



**CONSEJO DE
LA UNIÓN EUROPEA**

**Bruselas, 25 de octubre de 2001 (06.11)
(OR. EN)**

13228/01

LIMITE

FISC 218

NOTA DE LA PRESIDENCIA

al: Grupo del Código de Conducta (Fiscalidad de las empresas)
con fecha de: de 8 de noviembre de 2001

Asunto: Código de Conducta (Fiscalidad de las empresas)
- Proyecto de informe al Consejo ECOFIN del 4 de diciembre de 2001

Introducción

1. El Consejo y los Representantes de los Gobiernos de los Estados miembros, reunidos en el seno del Consejo, adoptaron el 1 de diciembre de 1997 una Resolución sobre un Código de Conducta relativo a la fiscalidad de las empresas. Dicha Resolución dispone el establecimiento de un Grupo en el marco del Consejo para evaluar las medidas fiscales a las que pueda aplicarse el Código.
2. El Consejo confirmó posteriormente la creación del Grupo " Código de Conducta" el 9 de marzo de 1998.
3. El Grupo ha informado periódicamente sobre las medidas evaluadas y sus informes se han sometido a la consideración del Consejo. Dos informes intermedios del Grupo " Código de Conducta " se presentaron al Consejo ECOFIN el 1 de diciembre de 1998 y el 25 de mayo de 1999 respectivamente y, posteriormente, el Grupo informó al Consejo ECOFIN el 29 de noviembre de 1999 sobre los resultados de la evaluación de 271 medidas fiscales con arreglo al Código, 66 de cuales fueron consideradas perniciosas por el Grupo.

4. El 4 de noviembre de 2000, el Grupo " Código" presentó un informe de situación sobre sus trabajos al Consejo ECOFIN de los días 26 y 27 de noviembre de 2000 (13563/00 FISC 193).
5. Bajo la Presidencia sueca se presentó otro informe de situación sobre los trabajos del Grupo al Consejo ECOFIN del 5 de junio de 2001. El Consejo en sus conclusiones sobre el paquete de medidas fiscales (9553/01 FISC 106), y con vistas al código de conducta, tomó nota del informe y:

Aprobó el programa de trabajo relativos a la transparencia y el intercambio de información sobre los precios de transferencia que se recoge en el Anexo 1 del informe del Grupo y pidió al Grupo que prosiguiera sus trabajos sobre el statu quo y el desmantelamiento e informar al Consejo al final del año de los progresos realizados.

6. De conformidad con las conclusiones de ECOFIN de 9 de marzo de 1998, el informe del Grupo al Consejo ECOFIN del 29 de noviembre de 1999 plasmaba la opinión unánime de los miembros del Grupo o las diversas opiniones expresadas durante el debate. Las referencias al " Grupo" en ese informe significan la existencia de un amplio consenso en caso de no haber unanimidad y las opiniones divergentes se recogen en notas correspondientes. Las referencias a " el Grupo" en el presente informe deben interpretarse del mismo modo que en el informe que el Grupo presentó al ECOFIN de 29 de noviembre de 1999.

Situación de los trabajos

7. Desde la reunión del Consejo del 5 de junio de 2001, el Grupo " Código" celebró cuatro reuniones: el 28 de junio bajo la Presidencia sueca y el 26 de septiembre, el 17 de octubre y el 8 de noviembre bajo la Presidencia belga.
8. En su reunión del 28 de junio, el Grupo decidió su calendario y los principales elementos de su programa de trabajo bajo la Presidencia belga:
 - transparencia e intercambio de información en relación con los elementos acordados de los precios de transferencia;
 - ulteriores trabajos relativos al statu quo
 - desmantelamiento

9. Seguidamente, el Grupo acordó también debatir la posible interacción de sus trabajos sobre statu quo y desmantelamiento con los procedimientos relativos a las ayudas estatales con respecto a 13 de las 66 medidas indicadas en el Informe de 1999. Acordó asimismo recibir un informe de los Servicios de la Comisión sobre sus trabajos sobre las medidas fiscales para las empresas en los países candidatos a la adhesión que pueden ser perniciosas con arreglo al Código de Conducta.
10. El 26 de septiembre se confirmaron el Sr. Haltry, representante personal del Ministro de Finanzas de Bélgica, senador honorario y ex Ministro de Finanzas (B) y D. Rodríguez-Ponga y Salamanca, Secretario de Estado en el Ministerio de Hacienda (SP) como primer y segundo vicepresidentes hasta el final de la Presidencia belga.
- A. Transparencia e intercambio de información en relación con los elementos acordados de los precios de transparencia**
11. Como se ha apuntado en el punto 5, el Consejo ECOFIN del 5 de junio aprobó el programa de trabajo del Grupo sobre transparencia e intercambio de información en el ámbito de los precios de transferencia que se recoge en el Anexo 1 del Informe del Grupo (9553/01 FISC 106).
12. Intercambio anual de la información puesta a la disposición del público: Como se explica en el punto 14 de dicho informe, el Grupo tenía la esperanza de alcanzar un acuerdo sobre la información puesta a disposición del público, con vistas al intercambio anual que se realizará en 2002. Al objeto de seguir avanzando en sus trabajos, el Grupo invitó a los Estados miembros, en primer lugar, a facilitar información relativa al intercambio anual de información. Concretamente se invitó a que cada Estado miembro presente un informe escrito que contenga:
- la información puesta a disposición del público en su país sobre los elementos acordados de los precios de transferencia que se mencionan en el punto 17 del Anexo 1 del informe para el Consejo ECOFIN de los días 26 y 27 de noviembre de 2000 (13563/00 FISC 193));
 - la manera en que utilizarían una información similar de otros Estados miembros si se dispusiera de ella ;
 - cualquier impedimento existente al intercambio de su información puesta a disposición del público.
13. El Grupo estudió también estos informes y escuchó informes verbales de todos los Estados miembros. En dichos informes se indicaba la legislación pertinente, las circulares, las disposiciones administrativas, las orientaciones y las medidas puestas a disposición del público a las que pueden acceder otros Estados miembros.

14. Algunos miembros del Grupo indicaron abrigar dudas sobre la utilidad de un intercambio anual de información accesible al público. Otros señalaron que esa información podría aumentar la comprensión de la legislación y las prácticas de otros Estados miembros. Se planteó la cuestión de si los costes de traducción de largas normas y orientaciones estarían justificados por la utilización de la información en la práctica.
15. Se acordó que el objetivo debe ser mantener a los Estados miembros bien informados y al día pero evitando una circulación costosa o innecesaria de información. En consecuencia, el Grupo acordó hacer accesible a todos la información pertinente puesta a disposición del público en su país y más tarde facilitar actualizaciones anuales en las que se indiquen los cambios que puedan haberse producido.
16. Intercambio de información en casos específicos: Habiendo observado que el punto 17 de la nota orientativa del Grupo relativa al desmantelamiento y el statu quo en los ámbitos de la sucursales financieras, sociedades de cartera y sedes (Anexo 1 del informe ECOFIN de 26 y 27 de noviembre de 2000 (13563/00 FISC 193) contemplaba el intercambio de información en forma resumida (número y tipo de casos) y de información específica en determinados casos, el Grupo acordó que necesitaría información de los Estados miembros referente a la segunda parte del programa de trabajos, a saber, el intercambio de información en casos individuales.
17. El Grupo tomó nota de que desde el debate inicial de los factores que era necesario tener en cuenta en tales intercambios, celebrado por un subgrupo bajo la Presidencia sueca, había una serie de cuestiones complejas que era necesario examinar más detenidamente. Hubo acuerdo en que los Estados miembros necesitan tiempo para preparar sus respuestas. Por lo tanto, se pidió a éstos que presenten antes del 30 de noviembre de 2001 informes escritos que contengan información pertinente.

B. Continuación de los trabajos sobre statu quo

18. Como se contempla en el apartado 21 del Informe del Grupo (8789/01 FISC 83), el Grupo ha proseguido sus trabajos sobre la evaluación del régimen alemán relativo a las sociedades de cartera y las medidas bajo el marco fiscal para las Antillas neerlandesas.

19. Alemania – Sociedades de cartera: El Grupo acordó la descripción del régimen alemán para las sociedades de cartera (**Anexo A**) y opinó que el informe de la Delegación alemana sobre el nivel impositivo efectivo relativo a la medida no proporcionaba una certeza satisfactoria de que la medida no podía, al menos en determinadas circunstancias, proporcionar un nivel impositivo efectivo más bajo. El Grupo consideró que la medida no cumplía ninguno de los criterios de los apartados B1 a B5. Adoptando un enfoque coherente con los apartados 29 a 67 del Informe del Grupo al Consejo ECOFIN del 29 de noviembre de 1999 (SN 4901/99), el Grupo analizó si la medida afecta o puede afectar, en forma significativa, el emplazamiento de la actividad empresarial en la Comunidad. Sobre la base de su evaluación global, el Grupo decidió que la medida no podía considerarse positiva. Pero el Grupo observó la existencia de interacciones complejas con la legislación efectiva de las Controlled Foreign Companies (normas CFC). El Grupo acordó asimismo que no eran necesarios más trabajos de carácter general sobre las empresas de cartera.
20. Países Bajos – Marco Fiscal para las Antillas neerlandesas: El Grupo acordó aceptar las descripciones de las dos medidas con arreglo al Marco Fiscal neerlandés (NFF) (**Anexo B**) en nombre de los Países Bajos:
- el régimen fiscal de las sociedades de cartera; y
 - el régimen fiscal de las sociedades exentas.
21. El Grupo consideró y aprobó una evaluación contra los criterios 1 a 5 del apartado B del Código propuesto por los servicios de la Comisión
22. [El Grupo examinó un informe presentado por la Delegación neerlandesa sobre los niveles efectivos de imposición para las medidas en su nombre.]

