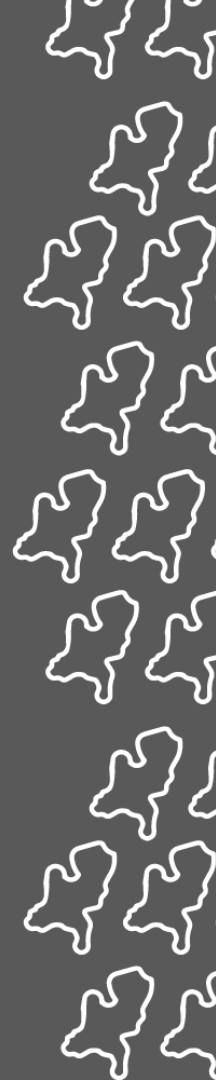


Tax developments in France and the Netherlands

Presentation by PwC France and the Netherlands
15 March 2022





Agenda

01

Opening

02

EU developments

03

French developments

04

Dutch developments

05

Questions & Answers

06

Contact

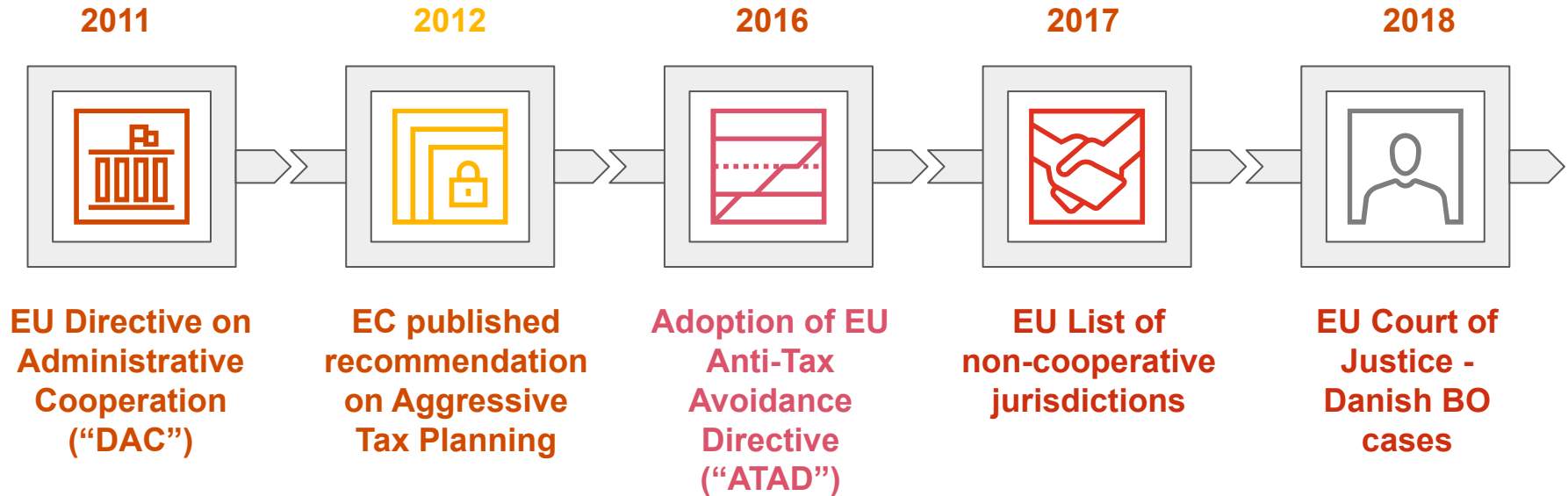
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EU

developments

Setting the scene

What has taken place over the last couple of years, prior to the introduction of the ATAD III Directive?



EU Gateway: Timeline on EU legislative tax developments



Public CbCR Directive
Publication in EU's Official Journal. Requirement for large multinationals to publicly disclose paid corporate income tax.

Pillar 2 Directive proposal
Implementation of a minimum level of corporate taxation of 15%, in line with the OECD 'model rules'.

ATAD 3 Directive proposal
Preventing the misuse of shell entities with no to minimal substance.

DAC8 Directive proposal
Tax reporting obligations for income generated from investments or payments in e-money and crypto-assets. Expected in the first half of 2022.

ETR Disclosure proposal
Obligation for large companies to publish paid effective tax rates, based on Pillar 2 methodology. Expected in the first half of 2022.

