The ITPS Group

INTERNATIONAL TAX PLANNING AND STRUCTURE SERVICES

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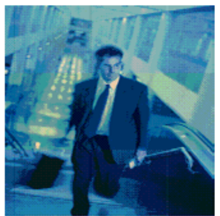

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SIMPLIFICATION AND FLEXIBILIZATION OF DUTCH CORPORATE LAW CONCERNING BV'S

Effective on October 1, 2012

On 12 June 2012 the Senate (*Eerste Kamer*) of the Dutch Parliament finally adopted the bill for the simplification and flexibilization of the rules on Dutch private limited liability companies ("*Wet vereenvoudiging en Flexibilisering B.V.-recht*") and the bill relating to the implementation of these rules, the Implementation Act ("*Invoeringswet*"), hereinafter together referred to as the Flex BV Act. The former bill has been before the Senate since 15 December 2009, the latter was submitted about a year later. The laws will become effective on October 1, 2012.

Corporate law aspects

The Flex BV Act will make important changes to the Dutch law governing private limited liability companies ("*Besloten Vennootschap met beperkte aansprakelijkheid or BV*") as laid down in Book 2 of the Dutch Civil Code. It will simplify the rules, remove unnecessary impediments and abolish a number of mandatory provisions. The amendments fit in with the needs of the current practice and will give more flexibility and freedom to tailor the articles of association in accordance to the wishes of the shareholders of a BV.

Flex BV

Examples of the simplification and flexibilization of the rules, as further elaborated below, are that it will no longer be necessary to lay down elaborate regulations in the articles of association, the articles of association for a standard BV may even cover only one page; the incorporator may deviate from the legal provisions in the law, e.g. by allowing each shareholder or group of shareholders to appoint his/its own director; it will be possible to issue shares without voting rights and there are more opportunities to adopt resolutions outside general meetings. Therefore, the BV with articles of association under these new rules is already being referred to as the "Flex BV".

Main changes

The main changes are as follows:

1. The rules on capital protection and the protection of creditors will become more flexible.
2. Payments to shareholders will be subject to approval of the board of managing directors.
3. The private character of the BV will become less strict as share transfer restrictions will no longer be mandatory.
4. The rules on decision making within BV's will be relaxed.
5. The dispute settlement procedure will become more flexible.

1. The rules on capital protection and the protection of creditors

The most important changes to the rules on capital protection and the protection of creditors are the following:

- The requirement of a minimum issued share capital of € 18,000 at the incorporation of the BV will be abolished. The requirement that at least 20% of the authorised capital be issued will also be abolished. Under the new rules at least one share with voting rights should be held by a party other than the BV or (if any) a subsidiary of the BV.
- The requirement that prior to incorporation a bank statement will be submitted to the notary confirming that shares are paid-up in cash will be abolished.
- Shares remain to be registered shares, although share certificates will be allowed.
- Shares will remain to have a nominal value, but the nominal value of the shares may be denominated in a currency other than the euro. →

- Shares without voting rights and shares without profit rights/rights of entitlement to reserves will be possible.
- It will no longer be required to stipulate in its articles of association the authorized capital, i.e. the maximum amount of share capital that the BV could issue under its current articles of association.
- The requirement to provide an auditor's statement when shares are paid for in kind upon incorporation is no longer required. However, a description of the contributed assets will still have to be provided by the board members or the incorporators.
- The rules pertaining to the acquisition by the BV of assets from an incorporator or shareholder within two years after the BV's initial registration in the trade register, the so-called "*Nachgründung*" will be abolished.
- The rules on financial assistance to third parties for the purchase of shares in the company's own capital will be abolished.
- The possibilities to repurchase shares will be broader, provided that at least one share with voting rights will be held by another party than the respective B.V. itself.
- The procedural requirements that currently must be met to reduce a BV's capital will be abolished.

2. Payments to shareholders

Currently, it is the discretion of the shareholders to resolve payments to shareholders.

Under the new rules the starting point is that a decision to distribute profits or reserves must be made by the shareholders. This authorization can be limited or attributed to another body. Distributions, whether profit, reserves or capital, can be made to the extent that the shareholders' equity exceeds the reserves that must be maintained by law or under the articles of association.

The basic new rule is that the BV's board of directors has to approve payments made to shareholders, including the purchase of own shares and capital reductions. Thus a resolution of the general meeting of shareholders to make a distribution will be subject to the approval of the board of directors. The board must refuse to grant its approval if it knows or should reasonably foresee that, after making the distribution and within a period of 12 months, the BV will be unable to continue paying its due and payable debts. For BV's under management by ITPS such an approval will generally be subject to receipt of an indemnity for any liability.

If it appears – with hindsight – that the BV cannot pay its debts anymore, then the members of the board of directors who knew or should reasonably have foreseen the same, will be jointly and severally liable for the shortfall plus interest at the statutory rate as from the date of payment.

The same applies to shareholders receiving the payments, whilst it knew or should have reasons to believe that the B.V. would not be able to pay its debts anymore after the distribution, however with a maximum of the amount that the pertinent shareholder has received plus the statutory interest as from the date of payment.

3. The transfer of shares

Under the current rules, the articles of association of a Dutch BV should include a share transfer restriction clause which may be an approval system or a right of first refusal.

Under the new rules tailor made transfer restriction clauses, as agreed between shareholders, will be possible. The most important changes to the transfer of shares are the following:

- It will no longer be required to include a transfer restriction in the articles of association of a BV. →

- If no provision is included in the articles of association, then a right of first refusal will be applicable.
- Tailor made transfer restriction clauses as agreed between the shareholders may be included in the articles including detailed rules on how the price of the shares will be determined.
- It is possible to include a lock-up clause in the articles of association prohibiting the transfer of shares for a specific period.
- It will be possible imposing certain clearly defined obligations for shareholders in the articles of association (such as the obligation to grant a loan to the BV).

For BV's under it's management, ITPS will generally require a transfer restriction in the articles of association as it is required to screen the shareholders of a BV.

