NVER Nederlandse Vereniging voor Europees Recht
Netherlands Association for European Law

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National Report of the Netherlands Association for European Law

1. Introduction

The present national report contains the input of the Netherlands Association for European Law (NVER) on the topic 'Taxation, State aid and distortions of competition'.[1] The report is structured as follows. Section 2 provides details on the structure, procedure and content of the Dutch tax ruling process.[2] In this context, it will be discussed in what circumstances taxpayers are eligible for a ruling. Section 3 discusses how the arm's length principle is interpreted and applied in Dutch tax law.[3] Section 4 discusses the Dutch general anti-avoidance rule in tax matters.[4] In section 5, the Dutch regulatory framework on the recovery of unlawful state aid is reviewed and the application thereof in practice.[5] In section 6, an overview is provided of the international obligations of the Netherlands in respect of property and investor protection.[6] This section will also discuss how a conflict between EU law and such international obligations is generally resolved. Section 7 contains final remarks.

2. The Dutch tax ruling process

2.1 Legal basis

The Decree on Administrative Law in tax matters (*Besluit Fiscaal bestuursrecht*) states that any taxpayer may file a request for prior consultation with the tax inspector.[7] This prior consultation may result in a formal position taken by the tax inspector about the application of the law in the specific circumstances of the taxpayer. It may also result in an Advance Tax Ruling (ATR), Advance Pricing Agreement (APA) or a more general settlement agreement. Those 'rulings' are governed by the Dutch Civil Code (*Burgerlijk Wetboek*, hereinafter: BW).[8] This code contains the following provisions:[9]

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[1] This report has been prepared by the national reporter Sjoerd Douma (University of Amsterdam and Lubbers, Boer & Douma) and the following members of the NVER: Sebastiaan Cnossen (Pels Rijcken), Johan van Haersolte (Coupry), Emma Hameleers (NautaDutilh), Jurian Langer (University of Groningen and Ministry of Foreign Affairs), Doortje Ninck Blok (Windt Le Grand Leeuwenburgh), René Repasi (European Research Centre for Economic and Financial Governance) and Bram Vos (LLM student Corporate Law at VU Amsterdam). All opinions expressed are personal and do not represent the views of the organisations the authors work for.
[2] Section 2 contains answers to questions 1-6 of the Questionnaire.
[3] Section 3 discusses questions 7-9 of the Questionnaire.
[4] Section 4 answers question 10 of the Questionnaire.
[5] Section 5 addresses questions 11-12 of the Questionnaire.
[6] Section 6 regards questions 13-14 of the Questionnaire.
[7] Decree of 9 May 2017, no. 2017-1209, para. 3. The decrees referred to in the present report are policy rules rather than binding legislation.
[8] See the Decrees of the State Secretary for Finance of 3 June 2014, nos. DGB 2014/3098 and DGB 2014/3099.
[9] See www.dutchcivillaw.com for these translations.

> Article 7:900(1) BW
> Under a settlement agreement parties bind themselves towards each other, in order to end or to avoid any uncertainty or dispute about what applies to them legally, to the assessment and establishment of a new legal status between them, intended to apply as well as far as it differs from their previously existing legal status.
>
> Article 7:902 BW
> The establishment of a new legal status in order to end any uncertainty or dispute on the field of property law is also valid if it would appear to be in conflict with mandatory law, unless its content or necessary implications are in conflict as well with public morals or public order.
>
> Article 3:40 BW
> 1. A juridical act that, by its content or necessary implications, violates public morality or public order, is null and void.
> 2. A juridical act that violates a statutory provision of mandatory law is null and void; yet, if this statutory provision merely intends to protect one of the parties to a more-sided (multilateral) juridical act, then such a juridical act is voidable, provided that this is in line with the underlying principle of the violated statutory provision.
> 3. The previous paragraph does not concern statutory provisions that do not purport to make a conflicting juridical act invalid.

Article 7:900(1) BW makes clear that no agreement between a taxpayer and the tax authorities can exist where there is no "*uncertainty or dispute about what applies to them legally*". Indeed, pursuant to Articles 7:902 and 3:40 BW, such an agreement is null and void in case of a *manifest* violation of mandatory tax law. A violation of the law in circumstances where such violation was not known – or could not have been known – to the tax authorities and the taxpayer can be no reason for such nullity, because the object and purpose of Article 7:900(1) BW is to introduce a legal instrument in the Dutch legal order to end objective legal uncertainty between the parties. However, if no objective uncertainty exists, no agreement between the tax authorities and the taxpayer can exist, because this would be contrary to the public order. The Dutch Supreme Court has held that the agreement as a whole determines whether it manifestly violates the applicable tax law. The circumstance that both parties know that a certain aspect of the agreement is contrary to the law is insufficient to invalidate that agreement, because the agreement as a whole and the goals pursued therein are decisive on this point.[10] In 2017, an internal but independent research group of the Ministry of Finance and the tax authorities concluded that the Dutch ATR/APA practice as

