Master Thesis Fiscal Economics 2017/2018

EUCOTAX Wintercourse 2018:

Challenges to tax autonomy in an era of conflicting political goals
Subtopic 6: Tax autonomy and the administration of tax law

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“If you exchange information internationally, you must simultaneously strengthen data protection.
Those are two sides of the same coin.”

Gijs de Vries, European Union’s first counter-terrorism coordinator 2004

Executive summary

This master thesis is a contribution for describing, analyzing and evaluating the international and EU regulations concerning the information exchange and the implementation of those cooperations within the Dutch tax system. It is about the difficulties of the balance between effective and efficient administrative assistance to combat tax avoidance and evasion, and the interests of the involved taxpayers on the other hand. This literature review in combination with comparative law will illustrate the problem of globalization on the domestic tax systems, the cooperation between States' tax authorities, the Dutch tax policy concerning international cooperation, the important criteria for effective and efficient exchange, the perspective of the Dutch tax autonomy, and provisions of participating EUCOTAX Wintercourse State's domestic law. It will be discussed whether the current law need to be improved, on which elements and a recommendation will be given how optimal information exchange should be.

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List of abbreviations

Abbreviation	Explanation
APA	Advance Pricing Agreement
Associates	Associated companies
ATR	Advance Tax Ruling
AWR	General Law on State Government 1959
BEPS	Base Erosion and Profit Shifting
CbC MCAA	Multilateral Competent Authority Agreement on the Exchange of country-by-country reports
CbCR	Country-by-Country Reporting
CITA	Corporate Income Tax Act 1969
Country report	country-by-country report
CRS	Common Reporting Standard
CRS MCAA	The CRS Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information
DAC	Directive on Administrative Cooperation, Council Directive 2011/16/EU
DTC	Double Taxation Convention
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
FATCA	Foreign Account Tax Compliance Act
FFI	Foreign Financial Institution
FI	Financial Institution
PE	Permanent Establishment
Privacy Directive	Council Directive 95/46/EC
G20	Group of Twenty Ministers of Finance and Presidents of Central Banks
Global Forum	Global Forum on Transparency and Exchange of

	Information for Tax Purposes
IGA	Intergovernmental Agreement
IRS	Internal Revenue Service
MAP	Mutual Agreement Procedure
MCAA	Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information
MLI	Multilateral Instrument
MNE	Multinational Enterprise
NL IGA	Dutch Intergovernmental Agreement
NFFE	Non-Financial Foreign Entity
NFE	Non-Financial Entity
OECD	Organization for Economic Cooperation and Development
OECD MC	Organization for Economic Cooperation and Development Model Convention on Income and on Capital
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TIEA	Tax Information Exchange Agreement
UN	United Nations
US	United States
Strasbourg Convention	Multilateral Convention on Mutual Administrative Assistance in Tax Matters
WIB	International Assistance with Levying Taxes Act 1986

Acknowledgment

The EUCOTAX Wintercourse project finds its origin in 1993 and was introduced by the University of Hamburg, the University of Paris and Tilburg University. In the following years more and more universities participated in this project, until the number of fifteen universities from thirteen different States. This year it was the 26th edition of the EUCOTAX Wintercourse project and was held in Scotland, Edinburgh. Ultimately, the participants' intention is to cover the entire European Union. Hence a gradual extension of the number of participating States is necessary.

Thinking back to the EUCOTAX Wintercourse project, I experienced it as very satisfying. In the first place I did not expect that it would be that intensive, especially the writing of my paper appeared to be a lot of effort. Nevertheless, I am very satisfied that I participated as student of Tilburg University. I am proud of what I have accomplished and the experience I got due to this project. Meeting a bunch of new international students and professors of all over the world was very motivating, which was for sure the best part of this whole project.

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Dana Koert

Section 1 Introduction

§1.1 Introduction

"Effective exchange of information is the key to global tax co-operation through the implementation of international tax standards and other instruments to tackle tax avoidance and evasion. Enormous progress has been made to establish high standards of tax transparency and information sharing so as to improve tax authorities' ability to deter, detect and disrupt tax evasion and avoidance." [1] Already a strong intensification of cooperation between States, both on the level of the European Union (EU) and on international level, is realized, concerning an increasingly effective and efficient exchange of information. This cooperation between States has been strengthened to prevent the cross-border tax avoidance and tax evasion. Such matters are more revealed due to the increasing emergence of media and therefore currently high on the fiscal agenda to combat.[2]

Through globalization, the world becomes a 'global village', in which the States' economies become more connected.[3] Hence, it is getting easier for individuals and companies to be very mobile and obtain the possibility to operate as a global villager. Businesses have also the need to cross national borders on the basis of competitive considerations.[4] Increasingly parts of the tax resident's income or profit will find their origin in States other than their State of residence, or at least are strongly controlled by foreign facts and circumstances.[5] This causes that taxation is not limited to a State's territory anymore. (Most) States have included formal rules in their national tax law to ensure the implementation of substantive tax rules, such as information obligations and penalties in the event of non-compliance.[6] Such formal tax rules are effective in a nationally operating society. However, a problem arises once tax residents become part of the international society. Application of the aforementioned formal implementing rules is then strongly limited by the principle of sovereignty.[7]

A State is not allowed to execute its national legislation outside its own territory, because the principle of sovereignty prevents a State from operating independently within the jurisdiction of another

[1] This citation can be found on the OECD website: http://www.oecd.org/ctp/exchange-of-tax-information/about-exchange-of-tax-information.htm.
[2] Happe, R.H. (2015). Fiscale ethiek voor MNEs. *WFR 2015/938.* Paragraph 2.
[3] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 1.
[4] A. Pleijsier, *Internationale fiscale informatieverplichtingen en gegevensuitwisseling,* Arnhem: Gouda Quint 1995. p. 13.
[5] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 1.
[6] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 1.1.
[7] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 1.1.

State.[8] Originating in the past, the limit on the exercise of public powers in the territory of a different State is based on this principle of sovereignty. It is a multidimensional concept and a distinction can be made between internal and external sovereignty.[9] Internal sovereignty concerns the formation of powers within a State. It is about who may, within a certain legal order, under what conditions, set binding, general rules or who is, in specific cases, able to take binding decisions. It is the capability of an authority to establish its own legal order, without the obligation to consider other's interest. In this case sovereignty is a claim to autonomy.[10] Not to be subordinated to any power and cannot be bound in contradiction of its own willingness. External sovereignty, on the other hand, is all about autonomy regarding external actors within the international order with the associated characteristics, rights and obligations.[11] It concerns the recognition of an exclusive authority within the boundaries of its own territory and regarding its own subjects. No external authorities, such as another State, international or supranational[12] organisations, may exercise power on the States territory without being derived from that of the sovereign.[13]

The problem of the territorial limitation of national powers, is the so-called regulatory problem. Due to this it is difficult to determine the correct tax claim by a State itself and results in the increasing need for each other's assistance to receive relevant information for the correct exercise of their tax law. The tax authorities' inability to levy correct taxes, because of the lack of information, leads to undeclared and untaxed revenues, which subsequently leads to a substantial loss of national tax revenues.[14] Hence, it is important to organize a more 'efficient and effective neutral tax system' between the States by means of the internationalization and harmonization of tax systems.[15] In international situations, the regulatory problem leads also to reduced possibilities for preventively monitoring compliance with tax rules, as well as reduced possibilities to take repressive action against fraud.[16] The first leads to better opportunities for the taxpayer to maintain tax-advantaging constructions, or other gray activities in international situations. The latter leads to a lower risk of being caught and thus to more tax fraud will occur. The problem arising

[8] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 1.
[9] Wheaton, Elements of International Law, p. 28: Reference from K. Manusama & P. Rauwerda & P. van Schie & J. Toet & D. Turk, *Soevereiniteit*, Den Haag: Oranje/Van Loon 2016. p. 9.
[10] See paragraph 2.1 for further explanation of the concept of autonomy.
[11] K. Manusama & P. Rauwerda & P. van Schie & J. Toet & D. Turk, *Soevereiniteit*, Den Haag: Oranje/Van Loon 2016. p. 9-10.
[12] Supranational means, literally translated, above (supra) the State (national). It concerns organisations that can establish agreements and regulations to which the Member States must comply with. From here this will concern, in the context of this master thesis, the European Union as supranational organisation that establish supranational law. This supranational law is a specific source of international law, with an effect and application in the national law of each Member State of the European Union.
[13] K. Manusama & P. Rauwerda & P. van Schie & J. Toet & D. Turk, *Soevereiniteit*, Den Haag: Oranje/Van Loon 2016. p. 18.
[14] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 2.
[15] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 4.
[16] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 1.2.

from this regulatory problem will be mentioned as the social taxation problem of our globalizing area.[17] This social problem is, in view of the regulatory problem, only solvable (or limited) by States, by requesting permission from another State to implement their domestic law on its territory or to request assistance in the form of mutual assistance in tax matters, such as the exchange of information.

§1.2 Motivation of the research

More focused on the Netherlands, the international intensification concerning the information exchange is essential for the open Dutch economy, because the foreign market is of great importance for Dutch entrepreneurs.[18] To create an attractive investment climate for national and international businesses, the basis of the Dutch tax system intends that businesses have as little as possible obstructions to operate across the border.[19] However, the downside of the international orientation, is that the Dutch tax system is also susceptible to artificial structures of internationally operating businesses that avoid and evade taxation. This will be harmful for the tax moral, the international Dutch reputation, and thus the investment climate that the Netherlands wants to create.[20] Tax evasion is illegal and, for that reason, little discussion is necessary that such engagements are punishable. Additionally, legal tax avoidance need to be combated. Not only the Netherlands is struggling with tax residents who are avoiding their tax obligations, it is an international issue where all States have to deal with. Therefore, it can only be effectively combated at an international level, [21] because undertaking unilateral measures means that the problem of international tax avoidance will only move up to others.[22]

The fiscal agenda of the Dutch parliament contains a high priority to combat tax avoidance and evasion. Additionally, they have the ambition to change the general thought that the Netherlands cooperates in tax avoidance structures of international businesses.[23] Concerning the protection of the tax base, the Dutch State Secretary[24] has introduced a broad package of measures that will also improve the

[17] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 1.2.
[18] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 1.
[19] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 1.
[20] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 1.
[21] Wilde, de M.F. (2016). Het OESO BEPS-project in vogelvlucht. *MBB 2016/11-01*. Paragraph 2.
[22] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 1.
[23] Recently, the Netherlands is in the news as a tax haven, because they are involved in big tax avoidance scandals of international MNEs. See the Starbucks case for example.
[24] On 23 February 2018, the State Secretary of Finance, dhr. Snel, has sent his memorandum 'Tax evasion and tax evasion approach' to the government. In this memorandum he describes a broad package of measures to combat tax avoidance.

current exchange of information in the respect of transparency.[25] In discussions to tackle tax avoidance and evasion, transparency is seen as an important instrument.[26]

It can be concluded that the Netherlands, and other States, are already on track of tackling (and prevent more) tax avoidance and evasion due to the strong intensification of cooperation aimed on an increasingly efficient and effective information exchange. However, it is not optimal yet and it is a long way to go to organize (more) optimal procedures. This master thesis is written in response to this intended international optimization, also (re)considering the taxpayer's legal protection, and the Dutch tax policy about the intended improvements in this context.

§1.3 Purpose of the research

The main goal of this master thesis is to examine how to organize efficient and effective information exchange regulations contributing to achieve a solution for the regulatory problem and the inherent social problem.[27] This research will also analyze how these standards for international administrative assistance can ensure the feasibility of the national powers in a globalizing context, focused on the Dutch tax autonomy, and the Dutch influence on these instruments. The examination concerns an analysis and evaluation of a wide scope of information exchange regulations. Specifically illustrating on international level it concerns regulations of article 26 OECD MC, the Strasbourg Convention, TIEA, FATCA, CRS, Rulings and CbCR, and on EU level it concerns Directive 2011/16/EU (DAC) and its amendments due to the regulations of CRS, Rulings, the UBO-register and CbCR. On Dutch level it is about the implementation of foregoing regulations in a Dutch Act, the *WIB,* and the national Act for the levy of taxes of Dutch tax residents, the *AWR.* However, this master thesis main focus is on tax information exchange instruments, although it is important to note that other aspects of administrative cooperation are also increasing, including assistance in investigation, enforcement and collection of taxes and the management of enhanced relationships between governments and (multinational) businesses.[28]

[25] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 1.
[26] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 3.
[27] See the introduction of this master thesis.
[28] Stewart, M. (2012). Transnational tax information exchange networks: steps toward a globalized, legitimate tax administration. *World Tax Journal, June 2012.* Paragraph 1.

In accordance with the research purpose, the main research question of this master thesis is*: "To what extent have the current administrative assistance collaborations for the exchange of information to levy taxes impact on the Dutch tax law and how should these cooperations concerning the information exchange be, from a Dutch point of view, to achieve optimal combatting of tax avoidance and tax evasion, both in the perspective of the Dutch tax autonomy?"*

From this main research question arises two main elements: 'how is' and 'how should'. The first element is descriptive, which describes and explains the actual state of affairs.[29] It describes the current legal tax system on the field of the exchange of information. The second element is of a normative (prescriptive) character that indicates how it should be. It is related to ethic that, in a general sense, tries to determine the criteria to judge whether an action can be qualified as right or wrong, and to be able to evaluate the motives and consequences of this action. [30] This moral principle is the normative equivalent of the scientific formula that is applied to concrete situations.[31]

To formulate an answer on the main research question, several sub-questions are prepared:

1. What criteria, of legislation and regulations, are important to combat tax avoidance and tax evasion? (section 2)

2. Generally, what is the hierarchy of international and EU law in the Dutch domestic (tax) system? And, therefore, what is the influence of those on the Dutch tax autonomy? (section 3)

3. What are the current relevant legislation and regulations on international and EU level? What is the influence of those on the Dutch tax autonomy? (sections 4-8)

These sections concern the following international and EU legislation and regulations: article 26 OECD MC, the Strasbourg Convention, TIEAs, Directive 2011/16/EU (DAC) and its amendments, FATCA, CRS, Rulings and CbCR.

4. Concerning the legislation and regulations of section 4-8, what provisions meet the criteria of the benchmark and/or on what criteria has the current legislation and regulations a lack? (section 9)

5. To what extent do the tax law of the participating EUCOTAX Wintercourse States meet the criteria of the benchmark? What provisions are interesting for the Dutch and/or international tax law to combat tax avoidance and tax evasion? (section 10)

[29] Rebel, F. (red.) & Wolf, S. (2017). Basisboek wijsgerige ethiek. *ISVW Uitgevers.* P. 10-13.
[30] Rebel, F. (red.) & Wolf, S. (2017). Basisboek wijsgerige ethiek. *ISVW Uitgevers.* P. 10-13.
[31] Rebel, F. (red.) & Wolf, S. (2017). Basisboek wijsgerige ethiek. *ISVW Uitgevers.* P. 10-13.

§1.4 Delimitation

Two main topics are discussed in the EUCOTAX Wintercourse questionnaire.[32] It describes that both the tax assessment and tax collection phases are relevant within international cooperation, primarily aimed to prevent tax avoidance and evasion. In this master thesis this second phase, the collection of taxes, will be left out of consideration, to limit the scope of the research. This phase includes a smaller part of the Wintercourse paper and for that reason the focus within this research is limited to the administrative assistance to levy taxes.

The main topic, the exchange of information, of this master thesis has a wide scope. Hence, in order to answer the main question, it is necessary to delimitate the scope of the research. Firstly, it discuss the international and supranational tax law in accordance with the perspective of the Netherlands. Secondly, this master thesis disregard some legislation and regulations in the field of the exchange of information. The focus is on the information exchange within article 26 of the OECD MC, the Strasbourg Convention, TIEAs, the DAC and its amendments, FATCA, CRS, Rulings regulations and CbCR, and the implementation of them into the Dutch domestic law.

To define the scope of the Dutch domestic law, the coherence of 'the Kingdom of the Netherlands' regarding to the Dutch legal system will be explained. The Kingdom of the Netherlands consists of four independent States: the Netherlands, Aruba, Curacao and Saint Martin. These islands have, beside the European part of the Netherlands, their own government and parliament and therefore carry the responsibility of governance and legislation, including their own legal tax system. In addition to these independent States, the Kingdom of the Netherlands includes Caribbean Netherlands (called the BES islands), which are independent public bodies and consisting of Bonaire, Saint Eustatius and Saba. A public body is an authority that carries out certain tasks within a certain geographical area or in a specific discipline. The BES islands are similar to the municipalities of the Netherlands. They have their own jurisdiction with their own legislation that only applies in the BES and not in the European part of the Netherlands. The Dutch tax law is not applicable in the BES, except for a limited number of exceptions.[33] To delimitate the scope, this master thesis will only discusses the elements of the European part of the Netherlands.

[32] The questionnaire of subtopic 6, prepared by Giuseppe Melis and Prof. Eugenio Ruggiere (of the LUISS Guido Carli University of Rome).
[33] Kavelaars, P. & Adeler, J. & Beeks, D. & Lopez Ramirez, J. (2016). Het fiscale stelsel in het Caribisch Koninkrijk. *Fiscale Geschriften, 2016 nr. 29-03.* Paragraph 10.1.

§1.5 Methodology

This master thesis is a research in the field of taxes. (Scientific) research can be seen as an intentional explanation of a phenomenon to enhance a scholars' understanding and expect that the outcome of such research has value for the scientific community.[34]

This research master thesis consist of two parts. The first part is a literature review, in which international, EU and national tax law will be described and analyzed. A literature review can be defined as: *"the use of ideas in the literature to justify the particular approach to the topic, the selection of methods, and demonstration that this research contributes something new."*[35] Another definition given for a literature review is that *"it creates a firm foundation for advancing knowledge. It facilitates theory development, closes areas where a plethora of research exists, and uncovers areas where research is needed."*[36] From these definitions it is clear that an effective literature review enables a researcher to understand the existing knowledge of a phenomenon and what is needed to know. This can be converted into a new research problem from which the research question arises. Furthermore, the literature review provides a solid theoretical base for the research proposal. This base also contains valid research approaches, goals and research questions for the proposed research.[37]

The second part of this master thesis contains comparative law between the Netherlands and the participating EUCOTAX Wintercourse States. Comparative law is the study of the similarities and differences between legal systems of different States.[38] In the legal comparison, analyses are made of different legal systems. The legal comparison enables insights in the own legal system and insights to understand the functioning of legal systems. These insights can be used as a tool for legal reform and to achieve an optimization and harmonization of the law. The possibility of harmonization arises when one has sufficient knowledge of the different systems.[39]

[34] Leedy, P. D., & Ormrod, J. E. (2005). Practical research: Planning and design (8th ed.). *Upper Saddle River, NJ: Prentice Hall*. P. 4.
[35] Hart, C. (1998). Doing a literature review: Releasing the social science research imagination. *London, UK: Sage Publications.* P. 1.
[36] Webster, J., & Watson, R. T. (2002). Analyzing the past to prepare for the future: Writing a literature review. *MIS Quarterly, 26(2).* P. 13.
[37] Ellis, T.J & Levy, Y. (2006). A systems approach to conduct an effective literature review in support of information systems research. *Volume 9, 2006.* Section (What is a literature review?).
[38] S.M. McDougal & F.P. Feliciano, *The legal Regulation of International Corecion,* Yale University Press New Haven 1961. P. 4.
[39] Law department of the KU Leuven document about Methodology: https://www.law.kuleuven.be/web/mstorme/rvgl2002-II.doc.

§1.6 Research structure

This master thesis describes, analyses and evaluates tax law concerning the international and EU tax administration from a Dutch point of view. This covers the administrative assistance, which can be explained as the States' cooperation procedures, focused on helping each other's tax authorities to exercise their tax law in a correct way. In this master thesis, the focus is limited to the administrative assistance to levy taxes. All procedures that are subject of this thesis, will be exchange of information instruments. Thus, in the following, the term 'exchange of information' will be used as synonym of the term 'administrative assistance to levy taxes'. All the descriptions, analyses and evaluations are based on several sources of law, such as: domestic law of the Netherlands and participating EUCOTAX Wintercourse States, international (tax) treaties, EU law, legislative history, tax policies, technical explanations, case law, statements of practice, and literature.

In order to answer the main research question, this master thesis has the following structure. Section two will define the benchmark for this research, which will help answering the normative part of the research question. In section three the implementation of International and EU law in the Dutch tax system will be discussed. Within section four, five, six, seven and eight, the descriptive part of the main research question will be discussed. These sections will describe the current international and EU legislation and regulations concerning the exchange of information, and the implementation of such instruments in the Dutch tax law. A wide range of current legislation and regulations come up for discussion, such as article 26 of the OECD MC, the Strasbourg Convention, TIEAs, the DAC and its amendments, Case law, FATCA, CRS, Rulings and CBCR, and the implementation of them into the Dutch domestic law. See **appendix 1** for a timeline that structures the implementation of this legislation and these regulations. Additionally, the effect of these administrative assistance procedures in the Dutch tax system, including the Dutch tax autonomy, will be reviewed. This review makes clear whether the Netherlands at all, or otherwise to what extent, in its legal tax order, is required to or/and wants to participate in the harmonization of tax systems. Subsequently, by means of the research benchmark, in section nine will be analyzed whether the current instruments are effective and/or efficient. This will be checked through the kind of provisions they implemented related to the criteria and what the shortcomings are. In section ten a comparative analysis of the EUCOTAX Wintercourse papers will be made also by means of the criteria. Finally, in section eleven, the conclusion and recommendation will evaluate both the improvements for the current tax system which are the motive for how effective and efficient law should be to optimal counteract tax avoidance and evasion, and the influence of this optimal law on the tax autonomy.

Section 2 Research benchmark

§2.1 Introduction

The second element of the main research question has a normative character: *"..how should these cooperations concerning the information exchange be, from a Dutch point of view, to achieve optimal combatting of tax avoidance and tax evasion.."* Administrative assistance is chosen as a solution for the regulatory problem and the inherent social problem.[40] The question is whether and to what extent this solution is sufficiently effective and efficient, and what is needed to make it as optimal as possible. Hence, the objective is to analyze what 'effective and efficient assistance' should mean. In this extension a benchmark has been made to determine which criteria these instruments must meet to combat tax avoidance and evasion. The 'perfect' outcome of this research should be the optimization of effective and efficient initiatives for the exchange of information, only it is hard to determine what the 'most' optimal way is.

This research, about 'what will be the most/more efficient and effective information exchange', will be reviewed from a Dutch perspective. In this view the concept of autonomy must be included, because it is a limitation to the legislative powers of the Netherlands. This concept is included in the last sentence of the main research question: *".., both in the perspective of the Dutch tax autonomy?"* Autonomy can be given meaning in several ways. Originally translated from Greek, the definition is 'the independence of the legislator when imposing law'. Thus, tax autonomy gives competency to the legislator to exercise its public powers in creating tax legislation to its own discretion.[41] Autonomy is promoted by the absence of obstacles, when the freedom of choice is available (negative freedom).[42]

The research benchmark contains criteria, which are considered to be 'the most important ones' for effective and efficient information exchange. These selected criteria are collected from the literature and have a view from two different angles; the tax authority's angle and the taxpayer's angle. To illustrate the benchmark, a chart is composed. By means of this chart a structured overview of the current legislation and regulations measured to the criteria of the benchmark can be organized. The use of this research benchmark will be on three levels. Firstly the current tax law in the field of administrative assistance to levy taxes, the exchange of information procedures, will be tested.[43] Along these lines, the essential and/or weak spots of the current tax law should be revealed. With the overview resulting from

[40] See the introduction of this master thesis.
[41] S.J.C. Hemels, *De Toren van Babel,* Den Haag: Sdu Uitgevers 2011. p. 9.
[42] Gribnau, J.L.M., *Instrumentalisme en vrijheid*, NTFR 2012/517 nr.10, paragraph 3.1.
[43] See section 9 of this master thesis.

this analysis, it can be evaluated what must remain and what has to be replaced. Secondly, this research benchmark will measure the score of these criteria on the domestic law of other EUCOTAX Wintercourse States.[44] In this way it can be reviewed whether the other States have implemented interesting provisions concerning the exchange of information, which are essential and interesting for the Dutch and/or international instruments. Thirdly, this research benchmark is also used for the recommendation to improve and/or to optimize efficient and effective exchange of information to optimal combat tax avoidance and evasion.[45] Subsequently, on the basis of this research benchmark, it will be discussed whether those recommended amendments need to be implemented in the Dutch domestic law or in international regulations to strengthen the scope.

§2.2 Fundamental criteria for effective and efficient exchange

§2.2.1 Information transparency

Jeffrey Owens already made a comment many years ago about transparency: *"Over the next decade, there's going to be one word that's going to dominate the tax debate, particularly the international tax debate, and that word is transparency."*[46] He made a good prediction, as transparency is a widely used concept in the current tax law, tax policies and tax law proposals. In our current society, in principle, a positive connotation is given to this concept.[47] This is confirmed by the media, that describe transparent as the new black, or as the new authentic, the new integer and the new objective. Transparency is an indisputable characteristic, loved by almost everyone. It is becoming the magic word of the twenty-first century. [48] Through information that is made transparent, the public debates got guidance. This information selects, distorts, accentuates, limits, excludes and obscures the society's knowledge and thus the topics spoken about.[49]

However, mainly a positive connotation is given to the concept of transparency, due to the resulting advantages, it is not interpreted as positive by everyone. They fear that this instrument will negatively affect their interests.[50] Information transparency can expose taxpayers in a negative manner causing negative consequences. Being transparent means that they have to reveal personal information

[44] See section 10 of this master thesis for the legal comparison between the EUCOTAX Wintercourse States.
[45] See section 11 of this master thesis.
[46] Owens, J. & Whitehouse, E. (1996). *Tax reform for the 21st century. MPRA Paper No. 21135, publiced on 7 March 2010.* Paragraph XV.
[47] S.A. Stevens, *Van der Geld Bundel: Transparantie over belastingen,* Tilburg University 2016. P. 263.
[48] Berger, L. (2013). Hoe 'transparantie' het antwoord op alles werd. *De correspondent, 4 October 2013.* P. 1.
[49] Scholtes, H.H.M. (2012). Transparantie, icoon van een dolende overheid. *Publisher 's PDF*. p. 221-224.
[50] Broeders, D. & Prins, C.J.E.J. & Griffioen, H. & Jonkers, P. & Bokhorst, M. & Sax. M. (red). (2013). Speelruimte voor transparantere rechtspraak. *Amsterdam University Press.* P. 235.

resulting in being at risk for unwanted consequences.[51] As counter argument for (more) transparency is that it collides with the right to privacy of the involved taxpayer.[52]

The concept of transparency has not an unambiguous character and it is not a simple concept either. In literature, often no definition is given or the description occurs in a variety of contexts, resulting in many variants of definitions.[53] Generally, transparency can be seen, in the broadest form, as a concept of openness, visibility and accessibility. These descriptions refer to the fact that transparency gives the entrance to information: knowledge can be taken. In addition to the justified[54] and objective[55] character of transparency, it also sets limits on right and wrong, legal and illegal. It is a normative concept that is used by the government to achieve certain effects and to adjust the taxpayers' behavior. It is used as fundamental force within our social system, a pressure tool that affects all social processes. This also applies to the tax system, in which taxpayers are expected to be more accountable for their tax behavior.[56] Another characteristic of transparency is the wide range of perspectives. In the Dutch tax policy,[57] they are focused on the transparency between the tax resident and the Dutch tax authorities, between tax authorities of different States, in the EU on the tax payment of large MNEs and transparency about the routine on which various States contribute to combat tax avoidance and evasion.

Because of the lack of one clear description in the literature, the meaning of this concept used in this research is: *transparency is about the availability, understandability (in form and content), visibility and timely accessibility of any form of 'relevant' information, which may be of importance for the correct taxation by the tax authorities.*[58] Briefly summarized, transparency means that the exchange is conveyed in such a way that it is an objective and honest representation of factual information. It is the opposite of secrecy to or between tax authorities. As the definition defines, the concept is associated with relevancy, which is the extent to which information contributes to determine the correct tax claim. The information is judged on the basis of content, form and topicality.[59] However the difficult part of this criterion is that information only can be judged after receiving it, thus to determine in advance whether information will

[51] See section 2.2.3 of this master thesis.
[52] S.A. Stevens, *Van der Geld Bundel: Transparantie over belastingen,* Tilburg University 2016. P. 263.
[53] Scholtes, H.H.M. (2012). Transparantie, icoon van een dolende overheid. *Publisher 's PDF*. p. 50-51.
[54] Justified character: by means of transparency the society has the possibility to know the (underlying) information which will be considered as more justified.
[55] Objective character: it gives entrance to information, which contributes to clarifying the facts.
[56] S.A. Stevens, *Van der Geld Bundel: Transparantie over belastingen,* Tilburg University 2016. P. 263.
[57] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 3.
[58] This definition of transparency is based on the view of E. Scholtes (2007), *Turven, tellen toetsen, hoofdstuk: Toezichthouders en transparantie,* Den Haag: Boom Juridische uitgevers 2007.
[59] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 3.2.

actually be relevant or not is an almost impossible task. First information must be gathered, after which it can be checked whether it is actually relevant or not.

Transparency is an important criterion in this research, because it contributes to counter tax avoidance and evasion. It is an instrument to maintain the taxpayer's moral standard by the control that it can exercise.[60] A standard of morality gives guidance to what is justified and what is not, focused on to society's contribution by paying a 'fair share'. As the tax behavior becomes more visible, the pressure on taxpayers will increase in order to conform to the prevailing society's view. Therefore, making information public, a step further than transparency to or between tax authorities, gives pressure from society, because it can damage someone's reputation. The greater the social cohesion in a community, more transparency will promote more motivation to meet the moral standard.[61]

In the context of this research, transparency will be examined on two levels. Firstly, the examination of the taxpayer's or third parties transparency to the Dutch tax authorities. This seemed to be the most important level, because, in the first place, tax authorities need information from a taxpayer in advance, before exchanging it to other tax authorities. Secondly, transparency towards other tax authorities, which is achieved through the exchange of information regulations. By exchanging relevant information, tax authorities are given the opportunity to detect possible risks of tax avoidance and evasion.[62] The first and second level of transparency are related, because the more transparency on the first level, the more transparent they can be on the second level.

§2.2.2 Simplicity of procedures

According to Arendsen,[63] taxation, including the information exchange instruments, can be regarded as an extensive administrative system, within which data is collected, registered, exchanged and processed. A system within attempts are made to model the reality: to 'catch' it in rules, to process, to administrate and to signal. The collecting and processing of information is a massive process and therefore efficiency considerations are important. The degree to which interfaces, between reality and the processing system, succeed to create clarity about the interaction with and the structure of this information system, determines the degree of (perceived) simplicity or complexity.[64]

[60] Dietsch, P. (2006). 'Show me the money: The case for income transparency'. *Journal of Social Philosophy*, *vol. 37 No. 2, Summer 2006.* p. 198-204.
[61] S.A. Stevens, *Van der Geld Bundel: Transparantie over belastingen,* Tilburg University 2016. P. 263.
[62] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 475.
[63] Arendsen, R. (2016). Hoofdstuk 1 Belastingrecht in uitvoering, Eenvoudig belasting heffen. *Andere wetenschappelijke uitgaven, nr, 57.* Paragraph 1.1.
[64] Arendsen, R. (2016). Hoofdstuk 3 Uitvoerbaarheid, Eenvoudig belasting heffen. *Andere wetenschappelijke uitgaven, nr, 57.* Paragraph 3.2.

It is challenging to concretize simplicity as a concept, because the definitions often contain descriptions such as 'absence of ..' or 'without ..'.[65] The concept of complexity, which is the opposite of simplicity, is easier to concretize and is therefore often used when it comes to simplicity. Both concepts of simplicity and complexity are subjective, because the degree of perceived simplicity depends on, among other things, the experiences and competencies of the actors, in this case the tax authorities.[66] Concerning the information exchange it is about *'the administrative complexity that concerns the lack of overview and certainty as a result of the many and difficult procedures, regulations and systems around the tax administration'*.[67] Simplification can be achieved by limiting the number of required actions for the tax authorities (and taxpayer). On the level of the administrative system, the degree of complexity makes use of indicators such as: the operational costs, the sum of implementation and compliance costs, the number of different tax laws and the accompanying different procedures or the degree of use of commercial tax service providers.[68] Given the scope of this master thesis the number of tax laws and the information exchange procedures are the only examined indicators.

Simplicity is an important influencing factor for a feasible tax system and serves the understanding and clarity of the tax law.[69] Simplicity, and therefore better feasibility, are important legislative qualities.[70] The feasibility of a statutory regulation is understand to be 'the actual possibilities that taxpayers have to comply with the legislation and regulations and the actual possibilities of the government to implement them'. [71] The first part indicates whether taxpayers can actually fulfill their obligations resulting from the law, without too aggravating circumstances.[72] The second part of the definition can be sharpened to 'the government's possibilities to realize their tasks and responsibilities, described in the regulations, demonstrably and at acceptable costs'.[73]

In this research, the administrative information procedures will be reviewed on national and international level. First, to obtain information from taxpayers prior to the international exchange, the domestic procedures are used. Secondly, international procedures are necessary for providing and obtaining information of other tax authorities. Simplicity of such procedures is an essential element, because from the complexity indicators it can be determined that, briefly said, the more simple the

[65] Arendsen, R. (2016). Hoofdstuk 3 Uitvoerbaarheid, Eenvoudig belasting heffen. *Andere wetenschappelijke uitgaven, nr, 57.* Paragraph 3.2.
[66] Arendsen, R. (2016). Hoofdstuk 3 Uitvoerbaarheid, Eenvoudig belasting heffen. *Andere wetenschappelijke uitgaven, nr, 57.* Paragraph 3.2.1.
[67] Arendsen, R. (2016). Hoofdstuk 3 Uitvoerbaarheid, Eenvoudig belasting heffen. *Andere wetenschappelijke uitgaven, nr, 57.* Paragraph 3.2.4.
[68] Arendsen, R. (2016). Hoofdstuk 3 Uitvoerbaarheid, Eenvoudig belasting heffen. *Andere wetenschappelijke uitgaven, nr, 57.* Paragraph 3.2.1.
[69] Arendsen, R. (2016). Hoofdstuk 3 Uitvoerbaarheid, Eenvoudig belasting heffen. *Andere wetenschappelijke uitgaven, nr, 57.* Paragraph 3.2.
[70] Zijlstra, S.E. (2012). Nota Zicht op wetgeving (1991). *NDFR, 2012/34.* P. 105.
[71] S.E. Zijlstra. *Wetgeven, handboek voor de centrale en decentrale overheid.* Deventer: Kluwer 2012. P. 486.
[72] S.E. Zijlstra. *Wetgeven, handboek voor de centrale en decentrale overheid.* Deventer: Kluwer 2012. P. 486.
[73] S.E. Zijlstra. *Wetgeven, handboek voor de centrale en decentrale overheid.* Deventer: Kluwer 2012. P. 486.

procedures are to obtain information of taxpayers and to exchange it, the less time-consuming it would be, the less manpower it takes, the cheaper and faster information can be provided to another State, and the information is more up-to-date. By means of those elements, arising from the simplicity of procedures, the administrative assistance to levy taxes will be more efficient and effective.

§2.2.3 Legal protection

Previous criteria are important from a State's perspective. Their objective of effectiveness is to combat substantial loss of their national tax revenues due to tax avoidance and evasion. On the contrary, the interests of taxpayers are of importance in our democratic Constitutional State. This modern State is based on the rule of law, which means that the existence of the State depends on a legal system and, at the same time, the presence of a legal system is an indication of the existence of a State.[74] Typical to such State is that the power is exercised in the name of and in accordance with the system of the rule of law.[75] This is the principle of legality, a classic 'rule of law concept', which requires that every government performance, including the tax authorities, must be based on the law[76] and it prohibits the retroactively application of new legislation. [77] This principle gave the State's actions predictability and increased the security for the citizen.[78] Tax law legitimizes that the government, when levying taxes, infringes the property rights of taxpayers. This relationship between the taxpayer and the government is therefore precarious and requires adequate legal protection.[79] Additionally, the moral concept of freedom is the other most characteristic aspect of the rule of law, which means that everyone's equal right to freedom, the autonomy, must remain unaffected as much as possible, and can only be infringed by a formal law.[80]

Another characteristic of our democratic State is the ideal of equality, which means that every individual is entitled, trough equal opportunities, to have access to self-realizing instruments.[81] This is what Dworkin called the 'equal concern and respect'.[82] This is the reason that participants, in all legal relationships, have the duty to take each other's interests into account. This duty is heavier on those who have the most power or authorizations in that relationship. Thus in the asymmetrical fiscal legal relationship between the government and taxpayer, the government has the duty of care to judiciously

[74] Gribnau, J.L.M (2013). Legitieme belastingheffing: recht, governance en vertrouwen. *MBB, 2013/7-8.* P. 230.
[75] Gribnau, J.L.M (2013). Legitieme belastingheffing: recht, governance en vertrouwen. *MBB, 2013/7-8.* P. 230.
[76] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 12-13.
[77] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 12-13.
[78] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 12.
[79] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 473.
[80] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 12-13.
[81] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 265.
[82] Dworkin, R. (1977). Taking Rights Seriously. Londen, 1977.

consider taxpayers' interests.[83] The government is obliged to weigh taxpayers' interests on their actions, from the premise that they are not placed above them, but that they participate with them in a relationship of mutual dependency, which should be governed by the law. This has emerged from the research of Schenk-Geers, [84] who, from a general legal-philosophical framework, investigated the existence of a public legal duty of the government when fulfilling the obligation to exchange information. In addition, the question is whether the fulfillment of this obligation is possible within the exchange procedures and what interests that protection must contain. In general, these taxpayer's interest are implemented on international,[85]European[86] and Dutch level, and concerning the exchange of information the important taxpayer's rights are 'the right to privacy' and 'the right to a fair trial'.[87] These rights are the legal protection provisions within this framework, which means '*the taxpayer's possibility of protection, especially through the law and the courts, for undesirable effects.'*

In the Netherlands, the European Convention on Human Rights (ECHR)[88] is a leading treaty to protect human rights and fundamental freedoms. Article 8[89] ECHR contains the right to privacy, which is one of the most significant taxpayer's rights, and states that: "*Everyone has the right to respect for his private and family life, his home and his correspondence. No interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."* This right to privacy is a 'classic freedom right' based on the protection of an individual against external offenses on his private life. This provision prohibits arbitrary government

[83] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 265.
[84] This is the conclusion of her research on the existence of a public legal duty of the government (page 265) in her book: A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007.
[85] In the Universal Declaration of Human Rights (UDHR) of 1948. This manuscript contains human rights, which has to apply to every human being. It is meant to be a common (minimum) standard of achievement of rights that every person should enjoy. It is a recommendation, not legally binding. A direct appeal, from the perspective of the civilian, is therefore not possible.
In addition, the International Covenant on Civil and Political Rights (ICCPR). It attempts to ensure the protection of civil and political rights by, in particular, abstaining the government from intervention. It is binding on all parties of the treaty and all States who have concluded and ratified the treaty must comply with these rights.
[86] The European Convention on Human Rights (ECHR) is a treaty to protect human rights and fundamental freedoms within Europe (not explicitly the EU). The ECHR offers citizens of member States the opportunity to have the respect, or lack thereof, of their rights and fundamental freedoms tested by a judiciary. They can invoke provisions in the ECHR with an important organ of the Council of Europe: the European Court of Human Rights.
In addition, the European Charter of Fundamental Rights. The Charter is based on EU treaties, international treaties and agreements such as the ECHR. It was concluded in 2000 in Nice and with the adoption of the Treaty of Lisbon on 1 December 2009, the Charter got a legally binding effect. This means that the national court can review to this Charter and taxpayers may also directly appeal to its provisions.
[87] UDHR: articles 12 and 10. ICCPR: articles 17 and 14. Dutch Constitution: articles 10 and there is the intention to implement the right to a fair trial.
[88] The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, last amended on 13 May 2004.
[89] Article 8 paragraph 1 jo. 2 ECHR.

interferences. Any public interferences to this right to privacy must be based on and justified by domestic law, necessity and proportionality. Related to the protection of personal data, the individual has the right to have his data processed in a lawful way, in order to prevent this from being harmful. After all, the consequences of unlawful processing can be enormous.[90]

The right to a fair trial is included in article 6 paragraph 1 ECHR, which determines: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* This right is an important guarantee of the democratic State. The elaboration of this right is that everyone gets the change to defend himself against the powers of the government and to prove his innocence.

Due to the increasing importance of the exchange of information, the legal protection within the framework of tax cooperation increasingly requires attention. In essence, it is about the recognition of the fact that the exchange between States is not possible without the tax resident's cooperation.[91] If a State requires administrative assistance to obtain information from abroad, it indirectly needs the assistance of taxpayers of that other State. After all, they are the ones who have to provide, in the first place, the necessary information to their national tax authorities. In all cases, the provision of tax information to a treaty partner requires the (enforced) cooperation of these individuals in the supplying State.[92] Hence, a State's national tax law contains such obligations to inform the tax authorities and in order to ensure a taxpayer's compliance with these obligations, audit powers are granted to the tax authorities. This is necessary to counteract tax avoidance and evasion, because States need relevant information for their fair taxation. The justification for those interventions is the public interest, which has been established democratically in the Constitutional State, and whose realization is assigned to the government.[93]

The legal tax relationship between the government and taxpayer is those within administrative law, and therefore asymmetric in nature. In principle, the government determines unilaterally the formal tax debt of the individual, who is mandatory to this legal relationship. On the other hand, this governing body depends for a large part on the cooperation of the taxpayers, who have to provide the necessary

[90] F. van der Jagt, *Grondrechten, Hoofdstuk 7: Het recht op bescherming van persoonsgegevens,* Nijmegen: Ars Aequi Libri 2013.Paragraph 1.
[91] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 3.
[92] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 465.
[93] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 25.

information.[94] In addition, the involved tax residents experience the risk that data and information related to them are incorrect or incomplete, in the other State will be interpreted as incorrect or incomplete, could not be kept secret by another tax authority, or could be used unlawfully, and therefore they can cause damage.[95] For this reason legal protection is a fair concept and it will be effective legal protection, related to the exchange of information, if it takes such risk consequences into account and ensures involved tax residents protection in case such risks arise.

The taxpayer's rights will be tested on two levels: nationally and internationally. The administrative assistance between States also implies a legal relationship between the Dutch government and the taxpayer, because the data for the other State must first be collected from them.[96] In this relationship the taxpayer has its rights concerning the providing of his information. When the information will be exchanged between States, the taxpayer has his rights concerning the international exchange of his information.

§2.3 Benchmark model

Foregoing criteria, of the research benchmark, are considered as the most important elements for an effective and efficient exchange of information. In addition, used as illustration of this benchmark, a chart is composed to structure the analyzed legislation and regulations concerning the information exchange in section nine. By means of this chart a clear and organized overview will be given, in appendix 2, of this legislation and these regulations on international, supranational and Dutch level. To measure to what extent the legislation and regulations comply with the selected criteria of the benchmark, a score is linked to the analysis of section nine, varying from the one extreme of 'absolutely not complying' to the other extreme of 'absolutely complying'. With the score in the chart's overview, resulting from the analysis, it can be evaluated easily what provisions must remain unaffected and what provisions need to be improved in the context of this research.

[94] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 25.
[95] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 3.
[96] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 25.

The standard chart of reference will be as follows:

Criteria	international level	EU level	Dutch level
	(Legislation/Regulation)	(Legislation/Regulation)	(Legislation/Regulation)
Transparency[97]			
Simplicity[98]			
Legal protection[99]			

The score to what extent the legislation and regulations comply with the criteria of the benchmark:

Score	--	-	+/-	+	++
Explanation	Absolutely not complying	not complying	partly complying	complying	absolutely complying
Preferences	most undesirable	undesirable	neutral	desirable	most desirable

The score of 'absolutely not complying' (--) means that the regulation in question does not comply with the criterion and even contains elements which are contrary with the criterion.

The score of 'not complying' (-) means that the regulation in question does not comply with the criterion.

The score of 'partly complying' (+/-) means that the regulation in question has a neutral position in the perspective of the criterion.

The score of 'complying' (+) means that the regulation in question complies with the criterion.

The score of 'absolutely complying' (++) means that the regulation in question complies with the criterion and even contains elements which are further reaching than the criterion.

[97] Definition: the availability, understandability (in form and content), visibility and timely accessibility of any form of 'relevant' information, which may be of importance for the correct taxation by the tax authorities.
[98] Definition: the opposite of the lack of overview and certainty as a result of the many and difficult procedures, regulations and systems around the tax administration.
[99] Definition: the taxpayer's possibility of protection, especially through the law and the courts, for undesirable effects.

Section 3 The implementation of International and EU Law in the Dutch tax system

§3.1 Introduction

International and supranational tax law, currently, have a significant role in the Dutch tax system. By means of those collaborations, States, such as the Netherlands, give up a ration of their (external) autonomous powers. To understand the influence of international and EU law on the Dutch domestic tax system, this section will explain the general functioning and hierarchy of the law. By means of this, it will become clear how those regulations are implemented in the Dutch (tax) law, what the guarantees for the taxpayers are (procedures of the Court) and what the effect is on the Dutch (tax) autonomy. Not all the regulations of the higher rule of law are implemented in a similar way, because they do not all have the same effect on national law.

In the Netherlands, taxation is only possible on the basis of a formal law, which is a law that has been adopted together by the Dutch government and the parliament. It is required that the tax authorities need a legal basis to levy taxes. This follows from the principle of legality,[100] which forms the basis for the Dutch tax legislation.[101] By virtue of this principle, infringements in the freedom of decisions of the citizen with respect to his income and assets, can only take place on the basis of a formal law. Therefore, the tax authorities can only impose a tax assessment on the basis of the law and within the limits of the law. This principle grants protection for taxpayers for the randomness of the executive power and it implies, in addition, that the taxpayer must act in accordance with the legal tax obligations.[102] Succeeding from this, it means that the Dutch tax law is the main source for taxation, because this legislation and these regulations create the right to levy taxes.[103]

§3.2 The implementation of international tax law

The hierarchal relationship between international and national law is substantial for the practice of the Dutch tax system. There are two types of approaches for the interaction between international and national tax level: a monistic and dualistic system. Monism is based on the unity of the law and, in cases of conflicting regulations, priority must be given to the higher rule of law. In this system, the treaty

[100] Article 104 Dutch Constitution 1815.
[101] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 17.
[102] Poelmann, E. (2017). Fiscaal bestuursrecht – Algemeen. *Kluwer Navigator Cursus Belastingrecht*, *FBR.5.0.1.B.a.*
[103] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 17.

provisions have a direct effect and are directly part of the national legal order, so it is not necessary to implement this higher legislation in the national tax system. In dualism, on the other hand, two legal spheres are working side by side. In this case, international law mainly regulates the relation between States and the national law is the legal basis which provide the powers and obligations. Because of this approach, the treaty provisions are only valid in the Dutch legal system once it has been converted into a rule of national law.[104] Considering the tax treaties, the Netherlands has a moderately monistic system in which tax treaties first must be announced in the Tractatenblad.[105][106]

From the Dutch perspective, international tax law is necessary because of the taxation in cross-border situations. The sources of international law include multilateral conventions, such as the treaty from which the EU emerged. Multilateral means that the same convention is signed by multiple States. Under the applicable multilateral treaties with significance for the Netherlands, are also the ECHR[107] (at EU level) and the ICCPR[108] (at international level). In addition, the new introduced Multilateral Instrument (MLI),[109] also a multilateral convention, will assist to automatically amend already concluded treaties between States, such as bilateral treaties.[110] Bilateral treaties are often concluded between two States. Usually these are agreed in the form of a convention to prevent double taxation,[111] but this is not necessary. To be in line with the topic of this research, States may also conclude treaties for the exchange of information. It is important to know that a treaty does not create any right to levy taxes but only allocates the competence for it. Thereafter, the national law determines whether the authority can actually be used.