Pillar 2 Directive proposal
New taxing rights for market/user jurisdictions.

Transposition deadline ATAD 3 Directive
Preventing the misuse of shell entities with no to minimal substance.

Proposal second basket own resources
Second basket of new resources for revenue for the EU. Expected at the end of 2023.

BEFIT Directive proposal
'Business in Europe: Framework for Income Taxation' will provide a single corporate tax rulebook for the EU. Expected at the end of 2023

Application of ATAD 3 Directive in the EU
Preventing the misuse of shell entities with no to minimal substance



Own resources package
Proposal for three new resources of revenue for the EU: emissions trading, CBAM and re-allocation Pillar 1.

DEBRA Directive proposal
Addressing the pro-debt bias of tax rules, by implementing a debt-equity bias in corporate taxation through an allowance system.

Application of Pillar 2 Directive in the EU
Implementation of a minimum level of corporate taxation of 15%, in line with the OECD 'model rules'.

OECD Pillar 2 'model rules'
Framework for a global system that brings the total amount of taxes paid on multinationals excess profit to the minimum effective rate of 15%.

Directive Proposals own resources
Anticipated EC Directive proposals for three new resources of revenue. Expected in the first half of 2022

Introduction own resources
Introduction of three new resources of revenue: emissions trading, CBAM and re-allocation Pillar 1.

Implementation deadline CbCR Directive
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EU Gateway: Timeline on EU legislative tax developments



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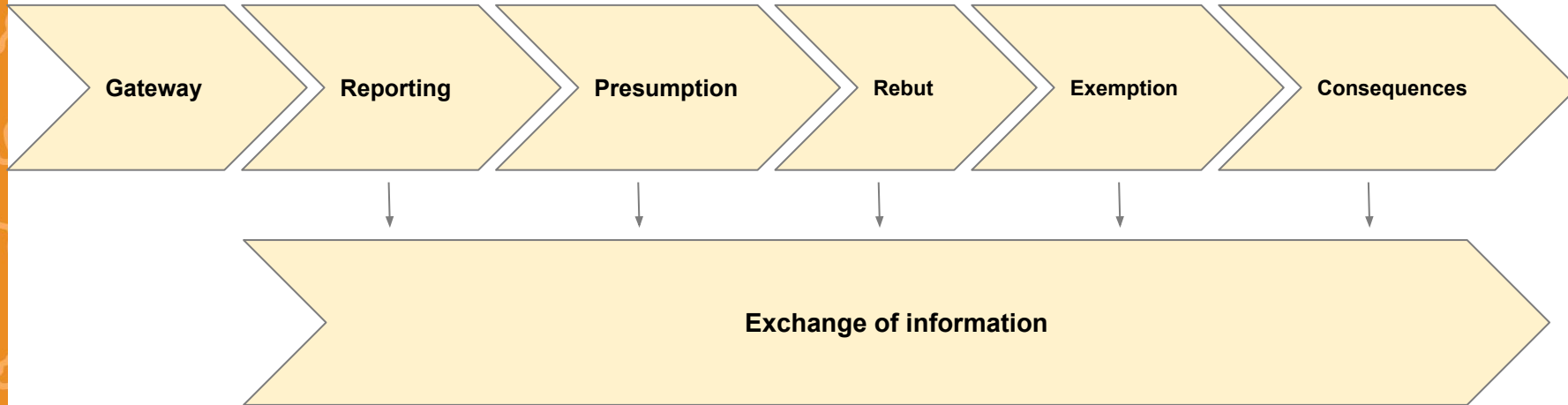
Netherlands

ATAD 3



ATAD 3

Seven steps



ATAD 3

Theoretical framework

- (1) **Gateway**
 - Relevant income test (geographically mobile, 75%)
 - Cross-border activity (60%)
 - Outsourced administration (day-to-day operations) and decision making (significant functions)
- (2) **Reporting** and (3) **presumption**: if not met, presumed to be a shell:
 - Own premises for exclusive use
 - Active bank account within the Union
 - Qualifying director / majority of undertakings employees
- (4) **Rebut** and (5) **exemption**
 - Rebut: No shell company due to commercial rationale of the undertaking
 - Exemption: Shell does not impact tax liability of its BO's of the group
- (6) **Tax consequences**
- (7) **Exchange of information**

ATAD 3

Tax consequences

Member States will exchange information on shell entities in the EU.

