GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

**Peer Review Report on the Exchange of Information on Request**

# THE NETHERLANDS

**2019** (Second Round)

OECD

# Global Forum on Transparency and Exchange of Information for Tax Purposes: The Netherlands 2019 (Second Round)

PEER REVIEW REPORT ON THE EXCHANGE OF INFORMATION ON REQUEST

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(reflecting the legal and regulatory framework as at October 2018)

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# Reader's guide

The Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 150 jurisdictions that participate in the Global Forum on an equal footing. The Global Forum is charged with the in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes (both on request and automatic).

## Sources of the Exchange of Information on Request standards and Methodology for the peer reviews

The international standard of exchange of information on request (EOIR) is primarily reflected in the 2002 OECD Model Agreement on Exchange of Information on Tax Matters and its commentary, Article 26 of the OECD Model Tax Convention on Income and on Capital and its commentary and Article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries and its commentary. The EOIR standard provides for exchange on request of information foreseeably relevant for carrying out the provisions of the applicable instrument or to the administration or enforcement of the domestic tax laws of a requesting jurisdiction. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including ownership, accounting and banking information.

All Global Forum members, as well as non-members that are relevant to the Global Forum's work, are assessed through a peer review process for their implementation of the EOIR standard as set out in the 2016 Terms of Reference (ToR), which break down the standard into 10 essential elements under three categories: (A) availability of ownership, accounting and banking information; (B) access to information by the competent authority; and (C) exchanging information.

The assessment results in recommendations for improvements where appropriate and an overall rating of the jurisdiction's compliance with the EOIR standard based on:

1. The implementation of the EOIR standard in the legal and regulatory framework, with each of the element of the standard determined to be either (i) in place, (ii) in place but certain aspects need improvement, or (iii) not in place.
2. The implementation of that framework in practice with each element being rated (i) compliant, (ii) largely compliant, (iii) partially compliant, or (iv) non-compliant.

The response of the assessed jurisdiction to the report is available in an annex. Reviewed jurisdictions are expected to address any recommendations made, and progress is monitored by the Global Forum.

A first round of reviews was conducted over 2010-16. The Global Forum started a second round of reviews in 2016 based on enhanced Terms of Reference, which notably include new principles agreed in the 2012 update to Article 26 of the OECD Model Tax Convention and its commentary, the availability of and access to beneficial ownership information, and completeness and quality of outgoing EOI requests. Clarifications were also made on a few other aspects of the pre-existing Terms of Reference (on foreign companies, record keeping periods, etc.).

Whereas the first round of reviews was generally conducted in two phases for assessing the legal and regulatory framework (Phase 1) and EOIR in practice (Phase 2), the second round of reviews combine both assessment phases into a single review. For the sake of brevity, on those topics where there has not been any material change in the assessed jurisdictions or in the requirements of the Terms of Reference since the first round, the second round review does not repeat the analysis already conducted. Instead, it summarises the conclusions and includes cross-references to the analysis in the previous report(s). Information on the Methodology used for this review is set out in Annex 3 to this report.

## Consideration of the Financial Action Task Force Evaluations and Ratings

The Financial Action Task Force (FATF) evaluates jurisdictions for compliance with anti-money laundering and combating terrorist financing (AML/CFT) standards. Its reviews are based on a jurisdiction's compliance with 40 different technical recommendations and the effectiveness regarding 11 immediate outcomes, which cover a broad array of money-laundering issues.

The definition of beneficial owner included in the 2012 FATF standards has been incorporated into elements A.1, A.3 and B.1 of the 2016 ToR. The 2016 ToR also recognises that FATF materials can be relevant for carrying out EOIR assessments to the extent they deal with the definition of beneficial ownership, as the FATF definition is used in the 2016 ToR (see 2016 ToR, annex 1, part I.D). It is also noted that the purpose for which the FATF materials have been produced (combating money-laundering and terrorist financing) is different from the purpose of the EOIR standard (ensuring effective exchange of information for tax purposes), and care should be taken to ensure that assessments under the ToR do not evaluate issues that are outside the scope of the Global Forum's mandate.

While on a case-by-case basis an EOIR assessment may take into account some of the findings made by the FATF, the Global Forum recognises that the evaluations of the FATF cover issues that are not relevant for the purposes of ensuring effective exchange of information on beneficial ownership for tax purposes. In addition, EOIR assessments may find that deficiencies identified by the FATF do not have an impact on the availability of beneficial ownership information for tax purposes; for example, because mechanisms other than those that are relevant for AML/CFT purposes exist within that jurisdiction to ensure that beneficial ownership information is available for tax purposes.

These differences in the scope of reviews and in the approach used may result in differing conclusions and ratings.

## More information

All reports are published once adopted by the Global Forum. For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published reports, please refer to www.oecd.org/tax/transparency and http://dx.doi.org/10.1787/2219469x.

# Abbreviations and acronyms

| | |
|---|---|
| **4th EU AMLD** | 4th EU Anti-Money Laundering Directive |
| **AFM** | Authority for the Financial Markets |
| **AML** | Anti-Money Laundering |
| **AML/CFT** | Anti-Money Laundering/Countering the Financing of Terrorism |
| **BES** | Bonaire, Saint Eustatius and Saba |
| **BV** | *Besloten Vennootschap* (Private Limited Liability Company in the Netherlands) |
| **CDD** | Customer Due Diligence |
| **CITA** | Corporate Income Tax Act |
| **CLO** | Central Liaison Office. Designated competent authority for direct taxes, part of Central Liaison Office Almelo |
| **DTC** | Double Tax Convention |
| **ECJ** | Court of Justice of the European Union |
| **EEIG** | European Economic Interest Grouping |
| **EOI** | Exchange of information |
| **EOIR** | Exchange of information on request |
| **EU** | European Union |
| **FATF** | Financial Action Task Force |
| **FIOD** | Fiscal Investigation and Intelligence Service |
| **Global Forum** | Global Forum on Transparency and Exchange of Information for Tax Purposes |
| **GSTA** | General State Tax Act |

| | |
|---|---|
| **LLC** | Limited liability company |
| **LP** | Limited partnership |
| **LLP** | Limited liability partnership |
| **Multilateral Convention** | The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended |
| **NTCA** | Netherlands Tax and Customs Administration |
| **NV** | *Naamloze Vennootschap* (Public Limited Liability Company in the Netherlands) |
| **PITA** | Personal Income Tax Act |
| **PRG** | Peer Review Group of the Global Forum |
| **RLO** | Regional Liaison Office |
| **SAR** | Suspicious Activity Report |
| **STAK** | *Stichting Administratiekantoor* (A type of Foundation in the Netherlands) |
| **Standard** | International standard on transparency and exchange of information for tax purposes, as set out in the 2016 Terms of Reference |
| **TIEA** | Tax Information Exchange Agreement |
| **2016 Assessment Criteria Note** | Assessment Criteria Note, as approved by the Global Forum on 29-30 October 2015 |
| **2016 Methodology** | 2016 Methodology for peer reviews and non-member reviews, as approved by the Global Forum on 29-30 October 2015 |
| **2016 Terms of Reference (ToR)** | Terms of Reference related to Exchange of Information on Request (EOIR), as approved by the Global Forum on 29-30 October 2015 |

# Executive summary

1. This report analyses the implementation of the international standard on transparency and exchange of information on request (EOIR) by the Netherlands on the second round of reviews conducted by the Global Forum against the 2016 Terms of Reference. It assesses both the legal and regulatory framework as on 14 December 2018 and the practical implementation of this framework, in particular in respect of EOI requests received during the period from 1 July 2014 to 30 June 2017. This second round report concludes that the Netherlands continues to be rated overall **Largely Compliant** with the international standard. The Netherlands previously underwent the EOIR peer review in the first round of reviews by means of a combined Phase 1 and Phase 2 Report (the 2011 Report).

2. The following table shows the comparison of results from the first and the second round review of the Netherlands' implementation of the EOIR standard:

| | Element | First Round Report (2011) | Second Round Report (2018) |
|---|---|---|---|
| A.1 | Availability of ownership and identity information | LC | PC |
| A.2 | Availability of accounting information | C | C |
| A.3 | Availability of banking information | C | LC |
| B.1 | Access to information | C | C |
| B.2 | Rights and Safeguards | LC | C |
| C.1 | EOIR Mechanisms | LC | C |
| C.2 | Network of EOIR Mechanisms | C | C |
| C.3 | Confidentiality | C | C |
| C.4 | Rights and Safeguards | C | C |
| C.5 | Quality and timeliness of responses | C | C |
| | **OVERALL RATING** | LC | **LC** |

**C** = Compliant; **LC** = Largely Compliant; **PC** = Partially Compliant; **NC** = Non-Compliant

## Progress made since previous review

3. Since the 2011 Report, the Netherlands continues to perform well in all aspects of exchange of information. The organisation and procedures to reply to EOI requests are complete and coherent and peers have been satisfied with the quality and timeliness of the information provided by the Netherlands. During the new review period, the Netherlands has received more than 2 000 EOI requests, mainly from other members of the European Union.

4. The Netherlands has made progress in addressing some of the recommendations made in 2011. Recommendations were made in respect of seven essential elements, three of which were rated Largely Compliant (i.e. A.1, B.2 and C.1) and the remaining elements were rated Compliant.

5. Most progress has been made in the handling of EOI requests and in upgrading the EOI treaty network. The recommendations on element B.2 (on the process for notification and appeal), on element C.1 (to bring EOI agreements to the standard and to ensure expeditious ratification of all signed agreements), and on element C.5 (to ensure responses in a timely manner and communication with the partners) have been adequately addressed. The only issue concerning access and exchange under the 2011 Report that remains to be addressed relates to clarifying the scope of professional privilege in tax matters.

6. Improvement is still needed in relation to transparency and the availability of information. Under element A.1 (availability of ownership and identity information) the Netherlands received recommendations in its 2011 Report concerning foreign partners of limited partnerships, holders of bearer shares and beneficiaries of foundations. The availability of information regarding foreign partners of limited partnerships has since been clarified but the recommendations on holders of bearer shares and beneficiaries of foundations remain to be fully addressed by the Netherlands.

## Key recommendation(s)

7. Key recommendations relate mainly to the new requirement for the availability of beneficial ownership information introduced by the 2016 ToR. The Netherlands needs to bring its legal framework and practice fully in line with the international standard. Beneficial ownership information is collected when a legal entity or arrangement has a relationship with a person subject to anti-money laundering obligations; however, there is currently no legal requirement for all Netherlands legal entities and arrangements to engage an AML obliged person at all times. Moreover, a new definition of beneficial owner has been introduced in European Netherlands on 25 July 2018 and its

implementation needs to be supervised. This new definition is not in effect in Caribbean Netherlands and amendment to the legal framework is therefore required.

8. Finally, the Netherlands needs to address the remaining recommendations from the 2011 Report, especially on bearer shares and professional privilege.

## Overall rating

9. The Netherlands has achieved a rating of Partially Compliant in relation to element A.1, Largely Compliant in relation to element A.3 and Compliant for all other elements. The Netherlands' overall rating is **Largely Compliant** based on a global consideration of the Netherlands' compliance with the individual elements.

10. This report was approved at the PRG meeting in February 2019 and was adopted by the Global Forum on 15 March. A follow-up report on the steps undertaken by the Netherlands to address the recommendations made in this report should be sent to the PRG no later than 30 June 2020 and thereafter in accordance with the procedure set out under the 2016 Methodology.

**Summary of determinations, ratings and recommendations**

| Determinations and Ratings | Factors underlying recommendations | Recommendations |
|---|---|---|
| Jurisdictions should ensure that ownership and identity information, including information on legal and beneficial owners, for all relevant entities and arrangements is available to their competent authorities *(ToR A.1)* | | |
| **The legal and regulatory framework is in place but needs improvement.** | There are some bearer shares in circulation in the Netherlands at present, but there are insufficient mechanisms in place that ensure the availability of information allowing for identification of the owners of bearer shares in unlisted public limited liability companies. There are insufficient mechanisms in place in the Caribbean Netherlands that ensure the availability of information on the owners of bearer shares. | The Netherlands should take necessary measures to ensure that mechanisms are in place to identify the owners of bearer shares in unlisted public limited liability companies in the European Netherlands and in the Caribbean Netherlands, or should eliminate such bearer instruments. |

| Determinations and Ratings | Factors underlying recommendations | Recommendations |
|---|---|---|
| **The legal and regulatory framework is in place but needs improvement.** *(continued)* | Foundations in the European Netherlands and the Caribbean Netherlands are not systematically required to keep identity information concerning all beneficiaries. | An obligation should be established in both the European Netherlands and the Caribbean Netherlands for foundations to keep identity information concerning all beneficiaries. |
| | Beneficial ownership information is required to be collected by a wide range of AML obliged persons in the European Netherlands and the Caribbean Netherlands when engaged by legal entities and arrangements. In practice, legal entities and arrangements usually have a relationship with an AML obliged person, but they have no obligation to do so. In addition, the AML legal framework in force in the Caribbean Netherlands is not fully in line with the standard. | The Netherlands should ensure that beneficial ownership information is available for all relevant entities and arrangements in accordance with the standard. |
| **Partially Compliant** | In July 2018, the AML legal framework in the European Netherlands was amended, in particular, to define new rules for simplified customer due diligence and for identification of beneficial owners. Due to its recent entry into force, the implementation of the new provision could not be assessed in practice. | The Netherlands should supervise the effective implementation of the recent amendments to the AML legal framework. |
| Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements *(ToR A.2)* | | |
| **The legal and regulatory framework is in place.** | | |
| **Compliant** | | |

| Determinations and Ratings | Factors underlying recommendations | Recommendations |
|---|---|---|
| Banking information and beneficial ownership information should be available for all account-holders *(ToR A.3)* | | |
| **The legal and regulatory framework is in place.** | The definition of beneficial owner and the simplified customer due diligences which allow the AML obliged person not to identify and verify the beneficial owner of a customer who is also a customer of other professionals (who may not be based in the Netherlands), as applicable in the Caribbean Netherlands is not fully in line with the standard. | The Netherlands should ensure that beneficial ownership information is available for all relevant entities and arrangements in the Caribbean Netherlands in accordance with the standard. |
| **Largely Compliant** | Before 25 July 2018, the AML legal framework in European Netherlands was not in line with the standards and deficiencies were found with regards to simplified due diligence, customer due diligence requirements to identify the beneficial owners of relevant entities and arrangements. After the review period, in July 2018, the AML legal framework in European Netherlands was amended, in particular to define new rules for simplified customer due diligence and for identification of beneficial owners. Due to its recent entry into force, the implementation of the new provision could not be assessed in practice. | The Netherlands should supervise the effective implementation of the recent amendments on beneficial ownership. |

| Determinations and Ratings | Factors underlying recommendations | Recommendations |
|---|---|---|
| Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information) *(ToR B.1)* | | |
| **The legal and regulatory framework is in place.** | | |
| **Compliant** | | |
| The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information *(ToR B.2)* | | |
| **The legal and regulatory framework is in place.** | | |
| **Compliant** | | |
| Exchange of information mechanisms should provide for effective exchange of information *(ToR C.1)* | | |
| **The legal and regulatory framework is in place.** | | |
| **Compliant** | | |
| The jurisdictions' network of information exchange mechanisms should cover all relevant partners *(ToR C.2)* | | |
| **The legal and regulatory framework is in place.** | | |
| **Compliant** | | |
| The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received *(ToR C.3)* | | |
| **The legal and regulatory framework is in place.** | | |
| **Compliant** | | |
| The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties *(ToR C.4)* | | |
| **The legal and regulatory framework is in place.** | | |
| **Compliant** | | |
| The jurisdiction should request and provide information under its network of agreements in an effective manner *(ToR C.5)* | | |
| **Legal and regulatory framework:** | This element involves issues of practice. Accordingly, no determination on the legal and regulatory framework has been made. | |
| **Compliant** | | |

# Overview of the Netherlands

11. This overview provides some basic information about the Netherlands that serves as context for understanding the analysis in the main body of the report. This is not intended to be a comprehensive overview of the Netherlands' legal, commercial or regulatory systems.

## The Kingdom of the Netherlands and its constituencies

12. The Netherlands is a constituent country of the Kingdom of the Netherlands, located mainly in Europe, with three small islands in the Caribbean – Bonaire, Saint Eustatius and Saba, which are special municipalities in the Netherlands administrative structure. These special municipalities are covered in the present report and referred to as the Caribbean Netherlands or BES-Islands.

13. The other jurisdictions of the Kingdom of the Netherlands are Aruba, Curaçao, and Sint Maarten. The relation between the Netherlands and the other parts of the Kingdom of the Netherlands is governed by the Statute for the Kingdom of the Netherlands, pursuant to which Aruba, Curaçao and Sint Maarten are self-governing to a large degree and accordingly, have legislative autonomy on various matters, including taxes. Defence, foreign relations, nationality and extradition are affairs of the Kingdom. Aruba, Curaçao and Sint Maarten are members of the Global Forum and are subjects of separate peer reviews.

14. The Netherlands currency is the Euro. From 1 January 2011, the official currency of the Caribbean Netherlands is the US Dollar.

## Legal system

15. The Netherlands is a parliamentary democracy. The State is ruled by the government under the supervision of parliament. The government consists of the King and the Ministers under the leadership of the Prime Minister. The Parliament consists of an Upper House and a Lower House.

The 150 members of the Lower House are elected directly by the citizens of the Netherlands. Delegates from the Provincial Councils elect the members of the Upper House.

16. The legal system is based on civil law. Corporate law legislation mainly follows from the Civil Code and the Commercial Code, although specific parts of company law can be found in separate laws. The Caribbean Netherlands have a separate Civil Code and a Commercial Code, and the types of legal entities that can be incorporated there broadly follow the ones of the European Netherlands.

17. The Netherlands is divided into 11 districts, each with its own court. Administrative disputes are mainly heard by the administrative law sector of the district court; in many cases the hearing is preceded by an objection procedure under the auspices of the administrative authorities. Tax cases also fall under the administrative law sector and are preceded by an objection procedure before the tax authority. Appeals against judgements passed by the district court can be lodged at the competent Court of Appeal. Further appeals in cassation are lodged at the Supreme Court of the Netherlands.

18. The Netherlands is a member of the European Union. Furthermore, the Netherlands has to adhere to the jurisprudence of the Court of Justice of the EU and the European Court for Human Rights, including in taxation matters.

## Tax system

19. The Netherlands levies income tax, corporate income tax, wage tax, dividend withholding tax, value added tax, inheritance tax and gift tax.

20. Individuals resident in the Netherlands are subject to income tax on their worldwide income. Non-resident individuals are subject to income tax on income from sources in the Netherlands. The tax year follows the calendar year. Income is classified as: income from employment and home ownership (progressive tax rate, maximum 51.95%); income from a substantial interest[1] (flat tax rate, 25%); and income from savings and investments (flat tax rate, 30%).

21. Legal entities are generally subject to corporate income tax on their worldwide profits. Non-resident companies are subject to corporate tax on income earned from business through a permanent establishment or a permanent representative in the Netherlands and on income from a substantial interest in a company established in the Netherlands or from the Netherlands' real estate. The corporate income tax rate is progressive: the first EUR 200 000 profits are taxed at 20%; the subsequent profits are taxed at 25%.

1. Please see definition under the subsection "Obligation to identify substantial interest holders under the tax laws" in A.1.1 below.

22. Dividends distributed by a resident company are subject to a 15% withholding tax though, under applicable tax treaties, the rate for intercompany dividends is often reduced. Dividends received and capital gains derived from a shareholding may also benefit from participation exemption. The Netherlands does not levy withholding tax on interest and royalties nor on remittance of profits by a permanent establishment to its foreign head office.

23. The Netherlands International Assistance (Levying of Taxes) Act and General State Tax Act (GSTA) provide the domestic framework for the international exchange of information in tax matters. The Minister of Finance is the competent authority. Officials of the Ministry of Finance lead the work relating to policies and negotiation of international agreements, while the Central Liaison Office within the Netherlands Tax and Customs Administration (NTCA) bears the primary responsibility for conducting the international exchange of information.

24. International agreements come into force after ratification by the Parliament (Art. 91 Constitution). European Union directives need to be transposed in the domestic laws to be legally binding in the Netherlands. International treaties including tax treaties take precedence over any conflicting national law and have priority over the Acts of Parliament and the Constitution itself.

25. The Netherlands government is responsible for the (tax) laws in the BES-islands as well. The tax administration of the Caribbean Netherlands is a part of the Netherlands tax administration. The substantive tax law in the Caribbean Netherlands differs from that of the European Netherlands, but the procedural law, including the articles concerning the international exchange of information is quite similar.

26. All entities resident in the Caribbean Netherlands are deemed to be tax resident in the Netherlands and as such subject to the Netherlands Corporate Income Tax (Article 5.2 (1) BES Tax Act and article 2(8) Corporate Income Tax Act, CITA). Only entities that (i) pass a "substance threshold" and (ii) request for a "residency declaration" become tax resident of the Caribbean Netherlands. The substance threshold can be met in three ways:

i. small enterprises (maximum revenue of USD 80 000; or maximum assets of USD 200 000) that do not engage in substantial financial activities

ii. enterprises that have max. 50% of "mobile assets" (such as stocks, participations in subsidiaries, liquid assets, other assets related to financing and licensing activities)

iii. enterprises that employ at least three "relevant full time equivalent" persons and have immovable property at their disposal of at least USD 50 000 for 24 months.

## Financial services sector

27. The Netherlands has a large and globally interconnected financial system with assets nearly eight times gross domestic product (GDP).

28. The Netherlands Central Bank focuses on the prudential objective of promoting the soundness of financial institutions, while the Netherlands Authority for the Financial Markets focuses on the conduct of business objective of enhancing orderly and fair market practices. Integrity supervision, including AML/CFT supervision, is performed by both.

29. The Netherlands has one of the most concentrated banking sectors in the euro area and is dominated by a small number of large national banks undertaking a wide range of activities. The banking system comprises half of the financial sector. There are approximately 100 banks operating in the Netherlands. The country is home to a "globally systemic important" bank. Three banks, ING, ABN AMRO and Rabobank control 72% of the sector's assets. Foreign competitors are scarce in the Netherlands market, holding approximately 10% of Netherlands banking assets, of which approximately 85% originate from the EU and 15% from outside the EU.

30. As of December 2016, there were 8 721 public accountants, 12 900 tax advisors, 17 500 lawyers (in more than 5 000 law firms), 3 171 notaries and 236 licensed trust and company service providers (TCSPs) in the European Netherlands.

31. The Netherlands law requires a notarial instrument for a number of agreements and legal transactions, including incorporating public or private limited liability companies or altering their articles of association, transferring nominative shares, and establishing foundations or associations.

32. As of January 2018, there were 8 credit institutions in the Caribbean Netherlands: 1 with a registered office (legal seat) in Bonaire and 7 foreign credit institutions with branch office authorisation. Furthermore, there were 2 foreign credit institutions with authorisation for service provision without branch office. There were also 9 lawyers, 13 accountants, 2 notaries public and 1 TCSP.

## FATF Evaluation

33. The Netherlands is a member of the Financial Action Task Force (FATF). The FATF last published a Mutual Evaluation Report (MER) for the Netherlands in 2011.[2] The 2011 MER placed the Netherlands in a

2. www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Netherlands%20full.pdf.

regular follow-up process. In February 2014, the FATF recognised that the Netherlands had made significant progress in addressing the deficiencies identified in the 2011 MER and could be removed from the regular follow-up process. The 2014 Follow-up report[3] concluded that the Netherlands had achieved a compliance level equivalent to Largely Compliant with Recommendation 5 (Customer Due Diligence), but that the compliance with Recommendations 33 (Transparency and beneficial ownership of legal persons) and 34 (Transparency and beneficial ownership of legal arrangements) was still equivalent to Partially Compliant.

34. The Netherlands' next FATF evaluation under the 4th Round of Mutual Evaluations is scheduled to commence in 2020.

## Recent developments

35. The Act on Registration of Notarial Deeds 1970 was amended to require that all notarial deeds with respect to legal entities be submitted to the NTCA digitally from 1 July 2014 (Article 7a).

36. The Law on Securities Trading has been amended per 1 January 2011 (with a transition period until 1 January 2013).This law provides that bearer shares issued by listed public limited liability companies may only be held on a securities account by a custodian. Euroclear and other banks in the Netherlands have been designated as custodians.

37. The Netherlands is in the process of fully implementing the 4th EU Anti-Money Laundering Directive. The first stage was finalised on 25 July 2018 through the entry into force of a Decree introducing a new definition of beneficial owner. Subsequently, amendments were brought to the Money Laundering and Terrorist Financing (Prevention) Act, particularly on customer due diligence. However, the 4th EU AML Directive has not been translated yet in the Caribbean Netherlands' legal framework. The second phase, which concerns the implementation of a beneficial owner Register, is ongoing.

38. Revision of the Act on the supervision of trust and company service providers is also expected to be in force by January 2019.

39. A bill of law providing for (i) the identification of holders of existing bearer shares in the Netherlands' non-listed public limited liability companies through dematerialisation; and (ii) the prohibition of the issuance of new bearer shares by such companies is expected to be passed in 2019. This bill also provides for the abolishment of bearer shares in relation to public limited

3. www.fatf-gafi.org/media/fatf/documents/reports/mer/FUR-Netherlands-2014.pdf.

liability companies in the BES Islands and the conversion of any existing bearer shares into registered shares.

40. A legislative proposal has also been submitted to Parliament to strengthen the role of the Chamber of Commerce in combating malicious practices in the trade sector and to simplify the criteria for dissolution of legal entities. This law is currently before the second chamber of Parliament and is intended to come into force on 1 January 2019.

41. The Netherlands government is currently working on a bill to clarify the statutory right of non-disclosure enjoyed by persons that fall under the scope of the current professional secrecy rules.[4]

4. The following background was included in the government's policy letter of February 2018 to Parliament:

"The parliamentary committee on tax avoidance schemes states in its report of 5 July 2017 that the engagement of the services of tax consultants and trusts or company service providers sometimes creates a reality that exists only on paper. This makes it more difficult for regulators and the Tax and Customs Administration to see what is really going on, complicating the enforcement of the rules and increasing the risk of tax avoidance and tax evasion. The parliamentary committee's findings also reveal the highly interconnected nature of a sector in which established partnerships of trusts or company service providers, tax advisers and civil-law notaries work together to devise tax avoidance arrangements. Each participant in this process only considers their responsibility for their own role, but nobody takes responsibility for the negative side effects of the arrangement as a whole. This can result in tax evasion or tax avoidance by exploiting differences between tax jurisdictions.

The findings of the parliamentary committee on tax avoidance schemes reinforce the government's conviction that the Tax and Customs Administration must be enabled to gain access to the facts that are relevant to taxation. This is also why, in the coalition agreement, the government identifies the need in the light of the Panama Papers to ensure that the Tax and Customs Administration has better access to information and to increase transparency. The announcement that the right of non-disclosure in tax matters would be clarified should also be viewed against this backdrop."

# Part A: Availability of information

42. Sections A.1, A.2 and A.3 evaluate the availability of ownership and identity information for relevant entities and arrangements, the availability of accounting information and the availability of bank information.

