LOYENS & LOEFF

2018-2019

International private clients update

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Preface

Today's entrepreneurs and high net worth individuals have an international footprint. The ease in which borders are crossed – to the extent they have not faded – due to all kinds of economic, social and technological developments result in a perspective that is truly international. Staying confined to a single jurisdiction is becoming more and more difficult!

Whether you consider yourself a 'global citizen', hold cross-border investments or do business on a global scale; in any case you are faced with a complex framework of tax and legal rules at home and abroad. On top of this fact we are experiencing an unparalleled pace of change in the field of tax and legal developments. International tax developments continue apace, such as efforts to combat tax avoidance, the need for transparency and the creation of a level playing field in cross-border situations. All these developments have an impact on legislation, regulations and policy, which in turn affect your (family) business and private wealth.

This edition of *'International private clients update 2018-2019'* looks at the various (anticipated) international developments that might be of relevance to you. In this update we also share news about some of the changes in our four home markets: the Netherlands, Belgium, Luxembourg and Switzerland.

Enjoy this read! If you need any further information on any of the topics, or if you would like a non-obligatory consultation, please do not hesitate to contact your Loyens & Loeff adviser or one of our advisers in the Family Owned Business & Private Wealth (FOB&PW) team.

We are happy to help.

With best wishes,

Rotterdam, 8 November 2018

Fred van der Leije
Chairman of FOB&PW
Tax Adviser / Partner

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Jurisdictions are implementing various technical measures in their national legislation at an unparalleled pace

International developments

The global financial crisis that followed the credit crunch, the digital revolution in trade and the advent of international terrorist organisations have created momentum in international politics to pass (tax) legislation that functions across borders and results in greater transparency in a complex legal environment. The decline in tax revenues as a result of the crisis and the need for greater transparency go hand in hand with the global approach to tax evasion and perceived tax avoidance. This approach has resulted in cross-border co-operation on an unprecedented scale.

Jurisdictions are implementing various technical measures in their national legislation at an unparalleled pace, with the goal of remedying the perceived harmful arbitrage between tax and legal legislative frameworks applicable in different countries. Examples of such measures include *(i)* implementation of the UBO register in EU member states, *(ii)* intermediaries' reporting obligation on cross-border (tax) planning schemes, *(iii)* expansion of information exchange between countries, *(iv)* the roll-out of the BEPS projects including the introduction of the multilateral instrument (MLI). It should also be noted that legislation and regulations are being harmonised at the level of private international law, for example in international inheritance law and matrimonial property law.

This section highlights some of these (technical) measures that may affect you.

Various measures

- Implementation of the UBO register in EU member states
- Mandatory reporting obligation on cross-border (tax) planning schemes
- Expansion of information exchange between countries
- The roll-out of the BEPS project
- Introduction of the multilateral instrument (MLI)
- Harmonisation of international inheritance law
- Harmonisation of international matrimonial property law

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Implementation of the UBO register in EU member states

Mandatory implementation

The *'European Union'* (EU) has put a great effort into tax transparency and anti-money laundering measures. Accordingly, all EU member states must keep a register containing the details of the individuals that are known as the *'ultimate beneficial owners'* of legal entities and other entities based in the EU; hence the new register is called the *'UBO register'*. Pursuant to the *'fourth Anti-Money Laundering Directive'* (AMLD 4), EU Member States should have implemented the UBO register by 25 June 2017. Many EU Member States have not met this deadline and some EU Member States have postponed the implementation of the UBO register.

In December 2017 the EU reached agreement on a proposal for a directive amending AMLD 4, including the UBO register contained therein. These amendments are included in the *'fifth Anti-Money Laundering Directive'* (AMLD 5), which entered into force on 9 July 2018.

In accordance with AMLD 5, the minimum UBO threshold (25% plus one) will not be lowered and all EU UBO registers for companies and other legal entities must be accessible to the general public. Furthermore, all EU Member States must provide for a UBO register for trusts that are established in, are residing in, are managed in (for example because the trustee is residing there) or enter into certain business transactions in that EU Member State. The UBOs of a trust are the settlor(s), the trustee(s), the protector, the beneficiaries or classes of beneficiaries and any other natural person exercising ultimate control over the trust by other means. The UBO's of foundations are in principle determined in the same manner as for trusts. The UBO register for trusts will not be publicly accessible, but will only be available to persons who can demonstrate a *'legitimate interest'*.

According to AMLD 5, the UBO register for legal entities should be implemented by 10 January 2020 and the UBO register for trusts should be implemented by 10 March 2020.

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Our home market of Switzerland is not part of the EU and is therefore not obliged to implement a UBO register, nor does it intend to do so.

Identify what this means for you

It is advisable to identify the impact of the introduction of the UBO register for you and your family so that you know whether your privacy will continue to be adequately safeguarded in 2019. A person with more than 25% (economic and/or controlling) interest in an entity will always be designated as a UBO although member states may also apply a lower threshold. The UBO register will contain certain personal information of the UBOs of corporate entities and other legal entities, such as the name and the month and year of birth of the UBO, as well as the nature and extent of the beneficial interest held. Finally, please note that under certain strict conditions UBO's can be exempt from inclusion in the UBO register.

Mandatory reporting obligation on cross-border (tax) planning schemes

Mandatory reporting by EU member states of cross-border tax planning schemes
On 25 May 2018, the Council of the European Union adopted a *'Council Directive' (Directive)* introducing mandatory disclosure rules for EU-linked intermediaries such as lawyers, accountants and tax advisers. The Directive obliges Member States to implement rules based on which qualifying intermediaries, and under certain circumstances taxpayers, need to report certain arrangements to the relevant tax authorities. These arrangements concern potentially aggressive tax planning arrangements with a cross-border dimension and arrangements designed to circumvent reporting requirements such as the *'Common Reporting Standard' (CRS)* and *'Ultimate Beneficial Owner' (UBO)* reporting. The tax authorities will exchange the information received automatically within the EU through a centralised database.

Examples

The Directive does not contain a definition of potentially aggressive tax planning arrangements. Instead, the annex to the Directive contains a list of characteristics or features (so-called *'hallmarks'*) of a cross-border arrangement that according to the European Commission present an indication of a potential risk of tax avoidance.

Some of the hallmarks only apply if also a main benefit test is met. A cross-border arrangement is reportable if it contains at least one of the hallmarks. An example of a hallmark is the conversion of income into gifts, capital or other categories of revenue which are taxed at a lower rate or are exempt from tax. Another example is an arrangement involving a deductible cross-border payment between associated enterprises whereby the recipient is not taxed in any jurisdiction or is tax-resident in a jurisdiction that imposes a zero or almost zero corporate tax rate.

Who has a reporting obligation?

Primarily intermediaries having a link with the EU have to report. The definition of intermediaries is very broad and includes tax advisers, lawyers, consultants and bankers. The obligation to disclose may not be enforceable on an intermediary due to legal professional privilege (depending on the domestic implementation of the Directive), or because the intermediary does not have a presence within the EU or it might be the case that there is no intermediary involved because the taxpayer designs and implements a scheme in-house. In these circumstances, the disclosure obligation shifts to the taxpayer.

What has to be reported?

The intermediary or taxpayer must report at least the following information to the tax authorities:

- the identity of the relevant taxpayer and the intermediaries;
- details of the hallmark(s) that make the cross-border arrangement reportable;
- a summary of the content of the arrangement;
- the (proposed) date of the first step of implementation;
- details of the national tax provisions forming the basis of the reportable cross-border arrangement;
- the value of reportable cross-border arrangement;
- the identification of the other member states of the relevant taxpayer and any other member states which are likely to be concerned by the reportable cross-border arrangement;
- The identification of any person in a member state likely to be affected by the arrangement, indicating to which member state such person is linked.

Reporting in a central EU database

There is no threshold amount of tax savings above which a report must be made. The requirement to report a scheme does not necessarily imply that it is illegal or harmful. Under the proposal, the tax authorities in every EU member state will exchange information by entering the reports in a central EU database. The tax authorities in another member state will have access to that database and can initiate an investigation if necessary. The idea is that this will give the tax authorities in another member state an early warning of a potential aggressive tax planning scheme.

Reporting deadline

Member States must implement the Directive by 31 December 2019 at the latest and shall apply the provisions from 1 July 2020 onwards. Intermediaries or taxpayers shall be required to file information on the reportable cross-border arrangements within thirty days of *(i)* the day after the arrangement is made available for implementation; *(ii)* the day after the arrangement is ready for implementation; or *(iii)* the first step in the implementation having been made – whichever occurs first. Furthermore, all reportable arrangements of which the first step is implemented in the time frame between 25 June 2018 and 1 July 2020 must be reported ultimately on 31 August 2020. As a result of this retroactive effect, intermediaries as well as taxpayers must already start monitoring what information may need to be disclosed in 2020 about structures that are being advised on or are being implemented today.

Practical suggestions

It is advisable to organise yourself to be in control of the consequences of the implementation of the Directive. Since the information to be reported relates to taxpayers, the following suggestions are recommended:

- Discuss and streamline with your advisers the information which potentially will have to be filed with the tax authorities on the arrangement, especially if more than one intermediary is involved;
- Review cross-border arrangements which are developed in-house or where only non-EU advisers are involved if they are reportable under the Directive. If so, or if as a result of the lack of detailed guidelines the position is unclear, include information in

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a sort of database to ensure that a future obligation to report can be properly fulfilled (given the retroactive effect);

- Be aware that if the intermediary involved is entitled to a legal professional privilege, the Member States may grant the intermediary a waiver from filing the information. Depending on the local implementation the reporting obligation may then shift to the taxpayer. Also in such situations it is recommended keeping track of information in the above-mentioned database.