C. Desmantelamiento

23. Por lo que respecta al calendario de los trabajos sobre el paquete fiscal para el Consejo ECOFIN en diciembre 2001, en las Conclusiones del Consejo ECOFIN del 10 de julio (10768/01 FISC 130) se dice, entre otras cosas, lo siguiente:

En lo que al Código de Conducta se refiere:

Tendrá que considerar el informe al Consejo del Grupo del Código de Conducta sobre los progresos alcanzados sobre statu quo y desmantelamiento, incluidas:

- *una revisión de las medidas que los Estados miembros están dispuestos a aplicar para cumplir con su compromiso de las conclusiones del Consejo ECOFIN de noviembre de 2000 relativas a nuevos beneficiarios, y*
- *una evaluación sobre si los Estados miembros que habían introducido notas a pie de página en el informe de noviembre de 1999 desean mantener esas reservas a la luz de los posteriores trabajos del Grupo*

24. El programa de trabajos sobre el desmantelamiento bajo la Presidencia belga acordado por el Grupo " Código" en su reunión del 28 de junio de 2001 está en concordancia.
25. Por consiguiente, el Grupo invitó a los Estados miembros a facilitar información actualizada sobre desmantelamiento, incluida información relativa al compromiso de los Estados miembros sobre nuevos beneficiarios e información sobre si los Estados miembros objeto de notas en el informe de noviembre de 1999 seguían deseando aún mantener sus reservas a la vista de los trabajos ulteriores del Grupo.
26. En el **Anexo C** se recogen los resúmenes realizados por los Estados miembros.
27. El Grupo observó que se había avanzando en cuanto al número de medidas que ya se habían desmantelado o que se estaban desmantelando. El Grupo observó también que se había avanzado en el cumplimiento del compromiso relativo a nuevos beneficiarios y que, a la luz de los trabajos realizados por el Grupo desde noviembre de 1999, había dejado de mantenerse una serie de reservas al informe de noviembre de 1999.

D. Posible interacción entre los trabajos del Grupo " Código de Conducta" y los procedimientos en materia de ayuda estatal

28. [Se añadirá]

E. Medidas potencialmente perniciosas en los países candidatos a la adhesión

29. Tras la distribución por los Servicios de la Comisión de su informe sobre Ampliación e Imposición directa al Grupo IV el 17 de septiembre, el Grupo escuchó un informe verbal de los servicios de la Comisión sobre sus trabajos relativos a las medidas potencialmente perniciosas en los países candidatos.
30. El Grupo tomó nota del informe de la Comisión y opinó que los criterios aplicados por la Comisión en relación sus estos trabajos no deberían exceder los criterios establecidos en el Código. En particular, el ámbito de aplicación del Código se limitaba a las medidas fiscales para las empresas y no abarcaba los regímenes fiscales.

Otros trabajos

31. En el Consejo ECOFIN del 10 de julio (10768/01 FISC 130) se acordó el siguiente calendario de los trabajos sobre el paquete fiscal para el Consejo ECOFIN de abril y junio de 2002:

Abril de 2002: Consejo ECOFIN:

...

En lo que el Código de Conducta se refiere, tomará nota de:

- *los progresos realizados en los trabajos sobre el Código de Conducta con respecto a los Estados miembros;*
- *los informes sobre los progresos realizados en los debates celebrados entre los Estados miembros interesados y sus territorios dependientes o asociados.*

Junio de 2002: El Consejo ECOFIN tendrá que:

...

en el contexto de Código de Conducta, se evaluará la adecuación de las medidas legislativas o administrativas contempladas para dismantelar los rasgos perjudiciales de las medidas identificadas por el Grupo del Código en noviembre de 1999 y se finalizará el trabajo relativo al statu quo y a la posible prórroga de las ventajas para determinadas medidas más allá de 2005

32. El Grupo acordó, por lo tanto, completar sus actuales trabajos sobre statu quo y desmantelamiento e informar al Consejo ECOFIN sobre los resultados en mayo de 2002. El Grupo acordó también proseguir su programa de trabajo sobre transparencia e intercambio de información (Anexo 11 del informe del Grupo al Consejo ECOFIN de 5 de junio de 2001 (8789/01 FISC 83) en el contexto del punto 17 del Anexo II del informe del Grupo al Consejo ECOFIN del 26 y 27 de noviembre de 2000 (13563/00 FISC 193).
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DESCRPCIÓN DEL RÉGIMEN DE LAS SOCIEDADES DE CARTERA DE ALEMANIA

En relación con la actual reforma fiscal, Alemania ha introducido nuevas normas relativas al trato fiscal de los dividendos y plusvalías, principalmente, que sustituyen al sistema anterior de imputación de crédito con exención para los dividendos (inter sociedades) y exención de las plusvalías procedentes de la liquidación de acciones de otras sociedades. Las leyes que introducían éste y muchos otros cambios se adoptaron en el año 2000 y, con algunas excepciones transitorias, las nuevas normas entraron en vigor el 1 de enero de 2001.

Al mismo tiempo se introdujeron también cambios en las normas con arreglo a las cuales los ingresos de las empresas extranjeras controladas pueden ser sometidos a la imposición " actual" a través de sus accionistas alemanes. Otras normas (o modificaciones) introducidas en relación con la reforma fiscal (y que pueden ser relevantes para las estructuras de cartera) son , por ejemplo, las que se refieren a la deductibilidad de los intereses pagados a accionistas cuando los pagos de intereses no están sometidos a impuesto en Alemania y la supresión de la posibilidad de cancelar una reducción permanente del valor de una participación.

Requisitos necesarios

Las nuevas normas sobre el trato fiscal de los dividendos inter-sociedades y las plusvalías se aplican a las sociedades alemanas, a los establecimientos alemanes permanentes de empresas extranjeras y a empresas que detentan acciones de otras empresas a través de un asociado residente en Alemania. Con respecto a las empresas accionistas, la aplicación de las nuevas normas no está condicionada a ningún umbral de participación.

Por lo que se refiere a los dividendos recibidos, las nuevas normas son aplicables a los dividendos procedentes del interior o del extranjero. Los dividendos nacionales y extranjeros están sometidos a las mismas normas fiscales, con excepción de la no deductibilidad de los gastos. Con respecto a las plusvalías sobre realización de participaciones, no se hacen distinciones entre acciones que se poseían en sociedades alemanas o extranjeras. La exención de las plusvalías por acciones poseídas por accionistas institucionales tampoco está sometida a umbrales de participación. La exención de los dividendos y de las plusvalías no depende de la naturaleza de las actividades de la empresa de donde proceden los dividendos o cuyas acciones se liquidan.

No obstante, las normas CFC no se aplican a todo accionista residente en Alemania, de una sociedad extranjera controlada por accionistas residentes en Alemania y por otros accionistas siempre que la sociedad extranjera esté sometida a una fiscalidad reducida (véase Anexo). Las normas CFC también se aplican a todo accionista residente en Alemania que disponga de al menos 10 % de las acciones de una sociedad extranjera cuando los ingresos de la sociedad extranjera son de inversión de capital. Se considera que una sociedad extranjera controlada está sometida a una fiscalidad reducida cuando está sujeta a un impuesto de sociedades con una tasa efectiva inferior al 25 % (calculando la base imponible con arreglo a la normativa alemana para el impuesto de sociedades). Las normas CFC se aplican en la medida en que dichas empresas tienen ingresos contaminados como se definen en el artículo 8 de la " Außensteuergesetz" que se refiere a las prácticas fiscales ilícitas en el extranjero. Por regla general hay una presunción de ingresos contaminados cuando se derivan exclusivamente de actividades internas del grupo (transacciones con partes relacionadas). Actualmente se siguen estudiando estas normas CFC.

Beneficios fiscales

Los dividendos inter sociedades pagados por sociedades no residentes a otras sociedades están exentos de impuesto para evitar la doble imposición. Según las nuevas normas, no se añade una imputación de crédito a los dividendos recibidos; la retención del 20% en concepto de impuesto de sociedades que se aplica a la distribución de dividendos se acredita sobre el impuesto de sociedades del beneficiario. La retención de impuesto en el momento de la distribución (con un tipo del 20%) se devolverá en la medida en que la compañía receptora no tenga ingresos imposables en Alemania o que el crédito supere el impuesto de sociedades que debe pagar el receptor del dividendo.

En cuanto a los dividendos recibidos de sociedades extranjeras, el 95% de tales dividendos queda exento (con arreglo a lo dispuesto en la Directiva sobre empresas matrices y sucursales). El 5% restante se considera como un gasto no deducible relacionado con los ingresos de la sociedad de cartera y por consiguiente quedará sometido a impuesto con cargo a la empresa accionista receptora mientras que el accionista receptor podrá deducir sin limitaciones todos los gastos relativos a la adquisición de esos ingresos de dividendos extranjeros. Si las normas CFC se aplicaran a la sociedad extranjera en cuestión, la empresa accionista estaría sometida a impuesto sobre los ingresos contaminados no distribuidos derivados de la empresa extranjera. En tal caso, la exención

del 95% no se aplica al dividendo supuesto sino al dividendo real distribuido recibido de tales sociedades extranjeras. En cuanto a los dividendos recibidos de sociedades nacionales, todos los gastos directamente relacionados directamente con la adquisición o mantenimiento de las participaciones en las empresas distribuyentes exentas de impuestos son no deducibles (Sec. 3 c Ley de impuestos sobre la renta).

Las plusvalías derivadas de la venta de acciones de sociedades nacionales o extranjeras están exentas para evitar la doble imposición y las pérdidas de capital debidas a tales ventas no son deducibles. Con arreglo a las nuevas normas, la posibilidad de deducir una depreciación permanente del valor de un paquete de acciones ya no es admisible a efectos fiscales. No obstante, en la medida en que se hubiera hecho dicha deducción (antes de la entrada en vigor de las nuevas normas), un futuro aumento de valor del paquete de acciones, o una plusvalía realizada al vender tales acciones, sería recuperada y, por consiguiente, sometida a impuesto.

Las nuevas normas sobre insuficiencia de capital imponen unos límites más estrictos para la deductibilidad de los pagos de intereses en la medida en que se hagan pagos a accionistas extranjeros y nacionales. Las siguientes ratios de activo y pasivo se consideran aceptables:

- 3/1 para las sociedades cuya principal actividad sea la tenencia de participaciones en sociedades y la financiación de tales sociedades o cuyos balances indiquen activos de más del 75% consistentes en participaciones de sociedades; y
- 1,5/1 para las demás sociedades.

En las situaciones en que se considera que la parte de financiación de la deuda es excesiva, se efectúa una reclasificación de tales pagos de intereses como dividendos constructivos.

