recent economic crisis and its consequences on public finances have put pressure on government to reduce their budget deficits. Tax authorities within Europe and around the world have to play their part delivering tax revenues by improving compliance of taxpayers with tax law. Their challenge is to protect the tax receipts and close the tax gap by assuring that every taxpayer pays the taxes due.

In addition, the environment in which tax authorities operate is complex and subject to change, influenced by the changing role of government in relation to citizens and businesses, the complexity of legislation and globalisation. Globalisation creates opportunities for citizens and businesses to increase global wealth but also results in increased financial and fiscal risks. The growth in cross-border movements of goods, capital and people and the construct of a global financial system requires better transparency and information exchange for tax purposes.

The convergence of trends however, also asks for more in depth (joint) co-operation among tax authorities and between tax authorities and businesses/tax intermediaries, to ensure that taxpayers that want to be compliant and that pay the right amount of tax are being served and that taxpayers that do not want to be compliant have no place to hide their income and assets.

In the Netherlands the policy of the tax authority is to modernise and extend the treaties network in the coming years. The conclusion of tax treaties is based on two pillars: to make the Netherlands an attractive venue for international businesses and to combat the abuse of tax treaties.[1]

2. Legal Framework

2.1. Bilateral or multilateral approach

For decades, bilateral treaties for the prevention of double taxation have been concluded in order to enable international cooperation in the area of taxation. Generally, these treaties are based on the OECD Model Tax Convention which, however, does not lay down any binding prescriptions.[2] Almost all currently existing bilateral tax treaties the Netherlands has concluded include an Article concerning exchange of information analogous to Article 26 of the OECD Model Tax Convention.[3]

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[1] Notitie Fiscaal Verdragsbeleid 2011, Ministerie van Financiën. http://www.rijksoverheid.nl/onderwerpen/belastingen-internationaal/belastingverdragen/notitie-fiscaal-verdragsbeleid-2011

[2] OECD Model Tax Convention on Income and on Capital of 1963, 1977 and 1992 (as amended in 1994, 1995, 1997, 2000, 2003 and 2008), formerly the OECD Model Tax Treaty.

[3] The phrasing in Dutch of Article 27 of the standard treaty of the Netherlands is virtually the same as Article 26 of the OECD Model Treaty.

The fourth paragraph of Article 26 confirms and reinforces the obligation to exchange information in situations in which the requested state has no interest in such information. Finally, analogous to the fourth paragraph, the fifth paragraph provides that the fact that the requested information is in the possession of a bank or similar institution, should not prevent the exchange of information. By adding paragraph 5 to Article 26, invoking the banking secrecy, in particular, no longer stands as an unchallenged ground for exemption from the informational obligation. In the Netherlands paragraph 5 of Article 26 has been added to all new concluded treaties.

During the past two years the Netherlands has been actively concluding dozens of Tax Information Exchange Agreements (TIEA's) and has been upgrading a number of treaties to avoid double taxation giving the international tax cooperation by means of the exchange of data, a strong impetus. On a national level, domestic tax legislation has been subject to significant change, partly due to international developments. All these combined developments have necessitated the publication of a new policy memorandum on Dutch tax treaty policy which covers the major policy positions in regard of future tax treaty negotiations.[4]

Dutch tax legislation does not contain a definition of a 'tax haven' neither is there a ‘black list’ of ‘uncooperative’ countries. The Dutch government applied the list of 'committed tax havens' as used by the OECD at the moment the decision was made with which countries TIEAS would be negotiated.[5]

2.2. Domestic Law

In 1986 the Dutch legislator enacted the *Wet op de Internationale Bijstandverlening bij de heffing van Belasting* (WIB). This law is designed to eliminate certain hindrances in domestic law (i.e. secrecy provisions) and determines taxpayers have the same obligations towards tax inspectors in case the request for information is on behalf of foreign tax authorities as they do when it concerns domestic cases.

As a consequence of Directive 2011/16/EU the WIB will be changed.[6] The Dutch legislator is in the process to alter the current legislation in order to facilitate the international exchange of information. These amendments regard the scope of the WIB, the terms within which the request should be answered, the use of digital information, extension of automatic exchange, the obligation to provide information spontaneously, rules concerning multinational audits, (none) grounds for refusal to exchange information and secrecy provisions.

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[4] http://www.rijksoverheid.nl/onderwerpen/belastingen-internationaal/documenten-en-publicaties/circulaires/2011/02/14/summary-memorandum-dutch-tax-treaty-policy-2011.html

[5] R. Seer and I. Gabert, Mutual assistance and information exchange, EATLP 2009, p. 417.

[6] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

After these amendments are enacted the underlying domestic legislation facilitates the exchange of information. The only real restriction concerns (the scope of) the possibility to appeal against it.