4. Decision making

As mentioned above, under the new rules a Dutch BV may issue shares without voting rights and shares without profit rights/rights of entitlement to reserves. Other changes include:

- The statutory term for convening share-holders' meetings is reduced (from fifteen) to eight days.
- It will be possible to hold shareholders' meetings outside the Netherlands.
- Shareholder's resolutions may be taken outside a meeting if all persons with rights to attend the general meeting of shareholders approved such resolution taking outside a meeting and casted their vote in writing. The requirements of a unanimous resolution and to record such decision-making in writing is abolished.
- Shareholders of non-voting shares will also be entitled to attend a meeting of shareholders.
- In principle, shares with an equal nominal value will have equal voting rights unless stipulated otherwise in the articles of association.
- Holders of a depositary receipt for shares only have the right to attend a shareholder's meeting when provided for in the articles of association.
- The BV may issue shares bearing multiple votes, which could be particularly useful in the case of joint ventures and family-owned companies.
- The BV's articles of association should state whether or not holders of depositary receipts have rights to attend meetings.
- The shareholders (and other bodies, if any) will be given wider powers to instruct the board.
- The articles of association may provide that the meeting of holders of a certain class of shares is entitled to appoint a director, provided that each shareholder of shares with voting rights may take part in the decision making process regarding the appointment of at least one director. In addition, the articles may provide that a corporate body of the BV may provide directions to the board of directors.

5. The dispute settlement procedure (also applicable to NV's)

The present dispute settlement procedure is cumbersome, time-consuming and rigid and is therefore rarely followed in practice. The intention is for the procedure to become faster and more efficient for all parties concerned.

Under the current rules the shareholders may demand in court to expel a co-shareholder whose actions are damaging the company's interest to such an extent that the company cannot reasonably be required to keep him on as a shareholder. These rules also make it possible for a shareholder to demand of his co-shareholders that they take over his shares if his rights and interests are being damaged by actions of his co-shareholders to such an extent that he can no longer be required to continue to act as a shareholder. →

There will be greater flexibility with regard to the statutory mechanism for the resolution of disputes. Contrary to the other new rules, these will also apply to Dutch public limited liability companies (*"Naamloze Vennootschap or NV"*).

A number of procedural changes have been included to shorten the procedure, such as the possibility of having a judgment declared enforceable at once, regardless of appeal, so that a court order to transfer shares can immediately be enforced. The new rules also offer the possibility of departing from all or some of the statutory dispute settlement rules, for instance by electing to have disputes settled by means of arbitration.

Tax consequences

According to the Minister the new legislation will have very few tax consequences. However, many of the current tax rules were written for the traditional forms of legal entity and it is uncertain how the existing rules may affect the Flex BV.

It is important to note that whilst the new law enables the BV to hold meetings of shareholders outside the Netherlands, these meetings - like directors' meetings - should still be held in the Netherlands from a substance point of view.

Transitional rules/
required action in relation to the Flex-BV Act

The Flex BV Act does not require BVs to amend its current articles of association in order to make them compliant with the new rules. Effective October 1, 2012 the new legislation will directly become into force and may set aside provisions of the current articles of association.

It goes without saying that in order to take advantage of the new flexibility, the company's existing articles may have to be amended.

There are some amendments to be made mandatory once the articles of association will be amended:

1. If the articles of association provide for a supervisory board, the amendments must include the addition of provisions on how the board's duties and authority will be exercised if one or more board members are unable to perform their duties or cease to hold office.

2. If the BV co-operated in the issue of depositary receipts before the entry into effect of the new rules, the amendment must include provisions granting meeting rights to the holders of these receipts. In addition, such BVs must enter the names and addresses of the receipt holders, as well as the dates on which the meeting rights were granted and the dates of acknowledgement or service, in the shareholders' register before October 1, 2013.

It should be noted that, an amendment of the articles of association of a BV under the new law can only prejudice the current rights of a shareholder to the extent that the shareholder has committed himself/ herself to such an amendment. ■

EC: CONCRETE WAYS TO REINFORCE THE FIGHT AGAINST TAX FRAUD AND TAX EVASION

Communication COM (2012) 351 of June 27, 2012

At European Council held in March 2012, Member States asked the Commission "to rapidly develop concrete ways to improve the fight against tax fraud and tax evasion, including in relation to third countries and to report by June 2012". Accordingly, on 27 June last, the European Commission issued Communication COM (2012) 351 on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries.

Algirdas Šemeta, Commissioner for taxation, customs, anti-fraud and audit, said: "Let there be no illusion: tax evaders steal from the pockets of ordinary citizens and deprive Member States of much-needed revenue. If we want fair and efficient tax systems, we must stamp out this activity. The political will to intensify the battle is there. Now it is time to translate that into action. As a Union of 27, we have a powerful advantage - strength in numbers. If we play as a team, with a common strategy, we can defeat the fraudsters and evaders, and reclaim vast sums of money that are legitimately due."

Tax fraud and tax evasion

Tax fraud is a form of deliberate evasion of tax which is generally punishable under criminal law. The term includes situations in which deliberately false statements are submitted or fake documents are produced.

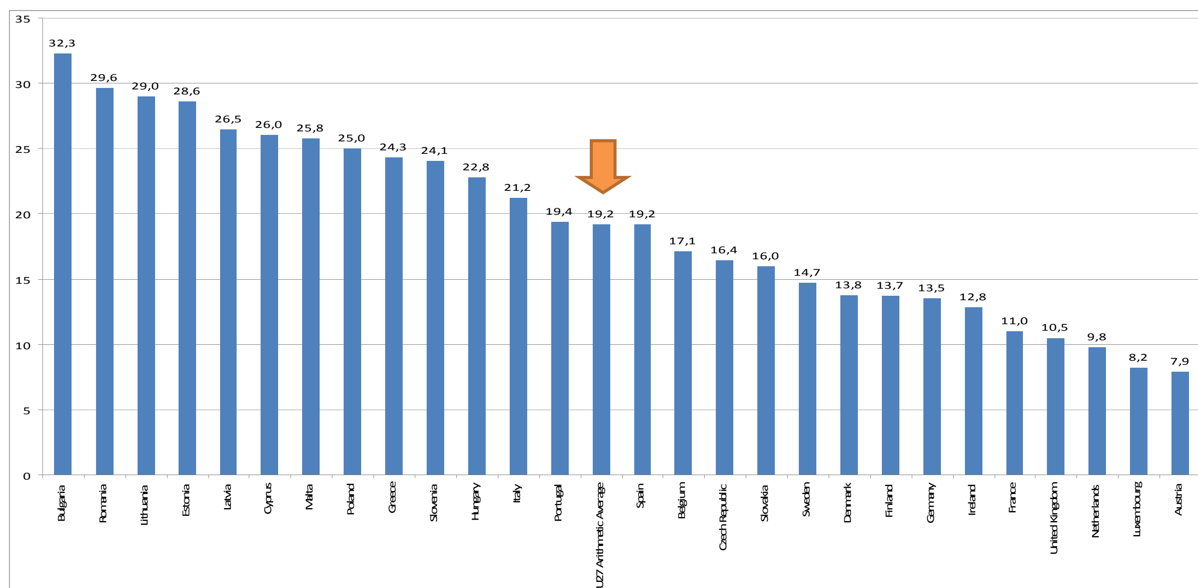
Tax evasion generally comprises illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities.

