RÅDET FOR
DEN EUROPÆISKE UNION

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PUBLIC

NOTE FRA FORMANDSKABET

efter mødet den:	8. november 2001
til:	Gruppen vedrørende Adfærdskodeksen (erhvervsbeskatning)
Vedr.:	Adfærdskodeksen (erhvervsbeskatning) – Udkast til rapport til Økofin-Rådets samling den 4. december 2001

Indledning

1. Rådet og repræsentanterne for medlemsstaternes regeringer, forsamlet i Rådet, vedtog den 1. december 1997 en resolution om en adfærdskodeks for erhvervsbeskatning. Ifølge resolutionen skal der nedsættes en gruppe under Rådet til at vurdere, hvilke skatteforanstaltninger eventuelt falder ind under kodeksens anvendelsesområde.

2. Rådet bekræftede senere, at Gruppen vedrørende Adfærdskodeksen var blevet nedsat den 9. marts 1998.

3. Gruppen har regelmæssigt aflagt rapport om de foranstaltninger, den har vurderet. Disse rapporter er blevet videresendt til drøftelse i Rådet. Gruppen vedrørende Adfærdskodeksen forelagde Økofin-Rådet to interimsrapporter hhv. den 1. december 1998 og den 25. maj 1999 (12530/98 FISC 164 og 8231/99 FISC 119), og den aflagde siden rapport til Økofin-Rådets samling den 29. november 1999; i denne rapport gør den rede for resultaterne af sit arbejde med vurderingen af 271 skatteforanstaltninger under kodeksen (SN 4901/99), hvoraf den anser 66 for at være skadelige.

4. I november 2000 forelagde Kodeksgruppen en situationsrapport om sit arbejde med henblik på Økofin-Rådets samling den 26.-27. november 2000 (13563/00 FISC 193).

5. Endnu en situationsrapport om Kodeksgruppens arbejde blev under det svenske formandskab forelagt på Økofin-Rådets samling den 5. juni 2001. I sine konklusioner om skattepakken (9553/01 FISC 106) og for så vidt angår adfærdskodeksen noterede Rådet sig rapporten og:

   godkendte arbejdsprogrammet i bilag 1 til gruppens rapport om gennemsigtighed og informationsudveksling i forbindelse med interne afregningspriser og bad gruppen om at gå videre med behandlingen af aspekterne standstill og rollback og at rapportere tilbage til Rådet inden udgangen af 2001 om, hvor langt den er nået.

6. Som anført i Økofin-Rådets konklusioner af 9. marts 1998 afspejlede gruppens rapport til Økofin-Rådets samling den 29. november 1999 enten gruppemedlemmernes enstemmige holdning eller de forskellige holdninger, der var kommet til udtryk under drøftelserne. Henvisninger til "gruppen" i denne rapport afspejlede en bred enighed på de punkter, hvor der ikke var opnået enstemmighed, og eventuelle alternative synspunkter var anført i fodnoterne. Henvisningerne til "gruppen" i nærværende rapport skal fortolkes på samme måde som i forbindelse med gruppens rapport til Økofin-Rådets samling den 29. november 1999.

Status over arbejdet

7. Siden Rådets samling den 5. juni 2001 er der blevet afholdt fire møder i Kodeksgruppen: den 28. juni under det svenske formandskab og den 26. september, den 17. oktober og den 8. november under det belgiske formandskab.

8. På mødet den 28. juni vedtog gruppen sin tidsplan og hovedelementerne i det fremtidige arbejdsprogram under det belgiske formandskab

   - gennemsigtighed og udveksling af oplysninger om aftaler vedrørende interne afregningspriser

   - det videre arbejde vedrørende standstill

   - rollback.

9. Gruppen enedes også senere om at drøfte muligheden for, at dens arbejde vedrørende standstill og rollback og statsstøtteprocedurerne griber ind i hinanden i forbindelse med 13 af de 66 foranstaltninger, der er anført i gruppens rapport fra 1999. Gruppen vedtog endvidere, at Kommissionens tjenestegrene skulle forelægge den en rapport om deres arbejde med sådanne erhvervsbeskatningsforanstaltninger i tiltrædelseslandene, der er potentielt skadelige i henhold til adfærdskodeksen.

10. På mødet den 26. september blev det bekræftet, at Paul Hatry, den belgiske finansministers personlige repræsentant, æresmedlem af Senatet og tidligere finansminister (B), og Estanislao Rodríguez-Ponga y Salamanca, statssekretær i Finansministeriet (E), fungerer som hhv. første og anden viceformand i perioden indtil slutningen af det belgiske formandskab.

A. Gennemsigtighed og udveksling af oplysninger om aftaler vedrørende interne afregningspriser

11. Som anført i punkt 5 ovenfor godkendte Økofin-Rådet på samlingen den 5. juni gruppens arbejdsprogram om gennemsigtighed og udveksling af oplysninger vedrørende interne afregningspriser, jf. bilag 1 til gruppens rapport (9553/01 FISC 106).

12. Udveksling af offentligt tilgængelige oplysninger på årlig basis: Som anført i punkt 14 til nævnte rapport håbede gruppen for så vidt angår offentligt tilgængelige oplysninger at kunne nå til enighed om indførelse af en årlig udvekslingsprocedure i løbet af 2002. For at gruppen kan komme videre i arbejdet opfordrede den medlemsstaterne til i første omgang at fremlægge oplysninger om udveksling af oplysninger på årlig basis. Den enkelte medlemsstat blev bedt om at fremsende en skriftlig rapport med angivelse af:

- de offentligt tilgængelige oplysninger i det pågældende land vedrørende de aftalte aspekter af interne afregningspriser som omhandlet i punkt 17 i bilag 1 til rapporten til Økofin-Rådets samling den 26.-27. november 2000 (dok. 13563/00 FISC 193),

- hvorledes den vil gøre brug af eventuelle lignende oplysninger fra andre medlemsstater,

- eventuelle hindringer for udveksling af offentligt tilgængelige oplysninger i det pågældende land.

13. Gruppen drøftede disse rapporter og fik også forelagt mundtlige rapporter fra alle medlemsstaterne. Disse anførte, at andre medlemsstater vil kunne få adgang til relevante lovbestemmelser, cirkulærer, administrative bestemmelser, retningslinjer og regler for, hvordan man går til værks, der er offentligt tilgængelige.

14. Nogle medlemmer af gruppen bemærkede, at de var i tvivl om, hvorvidt det vil være nyttigt med en årlig udveksling af offentligt tilgængelige oplysninger. Andre bemærkede, at sådanne oplysninger vil kunne øge forståelsen for andre medlemsstaters lovgivning og praksis. Det blev diskuteret, om udgifterne til oversættelse af detaljerede regler og retningslinjer vil være berettiget i betragtning af oplysningernes praktiske nytteværdi.

15. Der var enighed om, at målet skal være at holde medlemsstaterne fuldt informeret og ajour, samtidig med at man undgår bekostelig og unødvendig videresendelse af oplysninger. Gruppen vedtog derfor, at der skal gives adgang til alle relevante offentligt tilgængelige oplysninger i medlemsstaterne og derefter senere udarbejdes årlige ajourføringer med angivelse af eventuelle ændringer.

16. Udveksling af oplysninger om enkeltsager: gruppen bemærkede, at punkt 17 i gruppens vejledning om rollback og standstill på områderne finansafdelinger, holdingselskaber og headquarter-selskaber (bilag 1 til rapporten til Økofin-Rådets samling den 26.-27. november 2000 (13563/00 FISC 193) omhandlede udveksling af oplysninger i oversigtsform (antal og typer af tilfælde) og specifikke oplysninger i bestemte tilfælde og var enig om, at den havde behov for oplysninger fra medlemsstaterne om arbejdsprogrammets anden del, nemlig udveksling af oplysninger om enkeltsager.

17. Gruppen bemærkede, at der fra en indledende drøftelse, der havde fundet sted under det svenske formandskab i en undergruppe om de faktorer, der skal tages i betragtning i forbindelse med sådanne udvekslinger, var en række komplekse spørgsmål, der måtte drøftes nærmere. Der var enighed om, at medlemsstaterne måtte have tid til at udarbejde deres besvarelser. Medlemsstaterne blev derfor bedt om at fremsende skriftlige rapporter med de relevante oplysninger inden den 30. november 2001.

B. Det videre arbejde vedrørende standstill

18. Gruppen gik som planlagt i punkt 21 i gruppens rapport (8789/01 FISC 83) videre med vurderingen af Tysklands ordning for holdingselskaber og foranstaltningerne under den skattemæssige ramme for De Nederlandske Antiller.

19. Tyskland - holdingselskaber: Gruppen nåede til enighed om en beskrivelse af den tyske ordning for holdingselskaber (**bilag A**) og var af den opfattelse, at rapporten fra den tyske delegation om det effektive beskatningsniveau for foranstaltningen ikke giver tilstrækkelig stor sikkerhed for, at foranstaltningen ikke, i det mindste under visse omstændigheder, vil kunne resultere i et betydeligt lavere effektivt beskatningsniveau. Gruppen fandt, at foranstaltningen ikke opfylder nogen af kriterierne i punkt 1-5 i kodeksens litra B. Gruppen overvejede ud fra en tilgang svarende til punkt 29-67 i gruppens rapport til Økofin-Rådets samling den 29. november 1999 (SN 4901/99), hvorvidt foranstaltningen indvirker eller kan indvirke betydeligt på lokaliseringen af erhvervsaktiviteter i Fællesskabet. Gruppen besluttede på grundlag af sin generelle evaluering, at foranstaltningen ikke skal have en positiv vurdering. Gruppen bemærkede imidlertid, at der var komplikationer, idet lovgivningen om holdingselskaber og lovgivningen om faktisk kontrollerede udenlandske selskaber påvirker hinanden. Gruppen var også enig om, at der ikke er noget behov for generelt at arbejde videre med spørgsmålet om holdingselskaber.

20. Nederlandene - den fiskale ramme for De Nederlandske Antiller: gruppen enedes på Nederlandenes vegne om beskrivelserne af de to foranstaltninger under den fiskale ramme for Nederlandene (**bilag B**)

- skattemæssig behandling af holdingselskaber og

- skattemæssig behandling af skattefritagne selskaber.

21. Gruppen drøftede og vedtog en vurdering foreslået af Kommissionens tjenestegrene på grundlag af kriterium 1-5 i kodeksens litra B.

22. [Gruppen behandlede en rapport fra den nederlandske delegation om de effektive beskatningsniveauer for de nederlandske foranstaltninger.]

C. Rollback

23. Konklusionerne fra Økofin-Rådets samling den 10. juli (10768/01 FISC 130) omfatter følgende erklæringer om tidsplanen for arbejdet med skattepakken med henblik på Økofin-Rådets samling i december 2001:

<u>For så vidt angår adfærdskodeksen</u>:

– *at gennemgå rapporten til Rådet fra Gruppen vedrørende Adfærdskodeksen om det hidtidige arbejde vedrørende standstill and rollback med*

  - *en oversigt over foranstaltninger, som medlemsstaterne er rede til at træffe for at opfylde deres tilsagn i konklusionerne fra samlingen i Rådet (økonomi og finans) i november 2000 om nytilkomne og*

  - *en vurdering af, om de medlemsstater, der har fodnoter til rapporten fra november 1999, ønsker at opretholde disse forbehold på baggrund af gruppens senere arbejde.*

24. Arbejdsprogrammet vedrørende rollback under det belgiske formandskab som vedtaget af Kodeksgruppen på mødet den 28. juni 2001 var i overensstemmelse med ovenstående.

25. Gruppen opfordrede derfor medlemsstaterne til at fremsende ajourførte oplysninger om rollback, herunder oplysninger om medlemsstaternes tilsagn med hensyn til nytilkomne og nærmere oplysninger om, hvorvidt medlemsstater, der har fodnoter i rapporten fra november 1999, stadig ønsker at opretholde deres forbehold på baggrund af gruppens senere arbejde.

26. De kortfattede redegørelser fra medlemsstaterne findes i **bilag C**.

27. Gruppen noterede, at der var sket yderligere fremskridt med hensyn til det antal skadelige foranstaltninger, der allerede var blevet eller som var ved at blive afviklet. Gruppen noterede også, at der var sket fremskridt med hensyn til at opfylde tilsagnet vedrørende nytilkomne og at en række af forbeholdene fra november 1999 ikke længere blev opretholdt under hensyn til det arbejde, der var foregået i gruppen siden november 1999.

D. Mulighed for at arbejdet i Gruppen vedrørende Adfærdskodeksen og statsstøtteprocedurerne griber ind i hinanden

28. [skal indsættes]

E. Potentielt skadelige foranstaltninger i tiltrædelseslandene

29. I forlængelse af den rapport om *udvidelsen og direkte beskatning*, som Kommissionens tjenestegrene havde omdelt på mødet i arbejdsgruppe IV den 17. september, fik gruppen forelagt en mundtlig rapport fra Kommissionens tjenestegrene om deres arbejde vedrørende potentielt skadelige foranstaltninger i kandidatlandene.

30. Gruppen noterede sig Kommissionens rapport og gav udtryk for den opfattelse, at de kriterier, Kommissionen anvender i forbindelse med dette arbejde, ikke må være mere vidtrækkende end kriterierne i kodeksen. Kodeksens anvendelsesområde er nemlig begrænset til vurdering af erhvervsbeskatningsforanstaltninger og omfatter ikke skattesystemer.

Det videre arbejde

31. Konklusionerne fra Økofin-Rådets samling den 10. juli (10768/01 FISC 130) omfatter følgende erklæringer om tidsplanen for arbejdet med skattepakken med henblik på Økofin-Rådets samlinger i april og juni 2002:

<u>April 2002</u>: *Rådet (økonomi og finans) skal*

for så vidt angår adfærdskodeksen notere sig

- *de fremskridt, der er gjort i arbejdet med adfærdskodeksen for så vidt angår medlemsstaterne*
- *rapportere om de fremskridt, der er gjort i drøftelserne mellem de berørte medlemsstater og deres afhængige eller associerede territorier.*

<u>Juni 2002</u>: *Rådet (økonomi og finans) skal*
for så vidt angår adfærdskodeksen vurdere om de påtænkte lovgivningsmæssige og administrative foranstaltninger med henblik på rollback af de skadelige aspekter af foranstaltningerne, som Gruppen vedrørende Adfærdskodeksen har identificeret i rapporten fra 1999, er tilstrækkelige, og færdiggøre arbejdet vedrørende standstill og en eventuel forlængelse af fordele i forbindelse med visse foranstaltninger ud over 2005.

32. Gruppen vedtog derfor at færdiggøre det igangværende arbejde med standstill og rollback og at aflægge rapport om resultatet til Økofin-Rådets samling i maj 2002. Gruppen vedtog også at gå videre i sit arbejdsprogram vedrørende gennemsigtighed og udveksling af oplysninger (bilag 1 til gruppens rapport til Økofin-Rådets samling den 5. juni 2001 (8789/01 FISC 83) i forbindelse med punkt 17 i bilag 1 til gruppens rapport til Økofin-Rådets samling den 26.-27. november 2000 (13563/00 FISC 193).

BILAG A

BESKRIVELSE AF TYSKLANDS ORDNING FOR HOLDINGSELSKABER

Tyskland har i forbindelse med den igangværende skattereform indført nye regler vedrørende beskatning af udbytte og kapitalgevinster, navnlig ved at lade den tidligere skattegodtgørelsesordning afløse af en metode til skattefritagelse for (koncerninternt) udbytte og ved at fritage kapitalgevinster fra afhændelse af aktier i andre selskaber for skat. Loven med disse og mange andre ændringer blev vedtaget i 2000, og de nye regler trådte med forbehold af visse overgangsbestemmelser i kraft den 1. januar 2001.

Samtidig blev der også foretaget ændringer af reglerne om, at CFC-indkomst kan pålignes "gældende" skat, når den tilfalder tyske indehavere af kapitalandele. Af øvrige bestemmelser (hhv. ændringer) indført i forbindelse med skattereformen (og som kan være relevante for holdingstrukturer) kan f.eks. nævnes fradrag for renter udbetalt til indehavere af kapitalandele, hvis renteudbetalinger ikke beskattes i Tyskland, og afskaffelse af muligheden for at afskrive varige nedskrivninger af værdien af aktiebeholdningen.

Betingelser

De nye bestemmelser om den skattemæssige behandling af koncerninternt udbytte og koncerninterne kapitalgevinster finder anvendelse på tyske selskaber, udenlandske selskabers faste driftssteder i Tyskland og selskaber, der har kapitalandele i andre selskaber, via et personselskab baseret i Tyskland. For aktieejende selskaber er anvendelsen af de nye bestemmelser ikke betinget af mindstekrav til kapitalandele.

For så vidt angår modtaget udbytte finder de nye bestemmelser anvendelse på udbytte af såvel tysk som udenlandsk oprindelse. Tysk og udenlandsk udbytte er omfattet af samme skatteordning, bortset fra at udgifter ikke kan fradrages. For så vidt angår kapitalgevinster fra afhændelse af aktier skelnes der ikke mellem kapitalandele i tyske og udenlandske selskaber. Den skattefritagelse for kapitalgevinster, der tilfalder aktieejende selskaber, kan ligeledes anvendes uden mindstekrav til kapitalandele. Skattefritagelse for udbytte og kapitalgevinster kan anvendes, uanset hvilke aktiviteter der udøves i det selskab, der udbetaler udbyttet eller afhænder aktierne.

CFC-bestemmelserne finder imidlertid anvendelse på samtlige i Tyskland hjemmehørende indehavere af kapitalandele i et udenlandsk selskab, der kontrolleres af indehavere af kapitalandele med bopæl i Tyskland og visse andre indehavere af kapitalandele, når det udenlandske selskab er omfattet af lav beskatning (jf. bilaget). CFC-bestemmelserne finder også anvendelse på samtlige i Tyskland hjemmehørende indehavere af kapitalandele, der ejer mindst 10% af aktiekapitalen i et udenlandsk selskab, når det udenlandske selskabs indkomst stammer fra anlægsinvesteringer. Den lave CFC-beskatning finder anvendelse, når den effektive selskabsskattesats er under 25% (skattegrundlaget beregnes i henhold til de tyske regler for selskabsskat). CFC-bestemmelserne anvendes i den udstrækning, et sådant kontrolleret udenlandsk selskab har indkomst erhvervet på svigagtigt grundlag som defineret i § 8 i loven om de skattemæssige relationer med udlandet, der omhandler uhæderlig skattepraksis i andre lande. Der er generelt en formodning om, at en indkomst er erhvervet på svigagtigt grundlag, hvis den udelukkende stammer fra koncerninterne aktiviteter (transaktioner med tilknyttede parter). Disse CFC-bestemmelser er i øjeblikket genstand for yderligere overvejelser.

Skattefordele

<u>Koncerninternt udbytte</u>, der udbetales af et selskab, der ikke er hjemmehørende i Tyskland, til et andet selskab, er fritaget for skat for at undgå dobbeltbeskatning. Der er ikke knyttet nogen skattegodtgørelse til det udbytte, der modtages under de nye bestemmelser. Den forskudskat på 20%, der opkræves ved udlodningen, modregnes i den skat, modtagerne skal betale. Den kildeskat, der skal betales ved udlodningen (dvs. 20%) kan tilbagebetales, hvis det modtagende selskab ikke har skattepligtig indkomst i Tyskland, eller hvis tilgodehavendet overstiger den skat, udbyttemodtageren skal betale.

For så vidt angår udbytte, der modtages fra udenlandske selskaber, er 95% af et sådant udbytte fritaget for skat (jf. direktivet om moder- og datterselskaber). De sidste 5% betragtes som en ikke-fradragsberettiget udgift knyttet til indkomst fra holdingselskabet, som følgelig beskattes hos det modtagende aktieejende selskab, mens den modtagende aktieejer har ret til uden begrænsning at fradrage samtlige de udgifter, der er afholdt med henblik på at opnå et sådant udenlandsk udbytte. Hvis CFC-bestemmelserne skulle finde anvendelse i forbindelse med det pågældende udenlandske selskab, ville det aktieejende selskab blive beskattet af den ikke-udbetalte indkomst erhvervet på svigagtig vis, som stammer fra det udenlandske selskab.

I sådanne tilfælde anvendes 95%-fritagelsen ikke på det skønnede udbytte, men kun på det faktisk udbetalte udbytte, der er modtaget fra sådanne udenlandske selskaber. For så vidt angår skattefrit udbytte fra tyske selskaber er ingen af de udgifter, der direkte vedrører erhvervelse eller besiddelse af aktierne i det udbetalende selskab, fradragsberettigede (jf. paragraf 3, litra c, i indkomstskatte-loven).

Kapitalgevinst, der stammer fra afhændelse af kapitalandele i tyske eller udenlandske selskaber, er fritaget for skat for at undgå dobbeltbeskatning, og kapitaltab som følge af en sådan afhændelse er ikke fradragsberettiget. I medfør af de nye bestemmelser anerkendes den tidligere skattebegunstigelse i form af muligheden for at afskrive varige nedskrivninger af værdien af aktiebeholdningen ikke længere til skatteformål. Hvis en sådan afskrivning imidlertid har fundet sted (inden de nye bestemmelser trådte i kraft), vil en senere opskrivning af en sådan aktiebeholdning eller en kapitalgevinst, der er opnået ved afhændelse af sådanne aktier, blive medregnet igen og vil således skulle beskattes.