The case law with regard to the exchange of information based on the WIB is limited. As the grounds for refusal are limited, the chances of a successful appeal for the person involved are very small. Most of the time these proceedings only have the effect of delay, but in the end the information will almost always be provided to the requesting state.

Without having underlying evidence we understood the Dutch tax authorities do not succeed in every occasion to reply within the time-frame desired. After the amendments are enacted the terms will be in the law.

The WIB is no longer applicable with regard to VAT and Excise duties as the provisions with regard to the exchange of information with regard to these levies are determined in Council Regulations that are directly applicable in the Netherlands. Article 55 of Council Regulation (EU) No 904/2010 of 7 October 2010 - on administrative cooperation and combating fraud in the field of value added tax - prescribes that the exchanged information on the bases of the VAT regulation can also be used for direct taxes. In this Article the following is stated: *"The information may also be used for the assessment of other levies, duties, and taxes covered by Article 2 of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures."*

3. Exchange of Information

The Netherlands regards the current international standard on exchange of information as a minimum. The Netherlands will continue to seek the enhancement of the instruments for exchange of information both on a multilateral and a bilateral level, for instance by spontaneous and automatic exchanges. An example of the multilateral level is the recent change of the Convention on Mutual Administrative Assistance in tax matters.[7] On a bilateral level the Netherlands is concluding TIEA's aimed specifically at the exchange of information and is including a provision in accordance with the current Article 26 of the OECD Model Convention in comprehensive tax treaties.[8]

Since 2009 TIEA's have been concluded with 28 States: Andorra, Anguilla, Antigua and Barbuda, Bahamas, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey,

[7] The Convention on Mutual Administrative Assistance in tax matters, as changed most recently by the Protocol of May 27th, 2010, Trb. 2010, 221.
[8] Notitie Fiscaal Verdragsbeleid 2011, Ministerie van Financiën. http://www.rijksoverheid.nl/onderwerpen/belastingen-internationaal/belastingverdragen/notitie-fiscaal-verdragsbeleid-2011

Liberia, Liechtenstein, Marshall islands, Monaco, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Seychelles, Turkish and Caicos Islands.

Most frequently the Netherlands exchanges information (on request, spontaneous and automatically) with EU Member States (especially with the neighboring countries Belgium, Germany and France) and with Australia, Canada and the USA. The main reason are the intensive economic relations with these countries.

In the table below both the *number of request* the Netherlands receives annually on the basis of bilateral and multilateral agreements and the number of requests the Netherlands makes to other States, are mentioned.[9]

On request	**2010**	**2011**
Requests received	476	403
Requests made	389	276

In the Netherlands the exchange of information on request still prevails, although there is a growing interest in the automatic exchange of information. The Netherlands concludes more and more agreements regarding this form of exchange of information. At this moment agreements (Memoranda of Understanding – MOU) with 15 countries have been concluded and the Netherlands is negotiating with several other Countries.[10]

In the table below both the number of records received and sent *automatically* are mentioned.[11]

Automatic	**2010**	**2011**
Records received	262.160	353.690
Records sent	169.176	157.766

Besides the request for information and the automatic exchange the Netherlands is also exchanging information spontaneously. In the table below both the number of records received and sent *spontaneously* are mentioned.

[9] Proceedings of the Chamber of Parliament II, 2011-2012, 33 174 (R 1974), nr. 6.
[10] The Netherlands has concluded MOUs with Australia, Belgium, Canada, Denmark, Germany, Estonia, France, Hungary, Japan, Lithuania, Poland, Slovenia, Spain, the Czech Republic and Sweden.
[11] Proceedings of the Chamber of Parliament II, 2011-2012, 33 174 (R 1974), nr. 6.

Spontaneous	2010	2011
Records received	67.471	20.069
Records sent	30.747	1.069

Domestic legislation does not provide special Articles on *group requests*. In our view group requests could be problematic from the point of view of secrecy and privacy. In case the received documents are used in fiscal proceedings there is a risk the names of other persons than the taxpayer are revealed.

4. Simultaneous Examinations and Joint Audits

4.1. Introduction

The *exchange of information* is the basis for the international cooperation in the area of taxation. Without an adequate legal framework for the exchange of information States would not be able to 'communicate' with each other about cross-border tax issues. Sometimes, however, more is needed – than 'just' the exchange of information - to tackle international tax problems adequately. Due to the complexity of the cross-border problems it may for example be of interest for tax officials to be present in another State to be able to explain their request for information. Or to have the opportunity to simultaneously examine, each in its own territory, the tax affairs of a person or persons in which the participating States have a common or related interest. Also the approach of international tax fraud, such as VAT carousel fraud, often asks for more than just exchanging information. Without effective international cooperation, the fraudster has a 'free game' and there is a risk that the problem moves from one State to another.

In the past decade this has led to other forms of mutual assistance – in addition to the exchange of information – such as *presence of tax officers in another State*, *simultaneous examinations* and – since recently - *joint audits*.