Member States may request other member states to perform a tax audit.

Denial to issue tax residency certificate or issuance of certificate with a warning statement.

Denial of tax benefits of EU tax directives and tax treaties by Member States (within the EU)

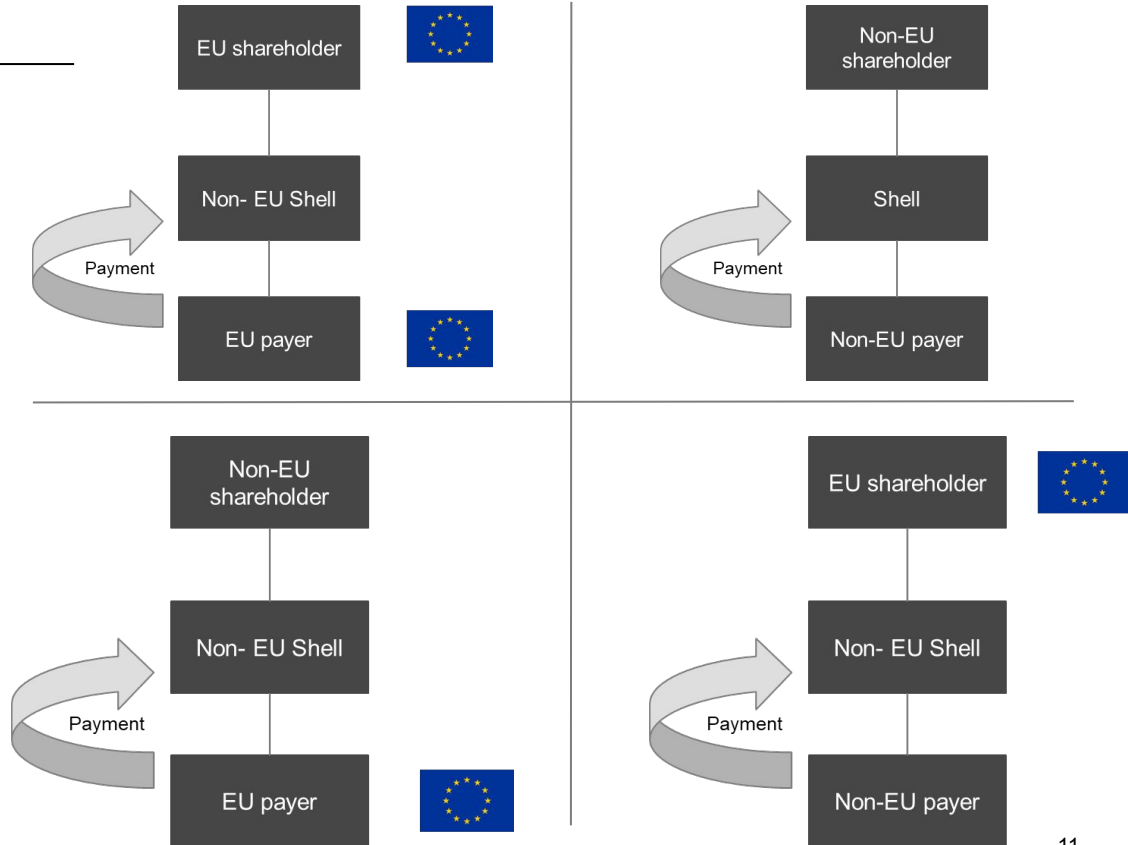
EU shareholder of shell gets a "CFC"-type taxing right of the shell's income.

In case of non-compliance with the provisions of the Proposed Directive, penalties may apply with a minimum of 5% of the shell's turnover.