I. Información complementaria relativa al funcionamiento de las normas sobre control de la sociedades extranjeras controladas (CFC)

1. Ingresos sujetos al *Hinzurechnungsbesteuerung* (ingresos pasivos de la sociedad extranjera que deben añadirse a la base imponible en Alemania)
El apartado 1 del artículo 8 de la Ley fiscal relativa a las relaciones con el extranjero (AStG-Aussensteuergesetz) estipula el tipo de ingresos que no están sujetos al *Hinzurechnungsbesteuerung*. Se trata básicamente de los ingresos activos (procedentes de la actividades económica real) de una sociedad extranjera, es decir, de su participación en la actividad económica general. El ingreso que debe añadirse a la base imponible en Alemania incluye por tanto todos los ingresos que no procedan de una actividad económica real efectuada en el extranjero como por ejemplo dividendos, cánones por patentes e intereses. La línea divisoria entre ingresos activos y pasivos sólo puede establecerse mediante el estudio de cada situación particular. Las funciones que desempeña la sociedad extranjera en la obtención de ingresos son decisivas a este respecto. Para clasificar correctamente el ingreso en cuestión es preciso analizar los ingresos de la sociedad extranjera de acuerdo con la lista de actividades que recoge en apartado 1 del artículo 8 de la Ley fiscal relativa a las relaciones con el extranjero.
2. Relación entre el *Hinzurechnungsbesteuerung* y los acuerdos en materia de doble imposición.

El *Hinzurechnungsbesteuerung* no es aplicable si el reparto de beneficios en cuestión está exento de impuestos con arreglo a un acuerdo en materia de doble imposición. Los beneficios que reparte una sociedad extranjera a una sociedad con sede en Alemania pueden estar exentos con arreglo a dichos acuerdos (por lo general antiguos) si la participación de ésta última en la empresa que reparte beneficios asciende a un mínimo del 10% del capital (aplicación del método de exención por reparto de beneficios). La exención fiscal está sujeta a la condición de que los ingresos de la sociedad extranjera procedan de actividades empresariales activas.

Los acuerdos de doble imposición no prevén exención fiscal alguna para los " ingresos por inversión en capital" (ingresos procedentes de la propiedad, gestión, mantenimiento o incremento de valores líquidos, títulos de crédito, valores mobiliarios, acciones u otros títulos de propiedad similares). Esta restricción de la exención fiscal se aplica si las ganancias procedentes de los " ingresos por inversión en capital" superan el 10% del total de ingresos de la sociedad extranjera en concepto de beneficio intermedio o superan los 120.000 DEM. Exista o no un acuerdo en materia de doble imposición, los ingresos (intereses) procedentes de operaciones financieras están incluidos en la cantidad que habrá que añadir a la base imponible a menos que procedan de una actividad que contribuya a la actividad económica real (que no sea una operación de financiación) de la sociedad extranjera. No obstante, sólo será imponible el 80% de los ingresos procedentes de la financiación de sociedades pertenecientes al grupo, lo que se traduce en una imposición real de un 30%. Este porcentaje del 80% corresponde aproximadamente a la carga impositiva que activa el *Hinzurechnungsbesteuerung*.

Los ingresos procedentes de una sociedad con sede en el extranjero en la que una sociedad alemana posea al menos el 10% del capital no constituyen " ingresos por inversión de capital" , si los ingresos han sido gravados al menos con un 25%.

3. ¿Cómo se determinan los ingresos intermedios?

El *Hinzurechnungsbesteuerung* se basa en la cantidad de ingresos pasivos que deben añadirse a la base imponible en Alemania (" Hinzurechnungsbetrag"). Dicha cantidad corresponde al total de los ingresos pasivos de la sociedad extranjera previa deducción de los impuestos abonados sobre los ingresos. El total de ingresos se determina de acuerdo con la legislación fiscal alemana. Si la sociedad extranjera dispone de ingresos procedentes de una actividad real y de ingresos pasivos, los primeros deberán deducirse del total. Si las actividades reales y los ingresos pasivos están tan íntimamente relacionados que los ingresos de aquellas no pueden aislarse, se dividirá el total de ingresos en relación con el volumen de negocio, siempre que no se disponga de un criterio de distribución más adecuado.

4. Fiscalidad " reducida"

No existe fiscalidad " reducida" cuando los ingresos de la sociedad extranjera determinados conforme a la Ley fiscal alemana están sujetos, bien en el Estado en el que la sociedad extranjera tenga la sede de su dirección efectiva o bien en el que tenga su domicilio social (sede), a un tipo mínimo del 25% .

La Ley de la fiscalidad reducida (*Steuersenkungsgesetz* - StSenkG) aclara el apartado 3 del artículo 8 de la Ley fiscal relativa a las relaciones con el extranjero pero no altera su sustancia. Reza así:

" Existe la imposición reducida, ... cuando los ingresos en el Estado en que la sociedad extranjera tiene la sede de su dirección efectiva y en el Estado de su domicilio social (sede) están sujetos respectivamente a un tipo de impuesto de sociedades inferior al 25%, ..." .

Esto significa que cuando una sociedad extranjera tenga doble residencia, es decir que tenga su domicilio social o sede (inscripción en el registro comercial) en un Estado y su gestión efectiva se realice en otro -caso raro en la práctica- y que los mismos ingresos estén gravados en ambos Estados extranjeros, el *Hinzurechnungsbesteuerung* sólo será aplicable si el nivel de imposición es " reducido" en ambos países. O sea que no se aplicará si los ingresos en cuestión están gravados con el tipo " fuerte" en al menos uno de los Estados.

Véanse los siguientes ejemplos:

	Imposición de los ingresos en		Aplicación del <i>Hinzurechnungs besteuerung</i>
	País del domicilio social o sede en %	País de la dirección efectiva en %	
1	0	0	Sí
2	0	24	Sí
3	0	25	No
4	10	20	Sí
5	10	25	No
6	24,9	24,9	Sí

5. Tipo impositivo

El tipo aplicable a la cantidad que deberá añadirse a la base imponible es del 38% y se añadirá al impuesto de sociedades general. La letra b) del artículo 8 de la Ley del impuesto sobre sociedades (*Körperschaftsteuergesetz - KStG*) relativo a la exención de los dividendos no es aplicable a la cantidad añadida.

6. Otras disposiciones destinadas a combatir abusos (artículo 42 del Código fiscal general)

Aunque el dispositivo jurídico elegido sea claramente inadecuado - por ejemplo si no responde a la realidad material extrafiscal que justifica la aplicación de un dispositivo determinado siendo el resultado económico el mismo que en el supuesto directamente imponible - la deuda fiscal existirá del mismo modo que en el marco de un dispositivo jurídico conforme a las operaciones económicas en cuestión. En caso de abuso vinculado a la inadecuación del dispositivo jurídico, la imposición no se basará en el supuesto efectivo, sino en el dispositivo jurídico que se estime más adecuado.

II. Apartado 5 del artículo 8 ter de la Ley de fiscalidad de las empresas (5% de los dividendos extranjeros considerados como gastos empresariales no deducibles)

Con arreglo al apartado 5 del artículo 8 ter de la Ley de fiscalidad de las empresas, se consideran gastos de gestión no deducibles una tasa a tanto alzado del 5% de los dividendos. Si los gastos superan el 5% de los dividendos, la percepción de dividendos de sociedades filiales extranjeras recibirá un trato fiscal más favorable que la de los dividendos procedentes de filiales nacionales. No obstante, cuando los gastos sean inferiores, la percepción de dividendos procedentes de filiales nacionales recibirá un trato más favorable que la de las filiales extranjeras. En realidad es imposible determinar quién recibe al fin y al cabo un trato más favorable, si las filiales nacionales o las extranjeras.

La aplicación de la tasa a tanto alzado como gastos de gestión no deducibles es una medida de simplificación coherente con el apartado 2 del artículo 4 de la Directiva sobre sociedades matrices y filiales, que fija esta tasa en un 5% de los beneficios repartidos por la filial.

**DESCRIPCIÓN DE LAS DOS MEDIDAS CON ARREGLO AL MARCO FISCAL PARA
LOS PAÍSES BAJOS**

Antillas Neerlandesas – régimen fiscal de las sociedades de cartera con arreglo al nuevo marco fiscal

Antecedentes

En diciembre de 1999, las Antillas Neerlandesas introdujeron una serie de cambios fiscales por los que se modificaba el reglamento impositivo sobre los beneficios y se introducía un nuevo reglamento impositivo sobre los dividendos, con arreglo a un nuevo marco fiscal. Los nuevos reglamentos fiscales, orientados a una transparencia perfeccionada, entraron en vigor el 1 de enero de 2000 y está previsto que sus disposiciones sean aplicables con efectos retroactivos a partir del 1 de enero de 2001.

El nuevo reglamento fiscal sobre los dividendos introducía una retención fiscal sobre los dividendos pagadera a un tipo del 10% del dividendo bruto. Sin embargo, aún no es efectiva la retención fiscal sobre el dividendo ¹.

En diciembre de 2000 los Países Bajos y las Antillas Neerlandesas celebraron un acuerdo que contiene, entre otras cosas, la promesa de que las Antillas Neerlandesas adoptarán y mantendrán su legislación de conformidad con los principios impositivos (internacionales) de la Unión Europea y de la OCDE, comprometiéndose al proceso de competencia fiscal "perniciosa" de la OCDE (las Antillas Neerlandesas se comprometieron en ese sentido en noviembre de 2000), así como la promesa de cooperar para la realización de los principios que subyacen a la directiva de los ahorros. Además, el acuerdo tiene como implicación una modificación del reglamento fiscal del Reino de los Países Bajos. Dicha modificación tiene que ser aceptada por el Parlamento de los Países Bajos. La modificación ha sido enviada recientemente al Parlamento y se espera que el Parlamento acepte la modificación antes de que finalice 2001. Las Antillas Neerlandesas han estipulado que la aplicación del nuevo marco fiscal dependerá de la aceptación de la modificación del reglamento fiscal por parte del Parlamento.

¹ La fecha de comienzo del reglamento impositivo sobre los dividendos depende de varios aspectos, entre otras cosas la política de las Antillas Neerlandesas en materia de Tratados.

