THE EUROMONEY
CORPORATE TAX HANDBOOK
2012

EUROMONEY
HANDBOOKS
Part of Euromoney Trading Ltd

Recent developments with the Dutch dividend withholding tax – a major bottleneck in international tax planning

by Jos Peters, Merlyn International Tax Solutions Group

With the recent unfolding of the Dutch government's tax plans for 2012, on Budget Day (traditionally the third Tuesday in September), it has become clear that the Netherlands will continue to strive at protection of its dividend withholding tax. Somewhat curious because Supreme Tax Court case law, dating back to 1994 clearly shows that there is an easy way to circumvent this tax (details later in the chapter). And also curious because with the measures announced, the Netherlands is shooting itself in the foot. The country has an amazingly modern participation exemption and all its tax treaties forbid foreign countries to tax capital gains on shareholdings, which means everybody wants to have a Dutch intermediate holding company. On top of this, the use of so-called profit participating loans has been cleared by new tax legislation in 2007 and this opportunity forms a very attractive additional element of the Dutch corporate income tax system. But once the money has been drawn into the Netherlands in a very tax efficient way, the country goes all out to prevent investors from taking it out. This is not just curious, it is almost schizophrenic.

The most eye-catching measure for 2012 was the announcement by the Dutch Ministry of Finance to attack 'abusive' structures with Co-operative Associations (usually referred to as 'Co-ops'). These legal entities were not subject to dividend withholding tax until now and over the last decade, many multinationally oriented enterprises which were not able to get Dutch dividends out at 0% withholding tax because their home country either had no tax treaty with the Netherlands at all or a tax treaty that provided for a higher dividend withholding tax than 0%, have availed themselves of such a Co-op. On a day to day practice, for Dutch corporation tax purposes, such an entity functions almost similar to a BV entity (it can even be the parent in a Dutch tax consolidated group) but it was not subject to the Dutch dividend withholding tax (15%).

Dutch Co-ops, on top of not being subject to Dutch dividend withholding tax, are also great instruments to reduce foreign dividend withholding taxes: a Dutch Co-op is a resident of the Netherlands in the sense of the Dutch tax treaties. Therefore, like the regular Dutch BV entity which everybody uses, it enjoys the participation exemption and offers treaty protection against foreign dividend withholding taxes and foreign capital gains taxation. So on paper Co-ops were ideal vehicles to interpose into a dividends and capital gains loop; the only risk being that the Dutch government would one day decide to attack the main Co-op tax benefit by unilaterally changing the rules, as it has now announced it will.

There are other exits from the Netherlands against 0% dividend withholding tax, based on tax treaties or based on the EU parent-subsidiary directive which the Netherlands cannot unilaterally change, such as the Cyprus and Malta exits. These will now need to be revisited because taxpayers may want to replace their Co-ops with, or by setting up new structures via an intermediate holding company in one of these jurisdictions, if the Co-op dividend routing has lost its appeal, in cases where a given structure will be declared 'abusive'.

'Old school' Dutch dividend tax avoidance

Let's go back to a 1994 Supreme Court case which seemed to indicate the end of Dutch dividend withholding tax altogether. The verdict was so harsh on the Ministry of Finance that Prof. Eric Kemmeren, then a colleague senior tax manager with Ernst & Young Rotterdam, wrote an article called 'the Supreme Court has abolished our Dividend Tax!'.

Imagine you own a Dutch intermediate holding company in the form of the usual BV entity, which is stuffed with low-taxed retained earnings as a result of the wonderful Dutch participation exemption. You would like to cash in on this but you do not want to suffer the Dutch dividend withholding tax.

If you are not established in a country which has a tax treaty with the Netherlands that provides for 0% Dutch dividend tax, there is an old trick converting the Dutch retained earnings into debt, which makes the Dutch dividend tax claim disappear. This enables you to get your money out of the Dutch BV in the form of debt redemption, free from dividend withholding tax. Please read and digest the explanation of how this works carefully, because it may work elsewhere too.

