

# A TAX TREATY POLICY FOR CURAÇAO

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## INTRODUCTION

Curaçao is an autonomous country within the Kingdom of the Netherlands (hereinafter: the Kingdom) and has just one single tax treaty for the prevention of double taxation, namely the tax treaty with Norway. Although Curaçao has concluded a large number of tax information exchange agreements (the so-called TIEAs), it has proven unsuccessful in the conclusion and ratification of full tax treaties. This is problematic, as tax treaties generally stimulate the economic development of a country. Until now, little attention has been paid to the underlying reasons why Curaçao has proven unsuccessful in building a tax treaty network. In addition to this, at the end of 2021, Curaçao still did not have any published policy on tax treaties. This gap is an important reason for my doctoral thesis research 'A Tax Treaty Policy for Curaçao'. The central research question is: "How should Curaçao design its tax treaty policy in order to build a tax treaty network?" This study does not aim to provide recommendations on the technical aspects of a tax treaty policy or a model convention. Rather, the objective of this study is to identify the conditions for building a tax treaty network.

Based on a review of literature, as well as qualitative and quantitative research, I have on the one hand researched the obstacles for Curaçao when it comes to the conclusion and ratification of tax treaties. On the other hand, I have conducted research into which considerations are relevant for Curaçao when it comes to building a tax treaty

network. The outcome of this research is an evaluation framework that can act as a guide for Curaçao when designing a tax treaty policy or adjusting a potentially existing (but unpublished) tax treaty policy. This research was conducted in light of the constitutional, EU law, economic and fiscal context.

## CONSTITUTIONAL, EU LAW AND ECONOMIC CONTEXT

According to the Charter for the Kingdom, the countries within the Kingdom are equal partners that can in principle arrange their own affairs autonomously, the so-called 'Affairs of the Countries', which include the negotiation and conclusion of (tax) treaties. However, the ratification of (tax) treaties is considered to be an 'Affair of the Kingdom', which means that only the Kingdom (read: the Netherlands) is competent to ratify Curaçao's tax treaties. Consequently, Curaçao is de facto dependent on the Kingdom when it comes to building a tax treaty network.

The EU law status of Curaçao as one of the overseas countries and territories (OCTs) is also addressed in the research. The OCTs do not belong to the territory of the European Union (EU), and EU law is in principle not applicable to the OCTs. The OCTs are included on a list that has been added to the Treaty on the Functioning of the European Union as an Annex. However, it is possible for OCTs to obtain the status of outermost region (OR), in which case the entire EU acquis would be applicable. The doctoral thesis explores the question of whether the OR-status could help speed up the process of building a tax treaty network for Curaçao. The research establishes that the current ORs do not have their own tax treaties. The ORs are within the territorial scope of the tax treaties concluded by the parent Member State.



Historically, tax treaties are concluded in order to prevent double taxation. The prevention of double taxes is primarily important if there are economic relationships with other countries. For this reason, this study also focuses on the economy of Curaçao. The economy of Curaçao has been in a recession since 2016 (the economic crisis in Venezuela) as a result of economic contraction and high levels of unemployment. In 2020, the economic contraction in Curaçao as a result of the COVID pandemic was relatively stronger than in other Caribbean countries. It is evident that there is a need for the use of new fiscal instruments in order to stimulate economic growth in Curaçao.

### **THE TAX STATUS OF CURAÇAO**

As the tax status of countries in part determines whether countries want to enter into treaty negotiations with each other, the tax status of Curaçao is addressed in the study. This shows that the specific characteristics of Curaçao as one of the Small Island Developing States (SIDS) (e.g. the small scale, an open economy, and a small and limited

domestic market) have meant that Curaçao has for several decades had a tax policy that was mainly aimed at providing favourable tax facilities. As a result of offering low tax rates to non-residents for non-local activities without substance or transparency or information exchange, Curaçao was considered to be a tax haven. It is partly due to this status that the United States terminated the tax treaty with the former Netherlands Antilles (NA/Curaçao). This termination and changes to the Tax Agreement for the Kingdom are the most important reasons for the decline of the financial services sector in Curaçao. In addition to this, both the Organisation for Economic Co-operation and Development (OECD) and the EU have successfully taken up the fight against harmful tax competition. The OECD has addressed the artificial reduction of fiscal profit and profit shifting through the global roll-out of the BEPS (base erosion and profit shifting) Project. Curaçao too has committed itself to the OECD standards. The OECD and the EU have both placed countries that do not meet the international tax standards on a blacklist.

Since the last tax reform in 2019, Curaçao is no longer on the OECD/EU list and is officially no longer a tax haven. However, the possibilities for Curaçao to stimulate its economy with (new) preferential tax regimes, have become extremely limited, all the more because the BEPS Project has had a follow-up in the form of BEPS 2.0. Part of BEPS 2.0 is the introduction of a minimum profit tax for Multinational Enterprises, the so-called Pillar Two. This means that fiscally beneficial regimes must be brought in line with the required level of minimum profit taxation. In light of this, Curaçao will need to focus more explicitly on building a tax treaty network in order to attract foreign investors. In this way, the economy of Curaçao can be stimulated.