These conventions, multilateral and bilateral, are mostly based on model conventions, of which the text is used as an example for the content of the convention.[112] The model conventions are composed by international organisations which aim for better tax cooperation between States. The United Nations (UN) is one of the better known international organisations, who facilitates in a wide range of

[104] A. Cools, *Internationaal belastingrecht*, Apeldoorn Maklu 2012. p. 25.
[105] The Tractatenblad of the Kingdom of the Netherlands contains the text of treaties and decisions of international organisations and the data on treaties and decisions of international organisations that the Kingdom of the Netherlands has concluded with other States or international organisations.
[106] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 21.
[107] The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, last amended on 13 May 2004.
[108] The International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966.
[109] The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS.
[110] See section 4.2.4 of this master thesis.
[111] Mainly based on the OECD-MC.
[112] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 21-25.

collaborations. On the tax field the OECD is a well-known organisation, which priority is promoting cooperation for the economic and social development of prosperous western States.[113] Additionally to these treaties, there are other sources of international tax law, such as general principles of law, (not) binding decisions of international organisations and decisions of the International Court of Justice.

According to the Dutch Constitution, provisions of international treaties which 'can connect everyone' according to their content, have a binding force after they have been published.[114] The condition of 'can connect everyone' means that everyone in the Netherlands, such as natural persons and businesses, are connected with these provisions of the treaty. These provisions unconditionally and sufficiently clearly establish the citizen rights with respect to the government.[115] In concrete terms, they can go to the national court with an appeal to these provisions. In addition, these provisions have priority over the Dutch legislation and no legal national provision is applicable if this is incompatible with these binding provisions.[116] The same condition applies to decisions of international law organisations. This occurrence is better known as the direct effect of provisions, which is part of the aforementioned monistic tax system. The concluded treaty has an immediate internal validity in the taxation of the Contracting States. This primacy of international law was explicitly included in the Constitution with the view to the future international integration. From the implementation of the provisions, the court has the far-reaching power, and even the obligation, to apply international law with priority over the Dutch law, including the Constitution.[117]

§3.3 The implementation of European tax law

The European law is a specific source of international law, with an effect and application in the national law of each Member State of the European Union,[118] such as the Netherlands. Just as other international organisations, the EU has been established by means of a treaty concluded by several States, a so-called multilateral convention. However, the difference is that other organisations continue their partnership on the basis of their agreement, the EU does not do this on the basis of the agreement. The EU is not a partnership between the Member States, but it is an authority, on top of the authorities of the Member

[113] The Organization of Economic Collaboration and Developments, is a partnership to discuss, study and coordinate social and economic policy. About OECD : www.oecd.org .
[114] Article 93 Dutch Constitution 1815.
[115] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 22.
[116] Article 94 Dutch Constitution 1815.
[117] Poelmann, E. (2017). Fiscaal bestuursrecht – Algmeen. *Kluwer Navigator Cursus Belastingrecht*, *FBR.5.0.1.B.a.*
[118] The EU is a political land economic union of 28 Member States that are located in Europe.

States, whose institutions have far-reaching powers.[119] The Member States created a supranational partnership that is unique in the world, because all the Member States have ceded a part of their autonomous powers to the EU. The Executive Committee of the EU, the so-called European Commission (EC), operates as an independent authority. Thus, the integration has progressed to the extent that a new committee layer has been formed above the national levels of the Member States.

The reason Member States entered into this European collaboration was that they wanted to be able to optimally pursue their common social and economic values and interests, including to promote the well-being of the EU citizens. To achieve this goal, the internal market has been created. It is a common market without internal borders with the possibility for fair and free competition.[120] This includes the goal to achieve free traffic of capital, [121] services,[122] products,[123] and persons.[124] These are the so-called fundamental freedoms or the EU Treaty freedoms. The EU Member States are intended to ensure equal tax treatment of economically cases within the scope of the TFEU.[125] When the EU law applies, these Treaty freedoms guarantee the taxpayer, with cross-border activities, no worse treatment for tax purposes than he would be due if he had carried out his/her activities in a purely domestic situation. In addition, there can also be no different treatment of taxpayers by a Member State on the basis of nationality or place of residence, because this creates discrimination.[126][127] To accomplish this, the Member States have to remove the distortions in the functioning of the internal market. This is the so-called neutrality principle of taxes. Exchanges between different Member States have to experience as little as possible of the barriers, which has a positive influence on the concurrency position within the EU.[128]

There are two different kinds of EU law, the primary and secondary law, and the category of the law determines which placement the law source proceeds in the juridical hierarchy.[129] Primary law is the original and amending treaties of the foundation of the EU cooperation, on which the EU and its

[119] C.S. Pisuisse & A.M.M. Teubner, *Elementair Europees Gemeenschapsrecht*, Amsterdam: Wolters-Noordhooff 1994. p.25.
[120] Article 26 paragraph 2 TFEU.
[121] Articles 63-66 TFEU.
[122] Articles 56-62 TFEU.
[123] Articles 28-37 TFEU.
[124] Articles 45-55 TFEU.
[125] The Treaty on the Functioning of the European Union of 13 December 2007.
[126]Article 18 TFEU.
[127] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 182.
[128] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 172-173.
[129] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 21.

predecessors were established and expanded. At this moment, the Treaty on European Union (TEU)[130] and the Treaty on the Functioning of the European Union (TFEU) are in force. Together they form the current EU-treaty, which is the so-called Treaty of Lisbon.[131] This treaty is the fundament of all powers of the EU authorities, contains the EU objectives and provides the framework for assessing the exercise of these competences. The influence and the effect of the primary EU law in the national legal order is determined by the EU law itself. The ECJ has determined that the primary EU law is a supranational, autonomous legal order which is directly applicable and also prevails over the national laws of each Member State.[132][133] Following from this, the EU-treaty has a direct effect in the Dutch legal system, which means it has not to be converted into national law. It is part of the monistic system, because it has an immediate internal validity.

In addition there is secondary law (also known as the derived law), the derivative of the primary law. All these legal acts are taken on the basis of the authorizations provided by the EU-treaty and are therefore always subordinate to the primary law. These are the decisions made by the EU institutions, which are established by the EU Treaty. Secondary law which is contrary with the primary law, would be eliminated by the ECJ.[134] This secondary law consists of all the decisions, measures, rules and standards adopted by the EU institutions over time. In the field of taxation, mainly directives are used as instrument of secondary law. Ordinances and individual or general decisions are also legal acts of secondary law. The instrument of ordinances is not used in the tax system for direct taxes,[135] thus will left out of consideration in this master thesis.

A directive does not have a direct effect and to become valid it must be converted into the Dutch law, which make them part of the dualistic system. Generally, a directive is only applicable for national authorities of the EU Member States. The States must adapt their national legislation in such a way that the purpose of a directive can be achieved.[136] A directive commences with a proposal from the European Commission (EC) and afterwards the Council[137] can be adopt it by means of unanimity. All Member States

[130] The Treaty on European Union of 13 December 2007.
[131] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. The Treaty of Lisbon was signed by the EU Member States on 13 December 2007, and entered into force on 1 December 2009. It amends the Maastricht Treaty (1993) and the Treaty of Rome (1957).
[132] ECJ 5 February 1963, Case C-26/62 (Van Gend & Loos) & ECJ 15 July 1964, Case C-6/64 (Costa v E.N.E.L.).
[133] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 22.
[134] European law expertise center about legal acts of the EU: www.minbuza.nl/ecer/eu-essentieel/soorten-besluiten.html.
[135] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 227.
[136] European law expertise center about legal acts of the EU: www.minbuza.nl/ecer/eu-essentieel/soorten-besluiten.html.
[137] The EU Council consist of all Member States' Ministers.

have a right of veto and can block the passage of a directive. When a directive is adopted, it obligates the Member States to achieve the objectives included in the directive. However, it does not provide how the Member States must achieve this goal, thus they can choose how they will implement the directive in their national tax law.[138] If the given implementation period has expired, or in case the conversion is not complete, or incorrect, the directive gets a direct effect. The provisions of the directive must then be followed without the intervention of the national government.[139]

Member States' tax systems are becoming coordinated in a more similar way due to directives, a process called positive integration or harmonization. It is called positive because the EU legislator is the one that coordinates the harmonization of tax systems by prescribing the Member States how they should act.[140] As well, decisions can be made in the field of taxation. These are binding in all its parts, but are only applicable to person(s) (natural and legal persons) to whom it is addressed.[141] Lastly, there are treaty principles, written and unwritten, and case law of the ECJ beside primary and secondary law.[142]

The EU tax legislation and regulations are not covering every element of national law, which means that Member States are autonomous in establishing their tax systems on these areas. Accordingly, the EU law does not force a complete harmonization of the tax systems of each Member State. When they want to conclude tax treaties, they are also autonomous to act. The autonomy of the Member States is wide, because the positive harmonization, in the area of direct taxation, has so far only been limited to a handful of European directives. There is, for example, a directive[143] published for ATAD I and II,[144] the prohibition of State aid within the EU, [145] and there is a proposal for CCCTB on EU level,[146] to create a more transparent, efficient and more fair system for the calculation of the tax base of cross-border businesses. These regulations contribute (not yet) to a more harmonized EU. However, this autonomous competence is not unlimited, because ECJ jurisprudence shows that Member States must respect the EU treaty freedoms, for the functioning of the internal market, as soon as they express their tax autonomy and proceed to taxation. [147]

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[138] Article 288 TFEU.
[139] European law expertise center about legal acts of the EU: www.minbuza.nl/ecer/eu-essentieel/soorten-besluiten.html.
[140] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 177.
[141] European law expertise center about legal acts of the EU: www.minbuza.nl/ecer/eu-essentieel/soorten-besluiten.html.
[142] European law expertise center about legal acts of the EU: www.minbuza.nl/ecer/eu-essentieel/soorten-besluiten.html.
[143] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
[144] Anti Tax Avoidance Directive I and II, on the BEPS project based measures for tax avoidance.
[145] Article 107-109 EU Treaty.
[146] Common Consolidated Corporate Tax Base, a EC proposal to introduce EU company tax regulations.
[147] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, Grondslagen internationaal belastingrecht, Den Haag: Boom juridisch 2016. p. 177.

According to the principle of priority[148], EU legislation is beyond the national legislation of all Member States of the EU. This principle applies to the regulations established by European Institutions and determines that the regulations will be incorporated into the national legal systems of the Member States, which must comply with it. If a national rule is contrary to a European provision, the authorities of the Member States must therefore apply the Europeans. National law is neither cancelled nor withdrawn, but its binding nature is suspended.

§3.4 The Court

In the Netherlands, the entitled person has to be turned down in the objection procedure by the Dutch tax authorities, before he/she appeals. Against the objection decision, the taxpayer has the possibility to go to the national court. The administrative court is able to assess administrative matters, including tax affairs. In the Netherlands, there are three different kinds of courts that belong to the judicial power; the lower court (11), the court of appeal (4) and the Supreme Court (1) of the Netherlands.[149] In the first appeal, the entitled person has to go to the competent national lower court. The judge of the national court reviews the case on relevant information. Because of the wide margin of appreciation of the legislator, the judge reviews restrained. Together they form the legislation (also in collaboration with the executive power), but the primacy is distributed to the legislator. The court may review the case in three ways: see if the decision does not conflict with the legislation, then it looks whether all procedural rules have been properly observed and it reviews if the decision is in conflict with the general principles of good governance. By the conclusion of the court, the appeal of the entitled person can be declared well-founded, what will give this person his/her right. Subsequently, there are three possible reactions to recognize. The court gives the instruction to the administrative authority to re-examine the objection and to make a new decision, on the basis of the judgement. In addition, the court has the possibility to decide that the decision's legal consequences remain or he can make a new decision himself.[150] After the conclusion of the court, the person in appeal is able to go in higher appeal if he does not agree with it. He can go to one of the courts of appeal and finally to the Supreme Court. By this last one, it is called the appeal in cassation.[151]

[148] ECJ 15 July 1964, Case C-6/64 (Costa v E.N.E.L.).
[149] The juridicial organisation of the Netherlands, how is the juridicial power organized?: www.rechtspraak.nl.
[150] Feteris, M.W.C. (2008). Hoe is het gesteld met de fiscale rechtsbescherming? *Andere wetenschappelijke uitgaven, nr. 32.* Paragraph 5.1-5.2.2.
[151] The juridicial organisation of the Netherlands, Procedures of the juridical power: www.rechtspraak.nl.

When international law is involved, it is possible that, in addition to the national courts, international courts will be involved. On EU level, the European Court of Justice is the competent court for conflicts with EU legislation. The ECJ receives its cases in two ways, via the EC or via the national court of a Member State. The Commission is entitled to initiate proceedings against a Member State if it considers that they do not comply with the EU law. The second route goes via one of the national courts. They can ask the ECJ to explain EU law by means of preliminary questions, in absence of clarity how a provision of EU law should be applied or interpreted.[152] The Supreme Court is in some cases even obligated to ask such questions, if the effect of the EU law in the case is not obvious (acte clair) or has not been answered as factual by the ECJ (acte éclairé).[153] The parties in conflict cannot go to the ECJ themselves, only the national court can request an explanation by submitting preliminary questions.[154] On the basis of the binding explanation provided by the ECJ, the national court gives thereafter his opinion on the case. The ECJ therefore does not replace the national court, but they are legally bound by the ECJ's interpretation of the relevant EU legislation.[155]

The national court has the possibility to apply in (tax) cases directly to international law. In addition, the taxpayer can also appeal directly to it. This can occur in two ways, namely by the way of the Dutch Constitution[156] in the context of international conventions or by the way of the direct effect of the primary EU law. The primary law are the provisions of the monistic system which have a direct effect in the Dutch legislation. EU taxpayers may appeal to the directly operating EU regulations in respect to the authorities in their States. They can appeal to these provisions arising from EU law, if that provision in question is 'unconditionally' and 'sufficiently accurate'.[157] Unconditionally means that the imposed obligation does not dependent on an act of the EU or a Member State. A provision is sufficiently accurate if the imposed obligation is clearly stated.[158]

By virtue of the Dutch Constitution, the court can review international conventions. Article 94 regulates that treaty provisions, which are directly focusing on the residents, instead of on States, go for national rules without the need of the State's intervention. The direct effect of EU law means that the relevant provisions can be accessed as such in the national legal system, and in particular accessed by the

[152] Article 267 TFEU.
[153] ECJ 18 November 2006, Case 281/81.
[154] ECJ 17 September 1997, Case C-54/96 (Dorsch Consult).
[155] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 180-181.
[156] Article 94 Dutch Constitution 1815.
[157] ECJ 23 February 1994, Case C-236/92 (Difesa della Cava).
[158] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 180.

national courts, by anyone who has interest in it. It can take place by using the procedural means which are available by national law.[159]

The ECJ, according to its case law, reviews the Member States' tax measures on their compatibility with primary EU law as a sort of constitutional judge. This means that the Member States' tax systems getting more and more harmonized by the reviews of the ECJ, a process that is called 'negative integration'. It is called negative because it is not the EU legislator who encourages this form of integration. The ECJ is only competent to judge the compatibility with the EU law and is not empowered to propose Member States how to organize their tax systems.[160]

When a directive has been implemented in the Dutch legislation, residents can rely on this implemented national law by the national court. The court must interpret this in accordance with the applicable directive. If necessary, the national court will ask the ECJ preliminary questions how to interpret the text of the directive. In the interpretation of the EU directives, the ECJ operates as a regular tax court who explains the EU tax law. As a rule, tax residents cannot directly rely on a directive, but they do so by means of the national law which implemented the directive. After all, the directive focuses on the Member States. If a Member State does not implement a directive, not timely, or not correctly, citizens can invoke the directive directly,[161] because in that case obtains a direct effect.[162]

§3.5 Summary and conclusion

'*Generally, what is the hierarchy of international and EU law in the Dutch domestic (tax) system? And, therefore, what is the influence of those on the Dutch tax autonomy?*'

Presently, international collaborations are exercised for better alignments between States' domestic tax law. The relationship of international, EU and Dutch national tax law is determinative for the application of the legal tax system. The hierarchy of international and supranational tax law in relation to the Dutch tax system, can be subdivided into a monistic or dualistic system. International multilateral conventions, including the primary EU law, the ECHR and the ICCPR, and bilateral treaties are covered by the monistic system. Succeeding from this, the provisions have a direct effect in the Dutch law. It is

[159] C.S. Pisuisse & A.M.M. Teubner, *Elementair Europees Gemeenschapsrecht*, Amsterdam: Wolters-Noordhoff 1994. p.28.
[160] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 176.
[161] Ca ECJ 5 April 1979, Case 148/78 (Ratti).
[162] M. van Gorp, G. Joosten, H. Vermeulen, M.F. de Wilde, C. Wisman, *Grondslagen internationaal belastingrecht,* Den Haag: Boom juridisch 2016. p. 228.

intended that the Dutch legislator take those into account when exercising its powers. According to the principle of legality, tax authorities can only levy taxes on the basis of a Dutch formal law and therefore, to exchange information internationally, both a national legal basis and a treaty basis are required. Within the dualistic system, mainly the directives are applicable in the tax field, the so-called secondary EU law. These provisions need to be implemented into the Dutch tax law to get effect. However, if the given implementation period has expired or in case the conversion is not complete or incorrect, these directives get also a direct effect into the Dutch tax law. Taxpayers can only appeal on the Dutch law among which the directive is implemented.

In cases of conflict the international and supranational legislation prevail always over the Dutch legislation, including the Dutch Constitution. Therefore, the Dutch national courts have the obligation to apply these tax law with priority over the Dutch law. The court can apply directly to the higher rule of law, by means of article 94 of the Dutch Constitution or due to the direct effect of primary EU law. The taxpayers can also appeal immediately to the directly operating international and EU regulations in respect to the Dutch tax authorities.

The legislator has, by means of the Dutch law, a wide margin of appreciation. The Constitution[163] gives the Dutch legislator, consisting of the government and parliament, the authority to determine (tax) law.[164] Despite the authority given by the Constitution, the Dutch legislator cannot operate in complete independency. Through external incentives, nationally and internationally, legally and not legally, the legislator can be perceived as very active if it comes down to creating legislation. These external incentives limit its autonomy, because he must respond to social, economic and technical developments and the society's wishes. [165] Additionally, he must respond to external incentives from the judiciary, international and EU collaborations. By imposing such international and supranational instruments on the exercise of national public powers, more harmonization of the States' tax law can be achieved. General administrative tax implementation ensures instruments that provide to a significant extent the same regulations, rights and obligations for all States. Ascribable to this, international and EU collaborators are expecting that a better integrated system will be created around the world.

The influence of these international and supranational instruments on the Dutch tax autonomy can be observed from two perspectives, namely that the Dutch (tax) legislator gets somehow less and, at

[163] Article 81 Dutch Constitution 1815.
[164] S.J.C. Hemels, *De Toren van Babel,* Den Haag: Sdu Uitgevers 2011. p. 9.
[165] Gribnau, J.L.M., *Instrumentalisme en vrijheid*, NTFR 2012/517 nr.10. Paragraph 1.

the same time, more tax autonomy within the Dutch territory. Seen from the first perspective, it can be concluded that the tax autonomy gets more restricted, as a consequence of the administration of the higher rule of law within the Dutch system or due to its direct effect. Since the Dutch tax law is subordinated to international and EU tax law, which only will expand within time through the implementation of more regulations, it should be assumed that the Netherlands is not completely autonomous anymore. For example, a unique supranational partnership is created on EU level, with European administrative authorities which are operating independently, and have control and power above the powers of the Dutch legislator. The Dutch legislator, which is the tax autonomous within the Netherlands with the competency to create tax legislation, becomes restricted in exercising its powers to its own discretion. Nevertheless, the Netherlands itself participates in such collaborations, perhaps due to social and economic pressure, which impose tax law over the Dutch tax system, and give up a part of their tax autonomy. It must also be mentioned that the EU regulations have some open norms and the Netherlands is free to conclude tax treaties according to its own view.

From the second perspective, it can be assumed that the Dutch tax autonomy broadens by the implementation of international and supranational arrangements. Weiss[166] has suggested that even in a context of economic globalization, which is frequently perceived as a threat to national sovereignty, new technologies of regulation that extend across borders may have the ultimate effect of extending "the state's capacity to govern".[167] The Dutch legislator actually cannot fully introduce the own legislation to its own discretion, but can, by means of the administrative assistance, obtain information from abroad for the tax purposes within its territory, namely the Netherlands. The principle of sovereignty got in this way less burdensome on the exercise of the legislator powers to determine the correct tax assessment. Additionally, the Netherlands participates in collaborations, such as the OECD and EU, which are composing those regulations and therefore has voice in the content of such regulations.

[166] Weiss, L. (2005). The State-augmenting Effects of Globalization. (2005) *New Political Economy.* P. 345.
[167] Stewart, M. (2012). Transnational taks information exchange networks: steps toward a globalized, legitimate tax administration. *World Taks Journal, June 2012.* Paragraph 1.

Section 4 Exchange of information

§4.1 Introduction

This section concerns the importance of the (formal rules for the) exchange of information regarding to the levy of taxes in cross-border situations. The importance is obvious significant, considering the fact that without a properly functioning system of data and information exchange it is virtually impossible for the tax authorities to exercise control over cross-border income.[168] In addition, it can be difficult to actually levy taxes in cross-border situations because, for example, a foreign taxpayer is not traceable. And if the charge is effected, the collection of the tax due can result in complications. In order to actually levy a charge in cross-border situations, supranational and international regulations have arisen.[169]

As already mentioned in the introduction of this master thesis, the cooperation on supranational and international level is necessary for a more effective and efficient combatting and prevention of tax avoidance and tax evasion in this globalizing world. Through the mobility of tax residents and their cross-border transactions, it is difficult for States to determine the right tax claim, because their national powers are limited to their own territory.[170] The incorrect determination of taxation can lead to the hampering of the proper functioning of the tax systems. This might cause double taxation, which encourages tax residents to adapt their actions to reduce taxation. Therefore, a State cannot longer manage its own tax system individually, in particular with regard to direct taxation, without information from other States.[171] The solution for this problem is an intensification of cooperation between States on the mutual assistance in taxation. This intensifying cooperation of the exchange of information is a key element for the improvement of the tax assessment phase, in which the taxpayer's tax debt will be determined.

The importance of information for the tax authorities is quoted by Feteris: *"... without a correct and complete picture of the relevant facts, the government is unable to determine the correct amount of tax due (to be levied) and thereafter to claim. The provision of information to the tax authorities is therefore essential for a well-functioning system of formal tax law, in which tax debts that exist according to the law (material tax debts) are paid as much as possible. If the tax authorities do not sufficiently investigate the facts, fraud remains undetected; due to a lack of control, fraud can even be stimulated.*

[168] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 403.
[169] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 403.
[170] A.C.M Schenk-Geers, Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige, Tilburg 2007. p. 1.
[171] Consideration 1 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

This creates not only an incorrect actual tax burden, but also an arbitrary distribution of this pressure on citizens, which deviates from the burden-sharing that the legislator has chosen."[172]

By means of the law and other regulations, authorization has been awarded to tax authorities in order to provide them access to information for the State's tax purposes. However, it could occur that the tax authorities need information from other States for the tax assessment of the concerning taxpayer. Therefore also specific competences has been awarded to them for the assessment phase on international and supranational level. To facilitate this exchange of information, agreements on international and EU level are concluded. Information exchange takes place on the basis of bilateral tax treaties (see article 26 of the OECD Model Convention), Tax Information and Exchange Agreements (TIEA), the Strasbourg Convention or, within the EU, on the basis of the Directive on Administrative Cooperation (DAC). All these components are discussed in this section as element of the assessment phase of taxation in cross-border situations.

Generally, the international and supranational regulations discussed correspond with each other. All these arrangements provide exchange of information on request, automatically or spontaneously, with the exception of the Model Agreement for the TIEAs. Furthermore, all regulations include the following: the principle of reciprocity, the principle of exhaustion, information can only be requested if it is not possible to obtain the information on the basis of its own legislation, arrangements regarding the confidentiality of the obtained information and grounds for refusal.[173]

§4.2 International level

§4.2.1 Article 26 OECD MC

By means of the Convention of 1960,[174] the 'Organization for Economic Cooperation and Development' (OECD) was created by twenty States,[175] including the Netherlands, with the aim of promoting economic growth and employment for the OECD Member States,[176] but also in the relationship with non-member States. In order to achieve this goal, Member States agreed, among others, to remove or reduce as much as possible international trade obstacles. For example double taxation, which is a major obstacle to international trade. The OECD published, in order to promote bilateral treaties, its first Model Convention

[172] M.W.C. Feteris, *Formeel belastingrecht,* Deventer: Wolters Kluwer 2007. p. 246. Unofficial translation by author.
[173] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 484.
[174] Convention on the OECD signed in Paris on 14 December 1960.
[175] At the moment 35 Member States are affiliated with the OECD.
[176] Article 1 OECD Convention.

(OECD MC)[177] with accompanying Commentary[178] in 1963. The OECD recommended to use this Convention as a basis for bilateral treaty negotiations.[179] The Netherlands has closed over ninety tax treaties, the majority based on the OECD MC.[180] In addition, a Manual has been published to provide tax authorities more insight in each other's practices.[181]

The OECD MC is designed to be a standard for bilateral tax treaties to prevent double taxation between States, without violating the autonomy of other States or the rights of taxpayers. This Convention, including the accompanying Commentary, often serves as a blueprint for treaty provisions when States conclude a new Double Taxation Convention (hereafter: DTC) or change an existing DTC. A DTC has proved to be an adequate instrument for reasonably allocating taxing rights in case of cross-border income categories.[182] Because it is a model, it is not mandatory for States to use the Convention for their treaties. The OECD MC resigns primacy to the State of residence of the taxpayer and for that reason capital exporting States are favored over capital importing States. In general, developing States are mainly the ones that import capital, thus the OECD MC is to their disadvantage. For this reason, the United Nations (UN) developed the 'United Nations Model Double Taxation Convention' (UN MC)[183] in 1980, which largely resembles the OECD MC, but the position of the State of source is strengthened.[184]

Traditionally, international tax law was predominantly concerned with the avoidance of double taxation. Although the developed DTC had proved to be an appropriate instrument for allocating taxing rights on cross-border income categories reasonably between contracting States, a just taxation in the States was not yet been ensured.[185] There was a high risk that cross-border revenues did not become known to the States, resulting in a reduction of tax revenues. For this reason almost all tax treaties appeared to contain a provision that obliges the exchange of fiscal data that may be relevant for the treaty partner. As blueprint for such a provision contains the designed OECD MC an article focused on such an exchange of information between States. It concerns article 26 OECD MC, which was the first provision in which the mutual international exchange of information was arranged and gives the possibility to exchange information in three different ways: the exchange on request, the automatic exchange and the

[177] Model Tax Convention on Income and on Capital updated in 1977, 1992, 1994, 1995, 1997, 2000, 2003, 2005, 2008, 2010, 2014 and 2017.
[178] Commentaries on the Articles of the Model Tax Convention.
[179] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 104.
[180] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 105.
[181] Manual on the implementation of exchange of information provisions for tax purposes by the OECD Committee on Fiscal Affairs on 23 January 2006.
[182] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 466.
[183] United Nations Model Double Taxation Convention between Developed and Developing States, New York 2001.
[184] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 108.
[185] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 466.

spontaneous exchange of information.[186] These exchange possibilities are not included in the article, but are mentioned in the OECD Commentary.[187]

Additionally, such administrative assistance to levy taxes can only be effective if 'reliable' information is 'available' in the requested State or can be made available in the short term.[188] The participation of taxpayers is an important aspect in the process of reliability in tax matters, because it will increase the reliability of the information, which is a positive effect.[189] The OECD has therefore drawn up an availability and reliability standard. It contains regulations for:[190]

- the holding of reliable books and documents;
- the retention of books and records;
- the guarantee of the presence of reliable books and documents; and
- access to books and documents.

For a long period, the exchange on request was mainly used as the procedure of exchange. Even this procedure is still a useful device to counter tax avoidance and evasion, it did not prove to be the best stand-alone procedure to achieve the set of goals in the most efficient manner.[191] On that grounds the OECD's focus shifted more to the automatic exchange and spontaneous exchange of information. The explanation of the three manners to exchange information will be discussed in more detail in section 4.3.2.1. that concerns the information exchange on EU level. Generally speaking, the OECD procedures are in the main outline comparable to the manners of exchange implemented by the EU. Distinctions between the OECD and EU procedures of exchange are minimal and not of great importance, and therefore not necessary to mention.

According to article 26, Contracting States are obliged to exchange such information which is 'foreseeably relevant' for the application of the treaty or for the application of the domestic legislation, regarding to any form of taxes insofar as the taxation thereunder is not contrary to the Convention.[192] It enables to carry out large data traffic, because data can be exchanged both for the exercising of the treaty

[186] See section 4.3.2.1. for the further explanation of these ways to exchange information.
[187] Paragraph 9 OECD Commentary 2017.
[188] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 4.
[189] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 5.4.1.
[190] The standards were developed by the Global Forum Joint Ad Hoc Group on Accounts set up in 2003 by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes.
[191] See section 9.2.1 of this master thesis for the explanation.
[192] The scope of the provision is not limited by Article 1 (Persons Covered) and Article 2 (Taxes Covered) OECD MC.

and for exercising of the national law.[193] In addition, the article contains three grounds for refusal to cooperate with a request of information.[194] These limits of providing information are; no performing of conflicting administrative measures, no supply of non-obtainable information, or no supply of information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

The requirement 'foreseeable relevance' is an important condition which must be met by the request for the exchange of information: *"The standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer."* [195] It is the main rule for the requesting State concerning the exchange of information and sees on the relation between the requested information and the taxation of the taxpayer. The standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. It keeps requesting States from implementation of 'fishing expeditions', which is an investigation that does not stick to a stated objective but hopes to uncover incriminating or newsworthy evidence.[196]

The duty of confidentiality is also included in article 26 OECD MC. The exchange of data between two States only takes place if the providing authority is assured that the receiving authority will keep the information confidential. It determines that the received information within the functioning of a bilateral treaty shall be treated as secret in the same manner as information obtained due to the domestic legislation of that State and shall only be disclosed to the persons or authorities (including courts and administrative bodies) involved in the assessment or collection of the concerning taxes to which the treaty applies.[197] However, the obtained information may also be used for other purposes, rather than tax purposes, as long as the information, according to the tax laws of both Contracting States, may also be used for this other purpose and the authority, which provided the information, agrees with the use of the

[193] Burgers, I.J.J. (2017). Wegwijs in het Internationaal en Europees Belastingrecht, hoofdstuk 14 Internationale bijstandsverlening. *Wegwijs Reeks,* nr. 07-09. Paragraph 14.3.1.
[194] Article 26 paragraph 3 OECD MC.
[195] Article 26 OECD commentary 2017 & Consideration 9 of Council Directive 2011/16/EU.
[196] Article 26 OECD Commentary 2017.
[197] Article 26 paragraph 2 OECD MC.

information.[198] The requesting State shall clarify the purpose for what the information will be used and on what grounds this information may be requested in accordance with their national law.[199][200]

§4.2.2 OECD Multilateral Convention on Administrative Assistance in Tax Matters

This Convention, the 'Multilateral Convention on Mutual Administrative Assistance in Tax Matters' (Strasbourg Convention), is a multilateral treaty that provides regulations for mutual administrative assistance for the levy and recovery of taxes between States. This treaty has been concluded by the Council of Europe and the OECD in 1988 and entered into force on 1 April 1995, in response to the increasing opportunities for avoidance and evasion due to the increasing internationalization of the Member States' economies. The Netherlands has signed the Convention on 25 September 1990 and applied it from 17 July 1996.[201][202] The Netherlands has chosen to implement the Convention in the 'International Assistance with Levying Taxes Act' (*WIB),*[203] which will be discussed in section 4.4.3.

The aim of the Convention is to promote international cooperation in the enforcement of national tax law, in particular with a view to combatting tax avoidance and evasion. On the other hand, an important precondition is that it tried to respect the taxpayer's fundamental rights. The Convention provides the widest possible mutual administrative assistance in the levy (exchange of information) and collection of tax claims and the assistance with issuing documents between States.[204] Therefore, the Strasbourg Convention is much more extensive than the provision of article 26 OECD MC. Almost every Member State has made a restriction for some taxation. Just as article 26, this Convention arranges the exchange of information on request, automatically or spontaneously.[205]

The G20[206] has regularly encouraged States to join the Convention to fight against tax avoidance, tax evasion, money laundering and corruption. This ample opportunity to exchange tax-relevant information was seen as an important condition for the plans to combat aggressive tax planning. On 1 July

[198] Article 26 paragraph 2 OECD MC.
[199] Article 26 OECD Commentary 2017, paragraph 12.3.
[200] Burgers, I.J.J. (2017). Wegwijs in het Internationaal en Europees Belastingrecht, hoofdstuk 14 Internationale bijstandsverlening. *Wegwijs Reeks,* nr. 07-09. Paragraph 14.3.4.
[201] For the whole Kingdom, this is on 1 February 1997. The Netherlands and the other States of the Kingdom have made a number of reservations to the Convention.
[202] Burgers, I.J.J. (2017). Wegwijs in het Internationaal en Europees Belastingrecht, hoofdstuk 14 Internationale bijstandsverlening. *Wegwijs Reeks,* nr. 07-09. Paragraph 14.7.1.
[203] I.J.J. Burgers etc., Wegwijs in het International en Europees Belatingrecht, Wegwijs Reeks, ndfr.nl H14, paragraph 14.6.8.
[204](2011). Kern & Inleiding Verdrag inzake wederzijdse administratieve bijstand in belastingzaken. *Vakstudie Nederlands Internationaal Belastingrecht, 2011.* Paragraph 1.4.
[205] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 492.
[206] Group of Twenty Finance Ministers and Central Bank Governors. This international forum consists of the 19 largest national economies plus the European Union. The Netherlands is not one of the 19 States. The purpose of the cooperation between these economies is to contribute to global economic growth, to coordinate policies at the international level and to increase development. www.oecd.org/G20/

2011, an amendment protocol came into effect. This amendment protocol conciliates the treaty with the international standard on information exchange (CRS), in particular the exchange of financial information, and non-Member States of the OECD and the EU will also have access to the Convention. This also makes it easier for developing States to exchange information for tax purposes and the call from the G20 and OECD's is being met to support these States in improving their taxation.[207] These amendments must be placed against the background of the global financial crisis and the approach of black savers. For the Netherlands, this amendment protocol became applicable on 1 September 2013.[208]

Article 1 declares the aim of the Convention, which is the mutual assistance in tax affairs. A distinction is made between administrative assistance and legal assistance in criminal matters. Information for the latter cannot be obtained within this Convention, but must be obtained through criminal legal assistance.[209] On the field of the administrative assistance to levy taxes it is mainly similar to article 26 OECD MC.[210]

§4.2.3 OECD Model Agreement on Exchange of Information on Tax Matters

As bilateral treaties correspond to the OECD MC, exchange of information is possible on the basis of article 26 OECD MC. In case such a tax treaty between States is missing, it could still be important to exchange information. This is possible on the basis of a Tax Information Exchange Agreement (TIEA). The OECD[211] has developed a model for Conventions, bilateral and multilateral, as a standard for the exchange of information, which is the 'OECD Model Agreement on Exchange of Information on Tax Matters' and additional Commentary.[212][213]

The purpose of this agreement is to promote international cooperation in tax matters through the exchange of information. The Model Agreement counts sixteen articles and was developed in 2002 in response to the lack of effective information exchange, which was one of the criteria examined by the OECD as a feature of harmful tax practices.[214] The OECD therefore decided to complete further research into effective information exchange. This showed that article 26 is not suitable for tax havens and the

[207] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 35.
[208] The editors of NTFR (2010). Nederland ondertekent wijzigingsprotocol WABB-verdrag. *NTFR, 2010/13/24.* Section (summary).
[209] Article 1 Strasbourg Convention.
[210] Article 1-11, 18-30 Strasbourg Convention relate to the administrative assistance to levy taxes.
[211] The OECD Global Forum Working Group on Effective Exchange of Information which consists of representatives from OECD Member States and from several other States.
[212] The 2002 Model Agreement on Exchange of Information on Tax Matters and Commentary.
[213] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 483.
[214] See for more information of the Model Agreement: www.oecd.org.

Strasbourg Convention and the Assistance Directive[215] were too broadly formulated for the limits to the obligation for providing assistance.[216] As result of this research, this Model Agreement has been published that can serve as an example for specific information exchanges. The leading aim of this Model Agreement is to realize a legal instrument that could be used to establish a fair and effective exchange of information with (mainly) previous tax havens.[217]

The Model Agreement is kind of similar to the OECD MC but the scope is limited since it only reaches to the exchange of information between Contracting States. In addition, this Model contains only a provision for the exchange upon request. It allows authorities to enforce their domestic laws in their State by exchanging information that is relevant to a tax matter of a certain taxpayer. It is not binding at all, so deviations by States are possible, even in the multilateral agreement the States can only commit themselves to the articles of which they have indicated by ratification that they are committed to this.[218] This Model Agreement is based on the criterion of the 'foreseeable relevance' of the information for the requesting State, which is introduced in article 26 OECD MC.

§4.2.4 Multilateral instrument

The OECD announced on 5 October 2015 the final action reports, consisting of 15 actions, of the 'Addressing Base Erosion and Profit Shifting Project' (BEPS report),[219] prepared on the request of the G20. BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations.[220] These actions equip governments with domestic and international instruments necessary to tackle BEPS.

In order to adjust a concluded tax treaty, permission is required from both Contracting States. In order to implement the adjustments, that have entered in the OECD MC as a result of the BEPS project, in the existing tax treaties, a few years will pass. That is the reason for adjusting the OECD commentary for most changes, instead of the OECD MC. Because a change in the OECD MC has solely effect after adjustment of all existing, already concluded treaties. By adjusting the OECD commentary, the treaty text can remain unchanged, but still provide clarifying or adapted explanations.[221] In order to eliminate this

[215] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (cancelled).
[216] Burgers, I.J.J. (2017). Wegwijs in het Internationaal en Europees Belastingrecht, hoofdstuk 14 Internationale bijstandsverlening. *Wegwijs Reeks,* nr. 07-09. Paragraph 14.8.1.
[217] J.C. Barnard, 'Voormalige belastingparadijzen bereid tot doorbreking van bankgeheim', *WFR 2002/1041*. Paragraph 2.
[218] Burgers, I.J.J. (2017). Wegwijs in het Internationaal en Europees Belastingrecht, hoofdstuk 14 Internationale bijstandsverlening. *Wegwijs Reeks,* nr. 07-09. Paragraph 14.8.4.
[219] Over 100 States and jurisdictions collaborate in this project.
[220] See for more information, BEPS report: www.oecd.org.
[221] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 104.

implementation problem, and therefore making adjustments through the commentary, the OECD has developed a Multilateral Instrument (MLI)[222] in action 15 of the BEPS report. By means of a multilateral treaty, the existing tax treaties can be automatically amended if the States that sign and ratify this MLI.[223] The Netherlands signed the MLI on 7 June 2017 and the Dutch parliament is currently discussing the implementation.

§4.2.5 Dutch Tax Treaty Policy

The Dutch Note General Tax Treaty Policy[224] contains guidelines to which the Netherlands intends to establish itself in the sphere of international tax law. This policy was first published in 1987, but due to social developments, necessary adjustments have been made. For example, the important new developments in the position of EU law and associated jurisprudence, the developments of the internet or the problem of tax competition.[225]

In 2011, a new Note Tax Treaty Policy 2011 (NTTP)[226] was published.[227] This note has a more policy-based character, as a result of which the preceding notes, which have a more technical-content character, largely retain their value. The NTTP contains a list of important policies in relation to the international tax law, also on the field of the exchange of information. The NTTP states that the Netherlands will use the current OECD norms as the minimum requirements for information exchange for tax purposes. In multilateral and bilateral relations, the Netherlands aims to expand the information exchange possibilities, in particular through spontaneous and automatic exchange.[228]

In addition, the Dutch State Secretary provides further insight into concrete actions that will be undertaken in the view of the NNTP. This occurs by means of publicizing his explanation in government letters that he submits to the Dutch government. Recently appeared his letter about the approach of tax avoidance and tax evasion.[229] In this letter he describes a broad package of measures that need to be undertaken and will be undertaken by the Dutch government to combat tax avoidance and evasion. Those intended measures will improve the information exchange in the respect of the criterion of transparency.

[222] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS.
[223] I I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 110.
[224] Kamertsukken II 1987/88, 20365, 1-2.
[225] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 112.
[226] Dutch: Nederlandse Notitie Fiscaal Verdragsbeleid 2011 (NFV 2011).
[227] Parliament documents II 2010/11, 25087, 7.
[228] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 113-115.
[229] On 23 February 2018, the State Secretary of Finance, dhr. Snel, has sent his memorandum 'Tax evasion and tax evasion approach' to the government.

§4.3 EU level

§4.3.1 Introduction

There is an essential need for administrative cooperation instruments that provide similar or same regulations, rights and obligations for all Member States. That is the reason for a completely new approach that must be adopted, based on a new text, which empowers Member States to ensure efficient cooperation at international level, to overcome the negative effects of ever-increasing globalization on the internal market.[230] This is the reason that the European Council introduced Directive 2011/16/EU (hereafter: DAC).[231] It has been adopted for the purpose of administrative cooperation between Member States on supranational level and replaced and cancelled the old Mutual Assistance Directive, Directive 77/799/EEC, [232] which was the first regulation which strengthen the cooperation between EU tax authorities in the field of direct taxation.

According to the European Council, this old Directive and its amendments did not meet the current requirements of the internal market. They decided that, given the number and importance of the adjustments to be made, an amendment of the Directive will not be sufficient to realize the objectives to be achieved. This is the reason for cancelling and replacing the Directive by a new one. The DAC provides, where necessary, clearer and more specific regulations for administrative cooperation and broadens the scope of this cooperation. Its scope should apply to direct and indirect taxes which are not covered (yet) by other EU legislation.[233] The more specific explanation about the provisions within the DAC will be discussed in section 4.4.3 under the implementation of the DAC in the Dutch tax system.

§4.3.2 Directive 2011/16/EU (DAC)

§4.3.2.1 Exchange of information in the Directive

The DAC provides three different ways of information exchange: [234]

- Exchange of information on request:[235] This is the most commonly used method to exchange information. To levy taxes, it is necessary to obtain all the relevant information of the concerned tax resident. The requesting authority must request the competent authority of another Member State for

[230] Considerations 2 and 3 Council Directive 2011/16/EU.
[231] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (PbEU 2011, L64).
[232] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums.
[233] Considerations 4-7 Council Directive 2011/16/EU.
[234] This is in accordance with the ways of exchange under article 26 OECD MC & the Strasbourg Convention, and also the TIEA Model 2002 for the exchange on request.
[235] Articles 5-7 Council Directive 2011/16/EU.

the exchange of such relevant information. Prior to a request to the other State, it is essential that the requesting authority has already exhausted any usual possibility of its internal taxation procedures that it could address in the circumstances without threatening the achievement of the intended objectives.[236] If this requirement is satisfied, a request can be made and the requested authority shall communicate any foreseeably relevant information[237] to the requesting authority that it has in its possession or that it can obtain as a result of carrying out administrative investigations.[238] In order to obtain the requested information or to carry out investigation procedures, the requested authority shall proceed in accordance with the same procedures as it act as such.[239]

- Mandatory automatic exchange of information:[240] This manner to exchange information contains the systematic transmission of large amounts of information about taxpayers. From the taxation periods of 1 January 2014 onwards, every competent authority of a Member State shall provide automatically information to the competent authorities of any other Member State, which it holds in respect of tax residents of that other Member State. The information relates to five specific categories of income and capital, to be understood within the meaning of the national legislation of the Member State which provides the information.[241] Thus, the national legislation of the providing State is decisive for the question what kind of information exactly needs to be provided due to the income and capital categories. It covers information of labour income, management fees, life insurance products, pensions and ownership of and income from immovable property.[242] The aim pursued by automatic exchange is to determine whether the taxpayer has reported its foreign source of income correctly by checking the obtained information by the State of source with the tax records of the State of residence.[243]

- Spontaneous exchange of information:[244] It is the non-systematic, in any time and the unsolicited providing of information to another Member State.[245] Under specific circumstances, the competent authorities of every Member State shall provide any foreseeably relevant information[246] to the competent authorities of any other Member State concerned, if the other State would like to receive this. In addition, they may exchange all information spontaneously of which they have knowledge and which

[236] Article 17 paragraph 1 Council Directive 2011/16/EU.
[237] The information referred to in article 1 paragraph 1 Council Directive 2011/16/EU.
[238] Article 5 Council Directive 2011/16/EU.
[239] Article 6 paragraph 3 Council Directive 2011/16/EU.
[240] Article 8 Council Directive 2011/16/EU.
[241] Article 8 paragraph 1 Council Directive 2011/16/EU.
[242] Article 8 paragraph 1 Council Directive 2011/16/EU.
[243] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Deventer: Kluwer 2018. P. 19.
[244] Articles 9 & 10 Council Directive 2011/16/EU.
[245] Article 3 paragraph 10 Council Directive 2011/16/EU.
[246] The information referred to in article 1 paragraph 1 Council Directive 2011/16/EU.

could be of use for any other Member State. When the information has to be exchanged is explained in the article and includes:

"(a) the competent authority of one Member State has grounds for supposing that there may be a loss of tax in the other Member State;

(b) a person liable to tax obtains a reduction in, or an exemption from, tax in one Member State which would give rise to an increase in tax or to liability to tax in the other Member State;

(c) business dealings between a person liable to tax in one Member State and a person liable to tax in the other Member State are conducted through one or more States in such a way that a saving in tax may result in one or the other Member State or in both;

(d) the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;

(e) information forwarded to one Member State by the competent authority of the other Member State has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Member State." [247]

§4.3.2.2 Amendments of the Directive

Contemporary, the DAC has been amended numerous times by new EU directives. The amendments shall also apply for the objectives of the Dutch implementation Act (*WIB)*[248] with effect from the day on which the relevant amending Directive has been implemented.[249] The following amendments have occurred in chronological order:[250]

1. Directive 2014/107/EU:[251] It contains an extension of the automatic exchange of information and suggests the exchange of financial account data within the CRS.[252] The DAC provides already automatic exchange for certain categories of income and capital, in particular of non-financial nature.[253] The amendment through Directive 2014/107/EU requires Member States to impose reporting and due

[247] Article 9 paragraph 1 Council Directive 2011/16/EU.
[248] International Assistance with Levying Taxes Act of 24 April 1986.
[249] Article 2 paragraph 2 WIB.
[250] Explanatory memorandum Cbc by the State Secretary of Finance.
[251] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (PbEU 2014, L 359).
[252] See section 6 of this master thesis for the explanation of CRS.
[253] Consideration 5 Council Directive 2014/107/EU.

diligence rules for their FIs that are fully consistent with the rules of the CRS developed by the OECD. Further explanation of this Directive is discussed in section 6.3.1.