ATAD 3

Tax consequences - out of scope

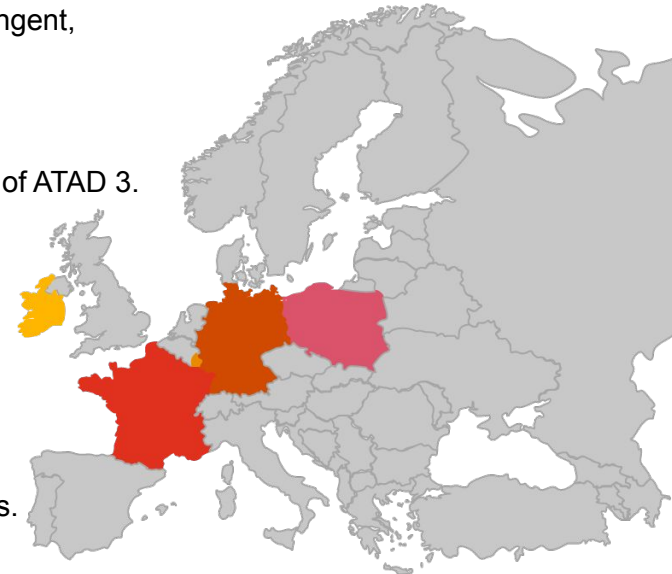
Out of scope



ATAD 3

EU Member State update - legislation

- **France**
France has strict unofficial substance requirements.
Not certain if the ATAD 3 requirements will replace the regime or provide additional requirements
- **Netherlands:** expected existing substance requirements to be more stringent, ATAD3 substance in addition to existing requirements
- **Germany**
Germany applies stricts substance rules + a direct relationship test. The expectation is that the regime will not change due to the implementation of ATAD 3.
- **Luxembourg**
Luxembourg does not have any specific substance requirements.
- **Ireland**
Ireland does not have any codified substance requirements.
ATAD 3 will codify them for the first time.
- **Poland**
Poland does not have any universally applicable substance requirements.
The ATAD 3 requirements will be most relevant to withholding taxation of interest and dividend.



ATAD 3

Questions & concerns

Dutch view: questions & concerns

- Is ATAD 3 proportionate and reasonable?
- ATAD 3 proposal risks the EU's competitiveness with countries outside the EU
- What are the reporting obligations for different entities that are part of the same group?
- How will several gateway criteria be defined?
- What will be the status of the rebuttal certificate?
- How will ATAD 3 relate to subjective criteria?
 - (e.g. beneficial ownership)

French view: questions & concerns

- What does ATAD 3 proposal bring to the table compared to the existing French arsenal (e.g. beneficial ownership test)? more objectivity and therefore predictability in the analysis
- However, France could continue to apply its own measures even if the entity does not qualify as a shell
- The risk of a difference in assessment between States and therefore of the French Tax Authorities questioning the analysis made in the State of the shell
- Additional costs of compliance to be expected for EU taxpayers.
- Penalties (5% of the turnover) are quite important

ATAD 3

Takeaway

Dutch takeaway

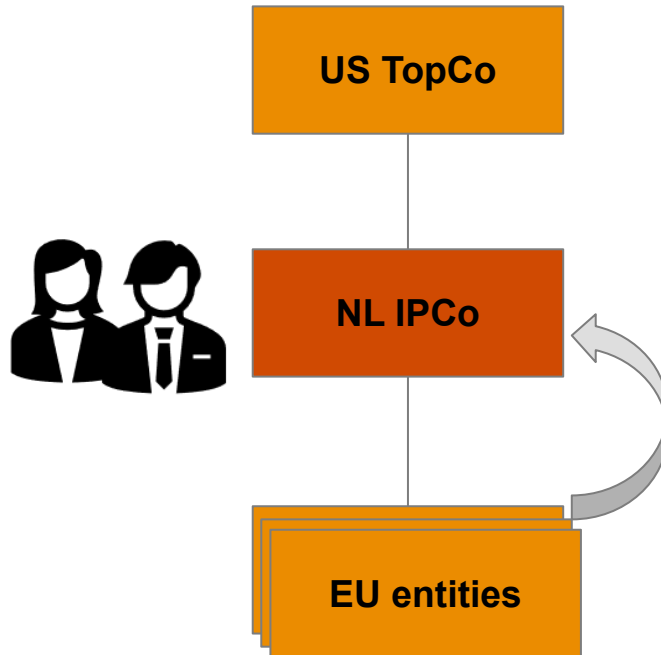
- Applies to all undertakings (no exceptions on size)
- Quasi-retroactive force (Gateway criteria - two preceding years requirement)
- Quite often a Dutch BV uses a trust for external director
- Entity in NL with outsourced services (directors and/ or administration) → at risk
- May all be captured by ATAD3
- Leading to additional (withholding) taxes;
- Information exchange, etc.
- Timely action may reduce the risks
- [Upcoming State of Tax webinar: 12 April](#)

