**Introduction**

Transfer pricing legislation has existed in the Netherlands since 1 January 2002. In addition to providing specific transfer pricing rules, the implementation of transfer pricing documentation requirements was meant to shift the burden of proof from the Dutch tax authorities to the taxpayer. This legislation is based largely on the Organisation for Economic Co-operation and Development (OECD) Guidelines, with some modifications to reflect Dutch business practices. In the past, transfer pricing disputes have usually been dealt with informally and resolved by negotiation between the tax authorities and the taxpayer. Consequently, there is at the moment little relevant case law. Multinational enterprises (MNEs) are experiencing an increase in the number of transfer pricing queries, which will force those companies to focus more on transfer pricing.

**Statutory rules**

Since 1 January 2002, specific transfer pricing provisions have been included in Article 8b of the Dutch Corporate Income Tax Act. This article is largely drafted in accordance with Article 9 of the OECD’s Model Tax Convention.

The basic features of the transfer pricing legislation are as follows:

- Codification of the arm’s-length principle.
- A widening of the scope of the transfer pricing legislation through a broader concept of ‘control’ between affiliated businesses that are directly or indirectly participating in the capital, management or supervision of another company, as long as there is sufficient influence on the prices charged between the companies involved. The level of control and influence is not quantified in the law. This legislation applies to transactions where one party controls the other or both parties are under common control.
- A requirement to maintain data in the administration that demonstrates the arm’s-length nature of the transfer prices and how these prices have been derived.
- A strict interpretation of the documentation requirements implies that taxpayers should prepare the relevant documentary evidence when the intragroup transactions take place. Although this is a prudent approach, the tax authorities effectively allow taxpayers four weeks to respond to any request to provide transfer pricing documentation, or three months where particularly complex transactions are involved.

Where there is an understatement of the taxable income reported by a Dutch group company because of non-arm’s-length related party transactions, the tax authorities make an upward adjustment to the taxable income of that company. Under certain conditions, the understatement may also be treated as a hidden dividend distribution,
attracting the appropriate withholding tax. Any surplus profit reported by a Dutch group company because of non-arm’s-length related party transactions may be treated as an informal capital contribution by the parent company. The Dutch group company can claim a notional deduction for the amount of the informal capital contribution for Dutch corporate income tax purposes.

**Innovation Box**
The Innovation Box is a Dutch corporate tax facility that allows Dutch taxpayers to benefit from a favourable effective tax rate with respect to income derived from qualifying intellectual property (IP). Both resident and non-resident taxpayers can benefit from this facility. The effective tax rate in the Innovation Box is 5%.

The key benefits of the Innovation Box regime are as follows:

- Income from (non-trademark) intangibles will be taxed at an effective corporate income tax rate of 5%.
- No limit to attribute income to intangibles under the Innovation Box.
- Innovation losses are deductible against the normal corporate income tax rate.
- The scope is broad; it is not linked only to (legally) patented intangibles. It provides opportunities for software companies and similar type of companies.
- To a certain extent the development of intangibles can take place outside the Netherlands.
- The Dutch tax authorities are eager to discuss cases where the Innovation Box can be applied.

For IP to qualify for the Innovation Box, it needs to meet the following cumulative conditions:

- IP developing test:
  - The Dutch entity legally owns patents, or
  - The Dutch entity has obtained research and development (R&D) declarations.
- IP economic ownership test:
  - The IP should be economically owned by the Dutch entity.
- New IP:
  - The Innovation Box is available for newly developed IP. For existing IP which is subject to continual improvements by further R&D, the Innovation Box can be gradually implemented.

**Other regulations**
Other regulations have been issued to cover certain specific circumstances. Those that concern transfer pricing issues are detailed below.

**Decrees and resolutions**
The decrees and resolutions issued by the Ministry of Finance give guidance on the interpretation and application of Dutch tax law in certain specific situations. They are intended to ensure a consistent application of the tax laws, and, consequently, the tax authorities are bound by them. A taxpayer, however, has the right to appeal to the courts on any provision in the decrees or resolutions.

Details of the relevant decrees are set out below.
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**Transfer pricing decree (IFZ2001/295)**
This decree of 30 March 2001 on ‘Transfer prices, the application of the arm’s-length principle and the OECD Guidelines provides guidance on the Dutch tax authorities’ interpretation of the OECD Guidelines and clarifies how certain issues should be approached in practice.

