

# Kluwer International Tax Blog

## The subordination clause in the new tax treaty between the Netherlands and Belgium that grants primacy to the Pillar 2 Directive

Mees Vergouwen (Assistant professor at Leiden University and tax advisor at De Brauw Blackstone Westbroek, Amsterdam. ) · Thursday, July 13th, 2023

Mees Vergouwen[1]

On 21 June 2023, the Netherlands and Belgium signed a new tax treaty.[2] Part of (the protocol to) this tax treaty is a subordination clause[3] that provides that “*nothing in this treaty shall prevent the application (...) of Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union*”[4] (“the Pillar 2 Directive”). This subordination clause is interesting because it marks the first treaty provision that stipulates that the treaty itself will not interfere with the duty to tax under the Pillar 2 Directive.[5] With respect to this subordination clause, the question arises as to why the Netherlands and/or Belgium have included such a clause in their tax treaty. In this blog post, a possible answer to this question is formulated

The starting point in formulating such an answer is that, based on a letter of the Dutch State Secretary of Finance of 8 February 2023, the inclusion of a subordination clause in the new tax treaty between the Netherlands and Belgium would seem unnecessary from a Dutch perspective.[6] This is due to the State Secretary of Finance indicating in such letter that – in general terms and outside the context of the implementation of the Pillar 2 Directive – no conflict should arise between a directive and a tax treaty concluded by the Netherlands with another EU Member State “*because both member states concerned have agreed to a directive in such a case.*”[7] Whereas the legal basis for this position is not set out by the State Secretary of Finance, it has been suggested that the absence of a conflict between a directive and a tax treaty concluded with another EU Member State might be based on the *lex posterior derogat legi priori* conflict rule of public international law as codified in article 30 Vienna Convention 1969.[8] In accordance with this conflict rule, a later treaty takes precedence over an earlier treaty that relates to the same subject matter. If the application of the *lex posterior* conflict rule were the basis for the position of the State Secretary of Finance, which seems conceivable with respect to a conflict between a later directive, as a decision of the European Union as an international organisation,[9] and an earlier tax treaty between two EU Member States through an analogous application of article 30 Vienna Convention 1969,[10] the Pillar 2 Directive (as *lex posterior*) could take precedence over an earlier tax treaty between two EU Member States (as *lex prior*). Such earlier tax treaty between two EU Member States would then only apply to the extent that its provisions are compatible with those of a later directive.[11]

If the position of the Dutch State Secretary of Finance in his letter of 8 February 2023 is understood as being based on the (analogous) application of the *lex posterior* conflict rule of article 30 Vienna Convention 1969, then this would provide a possible answer to the question why the subordination clause has been included in the tax treaty with Belgium. The line of reasoning in this respect would be as follows. The new tax treaty with Belgium has been signed after the adoption of the Pillar 2 Directive. This entails that the Pillar 2 Directive cannot qualify as the *lex posterior* vis-à-vis this tax treaty. If not qualifying as the *lex posterior* with respect to a tax treaty between the Netherlands and another EU Member State, the consequence would be that the Pillar 2 Directive (as *lex prior*) cannot take precedence over such a tax treaty (as *lex posterior*) under (an analogous application of) the *lex posterior* conflict rule of article 30 Vienna Convention 1969. If it is further assumed that the Pillar 2 Directive would not be able to take precedence over the new tax treaty between the Netherlands and Belgium on the basis of any other conflict rule of public international law, such as the *lex specialis derogat legi generali*,<sup>[12]</sup> the consequence would be that the obligations arising under the new tax treaty between the Netherlands and Belgium would not be affected by the Pillar 2 Directive under public international law. This would, in turn, entail that it would have to be concluded that the new tax treaty remains applicable under public international law in the event of a conflict with the Pillar 2 Directive.

Within the Netherlands, this conclusion entails that the Dutch legislation aimed at implementing the Pillar 2 Directive would be inapplicable to the extent such legislation is incompatible with the obligations under the tax treaty with Belgium.<sup>[13]</sup> It follows that, in the absence of a subordination clause, the new tax treaty would have been able to prevent the Netherlands from levying the top-up tax required by the Pillar 2 Directive by means of its national laws in the event that this would be incompatible with the new tax treaty. If it is assumed that the Netherlands intended to conclude a tax treaty that does not jeopardize achievement of the result required by the Pillar 2 Directive, i.e., levying a top-up tax, the inclusion of the subordination clause makes sense.<sup>[14]</sup> In the absence of such a clause, the Netherlands may not be able to achieve the result of the Pillar 2 Directive as a result of the Pillar 2 Directive being unable to take precedence over the new tax treaty between the Netherlands and Belgium on the basis of (an analogous application of) the *lex posterior* conflict rule of article 30 Vienna Convention 1969 in conjunction with the precedence of such a tax treaty within the Dutch legal order over the national legislation aimed at implementing the Pillar 2 Directive. In the presence of a subordination clause, by contrast, it is ensured that, under public international law, the new tax treaty is inapplicable to the extent required for the purposes of achieving the result of the Pillar 2 Directive, i.e., levying the top-up tax by means of the income inclusion rule and/or undertaxed profits rule. This, in turn, implies that, for the Netherlands, the new tax treaty would be able to render the national legislation aimed at implementing the Pillar 2 Directive inapplicable (because such legislation would not be incompatible with obligations under the new tax treaty after application of the subordination clause). Consequently, the inclusion of the subordination clause enables the Netherlands to comply with its obligation under article 288 TFEU to achieve the result of the Pillar 2 Directive by means of its national legislation. Taking this result into account, it is recommended that the Netherlands (and Member States facing similar issues as the Netherlands) include(s) a subordination clause, similar to the clause laid down in the new tax treaty with Belgium, in future tax treaties so as to ensure that such tax treaties cannot prevent the levying of the top-up tax(es) required by the Pillar 2 Directive.<sup>[15]</sup>

[1] Assistant professor at Leiden University and tax advisor at De Brauw Blackstone Westbroek, Amsterdam. The author can be contacted at [t.m.vergouwen@law.leidenuniv.nl](mailto:t.m.vergouwen@law.leidenuniv.nl). This blog post is an English, revised, version of the opinion published by this author in NLFiscaal (see T.M. Vergouwen, ‘De volkenrechtelijke voorrang van de Pijler 2 Richtlijn op het nieuwe

belastingverdrag met België’, NLF-O 2023/[?]).