French takeaway

- Minimum substance criteria to be anticipated as from 2022.
- Presumption of minimal substance or lack of minimal substance rule (and rebuttal certification) implementation to be closely monitored
- Necessity to clarify the rules and the EU legislator's intention: a “shell company” within the meaning of the proposal may also cover fully legitimate structure

ATAD 3

Example gateway 3 (outsourcing)

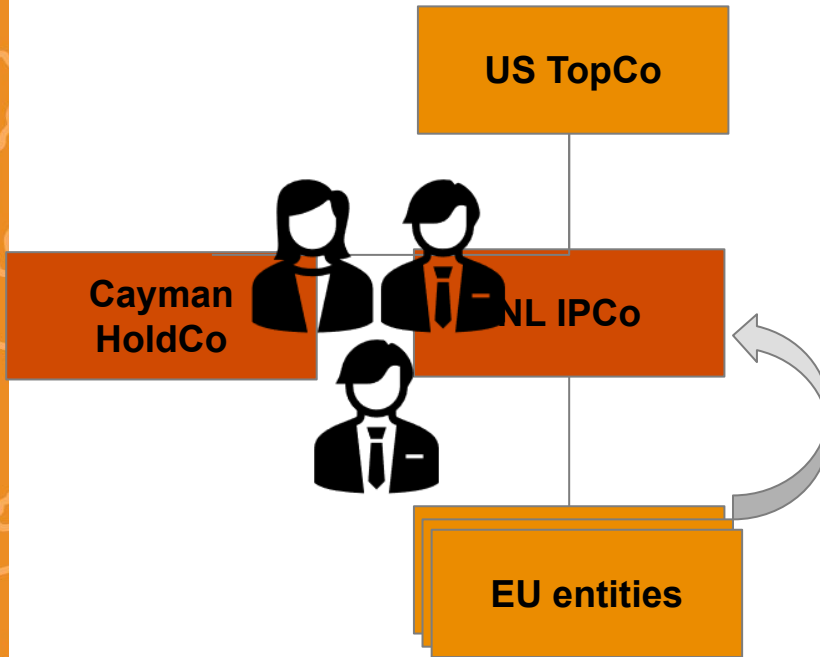


NL IPCo has the following characteristics

- 74% of its income in the preceding two tax years consisted of royalty income.
- 74% of its income is earned from cross-border transactions.
- NL IPCo has various Dutch tax resident directors (40% of its total directors) that exclusively work for NL IPCo. These directors perform decision-making on significant functions for NL IPCo, and their payroll amounts to more than EUR 100,000 annually.
- All NL IPCo's bookkeeping, administration, legal compliance and corporate address is taken care of by a corporate service provider (e.g. trust company).
- The company does not have any premises available - all activities are carried out from the directors home offices.

ATAD 3

Example reporting/ presumption - 3 indicators



NL IPCo has the following characteristics

- Gateway criteria are met.
- NL IPCo has an **own office space** available, rented exclusively in building owned by Cayman HoldCo.
- NL IPCo has a **bank account in the Netherlands**, for which the foreign NL IPCo directors have the exclusive decision power.
- NL IPCo has various Dutch tax resident **directors** have an active role in the decision making processes, in the formal powers that they are vested and participate in day-to-day management for NL IPCo.
- These directors do **also serve as board members for the related company Cayman HoldCo**
- **Bookkeeping, administration, legal compliance activities** for NL IPCo are outsourced to Cayman HoldCo.



Pillar 2

Council directive on ensuring a global minimum level of taxation for multinational groups in the Union (Pillar 2)



What

Global minimum tax of 15% in each jurisdiction



How

Top-up tax at parent level and/or other group entities
Compute for all jurisdictions both > and < 15%



When

2023: Income Inclusion Rule (IIR)
2024: Undertaxed Payments Rule (UTPR)

Scope & Takeaway



Revenue

MNE Group with consolidated annual revenue of **750 mln** Euro or more in 2 out of the last 4 years



Groups

Constituent Entities **related** through ownership or control as defined by the (acceptable) financial accounting standard (are included or should have been included in consolidation).



Location

Constituent entities or PE's in at least **2 jurisdictions**; Domestic Groups **within the EU**



ATAD2

ATAD2

ATAD2 at a glance

When does the rule apply?