The issues dealt with in this decree include the following:

- Application of the arm’s-length principle in practice: The taxpayer should demonstrate that its transfer prices meet the arm’s-length standard.
- Application of various transfer pricing methods: Particular attention is given to the cost plus method and the practical implications.
- Administrative approach for avoiding and resolving disputes about transfer pricing: Insight is given to the policies and procedures applied by the Dutch government in relation to mutual agreement and arbitration procedures.
- Arm’s-length fee for financial services.
- Allocation of profit to headquarters and permanent establishments (PEs): The arm’s-length principle is also applicable in determining the tax base of foreign taxpayers.

**Amendments to the transfer pricing decree (IFZ2004/680M)**
This decree of 21 August 2004 is intended as a clarification of the 30 March 2001 decree with respect to the following subjects:

**Intercompany services/head office expenses**
Some clarification is given on the activities that are considered shareholder activities. In addition, the decree provides guidance on the determination of an arm’s-length fee for services. It allows a fee based on cost for support services that meet certain criteria, thus providing a practical approach for common, low value-added services.

**Contract R&D**
In the decree of March 2001, the tax authorities explicitly referred to performing contract R&D from a Dutch tax perspective. In addition, a guideline now defines the manner in which these activities should be remunerated. The decree indicates that if ultimate decision making related to the R&D, the costs and risks of these activities, and the economic ownership of the developed assets lie with the principal, then the cost plus method is an appropriate method for remunerating the contract R&D activities.

**Cost contribution arrangements**
To end further discussions as to whether the cost contribution paragraph in the March 2001 decree was completely in accordance with the arm’s-length principle, this paragraph has been revoked, and it is explicitly stated in the amendments that the OECD Guidelines apply.

**Valuation of intangible assets**
According to the Ministry of Finance, there are circumstances under which non-related parties would not agree on a fixed price for a transfer of an intangible asset but would include a price adjustment clause indicating, for example, that the price of the intangible asset depends on future income. In the August 2004 decree, it is stated that an agreement on the transfer of an intangible asset is assumed to include a price adjustment clause, if such a clause would have been agreed on between independent parties operating under similar conditions.
Withholding taxes
The decree recognises that some countries levy withholding taxes on service fees, even if this is not allowed under the tax treaty between that country and the Netherlands. This is especially true for mixed contracts (i.e. contracts consisting of a service and a royalty component). For payments under these contracts, withholding tax might be levied on the entire fee, even though only withholding tax on the royalty component is allowed under the tax treaty. The decree states that withholding taxes cannot be credited against Dutch corporate income tax if these taxes conflict with the applicable treaty clause.

Advance pricing agreement (APA) decree (IFZ2004/124M)
On 11 August 2004, the Ministry of Finance published a decree (this decree is an update of the original decree IFZ2001/292M) titled ‘Procedure for dealing with requests for upfront certainty on transfer prices to be used in cross-border transactions (advance pricing agreements)’. The decree provides guidance on how the OECD Guidelines on APAs are applied in the Dutch practice.

Details about the procedures to be followed and the information given in an APA request are provided in the APA section, below.

Decrees on financing companies (IFZ2004/126M and IFZ2004/127M)
The regime for Dutch finance companies is applicable to back-to-back intercompany loans and intercompany licensing transactions.

Under this regime, a Dutch finance or licence company must meet the following requirements:

- The company must incur economic risk.
- The company must have sufficient operational substance.

These requirements are further elaborated in two decrees published by the Ministry of Finance in 2004. The first decree, issued on 11 August 2004 (IFZ2004/126M), focuses on companies involved in intercompany finance activities, and is an update of the original decree of 30 March 2001 (IFZ2001/294 M) on this subject. The second decree, also issued on 11 August 2004 (IFZ2004/127M), contains questions and answers on the decree’s application.

The importance of the regime lies in what happens if the requirements are not met. In such a case, interest and/or royalties paid and received are not included in the Dutch tax base. In addition, the Dutch tax authorities may spontaneously exchange information with local tax authorities of the countries to which the loan/licence is granted. This will likely result in an increase of withholding tax on these payments, which can subsequently not be offset in the Netherlands, as the interest and royalty are not included in the Dutch tax base.

