Executive summary

On 23 February 2016, the Netherlands Presidency of the Council of the European Union (the Dutch Presidency) presented to the members of the High Level Working Party on Taxation (HLWP) an EU-BEPS Roadmap setting out how the Dutch Presidency intends to carry out work on various European Union (EU) initiatives relating to tax competition and base erosion and profit shifting (BEPS) during its term, which ends in June.

The Roadmap outlines a timetable for implementing the European Commission’s 28 January 2016 anti-tax avoidance package which comprises four elements: (i) a proposed EU Anti-Tax Avoidance Directive (the ATA Directive) that would implement four of the Organisation for Economic Co-operation and Development’s (OECD’s) BEPS Action items (interest deductibility, a general anti-abuse rule, controlled foreign company (CFC) rules, and a framework to tackle hybrid mismatches) as well as two measures (a switch-over clause and consistent exit tax regimes) that were earlier considered as part of the Commission’s 2011 common consolidated corporate tax base (CCCTB) proposal; (ii) a proposed Directive that would implement the automatic exchange of country-by-country (CbC) reports (the CbCR Directive); (iii) a Recommendation on the implementation of measures against tax treaty abuse; and (iv) a Communication proposing a framework for a new EU external strategy for effective taxation.
The Roadmap also addresses the Dutch Presidency’s agenda regarding, inter alia, a proposed anti-abuse clause to the Interest and Royalties Directive, a reform of the Code of Conduct Group (business taxation), guidance on hybrid permanent establishment (PE) mismatches in situations involving third countries, and changes to existing EU patent box regimes in line with the “modified nexus approach.”

Lastly, the Roadmap outlines work items that the Member States have expressed a willingness to undertake in the medium term, including coordinating the EU’s work on transfer pricing with the OECD’s Action Plan recommendations regarding transfer pricing, developing EU guidance on the OECD’s Action 12 recommendations on disclosure of aggressive tax planning, and developing rules on the issuance of tax rulings.

### Detailed discussion

The Roadmap traces back to a 25 November 2014 HLWP meeting during which the members discussed plans to carry out further work relating to unfair tax competition and BEPS in an EU context. It was decided that a concrete roadmap should be developed setting out the actions and clear timelines for carrying out the work and taking account of the OECD’s BEPS Action Plan. Accordingly, Roadmaps were developed during the EU presidencies of Italy (July-December 2014), Latvia (January-June 2015) and Luxembourg (July-December 2015).

Following the Luxembourg Presidency’s 8 July 2015 issuance of its Roadmap, additional actions were taken by ECOFIN and the Commission. At an 8 December 2015 meeting, ECOFIN adopted conclusions on the EU implementation of the OECD’s October 2015 final BEPS recommendations and on the future of the Code of Conduct on business taxation. That was followed by the Commission’s 28 January 2016 release of a four-part anti-tax avoidance package.

The Dutch Presidency states that its Roadmap takes into account views expressed by Member States in informal bilateral contacts, as well as the recent Commission initiatives and the results of the OECD’s work on BEPS. The Roadmap sets out work that the Dutch Presidency intends to carry out in the short term (i.e., between now and the end of its term in June 2016), and work that could possibly be carried out in the medium term (i.e., the work could begin during the Dutch Presidency’s term but may not necessarily be completed by June 2016).

### Short term work

**The ATA Directive**

The Dutch Presidency states that it will capitalize on the work that has already been done in the context of the OECD’s BEPS project and by previous Presidencies, in particular by the Luxembourg Presidency with regard to the international anti-BEPS aspects of the 2011 CCCTB proposal, and will give high priority to the Commission’s proposed ATA Directive, with a view to reaching a political agreement by the end of its term (i.e., June 2016).

**The CbCR Directive**

The Dutch Presidency states that it will also give high priority to the proposed CbCR Directive, on which considerable work has already been done within the OECD’s BEPS project, with a view to reaching an early political agreement and adopting the legislative act by the end of its term.