## A.1. Legal and beneficial ownership and identity information

Jurisdictions should ensure that legal and beneficial ownership and identity information for all relevant entities and arrangements is available to their competent authorities.

43. The 2011 Report concluded that the legal and regulatory framework for the maintenance of ownership and identity information was in place in the Netherlands and the Caribbean Netherlands for many relevant entities and arrangements; however, improvements were needed to ensure the identification of (i) owners of bearer shares of public limited liability companies; (ii) foreign limited partners of limited partnerships; and (iii) all beneficiaries of foundations. The 2011 Report concluded that the monitoring and enforcement of legal requirements by the Netherlands authorities ensured the availability of identity and ownership information in practice. Element A.1 was determined to be in place but in need of improvement and rated Largely Compliant with the EOIR Standard.

44. Since the 2011 Report, a 2015 Decree clarified that the information on the identity of foreign limited partners of limited partnerships would be available pursuant to tax law and an amendment to the Law on Securities Trading that came into force on 1 January 2013 compels listed NVs to dematerialise the bearer shares they have issued. Some legislative work is being done in view of addressing the recommendations concerning the identification of owners of bearer shares in unlisted NVs. (see Recent developments above).

45. Availability of legal ownership information is ensured in practice by means of i) requirements of a notarial deed for the transfer of shares; and ii) supervisory and enforcement measures taken by the tax authorities concerning tax filings. Since 1 July 2014, notarial deeds are provided to the tax administration in digital form, allowing a more efficient and effective use by tax authorities.

46. Foundations in the Netherlands are not systematically required to keep identity information concerning all beneficiaries. An obligation should be established in both the European Netherlands and the Caribbean Netherlands for foundations to keep identity information concerning all beneficiaries.

47. Under the 2016 ToR, beneficial ownership of relevant entities and arrangements is required to be available. The Money Laundering and Terrorism Financing (Prevention) Act as amended in 2018 (the AML Act) is the central piece of the Netherland's framework for ensuring the availability of this type of information. Beneficial ownership information is required to be available where any relevant entity or arrangement establishes a relationship with a person obliged to conduct customer due diligence under the AML Act. The scope of AML obliged persons in the Netherlands is broad, covering financial institutions, tax advisors, accountants, trust and company service providers, and notaries and lawyers when providing certain services. Although many Netherlands' entities will have a relationship with a Netherlands' AML obliged person when carrying on their activities, there is currently no legal requirement that all of them have a relationship with an AML obliged person at all times.

48. The definition of beneficial owner in force in the Netherlands until 25 July 2018 for different entities and arrangements did not fully meet the international standard. Effective 25 July 2018, a Decree introduced a new beneficial owner definition (to meet the requirements of the 4th EU AML Directive).

49. Availability of beneficial ownership is supervised and enforced by the different AML supervising authorities in the Netherlands. The depth and frequency of the supervision is generally considered adequate.

50. In addition to AML Legislation, tax law also contributes to the identification of beneficial owners to a certain extent, as it requires companies to disclose their substantial interest holders. A substantial interest may be held through direct or indirect interest. This may provide some relevant information, even though the definition of substantial interest holder does not mirror the one of beneficial owner under the standard.

51. The supervision by the tax authorities concerning the substantial interest holder requirements appears to be adequate.

52. Overall, the availability of ownership information was confirmed in the Netherlands' EOI practice. During the review period, the Netherlands received approximately 600 requests that included an inquiry for legal and/or beneficial ownership information. Most of these requests referred to companies and a few referred to partnerships and foundations. No request was received in connection with bearer shares (or companies that had issued bearer shares) or trusts. Also no requests were received in connection with entities and arrangements in the Caribbean Netherlands.

53. Peer input did not report any problems with the availability of ownership information.

54. The new table of recommendations, determination and rating is as follows:

| Legal and Regulatory Framework | | |
|---|---|---|
| **Deficiencies identified in the implementation of the legal and regulatory framework** | **Underlying Factor** | **Recommendation** |
| | There are some bearer shares in circulation in the Netherlands at present, but there are insufficient mechanisms in place that ensure the availability of information allowing for identification of the owners of bearer shares in unlisted public limited liability companies. There are insufficient mechanisms in place in the Caribbean Netherlands that ensure the availability of information on the owners of bearer shares. | The Netherlands should take necessary measures to ensure that mechanisms are in place to identify the owners of bearer shares in unlisted public limited liability companies in the European Netherlands and in the Caribbean Netherlands, or should eliminate such bearer instruments. |
| | Foundations in the European Netherlands and the Caribbean Netherlands are not systematically required to keep identity information concerning all beneficiaries. | An obligation should be established in both the European Netherlands and the Caribbean Netherlands for foundations to keep identity information concerning all beneficiaries. |
| | Beneficial ownership information is required to be collected by a wide range of AML obliged persons in the European Netherlands and the Caribbean Netherlands when engaged by legal entities and arrangements. In practice, legal entities and arrangements usually have a relationship with an AML obliged person, but they have no obligation to do so. In addition, the AML legal framework in force in the Caribbean Netherlands is not fully in line with the standard. | The Netherlands should ensure that beneficial ownership information is available for all relevant entities and arrangements in accordance with the standard. |
| **Determination: The element is in place but certain aspects of the legal implementation of the elements need improvement.** | | |

| Practical implementation of the standard | | |
|---|---|---|
| **Deficiencies identified in the implementation of EOIR in practice** | **Underlying Factor** | **Recommendation** |
| | In July 2018, the AML legal framework in European Netherlands was amended, in particular to define new rules for simplified customer due diligence and for identification of beneficial owners. Due to its recent entry into force, the implementation of the new provision could not be assessed in practice. | The Netherlands should supervise the effective implementation of the recent amendments on beneficial owner. |
| **Rating: Partially Compliant** | | |

### *ToR A.1.1. Availability of legal and beneficial ownership information for companies*

55. The 2011 Report analysed the types of companies and the registration requirements in the Netherlands (see 2011 Report, paras. 59-63). The main piece of legislation is the Civil Code, followed by the Commercial Registry Act 2007 and the Commercial Registry Decree 2008 (see table below).

56. The table below identifies the different types of companies in the European Netherlands, their governing law, and their number at the end of the last review and at the end of the present review period. The number of legal entities continues to grow, in particular the number of private limited liability companies.

| Type of company | Governing law | Numbers as at 31 December 2009 | Numbers as at 30 June 2017 |
|---|---|---|---|
| **Private limited liability company** ("*Besloten Vennootschap*", BV) | Article 175 Book 2 Civil Code | 753 960 | 905 559 |
| **Public limited liability company** ("*Naamloze Vennootschap*", NV) | Article 64 Book 2 Civil Code | 3 642 | 3 961 |
| **Co-operatives** ("*Coöperatie*") | Article 53 Book 2 Civil Code | 5 277 | 8 378 |
| **European Company (SE)** ("*Europese Vennootschap*", SE) | Law of 17 March 2005, Official Journal 2005, 150 and Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company. | 33 | 44 |

| Type of company | Governing law | Numbers as at 31 December 2009 | Numbers as at 30 June 2017 |
|---|---|---|---|
| **European Co-operative Societies (SCE)** ("*Europese Cooperatieve Vennootschap*", SCE) | Law of 14 September 2006, Official Journal 2006, 425 and Council Regulation (EC) 1435/2003 of 22 July 2003 on the Statute for a European Co-operative Society. | 3 | 3 |
| **Foreign companies with the place of effective management in the Netherlands** | | N/A | 6 951 |

57. In respect of the BES Islands, as on 31 December 2017, there were a total of 4 464 domestic companies and 174 foreign companies in total registered in two business registers of the islands (the register of Bonaire and the combined register for Saba and St Eustatius).

### *Legal ownership and identity information requirements*

58. The 2011 Report concluded that legal ownership information in respect of domestic and foreign companies was required to be available in line with the standard (with the exception of NVs that had issued bearer shares, as analysed under A.1.2). There are no substantial changes in the relevant rules or practices since the first round review. The table below describes the main sources of ownership information.

| Availability of legal ownership information | Chamber of Commerce | Companies themselves | Notaries | Tax authorities |
|---|---|---|---|---|
| Non-listed NVs and SEs | Generally information on founders only | Yes | Yes (notarial deed required for transfer of shares) | Yes |
| BVs | Generally information on founders only (except for single shareholders BVs where updated shareholder information is kept by the Chamber) | Yes | Yes (notarial deed required for transfer of shares) | Yes |
| Co-operatives and SCEs | Yes (annual filings) | Yes | Yes (notarial deed required for transfer of interests) | Yes |
| Foreign companies with the place of effective management in the Netherlands | Yes | Yes | No | Yes |

59. Legal entities are established under the Netherlands' law by a deed of incorporation executed before a civil law notary. The notarial deed of incorporation must be signed by each incorporating person and by each person subscribing to shares.

60. The legal person (including foreign companies with place of effective management in the Netherlands) must be registered in the Chamber of Commerce within eight days of incorporation by a notary or a director of the company (in person). Non-compliance relating to registration or providing updates to registered information in the Chamber of Commerce is an economic offence punishable by imprisonment for six months maximum, community service or a fine of EUR 20 500 (Art. 1(4) Economic Offences Act). The Chamber of Commerce keeps information on the company but not on current shareholders, except for companies in which all shares are held by one person (or one person and his/her spouse). This is the case for approximately 420 000 BVs (i.e. almost half of BVs).

61. Legal ownership information is kept by the entity itself. The board of directors of a company must keep a register of shares, for a minimum period of seven years from the moment the information is no longer relevant.

62. The books, records and other data carriers of a legal entity which has been wound up must be kept by a custodian for a period of seven years after the legal person has ceased to exist (10 years in the Caribbean Netherlands). Article 2:24 of the Civil Code attributes this obligation to the person who is designated to do so in the statutes or by the general assembly. If no designated responsible person can be found, the court will designate the most appropriate person as custodian. When the custodian is not located in the Netherlands, the information must be accessible from the Netherlands and obtainable by the competent authority.

63. In relation to co-operatives, a copy of the membership list must be deposited at the office of the business register at the time of registration of the co-operative. Afterwards, changes to the membership list must be submitted within one month after the end of each accounting year.

64. For all companies (with the exception of bearer shares issued by NVs), transfers of shares require a notarial deed, which is provided to the tax administration. The tax administration and the notaries are required to keep these records for a minimum period of five years in all cases. A fine of up to EUR 8 200 can be imposed on notaries each time they fail to comply with their obligations to submit records to the tax authority.

65. Tax law also complements Companies law obligations. BVs, NVs and co-operatives formed under Netherlands law (being resident or non-resident for tax purposes) are required to file an annual corporate income tax (CIT) return and provide some shareholder information. If the entity has more than

seven shareholders, the entity needs to provide information on the seven shareholders with the largest interest in the company and maintain information on the remaining ones as these records may be subject to inspection. In case the interest of the shareholder qualifies as a substantial interest holder,[5] additional information on the shareholder must be provided (i.e. his/her/its tax identification number). Resident and non-resident holders of a substantial interest in a Netherlands' resident company must themselves file tax returns and report their shareholdings.

66. Foreign companies having their place of effective management in the Netherlands are considered tax resident in the Netherlands and are subject to the CIT filing obligations described above.

67. Failure to submit a tax return or to submit a tax return within due time constitutes an omission punishable with an administrative fine of up to EUR 5 278 (Articles 67(a) GSTA). In case of deliberate intent of the taxpayer in not filing a tax return or an incorrect or incomplete tax return, an administrative fine of up to 100% of the assessment can be imposed (Article 67(d) GSTA). The taxpayer may also be liable to imprisonment of up to four years or a penalty amounting to EUR 20 750 or 100% of the tax due for failure to file the return in due time (Article 69(1) GSTA). For failure to submit correct and complete tax return, the taxpayer may be liable to six years' imprisonment or to a penalty of EUR 83 000 or up to 300% of the tax due (Article 69(2) GSTA). The failure to keep and retain books, records or other data in accordance with the requirements of tax legislation is a criminal offence and can be penalised by a term of imprisonment of up to six months, or by a penalty amounting to EUR 8 300[6] (Art. 68(1)(d) GSTA).

68. Specific obligations concerning the disclosure of shareholdings on listed NVs are provided under the Act on Financial Supervision.

### Nominees

69. The legal situation has not changed since 2011. Although the concept of nominee ownership is not mentioned as such under Netherlands law, the Act on Financial Supervision indicates that a person can legally own shares although the economic risk is borne by another person (see paras. 101-108 of the 2011 Report). The Netherlands' laws do not oblige nominees to disclose to the company or government authorities the fact that they are nominees or any information on the persons on whose behalf they hold shares. Nonetheless,

5. Please see definition under the subsection "Obligation to identify substantial interest holders under the tax laws" below.
6. As at 1 January 2018. The amount of fines is adjusted every two years based on inflation.

persons acting as nominees on a professional basis have obligations to identify their customers pursuant to the Netherlands' AML Act. Moreover, the substantial interest rules provided under the Income Tax Act ultimately require the identification of both nominee and nominator having a 5% direct or indirect interest in a company (those rules will be explained in more detail in the beneficial ownership subsection below). The GSTA also requires all taxpayers or third parties to provide to the Tax and Customs Administration, upon request, any information enabling them to determine the amount of taxable income, whether this income is that of the person or of a person for whom they act (Arts.47, 52 and 53). The Netherlands was recommended to monitor the small remaining gap in information required to be available on the ownership chain behind nominees to ensure it did not in any way interfere with the effective exchange of information in tax matters. No issues related to nominees were identified by the Netherlands or raised by the peers in their input.

70. The Netherlands advises that it monitors the compliance with the tax return filing obligations as part of the yearly (re)assessment and audit procedures of the NTCA. Under the Netherlands system, the person who enjoys the income is required to file and the professional nominee should only have to include in its income tax return the possible receipt of remuneration for its nominee services. No issues related to nominees were identified by the Netherlands or raised by the peers in their input.

### Caribbean Netherlands

71. As described in the 2011 Report (paras. 110-116) public limited liability companies, private limited liability companies and co-operative companies can be incorporated in the Caribbean Netherlands. These forms of company mirror those in the European Netherlands. All companies are formed through a notarial deed signed by a notary. Information on all companies and businesses (including foreign companies) in the Caribbean Netherlands must be entered in the register held by the Caribbean Netherlands' Chamber of Commerce and a copy of the incorporation deed must be deposited. The management of public limited liability companies and private limited liability companies is obliged to keep an up-to-date register of the names and addresses of the holders of the registered shares. Domestic companies are also required to file tax returns, which contain information on the shareholders, in a similar way as in the European Netherlands.

72. The requirements for co-operatives and mutual insurance companies in the Caribbean Islands in terms of maintenance of information and submission of it to government authorities are the same as those prevailing in the Netherlands.

73. The laws of the Caribbean Netherlands do not oblige nominees to disclose to the company or to the government authorities the fact that they are nominees or any information on the persons on whose behalf they hold shares. However, the BES AML Act establishes a broad obligation regarding the identification of clients by service providers (Art. 2.2). The definition of services includes express reference to "fiduciary services" (through articles 1(d) and 3(c) of the related Decree) which may cover nominees, as persons acting in such a capacity would normally perform a fiduciary type of activity.

### *Implementation of obligations to keep legal ownership information in practice*

74. The 2011 Report concluded that relevant legal requirements as they applied to companies were properly implemented in practice and consequently no recommendation was given. There have been no significant changes made in the supervisory and enforcement practice. The main sources of legal ownership information in practice are the information filed with the NTCA and the entities themselves.

### Tax supervision

75. Ownership information of legal entities is required to be filed in tax returns and is subject to the review of the NTCA. The GSTA gives the tax administration comprehensive powers to enforce compliance with the obligation to maintain and provide the ownership information. Since 1 July 2014, the tax authorities' ability to cross check the filing of ownership information has been increased as all notarial deeds for the incorporation of companies and transfer of shares are now submitted in electronic format.

76. The NTCA ensures: (i) the correct registration of taxpayers; (ii) the on-time filing of returns; (iii) the correct and complete filing of tax returns; and (iv) the timely and full payment of tax debts. Intentional as well as unintentional errors are considered non-compliant behaviour and are subject to enforcement measures.

77. To ensure that taxpayers comply with their obligations, the Netherlands performs the following compliance efforts:

- efforts focused on proactive compliance (e.g. receipt of incorporation information from the Chamber of Commerce, pre-filling of tax returns, communication campaigns regarding the filing of tax returns, preliminary consultations, enhanced relationships with certain groups of taxpayers)

- actual compliance instruments (e.g. visiting the premises of enterprises, allowing for electronic amending of mistakes in the tax return)
- reactive compliance instruments (e.g. digital matching of the information in the tax returns with the available information (from approximately 130 internal and external sources), audits (including desk audits), visiting and searching the premises, tax fraud investigations, seizure and selling of seized goods).

78. Following the legal entities' registration with the Chamber of Commerce, this information is shared automatically with NTCA on a daily basis. Registration in the systems of the tax authorities takes place after the NTCA has determined which Netherlands taxes are applicable to the entity. Other sources are also consulted to identify, for instance, foreign incorporated entities that are carrying on business in the Netherlands. In total, NTCA receives information from approximately 50 types of external sources. This data is primarily used not only for the levying of taxes but also for (supervision of) registration.

79. During the years 2014 and 2015, the compliance with on-time filing of corporate income tax returns was respectively 95.2% and 94.7%. All corporate tax returns are assessed by either the Large Enterprises Segment or the Small and Medium Enterprises Segment of the NTCA.

80. In terms of the Netherlands audit activity, the table below includes the number of audits conducted in the years 2014 to 2017:

| Type of audit | 2014 | 2015 | 2016 | 2017 |
|---|---|---|---|---|
| Comprehensive audits (Corporate taxpayers, entrepreneurs and partnerships) | 38 300 | 26 300 | 27 900 | 24 400 |
| Issue-oriented audits (Corporate taxpayers, entrepreneurs and partnerships) | 33 100 | 18 300 | 8 400 | 7 000 |
| Desk-based audits (all) | 1 082 100 | 1 045 000 | 876 300 | 791 800 |

81. The monitoring of compliance with the disclosure of ownership information (including substantial interest information, as discussed later in this section) is part of the usual assessment and audit procedures. As conducting audits is costly and time consuming, NTCA explains that its audit policy is focused on the areas and issues that – based on risk analysis – carry the highest risks (i.e. where there are noticeable differences between income or deductions of the same taxpayer from one year to another; discrepancies between the information in the tax return and information obtained from other sources).Although the audit rate has decreased, the Netherlands advise that NTCA has become increasingly adept at identifying potential violation

and can focus on a lower number of more risky taxpayers, the difference in the number of audit performed does not entail a decrease in the resource and time spent on audits. In addition, the Netherlands also conducts random audits for compliance testing in targeted sectors and for enhancing risk profiling systems.

82. The following aggregate amount of penalties have been imposed by NTCA for non-compliance with tax return filing obligations, information obligations, and book and record keeping obligations concerning corporate income tax:

- 2014: 33 000 penalties imposed for a total amount of EUR 94 million
- 2015: 33 000 penalties imposed for a total amount of EUR 107 million
- 2016: 39 000 penalties imposed for a total amount of EUR 169 million.

83. As of 2015, sanctions provided under Articles 68 and 69 of the GSTA have been extended to accomplices, the actual managers and persons who provoked the non-compliance (Article 69(6) of the GSTA). In 2015, 15 persons were sanctioned based on Article 69(6), with total imposed penalties amounting to EUR 592 750. In 2016, 3 persons were sanctioned based on Article 69(6), with total imposed penalties amounting to EUR 5 500 000.

84. The year-wise numbers of tax cases prosecuted in criminal courts are: 469 in 2014; 466 in 2015; and 543 in 2016.

85. In relation to the Caribbean Netherlands, 54 audits (42 audits on enterprises that recently started their business and 12 audits on other enterprises) were conducted with a view to audit the books and records. The mission statement of the tax administration of the Caribbean Netherlands reflects the compliance policy of the NTCA. For the years 2014 and 2015 respectively, the compliance rate for filing of tax returns was 86% and 90%. The level of supervision by NTCA seems adequate to ensure compliance with tax obligation and to ensure the availability of ownership and identity information to some extent.

### Public notaries

86. There is indirect oversight on the shareholders registers of NVs, BVs, SEs, SCEs and co-operatives by public notaries, since transferring shares can only be completed via a notary. The execution of rights linked to the shares (like voting rights) can only take place after acknowledgement of the legal act by the entity, when the entity was given writ of the act or acknowledgement has taken place by registration in the register. Without this acknowledgement the shareholder cannot execute his/her rights. This way, third parties are protected when they rely on the register of shares and the register might not be correct.

### Chamber of Commerce

87. The Chamber of Commerce can dissolve legal entities that fail to comply with their filing obligations pursuant to article 2:19a of the Civil Code. In such instance, the company ceases to exist, and the shareholders are deprived from any rights In practice, the Chamber of Commerce will proceed to do so if the failure to file accounts has not been addressed within a year from the date it should have been submitted. During the years 2013 to 2017, the following number of legal entities have been dissolved by the Chamber of Commerce:

| Type of legal entity | 2013 | 2014 | 2015 | 2016 |
|---|---|---|---|---|
| BVs | 3 510 | 1 590 | 3 675 | 3 005 |
| NVs | 21 | 11 | 13 | 17 |
| Co-operatives | 37 | 20 | 37 | 48 |
| Associations | 73 | 26 | 64 | 15 |
| Foundations | 593 | 368 | 261 | 123 |
| Total | 4 234 | 2 015 | 4 050 | 3 208 |

### *Beneficial ownership information*

88. Under the 2016 ToR, beneficial ownership information on companies should be available. The following sections of the report deal with the requirements to identify beneficial owners of companies and their implementation in practice. The availability of the beneficial ownership information can be summarised as follows:

| Availability of beneficial ownership information | Tax law | AML law |
|---|---|---|
| Non-listed NVs and SEs | Some | Yes, when AML obliged person is engaged |
| BVs | Some | Yes, when AML obliged person is engaged |
| Co-operatives and SCEs | Some | Yes, when AML obliged person is engaged |
| Foreign companies with a place of effective management in the Netherlands | Some | Yes, when AML obliged person is engaged |

### AML obligations

89. Beneficial ownership information is primarily required to be maintained pursuant to the Money Laundering and Terrorism Financing (Prevention) Act 2008 (the AML Act).

90. The scope of application of the AML Act does not cover all relevant entities and arrangements as required by the standard. Beneficial ownership information is required to be available where any relevant entity or arrangement establishes a relationship with a person obliged to conduct customer due diligence (CDD) under the AML Act. Although companies are not required to have an on-going relationship with an AML obliged person at all times, in practice most of them are likely to do so:

- The scope of AML obliged persons in the Netherlands is broad, covering financial institutions, tax advisors, accountants, trust and company service providers, and notaries and lawyers, when providing certain services.[7]
- Notaries, who could be engaged solely for the purpose of preparing a notarial deed for the transfer of shares, would still establish a relationship with a customer and would still be subject to CDD obligations in relation to such transactions.
- All companies must be incorporated through notarial deeds and such deeds are also required for the transfer of shares (with the exception of listed NVs or in relation to bearer shares of NVs); this would cover all changes of beneficial owners each time the legal owners change, but not cases where the beneficial ownership changes without the legal ownership changing.
- During the years 2015 to 2017, approximately 80% of corporate tax returns were prepared by AML obliged persons (tax advisors, TCSPs, etc.).
- The NTCA abolished the possibility of legal entities paying taxes or receiving tax refunds in cash. A bank account should be informed in a special form available on the NTCA website for this purpose. This requirement will not ensure that the NTCA has information on a bank account of all taxpayers as taxes can be filed by a group of taxpayers in a fiscal unit. Similarly, bank account information may not be available if the company has no tax liability or tax refunds. Out

7. The services listed in section 1.1.a.12 of the AML Act are:

the purchase or sale of property subject to public registration;

the management of money, securities, among other values;

the incorporation or management of companies, legal persons or similar bodies;

the purchase or sale of shares in, or the full or partial purchase or sale or takeover of undertakings, companies, legal persons or similar bodies;

Activities in the field of taxation that are comparable with the activities of tax advisors or tax consultants.

of all the corporate taxpayer's bank accounts that are included in the NTCA database, 99.98% of them are held with a Netherlands bank. While this gives a certain level of assurance that beneficial ownership information would be available in practice, there is no legal obligation for a taxpayer to have a bank account in the Netherlands.

### Definition of beneficial owner in force until 25 July 2018 in the European Netherlands

91. Until 25 July 2018, the definition of beneficial owner in the case of a legal entity was as follows:

> "a natural person who:
>
> 1°. holds an interest of more than 25% in the capital of a customer;
>
> 2°. can exercise more than 25% of the voting rights at the general meeting of a customer;
>
> 3°. can exercise actual control over a customer;
>
> 4°. is a beneficiary of 25% or more of the capital of a customer or a trust; or
>
> 5°. has special control over 25% or more of the capital of a customer."

92. Although this definition refers to a "natural person" and to ownership or control, some elements of the standard are not spelled out either in law or regulation. The definition does not refer to direct or indirect ownership, as ownership can be exercised through a chain (although that could be implied based on the CDD measures described in the AML Act concerning taking adequate measures to obtain an insight into the customer's ownership and control structure, but this is risk-based only, i.e. not systematic). Although a reference is included to "actual control over a customer", the Netherlands authorities interpret it as control exercised by shareholding of 25% plus one share or ownership interest of more than 25% in the customer held by a natural person. Control exercised through other means (such as personal relationships) is therefore not covered. Finally, if no beneficiary that meets the criteria set is identified, there is no provision requiring that at least a relevant natural person holding the position of senior management official be identified (although this information would generally be available for Netherlands companies or foreign companies with a nexus to the Netherlands under company law obligations). This definition in force during the period under review was therefore, not in line with the standard.

### Definition of beneficial owner in force in the Caribbean Netherlands

93. In the Caribbean Netherlands, the main framework for the availability of beneficial ownership information is provided under the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Act (the BES AML Act). The definition of beneficial owner provided in that Act is very similar to the one provided under the AML Act for the European Netherlands before it was recently amended. The definition reads as follows:

> "a natural person who holds an interest of 25% or more in the equity interest or can exercise more than 25% of the voting rights at the shareholders' meeting of a legal person other than a foundation, or can exercise actual control of this legal person in some other manner(Treaty Series 1985, 141)."

94. The legal deficiencies found in the definition of beneficial owner in force in the European Netherlands until 25 July 2018 are similar. The Netherlands indicated that the upcoming revision of the BES AML Act to align with the AML Act requirements in force in the European Netherlands has been announced to the Parliament. However, it is not foreseen to come into force before 2020. It is therefore recommended that the Netherlands makes the necessary amendments to ensure that information on beneficial ownership of companies in the BES Islands is available.