Size of the shadow economy is estimated to be €2 trillion

Given the very nature of tax evasion and fraud, it is very difficult to put a precise figure on them. Nonetheless, the size of the shadow economy is estimated to be €2 trillion in total, which is almost one fifth of GDP on average across Member States, whereas around €1 trillion is not paid or collected as tax due to tax evasion and avoidance and tens of billions of euro's are off-shore, unreported and untaxed. Please see below figure with an estimate of the size of the shadow economy in the EU Member States. →

Source figure: Schneider, F. (2012), "Size and development of the Shadow Economy from 2003 to 2012: some new facts".

Figure: Estimate of the size of the shadow economy in 2011 (% of GDP)



The figures contained in this study are necessarily based on assumptions and should therefore be considered cautiously as their certainty is not demonstrated.

To create a stronger, more coordinated approach

Therefore, the Commission has undertaken a review of the measures currently in place, to see how they can be improved and intensified. It has also developed ideas of new initiatives that could help in the fight against fraud and evasion. The aim is to create a stronger, more coordinated approach to tackling tax evasion, aggressive financial and tax jurisdictions, and unfair tax competition.

The Communication sets out a 3 tier approach of improved measures and new initiatives aimed at attacking evasion and fraud from every possible angle, at a national, an EU and an international level. The Communication specifically refers to the need for action to tackle the intentional exploitation of difference in tax systems which undermine Member States' tax rules and lead to the loss of revenues.

Improved measures

The improved measures include:

- **Further strengthening of the Code of Conduct on Business Taxation**. The Code of Conduct is already an important instrument in this regard, with Member States committed to key principles and refraining from introducing measures that would allow harmful tax competition. It has been very successful since it began to be applied in 1998, with over 100 harmful tax measures rolled-back. The Commission is currently looking at how the Code can be further strengthened, and has started work to have its principles applied by key international partners. The Commission is currently in discussions with Switzerland and Liechtenstein to this end.
- **Continue tackling double non-taxation**. The public consultation on double non-taxation which was launched in February 2012 closed at the end of May. The Commission is now compiling and analysing the feedback from this consultation to decide the most appropriate measures to take in tackling this problem, which is frequently exploited by aggressive tax planners and tax avoiders.
- **Promoting automatic exchange of information under the Savings Directive**. This Directive is already proof of the benefits of intra-EU cooperation, with on average 20 billion euro's worth of savings information exchanged between Member States each year. This Directive creates an information exchange system for tax authorities to help identify individuals that receive savings income in a Member State other than their own. The core principle is that of automatic exchange of information. This means that Member States can collect data on the savings of non-resident individuals, and automatically provide this data to the authorities where the individual resides.
- **Signing more savings tax agreements with neighbouring non-EU countries to create a level playing field between the EU and its neighbours**. The EU has savings tax agreements with 5 neighbouring third countries: Switzerland, Andorra, Monaco, Liechtenstein and San Marino. The aim of these agreements is to assist Member States in taxing citizens who have savings accounts in these countries. The agreements also seek to create a more level playing-field between Member States and their non-EU neighbours, by getting these countries to apply measures which are equivalent to those laid down in the EU Savings Directive. Talks are currently ongoing with other third countries (Singapore, Hong Kong, Macao) to promote the application of equivalent measures there too. →

- **Continuing to work on the VAT strategy presented in December 2011 to tackle VAT fraud.** Already, a coordinated strategy to improve the fight against VAT fraud has been implemented since 2008, including measures to strengthen administrative cooperation between tax administrations. An important outcome of this strategy was the creation of Eurofisc, a network of national officials to detect and combat new cases of cross-border VAT fraud.
- **Tailored support to Member States to build up and operate their tax system more effectively.** The Commission provides targeted support and technical assistance to any Member State that needs it to strengthen its tax system against evasion, and improve tax collection. In Greece, for example, Commission services are actively engaged in helping build a more robust tax system to deliver quality revenues.

New measures

The Communication sets out a series of new measures that will be introduced, or should be further explored, to improve the EU approach to fighting evasion and fraud:

- **Improving information exchange.** Automatic exchange of information should be promoted wherever useful. In order for the information that is exchanged to be pertinent and ready for immediate use, it is important to improve the identification of taxpayers. In this context, the Commission will analyse the idea of a cross-border EU tax identification number, while Member States should give greater mutual access to relevant parts of each other's databases.
- **Improving tax compliance.** Tax compliance can be improved by providing taxpayers with better information on EU and national tax rules. The Communication mentions several tools that could facilitate this, including a single Tax Webportal with information on all taxes, for all taxpayers. There should also be measures – at national and EU level – to encourage tax compliance. The Commission will develop a taxpayers' charter, in the spirit of Corporate Social Responsibility. Strong deterrent measures are also an important part of the fight against evasion and fraud.
  In this context, the Communication suggests the possibility of common minimum rules and sanctions for certain types of tax offences. In the next few weeks, the Commission will propose criminal law measures to protect the EU's financial interests against fraud.
- **Tackling evasion and fraud trends.** Quickly identifying new trends and schemes in tax fraud and evasion is crucial to effectively stamp out this activity. New strategy to tackle aggressive tax planning in the EU will be put forward by the Commission before the end of 2012. An action plan will be presented on fighting fraud and evasion with an initiative on tax havens and aggressive tax planning. It will also examine ways to improve access to information on money flows through off-shore bank accounts.