The parent of the 'rich' Dutch BV incorporates a second Dutch BV (with minimum capital and no intention to have it perform any real business activities). The parent now sells the shares of the rich BV to the poor BV for fair market value (FMV). In doing so the parent realises a considerable capital gain, which:

i. is not taxable in the Netherlands because the country does not normally charge tax on capital gains realised with qualifying shareholdings (the good old Dutch participation exemption; one is not even required to file a Dutch tax return to claim this exemption because a foreign entity which realises income which is not taxed, is not required to file one); and
ii. should qualify, if at all needed, for a form of 'roll-over relief' or a reorganisation exemption in the home country of the parent company; after all, one is merely inserting a second Dutch legal entity between the parent and the old Dutch legal entity).

The purchasing new BV does not have any funds to pay its parent for the sale of the rich BV against FMV so it ends up with a debt towards its parent. The two Dutch BV entities then file for tax consolidation (which can be done on a day to day basis in the Netherlands these days), which makes the rich BV disappear for Dutch corporate income tax purposes that same day. Immediately thereafter, the rich BV distributes all its retained earnings to its new parent BV. This transaction is invisible for Dutch corporate income tax purposes under the 'fiscal unity' rules of Dutch tax consolidation. But even if it would be visible, the participation exemption would apply.

The new BV is now the rich BV and can start repaying its debt towards its foreign parent. Repayment of debt is of course not subject to dividend withholding tax, because the payment is not a dividend.

In 1968, the Dutch Supreme Court decided in a case known in the Netherlands as BNB 1968/80 that if the parent of the rich Dutch BV is a Dutch resident, the above series of transactions may constitute abuse of law. So the conversion of retained earnings into debt repayment, in a

Dutch national connotation, is tricky to say the least. But in a 1994 case where a foreign parent of a Dutch BV employed the same trick, the Dutch Supreme Tax Court came to the conclusion that the Dutch national anti-abuse rule could not be invoked by the tax inspector because there was no sign that when the Netherlands entered into the tax treaty with the country of the parent company, such conversions of retained earnings into debt repayment would qualify as treaty abuse. Therefore, the Dutch national rule had to give way to the treaty rule which implicitly OK'ed the transaction as non-abusive, by the sheer lack of an anti-abuse provision.

Eric Kemmeren came to the conclusion in his land-sliding article in the 'Dutch Tax Weekly' in 1994 that foreign taxpayers could therefore, if needed to, repeatedly, empty the pockets of their Dutch BV subsidiaries by selling them to newly created sister-BV's against debt. Hence his conclusion was that 'the Dutch Supreme Tax Court has effectively abolished the Dutch Dividend Tax'. The situation has not changed since. The Dutch government has made no attempt whatsoever upon treaty (re)negotiations since 1994 to close this loophole. To me and to many other Dutch tax professionals, this was a mild sign that our country might one day be willing to even formally abolish dividend withholding tax and there have been rumours each year since this decision was announced that 'The Hague', where our government sits, would launch plans to abolish dividend tax altogether.

Unfortunately, with the current financial crisis, the coin flipped the other way and the Netherlands has apparently decided to protect its dividend withholding tax to the utmost, even though this may well be 'penny wise, pound foolish'. It may bring some additional income in the short run but will chase foreign investors away, so this opportunistic approach will cost a multiple of its proceeds, longer term. In my view it will not even bring money in on the short-term because everybody who will be caught by the new provisions will have reorganised prior to December 31, 2011 in one way or another, if for no other reason than because they have read this chapter.

The new Dutch dividend tax rules for Co-ops

The new Dutch tax measures, announced on Dutch Budget Day 2012 on September 23, 2011, show eagerness by the Dutch government to protect its corporate income tax and dividend tax bases. The corporate income tax measures will be disregarded in this chapter and I will concentrate solely on dividend tax. The plans as published say that Co-ops will be brought under the working of the Dutch Dividend Tax Act in two ways. The Bill of Law distinguishes between *bona fide* and abusive structures and the two will be treated differently, as follows:

Bona fide structures

These are defined in the Bill of Law as structures involving Dutch Co-ops which do not have as their sole or primary goal, the avoidance of Dutch dividend withholding tax. They should also not fall under Article 17 of the Dutch Corporation Tax Act (CTA), the infamous 'substantial interest test'. This all by itself is curious because the substantial interest test (see following section) is already an anti-abuse measure: in certain cases, Dutch dividends are subjected to Dutch corporation tax (20%-25%) rather than to Dutch dividend tax as it is one or the other. So by putting these situations under the *mala fide* purpose test,

Jos Peters, Senior International Tax Partner
Merlyn International Tax Solutions Group
tel: +31 10 201 0820
mobile: +31 654 702 0804
email: jos@merlyn.eu

the Netherlands seems to be giving up its corporate income tax of 20%-25% in *lieu* for a dividend tax of 15%.

However, on a day to day practice, the 20%-25% tax on Dutch dividends, which results from Article 17 of the Dutch CTA, has to my knowledge never actually been levied. But the provision is there so the risk has always been there. Maybe the Ministry of Finance has decided that the application of Article 17 CTA is so narrow that it is no loss to give this up for a much wider application of the lower tax rate of the Dutch dividend tax act. The Bill of Law contains no explanations on this point.

Mala fide structures

These are defined in the bill through a new article in the Dutch dividend tax act, as follows:

i. the participant in the Dutch Co-op does not himself conduct an active trade or business (this requirement will therefore predominantly hit passive intermediate holding companies that are usually located in tax haven jurisdictions); and
ii. the Dutch Co-op structure has been set up or is maintained with the sole or predominant reason to avoid Dutch dividend withholding tax, or to avoid or mitigate any foreign tax.

In practice this means that the taxpayer will have to demonstrate that he has genuine business reasons to set up a Dutch Co-op, or to prove that the Co-op has no effect on his Dutch dividend tax obligations (e.g., if the participant is a resident of a country which has a tax treaty with the Netherlands which also provides for 0% Dutch dividend tax). He should then also prove, it seems, that the sole purpose of the structure was also not aimed at reducing foreign dividend withholding taxes below the Co-op level (many Dutch Co-ops own non-Dutch subsidiaries and benefit from the EU parent-subsidiary directive to keep German, French, Italian, Swedish etc., withholding taxes at a zero rate).

Again a rather peculiar test because if someone sets up a regular Dutch BV entity, this test is not applicable even if the Dutch BV can pay out dividends free from Dutch dividend tax under a tax treaty or the EU rules. This test will no doubt come down to the taxpayer being asked to demonstrate that he has sufficient non-tax reasons for setting up his structure via a Dutch Co-operative Association.

Both types of Co-ops, the *bona fide* ones and the *mala fide* ones, will, under the proper circumstances face Dutch dividend tax. The difference is enormous, however:

If a *bona fide* Co-op is used to invest in a Dutch BV entity (a very usual structure although not always necessary), the retained earnings of the Dutch BV at the moment of insertion of the Co-op will be subjected to dividend tax in the future, upon distribution. It is likely a first in, first out (FIFO) rule will apply here, so if the Co-op receives dividends from such existing retained earnings in a BV subsidiary but also dividends from new profits of that BV entity (for instance because the BV itself receives dividends from a foreign subsidiary and pays that onwards to the Co-op) and the Co-op itself distributes only part of its retained earnings itself, the Co-op will be deemed to first distribute 'tainted' reserves. Without a special provision to effect this, taxpayers may well seek to defend that what their Co-op pays out was a *pro rata* part of tainted and non-tainted reserves, or they can even take the position that their distributions take place under a last in, first out (LIFO) system, deferring Dutch dividend tax into oblivion as long as not all reserves are distributed.

If a *mala fide* Co-op distributes its retained earnings, there is no difference between tainted and untainted profit reserves and all of them will be subject to Dutch dividend tax, as well as any foreign dividends that the Co-op will in future receive, directly or indirectly from its foreign subsidiaries!