### Definition of beneficial owner in force since 25 July 2018 in European Netherlands.

95. In order to implement the 4th EU AML Directive, and with effect from 25 July 2018 in the European Netherlands only, Article 3(1) of the Money Laundering and Terrorist Financing (Prevention) Act (Implementation) Decree, 2018 was amended and a new definition of beneficial owner was introduced as follows:

> Article 3.
>
> 1. Categories of natural persons who should in any case be regarded as beneficial owners are-
>
> a. in case of a private limited liability company or a public company, not being a company that, as an issuer, is subject to disclosure requirements as referred to in the Transparency Directive, or to comparable international standards, including a wholly-owned subsidiary of such a company:
>
> 1°. natural persons who ultimately own or control the company, through:

> - direct or indirect ownership of more than 25% of the shares, of the voting rights or of the ownership interest in the company, including through bearer shareholdings; or
>
> - other means, including the conditions for consolidation of financial statements, referred to in Article 406, in conjunction with Articles 2 4a, 24b and 24d, of Book 2 of the Civil Code; or
>
> 2°. if, after all possible means have been exhausted and provided that there are no grounds for suspicion, none of the persons referred to in subsection 1° have been traced, or if there are any doubts whether a person referred to in subsection 1° is the ultimate owner or has control, or is the natural person on whose behalf a transaction is conducted, the natural person or persons forming part of the senior management of the company."

96. The new definition covers all legal entities, including BVs, NVs, listed NVs, European public limited liability companies and European Co-operatives as well as any comparable legal entities.

97. The definition now explicitly states the direct and indirect ownership interest and control, control by other means and requires the identification of the relevant natural person occupying the position of senior management official. In accordance with the explanatory memorandum on the amendments brought to the Money Laundering and Terrorist Financing (Prevention) Act in July 2018, the terms "other means" should be interpreted as control through a right to appoint or remove the majority of the board members of a legal entity, regardless of the percentage of shares being held by the person, or through the exercise of dominant influence over the legal entity, through economic ownership for instance. The Netherlands confirms that this would also capture control through personal connection to shareholders, nominee shareholders or senior managers.

98. While the definition seems in line with the standards, due to its recent entry into force, its effective implementation could not be assessed in practice. It is therefore recommended that the Netherlands supervises its effective implementation by the AML obliged persons.

### Customer due diligence obligations in the European Netherlands

99. Following amendments in July 2018, the AML Act provides for the following CDD obligations to the AML obliged persons (section 3):

- identify and verify the identity of the customer
- identify the beneficial owner of the customer and take reasonable measures in order to verify his identity and, if the customer is a legal

person, to take reasonable measures in order to obtain an insight into the customer's ownership and control structure

- continuously monitor the business relationship and the transactions conducted during the period of this relationship in order to ensure that these are in agreement with the institution's knowledge of the customer and the customer's risk profile, if necessary by checking the source of the assets used during the business relationship or the transaction
- establish whether the natural person representing the customer is authorised to do so and where relevant, identify the natural person and verify his/her identity
- take reasonable measures in order to verify if the customer acts on his own behalf or on behalf of a third party.

100. AML obliged persons are also required to take reasonable measures to ensure that the data collected pursuant to the above mentioned CDD obligations about the beneficial ownership information is kept up to date (section 3(11)). The amendments do not specify minimum time periods for the update. The Netherlands Central Bank, regulator for financial institutions, noted that it is generally the practice that beneficial ownership information for high risk customers is reviewed every year, whereas the information for low risk customers could be reviewed at the latest every five years. The Netherlands authorities advised that this is subject to a case by case analysis.

101. In the former provision on CDD obligations, the AML obliged person had to take "risk-based, adequate measure" to verify the information on beneficial ownership. This allowed the AML obliged person not to verify this information when the risk of money laundering and terrorist financing was low. With the new CDD requirements, the explanatory memorandum to the AML/CFT 2018 clarifies that "reasonable measure" must be interpreted as compelling the institution to endeavour to verify the identity of the beneficial owner at all times, although the intensity of the measures to be taken would still depend on the risk involved. Since AML obliged persons conduct CDD following a risk based approach, the beneficial ownership information may not be up to date at all times. The reliance on CDD alone is therefore not sufficient to meet the standard that requires the information to be adequate, accurate and up to date. The Netherlands is therefore recommended to ensure that beneficial ownership information available is kept up to date at all times. It is noted that this issue should be solved with the implementation of the register of beneficial owners. The Netherlands authorities report that the register will be effective on 1 January 2020.

### Simplified customer due diligence in the European Netherlands

102. Section 6 of the AML Act that provided for simplified CDD was amended. Rather than relying on a list of customers for which simplified CDD was allowed at all times under the earlier section 6, a risk-based approach has to be followed after the amendment. The amended section 6 provides for a list of risk factors that should, at the minimum, always be checked before performing simplified CDD. As opposed to the former provision, the risk factors not only consider the type of customer, but also encompass the product, the service, the transaction and the geography. Explanatory note presented to Parliament to explain the intention of the amendment now clarifies that simplified CDD does not relieve the AML obliged person from performing the due diligence of the customer and that it is only the intensity of the customer due diligence that would depend on the risk assessment under simplified CDD. The Netherlands Authorities have confirmed that these explanatory notes are binding in the Netherlands and are strictly followed by judges in case of disputes. However, section 6 as amended is quite recent, and its implementation could not be assessed in practice, therefore it is recommended that Netherlands supervises its effective implementation in practice.

103. Under section 5 of the AML Act, an AML obliged person may rely on the CDD performed by other persons on the condition that these persons are AML obliged persons under the law of the country they operate in, and that the CDD be performed in accordance with the requirements applicable to Netherlands AML obliged persons or in an equivalent manner. In accordance with the explanatory note, the Netherlands AML obliged person receiving the client has the ultimate responsibility for conducting complete CDD on that client. In addition, the AML obliged person is required to have all identification and verification data and other data regarding the identity of the beneficial owner. This is in line with the standards.

104. In the former CDD obligations provision, two types of exemption from CDD (including identification and verification of beneficial owner) were granted-

- an exemption granted by ministerial regulation to AML obliged persons who assist their customer to lodge tax returns when there was no taxable income from the assisted customer, there was no taxable result, there was no significant interest holder and there was no benefit from savings or investments.
- an exemption granted by the Minister of Finance on a case by case basis. There has never been any cases in practice where the Minister of Finance used this power.

105. Following the entry into force of the amendments to the AML Act, these exemptions have ceased to exist. The only possibility is for the Minister to provide exemption to providers of certain gambling services.

106. The AML Act requires obliged entities to retain client due diligence records, including the beneficial ownership information of their customers, in an accessible manner for a period of five years after the end of a business relationship with their customer or after the date of an occasional transaction (section 33).

107. Failure to comply with the client due diligence requirements may result in administrative sanctions. Based on Chapter 4 of the AML Act, the supervisory authorities can impose administrative sanctions and measures for breaches of the Act by the obliged entities. The possibility to start criminal proceedings based on Article 1(2) of the Economic Offences Act, also exists.

108. The administrative sanctions based on the AML Act can consist of:

- an administrative fine
- an order for incremental penalty payments
- an instruction obliging an obliged entity to adhere to a particular line of conduct
- specifically with regard to credit institutions and investment companies: the possibility to make a public statement with regard to a breach of the Act
- specifically with regard to credit institutions and investment companies: a temporary ban on exercising a particular function in a financial institution on any person holding managerial responsibilities, or any other natural person held responsible for the breach.

### Customer due diligence in the Caribbean Netherlands

109. In relation to the Caribbean Netherlands, CDD obligations (section 2.3) generally mirror the ones of the European Netherlands and would apply where a wide range of services would be provided, including services typically provided by financial institutions, TCSPs and certain services carried out by lawyers, accountants and notaries (Annex A of the BES AML Act). AML obliged persons can rely on CDD already performed by a lawyer or notary established in the BES Islands (section 2.6); the same rules as those in the European Netherlands apply. Deficiencies found under the simplified CDD applicable in European Netherlands before the amendments of the 25 July 2018 are the same in the Caribbean Netherlands (there is no obligation for the AML obliged person to identify the beneficial owner). It is

recommended that the Netherlands ensures that beneficial ownership information is available in the Caribbean Netherlands even when simplified CDD is applicable on a low risk customer and that this information is kept up to date at all times.

### *Implementation of obligations to keep beneficial ownership information under the AML Act in practice*

110. Practical availability of identification of beneficial owners is generally ensured through implementation of the AML obligations.

111. The supervision and enforcement of compliance by AML obliged entities that are relevant to the work of the Global Forum with CDD obligations, including the obligation to identify a customer's beneficial owner are performed by the following government authorities:

- The Netherlands Central Bank supervises, inter alia, 100 banks, 30 other credit/payment institutions and approximately 215 TCSPs.
- The Bureau of Financial Supervision supervises, inter alia, accountants, tax advisors and notaries.
- The Dean of the Bar Associations supervises lawyers.

112. For the Caribbean Netherlands, the Netherlands Central Bank is also responsible for the supervision of banks and other credit/payment institutions and TCSPs. The AML supervisory office of the NTCA is responsible for supervising lawyers, notaries and services that are subject to AML obligations.

113. The Netherlands Central Bank aims at ensuring that the supervised entities comply with their obligations under the AML Act, mainly by following a risk-based approach, with a mix of thematic reviews and individual examinations. The Central Bank has 34 full-time equivalents staff (FTEs) focused on integrity supervision, including AML supervision of banks. There are also 13 FTEs (9 FTEs during most part of the review period) focused on the licensing and supervision of TCSPs, including their compliance with AML and other regulatory requirements.

114. In all its supervisory activities, the Central Bank takes a risk-based approach based on up to date data. The Central Bank asks banks, payment institutions and money transfer offices to complete an online questionnaire about integrity risks, including AML aspects. The Central Bank also makes use of risk identification through data analysis. Various data sources are combined and analysed by the intelligence team within the Central Bank. In addition, the Central Bank analyses all money transfer transactions on a quarterly basis. On the basis of the requested data and the data analysis, the

Central Bank can determine an integrity risk profile of institutions and of the sectors. On this basis, the Central Bank draws up a risk-based programme for supervision. The Central Bank considers the risk profile when determining the frequency and intensity of supervision in the institutions and sectors. In addition, this data is used to monitor the compliance of the institutions and the sectors.

115. Thematic reviews: The Central Bank selects some themes to focus on each year according to a risk-based approach (e.g. review on Trade Base Money Laundering and anonymised tax planning and client anonymity). As part of each thematic review, a selection of supervised entities is examined in depth, both through on-site (normally less than 5 supervised entities) and off-site reviews (a larger number of supervised entities). Based on these reviews, the Central Bank publishes the overall results, including new guidance, if necessary, to enhance compliance of the financial sector as a whole.

116. Individual examinations: The Central Bank also conducts examinations of specific obligated persons based on newly identified risks and/or reported incidents/issues, e.g. when there is an (alleged) breach with AML/CFT obligations. These examinations will often have a large on-site component. The most significant and complex structural and/or fundamental problems at individual supervised entities are escalated to senior management of the Central Bank through so called "problem file reports". During the onsite visit by the assessment team, discussion with bankers demonstrated that they had a good understanding of their AML obligations.

117. During the review period, the number of on-site examinations that would include the examination of the entity's CDD policies and procedures and the review of client files (for instance to verify the steps taken to identify the beneficial owners of customers) covered 13% of credit institutions (52 onsite visits during the review period), 15% of payment institutions (18 onsite visits during the review period) and 10% of TCSP sector (71 onsite visits during the review period) every year.

118. The supervisory agency has a good understanding of the obligations and the shortcomings identified are the result of an in-depth supervision. Some of the findings were as follows:

- incompleteness of beneficial owner trails
- lack of documentation in place to prove the formal ownership from the client to the UBO
- absence of independent source of information to cross check the information provided by the client)
- in case clients have more than one beneficial owner, not all beneficial owners are identified and verified

- financial Institutions do not update their files in a timely manner in case of change in ownership.

119. All examinations, either thematic or occasional, might lead to informal and/or formal enforcement measures. Informal measures are commonly applied and include for instance the request and monitoring of action plans, the request for management statements of compliance, warning letters and compliance briefings. The supervised entities' adherence to remedial enforcement measures is in general confirmed through follow-up validations. During the review period, formal enforcement measures such as formal instructions, fines and licence withdrawn have been applied against banks and trust companies. In the case of TCSPs, the Central Bank has also reported some cases to law enforcement authorities.

120. The Bureau of Financial Supervision is tasked with supervising a wide range of professionals including notaries, tax advisors, registered accountants, accountants and administration consultants, independent legal professionals (with the exception of lawyers) and any other independent professional or business which carries out comparable activities, like administration offices, tax advisors and legal and business advisors. The Bureau has a staff of 11 FTEs focused on AML supervision, and a total technical staff of 50 employees, which can be involved in supervisory roles depending on the specific needs. It focuses on (i) increasing awareness of the AML and regulatory laws and regulations; (ii) partnering with professional organisations and associations that can contribute to training and assessment of compliance (e.g. web-based portal for self-assessments (for tax advisors and accountants) and other supervision arrangements with professional bodies such as peer reviews); and (iii) test compliance with laws and regulations by supervised professionals through risk focused investigations.

121. Investigations conducted include regular investigations, investigations based on signals/intelligence from different sources (e.g. the Fiscal Investigation and Intelligence Service, public prosecutor, police and also media reports such as on the Panama Papers) and thematic investigations.

122. During on-site inspections, the Bureau can focus on the set-up and existence of a risk policy, set up risk profiles per client, client acceptance procedures, file structure, internal control measures, education and training courses for personnel. The Bureau can also assess whether identification and verification of the identity of the client and the beneficial owner and/or politically exposed persons have been correctly carried out and whether unusual transactions have been reported.

123. When lack of compliance has been established, the Bureau can issue mandatory instructions to develop procedures and controls, as well as to follow training. Administrative or disciplinary sanctions are also an option.

The Bureau can also report serious breaches to the prosecutor, who can subsequently initiate a criminal investigation. Enforcement measures have been applied during the review period. Throughout the review period, sanctions have been imposed, onsite visits were conducted, and the Bureau assisted the public prosecutor in investigations. The supervisory framework appears to be adequate.

124. Since 1 January 2015, the Deans of the Netherlands Bar Association in the 11 judicial district are the designated authority for AML supervision for lawyers. They are assisted by experts from the office of the Netherlands Bar Association. In addition to AML supervision, the Deans are also responsible for the supervision of lawyers based on the Act on Advocates.

125. Natural persons, legal persons or companies providing advice or assistance as a lawyer in connection with specific activities (such as the purchase or sale of registered property or the management of money) fall within the scope of AML Act and fall under the supervision of the Dean.

126. The supervisory inspections are reported in a public annual report by the Netherlands Bar Association. The Bar Association also publishes guidance to support lawyers in their AML compliance. In 2013, a "centre of AML expertise" located within The Hague Bar Association was founded to raise further awareness on the AML legislation. Also, at least one AML training course is organised in each of the 11 judicial districts on an annual basis. This course is mandatory for lawyers who are found to fall short on their compliance with the legislation.

127. Every year, approximately 10% of the law firms in the Netherlands are subject to an investigation by the supervisor. These "regular" investigations have a broader perspective, but always include the supervision of compliance with the AML Act. The on-site investigations are accompanied by a questionnaire with a specific section on AML compliance. When the results of the regular investigations raise concerns on AML compliance, specific AML investigations/on-sites can be carried out. Over the period 2015-17, a total of 92 on-site AML inspections were performed. Moreover, thematic investigations focused on different aspects of AML compliance were carried out and 50 firms were visited in 2015/2016.

128. In the period 2015-17, there were five decisions of the disciplinary court that resulted in the conditional suspension of a lawyer due to failure to comply with AML obligations. Also, in approximately 60% of the cases where the regular investigations resulted in further AML investigations, an instruction to adhere to a specific line of conduct was imposed. The supervisor has also assisted the public prosecution in two investigations on lawyers in the previous year that might result in criminal prosecution in the near future. No fines or other enforcement measures were imposed. The

Netherlands is recommended to monitor that the dissuasive sanctions are imposed where there is non-compliance with the obligations to identify the beneficial owner.

### Caribbean Netherlands

129. With respect to the Caribbean Netherlands, in the years 2013 to 2017, enforcement has been more intensive. The Central Bank has performed on-site thematic client integrity examinations (including a review of CDD) at all eight credit institutions and the one trust office under supervision. In following up on these thematic examinations all institutions were instructed to apply measures to address identified shortcomings. The Central Bank has performed onsite validation (verification) examinations at all these institutions to verify if instructions were followed. Two credit institutions were subsequently sanctioned with a punitive sanction or an administrative instruction. Moreover, the AML supervisory office of the NTCA supervises approximately 60 service providers on the BES Islands, 80% of which are based out of Bonaire. The AML supervisory office of the NTCA has visited all service providers under its supervision at least once, but often multiple times during 2014-17. The notaries on Bonaire are visited each year. Enforcement measures were taken, including instructions and referral to prosecution. However, lawyers were not subject to supervision. The Netherlands is recommended to ensure that there is adequate supervision of the obligations for lawyers in the BES Islands to collect beneficial ownership information.

### Obligation to identify substantial interest holders under tax laws

130. Pursuant to the Individual Income Tax Act 2001, any individual resident in the Netherlands holding an interest (e.g. shares, option to buy shares, profit-sharing certificates and/or voting rights) of 5% or more in a domestic or foreign company must file an annual tax return and disclose this interest holding. (Art. 7.5(1) and 4.6) of Individual Income Tax Act). The reporting requirements apply even if shares are held indirectly by a spouse or close relatives.

131. If the interest in a Netherlands company is held by a non-resident legal entity, an additional anti-abuse measure applies if a (domestic or foreign) legal entity is interposed with principal purpose to circumvent the application of the "substantial interest" to an individual. The law provides that a company is not considered to be set up to circumvent the "substantial interest" rules if it is set up for sound business reasons. This may be the case if this entity is set up for genuine business activities or if its principal purpose is not to prevent the application of substantial interest taxation.

132. The Netherlands legal entity itself also has the obligation to file the correct identity information of its substantial interest holding shareholders in its yearly corporate income tax returns (in addition to the seven most important legal owners).

133. While in many instances the substantial interest rules may be very useful to identify beneficial owners, there are instances where no individual is required to be identified – i.e. where a foreign legal entity holds an interest in the Netherlands entities for legitimate business reasons in accordance with the legislation. As a result, where those circumstances apply, no beneficial owner in line with the standard would be required to be identified.

### Implementation of the obligation to identify substantial interest holders under the tax laws

134. The NTCA monitors the compliance with the tax return filing obligations, the obligations to submit information on the taxpayers own tax affairs and on the tax affairs of third parties. The monitoring of the compliance with the substantial interest requirements is also part of the usual assessment and audit procedures of the NTCA. On the NTCA's compliance policy, statistics on compliance, audits and sanctions, please see the subsection on the implementation of obligations to maintain legal ownership information earlier on this section.

135. The Netherlands CIT rules also apply to companies in the Caribbean Netherlands that do not meet the "substance test" described in the "Overview of the Netherlands" section of this report, under Tax System.

## *ToR A.1.2. Bearer shares*

136. The 2011 Report concluded that listed and unlisted public limited liability companies (NVs) could issue bearer shares (paras. 122 to 133) and bearer shares were in circulation. While some mechanisms were in place that would require in many instances the identification of holders of bearer shares, those mechanisms were considered insufficient. The Netherlands was recommended to ensure that sufficient mechanisms were in place to identify the owners of bearer shares.

137. Since the 2011 Report, the Netherlands advised that, in relation to listed NVs, as of 1 January 2013, all bearer shares are electronically registered in the clearing house Euroclear in the Netherlands or in Netherlands banks (Law on Securities Trading as amended). Legal owners of bearer shares can be identified through their securities accounts. Section 50(d) of the Law on Securities Trading compels all institutions that issued bearer shares to identify all bearer shares owners by transposing all shares in a securities

account or transposing the bearer shares into registered shares. In case this was not done by 1 January 2013, the NV would no longer be listed as it would not meet the requirement anymore and the securities could not be traded. There are currently 150 listed NVs and the Netherlands authorities report that all bearer shares have been identified.

138. In relation to bearer shares of unlisted NVs, there has been no change since the 2011 Report. Although an obligation is imposed on the company to report all shareholders that hold at least 5% of its shares, it is not clear how a company that has issued bearer shares would be able to obtain such information in all cases. Moreover, since this tax reporting requirement applies on an annual basis, transfer of bearer shares in the course of the year would go undetected. There are 3 811 unlisted NVs. Even though other obligations such as the disclosing obligations related to dividend withholding tax and obligations applicable to bearer share owners that are resident in the Netherlands would assist in disclosing owners of bearer shares, this would not be sufficient to cover the gap.

139. In practice, major Netherlands banks have the policy of not accepting entities that have issued bearer shares as their customers, which would contribute to some companies that wish to have a bank relationship in the Netherlands to not issue such shares. It remains that mechanisms currently available are insufficient to ensure the availability of information on owners of bearer shares in all cases.

140. A bill of law providing for the dematerialisation of existing bearer shares and the prohibition of the enactment of new bearer shares is in Parliament. The 3 811 existing unlisted NVs account for approximately 0.4% of companies in the Netherlands. The Netherlands indicated that they started an exercise in 2017 to assess the level of possibility for unlisted NVs to issue bearer shares. They came across 5 cases out of 258 notarial deeds that were checked. Therefore the issue has some materiality. The 2011 recommendation is only partially implemented.

141. During the review period, the Netherlands did not receive requests relating to bearer shares or companies that had issued such shares.

### *Caribbean Netherlands*

142. There have been no amendments to the legal framework governing bearer shares in the Caribbean Islands. The BES Civil Code prohibits the issuance of bearer shares unless a deed of incorporation of an NV provides for the issuance of a bearer share certificate at the request of a shareholder against the surrender of a registered share certificate. The mechanisms in place such as the obligation for an individual with at least a 5% capital interest in a company to disclose this information in his tax return or the

obligation for AML obliged persons to obtain such information in line with the AML Act are not sufficient to ensure that bearer share holders are identified at all times.

143. The Netherlands authorities explained that there are no listed NVs in the Caribbean Netherlands. However, the law abolishing the bearer shares in the Caribbean Islands is still at bill stage before Parliament.

### *ToR A.1.3. Partnerships*

144. Under Netherlands law, partnerships are not legal entities and they cannot acquire title to property. Four types of partnerships can be established: civil partnership, firm or general partnership, limited partnership (LP) and European Economic Interest Groupings (EEIGs) (see paras. 138 to 149 of the 2011 Report). The number of partnerships is as indicated below:

| Type of partnership | Governing law | Numbers in the 2011 Report | Numbers as at 30 June 2017 |
|---|---|---|---|
| **Civil partnership** (*maatschap*) | art. 1655-1688 Book 7A Civil Code | 29 675 | 35 653 |
| **Firm** (*vennootschap onder firma*) | art. 16-34 Commercial Code | 159 642 | 178 430 |
| **Limited partnership** (*commanditaire vennootschap* (LP) | art. 16-34 Commercial Code | 10 893 | 11 579 |
| **European Economic Interest Grouping** (*Europees Economisch Samenwerkingsverband*) | Law of 28 June 1989, and Council Regulation (EEC) No. 2137/85 of 25 July 1985 | 63 | 49 |
| **Foreign companies and partnerships** | Article 8, 51 and 52 GSTA | 6 955 | 7 634 |

#### *Availability of information on the identity of partners*

##### Legal requirements

145. Firms/general partnerships, civil partnership and LPs are required to register in the commercial register if they carry on a business in the Netherlands. Information on the identity of partners needs to be submitted as part of registration, with the exception of information on limited partners of LPs. Partnerships are generally not subject to corporate income tax and are treated as transparent for tax purposes.[8] The share of income from the partnership is directly taxed in the hands of the partners. Partners, resident

8. With the exception of "open" LPs, as further explained in this section.

and non-resident, are required to file tax returns with the tax authorities and thus, the NTCA holds information on all partners, including limited partners who earn Netherlands-sourced income. The list of partners with Netherlands-sourced income in a partnership can be compiled from the database of the NTCA.

146. The 2011 Report found that a remaining gap would exist in relation to foreign resident partners of LPs who did not earn income from the Netherlands. The identity of those partners might not be available to the Netherlands authorities.

147. In the Netherlands, all partnerships but Limited Partnerships are transparent for tax purposes. Since the last review, a decree dated 15 December 2015 now requires the identification of all partners at all times.

148. LPs have at least one general (managing) partner and one silent (limited) partner. The silent partners cannot carry out any external act of management and have limited liability. Under tax law, LPs can either be transparent ("closed") or non-transparent ("open"). An LP is considered "closed" when any event affecting the ownership interests of existing/new limited partners requires the prior written consent of all partners. If such prior written consent is not granted, the partnership will become subject to corporate income tax as an "open" LP. As such, closed LPs will have information of all their partners, since prior written consent is provided and therefore the book-keeping requirements of Article 52 GSTA applies to this information. Therefore, there is no gap for closed LPs.

149. An LP is considered "open" where any event affecting the ownership interest of existing/new limited partners does not require the prior written consent of all partners (Article 2(3c) GSTA). Open LPs represent approximately 9% of all LPs in the Netherlands. They are subject to corporate income tax (Article 2 (1a) CITA) and will therefore have to submit information on their controlling partners in their tax return. Open LPs are subject to the information, book-keeping and third-party investigation requirements. The information on non-controlling partners would still be available as part of the information and book-keeping requirements.

150. For EEIGs, an authentic copy of the contract establishing the grouping must be lodged at the commercial register and information on the personal particulars of each director and supervisory board member must be registered (Art. 23 Commercial Register Decree). Any change relating to the members of the EEIG will also have to be lodged at the commercial register.

151. Where a foreign partnership establishes an undertaking or a branch in the Netherlands and is managed in the Netherlands, that undertaking or branch must be registered in the commercial register. Information on particulars of each partner should be submitted as part of the registration alongside

details on when partners took and ceased office. The place of registration of the partnership outside the Netherlands and the address of its place of business is also required. If a foreign partnership does not formally establish an undertaking in the Netherlands but carries on business in the Netherlands and forms a permanent establishment, tax obligations would apply. Depending on the nature of the foreign partnership, the rules of the "open" or "closed" partnerships apply. In all events, these foreign partnerships would be liable to book-keeping requirements.

### Caribbean Netherlands

152. Similar to the European Netherlands, the Caribbean Netherlands provides for the establishment of civil partnerships, firms/general partnerships and limited partnerships. The same gap in relation to the identity of foreign resident limited partners of limited partnerships was identified. Similarly to the rules applicable in European Netherlands, the foreign partnerships will be liable to book keeping requirements, ensuring availability of information for all partners.

153. As at 31 December 2017, there were 15 partnerships registered in the Caribbean Netherlands.

154. Obligations to keep ownership and identity information in relation to partnerships that ceased to exist never elapse and information is kept indefinitely with the Chamber of Commerce of both European and Caribbean Netherlands.

### Implementation of obligations to keep partner information in practice

155. The 2011 Report did not identify an issue in respect of implementation of the relevant rules in practice and concluded that they are properly implemented to ensure availability of the relevant information in practice. There has been no relevant change in the Netherlands practice in this respect. Implementation of the relevant obligations is ensured in the same way as in the case of companies, mainly through tax filing obligations and audits (see further section A.1.1). The Netherlands have received 36 requests on partnerships, both limited partnerships and general partnerships.

156. The main source of legal ownership information in practice is the information filed with the NTCA and information available with the partnerships themselves.