2. Directive 2015/2376/EU:[254] The effect of this amendment is that the spontaneous exchange of information on rulings under the DAC is extended to automatic (mandatory) exchange of information on issued cross-border rulings and transfer pricing agreements in advance, with effect from 1 January 2017 onwards. In many States, it is common practice to give clarity on the application of national tax law in advance to taxpayers, and especially the legal persons, by issuing rulings or by making transfer pricing agreements. The advantage of this practice is that certainty is given in advance about the tax treatment of certain actions.[255] Transparency between Member States' tax authorities on issued rulings and transfer pricing arrangements may lead to a better understanding of the position of the undertakings concerned and thereby contribute to addressing structures by which taxation is circumvented. The DAC already provides the basis for the spontaneous exchange of information on rulings. However, it has been found that in practice this is less effective, partly because this spontaneous exchange leaves room for Member States to determine themselves whether a ruling is relevant for other Member States. This is the reason for the amendment by this Directive.[256] Further explanation of this Directive is discussed in section 7.2.2.

3. Directive 2016/881/EU:[257] This Directive extends the scope of the mandatory automatic exchange of information with the provision of CbCR, the so-called Country-by-Country Reporting. This Directive provides the obligation for the Member States' MNEs to compose country reports and to exchange these automatically. Further explanation of this Directive is discussed in section 8.2.

4. Directive 2016/2258/EU:[258] The amendment, by means of this Directive, includes that the following paragraph is inserted in article 22 of the DAC: *"For the purpose of the implementation and enforcement of the laws of the Member States giving effect to this Directive and to ensure the functioning of the administrative cooperation it establishes, Member States shall provide by law for access by tax authorities to the mechanisms, procedures, documents and information referred to in Articles 13, 30, 31 and 40 of Directive (EU) 2015/849 of the European Parliament and of the Council."* The reason for this

[254] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.
[255] Consideration 1 Council Directive 2015/2376/EU.
[256] Burgers, I.J.J. (2017). Wegwijs in het Internationaal en Europees Belastingrecht, hoofdstuk 14 Internationale bijstandsverlening. *Wegwijs Reeks, nr. 07-09.* Paragraph 14.6.3.1.4.
[257] Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (PbEU 2016, L 146).
[258] Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities.

addition is to allow tax authorities access to the so-called AML data, the 'Anti-Money Laundry'. This is necessary in order to give the tax authorities more opportunities to carry out their tasks under the DAC, as well as to combat tax evasion more effectively.[259] On the basis of this amendment, the tax authorities will have access to information that is recorded by FIs for the purpose of monitoring the correctness and completeness of data exchanged within the EU within the framework of the CRS. The Directive also regulates for the same purpose the access for the tax authorities to the central register with information about ultimate stakeholders (UBO-register).

§4.4 Dutch level

§4.4.1 Introduction

On Dutch level, international exchange of information is of great importance. The Dutch economy is highly internationalized and, therefore, there is a need of foreign tax data for levying taxes. The Netherlands has entered into exchange obligations with many States on the basis of the OECD MC, the DAC and the multilateral Strasbourg Convention.[260] To exchange information internationally, both a national legal basis and a treaty basis are required. These national regulations can be subdivided into the tax law which enables the request for information from taxpayers and third parties, and regulations providing the administrative framework to exchange information with foreign States due to the use and implementation of tax treaties and European regulations.[261] The national legislation for levying taxes of Dutch tax residents within the Netherlands is the 'General Law on State Government 1959' (hereafter: *AWR)* and the 'International Assistance with Levying Taxes Act 1986' (hereafter: *WIB)* provides the administrative framework for the international exchange with the implementation of these regulations in the Dutch tax law.

The Dutch tax authorities can use the obtained information through the exchange for the tax assessment of Dutch tax residents. However, the obtained information is not always available for taxation, in the Netherlands. This is discussed in a Dutch tax case, in which the court reviews the question if evidence may be used to impose tax assessments when the tax authorities have purchased it from an informant. The Dutch tax authorities got information about foreign bank accounts of Dutch tax residents and as a result of that they have imposed a tax assessment. According to the national court, the informant

[259] Consideration 3 & 4 Council Directive 2016/2258/EU.
[260] A.C.M. Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige,* Tilburg 2007. P. 6.
[261] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 69.

has committed a crime when obtaining the evidence, and the tax authorities paid for this evidence. Depending on the outcome of an 'assessment of the weighted interests', it is decided whether the evidence has to be excluded of use. A balance is made between the importances of combatting tax avoidance and, on the other hand, that criminal behavior is prohibited.[262] Thus depending on the 'assessment of the weighted interests' will be determined whether the obtained information, as well by an exchange, can be used or not.[263]

§4.4.2 AWR

In the Netherlands, the national regulations for the levying of taxes are included in the 'General Law on Government Taxes' (*AWR*).[264] The powers of the inspector of the Dutch tax authorities are implemented in this law, for the collection of information from and about Dutch taxpayers on national level. In line with this law, the State Secretary of Finance created the 'Implementation Regulation *AWR*' which gives substance to the exercise of some articles. According to article 1 of the *AWR*, the scope of the law is as follows: "*The provisions of this law apply in the Netherlands when levying government taxes, the levying of tax interest, revisionary interest and administrative fines which can be determined or imposed pursuant to the tax system, as well as for the execution of the basic registration income, with the exception of taxes…"*[265]

In order to levy taxes properly, the tax authorities need the necessary information on personal and business level. Therefore, the inspector, who has to determine the tax claim, has been granted unilateral wide powers by the *AWR*, because taxpayers, in general, do not voluntarily cooperate in supplying data and information when levying aforementioned taxes. Specifically, articles 6 up to and including article 20 of this law include the needed powers for the inspector's exercising in the national assessment and return activities. In addition to the competences in this law, the inspector's exercising is bound by the general principles of good governance, including the principle of proportionality and fair play principle.[266]

The *AWR* contains a section 'obligations for tax purposes',[267] including article 47 *AWR*, which contains obligations for taxpayers with respect to the inspector and article 53 *AWR* which determines that

[262] Conclusion ECLI:NL:PHR:2015:1480, in cassation of ECLI:NL:GHARL:2015:645.
[263] The conclusion, in cassation, in this case was that the Dutch tax authorities may use the evidence of the crime for the tax assessment of the concerned individuals.
[264] Dutch: Algemene wet inzake Rijksbelastingen 1959 (AWR).
[265] Article 1 AWR. Unofficial translation by author.
[266] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 483.
[267] Articles 47-56 AWR.

these same obligations apply to third parties. It contains the active and passive information obligation. Everyone is obligated to provide information and data at the request of the inspector if this information 'may' be important for tax purposes (active). The word 'may' indicates that it is not necessary that a tax levy has to be imposes or will be imposed, but the inspector's reasonable suspicion is enough. In addition, the taxpayer must provide access to books, documents or other data whose consultation 'may' be of importance for the determination of the taxation (passive).[268]

The obligation to provide data and information only arises if the inspector has made a request for this, because taxpayers do not have to provide data or information on their own initiative. Namely, the inspector may invite persons who, in his opinion, are presumed to be liable to pay taxes or are obligated to withhold taxes, to make a tax declaration or to accept the tax assessment. Even if the law considers matters of a third party as matters of the person who is presumed liable to tax or withholding, the inspector may also invite that third party to make a declaration.[269] This information must then be provided within a reasonable period set by the inspector. The inspector must consider the nature and extent of the requested data when determining the length of the term. In addition, the inspector cannot go on the so-called 'fishing expedition'.[270] The tax authorities can use article 47 *AWR* to request information from domestic taxpayers, as well from foreign taxpayers who receive Dutch income and in situations of domestic taxpayers with foreign income.[271]

This is extended by article 47a *AWR*, which is introduced in order to prevent tax avoidance and evasion in international intercompany relations. This article determines that article 47 *AWR*, the information obligation also applies to information and data held by a foreign body or natural person having at least an interest of fifty percent of the shares and/or control in a company[272] or in a sister company[273] established in the Netherlands. The possibility arises to request information that is in the possession of a foreign shareholder, but which is or can be important for the tax position of the taxpayer.[274] It only has a limited effect, because it is unimportant if the non-resident shareholder resides

[268] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 484-485.
[269]Article 6 AWR jo. article 53 AWR.
[270] See paragraph 4.2.2 of this master thesis for a detailed explanation.
[271] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 406.
[272] Article 47a paragraph 1 AWR.
[273] Article 47a paragraph 2 AWR.
[274]A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 407.

in the EU because the further reaching Mutual Assistance Directive applies[275] or if a State established a tax treaty containing an information exchange provision.[276][277]

If the Dutch tax authorities require information, at the service of Dutch taxation, and the taxpayer or involved third party is abroad and refuses to provide the necessary information, the Dutch tax authorities can, first of all, turn to the tax authorities of the State in question. However, the Dutch tax authorities can solve this problem through its own legislation, because when a (suspected) taxpayer does not provide the requested information, the inspector can, under art. 52a *AWR* issue an information decision. The information decision is subject to the taxpayer's objection and appeal. This means that when it appears there is an absence of legal obstacles to request the information (for example 'fishing expedition'), and the information is not provided, this leads to reversal of the burden of proof. The tax authorities may then, on the basis of assumptions, reasonably determine the tax debt.[278]

In the Netherlands the authority to determine the tax assessment expires three years after the date on which the tax debt has arisen.[279] In addition the tax authorities have the competency to determine a recovery claim, which expires five years after the date on which the tax debt has arisen,[280] but if too little tax is levied related to tax components held abroad or has arisen abroad, the tax authorities have the right to post-clearance through the lapse of twelve years after the date on which the tax debt arose.[281]

Aforementioned regulations are the powers, which tax authorities may exercise in order to collect data and information of a tax resident within the Netherlands. Through the mobility of tax residents, it became more common to exchange information. If a foreign tax authority requests information from the Dutch tax authorities, it may be that they do not possess the requested information (yet). The tax authorities will request this from the taxpayer or a third party, by using their powers and the information obligation.[282] Thus the powers which the tax authorities may exercise in order to collect data and information in the context of an exchange of information are the same as these in the national procedure.

[275] Article 47a paragraph 3 AWR.
[276] Article 47a paragraph 4 AWR.
[277] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 484-485.
[278] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 70.
[279] Article 11 paragraph 3 AWR.
[280] Article 16 paragraph 3 AWR.
[281] Article 16 paragraph 4 AWR.
[282] Article 47 jo. article 53 AWR.

§4.4.3 *WIB*

The Netherlands has implemented bilateral treaties, the Strasbourg Convention and EU directives,[283] as such as the Mutual Assistance Directive,[284] in the Dutch legal tax system by the 'International Assistance with Levying Taxes Act' (*WIB*),[285] which has been in effect since 1986. Article 1 of the *WIB* clarifies that its provisions are intended to implement directives of the Council of the EU and other regulations of international and interregional law to provide mutual assistance in the levy of taxes, as well as interest and administrative penalties and fines related thereto, on national and local level, in the Netherlands.[286] In 2013, the *WIB* has been adjusted in connection with the entry of the revised DAC. Since the *WIB* also implemented the administrative cooperation that is included in other international agreements and EU directives, the new Directive only changed the *WIB* and did not replace it by means of a new national law.[287]

The *WIB* contains, among others, tax levy regulations for the tax authorities in cross-border situations. To provide mutual assistance in taxation, there must always be an underlying (international) regulation from which the obligation arises, otherwise the Netherlands is not allowed to provide any information. In principle, the *WIB* is the only legislation on the basis of which the Netherlands provides information,[288] thus if the information exchange is not included in the *WIB*, the Minister does not provide this information.[289] In addition, the *WIB* contains provisions for FIs to perform reporting and due diligence rules, this is discussed in section 6.3.2.

The *WIB* contains, in section II and III, the three information exchange ways, which must be provided or received by the Netherlands.[290] Namely, the exchange of information on request,[291] automatically[292] or spontaneously[293] and in addition the investigation within the context of the providing assistance.[294] These provisions are in accordance with the Directive. The *WIB* consists of thirty-six articles, subdivided in five sections and concluded with a final form and sign of the Queen Beatrix and the Secretary of Finance. Section I contains general provisions, including the scope and the definitions. Section II deals

[283] Exemptions are included in article 1 paragraph 2 WIB.
[284] Council Directive 2011/16/EU, first the Council Directive 77/799/EC was implemented in the WIB.
[285] In Dutch: Wet op de internationale bijstandsverlening bij de heffing van belastingen (WIB).
[286] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 414.
[287] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 415.
[288] A.C.G.A.C. de Graaf & P. Kavelaars & A.J.A. Stevens, *Internationaal belastingrecht,* Deventer: Wolters Kluwer 2017. p. 414.
[289] Article 14 paragraph 1 WIB.
[290] This is in accordance with the ways to exchange information in Council Directive 2011/16/EU.
[291] Article 5 jo. 5a WIB.
[292] Article 6–6e and 23-24 WIB.
[293] Article 7–7a and 25-26 WIB.
[294] Article 8–10 and 27 WIB.

with the providing assistance by the Netherlands and section III with regard to the requesting assistance by the Netherlands. Section IIIA consist of one article for transitional law and the final provisions are included in section IV.

The following sections will discuss some arrangements in the Dutch tax law, through the implementation of the international and supranational regulations. These are the regulations in the Netherlands, so if foreign authorities requesting for information. The extent to which foreign tax authorities comply with a request from the Netherlands, depends on how the Directive has been implemented and how that foreign authorities make use of any policy freedom.[295]

§4.4.3.1 Competent authority in the *WIB*

The mutual exchange of information occurs between the competent authorities of the States which need assistance. Article 26 provides no description of such an authority, which gives the Contracting States the legal freedom to define this definition. The Directive and the Strasbourg Convention, on the other hand, have given a definition, which has to be followed by EU Member States and participating States of the Convention. This definition is implemented in the *WIB* and describes it as follows: *"The person or authority appointed by a State to exchange information."*[296] In addition, a central liaison office can be designated by this competent authority, which is responsible for the primary care for contacts with other States in the field of administrative cooperation. In the Netherlands, the Minister of Finance is appointed as the competent authority and central liaison office for the levy of taxes. The Minister is also responsible for the contact with the EC.[297]

In addition, there are two liaison offices which were established in order of the cancelled and replaced Directive 2008/55/EC. They are established to support the tax authorities in the Netherlands for assistance at European level. One liaison office is located in Rotterdam for Customs (Custom Information Centre, CIC) and one in Almelo (Central Liaison Office, CLO). These liaison offices ensure that the information that is received via the common communication network (CCN network) is sent to the competent tax region and vice versa. In the *WIB*, the CIC and the CLO will be mandated by the Minister of

[295] Voort Maarschalk, van der A.E.H. & Rosier, E.J.M. (2012). Wet wederzijdse bijstand in de Europese Unie bij de invordering van belastingschulden en enkele andere schuldvorderingen 2012: enkele. *Tijdschrift Formeel Belastingrecht, 2012/03-02.* Paragraph 1.4.
[296] Article 2 paragraph 1 sub f WIB. Unofficial translation by author.
[297] Article 3 WIB.

Finance to give practical execution to the powers of the Minister as the central liaison office, arising from this law.[298]

§4.4.3.2 Exchange of information on request in the *WIB*

States can request each other's assistance to provide information of tax residents for the levy of taxes. These provisions are included in article 5 and 5a for the provided assistance by the Netherlands and in article 23 and 24 for outgoing requests. The Minister shall communicate any foreseeably relevant information in his possession or resulting from an administrative investigation, with respect to the levy of taxes covered by the scope[299] of mutual assistance. [300]

The Minister shall provide the requested information as soon as possible and no later than six months after the date of receipt of the request. If the Minister has already information in its possession, he shall provide it within two months. Under special circumstances, the Minister and competent authority of the requesting State, may agree other terms.[301]

§4.4.3.3 Mandatory automatic exchange of information in the *WIB*

The implementation of these provisions is under article 6-6e for incoming requests and under article 25 and 26 for requests from the Netherlands. The Minister will, within the meaning of the DAC, automatically provide the competent States the available information of foreign tax residents concerning specific income and capital categories. These categories are: labour income, management fees, life insurance products, pensions and ownership of and income from immovable property.[302] Available information for the exchange of all the five categories, is the information in the tax files of the Netherlands or the information which can be retrieved in accordance with the procedure for collecting and processing information in the Netherlands.[303] It could be that a State has indicated that it does not wish to receive information regarding one or more of these categories. In this circumstance, the Minister does not provide such information to that State.[304]

[298] Explanatory memorandum to bill of the Mutual Assistance Act in the European Union in the collection of tax debts and some other debts 2012 (MAA 2012). Paragraph 4.1.
[299] Article 1 WIB.
[300] Article 5 WIB.
[301] Article 5a WIB & article 7 Council Directive 2011/16/EU (in the Strasbourg Convention are no time limits included).
[302] Article 6b paragraph 1 WIB & Article 8 paragraph 1 Council Directive 2011/16/EU.
[303] Article 6b paragraph 2 WIB.
[304] Article 6b paragraph 3 WIB & Article 8 paragraph 3 Council Directive 2011/16/EU.

The Minister will automatically provide the information at least once a year, within six months after the end of the tax period in which the information came available.[305]

§4.4.3.4 Spontaneous exchange of information in the *WIB*

Under the same circumstances as within the DAC and the Strasbourg Convention,[306] the Minister spontaneously provides information to other competent authorities.[307] Articles 25 and 26 contains the regulations for the spontaneously received information by the Netherlands.

The Minister will provide the information as soon as possible and no longer than on month after the information became available.[308]

§4.4.3.5 Investigation procedure in the *WIB*

To provide the information on request, automatically or spontaneously, the Minster shall, if necessary, commission an investigation to obtain the relevant information for the levying of taxes.[309] This investigation takes place in accordance with the national law, in the Dutch situation the *AWR.* Section VIII, section 2,[310] shall apply to this investigation, which is already discussed in section 4.4.2 of this master thesis.

§4.4.3.6 Limits for the exchange of information in the *WIB*

Under some circumstances, the Minister does not have to provide information upon a request. This is in the following cases:[311]

- The Dutch public policy disallows this;
- In the Netherlands, such information pursuant to statutory provisions or administrative practice cannot be obtained for the purpose of levying taxes; (protection of the Dutch sovereignty)
- It is likely that the receiving authority has not used their available provisions of obtaining the information it has requested; (the principle of exhaustion, an instrument to protect a requesting State for unnecessary efforts)
- The competent authority for whom the information is intended, is not authorized or able to provide the Minister similar information;
- A commercial, industrial or professional secret would be disclosed;

[305] Article 6b paragraph 4 WIB & Article 8 paragraph 6 Council Directive 2011/16/EU (in the Strasbourg Convention are no time limits included).
[306] See paragraph 4.3.2.1.
[307] Article 7 WIB & article 9 Council Directive 2011/16/EU & article 7 Strasbourg Convention.
[308] Article 7a WIB & article 10 Council Directive 2011/16/EU (in the Strasbourg Convention are no time limits included).
[309] Article 8 WIB & article 6 Council Directive 2011/16/EU.
[310] With the exception of article 53 paragraph 2 and 3 AWR.
[311] Article 14 paragraph 2 WIB & article 17 Council Directive 2011/16/EU.

- The providing would be contrary to generally accepted principles of taxation or other restrictions deriving from the applicable provisions on international and interregional law.

The Minister informs the competent authority of the requesting State on what grounds he rejects the request for information.[312]

§4.4.3.7 Non-tax purposes in the *WIB*

The provided information, by the Minister, may be used for other purposes than the taxes within the scope of the mutual assistance within the *WIB*, and therefore also the scope of other directives, international and interregional regulations. The Minister shall authorize the competent authority of the other State to use the information for other purposes. This approval is granted in any case if the information can be used in the Netherlands for similar purposes.[313]

Unless a competent authority of another State determines otherwise, the obtained information by the Minister can only be used for the levy of taxes that fall within the scope of the mutual assistance of the *WIB*.[314] The Minister may ask permission from a competent authority of a State to use the information for other purposes.[315]

§4.4.3.8 Legal protection in the *WIB*

Until 1 January 2014, the Netherlands had a far-reaching form of legal protection. A notification procedure was included in the *WIB,* which determined that the tax resident, who provided the information, received a notification[316] before the transfer of his/her provided information. On this basis of this notification the involved tax resident had the opportunity to lodge an objection and/or an appeal against the intended exchange to other States.[317] The tax resident had an interest in such an objection if there was a risk that data and information related to him/her could not be kept secret by another tax authority, could be used unlawfully, or that the information was not correct or incomplete. It was effective legal protection related to the exchange of information.[318]

On 1 January 2014, however, this notification obligation was ended, as a result of which the legal protection has been substantially reduced. The major argument for withdrawing this provision it can be noticed that currently, dissimilar at the time of the introduction of the *WIB,* sufficient safeguards are

[312] Article 14 paragraph 4 WIB.
[313] Article 17 paragraph 2 and 5 WIB.
[314] Article 30 paragraph 1 WIB.
[315] Article 30 paragraph 2 WIB.
[316] Article 5 paragraph 2 WIB (cancelled article).
[317] Article 5 paragraph 3 WIB (cancelled article).
[318] Booij, J.A. (2017). Afkalving rechtsbescherming bij informatie uitwisseling aan het buitenland? *TFO, 2017/152.5.* Paragraph 2.

maintaining the confidentiality of exchanged information.[319] Another reason to abolish this provision is that such a procedure was not routine on international level and, therefore, due to the pressure the Netherlands opt out.[320] The abolition is in line with the recommendations of the 'peer review'[321] on the Netherlands of the Global Forum.[322] Abolition would prevent the Netherlands from putting itself in an exceptional position, because the DAC has no obligation to send such a prior notification.

The Global Forum was introduced to get more attention for risks of non-cooperating States when it comes to fiscal exchange of information.[323] The aim of the Global Forum is to ensure that the international standards on transparency and exchange of information are implemented in all the participating States. By means of 'peer reviews', that are held under the members, an assessment is made of each State's ability to fulfill their obligations according to the internationally agreed standard.[324] This standard determines that information must be exchanged on request in cases where it is foreseeable relevant for the national taxation or other tax obligations in the requesting State. Effective exchange of information means that the participating States ensure that the relevant information is available, that it can be obtained by the requested State and that there are procedures that allow information to be exchanged.[325]

§4.4.3.9 Duty of confidentiality in the *WIB*

The duty of confidentiality of the *AWR*[326] applies to the obtained information in the *WIB*.[327] In addition, the Minister will not provide any information to a competent authority if the legislation of that State does not impose a duty of confidentiality on officials of the tax authorities, with respect to exchange of information.[328]

§4.4.3.10 Penalty regime in the *WIB*

Some measures are included in the *WIB* to require the compliance of providing relevant information by tax residents or by accounting officers. When the compliance of providing such information,[329] is not, not timely, incomplete or incorrect due deliberate intent or gross negligence, a penalty can be imposed. The

[319] Neve, L.E.C. (2013). Kennisgeving informatie uitwisseling, plicht en fundamenteel recht. *NTFR, 2013/27.* Paragraph 1.
[320] Booij, J.A. (2017). Afkalving rechtsbescherming bij informatie uitwisseling aan het buitenland? *TFO, 2017/152.5.* Paragraph 2.
[321] Global Forum report on the Netherlands, annex of Parliament documents-II, 2011-2012, 25 087, nr. 28.
[322] The Global Forum on Transparency and Exchange of Information for Tax Purposes.
[323] http://ww.oecd.org/tax/transparency.
[324] Burgers, I.J.J. (2017). Peer review effective governance-instrument?. *NTFR, 2017/2717.* & http://ww.oecd.org/tax/transparency/about-the-global-forum/.
[325] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2017. P. 52-53.
[326] Article 67 AWR.
[327] Article 28 WIB.
[328] Article 16 WIB.
[329] Article 8 WIB.

non-compliance of providing information, is regarded as a punishable infringement, on which an offense fine not exceeding the amount of the fourth category of the Criminal Code.[330] This fine amounts to a maximum of €20,750.[331] On international non-compliance it is also possible to assign a criminal penalty.[332][333]

§4.5 Case law

In the next case law, situations arise in which information about taxpayers need to be collected concerning the exchange of information on request. The national courts of the concerned States asked the ECJ or the European Court of Human Rights preliminary questions on the applicability and scope of these international regulations. The judgements given, illustrate the increasing concern of the taxpayer's rights. These case law concerns the procedural legal protection of taxpayers, in particular the question if a formal legal entrance is present for the taxpayers when exchanging information. By giving their judicial review, they have set out principles that need to be considered when exchanging information. It will broaden the scope of such international agreements since there are no specific tax related articles which protects the rights of these taxpayers. These conclusions have effect on EU level and on the Dutch national exercising.

§4.5.1 Case C-276/12 Sabou [334]

§4.5.1.1 Content of the case

In this case the Czech tax authorities have requested information from the competent authorities of other Member States, because they are doubting how to review the tax assessment concerned. In dispute is that Sabou, the tax resident in this case, does not agree with the lawfulness of the information exchange, because of the lack of fundamental rights for him as taxpayer. He pleads that he has the right to be informed about the decision of requesting information, so he can take part in the formulation of the questions and in the witness examination in the requested State. In principle, the question arising in this case is whether the Directive 77/799/EC[335] provides the taxpayer rights if his State request information

[330] Article 23 paragraph 4 Criminal Code.
[331] This is the offense fine amount of the fourth category since 1 January 2018.
[332] Article 11 paragraph 4 WIB.
[333] (2018). Commentaar op de Wet op de internationale bijstandsverlening bij de heffing van belastingen, Artikel 11. *Vakstudie Nederlands Internationaal Belastingrecht, art. 11 WIB.* Note 2.
[334] ECJ 22 October 2013, Case C-276/12 (Sabou).
[335] Because this Directive is cancelled and replaced by Directive 2011/16/EU, the judgement in this case has also relevance to this new Directive.

from other Member States.[336] The referring court asks the ECJ preliminary questions on the applicability and scope of the EU Charter[337] and on the interpretation of the Directive.

The EU Charter contains the fundamental rights, freedoms and principles of the EU. Since December 2009, the Charter is legally binding on the institutions of the EU and on the EU Member States when they exercise the EU law.[338] The Charter constitutes since then primary law, which serves, as such, as a parameter for examining the validity of secondary EU legislation and national measures. The aim of it was to make the fundamental rights protected by EU law more visible. In addition, because of the principles of direct effect (monistic system) and of the primacy of EU law, the Charter was necessary in some States. This is the case when European law prevails over domestic Constitutional law, because it would become possible for it to breach national fundamental rights.[339] In this case, the EU charter is irrelevant, because it is about a period before December 2009.

In addition, aforementioned Directive is implemented to coordinate mutual exchange of information between the competent tax authorities of Member States. In that context, it imposes certain obligations to Member States but does not provide certain rights for taxpayers. A distinction can be made in the tax audit procedure, between the stage of investigation and the stage of contradiction. A request for information, on the basis of the Directive, belongs to the investigation stage.[340] The ECJ concluded, on the basis of Directive 77/799/EEC, that a Member State is not obligated to inform tax residents or ask for their opinion when a request for information exchange has been made in the investigation stage. The same principle is applicable for the reply on the request or the witness examination.[341] Thus, according to the ECJ, the request for information was permitted and is not in conflict with the respect for the rights of the defense.[342] This defense principle means that addressees of government decisions, which are significantly affected by their interest, should be able to make their view sufficiently known.[343][344]

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[336] Egelie, W.F.E.M. (2013). Geen notificatieverplichting op grond van EU-recht bij een verzoek om informatieuitwisseling. *NTFR, 2013/2079.* Section (summary).
[337] Charter of the Fundamental Rights of the European Union 2000/C 364/01.
[338] Article 51 EU Charter.
[339] Brittain, S. The relationship between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an originalist analysis. *https://www.cambridge.org/core/services/aop-cambridge-core/content/view/704D1FE83B8F7A2F9D8045AEDB4B0745/S1574019615000255a.pdf/relationship_between_the_eu_charter_of_fundamental_rights_and_the_european_convention_on_human_rights_an_originalist_analysis.pdf*. P. 496.
[340] Egelie, W.F.E.M. (2013). Geen notificatieverplichting op grond van EU-recht bij een verzoek om informatieuitwisseling. *NTFR, 2013/2079.* Section (commentarty).
[341] Egelie, W.F.E.M. (2013). Geen notificatieverplichting op grond van EU-recht bij een verzoek om informatieuitwisseling. *NTFR, 2013/2079.* Section (summary).
[342] Weber, D.M. (2017). Handvest van de grondrechten van de Europese Unie, *EBR.4.0.3.* Paragraph 1.
[343] ECJ 23 October 1974, Case C-17/74 (Transocean Marine Paint Association).
[344] Lammers, M.H.W.N. (2012). Het verdedigingsbeginsel. *MBB, 2012/06.* Paragraph 7.

None of the Conventions or the Mutual Assistance Directive, explicitly paid attention to the procedural legal protection of taxpayers in the context of the exchange of information. Apparently, this is something that the States should arrange themselves, with due regard for national law and within the framework of the scope of the agreed Conventions and the Directive.[345] Thus, there may only be a chance for the tax resident to object the occurrence according to the rules and procedures applicable in the national law of his/her State of residence.[346]

§4.5.1.2 Implications for the Netherlands

In this case the ECJ concluded that the Directive does not provide any rights for the tax resident when information is exchanged between tax authorities of Member States. From the conclusion of the ECJ in this case, it is clear that tax residents have no legal basis for the right of being heard by the EU law; do not need to be informed of the intended exchange and no right to express his/her views on the exchange of information between tax authorities. If the national law provides regulations and procedures for the exchange of information between States, the taxpayer can rely to this. Thus the Dutch law may offer a further reaching form of legal protection, as long as it does not infringe (the primacy of) EU law. Until 1 January 2014, the Netherlands had such a further reaching provision for legal protection, which arranged that tax residents were informed in advance of the intention of exchange.[347] Due to the abolition of this notification obligation, the legal protection is considerably reduced.[348]

§4.5.2 Case C-682/15 Berlioz [349]

§4.5.2.1 Content of the case

In the context of the international exchange of information between tax authorities, this is an important decision in relation with the taxpayers' legal protection. In this case the French tax authorities request information, in accordance with the DAC, of a Luxembourg parent company (Berlioz), via the Luxembourg tax authorities. The information is necessary for the French investigation into the tax position of a SAS, a company divided into shares under French law. Berlioz refused to provide any requested information to the Luxembourg tax authorities, because it considers that certain information is not expected to be

[345] Booij, J.A. (2017). Afkalving rechtsbescherming bij informatie uitwisseling aan het buitenland? *TFO, 2017/152.5.* Parargaph 4.
[346] Egelie, W.F.E.M. (2013). Geen notificatieverplichting op grond van EU-recht bij een verzoek om informatieuitwisseling. *NTFR, 2013/2079.* Section (summary).
[347] See section 4.4.3.8 of this master thesis.
[348] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Paragraph 8 (end note).
[349] ECJ 16 May 2017, Case C-682/15 (Berlioz), this case is in principle only applicable in the EU, because of the EU Charter.

relevant (foreseeable relevance) for the investigation within the meaning of the Directive. Due to their refusal, a fine is imposed on Berlioz by the Luxembourg tax authorities, on what Berlioz lodged an appeal by the 'Cour Administrative'. [350][351] In this context it is important that, under the Luxembourg tax law, the taxpayer was able to lodge an appeal against such fine, but not against the underlying request for the information exchange.[352]

The referring court in this case, asks the ECJ preliminary questions about the applicability and scope of the EU Charter and the interpretation of the Directive. In this situation, it is about the 'right to fair trial' of article 47 of the Charter which guarantees effective legal protection in relation with government decisions. The ECJ concludes that the EU Charter also applies in the situations when Member States use national provisions (including such a fine) which are independent of the EU legislation, but are used to exercise the EU law. This causes that not only a such a fine, but also the decision on what the fine is based, namely the request for exchange of information, can be subject to a judicial review. It gives the taxpayer the right to challenge the legality of the decision. Thus, the national court is not only authorized to review the penalty given, they may also review the legality of the order imposed. [353][354]

In addition, the scope of the review has to be determined. This raises the question what should the information request from the Luxembourg tax authorities and information request from the French tax authorities meet to be considered legitimate within the meaning of the Directive? The criterion of 'foreseeable relevance'[355] of the requested information is an important condition which must be satisfied by the request of information. In addition, this criterion is at the same time a condition for the legality of the order addressed to a tax resident, by the requested State, and for the penalty imposed on him for non-compliance of that order. A marginal review must be made to determine whether the information requested is 'foreseeably relevant' for the taxation in France, the requesting State. For the purpose of this review, the ECJ observes that the requesting authority must provide sufficient reasons why the requested information is relevant. The purpose of the concept of foreseeable relevance is thus to enable the requesting authority to obtain all the information which seems justified for its investigation, while not

[350] The highest administrative court of Luxembourg.
[351] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Paragraph 2 (end note).
[352] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Paragraph 2 (end note).
[353] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Under note paragraph 3.
[354] According to article 6 paragraph 1 ECHR, article 13 ECHR and 47 EU Charter.
[355] See section 4.2.2 of this master thesis.

authorizing it manifestly to exceed the parameters of that investigation nor to place an excessive burden on the requested authority.[356]

The ECJ also expresses its opinion on whether the national court of the requested Member State should have access to the information request in the exercise of its judicial review and whether that document must also be communicated to the concerned tax resident. The national court, in this case the Cour Administrative, is, in the context of an appeal against a penalty measure for non-compliance of the information exchange request, not only authorized to review the penalty imposed but also to review the legality of that order. Regarding to the 'foreseeable relevance', the judicial review is limited to the question of whether such relevancy is not manifestly lacking. According to the ECJ, the court of the requested Member State must, in the exercise of its judicial review, have access to the request for information addressed to the requested Member State. The concerned tax resident does not have the right to access the request, because it remains a secret document.[357] He has only the right to get minimum information,[358] which concerns the identity of the person to whom the investigation or control is being made and the tax purpose for which the information is requested.[359]

The judicial conclusion of this case differs from the conclusion given by the ECJ in case Sabou, in which is concluded that in the process of an information exchange the taxpayer is not entitled to be heard and to have the legality to review the information request. The reason for the different conclusions is that in the case of Sabou the exchange took place between two tax authorities and the tax resident was not directly involved in the information exchange process. That situation differs from the situation in this case, because the tax resident became involved in this process. In case Berlioz, the taxpayer concerned was sent a request to provide the requested information. The legal protection is improved in this case, because the concerned tax resident had the possibility to have the legality of the request for information checked by the judge. In case Sabou this was not a possibility.[360] However, it should be noted that the legal protection from this case law only extends to the one on whom the investigation takes place. When this

[356] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Under note paragraph 4.
[357] Article 16 Council Directive 2011/16/EU.
[358] Article 20 paragraph 2 Council Directive 2011/16/EU.
[359] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Paragraph 7 (end note).
[360] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Paragraph 10 (end note).

is at a third party, as is the case with Berlioz, then the taxpayer who is the subject of the investigation still does not have the possibility to respond to the request for information. [361]

§4.5.2.2 Implications for the Netherlands

In the event that the Dutch tax authorities do not have the requested information they have to conduct an investigation to obtain this relevant information in the first place.[362] The Dutch tax authorities have the possibility to conduct an investigation, at the taxpayer [363] or/and a third, [364] to collect the relevant information for the exchange of information. This investigation may also take place at the request of a competent authority of a requesting Member State.[365] Article 47 *AWR* and 53 *AWR* applies in this case, which contains the obligation for tax residents and third parties to provide the requested information. In addition, a fine can be imposed if the obligation to provide the necessary information within the investigation procedure has not been met. The penalty provisions of the *AWR*[366] apply also in this case [367] and therefore, under Dutch law, objections and appeals may be lodged against the fine in a similar situation to this case.[368] Due to the conclusion of the ECJ, such an objection and/or appeal can also be lodged to the underlying decision, namely the information request. Even if no fine has been imposed yet, the one on whom the investigation takes place had already the possibility under Dutch law to question the exchange of information. This is the case when the taxpayer continues to refuse to provide the requested information, the Dutch tax authorities can start an injunction to enforce this obligation. In that procedure, the taxpayer or third may take the view that the request for information and/or the proposed exchange thereof is in conflict with the (EU) law.[369]

In addition, article 8 paragraph 6 *WIB,* states that no appeal can be lodged against an investigation that has been conduct by the tax authorities to comply with an information request. This provision had as underlying meaning that it was undesirable to lodge an objection and/or appeal in the investigation phase, while this could already be done on the basis of the notification procedure[370] prior to the exchange to another tax authority. In fact, this article should also have been abolished at the same time with the

[361] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Paragraph 6 (end note).
[362] Article 8 WIB,
[363] Article 47 AWR.
[364] Article 53 AWR.
[365] Article 8 paragraph 2 WIB.
[366] Article 67g paragraph 1 AWR & other penalty provisions within the AWR.
[367] Article 11 paragraph 2 WIB.
[368] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Paragraph 8 (end note).
[369] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Paragraph 8 (end note).
[370] See section 4.2.2 of this master thesis.

abolition of the notification procedure. If this provision precludes effective legal protection, then this is in any case changed by this case.[371]

The foregoing means that the Dutch legal protection in situations such as that of the Berlioz judgment in principle does not need to be adjusted. It only appears that legal protection can now be realized solely by refusing to provide the requested information. However, the Dutch tax authorities could subsequently impose a fine.[372]

§4.5.3 Case C-201/14 Bara [373]

§4.5.3.1 Content of the case

The central question of this case, is to what extent and in what way may public authorities of a Member State share personal data of their tax residents in the exercise of their public powers? In this case it is, in particular, about income data that is requested by other government authorities for the fulfilment of their common interest task. The ECJ clearly marked the boundaries of the information exchange with its judgement.[374]

Smaranda Bara is a Romanian tax resident, who works as a self-employed individual. She, and other individuals, receive income from self-employment and on the basis of these data, which has been provided by the Romanian tax authorities (ANAF)[375], an overdue contribution has been determined by the hospital fund (CNAS).[376] The involved individuals dispute before the referring court the legal validity of the data transferred between authorities in one State, on the basis of Directive 95/46/EC (Privacy Directive).[377] They believe that their data has been used for purposes other than those for which they were originally communicated to the tax authorities, on basis of an unpublished internal protocol without their explicit consent and without prior notification.[378] The Privacy Directive has been established to protect natural persons concerning the processing of their personal data and the free movement of such data. The

[371] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178.* Paragraph 8 (end note).
[372] Eijsden, van J.A.R. (2017). Zaak Berlioz. Aan EU-Handvest te ontlenen rechten voor justitiabele die is beboet vanwege niet-naleving verzoek om inlichtingen. *BNB 2017/178*. Paragraph 8 (end note).
[373] ECJ 1 October 2015, Case C-201/14 (Bara).
[374] Niessen-Cobben, R.M.P.G. (2015). Roemeense wetgeving in strijd met Privacyrichtlijn vanwege informatieverstrekking door Roemeense belastingdienst zonder kennisgeving aan betrokkene. *NTFR, 2015/2592.* Section (commentary).
[375] 'Agentia Nationala de Administratre Fiscala'.
[376] 'Casa Nationala de Asigurari de Sanatate'.
[377] Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals regarding to the processing of personal data and on the free movement of such data.
[378] Niessen-Cobben, R.M.P.G. (2015). Roemeense wetgeving in strijd met Privacyrichtlijn vanwege informatieverstrekking door Roemeense belastingdienst zonder kennisgeving aan betrokkene. *NTFR, 2015/2592.* Section (summary).

Directive determines that personal data may be processed, if it is done in a fair, lawful, adequate and accurate manner.[379] In addition, it is also required that the processing of personal data has a legitimate basis.[380] It is important that the movement of personal data from one Member State to another should not always be possible, because the fundamental rights of individuals must be protected.

The referring court, 'Curtea de Apel Cluj',[381] asks the ECJ preliminary questions about the interpretation of article 124 TFEU, which is declared inadmissible, and the interpretation of the Privacy Directive. The ECJ reviews the case in accordance with the Directive and concludes that no permission is required from the tax residents when forwarding their data, if the law provides for the exchange (legal basis) and the exchange of the data has a legitimate basis.[382] In this case the legal basis is missing, because the exchange occurs via an 'unpublished internal protocol' concluded between the authorities. Without a legal basis, the data transfer can only be legitimate if the Romanian tax authorities had informed the taxpayers, Smaranda Bara etc., about the transfer of their data and also informed them about the purpose for which the data are transferred. The CNAS, the recipient of the personal data, should also had informed the concerned tax residents of the receipt of the data and the reason of receipt.[383] Thus in this case, the ECJ concluded that such a transfer is contrary to the Privacy Directive.[384][385]

Arising from this case is that the balance between a taxpayer's right to privacy and the need to collect information is that an involved taxpayer must be informed in advance in the case of transferring his/her personal data between national authorities, when there is no legal basis for the exchange.[386] Thus, the right to privacy must be respected as far as no national tax law foresees and justifies a potential restriction. It is relevant to mention that the ECJ referred to the provision of the Privacy Directive, which is a reflection of article 8 ECHR.

[379] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 2.
[380] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 2.
[381] The Court of Appeal of Romania.
[382] The legitimate reasons are explicitly mentioned in article 13 Privacy Directive.
[383] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 2.
[384] The main provision which appear to be relevant to the resolution are articles 5-7, 10-13 Directive 95/46/EC.
[385] Niessen-Cobben, R.M.P.G. (2015). Roemeense wetgeving in strijd met Privacyrichtlijn vanwege informatieverstrekking door Roemeense belastingdienst zonder kennisgeving aan betrokkene. *NTFR, 2015/2592.* Section (considerations).
[386] Niessen-Cobben, R.M.P.G. (2015). Roemeense wetgeving in strijd met Privacyrichtlijn vanwege informatieverstrekking door Roemeense belastingdienst zonder kennisgeving aan betrokkene. *NTFR, 2015/2592.* Section (commentary).

§4.5.3.2 Implications for the Netherlands

From the judgement of the ECJ can be noticed that the exchange of information by the Dutch tax authorities do not always meet those concluded requirements in all situations. On the basis of the Dutch Act '*AWR',* the Dutch tax authorities have wide powers to collect information from and about Dutch tax residents.[387] Other Dutch (government) authorities are aware of the fact that the inspector can obtain a lot of information and therefore they approach the tax inspector to get insights in the information that he has in his possession. In the first place, the inspector must adhere to the duty of confidentiality.[388] This obligation ensures the general importance of the protection of personal data. In addition, it also contributes to the fact that people are still supplying information to the Dutch tax authorities, because they know that this data will not be used for other purposes than the correct and efficient implementation of the tax law.[389] Nevertheless, situations are conceivable in which the personal information may also be relevant for other (government) authorities. To facilitate the exchange of these information the Dutch tax law[390] created the possibility to set aside the inspector's obligation of confidentiality.