Expansion of information exchange between countries

Tax authorities are exchanging more and more information

The tax authorities in our four home markets – and beyond – are engaging in more and more automatic exchange of data, both as recipient and as originator. Information can also be exchanged spontaneously at the request of another state. A number of developments are described below.

Exchange of information about 'rulings' with the tax authorities

If your international family-owned business has what is known as a 'ruling' with the tax authorities in a country, you should be aware that international and European agreements have been made about the exchange of information about these agreements. Existing rulings also fall within the scope of these agreements. The tax authorities in the country in question check the supplied information before sharing it with other countries.

Common Reporting Standards

In 2018, more than 90 countries, including the EU member states and Switzerland, have automatically exchanged information on financial accounts based on what is known as the *'Common Reporting Standards' (CRS)*. Based on the CRS, financial institutions have to identify their account holders with due observance of the CRS identification requirements. If it follows from the identification that the account holder is tax resident in another jurisdiction and such jurisdiction is a CRS participating jurisdiction, the financial account is reportable. If the account holder is an entity that for CRS purposes qualifies as a passive non-financial entity, the account is also reportable if the ultimate beneficial owner (controlling person) is tax resident abroad. If an account is reportable, the financial institution has to submit information annually about the identity of the account holder and the account such as the account number, account balance (or the value of an interest in an investment entity), interest and dividend income, the values of capital and life insurance policies and the income from financial products such as securities. The tax authorities will subsequently exchange the information received with the tax authorities of the account holder's country of tax residence as well as the country of residence of the controlling person in case the account holder qualifies as a passive non-financial entity.

The *Common Reporting Standards* could be seen as the OECD reaction to the US *'Foreign Account Tax Compliance Act' (FATCA)*, a law that aims to tackle undeclared savings and tax evasion by US taxpayers.

The roll-out of the BEPS project

Global initiative

The OECD launched the *'Base Erosion and Profit' (BEPS)* project in 2013 at the request of the G20. This project targets legal and illegal tax planning strategies that exploit gaps and mismatches in tax rules between jurisdictions to artificially shift profits to low-tax or no-tax locations. Such practices undermine the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level. Moreover, when tax payers see multinational enterprises legally avoid tax, it undermines voluntary compliance by all taxpayers. The foregoing led to the publication of fifteen BEPS Action reports on 5 October 2015.

Since it was launched in 2012, the BEPS project has grown into a global initiative, the results of which – in the form of various technical measures – are being adopted into tax laws and regulations in a large number of jurisdictions.

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Identify what this means for you

If you and your international family-owned business operate in multiple jurisdictions, it is recommended identifying the extent to which the anti-BEPS measures which have been or will be implemented may affect you personally and/ or your business.

Examples of important BEPS topics

To give you an impression, we discuss below a number of major topics in the BEPS project which we believe will have a substantial impact on the tax position of high net worth individuals and their enterprises:

1. ***Matching taxation and value creation*** – A key principle in the BEPS project is that taxable profit must be allocated to jurisdictions where economic activities are actually carried out *(i.e. matching taxation with the place where value is created)* To put this into practice so-called 'significant people functions' play a central role. People performing such functions are the ones who take fundamental business decisions that lead to the assumption of risks and the ownership of assets or the ongoing management of those risks and assets. The locations of people performing such functions make it possible to establish where value is created. As such, the nexus of such people with one or more jurisdictions is a key piece of information. In practice, high net worth individuals are often key decision-makers, which can lead to a perceived value creation and hence local taxation.

2. ***Tax treaty abuse*** – Tax treaties are concluded between jurisdictions to prevent double taxation. The BEPS project identifies tax treaty abuse as one of the most important sources of BEPS concerns. First of all, results on this topic clearly convey the message that tax treaties are not intended to be used to generate double non-taxation. Secondly, the practice of 'interposing' entities in one or more jurisdiction with the aim of obtaining tax treaty benefits *('treaty shopping')*, thus reducing the overall effective tax exposure, should be countered. This is done by introducing 'minimum standard' anti-abuse measures. In brief, this should result in tax treaty benefits only being available for bona fide structures, which show economic reality, whereby the principle of *'substance over form'* plays an important role. The 'minimum standard' anti-abuse measures will be incorporated in most tax treaties around the world (see the *'Introduction of the multilateral instrument (MLI)'* section on p. 10). In short, these provisions will have an enormous impact in practice. Zooming in on high net worth individuals, such persons frequently do business or make investments via relatively (deemed) passive holding companies, at least without a material business enterprise. We note that such entities – under certain circumstances – could fall within the scope of the anti-abuse measures, as a result of which tax treaty benefits will be denied.

3. ***Migration of entities*** – In practice entities can migrate from one jurisdiction to another by relocating the place of effective management. In some cases an entity will be considered to have two tax residences *('dual residency')* thus being exposed to potential double taxation. In most cases tax treaties resolve such issues by allocating the exclusive taxing rights to the jurisdiction in which the place of effective management is executed. Consequently, the jurisdiction of origin should not have taxing rights after the migration has taken place. Subject to the BEPS measures, the aforementioned procedure will make way for what is known as a 'mutual agreement procedure' between the two competent tax authorities. The idea is that such a 'case by case' approach will counter abusive situations more effectively. A big downside of this approach is that mutual agreement procedures generally take a long time. Furthermore, as no tax treaty benefits can be enjoyed while such a procedure is pending, the impact can be substantial.

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Proactive position of the EU

The European Commission is taking a proactive stance on increasing transparency and countering tax avoidance. Many initiatives have been proposed and some have already been adopted, thus the EU is ahead of the game in some areas.

Climate change

With the global fiscal 'climate' undergoing a drastic change, your primary concern will be to secure the continuity of your international family-owned business and preserve private wealth. In order to achieve these goals, a fiscal cash out without liquidities to pay the taxes due or even double taxation should be avoided. With this in mind, this rapidly changing reality more than ever demands a proactive stance in order to manage both commercial and tax risks.

Introduction of the multilateral instrument (MLI)

Modifications to existing tax treaties

If your international family-owned business enjoys tax benefits based on a bilateral tax treaty, you should be aware that various measures developed in the context of the BEPS project, are incorporated into the existing tax treaties between countries. The aim is to implement measures brought forward by the BEPS project such as preventing tax treaty abuse and - more generally - tackling international tax avoidance (see *'The roll-out of the BEPS project'* section on p. 8). Jurisdictions may incorporate some of the proposed BEPS measures in their domestic legislation. However, some of the key BEPS measures are incorporated in new and existing tax treaties. With a focus on the latter, since over 2000 tax treaties have been concluded around the world, the OECD wanted to facilitate, streamline and accelerate the process of modifying them. To this end, a mutilateral treaty has been developed and introduced, called the *'Multilateral Instrument' (MLI)*, pursuant to which new provisions and amendments of existing bilateral tax treaties can be incorporated relatively easily, without having to go back and renegotiate each tax treaty separately.

The consequences of the MLI for you or your international family-owned business

In practice, the MLI will act as an addendum to existing treaties and may affect your or your international family-owned business' eligibility for the benefits granted under a tax treaty. As such, the MLI may have far-reaching consequences. However, before any tax treaties are amended pursuant to the MLI process multiple steps have to be taken. The MLI (and the choices made by the respective governments within that context) first need to go through the national parliamentary ratification processes. Subsequently, the respective tax treaties concluded by a jurisdiction will not all be automatically modified; they will only be modified once and to the extent both treaty partners in question have ratified the MLI. Although difficult to predict, we do not expect modified bilateral treaties to come into force before 1 January 2020. It is therefore recommended reviewing your situation or that of your international family-owned business under the relevant tax treaties in the course of 2018 and 2019.

Please see our website for a complete overview of the choices and reservations made by our home markets of the Netherlands, Belgium, Luxembourg and Switzerland.

Harmonisation of international inheritance law

The EU has made it easier to settle international estates

An estate can be problematic to settle, and international estates even more so. An international estate is one involving two or more countries, for example if the testator did not live in the country of his citizenship, or left assets in more than one country. This may give rise to questions of which law – of which country – determines *(i)* who the heirs are, *(ii)* whether or not the will respects the statutory shares of children or others, *(iii)* whether the executor can settle the estate and *(iv)* what requirements apply to the distribution of the estate among the heirs. It becomes even more complicated if different countries answer these questions differently. Fortunately EU is riding to the rescue with the *'European Succession Regulation'*, which imposes uniform rules.

EU countries now on the same page

The *European Succession Regulation* came into force on 17 August 2015 and covers estates which are devolved on or after this date. The Regulation applies in all EU countries except for the United Kingdom, Ireland and Denmark. The Regulation creates new *international* inheritance law. This means that from this date, European countries use the same rules to determine which inheritance law – of which country – applies to an estate, so that European countries are on the same page. Citizens writing a will can now elect for the law of their country of nationality to apply to their entire estate. In the event of no specific choice being made, the Regulation states that the law of the testator's country of habitual residence at the time of death will apply.

Any law that is (legitimately) designated under the *European Succession Regulation* will be applied, irrespective of whether or not that country is a member state. If, for example, a Canadian national living in the Netherlands elects for Canadian law to apply, this choice will be respected.

No change to (internal) inheritance laws in individual countries

The Regulation has not made any changes to the (internal) inheritance laws in individual countries. For instance, a child's minimum statutory claim, the statutory share, under Dutch law differs from that in many foreign countries, such as Belgium and France.