Med de nye indskrænkende kapitaliseringsregler fastsættes der strengere grænser for fradrag for rentebetalinger i den udstrækning udenlandske og tyske aktieejere nyder godt af disse udbetalinger. Følgende forhold mellem fremmed- og egenkapital betragtes som acceptable:

- 3/1 for selskaber, der som hovedaktivitet har ejerskab af kapitalandele i selskaber og finansiering af sådanne selskaber, eller som i balancen har aktiver, der for mere end 75%'s vedkommende udgøres af kapitalandele i selskaber; og

- 1,5/1 for alle andre selskaber.

Hvis det vurderes, at den forholdsmæssige andel af fremmedkapitalfinansieringen er for stor, foretages der en omklassifikation af sådanne rentebetalinger til maskeret udbytte.

I. Yderligere oplysninger om, hvordan CFC-lovgivningen fungerer

1. Hvilken indkomst er omfattet af *Hinzurechnungsbesteuerung*? (= indkomst fra det udenlandske selskab, der skal lægges til skattegrundlaget i Tyskland)

   Ifølge artikel 8, stk. 1, i lov om de skattemæssige relationer med udlandet (Aussensteuergesetz - AStG) er indkomst, der ikke er omfattet af *Hinzurechnungsbesteuerung,* hovedsagelig indkomst, der hidrører fra et udenlandsk selskabs aktive erhvervsvirksomhed, dvs. fra deltagelse i almindelig økonomisk virksomhed. Den indkomst, der skal lægges til vurderingsgrundlaget i Tyskland, omfatter derfor al indkomst, der ikke hidrører fra aktiv erhvervsvirksomhed i udlandet som f.eks. udbytte, royalties og renter. Kun ved at undersøge hver enkelt situation kan man bestemme, hvordan der skal sondres mellem aktiv og passiv indkomst. De funktioner, det udenlandske selskab udfører for at opnå indkomsten, er afgørende i denne henseende. Med henblik på en korrekt rubricering af indkomsten er det nødvendigt at analysere indkomsten fra det udenlandske selskab på grundlag af listen over virksomhed i artikel 8, stk. 1, i loven om de skattemæssige relationer med udlandet.

2. Forholdet mellem *Hinzurechnungsbesteuerung* og dobbeltbeskatningsoverenskomster

   Hinzurechnungsbesteuerung finder ikke anvendelse, hvis den faktiske udlodning af overskud er fritaget i henhold til en dobbeltbeskatningsoverenskomst. Overskud, der udloddes af et udenlandsk selskab til et selskab i Tyskland, kan fritages ifølge (som oftest gamle) overenskomster, hvis det i Tyskland etablerede selskab ejer mindst 10% af aktierne i det udloddende selskab (anvendelse af fritagelsesmetoden for udlodning af udbytte). Skattefritagelsen er betinget af, at det udenlandske selskabs indkomst hidrører fra aktiv erhvervsvirksomhed.

Dobbeltbeskatningsoverenskomster giver ikke skattefritagelse for "kapitalindkomst" (indkomst fra ejerskab, forvaltning, opretholdelse eller forøgelse af værdien af betalingsmidler, fordringer, værdipapirer, kapitalandele i andre aktiver eller tilsvarende aktiver). Denne begrænsning i ovennævnte fritagelse gælder, hvis afkastet på grundlag af "kapitalindkomsten" udgør mere end 10% af den indkomst fra det udenlandske selskab, der indgår i det mellemliggende overskud, eller overskrider DEM 120 000. Uanset om der foreligger en dobbeltbeskatningsoverenskomst, medregnes indkomst (renter) fra selskaber, der driver finansiel virksomhed, i det beløb, der skal lægges til, medmindre de stammer fra en aktivitet, der bidrager til aktiv erhvervsvirksomhed (ikke finansiel virksomhed) i det udenlandske selskab. Imidlertid bliver kun 80% af den indkomst, der stammer fra finansiering af selskaber i en koncern, beskattet. Dette fører til en effektiv beskatning på ca. 30%. Denne sats svarer groft taget til den skattebelastning, der er afgørende for udløsning af *Hinzurechnungsbesteuerung*.

Indkomst fra et selskab, der er etableret i udlandet, og som et tysk selskab ejer mindst 10% af kapitalen af, er ikke "kapitalindkomst", hvis indkomsten er blevet beskattet med mindst 25%.

3. Hvordan fastlægges den mellemliggende indkomst?

Hinzurechnungsbesteuerung er baseret på den passive indkomst, der skal lægges oven i skattegrundlaget i Tyskland ("Hinzurechnungsbetrag"). Det beløb, der skal lægges til, er hele den passive indkomst fra det udenlandske selskab efter fradrag af skat på denne indkomst. Den samlede indkomst fastlægges efter tyske skattelovgivning. Hvis det udenlandske selskab har både aktiv og passiv indkomst, skal indkomsten fra den aktive virksomhed fratrækkes det samlede beløb. Hvis den aktive virksomhed og den passive indkomst er så tæt forbundet, at indkomsten fra førstnævnte ikke kan udskilles, skal den samlede indkomst opdeles i forhold til omsætningen, forudsat at der ikke findes et mere relevant opdelingskriterium.

4. "Lav" beskatning

Beskatningen anses ikke for at være "lav", hvis indkomsten fra det udenlandske selskab, fastlagt i henhold til tysk skattelovgivning, beskattes med en indkomstskat på mindst 25% enten i det land, hvor den faktiske ledelse af det udenlandske selskab foregår, eller i det land, hvor det udenlandske selskab har sit hovedkontor (hjemsted).

Loven om skattenedslag (Steuersenkungsgesetz - StSenkG) præciserer artikel 8, stk. 3, i loven om de skattemæssige relationer med udlandet, men ændrer ikke dens indhold. Den er nu affattet således

> "Der er tale om lav beskatning ..., hvis indkomsten i henholdsvis den stat, hvor den faktiske forvaltning finder sted og den stat, hvor det udenlandske selskab har sit hovedkontor (hjemsted), er beskattet med en selskabsskattesats på under 25%, ...".

Dette betyder, at hvis et udenlandsk selskab har sit hovedkontor/hjemsted (= registreret i handelsregistret) i et land og sin faktiske ledelse i et andet - med andre ord er dobbelt hjemmehørende, hvilket sjældent forekommer i praksis - og den samme indkomst beskattes i begge udenlandske selskaber, anvendes kun *Hinzurechnungsbesteuerung,* hvis beskatningen er "lav" både i det land, hvor hovedkontoret/hjemstedet er beliggende og i det land, hvor den faktiske ledelse foregår. Med andre ord er der ingen *Hinzurechnungsbesteuerung,* hvis den pågældende indkomst er "højt" beskattet i mindst et land.

Nedenstående oversigt viser en række eksempler:

	Indkomstbeskatning i		
	Land, hvor virksomheden har sit hovedkontor/hjemsted i %	Land, hvor ledelsen foregår i %	Anvendelse af *Hinzurechnungs-besteuerung*
1	0	0	ja
2	0	24	ja
3	0	25	nej
4	10	20	ja
5	10	25	nej
6	24,9	24,9	ja

5. Skattesats

Skatten på det beløb, der skal lægges til, er 38%, og dette lægges til den almindelige lov-bestemte selskabsskat. Artikel 8b i lov om selskabsskat (*Körperschaftssteuergesetz* - KStG) om fritagelse af udbytte gælder ikke for det beløb, der lægges til.

6. Yderligere bestemmelser til imødegåelse af misbrug (artikel 42 i den almindelige skattelov)

Hvis der er valgt en retlig struktur, en form eller ordning, der tydeligt er kunstig - f.eks. hvis der ikke er nogen reel, ikke-skattemæssig, begrundelse for den særlige struktur, form eller ordning, og hvis det økonomiske nettoresultat er det samme som ved en direkte skattepligtig transaktion - vil skattetilsvaret blive udfundet på samme måde som i en retlig struktur, form eller ordning, der er relevant for de pågældende økonomiske transaktioner. I tilfælde af misbrug via en irrelevant (kunstig) retlig struktur, form eller ordning, baseres beskatningen ikke på de faktiske transaktioner, men i stedet på den retlige struktur, form eller ordning, der skønnes mere relevant.

II. Artikel 8b, stk. 5 i selskabsskatteloven (5% af udenlandsk udbytte der anses for ikke-fradragsberettigede forrretningsomkostninger)

Ifølge artikel 8b, stk. 5, i selskabsskatteloven anses en fast sats på 5% af udbyttet som ikke-fradragsberettigede forretningsomkostninger. Hvis forretningsomkostningerne er over 5% af udbyttet, behandles udbetaling af udbytte fra udenlandske datterselskaber mere fordelagtigt end udbytte fra indenlandske datterselskaber; hvis forretningsomkostningerne er lavere, behandles udbetaling fra indenlandske datterselskaber derimod mere fordelagtigt end udbetaling af udbytte fra udenlandske datterselskaber. Resultatet er, at det er umuligt at sige, om det er indenlandske eller udenlandske datterselskaber, der behandles mest fordelagtigt.

Anvendelsen af en fast sats for fradragsberettigede forretningsomkostninger er en forenkling, der er i overensstemmelse med artikel 4, stk. 2, i direktivet om moder-datterselskaber, der fastsætter den til en fast sats på 5% af den fortjeneste, der udloddes af datterselskabet.

BESKRIVELSE AF DE TO FORANSTALTNINGER UNDER NEDERLANDENES FISKALE RAMME

De Nederlandske Antiller - Skattemæssig behandling af holdingselskaber under Nederlandenes fiskale ramme

Baggrund

I december 1999 vedtog De Nederlandske Antiller en række skatteændringer, hvorved anordningen om beskatning af overskud blev ændret og der blev indført en ny anordning om udbytteskat, som led i en ny fiskal ramme. De nye skatteanordninger, der tog sigte på at øge gennemsigtigheden, trådte i kraft den 1. januar 2000, og det er planen, at bestemmelserne skal gælde med tilbagevirkende kraft fra den 1. januar 2001.

Med den nye anordning om udbytteskat blev der indført kildeskat med en sats på 10% af bruttoudbyttet. Udbyttekildeskatten er dog endnu ikke trådt i kraft[1].

I december 2000 indgik Nederlandene og De Nederlandske Antiller en aftale, der blandt andet indeholder et tilsagn fra De Nederlandske Antiller om at bringe (og holde) deres lovgivning i overensstemmelse med EU's og OECD's (internationale) beskatningsprincipper og følge OECD-processen vedrørende skadelig skattekonkurrence (De Nederlandske Antiller afgav et sådant tilsagn i november 2000) og et løfte om at samarbejde om at gennemføre principperne i direktivet om beskatning af renteindtægter fra opsparing. Endvidere indebærer aftalen en ændring i Kongeriget Nederlandenes skatteordning. Ændringen skal godkendes af det nederlandske parlament. Den er for nylig blevet forelagt parlamentet, og det forventes, at det vil godkende den inden udgangen af 2001. De Nederlandske Antiller har fra begyndelsen gjort anvendelsen af Nederlandenes fiskale ramme betinget af, at det nederlandske parlament godkender ændringen i skatteordningen.

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1 Hvornår anordningen om udbytteskatten træder i kraft, afhænger af forskellige aspekter, blandt andet De Nederlandske Antillers traktatpolitik.

Tilknyttede betingelser

1. Skattefritagelse for kapitalandele kræver hverken, at det ikke-hjemmehørende selskab er underlagt overskudsbeskatning, herunder overskudsbeskatning i domicillandet, eller at kapitalandelen ejes i en bestemt periode, før fordelene opnås.

2. Der kan gives nedslag i udbyttekildeskatten, når udbytte fra udlandet kanaliseres gennem selskabet på De Nederlandske Antiller til dets udenlandske ejer af kapitalandele, forudsat at udbyttet har været pålignet en udenlandsk kildeskat på mindst 5%.

3. En række former for udlodning af udbytte er fritaget for udbyttekildeskat, herunder udbytte i forbindelse med likvidation samt udbytte udbetalt af

- selskaber, hvis aktier er noteret på en anerkendt børs
- skattefritagne selskaber
- offshore-selskaber
- selskaber, der opfylder kravene i anordningen om skibsregistre

4. Desuden gives der fritagelse for udbyttekildeskat for så vidt angår udbytteudbetaling af et selskab fra De Nederlandske Antiller til et udenlandsk selskab, der i en sammenhængende periode på mindst et år har besiddet 25% eller derover af kapitalandelen eller stemmeretten i selskabet på De Nederlandske Antiller.

5. Udbyttekildeskatten er endnu ikke trådt i kraft[1], men når den træder i kraft, vil skattepligtige kunne vælge en tolvmåneders "grandfather"-regel.

[1] Hvornår anordningen om udbytteskatten træder i kraft afhænger af forskellige aspekter, blandt andet De Nederlandske Antillers traktatpolitik.

Skattefordele

Selskaber på De Nederlandske Antiller er fritaget for beskatning af alle former for overskud (udbytte, kapitalgevinst, udlodning af overskud osv.) der er forbundet med en kvalificeret aktiebesiddelse i et hjemmehørende selskab og for 95% af overskuddet fra kapitalandele i et ikke-hjemmehørende selskab. En aktiebesiddelse i et skattefritaget selskab på De Nederlandske Antiller behandles som en kapitalandel i et ikke-hjemmehørende selskab.

Der kan på særlige betingelser (der f.eks. vedrører udbyttets oprindelse og bestemmelse, typen af det udbetalende selskab og aktiebesiddelsens størrelse) som ovenfor anført gives nedslag i og/eller fritagelse for udbyttekildeskat (skatteprocent i henhold til loven: 10% af bruttoudbyttet.

De Nederlandske Antiller - Skattefritagne selskaber under Nederlandenes fiskale ramme

Baggrund

I december 1999 vedtog De Nederlandske Antiller en række skatteændringer, hvorved anordningen om beskatning af overskud blev ændret og der blev indført en ny anordning om udbytteskat, som led i en ny fiskal ramme. Den nye ramme, der tager sigte på at øge gennemsigtigheden, trådte i kraft den 1. januar 2000. Datoen for den faktiske anvendelse af bestemmelserne i den nye ramme er blevet forlænget med endnu 1 år fra den 1. januar 2000 til den 1. januar 2001. I den forbindelse skal det bemærkes, at de fleste bestemmelser skal gælde med tilbagevirkende kraft fra den 1. januar 2001[1].

Med den ændrede anordning om beskatning af overskud blev der indført en ny ordning "Netherlands Antilles Exempt Company" (skattefritagne selskaber på De Nederlandske Antiller). Det er ikke tanken, at ordningen med skattefritagne selskaber skal træde i stedet for de eksisterende offshore-ordninger F020 og F023. De eksisterende offshore-beskatningsordninger blev ikke ophævet med virkning fra den 1. januar 2000. Offshore-ordningerne er fortsat i kraft og finder anvendelse, og vil (bortset fra grandfather-reglerne) blive ophævet, når Nederlandenes nye fiskale ramme træder i kraft og finder anvendelse.

I december 2000 indgik Nederlandene og De Nederlandske Antiller en aftale, der bl.a. indeholder et tilsagn fra De Nederlandske Antiller om at bringe (og holde) deres lovgivning i overensstemmelse med EU's og OECD's (internationale) beskatningsprincipper og følge OECD-processen vedrørende skadelig skattekonkurrence (De Nederlandske Antiller afgav et sådant tilsagn i november 2000), og et løfte om at samarbejde om at nå principperne i direktivet om beskatning af renteindtægter fra opsparing. Endvidere indebærer aftalen en ændring i Kongeriget Nederlandenes skatteordning. Ændringen skal godkendes af det nederlandske parlament. Den er for nylig blevet forelagt parlamentet, og det forventes, at det vil godkende den inden udgangen af 2001. De Nederlandske Antiller har fra begyndelsen gjort anvendelsen af Nederlandenes nye fiskale ramme betinget af, at det nederlandske parlament godkender ændringen i skatteordningen.

1 Hvornår anordningen om udbytteskatten træder i kraft, afhænger af forskellige aspekter, bl.a. De Nederlandske Antillers traktatpolitik.

Tilknyttede betingelser

1. Ledelsen for et skattefritaget selskab på De Nederlandske Antiller skal føre en fortegnelse over navne og adresser på alle aktionærer, der besidder mere end 5% af selskabets indbetalte aktiekapital.

2. Deltagelse i ledelsen af et skattefritaget selskab er begrænset til hjemmehørende (personer og anerkendte trust offices) på De Nederlandske Antiller. Under visse omstændigheder har ikke-hjemmehørende lov til at deltage i ledelsen.

3. Regnskaberne skal revideres af en uafhængig ekspert, som skal afgive revisionspåtegning som autoriseret revisor.

4. Selskabet må ikke være en bank eller en anden finansieringsinstitution, der er underlagt tilsyn af De Nederlandske Antillers centralbank.

5. Selskabets formål, både i henhold til vedtægterne og i praksis, må udelukkende eller næsten udelukkende bestå i at
   - yde kredit og investere midler
   - levere finansielle tjenesteydelser
   - udføre enhver handling, der har forbindelse med dets fastlagte formål.

6. Både hjemmehørende og ikke-hjemmehørende kan stifte et skattefritaget selskab.

Skattefordele

Et skattefritaget selskab på De Nederlandske Antiller, der er omfattet af den nye ordning, er fritaget for både overskudsbeskatning, hvis faste sats efter loven er 30% (34,5% med ø-tillægsskatten) og udbyttekildeskatten, hvis sats efter loven er 10%. Ovennævnte satser gælder i henhold til Nederlandenes fiskale ramme.

SAMMENFATNING AF MEDLEMSSTATERNES OPLYSNINGER OM ROLLBACK AF DERES SKADELIGE FORANSTALTNINGER I HENHOLD TIL DEN TIDSPLAN, SOM BLEV VEDTAGET AF ØKOFIN-RÅDET

ØSTRIG

Til:
Sue Babiker

Dato:
9. oktober 2001

Fra:
Dr. Kuttin

Vedrørende:
Rollback

Vi har allerede i vort brev af 26. april 2001 givet meddelelse om de foranstaltninger, Østrig overvejer. Arbejdet med at ændre selskabsskattelovens paragraf 10, stk. 3, er blevet indledt, således at der ikke vil være nytilkomne efter den 31. december 2001.

FINANSMINISTERIET

PAUL HATRY

Deres kontaktperson: Paul Hatry

Tlf.: 02 660 00 67

Fax: 02 660 72 27

Bruxelles, den oktober 2001

Avenue de la Colombie, 8

10100 Bruxelles

Madame PRIMAROLO
Présidente du Groupe Code de conduite
c/o Sue Babiker
H.M. Treasury
Parliament Street
LONDON SW1P 3AG
United Kingdom

Fr. formand,

Som svar på Deres anmodning af 26. september 2001 følger nedenfor en beskrivelse af de foranstaltninger, Belgien er rede til at træffe med henblik på at indfri det tilsagn med hensyn til rollback, som det indgik på Økofin-Rådets samling den 26.-27. november 2000.

– Indledende bemærkning

Den belgiske regering har for nylig påbegyndt en omfattende reform af selskabsskatten. Reformen, hvis mest fremtrædende aspekt er en nedsættelse af den nominelle sats fra 40,17% til 33,99%, blev vedtaget i ministerrådet i begyndelsen af oktober 2001. Lovforslaget med reformen vil snarest blive forelagt for det belgiske parlament. To af de rollback-foranstaltninger, der er beskrevet nedenfor, skal indgå i en lov og kunne derfor enten integreres i det lovforslag til reformen, den belgiske regering har forelagt, eller tage form af et lovforslag fremsat på parlamentets initiativ ("loi d'initiative parlementaire") stort set parallelt med selskabsskattereformen.

– Rollback

Rapporten af 23. november 1999 fra Gruppen vedrørende Adfærdskodeksen (SN 4901/99) har indkredset 5 belgiske skatteforanstaltninger, der har skadelige karakteristika. Koordinationscentre, distributionscentre, servicecentre, regler for amerikanske handelsselskaber (US Foreign Sales Companies) og rulings vedrørende uformel kapital.

– Koordinationscentre

Hvis reglerne for koordinationscentre skal afvikles, må der vedtages en lov. Det søgsmål, Europa-Kommissionen har anlagt mod Belgien i forbindelse med statsstøtte gør imidlertid ethvert samarbejde fra Belgiens side inden for rammerne af Gruppen vedrørende Adfærdskodeksen umuligt. Belgien står nemlig i øjeblikket over for to procedurer. En retslig procedure, der højst sandsynligt vil ende ved Domstolen for De Europæiske Fællesskaber, og en politisk procedure i Gruppen vedrørende Adfærdskodeksen. Belgien kan ikke fuldt ud hellige sig begge procedurer på én gang, da en eventuel godkendelse i Kodeksgruppen af Belgiens del af rollback-foranstaltningerne vil kunne udgøre et ugunstigt element for Belgien i forbindelse med drøftelsen af hensigtsmæssige foranstaltninger inden for rammerne af den retslige procedure vedrørende statsstøtte. Belgien finder det derfor uhensigtsmæssigt at beskæftige sig med rollback af reglerne for koordinationscentre på nuværende tidspunkt.

– Distributionscentre og servicecentre

Der vil blive foretaget følgende ændringer i de administrative cirkulærer vedrørende de pågældende to ordninger.

– "cost plus" vil blive beregnet i hvert enkelt tilfælde på baggrund af den reelle eller faktiske situation for den virksomhed, der ansøger om at anvende ordningen.

– det grundlag, på hvilket "cost plus" beregnes, omfatter alle centrets udgifter.