4.2. Presence of tax officers

A type of mutual assistance that reaches further than exchanging information is providing *assistance in person*, or *officials being present* at an examination. In 1977 Article 6 of the Mutual Assistance Directive created the possibility for officials of the tax administration requesting information to be present at an examination of business accounts in another Member State.[12] This possibility was given to tax officers instead of the competent authorities of the state.

[12] Council Directive 77/799/EEC of December 19th, 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums ('indirect taxation').

In the Netherlands, this possibility was included in the *Wet op de Internationale Bijstandverlening bij de heffing van Belasting (WIB).*[13] In this Act the opportunity to be present in another Member State is linked to the request for information. As a consequence, a request for officials to be present should always be part of a written request for information. This latter request thus limits the scope of the examination, notably gathering the information requested. The role of the tax auditor of the requesting Member State is (still) a passive one, as is evident from the wording of both the Mutual Assistance Directive and the *Wet op de Internationale Bijstandverlening bij de heffing van Belasting (WIB)* 'allowed to be present'.

The (new) Council Directive 2011/16/EU which needs to be implemented in the national legislation of the Member States per the 1st of January 2013, provides the possibility in its Article 11 paragraph 2, for a more 'active' presence of tax officials from one State on the territory of another State:

"2. In so far as this is permitted under the legislation of the requested Member State, the agreement referred to in paragraph 1 may provide that, where officials of the requesting authority are present during administrative enquiries, they may interview individuals and examine records."[14]

4.3. Simultaneous examinations

In Article 8 of the Convention on Mutual Administrative Assistance in Tax Matters we find for the first time (1995) a legal basis for conducting simultaneous tax examinations. Paragraph 2 of this Article explains:

'For the purposes of this Convention, a simultaneous tax examination means an arrangement between two or more Parties to examine simultaneously, each in its own territory, the tax affairs of a person or persons in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain.'

Note that it is explicitly stated that such a tax examination can be instituted by more than two parties.

Remarkably, in contrast to the Mutual Administrative Assistance Convention of the Council of Europe, until 2004 the Mutual Assistance Directive of the European Commission did not provide a legal framework for simultaneous tax examinations within the European Union.[15] Nor did Council Regulation (EEC) 218/92 which referred to the Mutual Administrative Assistance Directive.

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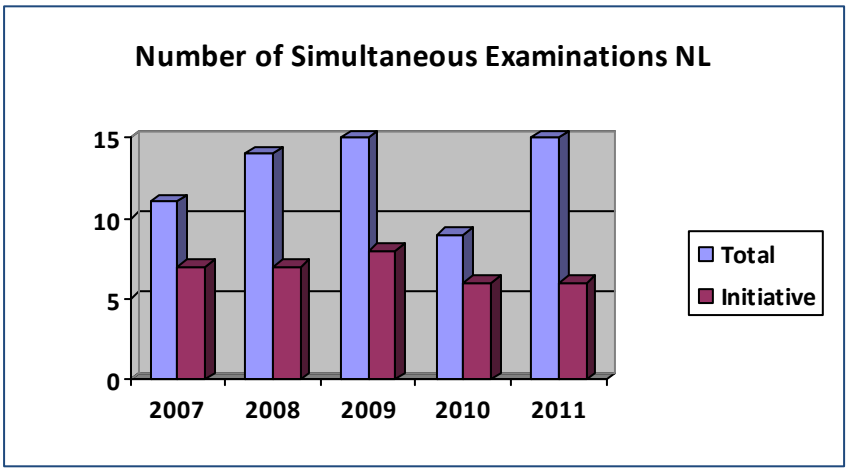
[13] Article 9, paragraph 1 in conjunction with Article 8 WIB.
[14] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. Article 29 par 1: "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive with effect from 1 January 2013."
[15] Convention on Mutual Administrative Assistance in Tax Matters, concluded on January 25th, 1988.

With effect from 2004, Regulation (EC) 1798/2003 regulates the possibility to carry out a 'simultaneous control' in Article 12.[16] To acknowledge the possibility to conduct simultaneous tax examinations in particular, Article 8ter of Council Directive 77/799/EEC has been implemented, which at the same time codifies the simultaneous tax examination in the WIB, in Article 8a.[17] Paragraph 3 of this Article refers to a ministerial order in which further provisions on (the procedures for) simultaneous tax examinations can be promulgated.[18]