ATAD 2 is intended to neutralise payments in intercompany situations that result in hybrid mismatches.

Targeted mismatches:

- Hybrid financial instruments
- Hybrid entities
- Mismatches between permanent establishments

Hybrid mismatch must lead to:

- a tax deduction with no inclusion of the income (deduction, no inclusion; D/NI); or
- double deduction (DD)

Origin Test:
D/NI has to occur as a result of a hybrid mismatch

Primary rule:
Payer State denies deduction

Secondary rule:
Payee State includes the income

ATAD2

ATAD2 documentation

Each taxpayer needs to maintain documentation substantiating the impact of ATAD 2 for Dutch tax purposes.

Documentation may – for instance – include:

- A global structure chart;
- An analysis of the financial instruments, hybrid entities or permanent establishments in the context of Dutch and foreign tax;
- Information showing in which way the hybrid rules have been applied, and a calculation of the applied correction;
- Foreign tax returns and assessments, if they show the tax treatment of the financial instruments, (hybrid) entities; or permanent establishments
- An opinion on the application of foreign law, to the extent relevant for the hybrid qualification.

03

French developments

France

General



France

General

Competitive fiscal climate

- CIT rate of 25% (resulting from a gradual decrease initiated in 2017, 33,1/3%)
- A tax group regime, providing tax consolidation for activities within a corporate group (horizontal and vertical tax group)
- Possibility to carry forward tax losses indefinitely up to 1m€ plus 50% of the taxable result exceeding 1m€ (subject to change of activity rules)
- A wide network of nearly 130 bilateral tax treaties to avoid double taxation and to provide, in many cases, reduced or no withholding tax on passive income
- A broad participation exemption regime (95 to 99 percent exemption for qualifying dividends and 88 percent on capital gains).
- Broad domestic dividend WHT exemption (based on EU law implementation)
- Fully compliant and aligned with the international developments in the OECD and EU and often one of the driving forces behind a coordinated approach to taxation
- Competitive R&D climate with several incentive regimes (e.g. IP box reduced CIT rate regime at 10% on patents and softwares, 30% R&D tax credit, young innovative company status, etc...)

France

General and 2022 Finance Act

International developments

- BEPS, Pillar I and Pillar II
- ATAD1 implemented
- ATAD2 implemented and FTA guidelines published in December 2021
- DAC6
- DAC7 to enter into force in 2023
- Withholding taxes computed on a net basis (i.e., after deduction of expenses) as from 2022 for services provided or used in France and for dividends

Corporate tax developments

- **Amortization of goodwill for tax purposes** (temporary measure applicable to businesses acquired between 1 January 2022 and 31 December 2025)
- Introduction of a **Collaborative Research Tax Credit** amounting to 40% (increased to 50% for SMEs within the meaning of EU law) of the expenses invoiced by qualifying agencies, up to 6 million euros per year.
- Tax audit and preventive measures: the so-called “**Examen de Conformité fiscale**” consisting in a third-party review - before any tax audit - of ten specific tax items (e.g. rules for determining depreciation, provisions, exceptional expenses, etc...).
→ No penalties and late payment interest in case of tax reassessment on the items previously certified.

France

Significant case law



France

Significant case law

Beneficial Ownership

- Background
 - Absence of an autonomous definition of the concept of beneficial owner in French domestic law .
- Several unfavorable cases in 2021 (see after):
 - CE, 5 February 2021, no. 430594, PRS
 - CAA Versailles, 27 May 2021, no. 19VE00090, Alphatrad
 - CAA Bordeaux, 5 October 2021, no. 19BX0073 and 20BX03606, Meltex

Key takeaway and best practice

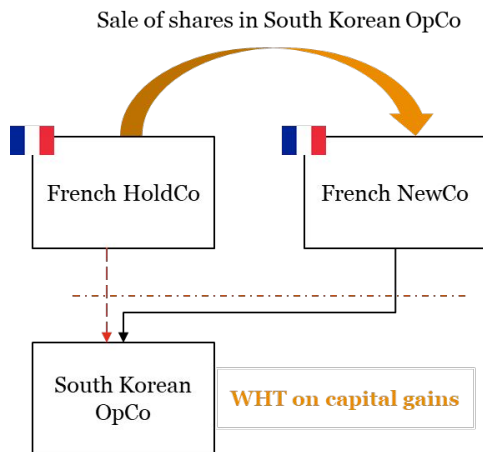
- Risk of double taxation due to the lack of obligation for the Courts to look for the “real” beneficial owner?
- Quid in the case where the recipient of the passive income is located in a foreign country, but the effective recipient is a French tax resident?
- Simplification of corporate group structures to be expected to avoid pure conduit situation (absence of substance and immediate repatriation of the cash received is under scrutiny)?
- Risk assessment in a transactional context and remedies, i.e., upstream securitization by way of ruling?