The Dutch national law[391] offers the inspector the opportunity to share the information with other 'specifically' mentioned administrative bodies.[392] In addition, if this list of specifically mentioned (government) authorities is not sufficient enough, the tax authorities have also the possibility to conclude 'free-space covenants' with other administrative authorities,[393] if this is necessary to ensure 'the integral application and enforcement of government regulations in an effective and efficient way'.[394][395] On the basis of these covenants, the inspector has the opportunity to provide the information with other authorities.[396] If the conclusion of these covenants does not sufficiently provide the opportunity to legitimize the necessary information exchanges, then there is a third 'way out': *"In other cases than referred to in the second paragraph, our Minister may grant an exemption from the duty of confidentiality."*[397] This exemption possibility can only be used in three situations: the provision of

[387] See section 4.4.2 of this master thesis.
[388] Article 67 paragraph 1 AWR.
[389] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 5.
[390] Article 67 paragraph 2 and 3 AWR.
[391] Article 67 paragraph 2 sub a AWR.
[392] These administrative bodies are the Minister of the Interior and Kingdom Relations, the public prosecutor, the Dutch Bank NV (DNB), the Dutch Authority for the Financial Markets (AFM) and so on.
[393] Article 43c paragraph 1 sub m Implementation Regulation AWR.
[394] Article 67 paragraph 2 sub b AWR.
[395] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 3.3.
[396] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 1.
[397] Article 67 paragraph 3. Unofficial translation by author.

information to taxpayers themselves who are not exempted from the duty of confidentiality, the provision is necessary for the proper fulfillment of a public-law task of an administrative body that has not yet been designated in a ministerial regulation, and in case of incidental or unforeseen cases where the provision of information is required.[398]

In practice, the inspector makes frequently use of these exceptions and leaves the tax residents unaware about the fact that he exchanges their personal information. The ECJ concluded that if the legal basis of national law for the information exchange is not in accordance with the Privacy Directive, the exchange cannot take place. The influence of this conclusion on the Dutch tax system is that the inspector may only exchange information, without a statutory basis, if he informs the concerned tax resident and the authority receiving the information also informs the taxpayer of receipt and explains the purpose for which it obtained the data. This means that the protection of personal data is more effective, but on the other hand this means a large increase in administrative activities.[399][400]

It is in question whether the exceptions within the Dutch tax law have such a legal basis.[401] The exceptions are based on a Dutch law, but are in fact mostly 'statutory provisions'. This was also the situation in the Bara case. Therefore, the statutory provision must explicitly mention the transfer of tax information. Thus for that reason, it can be concluded that in the Dutch practice of information exchange by far not all situations are in accordance with the judgement of the ECJ. In many situations, the inspector need to inform the taxpayer concerned about the information provision or request the taxpayer concerned for permission. If the inspector has not done so, the information exchange took place unlawfully and the receiving authority may not use this information for its decisions.[402]

§4.5.4 Case n.18497/03 Ravon [403]

§4.5.4.1 Content of the case

In this case, the French tax authority was authorized to visit Ravon and two companies governed by him, to look for documents, at its home address and offices of the companies, as proof they had wrongly

[398] Parliament documents II, 2005-2006, 30322, nr. 3, p. 19-21.
[399] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 5.
[400] Hout, van M.B.A. (2015). Gedeeld geheim, verloren geheim? *Tijdschrift Formeel Belastingrecht, 2015/06-04.* Paragraph 6.
[401] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 4.1.
[402] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 5.
[403] ECHR 21 February 2008, Case n.18497/03 (Ravon).

deducted the VAT.[404] Ravon wanted this investigation to be stopped and asked for a review at the national court. This was not possible in French law and his appeal was rejected. The permission for the investigation was already given by a national court, only Ravon was not informed about this procedure. Therefore, Ravon was not heard during this procedure and, after the investigation had been carried out, Ravon had no longer the possibility to dispute the unlawfulness of the investigation at the same court. Only when an assessment is imposed or when the person concerned is prosecuted, the investigation can be reviewed by that court. Both situations were not applicable in this case. Thereupon, Ravon went to the European Court of Human Rights with the condition that he had no access to a national court and because of this article 6 ECHR was violated.[405]

Normally, article 6 ECHR[406] does not apply to tax disputes, but the question in this case is based on the legitimacy of the visit and the seizure of documents, which concerns the right to respect of home under article 8 ECHR. In the connection with article 8 ECHR, Ravon got access to article 6 ECHR, which states that everyone has the right to access a judge. Without this connection, a tax case in which no penalty is in dispute, the taxpayer is not entitled to this application.[407]

Article 6 ECHR regulates the right to a proper process. It states that everyone has the right to an honest and public hearing by a competent, independent and impartial judicial body established by the law within a reasonable period of time, when determining whether a 'criminal prosecution against him has been established' or whether 'the determination of his civil rights and obligations in a lawsuit'. On the determination of the tax claim, this article does not apply, because according to the ECHR this cannot be regarded as 'establishing civil rights and obligations'. Tax obligations are seen as financial obligations to the State that are exclusively public law and therefore do not fall under article 6 ECHR.[408]

Article 8 ECHR contains the provision of the right to privacy, which means that everyone has the right of respect for his private life, family life and his home. No interferences from any public authority is permitted in the exercise of this right, except to the extent provided for by the law and necessary in a democratic society for the importance of national security, public security or the economic well-being of the State, the prevention of disorder and criminal offenses, the protection of health or good morals or the

[404] Value Added Tax.
[405] Vegt, van der J.M. (2009). Is het gebrek aan rechtsbescherming bij een waarneming ter plaatse in strijd met art. 6 EVRM? *Tijdschrift Formeel Belastingrecht 2009/03-05.* Paragraph 1.1.
[406] The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, last amended on 13 May 2004.
[407] Vegt, van der J.M. (2009). Is het gebrek aan rechtsbescherming bij een waarneming ter plaatse in strijd met art. 6 EVRM? *Tijdschrift Formeel Belastingrecht 2009/03-05.* Paragraph 2.3.
[408] Asbreuk, J.H. (2006). Kern Artikel 6 EVRM Recht op een eerlijk proces. *Ndfr.nl, artikel 6 EVRM.*

protection of the rights and freedoms of others.[409] The only possibility to interference in the tax resident's privacy is that it must be provided for by law. In the event of an investigation, the question arises whether and to what extent the investigation infringes this right to privacy of article 8 ECHR. It should be reviewed if the investigation was in a reasonable proportion with the intended goals.[410]

In the Ravon case there was permission from a national court to start the investigation, there was no court present during the investigation and there was no effective way to express objections during the investigation. There was also no effective way to submit the legality of the investigation to a national court.[411] This means that article 6, in connection with article 8 ECHR, was violated. Therefore, the concerned tax resident was equated and received a compensation.[412]

§4.5.4.2 Implications for the Netherlands

The conclusion of the ECHR has also influence for Dutch tax purposes. Under article 50 *AWR*, the Dutch inspector has the competence to access buildings. This access must be given in the context of a so-called observation on spot. Only, this observation is not the same as the French investigation, because if the entry is refused, the tax inspector cannot give himself access. Through the refuse of entry, the inspector may reverse the burden of proof or even impose a criminal prosecution.[413] The taxpayer will certainly feel this threat and feel forced to grant access to its buildings. Furthermore, on the basis of article 47 *AWR* the inspector may only request access to certain documents and request for copies. He is not allowed to seize the documents, which also differs from the French situation.[414] The taxpayer can also refuse to provide certain documents, and as reaction the inspector may also reverse the burden of proof in this case. In addition, the tax authorities have, on the basis of articles 81 and 83 *AWR*, competences which are more similar to these of the French tax authorities. They have access to any place and are authorized to seize objects.[415]

The power to have an observation on spot, is only subject to a review afterwards by the court if the legality of such observation is considered when the assessment is made. A taxpayer can attempt to

[409] Article 8 paragraph 2 ECHR.
[410] Asbreuk, J.H. (2014). Commentaar Artikel 8 EVRM Recht op eerbiediging van privé, familie- en gezinsleven. *Ndfr.nl, artikel 8 EVRM.* Paragraph 3.1.
[411] Asbreuk, J.H. (2014). Commentaar Artikel 8 EVRM Recht op eerbiediging van privé, familie- en gezinsleven. *Ndfr.nl, artikel 8 EVRM.* Paragraph 3.1.
[412] Vegt, van der J.M. (2009). Is het gebrek aan rechtsbescherming bij een waarneming ter plaatse in strijd met art. 6 EVRM? *Tijdschrift Formeel Belastingrecht 2009/03-05.* Paragraph 1.3.
[413] Articles 68 and 69 AWR.
[414] Vegt, van der J.M. (2009). Is het gebrek aan rechtsbescherming bij een waarneming ter plaatse in strijd met art. 6 EVRM? *Tijdschrift Formeel Belastingrecht 2009/03-05.* Paragraph 2.1.
[415] Vegt, van der J.M. (2009). Is het gebrek aan rechtsbescherming bij een waarneming ter plaatse in strijd met art. 6 EVRM? *Tijdschrift Formeel Belastingrecht 2009/03-05.* Paragraph 2.2.

stop the observation by means of a civil interlocutory procedure. There is no other remedy with which the observation can be reviewed before and during the observation by an independent court. The competences of the tax authorities included in article 81 and 83 *AWR* reach further and there is no prior review by an independent court. In case no tax assessment is made, the Dutch taxpayer has no legal basis to rely on. Therefore, it is very questionable whether these regulations are sufficiently practical and effective to obtain access to the court in accordance with article 6.[416]

The taxpayer's right to privacy is protected by article 8 ECHR, which has a direct effect in the national law, on which everyone can rely to. In the Netherlands, the conflicting provisions of the Dutch law with the ECHR cannot apply anymore on the basis of article 94 of the Dutch Constitution. If aforementioned powers of the Dutch tax authorities are determined to be in conflict with the taxpayer's privacy, shall article 6 provide a legal basis that the taxpayer needs access to the national court. This provides legal protection for the Dutch tax residents.[417]

§4.6 Summary and conclusion

'What are the current relevant legislation and regulations on international and EU level? What is the influence of those on the Dutch tax autonomy?' This section concerned article 26 OECD MC, the Strasbourg Convention and TIEA as international regulations and the DAC and its amendments as EU regulation.

The tax authorities' inability to levy correct taxes, because of the lack of information, leads to undeclared and untaxed revenues, which subsequently leads to a substantial loss of national tax revenues.[418] Therefore international and EU regulations are concluded to help other States' tax authorities to obtain the relevant information for the correct exercise of their tax law. Information exchange takes place automatic, spontaneous or on request on the basis of article 26 OECD MC, a TIEA, the Strasbourg Convention or, within the EU, on the basis of the DAC. Such regulations are important to organize a more 'efficient and effective neutral tax system' between the States by means of the internationalization and harmonization of tax systems.[419]

[416] Vegt, van der J.M. (2009). Is het gebrek aan rechtsbescherming bij een waarneming ter plaatse in strijd met art. 6 EVRM? *Tijdschrift Formeel Belastingrecht 2009/03-05.* Paragraph 2.4.
[417] Vegt, van der J.M. (2009). Is het gebrek aan rechtsbescherming bij een waarneming ter plaatse in strijd met art. 6 EVRM? *Tijdschrift Formeel Belastingrecht 2009/03-05.* Paragraph 2.
[418] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 2.
[419] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. p. 4.

In the Netherlands, the tax authorities have far-reaching powers to obtain relevant information of the Dutch tax resident. The *AWR* is the domestic Act that function as basis for those national regulations and especially articles 47 jo. 47a jo. 53 *AWR* are of relevance in this context. It contains obligations for taxpayers to provide information and data at the request of the tax inspector, if this information 'may' be of importance for tax purposes. Additionally, the inspector has access to books, documents or other data. After receiving the information, it can be exchanged with other States, which is arranged by the *WIB* within the Netherlands. This act implemented the DAC and its amendments, and other regulations of international and interregional law.

States are actively participating in the possible (mutual) exchange of information. The protection of the (fundamental) rights of the taxpayer involved is a challenge for many States to comply with. The process of information exchange is seen as a procedure between tax authorities, to which the interests of involved taxpayers have been subordinated insofar as these interests obstruct or delay an effective exchange. Contemporary, the exchange of information is mainly limited by technical impossibilities and not enough limited by legal standards and legal principles. By formulating standards and principles for the exchange of information, a balance has to be found between the public interest of the States and the individual interest of the tax residents, who are currently still too subordinate to the effectiveness of the exchange. [420] In the discussed case law, the lack of legal protection of tax residents has emerged. The ECJ and ECHR reviewed cases in the matter of the exchange of information resulting in the slightly improved legal protection of the tax residents.

The reason for having administrative assistance in the field of the exchange of information is that the autonomy of the States, in this respect, is limited to measures within their own territory, because States are not authorized to take such measures outside their own territory. In that view, it can be concluded that the tax authorities have broadened their powers to levy taxes by means of the EU and international arrangements. On the other hand, the implementation of regulations lead to more restrictions to the tax autonomy of the Netherlands. A lot of regulations are implemented in the national legislation, in the *WIB*, to comply with the concluded agreements for the exchange of information. The influence of the required implementation of the tax law limits the exercise of the public powers of the Dutch tax legislator as such.

[420] Neve, L.E.C. (2013). IFA-congres 2013, subject 2: inlichtingenuitwisseling. *Tijdschrift Formeel Belastingrecht, 2013/08-06.* Paragraph 4.

Section 5 Foreign Account Tax Compliance Act

§5.1 Introduction

The goal of the FATCA is to prevent worldwide tax evasions and black-savings of the US taxpayers, by holding investments abroad, out of the US tax authorities' sight.[421] The FATCA is the 'Foreign Account Tax Compliance Act', which is a law introduced by the US in 2010 and is part of the HIRE Act.[422] On 1 July, the FATCA obligations will be enforced worldwide. It focuses on the obligation of providing financial information located in States outside the US from 2014 onwards, but can concern any information relating to 2013.[423] This law essentially connects with the general tendency to exchange more, effective and efficient information for tax purposes. The basis of this data provision is based on art. 26 OECD MC.[424]

The general core of this US legislation requires 'foreign financial institutions' (FFIs) or 'non-financial foreign entities' (NFFEs) in which US taxpayers hold a substantial ownership interest, to report information about financial accounts held by US taxpayers to the IRS.[425] The IRS, the Internal Revenue Service, is the federal tax authority (the authority on national level) of the US and is responsible for the implementation and application of US federal tax law and the collection of tax revenues. The assumption of the IRS for composing this law, was the frequent violation of the tax return obligation of US taxpayers. It was considered problematic that FFIs and NFFEs[426] were not obligated to report about non-US income sources of US taxpayers to the IRS. The US tax law obligates Americans on basis of the nationality principle, wherever they live, to submit their annual tax return and/or assessment in the US.[427] Because of the nationality principle, which has an important role in the US tax assessment, it is necessary for the IRS to get all the relevant tax information of US taxpayers. By establishing this reporting obligation for the FFIs of the States worldwide on all source payments (also non-US income) to US taxpayers, the IRS hopes to get a complete picture of revenues and assets held by US taxpayers, in the US itself and abroad.[428] Remarkable about the FATCA is who is being imposed with the implementation of the law. Every qualifying non-American FI and NFE in the world, must (under penalty of a withholding tax on received payments) cooperate in the investigation for US tax evaders.[429]

[421] The editors of NTFR (2014). Ondertekening FATCA-overeenkomst met VS. *NTFR, 2014/332.*Section (summary).
[422] 'Hiring Incentives to Restore Employment Act'.
[423] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 1.
[424] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 1.
[425] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 1.
[426] In the remainder of this master thesis will only be spoken about FFIs considering that NFFEs are also included.
[427] US International Revenue Code (IRC) section 7701(a)(30).
[428] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 6.1.
[429] Bijl de Vroe, S.W. & Valenbreder T.C. (2013). FATCA: Taxation Without Representation? *MBB, 2013 nr. 5.* Paragraph 1.

§5.2 The FATCA

The provisions of the FATCA can be found in articles 1471 up to and including 1474 of the International Revenue Code (IRC). After a long legislative process, the final regulations were compiled in January 2013 and since only a few technical corrections have been made. The regulations define which types of institutions qualify for the FATCA and to which obligations these institutions must comply.[430]

When an institution qualifies as a FFI within the meaning of the FATCA,[431] the institution must automatically transfer the following information to the IRS, if the information relates to qualifying account holders: the name, address, identification number, account number, the balance of the account(s), the received interest and dividends and the proceeds of the sale, repayments or purchase of assets.[432][433] The FATCA obligates to report aforementioned information about financial accounts held by US taxpayers. Those to whom the information relates, the US taxpayers, are well defined: *'citizens or residents, domestic partnerships, domestic corporations, any estate other than a foreign estate, certain trusts, and other persons not being a foreign person'.*[434]

Secondly, the determination to what the information must relate is of importance. Namely, the financial accounts held by these US taxpayers, described as: *'any depository account maintained by the financial institution, any custodial account maintained by the financial institution, and any equity or debt interest in such financial institution.'*[435][436] The information obligation also has influence on customers, on new and existing ones, because it entails that they must provide information to the institutions. For customers, this means that they are obligated to respond to a request of the FI to provide information.[437]

Providing information does not have any commercial interest for FFIs. Especially not, if an institution is not active on the market of the US. The US finds it of great importance that the FFIs, within the meaning of FATCA, comply with the given obligations to provide information to the IRS. In order to force institutions to cooperate, the US devised a complex pressure tool in the FATCA legislation. For an effective enforcement it is, at all times, necessary to discourage negligent actions. If they do not comply with this, sanctions are imposed. The penalty arising from the non-fulfilment of the obligations is that FFIs will be subjected to a 30% withholding tax on income from US sources. The US will deduct this withholding

[430] Bijl de Vroe, S.W. & Valenbreder T.C. (2013). FATCA: Taxation Without Representation? *MBB, 2013 nr. 5.* Paragraph 2.
[431] These qualifications are left out of consideration due to the complexity of the definitions.
[432] US FATCA Regulations 2013 1.1471-4(c)(1).
[433] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 3.
[434] US FATCA Regulations 2013 & Implementation of International Tax Compliance Regulations 2013 paragraph 8.2.
[435] US FATCA Regulations 2013 & Implementation of International Tax Compliance Regulations 2013 paragraph 7.2.
[436] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 3.
[437] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 3.

tax of 30% from the FFI on a large number of received payments that have a direct or indirect connection with the US. The payments in question are mainly interest, dividends, profits, salaries, periodic payments and various other compensations that all have their source in the US.[438] A cooperating institution must also deduct 30% withholding tax on payments to its customers if they do not cooperate with the information of the IGA.

A FFI that does not meet the major obligations will be considered as a 'non-participating foreign financial institution' (NPFFI). This is the case if the following criteria apply: the failure to comply with reasonable requests for information to determine whether the account is being held by a qualifying person, a refusal to provide the name and address or not providing a statement that it waives the application of a foreign law, if that foreign law would prevent a FFI from providing any mandatory information to the US.[439]

In principle, the FATCA was prepared as unilaterally instrument for the US. However, it turned out that a number of aspects are contrary to national legislations and the obligation for qualifying FFIs to conclude an agreement with the IRS will lead to a considerable increase in their administrative burden. Due to national privacy regulations, many FFIs were not allowed to report the relevant information about US taxpayers. This problem had to be remedied through the conclusion of bilateral agreements, the so-called intergovernmental agreements (IGAs). The one-sided nature of the FATCA is thus eliminated.

Moreover, IGAs should ensure that the implementation of the FATCA is simplified and the costs for the institutions are reduced.[440] For these reasons, the EC has consulted with the IRS in order to come to a simplified procedure for EU Member States. The intention was that this procedure is, to the extent that this is possible, consistent with the exchange of information such as regulated in the Savings Directive.[441] On the basis of this Directive, FIs must provide the relevant information to their national tax authorities, who then automatically exchange this information annually with the tax authorities of other EU Member States, as well as with a number of third States. However, the scope of the Directive is more limited, it does not detract from the application of the way in which information exchanges are organized.[442]

[438] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 5.
[439] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 3.
[440] Bijl de Vroe, S.W. & Valenbreder T.C. (2013). FATCA: Taxation Without Representation? *MBB, 2013 nr. 5.* Paragraph 3.1.
[441] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (Cancelled).
[442] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 6.

Because of the possibility to exchange information on the level of competent tax authorities, the US Treasury[443] has developed two different kinds of FATCA model agreements, Model 1 and Model 2. In both models a State concludes an IGA with the US in which the FATCA requires foreign financial intermediaries to register the FFI on the IRS website to get a Global Intermediary Identification Number (GIIN),[444] to set up the customer due diligence,[445] and to report on US taxpayers.[446] This GIIN is needed to be included in the list of financial institutions called the "FATCA compliant". In addition, the FFIs are obligated to appoint a responsible officer (RO), who is responsible for the compliant status of the FFI. The RO makes a number of certifications to the IRS that reviews the correct fulfilment of the aforementioned obligations.[447]

The substantial difference between these two Models is the effectuation of the IGA. In case of Model 1, the information exchange takes place on the basis of an IGA between the US and the State of residence of the FFI. In addition, the information that the institution, otherwise, have to provide directly to the IRS will now be provided to its own tax authorities, which will subsequently exchange this information automatically and on a reciprocal basis with the US. This agreement should enable and require the mandatory provision of information of financial data between a State and the US.[448] Model 2 is also maintained with signing an IGA, but in this case the FFIs, the intermediary, of the relevant partner States must provide the information directly to IRS under a specific contract concluded between the aforementioned subjects.[449] Further details of the various provisions of the FATCA models have been given by the US in a number of Notices. The Model agreements also provide limited space for country-specific provisions.[450]

§5.3 The Dutch IGA

§5.3.1 NL IGA

The introduction of the FATCA legislation has commanded many States to conclude IGAs with the US. On 18 December 2013, the Netherlands and the US signed the NL IGA.[451] This IGA's main objective is to

[443] The US Ministry of Finance.
[444] US FATCA Regulations 1.1471-4(a).
[445] US FATCA Regulations 1.1471-4(a)(2).
[446] US FATCA Regulations 1.1471-4(a)(3).
[447] US FATCA Regulations 1.1471-4(c)(7).
[448] Bijl de Vroe, S.W. & Valenbreder T.C. (2013). FATCA: Taxation Without Representation? *MBB, 2013 nr. 5. P*aragraph 3.1.
[449] The editors of NTFR (2014). Ondertekening FATCA-overeenkomst met VS. *NTFR, 2014/332.* Section (commentary) .
[450] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* Paragraph 6.1.
[451] Approval of the Convention concluded in The Hague on 18 December 2013 between the Kingdom of the Netherlands and the United States of America for the improvement of international compliance with the tax obligation and the implementation of FATCA (Trb, 2014, 22 and 128).

enable the implementation of FATCA in the Dutch legislation. The intention is that the first exchange will take place in September 2015, when the reporting obligations arising from the NL IGA are implemented in the Dutch law, and will relate to the year of 2014. Furthermore, Dutch FIs will not be affected by US legislation during the implementation process and therefore no withholding tax is deducted in this period. This is a so-called 'gentlemen agreement'.[452] Incidentally, there are already FATCA obligations for the Dutch institutions from 1 July 2014.

Through concluding this IGA, the Netherlands and the US committed themselves to automatically exchange information on a reciprocal basis. The NL IGA protects the Dutch FIs from the direct application of the information obligations arising from the FATCA. The FIs have to provide financial information to the Dutch tax authorities which enable automatically mutual information exchange between them and the US tax authorities.[453] The exchange takes place on governmental level, which means that aforementioned FATCA Model 1 is adopted by the Netherlands.

Through the provisions arising from the NL IGA, Dutch FIs are obligated to authorize accounts which are held by US taxpayers, the so-called customer due diligence. This determination takes place through self-declaration or by examining available data of the FI. When it turns out that a financial account is held by a US taxpayer, they must provide that data to the Dutch tax authorities, which will exchange this information automatically with the IRS on a reciprocal basis. The Dutch tax authorities and the IRS maintain a high standard of data protection.[454] The advantage of Model I is that the FIs do not have to conclude individual agreements with the IRS and that every FI within the FATCA partner State is deemed to comply with the FATCA, so the US waives the 30% withholding tax.[455]

The structure of the NL IGA consists of ten articles and two attachments. Above and beyond, other documentations are available in connection with this IGA. Additionally, a FATCA guideline[456] has been published, in which the Ministry of Finance explains how the IGA should be interpreted and applied in the contemporary practice. The Dutch IGA starts with considerations which illustrates the motivation of concluding the convention. This shows, that the Netherlands concluded the IGA, in addition to facilitate the implementation of FATCA, to create a level playing field for the financial sector, by the simplification of the information exchange, and to gain insight into data from Dutch taxpayers who hold their assets in

[452] The editors of NTFR (2014). Ondertekening FATCA-overeenkomst met VS. *NTFR, 2014/332.* Section (commentary).
[453] Niessen, R.E.C.M. (2016). Internationale uitwisseling van fiscale gegevens en andere bijstandsvormen. *Tijdschrift Formeel Belastingrecht, 2016/02-01.* Paragraph 1.3.
[454] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* paragraph 3.
[455] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* paragraph 5.
[456] Guideline FATCA/CRS with technical explanatory notes to the NL IGA and the CRS regulations.

the US. The Netherlands has also negotiated specific exceptions in the IGA, because the Model agreement provides limited space for country-specific provisions. These are included in attachment II of the NL IGA. For example, the Dutch pension sector is exempted from the FATCA obligations. The exception of the pension sector was acceptable for the US Treasury because it is likely that, in this highly regulated sector, the risk of tax evasion by US taxpayers is low.

§5.3.2 Legal basis

The exchange of information, concluded in the NL IGA between the tax authorities of the Netherlands and the US, will take place on the basis of article 30 of the bilateral tax treaty between the Netherlands and the US.[457] This article is the provision for the exchange of information and administrative assistance. In addition, the possibility of (automatic) information exchange for tax purposes also arises from the Strasbourg Convention. Because this IGA contains regulations of international law to provide mutual assistance in the levying of taxes, the *WIB* establishes the legal basis for the IGA in the Dutch legislation. The 'Implementing Decree on international assistance in the levying of taxes' indicates the execution of the provisions in the *WIB.* Both, the *WIB* and *UB WIB* will be extended with the implementation of the IGA.

In order to facilitate the mutual exchange of information on the basis of the NL IGA, the qualifying Dutch FIs are designated as accounting officers in the *UB WIB*. The provisions of the *WIB* are intended to implement EU directives and other regulations of international and interregional law in the field of mutual assistance. Therefore, no great difference occurs between the exchange of FATCA information and information based on guidelines and other treaties.[458]

§5.3.3 Information protection

The adoption of the FATCA in the Netherlands, and other EU Member States, was obstructed by privacy legislation, namely by the European Privacy Directive.[459] The Directive underlines that a legal basis is necessary for the exchange of information, and that this legal basis must contain sufficient quality and foreseeability with regard to information protection. In addition, the Dutch Personal Data Protection Act requires the need for explicit permission of account holders to provide information to a third party, or whether it must be substantial for public interest or a model contract.[460] This was one of the reasons for

[457] The Convention between the Kingdom of the Netherlands and the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, concluded in Washington on December 18, 1992 ((Government Gazette 1993, 77 and 158), as amended on 13 October 1993 (Treaty Series 1993, 184) and on 8 March 2004 (Treaty Series 2004, 166).
[458] I.J.J. Burgers & R. Betten & H.M.M Bierlaagh, *Wegwijs in het Internationaal en Europees Belastingrecht,* Amersfoort: SDU 2005. Paragraph 14.9.3.
[459] Council Directive 95/46/EC.
[460] Schoonhoven, van J.P. (2012) Privacy versus FATCA: twee regimes op één kussen? *Tijdschrift Privacy & Compliance, 2012/2.*

the negotiation of the EU[461] for an IGA under which the information can be exchanged at governmental level. This IGA is the solution to the violation of the Privacy Directive in the EU. Such a bilateral treaty provides the legal framework for the exchange of information, so privacy related problems could be resolved. This solution offers the advantage that the FATCA standards are implemented into the Dutch national tax law, so all the FIs have to cooperate according to national legislation.[462] As well, the direct reporting by the Dutch FIs to the IRS would not be possible on the grounds of the Personal Data Protection Act. The conclusion of a Dutch IGA was therefore indispensable for the Dutch FIs.

Both the bilateral tax treaty with the US to prevent double taxation, the Strasbourg Convention and the *WIB* offer guarantees for the taxpayer if international (automatic) information exchange takes place. For example, the Netherlands will not provide information to another State if this State does not impose a duty of confidentiality[463][464] on its officials. Received information by the other State may only be used for the collection of taxes. For any other use, permission must be granted by the Dutch tax authorities.[465][466] This prevents information that is provided by the Netherlands from becoming public abroad or from being used in an unintended manner. These guarantees also apply to the information provided under NL IGA.

The aforementioned treaties and the *WIB* have, among others, fulfilled the requirements of the protection of privacy in international information exchanges in the Netherlands. The Dutch 'Data Protection Authority'[467] has indicated that the NL IGA does not conflict with the Dutch 'Personal Data Protection Act'.[468]

§5.4 Summary and conclusion

'What are the current relevant legislation and regulations on international and EU level? What is the influence of those on the Dutch tax autonomy?' This section concerned the legislation and regulations regarding FATCA.

[461] With an initiative of Germany, France, Italy, Spain and the UK.
[462] Kavelaars, P. (2013). De Foreign Account Tax Compliance Act (FATCA). *NTFR Beschouwingen, 2013/8.* paragraph 5.
[463] See paragraph 4.4.3.9 of this master thesis.
[464] Article 16 WIB.
[465] Article 17 paragraph 2 WIB.
[466] Schoonhoven, van J.P. (2012) Privacy versus FATCA: twee regimes op één kussen? *Tijdschrift Privacy & Compliance, 2012/2.*
[467] Dutch: College Bescherming Persoonsgegevens (CBP).
[468] In force since 1 September 2001 and is the Dutch law for the implementation of the Privacy Directive (Directive 95/46/EC). In Dutch: Wet bescherming persoonsgegevens (Wbp).

On basis of the nationality principle, Americans are always subject to US taxation wherever they live. Therefore, the IRS expected to get more information by establishing the FATCA, which is needed to determine the right tax claim of US taxpayers. Under FATCA the US obligates qualifying reporting FFIs to provide information about financial accounts held by US taxpayers. Firstly, a Dutch FI has to determine whether it qualifies within the meaning of FATCA. Subsequently, the Dutch FI has to determine whether a financial account is held by an US taxpayer and gather the relevant data and information. On basis of the NL IGA, Dutch FIs shall provide the financial information to the Dutch tax authorities, which subsequently exchange this automatically on a reciprocal basis with the US. Hence, the Dutch tax authorities will also receive data from Dutch taxpayers who hold accounts in the US at American FIs.

It can be argued that the provisions of FATCA impose US law on foreign States by requiring strict compliance that may contravene the domestic law of that foreign State. Based on the principle of reciprocity, FATCA is also designed to provide partner States with similar information relating to the citizens of that respective State. Although the IGA is ratified based on an understanding of reciprocity, the exchange of information is seen as an unbalanced burden affecting foreign States more heavily than it effect the US.

The impact of the implementation of the NL IGA, in the *WIB,* is mainly relative to the Dutch reporting FIs. They will have an increase in the administrative burden, because they are obligated to exchange annual relevant information and data from 1 September 2015 about US taxpayers from 2014 onwards. Fortunately, the EU arranged the IGA for the automatically exchange of information on the level of tax authorities, otherwise the impact on the administrative burden would be enormous. Still, the Dutch FIs have to collect relevant data of their clients and provide it to the Dutch tax authorities.

The tax autonomy of the Dutch legislator gets more restricted, due to the increased international and supranational legislation and regulations. He is losing independency when imposing tax law, since the influence and the implementation of the NL IGA must be taken into account from now on. On the other hand, due to these FATCA regulations, the Dutch tax authorities have benefit of the mandatory mutual exchange, because it gives a better possibility to counteract tax evasions and black-savings of Dutch taxpayers. The impact for the Dutch tax authorities is that they have to exchange the relevant information with the IRS and they have to check the received information about foreign financial accounts of Dutch tax residents, but their own taxation will become better.

Section 6 Common Reporting Standard

§6.1 Introduction

The Dutch State Secretary announced,[469] in response to the coverage of the Panama Papers,[470] that international constructions with the intent of avoiding and/or evading taxes are inadmissible and must for that reason be tackled. Transparency is a key concept in this approach, because access to information, exchange of information and supervision of the way States comply with international agreements, make an important contribution to the fact that assets transferred abroad are no longer out of the supervision of tax authorities. At the international level, agreements have been made about this, which will be applied in the short and longer term.

The new standard for the automatic international exchange of information (the Standard)[471] was established on 13 February 2014 and is already implemented, or intended to be implemented, by a large number of States worldwide.[472] The OECD Council developed this global standard, in the context to tackle international tax evasion and tax avoidance due to automatically exchange of financial information. It was developed in response to the G20 request. The Standard aims to harmonize the exchange of financial information on a bilateral basis, which contributes to the intended effectiveness of the automatic exchange of information. In addition, it contributes to a global level playing field for the covered information exchange for the States and the qualifying FIs and NFEs.[473] Under this standard, the FIs of every participating State are legally obligated to provide financial information of foreign tax residents to their national tax authorities.[474]

The Standard is strongly based on the FATCA[475] and thus aims to counteract tax evasions and black-savings of taxpayers of the States which are covered by the CRS MCAA.[476] To implement the FATCA, the US has concluded bilateral treaties with other States (Model I IGA), in which agreements have been made for the automatic exchange of financial information and data provided by FFIs. However, the Standard differs from FATCA in a number of important ways. The most essential difference is the fact that CRS is applied in a much broader multilateral context than FATCA, which on the other hand only applies

[469] Letter of the State Secretary of Finance, 17 January 2017, 2017-000000951. *Published in Tijdschrift Formeel Belasting recht 2017/01.*
[470] The Panama Papers is the name of a large collection of confidential documents from the Panamanian legal and business service provider Mossack Fonseca who were leaked to the international press in 2015. The coverage of the Panama Papers has made clear to a large audience how international structures can be used to keep assets and financial flows out of control of the authorities.
[471] The Standard for Automatic Exchange of Financial Information in Tax Matters.
[472] List of States intended to implement the new standard: www.oecd.org/tax/transparency/AEOI-commitments.pdf.
[473] In the remainder of the section there will only be spoken about FIs in the context, considering that NFEs are also included.
[474] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 1.
[475] See section 5 of this master thesis for the explanation of FATCA.
[476] The CRS Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information.

in the relationship between States with the US. Furthermore, a relevant difference is the resident starting point of the CRS in relation to the nationality starting point of FATCA. While the FATCA is heavily based on retrieving information about people with a US nationality, the CRS limits itself in bilateral situations to persons and entities which have their residence or are located in one of the two participating States. In addition to these differences, CRS differs in the way FIs have to identify customers and in which customers must identify themselves.[477]

The CRS sets out the financial account information to be exchanged, the FIs required to report, the different types of accounts and taxpayers to be covered, as well as the common due diligence procedures to be followed by FIs.[478] The development of the Standard resulted in the less importance of TIEAs,[479] because the CRS provisions have a wider margin. Insofar, as States implement this OECD regulation, a TIEA is no longer useful between these States. The Standard simply contains a minimum standard for the information to be exchanged and which FIs are obligated to provide this information to their national tax authorities. States may choose to exchange more information beyond the provided minimum standard of the CRS.

The Standard consists of four key parts. A model for a Multilateral Competent Authority Agreement (MCAA), providing the international legal framework for the automatic exchange of CRS information. In addition, it consists of an identification and reporting standard (the Common Reporting Standard (CRS)), which is a set of regulations for the reporting FIs. Subsequently it contains the OECD commentary on this model agreement and on the CRS, and a number of attachments (annexes).[480][481]

§6.2 The Standard

§6.2.1 MCAA

On 29 October 2014, the so-called 'early adopters group' signed a multilateral convention, the CRS MCAA. The number of States that signed the MCAA since has grown to 75 States, which includes the EU Member[482] States and the States with whom an agreement is concluded to exchange CRS information. By signing this, States agreed that they should have their first exchange of information with each other, on

[477] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 7.2.
[478] The editors of NDFR (2016). Uitvoeringsbesluit identificatie- en rapportageverplichtingen Common Reporting Standard. *NTFR, 2016/366.* Section (commentary).
[479] See section 4.2.3. of this master thesis.
[480] All these documents can be consulted on: www.oecd.org/tax/exchange-of-tax-information/automaticexchange.htm.
[481] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 2.
[482] Exception of Austria, which applies the CRS with effect from 1 January 2017.

the requirements of the CRS from September 2017 onwards about information of 2016. The early adopters are undertaking their first exchanges in 2017 and in addition there are intentions by participating States which have their first exchanges in 2018, 2019/2020 or on a not (yet) determined date in the future. This registration on the CRS by means of the MCAA, in combination with existing bilateral[483] and multilateral[484] conventions, arranges the automatic exchange of CRS information in the relationship with other States. In order to proceed to actual exchange on the basis of the CRS in the relationship with third States, separate CAAs still have to be concluded between States if these are not agreed yet (exception of EU Member States).[485] States have the possibility to join at a later date by concluding the CRS MCAA.

The Standard includes the aforementioned model agreement (CRS MCAA), which is the international framework agreement for automatically exchanging CRS information between States. The legal basis for the CRS MCAA rests in article 6[486] of the Strasbourg Convention.[487] The MCAA creates the legal basis for applying the CRS in the international scope.[488] In this way, the model agreement gives substance to the already existing provisions on the exchange of information in the tax treaties between States and the Strasbourg Convention, on which the exchange shall take place. However, on the basis of their relevant provisions, further agreements should be made about the information and data to be exchanged under CRS. This was done by signing the model agreement in the form of the MCAA.[489]

Thus, on the basis of the CRS MCAA, tax authorities shall automatically exchange the relevant financial information provided by reporting FIs. In this way, tax authorities can acquire more insight into data from their tax residents which have assets in other participating States. This helps to determine the right tax claim.

§6.2.2 CRS

To enable the exchange of the information and data between States, a financial reporting obligation will be imposed on FIs. This will take place on the basis of the Common Reporting Standard, which is part of the global Standard. They are obligated to follow the identification and reporting requirements of the CRS. In addition, it also contains definition provisions. The reporting requirements specify which information

[483] Conventions agreed to avoid double taxation with an article based on article 26 OECD-MC for the automatic exchange of information.
[484] Such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 protocol, Strasbourg 25 January 1988.
[485] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 1.
[486] This article contains provisions for the automatic exchange of information.
[487] The OECD explanation of the Multilateral Competent Authority Agreement: www.oecd.org/tax/transparency/technical-assistance/aeoi/whatisthemultilateralcompetentauthorityagreement.htm.
[488] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 2.
[489] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 1.

FIs must report to the competent tax authorities. Subsequently, the identification regulations contain rules on the basis of which a FI should conclude whether an account has to be reported. The identification requirements are extensive and detailed. Although, they leave the occasion for States to make a choice regarding the rules to be prescribed. There is also the possibility for FIs not to subject certain accounts below a threshold amount to an investigation.[490]

A reportable account is a financial account accommodated by a reporting FI of a CRS participating State and is property of natural persons or entities to be reported. In case the account holder is a so-called passive non-financial entity (passive NFE), data is also exchanged about the one or more ultimate stakeholders of that NFE, who is a person or entity to be reported, respectively.[491] These natural persons are residing or these entities are established in another participating State than the State where the FI is established and are therefore tax resident in that other State.[492] Each participating State has its own legislation and regulations for determining their tax residents. The OECD provides[493] an overview of the tax residency rules applicable for determining whether a person or entity is a tax resident of another State. In this way, the FI knows if the person in question is a tax resident of a participating State.

§6.2.3 OECD Commentary

As support of the CRS, the CRS commentary is introduced and it contains explanations and clarifications of the model agreement (MCAA) and of the CRS. Furthermore, the commentary offers some options for States to decide for a particular explanation or application.[494]

§6.2.4 Annexes

Lastly, the Standard includes seven attachments, the so-called annexes. These annexes are of various kinds. Annex 1 and annex 2 contain, for example, the model agreements, with annex 1 the 'Multilateral Model Competent Authority Agreement' and annex 2 the 'Nonreciprocal Model Competent Authority Agreement'. Annex 3, the Common Reporting Standard User Guide, contains guidelines for ICT aspects, such as a CRS scheme. In annex 5 alternatives are outlined for the application of the CRS, the so-called 'Wider Approach to the Common Reporting Standard.' The declaration on automatic exchange of

[490] Explanatory memorandum CRS by the State Secretary of Finance about the legislative proposal CRS.
[491] The editors of NDFR (2016). Uitvoeringsbesluit identificatie- en rapportageverplichtingen Common Reporting Standard. *NTFR, 2016/366.* Section (summary).
[492] The editors of NDFR (2016). Regeling aanwijzing rechtsgebieden Common Reporting Standard. *NTFR, 2016/412.* Section (summary).
[493] www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency.
[494] The editors of NDFR (2016). Regeling aanwijzing rechtsgebieden Common Reporting Standard. *NTFR, 2016/412.* Section (commentary).

information in tax matters is implemented in annex 6 and finally, annex 7 concerns the 'Recommendation of the Council on the Standard for Automatic Exchange of Financial Account Information in Tax Matters'.[495]

§6.3 CRS in the Netherlands

§6.3.1 EU implementation

The European Council expressed its appreciation of the international developments in the field of the automatic exchange of financial information and data, and requested its scope within the EU to combat tax fraud and aggressive tax planning.[496] The CRS is included in the Directive 2014/107/EU.[497] This Directive provides an extension of the, at that time already existing, automatic exchange of information under the DAC and replaces and cancelled the 'Savings Directive.'[498] Through the obligation for the EU Member States to implement this Directive, the information as provided in the CRS must be exchanged automatically within the EU. A fair level playing field has been created for the FIs in the EU, because the same identification and reporting standards have been imposed to them. The CRS and the CRS commentary offer some options for States to choose for a particular explanation or application, but the Directive has already given completion to an extensive number of these options.

The fact that Member States have entered into a FATCA agreement with the US means that these Member States have further cooperation with a third State, because of its wide scope, than the cooperation provided for in the DAC. This gives them the obligation, under this Directive, to extend this far-reaching cooperation also to other Member States if they wish to enter into this mutual cooperation.[499] As a result of this provision, Member States shall establish agreements themselves. This could lead to a disruption which would damage the proper functioning of the internal market of the EU. Based on the new Directive 2014/107/EU, a Union-wide legal instrument, a more comprehensive automatic exchange of information should be implemented. Therefore, it would no longer be necessary for Member States to conclude bilateral or multilateral agreements for supplementary cooperation.[500]

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[495] Explanatory memorandum CRS by the State Secretary of Finance about the legislative proposal CRS.
[496] Explanatory memorandum CRS by the State Secretary of Finance about the legislative proposal CRS.
[497] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (PbEU 2014, L 359).
[498] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (Cancelled).
Last amended by: Council Directive 2006/98/EC of 20 November 2006 adapting certain Directives in the field of taxation, by reason of the accession of Bulgaria and Romania.
[499] Article 19 Council Directive 2011/16/EU and implemented in article 18 WIB.
[500] Consideration 7 and 8 Council Directive 2014/107/EU.

Directive 2014/107/EU contains two appendixes which are added to the DAC.[501] The first appendix corresponds almost to a similar text of the CRS. It sets out the reporting and due diligence rules that reporting FIs must apply in order to allow Member States to provide the information automatically. To ensure FIs perform the obligated reporting and due diligence rules, each Member State will take the necessary measures for compliance. Its reporting FIs must apply the requirements set out in appendixes I and II and have to effectively implement and comply with them in accordance with Part IX of appendix I.[502] Furthermore, it sets out the rules and administrative procedures that the Member States must implement in order to ensure effective implementation and compliance with the reporting and due diligence procedures. The second appendix contains six prescriptions that have been taken from the OECD commentary. This appendix contains additional reporting and due diligence rules for information on financial accounts. As well, additional rules regarding to the electronic transmission of the information and a supplement to the privacy guarantees in the event of the exchange of the new category of information.[503]

§6.3.2 Dutch implementation

The formalization of the Dutch intention to automatically exchange international financial data according to the CRS takes place via two routes.[504] Firstly by signing the MCAA, the Netherlands[505] has committed itself to let the Standard take effect from 1 January 2016 and, provided that a number of additional conditions have been met, will automatically exchange information from 2017 onwards.[506] Secondly, aforementioned Directive has amended the DAC in such a way that the Member States of the EU are obligated to automatically exchange information on the basis of the CRS.

By means of the 'Act on the Common Reporting Standard,'[507] a delegation provision has been included in the *WIB,* under which identification and reporting requirements for reporting FIs can be given on the basis of a general administrative order. In the connecting 'Implementation Decision Identification and Reporting Regulations Common Reporting Standard', [508] these identification and reporting

[501] Article 8bis Council Directive 2014/107/EU.
[502] Referred to in article 8 paragraph 3a Council Directive 2011/16/EU.
[503] Explanatory memorandum CRS by the State Secretary of Finance about the legislative proposal CRS.
[504] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 1.
[505] Including the BES islands in this respect.
[506] The editors of NDFR (2016). Uitvoeringsbesluit identificatie- en rapportageverplichtingen Common Reporting Standard. *NTFR, 2016/366.* Section (commentary).
[507] Law of 23 December 2015 amending the Act on the International Assistance in Taxation and the BES Tax Act in connection with the implementation of Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU on mandatory automatic exchange of information in the field of taxation (PbEU 2014, L 359) & for the implementation of CRS.
[508] Decree of 23 December 2015, containing identification and reporting requirements for reporting financial institutions with a view to the automatic exchange of information on the basis of the Common Reporting Standard.

requirements have been included, derived from the CRS and Directive 2014/107/EU.[509] In the simultaneous implementation of the Directive and the international CRS obligations with respect to third States in the *WIB,* the legislator chose to refer for various relevant definitions directly to the definitions included in the Directive. Actually, this has been chosen to achieve the most uniform implementation of CRS regarding to other EU Member States.[510] In order to determine which accounts and persons should be reported on, it is the intention for Dutch reporting FIs to follow the identification requirements from the CRS and the Directive due the implementation in the *WIB*.[511]

Due to the implementation of the CRS in the Dutch legal tax system, Dutch reporting FIs are obligated to identify their account holders, to determine which financial accounts and persons or entities qualify for the CRS regulations and, provide the relevant data and information of financial accounts to the Dutch tax authorities. Subsequently the tax authorities, which is the Minister of Finance,[512] facilitate automatic exchange with the other competent tax authorities.[513] In this context, the Dutch reporting FIs have to determine for all existing and new financial accounts whether these need to be reported.[514] According to the Standard, the definition of the reporting FIs is broad and is expressed as "legal persons and legal arrangements, such as corporations, partnerships, trusts and foundations".[515] A FI is considered as a Dutch FI if it is located in the Netherlands. The definition of the Netherlands, in accordance with the *WIB*, is the part of the Kingdom that is situated in Europe, the overseas territories fall outside this definition.[516][517] Any foreign associates of the FI will be considered as a FFI. Conversely, branches of FFIs located in the Netherlands are also regarded as Dutch FIs.[518] There are also excluded Dutch FIs, the non-reporting FIs.[519]

The FIs will record the information of their customers in their records. After identifying the taxpayers, they are legally obligated to report the information about the foreign taxpayers annually to the Dutch tax authorities, which thereafter send this information automatically to the local tax authorities

[509] The editors of NDFR (2016). Uitvoeringsbesluit identificatie- en rapportageverplichtingen Common Reporting Standard. *NTFR, 2016/366.* Section (summary).
[510] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 2.
[511]The editors of NDFR (2016). Uitvoeringsbesluit identificatie- en rapportageverplichtingen Common Reporting Standard. *NTFR, 2016/366.* Section (commentary).
[512] Article 3 WIB.
[513]The editors of NDFR (2016). Uitvoeringsbesluit identificatie- en rapportageverplichtingen Common Reporting Standard. *NTFR, 2016/366.* Section (commentary).
[514] The editors of NDFR (2016). Regeling aanwijzing rechtsgebieden Common Reporting Standard. *NTFR, 2016/412.* Section (commentary).
[515] OECD (2015), Standard for Automatic Exchange of Financial Information in Tax Matters, The CRS Implementation Handbook, OECD Publishing, p. 7.
[516] Article 2 paragraph 1 sub a WIB.
[517] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 3.
[518] Article 2a paragraph 1 sub b WIB.
[519] Article 2a paragraph 1 sub d WIB.

which matter.[520] The exchange of information applies only if the Netherlands has concluded a bilateral treaty with the State of the foreign taxpayer or if it is an exchange with an EU Member State. The exchanged information should be checked by the relevant foreign tax authorities. The Dutch tax authorities are not involved in this controlling process of delivered information. Vice versa, information received about foreign financial accounts of Dutch tax residents have to be checked by the Dutch tax authorities. To be a Dutch tax resident does not automatically mean that he/she has to pay taxes in the Netherlands.[521] As an effect of this legislation, (new) customers of Dutch FIs receive a form prepared by the 'Dutch Banking Association' (NVB) in cooperation with the 'Ministry of Finance'. In this form FIs requesting for (additional) information of the customer. In this way, they comply with the legal obligations of the CRS. Present customers will only receive the form if there is a reason for it, for example if they want to open a new bank account that requires additional data about the customer.[522]

Section 4a[523] of the *WIB* contains the obligations of the FIs for the automatic provision of identification and information in the context of the CRS. By or pursuant to an Order of Council, the tax authorities impose regulations on reporting FIs with a view to provide data and information as referred to in this section.[524] In article 10b and 10c of the *WIB,* are the subjective and objective data implemented that must be provided by the FI, which match with the requirements from the CRS and the Directive. As well, articles are included with exceptions on the information providing.[525] The Netherlands has not exercised the faculty to exchange more information than those provided for by the CRS minimum standard.[526]

The Netherlands has adopted some measures to require the compliance of the FI's obligations to provide the relevant information. The Dutch legislation, the *WIB,* provides the imposition of offense fines if the obligations of reporting FIs are intentional or grossly guilty not, not timely, incomplete or incorrect complied with.[527] The non-compliance of the obligations by FIs, is regarded as a punishable infringement, on which an offense fine rests not exceeding the amount of the fourth category of the Criminal Code.[528]

[520] Explanatory memorandum CRS by the State Secretary of Finance about the legislative proposal CRS.
[521] Explanatory memorandum CRS by the State Secretary of Finance about the legislative proposal CRS.
[522] Explanatory memorandum CRS by the State Secretary of Finance about the legislative proposal CRS.
[523] Articles 10a–10f WIB.
[524] Article 10a WIB.
[525] Article 10d–10f WIB.
[526] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 6.
[527] Article 11 WIB.
[528] Article 23 paragraph 4 Criminal Code.