[10] Supreme Court (*Hoge Raad*) (hereinafter: HR) 9 December 2005, 41.117, ECLI:NL:HR:2005:AU7728, BNB 2006/201. Compare also Article 64 of the Dutch General Tax Act (*Algemene wet inzake rijksbelastingen*), which states that the tax inspector may formalise the tax due by a taxpayer in a different way, provided that the taxpayer agrees with the approach and that the total tax will not be lower than the tax which would otherwise have been payable.

developed by the tax authorities falls within the limits provided for by Dutch legislation, case law and policy rules.[11]

In case a tax inspector wishes to conclude an agreement with a taxpayer which is manifestly against the law, he may turn to the Minister of Finance. The Minister is competent to deviate from the law in favour of a taxpayer or group of taxpayers if a strict application of the law would, in his view, not be equitable.[12]

Taxpayers cannot force the tax authorities to conclude an agreement with them. Similarly, taxpayers cannot litigate against an ATR or APA with which they disagree. Of course, legal remedies are available against subsequent tax assessments; taxpayers would need to await these before any appeal with the tax courts may be lodged.

2.2 Organisation and procedure

Since 2004, ATRs and APAs have been centralised at the tax authorities' large enterprises division in Rotterdam.[13] If a local tax inspector wishes to enter into an agreement with a taxpayer he should consult with this team in certain situations. The APA/ATR team will subsequently issue an opinion which is binding on the tax inspector. This concerns, inter alia, the following situations:

- the determination of an arm's length remuneration or a method for the determination of an arm's length remuneration for cross-border transactions (goods and services) between affiliated organisations and companies, or between units of the same organisation or company (resulting in a unilateral or bilateral advance pricing agreement);
- confirmation of the participation exemption for situations where none of the subsidiaries of a holding carries out business activities in the Netherlands;
- confirmation of international structures that involve hybrid financing or hybrid legal entities;
- confirmation of the absence or presence of a permanent establishment in the Netherlands in respect of tax liability;
- confirmation on the absence of dividend withholding tax on payments made by Dutch cooperative societies.[14]

Certain situations, such as group financing companies and entities with limited or no real economic presence in the Netherlands engaged in the management of intellectual property rights, will be dealt with by the Rotterdam office exclusively so as to ensure enhanced scrutiny for these situations, as will be the case with entities with mere holding, financing

[11] Letter of the State Secretary for Finance of 23 May 2017 to Parliament, no. 2017-0000100477.
[12] Article 63 of the Dutch General Tax Act (*Algemene wet inzake rijksbelastingen*).
[13] *Belastingdienst Grote Ondernemingen*, Rotterdam.
[14] Decree (policy rule) of 3 June 2014, DGB 2014/296M, para. 3.1.

and licensing functions within international groups.[15] Other situations will continue to be dealt with by the competent local tax inspector.

The large enterprises division of the tax authorities in Rotterdam also includes, besides the APA/ATR-team, a 'contact point for potential foreign investors' (*aanspreekpunt potentiële buitenlandse investeerders,* or *APBI*).[16] This contact point is competent to make prior agreements with respect to future investments by a foreign investor, within the limits of legislation, case law and policy rules. These agreements may involve corporate income tax, personal income tax, wage tax, dividend withholding tax and value added tax. The agreements may include ATR's and ATAs but may also include other types of agreements. A 'potential foreign investor' should consider making an investment into the Netherlands of – generally speaking – more than € 4,5 million, leading to jobs in the Netherlands. Two additional criteria should be met: i) the central management of the investor is located outside of the Netherlands, and ii) the investor has not invested substantially in the Netherlands already. The APBI will publish on a yearly basis the general policy which it has pursued in the form of a summary.[17]

In terms of procedure, the tax authorities in Rotterdam will acknowledge the receipt of an APA or ATR request within 5 working days. Requests which are clear without further questions being necessary will be dealt with immediately. In other cases, the receipt confirmation will contain the name of the civil servant who is dealing with the request. Generally speaking, a request for an ATR will be dealt with in 8 weeks. In respect of a request for an APA, the taxpayer and the tax authorities will agree a 'case-management plan' in accordance with the APA Decree.[18] In all cases, a request for an APA, ATR or (other) settlement agreement will be processed when at least the following information has been provided: a clear description of all relevant facts, the legal question on which a position of the tax authorities is requested, and the taxpayer's own assessment of the tax consequences of the envisaged facts.[19] A request for an APA must contain all necessary information to perform a useful transfer pricing analysis.[20] An agreement with the tax authorities is reached on the basis of the specific facts and circumstances of the taxpayer; there are no 'one-size-fits-all' of 'default' rules.