– Regler for amerikanske handelsselskaber

Den seneste udvikling inden for Verdenshandelsorganisationen viser, at USA vil blive nødsaget til at ændre sin FSC-ordning for at bringe sig i overensstemmelse med organisationens regler. Så snart Verdenshandelsorganisationen har truffet en endelig afgørelse med hensyn til den amerikanske FSC-ordning og USA har efterlevet den, vil Belgien ophæve sin fiskale ledsageordning.

– Rulings vedrørende uformel kapital

I forbindelse med vedtagelsen af rapporten af 23. november 1999 fra Gruppen vedrørende Adfærdskodeksen (SN 4901/99) stod Belgien fast på, at denne ordning ikke har skadelig karakter, da princippet om uformel kapital er ved at blive accepteret som IAS-standard (international regnskabsstandard). Belgien agter dog at give ordningen et uanfægteligt retsgrundlag. Regentanordningen fra 1831 vil blive erstattet af en ny lov (se den indledende bemærkning). For så vidt angår selve den fiskale ordning vil den for fremtiden blive bevilget fra sag til sag på grundlag af virksomhedens reelle eller faktiske situation, og beslutningen om at bevilge denne fiskale ordning vil blive meddelt den medlemsstat, hvor moderselskabet er hjemmehørende.

Med venlig hilsen

Paul Hatry
Finansministerens personlige repræsentant
ved Den Europæiske Union
Tidl. finansminister
honorært medlem af senatet

DANMARK

25. oktober 2001

AAM 21 - Holdingselskaber

Med lov nr. 282 af 25. april 2001 er ordningen for holdingselskaber blevet ændret med virkning fra den 1. juli 2001. De nye regler omfatter både "eksisterende udbyttemodtagere" og "nytilkomne".

I henhold til de almindelige regler svares der kildeskat til en sats på 28% af udbytte, der udbetales af et selskab, der er hjemmehørende i Danmark. Satsen kan nedsættes i henhold til en dobbeltbeskatningsaftale.

Udbytte er dog fritaget for kildeskat, hvis det udbetales til et moderselskab, der har ejet mindst 25% af aktierne i det udbyttebetalende selskab i en sammenhængende periode på mindst et år, i hvilket der er blevet udbetalt udbytte.

I henhold til de bestemmelser, der var gældende indtil den 30. juni 2001, gjaldt undtagelsen for udbytte, der blev udbetalt til et moderselskab, uanset om moderselskabet var hjemmehørende i Danmark eller i udlandet.

Ændringen indebærer, at fritagelsen kun gælder for udbytte udbetalt til et udenlandsk moderselskab, i tilfælde hvor Danmark skal undlade at beskatte udbytte eller nedsætte skatten på udbytte i henhold til EF-direktivet om moder- og datterselskaber eller en af Danmark indgået dobbeltbeskatningsaftale.

Af udbytte udbetalt af et dansk datterselskab til et udenlandsk moderselskab, skal der derfor nu svares kildeskat med en sats på 28%, hvis sådant udbytte ikke er omfattet af EF-direktivet om moder- og datterselskaber eller en af Danmark indgået dobbeltbeskatningsaftale med den ovenfor beskrevne virkning.

Danmark har ikke indgået dobbeltbeskatningsaftaler med skattely-jurisdiktioner.

De nye bestemmelser gælder for udbytte udbetalt fra og med den 1. juli 2001, uanset hvornår det udenlandske moderselskab erhvervede aktierne i det danske datterselskab.

Lov nr. 282 af 25. april 2001 indeholder derfor ingen regler om velerhvervede rettigheder ("grandfathering"). De nye regler gælder også for udenlandske moderselskaber, der har nydt godt af de tidligere gældende regler.

Danmark ønsker ikke at opretholde fodnote 22 og 27 i rapporten fra november 1999.

FINLAND

25. oktober 2001

ADFÆRDSKODEKSEN - ROLLBACK

Gruppen vedrørende Adfærdskodeksen har anmodet medlemsstaterne om at hjælpe gruppen med oplysninger om de foranstaltninger, som de er rede til at gennemføre med henblik på at indfri deres tilsagn i konklusionerne fra Økofin-Rådets samling i november 2000 for så vidt angår nytilkomne.

Nedenfor følger Finlands redegørelse for spørgsmålet.

Nytilkomne

For Finlands vedkommende er der kun en foranstaltning, der ifølge 1999-rapporten anses for at være potentielt skadelig (B008, Ålandsøerne - Captive selskaber på forsikringsområdet). Ifølge provinsregeringen på Ålandsøerne er der ingen selskaber, der nyder godt af bestemmelserne om captive selskaber på forsikringsområdet.

Som allerede anført tidligere har provinsregeringen angivet, at den ikke i den nuværende situation anser sig for at være politisk forpligtet til at foretage en ændring af sin lovgivning om captive selskaber på forsikringsområdet. Som begrundelse for sin holdning har provinsregeringen anført, at der ikke har været tilstrækkelig åbenhed om forvaltningen af adfærdskodeksens regler til at give provinsregeringen mulighed for at vurdere indholdet af drøftelserne. Provinsregeringen er endvidere af den opfattelse, at den afgørelse, der er truffet på dette stadium, kun vedrører skatteforanstaltninger, der er potentielt skadelige.

Provinsregeringen har imidlertid tilkendegivet, at den er villig til at føre yderligere politiske drøftelser om en ændring af denne skatteforanstaltning. Den finske regering vil fortsat føre politiske drøftelser med provinsregeringen bl.a. om eventuelle nytilkomne efter den 31. december 2001.

FRANKRIG

STATSSEKRETÆREN MED ANSVAR FOR BUDGETTET

Fr. formand,

På mødet i Gruppen vedrørende Adfærdskodeksen den 26. september 2001 anmodede De om at få oplysninger om de påtænkte rollback-foranstaltninger med henblik på at forberede mødet den 17. oktober og udarbejde en rapport til Økofin-Rådet.

Frankrig har givet udførlige oplysninger om de ændringer, som det med forbehold af parlamentets holdning (jf. de tidligere meddelelser af 22. marts 2000, 19. oktober 2000 og 20. april 2001) vil skulle tage under overvejelse for at opfylde sine forpligtelser til rollback af foranstaltninger, der er anført på listen over skadelige foranstaltninger.

Rollback-foranstaltningerne er allerede blevet indledt i Frankrig, idet der med finansloven for 2001 er blevet foretaget ændringer i ordningen for henlæggelser til fornyelse af olie- og gasreserver, hvorved ordningens skadelige karakteristika efter vor opfattelse er blevet fjernet. På denne baggrund vil det være ønskeligt, at gruppen foretager en grundig gennemgang af de foranstaltninger, som medlemsstaterne har truffet eller som de overvejer med henblik på at afvikle deres ordninger eller fjerne de karakteristika, der anses for at være skadelige.

For så vidt angår rollback og nytilkomne hænger disse to spørgsmål efter vor opfattelse nøje sammen, og de vil blive behandlet samtidigt med virkning fra den 1. januar 2002. Vi vil kunne træffe de nødvendige foranstaltninger inden udgangen af 2001. Denne tidsfrist vil dog kunne blive forrykket som følge af iværksættelsen af procedurer vedrørende statsstøtte. Vi ønsker nemlig ikke igen at skulle forelægge parlamentet ændringer i regler, som det allerede har udtalt sig om i forbindelse med adfærdskodeksen.

Fodnoten i rapporten fra november 1999, hvori Frankrig understreger sammenhængen mellem de forskellige komponenter i skattepakken, kan udelades.

Med venlig hilsen

Florence Parly

Dawn Primarolo
Formand for Gruppen vedrørende
Adfærdskodeksen
Finansministeriet
Parliament Street
LONDON SW 1 P 3 AG
Det Forenede Kongerige

TYSKLAND

4. oktober 2001

Vedr.: Rollback. Svar fra den tyske delegation

Kære fr. Babiker,

Med hensyn til rollback af foranstaltning AAM019 (procenttillægget til fortjeneste for udenlandske koncerners kontrol- og koordinationscentre i Forbundsrepublikken Tyskland) gøres der opmærksom på, at Tyskland har ophævet den pågældende ordning med virkning fra den 1. januar 2001 (se dok. 14430/00 FISC 219).

Med venlig hilsen
Lars Poltorek
Tysklands forbundsfinansministerium

GRÆKENLAND

DEN HELLENSKE REPUBLIK
FINANSMINISTERIET
INTERNATIONALE ØKONOMISKE FORBINDELSER
SKATTEAFDELINGEN

Til | Dato: 12. oktober 2001

Skatteafdelingens sekretariat

Sue Babiker

Vedr.: Rollback: opfølgning af mødet i Gruppen vedrørende Adfærdskodeksen den 26.9.2001
Ref.: Deres dokument af 2.10.2001

Angående ovennævnte spørgsmål vil vi hermed meddele Dem, at lov 89/1967 (af Kontaktgruppen betegnet som B.11) vil blive ophævet ifølge artikel 7 i et lovforslag, der for nylig er blevet forelagt det græske parlament til ratificering.

Nedenfor gengives ordlyden af nævnte artikel 7:

Stk. 1: Fritagelser for told og skat samt enhver anden lettelse, der er omhandlet i lov 89/1967 (lovtidende 132A), finder ikke længere anvendelse på udenlandske industri- og handelsselskaber, der etableres i Grækenland fra og med 1. januar 2002.

Stk. 2: Industri- og handelsselskaber, der allerede er omfattet af lov 89/1967, vil fortsat være omfattet heraf indtil den 1. december 2005 for så vidt angår fritagelse for told og skat.

På ministerens vegne
C. Nihoritis
Direktør

IRLAND

9. oktober 2001

Sue Babiker

Gruppen vedrørende Adfærdskodeksen

Finansministeriet

Parliament St.

London FWIP 3AG

Adfærdskodeksen (Selskabsret)

1) Rollback og nytilkomne

2) Slettelse af fodnoter i rapporten fra november 1999

Som ønsket af formanden vedlægges hermed

- en redegørelse for Irlands gennemførelse af konklusionerne fra Økofin-Rådets samling i november 2000 især vedrørende rollback og nytilkomne

- en note om Irlands nuværende holdning med hensyn til fodnoterne i rapporten fra november 1999 - vi er indforstået med at trække to af vore fire forbehold tilbage på baggrund af det efterfølgende arbejde i gruppen.

Med venlig hilsen

Donald McNally

Vicegeneralsekretær

Indfrielse af vort tilsagn i konklusionerne fra Økofin-Rådets samling i november 2000 for så vidt angår nytilkomne

På Økofin-Rådets samling i november 2000 gav ministrene deres tilsagn til (punkt 4 i konklusionerne vedrørende adfærdskodeksen)

> "at virksomheden kun kan blive nyomfattet af skadelige ordninger indtil den 31. december 2001, medmindre disse ordninger har været omfattet af en eksisterende afgørelse fra Kommissionen om fastsættelse af en længere periode i forbindelse med statsstøtte, og under alle omstændigheder kun kan nyde godt heraf indtil den 31. december 2002".

Irland har følgende holdning med hensyn til nytilkomne for så vidt angår de fem af dets foranstaltninger, som et flertal i Gruppen vedrørende Adfærdskodeksen anser for skadelige:

B001 Det Internationale Center for Finansielle Tjenesteydelser (Dublin)	Konklusionerne fra Økofin-Rådets samling i november 2000 for så vidt angår nytilkomne er blevet gennemført
C024 Forarbejdningssats på 10%	Konklusionerne fra Økofin-Rådets samling i november 2000 for så vidt angår nytilkomne er blevet gennemført
C025 Olieskat	Denne foranstaltning kan ikke længere anses for skadelig, da skattesatsen (25%), der anvendes både på nytilkomne og eksisterende selskaber, nu er højere end den generelt anvendte sats (20%)
D017 Shannon Lufthavn	Konklusionerne fra Økofin-Rådets samling i november 2000 for så vidt angår nytilkomne er blevet gennemført
E007 Udenlandsk indkomst	Konklusionerne fra Økofin-Rådets samling i november 2000 for så vidt angår nytilkomne er blevet gennemført

Tilbagetrækning af fodnoter i rapporten fra november 1999

Irlands holdning med hensyn til dets fodnoter i rapporten fra november 1999 er nu følgende:

Fodnote 4	Vi er nu indforstået med, at fodnote 4 udgår
Fodnote 21	Forbeholdet i fodnote 21 er afgørende for Irland, og det ønsker derfor at bibeholde det i rapporten. Der er ikke i kodeksen grundlag for at tage noget andet lands skatteniveau i betragtning som led i vurderingen af individuelle foranstaltninger
Fodnote 28	Foranstaltning E007 er nu afviklet, men der er et lille antal overgangstilfælde. På baggrund heraf ønsker vi indtil videre at bibeholde fodnote 28
Fodnote 38	Da foranstaltning C24 er fuldt afviklet i overensstemmelse med konklusionerne fra Økofin-Rådets samling i november 2000, er vi nu indforstået med at trække fodnote 38 tilbage bortset fra sidste punktum, der blot er en faktuel konstatering vedrørende foranstaltning C25

ITALIEN

I Deres brev af 12. februar 2001 beder De mig under henvisning til arbejdet i Gruppen vedrørende Adfærdskodeksen om at anføre, hvilke initiativer den italienske regering vil tage med hensyn til den ordning, der skal gælde for vort land.

Som De ved, er Italien kun anført på listen over skadelige foranstaltninger i rapporten fra Gruppen vedrørende Adfærdskodeksen til Økofin-Rådets samling den 29. november 1999 med ordningen vedrørende Trieste - finansierings- og forsikringscenter (artikel 3 i lov af 19. januar 1991, nr. 19).

Med hensyn til denne ordning bekræfter jeg, at Italien har givet tilsagn om ikke at oprette centret. Den faste repræsentation har allerede i september 2000 formelt givet Kommissionen (Generaldirektoratet for Konkurrence) meddelelse herom.

Jeg vil gerne gentage, at Italien giver sin fulde støtte til det arbejde, der udføres i Gruppen vedrørende Adfærdskodeksen, og til skattepakken som helhed.

LUXEMBOURG

Adfærdskodeksen - opfølgning af mødet den 26. september 2001

Rollback

Den luxembourgske delegations besvarelse

Indledning

I formandskabets note med forslag til tidsplan og fremtidigt arbejdsprogram, som den foreligger efter mødet i Gruppen vedrørende Adfærdskodeksen den 28. juni 2001 (10302/1/01 REV 1 FISC 122), hedder det:

"7. *For at gruppen kan arbejde videre med rollback af de 66 foranstaltninger, der er anført i bilag C til gruppens rapport til Økofin-Rådets samling den 29. november 1999, skal der udarbejdes en rapport til Økofin-Rådet:*

- *om de foranstaltninger, som medlemsstaterne er rede til at gennemføre for at indfri deres tilsagn i konklusionerne fra Økofin-Rådets samling i november 2000 vedrørende nytilkomne, og*
- *om, hvorvidt de medlemsstater, der har indsat fodnoter i rapporten fra november 1999, ønsker at opretholde de pågældende forbehold på baggrund af gruppens efterfølgende arbejde."*

I henhold til nævnte arbejdsprogram agter Gruppen vedrørende Adfærdskodeksen at tage rollback-problematikken op på mødet den 17. oktober 2001.

Den luxembourgske delegation noterer med tilfredshed, at arbejdet vedrørende rollback er blevet genoptaget, hvilket er absolut nødvendigt for at opnå balance i skattepakken. Den kan dog ikke lade være med at bemærke, at dette arbejde hindres ikke alene af fodnoterne i rapporten fra november 1999, men også af en række andre faktorer, bl.a. følgende:

- det forhold, at Økofin-Rådet stadig ikke formelt har godkendt listen over skadelige foranstaltninger.

- Kommissionens nylige initiativ vedrørende statsstøtte
- visse af de erklæringer, der blev fremsat i forbindelse med konklusionerne fra Økofin-Rådets samling den 26.-27. november 2000
- sammenblandingen af adfærdskodeksens kriterier/"nøgleaspekterne" i den endelige rapport/"nøgleaspekterne" i "retningslinjerne"
- usikkerheden med hensyn til, om anmodningerne om forlængelse vil blive efterkommet.

Navnlig vil det forhold, at Kommissionen har iværksat overtrædelsesprocedurer mod nogle medlemsstater i forbindelse med bestemte ordninger, der er anført i listen over 66 foranstaltninger, kunne hæmme arbejdet vedrørende rollback inden for rammerne af kodeksen - idet der er tale om en retlig procedure, der har sine egne regler - i en sådan grad at visse tiltag i henhold til kodeksen eller under dække af kodeksen vil kunne volde problemer og endog være uforenelige med den iværksatte støtteprocedure.

Derudover er der stadig en vis usikkerhed med hensyn til andre foranstaltninger. F.eks. skal det bemærkes, at Kommissionen har bedt om oplysninger som led i statsstøtteprocedurer, men at den endnu ikke har besluttet, hvorvidt der skal indledes en overtrædelsesprocedure. Denne usikkerhed har forskellige konsekvenser, der vanskeliggør arbejdet under kodeksen. Som eksempel skal det ligeledes anføres, at hvis en ordning afvikles, er det absolut ikke sikkert, at denne afvikling, hvis ordningen betragtes som støtte, er i overensstemmelse med kravene med hensyn til støtte; det skal endvidere bemærkes, at en rollback-foranstaltning i sig selv kan indvirke juridisk på selve kommissionsafgørelsen vedrørende statsstøtte.

Der mindes om, at et af målene, om ikke hovedmålet i kodeksens litra J, hvorefter støttereglerne skal følges nøje, har været at undgå, at ordninger på statsstøtteområdet, der svarer til ordninger, der anses for skadelige i henhold til kodeksen, godkendes eller vedbliver med at være godkendt.

Rollback/nytilkomne

I forbindelse med konklusionerne fra november 2000 om skattepakken forpligtede medlemsstaterne sig i princippet til at sørge for, at virksomheder kun kan blive nyomfattet af skadelige ordninger indtil den 31. december 2001 og kun kan nyde godt heraf indtil den 31. december 2002.

Det skal dog bemærkes, at dette tilsagn vedrører "skadelige ordninger" og ikke foranstaltninger, der er nævnt i bilag C til rapporten fra Gruppen vedrørende Adfærdskodeksen til Økofin-Rådets samling den 29. november 1999, og at det således forudsætter, at der opnås enighed om listen over skadelige foranstaltninger inden udgangen af 2001. I den tidsplan vedrørende skattepakken, som Økofin-Rådet fastlagde den 10. juni 2001, er der dog ikke fastsat noget sådant i 2001.

Den luxembourgske delegation er indstillet på at gøre, hvad der er nødvendigt for sammen med de andre medlemsstater og deres afhængige eller associerede territorier at indfri sine tilsagn i almindelighed og med hensyn til nytilkomne i særdeleshed inden for de foreskrevne frister.

Med hensyn til to foranstaltninger i Luxembourg, der er nævnt i listen i bilag C til rapporten fra november 1999, nemlig koordinationscentre og finansieringsselskaber, er der - da de to pågældende cirkulærer er ophævet - ifølge sagens natur ikke længere nytilkomne.

Hvad angår de tre andre foranstaltninger i Luxembourg, der er nævnt i bilag C i rapporten fra november 1999, er Luxembourg af den opfattelse, at det er absolut nødvendigt, at listen over skadelige foranstaltninger godkendes, inden der kan iværksættes de nødvendige lovgivningsprocedurer på nationalt plan.

Med forbehold af disse generelle bemærkninger og under henvisning til ovenstående kommentarer vedrørende statsstøtte er den luxembourgske delegation rede til at overveje følgende foranstaltninger med henblik på at indfri sit tilsagn for så vidt angår nytilkomne.

Hvad angår ordningen for holdingselskaber af 1929 er Luxembourg rede til at ændre loven af 31. juli 1929 om skatteordningen for holdingselskaber.

Angående hensættelser til udsving i erstatningernes størrelse inden for genforsikring skal der erindres om, at Luxembourg ikke kan tilslutte sig gruppens vurdering. Det er dog villigt til at ændre den luxembourgske anordning af 20. december 1991, der er vedtaget i medfør af artikel 95, 96, 98 og 99 i lov af 6. december 1991 om forsikringssektoren, herunder navnlig genforsikring.

For så vidt angår filialer af finansieringsselskaber er Luxembourg parat til at indlede forhandlinger med Schweiz om et tillæg til skattekonventionen mellem Schweiz og Luxembourg med sigte på at indføre en ordning med skattelettelser i stedet for skattefritagelsesordningen, hvis det viser sig nødvendigt for at tilpasse filialerne til tilsvarende ordninger, der findes i andre medlemsstater, men som ikke har været nævnt i forbindelse med kodeksen.

Fodnoterne i rapporten fra november 1999

Rapporten fra november 1999 indeholder tre fodnoter, som den luxembourgske delegation har ønsket.

I den første fodnote minder den luxembourgske delegation om, at adfærdskodeksen omfatter erhvervsbeskatning og vedrører de foranstaltninger, der indvirker eller kan indvirke betydeligt på virksomhedernes lokalisering i Fællesskabet, og understreger, at den har meget vanskeligt ved at gå ind for den asymmetriske fremgangsmåde, der anvendes, og som består i, at der i vid udstrækning kun er foretaget positiv vurdering af foranstaltninger vedrørende koncerninterne tjenesteydelser, finansielle tjenester og off shore-selskaber.

Den anden fodnote fra den luxembourgske delegation vedrører vurderingen af foranstaltning B7 "hensættelser til udsving i erstatningernes størrelse". I denne fodnote gentager Luxembourg desuden den holdning (det har gjort udførligt rede for i dok. 14321/98 ADD 1 FISC 211) vedrørende vurderingen af kriterium B1 og B2 samt kriteriet for ikke-anvendelse af kodeksens litra G, første afsnit (sammenligning af medlemsstaterne).