In addition to the specific requirements for Dutch finance companies, the decrees also set out how the compensation for back-to-back intercompany loans and intercompany licensing transactions need to be established and documented. This needs to be done on a case-by-case basis and the compensation typically needs to consist of a handling fee component and a risk premium.
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It is also possible to obtain a unilateral APA in the Netherlands in which the Dutch tax authorities confirm (i) that the requirements are met, and (ii) that the remuneration applied (a spread determined on a case-by-case basis) is at arm’s-length. Depending on the structure, this can be a fairly straightforward process.

**Decree on mutual agreement procedures (MAP) and EU Arbitration Convention (IFZ2008/248M)**

The decree seeks to give guidance for taxpayers and improve the efficiency of the process for resolving disputes, and it relates both to MAPs initiated under double tax treaties and the arbitration convention for transfer pricing disputes within the European Union (EU).

**Decree on attribution of profits to permanent establishments (IFZ2010/457M)**

On 15 January 2011, the Dutch State Secretary of Finance issued a decree on how the Dutch tax authorities apply the OECD publications on the attribution of profits to PEs. The Dutch approach for the attribution of profits to a PE generally follows the OECD recommendations: the PE should be seen as a legally distinct and separate enterprise. In the first step of this approach, assets and risks are attributed to the head office or the PE based on a functional analysis. Subsequently, free capital and loans are allocated to the PE. Finally, interest is determined for the loans that have been attributed to the PE.

With regard to capital allocation, the State Secretary expresses a strong preference for a capital allocation approach (based on the company’s capital position). When it comes to attributing interest to the loans allocated to the PE, the State Secretary expresses a strong preference for the ‘fungibility approach’ (pro rata allocation of interest costs).

Under the new Article 7 of the OECD Model Tax Convention, executive and administrative expenses should be allocated to the PE with an at arm’s-length markup. The State Secretary has indicated that for the applicability of treaties containing the old Article 7, both methods of attributing costs to the PE (i.e. with or without an at arm’s-length markup) are considered to be acceptable. In addition, royalty charges between the head office and a PE can be acceptable if the development cost have been attributed to one part of the enterprise.

**Advance tax rulings (ATRs)**

Effective from 1 April 2001, the former Dutch ruling practice was converted into an ‘APA/ATR’ practice. Reference is made to the 2004 decrees on APAs and finance companies.

ATRs typically deal with issues like the applicability of the participation exemption, hybrid loans and the existence of a PE.

**Legal cases**

There are relatively few court cases on transfer pricing issues since most disputes are solved through compromise. One reason is the ability to obtain an APA (historically unilateral advance rulings) from the Dutch tax authorities on the arm’s-length nature of certain transfer pricing arrangements. Currently, the Dutch tax authorities are a strong advocate of bilateral or even multilateral APAs. Another factor may be that the burden of proof in transfer pricing disputes historically lies with the tax authorities, and the confidence of the tax authorities in this regard may have been a relevant factor.
This is illustrated by a Supreme Court decision of June 2002, which involved a Japanese parent with a distribution subsidiary in the Netherlands (Supreme Court, 28 June 2002, No. 36 446). The Dutch subsidiary sold a certain product at a loss for a lengthy period of time while the remaining product range was profitable. The transfer prices for all products were set by the parent company without clear evidence of negotiations. The Dutch tax authorities challenged the arm’s-length nature of the transfer price for the loss-making product, arguing that a third party would not have continued selling this product under these conditions. The High Court argued that the tax inspector wrongfully looked at only the loss-making product. Also, the court held that the tax inspector had the burden of proof and failed to demonstrate that third party distributors would not have agreed to the pricing arrangements for the transactions under review. The Supreme Court upheld the decision of the High Court and decided in favour of the taxpayer.

From this Supreme Court decision, one may conclude that the burden of proof rests with the tax authorities even if a taxpayer reports a profit margin that is relatively low and differs from the industry average. The Supreme Court also ruled that for the arm’s-length test, certain transactions can be aggregated and a particular product may be unprofitable if the overall result for the company represents a fair return on the capital employed and the business risks incurred.

On 13 September 2002, the State Secretary of Finance issued a decree (IFZ2002/830M) on the consequences of this Supreme Court decision. In the decree, it was concluded that the Supreme Court decision results in a heavy burden of proof for the tax authorities for the years before 1 January 2002.

In October 2005, the Supreme Court ruled on a case (Supreme Court, 14 October 2005, No. 41 050) which dealt with the issues of dual residency and the existence of a PE. A MNE with a head office located in the Netherlands operated its group financing function through a company located and incorporated in Belgium. The Supreme Court ruled that since a significant part of its core activities were on a day-to-day basis performed by the Belgian employees, the company should not have had dual residency and was therefore not subject to Dutch corporate income tax. Moreover, the involvement of the Dutch head office had not exceeded a normal level of involvement within a group, and as a result it could not be concluded that the Belgian group company had a PE in the Netherlands.

