



## ICEbreakers: Unlocking Netherlands



### Hot topics

**CJEU decision on interest deductions within fiscal unities:** On February 22, 2018, the CJEU issued a decision on two joined cases that the Dutch Supreme Court had referred to it for a preliminary ruling. One case concerned the Dutch interest expense deduction limitation rule, and the other was on the deduction of currency losses incurred on a participation. The court, in essence, ruled that the Netherlands is not allowed to favor domestic groups by permitting them to avoid the application of restrictive legislative provisions by participating in a fiscal unity, when such a fiscal unity is not permitted in cross-border situations.

The CJEU followed the advocate general opinion delivered on October 25, 2017. Immediately after the opinion was released, the Dutch State Secretary for Finance announced emergency remedial measures, which will be submitted in a bill in the second quarter of 2018. After parliament has approved the bill, the measures will take effect retroactively from October 25, 2017.

As a result, fiscal unities will be deemed not to exist for purposes of the application of specific statutory provisions relating to the limitation of interest deductions, the participation exemption, the limitation of interest deductions for an excessive participation interest and the limitation of loss setoffs upon a change in the ultimate beneficial interest. Potentially affected companies should review the impact on Dutch fiscal unities, as interest deductions may be jeopardized.

**Tax policy notice:** On February 23, 2018, the State Secretary for Finance sent his tax policy agenda to the House of Representatives. The cornerstones of the agenda—tackling tax avoidance and tax evasion—will be implemented by introducing measures to protect the (Dutch) tax base and that enhance the transparency and integrity of the tax system. In a nutshell, the most important items on the agenda are:

- **Base erosion:** Draft legislation is expected in the near future to implement the EU anti-tax avoidance directive (ATAD 1) rules on earnings stripping (capping the tax deduction of net interest payable at 30% of EBITDA) and the introduction of a controlled foreign company (CFC) regime in 2019. It is expected that the 30% EBITDA rule will apply above a threshold of EUR 1 million, with no group exception or “grandfathering” for existing loans. For the CFC rules, the Netherlands intends to apply “option A,” under which certain categories of passive income would be attributed to a taxpayer, only for CFCs that: (i) are statutorily low taxed and/or are established in jurisdictions on the EU list of noncooperative jurisdictions; and (ii) do not have minimum substance.
- **Tackling qualification differences:** As from January 1, 2020, the ATAD 2, aimed at addressing hybrid mismatches, will be implemented into Dutch law. A draft proposal is expected to be issued for consultation in summer 2018.
- **Abuse of the tax system:** The government intends to abolish the dividend withholding tax act in 2020 and replace it with a withholding tax on dividends, interest and royalties that would apply only to companies in low-tax jurisdictions and/or jurisdictions on the EU list of noncooperative jurisdictions. (The Netherlands currently does not impose withholding tax on interest and royalties.) Additional guidance on the Dutch implementation of the principal purpose test under the OECD multilateral instrument also is expected and will mainly revolve around sufficient substance.
- **Transparency:** The Dutch government has expressed its support of the EU initiatives on mandatory disclosure and public country-by-country reporting within the framework of transparency.

### Dividend withholding tax and cooperatives

As from January 1, 2018, the differences between cooperatives and NV/BVs for dividend withholding tax purposes have been abolished and replaced by new rules, under which a full exemption applies if the recipient of a Dutch dividend is located in a tax treaty jurisdiction and the structure is not considered abusive.

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