Timing for delivering on the ideas set out in the Communication

Before the end of 2012 the Commission intends to come forward with an action plan based on a proportionate impact assessment, which will identify specific measures which could be developed rapidly if the appropriate political priority is given. The presentation of this plan is foreseen together with the initiative on tax havens and aggressive tax planning. This action plan will set out concrete steps to enhance administrative cooperation and will support the development of the existing good governance policy, the wider issues of interaction with tax havens and of tackling aggressive tax planning and other aspects, including tax-related crimes. ■

BRUSH UP: DUTCH STATUTORY AUDIT AND CONSOLIDATION REQUIREMENTS

Too often directors as well as ultimate beneficial owners of a Dutch private limited liability company (*"Besloten Vennootschap or BV")* or a public limited liability company (*"Naamloze Vennootschap or NV")* that act as a top or intermediary holding company of an international group do not realize that the company should comply with Dutch statutory audit and consolidation requirements, i.e. to prepare consolidated financial statements and/ or have financial statements audited by a Dutch registered auditor or accounting consultant authorised to certify financial statements. It is important to note that directors not complying with these rules may face personal criminal and civil liability.

Therefore, this article wishes to brush-up the Dutch statutory audit and consolidations requirements. As these requirements seem to be complex we have also made a flowchart (see page 14), where every stakeholder of a Dutch company can check whether their company meets the Dutch statutory audit and consolidation requirements.

Size criteria: small, medium-sized and large

To what extent a Dutch company should comply with Dutch statutory audit and consolidation requirements depends on the size of the company.

A Dutch company qualifies as a small, medium-sized or large company if at least two out of three of the pertinent size criteria are met for two consecutive financial years, using consolidated figures of the Dutch company. The size of the company calculated at the end of the first financial year is decisive for the classification of the first and second financial year. These criteria are effective as of 1 January 2004.

Size criteria on a consolidated basis

It is important to note that, whether or not there is a legal requirement to have the financial statements consolidated, these criteria should be checked on a consolidated basis, i.e. the value of the total assets and net turnover in accordance with its stand-alone figures and those of its group companies, whereas the average number of employees includes the employees of group companies.

There is an exception to this rule if the company has applied for the intercompany holding company regime under article 408 Book 2 Dutch Civil Code, as explained below. In that case the company is not obliged to consolidate and it can use just use its own financial information to determine its size on the basis of these criteria.

The total assets in the balance sheet must be determined on a historical cost basis. The net turnover is defined as delivered goods and services excluding VAT minus discounts. When calculating the turnover, please note that dividend income is not considered turnover. Interest income is not considered turnover when the related loans are in fact an extension of the net investment in the investments of the company.

SIZE	Small	Medium-sized *)	Large
CRITERIA			
Total assets in the balance sheet	Up to € 4,4 million	Up to € 17,5 million	More than € 17,5 million
Net turnover	Up to € 8,8 million	Up to € 35 million	More than € 35 million
Average number of employees	Less than 50	Less than 250	250 or more

*) It should not qualify as a small company.

Interest income is considered turnover when the income results from activities that are characteristic of the company. Interest income is considered turnover when the income results from activities that are characteristic of the company.

Audit requirement
Under Dutch law an audit is only legally required for medium-sized and large companies and thus not for small companies.

Accordingly, an audit is not required if a Dutch company qualifies as a small company meeting at least two out of three of the following criteria for two consecutive financial years using consolidated figures:

1. The value of the total assets in the balance sheet does not exceed € 4,400,000;
2. The net turnover does not exceed € 8,800,000;
3. The average number of employees is less than 50.

A company of which the financial data have been included in the consolidated financial statements of another company may be exempt from audit, subject to certain conditions being met (article 403 Book 2 Dutch Civil Code).

Note that if a Dutch company reports under IFRS, there is always an audit requirement.

Any stakeholder may require a company to comply with the audit requirement. Not-compliance is an economic offence in accordance with the Economic Offences Act (*Wet op de economische delicten*).

Consolidation requirement
Under Dutch law the head of (part of) a group should generally prepare consolidated annual accounts as part of the explanatory notes, i.e. it should include the financial information of controlled subsidiaries and other group companies. Accordingly, it must prepare individual (stand-alone) accounts as well as consolidated accounts.

The head of a group (holding company)
The head of a group is the holding company which exercises dominant (policy-making) control over at least one other company, i.e. it gives instructions to this group company on at least the broad lines of policy in terms of both strategy and financing.

The fact that the holding company could exercise this control is not enough. The policy instructions must be enforceable. Generally speaking this enforceability manifests itself through a majority of the voting rights at the meeting of shareholders.

The head of part of a group (intermediate holding company)
If the company is the head of a part of a group (a sub-group), it qualifies as an intermediate holding company, also if it has only one subsidiary.

Although it may be difficult in certain cases to determine whether or not the intermediate holding company has the obligation to prepare consolidated accounts, the general view is that an intermediate holding company with at least one other company in its part of the group over which it has the power to control or perform central management is obliged to consolidate. This is generally the case if the company has a majority of the voting rights at the meeting of shareholders of the subsidiary.

Exemptions to the consolidation requirement
There are three important exceptions to the general rule that the head of (part of) a group should generally prepare consolidated annual accounts as well as stand-alone accounts:

1. The holding company or the intermediate holding company qualifies as a small company in accordance with the size criteria mentioned above;
2. Application of the intermediate holding company regime (article 408 Book 2 →

of the Dutch Civil Code).

3. Application of the group regime (article 403 Book 2 of the Dutch Civil Code Book).

Application of the intermediate holding company regime (article 2:408)

If an intermediate holding company applies for article 2:408, it is not obliged to prepare consolidated financial statements if the financial data that the intermediate holding company should consolidate, have been included in the consolidated financial statements of a larger group, i.e. at a higher level within the group, hereinafter the (ultimate) parent company.

A written objection against this application can be made by at least ten per cent of the members or holders of at least ten per cent of the capital within six months after the beginning of the financial year.

The consolidated financial statements of the parent company and the management board's report should be prepared in conformity with the requirements of the Seventh EC Directive on Company Law or the requirements of one of the Directives of the Council of the European Communities on (consolidated) financial statements of banks and other financial institutions or of insurance companies or according to a similar method if these requirements are not applicable.

If the parent company is resident outside the European Economic Area the requirements to prepare consolidated financial statements should be similar to those of the Seventh EC Directive on Company Law or the other requirements mentioned above. This will need to be checked on a case-by case basis. If the pertinent legal system does not require the publication of consolidated annual accounts, the Dutch company can not apply for the exemption of article 2:408.