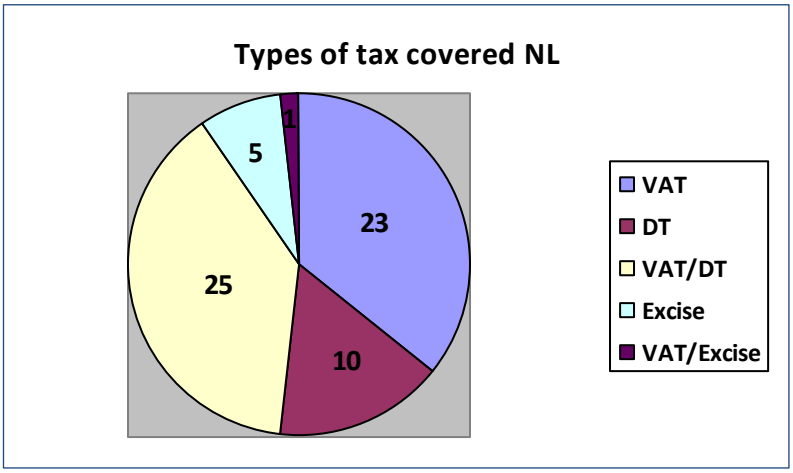
Several detailed bilateral regulations (Memoranda of Understanding) to intensify mutual assistance between the Netherlands and other tax administrations also mention *presence of officers* and/or *simultaneous tax examinations*.[19] The regulations with Belgium, Canada, Denmark, Germany, Estonia, Hungary, Lithuania, Poland, Slovenia, Spain, the Czech Republic and Sweden cover the presence of officials of the other country in a multilateral audit. The agreements between the Netherlands and respectively Ukraine (working agreement), Estonia, Lithuania, Poland, Spain and Sweden explicitly create the possibility for undertaking simultaneous examinations and contain procedures for the conduct of such examinations. With our neighboring countries also agreements have been concluded on direct cross-border co-operation, including presence of tax officers and simultaneous examinations; with Belgium covering direct tax and VAT and with Germany covering VAT (and applicable only in two 'Bundes' states).

In the last decades the Netherlands took part in several simultaneous examinations, especially together with other countries in Europe (in the Fiscalis program[20]). In the years 2007-2011 the Netherlands took part in 64 simultaneous examinations, of which they initiated 34.[21] See table below.

[16] Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (PB 264 of October 15th, 2003). Chapter II, Section 4, Simultaneous controls.
[17] Proceedings of the Chambers of Parliament II, 2003-04, 29755, No. 3, p. 3.
[18] *Uitvoeringsregeling internationale bijstandsverlening bij de heffing van belastingen* Implementation Decree on International Assistance in the Levying of Taxes Act. Decision of December 17th, 2004, No. WBD2004-748M. Stcrt. No. 249, Article 4.
[19] The Netherlands concluded fifteen so called Memoranda of Understanding, especially focused on automatic exchange of information.
[20] Fiscalis is a Community Programme to improve the operation of taxation systems in the internal market by means of co-operation between the Member States. Decision No 1482/2007/EC of the European Parliament and of the Council of 11 December 2007.
[21] Source: Information of the Netherlands Tax and Customs Administration.



In these simultaneous examinations various types of tax are covered; VAT, direct tax (DT) (since 2008), excise or a combination of types of taxes (VAT and direct tax, VAT and excise).[22] See table below.



An example of a successful simultaneous examination is a joint project with the French Tax Administration, in which also Belgium, Denmark, Germany, Ireland, Italy, Luxemburg, Malta, Spain, the United Kingdom and Portugal took place.

[22] Source: Information of the Netherlands Tax and Customs Administration.

Dutch Lead EU Crackdown On Yacht VAT Fraud[23]:

by Ulrika Lomas, Tax-News.com, Brussels

25 November 2008

Under the joint direction of the Netherlands and French tax authorities and customs services, European tax investigators have discovered a multi-million euro VAT fraud concerning the construction and delivery of luxury yachts. Approximately 300 owners of yachts and companies involved have settled unpaid tax bills to the tax authorities of 11 European Union (EU) member states.

The total value of the yachts investigated amounted to more than EUR1bn, with Dutch tax and customs levying EUR31m in additional tax assessments. A previous smaller-scale VAT probe undertaken by the Dutch and Belgian authorities in 2001 resulted in additional tax assessments of EUR10m.

Dutch State Secretary of Finance, Jan Kees de Jager, considers it important that these kinds of tax frauds are strictly investigated. "Most people just pay their taxes properly. Then they expect that the tax authorities investigate people who do not do so. The Dutch Tax and Customs Administration has played a leading role and achieved good results with the investigation." De Jager said that he would look into the possibility of further joint operations with EU tax authorities to prevent tax evasion.

The various tax authorities and customs services involved carried out 322 investigations into 225 transactions. In addition to the Netherlands and France, the joint initiative was assisted by ten other member states, including Belgium, Denmark, Germany, Ireland, Italy, Luxemburg, Malta, Spain, the United Kingdom and Portugal. In all, 150 people were involved in the probe. The complete operating chain, from yacht builders, dealers and intermediaries, up to the end user, was closely scrutinised during the investigation. The extent of the VAT fraud has surprised the government of the Netherlands, which has announced that an international network of tax specialists at the various EU tax agencies will be established to contribute to an ongoing investigation. The Dutch government has also announced that the number of inspections in Dutch marinas will be increased and extra attention given to the purchase of yachts to ensure that VAT has been paid.