This fine amounts to a maximum of €20,750.[529] On international non-compliance it is also possible to assign a criminal penalty.[530][531]

An additional problem with the automatic exchange of financial information is the privacy of the tax residents. The privacy is still guaranteed with the exchange of the information based on the CRS legislation. All the information collected by the FIs in the context of the CRS remain confidential. FIs are performing a legal obligation if they deliver certain information to the tax authorities.[532]

§6.4 Summary and conclusion

'What are the current relevant legislation and regulations on international and EU level? What is the influence of those on the Dutch tax autonomy?' The discussed legislation and regulations in this section are about CRS.

CRS, in a nutshell, is the basis for automatic annual exchange of information and data between competent tax authorities of States which signed the MCAA. Various phases can be distinguished with regard to the information exchange. Firstly, it will be determined which FIs are determined as Dutch reporting FIs. Secondly, these reporting FIs have to identify their account holders to whom they have to provide information, after which they gather the relevant information of them. Thereafter, this relevant information will be exchanged with the Dutch tax authorities. Subsequently, the Dutch tax authorities exchanges the information with the tax authorities of the States for which the information may be relevant for its tax purposes. Finally, the receiving competent tax authorities use the information and data for the levy of taxes according to the legislation and regulations of their State. Additionally, the Dutch tax authorities can receive information of reporting FFIs by their tax authorities.

The CRS provisions have a wider margin than the already existing provisions for automatically exchanging information. The EC adopted the CRS on the basis of an EU Directive which provisions are an extension of the automatic exchange under the DAC. The CRS also arranges the exchange of information on, for example, account balances, dividend income and the proceeds from the sale of securities.[533] In addition, the CRS is applied worldwide by the participating States.

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[529] This is the offense fine amount of the fourth category since 1 January 2018.
[530] Article 11 paragraph 4 WIB.
[531](2018). Commentaar op de Wet op de internationale bijstandsverlening bij de heffing van belastingen, Artikel 11. *Vakstudie Nederlands Internationaal Belastingrecht, art. 11 WIB.* Note. 2.
[532] Explanatory memorandum CRS by the State Secretary of Finance about the legislative proposal CRS.
[533] Meijermand, V.L. (2016). Common Reporting Standard: What's new!? *Civiel en Fiscaal Tijdschrift Vermogen, 2016/5-25.* Paragraph 2.

The impact of the implementation of the CRS, including the Directive, in the *WIB* is mainly relative to the Dutch reporting FIs. They will have an increase in the administrative burden, because they are obligated to exchange annual relevant information and data from 1 January 2017 about their clients from 2016 onwards. Firstly, they only had an obligation such as this under FATCA for the US taxpayers. Now, this obligation has been expanded for all the tax residents of participating States (and under the condition that the Netherlands is exchanging with that State).

The influence of the CRS on the Dutch tax autonomy can be observed from two perspectives. From the first perspective, it can be concluded that the tax autonomy of the Dutch legislator got more restricted through more international and supranational legislation and regulations. He is losing independency when imposing laws, because the influence and the implementation of the CRS must be taken into account from now on. The Dutch legislator becomes more limited in exercising its powers due to the CRS regulations. Secondly, the remarkable view from the other perspective has to be mentioned. As on the one hand the tax autonomy becomes more limited, on the other hand, it can be said that the tax autonomy becomes also broader. Due to the principle of sovereignty, the Netherlands is limited to exercise it public powers across their national borders. As a result of the international and supranational cooperations, is it possible to levy taxes within another State. In that view, it can be concluded that the powers have been broadened. The impact for the Dutch tax authorities is that they have to exchange the relevant information with the other competent tax authorities and they have to check the received information about foreign financial accounts of Dutch tax residents. This is for their own benefit, because it provides a better possibility to counteract tax evasions and black-savings of Dutch taxpayers. On the other hand,

Section 7 Rulings

§7.1 Introduction

Transparency is one of the most important criterion to tackle tax avoidance.[534] The exchange of rulings is one of the instruments to increase transparency in an international perspective. On the level of the OECD and EU level, agreements have been made about the exchange of information on rulings with an international character. In many States, it is a common and legitimate practice to provide taxpayers certainty in advance about the application of the (Corporation) tax law by means of a ruling.[535] In order to counter BEPS, it is important to have sufficient information about the taxpayer, mainly businesses, and the application of tax law abroad. The ruling exchange will lead to a better information position for tax authorities and is therefore an important instrument to fight against tax avoidance.[536]

A ruling provides, within the frameworks of law, policy and jurisprudence, certainty in advance about the tax application of intended legal actions of a taxpayer.[537] This preliminary consultation leads to an opinion of the tax authorities on the application of the law in this specific case. Rulings can have a general character, when it applies to a group of taxpayers, and a more specific character, when it applies to an individual taxpayer.[538] In an international context, the granting of certainty in advance in the form of a ruling is seen as a suitable instrument to address the unintentional, but inevitable, increased (fiscal) uncertainty.[539] Rulings, thus certainty insurances, do not lead to a fiscally more favorable treatment of a taxpayer than the treatment of the same set of facts afterwards. The discussion about ruling practice is therefore essentially a discussion about the possibilities and impossibilities of tax law policy and jurisprudence rather than a discussion about the instrument, the ruling itself. [540]

Under the concept of rulings are covered: (APA)[541] and Advance Tax Rulings (ATR).[542] An APA provides a taxpayer certainty in advance, on the basis of the OECD TP guidelines, about the determination of international transfer prices between associates. An ATR provides a taxpayer certainty in advance about

[534] Parliament documents II, 2014/15. 25087 nr. 102 & Parliament documents II 2015/16, 25087 nr. 112.
[535] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 1-2.
[536] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 1-2.
[537] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 1-2.
[538] Huibregtse, S.B. & Verdoner, L.A. & Valk-Derksen, van der M. & Pleijsier, S. (2018). Hoofdstuk 3: Definities van 'ruling en andere fiscaal gevoelige informatie volgens OESO, EU, UN en lokale fiscus. *Fiscaal dossier nr. 17.* Paragraph 2.
[539] Letter of State Secretary of Finance, 18 February 2018, 2018-0000024590. *Published in V-N 2018/11.13.* P. 3-4.
[540] Letter of State Secretary of Finance, 18 February 2018, 2018-0000024590. *Published in V-N 2018/11.13.* P. 3-4.
[541] Advance Pricing Agreements: providing advance certainty about international transfer prices.
[542] Advance Tax Ruling: providing advance certainty about tax qualification and the consequences of transactions in international structures.

the tax consequences of a proposed transaction or combination of transactions in an international context.[543]

§7.2 Ruling regulations

§7.2.1 International level

In the context of tackling tax avoidance by businesses and the harmful tax competition of States, the OECD presented regulations on rulings, which will be used as fiscal transparency instrument.[544] Action 5 of the final report of the BEPS project focusses on two elements, among which the transparency of rulings.[545] The report indicates that States will not exchange the rulings themselves, but only information about those, based on a template.[546] In principle, only the information included in the template will be exchanged, but if required, further information and presentation of the ruling can be submitted. The template has been further elaborated in the 'Exchange on Tax Ruling XML Scheme: User Guide for Tax Administrations',[547] in which the standards for electronic exchange are included.

The information of concluded rulings will be exchanged between all States of residence of the related parties, always including the State of residence of the direct parent company and the ultimate parent company, even if these are not directly part of the ruling.[548] Within the meaning of Action 5, in principle a 25% criterion applies to be a related party.[549] The formulation seems to suggest that it could also involve indirect and cumulative interests and not only direct 25% interests.[550] The exchange contains the principle of reciprocity. Although the report indicates that there are advantages if there is reciprocity in the exchange of rulings, at the same time it is indicated that the absence of reciprocity is no reason not to exchange.[551]

According to the OECD rulings can be defined as: *'Any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which*

[543] Notition APA-/ATR-practice 2017 file:///Users/danakoert/Downloads/notitie-apa-atr-verschijningsvormen.pdf.
[544] Letter of State Secretary of Finance, 18 February 2018, 2018-0000024590. *Published in V-N 2018/11.13.* P. 3-4.
[545] BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance.
[546] Appendix C of the BEPS report Action 5.
[547] www.oecd.org/tax/exchange-on-tax-rulings-xmlschema-user-guide-for-tax-administrations.pdf.
[548] Wilde, de M.F. (2015). Rapport BEPS Actiepunt 5. *NTFR 2015/2725*. & BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report. p. 52.
[549] BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report. p. 52.
[550] Kolste, N. (2017). De Wet uitwisseling inlichtingen over rulings. *MBB 2017/05-05.* Paragraph 1.3.
[551] BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report p. 55.

they are entitled to rely.' [552] Action 5 concludes that the method of spontaneous exchange of information about rulings, whereby the different tax authorities start the exchange on their own initiative, is not effective enough.[553] Therefore the OECD's proposal for the exchange of information on rulings obliges spontaneous exchange of information for the following categories of rulings:[554]

- Rulings related to preferential regimes;
- Cross border unilateral APAs or other unilateral transfer pricing rulings;
- Rulings giving a downward adjustment to profits;
- Permanent establishment (PE) rulings;
- Conduit rulings; and
- Any other type of ruling where the FHTP agrees in the future that the absence of exchange would give rise to BEPS concerns.

The OECD decided to exchange information about existing and new rulings. New rulings, in the OECD context, are rulings that are concluded on or after 1 April 2016. Existing rulings have been concluded in the period between 1 January 2010 and 1 April 2016 and were still valid on 1 January 2014.[555] Information about existing rulings must have been exchanged before 1 January 2017.[556] For the 'future' rulings (rulings after 1 April 2016), the related information must in principle be exchanged within three months.[557]

Concerning legal protection, the report contains the duty of confidentiality,[558] which obliges States to treat received information of rulings as confidential. It is required that the duty of confidentiality must be legally guaranteed, which is only possible when the receiving State has implemented accurate legislation and regulations to ensure this. Also concluded tax treaties and other instruments on which the exchange is based, must contain such confidentiality clause. Additionally, a special reservation applies to the exchanged information; the information may only be used for tax purposes.[559]

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[552] BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report. p. 47.
[553] BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report. p. 45-46.
[554]BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report. p. 48-51.
[555] BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report. p. 53.
[556] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 2.
[557] Kolste, N. (2017). De Wet uitwisseling inlichtingen over rulings. *MBB 2017/05-05.* Paragraph 1.4.
[558] BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report p. 55-56.
[559] BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report p. 55-56.

§7.2.2 EU level

Issuing tax rulings in advance, which facilitate consistent and transparent application of the law, is a common practice, also in EU Member States. The clarification of tax law for taxpayers provides security for businesses and can thereby promote investment and encourage compliance with the law. Consequently this also facilitates the further development of the EU internal market.[560] The consideration in the EU to implement regulations on the exchange of rulings is that those rulings concerning tax tax-driven structures have, in certain cases, led to a low taxation of artificially high revenues in the States issuing, amending or extending the advance ruling and resulting in artificially low income for taxation in other States involved.[561] That is the reason to increase the transparency on rulings within the EU.

Within the EU, Directive 2015/2376/EU [562] amended the DAC and extended thereby its spontaneous exchange of information on rulings to automatic exchange. The DAC provides for mandatory spontaneous exchange of information between Member States concerning five specific cases. One specific case is that information need to be exchanged when the competent authority has reason to suppose that there may be a tax loss in another Member State,[563] which applies to tax rulings that a Member State issues.[564] However, there are several important practical difficulties that hamper efficient spontaneous exchange of information on prior cross-border rulings and advance transfer pricing arrangements, such as the fact that the Member State issuing the ruling may decide for itself which other Member States should be informed. Therefore, the information exchanged should, where appropriate, be available to all other Member States.[565] Due to the amendment this is accomplished.

The Netherlands has argued within the EU to deviate as little as possible from the agreements in the OECD context, in order to limit the administrative burden as much as possible.[566] Therefore on most elements both agreements are comparable. In both the OECD and the EU context, the ruling itself is not exchanged in the first instance, but a standard form is exchanged. This standard form is internationally agreed and contains the most important information of a ruling.[567] Another matching element is that a State may request for a ruling. The EU Directive and OECD agreement still have major differences on a number of important points. The most outstanding is the difference between the automatic and the

[560] Consideration 1 Council Directive 2015/2376/EU.
[561] Consideration 1 Council Directive 2015/2376/EU.
[562] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.
[563] Article 1 paragraph 1 jo. Article 5 Council Directive 2015/2376/EU.
[564] Consideration 3 Council Directive 2015/2376/EU.
[565] Consideration 4 Council Directive 2015/2376/EU.
[566] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 1-2.
[567] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 1-2.

mandatory spontaneous exchange on rulings. The difference between those is that, in spontaneous division the exchange must come from the initiative of the State that issued the ruling. At the moment that the providing State suspects that the ruling may be of interest to the taxation in another State, the providing State is obliged to share the ruling.[568] In case of automatic exchange it is not checked whether the information will be of importance in that State, but it is just simply exchanged.

Another major difference is the definition of the concept of rulings. The definition of ruling in the EU is much broader, because it does not contain a defined ruling definition.[569] The concept of rulings need to be broadly interpreted to include (mainly) all forms of certainty in advance about cross-border transactions. This means that on the basis of the EU agreements much more ruling information must be exchanged than in the OECD context. This has consequences for the implementation.[570][571] According to the Directive 2015/2376/EU Member States are required to exchange the 'advance cross-border rulings' (ATR) and the 'advance transfer pricing arrangements' (APA).[572] This shows that only the obligation arises to exchange prior agreements and no requirements occurs to exchange agreements which are concluded afterwards about already elapsed years.[573] Secondly, it is essential that both are cross-border agreements. With respect to rulings and transfer pricing agreements, a further explanation what is meant by 'cross-border' is included in the Directive.[574]

The Directive requires, such as the OECD, the exchange of information on existing and new rulings. New rulings, for the Directive, are rulings that came into effect on or after 1 January 2017.[575] Existing rulings came into effect in the period from 1 January 2012 up to and including 31 December 2016, on the understanding that rulings still need to be valid on 1 January 2014.[576] This information on the existing rulings must have been exchanged with the other Member States before 1 January 2018.[577]

The DAC contains already various provisions for the legal protection of taxpayers. For example, the confidentiality of the exchanged cross-border rulings and cross-border transfer pricing arrangements is regulated on the basis of the already included duty of confidentiality provision of the DAC.[578]

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[568] Kolste, N. (2017). De Wet uitwisseling inlichtingen over rulings. *MBB 2017/05-05.* Paragraph 2.
[569] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 1-2.
[570] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 1-2.
[571] See paragraph 9.2.6 of this master thesis.
[572] Article 3 paragraph 14 & paragraph 15 Council Directive 2015/2376/EU.
[573] Kolste, N. (2017). De Wet uitwisseling inlichtingen over rulings. *MBB 2017/05-05.* Paragraph 2.3.
[574] Article 3 paragraph 16 Council Directive 2015/2376/EU.
[575] Article 8 bis paragraph 1 Council Directive 2015/2376/EU.
[576] Article 8 bis paragraph 2 Council Directive 2015/2376/EU.
[577] Article 8 bis paragraph 4 Council Directive 2015/2376/EU.
[578] Article 16 paragraph 1 Council Directive 2015/2376/EU.

§7.2.3 Dutch level

Prior consultation and advance certainty by means of a ruling are important tasks in the supervision of tax authorities. It is also an important pillar of the Dutch investment climate.[579] When the Dutch tax authorities provide a ruling, the tax assessment will be the same as the situation in which no certainty in advance has been given.[580] Thus no advantageous treatment will be given, because rulings will only be issued within the framework of the tax law, policy and jurisprudence. The Dutch government, therefore, remains fully in favor to create clarity at an early stage and to settle disputes between taxpayers and the tax authorities 'at the front'.[581]

No amendment of the Dutch domestic law was necessary for the spontaneous exchange of rulings based on BEPS Action 5. The exchange with Contracting States in accordance with the OECD guidelines takes place on the basis of the Strasbourg Convention, a DTC and/or a TIEA. On the other hand, Member States were required to incorporate the changes by Directive 2015/2376 into their national legislation by December 31st 2016 at the latest. In the Netherlands, the implementation has been shaped by the 'Exchange of Information on rulings Act'.[582] This Act amends the WIB and explicitly include the automatic exchange of rulings.[583]

Due to the implementation of the Directive in the WIB, the provisions are in accordance with the EU law. The legislative proposal does not contain obligations that are not related to the implementation of the Directive.[584] Therefore the broader EU definition of rulings has been adopted by the Netherlands. In Dutch context it is important that an APA[585] or ATR[586] is made by or on behalf of the tax inspector (tax authorities) or the Minister of Finance.[587] The issuance of international rulings are centralized within the Dutch tax authorities, the APA-/ATR-team.[588] The APAs and/or ATRs by the Dutch tax authorities will be exchanged every six months. The information must be provided within three months of the end of the six-month period during which the advance rulings has been issued, created, amended or renewed.[589]

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[579] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 3.2.
[580] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 1-2.
[581] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 3.2.
[582] Act of 21 December 2016 amending the Law on international assistance in the levying of taxes in connection with the automatic exchange of information on cross-border rulings and transfer pricing agreements.
[583] Article 6b WIB.
[584] Parliament documents II, 2015-2016, 34 527, nr. 3.
[585] Article 2c WIB.
[586] Article 2b WIB.
[587] Article 2 paragraph 3 AWR.
[588] WOB request of the APA-/ATR-practice, note on the most common manifestations. Letter of the State Secretary of Finance, 27 March 2017, 2017-0000051773.
[589] Article 6d paragraph 5 WIB.

Member States are granted the possibility to apply a threshold amount of €40 millions of turnover on APAs and ATRs concluded, modified or renewed before 1 April 2016.[590] This turnover criterion is based on the European definition of SME segment, because businesses with a turnover less than this amount are qualified as SME.[591] The Netherlands applies this possibility and, therefore, these APAs and ATRs do not need to be exchanged before 1 January 2018. Furthermore, an exception applies to cross-border rulings that relate exclusively to one or more natural persons; these need not to be exchanged.[592]

The State Secretary had already indicated that the Dutch tax authorities did not realize the deadlines for the exchange of information for existing rulings in both the OECD and EU contexts.[593] This is, in addition to the large amount of rulings and the fact that the rulings are not centrally registered, due to the different interpretations of OECD and EU concepts, which makes it difficult to fill in the standard forms.[594] The Dutch tax authorities have therefore decided to fill in the terms within these standard forms in a comprehensive manner, causing that the Netherlands has a relatively large number of rulings that must be shared.[595] That the deadlines are not met on time does not alter the fact that the rulings will be exchanged in the end. At the level of the OECD, in consultation with the secretariat of the Forum on Harmful Tax Practices (FHTP), it was agreed that the information would be exchanged by 31 December 2017 at the latest.[596] Where possible, within the careful fulfillment of agreements in the OECD and EU context, the choice is made to speed up the process.[597]

The current tax policy concerning the protection of the tax base,[598] will improve the current exchange of information in the respect of transparency. This transparency policy will be continued in the government's ruling approach. The Dutch government takes additional measures to intensify the quality and robustness of the Dutch ruling practice.[599] Both the process and content of the rulings will be revised.[600] An external advisory group with independent experts will be set up to serve as board for this revision. Important elements that will be taken into consideration are the forthcoming changing

[590] Article 8 bis paragraph 2 Council Directive 2015/2376/EU.
[591] Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (96/280/EG) [Publicatieblad L 107 van 30.04.1996].
[592] Article 8 bis paragraph 1 Council Directive 2015/2376/EU.
[593] Parliament documents II, 2016/2017, 34527, nr. 5.
[594] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 4.
[595] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 4.
[596] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 5.
[597] In the 'Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215. li* P. 5' is a list what the Dutch tax authorities has been undertaken to facilitate the acceleration of the exchange of information on rulings.
[598] On 23 February 2018, the State Secretary of Finance, dhr. Snel, has sent his memorandum 'Tax evasion and tax evasion approach' to the government. In this memorandum he describes a broad package of measures to combat tax avoidance.
[599] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 3.2.
[600] Letter of State Secretary of Finance, 18 February 2018, 2018-0000024590. *Published in V-N 2018/11.13.* P. 2.

legislation and social, economic and technical implementation aspects.[601] Transparency towards other tax authorities is achieved by exchanging information about rulings and answering any subsequent questions from foreign tax authorities.

With the introduction of the 'Exchange of Information on rulings Act', numerous times attention was requested for the lack of legal protection in the field of international information exchange.[602] The State Secretary declared explicitly that involved taxpayers are not informed in advance about the intended information exchange or about what kind of information is intended to be provided.[603] The taxpayer is not entitled to lodge an objection and, furthermore, there are no possibilities for the involved taxpayer to check whether the information intended to be exchanged is correct. [604] In the Dutch practice, the taxpayer has some influence because the template is filled in by the taxpayer himself, but the ultimate responsibility as to what information is exchanged lies with the tax authorities. [605] Needless to say, the provision of the DAC are implemented within the WIB, and, therefore, those provisions of legal protection are also valid within the Dutch tax law. The AWR contains, in addition to the WIB, also provision in national context for the legal protection of the involved taxpayer.

§7.3 Summary and conclusion

'*What are the current relevant legislation and regulations on international and EU level? What is the influence of those on the Dutch tax autonomy?'* In this section are the legislation and regulations discussed concerning the exchange of information on rulings.

The exchange of information on rulings is an important instrument that increases the transparency on an international level. Providing rulings, consisting of APAs and ATRs, is a common and legitimate practice in most States. The issuing occurs within the framework of the law, tax policy and jurisprudence and, therefore, it does not lead to a better treatment of taxpayers who concluded a ruling. The OECD and EU have implemented regulations that set a time limit when the information need to be exchanged and determined to what extent. The amendment of the DAC, by Directive 2015/2376/EU, is implemented in the *WIB*. Hence, the same provisions apply in the Dutch tax law as on EU level (and international level).

[601] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 3.2.
[602] Kolste, N. (2017). De Wet uitwisseling inlichtingen over rulings. MBB 2017/05-05. Paragraph 4.
[603] Parliament documents II, 2016-2017, 34 527, nr. 5, p. 14.
[604] Parliament documents II, 2016-2017, 34 527, nr. 5, p. 14.
[605] Parliament documents II, 2016-2017, 34 527, nr. 5, p. 12.

However, the tendency towards transparency seems to prevail over an effective legal protection, as a result of which the legal protection increasingly disappears into the background in international information exchange. It seems that the regulations for the exchange of information on rulings provide for almost no provisions to the privacy of taxpayers. A worrisome development. This will be discussed later in section 9.2.6.

Such as the FATCA, CRS, the DAC etc. the effect of more regulations of the higher rule of law is that the Netherlands get less autonomous. On the other side, it is important for the Netherlands to obtain information on rulings from abroad and to provide information on ruling to others to get more international transparency. Together, with as many as possible States, they can fight against tax avoidance, which will increase the national revenues of each (participating) State. In relation with other States, it seems the Netherlands have closed many rulings. Hence, the tax authorities are suffering with collecting the correct information, but nevertheless they are determined to meet the exchange obligations. Some States take the position that they did not conclude or did conclude only little rulings, which seems unlikely given the broad definition of the concept of rulings. The Netherlands need then to exert pressure in order to obtain information on rulings from other Member States in an EU context. At the OECD level, the Global Forum will put pressure on those States in the form of 'peer reviews'.[606] Aspects that are discussed in the peer review are whether States provide information on request, whether this is timely and whether the information provided is of sufficient quality. If in the Dutch opinion that a State had wrongly failed to answer a request, the Netherlands can report this in the context of the 'peer review' of the State in question.[607]

[606] BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance. – 2015 final report. p. 53.
[607] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 108.

Section 8 Country-by-Country Reporting

§8.1 Introduction

Transfer pricing refers to the regulations and methods for mutual pricing transactions between associated companies (after this associates). These transaction prices are not determined by the functioning of the free market, which enables associates to establish the transfer prices by themselves.[608] According to article 9 OECD-MC, an associate is: "*an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State..*"[609] There are no minimum quantitative requirements to the participating shareholding or decision-making power. As a result of maintaining this broad definition, States are able to give further requirements of this definition in their own tax law.[610]

At the starting-point of the transfer pricing regulations is the 'at arm's length principle.' This principle refers to situations in which associates have transactions with each other, which can lead to profit shifting. The 'at arm's length principle' is established to prevent artificial constructions through businesses with multiple concern components in several jurisdictions. It requires that associates have to act together as if they were independent third parties of each other and therefore concluded businesslike transfer prices. The underlying thought is that the profit must not differ between the situation where associates enter into transactions and the situation where unaffiliated parties enter into the same kind of transactions. In order to verify whether the terms of an associated transaction are in accordance with the 'at arm's length principle', these terms are compared with the conditions of a similar transaction under similar circumstances between unaffiliated parties.[611] The 'at arm's length principle' is included in article 9 OECD-MC, and in article 8b CITA,[612] which describes it as follows: "*..and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits.*" [613] The (corresponding) adjustment is also included in this article, which will be left out of consideration at the moment and will be explained in section 8.4.

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[608] Damsma, B.W.A.M. & Velden, van der W.T.M. (2017). BEPS Action 8-10: Aligning transfer pricing outcomes with value creation. *Maandblad Belasting Beschouwingen, 2017/05.* Paragraph 1.
[609] Article 9 paragraph 1 OECD MC.
[610] Damsma, B.W.A.M. & Velden, van der W.T.M. (2017). BEPS Action 8-10: Aligning transfer pricing outcomes with value creation. *Maandblad Belasting Beschouwingen, 2017/05.* Paragraph 1.
[611] J.T. van Egdom, *Verrekenprijzen; de verdeling van de winst van een MNE,* Deventer: Kluwer 2014, p. 37.
[612] See section 8.3.1 of this master thesis.
[613] Article 9 paragraph 2 OECD MC.

The global financial and economic crisis[614] caused the austerity of the States' welfare and the tax increases to help the governments to close the gap emerged from their financial difficulties. The relative heavier tax burden on individuals, and smaller businesses, has resulted in a development in which worldwide societies have raised the question whether international operating MNEs do pay their 'fair share'[615] on collective spending. On international level, broad political support has emerged, in recent years, for the coordinated combat of profit shifting and base erosion (BEPS), especially by MNEs.[616] MNEs have the indulgence position to set up complex structures, such as aggressive tax planning strategies that enables the benefit of the MNE's revenue through reducing the effective tax burden on the profit. Such structures do not contribute to a MNE's 'fair share', which is required to provide to the State of residence's society. The avoidance to contribute as compensation of the received benefits from society, is the so-called unjustified 'free riding' behavior, because those who withdraw from taxation do still benefit from tax-financed services such as good infrastructure and highly skilled workers.

States establish specific transfer pricing regulations, often by collaborations on international level. The OECD is one of the leading collaborations in this field and published in 1979 [617] a guidance for transfer pricing, which is currently in the updated form of 2017.[618] The increasingly advancing internationalization of States economies has guided to international operating businesses, whom are searching for possibilities to minimize their global effective tax burden by the use of arbitrage opportunities and mismatches between different legal systems and treaties.[619] In order to counteract the resulting base erosion and profit shifting, the OECD introduced the final action reports of the BEPS project on 5 October 2015.[620] These fifteen actions must ensure that the approach to combat international tax avoidance and (aggressive) tax planning is more effective and efficient. The actions 8-10 and 13 of the BEPS project, have a specific relationship with the situation regarding to transfer pricing. The regulations arranged by these actions should be implemented in the national tax law of OECD States, such as the Netherlands.[621]

[614] Started in the summer of 2007 and reached its peak in 2008.
[615] The concept that if you benefit from advantages of a society, you also need to contribute to this.
[616] Wilde, de M.F. (2016). Het OESO BEPS-project in vogelvlucht. *MBB 2016/11-01*. Paragraph 2.
[617] Transfer pricing and MNE enterprises; OECD 1 June 1979.
[618] OECD Transfer Pricing Guidelines for MNE Enterprises and Tax Administrations, originally published in 1979 and approved on 27 June 1995. Updated in 2009, 2010 and 2017. The BEPS Action 8-10 & 13 amended a number of chapters in the Guidelines. The amendments were formally adopted by the OECD Council on 23 May 2016, along with a Recommendation on BEPS Measures Related to Transfer Pricing, recommending that both the OECD member States and non-member States follow the guidance set out in the Actions.
[619] Damsma, B.W.A.M. & Velden, van der W.T.M. (2017). BEPS Action 8-10: Aligning transfer pricing outcomes with value creation. *Maandblad Belasting Beschouwingen, 2017/05.* Paragraph 2.2.
[620] Base Erosion and Profit Shifting project, which refers to tax avoidance strategies: www.oecd.org/tax/beps.
[621] Damsma, B.W.A.M. & Velden, van der W.T.M. (2017). BEPS Action 8-10: Aligning transfer pricing outcomes with value creation. *Maandblad Belasting Beschouwingen, 2017/05.* Paragraph 2.3.

§8.2 Country-by-Country Reporting

Action 13[622] of the OECD BEPS project is about transfer pricing documentation and Country-by-Country Reporting (after this CbCR). It provides standardized documentation requirements for MNE groups and requests for an automatic international exchange of country reports between tax authorities. With this action, minimum standards for transfer pricing documentation of MNEs are agreed upon transparency for documentation obligations of transfer pricing, incorporating a master file, local file, and country-by-country report (after this country report).[623] The OECD has developed the models for the documents in order to realize consistent implementation of participating States. These documentation obligations function as a tool for tax authorities to carry out a more efficient risk selection for transfer pricing. In case of identified BEPS risks, the relevant tax authorities can request further information and, if necessary, conduct further investigation.[624] BEPS action 13 resulted in the adaptation of section five of the OECD guidelines. It has to be implemented in national legislation of participating States for tax years starting on or after 1 January 2016.[625]

In the master file the MNE should provide its global business and an overview of their transfer pricing policy. This will include the information of the entire MNE group about the structure, description of the activities, the present intangibles, the financial transactions and the tax position. The file will be made available to the tax authorities of all States involved in the taxation of the MNE.[626] In addition, the local file provides a detailed focus on the activities within a specific State with extensive attention to the arm's length substantiation of the related transactions. It gives an overview of the associated transactions, the used transfer pricing, and a transfer pricing analysis of their business nature.[627] Action 13 also contains a documentation requirement for a country report. The MNE group provides a schematic overview of the States where it gains its worldwide profit and in which States it pays its profit tax. It provides information about the amount of revenues, profit before tax, profit tax paid, income tax included in the financial statements, paid-up capital, cumulated profit, number of employees, tangible assets other than cash or cash equivalents and other measures of economic activities in each State.[628] The ultimate parent company

[622] Action 13: 'Transfer Pricing Documentation and Country-by-Country Reporting'.
[623] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 1.
[624] Wilde, de M.F. (2015). Rapport BESP Actiepunt 13: 'Transfer Pricing Documentation and Country-by-Country Reporting'. *NTFR, 2015/2731.* Section (Summary & Commentary).
[625] About BEPS project: www.oecd.org.
[626] Wilde, de M.F. (2015). Rapport BESP Actiepunt 13: 'Transfer Pricing Documentation and Country-by-Country Reporting'. *NTFR, 2015/2731.* Section (Summary).
[627] Wilde, de M.F. (2015). Rapport BESP Actiepunt 13: 'Transfer Pricing Documentation and Country-by-Country Reporting'. *NTFR, 2015/2731.* Section (Summary).
[628] Oosterhoff, D. (2016). Regulatory Documentation and Country-by-Country Reporting Requirements (Netherlands). *International Transfer Pricing Journal, 2016 no.1.* Paragraph 3.2.

of the MNE group provides the country report to the tax authorities of the State of its residence. Subsequently, the tax authorities have to automatically exchange the country report with all States where the group has branches.

The country report will be treated confidentially and will not be publicly accessible,[629] thus will remain a secret to the public. However, a separate project has been started within the EU that will investigate the possibility to make the country reports public. The idea is to obligate MNEs to publish their tax information; thus, citizens can also see the tax payments of the MNEs. This is the so-called public CbCR and a proposal has been made to implement these obligations in a new EU directive for the annual financial reporting by companies. This 'Accounting Directive'[630] will be part of the accounting law for the MNEs.[631]

The arrangement of this newly standardized country report is based on the idea that tax authorities could exercise more efficient risk selections for transfer pricing. With this information and 'effective risk analysis', relations can be established between the activities in the States, the profit, and paid taxes. If this risk selection reveals a high risk of profit shifting, the relevant tax authorities can request more information and could undertake additional investigation in that case. In addition, transfer pricing adjustments should not be based on the country report. The country report will be used for aforementioned risk assessment purposes, but not for substantiating adjustments. With the help of a risk analysis, the scare capacity of tax authorities can be used more efficiently and base erosion and profit shifting can therefore be prevented more effectively. By the introduced threshold of consolidated revenue of 750 million, it is assumed that a right balance has been found between the relative administrative burden on businesses and the objectives of tax authorities.[632]

The mutual automatic international data exchange of country reports takes place on behalf of the 'CbC MCAA'[633] and is signed by 57 States on 1 January 2017.[634] This MCAA is inspired by the CRS MCAA. In addition to this multilateral agreement, the exchange may also take place via bilateral tax treaties and TIEAs, which States have to establish by themselves. The automatic data exchange only takes place

[629] Wilde, de M.F. (2015). Rapport BESP Actiepunt 13: 'Transfer Pricing Documentation and Country-by-Country Reporting'. *NTFR, 2015/2731.* Section (Summary).
[630] Procedure 2016/0107/EU: Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.
[631] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 8.
[632] Oosterhoff, D. (2016). Regulatory Documentation and Country-by-Country Reporting Requirements (Netherlands). *International Transfer Pricing Journal, 2016 no.1.* Paragraph 2.2.
[633] The Multilateral Competent Authority Agreement on the Exchange of country-by-country reports.
[634] The States participating the CbC MCAA: www.oecd.org/tax/automatic-exchange/about-automatic-exchange/CbC-MCAA-Signatories.pdf.

between relevant treaty partners, due to a legal basis. The provisions of the CbC MCAA to exchange information are only applicable if a State has implemented the CbCR legislation in its national law and only in respect of States that have explicitly designated each other as State to exchange the cbcr with. The notification has to be reported to the OECD and must be mutual.[635] [636] The Netherlands wants to collaborate with all the States that have signed the CbC MCAA to exchange country reports.

Within the EU, the CbCR regulations have resulted in the so-called CbCR Directive,[637] which includes the obligation for the EU Member States to compose country reports and the automatic exchange of these reports between the Member States. This Directive is, also, implemented in the Dutch tax system under the *WIB*.[638]

§8.3 Country-by-Country Reporting in the Netherlands

§8.3.1 Implementation

The Netherlands has great ambitions to be a leader in the field of exchanging information. They consider it as important, that international cooperation takes place through joint coordination. There are three specific areas in which the Netherlands wants to excel, namely transparency through information exchange, transfer pricing, and the support of developing States.[639] The Dutch tax authorities have extended their capacity with a special team, who focuses on the CbCR and is part of the Transfer Price Coordination Group.[640]

In the Dutch Corporate Income Tax Act (CITA),[641] transfer pricing law has been implemented since 2002. Article 8b CITA, contains the 'at arm's length principle'[642] and an administration obligation for the transfer pricing of the transactions between associates.[643] This documentation obligation is less substantive and detailed than the CbCR.

With effect from 1 January 2016 the CbCR legislation is implemented in the CITA, due to the approach of Action 13 of the BEPS Project. These CbCR documentation regulations are included in section

[635] Article 8 CbC MCAA.
[636] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 8.
[637] Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.
[638] Article 6 e WIB.
[639] See Parliament documents II 2013/14, 25087, 60 & Letter from the State Secretary of Finance, IZV/2015/4-314 U, 2 June.
[640] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 2.
[641] Corporate Income Tax Act of 8 October 1969, replacing the 1942 Corporate Income Tax Act with a new statutory regulation.
[642] Article 8b paragraph 1 CITA.
[643] Article 8b paragraph 3 CITA.

VIIa 'Additional documentation requirements for transfer pricing' under article 29b up to and including 29h of this law. These articles are largely implemented in accordance with the proposed legislation model, where no substantive deviation is intended.[644] The CbCR requirements have an impact on the current documentation of MNEs in the Netherlands, because they did not have a (similar) Dutch unilateral CbCR. These requirements are more detailed in relation to what taxpayers had to prepare and also propose penalty provisions to enforce these new requirements.[645]

§8.3.2 CbCR documentation under CITA

Further guidance, definitions, content, and templates regarding the three underlying CbCR documentations are provided through the Decision Decree of the State Secretary of Finance.[646] This Decree is in accordance with the guidance provided in BEPS Action 13. The Decree is left out of consideration in the following explanations of the CbCR in the Netherlands.

§8.3.2.1 Master file

The requirements for the master file are included in article 29g of the CITA. An entity of a MNE group that is liable to tax in the Netherlands must, within the deadline period of its corporate income tax return, provide a master file concerning the year to which the return relates.[647] This requirement is applicable for MNE groups exceeding a threshold of 50 million consolidated revenue. This revenue is based on the tax year preceding the reporting year for which the documentation requirement applies.[648] Regarding this article, the master file should include the following information: an overview of the MNE as such, including the nature of its business activities, transfer pricing strategy and its global allocation of income and economic activities.[649] This information will be used to support the tax authorities in assessing the presence of a substantial transfer pricing risk.[650]

§8.3.2.2 Local file

The requirements for this file are also included in article 29g of the CITA. Hence, the same requirements apply for the local file, but regarding this article, the local file should include other information. The file

[644] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 2.
[645] Oosterhoff, D. (2016). Regulatory Documentation and Country-by-Country Reporting Requirements (Netherlands). *International Transfer Pricing Journal, 2016 no.1.* Paragraph 1.
[646] Decree of the State Secretary of Finance, DB2015/462M, 30 Dec. 2015. In Dutch: Regeling van de Staatssecretaris van Financiën van 30 december 2015, nr. DB/2015/462M, houdende voorschriften ter verdere uitwerking van de aanvullende documentatieverplichtingen voor MNEe ondernemingen (Regeling aanvullende documentatieverplichtingen verrekenprijzen).
[647] Article 29g paragraph 1 CITA.
[648] Article 29g paragraph 4 CITA.
[649] Article 29g paragraph 2 CITA.
[650] Oosterhoff, D. (2016). Regulatory Documentation and Country-by-Country Reporting Requirements (Netherlands). *International Transfer Pricing Journal, 2016 no.1.* Paragraph 4.

contains relevant information for the transfer pricing analysis with respect to transactions between a taxpayer and a related group entity in another State, and helps to substantiate compliance with article 8b, as well as the information supports a business profit allocation to permanent establishments (PE).[651]

§8.3.2.3 Country-by-country report

The country report must meet the conditions of article 29e of the CITA. The information that must be included is: each State in which the MNE group operates, the amount of revenue, the profit before tax, the profit tax paid, the income tax included in the financial statements, the paid-up capital, the number of employees and the tangible assets other than cash or cash equivalents. The report also contains an overview of each existing entity of the MNE group, its State of resident and the nature of the business activities of each entity.

The country report consists of three tables. Table I is an overview of the distribution of income, taxes and business activities to tax jurisdiction that must be included. Table II must include a list of all group entities per tax jurisdiction. And finally, table III provides a scope for additional information or explanation that the reporting entity deems necessarily.[652] By ministerial regulation,[653] further rules can be required on the form and content of the country report.[654] The templates of these tables can be found in the Decision Decree of the State Secretary of Finance.[655]

It is the intention that an entity of a qualifying MNE group prepares the country report for the entire group. Therefore, it must be determined to which MNE group the obligation applies to prepare one and to which group entity the obligation to deliver the country report applies. If there is a qualifying MNE group, the country report will only be applicable to the Dutch tax authorities if there are one or more group entities of this group tax resident in the Netherlands. This makes sense, because the Dutch authorities do not necessarily need data of non-residents.

To be classified as a qualifying MNE group for the country report, certain requirements must be met. The composing of a country report applies only to a group entity which is part of a MNE group with a consolidated group revenue of €750 million onwards in the year prior to the reporting year to which the country report relates. An exemption is made for entities of MNE groups which have less than €750 million

[651] Article 29g paragraph 3 CITA.
[652] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 5.
[653] The Regulation on additional documentation obligations for transfer prices of 30 December 2015.
[654] Article 29e paragraph 2 CITA.
[655] Decree of the State Secretary of Finance, DB2015/462M, 30 Dec. 2015. In Dutch: Regeling van de Staatssecretaris van Financiën van 30 december 2015, nr. DB/2015/462M, houdende voorschriften ter verdere uitwerking van de aanvullende documentatieverplichtingen voor MNEe ondernemingen (Regeling aanvullende documentatieverplichtingen verrekenprijzen).

of consolidated group revenue in the year immediately prior to the reporting year.[656] The definitions of these requirements are explained in article 29b of the CITA.

After a MNE group meets the requirements and therefore has to apply a country report, it has to be determined which group entity is responsible for it. This entity can be established in the Netherlands or be a resident of another State. Hence, the delivery of the country report can take place in two different ways, by one of the group entities established in the Netherlands immediately to the Dutch tax authorities or from abroad through automatic international exchange. Based on the CbCR legislation, the ultimate parent company (or another reporting entity) has to report the country report to the national tax authorities of the State in which it is settled.

The question that arises from this, is to which group entity the obligation applies to deliver the country report to the tax authority. If the reporting entity is tax-based in the Netherlands, the country report has to be provided annually to the Dutch tax authorities. Afterwards they will send the country report to the competent authorities of other States in which group entities are located. On the basis of regulations, it must be determined whether or not this reporting entity is settled in the Netherlands. Since a reporting entity must qualify as a resident of a State, a PE cannot act as a reporting entity.[657] A reporting entity is: "*the group entity which, in the State of which it is resident for tax purposes, is held on behalf of the MNE group to submit a country report that meets the conditions of article 29e, being:*

1. *The ultimate parent entity;*
2. *The surrogate parent entity; or*
3. *Any other group entity as referred to in article 29c, second or third paragraph;"*[658]

The main rule is that the ultimate parent entity[659] annually provides and submits the country report to the tax authorities of its State of residence. The obligation for the Dutch ultimate parent entity is that it has to prepare the country report and provides the report to the Dutch tax authorities within twelve months of the last day of the reporting year.[660] In order to qualify as the ultimate parent entity, the entity must therefore be the highest entity in the structure at which level it is or should be consolidated if it were listed on the stock exchange.[661] After receiving the country report, the Dutch tax authorities will

[656] Article 29c paragraph 5 CITA.
[657] A permanent establishment is not a resident according to treaties.
[658] Article 29b paragraph d CITA.
[659] Article 29b paragraph e CITA.
[660] Article 29c paragraph 1 CITA.
[661] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 3.2.1.

determine which ones are the relevant treaty States to receive the country report. Thereafter, the actual exchange with the tax authorities of other relevant contract partners takes place automatically. These relevant States are the ones in which the MNE is operating on condition that the State signed the MCAA and mutual designated each other.