### **BUILDING A TAX TREATY NETWORK: THE DIFFICULTIES**

In this study, the difficulties which Curaçao is experiencing in the process of building a tax treaty network have been identified through interviews with treaty negotiators, who have in the past been closely involved with the negotiations that Curaçao has carried out. This research shows that the difficulties mainly concern a combination of factors. For example, most of the difficulties can be traced to specific characteristics of Curaçao as one of the SIDS. Curaçao's limited capacity in terms of administration and implementation, as well as the lack of sufficient economic relations with potential partner countries, are obstacles when it comes to concluding treaties. It is noticeable that for a long time now, Curaçao has not (or no longer) applied the territorial extension which is included in a number of tax treaties concluded by the Netherlands. Furthermore, Curaçao still suffers from the reputation as a tax haven, which makes potential partner countries reluctant to start treaty negotiations. In addition to this, the partner countries tend not to acknowledge the importance of a tax treaty in cases where Curaçao has concluded a TIEA.

The fact that Curaçao is dependent on the Netherlands for the ratification of a tax treaty, is an important obstacle. In practice, the ratification process is extremely difficult. The tax treaties which Curaçao has concluded, and which are notified in The Hague, are not being ratified. The exact cause of this remains unclear. This can be illustrated by the tax treaty that Curaçao concluded with Malta in 2015, which was forwarded through Foreign Affairs for ratification but has still not been ratified. According to the so-called PA List I 2021, as well as the PA List I of 2017, 2018, 2019, and 2020, the tax treaty between Curaçao and Malta has been held back because "the Explanatory Memorandum is being changed following the advice of the Council of State". Apparently, this change to the Explanatory Memorandum has not been completed since 2017. What the change entails and why it has not been completed, cannot be determined.



A treaty negotiator cites the many official questions posed by the Netherlands as the most important reason why the ratification process has ground to a halt. According to this treaty negotiator, these questions remain unanswered, often by Fiscal Affairs (Curaçao). When Fiscal Affairs (Curaçao) does answer questions, these are followed by more questions from the Netherlands, which then go unanswered. It is certainly remarkable that this generally concerns tax questions regarding the treaty provisions. This is especially jarring as tax treaty provisions in fact fall under the fiscal autonomy of Curaçao. Incidentally, it is the case that these treaty provisions can affect the foreign policy of the Kingdom, and for that reason the questions are legitimate. Nevertheless, there are good reasons for a critical look at the way in which the fiscal autonomy of Curaçao is limited during the ratification procedure.

### **HOW SHOULD CURAÇAO DESIGN ITS TAX TREATY POLICY?**

Based on an assessment framework and the outcomes of the research into the difficulties which Curaçao is experiencing in building its tax treaty network, I have sought to answer the central research question of my doctoral thesis: “How should Curaçao design its tax treaty policy in order to build a tax treaty network?” I have presented the manner in which Curaçao should design a tax treaty policy as an evaluation framework.

The evaluation framework that has been presented is based on the model conventions of the OECD (OECD MC) and the UN (UN MC), as well as the UN Handbook and the toolkit of the Platform for Collaboration on Tax Treaty Negotiations (PCT Toolkit), which itself is based on the Handbook. While designing the evaluation framework, I have sought to align with the approach of the so-called ‘catalogue of circumstances’. Although the circumstances which follow from this research have been identified in this study, these circumstances have not been weighted. This is because weighting is

inherently subjective and dependent on the circumstances. Moreover, it is ultimately up to the politicians to weigh the considerations in order to form a basis for decision-making. For this reason, I have not made a value judgement regarding which circumstances are, in my view, more important or less important when it comes to the design of the tax treaty policy. Without assigning a specific weighting factor for the first phase of the treaty negotiations, I have however weighted the factors that are essential for the question of which treaty countries Curaçao will most likely be able to conclude a tax treaty with.

In addition to the countries with which the Netherlands has concluded a tax treaty with a provision on territorial extension to Curaçao (most recently these are: Colombia, Cyprus, Chile, Liechtenstein, Kosovo, and Bulgaria), it is important when choosing a partner country, to seek alignment with the countries with which Curaçao has economic transactions. In 2020, this was mainly the United States and Venezuela; and in the Caribbean region: the Cayman Islands, Trinidad and Tobago, the Bahamas, the British Virgin Islands, Puerto Rico, Jamaica, and Cuba. Curaçao should make more use of the opportunities that arise from being part of the Kingdom and should request that the Netherlands provides (more) active coordination of the ratification process of the Curaçao tax treaties. In this regard, the fiscal autonomy of Curaçao does not necessarily preclude cooperation between the countries in the Kingdom.



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