Den luxembourgske delegation ønsker at opretholde disse to fodnoter. Navnlig for så vidt angår problematikken vedrørende kodeksens anvendelsesområde, fortolkningen af visse kriterier samt ikke-anvendelse af en sammenligning mellem medlemsstaterne har gruppens efterfølgende arbejde været præget af en tankegang, der var lige så uafbalanceret som den, der lå til grund for rapporten fra november 1999. I øvrigt er Luxembourg blevet bestyrket i sine betænkeligheder på baggrund af udvidelsen af Den Europæiske Union og den manglende revision af kodeksen.

I den tredje fodnote, der omhandler vurderingen af den såkaldte "skattefritagelse fra kapitaldeltagelse", har Luxembourg fremsat en slags undersøgelsesforbehold, da den finder bemærkningen om, at en eventuel eksisterende lovgivning om kontrollerede udenlandske selskaber kan have betydning for, om "skattefritagelse fra kapitaldeltagelse" vurderes negativt eller positivt, tvetydig. Den luxembourgske delegation er villig til at trække denne fodnote tilbage.

NEDERLANDENE

Finansministeriet
Dawn Primarolo
Parliament Street
SW1P 3AG LONDON
Det Forenede Kongerige

Fr. Primarolo,

Som svar på Deres anmodning om oplysninger vedrørende rollback og om, hvorvidt Nederlandene ønsker at opretholde de forbehold, det har fremsat i rapporten fra november 1999, skal jeg meddele følgende.

Nederlandene har pr. 1. april 2001 ændret sin fremgangsmåde for indgåelse af forhåndsaftaler og har således erstattet gældende praksis med en APA/ATR-praksis. Betingelserne for at opnå forhåndsprisgodkendelse (APA) er helt i overensstemmelse med den vejledning om spørgsmålet, der blev offentliggjort i 1999 i OECD's retningslinjer for afregningspriser. Det betyder, at det i hvert enkelt tilfælde vil blive vurderet, hvorvidt der anvendes den korrekte afregningsprismetode og de korrekte kriterier. Der vil ikke længere blive anvendt faste margener for aktiviteterne. Margenerne vil regelmæssigt blive nyvurderet for at se, om de opfylder de normale kommercielle kriterier. De anordninger, der indfører APA/ATR-praksis, er tilgængelige for offentligheden. Desuden vil de principper, der ligger bag indgåelse eller nægtelse af APA'er/ATR'er blive offentliggjort, medmindre de allerede har været offentliggjort tidligere. Det betyder, at der er garanteret fuld gennemsigtighed. En oversættelse af alle anordningerne vedrørende APA/ATR-praksis er vedlagt. Anordningerne kan også findes på det nederlandske finansministeriums hjemmeside.

Desuden har det nederlandske parlament fået forelagt et lovforslag om kodifikation af armslængdeprincippet. Med denne kodifikation vil armslængdeprincippet som angivet i OECD's modelkonvention finde anvendelse i Nederlandene. Loven vil blive gennemført i 2002.

Som følge af indførelsen af APA-praksis er følgende aftaler blevet ændret pr. 1. april 2001, hvormed der fuldt ud er taget hensyn til den kritik, der har været fremsat fra EU's side

- "the cost-plus ruling;
- the resale-minus ruling;
- the intra group finance ruling;
- the finance branch ruling;
- the royalties ruling;
- the non standard ruling;
- US foreign sales corporation ruling."

Med hensyn til uformel kapital kan det bemærkes, at der ikke er tale om en specifik foranstaltning, men om et generelt princip, der følger af den nederlandske ordning for selskabsbeskatning. Virkningen af dette princip er, at beskatningen sker efter armslængdeprincippet. Alle aspekter af aftaler vedrørende uformel kapital vil derfor som led i APA-praksis blive gennemgået på baggrund af OECD's retningslinjer for afregningspriser.

På Økofin-Rådets samling den 26.-27. november 2000 nåede medlemsstaterne til enighed om retningslinjer om rollback og standstill for bl.a. holdingselskaber. Efter Nederlandenes opfattelse er skattefritagelse fra kapitaldeltagelse som anført på Økofin-Rådets samling i november 2000 i fuld overensstemmelse med disse retningslinjer.

Selv om Kommissionen har indledt en statsstøtteprocedure vedrørende foranstaltningen "internationale finansieringsaktiviteter", er Nederlandene villige til at forpligte sig til at fortsætte den proces, Gruppen vedrørende Adfærdskodeksen har indledt. Nederlandene mener dog at problemet med manglende fælles spilleregler for beskatning af finansieringsaktiviteter og andre mobile aktiviteter i EU bør tages op til drøftelse.

Nederlandene har inden for rammerne af adfærdskodeksen forpligtet sig til så vidt overhovedet muligt at fremme anvendelsen af adfærdskodeksens principper i de områder, som afhænger af eller er associeret med Nederlandene. Nederlandene bestræber sig på at sikre, at såvel Aruba som De Nederlandske Antiller overholder adfærdskodeksens principper.

Konsultationer med disse autonome stater, som afhænger af eller er associeret med Nederlandene, har allerede givet resultater. De Nederlandske Antillers og Arubas regeringer har forpligtet sig til at følge OECD-proceduren vedrørende skadelig skattekonkurrence, og de har indgået en aftale med Nederlandene, hvori de har givet tilsagn om at tilpasse deres skattelovgivning til OECD's og EU's standarder for, hvad der er internationalt acceptabelt, eller at sørge for, at den fortsat er i overensstemmelse med disse standarder.

Endelig ønsker Nederlandene at opretholde sine forbehold vedrørende rapporten fra november 1999.

Med venlig hilsen

B. Brabers
Generaldirektør for skatte- og toldpolitik samt lovgivning

Bilag: Anordninger vedrørende APA-praksis.

Advance certainty; good faith between treaty partners[1]

Directorate for Legal Affairs

Decree of 30 March 2001, No. BOB2001/698M

The State Secretary for Finance has decreed as follows.

The Decree of 21 July 1995 (No. AFZ94/4519M) on fiscal implementation policy, standpoint provisions and appeals policy (as amended by the Decree of 26 January 1997 (No. AFZ94/4609M) sets out the rules for the provision of advance certainty by the tax administration. This decree provides a further explanation of those situations in which advance certainty will not be provided.

1. Introduction

In his letter to parliament of 17 February 1995 (No. DB96/716M), the State Secretary for Finance made the following remarks about the conditions under which advance certainty may be issued: "No rulings can be issued in cases of abuse of law or where such an action could constitute a breach of good faith between treaty partners". Under the Decree Transfer prices, the application of the arm's length principle and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines) of 30 March 2001 (No. IFZ2001/295M), the policy as published in the above mentioned letter was withdrawn. The present decree makes it clear that, in the future, the government will continue to pursue a policy based on the principle that no advance certainty will be granted if this is in breach of good faith between treaty partners and/or of general international interests.

1. This document contains an unofficial English translation by the Netherlands' Ministry of Finance of Decree No. BOB2001/698M, officially published in Dutch on 30 March 2001. Rights can only be derived from the original Dutch text of the decree.

2. Good faith

No advance certainty will be granted if this is in breach of good faith between treaty partners and/or of general international interests.
This means, for example, that the requested advance certainty will not be granted if the tax inspector suspects that doing so would be detrimental to the interests of a treaty partner or to another international interest.

A strong indication that providing advance certainty would be contrary to good faith between treaty partners arises if one or more aspects that are inherent in the proposed structures and/or to all of the various transactions related to the application for advance certainty would be contested if they occurred in the Netherlands (i.e. if the applicant is patently testing the limits of fiscal regulations). This strong indication that providing advance certainty would be contrary to good faith between treaty partners can be removed by imposing supplementary conditions on such advance certainty. In this respect the applicant may be asked to demonstrate that the treaty country or countries which are to be confronted with the aspects in question is or are aware of the overall structure and the series of connected transactions for which the advance certainty is requested in the Netherlands. An example of a situation in which it is possible to remove a suspicion that the provision of advance certainty would be contrary to good faith between treaty partners, is where a professional sportsman who is not resident in the Netherlands applies for advance certainty for the tax implications of a number of related transactions that have the effect of transferring the (legal and/or economic) interests of the sportsman's right to his name and image to an entity that is taxed at a rate which would not be considered as being reasonable by Dutch standards. There is a real risk in this situation that the tax base would be eroded either in the country in which the sportsman has built up his name and image or in the country in which the sportsman is a resident. For this reason, advance certainty will be provided in such cases only if the applicant is able to demonstrate that the tax administration in the country in which the sportsman has built up his name and image and/or in the country in which the sportsman is a resident is aware of the series of related transactions.

I have included other examples of situations which would be detrimental to the interests of a treaty partner inter alia in the Decree Entities providing intra-group financial services without a real economic presence in the Netherlands; no advance certainty, exchange of information and limited opportunities for crediting withholding tax (the Decree of 30 March 2001 (No. IFZ2001/294M), Paragraph 2).

An example of a situation that is contrary to general international interests is where goods are invoiced with the aim of concealing their origin and thereby evading an international boycott.

As a final point, no advance certainty is given, of course, if the tax inspector suspects that the information disclosed to the relevant foreign authorities is either inaccurate or inconsistent.

Procedure for dealing with requests for advance certainty in respect of transfer prices in cross-border transactions (advance pricing agreements) [1]

International Tax Policy and Legislation Directorate, Multilateral Affairs Division

Decree of 30 March 2001, No. IFZ2001/292M
The State Secretary for Finance has decreed as follows.

An advance pricing agreement (APA) provides advance approval on the determination of an arm's length price or a method for the determination of such a price for cross-border transactions (goods and services) between associated entities and between different parts of the same entity. The *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* published by the OECD in 1995 (hereinafter the OECD Guidelines) provide detailed guidance on the arm's length principle as included in Article 9 of the OECD Model Tax Convention.

The possibility of requesting an APA is being introduced into the national legislation of a growing number of countries. In October 1999, the Committee for Fiscal Affairs of the OECD published further procedural guidance (hereinafter the APA Guidelines) for the provision of such advance certainty. The APA Guidelines constitute a detailed explanation of Paragraphs 4.124 to 4.166 of the OECD Guidelines. The APA Guidelines are included as an Annexe to the OECD Guidelines[2]. The present decree provides detailed guidance on the application of the APA Guidelines in the Netherlands' tax practice.

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1. This document contains an unoffical English translation by the Netherlands' Ministry of finance of Decree No. IFZ 2001/292M, officially published in Dutch on 30 March 2001. Rights can only be derived from the original Dutch text of the decree.
2. The Dutch translation of the OECD Guidelines is included in binder *Internationale Fiscale Zaken* (Binder A), number 750.00.00.

This decree is not aimed at violating the rights and obligations set out in the General Taxes Act. The provision by the Netherlands' tax authorities of certainty falls within the scope of the Decree on Fiscal implementation policy, standpoint provisions and appeals policy (the Decree of 21 July 1995 (No. AFZ 94/4519M), as amended by the Decree of 26 January 1998 (No. AFZ97/4609M) and as further expanded by the Decree on advance certainty and good faith between treaty partners of 30 March 2001 (No. BOB 2001/698M)).

Since an APA provides advance certainty on the determination of transfer prices in an international context, the consequences of this certainty will not be limited to the Netherlands' tax base. This is what distinguishes an APA from giving advance certainty in a national context.

1. Organisation

A request for an APA should be addressed to the competent tax inspector. The tax inspector will always submit the request to the APA/ATR team of the Tax Office (Large Enterprises) in Rotterdam for binding advice. The APA/ATR team of the Tax Office (Large Enterprises) in Rotterdam will consult with the Co-ordination Group on Transfer Pricing (CGTP) in respect of the possible policy related aspects associated with the request which have not been published yet as part of existing policy in order to ensure that policy is consistent in both principle and practice. One of the members of the APA/ATR team of the Tax Office (Large Enterprises) in Rotterdam will at the same time be a member of the Co-ordination Group on Transfer Pricing.

If a request for the conclusion of a bilateral APA is submitted, the APA/ATR team of the Tax Office (Large Enterprises) in Rotterdam will immediately send a copy of the request to the Co-ordination Group on Transfer Pricing and to the International Tax Policy and Legislation Directorate of the Ministry of Finance. The International Tax Policy and Legislation Directorate will, as the competent authority for the Netherlands, notify the competent authority of the other state concerned of the request in order to start the bilateral procedure.

In order to accelerate the procedure of bi- and multilateral APAs, associated entities that are involved in such APA requests are advised to submit a request simultaneously to the competent authority in all the other states concerned. This will allow the states to start the assessment of the request at the same time instead of successively.

2. Unilateral or bilateral

The proceedings of the Netherlands' tax administration will in principle be aimed at concluding a bilateral APA. The consultation with the competent authorities of treaty countries for the conclusion of bilateral APAs is based on Article 25 of the OECD Model Tax Convention. Although a bilateral APA provides advance certainty to both sides, the tax administration cannot prescribe its use by taxpayers. In addition, in order to be able to enter into a bilateral APA, the Netherlands must have entered into an agreement for the avoidance of double taxation with that state that contains a provision similar to Article 25 of the OECD Model Tax Convention. The other state must also be prepared to enter into such a preliminary consultation. These circumstances may prevent the conclusion of a bilateral agreement. In less complex cases, for example, when only limited functions are performed with which little risk is involved or in cases with sufficient comparable data available, an unilateral APA may be preferable.

In certain circumstances, a taxpayer may wish to seek advance certainty in more than two countries and requests a multilateral APA. The tax administration will, in principle, co-operate with such requests. Should one or more states have, however, any objections to such a procedure, the request will be regarded as a request for the conclusion of various separate bilateral APAs. The applicant will be informed by the Tax Office (Large Enterprises) in Rotterdam on the division of the request into various separate requests for bilateral APAs.

3. Scope of an APA

An APA may include all of the transfer pricing issues relating to a taxpayer. The taxpayer has, however, a certain amount of flexibility to limit the request to specified related entities or specific transactions. Reference is made to Paragraph 4.137 of the OECD Guidelines. This does not mean that an APA request will be assessed in isolation. In its assessment of the request, the tax administration takes into account all of the relevant facts and circumstances that relate to the transaction(s) for which advance certainty is requested, such as, for example, the organisational structure that is chosen.

4. Duration

An APA is valid for the period specified in the agreement. On the one hand, it is desirable to provide approval for as long as possible a period in order to assess the tax implications of a business decision in advance as accurately as possible. On the other hand, a long period makes the predictions as to the future conditions on which the request is based less accurate thereby potentially casting doubt on the reliability of the methodology used in the request. The applicant is required to indicate for what period the advance certainty is desired and to provide reasons to support the acceptability of the use of this period. The acceptability of the period will, in particular, depend on the character of the activities and the period for which the facts and circumstances that affect the determination of the transfer prices can be regarded as retaining their relevance. In principle, the duration of the arrangement will be limited to four or five years. Exceptions may be made relating to, for example, long-term contracts.

At the expiry of the agreed period, on the request by the taxpayer, the tax authorities will assess whether or not a new APA can be concluded under the same conditions.

5. Retroactive effect

Although an APA normally applies to future transactions, the transaction or transactions to which a request relates may already have taken place in whole or in part before agreement is reached on the APA request. Then an APA may in certain cases apply to the transactions already concluded, provided that the taxpayer has requested this retroactive effect.

In principle, a requirement for retroactive effect is that the relevant facts and circumstances in the relevant period in the past are comparable to the facts and circumstances that are the basis for the APA request. Should there be recognisable differences in the relevant facts and circumstances, such a request can be considered if the applicant can demonstrate that for these differences accurate adjustments can be made to eliminate the material differences. When a request is made for an unilateral APA, the tax administration will take a request for retroactive effect only into consideration when it has been established that the retroactive effect does not lead to a reduction of the taxable profits in the outstanding years, which could effectively lead to part of the profits not being taxed at all.

6. The APA request

Depending on the facts and circumstances of each case, the taxpayer will have to submit the following information to the tax administration:

(a) information on the transactions, products, business or arrangements that will be covered by the request (including, if applicable, a brief explanation of why not all of the transactions, products, business or arrangements of the taxpayer(s) involved in the request have been included);
(b) information about the enterprises and permanent establishments involved in these transactions or arrangements;
(c) the names of the other state or states to which the request relates;
(d) information regarding the worldwide organisational structure (including information on the beneficial owners of the applicant's capital), history, financial data, products and functions, including the assets (tangible and intangible) and risks of any of the associated enterprises involved;
(e) a description of the proposed transfer pricing methodology, including a comparability analysis which includes comparable data from unrelated market parties and possible adjustments;
(f) the assumptions underpinning the request and a discussion of the effect of changes in those assumptions or other events, such as unexpected results, which might affect the continuing validity of the request;
(g) the financial years to be covered; and
(h) a general description of market conditions, for example, industry trends and the competitive environment.

Ad e. Transfer pricing methodology

The tax administration will start the assessment of a request in accordance with Paragraph 4.9 of the OECD Guidelines from the perspective of the method as proposed by the applicant. It follows that the taxpayer is free, in principle, in his choice of a transfer pricing method, provided that the chosen method leads to an arm's length remuneration for the specific transaction for which advance certainty is requested. The taxpayer has to substantiate the choice for a specific method.

Ad f. Critical assumptions

An APA relates to remuneration for transactions that have not yet taken place. It is, therefore, necessary to include in the determination agreement the critical assumptions, for example, operational and economic circumstances that may affect remuneration for the transactions when they take place. The taxpayer should include a description of these critical assumptions in his request. The purpose of the critical assumptions is to protect both the taxpayer and the tax administration against the risk that the agreement leads to results that are not in accordance with the arm's length principle. The assumptions should be phrased in such a way that the certainty remains applicable when the elements that are covered by the critical assumptions stay within certain margins. This prevents the situation arising that, for every variation from the starting situation, the APA has to be revised or reconsidered. With this, flexibility is guaranteed. When the market share of a certain product influences the determination of the arm's length price, a range for the market share could be considered. Within such a range, a change in the market share is supposed not to influence the price. When an assumption is no longer valid, a review of (a part of) the agreement is, in principle, required.

An overview of possible critical assumptions is set out below. This overview is not exhaustive and serves only as an example, and includes:

(a) assumptions that show the consequences for the APA of the relevant changes in legislation, published policy or case law;

(b) assumptions regarding tariffs, duties, import restrictions and government regulations;

(c) assumptions regarding economic conditions, the market share, market conditions, the end selling price and sales volume;

(d) a description of the functions provided in the request, taking into account the assets used and the risks assumed by the enterprises that are involved in the transactions; and

(e) assumptions regarding exchange rates, interest rates, credit ratings and capital structure.

7. Assessment of the request

The facts as presented in the request will, in principle and where possible, be reviewed by the tax administration. The extent of this review will depend on the specific facts and circumstances of each case. Where necessary, further explanations and information will be requested from a taxpayer.

8. Exchange of information

As part of the determination agreement, the applicant is required to declare that the information as included in the APA is not subject to one of the exemption clauses set out in Article 13, Paragraph 3, of the International Assistance with Levying Taxes Act (*Wet op de internationale bijstandsverlening bij de heffing van belastingen*,WIB) regarding commercial, industrial or professional secrets. In this way possible conflicts between the tax administration and the applicant are avoided.

9. Determination agreements

In the case of a bilateral APA, the final consensus between the states involved will be recorded in an agreement between the states. In order to implement this bilateral agreement in the Netherlands, the tax administration will conclude a determination agreement with the same contents with the associated entities involved which are resident in the Netherlands. In the case of a unilateral APA, only the last form of determination agreement is concluded. The tax administration will take into account the framework for determination agreements, as described in the Decree of 1 December 1997 (No. AFZ97/2412).

This decree includes a procedure on recording negative decisions on a request for a determination agreement. In this respect, the following should be noted. The orientational phase should not be regarded as constituting a form of consultation as defined in the above decree.

There will only be a form of consultation for which a written record needs to be drawn up once the request in question is more or less fully consistent with the framework for APAs that is issued under the government's current policy. A decision by the tax inspector in this specific case not to conclude a determination agreement will be communicated to the taxpayer in writing. In this case, a record is drafted as described in the Decree of 1 December 1997 (No. AFZ97/2412).

The determination agreement will at least contain the following elements:

a. the names and addresses of the enterprises that are covered by the agreement;
b. the transactions, agreements or arrangements and financial years covered by the agreement;
c. a description of the agreed methodology and other related matters such as agreed comparable data or a range of expected results;
d. a definition of relevant terms that form the basis for applying and calculating the methodology, for example, sales, cost of sales, gross profit, etc.;
e. the critical assumptions upon which the methodology is based;
f. any agreed procedures to deal with changes in the factual circumstances that could occur during the term of the determination agreement, such that the effects that arise from relatively minor changes of facts and circumstances are set out in the determination agreement (the establishment of this adjusting mechanism prevents every change in facts and circumstances resulting in the termination of the validity of the determination agreement);
g. if applicable, the agreed tax treatment of related issues;
h. the terms and conditions that must be fulfilled by a taxpayer in order for the mutual agreement to remain valid, together with the procedures to ensure that the taxpayer fulfils these terms and conditions;

i. the provision that the determination agreement will be rendered invalid immediately upon a change in the relevant legislation (should a transitional arrangement have been made under which the determination agreement may remain in force for either the whole or part of its remaining period, the determination agreement will cease to be valid either at the end of the period specified in the transitional arrangement or, as the case may be, at the end of the remaining period of the determination agreement);

j. the declaration by the taxpayer that the information as included in the determination agreement is not subject to one of the exemption clauses specified in Article 13, Paragraph 3, of the WIB; and

k. the provision that the determination agreement will cease to be valid if the agreed transfer price or methodology is not actually set out in the contracts between the applicant and the associated enterprise or is not actually paid and/or received, unless otherwise agreed.