Moreover, the consolidated financial statements of the (ultimate) parent company including auditor's report and management board's report, as far as these are not prepared or translated into Dutch, should be prepared or translated into French, German or English and should be filed together with the stand-alone accounts of the intermediate holding company within six months after the balance sheet date or within one month after a later date when the parent company may publish its consolidated accounts, with the Trade Register of the Chamber of Commerce in the place where the intermediate holding company has its domicile or registered address (although reference may be made to another file with the Trade Register in the Netherlands).

In the notes to the stand-alone financial statements of the intermediate holding company disclosure should be made of the fact that the exemption under article 2:408 has been applied; the name and domicile of the company that has filed the consolidated financial statements that include the intermediate holding company's data; and the location of the Trade Register in the Netherlands in which such consolidated statements have been filed.

A consequence of applying the intermediate holding company regime is that the company can value all subsidiaries in its stand-alone accounts at cost rather than at net asset value. Moreover the stand-alone accounts can be used when determining the size of the company, as a consequence whereof the company often qualifies as a small company as intermediate holding companies tend to have hardly any employees and a low net turnover.

Application of the group regime (article 2:403)

If a company applies for the group regime of article 403 Book 2 of the Dutch Civil Code, it is neither required to prepare consolidated financial statements, nor to have these financial statements audited. It is even not obliged to file abbreviated accounts with the Trade Register of the Dutch Chamber of Commerce.

Reason for applying the group regime include competition considerations and cost saving. →

In order to apply for this exemption, the financial data of the company should be included in the consolidated annual accounts of a legal person or partnership at a higher level within the group, which is an indirect or direct shareholder of the company, the (ultimate) parent company.

These consolidated annual accounts and the management board's report should be in Dutch, English, French or German and should be prepared in accordance with the legal system where it is resident in line with the requirements of the Seventh EC Directive on Company Law or the requirements of one of the Directives of the Council of the European Communities on (consolidated) financial statements of banks and other financial institutions or of insurance companies or according to a similar method if these requirements are not applicable. Moreover, the auditor's report and the management board's report should be prepared in the same language as these consolidated financial statements.

If the parent company is resident outside the European Economic Area the requirements to prepare consolidated financial statements should be similar to those of the Seventh EC Directive on Company Law or the other requirements mentioned above. This will need to be checked on a case-by case basis. If the pertinent legal system does not require the publication of consolidated annual accounts, the Dutch company can not apply for the exemption of article 403.

These consolidated annual accounts should be filed together with the annual report and the auditor's opinion should be filed within six months after the balance sheet date or within one month after a later date when the parent company may publish its consolidated accounts, with the Trade Register of the Chamber of Commerce in the place where the intermediate holding company has its domicile or registered address (although reference may be made to another file with the Trade Register in the Netherlands).

Moreover, the parent company should accept liability for debts arising from legal acts by the company. The parent does not have to accept liability for statutory debts, such as taxes. The parent company should file a statement to that extent with the Trade Register only once, the so-called "2:403 liability statement".

Furthermore, the members/ shareholders of the company should approve the application of the group regime after the start of the financial year and prior to the adoption of the financial statements, which statement should be filed with the Trade Register every year, the so-called "consent-statement".

Finally, the company must prepare a condensed balance and profit and loss account within five months after the end of the financial year or within eleven months of the meeting of shareholders has granted a extension thereof. There is no need to have these annual accounts filed with the Trade Register.

The companies to be consolidated

If a holding company or intermediate holding company has an obligation to consolidate, the financial information of the following companies should be consolidated:

1. The holding company or the (intermediate) holding company. However, in exceptional cases this information can be omitted from the consolidated annual accounts.
2. The group companies of the (intermediate) holding company, i.e. the companies over which it exercises actual dominant policy-making control.
3. Companies over which the (intermediate) holding company can exercise dominant policy-making control because the company can exercise the majority of the voting rights at the meeting of shareholders or because the company can exercise control because of a contractual arrangement, such as a shareholders agreement. →

4. Companies under central control by or on behalf of the company, i.e. the (intermediate) holding company can exercise actual policy-making control, without formally being able to enforce compliance with the policy instructions.

The (intermediate) holding company may not include any other company that does not fall into one of the categories above, such as minority interests.

Exemptions to the companies to be consolidated (article 2:407)
In accordance with article 407 Book 2 Dutch Civil Code, under certain circumstances, one or more of the aforementioned companies can be excluded from the consolidated annual accounts:

- Group companies whose total significance is immaterial to the group as a whole;
- Group companies whose financial data can only be obtained at disproportional cost or with great delay;
- Group companies which are only held for disposal.

Proportionate consolidation
The (intermediate) holding company may include the financial information of a joint venture in its consolidated annual accounts in proportion to the interest held in this joint venture if:

1. The (intermediate) holding company is also obliged to prepare consolidated annual accounts, even without the joint venture;
2. The joint venture must be based on a cooperation agreement with the other participants in the joint venture;
3. The proportionate consolidation complies with the statutory requirement that annual accounts should provide a true and fair view.

If the requirements are not met, or if the holding company or intermediate holding company opts not to consolidate the joint venture proportionally, the joint venture will be included in the consolidated annual accounts at net asset value. Please note that these rules will very probably be changed in the near future.

