# TAXE Committee : Country specific fact sheet
# Netherlands

*Roadmap for Green delegation*

**Key data**

- Regular Corporate income tax rate amounts to 25,5% (above EU average), but effective tax rate is much lower because of the selectivity when defining taxable profit
- Extensive Tax rulings practice combining Advance Pricing Agreements (APA) and Advance Tax Rulings (ATR). Substance requirements are still a big issue in spite of NL plans to strengthen the requirements (See 1)
- IP box regime with a 5% tax rate on qualifying income → Lowest among the

  EU MS endowed with such tax regime. (See 2)
- Extensive DTT network which allows multinationals to substantially reduce withholding taxes on dividends (down to 0%), no or very low withholding tax levied on interest and royalty payments on financial flows (See 3)
- 80 of 100 biggest firms have financing firms in the Netherlands. According to SOMO NGO, the Netherlands is hosting around 20.000 so-called "letter box" companies which are set up for tax purposes only (See 4)
- Netherlands is one of the toughest opponents to the CCCTB (See 5)

**1) The Dutch tax ruling features**

The Netherlands have traditionally had an extensive advance rulings practice. It mainly regards transfer pricing agreements. This is for instance the case with the Starbucks Manufacturing EMEA BV ruling where the substance of the transfer pricing agreement has been challenged by the Commission in 2014. (more detail below)

In this regard, both Advance Pricing Agreements (APA) as well as Advance Tax Rulings (ATR) can be concluded.
They are binding for the Taxpayer and the Dutch Tax Authorities (This is not the case in every Member-State, see Ireland for instance)

There are some statistics about APA and ATR :
- On average 420 ATRs and 226 APAs have been issued annually (2010-2014).
- The average annual number of requests for ATRs/APAs denied, withdrawn or set aside amounted to 175.

Guidelines were issued in 2004. It formalized the procedure in an advance tax ruling (ATR) policy and an advance pricing agreement (APA) policy. These 2004 decrees

also provided more clarity on how the fiscal rules within the APA/ATR practice should function in regard of the so-called arm's lenght principle set internationally.

Triggered by the investigations of COM in the Starbucks case, the Dutch government claims to have tightened the substance requirements with a recent decision in 2014,

→ Starbucks APA has been under the scrutiny of the European Commission for the Netherlands are suspected of having granted a selective tax advantage to the company in approving its transfer-pricing arrangements without verifying whether they complied with the so-called Arm's length principle.
The APA under scrutiny was concluded in April 2008 between Starbucks Manufacturing BV and the Dutch tax authorities.
It was used by Starbucks Manufacturing BV to calculate its corporate income tax basis in the Netherlands.

In short, 3 areas of the APA granted in 2008 could be an issue regarding EU State-Aid rules :

- Transfer pricing agreement in regard of the toll-maufacturing seems to be inaccurate (Transfer-pricing manipulation)
- Adjustments accepeted by the Dutch tax authorities regarding these agreements also raise doubts
- Calculation of the royalty payments and the level of the royalties in question might not be linked to the value of the Intellectual property in question

Dutch State Secretary for Finance, Eric Wiebes, responded that Netherlands fully applied the arm's lenght principle and therefore no Illegal State Aid was provided. According to him, these transfer pricing agreements were substantiated and documented enough.

Recently, Netherlands made a goodwill gesture in - supposedly - strengthening the substance requirements shortly after the case was opened.
These are the substance requirements that have been enacted in the decree of 12 June 2014:

-At Least half of the total number of statutory and decision making board resides or is actually established in the Netherlands.
-The board members resident or established in the Netherlands have the necessary professional knowledge to carry out their duties properly (such as closing transactions, ensuring proper handling of transactions concluded.)
-The establishment has qualified personnel for the proper implementation and registration of legal transactions.
-The governing decisions are taken in the Netherlands.
-The main bank accounts of the corporation are held in the Netherlands.

-The accounting is conducted in the Netherlands.
-The establishment- at least until the key moment - correctly fulfilled all its reporting obligations. This may include corporate tax, etc.
-The business address of the body is in the Netherlands. The legal entity shall, to the best knowledge of the body, not (also) be considered as a tax resident by another country.
-The legal person has equity corresponding to the functions carried out by the legal person (taking into account the assets used and risks assumed).

**Criticism on the NL ruling practice:**

Although the Dutch government is enacting new legislation, "substance" remains an ongoing issue in the Netherlands. The conditions as set out in the new decree may still be circumvented by dodging multinationals.
Letterbox companies have still not been banned from settling in the Netherlands (See 4).
The decree's enforcement has to be followed-up to see whether NL delivers.