1. La exención de participación no requiere ni que la compañía no residente esté sujeta al impuesto sobre los beneficios, incluido el impuesto sobre los beneficios en su país de residencia, ni que la participación haya sido poseída durante un determinado período de tiempo antes de que se disponga de los beneficios.
2. Se dispondrá de una reducción en la retención fiscal sobre el dividendo cuando los dividendos procedentes del extranjero pasen a través de la compañía de las Antillas Neerlandesas a su accionista extranjero, siempre que los dividendos hayan estado sujetos a una retención fiscal extranjera de por lo menos el 5%.
3. **Algunos repartos de dividendos están exentos de retención fiscal sobre los dividendos, incluidos los dividendos pagados en una liquidación y los pagados por**
 - sociedades cuyas acciones están cotizadas en una bolsa reconocida
 - una sociedad exenta
 - las sociedades extraterritoriales
 - las sociedades que se acogen al reglamento de registro naviero.
4. Además, se conceden exenciones en la retención fiscal sobre los dividendos a pagos de dividendos efectuados por una sociedad de las Antillas Neerlandesas a una sociedad extranjera que posea por lo menos el 25% de las acciones o de los derechos de voto de una sociedad de las Antillas Neerlandesas durante un período ininterrumpido de un año como mínimo.
5. La retención fiscal sobre los dividendos aún no es efectiva ¹, pero cuando entre en vigor, los contribuyentes podrán optar por una cláusula de exención por derechos adquiridos de 12 meses.

¹ La fecha de comienzo del reglamento impositivo sobre los dividendos depende de varios aspectos, entre otras cosas la política de las Antillas Neerlandesas en materia de Tratados.

Beneficios fiscales

Las sociedades de las Antillas Neerlandesas están exentas del impuesto sobre los beneficios en todos los rendimientos (dividendos, ganancias de capital, reparto de beneficios, etc.) ligados a la posesión de acciones en una sociedad residente y sobre el 95% de los rendimientos derivados de una participación en una sociedad no residente. Las acciones en una sociedad exenta de las Antillas Neerlandesas tienen el mismo régimen que en una sociedad no residente.

La reducción y/o la exención de la retención fiscal sobre los dividendos (tipo legal: 10% del dividendo bruto) puede aplicarse bajo condiciones específicas (relacionadas, por ejemplo, al origen y al destino del dividendo, al tipo de reparto efectuado por la empresa y a la proporción de las acciones), tal como se contempla anteriormente.

Antecedentes

En diciembre de 1999, las Antillas Neerlandesas introdujeron una serie de cambios fiscales, por los que se modificaba el reglamento impositivo sobre los beneficios y se introducía un nuevo reglamento impositivo sobre los dividendos, con arreglo a un nuevo marco fiscal. El nuevo marco fiscal, orientado a una transparencia perfeccionada, entró en vigor el 1 de enero de 2000. La fecha efectiva de aplicación de lo dispuesto en el nuevo marco fiscal se ha prorrogado durante otro año, del 1 de enero de 2000 al 1 de enero de 2001. En este contexto, cabe observar que está previsto que la mayor parte de las disposiciones sean aplicables con efectos retroactivos a partir del 1 de enero de 2001 ¹.

El reglamento impositivo sobre los beneficios modificado establecía un nuevo régimen, la "sociedad exenta de las Antillas Neerlandesas". No se entiende la sociedad exenta como una sustitución de los regímenes extraterritoriales en vigor F020 y F023. Los regímenes fiscales extraterritoriales en vigor no fueron suprimidos con efectos a partir del 1 de enero de 2000. Los regímenes extraterritoriales siguieron estando en vigor y surtiendo efectos y serán suprimidos (excepto para las cláusulas de exención por derechos adquiridos) en el momento en el que el nuevo marco fiscal entre en vigor y sea aplicable.

En diciembre de 2000, los Países Bajos y las Antillas Neerlandesas celebraron un acuerdo que contiene, entre otras cosas, la promesa de que las Antillas Neerlandesas adapten y mantengan su legislación de conformidad con los principios fiscales internacionales de la Unión Europea y de la OCDE, comprometiéndose al proceso de competencia fiscal pernicioso de la OCDE (las Antillas Neerlandesas se comprometieron en ese sentido en noviembre de 2000), y la promesa de cooperar para la realización de principios que subyacen a la directiva de los ahorros. Además, el acuerdo tiene la implicación de una modificación en el reglamento fiscal del Reino de los Países Bajos. Dicha modificación tiene que ser aceptada por el Parlamento de los Países Bajos. La modificación ha sido enviada recientemente al Parlamento y se espera que el Parlamento acepte la modificación antes de que finalice 2001. Las Antillas Neerlandesas han planteado desde el principio que la aplicación del nuevo marco fiscal depende de la aceptación de la modificación por parte del Parlamento del reglamento fiscal.

¹ La fecha de comienzo del reglamento impositivo sobre los dividendos depende de varios aspectos, entre otras cosas la política de las Antillas Neerlandesas en materia de Tratados.

Condiciones anejas

1. La gestión de una sociedad exenta de las Antillas Neerlandesas debe mantener un registro que comprenda los nombres y las direcciones de todos sus accionistas que tengan más del 5% del capital desembolsado en la empresa.
2. La participación en la gestión de una sociedad exenta se limitará a los residentes (personas físicas y fiduciarias certificadas) de las Antillas Neerlandesas. Bajo ciertas condiciones, los no residentes podrán participar en la gestión.
3. Los libros y cuentas deberán ser revisados por un experto independiente que deberá emitir un dictamen de auditoría reconocido.
4. La sociedad no podrá ser una entidad bancaria ni otra entidad financiera sometida a la supervisión del Banco de las Antillas Neerlandesas.
5. El objetivo de la empresa, tanto en sus estatutos como en la práctica, debería consistir, exclusiva o casi exclusivamente, en
 - otorgar créditos y fondos de inversión
 - ofrecer servicios financieros
 - realizar todos sus actos relacionados con sus objetivos declarados.
6. El régimen de la sociedad exenta es accesible tanto a los residentes como a los no residentes.

Beneficios fiscales

Una sociedad exenta de las Antillas Neerlandesas, con arreglo al nuevo régimen, está exenta tanto del impuesto sobre el beneficio cuyo tipo único legal es del 30% (el 34,5% si se incluye el recargo de la isla del 15%) como la retención fiscal sobre los dividendos cuyo tipo legal es el 10%. Los tipos mencionados son aplicables con arreglo al nuevo marco fiscal.

**RESUMEN DE LA INFORMACIÓN ACTUALIZADA FACILITADA POR LOS ESTADOS
MIEMBROS SOBRE EL DESMANTELAMIENTO, INCLUIDA LA INFORMACIÓN
RELATIVA A LOS ESTADOS MIEMBROS**

AUSTRIA

A:
Doña Sue Babiker

Fecha:
9. de octubre de 2001

Del:
Doctor Kuttin

Asunto:
Desmantelamiento

Querida Sue:

Ya anunciamos las medidas contempladas por Austria en nuestra carta del 26 de abril de 2001. Han empezado a introducirse las modificaciones relativas a la sección 10 del impuesto sobre sociedades, de forma que no habrá nuevos beneficiarios después del 31 de diciembre de 2001.

Atentamente,

=====

BÉLGICA

SN 4315/01

MINISTERIO DE HACIENDA



Bruselas, octubre 2001

Avenue de la Colombie, 8
10100 Bruxelles

PAUL HATRY

Para correspondencia adicional: Paul Hatry

Tel. : 02 660 00 67

Fax : 02 660 72 27

Madame PRIMAROLO
Presidenta del Grupo Código de conducta
c/o Sue Babiker
H.M. Treasury
Parliament Street
LONDON SW1P 3AG
United Kingdom

Señora Presidenta:

Como respuesta a su solicitud formulada el 26 de septiembre de 2001, le envío aneja una descripción de las medidas que Bélgica está dispuesta a tomar, a fin de cumplir los compromisos adquiridos en materia de desmantelamiento en el Consejo Ecofin de los días 26 y 27 noviembre de 2000.

- **Observación previa**

El Gobierno belga ha puesto en marcha recientemente una vasta reforma del impuesto de sociedades. Dicha reforma, cuyo aspecto más visible es una reducción del tipo nominal del 40,17% al 33,99%, ha sido adoptada por el Consejo de Ministros a principios del mes de octubre de 2001. El proyecto de ley que implica dicha reforma será presentado sin tardanza al Parlamento belga. Dos de las medidas de desmantelamiento descritas deberán ser objeto de una ley y podrían, por consiguiente, integrarse en el proyecto de ley de reforma presentado por el Gobierno belga, o bien tomar la forma de una propuesta del ley de iniciativa parlamentaria más o menos concomitante a la reforma de impuesto de sociedades.

- **Desmantelamiento**

El informe del Grupo de seguimiento del Código de conducta del 23 de noviembre de 1999 (SN 4901/99) definió cinco medidas fiscales belgas que conllevaban características perniciosas: los centros de coordinación, los centros de distribución, los centros de servicios, el régimen de las sociedades norteamericanas de venta en el mercado internacional (US Foreign Sales Companies) y los procedimientos " capital informal" .

- **Centros de coordinación**

El desmantelamiento del régimen de los centros de coordinación requieren la adopción de una ley. Sin embargo, la acción emprendida por la Comisión Europea contra Bélgica en materia de ayudas del Estado hace imposible toda cooperación por parte de nuestro país en el marco del Grupo Código de conducta. En efecto, actualmente Bélgica debe enfrentarse a dos procedimientos: Uno, judicial, que muy probablemente acabará ante el Tribunal de Justicia de las Comunidades Europeas, y otro, político, en el Grupo Código de conducta. No es posible para Bélgica dedicarse completamente a la vez a ambos procedimientos, pues la aprobación eventual por su parte de medidas de desmantelamiento al nivel del código de conducta podría constituir un elemento desfavorable para Bélgica en el marco del debate de las medidas útiles en el marco del procedimiento judicial " ayudas de Estado" . Bélgica considera, por tanto, que no es oportuno concentrarse actualmente en el desmantelamiento del régimen de los centros de coordinación.

- **Centros de distribución y centros de servicios**

Las circulares administrativas por las que se establecen estos dos regímenes serán modificadas en el siguiente sentido:

- el " coste más beneficio" será calculado en cada caso en función de la situación real o efectiva de la empresa que solicite la aplicación del régimen;
- la base que sirva de cálculo para el " coste más beneficio" incluirá todos los gastos efectuados por el centro.

- **Régimen de las sociedades norteamericanas de venta en el mercado internacional**

Se entiende por la reciente evolución a nivel de la Organización Mundial del Comercio que los Estados Unidos tendrán que modificar su régimen FSC para ajustarse a las reglas de dicha organización. En el momento en el que la Organización Mundial del Comercio haya tomado una decisión definitiva en cuanto al régimen norteamericano de los FSC y que los Estados Unidos se hayan ajustado a la misma, Bélgica suprimirá su régimen fiscal de acompañamiento.

