

**EXPLANATORY MEMORANDUM TO
THE TAX INFORMATION EXCHANGE AGREEMENT (TAXES ON
INCOME) (NETHERLANDS ANTILLES) ORDER 2005**

1. i) Title of instrument

The draft Tax Information Exchange Agreement (Taxes on Income) (Netherlands Antilles) Order 2005, laid before the House of Commons on 17 May 2005.

Laying Authority and Purpose

This Explanatory Memorandum is laid before the House of Commons by Command of Her Majesty and contains information for the Select Committee on Statutory Instruments.

To give effect within the domestic legal system of the United Kingdom, so far as necessary, to the provisions of an Agreement on tax information exchange entered into by the United Kingdom and the Kingdom of the Netherlands in respect of the Netherlands Antilles.

ii) Department responsible

HM Treasury and HM Revenue and Customs

2. Description

This draft Order brings into effect those arrangements specified in the Agreement set out in Part I of the Schedule annexed to the draft Order, and the exchange of letters set out in Part II of that Schedule.

3. Matters of special interest to the Select Committee on Statutory Instruments

i) Type of resolution

This draft Order is subject to the affirmative resolution procedure.

ii) Details of the Agreement

Further details of the Tax Information Exchange Agreement scheduled to the draft Order are annexed to this Memorandum.

4. Legislative Background

i) General

This Order is made under section 815C of the Income and Corporation Taxes Act 1988 (c.1), which was amended by section 198 of the Finance Act 2003 (c.14).

Section 815C of the Income and Corporation Taxes Act 1988 provides the mechanism by which arrangements made with overseas territories (including the dependent and [associated][overseas] territories of the United Kingdom) for the exchange of information necessary for carrying out the domestic laws of the United Kingdom concerning income tax, capital gains tax, corporation tax in respect of income and capital gains and taxes of a similar character in the other territory are given effect in the United Kingdom.

The relevant Convention or Agreement is scheduled to an Order made under section 815C of the ICTA 1988.

5. Extent

The draft Order applies to the whole of the United Kingdom.

6. European Convention on Human Rights

The Paymaster General (Dawn Primarolo) has confirmed that, in her view, the provisions of this draft Order are compatible with the European Convention on Human Rights.

7. Policy background to the instrument

This Agreement with [the Kingdom of the Netherlands in respect of] the Netherlands Antilles is one of the agreements by which certain dependent territories of Member States will implement the same measures as those contained in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (“the Directive”). Application of the Directive is contingent on the application of “same measures” by those territories, and “equivalent measures” by certain third countries. The Directive rules and the rules provided for under these agreements will therefore all take effect from the same date.

The Agreement is concluded in form of a Tax Information Exchange Agreement (TIEA). These instruments are designed to facilitate the exchange of information between tax authorities for direct tax purposes, in order to help the authorities counter cross-border tax evasion and avoidance.

Like TIEAs, the Agreement includes safeguards to ensure both the confidentiality of the information exchanged and that such information is used only for tax purposes.

8. Impact

i) On business, charities, voluntary bodies or individuals

The impact of implementing the specific changes required of relevant bodies [(excluding the Government)] by this Agreement are marginal, and occur as a part of the system changes necessary to the implementation of the Directive.

The detailed Regulatory Impact Assessment (RIA) for the Directive can be found at <http://www.hmrc.gov.uk/ria/eusd-ria.pdf>.

ii) On the Exchequer

Tax Information Exchange Agreements enable countries to obtain information to assist them to properly enforce their domestic tax laws. Agreements do not generally have an Exchequer cost; rather they improve HM Revenue and Customs' ability to tax UK residents on their world-wide income and gains and collect the proper amount of tax due.

The impact on the Exchequer of this Agreement will be positive and a factor of the overall benefits to the Exchequer of the implementation of the Directive (also covered in the Directive RIA mentioned above).

9. Contact

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**CONVENTION BETWEEN
THE KINGDOM OF THE NETHERLANDS IN RESPECT OF
THE NETHERLANDS ANTILLES AND
THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN
IRELAND
CONCERNING THE AUTOMATIC EXCHANGE OF INFORMATION
ABOUT SAVINGS INCOME IN THE FORM OF INTEREST PAYMENTS**

GENERAL

This Tax Information Exchange Agreement, in the form of a Convention between the United Kingdom and the Kingdom of the Netherlands in respect of the Netherlands Antilles, secures application in the Netherlands Antilles of the same measures as are contained in Directive 2003/48/EC on taxation of savings income in the form of interest payments (“the Directive”).

This is to fulfil the condition in the Directive (Article 17) under which application of the Directive is contingent on application, from the same date of same measures by certain territories¹, and equivalent measures by certain third countries.

The Convention constitutes a reciprocal arrangement between the parties for the exchange of information on savings income in the form of interest payments made cross-border from one party to individuals resident in the other party.