In the Netherlands, the tax authorities increasingly not only focus on the arm’s-length nature of the conditions of a transaction, but also on the arm’s-length nature of the transaction itself. An example in relation to the aforementioned is the case ruled by the Supreme Court in May 2008.

In May 2008, the Supreme Court ruled on a case (Supreme Court, 9 May 2008, No. 43 849) where a loan had been issued by a company to its parent company and where subsequently the lender was faced with a default on that loan. The court ruled that if and to the extent a supply of funds occurs on terms and under conditions such that a third party would not have assumed the debtors risk, it must be concluded that the supplier of the funds had accepted the debtors risk with the intent to serve the interests of its shareholder.
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**Burden of proof**
Since 2002, taxpayers have a legal obligation to maintain certain transfer pricing documentation. To the extent that this requirement is not met, the burden of proof is ultimately transferred to the taxpayer.

In general, there are no statutory provisions to indicate how the burden of proof is divided between the taxpayer and the tax authorities. The allocation of the burden of proof between the parties is at the discretion of the court. However, in practice and as a result of Dutch case law, if the company's revenue is adjusted upwards because of transfer pricing issues, the burden of proof usually lies with the tax authorities. On the other hand, the burden lies with the taxpayer to prove the deductibility of expenses.

In transfer pricing cases, the burden of proof transfers to the taxpayer if the pricing arrangements are unusual (e.g. if comparable uncontrolled prices (CUP) are available but not used, or goods or services are provided at cost or below cost). The burden of proof is also transferred to the taxpayer, and will be more onerous, if the taxpayer refuses to give information requested by the tax authorities where there is a legal obligation to do so, or if the requisite tax return is not filed. Finally, the court sometimes allocates the burden of proof to the party best able to provide the evidence.

**Tax audit procedures**

**Selection of companies for audit**
There are no clear criteria as to how companies are selected for a transfer pricing investigation, but a company bears an increased risk of such an investigation if one of the following situations occurs:

- The company has suffered losses for a number of years.
- The company is involved in transactions with related parties in tax havens.
- The company shows fluctuating results from year to year.
- The company closes.
- The company's activities are reorganised.
- The results of the company are lower than the average for the industry.
- The company pays substantial royalties or management fees.

The Dutch tax authorities conduct centrally coordinated transfer pricing investigations for certain industries, such as the pharmaceutical and automobile industries.

**The provision of information and duty of the taxpayer to cooperate with the tax authorities**
In accordance with the General Tax Act, a taxpayer can be compelled by the tax authorities to give access to all books and other documentation relevant to the determination of the facts of the company's tax position. If a taxpayer does not provide the requested information to the tax authorities, the burden of proof is transferred to the taxpayer. In addition, failure to comply can be considered a criminal offence, which could ultimately result in penalties or even imprisonment.

Transfer pricing legislation does not give a clear indication as to exactly what the minimum requirements are in terms of documentation. However, in the explanatory memorandum on the legislation, reference is made to the OECD Guidelines in this respect. The decrees of March 2001 and August 2004 also provide some guidance on
the documentation that should be maintained. It is understood that the documentation should include the following:

- A summary of the relevant intragroup transactions.
- A functional analysis.
- An industry analysis.
- A summary of the transfer pricing methods and margins used, including evidence that the methods have resulted in an arm’s-length outcome.
- Details on the company’s strategies, including critical assumptions.
- Intragroup arrangements, including the trading conditions.

With respect to requests for information about foreign group companies, which can affect the Dutch company’s tax position, the situations set out below can be distinguished.

**A Dutch company with a majority shareholding in a foreign company**

In this situation, the Dutch tax authorities can require the Dutch company to provide information on, and give access to, the books and records of the foreign subsidiary. If the requested information is not provided, the burden of proof transfers to the taxpayer.

**A Dutch company with a foreign parent company or fellow subsidiary**

The Dutch tax authorities can request a Dutch company to provide information on its foreign parent company or fellow subsidiary. However, a taxpayer is not obligated to provide this information if the parent company or fellow subsidiary is resident in either the EU or a country with which the Netherlands has a tax treaty that includes a provision for the exchange of information. In this case, the information should be requested directly from the tax authorities. If this process fails, no tax treaty exists or the treaty does not include an exchange of information article, the Dutch tax authorities can request access to the books and records of the foreign parent company or fellow subsidiary. If the requested information is not provided, the burden of proof transfers to the taxpayer.