10. Tax audits

During periodic audits, which can be initiated by the competent tax inspector in respect of all taxpayers and, therefore, also with taxpayers with whom an APA has been concluded, it will be verified whether or not the transfer prices are set as agreed in the determination agreement. This will include a check on whether or not the critical assumptions in the determination agreement are still satisfied, and if not, whether or not the determination agreement requires adjustment or has ceased to be valid.

11. Exclusions

The Decree of 21 July 1995 (No. AFZ94/4519M), as most recently amended by the Decree of 26 January 1998 (No. AFZ97/4609M) and as further expanded by the Decree of 30 March 2001 (No. BOB2001/698M regarding good faith), sets out a general framework within which the tax administration is entitled to refuse to give advance certainty. In addition, the Decree on entities providing intra-group financial services without a real economic presence in the Netherlands; no advance certainty, exchange of information and limited opportunities for crediting withholding tax of 30 March 2001 (No. IFZ2001/294M) describes a number of specific situations in which no advance certainty is given. The Decrees in question apply equally to the conclusion of APAs.

12. Publication of APAs

With regard to the Decree of 21 July 1995 (No. AFZ94/4519M), as most recently amended by the Decree of 26 January 1998 (No. AFZ97/4609M), the policy underlying the decision to issue or, depending on the circumstances, to refrain from issuing, APAs will be published unless the relevant policy has been published before. The relevant APAs will be published either on an anonymous basis or -- if it is not possible to conceal the applicant's identity even if the name is not revealed and where the revelation of the applicant's identity may constitute a breach of the duty of confidentiality laid down in Article 67 of the General Tax Act -- in the form of a summary. In the latter case, the summary should contain all of the elements that have determined the policy pursued.

13. Entry into force

This Decree enters into force on 1 April 2001.

14. Cancellation of previous decrees

This Decree replaces the Decree of 19 October 1994 (No. IFZ94/855).

Procedure for dealing with requests for advance certainty in the form of an advance tax ruling (ATR)[1]

International Tax Policy and Legislation Directorate, Multilateral Affairs Division

Decree of 30 March 2001, No. IFZ2001/293M

The State Secretary for Finance has decreed as follows.

1. Introduction

This decree describes the procedures that have to be followed when issuing an advance tax ruling (ATR). An ATR provides advance certainty in respect of the tax consequences of a contemplated transaction or combination of related transactions. The term "ATR" is reserved exclusively for the provision of advance certainty in respect of the situations described in paragraph 3 of this decree.

2. Organisation

The request for the issue of an ATR should be addressed to the competent tax inspector. To ensure the co-ordination of the practice, the tax inspector will always submit the request to the APA/ATR team of the Tax Office (Large Enterprises) in Rotterdam for binding advice. The APA/ATR team of the Tax Office (Large Enterprises) in Rotterdam will, if necessary, consult with the relevant knowledge groups to secure a uniform policy both in principle and in practice.
Because the APA/ATR team of the Tax Office (Large Enterprises) in Rotterdam is represented in all of the relevant knowledge groups, this form of consultation can take place during the assessment process, thereby helping to ensure that the request is dealt with both swiftly and efficiently.

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1. This document contains an unofficial English translation by the Netherlands' Ministry of Finance of Decree No. IFZ 2001/293M, officially published in Dutch on 30 March 2001. Rights can only be derived from the original Dutch text of the decree.

3. Binding advice

The local tax administration should submit the following requests for advance certainty for binding advice:

i. requests for advance certainty on the application of the participation exemption to conduit companies in international structures and to top holding companies where none of the subsidiaries of the top holding company conducts any business activities in the Netherlands;

ii. requests for advance certainty in respect of international structures involving forms of hybrid finance and/or hybrid legal entities. The Decree of 30 March 2001 (No. RTB2001/1379M[2] should be taken into consideration in assessing these requests; and

iii. requests for advance certainty on whether or not an entity that is registered abroad may be regarded as having a permanent establishment in the Netherlands.

4. Requests

Depending on the facts and circumstances of the specific case, a (potential) taxpayer will need to provide the tax authorities with at least the following information:

a. a detailed description of the facts and the contemplated legal acts covered by the request;

b. the names of the companies and permanent establishments involved;

c. the other state or states to which the request relates;

d. information on the group's worldwide legal structure and history (including full information on the beneficial owners of the applicant's capital); and

e. the financial years to which the request will apply.

2. This decree describes the situations in which advance assurance may or may not be given on the tax consequences of the use of hybrid forms of finance and hybrid legal entities (Revision of the Decree of 26 April 2000 (No. DB99/3582M)).

5. Duration

The applicant is initially required to specify the period for which it is reasonable to grant advance certainty. In principle, a period of four years is regarded as reasonable.

On the expiry of the agreed period, at the request of the taxpayer, the tax authorities will assess whether or not a new ATR can be issued under the same conditions.

6. Appraisal of the request

In appraising the request, the tax administration will take account of all of the relevant facts and circumstances relating to the transaction(s) for which advance certainty is requested.

7. Exchange of information

As part of the determination agreement, the applicant is required to declare that the information included in the ATR is not subject to one of the exemption clauses set out in Article 13, Paragraph 3, of the International Assistance with Levying Taxes Act (*Wet op de internationale bijstandsverlening bij de heffing van belastingen*, WIB) regarding commercial, industrial or professional secrets. In this way, possible conflicts between the tax administration and the applicant are avoided.

8. Determination agreements

In order to establish the consequences of an ATR, the tax administration will enter into a determination agreement with the entity requesting the ATR to make a formal written record of the ATR. The tax administration will take into account the framework for determination agreements, as described in the Decree of 1 December 1997 (No. AFZ97/2412). This decree includes a procedure for recording negative decisions on a request for a determination agreement. In respect of this, the following should be noted. The orientational phase should not be regarded as constituting a form of consultation, as defined in the above decree. There will only be a form of consultation for which a written record is required to be drawn up once the request in question is more or less fully consistent with the framework for ATRs, as issued under the government's current policy. The decision by the tax inspector in this specific case not to conclude a determination agreement will be communicated to the taxpayer in writing. In these cases, a record is drafted as described in the Decree of 1 December 1997 (No. AFZ97/2412).

The determination agreement will at least include the following elements:

1. the names and addresses of the entities that are to be covered by the agreement;
2. the facts, legal acts and financial years to which the agreement applies;
3. a description of the tax consequences;
4. a record of the relevant conditions that constitute the basis for the application of the relevant tax consequences;
5. the agreed procedures to respond to possible changes in the prevailing circumstances;
6. where relevant, a description of the arrangements that have been made for dealing with related tax issues;
7. a description of the conditions that the entity must meet in order for the agreement to remain valid, together with a description of the procedures that the entity must follow in order to comply with these conditions;

8. a provision to the effect that the determination agreement will be rendered invalid immediately by a change in the relevant legislation (where a transitional arrangement has been made under which the determination agreement can remain valid for either the whole or part of its remaining term, the determination agreement will lose its validity either at the end of the period specified in the transitional arrangement or, as the case may be, at the end of the remaining term of the determination agreement);
9. a declaration by the taxpayer that the information, as included in the determination agreement, is not subject to one of the exemption clauses specified in Article 13, Paragraph 3, of the WIB; and
10. where the request relates to the application of the participation exemption, a provision to the effect that the applicant will finance the cost price of the participations for which the ATR is being requested with at least 15 per cent equity capital.

9. Exclusions

The Decree of 21 July 1995 (No. AFZ94/4519M), as most recently amended by the Decree of 26 January 1998 (No. AFZ97/4609M) and as further expanded by the Decree of 30 March 2001 (No. BOB2001/698M regarding good faith), sets out a general framework within which the tax administration is entitled to refuse to give advance certainty. In addition, the Decree regarding entities providing intra-group financial services without a real economic presence in the Netherlands; no advance certainty, the exchange of information and limited opportunities for crediting withholding tax of 30 March 2001 (No. IFZ2001/294M) describes a number of specific situations in which no advance certainty can be given. These decrees apply equally to the conclusions of ATRs.

10. Publication of ATRs

With regard to the Decree of 21 July 1995 (No. AFZ94/4519M), as most recently amended by the Decree of 26 January 1998 (No. AFZ97/4609M), the policy underlying the decision to issue or, depending on the circumstances, to refrain from issuing ATRs, will be published unless the relevant policy has previously been published. The relevant ATRs will be published either on an anonymous basis or - if it is not possible to conceal the applicant's identity even if his name is not revealed and where the revelation of the applicant's identity may constitute a breach of the duty of confidentiality laid down in Article 67 of the General Taxes Act - in the form of a summary. In the latter case, the summary should contain all of the elements that have determined the policy adopted.

11. Competency

For information on the competency with regard to taxpayers applying for an ATR, reference should be made to the Decree of 30 March 2001 (No. RTB2001/1195M) on Advance Pricing Agreements (APAs), Advance Tax Rulings (ATRs), financial services, conduit companies, the International Investors Desk and Rulings, and Organisation and Jurisdiction Rules (no English translation available).

12. Entry into force

This decree enters into force on 1 April 2001.

Entities providing intra-group financial services without a real economic presence in the Netherlands; no advance certainty, exchange of information and limited opportunities for crediting withholdingtax[1]

International Tax Policy and Legislation Directorate, Multilateral Affairs Division
Decree of 30 March 2001, No. IFZ2001/294M
The State Secretary for Finance has decreed as follows.

1. Entities providing intra-group financial services

For the purpose of this decree, the term "entities providing intra-group financial services" (hereinafter referred to as service entities) is used to refer to entities the activities of which consist primarily of, either in law or in fact, directly or indirectly, and based on related transactions amongst entities that form part of the same group, the receipt and the (on)payment of interest and/or royalties under whatever name and of whatever nature. Activities related to the ownership of participations are not taken into account in assessing whether or not an entity's activities consist primarily of the activities described in the preceding sentence.
The term "group" is used with respect to the taxpayer together with related entities, as defined in Article 10a, Paragraph 4, of the Corporation Tax Act 1969, and related natural persons, as defined in Article 10a, Paragraph 5, of the Corporation Tax Act 1969. Transactions are regarded as related if they are arranged as a complex transaction, the results are mutually dependent or if in any other way a connection exists between the transactions.

2. No advance certainty

No advance certainty will be granted to a service entity on the tax consequences of all of the contemplated related transactions as defined in paragraph 1 above, if:

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1. **This document contains an unoffical English translation by the Netherlands' Ministry of Finance of Decree No. IFZ 2001/294M, officially published in Dutch on 30 March 2001. Rights can only be derived from the original Dutch text of the decree.**

a. the service entity does *not* meet one or more of the requirements listed in the Annexe in respect of the existence of a real presence (substance) in the Netherlands.

No advance certainty will be granted to a service entity on the tax consequences of related transactions as defined in paragraph 1 above, if:

b. the functions performed by the service entity in relation to these specific related transactions do not entail on balance any real risk (see paragraph 6 below).

This means that, if a service entity does not meet the requirements referred to in point a. with respect to a real presence in the Netherlands, no advance certainty will be granted for all of the contemplated transactions qualifying under the description in paragraph 1 above, regardless of whether or not the transactions in question entail any real risk as described in point b., and regardless of whether or not the taxpayer gives his consent to the spontaneous exchange of information to the country of source.

When a service entity does meet the requirements referred to in point a. in relation to a real presence in the Netherlands but fails the requirement referred to in point b., the service entity will not be granted advance certainty with regard to the specific related transactions that do not meet the requirement referred to in point b.. Contrary to the provisions of point b., advance certainty may nevertheless be granted in such situations if the taxpayer gives his consent, in a determination agreement with the tax administration, to the spontaneous exchange of information to the country of source.

For the purpose of the application of point b., risks that have been transferred to third parties (i.e. unrelated entities) shall be treated as the risks of the service entity. In general, this will lead to the result that groups that concentrate their treasury activities in one or more departments will be deemed to be running a real risk with regard to all of the financial transactions conducted by these treasury departments, given that one of the these departments' basic tasks is transferring to third parties the net risk run by the group regarding all of the financial transactions for which the department in question is responsible. The responsibility of the centralised treasury department will generally consist of independently managing the risks related to all of the financial transactions conducted by (an independent part of) the group. Where a service entity's responsibility does not extend to independently managing the risks as described above, this is an indication that the entity does not perform an active treasury function. In these situations, further action will be required to determine whether or not real risk is being incurred with respect to the related transactions as defined in paragraph 1.

3. Exchange of information

Point b. of paragraph 2 states that no advance certainty will be given on any related transactions as described there, unless the applicant gives his consent, as part of the determination agreement, to the spontaneous exchange of information to the country of source. This consent also includes a confirmation by the applicant that the information described in the advance pricing agreement or advance tax ruling that will be exchanged is not subject to one of the exemption clauses specified in Article 13, Paragraph 3, of the International Assistance with Levying Taxes Act (*Wet op de internationale bijstandsverlening bij de heffing van belastingen*, WIB). Once an applicant has committed himself to this position in the determination agreement, the grounds for an objection or appeal on the basis of this article, against the notification in which the exchange of information is announces, will cease to exist.

The fact that no advance certainty is granted in the situations described in paragraph 2, points a. or b. does not restrict taxpayers from conducting the financial transactions described under these points without any advance certainty about their tax consequences. Here too, the spontaneous exchange of information will take place to the country or countries in question. In situations where the requirements for a real presence in the Netherlands (see paragraph 2, point a.) are not met, information on a taxpayer's actual circumstances with regard to the requirements set out in the Annexe will be disclosed to other countries for which this may be relevant. In situations where structures are implemented as described in paragraph 2, point b., the information that is to be disclosed will relate to transactions performed or to be performed and the character of the entity.

The exchange of information will take place following a request for a certificate of residence or when, during the handling of a taxpayer's tax assessment, the suspicion arises that a country may have an interest in the information, but in any event no later than the date on which the corporation tax assessment is formally assessed. Thereto, the tax inspector will forward the relevant information, with a statement of the name of the country or countries concerned, to the Fiscal Information and Investigation Services (FIOD) in Haarlem. FIOD Haarlem International will determine whether or not the exchange of the information is in accordance with the relevant statutory regulations and treaty provisions, for example, whether or not it would constitute a breach of Article 13, Paragraphs 1 and 2, of the WIB.

4. Credit for foreign withholding tax

For the transactions described in paragraph 2, point b., no credit for foreign withholding tax will be provided, as the financial service entity in fact operates as an intermediary, which means that the received cash flows do not form part of that entity's Dutch tax base.

In the light of improving the international transparency of the treatment of such entities in the Netherlands, the government is considering codification of this matter.

5. Good faith between treaty partners

No advance certainty is given in the cases described in paragraph 2, points a. and b., as the elements referred to in these points form an indication that the provision of advance certainty would constitute a breach of good faith between treaty partners. In addition to the elements described specifically in points a. and b., any requests for advance certainty should be assessed in more general terms by reference to the Decree of 21 July 1995 (No. AFZ94/4519M) on fiscal implementation policy, standpoint provisions and appeals policy (as amended by the Decree of 26 January 1997 (No. AFZ94/4609M) and as further expanded in the Decree of 30 March 2001 (No. BOB2001/698M) on advance certainty and good faith between treaty partners).

6. No real risk exposure

When the functions performed by the service entity that are related to the related transactions described in paragraph 1 do not entail any real risk on balance, advance certainty may be given only if, as part of the determination agreement in which the advance certainty is set out, the taxpayer gives his consent to the spontaneous exchange of information to the treaty partner. It is, therefore, important to determine to what extent the service entity bears a risk in relation to these related transactions.

The risks that can relate to the transactions described in paragraph 1 consist, in particular, of credit risk (debtor and foreign exchange risk), market risk and operational risk. If the only risks born by the service entity are operational risks, this will generally not lead to the presence of real risk as defined in this decree. The extent to which the service entity bears a risk will translate itself primarily into the possibility that the equity held by the service entity to secure its assets could be affected. The decisive factor in assessing whether or not and to what extent a service entity is bearing real risk is therefore the question of whether or not and to what extent the service entity is bearing one or more of the above risks and whether or not the service entity maintains sufficient equity to be able to carry those risks.

A service entity, the activities of which consist of lending money, is regarded as bearing real risk if the amount of the equity that is required for it to be able to carry the risks is at least equal either to 1% of the nominal value of the loan or to an amount of EUR 2 million (NLG 4,407,420). If, therefore, the equity a service entity should maintain to adequately secure the money-lending activity concerned is at least equal either to 1% of the nominal value of the loan or to an amount of EUR 2 million, whichever is lower, the service entity in question is deemed to be bearing a real risk, provided that the applicant is able to show that there is a real possibility of it having to utilise this equity if the risks related to the related transactions materialise in practice.

Example 1

The sole activity of a service entity (SE) consists of the lending of EUR 100 million to X, a related entity. The equity of SE amounts to EUR 1.5 million. In addition, SE borrows, for the purpose of financing the issue of this loan, an amount of EUR 98.5 million from a related entity, Y. SE's parent company (PC) has given Y a guarantee that it will repay the entire loan if SE defaults on its repayment obligations. The first event that occurs if SE's credit risk (i.e. the debtor risk) materialises (i.e. X is unable to meet its repayment obligations) is that SE will be forced to utilise its own equity. The guarantee given by PC will take effect only if SE's equity is not sufficient to cover the repayment obligations. As SE maintains equity against the loan that is higher than 1 per cent of the nominal value of the loan and there is a real possibility that this equity could be affected when the risks born by SE (i.e. the debtor risk in this case) materialise in practice, SE may be regarded as bearing a real risk.

Example 2

The sole activity of a service entity (SE) is lending EUR 400 million to X, a related entity. The equity of SE amounts to EUR 3 million. In addition, SE borrows an amount of EUR 397 million from Y, another related entity, for the purposes of financing the issue of the loan. SE's parent company (PC) has given a guarantee that it will repay to SE the entire outstanding loan to X if X defaults on its repayment obligations. If SE's credit risk (i.e. the debtor risk) materialises (i.e. X is unable to meet its repayment obligations), SE will be able to invoke PC's guarantee and obtain repayment of the loan. Although SE has equity in excess of EUR 2 million, there is no realistic possibility that this equity will be affected if X defaults on its repayment obligations. For this reason, SE may not be regarded as running a real risk.

For the determination of an arm's length remuneration for entities providing intra-group financial services, see the Transfer Pricing Decree of 30 March 2001 (No. IFZ2001/295M).

7. Competence

For information on the competence with respect to service entities as referred to in this Decree, see the Decree of 30 March 2001 (No. RTB2001/1195M) on Advance Pricing Agreements (APAs), Advance Tax Rulings (ATRs), financial services, conduit companies, the International Investors Desk and Rulings. Organisation and Jurisdiction Rules (no English translation available).

8. Entry into force

This decree enters into force on 1 April 2001.

ANNEXE

List of minimum requirements

- At least half of the total number of the statutory directors and the directors competent to make decisions reside in the Netherlands (individuals) or have the place of effective management situated in the Netherlands (non-individuals).

- The directors resident in the Netherlands (individuals) or with the place of effective management situated in the Netherlands (non-individuals), have the professional knowledge required to properly perform their duties. The tasks of the (joint) directors include, at the very least, the decision making -- based on the legal entity's own responsibility and within the framework of normal intra-group involvement -- on transactions to be concluded by the legal entity as well as ensuring a proper execution of all of the concluded transactions. The legal entity has qualified staff at its disposal (either its own staff or obtained from third parties) who can adequately perform and record the transactions to be conducted by the legal entity.

- (Key) managerial decisions should be taken in the Netherlands.

- The legal entity's (main) bank accounts should be maintained in the Netherlands.

- The legal entity's accounts should be kept in the Netherlands.

- The legal entity should have complied with all of the relevant requirements relating to the submission of tax returns, at least until the date on which its application is assessed. This applies equally to all forms of tax, including corporation tax, wage withholding tax, VAT, etc.

- The legal entity's registered office must be located in the Netherlands. The legal entity is, to the best knowledge of the entity, not (also) regarded as tax resident in another country.

- The legal entity's equity should be adequate in relation to the functions performed (taking into account the assets used and the risks assumed).

Table of contents

Transfer prices, the application of the arm's length principle and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines)[1]

1. This document contains an unofficial English translation by the Netherlands' Ministry of Finance of Decree No. IFZ 2001/295M, officially published in Dutch on 30 March 2001. Rights can only be derived from the original Dutch text of the decree.

4. **Secondary adjustments (*Paragraphs 4.67-4.77*)**

5. **Arm's length price when valuation at the time of the transaction is highly uncertain (*Paragraphs 6.28-6.35*)**

6. **Intra-group services (*Chapter VII*)**

7. **Contributions to a Cost Contribution Arrangement (CCA) with profit mark-up (*Chapter VIII*)**

8. **Arm's length fee for financial services**

9. **Subsidies, tax incentives and costs subject to deduction restrictions**

10. **Allocation of the profit to headquarters and permanent establishments**

11. **Entry into force**

12. **Application to current policy**

Transfer prices, the application of the arm's length principle and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines)

International Tax Policy and Legislation Directorate, Multilateral Affairs Division
Decree of 30 March 2001, No. IFZ2001/295M
The State Secretary for Finance has decreed as follows.