European Certificate of Succession

The Regulation also creates a *'European Certificate of Succession'*, a single European declaration that enables people to prove in other EU countries that they are heirs and executors.

Harmonisation of international matrimonial property law

International matrimonial property law? Regulation is on the way

If you are married, the size and composition of your estate depends on your matrimonial property regime. In cross-border situations, therefore, the first question is always which matrimonial property law – of which country – is applicable.
As with inheritance law, different countries have a different approach to this. The EU has adopted a Regulation to standardise the rules relating to matrimonial property law for married couples and registered partnerships, which will come into force on 29 January 2019.

Find out how this will affect you

As now, it will soon be possible to choose the matrimonial property law of a particular country in your prenuptial agreement, with the proviso that this choice is not unrestricted. In the absence of a choice of law, the law of the couple's first country of habitual residence will apply. Failing this, the law of the state of their common nationality will apply (and in the absence of any of these, the law of the state to which the couple has the closest ties will apply).

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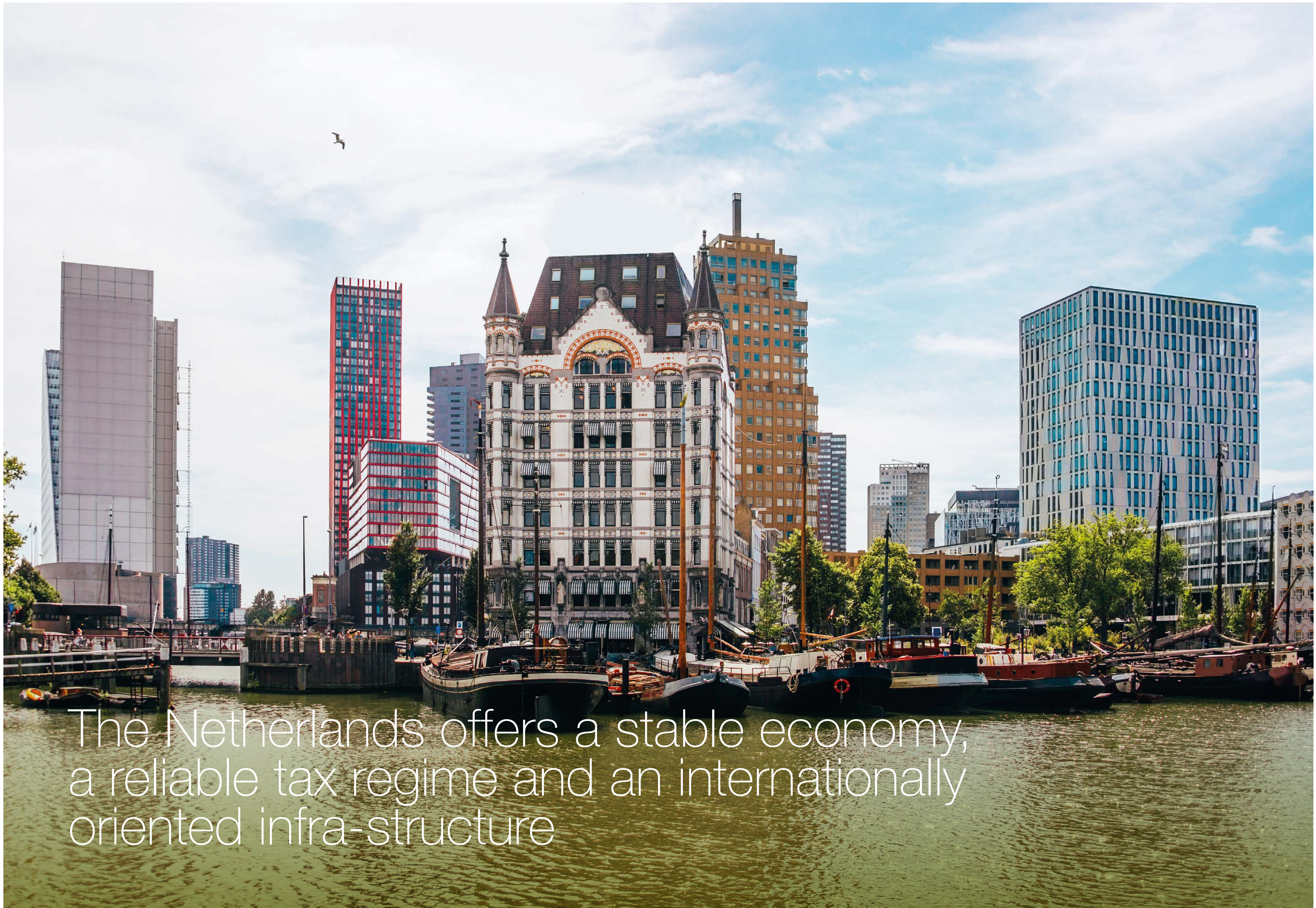
The Netherlands offers a stable economy, a reliable tax regime and an internationally oriented infra-structure

Home market: The Netherlands

For decades, international businesses have chosen the Netherlands as the base for their operations, whether as European headquarters, a shared service centre, a customer care centre, a distribution and logistics centre or an R&D facility. The pro-business environment and supporting policies implemented by the Dutch government have greatly increased the international popularity of the Netherlands as an investment location. The Netherlands offers a stable economy, a reliable and equitable tax regime, and a sophisticated and internationally oriented infrastructure.
The Dutch economy is innovation-driven and highly productive. It is known for its stable industrial relations, its productive and highly-skilled workforce, its excellent information technology connectivity, and its vital role as a European transportation hub.

This section looks at various measures and developments in our home market of the Netherlands that might affect you.

Various measures

- Portfolio investments and liquidities
- Changes to dividend withholding tax
- Exchange of information about 'rulings'
- Dutch foundation
- UBO register
- Management and supervision of your international family-owned business and wealth
- International family law and estate planning

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Portfolio investments and liquidities

Increasing tax burden on portfolio investments and liquidities

The Netherlands has taxed privately held savings and investments since 2001 based on a deemed yield over their market value at January 1 of each year. The effective tax burden on savings in particular, but also on portfolio investments and liquidities, has continuously increased as a result of falling market yields. Privately held portfolio investments and liquidities are now taxed progressively in Box 3 (savings and investments) for personal income tax purposes, irrespective of the actual income and the cash flow arising from the assets (i.e. imputed return).

The effective deemed yield and tax rates are as follows in 2019:

Box 3 basis	Effective deemed yield	Effective tax rate
€ 0 - € 30,360	0%	0%
€ 30,360 - € 102,010	1.94%	0.581%
€ 102,010 - € 1,020.096	4.45%	1.335%
> € 1,020,096	5.60%	1.680%

A coalition agreement was published on 10 October 2017 which includes tax plans to replace the tax regime based on an deemed yield *('vermogensrendementsheffing')* with one based on actual yields.

Corporate investment

In practice we see that high net worth individuals look for an alternative to the deemed yield in Box 3. This alternative may be found under the Box 2 tax regime which taxes the actual returns and not a deemed yield for portfolio investments and liquidities. To arrive at income taxation in Box 2, the Box 3 assets are contributed to a taxable company in which the investor holds a substantial (≥5%) shareholding. Whether it is worthwhile to contribute the Box 3 assets to a taxable company depends on the expected yield on the Box 3 assets. Under certain conditions the company can opt for the an exempt investment company ('VBI') regime. Under this regime the company is exempt from corporate income tax and dividend withholding tax.

Changes to dividend withholding tax

Dutch dividend withholding tax may be due on distributions to foreign holding companies

As of 1 January 2018, your Dutch company may be obliged to withhold Dutch dividend withholding tax on distributions to the foreign holding company/shareholder. If the foreign holding company has a limited economic reality *('substance')* and, for example, only holds the shares in the Dutch company, the current withholding tax exemption for dividend distributions by a Dutch company to a company based in the EU could cease to apply. As a result up to 15% Dutch dividend withholding tax should to be withheld. In many situations the Netherlands only has limited taxation rights under a tax treaty between the Netherlands and the other country. In light of international developments, however, this *'treaty protection'* may be lost in the longer term as a result of the implementation of the *'Multilateral Instrument' (MLI)* and, in particular, the *'Principal Purpose Test' (PPT)* in the tax treaties that the Netherlands has signed (see the *'Introduction of the multilateral instrument (MLI)'* section on p. 10).

No abolishment of dividend withholding tax

On Budget Day, 18 September 2018, a legislative proposal was presented by the Dutch cabinet to abolish dividend withholding tax as of 2020 and introduce a conditional withholding tax on payments to low-tax jurisdictions. The abolishment of dividend withholding tax was heavily debated in public and in parliamentary proceedings. At the same time market players, like large multinationals and investment funds, indicated that they did not see the abolishment as an extra incentive to establish in or invest through the Netherlands. As a consequence, the Dutch cabinet has decided to withdraw the legislative proposal with respect to abolishment of dividend withholding tax and to improve the investment climate by other measures (inter alia by reducing the corporate

income tax rate gradually to 15% in the lowest-bracket and 20,5% in the highest-bracket as per 2021). The legislative proposal for the introduction of a new conditional withholding tax, however, has not been withdrawn (see below).

Introduction of conditional withholding tax on interest and royalties as of 2021

The legislative proposal introducing a new withholding tax on dividends (including capital gains), in case of payments to certain related entities (not individuals) in low-tax jurisdictions or in cases of abuse, will be reconsidered as the effect of the combination of the remaining dividend withholding tax and such *'additional'* withholding tax first has to be thoroughly analyzed. The announced introduction of a withholding tax on interest and royalties to low-taxed entities (not individuals) and in abusive situations will not be affected by the fact that the Dutch dividend withholding tax will not be abolished. It is still the intention that such withholding tax will be introduced as of 1 January 2021. The conditional withholding tax rate is set at the same rate as the corporate income tax in the highest-bracket (i.e. 20,5% in 2021).