**The audit procedure**

Transfer pricing matters usually are an integral part of a general state audit. The Dutch tax authorities aim to audit every company at least once every five years and larger companies once a year. A state audit comprises an onsite examination of the company’s books, which usually covers a number of years, taking into account the five-year period within which the tax authorities may statutorily reassess taxes. This period is extended with the extension period granted for filing the tax return. Historically, the tax authorities concentrated largely on examining intragroup charges for service fees and royalties. Recently a lot of attention has been focused on the transfer pricing of goods, the treatment of intangible assets and the allocation of head office costs by Dutch MNEs. These may be examined through separate transfer pricing state audits, as the Dutch tax authorities are more active in this area.

The conduct of the taxpayer during the investigation, particularly with respect to requests for information from the tax authorities, could have an effect on the outcome of the dispute and size of the adjustment. Transfer pricing disputes between the Dutch tax authorities and the taxpayer are usually solved through negotiation rather than
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litigation. Note, however, that an additional assessment is the most likely outcome, since most disputes are solved through compromise.

Furthermore, the Dutch tax authorities tend to enhance the relationship with the taxpayer through so-called horizontal monitoring, which is to pursue an effective and efficient method of working based on mutual trust, understanding and transparency. As a result, the tax audits shift from tax audits performed by the Dutch tax authorities afterwards (reactive) to having upfront assurance from the Dutch tax authorities (proactive) whereby more and more is focused on internal risk and control processes of the company (Tax Control Framework).

Revised assessments and the appeals procedure
The taxpayer may appeal against the revised assessment and should do so within six weeks of the date when the additional assessment was raised. The tax authorities should make a formal decision on the appeal within six weeks after this period. If the tax authorities are not able to give a decision within this term, they may extend the period for another six weeks at most. The tax authorities cannot just reject the appeal without first providing an explanation for the decision.

If the tax authorities reject the initial appeal, the taxpayer can file an appeal with the District Court against the decision. This appeal must be filed within six weeks of the tax authorities’ formal decision. To speed up the decision process, if there is mutual consent between the taxpayer and the tax inspector, the appeal to the tax inspector can be bypassed by sending the appeal directly to the District Court. This is then treated as an appeal with the District Court.

There is no ultimate time limit within which the District Court must make its decision. Following its decision, the taxpayer or the tax authorities can file an appeal with the Dutch High Court within six weeks. Once the High Court has made a decision, the taxpayer or the tax authorities may appeal the decision on points of law to the Supreme Court. Such an appeal must also be filed within six weeks of the High Court’s decision. The Supreme Court is the final court; its decision is binding, and no further appeal is permitted. There is no ultimate time limit within which the High Court and the Supreme Court must make their decision. To speed up the decision process, and with mutual consent between the taxpayer and the tax inspector, the appeal to the High Court can be bypassed by sending the appeal directly to the Supreme Court. Generally, a taxpayer will want to avoid litigation since it can be a very time-consuming and costly exercise.

Additional tax and penalties
The Dutch legislation does not provide for specific transfer pricing penalties. Nevertheless, the existing penalty rules are applicable on any additional tax resulting from transfer pricing adjustments. The penalties vary from 25% to 100% of the additional tax, depending on the degree of the intent to avoid tax or gross negligence of the taxpayer. Penalties are not deductible for corporate income tax purposes. Note that transfer pricing adjustments do not often result in penalties, because the taxpayer’s position is usually more or less defensible and therefore is not strictly considered as tax avoidance. However, an additional tax assessment results in interest charges.
Resources available to the tax authorities
Transfer pricing enquiries are conducted by the local tax inspector and the tax auditor, usually in consultation with specialised accountants from the Transfer Pricing Coordination Group. This group is dedicated to transfer pricing and includes people from the Ministry of Finance and the tax authorities. Its main task is to prepare policies for those instances of incorrect application of the arm’s-length principle. In addition, the group should be consulted by the tax authorities and the Ministry of Finance on any transfer pricing issue (including allocation of profit between head office and PE), and it should guarantee a consistency in dealing with transfer pricing matters. Transfer pricing cases dealt with by the local tax inspector should also be reported to this group. This particularly applies to the following scenarios:

- Cross-border transactions with related entities established in tax havens.
- Proposed transfer pricing audits.
- Cross-border transactions that are, or will be, assessed as part of an industry examination.
- A request by a taxpayer for a corresponding adjustment in the area of transfer pricing as a result of a (proposed) adjustment at a related entity in another state.
- If it is likely that a mutual agreement or arbitration procedure will be started.
- A cross-border transfer of intangible assets within a group.
- A request for advance certainty on the extent of the documentation requirements of Article 8b of the Corporate Income Tax Act.