4.4. Joint Audits

As multinational companies operate more and more in a global context, it is necessary for governments to innovate to keep up with this trend. This is a real challenge, as a governments jurisdiction often ends at its border, while companies operate across borders. In the tax arena, the dramatic increase in cross-border activities and investments of both business entities and individuals has presented tax administrations

[23] http://www.tax-news.com/news/Dutch_Lead_EU_Crackdown_On_Yacht_VAT_Fraud____33653.html

with difficult and unique challenges. In response, revenue bodies around the world, in pursuit of stronger international tax compliance, will likely move beyond cooperation to various forms of coordinated action, such as *joint audits*.[24]

The OECD's Joint Audit Participants Guide defines a joint audit as '*an arrangement whereby Participating Countries agree to conduct a coordinated audit of one or more related taxable persons (both legal entities and individuals) where the audit focus has a common or complementary interest and/or transaction. A joint audit shall include at least two or more Participating Countries.*'[25]

Joint audits represent a new form of coordinated action between and among tax administrations. In a joint audit, two or more countries would join to form *a single audit team* to conduct a taxpayer examination. In other words: a joint audit should be carried out under similar conditions as an audit carried out within national borders, but with an international audit staff.

Joint audits should result in quicker issue resolution, more streamlined fact finding and more effective compliance. Joint audits would also have the potential to shorten examination processes and reduce costs, both for revenue authorities and for taxpayers.

The term 'joint audit' as such is not a *legal* term. In tax matters the term 'joint audit' has been used *in practice* to express the idea that two or more tax administrations work together. If countries want to carry out a joint audit (according to the OECD principles), it is necessary to determine the legal framework on which they can co-operate, before they start. The basis for cooperation can only be found in the current network of bilateral and multilateral tax treaties which provide for varying degrees of mutual assistance.

This current legal system however, has not been extended for the benefit of performing 'joint audits', while the OECD the 'joint audits' explicitly qualifies as a further form of cooperation compared to the forms of mutual assistance so far, including simultaneous examinations. That seems contradictory. One of the challenges for the Netherlands and the participating countries will be to find out the possibilities and limitations of this type of mutual assistance.

Due to the OECD, consulting the taxpayer involved and his tax advisor, is imperative. Possible legal constraints may also be addressed by an agreement between the revenue bodies and the taxpayer, which provides taxpayer consent to the international audit.

Cases most suitable for joint audit procedures in our opinion are large multinational corporations that must face (traditional) audits in multiple jurisdictions on the same set

[24] Joint Audit Report, Sixth Meeting of the OECD's Forum on Tax Administration, Istanbul (15 – 16 September 2010), Foreword.
[25] Joint Audit Participants Guide, Sixth Meeting of the OECD's Forum on Tax Administration, Istanbul (15 – 16 September 2010), Chapter 1.1.

of transactions. Also big multinationals taking part in so called ‘cooperative compliance models’ bases upon which they could demonstrate to more than one tax authority that they are in control of their fiscal affairs, e.g. by means of a tax control framework, are suitable for joint audits.[26]

At this moment the Netherlands had not (yet) conducted a joint audit as described in the OECD report. However, the Netherlands agreed with Germany to start a pilot project in 2013. From September 2012 onwards this pilot will be prepared and the legal framework and other issues will be discussed. The Netherlands has also contacted France to carry out a pilot project in this area, which responded positive.

5. Collaboration between authorities

The Dutch government is of the opinion tax abuse should be dealt with by measures providing disclosure of income and assets. In that regard the approach chosen by Germany and the United Kingdom to make an arrangement with Switzerland in order to collect taxes without disclosure of the name of the taxpayer, is not likely to be followed in the Netherlands.

More principal however, one could say these arrangements continue to give the taxpayer the possibility to hide (details of) income and assets necessary for the tax authorities (in the Netherlands) to examine the taxpayers overall compliance with tax law. It is our view the levy of withholding tax combined with a non-disclosure of the name of the taxpayer will not last for a long time.

In case the Dutch authorities receive information from abroad the same rules apply as in domestic situations. This means the information will be used for fiscal purposes only. In that regard the information can be shared with the taxpayer and the Courts. The State Secretary of Finance has the prerogative to make exceptions to the rule of secrecy. In that regard he has entered into agreements with several governmental authorities.

According to Article 14, paragraph 2 WIB a request for information will be denied in case the requesting state does not have a secrecy provision stating the tax inspectors have a legal obligation to keep secret all the information they received in their formal capacity as tax inspector. We are not familiar with other precautions the Dutch authorities took in order to guarantee the secrecy of the exchanged information in the requesting state.