**Good governance in tax matters in third countries**

The Dutch Presidency states that it will discuss an appropriate way forward in addressing good governance in tax matters in third countries, in line with the ECOFIN conclusions of 14 May 2013 (item 20), in which ECOFIN committed to further work on how best to ensure that third countries meet appropriate standards of good governance in tax matters and invited consideration of whether developing an EU list of third country non-cooperative jurisdictions is appropriate. The Dutch Presidency states that those discussions will include possible ECOFIN conclusions regarding the Commission’s 28 January 2016 Communication on a new EU external strategy for effective taxation.

**OECD BEPS treaty-related measures**

The Dutch Presidency notes that ECOFIN’s 8 December 2015 conclusions regarding the EU implementation of the OECD’s BEPS deliverables mentioned that certain OECD recommendations affect bilateral double taxation agreements entered into by EU Member States. The Dutch Presidency states that it foresees an exchange of views through the HLWP regarding those issues, along with discussions on the multilateral instrument being developed by the OECD under Action 15 (which is expected to be finalized and open for signature by the end of December 2016) and the Commission’s 28 January 2016 Recommendation on the implementation of measures against tax treaty abuse. The Dutch Presidency states that the latter may be tackled through the possible ECOFIN conclusions envisaged in the discussions pertaining to good governance in tax matters in third countries (see above).
Interest and Royalties Directive
The Dutch Presidency notes that the Latvian EU Presidency carried out work on developing a de minimis anti-abuse clause to the proposed recast of the Interest and Royalties Directive (IRD), similar to the one adopted for the Parent-Subsidiary Directive (2011/96/EU). The Latvian Presidency hoped to reach an agreement by June 2015 on that aspect of the IRD, leaving the remaining provisions for later discussions. However, several Member States were not in a position to agree to that approach and argued that the discussion should be held on the proposal as a whole, notably on the “effectively subject to tax” criterion contained in the 2011 recast proposal.

In early September 2015, the Luxembourg EU Presidency held discussions with the HLWP and ECOFIN on the concept of minimum effective taxation (MET). In two meetings held in September and October 2015, the Working Party on Tax Questions focused on the possible inclusion of a MET clause in the IRD and advanced technical work on three areas: the major elements of such a clause, the determination of a level of tax to be considered as low taxation, and the options to draft such a clause in a legislative text.

The Dutch Presidency states that it intends to take stock of these discussions as a basis for developing a Presidency compromise, with a view to obtaining a political agreement. It intends to build on the two alternatives submitted under the Luxembourg Presidency (MET rate as sole criterion or MET rate combined with an economic activity test), and further explore possibilities to drafting a practical and well-targeted MET clause that will provide legal certainty and prevent loopholes. The Dutch Presidency notes that a possible inclusion or reference to the OECD’s “modified nexus approach” in the IRD could be explored.

Reform of the Code of Conduct Group (business taxation)
The Dutch Presidency notes that in ECOFIN’s 8 December 2015 conclusions on the future of the Code of Conduct Group on business taxation, ECOFIN invited the HLWP to “discuss a revision to the [Group’s] mandate in relation to the concept that profits are subject, as appropriate, to an effective level of tax within the EU, notwithstanding the competencies of Member States in the area of taxation” and to “conclude on the need to enhance the overall governance, transparency and working methods and to finalize the reform of the Group during the Dutch Presidency.”

The Dutch Presidency states that in light of another of ECOFIN’s 8 December 2015 conclusions - i.e., that anti-BEPS measures that can be implemented through EU legislation should take priority over possible parallel soft-law discussions - it considers that, at this stage, it would be difficult to discuss the revision of the Code of Conduct Group’s mandate in parallel with discussions on the possible inclusion of a MET clause in the IRD.

Given that further discussions on extending the Group’s mandate should take into account the possible inclusion of a MET clause in the IRD, the Dutch Presidency states that it intends as a first step to discuss the governance, transparency and working methods of the Group. The Presidency intends to put forward concrete proposals in this area, taking into account the importance of striking the right balance between enhancing the Group’s transparency and the need for confidentiality in the Group’s deliberations, so that it can continue to deliver results.

As a second step, the Dutch Presidency states that it will start discussions on revising the Group’s mandate in relation to the concept that profits should be subject, as appropriate, to an effective level of tax within the EU. The Presidency aims to decide on the issue of the Group’s mandate before the end of its term.