- **Procedimientos " capital informal"**

Con motivo de la adopción del Informe del Grupo Código de conducta del 23 de noviembre de 1999 (SN 49019), Bélgica no cesó de negar el carácter perjudicial de dicho régimen, pues el principio del capital informal está a punto de ser aceptado como norma IAS (International Accounting Standards). Sin embargo, Bélgica tiene la intención de dar a dicho régimen una base legal incontestable. Una nueva ley (véase la observación previa) sustituirá el decreto del Regente fechado en 1831. En lo que se refiere al régimen fiscal propiamente dicho, se concederá en lo sucesivo en cada caso en función de la situación real o efectiva de la empresa y la decisión de conceder dicho régimen fiscal será notificada al Estado miembro en el que sea residente la sociedad matriz.

(Fórmula de cortesía).

Paul Hatry
Representante personal del Ministro de Hacienda
ante la Unión Europea
Antiguo Ministro de Hacienda
Senador Honorario

Copia: a D. Michael Graf, Secretaría del Consejo de la Unión Europea

DINAMARCA

25 de octubre de 2001

Sociedades de cartera AAM 21

La Ley nº 282 de 25 de abril de 2001 modificó el régimen de las sociedades de cartera con efectos a partir del 1 de julio de 2001. Las nuevas reglas engloban a los " beneficiarios existentes" , así como a los " nuevos participantes" .

Con arreglo a las normas generales, los dividendos pagados por una sociedad residente danesa están sujetos a una retención fiscal a un tipo del 28%. El tipo puede reducirse con arreglo a un acuerdo de la doble imposición.

Sin embargo, los dividendos están exentos de la retención fiscal cuando se abonan a una empresa matriz que posea por lo menos el 25% del capital por acciones de la sociedad de distribución para un período continuo de un año como mínimo, durante el cual se paguen los dividendos.

Según las reglas en vigor hasta el 30 de junio de 2001, la exención era aplicable para los dividendos pagados a una empresa matriz con independencia de que dicha empresa fuera residente en Dinamarca o residente de cualquier otro Estado extranjero.

La modificación implica que la exención se aplica sólo a los dividendos pagados a una empresa matriz extranjera si Dinamarca exime de la imposición o reduce la imposición de los dividendos con arreglo a la Directiva empresas filiales o matrices de la Unión Europea o a un acuerdo danés de doble imposición.

Los dividendos pagados por una filial danesa a su sociedad matriz extranjera están ahora, por consiguiente, sujetos a una retención fiscal del 28% si la Directiva de empresas filiales o matrices de la Unión Europea o un acuerdo danés de doble imposición no incluye a dichos dividendos con ese efecto.

Dinamarca carece de acuerdos de doble imposición en las jurisdicciones exentas de impuestos.

Estas nuevas reglas entraron en vigor para los dividendos repartidos a partir del 1 de julio de 2001, con independencia del momento en que la sociedad matriz extranjera adquiriera las acciones en la filial danesa.

Así, la Ley n° 282 del 25 de abril de 2001 no tiene cláusulas de exención por derechos adquiridos. Las nuevas reglas también se aplican a las sociedades matrices extranjeras que se benefician de las reglas previamente existentes.

Dinamarca no desea que se mantengan las notas a pie de página 22 y 27 del informe de noviembre de 1999.

FINLANDIA

25 de octubre de 2001

CÓDIGO DE CONDUCTA- DESMANTELAMIENTO

El Grupo Código de conducta solicitó a los Estados miembros que facilitasen al Grupo información relativa a las medidas que están dispuestos a aplicar a fin de cumplir el compromiso contraído en las conclusiones del Consejo Ecofin de noviembre de 2000 en lo que se refiere a nuevos candidatos.

A continuación se expone el informe de Finlandia sobre dicha cuestión:

Nuevos candidatos

En lo que se refiere a Finlandia, sólo hay una medida en el informe de 1999 que se considere potencialmente perniciosa (B008, Islas Åland. Sociedad Cautiva de Seguros). Según el Gobierno provincial de las Islas Åland no hay sociedades a las que se apliquen los beneficios de los reglamentos de las sociedades cautivas de seguros.

Asimismo como ya manifestamos anteriormente, el Gobierno provincial ha indicado que no se considera en esta situación políticamente vinculado por una modificación de su legislación de seguros cautivos. Como justificación para esta opinión, el Gobierno provincial mencionó que el tratamiento de las reglas del código de conducta no ha sido lo suficientemente abierto de forma que el Gobierno provincial pudiera evaluar el contenido de los trabajos. Además, el Gobierno provincial opina que la decisión tomada en esta fase sólo afecta a medidas fiscales que son potencialmente nocivas.

Sin embargo, el Gobierno provincial indicó su voluntad de celebrar ulteriores discusiones políticas sobre la modificación de su medida fiscal. El Gobierno finlandés continuará manteniendo discusiones políticas con el Gobierno provincial también en lo que se refiere a posibles (nuevos) beneficiarios después del 31 de diciembre de 2001.

FRANCIA

SECRETARIA DE ESTADO DEL PRESUPUESTO

Sra. Presidenta:

En la reunión del Grupo de seguimiento del código de conducta del 26 de septiembre pasado, y a fin de preparar la reunión del 17 de octubre y un próximo informe a ECOFIN, usted deseaba disponer de elementos sobre las medidas de desmantelamiento contempladas.

Francia ha dirigido respuestas completas sobre las modificaciones que estaría en medida de contemplar para ajustarse a sus compromisos de desmantelamiento de las medidas recogidas en la lista de los regímenes nocivos, sin perjuicio de la posición parlamentaria (véanse las comunicaciones precedentes de los días 22 de marzo de 2000, 19 de octubre de 2000 y 20 de abril de 2001).

El desmantelamiento se ha emprendido ya en Francia, ya que la Ley de Hacienda para 2001 ha aportado modificaciones al régimen de la provisión para reconstitución de yacimientos de hidrocarburos, que a nuestro juicio suprimen su carácter nocivo. En este espíritu, sería deseable que el grupo de seguimiento pudiera examinar a fondo las medidas tomadas o contempladas por los Estados miembros para desmantelar sus regímenes o sus características consideradas como nocivas.

Tratándose del desmantelamiento y de la cuestión de los nuevos candidatos, ambos temas están, desde nuestro punto de vista, estrechamente relacionados y serán tratados simultáneamente con efecto a 1 de enero de 2002. Podríamos tomar las disposiciones necesarias antes de que finalice este año. Sin embargo, el compromiso de procedimientos en virtud de las ayudas de Estado puede perturbar dicho calendario. En efecto, no contemplamos deber someter al Parlamento poco tiempo después modificaciones de regímenes sobre los que ya se habría pronunciado en virtud del código de conducta.

En lo que se refiere a la nota a pie de página del informe de noviembre de 1999, que recoge la posición francesa consistente a recordar la relación entre las diferentes componentes del paquete fiscal, podría suprimirse.

Fórmula de cortesía

Florence Parly

D^a Dawn Primarolo
Presidenta del Grupo código de conducta
H.M. Treasury
Parliament Street
London SW 1 P 3 AG
Reino Unido

ALEMANIA

4 de octubre de 2001

Asunto: desmantelamiento: respuesta de la delegación alemana

Querida Sra. Babiker:

En relación con el desmantelamiento de la medida AAM019 (centros de control y coordinación de las sociedades extranjeras en la República Federal de Alemania) desearía señalarle que Alemania ha revocado la reglamentación con efectos a partir del 1 de enero de 2001 (véase doc.14430/01 FISC 219).

Atentamente.

Lars Poltorek

Ministro de Hacienda de la República Federal de Alemania

GRECIA

REPÚBLICA GRIEGA

MINISTERIO DE HACIENDA

RELACIONES ECONÓMICAS INTERNACIONALES

SECCIÓN DE ASUNTO FISCALES

Fecha: 12 de octubre de 2001

A la Secretaría D.G.G. Fiscalidad

A la atención de D^a Sue Babiker

Asunto: Desmantelamiento: seguimiento de la reunión del grupo código de conducta del
26/09/01

Ref.: Su documento fechado 2/10/2001

En relación con el tema de referencia, desearía informarle que con arreglo al artículo 7 de un proyecto de ley que se ha sometido recientemente al Parlamento Griego para su ratificación, se ha previsto la derogación de la ley 89/1967 (descrita como B.11 por el grupo de contacto).

En particular, las disposiciones del mencionado artículo 7 son las siguientes:

Apartado 1: Excepciones sobre derechos aduaneros e impuesto, así como todas las facilidades previstas por la ley 89/1967 (D.O. 132A) dejarán de aplicarse, para las empresas extranjeras industriales y comerciales establecidas en Grecia a partir del 1 de enero DE 2002.

Apartado 2: Las empresas del apartado anterior que ya estén cubiertas por la ley 89/1967 seguirán estando cubiertas, en lo que se refiere a las excepciones sobre derechos aduaneros e impuestos, hasta el 1 de diciembre de 2005.

Por orden del ministro
El Director
C. Nihoritis

IRLANDA

9 de octubre de 2001

D^a Sue Babiker
Código de Conducta
HM Treasury
Parliament St.,
London FWIP 3AG.

Código de Conducta (Impuesto sobre sociedades)

- 1) Desmantelamiento y nuevos candidatos
- 2) Supresión de las notas a pie de página del informe de noviembre de 1999

Querida Sra. Babiker:

Tal como solicita la presidencia, le adjunto un informe sobre la aplicación por parte de Irlanda de las conclusiones del Consejo Ecofin de noviembre de 2000 relativas específicamente al desmantelamiento y a los nuevos candidatos, y una nota sobre nuestra posición actual en lo que se refiere a las notas a pie de página del informe de noviembre de 1999. Estamos de acuerdo en retirar tres de nuestras cuatro reservas a la luz del subsiguiente trabajo del grupo.

Atentamente,

Donal McNally
Segundo Secretario General

**Aplicación del compromiso en las conclusiones de Ecofin de noviembre 2000
en lo que se refiere a nuevos candidatos**

El Ecofin de noviembre de 2000, los ministros acordaron (en el apartado 4 de las conclusiones del código de conducta):

" apruebe que las empresas sólo puedan entrar en un régimen pernicioso hasta el 31 de diciembre de 2001, salvo en caso de que este régimen esté contemplado en una decisión actual de la Comisión que establezca un periodo más largo en el marco de las ayudas estatales, y beneficiarse del mismo, en todos los casos, sólo hasta el 31 de diciembre de 2002" .