In case that the State of residence of the ultimate parent entity did not implement the CbCR, the State is systematic negligent, or if there is no effective agreement between the Netherlands and the State of the ultimate parent entity, the Dutch group entity could function as surrogate parent entity.[662] It is a group entity of the same MNE group and is selected by that MNE group as substitute. This entity must submit the country report on behalf of the MNE group in its State of residence.[663] The Dutch surrogate parent entity shall also report and provide the country report within twelve months of the last day of the reporting year.[664] The MNE group is free to designate a surrogate parent entity.[665] In case a surrogate parent entity has to be appointed, it would be relevant, from the perspective of the MNE group, to choose a State that provides transparent and consistent procedures. This is not only desirable for the international exchange of information but also, where necessary, international dialogues with OECD members when questions arise about the information that will be exchanged. Under this assumption, the Netherlands provides such a stable environment.[666]

In addition, the reporting entity will be every group entity of the MNE group, which has to provide the country report to the tax authorities of the State of its residence. This obligation will be applicable if there is neither a qualifying ultimate parent company nor a qualifying surrogate parent entity. This is the so-called 'local filling'[667] obligation. In case more group entities are Dutch tax residents, the group may designate one Dutch entity by itself.[668]

The Dutch reporting entity has the obligation to inform the Dutch tax inspector that it will be the reporting entity of the MNE group. This should be done, at the latest, by the last day of the reporting period of the MNE group.[669] If a group entity, which is tax resident of another State, is the reporting entity,

[662] Article 29c paragraph 2 CITA.
[663] Article 29b paragraph f CITA.
[664] Article 29c paragraph 2 CITA.
[665] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 3.2.2.
[666] Oosterhoff, D. (2016). Regulatory Documentation and Country-by-Country Reporting Requirements (Netherlands). *International Transfer Pricing Journal, 2016 no.1.* Paragraph 3.3.
[667] Article 29c paragraph 2 CITA.
[668] Article 29c paragraph 3 CITA.
[669] Article 29d paragraph 1 CITA.

the Dutch tax resident entity is required to inform the tax inspector about the identity of this group entity.[670]

§8.3.3 Permanent establishment under CITA

In the Dutch Corporate Income Tax Act, the definition of a PE is a fixed business space with the assistance of which the activities of an entity are completely or partly carried on.[671] This definition is also in accordance with the OECD MC.[672] It has sufficient facilities to function as an independent company. From this definition and the resulting case law, it can be concluded that a PE exists when the following four requirements are met: there has to be a physical construction, which is slightly durable, available to the company and the activities of the company are fully or partly carried out in the establishment. In the profit calculation of the PE, the independence fiction plays an essential role. This fiction implies that the profit must be calculated as if the establishment was an independent company.[673]

According to the definitions for the CbCR, a PE, which is part of an entity that belongs to the MNE group, is a separate group entity of that MNE group. Additional requirements are that the entity must prepare separate financial statements for the PE with a view to the financial reporting, compliance with the regulations, and compliance with tax obligations or internal control.[674] The details of the PE must be reported by reference to the State where the PE is tax resident and not by reference to the State of settlement of the business unit of which the PE is a part. The business unit of which the PE is part, must exclude financial data relating to the PE in its report. Furthermore, a PE cannot act as a reporting entity, since a reporting entity must qualify as a resident of a State.[675]

§8.3.4 Penalty regime under CITA

To be able to force qualifying MNE groups to comply with the CbCR regulations, the Dutch tax authorities have far-reaching powers within the law. Effective enforcement is crucial according to the legislator, because it increases the compliance of taxpayers. In case the compliance with the obligation to provide a country report[676] is not, not timely, incomplete or incorrect due to deliberate intent or gross negligence, a penalty can be imposed. This can be done by an administrative fine[677] not exceeding the amount of the

[670] Article 29d paragraph 2 CITA.
[671] Article 15f CITA.
[672] Article 5 OECD MC.
[673] Hofman, A. Vaste inrichting: Grensoverschrijdende activiteiten belast in het buitenland. *FiscaalPlus Adviesdossiers 2014 published by www.navigator.nl.*
[674] Article 29b paragraph c sub 3 CITA.
[675] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 3.2.
[676] Intended as in article 29c & 29d CITA.
[677] Article 29h paragraph 1 CITA.

sixth category of the Criminal Code.[678] This fine amounts to a maximum of €830,000. A sanction can also be imposed through criminal law.[679] If there is a case of deliberate non-compliance with the relevant obligations[680] and is therefore a crime, by means of the reference to section IX *AWR*,[681] a prison sentence of at most four years or a fine of the sixth category can be imposed. The competency for the imposition of the fine by the Minister expires five years after the end of the calendar year in which the obligation arises.[682]

The maximum of €830,000 is reduced to 25% in case of gross negligence and in case of deliberate intent up to 50% of this statutory maximum.[683] This brings the maximum offense penalties to a maximum of €410,000 and €205,000.[684]

The sanction provisions of the CITA exclusively refer to the obligations of the country report, and do not see on to the obligation to accomplish a master file and local file. These files belong to the administration of the group entity. The non-compliance with the administrative obligations[685] include a punishment sanction,[686] as well as the sanction of the reversal of the burden of proof.[687]

§8.3.5 Risk assessment under CITA

The tax inspector will use the country report to measure substantial transfer pricing risks and other risks for the Netherlands related to the erosion of the tax base and profit shifts. This includes the risk of non-compliance with the applicable transfer pricing rules by members of the MNE group. Where necessary, the country report is used for economic and statistical analyses. The information included in a country report should not be used to replace a detailed transfer pricing analysis and it is not intended that the country report is used to propose adjustments to the transfer prices.[688] This is in accordance with the OECD TP guidelines, which specifically mentions that the country report cannot be used for 'global formulary apportionment'. [689][690]

[678] Article 23 paragraph 4 Criminal Code.
[679] Article 29h paragraph 3 CITA.
[680] Intended as in article 29c & 29d CITA.
[681] With exemption of article 69 AWR under this chapter.
[682] Article 29h paragraph 2 CITA.
[683] §28, paragraph 2, Decree on Administrative Penalty Tax Administration 1988. Dutch: Besluit Bestuurlijke Boete Belastingdienst 1998 (BBBB).
[684] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 7.
[685] Article 52 AWR.
[686] Article 68 & 69 AWR.
[687] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 7.
[688] Article 29f CITA.
[689] Chapter 5 section C3, paragraph 25 OECD Transfer Pricing Guidelines for MNE Enterprises and Tax Administrations 2017
[690] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 2.

§8.3.6 Third parties

The arrangements to transfer obtained information to third parties are covered under chapter III 'Forms of assistance to be received by the Netherlands', section 4 'General provisions' of the *WIB.* The Minister of Finance has been granted competency in the *WIB*, by means of the EU directives, to hand over obtained information, if he has the opinion that it may be of use for the taxation within the DAC, to the competent authority of a third Member State.[691] The Minister must inform the competent authority, of the Member State that provided the information, of its intention to provide this obtained information to a third Member State. If this authority objects within ten days after the date of receipt of the notification, the Minister will not provide the information.[692] The same procedure applies if the Netherlands provided the information and another State want to transfer the obtained information.[693]

Aforementioned possibilities do not apply to States outside the EU. This is the reason that a second provision has been included. The Netherlands may also transfer obtained information from a treaty partner to EU Member States and vice versa. The requirement to transfer obtained information to a Member State is that the Minister expects that the obtained information may be of importance for the taxation of the competent tax authorities of that Member State. He may also transfer it to each requesting authority of a Member State, provided that this is permitted under an agreement with the State where the information is from.[694]

The Minister can, in respect with the duty of confidentiality,[695] transfer received information to a State on the condition that the providing Member State approved the exchange and that the receiving State has a commitment to provide the necessary cooperation for the collection of evidence for tax purposes.[696][697]

§8.4 Corresponding adjustment

In the situation where associates do not conclude to businesslike transactions on the basis of the at arm's length principle, the local tax authorities will correct these transactions by means of the so-called transfer pricing adjustments. "…*then that other State shall make an appropriate adjustment to the amount of the*

[691] Article 30 paragraph 4 WIB.
[692] Article 30 paragraph 5 WIB.
[693] Article 17 paragraph 3 WIB.
[694] Article 31 paragraph 1 WIB.
[695] Article 67 AWR.
[696] Article 31 paragraph 2 WIB.
[697] Core and introduction WIB article 30 and 31 : Vakstudie Nederlands Internationaal Belastingrecht Navigator.

tax charged therein on those profits.." is written in article 9 OECD MC.[698] Along these lines, they bring the non-businesslike conditions within a transaction back in line with business conditions as if the transaction took place between third parties. There are three different kinds of transfer pricing adjustments. This article deals only with the primary adjustment, but there can also be a secondary and corresponding adjustment.

The primary adjustment is, according to the OECD Transfer Pricing Guideline: *"an adjustment that a tax administration in a first jurisdiction makes to a company's taxable profits as a result of applying the arm's length principle to transactions involving an associated enterprise in a second tax jurisdiction"*[699] As already included in the name, the primary adjustment is the first adaptation of the transaction and represents the difference between the price of the transaction, as determined by the associates, and the price of the transaction which has to be established in accordance with the arm's length principle. Depending on the direction of the primary adjustment, the consequences for the tax debt of the taxpayers could be higher or lower. This contains only a tax correction, so the cash flow between the associates will not really take place.

As a result of the primary adjustment, it is necessary in some States to detect a secondary transaction with a possible secondary adjustment. The secondary transaction is described in the Guideline as follows: *"A constructive transaction that some States will assert under their domestic legislation after having proposed a primary adjustment in order to make the actual allocation of profits consistent with the primary adjustment. Secondary transactions may take the form of constructive dividends, constructive equity contributions, or constructive loans."*[700] And the secondary adjustment: *"An adjustment that arises from imposing tax on a secondary transaction."*[701] The secondary transaction is not implemented by all the States, but from the Dutch perspective it is necessary to establish a second transaction from which the secondary adjustment could result.[702] The transaction shows the way the first adjustment has been incorporated in the balance sheet and profit and loss account. The adjustment is the taxation on the transaction, but is not always presented, because not all the transactions are taxable (such as capital contributions in the Netherlands).[703]

[698] Article 9 paragraph 2 OECD MC.
[699] OECD Transfer Pricing Guidelines, 2010, Glossary.
[700] OECD Transfer Pricing Guidelines, 2010, Glossary.
[701] OECD Transfer Pricing Guidelines, 2010, Glossary.
[702] Decree of the Secretary of Finance. Dutch: Besluit Staatssecretaris van Financiën, 14 november 2013, nr. IFZ 2013/184M, Stcrt. 2013, p. 9.
[703] The Netherlands does no longer have capital tax, it has been repealed since 1 January 2006. The rate for capital tax was 0,55%.

As a last adjustment, the corresponding adjustment is established, which is *"An adjustment to the tax liability of associated enterprise in second tax jurisdiction, made by the tax administration of first tax jurisdiction, corresponding to the primary adjustment made by the tax administration of the first state, so that the allocation of profits of two jurisdictions is consistent."*[704] In reply to the primary adjustment, and the possible secondary adjustment, a corresponding adjustment is made. It is a response of the second State on the primary and secondary adjustments of the first State. With this adjustment, the administrations of the relevant entities are reconciled. In this way, the symmetry of the transactions is guaranteed.[705]

As a result of these adjustments, the MNE group profit will be divided fairly between the associates which agree mutual transactions. The States in which these entities operating get their acceptable share of the MNE profit for their tax purpose.

However, corresponding adjustments are not an automatic result after the primary adjustment is made by the tax authorities. The adjustments of both States do not necessarily completely match with each other. If these adjustments of transfer pricing are not harmonious, it could result in double taxation which must be prevented. Therefore, it is important that States of the associates can consult with one another. All tax treaties signed by the Netherlands include a provision allowing the Netherlands to enter into consultation with the other treaty State in order to agree on a solution that will eliminate taxation that is not in accordance with the treaty.[706] This consultation between States is called a 'Mutual Agreement Procedure' (MAP).[707] Between EU Member States, a MAP can also be conducted in the EU Arbitration Convention.[708] The MAP will ensure the consultation procedures between the States in which they can conclude a solution to the problem of double taxation of the adjustments. In addition, the EU Directive on tax settlement of disputes of double taxation is currently concluded. Citizens and businesses that are double taxed can apply to a EU Arbitration Committee from 1 July 2019. This independent body intervenes if a conflict of double taxation is not resolved by the Member States within two years.[709]

[704] OECD Transfer Pricing Guidelines, 2010, Glossary.
[705] Shirley D. Peterson & Frances M. Horner, IFA Congress Seminar Series, Vol. 19b (1994), Secondary Adjustments and Related Aspects of Transfer Pricing Corrections, Den Haag: Kluwer Law International, p. 17.
[706] Article 25 OECD MC.
[707] Netherlands Decree Mutual Agreement Procedure paragraph 1.1 : www.oecd.org/ctp/transfer-pricing/netherlands.
[708] A treaty designed to eliminate double taxation in the event of profit adjustments between associated enterprises (Arbitration Convention 90/436/EEC).
[709] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union.

An explicit provision for corresponding adjustments of transfer pricing will be included in the Multilateral Instrument (MLI)[710] for Covered Tax Agreements of States that signed the MLI. With this provision, if one treaty State makes a profit correction, the other treaty State will make a compensatory adjustment.[711] The participating MLI States have the option not to apply this standard. The Netherlands signed this MLI in 2017 and did not make any reservations regarding to this provision.[712]

§8.5 Summary and conclusion

'What are the current relevant legislation and regulations on international and EU level? What is the influence of those on the Dutch tax autonomy?' This section concerned the discussion of legislation and regulations with regard to CbCR.

The OECD makes recommendations via fifteen action points to prevent harmful tax practices, base erosion and profit shifting. The intention is that profits are taxed in the State where the actual activities take place and the added value is created. Action 13 is published for the transfer pricing documentation and CbCR. It will provide the mutual automatic exchange country reports between participating States. The report of Action 13 includes three underlying standards, which are a master file, a local file and a country report which MNE groups must provide to the tax authorities of the participating States.

The implementation of the CbCR in the Dutch tax system is in the *WIB*, by means of the EU Directive, and in the CITA. Furthermore, the Decision Decree gives a more extensive explanation of the regulations under CbCR. The automatic exchange shall take place on behalf of the CbC MCAA between participating States.

MNE groups have to process and prepare a significant amount of information for the master file and local file. The OECD assumes that a large part of the data and information is already available within the MNE group, but it still has to be delivered in the requested format. Compiling the requested information in a consistent and coherent format of these files will take significant efforts for them. Some MNE groups are also required to provide insight in their global activity and data in a way that has not been the case before, by providing a country report. Experiences in practice shows that it is quite difficult to get all required information from the reporting systems, regardless off the interpretation issues

[710] See paragraph 4.2.4 of this master thesis.
[711] Article 17 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS.
[712] Authors NDFR (2017). Nederland ondertekent het MLI-verdrag. *Nieuwsbericht 7 juni 2017 Trb. 2017, nr. 86.*

concerning which information must be included. That is the reason the Netherlands has developed further instructions with regard to definitions in a Decision Decree.[713] A proper preparation and making well-considered choices when drafting the country report can ensure that a correct image is created of the company's global activities.[714] And as the vast majority of country reports will be prepared based on international accounting standards, the "readiness" to explain the difference between local statutory reporting and international accounting standards is another massive task that MNE groups are currently facing. [715]

The CbCR is only in its trial phase, thus the actual impact has not been determined yet. The OECD has an optimistic view according to the impact of these regulations, but the advantages need to be balanced against the reality that each State and tax authorities have their own objectives, budget, or monetary constraints. This may influence the interpretation of the data that will be monitored and evaluated globally. Therefore, it is still uncertain what kind of impact these new regulations will have on the Dutch tax authorities. However, the tax autonomous of the Netherlands, will be more restricted in the exercise of its powers with these new regulations.

[713] Oosterhoff, D. (2016). Regulatory Documentation and Country-by-Country Reporting Requirements (Netherlands). *International Transfer Pricing Journal, 2016 no.1.* Paragraph 6.
[714] Sahin, L.G.C. (2017). Country-by-country reporting – neem bewuste keuzes. *MBB, 2017/05-04.* Paragraph 1.
[715] Oosterhoff, D. (2016). Regulatory Documentation and Country-by-Country Reporting Requirements (Netherlands). *International Transfer Pricing Journal, 2016 no.1.* Paragraph 6.

Section 9 Evaluation information exchange instruments

§9.1 Introduction

The research benchmark, organized in section two, will be used to analyze the current legislation and regulations concerning the exchange of information on international, supranational and Dutch level. The analysis will be on basis of the three selected criteria which are considered as the most important elements for an effective and efficient exchange of information; the information transparency, the simplicity of procedures and the taxpayers' legal protection. These criteria need to be examined on two levels within this research. The regulations concerning the information exchange apply to the level of exchange between competent tax authorities of the different States. In addition, Dutch domestic law is necessary to obtain the relevant information of the Dutch tax resident, which is not a regulation in the context of the exchange of information, but it is indispensable within the information exchange procedures. The review will not discuss all the provisions in detail, because section four up to and including section eight already provide the necessary basis information.

By means of a chart that illustrates the research benchmark, a structured overview of the analyzed legislation and regulations is composed. These charts, inherent to the analysis, are implemented in **appendix 2** of this master thesis. The charts specify the score to which extent the legislation and regulations comply with the criteria of the research benchmark. All scores given (--, -, +/-. +, ++) are relative to each other. The used standard chart of reference has already been introduced in section 2.3, and is as follows:

Criteria	**international level**	**EU level**	**Dutch level**
	(Legislation/Regulation)	**(Legislation/Regulation)**	**(Legislation/Regulation)**
Transparency[716]			
Simplicity[717]			
Legal protection[718]			

[716] Definition: the availability, understandability (in form and content), visibility and timely accessibility of any form of 'relevant' information, which may be of importance for the correct taxation by the tax authorities.
[717] Definition: the opposite of the lack of overview and certainty as a result of the many and difficult procedures, regulations and systems around the tax administration.
[718] Definition: the taxpayer's possibility of protection, especially through the law and the courts, for undesirable effects.

As side note, it is important to mention that it can already be noticed that by means of the implementation of the higher rule of law in the Dutch tax system, in this case the Dutch *WIB*, mainly the same provisions apply on both levels. In addition, the regulations of international law and the EU directives are also in line, because the EC adopted mainly the regulations introduced by the OECD, with some deviations and/or additions.

§9.2 Review information exchange instruments

§9.2.1 Article 26 OECD MC and TIEA[719]

This article, included in the OECD MC, focuses on the bilateral exchange of information between Contracting States. The additional TIEA is based on the criterion of 'foreseeable relevance' introduced within this article. Both Models are designed as framework for the conclusion of tax treaties, but easily deviations can be made from these proposed instruments, because of their advisory nature.

Article 26 OECD MC contains the following obligation of **transparency**: "*no Contracting State may decline to supply information solely because it has no domestic interest,*[720] *the information is held by a bank of FI etc,*[721] *the received information may be used for other purposes if the law of both States authorizes such use,*[722] *information shall be exchanged which is relevant for carrying out the provisions of the OECD MC* ('limited exchange') *and enforcement of the domestic law of the other State* ('broad exchange')." [723] In addition, the principle of reciprocity applies, which means 'a relationship with mutual equivalent exchange'.[724] The lack of reciprocity is seen, in international exchange law, as a justifiable reason for the supplying State to refuse or refrain from providing information.[725] When making requests, the reciprocity test means that the Netherlands does not request any data that they are not be able to provide by their self.[726] This is also a limitation to the assistance to be provided by the Netherlands.[727]

The TIEA contains, subsequently, the obligation for the tax legislator to ensure that national provisions do not contain any obstacles and do not prevent the effective exchange of information. In the

[719] See appendix 2.1 for a structured overview of the score given to the analysis.
[720] Article 26 paragraph 4 OECD MC.
[721] Article 26 paragraph 5 OECD MC.
[722] Article 26 paragraph 2 OECD MC.
[723] Article 26 paragraph 1 OECD MC.
[724] Paragraph 15 OECD Commentary 2017.
[725] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 359.
[726] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.16.
[727] Article 13 WIB.

Netherlands, after the abolition of the notification procedure,[728] it seems that there are no burdensome obstacles anymore from the side of the Netherlands. TIEAs can be concluded bilateral and multilateral. Multilateral has a wider extent, compared to bilateral, due to the concluded relation with more States.

Additionally to those obligations, this article also contains limits to the exchange of information. These are **legal protection** provisions and the most important one is the criterion of 'foreseeable relevance' with its inherent prohibition of 'fishing expeditions'.[729] This criterion limits the exchange to a certain category of information, because only information related to the desired goal may be exchanged. It is intended that random other information of the taxpayer involved, may not be used or requested. This can be regulated by implementing a requirement on requesting States, that they need to motivate whether requested information may be relevant or not. Therefore, the provision of information can be limited to information that specifically relates to the necessity of the taxpayer's tax claim. Thus non-specific information, such as sensitive information, does not have to be exchanged. [730]

This article contains also the duty of confidentiality *"..shall be treated as secret in the same manner as information obtained under the domestic laws of that State.."* The essence of this provision is that the exchanged information is subject to the same confidentiality rules within the receiving State as nationally obtained information. [731] Thus, the law of the receiving State applies to the transferred information. However, it does not mean that the legislation and regulations of this State provide the same level of protection as the Netherlands. It is possible that confidentiality may be secured on paper, but practice proves the opposite.[732] As last to mention, an interesting element of the OECD Commentary is that information may be passed on the involved taxpayer.[733]

For the criterion of **simplicity,** the exchange procedures within this article are important. The ways of exchange are described within the OECD Commentary and it concerns automatic, spontaneous and exchange on request.[734] For a long period, the main procedure to exchange information was the exchange on request. This procedure requires that the competent authority of the requesting State has already gathered certain information about the taxpayer prior to the request. This means that requesting authorities must already participate in their national investigation activities before being able to make a

[728] Article 5 paragraph 2 and 3 WIB (cancelled article).
[729] Article 26 OECD commentary 2017.
[730] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 3.2.
[731] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.20.
[732] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.20.
[733] Paragraph 12 Article 26 OECD Commentary 2017.
[734] Paragraph 9 Article 26 OECD commentary 2017.

request, which seemed to be inefficient. Therefore, in the last decades, the OECD's focus is on both automatic and spontaneous exchange procedures. One of the main advantages of the automatic information exchange is that large volumes of information can be exchanged without any request by the receiving State. As this information is provided on a routine basis, it saves time as well as costs. Overall, automatic exchange of information is an effective tool to counter tax evasion and tax fraud. Additionally, information received spontaneously is generally more effective than the exchange on request, as it concerns circumstances already detected and selected by the providing tax officials.[735] However, the effectiveness and efficiency depends to a great extent on the initiative and motivation of the competent authorities in the providing State. A benefit of spontaneous exchange is that the provided information, as first, is not expected by the receiving State, but, nevertheless, is very useful for their taxation. Moreover, the receiving State benefits from the information without exercising additional effort.

It is not determined in which of the three ways certain information need to be exchanged, because this is something the Contracting States conclude themselves. It should also be stressed that article 26 OECD MC does not restrict the exchange to these proposed methods, but that the Contracting States may use other techniques to obtain information which may be relevant to both Contracting States such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information.[736]

§9.2.2 Strasbourg Convention[737]

This convention is, for the criteria to be reviewed, broadly similar to aforementioned article 26 OECD MC. Only the interesting additional provisions will be explained in this section. In the meaning of **transparency** an interesting element, additional to the provisions of article 26 OECD MC, is the simultaneous book research. This procedure can be used in transfer pricing studies of associates in different States.[738] Another interesting provision is that information also can be transferred to third parties, if prior consent of the first providing State has been given.[739] At the introduction of the Convention it was already foreseen that not all States are willing or able to provide all forms of assistance regulated in the Convention. That is why there is the possibility of making reservations.[740]

[735] Manual on the implementation of exchange of information provisions for tax purposes by the OECD Committee on Fiscal Affairs on 23 January 2006. Module 2, p. 3.
[736] Paragraph 9.1 Article 26 OECD Commentary 2017.
[737] See appendix 2.2 for a structured overview of the score given to the analysis.
[738] Article 8 Strasbourg Convention.
[739] Article 22 paragraph 4 Strasbourg Convention.
[740] Article 30 Strasbourg Convention.

The procedures, on request, spontaneous and automatically are the same as in article 26 OECD MC (**simplicity**). Deviated from this article is that the Convention globally indicates what form of assistance will cover certain information. The Convention also indicates how to compose a request for assistance. The data and documents listed in this article[741] should facilitate the requested State to provide the relevant information in due time.[742]

The taxpayer's **legal protection** in the Convention is mainly arranged in article 21: *"Nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested State."*[743] In addition, the Convention makes a distinction between administrative assistance and legal assistance in criminal matters. When information is necessary for an already started criminal proceeding, the way of 'legal aid treaties' should be used.[744] However, it is permitted to request information in order to assess whether there is reason to initiate criminal proceedings. [745] Thereafter, this information may not be used as prove in such a procedure, excepted by the prior permission of the providing State.[746] There is also an obligation for the requesting State, when there is a case of conflict of information received with those already known, to inform the providing State and therefore clarification can be requested from the taxpayer concerned.[747]

The concept of 'foreseeable relevance'[748] and the duty of confidentiality[749] are also implemented in the Convention. An interesting deviation of the duty of confidentiality has been made in comparison with article 26 OECD MC. The receiving State must in fact observe the secrecy provisions of the supplying State, if they involve more extensive confidentiality obligations. Violation of this obligation could be a justified reason to stop providing information.[750] Also, it offers the possibility to impose additional requirements on the confidentiality regulations within the requesting State.

§9.2.3 Directive on Administrative Cooperation[751]

The DAC is the main EU instrument that provides similar regulations, rights and obligations concerning the exchange of information within the EU. Consequently, a Member State cannot longer manage its own

[741] Article 18 Strasbourg Convention.
[742] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.41.
[743] In the Netherlands these guarantees are included in the WIB.
[744] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.38.
[745] Article 4 paragraph 1 Strasbourg Convention.
[746] Article 4 paragraph 2 Strasbourg Convention.
[747] Article 10 Strasbourg Convention.
[748] Article 4 Strasbourg Convention.
[749] Article 22 Strasbourg Convention.
[750] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.42.
[751] See appendix 2.3 for a structured overview of the score given to the analysis.

tax system individually without information from other Member States. The administrative assistance between the tax authorities of Member States, provided by the DAC, is therefore extremely necessary. The regulations of CRS, the Rulings, and CbCR, reviewed in section 9.2.5 up to and including section 9.2.7, are amendments of the DAC, by which those (reviewed) elements are also applicable to the DAC seen in a general picture.

The DAC scores outstanding on the level of **transparency**, because it includes regulations of the exchange of financial information, rulings and country reports. A specific general element of the DAC, excluding the provisions of the amendments, is that tax authorities need to provide the requesting State the requested information which is in their possession or otherwise obtainable through national administrative research.[752] Information may also be used for non-tax purposes[753] or can be exchanged with a third State,[754] stipulated that the issuing State provides permission and this is legally permitted within the law of the receiving State. Such consent shall be granted if the information can be used for similar purposes in the supplying Member State. Finally, there is an obligation to extend the cooperation between Member States if a Sate has entered in a further reaching cooperation with another State.[755] This further reaching cooperation broadens the transparency between Member States. With regard to the content of the DAC, it can be concluded that it goes far beyond the content of article 26 OEDC MC and the Strasbourg Convention.[756]

Due to the principle of reciprocity, a Member State is not obliged to provided information if the receiving competent authority, for whom the information is intended, is not authorized or able to provide similar information. This principle is, on EU level, discretional in nature and therefore flexible, especially when it comes to combatting tax fraud, and therefore the principle does not hinder the transparency for effective exchange. The Member States have the freedom to exchange information with regard to the different requirements of each State.[757]

The DAC contains rules for the exchange on request, spontaneous exchange and (mandatory) automatic exchange. It is determined that over five specific categories of income,[758] information will be

[752] Article 5 Council Directive 2016/11/EU.
[753] Article 16 paragraph 2 Council Directive 2016/11/EU.
[754] Article 24 Council Directive 2016/11/EU.
[755] Article 19 Council Directive 2016/11/EU.
[756] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.34.
[757] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 360.
[758] Article 8 paragraph 1 Council Directive 2016/11/EU.

exchanged on an automatic basis.[759] In addition, Member States are able to agree additional automatic exchange about other specific groups of information.[760] Concerning the spontaneous exchange, it is notable that it is not completely free of obligation. In addition to the fact that a category of information of choice can be provided,[761] if another Member State wants to receive this, the DAC also prescribes in which cases information must be provided.[762] To facilitate the exchange **(simplicity)**, the EC has adopt a Regulation[763] for the implementation of the DAC, with detailed guidelines. This Regulation contains, among other things, standard forms and instructions for the procedures of communication between Member States. This promotes the consistency of the information transfer between Member States.

The **legal protection** provisions within the DAC have also effect on the amendments that have been made on this Directive, including CRS, Rulings and CbCR regulations. The criterion of 'foreseeable relevance'[764] is included in the DAC, as also referred to in article 26 OECD MC and the Strasbourg Convention. Requested information must firstly satisfy the condition of 'foreseeable relevance' and, after the exchange has occurred, the duty of confidentiality[765] applies on the information. The exchanged information belongs to the confidence regulations of the received State and also additional possibilities, explained in section 9.2.2 Strasbourg Convention, are valid in the DAC.[766] Nonetheless, the obligation to provide information is not absolute, and therefore all exchange arrangements, including those within the scope of the DAC, provide grounds for rejection or omission.[767] Some limitations are included,[768] and the interests of those owed to States may also apply to taxpayers, which are elements of legal protection: the sovereignty argument[769] protects its legal certainty, the reciprocity argument its competitive position vis-à-vis taxpayers in other States, and the risk of disclosure of a business secret is, in fact, the only ground, specifically for the taxpayer's legal protection. In addition, there are general arguments about public policy and the general principles of taxation that represent more general interests, which makes them less personal for the taxpayer's protection.[770]

[759] Those five categories are: income from work, management fees, certain life insurance products, pensions and property and income from immovable property.
[760] Article 8 Council Directive 2016/11/EU.
[761] Article 9 paragraph 2 Council Directive 2016/11/EU.
[762] Article 9 paragraph 1 Council Directive 2016/11/EU.
[763] Commission Implementing Regulation (EU) No 1156/2012 of 6 December 2012 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation.
[764] Article 1 Council Directive 2011/16/EU.
[765] Article 23 paragraph 5 Council Directive 2011/16/EU.
[766] Article 16 paragraph 1 Council Directive 2011/16/EU.
[767] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. P. 473.
[768] Article 17 Council Directive 2011/16/EU.
[769] The requested Member State is not obliged to investigate or provide information if its own legislation does not allow it if that information will be used for its own purposes.
[770] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. P. 473.

§9.2.4 Case law[771]

Information requested and exchanged by the tax authorities is often of a personal nature. Privacy legislation applies to such information, only those rules of privacy may conflict with the exercise of tax law. Hence, probably for that reason, neither the taxpayers' rights nor those of the third party got serious attention in international and supranational regulations concerning the exchange of information. The taxpayer to whom the research is conducted may eventually lodge an objection and/or appeal on his tax assessment. Only, whether the information used for the tax assessment has been received legally from abroad is still the question. The discussed case law in section 4.5 is in the framework of the taxpayers' procedural **legal protection** within the EU and have (mostly) positively affect the taxpayers' interests in connection with the information exchange.

Firstly, in the **Sabou** case[772] the ECJ gave the judgement that no rights are arranged for taxpayers within the supranational procedures concerning the exchange of information. The taxpayer does not have a legal basis for the right to be heard; do not need to be informed about the intended exchange or the right to express his/her view on the exchange. However, this conclusion does not prohibit States from implementing such regulations and (notification) procedures in their domestic law on which the taxpayer may rely. The Netherlands had such notification procedure to ensure the legal protection of the Dutch tax resident involved, until 1 January 2014.[773] By means of the abolition of this procedure in the *WIB*, the procedural legal entrance to lodge an objection or/and appeal against an intended exchange has been cancelled. Hence, the legal protection has partly reduced. The goal to be achieved with the abolishment of this notification procedure was not in proportion with the sacrificed interest of the taxpayer. The arguments for the abolishment were; information can be exchanged faster, this is in line with the recommendation of the Global Forum 'peer review report' and the Netherlands would otherwise get problems to meet the exchange deadlines.[774] All these arguments will serve the fight against tax avoidance and evasion. Nevertheless, the delay in exchange was nil in practice, because in urgent cases one could already immediately proceed to the exchange.[775] In addition, the recommendation of the Global Forum was that the procedure should be reviewed with a view to ensure that it is compatible with effective

[771] See appendix 2.4 for a structured overview of the score given to the analysis.
[772] In Case Sabou no rights were implemented in Council Directive 77/799/EC.
[773] See section 4.4.3.8 of this master thesis.
[774] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.140-141.
[775] Eijsden, van J.A.R & Jonas, K.R.C.M. (2013). De kennisgeving vooraf bij internationale uitwisseling van informatie verdwijnt. En daarmee de rechtsbescherming ook! *WFR, 2013/1180.* Paragraph 1.

international exchange of information in tax matters,[776] and even if the DAC sees the exchange in installments, this is not a justification for this abolition.

Secondly, in the **Berlioz** case, the legal protection has been slightly improved. The Berlioz case concerns the application of article 47 of the EU Charter, 'the right to fair trial' by an independent Court. The ECJ concluded that the taxpayer, who provide the information in the first place, should have the possibility to challenge the legality of a request by the national court, in order to determine whether the request was foreseeably relevant. A taxpayer can only lodge an objection if he/she has interest in such objection, and when this is the case, he must indicate in substantive terms the content of his/her objection against the exchange.[777] For this reason the concept of 'foreseeable relevance' is essential, because this can be the substantial indication for such an objection. If the information intended to be exchanged is not foreseeable relevant, it should in principle not be exchanged. The competent authorities determine whether the requested information is relevant at the time the request has been made, regardless whether it subsequently appears that there was no relevance at the end.[778] A limit to the application of this concept is the prevention of 'fishing expeditions'.[779] It is therefore important to indicate when the requested information is 'foreseeably relevant' and whether there could be a 'fishing expedition'. The Dutch State Secretary interpreted fishing expeditions as requests whereby information is requested without a concrete starting point and seemed disproportional with regard to one or more taxpayers.[780] This concerns situations in which the link between the requested information and the taxpayer(s) cannot be made sufficiently plausible, thus when it cannot be said that the requested information is expected to be of importance for the implementation of the provisions of the treaty or for the application or enforcement of national legislation.[781] In theory this sounds as a suitable provision for the taxpayers' legal protection, but in practice it is mainly only possible to determine the relevancy after receiving the information, when the exchange has already occurred.

Thirdly, the ECJ clearly marked boundaries on the information exchange between tax authorities in relation with the right to privacy in the **Bara** case. On the grounds of fundamental privacy regulations

[776] OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: The Netherlands (combined phase 1 and 2), October 2011. P. 85.
[777] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.146.
[778] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.146.
[779] Article 26 OECD commentary 2017 & Consideration 9 of Council Directive 2011/16/EU.
[780] Note on the report page 15, approval of the Convention concluded between the Kingdom of the Netherlands and the Swiss Confederation on the avoidance of double taxation with respect to taxes on income, adopted on 26 February 2010 in The Hague, with Protocol (Trb) 2010, 98).
[781] Note on the report page 15, approval of the Convention concluded between the Kingdom of the Netherlands and the Swiss Confederation on the avoidance of double taxation with respect to taxes on income, adopted on 26 February 2010 in The Hague, with Protocol (Trb) 2010, 98).

within the Privacy Directive,[782] the ECJ concluded that without a legal basis the transfer is only legitimate when the taxpayers are informed,[783] otherwise the exchange violates those privacy regulations. This judgement has shown that the protection of personal data of Dutch taxpayers need to change, because it can and must be much better. Seen from the Dutch tax authorities, this will increase the burden of administrative activities, which will probably also lead to more costs.[784] However, this cost aspect cannot and must not be the reason to disregard important fundamental rights for taxpayers. It is understandable that tax authorities are focused on more effective and efficient exchange procedures and, in that view, legal protection procedures are experienced as an obstruction.[785] Nevertheless, the taxpayers' legal protection should not be pushed to the background and therefore this judgement is a good step in the progress of the taxpayers' interests.

Finally, the last case to discuss, the **Ravon** case, is about article 6 ECHR that got validity, in connection with article 8 ECHR, in tax disputes. It came to light that there was no effective way to submit the legality of the investigation to a (independent) national court, and the investigation was therefore a breach to the taxpayer's privacy. On closer examination, the judgment in the Ravon case offers good arguments to call into question the lack of legal protection for tax information obligations in general.[786] Article 6 ECHR concerns 'the right to fair trial', which states that everyone has the right to an honest and public hearing by a competent, independent and impartial judicial body established by the law within a reasonable period of time. This is an important human right in our democratic Constitutional State, especially from a practical view. Fair, independent and impartial justice is a prerequisite for a just society.[787] Judges, in particular the highest courts at national level and at supranational and international level, have an indispensable contribution to the development of law in modern society.[788] There is a separation of powers; the legislative, executive and judiciary power,[789] which protects society against arbitrariness and the abuse of power, which will be a great threat to the freedom of the citizen.[790] Therefore, the right to access of justice, is an important tool for the taxpayer to effectuate his claim to a humane position in society. Our democratic State cannot function without the judicial power, because its

[782] Specifically article 6 'fair processing of personal data'.
[783] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 5.
[784] Lammers, M.H.W.N. (2016). Is de informatie-uitwisseling door de inspecteur 'Smaranda Bara'-proof? *Tijdschrift Formeel Belastingrecht, 2016/01-05.* Paragraph 5.
[785] Lambooij, M.V. (2017). Iets meer rechtsbescherming bij inlichtingenuitwisseling? *NTFR, 2017/41.* Paragraph 8.
[786] Vegt, van der J.M. (2009). Is het gebrek aan rechtsbescherming bij een waarneming ter plaatse in strijd met art. 6 EVRM? *Tijdschrift Formeel Belastingrecht 2009/03-05.* Paragraph 3.
[787] The juridicial organisation of the Netherlands, how is the juridicial power organized?: www.rechtspraak.nl.
[788] Gribnau, J.L.M. (2004). Trias Politica in fiscalibus: Een kwestie van geven en nemen. *NDFR, 2004/448.* P. 100.
[789] Montesqieu Trias Politica.
[790] Gribnau, J.L.M. (2004). Trias Politica in fiscalibus: Een kwestie van geven en nemen. *NDFR, 2004/448.* P. 101.

independent view on conflicts is needed to settle those. Without any access to an independent court, the taxpayer has no provisions in the fight against the exercise of the far-reaching powers of the tax authorities and the taxpayers' rights are at risk.

§9.2.5 FATCA[791]

The FATCA is far-reaching legislation in the US with the aim of receiving the necessary information from abroad, so that financial accounts of US residents could no longer be hidden.[792] From the perspective of the US, the FATCA has strengthen the **transparency** of worldwide FFIs about accounts held by US residents towards the IRS. From Dutch perspective, the NL IGA creates only legal obligations for Dutch FIs towards the US and for US FIs towards the Netherlands. The principle of reciprocity is applicable in this relation.

The NL IGA requires that FIs automatically provide the required information to the Dutch tax authorities, which subsequently provide the information automatically to the IRS. As already mentioned in section 9.2.1, the automatic exchange of information is an easy way to obtain information without the necessity of any request. This is less time-consuming and it saves manpower of the receiving tax authorities, resulting in a cheaper and faster obtention of the relevant information. Automatic exchange of information is an effective and, due to the **simplicity** of this exchange procedure, an efficient tool to counter tax fraud.

By concluding the NL IGA more **legal protection** for the FIs customers is guaranteed. The IGA is in line with the Privacy Directive, which requires the necessity of a legal basis with sufficient quality and foreseeability with regard to information protection. As well, under relevant provisions of US law and according to US privacy legislation and standards, States entering into FATCA must complete the international data safeguards & infrastructure workbook.[793] The workbook was developed under the standards of the 'keeping it safe' guide prepared by the OECD.[794] Completing this workbook allows the IRS to analyze whether and to what extent foreign States has sufficient safeguard the protection of the taxpayer's information under respective US standards. Both the NL IGA, the Strasbourg Convention (IGA based on this) and the *WIB,* offer guarantees for international automatic information exchange. This concerns the duty of confidentiality and that data may only be used for other purposes if permission has

[791] See appendix 2.5 for a structured overview of the score given to the analysis.
[792] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.45.
[793] United States Internal Revenue Service: International Data Safeguards & Infrastructure Workbook. https://www.irs.gov/pub/fatca/IntlSafeguardsWorkbook.pdf.
[794] Data safeguarding, IRS (Feb. 13, 2018), https://www.irs.gov/businesses/corporations/safeguarding-data.

been given. This prevents information, that is provided by the Netherlands, from becoming public abroad or that information can be used inadvertently.

§9.2.6 CRS[795]

The purpose of the standard for automatic international data exchange **(simplicity)** is to prevent tax avoidance with regard to financial assets. The basis for this is formed by a set of rules applicable on 'reporting FIs'. In principle it is about the **transparency** of qualifying FIs to tax authorities on financial data held by them. Due to the implementation of the OECD's CRS regulations in the EU Directive 2014/107/EU all Member States must consistently apply the CRS. This Directive extends the existing automatic exchange of information within the DAC. It extends it with information on financial accounts of persons residing in a Member State other than that where the account is held. This harmonizes and optimizes the transparency of financial data within the EU. In the perspective of **legal protection**, the Directive has also introduced some additional provisions to the DAC. This includes rules relating to the electronic transmission of the information and guarantees a supplement to privacy in the event of the exchange of the new category of information.[796]

Compared with FATCA, the CRS is applied in a broader multilateral context. Reciprocity is also agreed in the IGA, but in practice the US obtains the needed information and only poorly information is provided by them. The CRS only works at full reciprocity.[797]

§9.2.7 Rulings[798]

The exchange of information on rulings is an important pillar in the context of international **transparency**. The Dutch tax authorities will provide, with some delay, the information on rulings in the context of the OECD and EU regulations.[799] Unilateral, bilateral and multilateral APAs are all covered by the ruling practice, but it can occur that tax treaties, under which they are concluded, contain a clause that determines that obtained information, on the basis of these treaties, may not be disclosed to third parties.[800] According to the OECD ruling guideline such a clause can be reversed, but in Dutch practice this conversion of a bilateral and multilateral APA into a unilateral APA is not expected to occur, because the Dutch treaties do not contain such clauses.[801]

[795] See appendix 2.6 for a structured overview of the score given to the analysis.
[796] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.29.
[797] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.52.
[798] See appendix 2.7 for a structured overview of the score given to the analysis.
[799] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 100.
[800] Consideration 11 Council Directive 2015/2376/EU.
[801] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 100.

The regulations implemented for the exchange of information on rulings are not that **simple**. The spontaneous and automatic exchange will be accomplished by a standard form. Only, due to the multiple interpretations of the OECD and EU concepts and the lack of guidance on the interpretation, the Dutch tax authorities are filing in this form in a generous way. As a result, filling in these standard forms turned out to be harder than initially foreseen,[802] which takes a lot of time for the Dutch tax authorities.

The lack of **legal protection** within the framework of the exchange of information on rulings has been cited by the implementation of these regulations into Dutch tax law. Unfortunately, no extra provisions are implemented. Of course the duty of confidentiality occurs as well in this context.

§9.2.8 CbCR[803]

The CbCR regulations are related to certain qualifying MNEs. It provides standardized documentation requirements for MNEs, including a master file, local file and country report, and requests for an automatic exchange **(simplicity)** of country reports between tax authorities. These regulations made MNEs **transparent** towards tax authorities on the documentation of transfer pricing. Tax authorities can use the country report for (more efficient) risk assessments, which allocates the scare capacity of tax authorities more efficiently. In case a high risk occurs, the tax authorities can request additional information and has the possibility to start an investigation. Within the EU, the CbCR regulations have resulted in the CbCR Directive. Therefore more harmonization and transparency has been achieved for the documentation of MNEs between EU Member States. The Directive gives the ability to transfer the country report to third States, if the competent authority of the providing State does not object.

The OECD developed standardized models for the documents, which encourages a more consistent documentation by MNEs within every State. This contributes to the **simplicity** of the procedure, because tax authorities obtain consistent documents which means that they can also work consistently. The country report has to be treated in a confidential way and will not be publicly assessable. Nevertheless, there is a proposal to make these reports public. Furthermore the provided country report may not be used for transfer pricing adjustments **(legal protection)**.

§9.2.9 *WIB*[804]

As mentioned in the introduction, the *WIB* implemented the higher rules of law in the Dutch tax law, such as the mentioned bilateral treaties, the Strasbourg Convention, TIEA, CRS, CbCR, Ruling regulations and

[802] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 99.
[803] See appendix 2.8 for a structured overview of the score given to the analysis.
[804] See appendix 2.1 up to and including 2.8 for a structured overview of the score given to the analysis.

the DAC and its amendments. Concluded from literature and the law, the Dutch provisions are largely implemented in accordance with the suggested regulations and no substantive deviations were intended. The conditions among which the *WIB* provides information, is that no information shall be provided if its provision is not aimed at the implementation of EU directives or other international law procedures for the provision of mutual assistance in the discharge of taxes, and interest and administrative penalties and fines related thereto.[805] Therefore a further detailed explanation of the provisions of the *WIB* will be left out of consideration, because those elements are already reviewed on international and supranational level of aforementioned sections. In the section 9.3, which will discussed below, some elements of the *WIB* in combination with the *AWR* will be analyzed.

§9.3 Dutch level[806]

In the first place, to obtain relevant information that is necessary for international and supranational exchange, the Dutch tax authorities need information from the Dutch tax resident. In this circumstance, the Dutch domestic law is essential to enforce the information obligation to the Dutch tax authorities. Even if it may not be legislation about the information exchange as such, it is essential to obtain information from taxpayers prior to the international or supranational exchange. It concerns the Dutch *AWR* that provides some additional characteristics in line with the criteria of the exchange of information. It is the national legislation for levying taxes of Dutch tax residents within the Netherlands.

The *AWR* ensures the **transparency** of taxpayers to the Dutch tax authorities, because on the basis of articles 47 and 47a *AWR* they are obliged to provide relevant information and on the basis of article 53 *AWR* third parties are obliged to provide information. The phrase 'to be of interest'[807] applies to those articles, which refers to the relevancy of requested information. Nevertheless, whether the information actually will be relevant or not, is left out of consideration, because the inspector can request any information which 'may' be important for the taxpayer's tax assessment.

Nevertheless, if the taxpayer or third party abroad do not provide the requested information, article 52a *AWR* will lead to the reversal of the burden proof. The international and supranational regulations concerning the exchange of information are then no longer essential. On the one hand, the information exchange procedures on request can be avoided (automatic and spontaneous exchange will

[805] Article 14 paragraph 1 WIB.
[806] See appendix 2.9 for a structured overview of the score given to the analysis.
[807] Unofficial translation by author. The phrase in Dutch: 'te zijnen aanzien van belang' in article 47 AWR.

be exchanged anyways), which will increase the **simplicity**, but on the other hand, by estimating the tax debt the correctness of the tax assessment is questionable. This can reduce the effectiveness to combat tax avoidance and evasion. The obligation to provide information within the procedures of article 47, 47a and 53 *AWR* only arises when the tax inspector has made a request.[808] The invitation to provide information happens in combination with some formal requirements to which the inspector must comply. In general, those requirements are not a heavy burden on the inspector.

In order to prevent that every dispute with the tax authorities will be brought to court immediately, the taxpayer must, in principle, first lodge an objection against the tax authorities' procedure. In this procedure, the tax authorities must reconsider their decision. If the taxpayer is still not satisfied with the rescinded decision, he is able to lodge an appeal by the national tax court. In some cases it is possible to skip the notice of objection and to lodge directly an appeal. In that case, the taxpayer requests the Dutch tax authorities in his notice of objection to agree to skip the objection phase. The general provisions on objections and appeals can be found in the 'General Administrative Act'[809] and specific provisions in the *AWR*, which apply to decisions concerning the State's taxes. The Dutch legal framework provides the opportunity to lodge an objection if there is an 'objectionable decision'. These are autonomous decisions made on requests from the taxpayer. Requests for information, such as article 47, 47a and 53 *AWR*, are not such objectionable decisions, and therefore no legal remedies, such as an objection and/or appeal, can be made.[810] On the other hand, the issued information decision by article 52a *AWR* and the imposed tax assessment, is accessible to objection and appeal.