2.3 Verification of facts

Only the taxpayer is responsible for the accuracy and completeness of the facts put to the tax authorities. If it turns out that the information has not been correct and/or complete,

[15] Decree of 3 June 2014, DGB 2014/296M, para. 3.2. Summary by E. van der Velde, 'Tax Rulings in the EU Member States', European Parliament 2015, p. 42.
[16] Decree of 3 June 2014, DGB 2014/296M, para. 4.
[17] Decree of 3 June 2014, DGB 2014/296M, para. 5.
[18] Decree of 3 June 2013, DGB 2014/3098
[19] Compare the Decree of 9 May 2017, no. 2017-1209, para. 3(2).
[20] Decree of the State Secretary for Finance of 3 June 2014, no. DGB 2014/3098, para. 6.

the tax authorities are not bound by any APA, ATR or (other) settlement agreement.[21] Of course, the competent tax inspector will have to verify all facts and circumstances when issuing a tax assessment on the basis of the prior agreement.

2.4 Relevance of the position of other countries

The tax authorities will not proceed with any prior consultation and will not take any legal position in case of aggressive tax planning (*fiscale grensverkenning*) or in case there is a risk that the international law principle of good faith or another principle of international law will be violated. A violation of the principle of good faith may be present if the tax authorities suspect, for instance, a link to money laundering, bribery, serious financial crimes or financing of terrorist activity.[22]

The fact that another country may qualify a certain item of income for tax purposes differently than the Netherlands has no bearing in principle on the possibility to enter into prior consultation with the Dutch tax authorities. The same is true in a situation where corresponding taxation in another country is absent. What matters is a correct interpretation and application of Dutch tax law, based on a full picture of all relevant facts. In this regard, the Dutch tax authorities do require that the taxpayer gives the foreign tax authorities a full, complete and transparent insight into its tax treatment in the Netherlands and the facts upon which that tax treatment is based. This is a critical circumstance in an advance pricing agreement.[23]

3. The arm's length principle

3.1 The notion of profits of an enterprise

In the Netherlands, the arm's length principle is rooted in Article 3.8 of the Income Tax Act (*Wet inkomstenbelasting 2001*) which defines profits from an enterprise as the total amount of proceeds which are derived 'from an undertaking' in whatever shape or form. This provision, which goes back a very long time, makes it clear that an increase or decrease in value of an undertaking which is not derived 'from an undertaking' but from something else – e.g. a capital contribution by or a dividend payment to the shareholders – is excluded from the notion of taxable profits. This means that the arm's length principle in the Netherlands historically includes both upward and downward adjustments. In 2002, Article 8b(1) was introduced in the Dutch Corporate Income Tax (CIT; *Wet op de vennootschapsbelasting 1969*). This provision codifies the already existing arm's length principle as follows:

> "Where an entity participates, directly or indirectly, in the management, control or capital of another entity, and conditions are made or imposed between these entities in their commercial and financial relations (transfer prices) which differ from conditions

[21] Decree of 9 May 2017, no. 2017-1209, para. 3(2), footnote 2.
[22] Decree of 9 May 2017, no. 2017-1209, paras. 3(4)(c) and 4.
[23] Kamerstukken II, 2016/17, 25 087, nr. 153.

> which would be made between independent parties, the profit of these entities will be determined as if the last mentioned conditions were made".

According to the Dutch legislator, this provision is to be interpreted in accordance with the OECD Transfer Pricing Guidelines.[24]

3.2 The Transfer Pricing Decree

Guidance as to how the Dutch tax administration interprets the arm's length principle is laid down in a Decree of 14 November 2013.[25] This Decree describes in detail how the Dutch tax authorities apply and interpret the OECD Transfer Pricing Guidelines in the context of the Dutch legal order. As requested by the general reporter, we would like to deal specifically with the following example:

> A product is sold from one group company to another at a price of 100. According to the tax authorities of the selling state an at arm's length price should have been 120 and it adjusts taxable profit upwards accordingly.