*Beneficial ownership information of partnerships*

157. Similar to companies, beneficial ownership information of partnerships is required to be collected where a partnership is a customer of an AML obliged person. There is no legal requirement for partnerships to do so. In practice, AML obliged persons such as notaries are involved in the establishment of limited partnerships in many instances, although this is not a legal requirement and that does not amount to a continued relationship that would guarantee the availability of up-to-date beneficial ownership information.

Definition of beneficial owner in force in the European Netherlands before 25 July 2018.

158. Until recent amendments, the AML Act provided for the following CDD obligations to be carried out in cases where customers acted as partners of a partnership:

> b. identify the natural person who:
>
> - upon dissolution of the partnership, is entitled to a share in the community of more than 25%;
>
> - is entitled to a share in the profits of the partnership of more than 25%;
>
> - if a decision is made to change the agreement on which the partnership is based or to execute that agreement other than by acts of management, can exercise more than 25% of the votes, insofar as that agreement stipulates that decisions be made by a majority of votes; or
>
> - can exercise actual control over the partnership;
>
> c. take risk-based and adequate measures in order to verify the identity of the natural person referred to under b.

159. This definition of beneficial owner broadly met the standards. However, similar to the analysis done under A.1.1 with regards to companies, some elements of the standard had not been spelled out either in law or in regulation, such as lack of reference to direct or indirect control, control through other means and no requirement to at least identify the natural person who holds the position of a senior management official.

Definition of beneficial owner in force in the European Netherlands since 25 July 2018

160. The entire former definition has been repealed and replaced with the following new definition of beneficial owner provided under the Money

Laundering and Terrorist Financing (Prevention) Act, 2018, in force since 25 July 2018. The item d) of the definition applied particularly in the context of partnerships:

> Article 3.
>
> 1. Categories of natural persons who should in any case be regarded as beneficial owners are-
>
> d. in case of a partnership:
>
> 1°. natural persons who ultimately own or control the partnership, through:
>
> - direct or indirect ownership of more than 25% of the ownership interest in the partnership;
>
> - direct or indirect exercise power of more than 25% of the votes in adopting resolutions on amending the agreement on which the partnership is based, or on the execution of that agreement other than by acts of management, insofar as that agreement stipulates that resolutions be adopted by a majority of votes; or
>
> - power to exercise of actual control over the partnership; or
>
> 2° If after all possible means have been exhausted and provided that there are no grounds for suspicion, none of the persons referred to in subsection 1° have been traced, or if there are any doubts whether a person referred to in subsection 1° is the ultimate owner or has control, or is the natural person on whose behalf a transaction is conducted, the natural person or persons forming part of the senior management of the partnership.

161. The new definition meets the standard as it makes an express reference to indirect control, and clarifies that if no beneficiary that meets the criteria set is identified, the relevant natural person holding the position of senior management official will be identified as the beneficial owner. The Netherlands has confirmed that actual control is not restricted to the control through ownership of 25% in the customer or shareholding rights of 25% plus one share anymore but is interpreted as including other means in line with the standard. However, there is no clear guidance to ensure that all AML obliged persons would apply "actual control over the partnership" similarly to "other means". Netherlands should clarify how the term "actual control over the partnership" applies in practice.

162. The AML obligations concerning the simplified CDD and third party reliance are the same as for companies.

### Definition of beneficial owner currently in force in Caribbean Netherlands

163. In the Caribbean Netherlands, the definition of beneficial owner is not in line with the standards and has the same deficiencies as the definition in force before July 2018 in the European Netherlands. The Netherlands indicated that the upcoming revision of the BES AML Act to align with the AML Act requirements in force in the European Netherlands has been announced to the Parliament. However, it is not foreseen to come into effect before 2020. The Netherlands is recommended to bring the definition of beneficial owner applicable to partnerships in BES Islands in line with the standard.

### Implementation of obligations to keep beneficial ownership information in practice

164. Implementation of the rules concerning availability of beneficial ownership information in partnership is supervised in the same way as in the case of companies. Since the new law came into effect recently, it was not possible to assess how it was received by the AML obliged persons and implemented and supervised in practice. The Netherlands should supervise the effective implementation of the recent amendments on beneficial ownership.

## *ToR A.1.4. Trusts*

165. While the Netherlands' legislation does not provide for the creation of trusts, the Netherlands is a signatory to the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition[9] and there are no restrictions on a resident acting as a trustee of a trust constituted under foreign law. The situation is the same in the Caribbean Netherlands.

166. The 2011 Report concluded that:

- Information on the settlors and beneficiaries of foreign trusts with a professional trustee resident in the Netherlands is available to the competent authority due to provisions in the GSTA, the Trust and Company Service Providers (Supervision) Act (the TCSP Act) and the AML Act. Thresholds related to identification of beneficiaries in the TCSP Act and AML Act (25%) create a gap which is filled by the GSTA provisions, though the Netherlands would benefit from a more express requirement that records kept by trustees for tax purposes must include details of settlors, trustees and beneficiaries of trusts.

9. www.hcch.net/index_en.php?act=conventions.text&cid=59.

- It was not clear whether non-professional trustees in the Netherlands, who would comprise primarily persons performing services gratuitously or in the course of a purely private non-business relationship, were engaged to act for foreign trusts. The Netherlands' authorities were of the view that this was improbable. An in-text recommendation was included for the Netherlands to monitor the potential gap in information required to be available on foreign trusts which use a non-professional trustee to ensure that it does not in any way interfere with the effective EOI in tax matters.
- For the Caribbean Netherlands, the obligations provided under the BES AML Act and the BES Tax Act would ensure the availability of information of settlors and beneficiaries in a similar way as for the European Netherlands.
- Obligations under the BES Tax Act will probably ensure the maintenance of information on all beneficiaries as well as settlors.

167. The legal framework applicable to trusts remain substantially the same as the one described in the 2011 Report. Legal requirements concerning retention period and enforcement provisions are in line with the standard. During the new review period, the Netherlands received no EOI requests concerning trusts.

168. The Netherlands continues to consider that the great majority of trusts administered in the Netherlands are administered by professional trustees. In order to issue a licence to a TCSP, the Central Bank assesses the TCSP situation, taking into account the intended services to be provided, the country from which services will be provided, the control structure of the TCSP, the soundness of the business operation, procedure to be followed for client research and client acceptance, and how the transaction will be monitored.

169. The Central Bank, as part of its supervision of the trust sector, monitors whether persons are running a TCSP as a business without obtaining a licence. Every year approximately 10-20 unregistered TCSPs are identified. Professionals providing incidental trustee services remain outside the TCSP licensing requirements. However, the service of professional trustee to a foreign trust can only be performed by a licensed TCSP. Non-professional trustees may also administer foreign trusts. At the time of the 2011 Report, it was reported that none of the TCSPs were providing services to foreign trusts. In 2017, the Netherlands authorities estimate that 23 foreign trusts are administered in Netherlands by 5 TCSPs.

170. The Netherlands is recommended to monitor the availability of identity information in respect of foreign trusts having a non-professional trustee not subject to the AML Act and the TCSP Act.

171. As noted under A.1.1, the Central Bank carries out off-site and on-site inspections of the trust sector. The number of supervisory staff has been increased recently (from 9 to 13 FTEs) to better supervise this sector. No breaches have been identified in relation to accounting records keeping obligations.

### *Beneficial ownership information*

172. Before the amendments to the AML Act, availability of beneficial ownership information on trusts was based mainly on obligations under the TCSP Act and the Regulations governing Sound Operational Practices under the Trust and Company Service Providers (Supervision) Act 2014 (the TCSP Regulation). Since 25 July 2018, the amended AML Act is now providing for a new definition of beneficial owner for trust.

173. During the review period, a TCSP acting as a trustee must have performed supplementary CDD, which should have enabled him/her to establish and verify the identity of:

- the settlor
- the protector
- the beneficial owner of the trust (i.e. a natural person who is a beneficiary of 25% or more of the capital of the trust)
- other trustees of the trust.

174. Furthermore, the TCSP must have knowledge of the origin of the assets of the settlor and of the origin and destination of funds of the trust. The TCSP Regulation further provides that insofar as the individuals who are the beneficiaries of the trust have not been recorded yet, the TCSP must record as much as possible the group of persons in whose interest the trust has been mainly incorporated or in whose interest the trust mainly performs activities.

175. Although the definition under the TCSP regulations is not in line with the standard as it does not allow for the identification of all beneficiaries, this deficiency in practice will have no impact as all TCSP covered by the TCSP Regulations are also covered by the AML/CFT Act which defines the beneficial owner of a trust as follows:

> Article 3.
>
> 1. Categories of natural persons who should in any case be regarded as beneficial owners are-
>
> e. in case of a trust:
>
> 1°. the settlor or settlors;

2°. the trustee or trustees;

3°. the protector or protectors, if applicable;

4°. the beneficiaries, or, if it is not possible to determine the individuals who are the beneficiaries of the trust, the class of persons in whose main interest the trust is set up or operates; and

5°. any other natural person who ultimately controls the trust through direct or indirect ownership or by other means.

176. Although the new definition under the AML Act meets the standards, it has not been implemented enough in practice and the Netherlands is recommended to monitor its implementation.

177. In relation to the Caribbean Netherlands, the BES AML Act requires TCSPs acting as trustees to identify settlors and beneficiaries of 25% or more of the assets of the trust. There was no obligation to identify protectors, other trustees, beneficial owners below the 25% threshold and other individuals exercising ultimate effective control over the trust. The Netherlands indicated that the upcoming revision of the BES AML Act to align it with the AML Act requirements in force in the European Netherlands has been announced to the Parliament. However, it is not foreseen to come into effect before 2020. The Netherlands is recommended to bring the definition of beneficial owner applicable to Trusts in BES Islands in line with the standard.

*Implementation of obligations to keep beneficial ownership information in practice*

178. Practical availability of the identification of beneficial owners of trusts is ensured primarily through supervision of professional TCSPs by the Central Bank. Details on the supervisory measures are included under A.1.1.

### *ToR A.1.5. Foundations*

179. Foundations are legal persons and are created through a notarial deed. Whilst the deed must contain the articles of the foundation, it does not necessarily contain information on the identity of founders, foundation council members or beneficiaries of the foundation. Foundations cannot make distributions to founder(s), those participating in its constituent body or to its beneficiaries, unless for the latter, the distributions have an idealistic or social purpose. Upon dissolution, the assets of the foundation have to be used in accordance with the purpose of the foundation and cannot be distributed to its founders or representatives.

180. Foundations can be created in the Netherlands for charitable, shareholding and commercial reasons, in line with social or idealistic purposes.

There are currently approximately 218 000 foundations in the Netherlands and there were approximately 200 000 at the time of the 2011 Report.

181. Approximately 56 000 foundations (i.e. 26%) are currently designated charities. Those are strictly regulated in the Netherlands to ensure that they comply with the terms of the legislation in order to be entitled to tax benefits, including tax deduction of donations made by the founder(s). They are monitored by a team of specialists within the NTCA. This monitoring has resulted in a loss of charity-status for approximately 10 000 foundations at the end of 2016. Approximately 13% of foundations qualify as a social interest group (mainly (local) sports clubs, music associations, (amateur) theatre companies, etc.). These may qualify for the same fiscal facilities as charities, except the deduction of donations. The following criteria have been considered to determine that the charities and foundations that qualify as a social interest group do not fall under the scope of the work of the Global Forum:

- the foundation must pursue a non-profit activity/a public interest/the foundation has no commercial purposes
- the foundation does not have identifiable beneficiaries
- the foundation does not make distribution to its member/founders, all its assets and liabilities are transferred to a public institution or to the State upon dissolution
- the assignment of the assets are irrevocable
- the foundation may benefit from a tax exempt status if certain conditions are met
- the constitution of the foundation is subject to government approval.

182. According to the above mentioned criteria, the above charities and foundation that qualify as a social interest group are therefore not analysed in this report. However, foundations with an economic activity and those holding shares against issuance of depository receipts are in scope. The Netherlands estimate that approximately 20% of the foundations have financial activities.

### *Availability of information on the identity of founders, members of the foundation council and beneficiaries*

183. All foundations are established under the Civil Code and must be registered in the commercial register. The names and addresses of the founder(s), foundation council members and the first supervisory directors are submitted as part of registration. In case of failure to comply with the obligation to submit this information upon registration, the Chamber of Commerce can

dissolve the foundation pursuant to the Civil Code provision. During the review period, 752 foundations have been dissolved.

184. However, foundations are not obliged to disclose information on the identity of their beneficiaries. If the foundation has a relationship with an AML obliged person, information on those beneficiaries who have at least a 25% interest in the foundation would need to be disclosed to this person. The 2011 Report recommended that the Netherlands establish an obligation in both the European Netherlands and the Caribbean Netherlands for foundations to keep identity information concerning all beneficiaries. The Netherlands has not yet addressed this recommendation.

### Implementation of obligations in practice

185. Where a foundation is set to hold shares, the foundation is the shareholder on behalf of the owners of the depository receipts, it receives the dividends and in turn distributes the dividends to the holders of the depository receipts/certificates. These foundations are only considered to be legal owners of the shares while the economic owners are the beneficiaries.

186. Foundations, whether taxable (when they have an economic activity) or not, are subject to book-keeping requirements under the GSTA. Foundations that have issued depository certificates are obliged to keep ownership information on the depository certificate holders in their books (administration) which may be requested by the NTCA. They have been subject to the NTCA's tax audits as other corporate taxpayers. This would ensure availability of legal ownership information only in cases of distribution to beneficiaries.

#### *Beneficial ownership information*

187. As for other types of entities, availability of beneficial ownership information on foundations is mainly based on AML obligations. While AML obliged persons must conduct CDD on foundations that are their customers, there is no legal requirement for foundations to have a relationship with an AML obliged person in the Netherlands.

188. Until 25 July 2018, there was no definition of beneficial owner specifically applicable to foundations and instead, the general definition provided in the AML Act required as follows:

> "the identification of a natural person who:
>
> holds an interest of more than 25% in the capital of a customer;
>
> can exercise more than 25% of the voting rights at the general meeting of a customer;

> can exercise actual control over a customer;
>
> is a beneficiary of 25% or more of the capital of a customer or a trust; or
>
> has special control over 25% or more of the capital of a customer"

189. Based on this definition, prior to 25 July 2018, beneficiaries of less than 25% of the capital of the foundation were not required to be identified. Also, the definition did not provide for the identification of any other natural person exercising ultimate effective control over the foundation by indirect ownership or other means.

### Definition of beneficial owner in force in the European Netherlands since 25 July 2018

190. Since 25 July 2018, the definition applicable to "other legal entities" under the AML/CFT Act reads as follows:

> Article 3.
>
> 1. Categories of natural persons who should in any case by regarded as beneficial owners are:
>
> c. in case of any other legal entity:
>
> 1°. natural persons who ultimately own or control the legal entity, through:
>
> - direct or indirect ownership of more than 25% of the ownership interest in the legal entity;
>
> - direct or indirect exercise of more than 25% of the votes in adopting resolutions on amending the articles of association of the legal entity; or
>
> - the exercise of actual control over the legal entity; or
>
> 2°. if, after all possible means have been exhausted and provided that there are no grounds for suspicion, none of the persons referred to in subsection 1° have been traced, or if there are any doubts whether a person referred to in subsection 1° is the ultimate owner or has control, or is the natural person on whose behalf a transaction is conducted, the natural person or persons forming part of the senior management of the legal entity.

191. The new definition addresses the shortfalls in the previous definition. It makes an express reference to indirect control, and clarifies that if

no beneficiary that meets the criteria set is identified, the relevant natural person holding the position of senior management official will be identified as the beneficial owner. As opposed to legal entities, the beneficial owner of a foundation refers to the natural person who ultimately owns or controls the foundation through the exercise of actual control over the said foundation. The Netherlands has confirmed that actual control is not restricted to the control through ownership of 25% in the customer or shareholding rights of 25% plus one share anymore but is interpreted as including other means in line with the standard. However, there is no clear guidance to ensure that all AML obliged persons would apply "actual control over the foundation" similarly to "other means". It is recommended that the Netherlands clarifies how the term "actual control over the foundation" applies in practice.

192. Since the definition only came into force recently, the Netherlands is recommended to monitor its effective implementation in practice and notably to clarify by means of guidance who are the beneficial owners in foundations acting as holding companies.

### Definition of beneficial owner currently in force in Caribbean Netherlands

193. A similar definition to the definition of beneficial owner under the European Netherlands before it was amended is provided in the BES AML Act for the Caribbean Netherlands. Based on this definition, beneficiaries of less than 25% of the capital of the foundation are not required to be identified. Also, the definition does not provide for the identification of any other natural person exercising ultimate effective control over the foundation by indirect ownership or other means. The Netherlands is recommended to bring the definition of beneficial owner applicable to foundations in line with the international standard.

### Implementation of obligations to keep beneficial ownership information in practice

194. Implementation of the rules concerning availability of beneficial ownership information is to be supervised in the same way as in the case of companies.

195. The Netherlands has received 94 requests on foundations and no peer has indicated any issues in relation to availability of information in relation to foundations.

- 48 of these requests related to pension funds. These questions always relate to participants of the pension funds (e.g. to check any Dutch withholding taxes from the participant).

- 11 of these requests related to STAKs (*Stichting Administratiekantoors*). The vast majority related to the residency permit (confirmation that an entity is resident of the Netherlands for tax purposes) issued for these foundations.
- 35 of these requests related to other foundations.

### *Other relevant entities and arrangements*

*Associations*

196. The 2011 Report included associations under section A.1.1. Pursuant to the Civil Code, an association is a legal person, with members, established for a certain goal, other than the goals of a co-operative society or a mutual company. Associations can make profits, however, these may be used only to further the common goal and profits may not be distributed (Civil Code, Book 2, Art. 26).

197. An association is formed by a notarial deed of incorporation which must contain the articles of association, which describe its purpose, the obligations of its members towards it, the method of convening the general meeting and for the appointment and dismissal of its officers. The directors of an association are responsible for registering the association in the commercial register (Art. 29). A copy of a notarial instrument of amendment and the amended articles must also be registered.

198. The 2011 Report found that there was no legal requirement for the maintenance of information on the members of associations. It was noted that AML obliged persons that have an association as a customer are required to hold information on the association members who hold at least a 25% interest in the association. A recommendation was included in the text for the Netherlands to monitor this issue to ensure that there was no difficulty in obtaining information on all members of associations, if needed, in order to respond to EOI requests. A similar recommendation was included in relation to associations in the Caribbean Netherlands.

199. The Netherlands has reported that no EOI requests were received in relation to associations and no issues were raised by peers in relation to this legal entity. There are currently 127 473 associations in the Netherlands, against 117 398 in 2011.

200. The Netherlands has advised that associations are only subject to taxation if they act as a co-operative, mutual insurance fund, housing corporation or if they carry on a business. A minority of associations are charities, which means that they are set up only for specified public benefit purposes of non-profit, humanitarian, cultural, social or educational nature and benefit from tax-exemption. These charitable associations have to comply with the

strict terms mentioned in the GSTA and the GSTA Regulation and are monitored by a team of specialists within the NTCA. The majority of associations qualify as social interest groups specified (mainly (local) sports clubs, music associations, (amateur) theatre companies, etc.). If they qualify as social interest groups, they have the same fiscal facilities as charities, except for the tax deduction of donations. All associations regardless of their purpose are subject to the book and recordkeeping requirements of Article 52 GSTA. The Netherlands is recommended to continue to monitor that there is no difficulty in ensuring the availability of information on members of associations.

201. In relation to the availability of beneficial ownership information, the same framework analysed under section A.1.5 on foundations would apply to associations.

## A.2. Accounting records

Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

202. Tax, commercial and AML laws in the Netherlands and in the Caribbean Netherlands require that all relevant entities maintain comprehensive accounting records and underlying documentation for a minimum of five years. However, the 2011 Report concluded that the precise nature of the accounting records and underlying documents to be maintained with respect to foreign trusts which have a trustee in the Netherlands or in the Caribbean Netherlands were not specified and a recommendation was included in this respect. The Netherlands amended the TCSP Regulations in 2014, which resulted in compelling professional trustees to keep data used in investigation into the origin of the assets of the settlor, origin and destination of the funds of the trust. The recommendation is therefore addressed. The rest of the legal framework concerning the availability of accounting information has not changed. Supervisory and enforcement measures carried out by NTCA are in place to ensure the availability of this type of information in practice.

203. The 2011 Report also noted that peer input was positive concerning the ability of the Netherlands to provide accounting information and that some information had been provided even after the expiry of the seven-year statutory retention period. Whilst most peers had expressed a concern on the Netherlands' ability to provide accounting information in a timely manner, this was perceived to be mainly due to the notification procedure that applied at the time, rather than issues of availability of this type of information (see element B.2 below to see how the issue of notification procedure has been addressed).

204. During the review period, accounting information was the type of information more commonly requested by the Netherlands' peers: it was requested

in relation to more than 56.6% of the EOI requests received (1 132 requests). Information requested included financial statements, loan agreements, investment agreements, commercial documents, payment supporting documents, insurance documents, other contracts/agreements between corporations, invoices, audited balance sheets, annual reports, profit and loss accounts, tax returns and protocols from board meetings. Peer input confirms the availability of this type of information in practice.

205. The table of determination is as follows:

| Legal and Regulatory Framework | | |
|---|---|---|
| **Deficiencies identified in the implementation of the legal and regulatory framework** | **Underlying Factor** | **Recommendation** |
| | | |
| **Determination: The element is in place.** | | |
| **Practical implementation of the standard** | | |
| **Rating: Compliant** | | |

### *ToR A.2.1. General requirements and A.2.2 Underlying documentation*

*Accounting requirements*

206. The Netherlands' legal and regulatory framework generally ensures the availability of accounting information in line with the standard. The main sources of accounting obligations in the Netherlands are tax law and civil law. The obligations to maintain accounting records and underlying documentation described in the 2011 Report (paras. 203 to 233) have not changed since the last review. In summary, the following obligations apply:

- Pursuant to the Civil Code (art. Article 2:10), accounting records have to be organised in such a way that the financial position of the legal entity can be determined with reasonable accuracy at any time. The annual accounts, prepared in accordance with generally acceptable accounting principles, must provide such a view so as to enable a sound judgment to be formed on the assets and liabilities and results of the legal entity and, insofar as the nature of annual accounts permits, of its solvency and liquidity. The annual accounts have to be prepared in accordance with Title 9 of Book 2 of the Civil Code (based on the EU Directive on annual financial statements/IFRS) (art. 360 Book 2 Civil Code).
- Legal entities subject to tax in the Netherlands (including foreign legal entities carrying on business or taxable activity in the

Netherlands) must maintain books and records of their financial position and of all facts pertaining to their business, independent profession or occupation according to the requirements of that business, independent profession or occupation. They must retain these books, records and other data carriers in such a way that they, at all times, clearly show the rights and tax obligations (Article 52 of GSTA).

- Article 15i of Book 3 of the Civil Code mandates that all persons who pursue a business or a professional practice, including partners of partnerships, have a duty to keep books and accounting records. They must keep and preserve books, accounting records and other facts with regard to the value of the business enterprise or practice, including all assets and liabilities, and in such a way that it is possible at all times to determine the rights and obligations in accordance with the standards acknowledged for that business or profession. These persons must also prepare a balance sheet and income and expenditure statement and retain books and records for seven years.

207. Similar requirements for accounting records and underlying documentation are provided pursuant to the BES Civil Code and BES Tax Act.

208. Companies are required to publish annual accounts. Such accounts must be deposited at the Chamber of Commerce. While small and medium sized companies file a simplified balance sheet and simplified profit and loss account, large companies must file comprehensive accounts and additional supporting documents.

209. Non-compliance with the accounting provisions of the Netherlands Civil Code is an economic offence and is subject to imprisonment for a maximum period of six months, or community service or a fine of a maximum amount of EUR 20 500 (art. 1(4) Economic Offences Act).

210. Failure to comply with the accounting obligations under the GSTA is subject to a reversal of the burden of proof regarding a tax assessment. The assessment of the taxable income and the due tax will normally be significantly higher where a taxpayer has failed to keep relevant accounting records and underlying documentation (Article 25(3) GSTA). If the taxpayer appeals against the estimated tax assessment, he/she will have the burden of proof and would have to convincingly demonstrate that the income is lower than what the tax inspector has estimated. Moreover, failure to keep and retain books, records or other data in accordance with the requirements of tax legislation is a criminal offence and can be penalised by a term of imprisonment of up to six months, or a fine of the third category, amounting to EUR 8 200[10]

10. As at 1 January 2010; the fine corresponding to a category is adjusted every two years based on inflation.

(Art. 68(1)(d) GSTA). In case of deliberate intent, the taxpayer can be penalised by a term of imprisonment of up to four years or a penalty amounting to EUR 20 500 or 100% of tax due (Article 69(1) GSTA). This is similar in the BES islands. The third category penalty on the BES amounts to USD 5 600 and the penalty in case of deliberate intent amounts to USD 14 000 (art. 8.74 BES Tax Act and art. 27 Penalty Code BES).

211. In the Netherlands, inactive companies are subject to the same accounting obligations as any other companies. The reason for this is that a company does not need to have an activity to be obliged to lodge tax returns and maintain accounting records and underlying documentation. The audit conducted by the NTCA on filing requirements applies also to inactive companies and fines for not filing tax returns will be imposed as explained below.

### Retention period and entities that ceased to exist

212. Accounting records have to be kept for seven years under civil law (Articles 2:10 and 2:394 Civil Code).

213. Entities cease to exist through either winding up, bankruptcy or dissolution. The books, records and other data carriers of a legal entity which has been wound up have to be kept by a custodian for a period of seven years after the legal person has ceased to exist as noted in para 63 above.

214. In case of bankruptcy, in addition to the general rules described above, special rules are provided in the Civil Code: if books and records are not maintained and retained properly, all former managers/directors will be jointly and severally liable for the debts of the entity. This is similar in the BES Islands (2.16 Civil Code BES).

215. The particulars registered in respect of a legal person in the register maintained by the Chamber of Commerce on the date on which it ceases to exist shall be kept there for a period of 10 years (art. 2:19 Civil Code). In practice, the Chamber of Commerce keeps the information indefinitely.

216. In relation to tax law, the retention period is also seven years, regardless of whether the entity has ceased to exist (Article 52(4) GSTA). For the determination of the starting point of the seven year retention period, the current "value" of a document to the operations is of importance. Documents that still have a current value (e.g. a contract which has not yet come to a conclusion) are part of the annual records and the seven-year record retention period begins once the document is no longer current. Article 42 of the GSTA attributes all tax obligations (including the book and recordkeeping obligations) to all managers/directors of the body (corporate entities, partnerships, foundations etc.). Similar legal provisions exist in the BES Islands (Articles 8.86(5) and (6)).

### Foreign trusts

217. The 2011 Report recommended that the nature of the accounting records and underlying documents that need to be maintained with respect to foreign trusts, which have a trustee in the European Netherlands or the Caribbean Netherlands, should be clearly outlined.