Excessive current account debts of substantial shareholders will be taxed as a deemed dividend

As part of the adjacent measures to find budget for the abolishment of the dividend withholding tax, the Dutch government has proposed to tax a current account debt of a substantial shareholder in a Dutch company (an interest of ≥ 5%) that exceeds € 500,000 as a deemed dividend. (Deemed) dividends received by a substantial shareholder are taxed in Box II against 25% personal income tax in 2019 (26.25% in 2020; 26.9% in 2021). Although the dividend withholding tax will not be abolished, this measure seems to remain. Qualifying debts in relation to the private dwelling *('eigenwoningschuld')* are excluded from this measure and will not be taxed. It should be noted that there is no legislative proposal yet, but it is expected that this measure will enter into force as of 1 January 2022 and a draft legislative proposal is expected by the end of the year 2018.

Term of Dutch expat ruling reduced from five to eight years as of 2019

As of 1 January 2019, the maximum term of the Dutch expat ruling (the so-called *'30% ruling'*) will be reduced from eight to five years. This measure, to reduce the term of the Dutch expat ruling, will also apply to existing cases. However, after the abolishment of dividend withholding tax was withdraw, the Dutch cabinet announced there will be transitional law for existing expats that would lose the 30% ruling in 2019 or 2020 due to this proposal.

Exchange of information about 'rulings'

The Dutch tax authorities will exchange information about existing rulings

In case your international family-owned business have made agreements with the Dutch tax authorities and these agreements have been documented in a so-called *'tax ruling'*, please note the following. Agreements have been made between countries on the exchange of information about tax rulings. Like every other EU member state, the Netherlands will exchange information with EU member states and many other countries with which the Netherlands has concluded (tax) treaties. Existing tax rulings also fall within the scope of this project. The Dutch tax authorities have now approached the first taxpayers with a request to complete a *'template'* that has been designed specifically for this exchange. The tax authorities check the supplied information before sharing it with other countries.

Dutch foundation

The Dutch foundation as a substitute for the common law trust

The *common law trust* is a frequently-used instrument in Anglo-Saxon countries for wealth preservation and privacy protection, private wealth planning and estate planning. You may have thought about (further) protecting your wealth and privacy, but found the trust as a legal concept not to be entirely suitable for your situation. The *'trust'* as a legal concept has lost some of its popularity in recent years, for example as a result of media reports (e.g. the Paradise Papers), because the trust itself is not a legal entity or because trusts and their trustees are usually established (far) overseas.

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Attractive alternative

The trust as such does not exist in the Dutch legal system. However, the Dutch foundation, which has many similarities to trusts but without the drawbacks discussed above, could offer an attractive alternative. In this Dutch equivalent to the trust, assets are gifted to a foundation. The gift is made *'conditional'*, which means that the donor imposes certain contractual obligations on and gives instructions to the foundation. The condition requires the foundation to use the gifted assets only within the framework of the goals that are described in the conditions (for example to provide care for family members in need). The conditional gift should be carefully planned to ensure that the transfer of wealth to the foundation is recognised.

Tax transparent whilst protecting privacy and wealth

The foundation is in principle not subject to Dutch corporate income tax, unless (and to the extent that) it conducts a business. The foundation is treated as *'transparent'* for Dutch income tax, gift and inheritance tax if the foundation qualifies as an *'segregated private wealth' (APV)*. To qualify as an APV, a foundation has to meet three cumulative requirements:

i. The foundation does not qualify as a *'public benefit organisation' (ANBI) or a 'social benefit organisation' (SBBI)*;
ii. The foundation, at least to a certain extent, serves the private interest of the settor; and
iii. No shares (or any other economic entitlement) have been issued against the contribution of the assets to the foundation.

If these requirements are met a gift to the foundation should not be subject to Dutch taxation as a result of the *'transparency'*. Moreover, the gifted assets continue to be attributed to the donor. The Dutch tax implications of payments by the foundation are therefore no different than if the donor himself/herself had made those payments. If the donor is resident outside the Netherlands no succession taxes or wealth tax should be due in the Netherlands on the assets held in the foundation. The foundation is generally tax-neutral in the Netherlands. Hence, the envisaged wealth governance is achieved in a vehicle with legal personality.

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UBO register

Mandatory implementation of the UBO register in the Netherlands

The Netherlands published, via Internet consultation, a draft bill on the implementation of the UBO register on 31 March 2017. Under the bill, a substantial part of the information included in the UBO register will be publicly accessible and the institution that will manage the UBO register is the Dutch Chamber of Commerce.

Based on the draft bill, the UBO register will include the UBOs of *(i)* enterprises established in the Netherlands and *(ii)* legal entities that have their registered office in the Netherlands under their articles of association. Examples are the UBOs of a BV *(private limited company)*, NV *(public limited company)* or foundation. Foreign legal entities with their headquarters or a branch office in the Netherlands will not need to register their UBOs for now. It has yet to be determined whether mutual funds will also need to register their UBOs.

The final legislative proposal for the implementation of the UBO register has not been sent to Parliament yet. Due the entry into force of AMLD 5, the government anticipates a final legislative proposal being sent to Parliament in early 2019. The implementation of the UBO register for trusts and similar legal structures will be done through a separate legislative process.

Management and supervision of your international family-owned business and wealth

Good corporate and family governance is crucial

Good governance is crucial to the long-term success of your international family-owned business. It is a key element to preserve your family wealth for future generations. But what is good corporate and family governance? This will be different for every business and every situation. Generally it means *'the right person in the right place at the right time'* and a good balance between management and supervision.

Statutory corporate governance obligations

As your international family-owned business grows, you may find yourself having to comply with various legal obligations relating to the corporate governance of your company. For example, under Dutch law, companies that employ more than 50 people are obliged to set up a works council that meets to consult on the company's policy and the employees' interests. The management is required to meet the works council at least twice a year to discuss the general course of the company's business. The management must inform the works council of any major decisions which are pending and how it intends to involve the works council in the decision-making process.

Your growing international family-owned business may also be subject to what is known as the two-tier board structure under Dutch law. This regime applies if, during an uninterrupted period of three years, *(i)* the issued capital in your international family-owned business is at least € 16 million, *(ii)* your business set up a legally required works council and *(iii)* your business employs at least 100 people. If these criteria are met, by law a Supervisory Board with certain rights of approval and appointment must be set up.

Generally speaking, the application of the two-tier board structure may restrict the powers of the shareholder, so some owners of international family-owned businesses consider it undesirable. Nevertheless, there are ways of avoiding the two-tier board structure such as using a foreign legal entity as a central holding company. A Curaçaoan public limited company is an example.

Control of your family-owned wealth is important

Family governance i.e. the control of (family) wealth, is just as important as corporate governance. From a tax perspective it may be beneficial to transfer wealth to your children at a young age, so that they can benefit from any future increase in its value. However you may not have the intention to grant your children independent and unrestricted access to the wealth that is transferred to them. What you then could do is to separate the ownership of the wealth from the control thereof.

One tried and tested way of achieving this is to use a legal entity that holds your wealth for *'administration purposes'* and separates beneficial entitlement from control; this is a common mechanism for shares in a family-owned business but it can for example also be used for investment portfolios. Under this mechanism, the wealth is transferred to a legal entity, usually a Dutch foundation acting as an administrative office (a *'STAK'*), which becomes the owner of the wealth. As a result, the management of the STAK exercises control over the wealth. The STAK issues depositary receipts representing the economic interest in the contributed wealth. These depositary receipts can then be gifted so the economic ownership is transferred to the next generation without handing over control.

Creating peace and stability

Control of the various components of your family-owned wealth must be managed uniformly and consistently to create the peace and stability that will encourage it to flourish. An excellent way of achieving this is to set up a family office foundation, that manages the (family) wealth, fulfilling roles such as executor, fiduciary administrator and authorised representative under a general power of attorney *('living will')*. The family office foundation can also act as a director of legal entities that own family wealth, such as a STAK. The family office foundation constitutes the central platform for control and management of the (family) wealth, which can be useful if family members live for example in different places around the world.

A further-reaching option is to place assets into a *'segregated private wealth' (APV)* vehicle, such as a *'Curaçaoan private fund foundation' (SPF)* or an *'Anglo-American trust'*. The APV becomes the owner of the wealth without issuing shares or depositary receipts, thus creating a stand-alone entity. The board of directors of the SPF or the trustee of the trust is usually given discretionary authority to make payments from the APV to its beneficiaries, and may be overseen by a supervisory board or protector.

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What can we do for you?

Taking into account your unique individual situation and your wishes, we can advise you on the regulations that apply to your international family owned business and wealth. We start by analysing the current setup of your (management) organisation. We discuss with you whether it still meets your needs, both now and in the future. If this analysis suggests changes should be made, we can advise you on how to design and implement them. For example, by defining control structures, outlining profiles for executive and non-executive board members and other arrangements for which there is a need.

International family law and estate planning

Make sure you are well informed about what Dutch law means for you

As a citizen of the world with assets in different countries, or an international enterprise with a footing in the Netherlands, or if you are a Dutch citizen, you may end up having to deal with Dutch law.