With regard to cross-border transactions, there is agreement amongst the OECD member countries regarding the "arm's length principle", as is included in Article 9 of the OECD Model Tax Convention. The OECD's commentary on Article 9 of the OECD Model Tax Convention and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (henceforth the OECD Guidelines)[2] provide further guidance on the arm's length principle. The policy of the Netherlands on the arm's length principle in the field of international tax law is that this principle forms an integral part of the Netherlands' system of tax law as a result of its incorporation in the broad definition of income recorded in Section 3.8 of the Income Tax Act 2001. In principle, this means that the OECD Guidelines apply directly to the Netherlands under Section 3.8 of the Income Tax Act 2001. There are a number of areas in which the OECD Guidelines provide scope for individual interpretation by the member countries. In a number of other areas, practical experience has shown that the OECD Guidelines are in need of clarification. This decree explains the Netherlands' position in relation to these particular points and seeks, where possible, to remove any confusion. The OECD Guidelines have not yet fully crystallised and are regularly expanded and adjusted. If necessary, this decree will also be adjusted to take account of new developments.

For the sake of clarity, the paragraphs in the OECD Guidelines corresponding to the text of the decree are referred to in brackets.

2. The Dutch translation of the OECD Guidelines is included in the binder *Internationale Fiscale Zaken* (binder A), number 750.00.00.

It is important to remember when assessing transfer prices that -- as the OECD Guidelines also stress -- transfer pricing is not an exact science. Accordingly, the OECD urges tax administrations to adopt a flexible approach and not to expect taxpayers to set transfer prices with a degree of accuracy that is unrealistic in the light of all of the various facts and circumstances. The Netherlands' tax administration will also bear this point in mind when assessing transfer prices.

For the sake of clarity, I have decided to integrate the text of a number of existing decrees into the text of the present decree. This means that the decrees referred to in section 12 are hereby revoked.

1. The arm's length principle (*Chapter I*)

Generally speaking, the arm's length principle is applied by comparing the conditions of a transaction conducted between associated enterprises with the conditions of a transaction conducted by independent or unrelated enterprises. Taxpayers are expected to be able to demonstrate that their transfer prices are consistent with the arm's length principle. The basic principle is that each of the enterprises involved should receive a remuneration that is a reflection of the functions performed, taking into account the assets used and the risks assumed (Paragraph 1.20).

Where the term "function(s)" appears elsewhere in this decree, it is intended to have the meaning of "function(s), taking into account the assets used and the risks assumed".

1.1. Aggregation of transactions (*Paragraphs 1.42-1.44*)

In principle, the OECD Guidelines require arm's length prices to be based on individual transactions. This requirement can, however, create a number of practical problems. When it is either very difficult or impossible to assess each individual transaction, for example, in case of a large number of similar transactions, the transactions may be aggregated for the purpose of deciding whether or not they were conducted at arm's length. In such a situation, taxpayers are expected to be able to demonstrate that the transfer price applying to the aggregated transactions is in accordance with the arm's length principle.

1.2. The use of a range (*Paragraphs 1.45-1.48*)

In some cases it will be possible to apply the arm's length principle and arrive at one single figure that is the most reliable to determine the arm's length character of the transfer prices. Because, however, transfer pricing is not an exact science, a particular transfer pricing method will often generate a range of figures all of which are equally reliable. The range is determined by the largest and the smallest value found. Where an arm's length range is used, after determining such range, the question arises as to which figure within the range a comparison can be made and to what point within the range an adjustment can be made. The OECD Guidelines leave this open.

It is important to make a distinction, when determining a range, between situations in which the comparables consist of readily comparable values and a situation in which use is made of less accurate comparative material. If the comparables consist of readily comparable values, these are all part of the range. If, however, use is made of less accurate comparative material, it may be necessary to use statistical methods to enhance the reliability of the material. One example would be the use of an interquartile range. The effect of this type of statistical method is to reduce the extent of the range, leaving a relevant range consisting of more reliable reference material.

Once the range is defined, the next step is to decide whether or not the remuneration for the transaction in question falls within the range. If it does fall within the range, no adjustment is made. An adjustment is made only if the remuneration does not fall within the range and the taxpayer cannot provide a substantiated explanation for the deviation. According to the OECD Guidelines, an adjustment should be made in such an event to the point within the range that best reflects the facts and circumstances of the relevant intra-group transaction. If there are grounds for assuming that one specific point within the range comes closest to replicating the conditions under which the intra-group transaction took place, this point should be taken as the basis for the adjustment. If it is not possible to identify one specific point, the Netherlands' position is that the median (i.e. the middle point of the range) should be taken as the basis for adjustment. As the OECD has yet to formulate a clear policy on this point, it may occur that the state in which the associated enterprise is located does not permit the transfer prices to be adjusted to the median. In such situations, the competent authority in the Netherlands, acting on the taxpayer's request, will consult the other state with a view to reaching agreement on a point within the range that is acceptable to both states.

In some cases, the transfer price originally adopted is adjusted either upwards or downwards by the taxpayer, leading to a shift within the range. In such situations, the taxpayer has to be able to substantiate the change in conditions in such a way as to justify the adjustment of the transfer price. If the taxpayer is unable to demonstrate that conditions have indeed changed in such a way as to justify an adjustment in the transfer price, it will generally be assumed that the reasons for adjusting the transfer price are predominantly tax driven. In such situations, the tax administration will not accept the change in the transfer price. An additional condition for accepting this type of shift within the range is that the modified price must be stipulated in the contracts concluded by the parties to the transaction and should actually be charged.

1.3. The use of multiple year data (*Paragraphs 1.49-1.51*)

It may be useful to evaluate data relating to a number of years when assessing a transaction. Making use of data covering a succession of years is one way of preventing adjustments from being made in a particular year, even though the average remuneration received by the taxpayer concerned over a number of years is in fact consistent with the arm's length principle. At the same time, the use of multiple year data may result in certain situations in the past being assessed with the benefit of hindsight. The OECD Guidelines stipulate that tax administrations cannot use hindsight. This means that, when multiple year data are used, the only figures that can be used are those relating to the year in question and previous years. One of the results of this is the system of moving averages. This leads to the following method:

- The first step is to assess whether or not the remuneration for the transaction in question falls within the arm's length range that has been created for the year in question. No adjustment is made if the remuneration falls within the range;
- If the remuneration does not fall within the range, it is then compared with the (moving) averages for a number of years. The length of the period on which this comparison is based depends partly on the length of the product's life cycle. If the average remuneration for the transaction in question falls within the multiple year range, no adjustment is made; and
- If the remuneration does not fall within the arm's length range for the year and not within the multiple year arm's length range, an adjustment is made in accordance with the procedure set out in section 1.2.

1.4. The effect of government policies (Paragraphs 1.55-1.59)

Certain government interventions may be regarded as being market conditions in the country in question and should for this reason be reflected in the transfer price.

Paragraph 1.59 of the OECD Guidelines describes two possible approaches to a situation in which a country, for example, either prevents or blocks a particular payment. Under Netherlands' tax law, the remuneration relating to a particular performance must be reflected in the result. It can, however, be in accordance with sound business practice to depreciate (partly) the value of accounts receivable relating to the particular performance. The costs associated with the transaction can be taken into account. Obviously, an assessment must be made when the account receivable arises as to whether or not the conditions of the transaction justify the conclusion that the transaction should materially be regarded as a contribution of equity rather than remuneration for an activity performed (Supreme Court, 27 January 1988, BNB1988/217). In addition, it goes without saying that the taxpayer is under an obligation to substantiate the reduction in value of the account receivable.

1.5. Request to lower transfer pricing adjustments (*Paragraphs 1.60-1.64*)

When the tax administration audits a taxpayer's books, the taxpayer is entitled to apply for a reduction in the proposed adjustment of a transfer price if the taxpayer is of the opinion that the adjustment proposed by the tax administration does not take sufficient account of compensating transactions. Under the OECD Guidelines, tax administrations have discretionary powers either to grant or deny such requests. The distinction made in the OECD Guidelines between a situation in which a taxpayer demonstrates the presence of an intentional set-off at the time when a tax return is filed and a situation in which an intentional set-off is stated by the taxpayer (and the acceptability is demonstrated) at the point when the tax administration recommends certain adjustments on the basis of a tax audit, is not relevant to the Netherlands' situation. In both cases, the taxpayer retains his statutory right to lodge an objection or appeal.

2. Transfer pricing methods (*Chapters II and III*)

Chapter II of the OECD Guidelines discusses the three traditional transaction methods introduced in Paragraphs 1.68 to 1.70 (i.e. the comparable uncontrolled price method, the resale price method and the cost-plus method), whilst Chapter III examines the methods known as the transactional profit methods (i.e. the profit-split method and the transactional net margin method or TNMM). Depending on the circumstances, a choice of one of these five accepted methods has to be made. The methods can supplement each other. The OECD Guidelines are based on a certain hierarchy of the methods where a preference exists for the traditional transaction methods. On the one hand, transactional profit methods are considered more or less as methods of last resort. On the other hand, the OECD Guidelines state that the tax authorities need to start a transfer pricing audit from the perspective of the method chosen by the taxpayer (see Paragraph 4.9 of the OECD Guidelines).

In accordance with Paragraph 4.9 of the OECD Guidelines, whenever the Netherlands' tax administration undertakes a transfer pricing audit, it should start from the perspective of the method adopted by the taxpayer at the time of the transaction. This complies with Paragraph 1.68 of the OECD Guidelines. The implication is that taxpayers are in principle free to choose a transfer pricing method, provided that the method adopted leads to an arm's length outcome for the transaction in question. In certain situations, however, some methods will generate better results than others. Although taxpayers may be expected to base their choice of a transfer pricing method on the reliability of the method for the particular situation, taxpayers are definitely not expected to weigh up the advantages and disadvantages of all of the various methods and then explain why the method that was ultimately adopted generates the best results in the prevailing conditions (i.e. the best method rule). Certain situations are also suited for a combination of methods. At the same time, taxpayers are not obliged to use more than one method. The only obligation resting on the taxpayer is to explain why the decision was taken to adopt the particular method that was adopted.

A number of examples of the various transfer pricing methods are given in the following paragraphs to illustrate how they work. It is explicitly not the object to discuss all issues that may arise in practical situations in relation to each method.

2.1. Comparable uncontrolled price method (*Paragraphs 2.6-2.13*)

With this method, the price calculated for goods that are transferred and services that are performed in a transaction with an associated party is compared with the price that is calculated for similar goods that are transferred and services that are performed in a free market transaction under comparable circumstances. If a comparable price is available, the comparable uncontrolled price method (commonly known as the CUP method) will, in general, be the most direct and the most reliable method in determining the transfer price, so that this method is to be preferred over other methods. A point to note is, however, that the reliability of the CUP method depends on the degree of accuracy with which adjustments can be made for purposes of comparison.

Example

A producer in country X sells wine to an associated Dutch wholesaler. The same producer in country X sells the same wine to an independent Dutch wholesaler for EUR 5 per bottle. In the agreement with the independent wholesaler, the external transportation costs are for the account of the producer. Under the arrangement made with the associated wholesaler, the external transportation charges of EUR 1.50 per bottle are not borne by the producer, but by the wholesaler. The other circumstances are the same for the associated wholesaler and the independent wholesaler. The wine is sold at EUR 12.50 per bottle.

Based on the difference in contractual terms, an adjustment needs to be made to the third party price in accordance with Paragraphs 2.8 and 2.9 of the OECD Guidelines. The CUP method can be used as follows to calculate the comparable third party price (i.e. the CUP).

Purchase price paid by independent wholesaler	5.00
Adjustment to account for difference in external transportation expenses between associated wholesaler and independent wholesaler	1.50
CUP for associated wholesaler	3.50

2.2. Resale price method (*Paragraphs 2.14-2.31*)

The second traditional transaction method is the resale price method. This method has as its starting point the market price that is agreed to with respect to the sale of a product to third parties. This product has been purchased from an associated enterprise. In order to calculate the arm's length remuneration for the functions performed by the associated enterprise that sells the product to the third party, the product's market price is reduced by a gross profit margin. The gross profit margin consists of the selling expenses and other costs arising from the functions performed by the seller and an appropriate profit margin. What is left after the adjustment for other costs associated with the sale of the product, such as customs duties, is an arm's length price.

Example

This example is based on the same situation used in the example illustrating the CUP method. The resale price method is based on the gross profit margin earned by the independent wholesaler, which may be calculated as follows:

Retail price	12.50	100%
Purchase price paid by independent wholesaler	5.00	40%
Gross profit margin of the independent wholesaler	7.50	60%

The functions performed by the independent wholesaler are the same as those performed by the associated wholesaler. The only difference is that the associated wholesaler is responsible for the external transportation charges whereas the independent wholesaler is not. The associated wholesaler will have to receive as remuneration for the functions performed an amount equal to the remuneration received by the independent wholesaler, plus a mark-up to cover the external transportation charges. The external transportation charges are 12 per cent of the retail price (i.e. EUR 1.50 per bottle selling at EUR 12.50). This means that a commercial gross profit margin for the associated wholesaler can be set at 72 per cent (i.e. 60 per cent plus 12 per cent). Using this figure as a basis, the resale price method can be used to calculate the following transfer price for the associated wholesaler:

Retail price	12.50	100%
Required gross profit margin	9.00	72%
Arm’s length transfer price	3.50	28%

The example shows that the associated wholesaler and the independent wholesaler pay the same purchase price, including external transportation charges (i.e. EUR 3.50 plus EUR 1.50 equals EUR 5).

2.3. Cost-plus method (*Paragraphs 2.32-2.48*)

The cost-plus method is the third traditional transaction method. In applying this method, the costs incurred by the enterprise are divided into the direct and indirect costs that can be allocated to individual transactions with (associated) enterprises (hereinafter: the direct and indirect costs) and the enterprise's other costs which cannot be allocated to individual transactions in such way (hereinafter: overhead costs). An appropriate mark-up that is required to realise profit in accordance with the functions performed is applied to the direct and indirect costs (the cost base) that can be allocated to an individual transaction with an associated enterprise. The mark-up also has to cover the overhead costs. The method is, therefore, based on a gross profit margin. This is the difference between the cost-plus method and the transactional net margin method, in which the operating profit is calculated either as a percentage of total cost, i.e. including overhead costs, or as a percentage of turnover.

Budgeting versus actual cost

In general, prices will be determined in advance based on budgeted cost. If the actual costs that are related to the transaction are higher than the budgeted costs, it depends on the nature of the difference whether or not this will lead to an adjustment of the price. In general, one can assume that the higher costs that are the result of inefficiency will be for the account of the party which performs the functions and services. This is after all the party that can influence the costs. In such a situation, an independent customer would not accept a price adjustment.

A requirement for a correct determination of the transfer prices based on budgeting is that these budgets are determined in an economically correct manner.

Overcapacity losses

A special situation presents itself with a "contract manufacturer". The characteristic of a contract manufacturer is that it performs certain production activities regarding the products of the principal in return for a previously agreed to fee. Because the goods in question remain the principal's property, the contract manufacturer assumes only a limited degree of risk with regard to the goods. Associated enterprises often subcontract production activities to a contract manufacturer working exclusively for the enterprise in question. The transfer prices are then often calculated on the basis of either the cost-plus method or the TNMM. Here too, the calculated mark-up should reflect the functions performed. An important factor for the calculation of the mark-up for the contract manufacturer is the question of who is responsible for any overcapacity losses. If these are the responsibility of the principal, a low(er) mark-up may be sufficient.

Disbursements

Costs that have the character of disbursements may be excluded from the cost base. These includes costs that are initially paid by the performing party but which are generally passed on separately to the client, for example, legal dues, court registry charges and costs charged for third party services. Although these external charges are related to the functions performed by the performing party, they do not warrant any additional remuneration, as there is no question of any added value generated by the performing party.

Financing costs

As is indicated earlier, overhead costs are excluded from the cost base, but should be covered by the mark-up. Generally, the costs of the capital, both the equity and the loan capital that is used for financing the enterprise's activities are regarded as forming part of the overhead costs. If, however, the financing costs are included in the direct costs in comparable situations, they should be included in the cost base.

Situations in which the cost-plus method can be used

The OECD Guidelines give examples of situations where the cost-plus method can be applied. This method is probably very useful where semi-finished goods are sold between related parties, where related parties have concluded joint facility agreements or long-term buy-and-supply arrangements, or where the controlled transaction is the provision of services (see Paragraph 2.32). Paragraphs 2.46 to 2.48 of the OECD Guidelines provide examples of possible applications of the cost-plus method. From these examples it appears that the cost-plus method gives the most reliable outcomes in situations where the functions performed are relatively straightforward and the contribution made by the associated party concerned is also of little added value or relatively straightforward.

Start-up period

Given that the cost-plus method will generally be used in relatively risk-free and straightforward settings, a party acting on an arm's length basis will not accept that during the start-up period no mark-up is charged. At the same time, the taxpayer may incur a loss because he is less efficient and, therefore, incurs relatively more expenses than the unrelated third party that has been used as a benchmark for the purpose of calculating the mark-up (see the section above on budgeting).

Example

A Dutch company (A) assembles computers for the European market on behalf of an independent computer manufacturer in country X. The assembly work is based on standard instructions compiled by the computer manufacturer in country X. Both the components and the finished products are and remain the property of the computer manufacturer in country X. The remuneration that A agrees with the computer manufacturer is fixed as follows:

Budgeted attributable costs (i.e. direct and indirect assembly costs)	100
Budgeted mark-up to cover overhead costs, plus profit mark-up (60%)	60
Price set	160

A computer manufacturer from country Y decides to set up a subsidiary in the Netherlands (B) to assemble computers for the European market. Whilst the computers assembled by A and B are not entirely identical, the assembly work performed by the two enterprises is comparable. In addition, the two companies assume similar risks (i.e. the computer manufacturer from country Y also holds and retains the title to both the components and the finished products). This means that A and B perform comparable functions. The direct and indirect costs resulting from B's assembly activities are EUR 110.

The cost-plus method can be used as follows to determine the arm's length price.

Budgeted attributable costs (i.e. direct and indirect assembly costs)	110
Budgeted mark-up to cover overhead costs, plus profit mark-up (60%)	66
Arm's length transfer price set	176

2.4. Profit-split method (*Paragraphs 3.5-3.25*)

The profit-split method is a transactional profit method. If transactions are strongly interconnected, they can often not be evaluated separately. With the profit-split method, first the combined profit accruing to the associated enterprises from a controlled transaction is identified. Subsequently, this profit is split between the associated enterprises in a manner that approximates to the division of profits that would have occurred in an agreement made at arm's length.

2.5. Transactional net margin method (TNMM) (*Paragraphs 3.26-3.48*)

The TNMM is also a transactional profit method. The net operating profit (i.e. earnings before tax, interest and extraordinary income and expenditure) relating to an appropriate base (such as costs, turnover or assets) that the taxpayer realises from a controlled transaction is compared with the net profit that a third party operating in comparable circumstances and performing comparable functions realises from comparable transactions. Further details on this method are given in Paragraphs 3.26 to 3.48 of the OECD Guidelines.

In the following paragraphs, the difference between the TNMM and the resale price method on the one hand and the TNMM and the cost-plus method on the other is illustrated by two examples.

2.5.1. TNMM versus the resale price method

The details of this example are the same as those in the example used to illustrate the resale price method, with the exception of the additional information given below on the composition of the aggregated costs.

A producer in country X sells wine to an associated Dutch wholesaler. The same producer in country X sells the same wine to an independent Dutch wholesaler for EUR 5 per bottle. Under the contract agreed with the independent wholesaler, the external transportation costs are for the account of the producer. Under the arrangement made with the associated wholesaler, the external transportation charges of EUR 1.50 per bottle are not borne by the producer but by the wholesaler. The other circumstances are the same for the associated wholesaler and the independent wholesaler. The wine sells at EUR 12.50 per bottle.

Additional information: the other costs incurred by the independent wholesaler in addition to the purchase price of the wine are estimated at EUR 6.25 per bottle.

The net profit margin earned by the independent wholesaler may be calculated as follows:

Retail price	12.50	100%
Purchase price paid by independent wholesaler	5.00	40%
Gross profit margin earned by independent wholesaler	7.50	60%
Other costs	6.25	50%
Net profit margin earned by independent wholesaler	**1.25**	**10%**

The associated wholesaler performs the same functions as the independent wholesaler. There are certain costs, however (i.e. the external transportation charges of EUR 1.50 per bottle), that the associated wholesaler bears that are not borne by the independent wholesaler. Provided that there is no difference in the type of functions performed, this type of difference in the division of costs between the producer and the wholesaler will not result in any difference in the net profit margin agreed between the two parties. In other words, the associated wholesaler will need to earn the same net profit margin as the independent wholesaler. The purchase price paid by the associated wholesaler may be calculated as follows:

	Independent wholesaler	**Associated wholesaler**
Retail price	12.50	12.50
Purchase price	5.00	?
External transportation charges	0.00	1.50
Other costs	6.25	6.25
Profit	1.25	1.25

The profit margin earned by the associated wholesaler must be the same as that earned by an independent third party. This means that the purchase price has to be set at EUR 3.50.

The retail price charged by the associated wholesaler may be broken down as follows:

Purchase price paid by associated wholesaler	3.50	28%
Other costs	7.75	62%
Net profit margin earned by associated wholesaler	1.25	10%
Retail price	12.50	100%

2.5.2. TNMM versus the cost-plus method

The details of this example are the same as those in the example used to illustrate the cost-plus method, with the exception of the additional information given below on the composition of the aggregated costs.