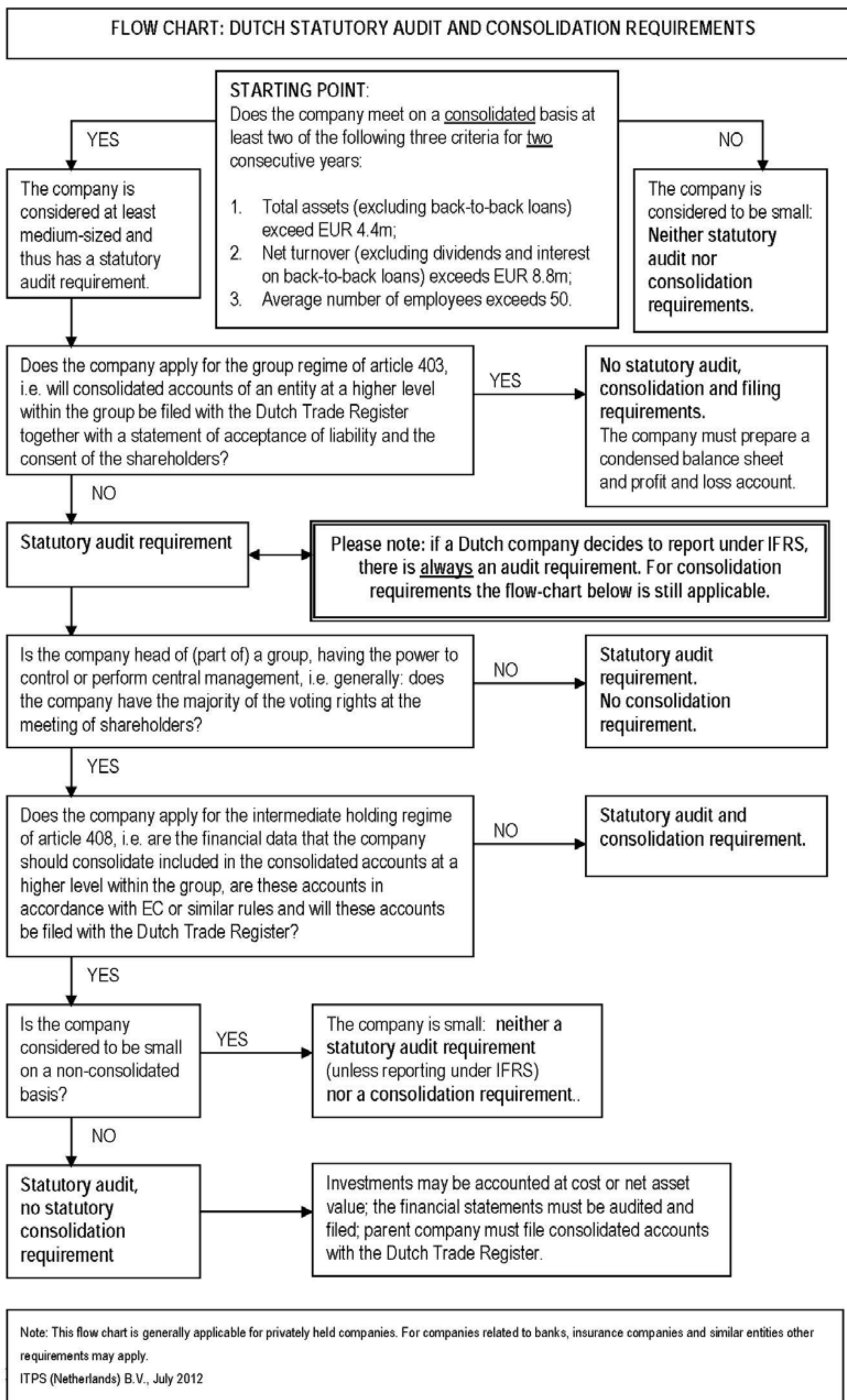
Note
Since Dutch trust offices tend to prepare financial statements at cost price, at a first glance it may seem that a Dutch (intermediate) holding company without any employees, domiciled a Dutch trust office and without any profit does not meet the Dutch statutory audit and consolidation requirements.

But, if it for example it holds a 100% interest in a foreign company that qualifies as a medium-sized company, the Dutch company does meet these requirements because of the rule that it should be determined using consolidated figures. Therefore, these requirements should be checked thoroughly and on an annual basis.

Not complying may lead to personal criminal and civil liability of the directors.

We trust that flow-chart is of assistance to you.

→


FLOW CHART: DUTCH STATUTORY AUDIT AND CONSOLIDATION REQUIREMENTS
STARTING POINT:
Does the company meet on a consolidated basis at least two of the following three criteria for two consecutive years:
1. Total assets (excluding back-to-back loans) exceed EUR 4.4m;
2. Net turnover (excluding dividends and interest on back-to-back loans) exceeds EUR 8.8m;
3. Average number of employees exceeds 50.
YES
The company is considered at least medium-sized and thus has a statutory audit requirement.
NO
The company is considered to be small: Neither statutory audit nor consolidation requirements.
Does the company apply for the group regime of article 403, i.e. will consolidated accounts of an entity at a higher level within the group be filed with the Dutch Trade Register together with a statement of acceptance of liability and the consent of the shareholders?
YES
No statutory audit, consolidation and filing requirements. The company must prepare a condensed balance sheet and profit and loss account.
NO
Statutory audit requirement
Please note: if a Dutch company decides to report under IFRS, there is always an audit requirement. For consolidation requirements the flow-chart below is still applicable.
Is the company head of (part of) a group, having the power to control or perform central management, i.e. generally: does the company have the majority of the voting rights at the meeting of shareholders?
NO
Statutory audit requirement. No consolidation requirement.
YES
Does the company apply for the intermediate holding regime of article 408, i.e. are the financial data that the company should consolidate included in the consolidated accounts at a higher level within the group, are these accounts in accordance with EC or similar rules and will these accounts be filed with the Dutch Trade Register?
NO
Statutory audit and consolidation requirement.
YES
Is the company considered to be small on a non-consolidated basis?
YES
The company is small: neither a statutory audit requirement (unless reporting under IFRS) nor a consolidation requirement..
NO
Statutory audit, no statutory consolidation requirement
Investments may be accounted at cost or net asset value; the financial statements must be audited and filed; parent company must file consolidated accounts with the Dutch Trade Register.
Note: This flow chart is generally applicable for privately held companies. For companies related to banks, insurance companies and similar entities other requirements may apply.
ITPS (Netherlands) B.V., July 2012

TAX TREATY DEVELOPMENTS

Please find below a number of tax treaties for the avoidance of double taxation as well as protocols to these treaties that have become effective recently or will become so shortly. The applicable maximum withholding tax rates under these tax treaties are mentioned. Moreover, if any, the tax treaties that have been terminated recently are also mentioned.

The list does not mean to be exhaustive. Kindly, also check the notes on the next page. Moreover, always check the wording of the pertinent tax treaty and protocol, if any, as there may be special conditions, including but not limited to ultimate beneficial ownership requirements, for the pertinent rate to apply.