Dutch law may apply because of your situation, or you may be able to opt for Dutch law to apply to your affairs. If you want to make a family-law arrangement, such as drawing up a prenuptial or postnuptial agreement or writing a will, it is very important for you to make the right choice of legal system – depending, of course, both on your intentions and the specific options offered by a particular legal system. We call this *'international estate planning'*.

The new matrimonial property law may have serious implications

As from 1 January 2018 the statutory matrimonial property law has changed. If you are married after this date without drawing up a prenuptial agreement, the limited community of goods will apply to you. The following assets are excluded from the community of goods: *(i)* any assets that were not jointly owned prior to marriage and *(ii)* inheritances and gifts.

A feature of matrimonial property law in the Netherlands is that there is freedom of contract between parties and that prenuptial and postnuptial agreements may deviate from the community of goods. In principle, judges must respect these agreements when the marriage ends.

As a result of the new matrimonial property law, a number of important new considerations apply if you plan to marry. For example, any assets that were jointly owned prior to marriage will become part of the new limited community of goods, even if the property ratio is not 50/50. One example might be the situation if you jointly own your home prior to marriage in a ratio of 70/30 or 80/20 and plan to marry without a prenuptial agreement. In this case, the new community of goods would designate each of you as a 50% owner of the home. This may be a reason to draw up a prenuptial agreement.

If you are a business owner who is married after 1 January 2018 or plans to marry, you may face compensation claims, even if the business is your own private property. This means that you, the business owner, may have to make a payment to the community even though this has been neither agreed nor intended. It is important for you to get specific advice on this. In some situations, you may need to draw up a prenuptial agreement.

Dutch inheritance law offers particular opportunities

Dutch inheritance law also offers particular opportunities for estate planning. For example, in the Netherlands you can use your will to make a far-reaching arrangement in favour of the surviving spouse under which the statutory share of a child is not exigible during the lifetime of the surviving spouse. Therefore, even if the child has a statutory share, you can use your will to protect your partner against the claims of any children.

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Consider including a usufruct arrangement in your will

Dutch law also offers the opportunity to make a usufruct arrangement in a will, which could have attractive tax implications for you. One of the features of Dutch usufruct is that, unlike in countries such as France and Belgium, a right of consumption and disposal can be assigned to the usufructuary. This right of consumption and disposal means that the usufructuary can act as if he were actually the owner. This enables wealth to be transferred to the next generation without diminishing the position of the surviving spouse, which is of particular interest for assets that can be expected to appreciate substantially in the future.

Consider the issuance of depositary receipts in return for your assets before transferring them to the next generation

If you want to transfer your assets to the next generation without ceding control at this time, you can use a Dutch trust foundation that holds your assets for *'administration purposes'* and separates beneficial entitlement from control. You transfer the assets, for example the shares in your company, to a Dutch foundation which then issues depositary receipts to you. You can subsequently pass on the depositary receipts as a gift to the next generation, but the board of the foundation determines how the wealth is invested or how the voting rights associated with the shares are exercised. You have a lot of flexibility in designing the *'rules'* for the administration of the assets by the Dutch foundation as well as the appointment of (successive) board members. This may also be attractive for you for tax reasons (see the *'Management and supervision of your international family-owned business and wealth'* section on p. 16-18).

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Belgium has implemented major (social)
economic and tax reforms in recent years
aimed at further improving the investment climate

Home market: Belgium

Belgium has a number of major advantages for investors: its ideal geographic location in Europe, its education system, its language skills, the diversity and quality of Belgian employees and its capacity to innovate. Belgium has implemented major (social) economic and tax reforms in recent years aimed at further improving the investment climate. The latest reform includes a reduction of the corporate income tax rate to make Belgium attractive to (foreign) investors. Competitiveness, justice, innovation and support for small and medium-sized enterprises are key concepts of this reform.

This section looks at various measures and developments in our home market of Belgium that might affect you.

Various measures

- Corporate income tax reform
- Taxation of capital reimbursements
- Broader scope for the Belgian transparency tax ('Cayman tax')
- Introduction of a new tax on securities accounts
- Belgium's attractive gift regime (restored)
- Marriage contracts
- Succession during your lifetime
- Remigration to the Netherlands and gifts to your children
- UBO register
- New Belgian Companies Code

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Corporate income tax reform

Reduction of the corporate income tax rate

On 1 January 2018, the corporate income tax rate was lowered from 33.99% to 29.58%. As from 1 January 2020, the corporate income tax rate will be reduced again, to 25%. Provided conditions are met, small and medium-sized companies benefit from a reduced corporate income tax rate of 20.4% on the first tranche of € 100,000 from 1 January 2018. This specific corporate income tax rate will be reduced to 20% in 2020.

Increase of the participation exemption for dividends

Prior to 2018, dividends qualifying for the participation exemption regime were only 95% exempted from corporate income tax. Since 1 January 2018, such dividends are 100% exempted from corporate income tax.

Amendments to the taxation of capital gains on shares

Prior to 2018, capital gains realised on shares that were held for an uninterrupted period of at least one year were exempted from corporate income tax. An exception was made for capital gains on shares realised by large companies after an uninterrupted holding period of one year. Such capital gains were subject to a minimum capital gains tax of 0.412%.

As from 2018, the 0.412% tax has been abolished. The conditions to benefit from the exemption on capital gains will however be linked to the conditions for the participation exemption. This means that capital gains realised on shares after an uninterrupted holding period of one year are only exempted from corporate income tax if a participation threshold of either 10% or a € 2.5 million acquisition value is met.

Capital gains realised on shares that are not held for an uninterrupted period of one year are currently taxable at the flat rate of 25% (to be increased with surcharges). As from 2018, (on conditions) such capital gains realised by small and medium sized companies can be subject to the corporate income tax rate of 20.4% on the first tranche of € 100,000 (20% as from 2020). As from 2020, the separate tax will be abolished for large companies, given that these capital gains can then be subjected to the regular corporate income tax rate of 25%.

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Taxation of capital reimbursements

Allocation of reimbursements exclusively to the company's paid-up capital has no longer been possible since 2018

Prior to 2018, capital reimbursements could be allocated exclusively to the company's paid-up (fiscal share) capital. Given that the entire reimbursement qualified as paid-up capital, no Belgian withholding tax was due. Since 1 January 2018, it is no longer possible to allocate the reimbursement exclusively to the company's paid-up capital if the company holds taxed (and certain tax-free) reserves. From a Belgian tax perspective, capital reimbursements are allocated proportionately to both the paid-up capital and the taxed (and certain tax-free) reserves. The part of the reimbursement that qualifies as the deemed distribution of reserves, will be taxed as a dividend.

Example

A company has a paid-up capital of 100 as well as taxed reserves of 100. The shareholder decides to reimburse the paid-up capital for an amount of 90. From a Belgian tax perspective, 45 of the reimbursement will be allocated to the taxed reserves. This part of the reimbursement will therefore be taxed as a dividend, in principle at the flat tax rate of 30%. This means that an amount of 13.5 tax will be due upon the capital reimbursement. This rule is not only applicable with respect to Belgian companies, but also with respect to foreign companies that have Belgian shareholders.

Broader scope for the Belgian transparency tax ('Cayman tax')

Targeted foreign legal structures

Belgian residents (natural persons and legal entities subject to tax for legal entities, e.g. foundations) are subject to the Cayman tax when they are the founder and / or beneficiary of targeted foreign legal structures. All trusts are targeted, as well as certain low taxed companies and foundations. All companies and foundations established outside the EEA are targeted, unless evidence can be provided that they are subject to at least 15% income tax (calculated on a Belgian taxable basis) or that they develop an actual economic activity. Companies and foundations established inside the EEA are only

targeted when they are included in a blacklist, e.g. the Luxembourg SPF. Further, fund-linked entities are targeted as well when they are fully controlled by an individual (and his/her family).

Since 2018 (investment insurance) contracts have also been targeted, when these contracts provide for the distribution of assets of foreign legal structures or when these contracts are funded with assets of foreign legal structures.

Reporting obligation

Founders and beneficiaries (who actually received a distribution / an advantage) have the obligation to report the existence of the foreign legal structure in their annual income tax return.

'Look-through-tax'

Founders are subject to the *'look-through tax'*, a transparency measure on the basis of which they are taxed on the income of the structure, as if the structure did not exist and regardless whether the income is distributed or not. Since 2018, the *'look-through tax'* can be applied to the income of all targeted entities in the structure, if the structure concerns a double-layer structure.

Tax on distributions

Initially, only distributions made by targeted companies and foundations were subject to Belgian income tax. Since 17 September 2017, distributions made by trusts have also been taxed. As from 1 January 2018, distributions made by targeted (investment insurance) contracts are taxable as well. Distributions made by foreign legal structures are taxed at the flat tax rate of 30%. Tax on distributions can only be avoided insofar as and to the extent that evidence can be provided that the distribution represents the initial contribution or that the distribution concerns income that has already been subject to the *'look-through tax'*. From 2018 onwards, the contribution of assets of targeted structures into another entity will be qualified as a distribution to the founder. Also, the transfer of seat of a targeted structure will qualify as a distribution to the founder, unless the seat is transferred to a treaty country.

Broader scope

On 12 October 2018, the Council of Ministers adopted a draft Royal Decree on the extension of the Belgian Cayman tax. The draft targets companies established within the EEA that are either not actually subject to income tax, or are tax transparent in their jurisdiction of residence, but not for Belgian tax purposes. Further, the draft targets fund linked entities. The draft Royal Decree has not been published yet.