A Dutch company (A) assembles computers for the European market on behalf of an independent computer manufacturer in country X. The assembly work is based on standard instructions compiled by the computer manufacturer in country X. Both the components and the finished products are and remain the property of the computer manufacturer in country X.

Additional information: the remuneration that A agrees with the computer manufacturer is fixed as follows:

Indirect and direct assembly costs + overhead costs	145	(100%)
Net profit mark-up	15	(10.3%)
Price set	160	(110.3%)

A computer manufacturer from country Y decides to set up a subsidiary in the Netherlands (B) to assemble computers for the European market. Whilst the computers assembled by A and B are not entirely identical, the assembly work performed by the two enterprises is comparable. In addition, the two companies run similar risks (i.e. the computer manufacturer from country Y also holds and retains the title to both the components used and the finished products). This means that A and B perform comparable functions. B's aggregate costs are estimated at EUR 160.

Using the TNMM method, the transfer price may be calculated as follows:

Indirect and direct assembly costs + overhead costs	160	(100%)
Net profit mark-up	16	(10.3%)
Price set	176	(110.3%)

3. Administrative approaches for avoiding and resolving disputes on transfer pricing (*Chapter IV*)

3.1. Mutual agreement procedures (Paragraph 4.61)

3.1.1. General

The number of mutual agreement and arbitration procedures with treaty countries is growing as a result of the rapid globalisation of the economy coupled with the increasing interest of tax administrations in transfer pricing issues. Accordingly, it is becoming increasingly important for the business community to be aware of the policies and procedures followed by the Netherlands' government in relation to such mutual agreement and arbitration procedures. The Netherlands aims at resolving issues of double taxation caused by transfer pricing adjustments as quickly as possible, and wishes to minimise the (administrative) burden placed on the private sector as a result of such adjustments.

All of the treaties for the avoidance of double taxation that the Netherlands has entered into contain a clause that is comparable to Article 25 of the OECD Model Tax Convention. In addition, for Member States of the European Union, the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (henceforth the Arbitration Convention (90/436/EEC)) applies since 1 January 1995. Unlike the mutual agreement procedures, the Arbitration Convention actually obliges the signatories to eliminate double taxation.

Taxpayers are entitled to lodge an objection or appeal if they are of the opinion that a profit adjustment is not justified. In addition, if the profit adjustment leads to international double taxation, taxpayers can also submit an application for a mutual agreement or arbitration procedure to the competent authority in either one of the Member States or both of the Member States involved.

3.1.2. Address for submitting the request

A request for the application of the mutual agreement article of a treaty or an Arbitration Convention procedure should be addressed to the competent authority, i.e.:

The Ministry of Finance
Director of International Tax Policy and Legislation
P.O. Box 20201
2500 EE The Hague
The Netherlands

Requests for a reduction in previous tax assessments resulting from transfer pricing adjustments either already made or likely to be made in the future by foreign tax administrations (i.e. requests for corresponding adjustments) should be addressed to the Ministry of Finance for the attention of the Director of the International Tax Policy and Legislation Directorate.
The competent authority will send a copy of all applications to the Co-ordination Group on Transfer Pricing (*Coördinatiegroep verrekenprijzen*, CGVP) for their advice. The CGVP was set up in March 1998 (see the Decree of 30 March 2001, No. RTB/1365M). In all cases, consultation will take place between the CGVP and the International Tax Policy and Legislation Directorate on the final position.

Where requests for corresponding adjustments in relation to either past or future tax assessments are received by the competent tax inspector, the latter should pass on such applications to the CGVP. The CGVP is responsible for soliciting the views of the International Tax Policy and Legislation Directorate on the matter and will give the inspector a binding advice on how the application should be dealt with.

3.1.3. Deadline for submitting the request

Article 25 of the OECD Model Tax Convention states that requests for competent authority assistance must be presented within three years from the first notification of the action resulting in international double taxation. Article 6 of the Arbitration Convention contains a similar clause.

Neither the commentary on Article 25 of the OECD Model Tax Convention and the Arbitration Convention, nor the text of the articles themselves, make it clear what exactly is meant by the term "first notice". The position taken by the Netherlands' government is that the taxpayer's request is regarded as having been submitted in time if it is received within three years either of the date of the assessment incorporating the adjustment or of the date on which justification was given for the adjustment, should this be later. As the mutual agreement and arbitration procedures involve more than one state, the taxpayer should ascertain the position adopted by the other state with regard to the starting date of the three-year period. If the other state has a different position, this could result in the three-year period commencing on a date prior to that on which the three-year period starts in accordance with the Netherlands' position.

Where the period quoted in the mutual agreement clause in a specific tax treaty differs from the period of three years referred to above, the taxpayer should take regard of the text of the mutual agreement clause and the commentary on this clause in the treaty. As long as there is no conflict either with the tax treaty in question or with the commentary on the treaty, the principle outlined in the preceding paragraph will be followed by analogy.

3.1.4. Concurrence of the objection and appeal procedure and the mutual agreement procedure

In principle, the competent authority in the Netherlands will not consult the competent authority in the other state involved as long as the taxpayer has the possibility under Netherlands' law (i.e. in the form of an objection, an appeal or an appeal in cassation) to contest a tax assessment resulting either from an adjustment or from the rejection of an application for a corresponding adjustment. The competent authority in the other state will, however, be informed that an application for a mutual agreement or arbitration procedure has been received. The reason for not starting consultation is the fact that, until the domestic procedure has been completed, it is not clear whether or not any international double taxation will indeed arise and, if so, what amount will actually be involved.

In certain situations, however, it may be highly inefficient for the competent authority to wait for the completion of all domestic procedures before starting a consultation with a foreign competent authority. For this reason, taxpayers are offered the possibility to request the competent authority to enter into consultation with the competent authority of the foreign state in question, in spite of the fact that the domestic procedures are still pending. A request to this effect will be granted only if the following conditions are met:

- the request for an early commencement of consultation must be made to the competent authority within six weeks of the date of the decision taken on the applicant's letter of objection. The request should be accompanied by a copy of the appeal (either substantive or pro forma) lodged with the Court of Appeal;

- the competent authority will only start the consultation after the Court of Appeal has approved the suspension of legal proceedings for the duration of the mutual agreement or arbitration procedure. To this end, the taxpayer is required to produce a written statement indicating his willingness to lend his full co-operation for a period of two years in obtaining the Court of Appeal's approval for the suspension of legal proceedings or, as the case may be, for the extension of the suspension of legal proceedings. Upon the expiry of this two-year period, the taxpayer is free to request the Court of Appeal to recommence legal proceedings;
- the tax administration and the taxpayer should sign a determination agreement in which the taxpayer undertakes immediately to cease legal proceedings if the mutual agreement or arbitration procedure leads to the elimination of the international double taxation in accordance with the mutual agreement or arbitration clause in the relevant treaty; and
- the competent authority is entitled to deny a request for an early commencement of consultation if the inspector submits detailed evidence showing that the taxpayer has failed to comply with his administrative obligations, as a result of which the burden of proof with respect to the adjustment to which the adjustment relates has been transferred to the taxpayer.

The competent authority in the other state may well not be prepared to assist in the early commencement of the mutual agreement or arbitration procedure, for example, because it feels that there is not sufficient certainty as to the existence of the international double taxation in question. If this situation occurs, the Netherlands' competent authority should notify both the taxpayer and the competent tax inspector immediately. Once they have received this notification, both the taxpayer and the tax inspector are entitled to request the Court of Appeal to recommence legal proceedings.

3.1.5. Start of the two-year period referred to in Article 7 of the Arbitration Convention

The Decree of 13 October 1997 (No. IFZ97/1113M) and the letters of 19 December 1997 (No. IFZ97/1515) and 15 April 1998 (No. IFZ98/266U) from the State Secretary for Finance to the Permanent Finance Committee of the Lower House of the Netherlands' Parliament set out the government's position on the Arbitration Convention. The Decree of 13 October 1997 (No. IFZ97/1113M) sets out the government's position on the start of the two-year period referred to in Article 7 of the Arbitration Convention. According to the wording of the latter decree, the Netherlands assumes that the two-year period does not start until the competent authority in the other state has rejected the adjustments made by the first state and the tax assessment incorporating the adjustments has been irrevocably determined. Developments in neighbouring countries have caused the Netherlands' government to revise its position on the two-year period. The period is now assumed to start on the later of the following two dates:

- the date on which the tax assessment incorporating the adjustments is irrevocably determined; and
- the date on which the competent authority receives the request.

In principle, it is up to the taxpayer to decide whether or not to invoke the Arbitration Convention straightaway or to avail himself first of the various legal remedies available under Netherlands' law. For the remainder, the decrees referred to above retain their validity.

Even in situations in which the competent authority has started the "early" consultation with the other state involved, as described in section 3.1.4., the wording of Article 7, Paragraph 1, second sentence, of the Arbitration Convention means that the two-year period does not start until the tax assessment incorporating the adjustments has been irrevocably determined. In terms of Article 7, Paragraph 4, of the Arbitration Convention, however, this requirement may be ignored, provided that this is done with the agreement of both the competent authorities and the associated enterprises in question. In terms of this article, the Netherlands' competent authority, acting on the request of the associated enterprises, will suggest to the competent authority in the other state that the two-year period should be limited to no more than twelve months after the date on which the tax assessment incorporating the adjustments has been irrevocably determined.

A request to this effect from the associated enterprises in question must be received by the Netherlands' competent authority within six weeks of the date on which the tax assessment incorporating the adjustments has been irrevocably determined. A copy of the proposal to reduce the term will be submitted to the taxpayer at the same time the proposal is submitted to the other competent authority. As soon as the competent authority receives a reply to the request, the taxpayer will be notified.

3.1.6. Oral explanation by the taxpayer

To a greater extent than in other situations, the underlying facts and circumstances play a key role in making and substantiating transfer pricing adjustments. In most cases, the underlying facts and circumstances are both complex in nature and numerous in quantity. Experience shows that taxpayers involved in mutual agreement and arbitration procedures relating to transfer pricing adjustments would like an opportunity to explain their position orally to the competent authority. In the light of this apparent need, taxpayers will upon request be given an opportunity to give such an oral explanation. Taxpayers may indicate, when submitting a request for a mutual agreement or arbitration procedure to be put into motion, that they wish to avail themselves of this opportunity.

3.1.7. Deadline for making a corresponding adjustment by means of a reduction ex officio in the tax assessment

It is frequently the case that, when a foreign state makes a transfer pricing adjustment, the corresponding tax assessments in the Netherlands have already been irrevocably determined. In such an event, a corresponding adjustment will, if necessary, be made in the form of a reduction ex officio in the tax assessments. The Decree on reductions ex officio in irrevocable tax assessments (the Decree of 25 March 1991 (DB89/735)) has given the tax administration a period of five years (plus any extension that has been granted to the taxpayer) in which to grant a request for a reduction ex officio. This period may be extended by a further five years if a reasonably recognisable error has been made. In certain situations in which a mutual agreement procedure has been conducted as a result of transfer pricing adjustments, the five-year period has been found to be too short, despite the fact that the time limits set for the submission of requests in the relevant tax treaty or in the Arbitration Convention have been met.

I agree to an extension of the five-year period in such cases, on condition of course that sufficient data are available to substantiate the existence of international double taxation.

3.1.8. Transfer pricing adjustments and interest charges (*Paragraphs 4.64 - 4.66*)

In addition to the actual transfer pricing adjustment that forms the subject of the mutual agreement or arbitration procedure, differences between the arrangements made by the respective states with regard to the collection and assessment of interest charges related to the adjustments may also cause international double taxation. In some cases, the amount of interest due may actually be larger than the tax charge. For this reason, Section 30k of the General Tax Act (*Algemene Wet inzake Rijksbelastingen*) and Section 31a of the Tax Collection Act 1990 (*Invorderingswet* 1990) create the possibility of including interest payments in any compromise reached in a mutual agreement procedure. When conducting mutual agreement and arbitration procedures, the Netherlands' government will seek to ensure that the assessment and collection of interest charged by one state and paid by the other state match each other.

Where the Netherlands is the state making the adjustment, the Netherlands' tax administration will upon request grant a deferral of payment on that part of the tax charge that is related to the adjustment. In principle, deferral will be granted until the date on which both the domestic and the international procedures for resolving the dispute have been completed. The policy in this respect will be based on the policy applying to objections lodged against tax assessments (see Article 25, Paragraph 2, of the Tax Collection Guidelines 1990 (*Leidraad Invordering* 1990)). The Tax Collection Guidelines 1990 will be amended on this point. This means that the entities involved will, apart from the obligatory collection and assessment interest, not have any other form of loss of interest. The above will resolve the interest and financing problems that can be caused by mutual agreement and arbitration procedures.

4. Secondary adjustments (*Paragraphs 4.67 - 4.77*)

Paragraphs 4.67 to 4.77 of the OECD Guidelines deal with the consequences of secondary transactions. Most countries do not limit transfer pricing adjustments to adjustments of taxable income, but also require that a secondary transaction is made so that the taxpayer's accounts reflect the way in which the adjustment made to the taxpayer's profit and loss account and balance sheet has been processed. A secondary transaction may take the form of an adjustment to a current account, a distribution of income or an informal capital payment. The Netherlands' authorities always require a transfer pricing adjustment to be processed by means of a secondary transaction. A secondary transaction may lead to a secondary adjustment, such as the attribution of interest to the current account, the levying of dividend withholding tax on a distribution of income, or the levying of capital duty on an informal capital payment. Systems differ from one country to another, and this means that the foreign tax authority in question may not be prepared, for example, to credit the dividend withholding tax against its own tax because it does not recognise the payment of a deemed dividend. The secondary adjustment is not performed if the taxpayer is able to demonstrate that, in the light of the difference between the tax systems used by the two states, the dividend withholding tax paid cannot be credited and there is no situation of abuse aimed at the avoidance of dividend withholding tax.

5. Arm's length pricing when valuation at the time of the transaction is highly uncertain (*Paragraphs 6.28 - 6.35*)

Where intangible assets such as patents are transferred, it may be difficult to establish the value at the time of the transfer because not enough information is available about the future benefits and risks. Paragraph 6.34 states in this respect that, if independent enterprises under similar conditions would have demanded a price adjustment clause, a tax administration must be permitted to calculate the price using this type of clause. This refers to an arrangement whereby the fee is commensurate with the benefits that the intangible asset will generate in the future.

Agreeing to a benefit dependent fee contributes to taxation that is more in accordance with the actual results obtained. In certain circumstances, the Netherlands' tax administration also takes the position that it is not at arm's length to agree on a fixed price if there is very little certainty about the asset's value at the time of the transaction, as unrelated third parties would not agree on a fixed price in a similar situation.

In such cases, a price adjustment clause should be incorporated into the contract between the associated enterprises stating that the price charged depends partly on the level of future income. An example would be the situation in which a new intangible asset has been developed that is sold to an associated enterprise at a time when there are very few guarantees as to its future success, for instance because it has yet to generate any revenue and any estimates of future revenue are surrounded by major uncertainties. In these circumstances, it is very difficult value the asset at the time of the transaction and it would be sensible for the parties to use an arm's length price adjustment clause (see, for example, the Supreme Court decision of 17 August 1998 (No. 32.997, BNB1998/385)).

6. Intra-group services (*Chapter VII*)

According to the arm's length principle, an intra-group service is an activity performed for a group entity that adds economic or commercial value and for which the group entity concerned would normally have been willing to pay. This does not apply to activities performed as a shareholder. The taxpayer can choose one of the methods described above for calculating the transfer price. In principle, remuneration is regarded as arm's length only if it includes an appropriate profit mark-up. The only exception to this requirement is the situation described in Paragraph 7.33 of the OECD Guidelines.
As far as charging for intra-group services is concerned, the OECD Guidelines express a clear preference for a direct method (Paragraph 7.20). Experience shows, however, that indirect methods are also frequently used, because of the major practical problems that the direct method can cause.

Where such practical problems occur, the Netherlands' tax authorities will accept the indirect method chosen by the taxpayer. Obviously, the method must produce a reliable result that is in accordance with the arm's length principle. For the purposes of an allocation key, the relationship between turnover, the number of personnel, or the human resource expenses could be relevant. An allocation key in which the price charged depends on the level of profit is not regarded as generating a result that is in accordance with the arm's length principle.

7. Contributions to a Cost Contribution Arrangement (CCA) with a profit mark-up (*Chapter VIII*)

Paragraph 8.15 of the OECD Guidelines leaves member countries the option of using both market prices (with a profit mark-up) and cost (without a profit mark-up) for the calculation of contributions to a CCA.
Some countries give a precise definition of the transactions between related parties which can be regarded as a CCA (without a profit mark-up) and transactions which can be regarded as services (with a profit mark-up). A CCA is defined here as an agreement between related parties in which each of the participants makes a relatively similar contribution and receives relatively similar benefits, and these contributions and benefits are permanently in balance. The Netherlands does not offer a specific definition of what can be classified as a CCA. In principle, a profit mark-up need not be added in a situation where each of the parties makes a similar contribution and receives relatively similar benefits, so that the mutual relationship is fairly in balance. Whether or not such a balance has actually been achieved in practice is a matter that has to be assessed on a case-by-case basis. When embarking on a CCA, one problem is how to make a correct assessment of the likely contributions and benefits for the various participants. The Netherlands takes the position that in principle a profit mark-up is always required on intercompany transactions. If interested parties nevertheless choose not to add a profit mark-up, that choice will have to be properly substantiated. In this respect , see the recommendations on the form of documentation to be supplied in Paragraph 8.40 of the OECD Guidelines.

Certain countries may not allow a mark-up to be charged. In such cases, they may well permit a fee to be charged for the capital tied up in the activities in question. Both methods may lead to the same result. The Netherlands' tax administration may give its consent to a particular modus operandi in the light of the acceptability of charges in certain countries, provided that the result is in accordance with the OECD Guidelines.

8. Arm's length fee for financial services

Financial services exist in a vast variety of forms. Here too, an arm's length price should be calculated on a case-by-case basis, based on the functions performed and on a comparison with transactions between third parties. If the functions of a financial service company consist primarily in supplying loans, the functions performed by the company in question are basically comparable with the functions performed by independent financial institutions operating under the supervision of the Netherlands' Central Bank (*De Nederlandse Bank*). The application of the arm's length principle implies that the arm's length price for the functions performed should be based on the fees charged by these institutions for comparable services.

Basically, there are four aspects that financial institutions, the functions of which consist of supplying loans, take into account when deciding whether or not to make a loan and, if so, on what conditions this should be made and what level of fee they should charge.

- *Financial risk*. In order to determine the financial risk assumed by the lender, the borrower's financial position is assessed on the basis of its balance sheet and profit and loss account.

- *Debtor risk*. Three specific aspects are scrutinised in order to measure the debtor risk, i.e. the presence of collateral, the purpose of the loan and the term of the loan.

- *Business risk/classification of the quality of the loan*. The assessment of this type of risk is based on the lender's views on the sector in which the borrower is active.

- *Structural risk*. The calculation of this type of risk is based on the classification (ratings) assessed by independent credit rating agencies.

In principle, these elements should be taken into account in determining the arm's length fee which an associated lender should charge.

Independent financial service providers calculate the charges for their loans by adding a number of mark-ups or surcharges to the basic cost of funding, i.e. a surcharge to take account of solvency requirements, a surcharge to take account of the credit risk, a handling fee and a mark-up for any foreign exchange risk that may be involved. The credit risk should be calculated on the basis of the contractual terms of the loan and the results of the risk analysis described above. The contractual terms of the loan also affect the degree of foreign exchange risk. Independent financial service providers always link the size of the fee charged to either the amount of money borrowed or the market value of assets held under management.

A surcharge to take account of solvency requirements may be based on the lender's own solvency or on the solvency of an associated enterprise that is acting as a guarantor, as in the latter case it is the guarantor's capital that is at risk. In the former case, the surcharge will consist of an arm’s length fee for the equity that the lender needs to retain for the purpose of the transaction. In the latter case, the enterprise acting as a guarantor will in principle charge a fee in return for placing its capital at risk. The solvency surcharge charged by the lender should at least consist of the cost of the guarantee.

If either the incoming or the outgoing interest payments are liable to withholding tax, the price charged in a transaction involving two unrelated enterprises will generally take account of which of the two ultimately pays the tax.

9. Subsidies, tax incentives and costs subject to deduction restrictions

It is clear from practical experience that, particularly in situations in which the cost-plus method is used for determining an arm's length price, the question arises as to whether or not subsidies and tax benefits should be deducted from the cost base. The basic rule in the Netherlands is that subsidies may be deducted from the cost base if there is a direct relationship between the subsidy and the product or service supplied, and the subsidy is granted in the form of a discount or a cost allowance.

This would be the case, for example, with a subsidy granted for the use of relatively expensive but environmentally friendly materials, a grant awarded on the purchase of an energy-efficient piece of machinery, or a grant made under the government's investment grant scheme (*investeringspremieregeling* (IPR)). Conversely, additional taxes, for example, in connection with the use of materials that are detrimental to the environment, will lead to an increase in the level of the cost base. Reduction remittances referred to in Section 3 of the Wages and Salaries Tax Act (*Wet vermindering afdracht loonbelasting en premie voor de volksverzekeringen*) reduce wage costs and result in a lower cost base for the application of the cost-plus method.

Subsidies and tax benefits granted specifically to the entity in question without any causal link with the cost-plus activity do not lead to a lowering of the cost base. Insofar as these form part of the pre-tax profit, they are credited individually to the profit and loss account.