218. The Netherlands has addressed this recommendation. In summary, the accounting requirements that would apply to foreign trusts having a Netherlands' resident trustee are as follows:

- Trustees that act in a professional capacity qualify as a TCSP within the scope of the Trust and Company Service Providers (Supervision) Act 2014 (TCSP Act) and the Regulations governing Sound Operational Practices under the Trust and Company Service Providers (Supervision) Act 2014 (TCSP Regulation), both effective as of 1 January 2015 are required to maintain records regarding the origin of the assets of the settlor, the origin and destination of the funds of the trust and a copy of the deed of trust or a legalised statement of the trustee along with a summary of the contents of the deed or other documents to substantiate this (Article 10 of the Act and Article 21(2) of the Regulations). Information, including underlying documents, is required to be retained for a period of five years after the end of a business relationship.
- The Netherlands has advised that the explanatory memorandum to the TCSP Regulation explicitly states that the requirements of Article 10 of Book 2 apply to the assets of the trust and should be taken into account by the TCSP, when acting as a trustee of a trust.

219. A Netherlands professional trustee of a foreign trust is taxable on his/her income from the trust and has to submit a tax return. Hence, the professional trustee is subject to the book and record keeping requirements and the obligation to provide information on third parties pursuant to Article 53(1) of GSTA. While this relates only to the income of the trustee rather than the income of the trust, this could usefully complement the obligations under the TCSP Act and more general Civil Code obligations.

220. The book and record keeping requirements do not apply to a non-professional trustee when it is an individual. It is therefore recommended that the Netherlands takes necessary actions to ensure that accounting records and underlying documents are maintained in respect of trusts administered by non-professional trustees and are available.

221. Similar obligations would apply to trustees resident in the Caribbean Netherlands pursuant to the BES Tax Act. The Netherlands authorities confirm that there are currently no professional trustees of a foreign trust in the BES Islands.

*Implementation of accounting requirements in practice*

222. The 2011 Report did not identify any issue concerning the implementation of accounting requirements in practice.

223. The enforcement of the documentation obligations in the tax returns and the book and record keeping requirements of Article 52 of GSTA are part of the yearly tax assessment and auditing procedures by the NTCA. The (electronic) template for Corporate Income Tax Act audits requires the tax officials concerned to submit in writing a judgement on the compliance with the book and record keeping requirements of Article 52 GSTA and a judgement on the compliance with the retention period of Article 52(4) GSTA. Taxpayers who do not comply not only face sanctions (Articles 68 and 69 GSTA), but also risk reversal of the burden of proof concerning the amount of tax assessment. Statistical information on NTCA's compliance policy, statistics on compliance with filing tax obligations statistics, audits and sanctions are provided under section A.1.1 of this report under Tax supervision.

224. Moreover, as of 2015, the NTCA's Bureau of Economic Supervision monitors compliance with the filing of financial statements with the Chamber of Commerce. The Bureau's efforts are focused on, inter alia, (i) recurrent non-compliance (ii) medium/big sized companies, and (iii) newly formed companies. In the year 2016, the Bureau contacted approximately 2 300 legal persons to warn them that they had not complied with their obligations to deposit financial statements for the year 2013. It was found that a number of these persons had complied with obligations (i.e. warnings were sent by mistake), others did so after the warning, while some failed to do so after the initial warning and were fined. The Bureau has also sent some cases for the attention of the Public Prosecutor. In 2017 a similar strategy was followed: 3 700 legal persons were contacted; 1 600 of them deposited their financial statements after being reminded; 208 applied for dissolution, 642 failed to comply and were subjected to a fine, and the procedure regarding the remaining is on-going. In 2018, the NTCA performed 36 supervisions controls among which 4 controls relating to AEOI specifically. No deficiencies were found. The close and regular consultation between the NTCA and Financial Institutions seemed successful.

225. The Central Bank, in charge of supervision of the TCSPs, has proceeded to checks of financial statements and accounting records during onsite visits of the TCSPs.

226. During the review period, the Netherlands was asked to provide a wide variety of accounting records and underlying documentation, including financial statements, loan agreements, investment agreements, commercial documents, payment supporting documents, insurance documents, other contracts/agreements between corporations, invoices, audited balance sheets,

annual reports, profit and loss accounts, tax returns and protocols from board meetings. These requests related primarily to companies, and also to some partnerships and foundations. None related to a trust. No issues concerning the availability of this type of information were reported by the Netherlands or the peers.

## A.3. Banking information

Banking information and beneficial ownership information should be available for all account-holders.

227. The 2011 Report concluded that banks' record keeping requirements and their implementation in practice in the Netherlands and in the Caribbean Netherlands were in line with the standard.

228. The EOIR standard now requires that beneficial ownership information (in addition to legal ownership) in respect of accountholders be available. In this regard, the AML law in the Netherlands and in the Caribbean Netherlands requires that banks, as reporting entities for the purposes of the AML/CFT, conduct CDD on a customer, any beneficial owner of a customer and any person acting on behalf of a customer. Varying levels of CDD apply based on the risk of the business relationship. A bank is also required to take risk-based and adequate measures to ensure that the beneficial ownership information is kept up to date. Records must be kept for a minimum period of five years from the end of the relationship with the account-holder.

229. The implementation of the recent amendments to the AML Act and its underlying Decree that came into force on 25 July 2018 need to be supervised in practice, particularly with regards to simplified CDD and new CDD requirements for the identification of beneficial owners in all relevant entities and arrangements. The definition of beneficial owner currently in force in the Caribbean Netherlands and in force during the review period in the European Netherlands did not fully meet the international standard (see Element A1).

230. Availability of beneficial ownership maintained by banks is supervised and enforced by the Central Bank. The supervision is considered adequate.

231. During the current review period, a relatively small number of requests (approximately 100) pertained to banking information. Information was found to be available. Peer input did not raise any issues regarding availability.

232. The new table of determination and rating is as follows:

| Legal and Regulatory Framework | | |
|---|---|---|
| **Deficiencies identified in the implementation of the legal and regulatory framework** | **Underlying Factor** | **Recommendation** |
| | The definition of beneficial owner and the simplified customer due diligences which allow the AML obliged person not to identify and verify the beneficial owner of a customer who is also a customer of other professionals (who may not be based in the Netherlands), as applicable in the Caribbean Netherlands is not fully in line with the standard. | The Netherlands should ensure that beneficial ownership information is available for all relevant entities and arrangements in the Caribbean Netherlands in accordance with the standard. |
| **Determination: The element is in place** | | |
| **Practical implementation of the standard** | | |
| | **Underlying Factor** | **Recommendation** |
| **Deficiencies identified in the implementation of EOIR in practice** | Before 25 July 2018, the AML legal framework in European Netherlands was not in line with the standards and deficiencies were found with regards to simplified due diligence, customer due diligence requirements to identify the beneficial owners of relevant entities and arrangements. After the review period, in July 2018, the AML legal framework in European Netherlands was amended, in particular to define new rules for simplified customer due diligence and for identification of beneficial owners. Due to its recent entry into force, the implementation of the new provision could not be assessed in practice. | The Netherlands should supervise the effective implementation of the recent amendments on beneficial ownership. |
| **Rating: Largely Compliant** | | |

### *ToR A.3.1. Record-keeping requirements*

*Financial and transactional information and identification of accountholders*

233. The Decree on Prudential Rules, issued pursuant to the Act on Financial Supervision, requires financial institutions in the Netherlands to maintain records regarding the identification of a customer and the monitoring of the client transactions for a minimum of five years after the services have been provided. This is supplemented by the transactional record keeping requirements provided under the AML Act.

234. The 2011 Report noted that, while the Netherlands' law did not allow for the creation of anonymous accounts or accounts in fictitious names, a small number of protected accounts[11] were held by financial institutions. It was noted that the AML Act provisions would ensure that identity information of all accountholders was available for all accounts, including protected accounts. At the time of the 2011 Report, the Central Bank was in the process of converting the protected accounts into regular bank accounts.

235. Since then, the conversion has been implemented. Pursuant to the Regulation on Protected Accounts under the Financial Supervision Act, effective as of 1 January 2007, banks or bank branches are permitted to make restricted use of protected accounts. The Regulation describes the way in which banks and bank branches should keep a central register in such a way that a customer's identity details are not visible or are otherwise protected during the processing of transactions, whilst being known elsewhere in the institution. The central register must contain the data to be recorded regarding the identity of the accountholder and the beneficial owner pursuant to the AML Act. The central register should be set up in such a manner that it can be searched by name and by number or code key.

236. In relation to the Caribbean Netherlands, the 2011 Report concluded that the Act on the Supervision of Bank and Credit System and the AML Act ensured that banking information was available for all account-holders as required under the standard.

237. In practice, the Netherlands exchanged transactional and financial information with its EOI partners and no problem of availability of that information was encountered. Peers were satisfied with the quality of the information provided.

11. The protected accounts, for example belong to members of the Royal family. Information on the accountholders is available in some documents and known to the responsible persons in the bank but not revealed in all documents to protect the identity of accountholders.

### *Beneficial ownership information on account-holders*

238. The 2016 ToR specifically require that beneficial ownership information be available in respect of all accountholders. As noted under A.1.1, all AML obliged persons, including banks in the Netherlands and the Caribbean Netherlands, are required to conduct customer due diligence (CDD) and identify a customer and beneficial owner of a customer. Before 25 July 2018, banks were obliged to take risk-based and adequate measures to verify the beneficial owner's identity and, if the customer was a legal person, to take risk-based and adequate measures in order to obtain an insight into the customer's ownership and control structure. Banks were also obliged to take risk-based and adequate measures to ensure that the beneficial ownership information was kept up to date.

239. As described under A.1, the following deficiencies were identified in relation to the Netherlands and the Caribbean Netherlands' framework in force before 25 July 2018 to identify beneficial owners:

- The definition of beneficial owner for legal persons did not refer to direct or indirect ownership, as ownership can be exercised through a chain (although that could be implied based on the CDD measures described in the AML Act concerning taking adequate measures to obtain an insight into the customer's ownership and control structure, but this is risk-based only, i.e. not systematic). It also did not capture control through other means.
- In relation to customers that are trusts, only beneficiaries of a minimum threshold of 25% of the assets were required to be identified. Moreover, there was no requirement that persons acting as protectors or other individuals exercising ultimate effective control over the trust are identified.
- Simplified CDD rules allowed banks not to identify beneficial owners before July 2018.

240. All deficiencies above have been addressed with the amendment made to the definition of beneficial owner, in force since 25 July 2018 but only in the European Netherlands. The Netherlands should ensure that beneficial ownership information is available for all relevant entities and arrangements in the Caribbean Netherlands in accordance with the standard.

241. As the Netherlands main source of information on beneficial owner is the AML obliged persons, which is based on a risk-based approach in accordance with CDD requirements, this information may not be up to date at all times. The Netherlands is recommended to ensure that beneficial ownership information on account holders is kept up to date.

### *Supervision of obligations to keep beneficial ownership information in practice*

242. The availability of banking information in practice is mainly supported by the supervision activities of the Central Bank and the NTCA. The Central Bank is responsible for prudential and AML supervision. The Netherlands Authority for the Financial Markets is responsible for the "conduct of business supervision" with regard to banks. The Netherlands Central Bank is the authority responsible for the supervision of the 100 banks operating in the Netherlands, as well as the 8 banks operating in the Caribbean Netherlands. As described under A.1.1, the Central Bank aims at ensuring compliance through a risk-based approach, a mix of thematic reviews and individual examinations. During the review period, the number of on-site examinations that would include the examination of a bank's CDD policies and procedures and the review of client files (for instance to verify the steps taken to identify the beneficial owners of customers) covered around 13% of the credit institutions and 15% of the payment institutions per year. The four major banks that cover 80% of the financial transactions in the Netherlands are all reviewed every year.

243. Moreover, the NTCA monitors the provision of financial account data to the NTCA for the purpose of exchange of information with automatic EOI partners. Over the past years, the NTCA has conducted continuous reviews on the banking information received from financial institutions to monitor compliance and increase data quality. In a dozen cases these reviews have led to the threat of imposition of fines by the NTCA. All those cases have been resolved as a result of (later) compliance by the financial institution. In 2017 and 2018, the NTCA conducted reviews with the four biggest financial institutions (accounting for 90-95% of all bank accountholders) on the AEOI implementation and the NTCA has advised that no deficiencies were found and that compliance was caused by the close and regular co-operation with the financial institutions. The review process will be extended to other financial institutions in the near future.

244. In July 2018, the AML legal framework in European Netherlands was amended, in particular to define new rules for simplified customer due diligence and for identification of beneficial owners. Due to its recent entry into force, the implementation of the new provision could not be assessed in practice. The Netherlands should supervise the effective implementation of the recent amendments on beneficial owner.

# Part B: Access to information

245. Sections B.1 and B.2 evaluate whether competent authorities have the power to obtain and provide information that is the subject of a request under an EOI arrangement from any person within their territorial jurisdiction who is in possession or control of such information; and whether rights and safeguards are compatible with effective EOI.

## B.1. Competent authority's ability to obtain and provide information

Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

246. The Netherlands' tax authorities have broad access powers to obtain all types of relevant information in order to comply with obligations under its EOI agreements, regardless of domestic tax interest. The 2011 Report found, however, that the scope of professional privilege in tax matters was unclear and appeared to extend beyond that provided for in the standard. Notwithstanding that potential deficiency, the legal and regulatory framework concerning access to information was determined to be in place and rated Compliant. Some aspects of the scope of professional secrecy applicable to lawyers and notaries have been clarified since the last review. Moreover, the Netherlands government is working on a bill to clarify the statutory right of non-disclosure enjoyed by these professionals when requested to provide third party information on tax matters.

247. Since the 2011 Report, there have been no changes in the legal framework applicable to access to information, with the exception to the introduction of explicit access powers to collect information that is kept for AML purposes. This new power may be useful when gathering beneficial ownership information from AML obliged entities, although the Netherlands competent authority advises that it was able to collect such type of information under its general access powers even before the enactment of the new provision.

248. During the previous review period, in order to reply to the majority of EOI requests, the tax authority could use information already at its hands or request information from information holders on a voluntary basis. When that was not possible, the European Netherlands had adequate powers to request information from taxpayers or third parties. The same was true also concerning access to information in the Caribbean Netherlands.

249. Access powers continue to be effectively used in practice and allow for timely access to information. This has been confirmed by peer input.

250. The new table of recommendations, determination and rating is as follows:

| Legal and Regulatory Framework | | |
|---|---|---|
| **Deficiencies identified in the implementation of the legal and regulatory framework** | **Underlying Factor** | **Recommendation** |
| | | |
| **Determination: The element is in place.** | | |
| **Practical implementation of the standard** | | |
| **Rating: Compliant** | | |

### *ToR B.1.1. Ownership, identity and bank information and ToR B.1.2 Accounting records*

251. The 2011 Report concluded that appropriate access powers were in place for EOI purposes (see paragraphs 259 to 269). In summary, the Netherlands' tax authorities have the power to request information from taxpayers and third parties that are required to keep records under the Netherlands tax law with regard to the tax position of a taxpayer (e.g. a third party that has a business relationship with a taxpayer may be asked to provide information that is relevant for the taxation of that taxpayer). Access powers apply irrespective of the fact that the taxpayer may be under examination for domestic purposes. The tax authority also has the power to inspect business premises or commence an audit solely for EOI purposes. In relation to the Caribbean Netherlands, the BES Tax Act provides for access powers to collect information in order to reply to EOI requests.

252. The competent authority (central liaison office located in Almelo) is responsible for the exchanges in both the European Netherlands and the Caribbean Netherlands.

253. There has been no relevant change in the Netherlands legal framework since then, with the exception to an additional power introduced under the Netherlands International Assistance (Levying of Taxes) Act. Effective as of 1 January 2018, Article 10g provides the Netherlands Ministry of Finance with powers to access identity, legal and beneficial ownership and accounting information which is required to be held by anyone for anti-money laundering purposes. Similar powers are available in the Caribbean Netherlands (BES Tax Act, Article 8.133b). The Netherlands authorities have explained that the change aims at clarifying the scope of access powers, as even prior to this change, beneficial ownership information has been accessed from AML obliged persons for purposes of replying to EOI requests.

### *Access to information in practice*

254. The competent authority has various information sources at its disposal in internal and external databases which are used to reply to many EOI requests. This includes data from several internal data providers (e.g. customs, fiscal intelligence, regional tax offices) and more than 50 external data providers (other government authorities (business registry, land registry, justice, housing, transport, education, municipal authorities) and private sector (e.g. banks, insurance companies, lease companies)). Financial institutions are required to supply NTCA information on the identity of account holders and other information (e.g. securities, savings, insurance, annuities, mortgages) annually on an automatic basis. Similarly, employers are required to provide NTCA with relevant tax information on their employees, and some entities are required to provide information on independent workers. The tax administration has also electronic access to all notarial deeds (with the exception of wills of persons who are not yet deceased).

255. Legal ownership information can be collected on the basis of notarial deeds, some information filed with NTCA, or accessed from the entities themselves and information on founders is also available with the business register. With respect to beneficial ownership information, the sources would normally be some information filed with NTCA (e.g. substantial interest taxation), the entities themselves or AML obliged persons such as TCSPs, banks and tax advisors.

256. With respect to accounting information, some financial information is accessible by means of tax returns and financial statements filed with the business register; for the rest, the main sources of information are taxpayers, either directly or through their agents or tax advisors. Access to banking information is detailed below.

257. In practice, the competent authority (CLO) responds directly to simple requests where the information can be accessed using one of the NTCA's databases. The CLO can also reply directly to requests that are very

specific, e.g. for requests for very specific invoices maintained by a taxpayer in the Netherlands, the CLO issues a notice for production of the specific pieces of information requested. In the other cases, the CLO liaises with regional liaison offices (RLOs) or other authorities such as the FIOD or the Large Taxpayers Department for their assistance with collecting information. Standard procedures have been agreed by the CLO and RLOs for their co-operation on EOI matters.

258. During the review period, there were two RLOs in the local tax offices of Amsterdam and Rotterdam. These two local offices were chosen because a significant part of the incoming requests concerning legal entities fall under the competence of these offices. The tax office in Amsterdam is responsible for the financial sector (e.g. banks, insurance companies) and the Rotterdam office hosts the advance pricing agreements (APAs) and advance tax rulings (ATRs). The Netherlands has received requests which require an additional analysis and investigations by, for instance, the APA/ATR team, the expert group on transfer pricing and the Ministry of Finance (department responsible for mutual agreement procedures).

259. In standard cases, the RLOs will liaise with local tax officers responsible for collecting information. The local officer assesses the request for information and determines whether he/she can answer it or will need to involve a colleague with more specialised knowledge (e.g. transfer pricing cases). The RLOs will also monitor outstanding responses and perform a quality review of the responses received.

260. Local tax officers, who possess either specific knowledge about a certain area of tax or about the relevant Netherlands taxpayer, are responsible for ensuring that information collected adequately replies to the request. When the requested information is not available in the NTCA's (local) files then the officer initiates an investigation to collect the necessary information.

261. Third-party investigations are commonly used to gather information for EOI. Investigations may take from a couple of days to a more extensive audit depending on the complexity of the information to be collected. The fact that an audit has been done for domestic purpose concerning the same year and/or the same tax is no limitation for an audit to be performed on a taxpayer or third party for EOI purposes.

262. When the officer receives the information, he/she then formulates a report with answers to the questions raised in the EOI request. The report will generally include a number of annexes with the requested records (such as financial statements, tax returns, contracts and deeds). It is submitted to the CLO and/or RLOs for the formulation of the final answer to the requesting jurisdiction.

263. While some peers noted that the access to accounting information and banking information seems to take longer than other types of information, as they normally require third-party investigations, no specific concerns were raised in relation to impediments or delays.

264. As in the previous peer review period, the Netherlands competent authority received no EOI requests pertaining to the Caribbean Netherlands during the current period under review.

### Information held by non-professional individuals

265. The NTCA can collect information from third parties that are required to keep records under the Netherlands tax law with regard to the tax position of a taxpayer (e.g. a third party that has a business relationship with a taxpayer may be asked to provide information that is relevant for the taxation of that taxpayer). The 2011 Report noted that an exception is provided for private individuals, who do not need to answer questions about third parties and do not need to permit tax authorities to inspect any records they may keep that could be necessary to ascertain taxation of third parties (Court of 's-Hertogenbosch 5 December 2002, V-N 2003/9.4). Those individuals may still be asked to provide information on third parties voluntarily but the tax administration, when approaching such taxpayers, must clearly state that they are not obliged to provide information.

266. In one case, accounting information held by a private individual on third parties could not be collected. The Netherlands indicated that the individual had been requested to provide the information voluntarily but did not do so. The individual had an employment relationship in the Netherlands and there was no indication that he, for instance, provided services to the foreign taxpayers and therefore formal access powers could not be used in the case. The exception provided for private individuals has not had a systemic impact on the Netherlands' ability to access information for EOI. As the standard requires that jurisdictions have the power to obtain information requested for EOI purposes from any person within its territorial jurisdiction in possession or control of such information, the Netherlands is recommended to monitor that the exception concerning third-party information held by non-entrepreneurial individuals does not hinder its ability to obtain information for EOI purposes.

### Access to information while a criminal investigation is ongoing

267. The 2011 Report noted that in the previous review period the provision of information was delayed in four cases due to on-going criminal investigations. An in-text recommendation was given for the Netherlands to monitor this issue to ensure that it did not undermine effective EOI.

268. In the current review period, tax criminal investigations did not impede the provision of information, but did lead to a delay in answering three EOI requests.

269. In practice, where information requested under EOI needs to be collected from a Netherlands taxpayer who is involved in a tax and/or economic criminal investigation, the competent authority contacts the Fiscal Investigation and Intelligence Service (FIOD), which is the department of the NTCA responsible for the investigation of tax and economic offences. The FIOD then contacts the Public Prosecutor dealing with the case.

270. If the domestic criminal investigation has already been completed, FIOD will provide the requested information to the competent authority (if the information has been collected as part of the criminal investigation) or the tax administration will collect the information from the taxpayer.

271. While a criminal investigation is ongoing, the tax administration can still proceed with collecting the information from the taxpayer if the information is not concerned with the criminal investigation. If the information is connected to that investigation, the Public Prosecutor will, in a majority of cases, proceed with completing the criminal investigation before granting the permission for the competent authority to share the information with the requesting jurisdiction. The Netherlands has advised that this is also the case for domestic purposes and the reason for this is that the disclosure of information could impair the domestic criminal investigation, since the requesting jurisdiction may share it with the taxpayer as part of its own domestic procedures. However, this procedure in the Netherlands has not affected exchange of information in practice, as confirmed by the peer inputs, which did not raise concerns on this.

### *Access to banking information*

272. In respect of access to banking information, the GSTA requires third-parties including financial institutions that hold documents of a taxpayer to provide these documents to the tax authority on request (Article 48 GSTA). In addition, several types of banking records are provided automatically (see above).

273. To reduce the administrative burden on banks, which receive a great number of requests from the NTCA, a 2012 administrative Decree (*Voorschrift informatie fiscus – banken* 2012) provides for specific procedures to be followed by the NTCA. The Decree requires the tax officer to first approach the taxpayer to provide the information, including requesting the information from the bank, unless "the importance of investigation does not permit that the procedures" involving the taxpayer are followed (e.g. if contacting the taxpayer could undermine the success of the investigation).

If the taxpayer refuses to co-operate, or if it is assessed that the taxpayer should not be approached first, the tax authorities will send a request for information to the bank. The Decree provides that the tax authority may request the bank not to inform the accountholder concerned about the request for information. Such a request to the bank needs to be signed by the director of the tax office.

274. The Decree does not apply to requests in criminal tax matters handled by the FIOD. In relation to those requests, FIOD would generally approach the bank first to obtain banking records and the accountholder would not be informed.

275. In practice, all requests for bank information are forwarded to one central point within the Amsterdam tax office, who is tasked with dealing with such requests. In case of group requests the authorisation of the Ministry of Finance is also required.

276. During the review period, approximately 46% of requests for banking information were responded within 90 days, 65% within 180 days, 99% within one year and 1% in more than one year. Regardless of the method chosen (through taxpayer or banks) the information was provided within a reasonable period.

277. Banking information can be requested also when only a bank account number is available. Where the bank account number allows the identification of the bank concerned, the tax authority will send a request directly to that bank to identify the accountholder. Where the format of the bank account number would not allow the identification of the bank, the tax authority will contact Equens, a pan-European payments and transactional service provider that may be able to identify the bank or in some cases the accountholder.

### *ToR B.1.3. Use of information gathering measures absent domestic tax interest*

278. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. The Netherlands laws (the Netherlands International Assistance (Levying of Taxes) Act and the BES Tax Act) expressly empower the Netherlands tax authorities to use their information gathering powers solely to assist its EOI partners. (Refer to paragraphs 279 to 286 of the Round 1 Report.) No issues were encountered in the previous and the present review periods. The Netherlands competent authority confirmed that it does not consider the existence of domestic tax interest as an element to take into account when establishing whether the request can be processed or not. No concerns were raised by peers.

### *ToR B.1.4. Effective enforcement provisions to compel the production of information*

279. The Netherlands has in place effective enforcement provisions to compel the production of information and these provisions are adequately applied in practice.

280. During the current review period, the threat of initiating civil proceedings was sufficient to compel information holders to produce the requested information. Whilst information holders could appeal against the application of sanctions, such an appeal would have no suspensive effect (i.e. the daily penalty set can be applied in conformity with the first court decision).

### *ToR B.1.5. Secrecy provisions*

281. The 2011 Report found that the scope of professional privilege in tax matters was not clear in the Netherlands and appeared to extend beyond the international standard.

282. The Code of Conduct for lawyers, adopted by the Bar Association under delegated powers, imposes an obligation of confidentiality upon lawyers.[12] Moreover, Article 53(a) of the GSTA and Article 8.88(2) of the BES Tax Act recognise that lawyers and notaries can refuse to provide information regarding third-parties when they would be bound by confidentiality:

> With regard to any refusal to comply with obligations relating to the levying of taxes on third parties only ministers of a faith, notaries, lawyers, physicians and pharmacists may appeal to the circumstances that they are in the capacity of their status, office or profession, bound to confidentiality.

12. Rule 6 "1. Advocates must observe secrecy; they shall not divulge the details of cases they are handling, the identity of their clients or the nature and extent of their interests.

2. If an advocate is of the opinion that the proper performance of the task entrusted to him requires his knowledge to be made public in any way, he shall be free to do so if the client does not object thereto and if it is compatible with sound professional practice.

3. Advocates shall impose the same obligation to observe secrecy upon their staff as that to which they are bound."

4. The obligation to observe secrecy shall continue after the relationship with the client has come to an end.

5. If advocates have undertaken to observe secrecy, or if this secrecy arises from the nature of their relationship with any third party, they shall also observe this secrecy vis-à-vis their clients."

283. As highlighted in the 2011 Report, the concerns related more to lawyers, to the extent that notaries were already required to submit a number of documents they produce (including deeds for incorporation of companies and transfer of shares) to the tax authorities.

284. It is not expressly provided neither in the Bar Association Code of Conduct nor in the tax law that legal professional privilege is confined to information that constitutes "confidential communication between a client and attorney, solicitor or other admitted legal representative, if such communication is produced for the purpose of seeking or providing legal advice or is produced for the purpose of use in existing or contemplated legal proceedings" (see Paragraph 19.3 of the commentary on Article 26 of the OECD Model Tax Convention).