Article 15, paragraph 4 of the WIB allows the requesting state to use the obtained information for other purposes than the taxation mentioned in the request, after the Dutch authorities have given their approval. This requirement also applies in case the

[26] The concept of a tax control framework in its essence means that within the business control framework tax is embedded. Tax risk management and reporting functionalities are part of the integrated risk management framework (preferably based on known and accepted risk management standards and frameworks).

requesting states want to send the information received from the Netherlands to a third State.

Information received from another State within the exchange of information procedure is considered to be evidence that could be used in tax proceedings before the Court. [27] This could be different in case the providing State was involved or initiated the unlawful act or there was an infringement on fundamental rights.

6. Identification of the taxpayer and holder of information

The Dutch Model Convention does not require the requesting state to provide the name of the person concerned. As mentioned earlier the WIB determines that the domestic legislation with regard to the investigative powers of the tax inspector also applies with regard to requests for information from abroad. The Supreme Court[28] in the Netherlands ruled that a tax inspector has the right to make enquiries and demand documents from a person in relation to the taxation of a third party, even though the inspector at that time does not know for which (to be identified) taxpayer this information could be useful. From a domestic (and therefor international) point of view there is no legal problem in case there are problems identifying the taxpayer in question.

The abovementioned issue regards the taxpayer that is investigated in the requesting state. Another issue that was discussed within the framework of the Global Forum deals with the situation the requesting state does not provide the name of the person or legal entity in the requested state which could provide the needed documents or answers. In the Dutch Model Convention there is no administrative clause stating the requesting state should provide a name and address. There are exemptions, like for instance the treaty with Switzerland.

In the Netherlands the discussion with regard to requests that could be characterized as ‘fishing expeditions’ is not primarily focused on the issue of the identification. Although one of the reasons to refuse a request for information could be the fact the requesting state is 'fishing', in case law there are no examples of cases in which the judge granted an appeal of this kind. This could be the result of the fact the tax authorities filter these kinds of requests. A clear definition of a 'fishing expedition' cannot be found in Dutch law. Recently in Parliament a description of this phenomenon was given. Fishing expeditions could be described as a request with regard to one or more taxpayers without a concrete reason. It concerns situations in which the link between the requested information and the taxpayer(s) mentioned is insufficiently substantiated, as a result of which it can not be concluded that the information requested is expected to be of relevance for the provisions of the treaty or domestic law. The State Secretary states there is no international definition, although the Commentary to the TIEA-model contains a number of examples. He furthermore refers to an OECD study

[27] HR 21 maart 2008, BNB 2008/159.
[28] HR 22 September 2006, BNB 2007/45.

based on situations in practice and case-law in several countries. This study is intended to conclude with a concrete guideline. This could also be used to determine in what way the treaty 'foreseeably relevant' should be interpreted. The State Secretary furthermore mentioned that he is of the opinion that there is no need to regard the minimal requirements that are stated in Article 5, paragraph 5 of the TIEA-Model as a guideline with regard to the question whether a request has 'fishing' intentions.

In case the Dutch tax authorities receive a request from a country with which the Netherlands concluded a treaty, the request is assumed to be valid and in line with the prerequisites of the treaty (principle of trust between treaty-states). An effective exchange of information is the goal of the Dutch government and a request will not easily be considered to be a fishing expedition. In case the request lacks vital information as a result of which the Dutch authorities do not have guidance as to where the requested information can be retrieved, an effective exchange of information will not be hindered as it is considered to be a fishing expedition but as a consequence of factual impossibility to find the documents and answers.

Under Dutch law every taxpayer that has the obligation to have a bookkeeping is required to give answers and provide documents on request of the tax inspector. In that regard there is no discussion on whether banks, other financial institutions and persons acting in an agency or a fiduciary capacity should provide information upon request. This is the same with regard to trusts and foundations as the trustee or the board is obliged to respond to questions of the tax authorities.

In the Netherlands banks, insurance-companies, pension funds and employers have a duty to automatically supply information to the tax authorities. In that regard there is a long tradition to obtain information from these institutions. This information from intermediaries could of course also be used in case a foreign state request for it or spontaneously.

7. Limits

7.1. Right to Privacy

A. Bank Secrecy

Bank secrecy does not exist in the Netherlands, neither in the Civil Code, nor in the tax law. Like any other corporation, a bank or other financial institution will have to provide the information a tax inspector requests. There are furthermore obligations to provide information about (the contents of) bank accounts automatically.

The tax authorities made a special ruling[29] in consultation with the Association of Banks. This ruling provides rules that concern the requests for information towards

[29] Voorschrift informatie fiscus/banken, besluit van 28 januari 2011, nr. BLKB2011/109M, Stcrt. 2011, nr. 2078, BNB 2011/92.

banks and is explicitly also applicable in case the request is a result of a foreign request for information. The ruling is intended to provide some guarantees with regard to requests to banks, but does not infringe upon the right to makes enquiries in the files of the banks.

