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**Board of General Fiscal
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Your letter (reference)

Date 27 November 2015
Subject Cabinet Response to the European Commission Decision on Starbucks
Manufacturing BV

Enclosures

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Dear President,

I - Introduction

An increasing amount of effort has these past few years been expended on countering tax avoidance by multinational enterprises. The Cabinet supports this fight, cooperating with its partners in both the European and the OECD context. The problem arises from differences between national tax systems. Enterprises, whether large or small, are to pay taxes in the country where they create economic value. So as to come to an effective approach, the OECD submitted a number of proposals aimed at countering Base Erosion and Profit Shifting (BEPS). The Netherlands attaches great importance to this project and will endeavour, in the European context, to come to international agreements.

At the same time, the European Commission on 21 October 2015 ruled that the Dutch Tax Authorities granted a selective advantage to Starbucks Manufacturing EMEA BV (Starbucks) by means of a so-called Advance-Pricing Agreement (APA), which implies a case of alleged illegal State aid. As the Dutch Tax Authorities use internationally recognised methods and the Commission's decision in this case raised many questions, the Cabinet considered itself forced to appeal the decision.

This letter will first address the Cabinet's view on the fight against tax avoidance while maintaining an attractive business climate. Our pursuit of an attractive fiscal business climate will also be further elaborated in the year ahead in accordance with the Neppérus motion¹. Next, we will indicate why the Netherlands appeals the decision in the Starbucks case. And finally, we will address the progress of the initiatives launched by the Netherlands to counter tax avoidance.

II – Fighting tax avoidance while maintaining an attractive business climate

¹ Parliamentary documents II 2015/16, 34 302, no. 73.

In my letters of 2 June² and 5 October³ 2015, I explained my strategy of how the Netherlands, within the existing OECD and EU cooperation framework, will put into practice the fight against tax avoidance using a differentiated approach. This strategy comprises three different aspects:

- The (pro)active adjustment of the Dutch regulations and treaties.
For example: Adopting the measures contained in the BEPS project concerning transfer pricing rules where necessary.
- Adjustments resulting from the coordinated international approach.
For example: Interest-deduction restrictions, hybrids and CFC rules.
- Promoting the Dutch policy.
For example: The accessibility of the Dutch Tax Authorities and giving advance certainty.

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It is essential that countries cooperate in fighting against tax avoidance and creating a sustainable level playing field. The OECD's BEPS project in this connection among other things works to prevent royalties from not being taxed in any single country. Where Dutch legislation clashes with the international agreements, the Cabinet personally takes measures to amend Dutch legislation and treaties. As far as Dutch regulations and Dutch policy on transfer pricing are concerned, they are already based on OECD Transfer Pricing Guidelines. The arm's length principle, which is elaborated in the Transfer Pricing Guidelines, has been incorporated into Dutch law.

Besides the proactive adjustment and potentially coordinated approach, the Cabinet wants to continue strongly promoting certain facets of Dutch policy. One of the strengths of the Dutch policy is the advance certainty provided by the Dutch Tax Authorities. This can be achieved through rulings, such as an APA or ATR (Advance Tax Ruling), by which enterprises can be provided, within the applicable legislative, policy and jurisprudential framework, with advance certainty about how the payable tax will be calculated. The Commission has itself also cited this practice as proof that the Netherlands generally applies a thorough assessment based on comprehensive information that the taxpayer is required to furnish.⁴

III – Starbucks

The Commission's decision in the Starbucks case is not compatible with the aforementioned policy pursued by the Cabinet. The Commission's decision in the Starbucks case focuses on the APA between the Tax Authorities and Starbucks. The Tax Authorities, acting in accordance with the international OECD framework for transfer pricing, applied the so-called Transactional Net Margin Method. By this method, members of multinational enterprises are treated in an identical fashion as independently operating national enterprises: profits are taxed wherever value is created, and this applies to everyone equally. In its decision, the Commission uses its own interpretation and application of the OECD guidelines about the transfer pricing methods, with the result that, according to the Commission, the so-called Comparable Uncontrolled Price (CUP) method should have been applied. The Dutch government does not believe that the CUP method should have been applied in the Starbucks case because of the absence of suitable data. Moreover,

² Parliamentary documents II 2014/15, 25 087, no. 102.

³ Parliamentary documents II 2015/16, 25 087, no. 112.

⁴ European Commission press release of 11 June 2014

in its decision, the Commission applies its own new criterion for profit calculation, which is incompatible with domestic regulations and the OECD framework. The Commission states in its Starbucks decision that the arm's length principle applied here is not the same as the arm's length principle stemming from Section 9 of the OECD treaty. This causes confusion and uncertainty. For the Tax Authorities such uncertainty relates to the question of what rules are to be applied in which fashion. And for enterprises, such uncertainty relates to the proper application of rules in rulings. So as to obtain more clarity and jurisprudence in this matter, the Cabinet appeals the decision.