Introduction of a new tax on securities accounts

New tax on securities accounts for Belgian residents with at least € 500,000 worth of securities

In 2018, a tax on securities accounts has been introduced. The tax can be due both by Belgian residents with respect to their Belgian and foreign securities accounts, and by non-Belgian residents with respect to their Belgian securities accounts. The tax is due if the targeted securities have an average value of € 500,000 or more. Listed and non-listed shares and certificates on such shares, listed and non-listed bonds and certificates on such bonds, treasury bills and warrants are targeted securities. Units in investment funds and shares in investment companies are targeted as well, unless they are included in a life insurance contract or a pension plan. The tax amounts to 0.15% and will be levied on the full value of the targeted securities, not just on the value exceeding € 500,000. Married couples can pool their individual allowances of € 500,000 so that this tax only kicks in if the value of their combined securities accounts reaches at least € 1,000,000.

Belgium's attractive gift regime (restored)

Gifts made before a Dutch civil-law notary

Gifts of movable assets can be gifted in Belgium without payment of gift tax. Gift tax is only due when the gift is either made before a Belgian civil-law notary or when the gift is voluntarily registered in Belgium. This means that gifts, made before a Dutch civil-law notary, can remain free from Belgian gift tax. If no Belgian gift tax has been paid, Belgian inheritance tax will be due on the gift if the donor dies as a Belgian resident within three

years after the gift is made. The three-year risk of Belgian inheritance tax can be avoided by paying Belgian gift tax.

Three Belgian Regions gift tax rates

The three Belgian Regions are competent to levy gift tax. In direct line and between spouses, the gift tax rates amount to 3% in Flanders and Brussels and to 3.3% in Wallonia.

Gifts made with reservation of usufruct in the Flemish Region

Previously the Flemish tax administration took the position that gifts of securities and shares of limited partnerships, made with reservation of usufruct, were always subject to inheritance tax, even if the donor survived for three years after making the gift. This meant that gift tax always needed to be paid on these gifts by donors residing in Flanders, in order to avoid inheritance tax. The Belgian Council of State has now annulled this standpoint of the Flemish tax administration, restoring Belgium's attractive gift regime for gifts made with reservation of usufruct in the Flemish Region.

Marriage contracts

Flemish inheritance tax due on wealth growth

Since 2018, settlement clauses included in marriage contracts have been targeted for inheritance tax purposes in the Flemish Region. Via settlement clauses or *'as-if-clauses'*, spouses can allocate their own property to each other upon the dissolution of the marriage, as if this property would have been part of the community. Upon the death of the first spouse, the settlement clause creates a debt of the first spouse's estate to the surviving spouse. In principle this debt reduces the taxable basis for inheritance tax purposes, making the settlement clause an attractive way to allocate the wealthier spouse's own property to the other (surviving) spouse without having to apply a (full) community property regime during the marriage. In the Flemish Region, it is no longer allowed to reduce the taxable basis of the estate with the debt arising from the settlement clause. It is therefore advisable for residents of the Flemish Region to have an expert look at their marriage contracts in order to avoid unpleasant surprises for the surviving spouse.

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Succession during your lifetime

New Belgian inheritance law permits succession agreements

New Belgian inheritance law was introduced on 1 September 2018. Belgian inheritance law now allows you to conclude a succession agreement with your future heirs prior to your death, governing the distribution of your estate. This enables you to make binding agreements with your children about your estate which your children cannot change after your death. The purpose of succession agreements is to prevent disagreements between your children after your death. If you, as a Belgian resident, have a will that is drawn up under foreign inheritance law, you should consider re-evaluating your choice of law, because a new will in which you opt for the new Belgian inheritance law allows you to arrange your succession during your lifetime. The same applies if you have an old will drawn up under Belgian law.

Remigration to the Netherlands and gifts to your children

You can make tax-free gifts to your children up to 6 months before remigration to the Netherlands

If you have lived in Belgium for more than 10 years, there are certain conditions under which you can make a *'paper gift'* up to 6 months prior to your remigration from Belgium to the Netherlands and this gift can be exempted from Belgian and Dutch gift and inheritance tax. One important criterion is that you, the donor, should not die before remigrating. A paper gift means that you give your wealth to your children on paper only, before a Dutch civil-law notary, but do not actually transfer the amount of the gift. You are free to enjoy the amount of the gift as long as you live and you can spend it without restrictions. Your children, as the beneficiaries, only receive a claim on you as the donor which is not payable until you die. The downside is that you must be prepared to pay interest for life on the debt to the beneficiaries.

UBO register

Mandatory implementation of the UBO register in Belgium

The law of 18 September 2017 implemented the framework of the Belgian UBO register. The Royal Decree including the practical implementation of the UBO register entered into force on 31 October 2018. Companies, associations and foundations incorporated in Belgium need to register their UBOs with the Belgian UBO register by 31 March 2019. The same applies to trusts and fiduciaries that have a specific link with Belgium.

Definition of UBO

UBOs of companies are *(i)* the natural persons who directly or indirectly own a sufficient percentage of voting rights or interest in the company and *(ii)* the natural persons who control the company by other means. Natural persons who hold more than 25% of the voting rights, the shares or the share capital of the company qualify as direct UBOs. Indirect UBOs are the natural persons who control the holding company when the company is indirectly held through one or more holding companies that hold more than 25% of the shares or the share capital of the company. In the event no such UBO can be identified, the natural persons who hold the position of senior managing official (e.g. the CEO or the chair of the executive board) need to be reported as UBOs. A specific definition is upheld for UBOs of foundations, associations, trusts and fiduciaries.

Information to be reported

Directors have the obligation to report the required information to the UBO register. The UBO's name, date of birth, nationality, country of residence and address need to be reported, as well as details on the interest held, such as the category of UBO, the percentage of the shares or voting rights.

Access to the UBO register

The UBO register will be accessible to competent authorities, obliged entities (within the framework of their client identification obligation) and citizens. Citizens will however not have access to the first name, day and month of birth, the UBO's address and the UBO's National Register Number. Moreover, citizens who want to consult the UBO register with respect to foundations, associations, trusts and fiduciaries will need to demonstrate a legitimate interest, linked to anti-money laundering, anti-terrorism financing or connected criminal activities.

UBOs can request to block the access of citizens and certain obliged entities for certain or all information. A formal request needs to be submitted in which the UBO demonstrates a disproportionate risk. In any event, access to the UBO's information will be blocked if the UBO concerned is a minor or otherwise incompetent.

New Belgian Companies Code

More flexibility to issue different kind of shares

A draft for a *new Belgian Companies Code* has been submitted to the Belgian parliament. The *new Companies Code* will introduce more flexibility to issue shares with or without voting rights and to issue shares with different profit rights. The *new Belgian Company* law therefore offers new possibilities for the transfer of family-owned business to the next generation, with reservation of control and / or profit rights. The *new Companies Code* is expected to enter into force on 1 May 2019 for new companies. Existing companies will be subject to the *new Companies Code* as from 1 January 2020, with transitional measures up to 2024.

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Luxembourg has a long tradition of asset management and is well known for its stable political climate

Home market: Luxembourg

Ideally situated in the heart of Europe, over the decades Luxembourg has developed as a financial centre with proven appeal for private banking, investment funds, holding and financing activities and family offices. In addition to the three official languages (French, German and Luxembourgish), more and more English is being spoken. Luxembourg has a long tradition of asset management and is well known for its stable political climate, a background that has helped make Luxembourg the world's second largest platform for investment funds.

This section looks at various measures and developments in our home market of Luxembourg that might affect you.

Various measures

- Emigration to Luxembourg
- Gifts made by Luxembourg residents
- Death of a Luxembourg resident
- UBO register
- Asset management via investment funds
- CFC rules
- Anti-hybrid rules
- General anti-abuse rule (GAAR)

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Emigration to Luxembourg

Step up if you emigrate to Luxembourg

If you have a substantial interest in a company (or shares in your own private or public limited company) and are considering emigrating to Luxembourg (from any country), you can legally claim an increased acquisition price for your substantial interest. This is also called *'step up'*. Under this scheme, the acquisition price of the substantial participation is set at the market value at the time of emigration. As a result, at the time of disposal (for example if you sell the interest) Luxembourg will not tax capital gains on your substantial interest that accumulated in the period prior to your emigration (deferred tax assets).

N.B. step up can be obtained in Luxembourg for shareholdings of over 10% of the issued capital of a company.

Gifts made by Luxembourg residents

No gift tax due on gifts to your children

If you have emigrated to Luxembourg and are considering making a gift to your children, these gifts are exempt of Luxembourg gift tax regardless of where your children live. It is also advisable to check the implications of this gift for the country from which you emigrated.

Death of a Luxembourg resident

No inheritance tax if you leave your wealth to your children

When a Luxembourg-resident taxpayer dies, there is no inheritance tax to pay in Luxembourg on bequests to direct descendants providing that the statutory distribution to each descendant under Luxembourg law has been respected. It does not matter where the direct descendants live. This means that if you have emigrated to Luxembourg and are considering leaving your wealth to your children on your death, they will not have to pay any inheritance tax to Luxembourg. However, if one child receives more than the other, Luxembourg levies up to 5% inheritance tax on the difference. Moreover, a surviving spouse is also exempt from inheritance tax under certain conditions.