The group reviews (interim) reports, provides binding advice to the local tax inspector and also operates as a help desk for staff members of the tax authorities. This binding advice does not relate to APA requests because the local tax inspectors should involve the centralised APA/ATR team for these.

Use and availability of comparable information
Use of information
As indicated above, the principles in the OECD Guidelines have been accepted by the Netherlands and are generally applied. Since the OECD Guidelines recommend the use of comparable information, a comparables study is an appropriate means to justify a transfer pricing policy. Furthermore, the reference to comparables in the explanatory notes on the transfer pricing legislation make it evident that comparables information is a crucial element in defending transfer prices in the Netherlands. The tax authorities have access to their own comparables data, and they also use commercially available databases (see below). According to the transfer pricing legislation and their explanatory notes, it is, strictly speaking, not mandatory for a taxpayer to perform a comparables study (i.e. benchmarking) to support its transfer pricing policy. On the other hand, in the absence of a comparables study, it is likely that the Dutch tax authorities will perform such a study themselves. It is therefore advisable for a taxpayer to perform a comparables study to support the arm’s-length nature of its pricing arrangements. In case of an APA, a comparables study is required as part of the information to be provided to the tax authorities. (See the APA section for more information).

Availability
Dutch companies are required to file their statutory financial statements in full or abbreviated form (depending on the size of the company) with the local chamber of
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commerce. This information is compiled on a publicly accessible database and may be used by other companies in similar situations to justify or defend a pricing policy.

The tax authorities can also obtain and use all information that is publicly available, including external databases, to support its position. In addition, the tax authorities may use information (e.g. gross margins or net operating profit margins) obtained from corporate income tax returns and state audits. However, such information is rarely used as evidence before the courts because the tax authorities might be compelled to disclose the underlying financial information and this might put the tax authorities in breach of their confidentiality obligations.

Risk transactions or industries
No transactions or industries are excluded from the scope of the transfer pricing legislation. Historically, the Dutch tax authorities have primarily focused on intragroup charges like royalties, management fees, commissions and interest payments, as well as intragroup transactions with low-tax countries and intragroup transactions involving intangible assets.

Since the introduction of the transfer pricing decrees and the legislation, there is a tendency for more queries to be raised concerning the transfer prices and margins of goods, as well as the allocation of head office costs and related service charges by Dutch MNEs. In addition, the Dutch tax authorities are increasingly becoming sophisticated in the area of intercompany financial transactions, including the arm’s-length nature of the interest rates applied on group loans, cash pooling and credit guarantees.

Limitation of double taxation and competent authority proceedings
Most tax treaties for the avoidance of double taxation concluded by the Netherlands include provisions for a mutual agreement procedure (MAP). Moreover, the Netherlands has concluded a treaty containing an arbitration clause with approximately 23 countries, including the treaties with Japan, Switzerland and the United Kingdom. In the Netherlands, a request to initiate the MAP should be filed with the Dutch Ministry of Finance, generally within three years of the tax assessment with the adjustment that results in double taxation. The Dutch Ministry of Finance has issued a decree on the application of MAP procedure or EU arbitration procedure (see also Other regulations section, above) to provide guidance for taxpayers and improve the efficiency of the process for resolving disputes. No information is available on the number of requests made as the Ministry of Finance has not disclosed this information. The use of the competent authority procedure had increased significantly over the last years. Most cases are solved within a period of two to three years. Additionally, it is understood that it is part of the Dutch treaty policy to include an arbitration clause in future tax treaties.

Advance pricing agreements
As indicated previously, there are formal procedures in the Netherlands for setting pricing policies in advance through a unilateral or bilateral APA. The authority for the APA procedures lies in the amended APA decree published by the Ministry of Finance on 11 August 2004, which replaces the 30 March 2001 decree. APAs may include transfer pricing methodologies covering different types of related party transactions or specific transactions, including transfers of tangible or intangible property, financing
and licensing activities and the provision of services. APAs may cover all the taxpayer’s transfer pricing issues or may be limited to one or more specific issues.