The Convention adopts the same definitions as the Directive and operates on the basis that the same mechanisms as in the Directive will be followed for the identification of individual owners, and for collecting the information to be exchanged.

For an initial transitional period corresponding to the transitional period in the Directive, the Netherlands Antilles will levy a withholding tax on relevant payments, unless the individual owner opts for the interest to be reported. (This arrangement corresponds to the transitional provisions granted under the Directive to Austria, Belgium and Luxembourg.) Income generated by the withholding tax will be shared with the United Kingdom, and relieved in the same manner as in withholding tax is to be relieved under the Directive.

¹ Per Article 17(2)(ii) of the Directive, the territories concerned are the Channel Islands, Isle of Man and the relevant dependent or associated territories in the Caribbean. The relevant third countries – Article 17(2)(i) – are Switzerland, Liechtenstein, San Marino, Monaco and Andorra.

NOTES ON DETAILS

RECITALS

The recitals explain the genesis of the Convention in relation to the Directive. They confirm that the Netherlands Antilles will apply a transitional withholding tax corresponding to the transitional withholding tax to be applied by three Member States under the Directive.

ARTICLE 1 – GENERAL SCOPE

Article 1 outlines the scope of the Convention.

Paragraph 1 confirms that the Convention is to apply to savings income payments made from one Contracting Party to individual beneficial owners resident in the other Contracting Party, with the aim of ensuring effective taxation of savings in accordance with the laws of the individual's State of residence.

Paragraph 2 confirms that the application of the Convention is limited to savings income in the form of interest payments, to the exclusion of, *inter alia*, pensions and insurance benefits.

Paragraph 3 confirms that as regards the Kingdom of the Netherlands, the Convention is limited to the Netherlands Antilles.

ARTICLE 2 – DEFINITIONS

Article 2 provides definitions.

Paragraph 1 defines the two Contracting Parties and confirms that the Directive definitions – including the terms beneficial owner, paying agent and interest – will be used for the purposes of the Convention.

Paragraph 2 confirms that for the purposes of the Convention, in the provisions of the Directive to which this Convention refers, the Directive reference to “Member States” shall be taken as referring to the Contracting States.

ARTICLE 3 – IDENTITY AND RESIDENCE OF BENEFICIAL OWNERS

Article 3 confirms that the Directive procedures for identifying individual beneficial owners and their place of residence are to be applied for the purposes of the Convention.

Where the Directive allows the Member State to use information obtained under its domestic rules and regulations for the prevention of money laundering (the “know your customer” rules), Article 3 confirms that Aruba is to use the equivalent provisions of Netherlands Antilles law and regulations.

ARTICLE 4 – AUTOMATIC EXCHANGE OF INFORMATION

Article 4 makes provision for automatic exchange of information.

Paragraph 1 confirms that the Competent Authority of the paying agent shall exchange the information referred to in Article 8 of the Directive to the Competent Authority of the beneficial owner.

Paragraph 2 confirms that the exchange of information shall be automatic and take place, in line with the Directive, within six months from the end of the tax year of the State where the paying agent is established.

Paragraph 3 provides that the information exchanged shall be subject to the same rules on confidentiality that apply under the Directive. These are the rules of Article 7 of the Mutual Assistance Directive (Directive 77/799/EEC).

ARTICLE 5 – TRANSITIONAL PROVISIONS

Article 5 deals with the transitional withholding tax.

Paragraph 1 confirms that during the transitional period of the Directive, paying agents in the Netherlands Antilles will levy a withholding tax corresponding to the Directive withholding tax on savings income payments made cross-border to individual owners resident in the United Kingdom. During that period, however, the Netherlands Antilles will receive automatic information in respect of its residents from the United Kingdom.

Paragraph 2 confirms that the withholding tax will be applied by paying agents in the Netherlands Antilles in the same way as it is applied by paying agents in Belgium, Austria and Luxembourg under the Directive.

Paragraph 3 confirms that the levying of this withholding tax shall not prevent the normal operation of other taxes on that income in the United Kingdom.

Paragraph 4 provides that where the payment of interest is made from the Netherlands Antilles to a residual entity in the United Kingdom, the Netherlands Antilles paying agent may levy the retention tax on that payment instead of following the reporting rules for entities under that Article.

Paragraph 5 confirms that when the transitional period ends, the Netherlands Antilles will cease to apply withholding tax and move to full automatic exchange of information on savings income payments. In line with the provisions for Member States applying withholding tax under the Directive, however, the Netherlands Antilles has discretion to elect to apply automatic exchange earlier in the transitional period if it wishes.

ARTICLE 6 – REVENUE SHARING

Article 6 deals with revenue sharing. (The rules on revenue sharing mirror the revenue sharing rules for Member States applying withholding tax.)

Paragraph 1 provides that 75% of the withholding tax by the Netherlands Antilles on interest payments is to be shared with the United Kingdom.

Paragraph 2 provides that this same rule will apply for any tax withheld by Netherlands Antilles paying agents on payments to residual entities under Article 5(4) of the Agreement.