UBO register

Mandatory implementation of the UBO register in Luxembourg

Luxembourg has decided to progressively implement the UBO register in Luxembourg. So far, the law of 10 August 2018 only deals with the information that trustees *(fiduciaires)* of a fiducie *(fiduciary agreement)* governed by Luxembourg law must collect on the *fiducie's* UBOs. The draft bills relating to the creation of a register for *fiducies* and companies have not yet been adopted. In line with EU requirements, the public will have access to information contained in the register for companies without having to demonstrate a legitimate interest. However, the UBO is expressly given the right to request that the access to information recorded in the register be restricted (e.g. in case the UBO would otherwise be exposed to a risk of fraud or kidnapping) and any communication between the manager of the UBO register and the entities subject to disclosure obligations will occur via a secure electronic system that leaves a trace of such communication.

Asset management via investment funds

Luxembourg offers a range of options for managing your wealth

Luxembourg offers a range of options for setting up and investing via directly or indirectly regulated investment funds. Common fund structures are based on the *'SIF' (Specialised Investment Fund)* regime or the *'RAIF' (Reserved Alternative Investment Fund)* regime. A SIF is regulated and subject to the *supervision of the financial markets supervision body (CSSF)*, so that investors are protected. A SIF can be set up as a fiscally transparent entity or as an 'ordinary' company with complete exemption from tax on profits, assets and dividends. Instead there is a *'subscription tax'* of 0.01% of the net worth of the SIF.

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In contrast to a SIF, a RAIF is not regulated at fund level but *at fund manager level (AIFM)*. This means a RAIF can use a fund manager that is not based in Luxembourg. The RAIF is subject to a similar tax regime to a SIF (except RAIFs that invest in *risk and venture capital*, to which different specific exemptions apply).

CFC rules

Income from an entity in a low-tax country may be taxable in Luxembourg in future

Once Luxembourg has implemented the ATAD (in principle, as from 1 January 2019), an entity in a low-tax foreign country in which a Luxembourg company has an interest of more than 50% and that has been put in place essentially for the purpose of obtaining a tax advantage risks being qualified as a *'controlled foreign corporation' (CFC)*. Luxembourg companies will be taxed on the undistributed net income of a CFC, pro rata to their ownership or control of the foreign branch or the (directly and indirectly held) subsidiary, to the extent such income is related to significant functions carried out by the Luxembourg corporate taxpayer. CFC rules will apply for corporate income tax, but not for municipal business tax purposes. To the extent that a Luxembourg company can establish that it does not perform significant functions related to the CFC's activities, there should not be an adverse tax impact in Luxembourg. In all cases, adequate documentation of activities and/or functions is recommended.

Anti-hybrid rules

Luxembourg payer companies may be confronted with the non-deductibility of interest

Under the ATAD, an anti-hybrid rule tackles intra-EU hybrid mismatches resulting from differences between two EU Member States in the characterisation of a financial instrument or an entity, which give rise to double deductions or a deduction without a corresponding inclusion. Intra-EU hybrid mismatches had already been targeted by the denial of the Luxembourg participation exemption if the payment was deductible at payer level. Once Luxembourg has implemented the ATAD (in principle, as from 1 January 2019), Luxembourg payer companies may be confronted with the non-deductibility of interest.

General anti-abuse rule (GAAR)

The revised GAAR applies to all direct taxes

The wording of the existing domestic GAAR provision will be brought in line with the ATAD's wording, introducing the concept of *'non-genuine arrangement'*. It will suffice for a tax advantage to be *'one of the main purposes'* of the arrangement to be caught under the GAAR. The revised GAAR applies to all direct taxes, for corporate as well as individual taxpayers.

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In addition to Switzerland's appeal for business and lifestyle, the country is widely known for its attractive tax system

Home market: Switzerland

Switzerland is ranked in various annual publications as one of the top countries in the world when it comes to its competitiveness, quality of life and image abroad. Switzerland is an internationally oriented (business) location, not least due to its central geographic location, excellent and extensive infrastructure, unparalleled economic and political stability and neutrality, and exceptional quality of life. The Swiss population is multilingual and has an excellent command of English. A great advantage of Switzerland is that it is part of the Schengen area, so only one visa is required for all the EU member states that form part of the Schengen agreement and Switzerland. In addition to Switzerland's appeal for business and lifestyle, the country is widely known for its attractive tax system.

This section looks at various measures and developments in our home market of Switzerland that might affect you.

Various measures

- Emigration to Switzerland
- Resident in Switzerland
- Holiday home in Switzerland
- Swiss corporate tax reform package (TP 17)
- UBOs
- Exchange of rulings
- Impact of voluntary self-disclosure and the automatic exchange of information rules

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Emigration to Switzerland

Your income and wealth can be assessed on a lump-sum basis

If you would like to emigrate to Switzerland, remember that in principle all your worldwide income and wealth is subject to income and wealth tax in Switzerland.

Under certain conditions you can take advantage of lump-sum taxation. Subject to the lump-sum taxation regime your income and wealth is assessed on a fixed *('lump-sum')* basis. This means that taxation of your income and wealth is based on your and your family's living expenses rather than your actual income and wealth.

In practice, the amount of lump-sum taxation is agreed with the competent Swiss cantonal tax authorities. As a general rule, the assessment basis for lump-sum taxation is equivalent to seven times the annual rent or rental value of your home that is inhabited by you in Switzerland as primary residence. In addition, every canton has its individual rules on the minimum taxable lump-sum amount for income and wealth tax purposes. Therefore, it is recommended carefully assessing the canton of primary residence before the actual relocation to Switzerland takes place.

Residents must pay health insurance and social security deductions

Once immigrated to Switzerland, you are obliged to obtain private health insurance in Switzerland, evidence of which you must submit to the competent communal residents registration office when you register as resident in Switzerland in the course of your registration as a Swiss resident.

Additionally, you are subject to social security contribution payments until you reach the official retirement age, irrespective of whether you are working or not. If you have agreed with the competent cantonal tax authorities to be subject to lump-sum taxation, your premiums to the Swiss social security system will not exceed CHF 25,000 per person, provided that you do not perform any activity within the EU which is subject to social security contribution payments.

Resident in Switzerland

Identify the impact of the overhauled lump-sum taxation legislation at an early stage

The law on lump-sum taxation was changed with effect from 1 January 2016. In July 2018 the Swiss federal tax administration published a circular, giving a further explanation of the modified lump-sum taxation legislation. If you are already resident in Switzerland and taking advantage of lump-sum taxation, it is sensible to check whether the reformed lump-sum taxation legislation will impact your current lump-sum determination confirmed in a ruling. In particular, the changes to the law include a higher (minimum) deemed income amount that is taxable in Switzerland and tighter eligibility requirements for lump-sum taxation. Also the (minimum) deemed amount for wealth tax purposes has been amended.

Existing lump-sum rulings benefit from a five-year grandfathering period as of the beginning of 2016 as a transitional arrangement. In other words, anyone with a lump-sum taxation agreement made prior to 2016 will be subject to the legislative amendments with effect from 1 January 2021. Since the rule changes could have a significant impact on your future lump-sum tax situation, it is advisable to identify this impact at an early stage with your Swiss tax adviser and reach out to the competent cantonal tax authorities in a timely manner to renegotiate the new deemed income and deemed wealth before the expiry of the grandfathering period, being 1 January 2021.

Holiday home in Switzerland

Donate your holiday home to your descendants without substantial Swiss taxation

If you plan to transfer your Swiss holiday home to your children, you must consider potential tax and other regulatory implications in Switzerland. In principle, you can donate a Swiss holiday home to your children without being subject to Swiss gift tax, real estate gains tax *(Grundstueckgewinnsteuer)* and real estate transfer tax *(Handaenderungssteuer)* if the gift is properly structured in advance. Such structuring varies from canton to canton

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where the real estate concerned is located, depending on the local laws and the facts and circumstances of each specific case.

No transfer limitations on acquisition or transfer of a holiday home within the family

If you acquire or transfer a Swiss holiday home, you must bear in mind that Switzerland imposes restrictions on the acquisition or transfer (purchase, sale, gift, inheritance) of Swiss real estate by non-residents. The acquisition of Swiss real estate by persons that are not resident in Switzerland must, in general, be authorised by the competent cantonal authority, which will only grant permission for such a transaction if it complies with the relevant federal and cantonal laws, if any. One major condition, for example, is that the acquirer must be eligible to purchase such real estate. Further, in communities with a significant proportion of holiday homes, the property in the community in question must be designated as a holiday home. Moreover, the annual quota of transferred holiday homes in the canton in question must not yet have been reached provided that the transfer is subject to such restrictions. However, such transfer restrictions do not apply in most cases if you acquire or transfer a Swiss holiday home within the family.

Swiss corporate tax reform package (TP 17)

Abolition of special tax regimes for Swiss companies

On 28 September 2018, the Swiss parliament adopted the legislative bill for the Swiss corporate tax reform package, the *'Tax Proposal 17' (TP 17)*. The reform package will strengthen Switzerland's position as an attractive international business location. The final legislation closely follows the Swiss corporate tax reform III package which was rejected in a public vote back in February 2017. It replaces the current preferential tax regimes such as holding, principal, mixed company and finance branch regimes with new tax measures in line with international standards. Aside from favourable step-up mechanisms, TP 17 introduces a notional interest deduction on equity financing for companies in the canton of Zurich. Separately, many cantons announced significant tax rate reductions resulting in effective corporate tax rates in Switzerland of 12% to 14% in most cantons.

In order to sweeten the deal in view of a public referendum vote, minor changes will be made, notably to the preferential taxation of dividends for individuals and to the income and withholding tax treatment of qualifying capital reserves (additional paid-in capital). The latter changes only pertain to Swiss listed companies and due to broad exemptions essentially do not impact other multinationals. The reform package also contains an extension of the transposition rule concerning the transfer of an investment from an individual's private assets to his or her business assets.