[2] *Trb.* 2023, 77. For the text of the tax treaty, see also <https://www.taxlive.nl/media/6111/verdrag-tussen-het-koninkrijk-belgie-en-nederland.pdf>.

[3] A subordination clause is a treaty provision that provides that the relevant treaty does not apply to the extent that there would be a conflict with another source of international law. See, in this regard, T.M. Vergouwen, *The Effect of Directive in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties*, Alphen aan den Rijn: Kluwer Law International 2023, para 6.4.2.3.1 (forthcoming).

[4] Article 1(4) of the Protocol (translated by this author).

[5] Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union. Reference may also be made, in this context, to article 9 of the protocol signed by France and Switzerland on 27 June 2023, from which it follows, based on a DeepL translation, that “[t]he provisions of the Convention do not prevent Contracting States from applying national laws on minimum taxation of groups of companies based on the Global Anti-Base Erosion Rules (Pillar Two) developed by the Inclusive Framework of the OECD”. For the original (German) text, see <https://www.news.admin.ch/news/message/attachments/80213.pdf>.

[6] Letter of the Dutch State Secretary of Finance, 8 February 2023, no 2023-0000016511.

[7] Letter of the Dutch State Secretary of Finance, 8 February 2023, no 2023-0000016511, p. 12.

[8] S. Pancham, ‘De Pillar 2-heffing en belastingverdragen. Toch geen strijdigheid?’, NLF-O 2023/4, para. 4.3.

[9] Regarding the qualification of a directive in the area of direct taxation as a decisions of an international organisation, see T.M. Vergouwen, *The Effect of Directive in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties*, Alphen aan den Rijn: Kluwer Law International 2023, chapter 2 (forthcoming).

[10] See T.M. Vergouwen, *The Effect of Directive in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties*, Alphen aan den Rijn: Kluwer Law International 2023, para 6.4.2 (forthcoming).

[11] See, by analogy, article 30(3) Vienna Convention 1969.

[12] With regard to the applicability of the international law *lex specialis derogat legi priori* conflict rule in respect of a conflict between a tax treaty and a directive, see, in general terms, T.M. Vergouwen, *The Effect of Directive in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties*, Alphen aan den Rijn: Kluwer Law International 2023, para 6.4.3 (forthcoming).

[13] This follows from article 94 of the Dutch constitution. See *Parliamentary Proceedings II* 2020/21, 25 087, no. 260, p. 28. See also *Parliamentary Proceedings II* 2015/16, 34 306, no. 3, p. 5, *Parliamentary Proceedings II* 2018/19, 35 030, no. 3, p. 7 and *Parliamentary Proceedings II* 2018/19, 35 241, no. 3, p. 19, as well as the interpretation of these documents in F.A. Engelen, J.

Vleggeert and T.M. Vergouwen, F.A. Engelen, J. Vleggeert en T.M. Vergouwen, 'Belastingverdragen en voorrang van richtlijnen op het gebied van directe belastingen', WFR 2019/257.

[14] Regarding the validity of this assumption, see article 4(3) TEU.

[15] Regarding the recommendation to include subordination clauses granting precedence to obligations under EU law in general, see T.M. Vergouwen, *The Effect of Directive in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties*, Alphen aan den Rijn: Kluwer Law International 2023, para 10.1 (forthcoming).

---

To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe [here](#).

## Kluwer International Tax Law

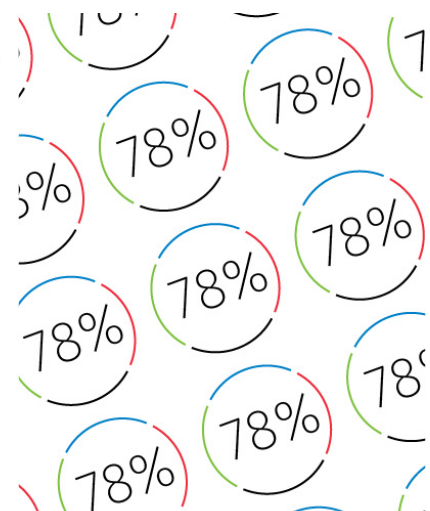
The **2022 Future Ready Lawyer survey** showed that 78% of lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity. Kluwer International Tax Law is an intuitive research platform for Tax Professionals leveraging Wolters Kluwer's top international content and practical tools to provide answers. You can easily access the tool from every preferred location. Are you, as a Tax professional, ready for the future?

Learn how **Kluwer International Tax Law** can support you.

---

78% of the lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity.

**Discover Kluwer International Tax Law.**  
The intuitive research platform for Tax Professionals.



2022 SURVEY REPORT  
The Wolters Kluwer Future Ready Lawyer  
Leading change

---

This entry was posted on Thursday, July 13th, 2023 at 9:00 am and is filed under [Directive, EU law, OECD, Pillar II](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.