Each multinational group that owns a Dutch Co-op, for whatever reason, should therefore verify whether it falls under the definition of a *bona fide* Co-op structure or a *mala fide* one and take appropriate action. Two action points seem clearly indicated:

i. get the Dutch retained earnings out of the Co-op or its Dutch subsidiaries before December 31, 2011 in case

such retained earnings were already present at the moment the Co-op was inserted into the group structure (*bona fide* and *mala fide* cases alike);

ii. get the retained earnings of the foreign (direct or indirect) subsidiaries out of the countries of those subsidiaries and flow them through the structure, to the participants in the Dutch Co-op (*mala fide* cases only);

iii. get rid of the Co-op and replace it with something better (options discussed later) as soon as possible (*mala fide* cases only).

In all cases, an assessment needs to be made whether or not the Dutch Co-op, which a multinational enterprise employs as an intermediate holding company in his group, or part thereof, risks to be considered a *mala fide* structure or not. There will be many grey areas ('how convincing are our non-tax reasons for using a Dutch Co-op?') and in case of doubt, the final decision, especially regarding point (iii) above, should depend on whether there is a viable alternative routing to avoid Dutch dividend withholding tax in the future.

If so, my recommendation would be, to not take any risk here. Dutch '*fraus legis*' case law is few and far between and certainly not well-developed. I myself have never been an advocate of Co-op structures because we have a good alternative in Malta (discussed in the following section) but I now see many Dutch tax practitioners who have advised clients to set up Dutch Co-ops and their first reactions to the Bill are surprisingly moderate. They do not want to lose their face, of course, by revoking previous advice and may tell their clients that the new provisions are manageable. But no one can ever manage future case law.

Alternative structures with a 0% dividend tax exit from the Netherlands

A reader may wonder why the Dutch Co-op has become so popular over the last decade that it is now almost a standard part of many international tax structures and consequently a cause for concern in the Dutch government that considerable tax money is leaking away because of these Co-ops. In other words: what is wrong with the other Dutch exit possibilities against 0% dividend tax?

We have already shown that Dutch dividend tax can in many cases easily be avoided by employing the Supreme Court case law of the 1994 'transformation of dividends into debt' case depicted earlier. This method is considered 'last resort' however, by many taxpayers. Setting up a new entity in the Netherlands and selling your old one to the new one for FMV may result in home country capital gains tax issues and would seem to require a difficult and/or expensive valuation process to arrive at the FMV.

On paper there seem to be easier exits. For instance: the Netherlands is not allowed to tax dividends which go out to parent companies in other EU jurisdictions, so it simply looks like a matter of finding other EU countries which:

i. have a full participation exemption system (so Dutch dividends are not taxed but can smoothly flow through); and

ii. do not withhold dividend tax from their own jurisdictions' dividend payments to foreign destinations even without a tax treaty.

These two requirements do shorten the list of qualifying EU countries substantially, however. Only two out of the 26 EU sister countries to the Netherlands are left, upon closer scrutiny: Cyprus and Malta. I will discuss them both and unfortunately there are 'issues' with both of them:

The Cyprus exit

The Netherlands and Cyprus are united in the EU. But does this mean that the Netherlands should allow dividend payments to Cyprus to go out untaxed? Likely yes, but the question is: what does 'untaxed' really mean? The Netherlands has a rather awkward unilateral rule that should a natural or legal foreign person own 5% or more of the shares in a Dutch BV (or Co-op for that matter) and this shareholding is not held in connection with the conduct of an active trade or business, the Netherlands will levy income tax on all proceeds which the foreign passive investor may realise from his Dutch shareholding. In situations where the owner is a private person, this will be Dutch personal income tax (disregarded in the remainder of this chapter) and if he is a legal person, Dutch corporation tax (20%-25%).

This is called the 'substantial interest rule' and as far as Dutch corporate income tax is concerned, it can be found in Article 17 of the Dutch CTA as well. So a passive foreign holding company which owns 5% or more of the shares in a Dutch BV, will have to pay Dutch corporation tax on:

i. all dividends he receives from the BV;
ii. all interest payments; and
iii. any capital gains realised with the shares of the BV.

This article was introduced in Dutch tax law long ago to avoid Dutch residents emigrating and subsequently emptying their Dutch legal entities by only paying Dutch withholding taxes (then 25% on dividends but 0% on interest payments and 0% on capital gains) instead of full individual income tax or full corporation tax. Obviously this anti-abuse measure could easily be overcome by such emigrants by interposing a foreign legal entity in the structure, so the substantial interest rule was also incorporated in the Dutch CTA, 'to close the back door' so to speak.