La posición en lo que se refiere a los nuevos candidatos para las cinco medidas irlandesas consideradas como perniciosas por la mayoría del grupo código de conducta es la siguiente:

<u>B001</u> Centro Internacional de Servicio financieros (Dublin)	Se ha aplicado la conclusión del Ecofin de noviembre de 2000 relativa a los nuevos candidatos
<u>C024</u> Tipo del 10% para actividades manufactureras	Se ha aplicado la conclusión del Ecofin de noviembre de 2000 relativa a los nuevos candidatos
<u>C025</u> Tributación del petróleo	Esta medida ya no puede contemplarse como perniciosa ya que el tipo impositivo (25%), que se aplica tanto a los nuevos candidatos como a las empresas existentes, es ahora más alto que el tipo generalmente aplicable (20%)
D017 Zona aeroportuaria de Shannon	Se ha aplicado la conclusión del Ecofin de noviembre de 2000 relativa a los nuevos candidatos
E007 Ingresos procedentes del extranjero	Se ha aplicado la conclusión del Ecofin de noviembre de 2000 relativa a los nuevos candidatos

**La posición actual en lo que se refiere a las notas a pie de página
del informe de noviembre de 1999**

.....

Nota nº 4	Podemos estar de acuerdo ahora en la supresión de la nota a pie de página nº 4
Nota nº 21	La reserva en la nota a pie de página nº 21 es fundamental para Irlanda y deseáramos tenerla en el informe. No hay ninguna base en el código para que se considere el nivel impositivo en cualquier otro país como parte de la evaluación de las medidas individuales
Nota nº 28	La medida se ha desmantelado ahora pero hay un número de casos de transición limitado. En vista de esto deseamos mantener la nota a pie de página nº 28 por ahora.
Nota nº 38	Debido a que la medida C24 se ha desmantelado plenamente en línea con las conclusiones Ecofin de noviembre de 2000, podemos ahora estar de acuerdo en que se retire la nota a pie de página nº 38 excepto a lo que se refiere a la última frase que es simplemente una declaración de hecho sobre la medida C25

ITALIA

Muy Señor mío:

En su carta de fecha 12 de febrero de 2001 relativa a los trabajos del Grupo Código de Conducta me preguntaba usted qué pasos pensaba dar el Gobierno italiano respecto del régimen que consta en la lista para Italia.

Como usted sabe, en el informe del Grupo Código de Conducta al Consejo ECOFIN de 29 de noviembre de 1999, sólo consta para Italia un régimen pernicioso, a saber el correspondiente al *Centro di servizi finanziari e assicurativi di Trieste* (Artículo 3 de la Ley nº 19 de 19 de enero de 1991)

Confirmando el compromiso de Italia de no poner en marcha el Centro. La Comisión (Dirección General de Competencia) fue formalmente informada de este compromiso a través de la Representación Permanente en septiembre de 2000.

Aprovecho la oportunidad para reiterar el pleno apoyo de Italia al progreso en el trabajo del Grupo Código de Conducta y en lo relativo al conjunto del paquete fiscal.

LUXEMBURGO

Código de Conducta - Acción consecutiva a la reunión de 26 de septiembre de 2001-10-30

Desmantelamiento

Contestación de la Delegación luxemburguesa

Introducción

La Nota de la Presidencia relativa al calendario y al programa de los futuros trabajos tal como resulta de los trabajos del Grupo Código de Conducta de 28 de junio de 2001 (10302/1/01 REV 1 FISC 122) especifica que:

" 7.

Para que el Grupo pueda avanzar en el desmantelamiento de las 66 medidas enumeradas en el Anexo C del informe que el Grupo presentó al Consejo 'ECOFIN de 29 de noviembre de 1999, hay que preparar un informe para ECOFIN

- *en el que se señalen las medidas que los Estados miembros están dispuestos a aplicar con el fin de cumplir el compromiso que suscribieron en las Conclusiones del ECOFIN de noviembre de 2000 en relación con los países de próxima adhesión*
- *y se indique si los Estados miembros que formularon notas a pie de página en el Informe de noviembre de 1999 desean mantener esas reservas a la luz del trabajo posterior del Grupo."*

De conformidad con el citado programa de trabajo, el Grupo Código de Conducta se propone abordar la problemática del desmantelamiento en su reunión de 17 de octubre de 2001.

La Delegación luxemburguesa se congratula de la reanudación de los trabajos relativos al desmantelamiento, indispensable para el equilibrio del paquete fiscal. No obstante, no puede pasar por alto que esos mismos trabajos se vean obstaculizados no sólo por las notas a pie de página que figuran en el informe de noviembre de 1999 sino también por cantidad de otros factores, entre ellos:

- el hecho de que la lista de medidas perjudiciales siga sin ser aprobada formalmente por el Consejo ECOFIN,

- la reciente iniciativa de la Comisión en materia de ayudas de Estado,
- algunas de las declaraciones hechas en el marco de las conclusiones del Consejo ECOFIN de 26-27 de noviembre de 2000,
- la confusión entre criterios del código/" features" del informe final /" features" de las " guidelines" ,
- la incertidumbre reinante en cuanto a la suerte que correrán las solicitudes de prórroga.

En particular, la puesta en marcha por la Comisión de procedimientos de infracción contra determinados Estados miembros respecto de ciertos regímenes de los mencionados en la lista de las 66 medidas puede poner en peligro los trabajos de desmantelamiento al amparo del código en tanto en cuanto se está ante un procedimiento jurídico que tiene sus propias reglas, hasta el punto de que determinadas acciones en el código o al amparo del código pueden plantear problemas y hasta ser incompatibles con el procedimiento de ayuda puesto en marcha.

Lo que es más, subsiste una incertidumbre en cuanto a otras medidas. Como ejemplo, cabe señalar que la Comisión ha solicitado información en el marco de los procedimientos de ayuda de Estado sin que hasta el día de la fecha haya decidido incoar ningún procedimiento de infracción. Esta incertidumbre tiene varias consecuencias que dificultan los trabajos al amparo del código. Como ejemplo mencionemos asimismo que, cuando se desmantela un régimen, nada nos dice que ese desmantelamiento, en el caso de un régimen que tenga la consideración de ayuda, se ajusta a las exigencias en materia de ayudas y observemos también que una acción de desmantelamiento puede por sí sola ejercer una influencia jurídica sobre la propia resolución de la Comisión en materia de ayudas de Estado.

Recordemos que un objetivo, cuando no el objetivo principal, del apartado J del código que contempla la rigurosa puesta en práctica de las reglas relativas a las ayudas era el de evitar que se autorizaran, o siguiesen estando autorizados, en materia de ayudas de Estado, ciertos regímenes similares a los que según el código tienen la consideración de perniciosos.

Desmantelamiento/nuevos candidatos

En el marco de las conclusiones de noviembre de 2000 relativas al paquete fiscal, los Estados miembros en principio se comprometieron a garantizar que en los regímenes perniciosos no pudiesen entrar empresas después del 31 de diciembre de 2001 y que ninguna pudiese beneficiarse de los mismo después del 31 de diciembre de 2002.

No hay más remedio que constatar que el compromiso citado se refiere a los regímenes perniciosos y no a las medidas citadas en el Anexo C del informe del Grupo "Código de Conducta" del Consejo ECOFIN de 29 de noviembre de 1999 y que, en consecuencia, presupone un acuerdo sobre la lista de las medidas perniciosas de aquí a finales de año. Ahora bien, el calendario para el paquete fiscal tal como lo fijó el Consejo ECOFIN de 10 de julio de 2001 no prevé tal acuerdo en 2001.

La Delegación luxemburguesa está dispuesta a poner en obra todo lo que sea necesario para cumplir junto con los demás Estados miembros y sus territorios dependientes o asociados sus compromisos en esta materia, en general, y para los nuevos candidatos en particular, dentro de los plazos exigidos.

Hay dos medidas luxemburguesas de las que figuran en la lista del Anexo C del informe de noviembre de 1999, concretamente para los centros de coordinación y para las sociedades de financiación, para las que por definición ya no hay nuevos candidatos dado que las dos circulares en cuestión han sido derogadas.

En cuanto a las otras tres medidas luxemburguesas citadas en el Anexo C del informe de noviembre de 1999, Luxemburgo considera que la aprobación previa de la lista de las medidas perniciosas constituye una condición imprescindible para la puesta en marcha a nivel nacional de los procedimientos legislativos que se imponen.

Sin perjuicio de estas observaciones generales y recordando lo apuntado más arriba en materia de ayudas de Estado, la Delegación luxemburguesa está dispuesta a contemplar las medidas siguientes para cumplir con su compromiso relativo a los nuevos beneficiarios.

En cuanto al régimen de las sociedades de cartera 1929, Luxemburgo está dispuesto a modificar la ley de 31 de julio de 1929 sobre el régimen fiscal de las sociedades de participación financiera (sociedades de cartera).

En relación con la provisión para fluctuación de siniestralidad en materia de reaseguro, cabe recordar que Luxemburgo no comparte la evaluación hecha por el Grupo. Aun así, está dispuesto a modificar el Reglamento granducal de 20 de diciembre de 1991 dictado en cumplimiento de los artículos 95, 96, 98 y 99 de la Ley de 6 de diciembre de 1991 sobre el sector de los seguros y aplicables más concretamente a los reaseguros.

En lo relativo a las sucursales de financiación, Luxemburgo está dispuesto a entablar negociaciones con Suiza para lograr un protocolo anejo al Convenio fiscal suizoluxemburgués mediante el que se sustituya el mecanismo de exención por el de crédito fiscal si ello fuese necesario para poner las sucursales en consonancia con los regímenes análogos que existen en otros Estados miembros y que el código no menciona.

Notas a pie de página en el informe de noviembre de 1999

El informe de noviembre de 1999 contiene tres notas a pie de página en nombre de la delegación luxemburguesa.

En la primera, la delegación de Luxemburgo recuerda que el Código de conducta abarca el régimen fiscal de las empresas y concierne las medidas que afectan o pueden afectar significativamente a la localización de las actividades económicas en la Comunidad, al tiempo que indica tener muchas dificultades para compartir el enfoque asimétrico considerado según el cual siempre se han concedido evaluaciones positivas a las medidas relacionadas con el servicio intragrupos, con los servicios financieros y las sociedades extraterritoriales.