Hybrid mismatches
Following the finalization of guidance and explanatory notes on hybrid entity mismatches in situations involving third countries by the Code of Conduct Group’s hybrid subgroup (and which were agreed by the Group in November 2015), the Dutch Presidency states that it intends to capitalize on this success and reach agreement before the end of its term on guidance and explanatory notes on hybrid PE mismatches in situations involving third countries.

Patent boxes
The Dutch Presidency notes that the Code of Conduct Group will continue monitoring the legislative process necessary to change existing patent box regimes following the agreement reached on the interpretation of the modified nexus approach and Member States’ subsequent commitment to report on the progress made through the annual standstill and rollback reports.
Medium term work
The Dutch Presidency notes that the Member States have expressed a willingness to undertake work in the medium term on several other items.

Transfer pricing
The Dutch Presidency notes that several Member States have stressed the need to ensure coordination between the EU's work in the area of transfer pricing and the OECD's work in the context of its BEPS project. It states that the Code of Conduct Group will start developing EU guidance on the interpretation of the fourth criterion for identifying potentially finding harmful measures (which is the granting of tax advantages even in the absence of any real economic activity) following the OECD's conclusions on Actions 8-10 on the aligning of transfer pricing outcomes with value creation. The Dutch Presidency notes that this guidance should take into account the work done in the EU Joint Transfer Pricing Forum, which will continue to communicate its findings to the Council.

Outbound payments
The Dutch Presidency notes that the Code of Conduct Group included outbound payments in its Work Package 2015. The initial work, which could start in spring 2016, will involve the identification of potential problems that arise when payments are made from the EU to a third country.

Disclosure of aggressive tax planning
The Code of Conduct Group will assess the opportunity of developing EU guidance for implementing the OECD's conclusions on Action 12 (disclosure of aggressive tax planning), notably with a view to facilitate exchange of such information between tax authorities.

Beneficial ownership of non-transparent entities
The Dutch Presidency notes that some Member States have expressed a strong interest in extending access to the beneficial ownership register envisaged in the 4th Anti-Money Laundering Directive (Articles 29-30) to tax authorities, in order to exchange information for tax purposes.

The Directive entered into force in June 2015. The Dutch Presidency states that the outcome of the negotiations, as well as possible next steps, could be discussed from a tax perspective, also taking into account the Action Plan to strengthen the fight against the financing of terrorism adopted by the Commission on 2 February 2016.

Dispute settlement in the area of transfer pricing
The Dutch Presidency states that the HLWP could discuss the state of play regarding the Arbitration Convention allowing the settlement of disputes concerning transfer pricing.

Conditions and rules for the issuance of tax rulings
The Dutch Presidency notes that according to the Code of Conduct Group's Work Package 2015, the Group will develop a set of guidelines on the conditions and rules for the issuance of tax rulings by Member States.

Implications
The Roadmap once again reflects the ambitious position of the Dutch Presidency to bring forward all pending topics in respect of aligning the tax laws of the 28 Member States and counter fighting base erosion and profit shifting. It is therefore important to constantly monitor the developments at EU level in order to be prepared for the upcoming legislative changes.

Endnotes
1. The HLWP is a preparatory body of the Economic and Financial Affairs Council of the European Union (ECOFIN) that examines tax-related legislative proposals sent by the Commission to ECOFIN. The HLWP is composed of experts from each Member State and is chaired by the delegate of the country holding the rotating six-month presidency of the Council.

2. See EY Global Tax Alert, European Commission releases anti-tax avoidance package designed to provide uniform implementation of BEPS measures and minimum standards across Member States, dated 28 January 2016.

For additional information with respect to this Alert, please contact the following:

**Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft, Munich**
- Dr. Klaus von Brocke  
  +49 89 14331 12287  
  klaus.von.brocke@de.ey.com

**Ernst & Young LLP, Washington, DC**
- Rob Thomas  
  +1 202 327 6053  
  rob.thomas@ey.com
About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients.

For more information about our organization, please visit ey.com.

EU Tax Services

© 2016 EYGM Limited.
All Rights Reserved.

EYG no. CM6271

1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com