Concerning the criterion of **legal protection** within the Dutch domestic law in case of the exchange of information, it is in practice thought that it would not be possible to lodge an objection and/or appeal to the exchange of information. However, the *AWR* is only applicable to State taxes and is therefore not applicable to the *WIB*.[811] This means that against decisions taken on the basis of the *WIB,* in principle, objection and appeal may be possible, in accordance with the rules of the 'General Administrative Act'. [812][813] However, the only problem is that it is not always clear when information would be exchanged.[814] If information is requested from the interested party, it can be expected that this action is

[808] Article 6 AWR jo. Article 53 AWR.
[809] Act of 4 June 1992, containing general rules of administrative law (General Administrative Law Act). Dutch: Wet van 4 juni 1992, houdende algemene regels van bestuursrecht (Algemene wet bestuursrecht).
[810] Article 26 paragraph 1 AWR.
[811] The AWR only applies to tax laws concerning article 1 paragraph 1 AWR. The WIB is not covered by this article.
[812] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.142.
[813] Neve, L.E.C. (2016). Internationale standaard voor inlichtingen-uitwisseling en mogelijkheden tot verzet: botsende visies. *MBB 2016/7-8.* P. 297.
[814] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.145.

done on the basis of a request from abroad. In this investigation procedure an objection and/or appeal can be lodged, which has already been proven by the conclusion of the ECJ in case Berlioz. Only after the abolition of the notification procedure, however, is it not clear in other cases whether and when information will be exchanged.[815] Nevertheless, neither in case of automatic nor spontaneous exchange the taxpayer will know when the exchange will occur.

The duty of confidentiality is also implemented in the Dutch tax law,[816] which stipulates that everyone is prohibited to reveal that what appears or is communicated to him from or in connection with any activity in the implementation of tax law on the person or property of another party, than necessary for the implementation of the tax law. Only, the Dutch tax inspector makes often use of the exceptions on this duty of confidentiality.[817] In case a State does not impose a duty of confidentiality on officials of the tax authorities, with respect to exchange of information, the Minister will not provide any information to a competent authority of the requesting State.[818]

§9.4 Summary and conclusion

'Concerning the legislation and regulations of section 4-8, what provisions meet the criteria of the benchmark and/or on what criteria has the current legislation and regulations a lack?' See **appendix 2** for a structured overview of the score given to foregoing analysis. In the recommendation, section 11.2, will be evaluated which elements need to be improved on Dutch level and/or international level to create efficient and effective legislation and regulations to achieve an optimal combatting of tax avoidance and evasion.

§9.4.1 Information transparency

The criterion of **transparency** is reviewed, in accordance with the research benchmark, on two levels: the taxpayer's transparency to the Dutch tax authorities and the transparency on the level of tax authorities of different States, by means of the use of international and EU tax law concerning the exchange of information. On the first level the Dutch tax inspector is competent to obtain all the relevant information by using the provisions of the *AWR*, which obliges taxpayers and/or third parties to provide any information that 'may' be of importance.[819] It is hard, or actually impossible, to check whether the

[815] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.145.
[816] Article 67 AWR.
[817] See section 4.5.3.2.
[818] Article 16 WIB.
[819] Article 47 AWR jo. 53 AWR.

information at the end was necessary to request, because whether the information will be relevant or not at the end, is left out of consideration. By means of the CRS, FATCA and CbCR regulations, qualifying FIs and MNEs are obliged to provide the required information to the (Dutch) tax authorities, which increase the transparency of such FIs and MNEs towards the State. All this together, the Dutch tax authorities are already able to obtain much information of a wide scope of sources.

On the second level, the transparency of the information exchange between competent tax authorities, States seems to be already very transparent. All regulations considered together, it can be concluded that tax authorities issue a wide range of information collected from different sources. Interesting elements, which emerge in several regulations, are the principle of reciprocity, the use of information for other non-tax purposes and the exchange with a third State. The last two elements increase the transparency positively, because information can be used for more purposes and by more States.

On the basis of reciprocity, the Netherlands will not provide any information to a competent authority if they are not authorized or able to provide similar information. The international provision of reciprocity is discretional in nature and therefore flexible, especially when it comes to combatting tax avoidance and evasion. In urgent situations, such as the presumption of tax avoidance or evasion, the States will be able to provide the needed information, regardless the lack of reciprocity of similar information.[820] In the Dutch tax system this is not possible, which is to the benefit of the taxpayer's security **(legal protection).**[821] This creates more transparency in the Dutch government action, because they will also not ask for information that they cannot obtain at national level.[822] However, it is recognized that applying the principle of reciprocity too rigorously could frustrate effective exchange of information. Therefore this principle should be interpreted in a broad and pragmatic manner.[823] This is the case when absolute reciprocity cannot be met, because State's procedures variate too much in obtaining and providing information. This should not be used as a basis for denying the exchange.[824]

§9.4.2 Simplicity of procedures

Given the criterion of **simplicity,** the provisions will be evaluated from the perspective of the concept of complexity both on international and national level, which concerns the *'lack of overview and certainty as*

[820] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.93.
[821] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 359.
[822] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.93.
[823] Paragraph 15 Article 26 OECD Commentary 2017.
[824] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 359.

a result of the many and difficult procedures, regulations and systems around the tax administration'. Each international arrangement separately occupied may not yield much complexity, because the procedures are focused only on the element(s) within that specific regulation. Nevertheless, due to the colossal amount of regulations and the resulting actions for the tax authorities, the current administrative assistance became a complex system of procedures. Prosperously, on EU level all the regulations concerning the exchange of information are implemented in a single directive, the DAC, which gives a more organized overview. From a Dutch perspective, these regulations, international and supranational, are implemented in a single Dutch act, namely the *WIB.*

Given the three manners to exchange information, the exchange on request seemed to be the least efficient procedure. Due to the obligation to collect certain information prior to the request, the requesting authority meets already a heavy burden to receive the relevant information. Also, the request and processing of such request takes time and a lot of man power, also in the context to check whether the request is 'foreseeable relevant'.[825] Therefore, mandatory automatic exchange has given an enormous boost to the improvement of possibilities within the tax authorities' business process and fits best in the criterion of simplicity. It is characterized by the systematic, category-wise and periodic exchange of information, as a result of mutual consultation.[826] This method has been used so far for situations in which treaty partners acknowledge structural risks for tax fraud as a result of their economic relation.[827] Instead of having a multitude of similar requests coming in, which is inevitable due to the calculated risk, this can be avoided by means of this mandatory automatic information exchange. In case of spontaneous exchange, neither requests need to be made. A benefit of spontaneous exchange is that the provided information, at first, is not expected by the receiving State, but, nevertheless, is very useful for their taxation. Because States, of course, cannot request for unknown facts, it is also important to implement an obligation for States to report information of which they suspect that it may be of relevance for the other State, in the context of their tax interest.[828]

Subsequently, the use of standard templates and instructions in most exchange procedures is of an added value for making the information exchange easier.[829] Due to such templates, the tax authorities got guidelines for what kind of information they need to fill in and thus need to be exchanged. This results in consistent and clear information provisions from every State that use those templates, because they

[825] Article 26 OECD commentary 2017 & Consideration 9 of Council Directive 2011/16/EU.
[826] OECD Commentary 2017, article 26 paragraph 8 & article 3 of the cancelled Council Directive 77/799/EC & article 6 Strasbourg Convention.
[827] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 357.
[828] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 360.
[829] This is not the case with the exchange of rulings, see section 9.2.7.

are exchanging the same information asked by the template. This promotes the processing of the information, because the template gives a clear overview of the information and every exchange will contain similar information, which enables the consistence of the information provision.

§9.4.3 Legal protection

Generally speaking, international and supranational regulations considering the exchange of information is seemed to be a pure inter-administrative procedure with little or no intervention given to (Dutch) taxpayers' **legal protection**. Despite the fact that they will suffer the consequences of the exchange, either before, during and or after it, in their role as taxpayers. Mainly, for the concretion of the position of the taxpayer before an exchange of his information will be referred to the domestic law of each concerned State,[830] according to the autonomous procedure principle.[831] Only, seen from Dutch tax law, the *AWR,* neither on this level has been explicitly paid attention to the taxpayers' interests. Due to this reference to the national autonomy a shortage of legal protection within the international and supranational regulations occurs.

Propitiously, international and EU treaties are concluded to protect human rights and fundamental freedoms. In the discussed case law, the ECHR, the EU Charter and the Privacy Directive are discussed, which have influence on the information exchange procedures. The 'right to privacy'[832] and 'the right to fair trial'[833] are essential in this context. These provisions ensure legal protection for the (Dutch) tax residents.[834] In the Netherlands, the ECHR and EU Charter have a direct effect in the Dutch tax law and therefore the legislator need to take those into account when exercising its powers. Due to the subordination of the Dutch Constitution[835] to the higher rule of law, the taxpayer's rights concerning the information exchange are protected by such international and supranational human right treaties, on which everyone can rely to.

An element that is positive for the taxpayers' legal protection, is the criterion of 'foreseeable relevance'[836] included in article 26 OECD MC, the Strasbourg Convention, the DAC and also in the *AWR*. This criterion, together with the inherent prohibition of 'fishing expeditions', ensures a limit on the

[830] See Case Sabou in section 4.5.1.
[831] Alfredo Garcia Prats, F. & Melis, G. Exchange of Information and Taxpayers' rights ('). *University of Valencia and LUISS University Rome.* P. 1.
[832] Article 8 ECHR.
[833] Article 6 ECHR.
[834] Vegt, van der J.M. (2009). Is het gebrek aan rechtsbescherming bij een waarneming ter plaatse in strijd met art. 6 EVRM? *Tijdschrift Formeel Belastingrecht 2009/03-05.* Paragraph 2.
[835] Article 94 Dutch Constitution.
836

exchange of non-specific information for the tax assessment. Within the Berlioz case,[837] the criterion of 'foreseeable relevance' is essential for the taxpayer or third party involved to challenge the legality of a request. Only, two side notes of this concept are: in practice it is mainly only possible to determine the relevancy after receiving the information, when the exchange has already occurred and whether the information actually will be relevant or not, once provided, is immaterial.

Idem, the Bara [838] and Ravon [839] case have improved the taxpayer's legal protection. The implication from the Bara case is that without a legal basis the information exchange is only legitimate when the taxpayer involved is informed about the intended exchange. In addition, the implication from the Ravon case is that taxpayers need a provision to test the legality of an investigation to the national court. Both judgements have shown that the legal protection concerning the taxpayer's privacy within the supranational regulations need to improve.

In the DAC are also limitations given to the exchange of information.[840] On those grounds the competent authority of a State, which is the Minister of Finance within the Netherlands, is not obliged to provide information upon a request. Those limits are also elements for the taxpayers' legal protection: the sovereignty argument[841] protects its legal certainty, the reciprocity argument its competitive position vis-à-vis taxpayers in other States, and the risk of disclosure of a business secret is, in fact, the only ground, specifically for the taxpayer's legal protection. In addition, there are general arguments about public policy and the general principles of taxation, on the other hand, represent more general interests, which makes them less personal for the taxpayer's protection.[842]

On the other hand, due to the abolition of the notification procedure, the legal protection of the Dutch taxpayer has been substantially reduced.[843] Currently, the taxpayer does not longer knows when and if information will be exchanged. In the view of Booij,[844] it is still possible to object (structurally) on the basis of the presumption that information will be exchanged. If the objection is too early or too late, the objection is inadmissible. There is also a chance that the objection is on time and then the goal will be

[837] See section 4.5.1 of this master thesis.
[838] See section 4.5.3 of this master thesis.
[839] See section 4.5.4 of this master thesis.
[840] Article 17 Council Directive 2011/16/EU.
[841] The requested Member State is not obliged to investigate or provide information if its own legislation does not allow it if that information will be used for its own purposes.
[842] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. P. 473.
[843] See section 4.4.3.8 of this master thesis.
[844] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 145-146.

met. This is when the foreign request is already received, but the information still need to be exchanged. However, usually such an objection will not suspend the exchange.

Another remarkable problem can be noticed. Arising from the idea that States themselves must enable regulations regarding the protection of taxpayers, mainly the right to privacy, is that the effect of the confidentiality regulations in one State differs from another State.[845] This concerns the legal obligation of tax authorities to maintain the secrecy of obtained information. Given the more detailed review of article 26 OECD MC on this scope of application,[846] the essence of the duty of confidentiality is that obtained information is subject to the same confidentiality regulations as nationally obtained information by the receiving tax authorities in their State. It is not required within the duty of confidentiality that other States need to require the same level of protection as provided in the Netherlands.[847] A guarantee for the taxpayer is that if a State does not impose a duty of confidentiality on obtained information by means of an exchange, the Dutch tax authorities does not provide any information. Only, in the situation when the duty of confidentiality is described in the law, but in practice will not be implemented, a problem arises. It can be doubted if this could be a reason as such to not exchange the information.[848] The Strasbourg Convention and DAC contains an additional possibility to impose additional requirements on the duty of the requesting State. Nonetheless, the provision for the confidentiality guarantee of the Dutch implementation Act, the *WIB*, did not implement this option.[849] Actually, this obligation need to be implemented in the second paragraph of article 14 *WIB* according to Schenk-Geers.[850] This would provide the interested taxpayer with the opportunity to handle carefully the risk from the lesser level of protection within the receiving State. Also, seen the legal process that is open to the taxpayer in the event of breach of the duty of confidentiality in the receiving State, it appears hardly to be regarded as sufficient protection.[851] Nevertheless, the Dutch tax inspector makes also often use of exceptions given to the duty of confidentiality, causing that this duty in the Netherlands is also not optimal from the perspective of the taxpayer.[852]

[845] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 129.
[846] See section 9.2.1 of this master thesis.
[847] The duty of confidentiality is implemented in article 67 AWR.
[848] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 129.
[849] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 473.
[850] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 458.
[851] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 473.
[852] See section 4.5.3.2 of this master thesis.

Section 10 Legal comparison EUCOTAX States

§10.1 Introduction

Previous sections gave insight into the Dutch tax system related to international administrative assistance. Other States also need to deal with (most of the) international and EU law, and implemented these in such a way that it will be in accordance with the hierarchy of their legal system. This section contains comparative law of the implementation of the current international and EU information exchange regulations,[853] and important additional domestic law, of the twelve participating States of this year's EUCOTAX Wintercourse project. The Wintercourse took place in April 2018 in Edinburgh, Scotland. The general topic of this year's EUCOTAX Wintercourse of 2018 is 'Challenges to tax autonomy in an era of conflicting political goals', which was subdivided into six subtopics. The paper used as basis for this master thesis, represented the Netherlands on subtopic six: 'Tax autonomy and the administration of tax law'. Additionally to the Netherlands, the participating States of this year's Wintercourse edition of subtopic six are: Austria, Belgium, France, Germany, Hungary, Italy, Poland, Spain, Singapore, the UK and the US. Switzerland was also participating this years' EUCOTAX Wintercourse, however no Swiss participant was joining this subtopic. Singapore is a special case, because the student of the Swedish university has a Singaporean nationality and for that reason her paper is from the perspective of Singapore.

In some States, in comparison with the Netherlands, interesting deviations and/or additions are made to the higher rule of law, which may be of relevance for the Dutch tax law within this research. Within this legal comparison, only the (most) interesting elements of the State's tax law, from the perspective of the Dutch tax system, will be discussed. Mainly EU Member States participated in this Wintercourse project and, because of this, EU law has the predominance within the legal comparison. The States' domestic tax law are largely harmonized, since the EU Member States are subject of this supranational partnership and ceded a part of their autonomy to the EU. A requirement of being Member of the EU is the subordination to primary EU law and the obligation to implement the EU directives (secondary EU law). Due to this, the States' domestic law do not deviate much from each other.

[853] Excluding a legal comparison of the exchange on rulings in the different States, because this is not part of the questionnaire.

§10.2 EUCOTAX States' information exchange provisions

§10.2.1 Autonomy

It is important to verify the hierarchal relationship between international, EU and domestic law for the relation with the State's tax autonomy. The Dutch tax law, including the Constitution, is subordinated to the higher rule of law. On EU level this is due to the principle of priority.[854] International law and primary EU law have an immediate internal validity (monistic approach) and secondary EU law must be implemented in the Dutch tax law (dualistic approach). Due to this, the Dutch courts have the obligation to apply to the higher rule of law with priority over the Dutch law. In this way, it can be said, that the Netherlands is not very autonomous anymore, because of the big influence of the higher rule of law in the national tax system. This system applies also to **Belgium.**[855]

The international and EU law enter into every State's national legal order, but will coordinate the internal law differently. Some States have another hierarchy of the higher rule of law in comparison with the Netherlands, and through this deviation it can be that States are more autonomous. If this is the case, it is possible that they will restrict the international regulations in such a way that it is at the expense of the Netherlands, because all the States need to participate in an optimal way to combat tax avoidance and evasion.

The Constitution of **Austria,**[856] **France,**[857] **Germany,**[858] **Poland,**[859] **Spain**[860] and **Italy**[861] has supremacy over all other sources of law, including international and EU law.[862] The other sources of domestic law, on the other hand, are subordinated in case of conflict to the higher rule of law. For example, in **Poland** the Constitution states: *"The Constitution shall be the supreme law of the Republic of Poland."*[863] In addition, in the Polish hierarchy of law sources, it should be noted that ratified international agreements generally do not prevail over any domestic statutes, but there is an exception for

[854] ECJ 15 July 1964, Case C-6/64 (Costa v E.N.E.L.). The principle of priority determines that EU law is beyond the national law of the EU Member States.
[855] Article 167 of the Belgian Constitution of 17 February 1994 and article 249 of the Treaty establishing the European Community.
[856] Article 50 paragraph 4 Austrian Constitution of 1920, 'Bundes-Verfassungsgesetz' (B-VG) jo. Article 44 paragraph 3 B-VG.
[857] Article 54 French Constitution of 4 October 1958: *In case of conflict, the Constitution provides that the international law prevails but in reality, it is the opposite since the Constitution needs to be modified in order to implement a conflicting international commitment.* The same applies for EU law.
[858] M. Herdegen, *Europarecht, 18. Auflage,* die Fachbuchhandlung 2017. Paragraph 10. & article 24 I German Constitution of 11 August 1919 (Grundgesetz/GG) jo. Article 23 German Constitution (Grundgesetz/GG).
[859] The Constitution of Republic of Poland, Journal of Laws 2 April 1997, no. 78, heading 483, amended.
[860] Article 96 of the Spanish Constitution of 31 October 1978 (EC).
[861] Article 53 Italian Constitution of 1948.
[862] The principle of priority: the ECJ concluded in 'Costa v ENEL' that the entire EU law has primacy of application and therefore takes priority over any national law. Only in these States the Constitution contains a provision which obstruct this.
[863] Article 8 section 1 Constitution of Republic of Poland, Journal of Laws 2 April 1997, no. 78, heading 483, amended.

international agreements ratified by the prior consent granted by a statute.[864] In **Austria** the Constitutional law is subdivided in the 'fundamental principles of the Constitution' and 'ordinary' law. The fundamental principles,[865] which forms the basis of the legal system, is the highest-ranking law in the Austrian legal system.[866] Every law and regulation, including international and EU law, must comply with these principles. An exemption for EU law has been made, which only prevails over the 'ordinary' constitutional law.

Hungary[867] harmonizes its domestic legal system with all the higher rules of law, because they only know the dualistic approach and to become valid it need to be implemented into their domestic law. When their domestic law is in conflict with international and EU law, they will modify it in such a way that these provisions would concur with those higher rule of law. The national court cannot apply directly to international law, but also for that reason they implement all regulations in the domestic law.

The **UK,** unlike other EU Member States, have the Principle of Parliamentary Sovereignty.[868] This means that the Parliament has the supreme authority when it comes to formation and enforcement of law. Due to this the Parliament has the right to make or unmake any law, no one has the right to override or set aside the Parliament's legislation. This principle is considered supreme, but the EU Communities Act (ECA),[869] made by the Parliament itself, provides for the supremacy of the EU law by enabling the Courts to intervene and set aside legislation that is found to be in conflict with the EU laws, or to refer such conflict to the ECJ.[870] In addition, the UK implements international law and treaties into their domestic law by way of an Act by the Parliament, and become therefore part of the domestic tax law.[871]

The legal system of **Singapore** is slightly different, because they are not a Member State of the EU and is, then, not subordinated to EU law. The Constitution[872] is the supreme law of Singapore, resulting in the annulation of any law what it is deemed to be in conflict with the wishes of the Constitution. By way of the dualistic system international law need to be implemented into the domestic law, because

[864] Article 90 section 1 Constitution of Republic of Poland, Journal of Laws 2 April 1997, no. 78, heading 483, amended.
[865] The democratic principle, the republican principle, the principle of federalism, the principle of the rule of law, the principle of the separation and the liberal principle.
[866] C. Grabenwarter & M. Holoubek, *Verfassungsrecht - Allgemeines Verwaltungsrecht* Wien: Facultas Verlags. p. 49.
[867] See page 2 of the paper of Kardos, Kinga (2018). Tax autonomy and the administration of tax law. *Corvinus University of Budapest, 2018 EUCOTAX Wintercourse project Edinburgh.*
[868] Constitutional Reform and Governance Act 2010 (CRGA 2010), § 20.
[869] The European Communities Act, 1972.
[870] ECA 1972, paragraph 3(1).
[871] Constitutional Reform and Governance Act 2010 (CRGA 2010), § 20.
[872] OECD(2013),Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Singapore 2013: Phase 2: Implementation of the Standard in Practice, OECD Publishing, Paris. Pp. 15.

international law obligations do not give rise to obligations in the domestic context unless and until transposed into domestic law by legislation.[873]

Within the **US**, States enter into agreements, which promotes uniformity of tax administration and procedures among the States.[874] In international context, the President of the US is given the constitutional power to make concluded treaties with other States.[875] He delegates his/her negotiation power to the Treasury for tax treaties. Only the US federal government (no state governments) can enter into treaties with other States, and only in the respect to federal tax law. Under the Constitution's Supremacy Clause,[876] the Constitution, congressionally enacted law, Treasury Regulations, and treaties, are considered as supreme law of the land and are given equal effect of the law by the judiciary (equal status doctrine). When a conflict arises between a congressionally enacted law and a treaty, courts use the later-in-time doctrine as a method of upholding the law.[877] The later-in-time doctrine gives effect to the most recently enacted or ratified law. In addition, self-executing treaties are binding on the courts under the Supremacy Clause in the same manner as legislatively enacted laws, and conflict of law standards are applied where there is an ambiguity as to which country's laws the courts should apply. Non-self-executing treaties, in contrast, require congressionally-enacted legislation in order to have the force of law in the United States.[878]

§10.2.2 Transparency

Transparency, and also the limits to transparency, is a main element within the discussion to detect risks of offshore tax avoidance and evasion. Without the exchange of information, tax authorities become self-contained, which makes it impossible, due to the principle of sovereignty, to levy taxes of all the taxpayers who are abroad and/or have money flows abroad.

The bank secrecy law in **Austria**[879] and **Belgium**[880] did prevent the effectiveness of the States' ability to exchange any information. This included a reserved position regarding the exchange of bank information.[881] Under the old version of the OECD MC or/and the Strasbourg Convention, States had the

[873] Public Prosecutor v Tan Cheng Yew and another appeal [2013] 1 SLR 1095 at [1116].
[874] The Constitution of the USA article II.
[875] The Multilateral Tax Compact (MTC).
[876] U.S. Constitution article VI, clause 2. & Parry, J.T. (2009). Congress, the Supremacy Clause, and the Implementation of Treaties. *32 FORDHAM INT'L L. J. 1209, 1209.*
[877] Robertson, W.V. 124 U.S. 190, 193-94 (1888). *See also* Kysar, *supra* note 95, at 20.
[878] Damrosch, L.F. (1991). The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing". *Treaties, 67 CHI.-KENT L. REV. 515, 515.*
[879] Section 38 of the Austrian Federal Banking Act (Bankwesengesetz, BWG).
[880] T. AFSCHRIFT, *La levée du secret bancaire fiscal*, Brussel: Larcier, 2011, 38; Section 322 of the Belgian Income Tax Code (BITC).
[881] Günter, O-C & Jergitsch, F. (2016). Aktuelle Rechtsfragen zum österreichischen Bankgeheimnis und dem internationalen Informationsaustausch in Steuersachen. *ÖBA 2016, 106.* P. 106.

possibility to refrain from exchanging information if such exchange was contrary with the State's domestic law or did not want to provide any information.[882] Even, due to the bank secrecy, Austria and Belgium were granted a special position within the DAC, which generally obliged all EU Member States to report information on interest payments to the State of residence of the beneficial owner.[883] During this transition period,[884] [885] they were granted an exemption on this obligation, and got the right to withhold taxes on such payments.[886] This withholding tax was 15% in the first three years, in the next three years 20% and the last three years 35%.[887] Subsequently, 75% of the withholding revenue was ceded to the beneficial owner's State of residence.[888] An exception was implemented on this regulation, on which the taxpayer involved could inform the FI to pass the information directly to his State of residence. In that case no withholding tax was withheld and the possibility to levy takes could take place in the State of residence.[889] Only, in case a fiscal criminal proceeding, comparable to Austrian procedures, was being carried out, the bank secrecy could be bypassed in Austria.[890] As mentioned above, the withholding tax applied only with respect to States having a bank secrecy and only during the expired transitional period. The withholding tax regime was thus not intended to be a permanent regime. Nevertheless, the OECD has been working on the combatting of tax avoidance and evasion and transparency became an important element within this context, also regarding bank information. With the addition of a new paragraph implemented in article 26 OECD MC, States were not able anymore to deny administrative assistance when information is in the possession of the bank.[891] In the first place, Austria and Belgium did not want to give up this secrecy and made a reservation to this new element.[892] However, due to the work of the OECD in identifying tax havens and due to international pressure, Austria and Belgium, finally started to accept the OECD principles and withdraw the bank secrecy.[893]

[882] Article 26 paragraph 2 sub a jo. sub b OECD MC.
[883] Cavelti, L.U. (2013). Automatic Information exchange versus the withholding tax regime globalization and increasing sovereignty conflicts in international taxation. *World Tax Journal, June 2013.* P. 192.
[884] A period of nine years was granted to this transition period.
[885] Article 10 Council Directive 2003/48/EC (cancelled).
[886] https://www.bankaustria.at/produktpdfs/EU-Zinsenrichtlinien_englisch.pdf (last retrieved 29.1.2018); https://www.mayerbrown.com/eu-savings-directive/ (last retrieved 29.1.2018).
[887] Article 11 Council Directive 2003/48/EC (cancelled).
[888] Article 12 Council Directive 2003/48/EC (cancelled).
[889] Article 13 Council Directive 2003/48/EC (cancelled).
[890] Article 38 paragraph 2 of the Austrian Federal Banking Act (Bankwesengesetz BWG).
[891] Article 26 paragraph 5 OECD MC: "In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person."
[892] C. Urtz, *Praxisfragen zum neuen Bankgeheimnis,* SWI 2011. P. 144.
[893]Kerschbaumer (2012). Der Geheimnisschutz bei der internationalen Amtshilfe gem Art.26 OECD-MA*. Published by the Wirtschaftsuniversität, 2012.* P. 24.

The FATCA, introduced by the **US**, has to do with the problem of the lack of financial information, also due to the bank secrecy. The key element of FATCA is a withholding tax regime, requiring any payer of withholdable payments to deduct and withhold a 30% tax if such income has its source in the US. As result of the withholding tax, foreign investors in US assets receive only 70% of their investment income unless they comply with FATCA and they deliver information about the US account holders or their US beneficial owners.[894] FFIs can avoid the withholding tax if they sign an agreement with the US Secretary of Treasury and impose extensive reporting and due diligence procedures on accounts held by US taxpayers ("US Accounts").[895] By means of this, FFIs are forced to comply with FATCA, otherwise the withholding tax will be implement on payments to the FFI. This mechanism also applies if foreign States have bank secrecy rules which prevent foreign banks from reporting the necessary information. In this case taxpayers must provide a waiver of the banking secrecy and if a taxpayer fails to do so, foreign banks are obliged to close the bank account.[896]

Continuing on the FATCA, **Belgium** has a remarkable provision implemented in the FATCA IGA with the US. It is the 'most favored Nation' clause.[897] This clause settled the principle according which any more favorable clause concluded by the US with another State, on basis of an IGA, should also automatically be applied by the US in its relation with Belgium.[898] As a result of this, Belgium can piggyback on better and more information providing provisions and can obtain the same information on his taxpayers as the other State will obtain from the US. In the extension of FATCA are the CRS regulations, which obligates FIs to provide information on their customers financial (bank) accounts. **Poland** implemented an additional requirement on FIs to submit also 'undocumented accounts', which are individual accounts held by individuals with unidentified tax residency.[899]

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[894] Cavelti, L.U. (2013). Automatic Information exchange versus the withholding tax regime globalization and increasing sovereignty conflicts in international taxation. *World Tax Journal, June 2013.* P. 183.

[895] Sec. 1471(a) IRC; For the term US Accounts FATCA takes a look-through perspective and asks for the account's beneficial owners. Accordingly, US Accounts are defined as financial accounts held by either one or more US persons or by a foreign entity, if a US person owns directly or indirectly more than 10% interest of such entity. Secs. 1471(d)(1), 1473(2), 1473(3) IRC; Sec. 1.471-5(a) Treasury Regulation 2013. Therefore, if a US person has a more than 10% ownership in a foreign entity, that interest in the foreign entity is generally subject to FATCA's reporting and due diligence requirements. However, an important exception is made for individuals with smaller accounts. If the aggregate value of all depositary accounts held by an individual with the same Foreign Financial Institution does not exceed USD 50,000, the Foreign Financial Institution can treat the depositary accounts as non-US accounts. Accordingly, no reporting is required. Sec. 1471(d)(B)(ii) IRC; Sec. 1.1471-5(a)(4) Treasury Regulation 2013.

[896] Sec. 1471(b)(1)(F) IRC.

[897] Hermand, O. & Delacroix, P. & Passagez, B. & Bourmanne, J.-F. (2011). « FATCA ou le nouvel impérialisme fiscal américain ». *R.G.F., 2011, n°1.* p. 1.

[898] Hermand, O. (2014). « Belgium and the US sign FATCA Intergovernmental Agreement ». *In PwC Belgian News, April 25, 2014, available at https://news.pwc.be/belgium-us-sign-fatca-intergovernmental-agreement.*

[899] Article 34 of the Act of 9 March 2017 on the Exchange of Tax Information, Journal of Laws 2017, no. 648 (AETI).

In most **EU Member States,** due to the obligation to implement the DAC,[900] the providing State must give permission for the use of data for other non-tax purposes. In principle, it is for sure allowed to use it for such purposes if the information can also be used for the same purposes within the providing State. Only, the **French**[901] tax law deviated, at first, from this given provision. Any information received by the exchange of information, can only be used for the purpose of establishing or recovering taxes which initially led to the exchange. The obtained information cannot be used for other purposes even if they might be interesting for other regulations, administrations or reveal non-fiscal offenses, and the social security administration cannot be informed.

Within the context of the information exchange, **Belgium,** [902] **France** [903] and **Spain** [904] have expanded the time limit period set for allowing for assessments because of their ability to exchange information with other States.[905] Such exchange of information provides for efficiencies in interstate cooperation and more comprehensive information exchanges where States have historically struggled to obtain such information within their allotted statute of limitations periods. This gives those States more time to consider transactions and exchange information.

It is also worth mentioning that **Singapore,** not even a member of the OECD, essentially adopts the OECD's initiatives because she will participate as a member within the global community and feels the pressure of the revealing on the grey list. After amending her domestic tax laws, to impose the new treaty obligations with the 14 protocols that she signed to incorporate the internationally agreed standard, as of 13 November 2009, Singapore has been removed of that list.[906] As Belgium and Austria, Singapore had also a bank secrecy. However, she has also conformed to the internationally agreed standard with regard to the exchange of (banking) information.[907] Nevertheless, this city State has no tax on income that is earned abroad and for that reason many citizens will seize this opportunity. As well, the financial sector

[900] Article 16 paragraph 2 Council Directive 2011/16/EU.
[901] Article L. 114 of the French Tax Procedure Book (FTPB).
[902] Belgium law extends the assessment period by 24 months; Belgian Act dated 1st July 2016, B.J. 4 July 2016; Administrative Circ. 2017/C/30 dated 9 May 2017 concerning Sections 45 until 50 of the Program-Act dated 01.07.2016.
[903] In case of exchange of information, the extended timeframe, in France, expires at the end of the year following the receipt of the answer or latest on the 31st of December of the third year following the one during which the initial deadline had expired; Article L.188A of the French Tax Procedure Book.
[904] Spain enables the assessment time period to be interrupted for a maximum of 12 months in case of exchange of information; Article 68. a and 150 LGT (Ley General Tributaria / General law on taxation).
[905] See section 4.4.2 for the Dutch implementation.
[906] OECD, A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard, Progress Made as at 2ndApril 2009.
[907] The editors of NTFR (2009). Aanpak buitenlands vermogen en belastingparadijzen. *NTFR, 2009/2164.* Section (Internationale ontwikkelingen).

has a lot of advantages, because Singapore provides for many exemptions on taxes and has a low tax rate.[908]

§10.2.3 Simplicity of procedures

The Netherlands implemented largely all the international and supranational regulations concerning the information exchange in the *WIB*. This is given the criterion of simplicity of a considerable degree, as it gives a better organized overview of the separate regulations. On supranational level, the DAC contains, by means of its amendments including the regulations of CRS, CBCR etc., also a compound overview of directives concerning the information exchange. Almost all the other **Member States** of the EU implemented the DAC, and its amendments, as the Netherlands commonly in one national act. Consequently, the DAC provide, therefore, the exchange of information in three different ways under the same circumstances: on request, automatically and spontaneously.

Within the **US** and **Singapore**, compared with the EU Member States, only international treaties with other States are concluded, on the basis of reciprocity,[909] concerning the information exchange. The taxpayer's information in the US is collected through the voluntary compliance functions of the Code[910] that requires taxpayers to file information returns and annual tax returns, as well as through IRS functions that allow the agency to request additional taxpayer information to make audit and assessment decisions. The IRS is not limited to seeking information from US citizens and residents, it can also seek to gather similar information about transactions and taxpayers that have a connection to the US from foreign States. In doing so, all of the provisions of the Code, Treasury Regulations, and case law apply.[911]

§10.2.4 Legal protection

Mainly, international instruments for the exchange of information do not include specific provisions for the legal protection of the taxpayers' rights. Propitiously, some States have important additional forms of legal protection within their domestic law. Mainly none of the States have provisions within their domestic law for prior legal protection, and therefore legal protection is only possible after the exchange of information has been carried out. This is with the exception of **Austria, Germany** and **Hungary**, which are

[908] The editors of NTFR (2009). Aanpak buitenlands vermogen en belastingparadijzen. *NTFR, 2009/2164.* Section (Internationale ontwikkelingen).
[909] Curtin, D.D. (1986). Exchange of Information under the United States Income Tax Treaties. *12 BROOKLYN J. INT'L L. 35, 66.*
[910] LB&I International Practice Service, Overview of Exchange of Information Programs, Department of the Treasury at 10 (Dec. 3, 2015), https://www.irs.gov/pub/int_practice_units/EOICUP_20.1_01R.pdf [hereinafter Overview of Exchange of Information].
[911] LB&I International Practice Service, Overview of Exchange of Information Programs, Department of the Treasury at 10 (Dec. 3, 2015), https://www.irs.gov/pub/int_practice_units/EOICUP_20.1_01R.pdf [hereinafter Overview of Exchange of Information].

providing, under some circumstances, possibilities for the taxpayer to prevent the exchange of their information.

Primarily also in **Austria**, legal protection is only possible after the information exchange has already occurred. With the exception of the situation in which the requesting State envisages the issuance of a formal notice, the taxpayer has to be granted the right to be heard,[912] which means that he or she must be informed about the exchange and its results. The authority is required to inform the taxpayer not only about the outcome of the gathering of evidence, but also about the sources from which it was taken. After the notice has been issued, the taxpayer has the possibility of lodging an appeal against it to the state administrative court in the state in which the notice was issued.[913]

Already in line with the ECJ's conclusion within the Berlioz case is the domestic law of **Germany**. It is a general case that investigative measures with an external effect based on a foreign request, which are directed to domestic participants, are administrative acts.[914] Administrative acts can be challenged with an objection. In addition, in **Hungary,** taxpayers have a right to view files[915] that means that they are entitled to view the documents concerning the tax paying procedure and could lodge an objection on this. However, there are restrictions when the tax authority does not have to provide this right to the taxpayer. We can differentiate between two types of restrictions: absolute and relative restrictions. Furthermore, personal information must be deleted after the fulfillment of the task or within period of usually five years.[916]

In the context of the CbCR regulations, an interesting guarantee for taxpayers and third parties in **France,** is the freedom to conduct business.[917] The French government considered to make all the economic and fiscal information concerning the country reports public.[918] Nevertheless, the Constitutional Council considered that it would enable all competitors to identify essential elements that would jeopardize the taxpayer's industrial and commercial strategy. Therefore, it was obviously disproportionately infringing the freedom to conduct business in the view of the pursued goal, which was the fight against fraud and tax evasion. Despite this decision, the EC has made a proposal for public CbCR.

[912] Section 115 paragraph 2 jo. section 161 paragraph 3 jo. section 183 paragraph 4 Federal Fiscal Code (FFC).
[913] Ellinger & Iro & Kramer & Sutter & Urtz, *Bundesabgabenordnung,* Manz 2011. Paragraph 167.
[914] Section 347 Fiscal Code (AO).
[915] "Iratbetekintési jog".
[916] See page 3 of the paper of Kardos, Kinga (2018). Tax autonomy and the administration of tax law. *Corvinus University of Budapest, 2018 EUCOTAX Wintercourse project.*
[917] Article 4 of the 1789 French declaration of the Man and citizen's rights "Déclaration des droits de l'Homme et du citoyen".
[918] Article 137 of the Sapin II bill: Law « Sapin II » related to transparency, fight against corruption and modernization of the economic life, 9 Dec. 2016: art 137 of the bill 830 of 8 Nov. 2016.

In addition, the French law concerning the CbCR regulations has implemented a very excellent professional secrecy obligation from the perspective of legal protection.[919] It means that if an agent gives any information to an unauthorized person, he will be sentenced to one year of prison and a 15,000 euro fine.[920] Thus, they also cannot provide information to third States.

The discussed EU case law of section 4.5, has a different effect in every State, with exemption of **Singapore** and the **US** that are not part of the EU. The ECJ's judgements in connection with EU law have set out principles that need to be considered when exchanging information. The implication of the judgement of the Berlioz case within Germany, has already been discussed in the first paragraph of this section. No additional interesting implications have occur in comparison with the Netherlands, thus further explanation of this case will left out of consideration in this legal comparison.

In the framework of the Sabou case, it can be noticed that **Germany,**[921] **Poland,**[922] **Spain**[923] and **France**[924] do not have legislation compelling tax authorities to notify taxpayers about foreign requests for information, rather, it is within the discretion of the tax authority to decide whether the concerned taxpayer will be informed. Within **Germany**, for example, the tax authorities provide a right of participant consultation,[925] if a burdensome administrative act has been taken against the taxpayer. This enables, in order to ensure the rights of a taxpayer as proceeding party, that this taxpayer must always be informed about his information that will be exchanged and to what extent. By participant consultation the involved taxpayer should be given the opportunity to comment and, if necessary, to submit reasoned objections. This means that in the case of a request of another State for information and vice versa, the taxpayer involved should in principle be informed of this if the purpose of the investigation is not jeopardized.[926] Whether the participation of the taxpayer may be renounced is in the discretion of the tax authorities.

Austria[927] had, also until 2014,[928] a regulation that ensured the prior notification to taxpayers in case of a request for information. This was effective legal protection for the taxpayer related to the exchange of his information to another State. The general problem with a notification procedure was that

[919] Article L.103 of the French tax procedure book (FTPB).
[920] Article 226-13 of the French penal code.
[921] AEAO Section 93 Fiscal Code (AO).
[922] Article 417 of the Act of 23 April 1964 on the Civil Code, Journal of Laws 1964, no. 16, heading 93, amended.
[923] Article 93 paragraph 1 of the General Regulation of Inspection.
[924] Article L. 118A of the French tax procedure code (FTPB).
[925] Sec. 91 Fiscal Code (AO).
[926] BMF: Merkblatt zur zwischenstaatlichen Amtshilfe durch Informationsaustausch in Steuersachen (3.1.2).
[927] This notification procedure was implemented in the 'Administrative Assistance Implementation Act' (Amtshilfedurchfuhrungsgesetz, ADG).
[928] Unger, P.(2014). Umfang und Grenzen der internationalen Amtshilfe. *Taxlex 2014*. P. 266.

it was presumed that this will jeopardize the success of exchange of information procedures.[929] In case of existing notification procedures the exchange of information can be delayed until a decision was made by the court or could even be completely prevented. In other words, there was a tension between efficiency on the one hand, and taxpayer rights on the other hand. Nevertheless, this thought is out of proportion with the sacrifice of the taxpayers' legal protection.[930]

The consequences of the ECJ's decision in the **Bara** case do not have an impact in all States, because several have already a legal basis for such exchanges or, for example, **Germany** has already the right of participant consultation.[931] In **Spain** the duty of collaboration[932] is the most relevant legal basis on which the different authorities may obtain personal tax information. Due to the implication of the Bara case, during the collection of information, this regulation which legally enables this, must be transparent, precise and taking the aspects into account that allow to inform the involved taxpayer about the status of their personal data with a 'minimum degree of certainty'. This is already the case under the duty of collaboration.

The last case to discuss, is the **Ravon** case and the effect of this judgement within the States' domestic tax law. **Poland** did already ensure the right to a fair trial[933] and right to privacy[934] through its Constitution that has supremacy over all other sources of law, including international and EU law. These rights are authorizing public authorities to undertake actions only on the basis of the provisions of binding law and within the limits set thereby. Due to the implementation of those rights within the Constitution, the domestic legislation and regulations need to take those elements into consideration, because it cannot be contrary to it.[935] Therefore, taxpayers in Poland cannot be placed in such situation as Ravon. Other States were impacted by the ECJ's decision and took the initiative to modify their internal domestic law in this respect. As such, **France** was only allowing the taxpayer to challenge such cases in front of the Judicial Supreme Court, which can only review the compliance with the law without considering the facts.[936] Therefore the ECJ concluded that the right to fair trial was not sufficiently protected by the French domestic law.[937] Following the Ravon case, the French legislator has decided to modify its legislation in

[929] Jirousek (2013). Das neue EU-Amtshilfegesetz. *Steuer und Wirtschaft International 2013*. p. 479.
[930] See section 9.2.4 of this master thesis for the explanation.
[931] Sec. 91 Fiscal Code (AO).
[932] Articles 93 and 94 of the General Law on Taxation (LGT) are the main provisions within the law on which taxpayers are obliged to provided relevant information to the Spanish tax authorities.
[933] Article 7 Constitution of Republic of Poland, Journal of Laws 2 April 1997, no. 78, heading 483, amended.
[934] Article 47 Constitution of Republic of Poland, Journal of Laws 2 April 1997, no. 78, heading 483, amended.
[935] Article 51 Constitution of Republic of Poland, Journal of Laws 2 April 1997, no. 78, heading 483, amended.
[936] Article L. 16 of the French tax procedure book (FTPB).
[937] Article L. 16B of the French tax procedure book (FTPB).

order to render it compliant with the convention and hence, better protect this right. Nowadays, the investigation procedure can be appealed in cassation in front of judiciary court, thus enabling the taxpayer involved to contest both the authorization and the proceedings carried out.[938]

As a result of the U.S. Privacy Act,[939] in the **US**, the use of information is limited to the purpose for which it was obtained, including information obtained about taxpayers. The provisions of the Privacy Act detail the process by which the government is allowed to collect, keep, and safeguard information.[940] Specifically, the Privacy Act requires that government agencies are only allowed to "collect and store information about subjects that is appropriate to their mission or task."[941] The rights to use the information has been expanded with the Patriot Act. This Act was enacted in 2001 following the September 11 terrorist attacks in the US and expands the ability of the IRS to release taxpayer information to federal law enforcement and intelligence agencies "for the purposes of punishing violators and detecting and preventing terrorist activities."[942]

The IRS has defined four categories of information that will be exchanged across international borders and the privacy protection to each category: taxpayer-specific information, sensitive information, non-sensitive information, and publicly available information.[943]As first the taxpayer-specific information, which is information necessary for tax assessments, may only be provided to a foreign tax official through the US Competent Authority Office, and is protected by the confidentiality standards.[944] Secondly, sensitive information is that *"which, if disclosed, could impair tax administration, harm treaty relations, or is otherwise contrary to public policy,"* including *"program plans or policy initiatives, investigative techniques, draft published guidance, emerging issues, or enforcement strategies" and "grace periods relevant to IRS compliance or other procedures."*[945] This information is protected by some provisions[946] and is not generally provided to other States unless there is a specific reason to release it. Like taxpayer-specific information, there is no legal mechanism allowing for the informal release of such information, such as confidentiality attached to trade and other business secrets. Non-sensitive information, on the other hand, is generally information, such as reports prepared by the IRS, and can be exchanged with

[938] It has been modified by article 164 of the law of the 4th August 2008.
[939] The (US) Privacy Act of 1974.
[940] Swindle, O. (2012). Perspectives on Privacy Law and Enforcement Activity in the United States. *PRIVACY & INFO. L. REPORT (2012).*
[941] Orson Swindle, *Perspectives on Privacy Law and Enforcement Activity in the United States*, PRIVACY & INFO. L. REPORT (2012).
[942] IRS Chief Counsel, *Publication 4639: Disclosure & Privacy Law Reference Guide*, IRS at 1-13 (Oct. 2010), https://www.irs.gov/pub/irs-pdf/p4639.pdf.
[943] I.R.M. § 4.60.1.1.2(3) (Sept. 19, 2014).
[944] Within Code section 6103 and 6105 and treaty agreements.
[945] I.R.M. § 4.60.1.1.2.2.
[946] Within Code section 6105.

foreign tax authorities without a the necessity of a formal tax information sharing agreement. Finally, public available information is readily available and accessible by the general public through the IRS website, public databases, and financial products.[947]

§10.3 Summary and conclusion

'To what extent do the tax law of the participating EUCOTAX Wintercourse States meet the criteria of the benchmark? What provisions are interesting for the Dutch and/or international tax law to combat tax avoidance and tax evasion?'

To a considerable degree, as already predicted, are the domestic tax systems of the EU Member States, due to the subordination and implementation of EU law, comparable. The domestic tax systems of the **US** and **Singapore** are the only ones excluded from this, and have only made arrangements on international level through DTCs, TIEAs and/or other regulation agreements. The EUCOTAX Wintercourse States have some considerable elements that may be interesting for the Dutch tax law, or even for the international and supranational regulations in the perspective of harmonization. By improving the current legislation and regulations on the criteria of transparency and simplicity information exchange is considered to be more effective and efficient to counteract and prevent tax avoidance and evasion. The criterion of legal protection need, additionally, also to be considered for the taxpayers' interests in the framework of the information exchange.