This rule is clearly out of line with any of the versions of the Organisation for Economic Co-operation and Development (OECD) model tax treaties, and in treaty situations, the Netherlands had had to give up this national anti-abuse rule although treaty partners did understand that in case of Dutch emigrants it had merits. So the Dutch tax treaties, without exception, only allow the Netherlands to use the substantial interest rule in case a Dutch person or entity has emigrated from the Netherlands to a country with which the Netherlands has a tax treaty, and then only for a maximum period of five to 10 years after such emigration.

This is why the Dutch substantial interest rule hardly ever comes into play with international tax structurings. Passive foreign legal entities that own more than 5% of the shares in a Dutch BV and have emigrated from the Netherlands less than five years ago are red herring cases – only of importance to tax advisers who assist such emigrants, and the rest of the world's tax advisers need not worry or even know about this special rule.

However, there is no tax treaty between the Netherlands and Cyprus, and Cypriot holding companies are not normally known to conduct an active trade or business, so Article 17 CTA is still alive.

The European Commission has recently asked the Dutch government for a second time why the Netherlands believes it has the right to charge tax on dividend and interest payments from, and capital gains with, shares of Dutch legal entities to (some) Cypriot legal entities and considers this a violation of the EU rules of freedom of establishment and freedom of capital deployment. The Dutch government has not replied either times which is a clear indication that the Netherlands wants to defend its rights before the European Court of Justice (ECJ) in Luxembourg – clearly the next stage of this dispute. The worry here is of course that dividend and interest will be judged by the ECJ to enjoy the protection of the parent-subsidiary directives on those taxes but that the Dutch capital gains taxation may escape such verdict.

Pending this, there are not many Dutch tax advisers to be found that will now start recommending the Cyprus exit, however nice it may look on paper.

The Malta exit

Another European jurisdiction which applies the participation exemption to Dutch dividends and has no dividend withholding tax itself – even for dividend distributions to tax haven locations – is Malta, after this EU country changed its rules in 2008. The Netherlands and Malta do have a tax treaty so there is protection against Article 17 of the Dutch CTA: regular Maltese legal entities have nothing to fear from the Dutch 'substantial interest' rule described.

There is a fly in the ointment with Malta as well, however: the protocol to the Dutch-Maltese tax treaty contains an anti-abuse rule which says that if a structure where a Maltese legal entity owns shares in a Dutch legal entity has been set up or is being maintained with the sole or main purpose to enjoy the 5% dividend tax rate of that treaty, the regular Dutch dividend tax rate will nonetheless apply.

This again is a confusing situation: the EU parent-subsidiary rules call for 0% Dutch dividend withholding tax while the bilateral Dutch-Maltese treaty could lead to 15% Dutch dividend tax. The main question of course being: will the multilateral EU treaty rules override bilaterally concluded treaty rules between EU countries? Does the ECJ in Luxembourg have jurisdiction over this apparent mismatch? Would an investor from outside the EU not have total liberty to choose his entry point into the EU and why would opting for Malta be abusive in any way? Has the Netherlands itself not always advocated, also officially, that such non-EU investors should use the Netherlands as EU point of entry? Is the Netherlands now forbidding another EU country what it has done itself for the last 40 years? (the Dutch CTA dates back to 1969).

Malta and Cyprus structures alike, have very often been rejected for advance tax rulings. Any remote element of doubt was used by the advanced tax ruling (ATR) team against the taxpayer. This has of course also led to the increased attention which Co-op structures have received over the last decade. Water flows to the lowest point and so do tax obligations. Many international tax practitioners were not able to obtain an advance tax ruling on Cyprus and Malta exit structures and started to recommend Co-ops.

These structures were not always free from 'substantial interest' problems depicted earlier either, of course: if a participant in a Dutch Co-op does not run an active trade or business and is not situated in a treaty country, substantial interest may raise its ugly head again. Nonetheless Co-ops were seen as the least risky option of the three from a practical viewpoint. This was aggravated by the fact that the Dutch revenue service never actually applied the substantial interest rule although they could have, for a very long time, and only recently showed signs of intensifying their investigations in this area.