La segunda nota a pie de página formulada por la Delegación luxemburguesa se refiere a la evaluación de la medida B 7" provisión para fluctuación de siniestralidad". En el marco de este nota a pie de página, Luxemburgo reitera además su posición (explicitada en el documento FISC 211/98 ADD 1) respecto de la evaluación de los criterios 1b y 2b, así como la relativa a la nueva aplicación del punto G, apartado 1 del código (comparación interestatal).

La Delegación luxemburguesa se propone mantener estas dos notas a pie de página. Efectivamente, en lo que se refiere más concretamente en lo relativo a la problemática del campo de aplicación del Código, la de la interpretación de determinados criterios y la de la no aplicación de una comparación interestatal, los trabajos ulteriores del grupo no han estado impregnados por una filosofía más equilibrada que la subyacente al informe de noviembre de 1999. Por otra parte, las inquietudes luxemburguesas se ven reforzadas, en particular, a la luz de la ampliación de la Unión Europea y ante la ausencia de una revisión del Código.

En la tercera nota a pie de página, relativa a la evaluación de las llamadas medidas de "participaciones con exención", Luxemburgo formula una especie de reserva de estudio por la ambigüedad de la referencia a las consecuencias de la presencia de legislaciones en materia de sociedades extranjeras controladas sobre la evaluación positiva o negativa de las medidas de "participaciones con exención". La delegación luxemburguesa está dispuesta a retirar esta nota a pie de página.

PAÍSES BAJOS

HM Treasury
Attn. Mrs. Dawn Primarolo
Parliament Street
SW1P 3AG LONDON

REINO UNIDO

Estimada Sra. Primarolo:

En respuesta a su petición de información sobre desmantelamiento y sobre si los Países Bajos desean mantener sus reservas formuladas al informe de noviembre de 1999, desearía informarle de lo que sigue:

Desde el 1 de abril de 2001 los Países Bajos han modificado su enfoque para hacer acuerdos adelantados, sustituyendo la práctica imperante por una práctica de APA/ATR. Los requisitos para obtener un APA, advance pricing arrangement (o acuerdo adelantado de fijación de precios) están plenamente en consonancia con la orientación publicada en 1999 dada sobre este asunto en las orientaciones sobre fijación de precios de transferencia por la OCDE. Ello significa que la valoración se haga caso por caso y que se estudie si se va a aplicar un método correcto de fijación del precio de transferencia y unas comparaciones correctas. Se dejarán de utilizar los márgenes fijos para cualquier actividad. Se efectuará una revisión periódica de los márgenes cotejándolos con criterios comerciales normales. Los decretos que regulan la práctica APA/ATR están publicados. Aparte de ello, la política que subyace a la celebración o denegación de APA/ATR se hará pública, excepto cuando la política correspondiente hubiera sido publicada con antelación. Ello significa que está garantizada la plena transparencia. Se adjunta traducción de todos los decretos relativos a la práctica APA/ATR. Estos decretos también están disponibles en el sitio internet del Ministerio Neerlandés de Hacienda.

Por otra parte, se presenta al Parlamento neerlandés una proposición de ley para codificar el principio de plena competencia. Con esta codificación, será aplicable en los Países Bajos el principio de plena competencia tal como figura en el artículo 9 del Convenio tipo de la OCDE sobre tributación. Previsiblemente la ley se pondrá en vigor el año próximo.

Por la introducción de la práctica APA, se modifican con efectos desde el 1 de abril de 2001 los siguientes acuerdos, con lo que se da plena satisfacción a las críticas europeas:

- la norma de coste más beneficios
- la norma del método de reventa
- la norma de financiación intragrupos
- la norma de sucursales financieras
- la norma sobre regalías
- la norma sobre circunstancias atípicas
- la norma sobre sociedades extranjeras de comercialización de los Estados Unidos.

Respecto del capital informal, cabe destacar que no se prevé ninguna medida específica, pero que existe un principio general derivado del sistema neerlandés del impuesto de sociedades. El efecto de este principio es que la tributación se hace en condiciones de máxima competencia. En consecuencia, se estudiarán todos los aspectos de los acuerdos sobre capital informal cotejándolas con las orientaciones de la OCDE sobre fijación de precios de transferencia, como parte de la práctica APA.

En el Consejo ECOFIN celebrado el 26 y 27 de noviembre de 2000 se logró un acuerdo entre Estados miembros sobre la supervisión del desmantelamiento y la inmovilización para, entre otras, las sociedades de cartera. Según los Países Bajos, tal como se hizo constar en el Consejo ECOFIN de noviembre de 2000, la exención de participaciones está plenamente en consonancia con las orientaciones antes mencionadas.

Si bien la Comisión incoó un procedimiento sobre ayudas de Estado para la medida actividades de financiación internacional, los Países Bajos están dispuestos a comprometerse a llevar adelante el proceso emprendido por el Grupo " Código de Conducta" . Ello no obstante, los Países Bajos consideran que merece debatirse el problema de la falta de un marco regulador para la tributación de la financiación y de otras actividades no fijas en la UE.

Dentro del Código de conducta, los Países Bajos han asumido la obligación de promover la aplicación de los principios del Código de conducta en los territorios dependientes o asociados en la medida en que esté en su poder. Los Países Bajos procuran garantizar que tanto Aruba como las Antillas neerlandesas cumplirán con los principios del código de conducta.

Ya se han obtenido resultados en consultas con estos Estados autónomos que forman parte del Reino de los Países Bajos. Los gobiernos de las Antillas neerlandesas y de Aruba se han comprometido con el proceso de la OCDE en materia de competencia fiscal desleal y han celebrado un acuerdo con los Países Bajos en el que prometen ajustar o mantener su legislación tributaria en consonancia con las normas de la OCDE y de la UE sobre aceptabilidad internacional.

Finalmente los Países Bajos desean mantener sus reservas respecto del informe de noviembre de 1999.

Atentamente,

M Brabers

Director General de Legislación y Política Fiscal y Aduanera

Anexo: Decretos de la práctica APA

Advance certainty; good faith between treaty partners¹

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 Guidelines². The present decree provides detailed guidance on the application of the APA Guidelines in the Netherlands' tax practice.

1. This document contains an unofficial 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.

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. RTB2001/1379M²) 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 withholdingtax¹

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:

1. This document contains an unofficial 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 announced, 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 Annex 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).

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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.

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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. Concurrency 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.

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PORTUGAL

INFORME PRESENTADO POR LA REPÚBLICA PORTUGUESA

Tomando en consideración el programa de trabajo del Grupo Código de conducta (Fiscalidad de las empresas), en particular la presentación de un informe hasta el 10.10.2001, y:

Considerando que la única medida portuguesa clasificada como perniciosa en el Informe "Primarolo" era la medida B6, relativa a las actividades financieras de la zona franca de Madeira;

Considerando que se trata de una medida especial con rasgos peculiares y que, como tal debe ser debidamente evaluada por el Grupo Código de conducta y que dicha medida debe incluirse en el ámbito del régimen de ayudas de Estado de naturaleza fiscal, por constituir un componente de una política de desarrollo unitaria y coherente de una isla pequeña y alejada con fuertes limitaciones y deficiencias estructurales no sólo al nivel económico sino también al social;

Considerando que la Comisión ha aprobado a continuación este régimen con arreglo al régimen de ayudas estatales con efectos hasta el 31.12.2011, siendo el plazo de la última autorización hasta el 31.12.2000;

Considerando que con arreglo a dicho objetivo, la medida contemplada anteriormente debería haber sido evaluada cuidadosamente por el Grupo Código de conducta, en particular los informes sometidos sobre su proporcionalidad a los objetivos económicos deseados, con arreglo a los términos del apartado G del Código;

Considerando como opuesta a la metodología adoptada en relación con todas las demás Delegaciones de los Estados miembros, el segundo informe presentado por Portugal presentado con arreglo al apartado G del Código de conducta, nunca ha sido discutido en el Grupo;

Considerando que Portugal no está de acuerdo con la evaluación sostenida de la medida B6 y que ha subrayado claramente dicha posición en la nota a pie de página nº 8 del Informe "Primarolo" ;

Considerando que en virtud del ámbito de las ayudas estatales de naturaleza regional, la Comisión inició procedimientos de investigación contra dicho régimen respecto del año 2000, teniendo en cuenta las nuevas directrices relativas a las ayudas de Estado de esa naturaleza;

Considerando que se llevaron a cabo cambios pertinentes sobre el régimen fiscal aplicable a las actividades financieras de la zona franca, para una vigencia del 1 de enero de 2001 al 31 de diciembre de 2006, en particular la introducción de un incremento progresivo de los tipos de impuestos de sociedades, encontrándose dichas modificaciones en un estado de negociación con la Comisión en el contexto de las ayudas estatales de naturaleza regional;

El Gobierno de la República Portuguesa manifiesta lo siguiente:

1. Las objeciones manifestadas por Portugal en el pasado, en relación con el procedimiento adoptado en la evaluación de la medida B6 relativa a las actividades financieras de la zona franca siguen siendo válidas.

En efecto, la medida nunca se ha evaluado debidamente desde la perspectiva de su respectiva proporcionalidad a los objetivos económicos deseados. En oposición a lo que se prevé en el apartado G del Código de conducta. Portugal mantiene todas las objeciones manifestadas en la nota a pie de página nº 8 añadida al Informe " Primarolo" , manifestado nuevamente su total desacuerdo con la " clasificación" de la medida como perniciosa y con el procedimiento adoptado a tal fin.

2. En lo que se refiere a la autorización de nuevas entidades en virtud del régimen, en tanto y cuanto que la Comisión ha iniciado procedimientos de investigación respecto del año 2000 y considerando que determinadas modificaciones al régimen fiscal se encuentran todavía en fase de negociación. Dichas modificaciones serán aplicables a partir del 1.1.2001 y, como tales, no se autorizarán nuevos candidatos desde el 1.1.2000.

3. En relación con la medida de desmantelamiento consideramos que el desmantelamiento de una medida no puede tener lugar, si dicha medida no se ha evaluado nunca debidamente como perniciosa.

Por otra parte, nos gustaría señalar que el Consejo ECOFIN nunca ha aprobado formalmente el Informe " Primarolo" .

No obstante, de acuerdo con lo que ya se ha mencionado, Portugal ha introducido modificaciones pertinentes al régimen en el contexto de las ayudas estatales de una naturaleza regional para que entre en vigor del 1.1.200 al 31.12.2006. Entre dichas modificaciones nos gustaría poner de manifiesto el incremento progresivo de los tipos de impuestos de sociedades. Las modificaciones mencionadas están siendo negociadas con la Comisión en el contexto de la notificación respectiva de ayudas estatales de naturaleza regional.