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In order to inform your Chamber to the fullest, I, availing myself of the powers vested in me by virtue of Section 67(3) of the General Tax Act to grant exemption from the tax confidentiality clause, am enclosing with this letter a summary of the Commission's decision. I have decided in this case to make public this summary because it concerns a highly-principled, exceptional case, a lot of information about which is already in the public domain. The Commission's decision will in any case be made public as soon as the Commission has removed the confidential information from the decision. For the record, I should point out that the summary represents the views of the Commission and not those of the Netherlands.

IV – Progress in fighting tax avoidance

In the context of the strategy summarily presented in Section II of this letter, the Cabinet has launched different initiatives. In the below, I will discuss the progress made in this connection.

- The Cabinet will already include the minimum standards for fighting treaty abuse in negotiations on tax treaties.
- The Commission is expected to present a proposal for an 'anti-BEPS directive' at the start of 2016 whereby different action points will be elaborated in a single directive. As president of the Ecofin Council, the Netherlands will prioritise making work of the proposed directive.
- In view of the increased use of cooperatives in an international context, the Cabinet will look into the difference in tax treatment between the different corporate forms, such as public or private limited companies (NVs and BVs) and cooperatives, in Dutch dividend tax.
- In the context of transparency, the Netherlands has started with the bilateral sharing of information on rulings with Germany on the basis of previously concluded Memorandum of Understanding. In addition, the Netherlands is preparing itself for the speediest possible application of the OECD agreements on the automatic exchange of information on rulings with other countries next year.
- The legislation on country-by-country reporting between tax administrations, which is currently being debated by the Senate, is to be effective from 2016. Included in this legislation is the stipulation that large enterprises have to disclose their worldwide taxable profit allocation and the (income) tax paid in countries where they have offices.
- The Netherlands has taken measures to prevent unintended use of treaties, including by tightening up the substance requirements. Financial service companies now also have to meet the substance requirements without having been provided with advance certainty. The Tax Authorities

no longer provide advance certainty to taxpayers that do not satisfy the substance requirements.

- The Netherlands has stepped up supervision of financial service companies. They are to be more than mere letterbox companies. That section of the APA/ATR team charged with supervision has attracted seven new employees and presently has a staff of 30. This allows for not only protecting the Dutch tax base, but also cooperating with foreign countries to counter abuse. There have been 106 investigations into substance requirements since 2014. Information has been provided to foreign partners in 38 cases since 2014 because the substance requirements had not been satisfied
- An additional seven specialists will be engaged to be able to more frequently assess whether the facts and circumstances forming the basis for the advance certainty are still in place. If not, the APA or ATR expires or is adjusted.
- In the results of investigations conducted by the Dutch Central Bank (DNB), the DNB stated that, from the perspective of the integrity of the Dutch financial system in the broad sense, services provided by trust offices to corporate structures are no longer acceptable. This concerns corporate structures that ensure anonymity of the end stakeholder. Such structures are sometimes used for tax evasion purposes. The Cabinet will therefore table a bill next spring to specifically ban trust offices from providing services aimed at such structures.
- As indicated in previous letters⁵, the Netherlands desires to take the lead in increasing transparency as a vital weapon against tax avoidance. The Netherlands aims to take further steps in this connection during its EU presidency, particularly in the context of the EU Code of Conduct group. The Netherlands feels that the confidentiality agreement in force within the Code of Conduct Group is due for revision. The Cabinet in this connection wants to distinguish between the review of individual tax regimes and the Group's preparation of guidelines. The Cabinet believes the guidelines adopted by the Group should be published openly, while more insight should be offered into the development of this pseudo-legislation.

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In summary

So as to obtain clarity and jurisprudence on the application of advance certainty through rulings, the Cabinet appeals the Commission's Starbucks decision. The Cabinet believes the Commission has failed to convincingly prove that the Tax Authorities deviated from statutory regulations and that State aid was provided.

In addition, the Netherlands is in various areas actively collaborating with other countries to counter international tax avoidance. For example, the Cabinet is taking action to step up supervision of financial service companies and current APAs and ATRs and increase transparency in the context of the EU Code of Conduct group. All of this should lead to a better approach to tax avoidance.

Yours sincerely

⁵ Including the letter of 2 June 2015, Parliamentary documents II 2014/15, 25 087, no. 102.

J.R.V.A. Dijsselbloem,

Minister of Finance

Eric Wiebes

State Secretary of Finance

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