285. Since the 2011 Report, some aspects of legal professional privilege have been clarified by regulation or case law. First, the Supreme Court in its decision of 27 April 2012 in the case of Tradman Netherlands B.V. v. the State of the Netherlands confirmed that the professional secrecy of Article 53a of the GSTA only applies to information entrusted to such persons in their professional capacity as confidant, and excludes information obtained outside of that capacity. The Netherlands interprets that decision as limiting the scope of professional secrecy in tax matters to information concerning clients that these professionals would have collected during their activities as confidants.

286. Effective as of 1 January 2015, the Regulation on Lawyers (article 6:20, binding for lawyers, with reference to article 46 of the Code of Conduct) implies that, when dealing with securities and valuables held by lawyers on behalf of their clients that the lawyer should not hold them unless holding them is connected with a legal case: "A lawyer may only accept and keep money, valuable papers, valuable goods or other matters, if the lawyer knows the background of the money, valuable papers, valuable goods or other matters and the lawyer is convinced that the aforementioned goods serve a reasonable purpose for the legal case the lawyer is handling". The Regulation contains the following background explanation: "one can think of a request of a client to accept and keep a closed envelope with content for a shorter or longer period of time. The lawyer risks in that case that clients misuse the lawyer's position because of its professional secrecy to hide tax offences and/or criminal offences. Accepting such requests is not allowed".

287. The Supreme Court of the Netherlands in its decision of 26 January 2016 (Case number 15/02336) clarified in the context of a criminal case that the mere provision of documents to a notary not connected to the provision of any services in his/her capacity of a notary would not benefit from professional privilege:

> "The right to legal privilege is only accorded to a notary under the scope of his provision of legal services to a person who has

> consulted him on account of his capacity as notary (…). If a copy of that correspondence is sent to the notary it cannot be said that for that reason alone the contents of that can be designated as knowledge which has been entrusted to the notary under the scope of his provision of legal services."

288. Notwithstanding the above, there is no evidence that the practice of professionals has evolved. So there remains a concern that lawyers and notaries apply the right of non-disclosure provided in the GSTA broadly, covering any information held by these professionals on behalf of their clients. In addition, the claim that the information is covered by professional privilege is subject to the decision of the respective lawyer or notary holding the information and there is a limited possibility for the tax administration to effectively appeal against such a claim. A case heard by the Supreme Court of the Netherlands on 1 July 2014 found that where legal professional privilege is claimed, the claim needs to be respected unless there could be *reasonable doubt* that such a claim is not justified. It appears to be very difficult in practice to verify the claim that the information is protected by professional privilege without having access to this information, unless for instance where the law enforcement authority already has evidence that the lawyer or the notary participates in criminal activity. As a result, in the majority of domestic situations, once the notary or the lawyer claims that the information is subject to professional privilege, the claim is not generally challenged and the information is therefore not disclosed. The Netherlands government is currently working on a bill to clarify the statutory right of non-disclosure enjoyed by these professionals.

289. The scope of the right of non-disclosure by a taxpayer's lawyer or notary under the GSTA and the BES Tax Act remains untested as the tax authorities do not commonly request information or documents from these professionals. While the 2011 recommendation is removed, it is recommended that the Netherlands monitors the scope of professional privilege in relation to EOI to ensure it is consistent with the international standard. In the event that the Netherlands identified that the scope goes beyond the standard, the Netherlands is recommended to take measures to ensure that it does not unduly restrict EOI.

290. The Netherlands has not had the need to collect information from lawyers or notaries for purposes of replying to EOI requests during the review period, as information requested was held by other information holders in all cases. Peers have not raised specific concerns regarding professional secrecy.

## B.2. Notification requirements, rights and safeguards

The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

291. The 2011 Report found that the Netherlands tax authorities had to notify the information holder of its decision to send information to the requesting jurisdiction prior to transmitting it. The notified party had a right to object, within ten days of the notification, and could request an injunction to stop the transmission of the information to the requesting authority. As the notification was given after the information is collected, and certain exceptions existed allowing for waiver of the notification, the 2011 Report concluded that it did not affect the access to information but caused delays on its exchange. The notification and appeal process took on average 10 to 18 weeks to be completed before the information could be provided to the requesting jurisdiction.

292. Effective as of 1 January 2014, the notification and appeal procedure was abolished by the law of 18 December 2013. Since then, there has been no notification or appeal prior to exchange. Similar amendments were made on the BES Tax Act effective as of 1 January 2014. Post-exchange notification is not provided in the Netherlands and the Caribbean Netherlands laws.

293. More generally, the Netherlands taxpayers do not have the right to object or appeal a decision from a tax authority during the investigation phase, i.e. their legal protection for their personal tax matters is addressed in the tax proceedings after the tax assessment. This position extends to exchange of information as well. No issues were found in practice regarding the application of rights and safeguards.

294. The notices issued to information holders in the context of information gathering for EOI do not contain information about the foreign investigation, the requesting jurisdiction, or the EOI instrument concerned. Only domestic powers are referred to. Notwithstanding the above, the Netherlands considers that, in the exchanges under the EU Directive, it may be required to disclose some information to the information holder (i.e. the identity of the taxpayer concerned and the purpose for which the information is sought) upon his/her request if circumstances similar to the ones of the Berlioz case arise in the Netherlands (see element C.3 for more details).

295. The new table of determination and rating is as follows:

| Legal and Regulatory Framework | | |
|---|---|---|
| **Deficiencies identified in the implementation of the legal and regulatory framework** | **Underlying Factor** | **Recommendation** |
| | | |
| **Determination: The element is in place.** | | |
| **Practical implementation of the standard** | | |
| **Deficiencies identified in the implementation of EOIR in practice** | **Underlying Factor** | **Recommendation** |
| | | |
| **Rating: Compliant** | | |

# Part C: Exchanging information

296. Sections C.1 to C.5 evaluate the effectiveness of the Netherlands' EOI in practice by reviewing its network of EOI mechanisms – whether these EOI mechanisms cover all its relevant partners, whether there were adequate provisions to ensure the confidentiality of information received, whether it respects the rights and safeguards of taxpayers and third parties and whether the Netherlands could provide the information requested in an effective manner.

## C.1. Exchange of information mechanisms

Exchange of information mechanisms should provide for effective exchange of information.

297. The 2011 Report concluded that the Netherlands' network of EOI mechanisms was generally in line with the standard and provided for effective exchange of information. It was found, however, some of the Netherlands' then 114 EOI agreements did not provide for exchange of information in line with the standard and 12 had not yet been ratified by the Netherlands. Element C.1 was determined to be in place, but rated Largely Compliant.

298. Since the last review, the Netherlands has maintained an active negotiation programme and made progress in bringing the deficient treaties in line with the standard. The Netherlands has also ratified the Multilateral Convention, which entered into force on 1 September 2013, and implemented the 2011 EU Directive on Mutual Administrative Assistance in Tax Matters (the EU Directive). Whereas a few EOI relationships are still not in line with the standard, the recommendation can be removed from the box of recommendations.

299. The Netherlands has also in most instances ratified signed agreements promptly. In a handful of cases, ratification on the Netherland's side has taken more than two years and that related to specific issues with the signed agreements (e.g. need for explicit ratification in the Netherlands' Parliament or inconsistencies in translation or typographical errors). No systemic problem with the Netherlands' ratification procedure was identified and the recommendation can be removed.

300. The Netherlands currently has a broad network of EOI agreements in line with the standard, covering 148 jurisdictions through 121 bilateral agreements, the EU Directive and the Multilateral Convention.

301. The Netherlands' interpretation of "foreseeable relevance" is in line with the standard. This was also confirmed by peers. The EOIR standard now includes a reference to group requests.[13] The Netherlands adheres to the Commentary to the OECD Model Tax Convention and considers that requesting jurisdictions should provide the information described in the Commentary to the Model Convention to support their requests. No additional requirements are provided under Netherlands law or practice. The Netherlands received two group requests during the review period. Following consultations with the EOI partner, one of these requests was converted into a bulk request. In relation to the other group request, the Netherlands asked the requesting jurisdiction for additional information, to substantiate with clear factual basis the reason for the treaty partner to believe that the taxpayers in the group for whom information was requested had been non-compliant with the law of the treaty partner. To date, the Netherlands has not received further information from its treaty partner.

302. The new table of determination and rating is as follows:

| Legal and Regulatory Framework | | |
|---|---|---|
| **Deficiencies identified in the implementation of the legal and regulatory framework** | **Underlying Factor** | **Recommendation** |
| | | |
| **Determination: The element is in place.** | | |
| **Practical implementation of the standard** | | |
| **Deficiencies identified in the implementation of EOIR in practice** | **Underlying Factor** | **Recommendation** |
| | | |
| **Rating: Compliant** | | |

13. In line with paragraph 5.2 of the Commentary to Article 26 of the OECD Model Tax Convention.

*Other forms of exchange*

303. In addition to exchange of information on request, the Netherlands also exchanges information spontaneously on a routine basis.

304. The Netherlands is also involved in automatic exchange of financial account information. The first exchanges took place in September 2017. Country-by-country reporting (CbCR) from large enterprises are also exchanged automatically with treaty partners since June 2018.

305. As of 1 January 2016, the Netherlands implemented Directive 2015/2376/EU pursuant to which information on rulings is exchanged automatically with other EU member states. In addition, the Netherlands spontaneously exchanges information in conformity with the OECD BEPS standards. The Netherlands has exchanged information on more than 5 000 rulings for the years 2010-17 (in 2016 and 2017).

### *ToR C.1.1. Foreseeably relevant standard*

306. Exchange of information mechanisms should allow for EOI on request where it is foreseeably relevant to the administration and enforcement of the domestic tax laws of the requesting jurisdiction. All EOI instruments entered by the Netherlands since the 2011 Report meet the foreseeable relevance standard. The 2011 Report concluded that some[14] of the Netherlands' then 114 EOI agreements did not provide for exchange of information in line with the standard. This refers to agreements that limited exchange of information to information that would be available in the normal course of administration and/or necessary for carrying out the provisions of the convention. These EOI instruments would not allow the Netherlands to exchange information for administration and enforcement of domestic laws.

307. Since the last review, the Netherlands maintained an active negotiation programme and has made progress in bringing the deficient treaties in line with the standard. The Netherlands has also ratified the Multilateral Convention, which entered into force with respect to both the European and Caribbean Netherlands on 1 September 2013, and implemented the 2011 EU Directive on Mutual Administrative Assistance in Tax Matters (the EU Directive). The Netherlands upgraded its EOI relationship to the standard

14. These 17 agreements covered 21 jurisdictions: Bosnia and Herzegovina, Brazil, Bulgaria, China (People's Republic of), Czech Republic, Germany, Hungary, Ireland, Israel, Malawi, Montenegro, Morocco, Nigeria, Philippines, Korea, Serbia, Slovak Republic, Spain, Thailand, Tunisia and Zambia. (the agreement with Kosovo* no longer applies).

* This designation is without prejudice to positions on status, and is in line with United Nations Security Council Resolution 1244/99 and the Advisory Opinion of the International Court of Justice on Kosovo's declaration of independence.

with 14[15] jurisdictions. Moreover, with respect to the remaining jurisdictions, the Netherlands (i) has signed and ratified a new agreement with Malawi which is not yet in force; (ii) is waiting for two jurisdictions that have signed the Multilateral Convention to bring that convention into force (Morocco and Philippines), (iii) has approached five of them to bring their EOI relationship in line with the standard (Bosnia and Herzegovina, Montenegro, Morocco, Serbia and Thailand).

308. In relation to the Caribbean Netherlands, the 2011 Report raised a concern with respect to the Tax Information Exchange Agreement (TIEA) entered with the Cayman Islands. Since then, the Cayman Islands and the Netherlands can exchange information in line with the standard with respect to the Caribbean Netherlands under the Multilateral Convention, which in is force in both jurisdictions.

309. The Netherlands is also willing to exchange information concerning the Caribbean Netherlands under all agreements entered by the Netherlands, even if these agreements do not formally cover the Caribbean Netherlands. This is also expressly provided for in the BES Tax Act (article 8.124(2)). This application has not yet taken place, since no request was received in relation to the BES islands.

### *Foreseeable relevance*

310. The Netherlands continues to interpret its EOI instruments in line with Article 26 of the OECD Model Convention and its Commentary and the OECD Model TIEA and its Commentary. The competent authority is not prescriptive on what would be the minimum information required under requests, although for exchanges under the EU Directive, it is understood that minimum information to complete e-form developed by the European Commission would be expected to be provided by member States. In other cases, the Netherlands does not request EOI partners to utilise a specific template. Foreseeable relevance is considered on the basis of facts and circumstances described in the request.

311. The analysis of whether the request meets the foreseeable relevance standard is first performed by the competent authority (CLO). The RLOs and local tax offices normally also look at the facts and circumstances of the request and may ask questions to the CLO in relation to the requests. In some cases, the CLO asks further information to the requesting jurisdiction. In the very rare cases where there may be disagreement on foreseeable relevance

15. Brazil, Bulgaria, People's Republic of China, the Czech Republic, Germany, Hungary, Ireland, Israel, Nigeria, Korea, Slovak Republic, Spain, Tunisia and Zambia.

between the CLO and the RLOs/local tax offices, the decision on the validity of the request is taken by the CLO, most of the times in consultation with the Ministry of Finance.

312. The Netherlands has ultimately declined to reply to six requests that were considered fishing expeditions. The competent authority reports that those would include cases where there is no background information about the foreign tax investigation; or where the circumstances of the request seem to indicate that the requesting jurisdiction plans to use the information for other purposes than the tax purposes specified in the request. In all cases, the competent authority attempted to clarify the facts and circumstances of the request with the requesting jurisdiction before declining to respond. Clarifications have also been asked when requests covered many years or many types of records without a clear explanation of why this would be foreseeable relevant to the foreign tax investigation. Peer input did not raise concerns on the Netherland's interpretation of foreseeable relevance, which appears to be in line with the standard.

### *Group requests*

313. None of the Netherlands EOI agreements or domestic law contains language prohibiting group requests. The Netherlands interprets its agreements and domestic law as allowing it to provide information requested pursuant to group requests in line with Article 26 of the OECD Model Tax Convention. The information required to be provided in a valid group request would mirror information required under Article 5(5) of the Model TIEA and specified in Paragraph 5.2 of the Commentary to Article 26 of the 2012 Update to the OECD Model Tax Convention. In summary, the Netherlands expects the following information to be provided by requesting jurisdictions:

- a detailed description of the group
- the specific facts and circumstances that led to the request
- an explanation of the applicable law and why there would be reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law supported by a clear factual basis
- a showing that the requested information would assist in determining compliance by the taxpayers in the group.

314. During the review period, the Netherlands received two group requests. Following consultations with the EOI partner, one of these requests was converted into a bulk request (i.e. a request related to a sizeable number of taxpayers that could be individually identified, whether by name or another identifier – such as a credit card or bank account number). The information

holder was approached in this case, and the Netherlands is currently waiting for it to provide the requested information. In relation to the other group request, the Netherlands asked the requesting jurisdiction for additional information in order to substantiate the facts around the group request, particularly with regards to the reason for the treaty partner to believe that there was a breach of the law in the treaty partner jurisdiction. Netherlands is waiting for the reply from its treaty partner. Despite the number of group requests being too low to allow an assessment of the implementation of the standard in this respect, no concerns were raised by peers regarding the Netherlands' ability to reply to group requests.

### *ToR C.1.2. Provide for exchange of information in respect of all persons*

315. The 2011 Report concluded that some of the Netherlands' DTCs did not expressly provide that EOI was not restricted by Article 1 of the Convention and limited EOI to that necessary for carrying out the provisions of the Convention. As such, under these DTCs information concerning non-residents might not be exchanged. Since the last review, the Netherlands has an EOI instrument in line with the standard that is in force with all but seven of these jurisdictions for which the current situation is described in under C.1.1 (i.e. Bosnia and Herzegovina, Malawi, Montenegro, Morocco, Philippines, Serbia and Thailand).

316. The EOI agreements signed or brought into force since the 2011 Report, including the Multilateral Convention, allow the Netherlands to exchange information in respect of all persons. The same applies to the Caribbean Netherlands. No issues were identified in this review period. The Netherlands has exchanged information in respect of non-residents during the review period, including banking information, information concerning guest accommodations, accounting and ownership information.

### *ToR C.1.3. Obligation to exchange all types of information*

317. The OECD Model Tax Convention Article 26(5) and the Model TIEA Article 5(4), which are authoritative sources of the standards, stipulate that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or a fiduciary capacity or because the information relates to an ownership interest.

318. However, the DTCs with Morocco and Thailand do not meet the standard as they explicitly state that the obligation to exchange information does not include information obtained from banks or other financial institutions. The Netherlands has approached both Morocco and Thailand to

renegotiate their DTCs. Moreover, the Netherlands will be able to exchange information in line with the standard with Morocco, once Morocco ratifies the Multilateral Convention.

319. All of the Netherlands' TIEAs contain wording akin to Model TIEA Article 5(4). With respect to DTCs, most recent DTCs contain similar wording but the Netherlands has a very broad network including an extensive number of DTCs signed prior to the 2005 update to the OECD Model Tax Convention, which therefore, do not contain a provision equivalent to Article 26(5). As concluded in the 2011 Report, the Netherlands has access to bank information for tax purposes and is able to exchange this type of information when requested on a reciprocal basis irrespective of whether its agreements contain the equivalent of Article 26(5).

320. Seventeen DTCs that do not contain Model Article 26(5) are with jurisdictions that have not yet been reviewed by the Global Forum.[16] As such, it is not known whether these jurisdictions have restrictions in accessing certain types of information, including banking information, under the respective DTCs. The Netherlands and Malawi have signed a new DTC (which is not yet in force) in line with the standard. The Netherlands has approached Bosnia and Herzegovina, Montenegro and Serbia to bring their EOI relationship in line with the standard.

321. During the period under review, the Netherlands received more than 100 requests for banking information. There was no case where the requested information could not be provided and the practice of the Netherlands conforms to the standard. No issue has been reported by peers in this respect (see further sections B.1 and C.5). However, since Netherlands would exchange banking information only with treaty partners on a reciprocal basis in the absence of Article 26(5), it is recommended that the Netherlands ensure that all its existing EOI agreements are brought in line with the standards.

### *ToR C.1.4. Absence of domestic tax interest*

322. Contracting parties must use their information gathering measures even though invoked solely to obtain and provide information to the other contracting party. Such obligation is explicitly contained in the OECD Model Tax Convention Article 26(4) and the Model TIEA Article 5(2).

323. There is no limitation in the Netherlands' domestic law that prevents EOI absent a domestic tax interest. The Netherlands also does not require that its agreements contain such a provision in order to provide information

16. These 17 DTCs are the ones with Armenia, Bangladesh, Belarus, Bosnia and Herzegovina, Egypt, Jordan, Kuwait, Malawi, Moldova, Montenegro, Serbia, Sri Lanka, Suriname, Chinese Taipei, Venezuela, Viet Nam and Zimbabwe.

regardless of domestic tax interest. Further, all of the Netherlands' TIEAs contain wording akin to Model TIEA Article 5(2).

324. Eighteen DTCs that do not contain Model Article 26(4) are entered with jurisdictions that have not yet been reviewed by the Global Forum.[17] As such, it is not known whether these jurisdictions have restrictions in accessing information in the absence of a domestic tax interest under the respective DTCs. As noted above, this will not impede the Netherlands' ability to provide information to those jurisdictions as it is able to do so even in the absence of reciprocity.

325. In practice, many incoming EOI requests relate to a person that is not a Netherlands taxpayer and in which the Netherlands has no domestic tax interest in obtaining the requested information. The Netherlands responds to all valid requests for information consistent with the international standard whether it has or does not have a domestic tax interest in obtaining the requested information. Accordingly, no concerns in this respect were reported by peers.

### *ToR C.1.5. Absence of dual criminality principles*

326. None of the Netherlands' EOI agreements apply the dual criminality principle to restrict exchange of information.

327. There has been no case during the reviewed period where the Netherlands declined a request because of a dual criminality requirement. Peer input raised no issues in this respect.

### *ToR C.1.6. Exchange information relating to both civil and criminal tax matters*

328. All of the Netherlands' EOI agreements provide for EOI in both civil and criminal tax matters.

329. As concluded in the 2011 Report, the eight Netherlands' DTCs that limited EOI for carrying out the provisions of the convention, also have the potential to limit EOI to information foreseeably relevant for the purposes of civil tax matters only (see C.1.1 for the status of the renegotiation of these agreements).

17. These 18 DTCs are the ones with Armenia, Bangladesh, Belarus, Bosnia and Herzegovina, Egypt, Jordan, Kuwait, Malawi, Moldova, Montenegro, Serbia, Sri Lanka, Suriname, Chinese Taipei, Thailand, Venezuela, Viet Nam and Zimbabwe.

330. In addition, the EOI agreements covering seven jurisdictions – Bangladesh, Bosnia and Herzegovina, Malawi, Montenegro, Morocco, Serbia and Thailand – do not expressly provide for disclosure of information to authorities who are involved with the prosecution of tax matters (see above, except for Bangladesh – The Netherlands has approached Bangladesh for renegotiation of their bilateral EOI instrument).

331. The Netherlands authorities have advised that if an information request pertains to a case involving criminal investigation directed by a public prosecutor in the requesting jurisdiction, the Netherlands will primarily exchange information based on mutual legal assistance treaties (MLATs) since it gives more possibilities to gather information and in that case the Minister of Justice is the competent authority. If such an instrument (MLAT) is not available, exchange of information in such a situation could take place based on an EOI instrument (e.g. DTC, TIEA, Multilateral Convention) which allows for information to be disclosed for prosecution. In such case, the request should meet the requirement of the EOI instrument.

### *ToR C.1.7. Provide information in specific form requested*

332. There are no restrictions in the Netherlands' EOI agreements that would prevent the Netherlands from providing information in a specific form, as long as this is consistent with its laws and administrative practices.

333. The power to take depositions of witnesses for domestic purposes is assigned to the Fiscal Investigation and Intelligence Service and can be used for domestic or criminal tax matters investigated by the FIOD under the Netherlands Criminal Procedure Code. The Netherlands has advised that the FIOD can take depositions of witnesses for EOI purposes on criminal tax matters investigated in the requesting jurisdiction. Notwithstanding the above, if the foreign authority asks for a witness deposition, the NTCA can ask the taxpayer to provide one voluntarily. If the taxpayer is reluctant to do so, the NTCA can oblige the taxpayer to provide such a statement to a tax inspector (Articles 47 and 53 GSTA). The tax inspector will take the statement down, and certify it under oath of office.

334. Input received from peers confirms that the Netherlands is able to respond to requests in accordance with the standard and no issue in respect of the form of the provided information has been indicated.

### *ToR C.1.8. Signed agreements should be in force*

335. The Netherlands has a broad EOI network covering 148 jurisdictions through 121 bilateral agreements, the EU Directive and the Multilateral Convention.

336. The Netherlands has ratified all its signed agreements, with the exception of the DTCs with Kenya signed in 2015, as the Netherlands put the ratification procedures of this agreement on hold after being advised by Kenya that the latter had not followed the correct internal procedures. The Netherlands has advised that Kenya is considering proposing substantive changes to the signed agreement.

337. Although the 2011 Report indicates that the ratification process in the Netherlands should not take more than about a year (para. 381), the ratification of some EOI instruments did take longer than two years. The Netherlands, has however, offered country-specific explanation in this regard. For instance the TIEA with the British Virgin Islands, where after signature several typographical errors were identified requiring several rounds of consultation between the two parties, took longer than two years. The DTC with Oman, where inconsistencies in translation were found, also required further rounds of consultations and the signature of explanatory memoranda. The DTC with Germany, which is the Netherland's most significant economic partner, took approximately four years due to discussions in the Netherlands' Parliament on the distribution of taxing rights under the treaty and the need to negotiate an additional agreement with Germany to deal with this issue. The delay in ratification in this case had no impact on EOI, since the two parties could still exchange information under the EU Directive. Finally, the DTC with Zambia was delayed, due to questions raised in the Parliament explicit procedure, covering not only the specific agreement but also the Netherlands' treaty policy with developing countries. No systemic problem with the Netherlands' ratification procedure was identified during the review period.

338. The following table summarises outcomes of the analysis under element C.1 in respect of the Netherlands' bilateral EOI mechanisms:

| | | | Total | Bilateral EOI Mechanisms not complemented by the MAC |
|---|---|---|---|---|
| A | Total Number of DTCs/TIEAs/other agreements | A = B + C | 121 | 44 |
| B | Number of DTCs/TIEAs signed but not in force | B = D + E | 3 (Algeria, Kenya and Malawi) | 3 (Algeria, Kenya and Malawi) |
| C | Number of DTCs/TIEAs signed and in force | C = F + G | 118 | 41 |
| D | Number of DTCs/TIEAs signed (but not in force) and to the Standard | | 3 (Algeria, Kenya and Malawi) | 3 (Algeria, Kenya and Malawi) |
| E | Number of DTCs/TIEAs signed (but not in force) and not to the Standard | | 0 | 0 |

| | | Total | Bilateral EOI Mechanisms not complemented by the MAC |
|---|---|---|---|
| F | Number of DTCs/TIEAs in force and to the Standard | 101 | 37 |
| G | Number of DTCs/TIEAs in force and not to the Standard | 17 (19 jurisdictions: Agreement established with the Former Socialist Federal Republic of Yugoslavia (for Bosnia and Herzegovina, Montenegro, and Serbia) Brazil, Bulgaria, France, Hungary, Ireland, Israel, Korea, Morocco, Nigeria, Philippines, Qatar, Slovak Republic, Spain, Chinese Taipei, Thailand, Tunisia) | 4 (6 jurisdictions: Agreement established with the Former Socialist Federal Republic of Yugoslavia (for Bosnia and Herzegovina, Montenegro and Serbia), Morocco, Philippines, Thailand) |

### *ToR C.1.9. Be given effect through domestic law*

339. The Netherlands has in place domestic legislation necessary to comply with the terms of its EOI agreements. Effective implementation of EOI agreements in domestic law has been confirmed in practice as there was no case encountered where the Netherlands was not able to obtain and provide the requested information due to unclear or limited effect of an EOI agreement in the Netherlands. Also, no issue in this regard was reported by peers.

## C.2. Exchange of information mechanisms with all relevant partners

The jurisdiction's network of information exchange mechanisms should cover all relevant partners.

340. The Netherlands has a very long history of exchanging information and its EOI network has continued to expand since the last review, from 90 EOI partners to 148 today through 121 bilateral relationships, the EU Directive and the Multilateral Convention. The Netherlands' EOI network encompasses a wide range of counterparties, including all of its major trading partners, all G20 members and all OECD members.

341. The Netherlands' negotiation priorities generally involve major trading partners but the Netherlands is open to enter into an EOI instrument with any partner that approaches it to do so. The Netherlands has also prioritised the renegotiation of DTCs with developing countries to ensure they include anti-abuse provisions.

342. Negotiations or renegotiations of bilateral agreements are currently ongoing with more than 40 jurisdictions. As the standard ultimately requires that jurisdictions establish an EOI relationship up to the standard with all partners who are interested in entering into such a relationship, the Netherlands is recommended to continue to conclude EOI agreements with any new relevant partner who would so require.