The differences between the States' domestic provisions concerning the information exchange also occur, in particular, due the effect of international and supranational law on each domestic tax system. Some States are more tax autonomous because the Constitution has supremacy and provisions included in this have still effect in the framework of international regulations. For example, this is the case in **Austria**, where fundamental principles are the highest-ranking law, even over international and EU law.[948] Therefore, every law and regulation must be subordinated to those principles. In such situation, it is possible that national provisions will restrict the international and supranational regulations in such a way that it is at the expense of the information exchange. This happens when domestic law is contrary with international law and does not lose its effect in this case of conflict.[949] It is essential for the optimization

[947] L.R.M § 4.60.1.1.2.4.
[948] C. Grabenwarter & M. Holoubek, *Verfassungsrecht - Allgemeines Verwaltungsrecht* Wien: Facultas Verlags. p. 49.
[949] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 3.2.

of effective and efficient international information exchange that all States participate in an optimal way. International and supranational instruments will have an optimal effect when the domestic (tax) law of the participating States do not restrict its effectiveness. Therefore, harmonization of each domestic tax system seems to be a perfect outcome, because then all tax systems will function the same.

Concerning the criterion of information transparency, it can be noticed that already considerable obstacles for an effective exchange have been abolished. This includes the bank secrecy, within **Austria**[950] and **Belgium**,[951] that prevented the effectiveness of the exchange of financial information held by banks within these States. An interesting provision that has come forward as reaction on the refrainment from the exchange of financial information, also due the bank secrecy, is the introduced FATCA by the **US**. In the circumstances that States have a bank secrecy, taxpayers must provide a waiver on this, otherwise the foreign bank is obliged to close his/her bank account.[952] In addition, for the expansion of transparency, the DAC enables the use of information for non-tax purposes.[953] Currently, all EU Member States will give such permission for the use of information for non-tax purposes if such information may also be used for the same purposes within the providing State.

Seen the simplicity of procedures, no interesting deviations and/or additions are implemented in the EUCOTAX Wintercourse States, which could be of an added value for the international and supranational regulations concerning the information exchange or for the Dutch tax law. Else ways, several elements for the taxpayer's legal protection are of a considerable degree in this legal comparison. It can be concluded, in a nutshell, that international and supranational information exchange regulations did not explicitly paid attention to the taxpayers' interests. Unfortunately, almost none of the States have specific prior legal protection provisions, before the exchange has occurred. Only **Austria**,[954] **Germany**[955] and **Hungary**[956] have, under specific circumstances, the right to be heard, the possibility to view the files and/or the possibility to lodge an objection on an investigation procedure for collecting the relevant information of a request. This last provision is in line with the judgement within the Berlioz case.

[950] Section 38 of the Austrian Federal Banking Act (Bankwesengesetz, BWG).
[951] T. AFSCHRIFT, *La levée du secret bancaire fiscal*, Brussel: Larcier, 2011, 38; Section 322 of the Belgian Income Tax Code (BITC).
[952] Sec. 1471(b)(1)(F) IRC.
[953] Article 16 paragraph 2 Council Directive 2011/16/EU.
[954] Section 115 paragraph 2 jo. section 161 paragraph 3 jo. section 183 paragraph 4 Federal Fiscal Code (FFC).
[955] Section 347 Fiscal Code (AO).
[956] See page 3 of the paper of Kardos, Kinga (2018). Tax autonomy and the administration of tax law. *Corvinus University of Budapest, 2018 EUCOTAX Wintercourse project.*

Other interesting elements arising from the conclusions of the discussed EU case law is that, in the context of the Sabou case, the tax authorities of **Germany,**[957] **Poland,**[958] **Spain**[959] and **France**[960] have the power to determine whether the taxpayer involved will be informed about the transfer of its information. In addition, **Austria**[961] had, just as the Netherlands, a notification procedure implemented in its domestic tax law, prior to the exchange of information. For similar reasons as the Netherlands and also due to international pressure, Austria had also waived this facility. The ECJ's judgement within the Bara case has no consequences for **Spain,**[962] because it had already the duty of collaboration that determines that (government) authorities may obtain personal tax information. Finally, it is interesting to mention that the conclusion of the Ravon case has no implication in the **Polish** domestic law, because the Constitution has supremacy.[963] The Constitution has implemented the right to privacy and the right to a fair trial and for that reason all other provisions of the domestic tax law must ensure those rights.

Finally, it can be concluded that the **US** provides a lot of limitations on the exchange and use of information. The government may only collect, keep and safeguard information that is appropriate to their mission or task.[964] Since the terrorist attacks on September 11, provisions are introduced concerning the release of information for the purposes of punishing violators and detecting and preventing terrorist activities.[965] The US wants to increase the likelihood that such terrorist plans will ever happen again. In addition, the IRS defined four information categories for the international exchange, all with different privacy protection elements. The underlying idea for this subdivision is that the different categories of information will be treated in the way they need to be treated from the perspective of the taxpayer's interest.[966]

In the recommendation, section 11.2, will be evaluated which elements are of importance to implement on Dutch level and/or international level to create efficient and effective legislation and regulations to achieve an optimal combatting of tax avoidance and evasion.

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[957] AEAO Section 93 Fiscal Code (AO).
[958] Article 417 of the Act of 23 April 1964 on the Civil Code, Journal of Laws 1964, no. 16, heading 93, amended.
[959] Article 93 paragraph 1 of the General Regulation of Inspection.
[960] Article L. 118A of the French tax procedure code (FTPB).
[961] This notification procedure was implemented in the 'Administrative Assistance Implementation Act' (Amtshilfedurchfuhrungsgesetz, ADG).
[962] Articles 93 and 94 of the General Law on Taxation (LGT) are the main provisions within the law on which taxpayers are obliged to provided relevant information to the Spanish tax authorities.
[963] Article 8 section 1 Constitution of Republic of Poland, Journal of Laws 2 April 1997, no. 78, heading 483, amended.
[964] The (US) Privacy Act of 1974.
[965] IRS Chief Counsel, *Publication 4639: Disclosure & Privacy Law Reference Guide*, IRS at 1-13 (Oct. 2010), https://www.irs.gov/pub/irs-pdf/p4639.pdf.
[966] I.R.M. § 4.60.1.1.2(3) (Sept. 19, 2014).

Section 11 Conclusion and recommendations

§11.1 Conclusion

This research described, analyzed and evaluated the current instruments concerning the exchange of information from a Dutch point of view. The main research question of this master thesis is: *"To what extent have the current administrative assistance collaborations for the exchange of information to levy taxes impact on the Dutch tax law and how should these cooperations concerning the information exchange be, from a Dutch point of view, to achieve optimal combatting of tax avoidance and tax evasion, both in the perspective of the Dutch tax autonomy?"* On behalf of the first element of the main research question, the descriptive part, an answer can be formulated by means of the literature and the law, which will be given in this conclusion.

This master thesis aims to provide a global picture of the administrative assistance regulations and legislation to levy taxes in cross-border situations. The Dutch perspective, such as law, policy and autonomy, concerning these 'complex', nonetheless, important international and supranational instruments is centralized within this master thesis. The impact of these instruments, in a nutshell, on the Dutch tax law can be subdivided into two approaches: the monistic and dualistic system.[967] Both approaches enter differently into the Dutch legal tax system and, therefore, will coordinate the internal law from another hierarchal view. Starting from the EU perspective, mainly directives of the EC have influenced the domestic law in relation to the administrative assistance to levy taxes, and such secondary EU law must be converted into Dutch legislation to ensure the effective application. The predominant directive in the context of this master thesis is the DAC, accompanied with its amendments and additional regulations, which is completely implemented in a singular Dutch act, to be precise the *WIB*. Subsequently, international regulations, multilateral and bilateral, such as the Strasbourg Convention, TIEAs, DTCs and other standards introduced by the OECD, are part of the coordination of States' domestic tax systems to achieve more harmonization.[968] Along with the primary EU law, international tax treaties have an immediate internal validity in the Dutch legal tax system, and according to the Dutch Constitution these provisions have always priority over the Dutch legislation and regulations, including the Constitution.

Thus, due to this hierarchal relationship, the Dutch legal tax system concerning the exchange of information is subordinated to and in accordance with international and supranational tax law. Verifying the impact of current international and supranational law on the Dutch tax autonomy, it can be concluded

[967] See section 3.2 of this master thesis.
[968] See appendix 1 for an organized overview of EU and international regulations concerning the exchange of information.

that the Dutch legislator got shortened on his wide margin of appreciation given by the Dutch law, as a consequence that the national tax autonomy got (more) restricted. Since the Dutch legal tax order has been subordinated to international and EU law, the Netherlands is not completely autonomous anymore in composing tax law to their own discretion. Seen from this perspective, the increasing administration of tax law seemed to be impressive on the exercise of the Dutch legislator. From another perspective it can be concluded that the Dutch tax autonomy, instead of restricted, becomes further reaching. Briefly summarized, States need each other's help for the correct exercise of their tax law, due to the principle of sovereignty[969] that limits States, such as the Netherlands, to levy taxes across their own national border. It is the need for receiving relevant information to levy taxes of taxpayers abroad, who are due to Dutch taxes. This can be realized by administrative assistance between States, which is the exchange of information that makes the principle of sovereignty less burdensome. It can be said that national tax authorities did finally achieve the levels of international tax cooperation required to maintain the national tax sovereignty.[970]

Such joint coordination of tax law results in a more efficient and effective neutral tax system on international and EU level, because the exercise of national public power gets more harmonized. General administrative tax implementation ensures instruments that provide the same regulations, rights and obligations for all (EU Member) States, and therefore collaborators expect that a better integrated system will be created around the world. The international instruments will have an optimal effect when the domestic (tax) law of the participating States do not restrict its effectiveness. This happens when domestic law is contrary with the international rules and does not lose its effect in case of conflict or in case national provisions delay the effective exchange of information.[971] The Netherlands participates largely in line with these initiatives, because international cooperation is important according to their tax policy.[972]

Although, in recent years already progress has been made for more effective and efficient exchange and an increase of the scope that this information exchange covers, there is still a long way to go to achieve the optimization of effective and efficient legislation and regulations in the field of international information exchange, if this is even possible. This appears, for example, from recent 'peer reviews' of the Global Forum, that not (yet) all States have implemented international regulations in an

[969] See page 13-14 of this master thesis.
[970] Stewart, M. (2012). Transnational tax information exchange networks: step towards a globalized, legitimate tax administration. *World tax journal, June 2012.* Paragraph 1.
[971] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 3.2.
[972] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* P. 17.

optimal way. The 'peer review' concerning the implementation of ruling regulations, has shown that the Netherlands has an enormous delay in providing the information concerned.[973] The Dutch tax authorities are currently working hard to implement the OECD and EU agreements concerning the rulings.[974] Thus on this moment, the exchange from the perspective of the Netherlands is not optimal yet in this procedure. In addition it is not even sure how effective this exchange will be in the context to optimal combat tax avoidance and evasion. This need still to be proven. This is also the case with the CbCR regulations that are still in the trial phase. The actual impact of both regulations has not been determined yet. Also, on international level, not all the States of the world are participating in such international collaborations or States have not concluded effective (bilateral) tax treaties with each other for the exchange of information.

On the level of transparency, simplicity and legal protection, the current tax law concerning the exchange of information has been reviewed and evaluated, by means of the research benchmark, in section nine. That the information exchange is not optimal yet, has also been shown by this analysis of the current legislation and regulations. This will be further discussed and concluded below.

§11.1.1 Information transparency

In the scope of this research transparency means '*the availability, understandability (in form and content), visibility and timely accessibility of any form of 'relevant' information, which may be of importance for the correct taxation by the tax authorities.'* Firstly, it can be concluded that the regulations and legislation related to transparency includes, enhanced in recent years, already a wide scope of information that need to be exchanged. The exchange helps tax authorities to obtain the relevant information for the correct fulfilment of their tax law. Though, the principle of reciprocity, withhold the Netherlands from providing and requesting any information that does not comply with this principle, which can interfere the effective exchange of information.

In addition, the research has analyzed that the taxpayer is obliged to be very transparent to the Dutch tax inspector by means of providing information which 'may' be of importance.[975] As the Dutch tax authorities can obtain much information, briefly said, they are also able to exchange this information, in the first place, to tax authorities of other States. Nevertheless, even the current transparency seems to be already well developed, there will probably appear new problems concerning situations of tax fraud that must be combated. For that reason, it can be doubted whether the level of obtaining and exchanging

[973] See section 7.3 of this master thesis.
[974] Letter of State Secretary of Finance, 11 January 2017, 2017-0000005643. *Published in NTFR 2017/215.* P. 2.
[975] Article 47 AWR jo. 53 AWR.

information is already optimal enough, or new regulations need to be introduced. The provisions within such new regulations must then ensure a greater flow of information collected from other information sources, such as other States, and the exchange of new information.

In the Dutch government's opinion, to combat tax avoidance and evasion effectively, it requires a change of the tax resident's culture.[976] Transparency is a key element that is of great importance for achieving this culture change, because access to information is indispensable to influence taxpayer's behavior.[977] Currently, in this context, the EC published a proposal for a mandatory disclosure Directive,[978] in conjunction with the recommendation of the OECD,[979] requiring financial intermediaries (such as tax advisors, lawyers, notaries, trust officers etc.) to provide information to their national tax authorities on cross-border, possibly aggressive, tax structures. Subsequently, the tax authorities transfer this information to a central database managed by the EC, to which the tax authorities of all Member States have access. The publication of the Panama Papers has shown that financial intermediaries are having, occasionally, an important position in setting up artificial or hidden offshore structures with the objective to evade taxes.[980] Hence, this initiative will increase the supervision on such financial intermediaries and will also introduce effective negative incentives when they promote aggressive tax planning structures.[981]

Another element to increase the transparency is the OECD's intention to make the outcomes of the CbCR, the country reports, public accessible.[982] They believe that information, exchanged on the tax authorities' level, is also of importance for businesses. By means of the EC proposal, the EU takes the lead in starting the publication of country reports. Although the EC is positive on the one hand, the MNEs are less enthusiastic about the proposed regulations to make data public accessible. They fear an increase in the administrative burden and the disclosure of information that might be sensitive to competition. Concerning the combatting of tax avoidance, the public CbCR can persuade MNEs to make a 'correct' allocation of profits to the various States within the group.[983] The Dutch government support such initiatives, because it provide the Dutch tax authorities with a better understanding of tax structures used

[976] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 3.4.
[977] Letter of the State Secretary of Finance, 17 January 2017, 2017-000000951. *Published in Tijdschrift Formeel Belasting recht 2017/01.* Paragraph 2.1.
[978] Pursuant to this proposal, Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements is to be amended with new transparency rules for intermediaries that design, market, sell and/or implement potentially aggressive tax planning schemes with a cross-border element.
[979] BEPS Action 12 'Mandatory disclosure'.
[980] Letter of the State Secretary of Finance, 17 January 2017, 2017-000000951. *Published in Tijdschrift Formeel Belasting recht 2017/01.* Paragraph 2.3.
[981] Letter of the State Secretary of Finance, 17 January 2017, 2017-000000951. *Published in Tijdschrift Formeel Belasting recht 2017/01.* Paragraph 2.3.
[982] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 3.4.
[983] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.112.

by tax residents. These measures are essential to achieve the necessary culture change when it comes down to tax avoidance.[984]

§11.1.2 Simplicity of procedures

Secondly, the simplicity/complexity of the used exchange procedures has been reviewed. The definition of this selected criterion used for the research benchmark is: *the opposite of the lack of overview and certainty as a result of the many and difficult procedures, regulations and systems around the tax administration.* It can be concluded that there are already many regulations on international and EU level in the context of this research, causing complexity. Successfully, the DAC and the *WIB* implemented all these regulations that enabled a better overview, because of the existence of just one singular law.

Additionally, concerning the cross-border information exchange, there are three different procedures: automatically, spontaneously and on request. In comparison, the exchange on request seems to be the least efficient procedure, because of the obliged principle of exhaustion regulation that information will only be provided if the requesting State has first used the usual options to collect the relevant information in its own State.[985] This procedure takes time and effort within the requesting State and, also, if a request still need to be made, this will take time and effort within the requested State to process such a request. Unfortunately, in the current regulations and legislation the exchange on request is often used, from which it can be concluded that the exchange can still improve much on its efficiency. Hence, such additional effort is not implemented in the automatic and spontaneous exchange procedures. Due to the automatic exchange procedure, systematic, category-wise and periodic exchange of information can be realized, which improves efficient exchange of information necessary for structural risks of tax avoidance and evasion. Additionally, the spontaneous exchange procedure will provide necessary information that the requesting State otherwise, in the first place, will not request because they do not know about the existence of such information.

Subsequently, the use of standard templates and instructions in most exchange procedures are important for the simplicity of the information exchange procedures.[986] By means of such templates, the competent tax authorities have guidelines for what information they need to fill in and thus need to be exchanged. This results in consistent and clear information provision from every State that use those templates, because they are exchanging the same information asked by the templates. This promotes the

[984] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 3.4.
[985] Article 14 paragraph 2 WIB & article 17 Council Directive 2011/16/EU.
[986] This is not the case with the exchange of rulings, see section 9.2.7.

processing of the information, because the template gives a clear overview of the information and every exchange will contain similar information, which enables the consistence of the information provision.

§11.1.3 Legal protection

Thirdly, from analyzing and evaluating the legal protection of the taxpayers' rights on both national and international level, it can be understood that the current tax law concerning the exchange of information need to be improved on this field. Legal protection is *'the taxpayer's possibility of protection, especially through the law and the courts, for undesirable effects',* that includes in this research the possibilities within the information exchange regulations or other tax law that have effect on those regulations. Superficially said, it seemed that States, including the Netherlands, are primarily focused on their own objectives to counteract tax avoidance and evasion, and therefore the need for relevant information for their 'fair' taxation. Hence, the procedures' effectiveness appears to be the guiding criterion for the interpretation of the development of those international instruments concerning the exchange of information. Far-reaching powers are included in (inter)national standards to ensure the taxpayer's compliance and even (effective) enforcement provisions are implemented in the law to discourage them from non-compliance. In the interest of information deliveries the interest of the taxpayer is limited in favor of the efficiency.[987] Therefore, the taxpayer's interest should be reconsidered within the international standards, because this is currently an underexposed subject.

The ECJ and the European Court of Human Rights benefit the improvement of the taxpayers' legal protection within the supranational regulations. This occurred in the Berlioz, Bara and Ravon case.[988] The ECHR, among others, offers citizens of EU Member States the opportunity to have the respect, or lack thereof, of their rights and fundamental freedoms tested by a judiciary. In our democratic (European) Constitutional State there are also restrictions to the exchange. Therefore it is important the courts, for example through the application of the ECHR, tries to maintain a certain balance between efficient tax audits and fundamental legal principles.[989] It is a good progress for the taxpayer's interest that the ECJ and the European Court of Human Rights have a critical look on the legal protection in such cases of (national) information exchange.

[987] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 465.
[988] See section 4.5 for the explanation of these cases, section 9.2.4 for the review of these cases and section 9.4.3 for the conclusion of these cases.
[989] Lambooij, M.V. (2017). Iets meer rechtsbescherming bij inlichtingenuitwisseling? *NTFR, 2017/41.* Paragraph 8.

Schenk-Geers[990] has already concluded in 2014, in her study on the legal status of the taxpayer concerning the exchange of information between States, that in the context of international exchange of information, the Dutch government also has a legal obligation regarding the taxpayer. This concerns the taxpayer who must supply his/her information when the Dutch Minister must comply with its obligation to provide information to its Contracting partner. This duty of law must be weighed to the interests of the taxpayer and must be implemented in the international regulations that govern this exchange. However, the obligation to provide information is not absolute, and therefore all exchange arrangements provide grounds for rejection or omission. From this it can be concluded that the providing States do have the possibility to weigh certain interests of their taxpayers against the interests of their own or the other State.[991]

[990] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 465-478.
[991] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 473.

§11.2 Recommendation

§11.2.1 Efficient and effective exchange

"..and how should these cooperations concerning the information exchange be, from a Dutch point of view, to achieve optimal combatting of tax avoidance and tax evasion, both in the perspective of the Dutch tax autonomy?" The recommendation for the second element of the main research question, the normative (prescriptive) part, can be given direction by evaluating the review of the current tax law in section nine and by the comparative law of section ten. To recommend the most important elements that a State should impose to optimize the exchange of information to optimal combat tax avoidance and evasion, by means of the analysis of the selected criteria, it is not only necessary to examine what is politically feasible, but especially what is necessary, given the unpredictable effects of globalization, in the perspective of the regulatory problem and the social problem. This is necessary to keep the tax system of a State executable.

Where on the one hand tax treaties, directives and other regulations encourage the exchange of relevant tax information, there is, or need to be, at the same time limits to the exchange of privacy-sensitive information.[992] Tax authorities are granted much possibilities to exchange information, resulting that privacy aspects can be jeopardized. Such far-reaching powers are necessary in cross-border situations for the correct exercise of the State's tax law and to counteract (and prevent) tax avoidance and evasion. The exchange procedures seems only to be exercised from the interest of the tax authorities, to which the interests of taxpayers involved are subordinated insofar those interests obstruct effective and/or efficient exchange. There is a natural tension between the objective of the government collecting information for the correct taxation on the one hand, and the taxpayers' privacy on the other hand.[993] Therefore a justified balance need to be created between both objectives of the public interest of the State and the individual interest of the taxpayer.[994] In this recommendation this balance will be made, by means of evaluating the selected criteria of the research benchmark, to accomplish an 'as optimal as possible' effective and efficient information exchange to combat tax avoidance and evasion.

The Netherlands has received a lot of criticism because of the favorable tax-friendly business climate, seen from the perspective of other States. As reaction to change this thought, the Netherlands has opted for more transparency.[995] For that reason, is seemed desirable to take measures that could lead to faster and more information provisions to other States.[996] As already concluded, the Dutch tax inspector can obtain

[992] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 132.
[993] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 132.
[994] Neve, L.E.C. (2013). IFA-congres 2013, subject 2: inlichtingenuitwisseling. *Tijdschrift Formeel Belastingrecht, 2013/08-06.* Paragraph 4.
[995] See page 16 of this master thesis.
[996] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 1.

all relevant information from the Dutch taxpayer, thus no transparency improvements will be recommended on this level. The international cooperation, on the other hand, seems also to exchange already a bunch of information on a wide scope of fact complexes. In this research it is not reviewed on which fact complexes tax authorities have still a lack of information to determine the correct tax claim and, in particular, what kind of specific regulations need to be implemented to exchange such information. This is for that reason not considered within this recommendation. Moreover, to improve international transparency, it is advisable to annually increase the minimum coverage ratio of the treaty network, so that eventually all States in the world have concluded agreements concerning the information exchange.[997]

On the other hand, in this context, it is also important to consider the national thought about the government's relationship with the taxpayer with regard to tax information duties. Although transparency is a great advantage from the perspective of the States, it has the ability to infringe on taxpayer's rights when their information is exchanged across international borders.[998] From both perspectives, the Dutch government's consideration within international exchange procedures will relate, in particular, to the disclosure of the taxpayer's information to other tax authorities to ensure more transparency in relation to the government's duty of care[999] towards the taxpayer's interest. Firstly, it is important that national legislation, in the framework of international assistance, is critically evaluated with a view to the (correct) relation between the interests of the government and those of the citizen. Naturally, it will also be necessary to look at international developments, not only because the Netherlands is subject to this, but also because, like every member of the international community, it has co-responsibility for the development of the law within this community. [1000] The principle of reciprocity ensures, from a Dutch view, such good balance between the government's interest of (more) transparency and the taxpayers' legal protection. This principle withhold the Dutch tax authorities from providing and requesting any information that does not comply with this principle.[1001] However, it is recognized that a too rigorous application of the principle of reciprocity could frustrate effective exchange of information.[1002]

[997] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 6
[998] Alfredo Garcia Prats, F. & Melis, G. Exchange of Information and Taxpayers' rights ('). University of Valencia and LUISS University Rome. Section (introduction).
[999] See page 27 of this master thesis.
[1000] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 6-7
[1001] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P.93.
[1002] Paragraph 15 Article 26 OECD Commentary 2017.

Not only the Netherlands is struggling with tax residents who are avoiding their tax obligations. All States have to deal with this problem, because it is an international issue. Therefore, it can only be effectively combated at an international level. Undertaking unilateral measures means that the problem of international tax avoidance will only move up to others.[1003] In addition, it should also be reminded that the position of the taxpayer should not only be an issue for the States to decide domestically. Considering the growing relevance of international cooperation tools between tax authorities of different States, the position of the taxpayer's rights should not only be a matter for States to decide unilaterally. I recommend that the protection of the taxpayer's rights should also be extended within such international mechanisms.[1004] Deriving from the conclusion of the Sabou case, is that the concretion of the position of the taxpayer, within the framework of the information exchange, must mainly be ensured within the States' domestic law. The taxpayers' rights concerning the cross-border exchange of information cannot be ensured and protected within the Dutch tax system, because of the supremacy of the higher rule of law over the Dutch legislation and regulations, including the Dutch Constitution. In case the Dutch domestic law conflicts with international and supranational law, those higher rules of law will always prevail and the national provision will lose effect. For that reason, it is also recommended that the taxpayer's rights will be arranged within the international and supranational regulations.

Due to this recommended harmonization, all States will exchange information on the same legal provisions and the taxpayer's certainty will improve in which way the exchanged information will be treated. International and EU law does not have supremacy in every State's domestic law. If this is the case, it is possible that domestic regulations will restrict international provisions in such a way that it is at the expense of the Netherlands or other States, because all the States need to participate in an 'optimal' way to combat tax avoidance and evasion. Harmonization of the domestic tax systems will prevent this. Also has been noticed that the duty of confidentiality differs within States, causing that exchanged information is not treated the same as it would be in the State of residence.[1005] This is a breach of the guarantee of the treatment of taxpayer's legal protection. Therefore, the optimal outcome for (Dutch) taxpayers concerned will be the harmonization of their rights within the international and supranational exchange regulations, because this will ensure the same provisions, taxpayers' rights and treatment of those rights within every State with which the Netherlands exchange their personal information.

[1003] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 1.
[1004] Alfredo Garcia Prats, F. & Melis, G. Exchange of Information and Taxpayers' rights ('). University of Valencia and LUISS University Rome. P. 2.
[1005] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. P. 129.

Concerning the internationalization and harmonization of tax systems, no 'Global Code' has been arranged which encodes the duty of cooperation between tax authorities of different States. A Global Code provides a common set of guiding principles to promote the integrity and effective functioning of regulations.[1006] This could be of importance as additional provision within EU and international law.

In my view, information need to be exchanged on a mandatory automatic base in combination with spontaneous exchange procedures, by means of standard templates used by all States, because then it will accomplish the most optimal effective and efficient administrative assistance to levy taxes, seen from the perspective of the government's interests concerning the criterion of simplicity. Such regulations need to be implemented in a singular Act, such as the DAC or *WIB*, for a more organized overview. The automatic information exchange is also regarded by the EC as the most effective instrument of determining the tax debt in a cross-border situations and combatting tax fraud.[1007] Nevertheless, the exchange procedures seen from the perspective of the taxpayer's interest, the exchange on request provides more guarantees. In this respect, limits to the exchange has been implemented in the *WIB,*[1008] among which the Minister does not provide the information upon request. A limit to this exchange on request is the principle of exhaustion, which is a heavy burden on tax authorities, because this procedure takes a lot of time and effort, but is immediately a guarantee for the exchange of the taxpayer's information.

Thus, to accomplish the 'most optimal' effective and efficient information exchange to combat tax avoidance and evasion, I recommend that future international information exchanges need to include a greater flow of information on an automatic basis, supported by spontaneous exchange procedures. To create a greater flow of information an expansion of the information sources is essential, both more States need to be covered within the exchange network and the fact complexes need to be broadened. To expand the network, those regulations need to be implemented in multilateral measures and must be concluded, seen from the most optimal view, by all States in the world, resulting in more harmonization of the States' domestic tax systems. This recommendation can be extended by the decentralization of the information exchange instead of the exchange on the level of tax authorities. More effectiveness can be achieved by adapting the current regulations in such a way that information exchange used to prevent tax

[1006] Aucejo, E.A. (2018). Towards an International Code for administrative cooperation in tax matter and international tax governance (translated from Spanish). *Revista Derecho del Estado n.o 40, enero-junio de 2018.* Paragraph 2.1.
[1007] J.A. Booij, *Internationale fiscale gegevensuitwisseling,* Kluwer: Deventer 2018. p. 27.
[1008] Article 14 paragraph 2 WIB & article 17 Council Directive 2011/16/EU.

avoidance and evasion will be decentralized.[1009] The contact about and with taxpayers become more direct and it is expected that more information can be exchanged.[1010] In order to increase effective and efficient information exchange and, in addition, to protect the taxpayers' rights, it is advisable to combine aforementioned recommendations with provisions of legal protection. Such provisions of the legal protection of the taxpayers' rights need to be implemented within the international and EU regulations concerning the exchange of information. Due to this harmonization of each domestic tax system, a right balance between the interests of the State and taxpayers' interest will be created.

Schenk-Geers[1011] concluded that it is not necessary to focus on the protection of privacy, but the legal protection must be connected to the concept of information as object of the right to undisturbed property. Then the interests of the information supplier, including the third party, in general can be recognized and protected. In addition, from the general administrative law, provided that this focuses on the specific situation and interests of the information providers of taxpayers, also appears to offer adequate legal protection. Under that circumstance there is an administrative legal relationship and a characteristic of this is that the decisions of the government must be announced in advance. Because the current problem is that only protection afterwards is applicable, because the international and national exchange law does not have a duty to disclose that precedes the actual exchange. The involved taxpayer has the risk that the other State has acted unlawfully and that damage has occurred, and therefore he has to litigate in the other State. Obtaining compensation will be difficult when the other State has the liability. The recommendation to prevent damage is creating prior legal protection that need to be implemented within the information exchange regulations, such as:

- the quality of the duty of confidentiality by the State, which is included in all exchange arrangements; and,

- notification right: the necessity or the desirability for the taxpayer to be able to defend the intended exchange of his/her personal information. In this way the taxpayer must be informed of an intended exchange and the content of the information intended to be provided. This is only possible in case of a request for the information exchange; and,

[1009] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 6
[1010] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 6
[1011] A.C.M Schenk-Geers, *Internationale fiscale gegevensuitwisseling en de rechtsbescherming van de belastingplichtige*, Tilburg 2007. p. 475.

- the right of intervention: the right to objection and appeal. Specific professional grounds, derived from the legality requirements of the international exchange law, and on those grounds for exception for that exchange obligation, which are to be regarded as interests of the information providers.

§11.2.2 Withholding tax regime

Currently the administrative assistance to levy taxes is a permanent instrument in States' legal tax systems as a reaction on the increasing influence of globalization and technological progress. It is almost impossible to imagine the absence of such international cooperation. There is no doubt that States need more international cooperation in taxation to defend the efficient and fair collection of taxes. Nevertheless, it is worth analyzing the alternative model of the withholding tax regime as counterpart of the 'complex' international cooperation.[1012] Withholding tax regime means, in an absolute implemented approach, that tax is only levied in the State where the tax base has arisen. The main reason to switch to an international withholding tax regime is the less burdensome administrative obligation for States as they directly receive the tax revenue on foreign (investment) income. The withholding tax regime makes complicated matching and tax enforcement procedures obsolete which is of course particularly appealing not only during financial crises but also for developing States.[1013]

Originally initiated by the Swiss Banking Association,[1014] the Swiss government proposed a withholding tax regime[1015] for future offshore investment income (incl. capital gains) as an equivalent alternative to automatic information exchange.[1016] The main objective of this proposal is to protect the privacy of financial information of bank clients that Switzerland considered as really important due to its bank secrecy (due to the international pressure it will be completely cancelled this year, 2018). Under the Swiss proposal, FIs were required to withhold and deduct a tax on investment income accruing on customers' (bank) accounts and the revenue from the withholding tax is then anonymously delivered to the foreign government.[1017] Hence, instead of reporting information about account holders, the banks directly deliver the tax revenue deducted and withheld from the taxpayer. In return, the investment

[1012]Cavelti, L.U. (2013). Automatic Information exchange versus the withholding tax regime globalization and increasing sovereignty conflicts in international taxation. *World Tax Journal, June 2013.* P. 213.
[1013] Cavelti, L.U. (2013). Automatic Information exchange versus the withholding tax regime globalization and increasing sovereignty conflicts in international taxation. *World Tax Journal, June 2013.* P. 193.
[1014] See Swiss Banking Association, Project Flat Rate Tax, Flat Rate Tax on Assets Held with Banks on a Cross- Border Basis (Dec. 2009), available online from http://shop.sba.ch/999957_e.pdf.
[1015] The Swiss government has named its proposal "final withholding tax" or 'Rubik'. Swiss Federal Department of Finance, Final Withholding Tax, the Swiss Proposal, Key Points in Brief (Oct. 25, 2010), available online from http://www.efd.admin.ch/dokumentation/zahlen/00579/00608/02189/index.html?lang=en.
[1016] Cavelti, L.U. (2013). Automatic Information exchange versus the withholding tax regime globalization and increasing sovereignty conflicts in international taxation. *World Tax Journal, June 2013.* P. 197.
[1017] The tax rate that is deducted and withheld follows the tax rate of the State of residence of the taxpayer concerned. If a treaty partner changes its tax rates, the tax rate for the withholding tax must be amended accordingly.

income that was subject to the withholding tax is no longer due to any other taxation, taxpayers whose withholding tax is deducted from their investment income would no longer be required to declare the offshore investment income in their State of residence and FIs can protect the financial privacy of their customers, necessarily in States with a bank secrecy.[1018] In return, the tax domicile country anonymously receives the tax revenue generated by the withholding tax.

Comparing the pros and cons of both models, in the question if the withholding tax regime is more efficient and effective in preventing tax evasion, Cavelti concluded in his research[1019] that the instruments concerning the automatic exchange of information is better suited as a global standard. The withholding tax regime, as it is proposed by the Swiss government, fails to cover changes in principal and, what is particularly disadvantageous for the Swiss model, it fails to establish a global level playing field. The Swiss concept is designed as a model for a bilateral solution between a selected numbers of Sates. The conclusion of the research of Stewart[1020] adds to this that we have to keep in our minds that receiving information is just one step towards the real goal of the collection of adequate tax revenues and an effective and fair division of the global tax base. Currently, only limited information is available compared with the scale of global financial transactions, and a significant improvement in operations and processes of national tax authorities, as well as much closer cross-border cooperation between tax authorities is necessary. Therefore, the establishment of an effective system for withholding of taxes should be carefully watched and the wider possibilities of this considered by the governments.

Given the view to the conflict of the principle of sovereignty in worldwide taxation, it is crucial that international organizations and national governments are aware of the increasingly conflicting sovereignty interests of every State. They must avoid seeing harmonization of national tax systems as the only solution for the fight against tax evasion and tax fraud. Otherwise, it will be difficult to enhance legitimacy in the States, which is indeed necessary to achieve a desirable transnational cooperation between tax administrations.[1021]

[1018] Cavelti, L.U. (2013). Automatic Information exchange versus the withholding tax regime globalization and increasing sovereignty conflicts in international taxation. *World Tax Journal, June 2013.* P. 175.
[1019] Cavelti, L.U. (2013). Automatic Information exchange versus the withholding tax regime globalization and increasing sovereignty conflicts in international taxation. *World Tax Journal, June 2013.* Paragraph 7.
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To this, the Dutch State Secretary announced in his letter on the Dutch tax policy[1022] that in order to counter tax base erosion, they want to take measures that primarily prevent the internationally oriented Dutch tax system as tool for transfer activities to tax havens. The intention is to introduce a system of withholding taxes on outgoing dividend, interest and royalty flows to low tax jurisdictions and in abusive situations. With the introduction of these withholding taxes, the Netherlands is anticipating an EU discussion on possible measures against non-cooperative countries.

§11.2.3 Further research

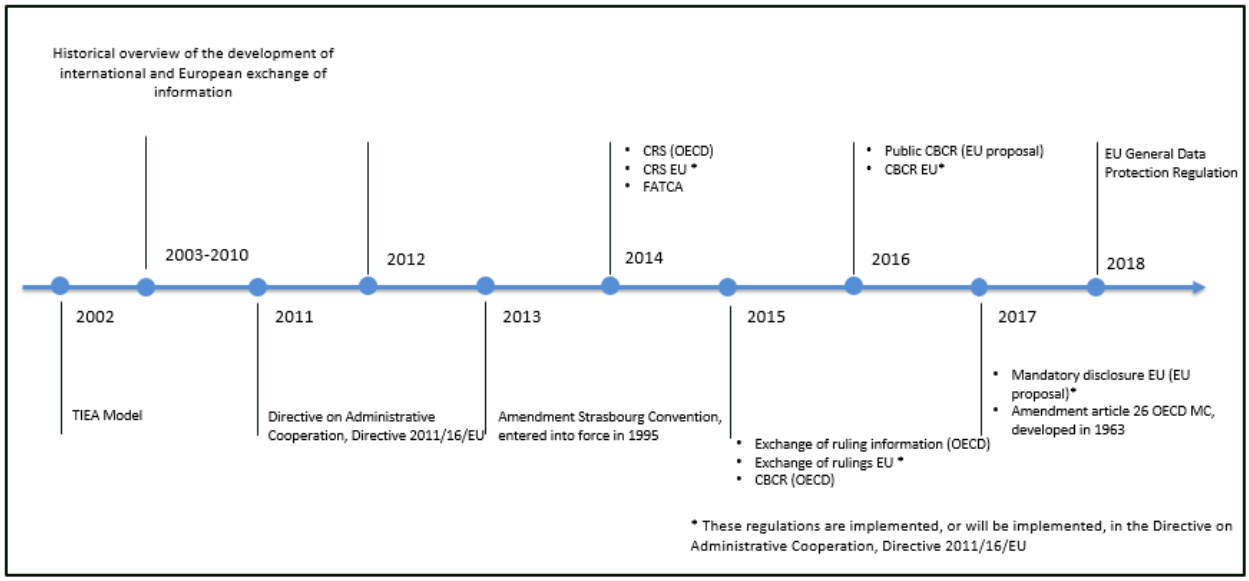
As third and final recommendation, to have a better overview of the social issues concerning the exchange of information, further research should be done. The recommended fiscal science, used for this further research, need to be very critical on its research methods. In particular, the selection for a research method that make allowances for the effects of offered legal solutions on society should be essential, as this research area concerns problems that are prompted by developments in society, like globalization. If the fiscal science fails to be sufficiently critical of the defense of the research method(s) used, comparative taste will remain the predominant case with comparative research in the field of this master thesis.[1023]

A new research question, following up the main research question of this master thesis, could be: *"What is the influence of social aspects, such as the globalization, on the decision making of tax law and to what extent must these social aspects considered for an efficient and effective administrative assistance to levy taxes?"*

[1022] Letter of the State Secretary of Finance, 23 February 2018, 2018-0000026987. *Published in V-N 2018/14.2.* Paragraph 2.3.
[1023] Vries, J.J. (2011). De OESO TIEA- en JAHGA-normen voor 'effectieve uitwisseling van betrouwbare informatie'; een 'effectieve' oplossing bij preventief toezicht op gestelde belastingregels? *MBB 2011/10-01.* Paragraph 6.

Appendix

Appendix 1



This chart gives a clarification of the implementation of the regulations and legislation that will be discussed within the framework of the exchange of information.

Appendix 2

All scores are relative to each other

2.1 Article 26 OECD MC and TIEA

Criteria	international level	EU level	Dutch level
	Article 26/TIEA	**xxx**	**WIB[1024]**
Transparency	+		" "
Simplicity	+/-		" "
Legal protection	+/-		" "

2.2 Strasbourg Convention

Criteria	international level	EU level	Dutch level
	Strasbourg Convention	**xxx**	**WIB[1025]**
Transparency	+		" "
Simplicity	+		" "
Legal protection	+		" "

2.3 DAC

Criteria	international level	EU level	Dutch level
	xxx	**Directive 2011/16/EU**	**WIB[1026]**
Transparency		++	" "
Simplicity		+	" "
Legal protection		+	" "

[1024] From previous sections, it can be concluded that no interesting deviations and/or additions are made from article 26 on international level. Therefore the same score applies to the provisions on Dutch level.
[1025] From previous sections, it can be concluded that no interesting deviations and/or additions are made from the Strasbourg Convention on international level. Therefore the same score applies to the provisions on Dutch level.
[1026] From previous sections, it can be concluded that no interesting deviations and/or additions are made from the DAC regulation on international level. Therefore the same score applies to the provisions on Dutch level.

2.4 Case law

Criteria	international level	EU level	Dutch level
	xxx	**Sabou, Berlioz, Bara, Ravon**	**AWR/WIB[1027]**
Transparency		xxx	xxx
Simplicity		xxx	xxx
Legal protection		++	++

2.5 FATCA

Criteria	international level	EU level	Dutch level
	FATCA (NL IGA)	**xxx**	**WIB[1028]**
Transparency	+/-		" "
Simplicity	++		" "
Legal protection	+/-		" "

2.6 CRS

Criteria	international level	EU level	Dutch level
	CRS	**Directive 2014/107/EU[1029]**	**WIB[1030]**
Transparency	+	" "	" "
Simplicity	++	" "	" "
Legal protection	+/-	" "	" "

[1027] By means of the ECJ's review, principles have been formed concerning legal protection that need to be considered when exchanging information. This has an implication in the Dutch tax law.
[1028] From previous sections, it can be concluded that no interesting deviations and/or additions are made from the FATCA regulation on international level. Therefore the same score applies to the provisions of FATCA on Dutch level.
[1029] From previous sections, it can be concluded that no interesting deviations and/or additions are made from the CRS regulation on international level. Therefore the same score applies to the provisions on EU level.
[1030] From previous sections, it can be concluded that no interesting deviations and/or additions are made from the CRS regulation on international and EU level. Therefore the same score applies to the provisions on Dutch level.

2.7 Rulings

Criteria	international level	EU level	Dutch level
	Ruling regulations	**Directive 2015/2376/EU**	**WIB[1031]**
Transparency	+	++	" "
Simplicity	+/-	+	" "
Legal protection	-	-	" "

2.8 CBCR

Criteria	international level	EU level	Dutch level
	CBCR	**Directive 2016/881/EU[1032]**	**WIB & CITA[1033]**
Transparency	++	" "	" "
Simplicity	++	" "	" "
Legal protection	-	" "	" "

2.9 Dutch level

Criteria	international level	EU level	Dutch level
	xxx	**xxx**	**AWR**
Transparency			++
Simplicity			+
Legal protection			+/-

[1031] From previous sections, it can be concluded that no interesting deviations and/or additions are made from the Ruling regulation on EU level. Therefore the same score applies to the provisions on Dutch level.
[1032] From previous sections, it can be concluded that no interesting deviations and/or additions are made from the CbCR regulations on international level. Therefore the same score applies to the provisions on EU level.
[1033] From previous sections, it can be concluded that no interesting deviations and/or additions are made from the CbCR regulations on international and EU level. Therefore the same score applies to the provisions on Dutch level.

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International law

Benelux recovery treaty

Convention of 5 September 1952, Trb. 1952, 137 approved for the Netherlands by the Law of 8 July 1953, Stb. 1953, 332.

BEPS Action 5

BEPS Action 5 on 'Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance.

CbC MCAA

The Multilateral Competent Authority Agreement on the Exchange of CbC Reports.

CRS MCAA

The CRS Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information.

Dutch IGA

Approval of the Convention concluded in The Hague on 18 December 2013 between the Kingdom of the Netherlands and the United States of America for the improvement of international compliance with the tax obligation and the implementation of FATCA (Trb, 2014, 22 and 128).

FATCA

US FATCA Regulations 2013 (Foreign Account Tax Compliance Act).

ICCPR

The International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966.

MLI

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS.

OECD

General information about the OECD and their projects: www.oecd.org.

OECD Convention

Convention on the OECD signed in Paris on 14 December 1960.

OECD Commentary

Commentaries on the Articles of the Model Tax Convention 2017.

OECD Manuel

Manual on the implementation of exchange of information provisions for tax purposes by the OECD Committee on Fiscal Affairs on 23 January 2006.

OECD Model Convention

Model Tax Convention on Income and on Capital updated in 1977, 1992, 1994, 1995, 1997, 2000, 2003, 2005, 2008, 2010, 2014 and 2017.

OECD CRS

The Standard for Automatic Exchange of Financial Information in Tax Matters 2015.

OECD TIEA

OECD The 2002 Model Agreement on Exchange of Information on Tax Matters and Commentary.

OECD TP

The Regulation on additional documentation obligations for transfer prices of 30 December 2015.

OECD TP Guidelines

OECD Transfer Pricing Guidelines for MNE Enterprises and Tax Administrations 2017.

Strasbourg Convention

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 protocol, Strasbourg 25 January 1988.

UDHR 1948

United Nations Universal Declaration of Human Rights 1948 adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

UN Model Convention

United Nations Model Double Taxation Convention between Developed and Developing States, New York 2001.

US IRC

United States Code, 2006 Edition, Supplement 3, Title 26 – Internal Revenue Code.

US Tax Treaty

The Convention between the Kingdom of the Netherlands and the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, concluded in Washington on December 18, 1992 ((Government Gazette 1993, 77 and 158), as amended on 13 October 1993 (Treaty Series 1993, 184) and on 8 March 2004 (Treaty Series 2004, 166).

European law

Arbitration Convention

A treaty designed to eliminate double taxation in the event of profit adjustments between associated enterprises (Arbitration Convention 90/436/EEC).

ECHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, last amended on 13 May 2004.

EC Recommendation

Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (96/280/EG) [Publicatieblad L 107 van 30.04.1996].

EC Regulation

Commission Implementing Regulation (EU) No 1156/2012 of 6 December 2012 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation.

EU Charter

Charter of the Fundamental Rights of the European Union 2000/C 364/01.

Treaty of Lisbon

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. The Treaty of Lisbon was signed by the EU Member States on 13 December 2007, and entered into force on 1 December 2009. It amends the Maastricht Treaty (1993) and the Treaty of Rome (1957).

TEU

The Treaty on European Union of 13 December 2007 (Consolidated Version).

TFEU

The Treaty on the Functioning of the European Union of 13 December 2007 (Consolidated Version).

Council Directive 77/799/EEC

Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums.

Directive 95/46/EC

Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals regarding to the processing of personal data and on the free movement of such data.

Council Directive 2003/48/EC

Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (Cancelled).

Council Directive 2006/98/EC

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