**2) "Innovatiebox" The Dutch version of Patent box**

Introduced in 2007, the IP box has been a key incentive in the Dutch corporate tax system.
Corporations liable to Dutch corporate income tax can opt for the so called patent-box. This is a special regime applying for profits - i.e. royalties.
Condition : these royalties must be received from self-developed patented intangible assets.
Broad definition of IP but not as wide as in Luxembourg: Qualifying income ranges from patents and certified R&D activities. Nevertheless, brand and trademark rights do not qualify making the regime not as encroaching as the Irish or the Luxembourgish ones.

In case the patent-box is applicable revenues received from intangible assets will be subject to a <u>5% (until 2010: 10%) corporate income tax</u>, rather than the 25,5% regular corporate income rate.

The scope of the regime has also been significantly widened by eliminating the applicable maximum amount. Indeed, prior to 2010, the maximum income that could benefit from the reduced rate equalled four times the amount invested into research and development.
Basically, before 2010, the profit you could deduct from your taxable income was capped to 4 times the amount you invested in developing, let's say, a patent.

E.g. : I invested 100 in X, X generated an income of 800.
I could only deduct 400 (4 times the amount invested as a ceiling)

Now, there's no such a ceiling. So under the 2010 reform, I can deduct as much income deriving from R&D as I want without the "4 times amount invested" limit.

→ Under the Innovation Box regime, there is no maximum amount of benefits a taxpayer can obtain. Therefore, now, a taxpayer may benefit from the Innovatiebox on an unlimited IP income.

**Criticism on the NL IP box regime:**

No cap for deductions invites to abuse the scheme.
The Netherlands have trouble coping with the modified Nexus approach advocated by the OECD.

**3) No withholding tax on interests and royalties : The stronghold of the Netherlands' double-taxation agreement (DTA) network**

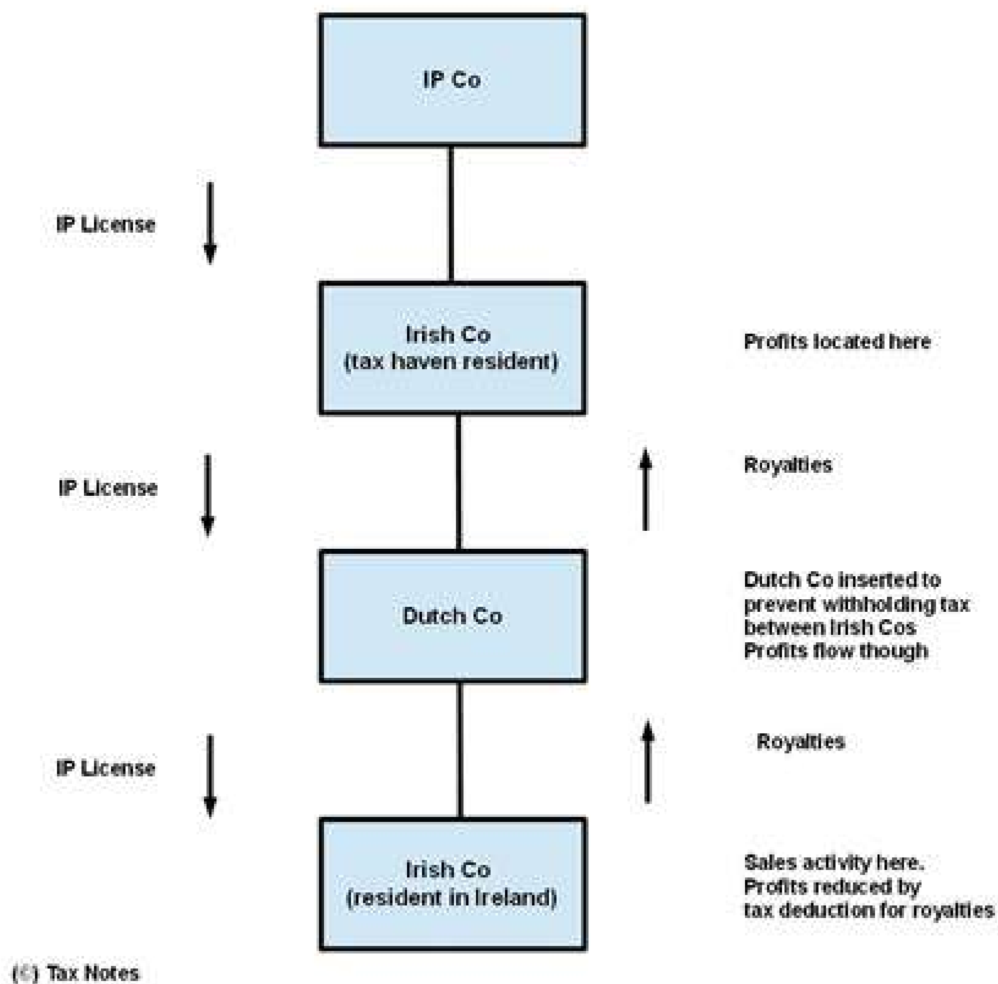
The Netherlands has one of the most extensive tax treaty networks in the world with more than 90 DTA in place according to PwC. These DTA include tax haven jurisdictions such as the Barbados, Curacao, Panama...