343. The Netherlands' willingness to enter into EOI agreements without insisting on additional conditions was also confirmed by peers as no jurisdiction has indicated that the Netherlands had refused to enter into or delayed negotiations of an EOI agreement.

344. The new table of determination and rating is as follows:

| Legal and Regulatory Framework | | |
|---|---|---|
| **Deficiencies identified in the implementation of the legal and regulatory framework** | **Underlying Factor** | **Recommendation** |
| | | |
| **Determination: The element is in place.** | | |
| **Practical implementation of the standard** | | |
| **Deficiencies identified in the implementation of EOIR in practice** | **Underlying Factor** | **Recommendation** |
| | | |
| **Rating: Compliant** | | |

## C.3. Confidentiality

The jurisdiction's information exchange mechanisms should have adequate provisions to ensure the confidentiality of information received.

345. All of the Netherlands' EOI agreements had confidentiality provisions in line with the standard.

346. There are also adequate confidentiality provisions protecting tax information in the Netherlands' domestic tax laws. These provisions also apply to information exchanged under the Netherlands' EOI instruments unless the respective EOI instrument stipulates different rules. Peer input did not indicate that there had ever been a breach of confidentiality concerning their exchanges of information with the Netherlands (either in the previous or current period under review).

347. The table of determination and rating remains as follows:

| Legal and Regulatory Framework | | |
|---|---|---|
| **Deficiencies identified in the implementation of the legal and regulatory framework** | **Underlying Factor** | **Recommendation** |
| | | |
| **Determination: The element is in place.** | | |
| **Practical implementation of the standard** | | |
| **Deficiencies identified in the implementation of EOIR in practice** | **Underlying Factor** | **Recommendation** |
| | | |
| **Rating: Compliant** | | |

### *ToR C.3.1. Information received: disclosure, use and safeguards*

348. The 2011 Report concluded that the applicable treaty provisions and statutory rules that apply to officials with access to treaty information as well as the practice in the Netherlands regarding confidentiality were in accordance with the standard. In the Netherlands, international treaties including tax treaties take precedence over any conflicting national law and enjoy priority over the Acts of Parliament and even over the Constitution itself (para.21). Thus, any legal or administrative act seeking to lift confidentiality in a way not authorised by the relevant EOI instrument would be invalid. There have been no changes in the Netherlands' legal framework with respect to confidentiality since the last review. Moreover, all EOI instruments signed since then contain appropriate confidentiality provisions.

#### *Practical measures to ensure confidentiality of the information received*

349. The 2011 Report concluded that the Netherlands had in place appropriate policies and procedures to ensure confidentiality of the exchanged information.

350. Various policies implemented in the Netherlands contribute to protecting confidentiality of the tax and EOI information (e.g. hiring process, training, access, information security management). In particular, EOI information is kept either physically in locked archives or stored electronically with access restricted to authorised employees (including CLO, RLO and local tax auditors). Employees are sensitised on the sensitiveness and confidentiality of EOI information. CLO, RLO and local tax offices use a secure internal email system to transmit EOI requests and related information.

351. The breach of a confidentiality provision is a criminal offence in the Netherlands, punishable by a fine and one year imprisonment. Administrative sanctions vary from warning to dismissal. In addition, the Netherlands have appropriate procedures to report and investigate confidentiality breaches and to take corrective actions. No breaches were identified in relation to EOI during the review period.

### Content of EOI notices and information disclosed to information holders

352. EOI notices issued by the Netherlands tax authorities make reference to the domestic access powers. No reference is included with respect to the relevant EOI instrument, the taxpayer under investigation or other background information of the request.

353. The Netherlands considers that in the exchanges under the EU Directive it may be required to disclose some information to the information holder (i.e. the identity of the taxpayer concerned and the purpose for which the information is sought) if circumstances similar to the ones of the Berlioz case arise in the Netherlands (Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes of Luxembourg, 16 May 2017, number C682/15, ECLI:EU:C:2017:373). The Netherlands clarified that it would not provide information on the identity of the taxpayer unless it is necessary.The Court of Justice of the European Union (CJEU) decided in that case that Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that a relevant person on whom a pecuniary penalty has been imposed for failure to comply with an administrative decision directing that person to provide information (the information order) in the context of an exchange between national tax administrations pursuant to Directive 2011/16 is entitled to challenge the legality of that decision. Furthermore, the court stated that Article 1(1) and Article 5 of Directive 2011/16 must be interpreted as meaning that the "foreseeable relevance" of the information requested by one Member State from another Member State is a condition that the request for information must satisfy in order for the requested Member State to be required to comply with that request, and thus a condition of the legality of the information order addressed by that Member State to a relevant person and of the penalty imposed on that person for failure to comply with that information order.

354. The CJEU considered that the information holder does not have an access right to the entire request letter of the requesting Member State, which is to remain a secret document according to the Directive. In order for that person to be given a full hearing of his/her case in relation to the lack of any foreseeable relevance of the requested information, it is sufficient, in principle, that he/she is in possession of the information referred to in article 20(2)

of the Directive (i.e. the identity of the taxpayer concerned and the purpose for which the information is sought). Today, this has not raised any issues in the Netherlands.

### Right to access files

355. The Netherlands' taxpayers have the right to access what information the NTCA holds on them. In the context of EOI, that would include, for instance, the information the Netherlands receives from other jurisdictions when making outbound EOI requests and the copy of the Netherlands' requests (a copy of competent authority letters received would not be included in the file and a redacted version of such letters would be disclosed only if a court requires the NTCA to do so, as further described below).

356. In relation to inbound requests, the request letters received by the Netherlands would not be included in a taxpayer file. The file may include the information collected by the NTCA to reply to its EOI partner, but not the cover letter that the competent authority sent.

357. The Netherlands will disclose competent authority letters received in response to outbound EOI requests if requested to do so by court. The Netherlands has a well-established practice of redaction for such cases. Information such as the identity and contact information of foreign officials and information that is not specific to the taxpayer in question would be redacted. If local tax inspectors have questions on which information should be redacted, the CLO is available for guidance. Peers raised no concerns in this respect.

### Use of regular post/encrypted email

358. According to the NTCA policy rules with regard to confidentiality and IT safeguards, the competent authority is not allowed to send sensitive correspondence related to taxpayers (including outbound EOI requests and answers to inbound EOI requests) via email with encrypted files. The competent authority prefers using CCN Mail for exchanges under the EU Directive, and PGP encryption for exchanges under other EOI instruments, as they are fast and secure methods. During the review period, regular and registered mail have also been used.

359. Two EOI partners have indicated not receiving answers to EOI requests sent by regular post or receiving them with a delay. The Netherlands' competent authority indicates that since April 2018 it has used only registered courier instead of the regular post, when partners cannot receive information by CCN Mail or with PGP encryption.

### Sharing of information received under EOI with other government authorities

360. The 2016 Terms of Reference clarified that although it remains the rule that information exchanged cannot be used for purposes other than tax purposes, an exception applies where the authority supplying the information authorises the use of information for purposes other than tax purposes, in accordance with the amendment to Article 26 of the OECD Model Tax Convention introducing this element, which previously appeared in the commentary to this Article. In the Netherlands, section 30 paragraph 2 of the Netherlands International Assistance (Levying of Taxes) Act provides for the possibility of sharing information received by the Netherlands under EOI with other government authorities (including police, AML authorities) if permission is granted by its EOI-partner.

361. In practice, the Netherlands competent authority first requests the permission of its EOI partners to share information and only after permission is obtained, the information is provided to the other Netherlands authorities. In most cases where the Netherlands requested permission from EOI partners, such permission was given. When it was not granted, the competent authority did not share the information.

## *ToR C.3.2. Confidentiality of other information*

362. The confidentiality provisions in the Netherlands' EOI agreements and domestic law do not draw a distinction between information received in response to requests and information forming part of the requests themselves. As such, these provisions apply equally to all requests for information, background documents to such requests, and any other documents reflecting such information, including communications between the requesting and requested jurisdictions and communications relating to the request that occur within the tax authorities of either jurisdiction. The internal policies in place in the NTCA and competent authority protect the confidentiality of these documents.

## C.4. Rights and safeguards of taxpayers and third parties

The information exchange mechanisms should respect the rights and safeguards of taxpayers and third parties.

### *ToR C.4.1. Exceptions to requirement to provide information*

363. All of the Netherlands' EOI agreements ensure that the contracting parties are not obliged to provide information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

364. The Netherlands may decline provision of information that would disclose professional secrets. The scope of the legal professional privilege available in the TIEAs signed by the Netherlands is similar to the Model TIEA and is consistent with the international standard. However, as noted in the 2011 Report, the term "professional secrets" is not defined in the DTCs and therefore this term would derive its meaning from the domestic laws of the Netherlands. The GSTA protects communication between a client and an attorney when the legal representative acts in his/her capacity as an attorney. While there remains some lack of clarity with respect to the scope of professional privilege (see Part B.1.5 of this report), some aspects have been clarified. Therefore, the recommendation has been removed from the box of element C.4 and remains only in the text of B.1.5.

365. The Netherlands' peers who have provided input to this review have not indicated any concern related to the application of rights and safeguards of taxpayers and third parties in the Netherlands.

366. The new table of determination and rating is as follows:

| Legal and Regulatory Framework | | |
|---|---|---|
| **Deficiencies identified in the implementation of the legal and regulatory framework** | **Underlying Factor** | **Recommendation** |
| | | |
| **Determination: The element is in place.** | | |
| **Practical implementation of the standard** | | |
| **Deficiencies identified in the implementation of EOIR in practice** | **Underlying Factor** | **Recommendation** |
| | | |
| **Rating: Compliant** | | |

## C.5. Requesting and providing information in an effective manner

The jurisdiction should request and provide information under its network of agreements in an effective manner.

367. In order for EOI to be effective, jurisdictions should request and provide information under their network of EOI mechanisms in an effective manner.

368. The 2011 Report concluded that the CLO, which has been primarily responsible for EOI since September 2009, was properly resourced with skilled staff and benefited from timely assistance from expert staff working in other departments of the tax administration. Appropriate procedures were in place to gather and provide the requested information. Many peers had commented positively on the relationship with the Netherlands' competent authorities. It was noted, however, that during the previous review period the Netherlands was often not able to respond to EOI requests within 90 days and had only just begun systematically providing status updates to the requesting jurisdictions in these cases. The Netherlands was recommended to address this issue.

369. Since the last review, the Netherlands has made important progress. It has significantly reduced response times and consistently provided status updates in the great majority of cases where a full response was not provided within 90 days during the new review period (1 July 2014 to 30 June 2017). Jurisdictions that have provided peer input to the present review considered the Netherlands' competent authority as a very co-operative partner and very easy to contact.

370. The 2016 ToR includes an additional requirement to ensure the quality of requests made by assessed jurisdictions. Resources and procedures are in place to ensure the quality of the Netherlands' outgoing requests. Peers appreciated the quality of the Netherlands' requests and the positive working relationship with its competent authority.

371. The new table of determination and rating is as follows:

| Legal and regulatory framework | | |
|---|---|---|
| **This element involves issues of practice. Accordingly, no determination has been made.** | | |
| **Deficiencies identified in the implementation of EOIR in practice** | **Underlying Factor** | **Recommendation** |
| | | |
| **Rating: Compliant** | | |

### *ToR C.5.1. Timeliness of responses to requests for information*

372. Over the period under review (1 July 2014 to 30 June 2017), the Netherlands received a total of 2 241 requests for information.

373. The Netherlands has not received any requests pertaining to the Caribbean Netherlands. The CLO bears responsibility for the actual exchange of information for the Caribbean Netherlands in the same way as it does for the European Netherlands.

374. On the basis of a manual assessment of the requests received, the Netherlands estimate that requests covered the following types of information:

- 27.7% of the requests covered ownership information
- 56.6% covered accounting information
- 5.3% covered banking information
- 37.2% related to other types of information.

375. The Netherlands' most significant EOI partners in terms of inbound requests remained five EU member countries: Germany, Belgium, Poland, France and Spain. German and Belgian companies maintain strong trade relationships with companies in the Netherlands. In addition, a considerable number of persons in the border regions between the Netherlands and Belgium or Germany work in one country and are domiciled in the other country. These factors play an important role in EOI. Information concerning employment or business income from purchase of used cars is often exchanged with Poland. In relation to France and Spain, companies and individuals resident in those countries may have business, trade or other links to companies established in the Netherlands. Moreover, the operation of multinationals enterprises in France/Spain and the Netherlands has triggered transfer pricing investigations and EOI has been an important tool in these cases.

376. The following table relates to the requests received during the period under review and gives an overview of response times of the Netherlands in providing a final response to these requests, together with a summary of other relevant factors impacting the effectiveness of the Netherlands exchange of information practice during the reviewed period.

| | | 1 July 2014-30 June 2015 | | 1 July 2015-30 June 2016 | | 1 July 2016-30 June 2017 | | Total | |
|---|---|---|---|---|---|---|---|---|---|
| | | Num. | % | Num. | % | Num. | % | Num. | % |
| Total number of requests received | (A+B+C+D+E) | 843 | 36.9 | 678 | 30.3 | 720 | 32.8 | 2 241 | 100 |
| Full response: ≤ 90 days | | 469 | 58.1 | 368 | 55.5 | 387 | 54.3 | 1 224 | 56 |
| (cumulative) ≤ 180 days | | 606 | 75.1 | 535 | 80.7 | 563 | 78.6 | 1 704 | 78 |
| (cumulative) ≤ 1 year | (A) | 767 | 95.1 | 644 | 97.1 | 677 | 94.6 | 2 088 | 95.5 |
| > 1 year | (B) | 30 | 3.7 | 7 | 1.1 | 20 | 2.8 | 57 | 2.6 |
| Declined for valid reasons | | 37 | 4.6 | 15 | 2.3 | 13 | 1.8 | 65 | 3 |
| Status update provided within 90 days (for responses sent after 90 days) | | 275 | 90.4 | 280 | 98.2 | 325 | 100 | 880 | 96.3 |
| Requests withdrawn by requesting jurisdiction | (C) | 9 | 1.1 | 10 | 1.5 | 5 | 0.7 | 24 | 1.1 |
| Failure to obtain and provide information requested | (D) | 0 | 0 | 2 | 0.3 | 1 | 0.1 | 3 | 0.1 |
| Requests still pending at date of review (as at 15 April 2018) | (E) | | 0 | 0 | 0 | 4 | 0.9 | 4 | 0.2 |

*Notes:* The Netherlands counts an inquiry concerning one Netherlands information holder/taxpayer as one request, regardless of how many pieces of information are requested. If the inquiry relates to a number of Netherlands information holders in the Netherlands it will be counted as more than one request (equal to the number of information holders/taxpayers).

The time periods in this table are counted from the date of receipt of the request to the date on which the final and complete response was issued.

377. The average response times have improved since the first round review from 35% of requests responded to within 90 days to 56% in the current period under review. The proportion of requests responded to within 180 days has also increased from 54% in the first round to 78% in the current review period, despite an increase in the number of requests received.

378. Longer response times are usually due to a combination of complexity and extensiveness of the requested information (e.g. number of inquiries, number of taxpayers under investigation or information holders). Sometimes the age of the information can also cause delays as older files generally take longer to be retrieved. The Netherlands does not consider that some types of information take longer to be collected than others; although some peers indicated that accounting and banking information seem to require more time to be produced by the Netherlands. This could also be related to the number of inquiries or the complexity that may be involved in some of those requests.

379. One percent of requests received by the Netherlands during the review period were subsequently withdrawn by the requesting jurisdiction. In some cases this was caused by expiry of the statute of limitations or other procedural deadlines in the requesting jurisdiction, which caused the requested information to be no longer relevant. In all cases, status updates were provided.

### *Status updates*

380. The 2011 Report recommended that the Netherlands ensure that its authorities respond to EOI requests in a timely manner, by providing the information requested within 90 days of receipt of the request, or when unable to do so, by providing a status update. The Netherlands has implemented the organisational procedures necessary to ensure that responses are timely and status updates are systematically provided.

381. The procedures and tools are now in place for ensuring that status updates can be provided in 100% of the cases when full responses could not be provided within 90 days. The Netherlands has advised that updates were provided in 96.3% of these instances and this has been generally confirmed by peer input. Status updates were not provided when a response would be submitted a few days after.

### *Declined requests*

382. The Netherlands declined to reply to 65 requests (i.e. 3%) during the review period. Eleven requests were not meeting "foreseeable relevance" (including "fishing expedition", see C.1.1). In five out of eleven cases, partial responses were provided. In order to establish the "foreseeable relevance" criteria, the Netherlands interacted with the treaty partner concerned. None of the peers concerned raised any issues. In relation to five requests, the retention period of seven years had expired or it referred to a third-party investigation where the information holder was a private individual. Information was asked to be provided voluntarily by information holders, but in those instances it was not provided (see B.1). Finally, in two cases, tax returns were requested and could not be provided as a result of an internal CLO policy: tax returns can only be provided when they have been settled by the tax authority. According to the Netherlands, in a majority of cases, this settlement should not take more than half a year but in complex cases (especially if there is open discussion with the tax inspector to settle the return), this can take up to three years. The Netherlands states that where the competent authority was unable to provide tax returns, this was communicated to the treaty partner. Where possible, the competent authority would also collect information found in the requested tax return from other sources and exchange this with the requesting party. In the remaining 47 cases, 30 cases lacked taxation interest in requesting jurisdictions (i.e. investigation closed, not tax related), 10 cases lacked on information enabling the Competent Authority to identify a taxpayer or an information holder in the Netherlands and 7 cases came from Authorities which are not Competent Authority.

383. In all cases, the Netherlands confirmed that the treaty partners were contacted to explain the reasons for declining the requests, as confirmed by the peer inputs.

*Failure to obtain the requested information*

384. The Netherlands has classified three cases as failures to reply to the request. In one case the taxpayer had left the Netherlands and failed to respond to the tax authorities' letters requesting the production of the information. In the two other cases, the information holders moved to the requesting country and after liaising with the requesting jurisdiction, it was agreed that the requesting authority would directly ask the information to the information holder now located in the requesting jurisdiction.

*Pending requests*

385. As on 11 December 2018, there were 6 requests still pending:

- One request received in 2014 – The case involved a cash pool arrangement registered as a single entity in the financial institution, which actually involved approximately 80 participants and a potentially larger number of bank accounts. While a partial reply has been provided by the financial institution, it is still working to provide the information requested. The financial institution is working to split the relevant transactions among all participants of the cash pool arrangement.
- Five requests received in 2016 – Out of these five requests, four are cases where the Netherlands commenced civil proceedings against the information holders to enforce the provision of the information requested. One of these five requests is a complex case and requires extensive inquiries (e.g. requests concerning aggressive tax planning, transfer pricing, requests requiring comprehensive accounting and banking records).

386. In all cases, there was good communication with the requesting partners and partial responses were also provided. This is therefore not a systemic issue.

### *ToR C.5.2. Organisational processes and resources*

387. The NTCA's Central Liaison Office (CLO) is the Netherlands delegated competent authority responsible for exchange of information under all the Netherlands' EOI instruments. In addition to dealing with EOI on direct taxes, the CLO is also responsible for the mutual administrative assistance on the recovery of tax debts and concerning the levy and collection of value-added tax.

388. The CLO has 11 staff (corresponding to 8.4 full time-equivalents) dedicated to EOI on direct taxes. In addition, two RLOs support the information gathering process.

389. The CLO and RLO staff is selected from among officers with an established experience in tax assessment, tax audit, tax systems/files and IT-tools. New staff are trained on the job. The CLO and RLO staff also undergo training and/or receive updates on matters that can influence their work (e.g. OECD and EU developments, changes in relevant legislation). They are provided with relevant supporting documents (OECD manual, EU guidelines and all internal guidelines/instructions) and carry out monthly meetings to discuss EOI topics.

### *Incoming requests*

390. The CLO developed the "Process specification, Mutual Assistance – Direct Taxation" manual (the EOI Manual), which details the EOI procedures. Those procedures are followed in practice and ensure timeliness and quality of responses.

391. All inbound and outbound requests, as well as spontaneous exchanges are recorded in an electronic database. A unique number is assigned to each request which is used for tracking its current status. All correspondence related to the request (e.g. request letter, correspondence with RLO/local tax office, reply letter) is also kept electronically in the system. The database allows performance indicators to be drawn.

392. The CLO targets to register and perform an initial review of the validity of requests within five working days from the receipt. If requests are not complete or do not appear to be valid, the CLO contacts the requesting competent authority. The only circumstance where the CLO would decline to reply to the request without requesting for clarification first would be when there is no legal basis for EOI between the Netherlands and the requesting jurisdiction, but this has not occurred during the period under review. The CLO will generally send a confirmation of receipt to the requesting jurisdiction. Requests can be received and replied to in Dutch, English, French and German.

393. In case the information requested can be retrieved directly from the NTCA's systems (e.g. address of an individual or legal entity, addresses of heirs of a deceased person, income from employment), the CLO will access the information and reply to the requesting jurisdiction immediately.

394. In other cases, the CLO will forward the request to the RLO/local tax offices (see element B.1). Generally, a two-month period is provided to the RLO/local tax office to collect the information. If those timeframes are not observed, reminders are sent by the CLO on a regular basis until the

information is received. A phone call is placed if initial reminders have not been sufficient to secure the information.

395. The RLO/CLO prepares a draft reply to the request based on the information collected by the local tax office and performs a quality review on whether the information collected fully answers the request.

396. A query of the EOI database is run weekly to identify requests that could not be replied to within 90 days and to ensure that status updates are sent to the requesting authorities. At the beginning of the review period, the query was run monthly, but the competent authority felt that a weekly control would be more appropriate.

397. The CLO communicated with the requesting jurisdictions when it felt the request was very burdensome (time and resource intensive) for the NTCA. When the information collected seemed to indicate that taxes would be due in the requesting jurisdiction, the Netherlands would request feedback from the requesting jurisdiction.

### *Outgoing requests*

398. The 2016 ToR also cover requirements to ensure the quality of requests made by the assessed jurisdiction.

399. The Netherlands has a vast experience with requesting information pursuant to its EOI instruments. EOIR has been frequently used to obtain tax-relevant information. During the period under review the Netherlands sent 1 314 requests for information related to direct taxes. The number of outgoing requests is counted per the number of foreign information holders mentioned in each outgoing request letter.

### Processing outgoing requests

400. Tax officers (field and desk auditors) use all possible means to obtain the information within the Netherlands. Subsequently, if information is not available, the tax officers prepare a case to request the information to another jurisdiction. In general, the case is assessed by several tax specialists (tax auditors, expert groups) to ensure there is basis for a request and that the facts and circumstances are well explained.

401. The tax officers use a standard template, which requires them to provide information on: the Netherlands' taxpayer under investigation, the identification of information holder in the requesting jurisdiction; the taxes concerned, the tax years/period; the case description, including (i) the relationship between the Netherlands' and the foreign stakeholders; (ii) the hypothesis being investigated; (iii) the foreseeable relevance of the information; (iv) a possible suspicion of fraud in the Netherlands or abroad; (v) any explanation of the

Netherlands' legal provisions and tax consequences; (vi) the actions undertaken in the Netherlands to collect the information; and (vii) the required information. When possible, underlying documents should be attached to support the request.

402. A CLO officer verifies if the completed document complies with the requirements of the EOI instrument in question and any additional jurisdiction-specific requirement. Where required, the CLO specialist and the tax officer discuss the case to resolve any issues with the proposed request. The CLO specialist prepares the official request for information, checks it against a checklist and organises for its translation where required. The CLO specialist also ensures that the request is addressed to the competent authority of the requesting jurisdiction by checking the Global Forum secured database for competent authorities, correspondence with the EOI partner or other sources of information.

403. The following table summarises the number of outgoing requests made by the Netherlands during each year of the review period. The Netherlands' most significant partners in terms of outgoing requests were: Switzerland, Germany, Belgium, Cyprus[18] and Luxembourg.

| | 2014-15 | 2015-16 | 2016-17 | Total |
|---|---|---|---|---|
| Number of outgoing requests | 342 | 617 | 355 | 1 314 |

404. The Netherlands did not maintain statistics on the number of requests for clarification received and whether they have been replied to by the Netherlands. However, peer input confirms the quality of the Netherlands' outgoing requests. According to peers, clarification was occasionally requested in cases where the requests were complex, where additional information was needed to identify the taxpayer or the information holder, or additional background information was needed to support administrative practices of the

18. Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

Note by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

requested jurisdiction (notification procedures, court procedures, etc.). Only one peer noted that the clarification requested had not been provided.

405. Requests for clarification are received by the CLO and forwarded to the tax officer who submitted the case. The CLO includes the requests for clarification in the deadline monitoring system and the tax officer is regularly reminded of such requests.

406. The CLO provides feedback on the assistance received from EOI partners. The CLO contacts the local tax officer/RLO to provide information on the usefulness of the information received. Substantive feedback may take a long time to be provided as it normally requires the tax investigation/assessment to be completed. CLO database includes requests for feedback in the deadline monitoring system as well.

### *ToR C.5.3. Unreasonable, disproportionate or unduly restrictive conditions for EOI*

407. There are no factors or issues identified that could unreasonably, disproportionately or unduly restrict effective EOI in the Netherlands.

# Annex 1: List of in-text recommendations

The assessment team or the PRG may identify issues that have not had and are unlikely in the current circumstances to have more than a negligible impact on EOIR in practice. Nevertheless, there may be a concern that the circumstances may change and the relevance of the issue may increase. In these cases, a recommendation may be made; however, such recommendations should not be placed in the same box as more substantive recommendations. Rather, these recommendations can be mentioned in the text of the report. A list of such recommendations is presented below.

## Availability of information

### *European and Caribbean Netherlands*

- Element A.1 – Since AML obliged persons conduct CDD following a risk based approach, the beneficial ownership information may not be up to date at all times. The reliance on CDD only is not sufficient to meet the standard that requires the information to be adequate, accurate and up to date. It is recommended that the Netherlands ensure that beneficial ownership information available is kept up to date at all times (see paragraph 102).
- Element A.1.1 – It is recommended that the Netherlands monitor the imposition of dissuasive sanctions where the obligations to identify the beneficial owner is not complied with (see paragraph 128).
- Element A.1.3 – It is recommended that the Netherlands clarify how the terms "actual control over the partnership" apply in practice (see paragraph 161).
- Element A.1.4 – It is recommended that the Netherlands monitor the availability of identity information in respect of foreign trusts having a non-professional trustee that is not subject to the AML Act and the TCSP Act (see paragraph 170).

- Element A.1.5 – It is recommended that the Netherlands brings the definition of beneficial owner applicable to foundations in line with the international standard. In particular, it is recommended that the Netherlands clarify how the terms "actual control over the foundation" apply in practice, and clarify by means of guidance who are the beneficial owners in foundations acting as holding companies (see paragraphs 190, 191 and 192).
- Element A.1 – It is recommended that the Netherlands continue to monitor that there is no difficulty to ensure the availability of information on members of associations (see paragraph 199).
- Element A.2 – It is recommended that the Netherlands take necessary actions to ensure that accounting records and underlying documents to be maintained in respect of trusts administered by non-professional trustees are available (see paragraph 219).
- Element A3 – As the Netherlands main source of information on beneficial owner is the AML obliged persons, which is based on a risk-based approach in accordance with CDD requirements, this information may not be up to date at all times. The Netherlands is recommended to ensure that beneficial ownership information on account holders is kept up to date (see paragraph 239).