Tax treaties between	*Signed*	*Enters/ entered Into force on*	*Will become effective/ became effective on*	*Maximum rates of withholding tax*				
				Dividends			*Interest*	*Royalties*
				General (portfolio)	*Minimum % for special rate*	*Special rate (participation dividends)*		
Cyprus – Poland (Protocol to 1992 DTT)	22 March 2012			5	10	0 *1	5	5
Cyprus – Russia (Protocol to 1998 DTT) *2	7 October 2010	2 April 2012	1 January 2013					
Finland – Turkey	6 October 2009	4 May 2012	1 January 2013	15	25	5	15/ 10/ 5 *3	10
Hong Kong – Mexico *4	18 June 2012							
Hong Kong – Portugal *5	22 March 2011	3 June 2012	1 January 2013 (PT)/ 1 April 2013 (HK)	10	10 *6	5	10	5
Luxembourg – Poland (Protocol to 1995 DTT) *7	7 June 2012			15	10	0	5	5
Luxembourg – Portugal (Protocol to 1999 DTT) *4	7 September 2011	18 May 2012	1 January 2013					
Luxembourg – Seychelles *4	4 June 12							
Kazakhstan – Macedonia *4	2 July 2012							
Malta – Switzerland *8	25 February 2011	6 July 2012	1 January 2013		10	0		
Norway – Portugal *9	11 March 2011	15 June 2012	1 January 2013	15	10 *10	5	10	10
Switzerland – Portugal (Protocol to 1974 DTT)	25 June 2012			15	25 *11	0	0 *12	0 *12
Switzerland – Turkey *4		8 February 2012	1 January 2013					

Tax treaties between	Signed	Terminated	Ceases to apply on
Argentina – Spain (DTT 1992)		29 June 2012	1 January 2013

→

**Notes*

1. 0% if the beneficial owner is a company (other than a partnership) that holds directly at least 10% of the capital of the company paying the dividends for an uninterrupted period of 24 months.
2. The withholding tax rates under the Treaty applicable to dividends, interest and royalties remain unchanged. However, the minimum investment required in order to qualify for the lower rate of 5% on dividends is changed from USD 100,000 to EUR 100,000. The general rule that the country of residence of the seller has the right to tax gains from the disposal of assets is modified in certain circumstances. An important consequence of the Protocol entering into force is the anticipated removal of Cyprus from the Russian Ministry of Finance's black list.
3. 10% on interest derived by a bank; and 5% in respect of a loan or credit made, guaranteed or insured for the purpose of promoting export by the Finnish Export Credit or the FINNVERA or similar Turkish public entities.
4. Further details to be reported.
5. Under a limitation of benefits clause dividends, interest, royalties, capital gains and other income do not apply if the dividends, loans, rights, alienation, or other income payments are created with the main purpose, or have as one of their main purposes, of obtaining treaty benefits.
6. Receiving company should be beneficial owner of the dividend.
7. The treaty will not apply to payments made or income received under an artificial arrangement.
8. The new treaty supersedes the Switzerland-Malta income tax treaty of 18 December 2008, which consequently will never enter into force. The treaty contains an anti-abuse clause, e.g. the reduction of withholding tax does not apply in case of artificially arranged business activities.
9. Replaces the 1970 DTT.
10. The shareholder should hold the subsidiary for an uninterrupted period of at least 12 months prior to the payment of the dividends or for a shorter period, i.e. as long as the subsidiary exists.
11. 0% on corporate dividends (shareholding of 25% for at least 2 years); 0% on dividends paid to pension funds and national banks.
12. Interest and royalties paid between affiliated companies (a shareholding of 25% held for at least two years) will not be subject to withholding tax from 1 July 2013. ■

CURACAO TAX REFORM 2011-2014

As we have informed you in our newsletter of December 2010, as a consequence of a Constitutional Reform, the Netherlands Antilles which had existed since 1954 as an autonomous Caribbean country within the Kingdom of the Netherlands, was dissolved on 10 October 2010. At the same time Curacao became a constituent state within the Kingdom of the Netherlands.

Effective from 1 January 2012

Partly as a result thereof, Curacao drafted a bill of amendment to the country's tax regime, the Tax Provisions of 2011, which was approved by the Curacao Parliament on 15 September 2011, published in the Official Gazette on 29 December 2011 and is generally effective from 1 January 2012.

The Tax Provisions of 2011 is part of Curacao's tax reform process for the period 2011-2014 and is focussed on enhancing the competitive edge of the Curacao jurisdiction, whilst broadening the tax base, shifting from a reliance on direct to indirect taxes and moderately increasing overall tax revenue. It is important to note that the overall tax regime broadly remains the same as that of the former Netherlands Antilles. The most important changes are summarized below.

Corporate income tax rate reduced to 27.5%

The corporate income tax rate of 34.5% was reduced to 27.5%. The aim is to further reduce the rate to 15% percent in the near future, though no draft legislation has been presented at this point.

Participation exemption

The Curacao participation exemption applies if:

- A resident company owns at least 5% of the paid-in share capital, or 5% of the voting rights of another (resident or non-resident) company; or
- A resident company holds a participation of less than 5%, but with a value of more than USD 500,000.
- A resident company is a member of a Dutch co-operative (*Coöperatie)* or of a Dutch mutual insurance company (*Onderlinge Waarborgmaatschappij)*.

Subject to the application of the participation exemption, dividends, stock dividends, bonus shares, hidden profit distributions and capital gains (including currency gains) realized on the disposal of (part of) a qualifying participation in a resident or non-resident company are fully exempt from corporate income tax.

Dividends from low-taxed passive investments – exemption reduced from 70% to 63%

However, until 1 January 2012, the participation exemption regarding dividends from so-called low-taxed passive investments is only 70% (in stead of 100%), resulting into an effective tax rate of (30% x 34.5% is) 10.35%, if:

- The subsidiary is not subject to a nominal profit tax rate of at least 10% ("subject to tax" test); <u>and</u>
- More than 50% of the subsidiary's assets consists of passive investments ("asset" test).

Effective 1 January 2012, the participation exemption regarding dividends from low-taxed passive investments is reduced from 70% to 63%, resulting into an effective tax rate of (37% x 27.5% is) 10.175%, to ensure that the effective tax rate on dividends from-low taxed passive investments will at least be 10% (note that an exemption of 70% under the new corporate tax rate of 27.5% would have lead to an effective tax rate of 30% x 27.5% is 8.25%) and thus will not potentially trigger anti-avoidance legislation in other tax jurisdictions. The consequence of this amendment is an even lower tax burden on dividends received from "low taxed passive investments". →

The rules pertaining to dividends from low-taxed passive investments (did not and) do not apply to dividends from a participation that (almost) exclusively (directly or indirectly) holds immovable property, so that a 100% participation exemption applies to these dividends.