France

Significant case law

Participation exemption on capital gains

CE, 15 November 2021, n° 454105, SA L'Air Liquide



Ruling

- Since 2007, capital gains realized by a company liable to CIT on the sale of securities held for at least two years are tax exempted, but subject to the add-back of a share of costs and expenses fixed at 12% of the gross amount of the capital gain
- The disputed FTA's guidelines denied the right to credit on French CIT foreign WHT paid on capital gain in accordance with DTT since the long-term capital gains are exempted
- The French Administrative Supreme Court censured the FTA's position and ruled that the 12% add-back must be considered as taxing, at a reduced CIT rate, the capital gains

Key takeaway

- Companies should now be able to offset against CIT paid on the 12% lump sum the tax credit resulting from the taxation incurred abroad if applicable based on the DTT provisions.
- In addition, companies should be able to file claims to seek the refund of part of the unused foreign tax credit for the last 3 FYs.

France

Cabinet priorities



France

Cabinet priorities

Global trend

- Specific context, **election year**:
 - Presidential election to be held in April and May 2022
 - Candidates tax programmes are mainly oriented on patrimonial/individual measures
- **French Presidency of the European Council** until July 1st 2022:
 - French Presidency supports the high priority of the OECD pillar 2 reform implementation in EU law
 - French Presidency expressed its intention to strengthen administrative cooperation between Member States and the fight against fraud and tax evasion.

04

Dutch developments

Netherlands

General



Netherlands

General

Competitive fiscal climate

- **CIT rate** of 25.8% (2022)
 - First € 395,000 taxed at 15%
- An **efficient fiscal unity regime**, providing tax consolidation for Dutch activities within a corporate group
- A **wide network of** nearly 100 bilateral **tax treaties** to avoid double taxation and to provide, in many cases, reduced or no withholding tax on dividends, interest and royalties
- Clarity and **certainty in advance** on the tax consequences of proposed major investments in the Netherlands
- A **broad participation exemption** (100 per cent exemption for qualifying dividends and capital gains) which is vital for (European) headquarters.
- Broad domestic dividend **WHT exemption**
- **Favourable expat tax program** with a 30 percent personal income tax advantage for qualified, skilled foreign employees
- Fully compliant and **aligned with the international developments in the OECD and EU** and often one of the driving forces behind a coordinated approach to taxation

Netherlands

General

International developments

- BEPS, Pillar I and Pillar II
- ATAD1 implemented
- ATAD2 implemented as per 2022 for reversed hybrids
- DAC6
- DAC7
- Conditional WHT on interest and royalties as from 2021
- Conditional WHT on dividends as from 2024

Corporate income tax

- New TP anti-mismatch rules
- Interest deduction (limitations)
 - Anti-abuse for affiliates
 - EBITDA rule: 20% as per 1 January 2022
- Innovation box regime
- Pending proposal (with retroactive force): exit tax

Netherlands

Coalition agreement '21-'25



Netherlands

Coalition agreement '21-'25

Corporate income tax

- Combating tax avoidance
- Digital services tax
- Minimum rate for profit tax (OECD Pillar II)
- Measures with regard to the CIT base
- CFC measure

Netherlands

Loss compensation



Netherlands

Loss compensation

Limited to 50% of the annual profit

- Introduced as per 1 January 2022
- Inspired on the French regulation
- Threshold of EUR 1 million
- Only 50% of annual profit to be offset
- Remainder: carry forward indefinitely
- Transitional law:
 - Before 1 January 2013: remains compensable for 9 years
 - As from 1 January 2013: in principle indefinitely
- → Only loss compensation in case of a profit (and the € 1 million threshold)

Netherlands

Loss compensation

Example

A taxpayer attains the following results:

- Year 1: profit of € 1 mio
- Year 2: loss of € 4 mio
- Year 3: profit of € 4 mio

	Year 1	Year 2	Year 3
Result	€ 1 mio	(€ 4 mio)	€ 4 mio
Step 1		€ 1 mio	
	-	(€ 3 mio)	€ 4 mio
Step 2			(€ 2.5 mio)
	-	(€ 0.5 mio)	€ 1.5 mio

Explanation

- Step 1: € 1 mio of Year 2 can be offset against the profit of Year 1 (threshold)
- Step 2: € 2.5 loss of Year 2 to be offset with Year 3 profit (1 mio threshold + 50% of (4 - 1 = 3))
- Result:
 - Tax due on €1.5 mio
 - Available for carry forward: (€0.5) mio
- CIT current rules ca. 375k (25% of €1.5 mio)
- CIT old rules ca. 250k (25% of €1 mio)



Netherlands

Priorities cabinet

Netherlands

Priorities Cabinet

Letter to the Parliament 16 February 2022 (1)

1. Environment

- Tightening CO2-taxation
- Introduction CO2-price industries

2. Business taxation

- Implementation OECD/EU agreements Pillar 2
- Improving business succession

3. Labor and income tax

- Relief tax burden

Netherlands

Priorities Cabinet

Letter to the Parliament 16 February 2022 (2)

4. Wealth tax

- Taxation of actual return on investments instead of deemed return
- Taxation of real estate rent income

5. Living and health

- Taxation of real estate rent income
- Reducing/abolishing gift exemption 100,000 EUROS for owner-occupied homes
- Increase tobacco excise duty with 10 EUROS each pack of cigarettes

05

Q&A

06

Contact

Contact us!



Eve Castex

Partner

+33 6 45 86 93 69

eve.castex@avocats.pwc.com



Romain Bureau

Associate

+33 6 43 17 23 20

romain.bureau@avocats.pwc.com

Contact us!



Michel van Dun
Senior Manager
+31 6 10421199
michel.van.dun@pwc.com



Jan-Willem Thoen
Senior Director
+31 6 10029571
jan-willem.thoen@pwc.com

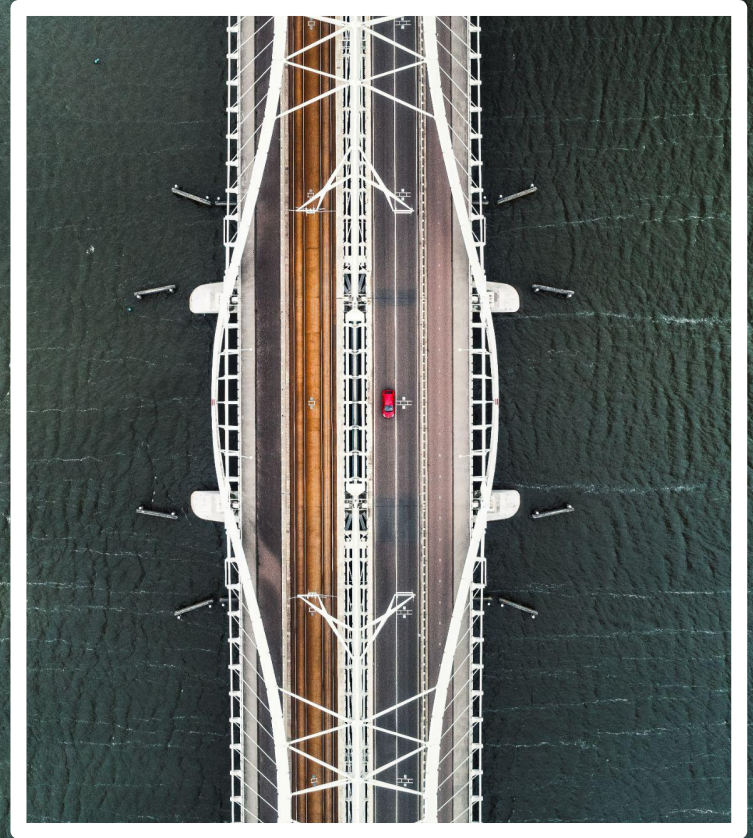


Fay Govers
Senior Associate
+31 6 83070999
fay.govers@pwc.com

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