### *Caribbean Netherlands only*

- Element A.1 – It is recommended that the Netherlands ensure that there is adequate supervision of the obligations for lawyers in the BES Islands to collect beneficial ownership information (see paragraph 129).

## Access to information

- Element B.1 – As the standard requires that jurisdictions have the power to obtain information requested for EOI purposes from any person within its territorial jurisdiction in possession or control of such information, it is recommended that the Netherlands monitor that the exception concerning third-party information held by non-entrepreneurial individuals does not hinder its ability to obtain information for EOI purposes (see paragraph 264).
- Element B.1 – It is recommended that the Netherlands monitor the scope of professional privilege in relation to EOI to ensure it is consistent with the international standard. In the event that the Netherlands identifies that the scope goes beyond the standard, it is recommended that the Netherlands take measures to ensure that it does not unduly restrict EOI (see paragraph 287).

## Exchange of information

- Element C.1.3 – It is recommended that the Netherlands ensure that all its existing EOI agreements are brought in line with the standard (see paragraph 319).
- Element C.2 – As the standard ultimately requires that jurisdictions establish an EOI relationship up to the standard with all partners who are interested in entering into such a relationship, it is recommended that the Netherlands continue to conclude EOI agreements with any new relevant partner who would so require (see paragraph 340).

# Annex 2: List of Netherlands' EOI mechanisms

## Bilateral international agreements for the exchange of information

| | EOI Partner | Type of EOI arrangement | Date signed | Date in force |
|---|---|---|---|---|
| 1 | Albania | Double taxation convention (DTC) | 22.07.2004 | 15.11.2005 |
| 2 | Algeria | DTC | 09.05.2018 | Not in force |
| 3 | Andorra | Taxation information exchange agreement (TIEA) | 06.11.2009 | 01.01.2011 |
| 4 | Anguilla | TIEA | 22.07.2009 | 01.05.2011 |
| 5 | Antigua and Barbuda | TIEA | 02.09.2009 | 01.03.2010 |
| 6 | Argentina | DTC | 22.12.1996 | 11.02.1998 |
| 7 | Armenia | DTC | 31.10.2001 | 22.11.2002 |
| 8 | Australia | DTC | 17.03.1976 | 27.09.1976 |
| 9 | Austria | DTC | 01.09.1970 | 21.04.1971 |
| | | Protocol | 08.09.2009 | 01.07.2010 |
| 10 | Azerbaijan | DTC | 22.09.2008 | 18.12.2009 |
| 11 | Bahamas | TIEA | 04.12.2009 | 01.12.2010 |
| 12 | Bahrain | DTC | 16.04.2008 | 24.12.2009 |
| 13 | Bangladesh | DTC | 13.07.1993 | 08.06.1994 |
| 14 | Barbados | DTC | 28.11.2006 | 12.07.2007 |
| | | Protocol | 27.11.2009 | 13.11.2011 |
| 15 | Belarus | DTC | 26.03.1996 | 31.12.1997 |
| 16 | Belgium | DTC | 05.06.2001 | 31.12.2002 |
| | | Protocol | 23.06.2009 | 01.09.2013 |
| 17 | Belize | TIEA | 04.02.2010 | 01.01.2011 |
| 18 | Bermuda | TIEA | 08.06.2009 | 01.02.2010 |
| 19 | Bosnia and Herzegovina [a] | DTC | 22.02.1982 | 06.02.1983 |

| | EOI Partner | Type of EOI arrangement | Date signed | Date in force |
|---|---|---|---|---|
| 20 | Brazil | DTC | 08.03.1990 | 22.11.1991 |
| 21 | British Virgin Islands | TIEA | 11.09.2009 | 01.07.2013 |
| 22 | Bulgaria | DTC | 06.07.1990 | 11.05.1994 |
| 23 | Canada | DTC | 27.05.1986 | 21.08.1987 |
| 24 | Cayman Islands | TIEA | 08.07.2009 | 29.12.2009 |
| 25 | China (People's Republic of) | DTC | 31.05.2013 | 31.08.2014 |
| 26 | Cook Islands | TIEA | 23.10.2009 | 07.09.2011 |
| 27 | Costa Rica | TIEA | 29.03.2011 | 01.07.2012 |
| 28 | Croatia | DTC | 23.05.2000 | 06.04.2001 |
| 29 | Curaçao | Other | 29.03.2011 | 01.12.2015 |
| 30 | Czech Republic | DTC | 04.03.1974 | 05.11.1974 |
| | | Protocol | 15.10.2012 | 31.05.2013 |
| 31 | Denmark | DTC | 01.07.1996 | 06.03.1998 |
| | | Protocol | 09.05.2018 | Not in force |
| 32 | Dominica | TIEA | 11.05.2010 | 01.03.2012 |
| 33 | Egypt | DTC | 21.04.1999 | 20.05.2000 |
| 34 | Estonia | DTC | 14.03.1997 | 08.11.1998 |
| 35 | Ethiopia | DTC | 18.08.2014 | 30.09.2016 |
| 36 | Finland | DTC | 28.12.1995 | 20.12.1997 |
| 37 | France | DTC | 16.03.1973 | 29.03.1974 |
| 38 | Georgia | DTC | 21.03.2002 | 21.02.2003 |
| 39 | Germany | DTC | 16.06.1959 | 18.09.1960 |
| | | Protocol | 04.12.2012 | 31.12.2016 |
| 40 | Ghana | DTC | 10.03.2008 | 12.11.2008 |
| | | Protocol | 10.03.2017 | 31.12.2017 |
| 41 | Gibraltar | TIEA | 23.04.2010 | 01.12.2011 |
| 42 | Greece | DTC | 16.07.1981 | 17.07.1984 |
| 43 | Grenada | TIEA | 18.02.2010 | 20.01.2012 |
| 44 | Guernsey | TIEA | 25.04.2008 | 11.04.2009 |
| 45 | Hong Kong (China) | DTC | 22.03.2010 | 24.10.2011 |
| 46 | Hungary | DTC | 05.06.1986 | 25.09.1987 |
| 47 | Iceland | DTC | 25.09.1997 | 27.12.1998 |
| 48 | India | DTC | 30.07.1988 | 21.01.1989 |
| | | Protocol | 10.05.2012 | 02.11.2012 |

| | EOI Partner | Type of EOI arrangement | Date signed | Date in force |
|---|---|---|---|---|
| 49 | Indonesia | DTC | 29.01.2002 | 31.12.2003 |
| | | Protocol | 30.07.2015 | 01.08.2017 |
| 50 | Ireland | DTC | 11.02.1969 | 12.05.1970 |
| 51 | Isle of Man | TIEA | 12.10.2005 | 24.07.2006 |
| 52 | Israel | DTC | 02.07.1973 | 09.09.1974 |
| 53 | Italy | DTC | 08.05.1990 | 03.10.1993 |
| 54 | Japan | DTC | 03.04.1970 | 23.10.1970 |
| | | Protocol | 25.08.2010 | 01.01.2015 |
| 55 | Jersey | TIEA | 20.06.2007 | 01.03.2008 |
| 56 | Jordan | DTC | 30.10.2006 | 16.08.2007 |
| 57 | Kazakhstan | DTC | 24.04.1996 | 02.05.1997 |
| 58 | Kenya | DTC | 22.07.2015 | Not in force |
| 59 | Korea | DTC | 25.10.1978 | 17.04.1981 |
| 60 | Kuwait | DTC | 29.05.2001 | 23.04.2002 |
| 61 | Kyrgyzstan | DTC | 21.11.1986 | 27.09.1987 |
| 62 | Latvia | DTC | 14.03.1994 | 29.01.1995 |
| 63 | Liberia | TIEA | 27.05.2010 | 01.06.2012 |
| 64 | Liechtenstein | TIEA | 10.11.2009 | 01.12.2010 |
| 65 | Lithuania | DTC | 16.06.1999 | 31.08.2000 |
| 66 | Luxembourg | DTC | 08.05.1968 | 20.10.1969 |
| | | Protocol | 29.05.2009 | 01.07.2010 |
| 67 | Malawi | DTC | 19.04.2015 | Not in force[b*] |
| 68 | Malaysia | DTC | 07.03.1998 | 02.02.1989 |
| | | Protocol | 04.12.2009 | 19.10.2010 |
| 69 | Malta | DTC | 18.05.1977 | 09.11.1977 |
| | | Protocol | 18.07.1995 | 28.03.1999 |
| 70 | Marshall Islands | TIEA | 14.05.2010 | 08.11.2011 |
| 71 | Mexico | DTC | 27.09.1993 | 13.10.1994 |
| | | Protocol | 11.12.2008 | 31.12.2009 |
| 72 | Moldova | DTC | 03.07.2000 | 01.06.2001 |
| 73 | Monaco | TIEA | 11.01.2010 | 01.12.2010 |
| 74 | Montenegro[c] | DTC | 22.02.1982 | 06.02.1983 |
| 75 | Montserrat | TIEA | 10.12.2009 | 01.12.2011 |
| 76 | Morocco | DTC | 12.08.1977 | 10.06.1987 |

| | EOI Partner | Type of EOI arrangement | Date signed | Date in force |
|---|---|---|---|---|
| 77 | New Zealand | DTC | 15.10.1980 | 18.03.1981 |
| 78 | Nigeria | DTC | 11.12.1991 | 09.12.1992 |
| 79 | Republic of North Macedonia [d] | DTC | 11.09.1998 | 21.04.1999 |
| 80 | Norway | DTC | 12.01.1990 | 31.12.1990 |
| | | Protocol | 23.04.2013 | 30.11.2013 |
| 81 | Oman | DTC | 05.10.2009 | 28.12.2011 |
| 82 | Pakistan | DTC | 24.03.1982 | 04.10.1982 |
| 83 | Panama | DTC | 06.10.2010 | 01.12.2011 |
| 84 | Philippines | DTC | 09.03.1989 | 20.09.1991 |
| 85 | Poland | DTC | 13.02.2002 | 18.03.2003 |
| 86 | Portugal | DTC | 20.09.1999 | 11.08.2000 |
| 87 | Qatar | DTC | 24.04.2008 | 25.12.2009 |
| 88 | Romania | DTC | 05.03.1998 | 29.07.1999 |
| 89 | Russia | DTC | 16.12.1996 | 27.08.1998 |
| 90 | Saint Kitts and Nevis | TIEA | 02.09.2009 | 29.11.2010 |
| 91 | Saint Lucia | TIEA | 02.12.2009 | 31.03.2011 |
| 92 | Saint Vincent and the Grenadines | TIEA | 01.09.2009 | 21.03.2011 |
| 93 | Samoa | TIEA | 14.09.2009 | 02.03.2012 |
| 94 | San Marino | TIEA | 27.01.2010 | 01.01.2011 |
| 95 | Saudi Arabia | DTC | 13.10.2008 | 01.12.2010 |
| 96 | Serbia [e] | DTC | 22.02.1982 | 06.02.1983 |
| 97 | Seychelles | TIEA | 04.08.2010 | 01.09.2012 |
| 98 | Singapore | DTC | 19.02.1971 | 31.08.1971 |
| | | Protocol | 25.08.2009 | 01.05.2010 |
| 99 | Sint Maarten | Other | 09.07.2014 | 01.03.2016 |
| 100 | Slovak Republic | DTC | 04.03.1974 | 05.11.1974 |
| | | Protocol | 07.06.2010 | 01.12.2010 |
| 101 | Slovenia | DTC | 30.06.2004 | 31.12.2005 |
| 102 | South Africa | DTC | 10.10.2005 | 28.12.2008 |
| | | Protocol | 08.07.2008 | 24.12.2008 |
| 103 | Spain | DTC | 16.06.1971 | 20.09.1972 |
| 104 | Sri Lanka | DTC | 17.11.1982 | 24.01.1984 |
| 105 | Suriname | DTC | 25.11.1975 | 13.04.1977 |

| | EOI Partner | Type of EOI arrangement | Date signed | Date in force |
|---|---|---|---|---|
| 106 | Sweden | DTC | 18.06.1991 | 12.08.1992 |
| 107 | Switzerland[f] | DTC | 26.02.2010 | 09.11.2011 |
| 108 | Chinese Taipei | Other | 27.02.2001 | 16.05.2001 |
| 109 | Thailand | DTC | 11.09.1975 | 09.06.1976 |
| 110 | Tunisia | DTC | 16.05.1995 | 15.12.1995 |
| 111 | Turkey | DTC | 27.03.1986 | 30.09.1998 |
| 112 | Turks and Caicos Islands | TIEA | 22.07.2009 | 01.05.2011 |
| 113 | Uganda | DTC | 31.08.2004 | 10.09.2006 |
| 114 | Ukraine | DTC | 24.10.1995 | 02.11.1996 |
| | | Protocol | 12.03.2018 | Not in force |
| 115 | United Arab Emirates | DTC | 08.05.2007 | 02.06.2010 |
| 116 | United Kingdom | DTC | 26.09.2008 | 25.12.2010 |
| | | Protocol | 12.06.2013 | 31.01.2014 |
| 117 | United States | DTC | 18.12.1992 | 31.12.1993 |
| | | Protocol | 08.03.2004 | 28.12.2004 |
| 118 | Uruguay | TIEA | 24.10.2012 | 01.06.2016 |
| 119 | Uzbekistan | DTC | 18.10.2001 | 27.05.2002 |
| | | Protocol | 06.02.2017 | 31.12.2017 |
| 120 | Venezuela | DTC | 29.05.1991 | 11.12.1997 |
| 121 | Viet Nam | DTC | 24.01.1995 | 25.10.1995 |
| 122 | Zambia | DTC | 15.07.2015 | 31.03.2018 |
| 123 | Zimbabwe | DTC | 18.05.1989 | 21.04.1991 |

*Notes:* a. The Netherlands continues to apply the agreement established with the Former Socialist Federal Republic of Yugoslavia to Bosnia and Herzegovina.

b. Ratified by The Netherlands.

c. The Netherlands continues to apply the agreement established with the Former Socialist Federal Republic of Yugoslavia to Montenegro.

d. The Republic of North Macedonia, previously known as the Former Yugoslav Republic of Macedonia, has informed the United Nations and the OECD of its new official name. The change is effective as of 14 February 2019.

e. The Netherlands continues to apply the agreement established with the Former Socialist Federal Republic of Yugoslavia to Serbia.

f. The Netherlands also has a DTC with Switzerland signed on 12 November 1951, however, this does not provide for exchange of information in tax matters.

## Bilateral agreements for the Caribbean Netherlands

| | Jurisdiction | Type of EOI arrangement | Date signed | Date in force |
|---|---|---|---|---|
| 1 | Antigua and Barbuda | TIEA | 29.10.2009 | 05.12.2013 |
| 2 | Australia | TIEA | 01.03.2007 | 04.04.2008 |
| 3 | Bermuda | TIEA | 28.09.2009 | 24.03.2015 |
| 4 | British Virgin Islands | TIEA | 11.09.2009 | Not in force |
| 5 | Canada | TIEA | 29.08.2009 | 01.01.2011 |
| 6 | Cayman Island | TIEA | 29.10.2009 | 01.12.2017 |
| 7 | Denmark | TIEA | 10.09.2009 | 01.01.2012 |
| 8 | Faroe Islands | TIEA | 10.09.2010 | 01.07.2011 |
| 9 | Finland | TIEA | 10.09.2009 | 01.06.2011 |
| 10 | France | TIEA | 10.09.2009 | 01.08.2012 |
| 11 | Greenland | TIEA | 10.09.2009 | 01.05.2012 |
| 12 | Iceland | TIEA | 10.09.2009 | 01.01.2012 |
| 13 | Mexico | TIEA | 01.09.2009 | 04.02.2011 |
| 14 | New Zealand | TIEA | 01.03.2007 | 02.10.2008 |
| 15 | Norway | DTC | 13.11.1989 | 17.12.1990 |
| | | Protocol | 10.09.2009 | 01.09.2011 |
| 16 | Saint Kitts and Nevis | TIEA | 11.09.2009 | 06.11.2014 |
| 17 | Saint Lucia | TIEA | 29.10.2009 | 01.10.2013 |
| 18 | Saint Vincent and the Grenadines | TIEA | 28.09.2009 | 13.07.2013 |
| 19 | Spain | TIEA | 10.06.2008 | 27.01.2010 |
| 20 | Sweden | TIEA | 10.09.2009 | 20.04.2011 |
| 21 | United Kingdom | TIEA | 10.09.2010 | 01.05.2013 |
| 22 | United States | TIEA | 17.04.2002 | 22.03.2007 |

## EU Directive on Administrative Co-operation

The Netherlands can exchange information relevant for direct taxes upon request with EU member states under the EU Council Directive 2011/16/EU of 15 February 2011 on administrative co-operation in the field of taxation (as amended). The Directive came into force on 1 January 2013. All EU members were required to transpose it into their domestic legislation by 1 January 2013. The Netherlands can exchange information within the framework

of the Directive with Austria, Belgium, Bulgaria, Croatia, Cyprus[19], the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, the Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom.

## Convention on Mutual Administrative Assistance in Tax Matters

The Convention on Mutual Administrative Assistance in Tax Matters (the 1988 Convention) was developed jointly by the OECD and the Council of Europe in 1988 and amended in 2010 (the amended Convention).[20] The Convention is the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance, a top priority for all jurisdictions.

The 1988 Convention was amended to respond to the call of the G20 at its April 2009 London Summit to align it to the international standard on exchange of information on request and to open it to all countries, in particular to ensure that developing countries could benefit from the new more transparent environment. The amended Convention was opened for signature on 1 June 2011.

The Netherlands signed the 1988 Convention on 25 September 1990 and deposited the instrument of ratification on 15 October 1996. The 1988 Convention entered into force for the Netherlands on 1 February 1997. The Netherlands signed the Protocol amending the 1988 Convention on 27 May 2010 and deposited the instrument of ratification on 29 May 2013. The amending Protocol entered into force for the Netherlands on 1 September 2013.

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19. Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

    Note by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

20. The amendments to the 1988 Convention were embodied into two separate instruments achieving the same purpose: the amended Convention which integrates the amendments into a consolidated text, and the Protocol amending the 1988 Convention which sets out the amendments separately.

Currently, the amended Convention is in force in respect of the following jurisdictions: Albania, Andorra, Anguilla (extension by the United Kingdom), Argentina, Aruba (extension by the Netherlands), Australia, Austria, Azerbaijan, Bahamas, Barbados, Bahrain, Belgium, Belize, Bermuda (extension by the United Kingdom), Brazil, British Virgin Islands (extension by the United Kingdom), Bulgaria, Cameroon, Canada, Cayman Islands (extension by the United Kingdom), Chile, China (People's Republic of), Colombia, Cook Islands, Costa Rica, Croatia, Curacao (extension by the Netherlands), Cyprus, Czech Republic, Denmark, Estonia, Faroe Islands (extension by Denmark), Finland, France, Georgia, Germany, Ghana, Gibraltar (extension by the United Kingdom), Greece, Greenland (extension by Denmark), Grenada, Guatemala, Guernsey (extension by the United Kingdom), Hong Kong (China) (extension by China), Hungary, Iceland, India, Indonesia, Ireland, Isle of Man (extension by the United Kingdom), Israel, Italy, Japan, Jersey (extension by the United Kingdom), Kazakhstan, Korea, Kuwait, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, Macau (China), Malaysia, Malta, Marshall Islands, Mauritius, Mexico, Moldova, Monaco, Montserrat (extension by the United Kingdom), Nauru, the Netherlands, New Zealand, Nigeria, Niue, Norway, Pakistan, Panama, Peru, Poland, Portugal, Romania, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Saudi Arabia, Senegal, Seychelles, Singapore, Sint Maarten (extension by the Netherlands), Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Turks and Caicos Islands (extension by the United Kingdom), United Arab Emirates, Uganda, Ukraine, United Kingdom, Uruguay and Vanuatu.

In addition, the following are the jurisdictions that have signed the amended Convention, but where it is not yet in force: Antigua and Barbuda (entry into force on 1 February 2019), Armenia, Brunei Darussalam, Burkina Faso, Dominican Republic, Ecuador, El Salvador, Former Yugoslav Republic of Macedonia, Gabon, Jamaica (entry into force on 1 March 2019), Kenya, Liberia, Morocco, Paraguay, Philippines, Qatar (entry into force on 1 January 2019), United States (the original 1988 Convention is in force since 1 April 1995, the amending Protocol was signed on 27 April 2010).

# Annex 3: Methodology for the review

The reviews are based on the 2016 Terms of Reference and conducted in accordance with the 2016 Methodology for peer reviews and non-member reviews, as approved by the Global Forum in October 2015 and the 2016-21 Schedule of Reviews.

This evaluation is based on the 2016 ToR, and has been prepared using the 2016 Methodology. The evaluation is based on information available to the assessment team including the exchange of information arrangements signed, laws and regulations in force or effective as at 31 October 2018, the Netherlands' EOIR practice in respect of EOI requests made and received during the three year period from 1 July 2014 to 30 June 2017, Netherlands' responses to the EOIR questionnaire, information supplied by partner jurisdictions, as well as information provided by the Netherlands during the on-site visit that took place from 20 to 23 March 2018 in The Hague, the Netherlands.

## List of laws, regulations and other materials received

### *Tax law*

bES Tax Act

Corporate Income Tax Act

General State Tax Act

Netherlands International Assistance (Levying of Taxes) Act

Decree of 13 December 2012, no. BLKB 2012/1937M.

### *Company law*

civil Code, relevant extracts

### *AML Act and regulatory law*

Money Laundering and Terrorist Financing (Prevention) Act

Money Laundering and Terrorist Financing (Prevention) (BES Islands) Act

Money Laundering and Terrorist Financing (Prevention) Act (Implementation) Decree 2018

Regulations governing Sound Operational Practices under the Trust and Company Service Providers (Supervision) Act 2014

Trust and Company Service Providers (Supervision) Act

## Authorities interviewed during on-site visit

Ministry of Finance

Netherlands Tax and Customs Administration

- Central Liaison Office
- Bureau of Economic Supervision

Chamber of Commerce

Ministry of Justice

Central Bank

Bureau of Financial Supervision

Bar Association

Private sector representatives

## Current and preview reviews

This report provides the outcomes of the second peer review of the Netherlands' implementation of the EOIR standard conducted by the Global Forum. The Netherlands previously underwent an EOIR Combined review in 2011 of both its legal and regulatory framework and the implementation of that framework in practice (the 2011 Report). The 2011 Report containing the conclusions of the first review was first published in October 2011 (reflecting the legal and regulatory framework in place as of July 2011).

The 2011 Report was conducted according to the terms of reference approved by the Global Forum in February 2010 (2010 ToR) and the Methodology used in the first round of reviews. The 2011 Report was initially published without a rating of the individual essential elements or any overall

rating, as the Global Forum waited until a representative subset of reviews from across a range of Global Forum members had been completed in 2013 to assign and publish ratings for each of those reviews. The Netherlands' 2011 Report was part of this group of reports. Accordingly, the 2011 Report was republished in 2013 to reflect the ratings for each element and the overall rating for the Netherlands.

Information on the Netherlands' reviews is listed in the table below.

| Review | Assessment team | Period under review | Legal framework as of | Date of adoption by Global Forum |
|---|---|---|---|---|
| **2011 Report** | Ms Shauna Pittman, Legal Counsel, Legal Services, Canada Revenue Agency; Mr Torsten Kluge, Saxon State Ministry of Finance, Germany; and Mr Sanjeev Sharma of the Global Forum Secretariat | 1 January 2007 to 31 December 2009 | July 2011 | October 2011 |
| **2018 Report** | Mr Duncan Nicol, from the Cayman Islands; Ms Flor Nieto, from Mexico; Ms Aurore Arcambal and Ms Renata Teixeira, from Global Forum Secretariat | 1 July 2014 to 30 June 2017 | December 2018 | 15 March 2019 |

# Annex 4: The Netherlands' response to the review report[21]

The Netherlands would like to express its gratitude for the ongoing hard work of the Global Forum in assisting countries to implement the international standards of exchange of information. Collaboration and exchange of information are cornerstones of shaping and sustaining a fair international tax system.

The Netherlands has a long history of exchanging information with our treaty partners which dates back to the early decades of the 20th century. Our commitment to the exchange of information is also reflected in our wide treaty network encompassing 148 jurisdictions and the active participation of the Netherlands in the Global Forum and the OECD in the field of exchange of information.

Commitment to updated international standards and enforcing those commitments are two sides of the same coin. Therefore, the Netherlands is pleased with the work done by the Global Forum to ensure an effective implementation of the international standards. One of the products of this process is this report on the exchange of information on request on Netherlands' compliance with the international standard.

Building on the 2013 report of the Netherlands in the first round, the draft report notes fair progress of the Netherlands in updating its treaty network, abolishing a notification system and ensuring timely responses to a large number of requests. In addition, the Netherlands updated its AML legal framework and strengthened its AML supervision over the past years.

Over the review period, the Netherlands has received more than 2.000 requests. The Netherlands received several group requests and was able to reply such requests. The Netherlands is grateful for the positive peer input received from other countries in relation to the information that is exchanged by the Netherlands.

21. This Annex presents the Jurisdiction's response to the review report and shall not be deemed to represent the Global Forum's views.

The report also notes several improvements that the Netherlands is recommended to make, in particular in relation to the beneficial ownership of legal entities in the Netherlands. The Netherlands embraces the outcomes of the report. A bill on abolishing bearer shares was already passed in February 2019 and a bill on introducing a beneficial owner registry will be submitted in the spring of 2019. The registry will be operative as of January 2020. The Netherlands shall describe the progress in a follow up report next year. The Netherlands wishes to reiterate both our commitment to the work of the Global Forum and the fundamental importance of international cooperation in the area of taxation.

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GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

# Peer Review Report on the Exchange of Information on Request THE NETHERLANDS 2019 (Second Round)

The Global Forum on Transparency and Exchange of Information for Tax Purposes is a multilateral framework for tax transparency and information sharing, within which over 150 jurisdictions participate on an equal footing.

The Global Forum monitors and peer reviews the implementation of international standard of exchange of information on request (EOIR) and automatic exchange of information. The EOIR provides for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. All Global Forum members have agreed to have their implementation of the EOIR standard be assessed by peer review. In addition, non-members that are relevant to the Global Forum's work are also subject to review. The legal and regulatory framework of each jurisdiction is assessed as is the implementation of the EOIR framework in practice. The final result is a rating for each of the essential elements and an overall rating.

The first round of reviews was conducted from 2010 to 2016. The Global Forum has agreed that all members and relevant non-members should be subject to a second round of review starting in 2016, to ensure continued compliance with and implementation of the EOIR standard. Whereas the first round of reviews was generally conducted as separate reviews for Phase 1 (review of the legal framework) and Phase 2 (review of EOIR in practice), the EOIR reviews commencing in 2016 combine both Phase 1 and Phase 2 aspects into one review. Final review reports are published and reviewed jurisdictions are expected to follow up on any recommendations made. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

This report contains the 2019 Peer Review Report on the Exchange of Information on Request of the Netherlands.

Consult this publication on line at ***https://doi.org/10.1787/fdce8e7f-en***.

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