Turnover tax

To finance the reduction of the corporate income tax rate from 34.5% to 27.5%, the turnover tax rate has been increased from 5% to 6% and the tax base broadened. For example, services rendered by non-resident entrepreneurs to entrepreneurs resident in Curacao will be deemed to be performed in Curacao and thus subject to turnover tax, leading to a level playing field for foreign and domestic service providers.

Transparent limited liability company

Effective 1 January 2012, a public limited liability company (*Naamloze Vennootschap or NV*) or a private limited liability company (*Besloten Vennootschap or BV*) may apply becoming a "transparent limited liability company", as a consequence whereof the company is disregarded for Curacao tax purposes and all of its income and assets will be allocated to its shareholders.

Consequently, the shareholders may be subject to profit tax or personal income tax in their country of residence. At that level the NV or the BV should in principle be considered as a normal limited liability company subject to profit tax. By making use of the potential difference in the qualification of the transparent company between jurisdictions, it should be possible to defer profit tax. If the transparent status is granted, the company will however not be eligible for benefits under a tax treaty.

A number of conditions have to be met, inter alia the company may not have bearer shares; the articles of association should contain a right of first refusal (or pre-emption rights clause); the board of directors should maintain a record in which the ultimate beneficial owners who hold an interest of at least 10% are registered.

If these conditions are not fulfilled, the transparent status will cease to exist with retroactive effect from the 1st of January of the pertinent year.

The application must be submitted to the Inspector of Taxes by the company's board of directors on behalf of the shareholders. If no decision is made within two months from the date of application the request will deemed to be granted.

A transparent entity is only subject to limited filing obligations. It should file annually:

- A statement confirming that no bearer shares have been issued;
- A list of shareholders who sold their interest; and
- A balance sheet and a profit & loss account for that year.

Upon request from a foreign tax authority, this information may be exchanged under tax information exchange agreements.

Private foundations may opt for a taxable status at an effective tax rate of 10%

A private foundation is a commonly used entity for international asset protection, privacy, estate planning, passive portfolio and international holding structures. Until the end of December 2011, Curacao private foundations were not subject to tax on income unless they carried out active business operations. The disadvantage of this tax-exempt status was that it made foundations less attractive in international tax planning involving certain jurisdictions, i.e. jurisdictions that may impose a subject-to-tax requirement.

Although following the implementation of the Tax Provisions of 2011, a private foundation would generally still be fully tax exempt (unless it is conducting business activities), as per 1 January 2012, it may opt to be treated as a so-called allocated fund ("*doelvermogen*") subject to corporate income tax at a rate of 10%. To that effect a request needs to be filed with the Curacao tax authorities. →

If it opts for this taxable status it also benefits from the Curacao participation exemption.

The effective tax rate of 10% has been introduced to meet international standards. Various jurisdictions have agreed not to apply local CFC legislation if an entity meets a minimum and reasonable effective tax rate. Within the EU, an effective tax rate of at least 10% is considered to be reasonable.

Tax reform enhances the competitive edge of Curacao

From the above it will be clear that the tax reform process is very much focussed on enhancing the competitive edge of the Curacao jurisdiction.

The amendment of the participation exemption to international standards, the introduction of a transparent Curacao entity and of a private foundation without a tax exempt status, combined with a civil law system in an OECD compliant country, whereas the overall tax regime broadly remains the same as that of the former Netherlands Antilles, should list Curacao as the premier location for new funds, international asset protection, passive portfolio and international holding structures. ■

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ITPS GROUP PROFILE

Needs of clients

As business is becoming more international, organizations are seeking ways to minimize the incidence of taxation linked to it. On the other hand, organizations as well as individuals are seeking international ways to optimize their profits and to protect their assets. The increasing complexity of (tax) laws necessitates careful planning and consideration of the structure to be established and maintained. Customers require highly specialized professional services.

Mission

The purpose of ITPS is: doing the best the things that the customer values most. The focus is long term customer satisfaction. The mission of the ITPS Group is to create value for it's customers through the provision of professional services in the field of international tax planning and structure, designed to optimize the customer's after tax profits.

Services

The objective of ITPS is to meet customer needs for international tax planning and structure by rendering "total offering" services with the highest standards of professional and personal service combined with complete confidentiality.

This comprehensive offering comprises not only the advice for international tax planning (i.e. for legal and tax questions), but also implementation to establish and maintain structures.

These services include, but are not limited to:

- International tax planning;
- Company formation, registered office facility, management, accounting and tax compliance;
- Trust and foundation formation and administration;
- Licensing and sub-licensing of intellectual property rights.

The services ITPS does not provide, but which we are rendered by correspondents, include auditing, legal opinions, litigation and portfolio investment.

Why you should use ITPS

The ITPS Group holds an unique position in each of these jurisdictions for the following reasons:

1. Market oriented (and not product oriented):
ITPS focuses on meeting the needs of the clients;
2. Rendering international tax planning and structure (trust) services:
Tax planning and structure services are complementary. Planning is of no use if you do not structure it. Moreover you can not efficiently structure if you do not take the first step: plan the structure. Therefore, the services of ITPS are not restricted to trust services. Since ITPS has the combined skill and experience for more than ten years, high quality is ensured;
3. All included fixed fees for structure (trust) services:
In each jurisdiction, tax structure services are charged at annual fixed fees, generally payable in quarterly installments in advance. Tax planning services are charged at an hourly rate;
4. One contact person is possible for several jurisdictions;
5. Independent:
There is no conflict of interest. ITPS works with all other skilled professionals and (financial) institutions as the client deems appropriate;
6. Personal contact and continuity:
ITPS focuses on long-term customer satisfaction, providing proactive, personal, attentive and competent services;
7. Regular meetings:
Customers and correspondents are visited on a regular basis (three to four times a year) to touch base and to discuss opportunities and problems that may have arisen, without a fee being charged;
8. Tax sparring and education:
ITPS strives to built up a (tax) sparring relationship with customers and correspondents in order to keep each other abreast in a fast changing environment. A quarterly newsletter on international tax planning, the International Tax Planning Newsletter, is sent to inform customers and correspondents on the changes in legislation;
9. An excellent network:
Since ITPS is not part of an international network, it has built up a network of highly skilled professionals to work with.

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