INFORMACIÓN SOBRE LAS MEDIDAS ESPAÑOLAS DE DESMANTELAMIENTO

De acuerdo con lo acordado en la reunión del Grupo del Código de Conducta de 28 de junio de 2001, la delegación española informa sobre los procesos administrativos y legislativos llevados a cabo y pendientes de realizar con el objeto de proceder al desmantelamiento de las medidas españolas evaluadas positivamente en el ámbito del Código de Conducta, en especial en lo relativo a las nuevas entradas.

- **A4: Centros de dirección, coordinación y financieros del País Vasco.**

Como ya se ha comunicado a la Comisión Europea en anteriores ocasiones, en el seno de la Comisión Mixta del Cupo Estado-País Vasco nº 1/2000, de 18 de enero de 2000, se alcanzó el compromiso por parte de los Territorios Forales de Álava, Guipúzcoa y Vizcaya, de derogar los centros de coordinación previstos en sus respectivas normativas.

Sólo queda pendiente de derogación la medida correspondiente a Vizcaya. Esperamos que antes del 31 de diciembre de 2001 se produzca la citada derogación o bien, el compromiso de no proceder a nuevas autorizaciones.

- **A5: Centros de dirección, coordinación y financieros de Navarra.**

Como consecuencia del Acuerdo Primero de la Junta de Cooperación Estado-Comunidad Foral de Navarra, celebrada el 16 de enero de 2001, la Ley Foral 8/2001, de 10 de noviembre ha derogado los centros de coordinación previstos en su normativa.

- **C25: Investigación y explotación de hidrocarburos.**

En relación con el régimen fiscal de la investigación y explotación de hidrocarburos regulado en el Capítulo X de la Ley 43/1995, de 27 de diciembre, del Impuesto sobre Sociedades, la voluntad del Gobierno español es la de respetar los plazos establecidos, aprovechando la ocasión que brinda la reforma general de este Impuesto que se está estudiando actualmente.

El régimen no se instrumenta a través de autorizaciones administrativas, sino que se aplica automáticamente. Por ello, antes de la derogación del mismo, no es posible llevar a cabo ninguna medida jurídica que impida la entrada de nuevos beneficiarios.

Sin embargo, a pesar de no precisar de autorización la entrada en el régimen fiscal, sí sería necesario tramitar el correspondiente proceso administrativo que permita la obtención de un permiso, autorización o concesión administrativa para iniciar las actividades de exploración, investigación y explotación de Hidrocarburos. Por ello, no es probable que se produzcan nuevas entradas en el régimen fiscal.

Por último, España está dispuesta a estudiar, en el seno del Grupo del Código de Conducta, la posibilidad de retirar las reservas contenidas en las notas a pie de página del Informe del Grupo de noviembre de 1999, en la medida que la opinión del resto de los Estados Miembros vaya en ese sentido.

REINO UNIDO

DESMANTELAMIENTO DE MEDIDAS PERNICIOSAS

NOTA DEL REINO UNIDO

En el informe de noviembre de 1999 al ECOFIN presentado por el Grupo " Código de Conducta" (SN 4901/99) se señalaban tres medidas en Gibraltar caracterizadas por elementos perniciosos y dieciséis en cuatro territorios dependientes del Reino Unido.

En el Grupo " Código de Conducta" y en el ECOFIN el Reino Unido aceptó la obligación de procurar el desmantelamiento de las medidas consideradas perniciosos en el informe del Grupo, dentro de un programa equilibrado de desmantelamiento.

Al amparo de la Sección M, el Reino Unido se ha comprometido a garantizar que en sus territorios dependientes se cumplan los principios del Código " dentro del marco de las disposiciones constitucionales aplicables a dichos territorios" . El informe del Reino Unido (13193/98 FISC 179) de noviembre de 1998 al Grupo " Código de Conducta" explicaba esas disposiciones. Las leyes tributarias las ponen en práctica las Asambleas Legislativas directamente elegidas de las dependencias de la Corona y Territorios de Ultramar. A la luz de su compromiso con el Código de Conducta, el Reino Unido se ha comprometido a llevar a cabo el desmantelamiento. El Reino Unido ha mantenido amplios debates con los gobiernos de Gibraltar y los demás territorios dependientes afectados y en repetidas ocasiones ha explicado su posición.

El Reino Unido cree que su compromiso derivado de la Sección M del Código (incluidos los nuevos candidatos y el proceso de desmantelamiento), que reitera, se acercará más eficazmente a su objetivo si existe una demostración clara de que todos los Estados miembros por igual están decididos a aplicar las constataciones del Grupo a sí mismos con el mismo rigor que a los territorios dependientes y asociados.

Gibraltar

Como territorio europeo de cuyas relaciones exteriores es responsable el Reino Unido, Gibraltar está en de la Unión Europea como parte del Estado miembro Reino Unido, según dispone el apartado 4 del artículo 299 del Tratado de Roma.

En el informe del Grupo de noviembre de 1999 se mencionan las siguientes medidas como afectadas por elementos perniciosos:

A017 Sociedades establecidas en Gibraltar con arreglo a la normativa de 1992

B012 Sociedades (offshore) exentas y compañías de seguros cautivas

B013 Sociedades (offshore) cualificadas y compañías de seguros cautivas

Territorios de Ultramar y Dependencias de la Corona

El informe del Grupo de noviembre de 1999 concluyó que las siguientes medidas contienen elementos perniciosos:

Islas Vírgenes Británicas	F056:	Sociedades mercantiles internacionales
Guernsey (Incluido Alderney)	F037:	Sociedades exentas
Guernsey (Incluido Alderney)	F038:	Actividades internacionales de préstamo
Guernsey (incluido Alderney)	F040:	Instituciones internacionales
Guernsey (incluido Alderney)	F042:	Compañías de seguros extraterritoriales
Guernsey (incluido Alderney)	F043:	Compañías de seguros
Isla de Man	F061:	Sociedades mercantiles internacionales
Isla de Man	F062:	Exención para sociedades no residentes
Isla de Man	F063:	Compañías de seguros exentas
Isla de Man	F065:	Actividades internacionales de préstamo
Isla de Man	F066:	Actividades bancarias offshore
Isla de Man	F067:	Gestión de fondos
Jersey	F045:	Sociedades exentas de impuestos
Jersey	F046:	Operaciones internacionales de tesorería
Jersey	F047:	Sociedades mercantiles internacionales
Jersey	F078:	Compañías de seguros cautivas

Intensos debates del Reino Unido con sus Territorios Dependientes**2001**

29 de octubre	<i>Debates a nivel de funcionarios con Guernsey</i>
23-26 de octubre	<i>Debate bilateral y multilateral a nivel de ministros con todos los territorios dependientes del Caribe</i>
17 de octubre	<i>Debates de nivel de funcionarios con Jersey</i>
12 de octubre	Debates a nivel de funcionarios con la Isla de Man
9 de octubre	Encuentro de los Ministros del Tesoro y del Departamento del Lord Chancellor(LCD) Department con el gobierno y funcionarios de Guernsey
Septiembre/octubre	Debates continuados del Ministro de Asuntos Exteriores con el Primer Ministro de Gibraltar
25 de septiembre	Consejo consultivo anual con los Territorios de Ultramar. Discusiones de los Ministros del Tesoro y de Asuntos Exteriores sobre todos los aspectos de las iniciativas fiscales internacionales. Con asistencia de las Islas Caimán, Islas Vírgenes británicas, Turcos y Caicos, Montserrat y Bermudas
12 de septiembre	Encuentro de los Ministros del Tesoro y del Departamento del Lord Chancellor con el Gobierno y funcionarios de Jersey
29 de agosto	Debates de nivel de funcionarios con la Isla de Man

3 de agosto	Recapitulación semestral de asuntos internacionales de interés para las dependencias de la Corona, celebrada por el Departamento del Lord Chancellor: debate sobre todos los aspectos, tanto con funcionarios como con políticos
31 de julio	El Primer Ministro de Gibraltar trata del Código de Conducta con funcionarios
24 de julio	Visita del Ministro del LCD a Jersey
4 de julio	Visita del Ministro del Tesoro a la Isla de Man
26 de junio	Visita de funcionarios del Reino Unido a la Isla de Man
28 de abril-2 de mayo	Visita de funcionarios del Reino Unido a los Territorios de Ultramar en el Caribe
11 de abril	Visita del Reino Unido a Jersey para una reunión a nivel de funcionarios
6 de abril	Reunión con funcionarios de Jersey y Asesores Especiales del Chancellor en Londres
16 de febrero	Visita del Ministro del Interior a Jersey
Febrero	Cartas ministeriales sobre el Código de Conducta a dependencias de la Corona; Gibraltar y las Islas Vírgenes Británicas;
12 de enero	Recapitulación semestral sobre asuntos internacionales de interés para las dependencias de la Corona, lugar de celebración: HMT - debates sobre todos los aspectos a nivel de funcionarios

2000

23 de noviembre	Reunión bilateral del Ministro del Tesoro con Jersey
23 de noviembre	Reunión bilateral del Ministro del Tesoro con Guernsey

22 de noviembre	Reunión bilateral del Ministro del Tesoro con la Isla de Man
10 de noviembre	Visita del Ministro del Interior a la Isla de Man. Debate en Consejo de Ministros sobre la Directiva relativa a los ahorros
3-5 de octubre	Consejo consultivo anual Territorios de Ultramar seguido de seminario fiscal sobre todos los aspectos de las iniciativas fiscales internacionales. Con asistencia de las Islas Caimán, Vírgenes británicas, Turcos y Caicos, Montserrat y Bermudas
19-21 de septiembre	Reunión en Malta de los Ministros de Hacienda del Commonwealth - debates sobre competencia desleal en materia fiscal - iniciativas OCDE
26 de junio	Reunión informativa semestral para representantes de las dependencias de la Corona sobre Europa y la evolución internacional, celebrada en el Ministerio del Interior. Debates sobre todos los aspectos del paquete fiscal

1999

17 de diciembre	Reunión informativa semestral para representantes de las dependencias de la Corona sobre Europa y la evolución internacional, celebrada en el Ministerio del Interior. Debates sobre todos los aspectos del paquete fiscal
19-20 de octubre	Consejo consultivo con Territorios de Ultramar. Amplio debate sobre iniciativas internacionales.