If the buying company would be a resident of the Netherlands, the Dutch tax authorities would not automatically accept this higher transfer price and adjust the level of taxable profit downwards. In a Decree from 2008, the State Secretary for Finance writes the following:[26]

> "There are two ways in which the Netherlands can eliminate double taxation arising as a result of transfer pricing adjustments in another country:
> 1. Following a taxpayer's request, the Dutch tax assessment can be unilaterally adjusted without consulting the treaty partner;
> 2. Following a taxpayer's request, the double taxation can be eliminated after consultations with the other competent authority, either by adjustment of the Dutch assessment or otherwise.
> A request as referred to in point 1 is also referred to as a request for a corresponding adjustment. This can be sent to the competent tax inspector, who will then decide, on the basis of Dutch legislation and regulations (including the applicable tax treaty), whether the Netherlands will unilaterally renounce its claim. Depending on the stage of the tax assessment, such a request may be filed as:
> a. a request for adjustment of the taxpayer's tax return;
> b. an objection to the assessment;

[24] Kamerstukken II 2001/02, 28034, nr. 3, p. 8
[25] Decree of the State Secretary for Finance of 14 November 2013 no. IFZ 2013/184 M. An official English translation is available on https://www.government.nl/topics/taxation-and-businesses/documents/decrees/2014/03/25/ifz2013-184m-international-tax-law-transfer-pricing-method-application-of-the-arm-s-length-principle-and-the-transfer-pricing-g.
[26] Decree of 29 September 2008, No. IFZ2008/ 248M, para. 2.4.1. English translation available at http://www.oecd.org/ctp/transfer-pricing/netherlands-decree-mutual-agreement-procedure-2008.pdf.

c. a request for a reduction ex officio of the tax liability.
The tax inspector will decide whether a reduction is appropriate. The tax inspector has to submit all requests to the Coordination Group on Transfer Pricing[27] for binding advice. If the inspector decides, based on the information provided by the taxpayer, that the Netherlands cannot eliminate the double taxation by reducing the assessment or considers consultations with the other country to be needed in order to decide which country should be assigned the taxation rights, the double taxation will continue to apply. If a taxpayer disagrees with the inspector's decision and is still in stage a. or b above, the taxpayer can still seek recourse to the domestic remedies available. In addition to the various domestic remedies, it is always possible to request a mutual agreement procedure [on the basis of the applicable tax treaty], providing the time limit for filing such requests has not expired."

The above can therefore be summarized as follows: a corresponding adjustment will only be granted unilaterally if the facts justify this. If not, the taxpayer may request the initiation of a mutual agreement procedure.

4. Fraus legis

The most important general domestic anti-abuse measure is the unwritten *fraus legis* doctrine, as further developed in Dutch case law. *Fraus legis* is a principle with its origins in Roman law. As a general legal principle of law, it is applicable to all areas of law, not only tax law, although it is used frequently by the Dutch Revenue Service. It is settled case law of the *Hoge Raad* that two criteria have to be met simultaneously before *fraus legis* can be applied: a subjective criterion (that the avoidance of tax is the only, or paramount, motive for the transactions) and an objective criterion (a conflict with the intention and purport of the law).[28] The legal transactions entered into by the taxpayer in order to obtain a fiscal advantage can subsequently be either ignored (elimination) or replaced by other transactions (substitution), depending on which option gives the best expression to the intention and purport of the law. Application of the doctrine of *fraus legis* in tax matters does not change the transactions for any other purposes other than that of taxation. Interestingly, the Dutch government is of the opinion that the Netherlands does not have to implement Article 6 (GAAR) of the Anti-Tax Avoidance Directive[29] because the concept of fraus legis provides an equally effective protection.[30] The Dutch Supreme Court has decided that the notion of *fraus legis* can be applied to and next to specific anti-avoidance rules.[31]

[27] This a certain group within the Dutch tax authorities.
[28] HR 20 March 1985, BNB 1985/171.
[29] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, p. 1–14.
[30] Kamerstukken 2016/17, 25087, nr. 179, p. 2.
[31] For instance, HR 11 July 2008, nr. 43.376, BNB 2008/266.

5. Recovery of unlawful State aid

At present (2017), Dutch law does not provide for a specific set of rules ensuring the effective recovery of state aid. Unlawful state aid has to be recovered on the basis of the powers attributed by various Dutch rules that may apply. Which one depends on the case at hand, more specifically on how the state aid was granted to the recipient. In this respect, one has to distinguish between civil law[32], administrative law[33] and fiscal law[34]. To our understanding, most Dutch case law relates to civil and administrative law and almost none to fiscal law. Furthermore, most cases have been brought to court by parties invoking Article 108(3) TFEU (notification and stand-still obligations) and a Commission Decision was not involved. Recovery will in those cases be one of several claims put forward and the competent court has to decide whether the claim is justified and if that is the case, how to effectuate the recovery.