Considering the above mentioned it is remarkable to read in the new proposals with regard to the WIB as a result of Directive 2011/16/EU, that the legislator suggests to explicitly mention in Article 14 WIB that a request will not be refused in case the information should be obtained from a bank, other financial institution or a person acting in an agency or a fiduciary capacity. Also the 'ownership interest' is explicitly ruled out as a ground for refusal.

B. Lawyer's legal professional privilege

Dutch domestic law recognises in Article 53a *Algemene wet inzake rijksbelastingen (AWR)* the lawyer's legal professional privilege as an infringement to the obligation to provide information upon request of the tax inspector. This privilege is granted to lawyers that are admitted to the Bar. In the Netherlands also in-house lawyers can be admitted, in which case the independence is guaranteed by special rules. No distinction is made in Article 53a AWR with regard to lawyers that have a relationship of employment and those that are really independent.

The Dutch Supreme Court[30] also acknowledged a quasi legal professional privilege for tax advisers, not admitted to the Bar. The principle of fair play forbids the tax inspector to request the taxpayer for reports and other documents, as far as these were written to underexpose the fiscal position of the taxpayer or to advise him in that regard. As most tax advisers are not lawyers admitted to the Bar, this factual extension of the legal professional privilege is of great importance also for international exchange of information.

The modification of the OECD standards did not effect the abovementioned provisions and case law.

C. Data protection

The question of data protection with respect to international obligations regarding exchange of information is not broadly discussed in Dutch literature. The *Wet bescherming persoongegevens* (Wbp) contains several exemptions with regard to the obligation to make a notification to the persons involved and the supervisory body. These exemptions apply in case there is a legal obligation to provide information to a government body and furthermore deals with situations in which there is a suspicion of fraud or vital interests of the state are at stake. In practice a specific notification with regard to the privacy regulation with regard to a foreign request for information is never issued.

[30] HR 23 september 2005, BNB 2006/21.

1. Domestic law and administrative practices

The text of Article 26, paragraph 1 OECD Model Treaty makes it clear the exchange of information is not restricted by Article 2 (Taxes Covered). Accordingly, “taxes of every kind” i.e. direct and indirect taxes fall within the scope of the exchange of information. Also the Dutch Model Convention contains a similar Article. In that regard there is no limitation in the Dutch intentions while concluding a treaty.

The limitation regarding domestic law and administrative practices is in fact the only real limitation that restricts the exchange of information. The legal professional privilege and the case law from the Supreme Court on this matter are examples of this limitation. In case there is no right on information in the domestic situation, this is exactly the same in case there is a request from abroad.

The right to make requests for information is very extensive. Article 47 AWR obliges a taxpayer to give answers and provide documents in case the tax inspector demands these. The only restricting criterium is whether the answers or documents requested could be of relevance with regard to taxation purposes. The question is therefor not whether the answers and documents are relevant, but merely whether they could be. This extensive provision is applicable to requests with respect to enquiries regarding international exchange of information as it is referred to in Article 53 AWR.

Article 53 AWR applies to the holder of information. Only persons and legal entities that have the obligation to have a bookkeeping can be legally forced to provide information about third parties. This is also a limitation that affects the exchange of information.

All requests in the Netherlands are subject to principles of good governance. In this regard the principle of proportionality is of importance as it requires a fair balance between the interests of the requesting countries and the holder of the information.

2. Commercial Industrial Business Secret

The Dutch authorities stress the importance of this limitation by implementing this limitation in the Dutch Model Convention. Furthermore the WIB explicitly states these kinds of secrets are a solid ground for refusal.

In case the Dutch authorities nevertheless proceed with a request from abroad regarding a matter the holder of the information considers to be a commercial, industrial or business secret, the position of the holder is delicate. It could be argued that the requested information could not be of any relevance for the taxation abroad. Above that the Dutch holder of the information could state the principle of proportionality is violated. His valid interests with regard to the secret could be of more weight than the benefit the requesting State has.

We are not familiar with case law in which a Dutch party claims for damages as a result of violated commercial, industrial or business secrets. Damages can only be claimed in case of an unlawful act of the Dutch government. In cases like this the authorities will give a notification to the holder of the information after the documents were handed over to the Dutch authorities. The holder can make objections and in case these are dismissed appeal to the court. In case a court rules the exchange of information is in line with the law, in our view there is no unlawful act. In case the authorities do not sent a notification the lawfulness is not guaranteed and the position of the Dutch authorities could be different. In that regard it could be of relevance whether the requesting state respects its secrecy clause. If that is the case, the damages regarding the exchange of the commercials, industrial or business secrets will be limited. The exchanged secret remains at the office of the tax authorities of the requesting state and cannot be unlawfully applied by competitors in the requesting State. If the secrecy clause is however violated and there really is a commercial, industrial of business secret, the damages could be substantive. In that case legal proceedings against the requesting State could be started.