Paragraph 3 confirms the timing for revenue sharing: this will take place annually, six months after the end of the tax year of the paying agent in the Netherlands Antilles.

Paragraph 4 confirms that responsibility for the smooth functioning of the revenue sharing system rests with the Netherlands Antilles.

ARTICLE 7 – EXCEPTIONS TO THE WITHHOLDING PROCEDURE

Article 7 deals with exceptions to the withholding procedure.

Paragraph 1 states that the Netherlands Antilles shall provide for one or both of two procedures specified in Article 13 of the Directive to enable individuals to avoid withholding tax being applied to their savings income. These methods would permit the individual either

- to authorise his Jersey paying agent to make a report on the interest payment; or
- to authorise gross payment of the interest on the basis of a certificate drawn up for him by his competent authority. (This demonstrates his competent authority is aware of the payment.)

Paragraph 2 states that if the certificate procedure is used, the United Kingdom competent authority will provide the said certificate, containing the information as specified in Article 13(2) of the Directive.

ARTICLE 8 – ELIMINATION OF DOUBLE TAXATION

Article 8 confirms that the United Kingdom will provide for the relief of double taxation in relation to tax withheld under the Agreement in the same manner as the Directive withholding taxes are to be relieved.

Legislation relating to all withholding (or retention) taxes connected with the Directive is contained in Finance Bill 2004

ARTICLE 9 – OTHER WITHHOLDING TAXES

Article 9 confirms that the application of the transitional withholding tax in the Netherlands Antilles will not affect the application of other withholding taxes in the Contracting States.

ARTICLE 10 – TRANSPOSITION

Article 10 provides that the implementing legislation for the Convention is to be in place before 1 January 2005.

ARTICLE 11 – ANNEX

(TN this is as in the Aruba Explanatory Memorandum)

Article 11 states that the texts of the Directive and of Article 7 of the Mutual Assistance Directive (Directive 77/799/EEC) are to be appended as an Annex to the Convention and to form an integral part of the Convention.

The annexed text of Article 7 of Directive 77/799/EEC will be replaced by the text of Article 7 in the revised Directive 77/799/EEC if this revised Directive enters into force before the date from which the Convention takes effect.

The text of the Savings Directive is not reproduced in the Statutory Instrument. The footnotes state where these texts are available. The text of Article 7 of Directive 77/799/EEC in force at the time of the making of the Convention (and also the date of the laying of the draft Order) is set out at the end of this Explanatory Memorandum.

ARTICLE 12 – ENTRY INTO FORCE

Article 12 deals with entry into force and commencement.

It provides that the Convention shall enter into force on the thirtieth day after the latter of the dates on which the respective Governments have notified each other in writing that the formalities constitutionally required in their respective States have been complied with, and that it shall apply from the date from which the Directive applies.

ARTICLE 13 – TERMINATION

Article 13 confirms the right of the Contracting States to terminate the Convention and the procedures to be followed in such a case. If the Convention is terminated, it will cease to apply for periods beginning after the end of the calendar year in which the notice of termination has been given.

EXCHANGE OF NOTES

The Exchange of Notes contained in Part II to the Schedule constitutes a formal agreement between the Government of United Kingdom and the Government of the Netherlands in respect of the Netherlands Antilles, and confirms that the date of application of the Agreement shall correspond with the date of application of the Directive.

TEXT OF ARTICLE 7 OF DIRECTIVE 77/799/ EEC AS AT THE DATE OF THE LAYING OF THE DRAFT ORDER

“Provisions relating to secrecy

1. All information made known to a Member State under this Directive shall be kept secret in that State in the same manner as information received under its national legislation. In any case, such information:
 - may be made available only to the persons directly involved in the assessment of the tax or in the administrative control of this assessment,
 - may be made known only in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or relating to, the making or reviewing the tax assessment and only to persons who are directly involved in such proceedings; such information may, however, be disclosed during public hearings or in judgements if the competent authority of the Member State supplying the information raises no objection,
 - shall in no circumstances be used other than for taxation purposes or in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or in relation to, the making or reviewing of the tax assessment.

In addition, Member States may provide for the information referred to in the first subparagraph to be used for assessment of other levies, duties and taxes covered by Article 2 of Directive 76/308/EEC.

2. Paragraph 1 shall not oblige a Member State whose legislation or administrative practices lays down, for domestic purposes, narrower limits than those contained in the provisions of that paragraph, to provide information if the State concerned does not undertake to respect those narrower limits.
3. Notwithstanding paragraph 1, the competent authorities of the Member State providing the information may permit it to be used for other purposes in the requesting State if, under the legislation of the informing State, the information could, in similar circumstances, be used in the informing State for similar purposes.
4. Where a competent authority of a Member State considers that information which it has received from the competent authority of another Member State is likely to be useful to the competent authority of a third Member State, it may transmit it to the latter competent authority with the agreement of the competent authority which supplied the information. ”