In civil law cases involving state aid a Dutch civil court often has to grapple with different claims aiming at the reversal, the discontinuation or the stay of the aid measures. The challenge for Dutch judges lies in the fact that the actual state aid (the transfer of state resources) often entangled in a web of contractual civil as well as public law relationships. The relevant remedies such as damages, invalidity, dissolution etc., do not accommodate recovery seamlessly. On the other hand, this variety of remedies also offers more possibilities eventually to effectuate recovery. The main avenue to effectuate recovery in civil law is the claim of undue payment.[35] In the *Fleuren Compost* judgment (2007) the Rotterdam District Court accepted such a claim by the Dutch state against a company that had received illegal aid.[36] However, the court also made clear that the interest could be claimed only insofar as Dutch civil law provides for this. It is generally assumed that this amounts to less than EU law requires.[37] Undue payment (of the beneficiary of the state aid) as a legal basis for recovery can also be used when the contract that governs the aid has

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[32] E.g. in case of a contract for the sale of land between a municipality and a building company (District Court Noord Nederland, 1 July 2015, *Harlingen/Saanen Holding*, ECLI:NL:RBNNE:2015:3300).
[33] E.g. in case of the *vereveningsbijdrage*, the contribution paid by the government to health insurance companies under the Health Insurance Act (Administrative Jurisdiction Division of the Council of State, 15 April 2015, *Zorg en Zekerheid*, ECLI:NL:RVS:2015:1152).
[34] E.g. in case of a commuter tax assessment imposed by a municipality (District Court The Hague, 7 July 2011, NN/*Goedereede*, ECLI:NL:RBSGR:BR4069).
[35] *'Onverschuldigde betaling'* in art. 6:203 Dutch Civil Code (*Burgerlijk Wetboek*).
[36] District Court Rotterdam, 4 July 2007, *BPM*, ECLI:NL:RBROT:2007:BB0270. This case concerned state aid by way of a subsidy. Although the state aid took place in the context of administrative law the recovery had to be effectuated before a civil court as the administrated court was only entitled to annul the administrative decision through which the aid was granted, this according to Administrative Jurisdiction Division of the Council of State, 11 January 2006, *BPM*, ECLI:NL:RVS:2006:AU9416.
[37] Art. 6:120 Dutch Civil Code (*Burgerlijk Wetboek*). The statutory interest is lower and the period concerned starts when the claim is submitted and not when the aid itself started. This discrepancy provoked an infringement procedure by the Commission (C-401/07) that was removed from the register of the ECJ in 2008 when the Dutch government declared to change the law in that respect.

been annulled by a court because of breach of article 108(3) TFEU.[38] This approach ensues from the *Residex* judgment of the ECJ in 2011.[39] A similar claim to undue payment is that of unjustified enrichment. This can, on the basis of an interpretation of Dutch law (i.e. of the concept of unjustified enrichment) in conformity with EU law, ensure recovery in cases of (illegal) aid that concern relationships between more than two parties.[40]

In administrative law, a court can only assess the administrative decision that is the object of appeal. Therefore, the outcome can also only be the confirmation or the annulment of that decision. This limits the possibilities of recovery of state aid. When the concerned administrative decision has been annulled, a separate decision will have to be taken by the authorities to effectuate recovery. The leading case in this respect is the so-called *BPM* case. To follow-up on Decision 2001/521/EC of 13 December 2000,[41] the Dutch authorities adopted a decision on 5 April 2004 to recover the illegal aid granted to NN on the basis of the *Bijdrageregeling Proefprojecten Mestverwerking (BPM)* (aid scheme for pilot projects in manure-processing). The District Court of Den Bosch ruled in 2004 that the authorities were entitled on the basis of the articles 4:49 and 4:57 General Administrative Act[42] to adopt a decision repealing the decision granting the subsidy and ordering the recovery of the transferred sum in order to effectuate a negative state aid decision of the European Commission.[43] In appeal, the Council of State (Judiciary Division) took the opportunity to give some clarification on the (national) principles underlying a decision to recover state aid. First of all, the Council of State, referring to case law of the CJEU (C-142-87, C-5/89) explicitly stated that a national basis was required, unless the procedures applied in national law would render the recovery as required by EU law practically impossible or utterly difficult (Council of State, 11 January 2006, BPM, ECLI:NL:RVS:2006:AU9416, para. 2.3). Thus, the Commission Decision ordering the recovery of the aid could not in itself be seen as providing a legal basis for the recovery of state aid. Subsequently, it was noted that the decision for the order for recovery of the state aid had been based on (new) articles of the General Administrative Act that were not in force when the recovery decision had been made.[44] This meant there was no *written* basis to be found in national law at the time of the recovery decision. Instead of striking down the judgment of the district court in its entirety, however, the Council of State found a national legal basis in the unwritten (principle of)