TP 17 is expected to enter into force on 1 January 2020. A public referendum vote is however expected in May 2019.

Some changes to individual income tax

As outlined above, TP 17 also brings about some changes to individual income tax. First and foremost, the reduced taxation of dividends is slightly increased: The minimum tax basis for dividend payments on qualifying investments (10%) held by an individual is increased to 70% at federal level and 50% at cantonal level. This rule applies both to investments held by a private individual as well as investments held by an individual as part of a business asset. Given that most cantons are expected to significantly reduce the overall corporate income tax rates, this increase in dividend taxation is obviously a logical step. Depending on the individual case, some private investors may want to evaluate dividend distributions prior to TP 17 in order to benefit from the current lower tax basis.

Second, aside from the income taxation of dividends under the new priority rule described above, TP 17 also amends income tax rules pertaining to the transfer of an investment held by an individual to a business or legal entity held by the same individual. Under current rules, such a transfer can trigger income tax if the investment transferred pertains to at least 5% in the capital of a legal entity if not structured properly. Under revised rules, the 5% rule is abolished and any transfer will thus trigger income tax if not properly structured. The tax impact can still be mitigated if the transfer is structured properly.

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Slight changes to the withholding tax regime

Switzerland notably levies a 35% withholding tax on dividends. As an exception to this rule, a repayment of nominal share capital and the distribution of profits from so-called *'reserves from capital contributions'* (essentially additional paid-in capital recognised as capital reserves) are exempt from withholding tax provided certain formalities are met. Most importantly, this also applies on payments to non-Swiss resident shareholders, regardless of the individual treaty position of the beneficiary. In a domestic context, payments made out of such reserves are not subject to individual income tax.

TP 17 introduces some slight changes to the above regime, by introducing a limited priority rule for distributions made by a Swiss listed entity. In short, distributions by Swiss listed companies are required to be made from profit reserves in an equal amount as distributions made from qualifying capital reserves and are thus partially subject to withholding tax (and taxed for individual income tax purposes) again. Due to exemptions for non-Swiss listed groups, intra-group distributions and privately held companies, the impact is limited.

Identify what this means for your international family-owned company

As mentioned above, TP17 mainly includes measures that relate to corporate income taxes. It is advisable to identify what the Swiss Tax Proposal 17 will mean for your international family-owned company.

UBOs

Mandatory internal registration of UBOs of Swiss companies

If you are the UBO of a Swiss company, the following information is of relevance to you. Switzerland is not part of the EU and therefore, in contrast to all EU member states, is not obliged to keep a (public) UBO register. The introduction of such a publicly available register is currently not intended in Switzerland.

However, Swiss companies are obliged to keep an internal UBO register for anti-money laundering purposes. Such an internal UBO register is not publicly available. Only the Swiss authorities can request access to the internal UBO register in connection with circumstances such as criminal proceedings or an information request from foreign tax authorities based on a double tax treaty with the requesting state if the respective legal requirements are met.

Exchange of rulings

Be aware of spontaneous exchange of tax rulings

Switzerland's legislation on spontaneous exchange of information of advance tax rulings entered into force on 1 January 2017. The law provides for exchange of certain tax rulings with effect from 1 January 2018 if they were issued on or after 1 January 2010 and are still in force on 1 January 2018. Rulings on corporate income tax, annual capital tax and Swiss withholding tax are covered by the framework for spontaneous exchange. Rulings solely dealing with the taxation of a Swiss resident should, in principle, not be affected by the exchange.

Impact of voluntary self-disclosure and the automatic exchange of information rules

Voluntary self-disclosure may still be taken into account as a mitigating factor

In Switzerland, one of the criteria for voluntary self-disclosure is that the tax authorities are not yet aware of the undeclared assets. Given that the *automatic exchange of information (AEOI)* will include bank account information from foreign bank accounts of Swiss residents, the question is at which point the tax authorities will become aware of such information and, consequently, voluntary self-disclosure is no longer possible.
As published in a recent statement by the Swiss federal tax administration with respect to the impact of AEOI on voluntary self-disclosures, Swiss tax authorities should be deemed to be aware of non-disclosed information as of 30 September of the year following the introduction of AEOI with a specific country. In other words, voluntary self-disclosure will

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cease to be possible after this date because the local tax authorities will be deemed to be fully aware of any missing information relating to a taxpayer.

Since Switzerland introduced AEOI with all EU member states with effect from 1 January 2017, a voluntary self-disclosure to the Swiss tax authorities of undeclared bank accounts located in EU member states was only possible until 30 September 2018. However, voluntary self-disclosure may still be taken into account as a mitigating factor when assessing fines for tax evasion.

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Team Family Owned Business & Private Wealth

Do you own a family business? Are you an entrepreneur? Or maybe a high net worth individual? If so, you no doubt face complex tax and legal regulations, both at home and abroad. Not just related to your business, but also to your personal (family) wealth.

You may well be wondering if your tax and legal position in business and in personal affairs is up to date and optimal. Or perhaps you have questions on how to ensure a smooth transfer of your family-owned company to the next generation, without disrupting the continuity of the business. These are not just questions of the mind; personal values, family values and emotion - heart - play a part as well and must be involved in any considerations.

Our Family Owned Business & Private Wealth team would be delighted to offer you tailored, personal advice. We take a co-operative and forward-thinking approach, anticipating social dynamics, and help you to make the right choices. This also applies to our services for family offices, private bankers, (family) foundations, and (family) trusts.

What can you expect from us?

The ten examples that follow will give you an idea of what you can expect from us:

1. Tax and legal structuring of your family-owned business
2. Advice on the management and supervision of your family-owned business and wealth
3. Protection of your wealth and your privacy
4. Tax and legal structuring of your succession planning
5. Support for your emigration and/or repatriation
6. Tax and legal structuring of your valuable assets
7. Advice on prenuptial agreements and wills
8. Establishing (family) foundations and charitable organisations
9. Advice on pension provision
10. Performing compliance activities, such as drafting tax returns

What makes us unique?

We are unique because of the fully-integrated collaboration between tax advisers, civil law notaries and lawyers. Your questions are considered and addressed from various perspectives, and we are completely independent from accountants. You can also draw on specialist tax and legal knowledge of the rules in our four home markets (the Netherlands, Belgium, Luxembourg, and Switzerland) and you can draw on our global (business) network.

We have 100 years of experience in the industry and we are genuinely interested in our clients. This allows us to efficiently transform your complex tax and legal issues into pragmatic solutions. We aim to build long-term client relationships founded on mutual trust (trusted advisor).

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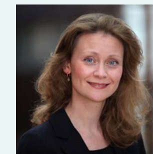
Contact

Do you need more information having read this update? Or would you like to find out about the implications of specific legislation and rules for your situation? Then contact your Loyens & Loeff adviser or feel free to contact one of our advisers in the Family Owned Business & Private Wealth team for a non-obligatory consultation.

Netherlands

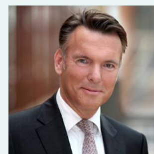
Jules de Beer
Tax adviser / Senior associate
T +31 10 224 61 55
E jules.de.beer@loyenloeff.com

Mariëlle Nuijens
Sr. deputy civil law notary / Sr. associate
T +31 20 578 56 82
E marielle.nuijens@loyensloeff.com



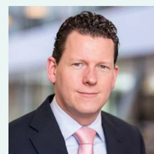
Rogier Ploeg
Tax adviser / Senior associate
T +31 20 578 59 29
E rogier.ploeg@loyensloeff.com

Cees Goosen
Tax adviser / Senior associate
T +31 20 578 52 27
E cees.goosen@loyensloeff.com



Pieter van Onzenoort
Notary / Counsel
T +31 10 224 62 97
E pieter.van.onzenoort@loyensloeff.com

Dirk-Jan Maasland
Sr. deputy civil law notary / Sr. associate
T +31 20 578 57 43
E dirk.jan.maasland@loyensloeff.com



Christa Parlevliet
Assigned civil law notary / Sr. associate
T +31 10 224 62 14
E christa.parlevliet@loyensloeff.com

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Belgium

Barbara Albrecht
Attorney at law / Associate
T +32 2 773 23 71
E barbara.albrecht@loyensloeff.com

Nicolas Bertrand
Attorney at law / Partner
T +32 2 773 23 46
E nicolas.bertrand@loyensloeff.com

Saskia Lust
Attorney at law / Partner
T +32 2 700 10 27
E saskia.lust@loyensloeff.com

Luxembourg

Marcel Vrijenhoek
Tax adviser / Senior associate
T +352 466 230 295
E marcel.vrijenhoek@loyensloeff.com

Switzerland

Georges Frick
Lawyer / Associate
T +41 43 434 67 12
E georges.frick@loyensloeff.com

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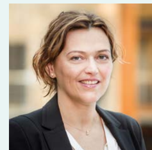
Credits

Authors

Barbara Albrecht, Jules de Beer, Almut Breuer, Georges Frick, Cees Goosen, Gerhard Grauss, Tim Hendriks, Anne Klethi, Saskia Lust, Dirk-Jan Maasland, Mariëlle Nuijens, Rogier Ploeg, Bert van der Poel, Wiesje Schakenraad, Rick van der Velden, Pleuni Visser, Marcel Vrijenhoek, Valérie van der Weijden and Ruben van der Wilt.

Author and editor (in chief)

Jessica Litjens
Professional Support Lawyer / Senior associate
T +31 20 578 55 37
E jessica.litjens@loyensloeff.com



Copy deadline

The copy deadline for this edition was 8 November 2018, which means that any later developments are not covered.

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