A deeper analysis of the anti-abuse provision in the Dutch-Maltese tax treaty would, in my view, have revealed that Maltese entities are in fact less risky than Co-ops and should have prevailed, but practice often differs from theory in remarkable, non-logical ways. But with Co-ops now out of the window in at least part of the cases (I have not seen many *bona fide* Co-op structures, to be honest), it pays to look deeper into ECJ case law to see if the EU treaty rules might supersede the rules of bilateral tax treaties between EU countries.

The conflict between the EU treaty and the Dutch-Maltese bilateral tax treaty; a deeper analysis

The Dutch-Maltese anti-abuse provision reads as follows: "the provisions of sub-paragraph (a) of paragraph 2 of Article 10 (*the dividend withholding tax article, JP*) shall not apply if the relation between the two companies has been arranged or is maintained primarily with the intention of securing this reduction."

The doctrine used in the Netherlands to combat fraud and abuse is a general anti-abuse concept or *fraus legis*. It is not as such laid down in Netherlands tax law but the doctrine has been developed in the Netherlands Supreme Tax Court case law and ministerial by-laws. According to these rules, a taxpayer transaction is considered to be an abuse of tax law (*fraus legis*) when its sole or main purpose is to frustrate taxation, i.e., tax avoidance is the taxpayer's only or predominant motive, and these actions are, although fully legal by themselves, judged as artificial and also in conflict with the meaning and purpose of the relevant tax rule, treaty or directive.

The concept of *fraus conventionis*, which applies a substance-over-form principle in respect of treaty provisions, should be distinguished from the application of *fraus legis*. There is only one meaningful *fraus conventionis* case in the Netherlands, when a Dutch taxpayer, after declaring a dividend to its Canadian parent, saw a Dutch Antilles entity interposed into the payment loop in order to reduce the Dutch dividend tax rate from the Dutch-Canadian treaty rate to the zero rate applicable in those years to 'intra Netherlands' dividends. This timing element was seen as clearly abusive by the Dutch Supreme Tax Court and everybody can understand that.

Not only Dutch local transactions but also those involving non-resident shareholders can lead to a denial of an exemption from dividend withholding tax based on a charge of fraud or abuse. The ECJ ruled on the incompatibility of any such national arrangements with the free movement of capital in the *Amurta* case. In *Amurta*, the ECJ found that an EU country which has different requirements for applying the dividend withholding tax exemption in domestic and in EU situations, employs rules that are incompatible with the free movement of capital within the EU. The ECJ, in the *Commission v Netherlands* case restated this finding, holding that dividends distributed by a Netherlands company to its qualifying parent company in a European Economic Area (EEA) country should be exempt from dividend withholding tax under the same conditions that domestic dividends would be exempt. So, clearly, any Dutch national anti-abuse rules have to give way to the EU principles.

Dividend distributions from the Netherlands to qualifying EU corporate shareholders are not normally affected by Netherlands dividend withholding tax rules, except in certain situations of fraud and abuse and if anti-abuse provisions are included in the relevant tax treaty. It should be noted in this respect that the EC parent-subsidiary directive does not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse (Article 1(2) of the EC parent-subsidiary directive).

In the *Avoir fiscal* case, the Court concluded that the rights conferred by Article 52 of the EC Treaty (now Article 43) regarding the freedom of establishment are unconditional and a Member State cannot make those rights subject to the contents of an agreement concluded with another Member State. In both the *Fokus Bank* case and in the *Denkavit Internationaal* case, reference was made to the *Avoir fiscal* case. In the *Fokus Bank* case, the European Free Trade Area (EFTA) Court stated that a contracting party cannot make the rights conferred by Article 40 of the EEA subject to the contents of a bilateral agreement concluded with another contracting party. In *Denkavit*, the ECJ held that France could not rely on the France-Netherlands tax treaty in order to avoid the obligations imposed on it by the EC Treaty.