[38] On the basis of art. 3:40(2) Dutch Civil Code (*Burgerlijk Wetboek*) a contract that infringes art. 108(3) TFEU is to be considered void.
[39] ECJ 8 December 2011, C-275/10, *Residex*, ECLI: ECLI:EU:C:2011:814. District Court Noord Nederland, 1 July 2015, *Harlingen/Spaansen Holding*, ECLI:NL:RBNNE:2015:3300.
[40] '*Ongerechtvaardigde verrijking*' in art. 6:12 Civil Code (*Burgerlijk Wetboek*). District Court Rotterdam, 18 September 2013, ECLI:NL:RBROT:2013:9330, *KG Holding.*
[41] OJ EC, L 189/13. An appeal by another affected company was dismissed by the Court of First Instance on 14 January 2004, T-109/01, *Fleuren Compost*, ECLI:EU:T:2004:4.
[42] Articles 4:49 (on withdrawal and amendment of subsidy decisions) and 4:57 (on undue paid subsidies) *Algemene wet bestuursrecht*. Also relevant is art. 16 BPM that stated that a beneficiary was only entitled to the subsidy when articles of the General Administrative Act did not apply yet on the case at hand the Commission had not made an objection.
[43] District Court 's-Hertogenbosch, 26 November 2004, *BPM*, ECLI:NL:RBSHE:2004:AR6630.
[44] The provisions date from 1998 and the case from 1995.

administrative law, which holds that a (favourable) decision could in principle be withdrawn if circumstances give rise to this. Connecting this (Dutch) principle to the European principle of effectiveness and the principle of cooperation as laid down in Article 10 EC (presently article 4(3) TEU), the Council of State found that the administrative authority was competent to recover the BPM-subsidy, on the basis that the BPM-subsidy had been unduly paid to the beneficiary. This approach, however, did not work out for the recovery of the interest concerned, and the Council of State ruled that no legal basis could be found to recover any interest.[45]

In a more recent case[46], the Council of State slightly deviated from its former approach by adding that, besides unwritten (principles of) administrative law, a legal basis for the recovery of state aid could be found in (the direct effect of) article 108(3) TFEU itself.

In fiscal law, the recovery of state aid is at present not specifically dealt with in legislation. The most relevant provisions seem to be Article 16 (*navordering*) and Article 20 (*naheffing*) of the General Tax Act (*Algemene wet inzake rijksbelastingen; AWR*), which also applies to taxes at the provincial and municipal level. The object and purpose of these provisions is to provide for a legal basis for the tax authorities to correct mistakes in decisions made either by themselves or by the taxpayer. It is not surprising that the possibility to correct mistakes is subject to certain limits to protect the taxpayer. For instance, Article 16 AWR – a provision applicable to direct taxation such as corporate income tax – states that an additional tax assessment is possible only if the tax authorities have discovered a 'new fact' the existence of which they could not have known before.[47] Another case in point related to fiscal law is that the Dutch statute of limitation is, in principle, five years, whereas EU law requires that there is a limitation period of ten years for recovery. This raises the question whether, faced with contradictory statutes of limitation, the national court would be obliged to set aside the national statute of limitation. The case law in this field of fiscal law is scarce. In 1997, the Netherlands adopted a scheme to compensate petrol stations near the German border that had difficulties to compete with German stations where excise duties on petrol, diesel and liquid gas were lower following a recent change in Dutch fiscal legislation. The subsequent decision 1999/705/EC[48] declared the aid illegal and ordered its recovery.[49] More recent is the *Starbucks* case. It concerned an APA that had been concluded by the Dutch tax authorities with Starbucks' Dutch subsidiaries. On the basis of such a fiscal ruling, according to the Commission, Starbucks could reduce its tax liability and therefore benefit from a selective advantage. The European Commission adopted a negative decision in November 2015,[50] which was subsequently challenged before the General Court of the European Union