3. Public Order

The limitation regarding the public order is not a real hindrance with regard to an effective exchange of information. It considers public safety and vital interests of the State. In case law a holder of information is not likely to make objections based on this limitation. The Dutch authorities do not see any reason to refuse a request in case it derives from information that was illegally obtained.

4. Procedural guarantees and administrative principles

The WIB provides procedural guarantees as it prescribes the authorities to give a notification in case it is intended to exchange information. In case law and also in the WIB it is explicitly stated that there is no possibility of appeal against the request for information and the investigation itself. The legal remedy is restricted to the intended exchange.

The (legal) person that receives the notification has the right to object against the intended exchange of information. This objection will be dealt with by the tax authorities. There is the right to be heard. If the objections are denied, a petition with grounds can be filed at the District Court. In case this is rejected, an appeal can be made at the *Raad van State*. At each occasion the plaintiff has the right to be heard and to plea his arguments.

With regard to the procedural guarantees it is important to make a few distinctions between the parties involved and the kind of taxes concerned. These distinctions follow from the WIB.

First of all VAT and Excise duties are not subject to the provisions of the WIB. As the EU Directives do not provide in any legal proceedings it is not possible to go to administrative court. In case a taxpayer wants to appeal to Court to bar the exchange of information the only possibility is civil Court.

As of July 1st 2011 Dutch law provides for a proceeding in case the holder of information is confronted with a request which in his view was invalid. This proceeding can only be started after the request was complied with. This new regulation cannot be considered to be a possibility to bar the exchange of information. It only provides a way to challenge the legal aspects of the decision to exchange information.

Besides the kind of taxes involved, it is very important to make a distinction between the parties involved. The requesting State most of the time would like the Dutch authorities to retrieve information from a third party, the holder of the information. This Dutch entity is normally a different (legal) person than the taxpayer that is investigated. The legislator has explicitly limited the persons that can appeal to Court. On the basis of the WIB only the (legal) person from which the information was obtained and resides in the Netherlands has the right to make an appeal to the Court with regard to the notification with the intention to exchange the retrieved information. This means that almost always the taxpayer that is being investigated by the requesting State has no legal remedy based on the WIB.

After the notification the Dutch authorities will wait for a period of 10 days before exchanging the information as mentioned in the notification. As the legal proceedings will take much longer than ten days the plaintiff is compelled to start preliminary proceedings to bar the exchange of information.

In case of 'urgent reasons' the notification can be delayed for a period of four months. Within this term the information will be exchanged to the requesting State without any knowledge of the holder that already provided the information. An appeal against a delayed notification is only useful to challenge the legality of the exchange in order to claim damages.

Urgent reasons could be present in case there is a suspicion of tax fraud or the statute of limitations almost makes the levy of taxes in the requesting state impossible.

Dutch law does not provide for a legal remedy in case the Dutch authorities request for information to another State. Such a request will not be made public to the taxpayer. He will learn about it in case he has the right to study his case file or in the situation in which he is confronted with the information obtained abroad.

The procedural guarantees of the Human right conventions only apply to tax fines. The Dutch Supreme Court is of the opinion that taxation does not constitute a criminal charge nor civil right and obligations. Therefor Article 6 ECHR does not apply to proceedings that have a strictly tax dispute (without any fines).

With regard to the case law on the principle of self-incrimination it is important to note this principle only applies in case the investigative powers are used towards the suspect. Usually this is not the case in international requests for information. As mentioned before the requesting State will normally ask for assistance to retrieve information from a third party in the Netherlands with regard to another person (most of the time living in the requesting State). This other person is the suspect, not the holder of the information that resides in the Netherlands. The Dutch holder of the information does not have any claims with regard to the principle of self-incrimination.

7. Conclusion

The economic crisis was a strong impetus for the struggle against tax avoidance. One of the consequences was a political momentum to combat bank secrecy and tax havens. In that regard the last years showed more progress towards countries as Switzerland and Liechtenstein than could be expected only a decade ago. Off course there could be criticism towards the contents of TIEA's, but in general the trend regarding transparency and cooperation is positive and should be followed.

In our view it is remarkable other forms of cooperation, and joint audits in particular, do not seem to keep pace with the new developments. Although joint audits could be considered as an ultimate proof of cooperation between countries, in practise it is still a method that is seldom applied. It could be useful to select certain pilot cases to verify whether the existing rules facilitate an effective joint audit in several countries.

The trend towards transparency and cooperation should be accompanied by the protection of the human rights of the tax payers involved. In a level playing field within the European Union the legal remedies in our opinion also should be dealt with in a similar way by the Member States.