If the tax benefits in question are granted in the form of tax credits or allowances that may be deducted from the enterprise's taxable income, allowances for work-related training and investment allowances may not be deducted from the cost base. The rule is that the profit should first be calculated using the cost-plus method, after which the allowance is deducted separately from the taxable income.

Under Netherlands' tax law, certain types of cost are not fully deductible. This applies, for example, to costs incurred under Section 3.14 of the Income Tax Act 2001. At the same time, these costs do form part of the cost base to which the cost-plus mark-up is applied. The restriction on the deduction of these costs is implemented by adding the non-deductible part of the cost to the profit when determining the taxable profit.

10. Allocation of profit to headquarters and permanent establishments

The arm's length principle applies by analogy to the permanent establishments of foreign taxpayers.

This is in accordance with the existing practice of allocating profits to a foreign taxpayer's permanent establishment under Article 7 of the OECD Model Tax Convention. The country in which the permanent establishment is located is entitled to tax any profits that can be allocated to the permanent establishment in question. Revenue and expenditure are divided between the headquarters and the permanent establishment in accordance with the functions performed by each of them, as if they were unrelated enterprises. This means that an arm's length price should be used for internal supplies of goods and services, except where the commentary on Article 7 of the OECD Model Tax Convention, the Double Taxation Avoidance Decree 2001 (*Besluit voorkoming dubbele belasting* 2001) and/or Netherlands' case law impose certain restrictions on such practices

Any assets transferred to a Netherlands' permanent establishment by the foreign headquarter (i.e. including intangible assets) are valued at fair market value. This applies equally to goodwill. For the purpose of calculating the profit made by the Netherlands' permanent establishment, depreciation of the fair market value of the goodwill and other fixed assets is taken into account.
In order to prevent either all or part of the capitalised value from being disregarded by the relevant foreign tax authorities, the treaty partner will be informed of the capitalised value of the assets in question.

Under the provisions of Article 9 of the Double Taxation Avoidance Decree 2001, the above also applies to the mirror image situation in which the taxpayer needs to calculate the amount of profit that is attributable to a foreign permanent establishment (see also the Decree of 22 January 1996 (No. DGO96/06916)).

Article 7, Paragraph 3, of the OECD Model Tax Convention lays down certain rules for the deduction of costs from the profit allocated to the permanent establishment. Managerial fees and general administration charges are regarded as qualifying costs irrespective of the country in which these are incurred. In connection with this, Paragraph 3 of Article 7 should be seen as a clarification of, and not as a restriction on, Paragraph 2 of Article 7.

11. Entry into force

This Decree enters into force on 1 April 2001

12. Application to current policy

The publications listed below under points 1 to 11 apply exclusively to rulings (including "quasi" rulings) which, under the transitional arrangement set out in the Decree of 21 December 2000 (No. RTB2000/3227M), are due to expire after 31 March 2001. I should like to point out for the sake of clarity that any rulings currently in force that are consistent with the policy as at 31 March 2001 and which are due to expire before 31 December 2005 will be extended to 31 December 2005, unless the taxpayer wishes to adhere to the earlier date specified in the ruling. It goes without saying that the applicability of the ruling may not be extended beyond 31 December 2005.

The published, tailor-made rulings listed under point 12 below continue to remain valid in accordance with the provisions of the first paragraph with regard to rulings and "quasi" rulings. These publications also remain valid, provided that the policy set out therein is unconnected with the policy that is to be revoked as described in points 1 to 11 below, and on condition that there is no conflict with the provisions of the present decree. The policy on the participation exemption and the provision of advance assurance on the participation exemption remain unchanged.

1. Decree of 25 April 1985 (No. 084-2737); Tax treatment of certain intra-group activities (BNB1985/196).

2. Announcement of 7 May 1985 (No. 285-6549) by the State Secretary for Finance on the treatment of foreign sales corporations, as published in *Infobulletin* 1985/253. This publication contains the letter of 3 December 1985 (No. 284-17129) from the State Secretary for Finance and the letter of 25 March 1985 (Ref. 285-4056) from the State Secretary for Finance.

3. Letter of 15 October 1985 from the State Secretary to the Permanent Finance Committee of the Lower House of the Netherlands' Parliament, and of 24 December 1986 to the Secretary General of the Lower House of the Netherlands' Parliament (Proceedings II, 19700, Chapter IXB). Nos. 25 and 36 respectively.

4. Decree of 6 June 1989 issued by the State Secretary for Finance, Policy on the extension and termination of tax rulings, Government Gazette (*Staatscourant*) 107.

5. Announcement of 8 August 1989 (No. DB89/3695) by the State Secretary for Finance, Profit ruling on perpetual loans, as published in *Infobulletin* 1989/504.

6. Decree of 26 April 1990 (No. CA90.3) issued by the State Secretary for Finance, Explanatory notes on the concentration of the treatment of rulings, and the reprint of 15 September 1997.

7. Announcement of 4 February 1993 (No. DB93/228) by the State Secretary for Finance, Spreads for finance rulings/arm's length remuneration in respect of finance companies, published in V-N1993/496, point 19, and the revised edition published in V-N1993/606, point 20.

8. Decree of 5 March 1993 (No. DB93/881) issued by the State Secretary for Finance, Ruling, mixed expenses under "Oort" regulations and cost-plus rulings, second reprint of 15 September 1997.

9. Model book rulings, Tax Ruling Team at Local Office for Business Taxpayers/Large Companies in Rotterdam, September 1993.

10. Announcement by Local Office for Business Taxpayers/Large Companies in Rotterdam, unnumbered and undated, guidelines on ruling companies, V-N1994/173, point 28.

11. Brochure outlining the ruling policy, *Financiënreeks* 95-3, 17 February 1995, DB95/761M.

12. Published non-standard, tailor-made rulings:

- Letter of 15 March 1990 from the State Secretary for Finance (No. DB 90/1475);
- Letter of 20 February 1992 from the State Secretary for Finance (No. DB92/831);
- Letter of 7 January 1993 from the State Secretary for Finance (No. DB92/6363);
- Decree of 16 September 1994 (No. V-N1994, p. 3018) issued by the State Secretary for Finance;
- Letter of 11 October 1994 from the State Secretary for Finance;
- Letter of 14 December 1994 from the State Secretary for Finance (No. DB94/4108M);
- Decision of 18 June 1999 (No. WJB99/534) taken by the State Secretary for Finance, V-N1999/31.27;

- List of non-standard rulings for the period from 1995 to 1998, as published in *Fiscaal up to Date* of 7 December 1999, No. 1999-1854, p. 5 ff; and
- List of non-standard rulings for the period from 1999 to mid-September 2000, as included in Annexe 4 to the letter of 20 November 2000 (No. G2000-00454) from the State Secretary for Finance to the Lower House of the Netherlands' Parliament.

The Decree of 18 December 2000 (No. IFZ2000/1327M, transfer of goodwill to a permanent establishment in the Netherlands) is repealed as of 1 April 2001, given that its contents are incorporated into the present decree.

PORTUGAL

RAPPORT FRA DEN PORTUGISISKE REPUBLIK

DEN PORTUGISISKE REPUBLIKS REGERING MÅ -

under henvisning til arbejdsprogrammet for Gruppen vedrørende Adfærdskodeksen (erhvervs-beskatning), og navnlig bemærkningen om, at der skal indsendes en rapport inden den 10.10.2001, og

ud fra følgende betragtninger:

Den eneste portugisiske foranstaltning, der er "klassificeret" som skadelig i "Primarolo-rapporten", er foranstaltning B6 om finansielle aktiviteter i Madeiras frizone.

Der er tale om en speciel foranstaltning med særegne træk, der som sådan skal underkastes en behørig vurdering i Gruppen vedrørende Adfærdskodeksen og medtages under ordningen for statsstøtte af fiskal karakter, da den er led i en enhedspræget og sammenhængende udviklingspolitik for en lille og fjernt beliggende ø med stærkt begrænsede økonomiske og sociale muligheder.

Kommissionen har efterfølgende godkendt denne ordning under statsstøtteordningen med virkning indtil den 31.12.2011, idet dog sidste frist for at få meddelt tilladelse er den 31.12.2000.

På denne baggrund burde den nævnte foranstaltning være blevet gjort til genstand for en grundig vurdering i Gruppen vedrørende Adfærdskodeksen, især de rapporter om, hvorvidt den står i forhold til det tilstræbte økonomiske mål, der er blevet forelagt i henhold til kodeksens litra G).

I modsætning til den fremgangsmåde, der er blevet anvendt for alle de andre medlemsstaters delegationer, er Portugals anden rapport vedrørende adfærdskodeksens litra G) aldrig blevet gennemgået i gruppen.

Portugal er ikke enigt i den foretagne vurdering af foranstaltning B6 og har klart tilkendegivet denne holdning i fodnote 8 i Primarolo-rapporten.

Kommissionen har i forbindelse med statsstøtteforanstaltninger af regional karakter indledt en undersøgelsesprocedure vedrørende ordningen for så vidt angår år 2000 under hensyn til de nye retningslinjer vedrørende regional statsstøtte.

Der er i skatteordningen for finansielle aktiviteter i Madeiras frizone blevet foretaget relevante ændringer, der gælder fra den 1. januar 2001 til den 31. december 2006, navnlig indførelse af progressivt stigende selskabsskattesatser. Ændringerne er ved at blive forhandlet med Kommissionen inden for rammerne af statsstøtteforanstaltninger af regional karakter -

KONSTATERE FØLGENDE:

1. De indvendinger, som Portugal tidligere har fremsat vedrørende den fremgangsmåde, der er blevet anvendt ved vurderingen af foranstaltning B6 vedrørende finansielle aktiviteter i Madeiras frizone, står stadig ved magt.

   Foranstaltningen er nemlig i modstrid med adfærdskodeksens litra G) aldrig blevet vurderet på behørig måde for at afgøre, i hvilket omfang den opfylder de tilstræbte økonomiske mål. Portugal opretholder alle de indvendinger, det har fremsat i fodnote 8 i Primarolo-rapporten, og giver igen udtryk for, at det absolut ikke er enigt i "klassificeringen" af foranstaltningen som skadelig og med den fremgangsmåde, der er blevet anvendt med henblik herpå.

2. For så vidt angår optagelse af nye enheder under ordningen er der, i betragtning af at Kommissionen har indledt en undersøgelsesprocedure for år 2000, og at nogle ændringer til skatteordningen, der skal gælde fra den 1.1.2001, er under forhandling, ikke blevet medtaget nye enheder siden den 1.1.2000.

3. Hvad angår rollback af foranstaltningen, er vi af den opfattelse, at der ikke kan ske rollback, hvis foranstaltningen aldrig har været underkastet en behørig vurdering, hvorved den er blevet klassificeret som skadelig.

   Desuden vil vi gerne gøre opmærksom på, at Primarolo-rapporten aldrig er blevet formelt godkendt af Økofin-Rådet.

Portugal har dog som allerede nævnt indført relevante ændringer i ordningen inden for rammerne af statsstøtteforanstaltninger af regional karakter; disse ændringer gælder fra den 1.1.2001 til den 31.12.2006. Blandt ændringerne skal vi navnlig fremhæve de progressivt stigende selskabsskattesatser. Ændringerne er ved at blive forhandlet med Kommissionen inden for rammerne af anmeldelsen af foranstaltningen som regional statsstøtte.

SPANIEN

OPLYSNINGER OM ROLLBACK I FORBINDELSE MED DE SPANSKE FORANSTALTNINGER

Som besluttet på mødet den 28. juni 2001 i Gruppen vedrørende Adfærdskodeksen skal den spanske delegation hermed redegøre for de administrative og lovgivningsmæssige processer, der er blevet gennemført eller er ved at blive gennemført med henblik på rollback af de spanske foranstaltninger, der er blevet vurderet positivt i forbindelse med adfærdskodeksen, navnlig for så vidt angår nytilkomne.

- **A4: Ledelses-, koordinations- og finanscentre i Baskerlandet**

  Som det allerede ved tidligere lejligheder er blevet meddelt Europa-Kommissionen, gav de "privilegerede områder" Álava, Guipúzcoa og Vizcaya på det første møde i 2000 i Det Blandede Kontingentudvalg mellem Staten og Baskerlandet den 18. januar 2000 tilsagn om at ophæve de bestemmelser om koordinationscentre, der var fastlagt i disse områders lovgivning.

  Det er kun foranstaltningen vedrørende Vizcaya, der endnu ikke er ophævet. Vi forventer, at den vil blive ophævet inden den 31. december 2001, eller at der vil blive givet tilsagn om, at der ikke gives nye tilladelser.

- **A5: Ledelses-, koordinations- og finanscentre i Navarra**

  Ifølge den første aftale, der blev indgået i Samarbejdsudvalget mellem Staten og Comunidad Foral de Navarra den 16. januar 2001, ophæver den regionale lov nr. 8/2001 af 10. november de bestemmelser om koordinationscentre, der er fastlagt i regionens lovgivning.

- **C25: Efterforskning og udnyttelse af kulbrinter**

  For så vidt angår skatteordningen for efterforskning og udnyttelse af kulbrinter i henhold til kapitel X i lov nr. 43/1995 af 27. december om selskabsbeskatning er den spanske regering fast besluttet på at overholde de fastsatte tidsfrister, idet den benytter sig af den anledning, som den generelle reform af selskabsbeskatningen, der for tiden er til drøftelse, giver.

Ordningen udmøntes ikke gennem administrative tilladelser, men anvendes derimod automatisk. Af den grund er det ikke muligt inden dens ophævelse at gennemføre en retslig foranstaltning, som forhindrer, at nytilkomne indtræder i ordningen.

Bortset fra at der er behov for en tilladelse for at blive optaget under skatteordningen, vil det imidlertid være nødvendigt at iværksætte den tilsvarende administrative proces, der gør det muligt at opnå en autorisation, tilladelse eller administrativ bevilling til at indlede aktiviteter i forbindelse med efterforskning og udnyttelse af kulbrinter. Det er derfor ikke sandsynligt, at nytilkomne indtræder i skatteordningen.

Endelig er Spanien rede til i Gruppen vedrørende Adfærdskodeksen at undersøge muligheden for at hæve de forbehold, der findes i fodnoterne til gruppens rapport fra november 1999 for så vidt som de øvrige medlemsstater er enige heri.

DET FORENEDE KONGERIGE

ROLLBACK AF SKADELIGE FORANSTALTNINGER

NOTE FRA DET FORENEDE KONGERIGE

I rapporten fra november 1999 fra Gruppen vedrørende Adfærdskodeksen til Økofin-Rådet (SN 4901/99) blev tre foranstaltninger på Gibraltar og seksten foranstaltninger i fire territorier, der afhænger af UK, identificeret som foranstaltninger med skadelige karakteristika.

UK har i Kodeksgruppen og i Økofin-Rådet accepteret, at det bør søge at afvikle de foranstaltninger, der i gruppens rapport blev anset for at være skadelige, som led i et afbalanceret program for rollback.

UK har i henhold til kodeksens litra M forpligtet sig til at sikre, at kodeksens principper finder anvendelse på alle dets afhængige territorier "inden for rammerne af deres forfatningsmæssige bestemmelser". I UK's rapport til Kodeksgruppen fra november 1998 (13193/98, FISC 179) er der gjort rede for disse bestemmelser. I kronbesiddelserne og de oversøiske territorier vedtages skattelove af de direkte valgte lovgivende forsamlinger. UK fortsætter aktivt rollback-processen under hensyn til det tilsagn, det har afgivet i forbindelse med adfærdskodeksen. UK har ført omfattende drøftelser med Gibraltars regering og regeringerne i de andre berørte afhængige territorier og har gjort sin holdning klar gentagne gange.

UK er af den opfattelse, at det tilsagn, det har afgivet i forbindelse med kodeksens litra M (herunder også vedrørende nytilkomne og rollback-processen), og som det gentager, vil være meget lettere at indfri, hvis det klart fremgår, at alle medlemsstater i samme grad er indstillet på at anvende gruppens konklusioner lige så rigorøst på sig selv som på de territorier, der er afhængige af dem eller associerede med dem.

Gibraltar

Da Gibraltar er et europæisk område, hvis udenrigsanliggender varetages af UK, er det i henhold til Rom-traktatens artikel 299, stk. 4, med i Den Europæiske Union takket være UK's medlemskab.

I gruppens rapport fra november 1999 blev det konstateret, at der er skadelige karakteristika ved følgende foranstaltninger:

A017 Gibraltar-Selskaber af 1992
B012 Skattefritagne (offshore) selskaber og captive insurance
B013 Qualifying (offshore) companies og captive insurance

<u>Oversøiske territorier og kronbesiddelser</u>

I gruppens rapport fra november 1999 blev det konstateret, at der er skadelige karakteristika ved følgende foranstaltninger:

De Britiske Jomfruøer	F056:	internationale handelsselskaber
Guernsey (herunder Alderney)	F037:	skattefritagne virksomheder
Guernsey (herunder Alderney)	F038:	international långivningsvirksomhed
Guernsey (herunder Alderney)	F040:	internationale selskaber
Guernsey (herunder Alderney)	F042:	offshore-forsikringsselskaber
Guernsey (herunder Alderney)	F043:	forsikringsselskaber
Isle of Man	F061:	internationale handelsselskaber
Isle of Man	F062:	skattefritagelse for selskaber, der ejes af personer, der ikke er hjemmehørende på Isle of Man
Isle of Man	F063:	forsikringsselskaber med skattefritagelse
Isle of Man	F065:	international långivningsvirksomhed
Isle of Man	F066:	offshore-bankvirksomhed
Isle of Man	F067:	forvaltning af fonde
Jersey	F045:	skattefritagne virksomheder
Jersey	F046:	internationale finansieringsselskaber
Jersey	F047:	internationale handelsselskaber
Jersey	F078:	captive insurance selskaber

UK's intensive drøftelser med dets afhængige territorier

2001

29. oktober	***Drøftelser på officielt plan med Guernsey***
23.-26. oktober	***Bilateral og multilateral drøftelse på ministerplan med alle afhængige territorier i Caribien***
17. oktober	***Drøftelser på officielt plan med Jersey***
12. oktober	**Drøftelser på officielt plan med Isle of Man**
9. oktober	**Viceministre fra Finansministeriet og Justitsministeriet møder Guernseys regering og embedsmænd**
Sept./okt.	**Viceminister fra Udenrigsministeriet fører regulære drøftelser med Gibraltars premierminister**
25. september	**Årlig samling i Det Rådgivende Råd for De Oversøiske Territorier. Viceministre fra Finansministeriet og Udenrigsministeriet drøfter alle aspekter af internationale skatteinitiativer. Deltagelse af repræsentanter for Caymanøerne, De Britiske Jomfruøer, Turks- og Caicosøerne, Montserrat og Bermuda.**
12. september	**Viceministre fra Finansministeriet og Justitsministeriet møder Jerseys regering og embedsmænd**
29. august	**Drøftelser på officielt plan med Isle of Man**

3. august	**Halvårlig undersøgelse i Justitsministeriets regi af internationale spørgsmål, i det omfang de berører kronbesiddelserne - alle aspekter drøftet med både embedsmænd og politikere**
31. juli	**Gibraltars premierminister drøfter affærdskodeksen med embedsmænd**
24. juli	**Viceminister fra Justitsministeriet besøger Jersey**
4. juli	**Viceminister fra Finansministeriet besøger Isle of Man**
26. juni	**UK-embedsmænd besøger Isle of Man**
28. april-2. maj	**UK-embedsmænd besøger oversøiske territorier i Caribien**
11. april	**UK-besøg på Jersey med henblik på et møde på officielt plan**
6. april	**Møde på officielt plan i London mellem Jersey og finansministerens særlige rådgivere**
16. februar	**Viceminister for Indenrigsministeriet besøger Jersey**
Februar	**Ministerielle skrivelser om adfærdskodeksen, er blevet sendt til kronbesiddelserne, Gibraltar og De britiske Jomfruøer**
12. januar	**Drøftelse i Finansministeriet af den halvårlige undersøgelse af internationale spørgsmål, i det omfang de berører kronbesiddelserne - alle aspekter behandlet på officielt plan**

2000

23. november	**Viceminister fra Finansministeriet holder bilateralt møde med Jersey**
23. november	**Viceminister fra Finansministeriet holder bilateralt møde med Guernsey**

22. november	**Viceminister fra Finansministeriet holder bilateralt møde med Isle of Man**
10. november	**Viceminister fra Indenrigsministeriet besøger Isle of Man. Direktivet om beskatning af renteindtægter drøftes**
3.-5. oktober	**Årlig samling i Det Rådgivende Råd for De Oversøiske Territorier efterfulgt af et skatteseminar omfattende alle aspekter af internationale skatteinitiativer. Overværes af repræsentanter for Caymanøerne, De Britiske Jomfruøer, Turks- og Caicosøerne, Monserrat og Bermuda**
19.-21. sept.	**Commonwealth-finansministermøde på Malta - drøftelser af skadelig skattekonkurrence/OECD-initiativer**
26. juni	**Halvårlig briefing om "Europa og den internationale udvikling" afholdt i Indenrigsministeriet for repræsentanter for kronbesiddelserne. Alle aspekter af skattepakken behandlet**

1999

17. december	**Halvårlig briefing om "Europa og den internationale udvikling" afholdt i Indenrigsministeriet for repræsentanter for kronbesiddelserne. Alle aspekter af skattepakken behandlet**
19.-20. oktober	**Møde i Det Rådgivende Råd for De Oversøiske Territorier. Bred drøftelse af internationale initiativer.**