[45] Council of State, 11 January 2006, *BPM*, ECLI:NL:RVS:2006:AU9416.
[46] Council of State, 15 April 2015, *Zorg en Zekerheid*, ECLI:NL:RVS:2015:1152
[47] Furthermore – and this is a more general point – , general (national) principles of good governance could potentially limit the practical use of provisions such as Articles 16 as well as Article 20 AWR. We are not aware of any case law dealing with these issues.
[48] OJ EC 1999, L 280/87.
[49] This was confirmed by the ECJ in its judgment of 13 June 2002, C-382/99, ECLI:EU:C:2002:363.
[50] Decision (EU) 2017/502 of 21 October 2015, OJ EU 2017, L 83/38. The Netherlands was to recover € 25,7 millions (*Financieele Dagblad*, 30 August 2016).

by the Dutch State and by Starbucks.[51] Recovery however, has reportedly already taken place as the appeal in Luxemburg has no suspensory effect.[52]

In April 2008, a draft was presented to Dutch Parliament to introduce a legal basis for recovery of state aid in civil, administrative as well as fiscal law.[53] It would deal with a recovery order by the EC as well as by a EU court and by a Dutch court. The draft however, became stillborn within a few months. After nine years, in July 2017, a new draft was presented to Parliament; the old proposal has been withdrawn.[54] The Act on recovery of state aid[55] will serve as an autonomous legal basis for recovery of state aid in the civil and administrative law spheres and is intended to offer solutions to all issues that had arisen in Dutch case law during the past years (position of third parties, interest rate, time limits etc.). The draft has a bearing on (i) recovery (including the connected interest rate) following a decision by the European Commission and (ii) on the applicable interest rate when recovery has been ordered not by the EC but by a Dutch court. When no EC decision has (yet) been taken but a Dutch court orders a recovery, the recovery of the principal amount itself will not be governed by this draft and be considered to be the consequence of the fact that the national court has declared the state aid illegal. Recovery will then be enforceable on the basis of undue payment. In cases covered by the draft the recovery order will be taken by an administrative decision issued by the authority responsible for the state aid. In respect of tax cases, the proposal simply introduces two new provisions in the AWR – Articles 20a and 20b – which state that recovery of state aid in the tax area will be governed by the normal rules on taxation, thereby setting aside any obstacles for such recovery (statutory time limits and other conditions such as the one of a 'new fact'). The interest rate will be governed by EU law instead of national law. The proposal makes it clear that the recovery of state aid will take the form of a tax assessment. This is important, because the availability of a tax credit for the avoidance of double taxation in other countries may depend on this.

To our understanding, there have been no cases where a Dutch court has refused to allow for the full recovery of illegal state aid. Dutch judges have always tried to accommodate a recovery order by the European Commission. This has however sometimes led to some legal frictions as discussed *supra* but these were generally solved by judicial creativity.

In this regard, we also mention the infringement procedure[56] against the Netherlands regarding the recovery of the interest (rate) of state aid that had been granted by way of a subsidy in breach of state aid law.[57] The Commission claimed that according to the Council of State (Judiciary Division) the principal sum had to be recovered through administrative

[51] T-636/16, Starbucks and Starbucks Manufacturing Emea/Commission, case still pending.
[52] Art. 278 TFEU.
[53] *Kamerstukken* 2007/08, 31 148.
[54] Voorstel van wet houdende regels voor de terugvordering van staatssteun (Wet terugvordering staatssteun), Kamerstukken 2016/17, 34754, nr. 2.
[55] *Wet terugvordering staatssteun*.
[56] C-401/07.
[57] Decision 2001/521/EC of 13 December 2000, OJ EC, L 189/13.

law procedures while the interest had to be recovered through civil law procedures which was unnecessarily complicated and time consuming.[58] Furthermore the concerned company, Fleuren Compost, had only submitted a bank guarantee without making the repayment itself. The case was removed from the register of the CJEU in 2008 after the Netherlands promised to adopt legislation in that respect.

6. International property and investor protection

The Netherlands has concluded 95 bilateral investment treaties with other countries, 4 of which have not yet entered into force.[59] These countries are located in Asia, Latin America, Africa and Eastern Europe. The Dutch government has published a Model Agreement on encouragement and reciprocal protection of investments in 2004, which serves as a basis for the Dutch treaty negotiators (hereinafter: the Model Treaty).[60]

Article 3 of the Model Treaty states the following about fair and equitable treatment, non-discrimination and the most-favoured nation principle:

> 1) Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.
> 2) More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.
> 3) If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to nationals of the other Contracting Party.
> 4) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.
> 5) If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific,

[58] The Dutch case that the Commission had in mind was Administrative Jurisdiction Division of the Council of State, 11 January 2006, *BPM*, ECLI:NL:RVS:2006:AU9416.
[59] An overview of these treaties has been published here: https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2010/02/22/ibo-landenlijst/IBO+overzicht+Nederland+update+jan+2016.pdf.
[60] This model treaty has been published here: https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/convenanten/2004/08/27/ibo-modelovereenkomst/ibo-modelovereenkomst.pdf.

> entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

According to Article 1 of the Model Treaty, the term "investments" means every kind of asset and more particularly, though not exclusively:

> (i) movable and immovable property as well as any other rights in rem in respect of every kind of asset;
> (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
> (iii) claims to money, to other assets or to any performance having an economic value;
> (iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
> (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

Article 6 of the Model Treaty contains the following safeguards around the deprivation of investments:

> Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:
> a) the measures are taken in the public interest and under due process of law;
> b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
> c) the measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

Article 9 of the Model Treaty provides:

> Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965. A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other

> Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention, for the purpose of the Convention be treated as a national of the other Contracting Party.

Article 10 of the Model Treaty states that its provisions shall, from the date of entry into force thereof, also apply to investments, which have been made before that date. Article 14(3) of the Model Treaty adds that in respect of investments made before the date of the termination of the treaty, its provisions shall continue to be effective for a further period of fifteen years from that date. Specifically on taxation, Article 4 of the Model Treaty provides:

> With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State who are in the same circumstances, whichever is more favourable to the nationals concerned. For this purpose, however, any special fiscal advantages accorded by that Party, shall not be taken into account:
> a) under an agreement for the avoidance of double taxation; or
> b) by virtue of its participation in a customs union, economic union or similar institution; or
> c) on the basis of reciprocity with a third State.

The Netherlands has not concluded a bilateral investment treaty with the United States or the United Kingdom. With respect to the United States, however, a treaty of friendship does exist.[61] Article I(1) of that treaty states:

> Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.

Article 6 of the treaty of friendship states with respect to investment protection, non-discrimination and favoured-nation treatment:

> 1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.
> 2. (…)
> 3. Neither Party shall take unreasonable or discriminatory measures that would impair the rights or interests within its territories of nationals and companies of the other Party, whether in their capital, or in their enterprises and the property thereof, or in the skills, arts or technology which they have supplied.
> 4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public interest, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively

[61] Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America of 27 March 1956, Trb. 1956, 40.

realizable form and shall represent the equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.
5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control or administration.

Article XI specifically deals with tax issues:

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party,
shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.
2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.
3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.
4. In the case of companies and of non-resident nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

According to Protocol 12 to the treaty of friendship, nothing in the present Treaty shall be construed to supersede any provision of the Convention between the Kingdom of the Netherlands and the United States of America with respect to taxes on income and certain other taxes, signed at Washington April 29, 1948.

If obligations of European Union law and a bilateral treaty collide the Dutch courts will do everything they can to achieve an interpretation of the bilateral agreement in conformity with Union law. If this is not possible, European Union law will take precedence if the interests of the other contracting state are not jeopardised.[62] If the interests of the other contracting state would, however, be violated, a distinction has to be made between the situation where i) the treaty partner is an EU Member State and ii) the treaty partner is a third country. In the first situation, the European Commission is of the view that European Union law should prevail. For this reason, it has started infringement proceedings against, inter alia, the Netherlands for maintaining bilateral investment treaties with other EU Member States.[63] It is our expectation that the Netherlands courts would indeed give precedence to Union law in case of a conflict between Union law and a bilateral treaty with another Member State.[64] In the second situation, Regulation No 1219/2012 confirms that the Netherlands continues to be bound, under international law, to bilateral investments treaties with third countries, under the conditions set out in that regulation.[65] It is indeed our expectation that the Dutch courts will share this basic starting position that the Netherlands, as a state, is bound to its treaties with third countries and that it cannot invoke EU law vis-à-vis that third country as a reason not to apply the treaty (compare Article 27 VCLT).

7. Final remarks

The present report has discussed the structure, procedure and content of the Dutch tax ruling process. Specific remarks have been made with respect to the arm's length principle in Dutch tax law and with respect to the *fraus legis* doctrine in the Netherlands. The Dutch regulatory framework on the recovery of unlawful state aid has been reviewed, both under current and future legislation. Finally, an overview has been provided of the international obligations of the Netherlands in respect of property and investor protection. We hope that the overview provided in this report will be useful for the preparation. We are looking forward to participating in the XVIII FIDE Congress in Portugal.

[62] E.g. CJEU 16 October 2008, C-527/06, Renneberg.
[63] European Commission, press release of 18 June 2015, IP/15/5198.
[64] Compare CJEU 27 September 1988, 235/87, Matteucci.
[65] Regulation No 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.