EU Member States obviously need to be able to prevent their tax bases from being unduly eroded because of abuse and, according to ECJ case law, in particular *Cadbury Schweppes*, a national measure restricting the freedom of establishment may be justified on the ground of prevention of abusive practices where it specifically relates to wholly artificial arrangements that do not reflect economic reality, aimed at circumventing the application of the legislation of the Member State concerned, in particular with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.

In other words, the ECJ recognised the validity of domestic anti-avoidance rules in regard to purely artificial arrangements. In addition, it was established that the mere fact that a resident company establishes a subsidiary in another Member State cannot lead to a general presumption of tax evasion and cannot justify a measure that compromises the exercise of a fundamental freedom guaranteed by the treaty.

This was also confirmed in a Communication published by the European Commission on anti-abuse measures in the area of direct taxation, in which it was concluded that, provided that there is no abuse, it is perfectly legitimate to take advantage of a more favourable tax regime in another Member State. In other words, tax reduction motives are, in themselves, legal and tax planning across Europe is a legitimate way to reduce tax burdens. Tax reasons are business reasons, after all.

It follows that the Netherlands' anti-abuse concept may not meet the criteria laid down in ECJ case law and may be too generic to qualify as a provision in terms of the EC parent-subsidiary directive. Moreover, the ECJ, in the *Halifax* case, held that the requirement of legal certainty must be observed so that those concerned may know precisely the extent of their rights and obligations.

It could be argued that the need for certainty implies that general anti-avoidance principles are not allowed; only a precise and narrow definition of abuse should be accepted. In this respect, the Communication states that, in order to be lawful, national anti-avoidance rules must be proportionate and serve the specific purpose of preventing wholly artificial arrangements.

Conclusions

Clearly the very general Dutch-Maltese anti-abuse treaty rule constitutes a restriction on the freedom of establishment and on the free movement of capital within the EU. The recent rulings by the ECJ in this field clearly show, in my view, that Member States need to do a better job with formulating, much more precisely, what they consider abusive conduct and cannot rely on generally formulated, wide rules. I fully understand that Member States need to ensure that their tax bases are not unduly eroded because of abusive and overtly aggressive tax planning schemes, but disproportionate obstacles to cross-border activity within the EU will in my view continue to be judged incompatible with the Rome Treaty and its very basic freedom of capital deployment and freedom of establishment rights.

It is clear that anti-abuse rules in tax treaties between EU countries rules must not be framed too broadly but be targeted at situations where there is a lack of commercial underpinning and the end result is clearly out of line with the intentions of the treaty. To me it is therefore clear that the anti-abuse provision of the protocol to the Dutch-Maltese tax treaty which dates back to 1993, lost its meaning when Malta entered the EU in May 2004.

Final observations

Avoidance of the Dutch dividend tax is an art all by itself and my country shows no willingness to help. We have gone out of our way, since 2005, to change our CTA in such a way that the Dutch participation exemption is by far the most attractive one in the world. One would have expected that Dutch politicians would then have the courage (and the insight) to complete this overhaul by a courageous decision to formally abolish the Dutch dividend withholding tax. But they refuse to take that step.

With the recently announced attack as of January 1, 2012 on Co-op structures, many taxpayers who employ Dutch Co-ops must rethink their position and take action, sometimes immediately. If the Dutch Co-op which a given taxpayer employs is not clearly out of the 'abusive' danger zone, it is time to consider trading it in for a better alternative. Malta, in my view, has the best cards in this respect. Maltese holding companies are also not known for their economical substance, like Cypriot ones, but the ATR team had announced earlier this year that this hurdle can be overcome by applying Resolution BNB 1975/11: if the foreign intermediate holding company does not run an active trade or business itself, but its parent(s) do(es), one can invoke the non-discrimination article in the Dutch tax treaties to obtain certainty, if needed in advance, that such a 'switch function' of that foreign holding company between entities that do qualify as 'entrepreneurs' makes the company qualify for fiscal entrepreneurship themselves, which is required under the 'substantial interest' rule. Obviously this will not benefit Cypriot exit structures as long as the Netherlands does not have a tax treaty with Cyprus which contains such a (standard) non-discrimination clause – so again Malta comes out ahead.