Some Double Taxation Treaty highlights:
Curacao: Dividend Withholding tax 0%
Ethiopia: Dividend Withholding tax 5%; Interest Withholding tax 5%; Royalty Withholding tax 5%
Panama: Dividend Withholding tax 0%; Interest Withholding tax 5%; Royalty Withholding tax 5%
Hong-Kong: Dividend Withholding tax 0%; Interest Withholding tax 0%; Royalty Withholding tax 3%

Profits from Dutch located subsidiaries/branches of a foreign company can enjoy tax free due to the full participation exemption and foreign branch exemption regimes in numerous DTAs.
E.g. : if a dividend recipient is a company that owns at least 25% of the capital in the Dutch company, the withholding tax on dividend is lowered or even suppressed.
Just take the case of the other scrutinized jurisdiction:
- Luxembourg qualifying recipient : 2,5%
- Switzerland qualifying recipient : 0%

The Netherlands do not impose withholding tax on interest- and royalty payments.
Result: Double non-taxation.
The dividend withholding tax rate is 15%.

In the following simplified diagram on the Double Irish structure, we can see how crucial is the role of the Dutch company in order to prevent royalties transferred from the Irish operating company that generates most of the IP exploitation income being taxed.




**Criticism on the Dutch withholding tax exemption:**
DTAs with tax havens that allow to avoid taxes on interest and royalty payments.
Tax revenue lost for the Netherlands and other EU member states.

## 4) Letterbox companies

The "letterbox" companies in the Netherlands are officially called special financial institution (in Dutch: BFI). They increase the phenomenon of double non-taxation by making the most of the loopholes contained in DTAs.
Indeed, the income (dividends, interest, royalty payments) redistributed by these "letterbox" may not be subject to withholding tax thanks to the well-kept Dutch double-tax treaty network.

It is not exaggerating to say that these “letterbox companies” are set up in the sole purpose of avoiding taxation on the potential income aforementionned.
In a nutshell :

- 23.000 letterbox companies in the Netherlands according to estimates
- Managed by 176 licensed trust firms
- Just for the year 2011, they managed €8 trillion worth of transactions
- More than 400 US companies have their European headquarters in the Netherlands fuelling the letterbox phenomenon.

As the Netherlands have committed to OECD and EU standards and that the substance issue is at the core of the BEPS plan or discussed at the Transfer-pricing EU group, the letterbox system may be challenged in the near future in spite of dutch efforts to make it look acceptable in national law.

**Criticism on Dutch Letterbox Companies:**
Letterbox companies are very easy to set up and although the substance requirements have been strenghtened, lastly in a 2014 decree (see 1), they have not yet been banned.
Their number remains stable and the 2014 decree demonstrates that the Netherlands are not willing to overhaul their corporate tax system and their advantageous DTA network.

## 5) Netherlands is one of the Common Consolidated Corporate Tax Base (CCCTB) slingers

The CCCTB is a well-worn issue now. It has been endorsed both by the European Commission with its 2011 proposal as well as the European Parliament with its 2013 resolution calling for a compulsory CCCTB.
However, it has been blocked at European Council level for 4 years now.
Some MS at the Council have advocated for a comprehensive CCCTB (France, Germany and Italy) and were ready to endorse the proposal as well.

The Netherlands was one of the toughest opponents to the CCCTB (along with Ireland, the UK and Sweden...).

In a 2011 reasoned opinion addressed to the Commission, the Dutch House of representatives was very critical:

> *"The Netherlands feels that CCCTB in its current form may result in a reduction of its tax base with 30% due to cross-border loss compensation. In addition, the CCCTB ignores key value drivers such as intangibles and financial assets.."*

It also cast doubt on the proposal for more selfish motives such as a negative impact on GDP and inward investment.

→ We should not forget the true motive for this strong rejection: if the CCCTB is implemented, room for transfer-pricing manipulations between the Dutch tax authorities and MNEs, profit shifting manoeuvers or tax optimization through the patent box regime would be seriously diminished.

The Dutch Parliament and its government are digging their heels on the CCCTB because they are following a tax competition doctrine that would be seriously undermined by a common consolidated corporate tax base.
Their position ought to be challenged (See questions below).