Since the publication of the 2004 decree, the number of APAs concluded by the Dutch tax authorities has increased significantly. An APA request requires a certain amount of detail to be disclosed to the tax authorities. However this is not materially different from the documentation that the taxpayer must maintain under the transfer pricing documentation requirements.

The information to be provided to the tax authorities by the taxpayer as part of an APA request generally includes, among other things, the following:

- Details on transactions, products and agreements relating to the proposal.
- Details on the entities and PEs involved.
- The relevant jurisdictions.
- Details on the worldwide group structure, history, financial data, products, functions, risks and (in)angible assets involved.
- A description of the proposed transfer pricing method, including a comparables analysis.
- Details on the critical assumptions applied in the proposal and the implications of changes therein. This would allow a certain flexibility in the actual application of the APA, provided that the critical elements (e.g. market share or value chain) fluctuate within a certain predetermined range.
- The accounting years involved.
- General information on the market conditions (i.e. industry analysis).

The APA request needs to be filed with the tax inspector or directly with the APA/ATR team of the Dutch tax authorities (particularly in cases where the request concerns activities to be established in the Netherlands). In all cases, the inspector is obliged to present the request to the APA/ATR team of the Dutch tax authorities for binding advice (in cases of new policy after consultation of the Transfer Pricing Co-ordination Group). In the case of a bilateral APA request, the Dutch Ministry of Finance initiates the bilateral agreement procedure with the other country involved. In principle, an APA is applicable for a period of four to five years unless longer-term contracts are involved. Under certain conditions an APA can be applied retroactively, for example, as part of a conflict resolution during a state audit. The Dutch tax authorities are eager to make the APA regime work and, as a result, according to the Dutch State Secretary of Finance, the Dutch tax authorities maintain a professional, flexible and cooperative international reputation in this area. The APA decree of 11 August 2004 (IFZ2004/124M) entails various measures to further develop the APA practice and to streamline the filing process. These measures relate to the possibility of a prefiling meeting, the introduction of a case management plan and the possibility of assistance by the tax authorities in identifying comparables data for small businesses (i.e. companies with a balance sheet total of less than EUR 5 million and with an average number of employees of less than 50).

The prefiling meeting creates the potential to discuss the APA request with the APA team before it is actually filed. The benefit to the taxpayer is a clarification of the information that is likely to be required and specific elements likely to be pertinent to the formal APA request.
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In cooperation with the APA team, a joint case management plan (i.e. a work plan) can be prepared describing the process and timing between the filing and the completion of an APA request. The intention of this case management plan is to reduce the uncertainty for the taxpayer with respect to the handling process of the application. The case management plan should provide a realistic time frame for the completion of the request as agreed by both parties.

To decrease the administrative burden for smaller companies, the tax authorities, to the extent possible, give comparable financial information of independent enterprises. This assistance should make it easier for relatively small companies to file an APA request, as many small companies are reluctant to enter the APA process due to the administrative burden and related costs. The taxpayer still must provide the necessary information on the organisation and functional analysis of the company, as well as the rationale for the proposed transfer pricing method and mechanisms, for example.

**Anticipated developments in law and practice**

With the existence of specific transfer pricing legislation in the Netherlands and considering the increased awareness of the Dutch tax authorities with respect to transfer pricing matters, the most likely development is that, in practice, intragroup transactions will be reviewed even more closely and challenged even more frequently than is the case presently. This is also a result of the active approach to transfer pricing by the authorities of the most important Dutch trade partners, like Germany and the US. These developments will force MNEs to review their transfer pricing policies and carefully document them in order to defend their prices against future challenge.

**Liaison with customs authorities**

The exchange of information between the corporate income tax authorities and the customs authorities takes place as part of the daily routine of the Dutch tax authorities. The special customs valuation team based in Rotterdam now directly cooperates with the corporate income tax authorities throughout the process of an investigation for customs purposes. Also, combined customs and corporate income tax teams exist within other major offices of the Dutch tax authorities. In addition, the customs authorities have now implemented a database containing pricing structures and price levels for different industries.

In case of a customs valuation audit, the following information may be requested by the customs authorities:

- General information on the company.
- Available information on transfer prices.
- Annual accounts.
- Legal structure, including contracts and agreements in place.
- Specific information on the goods flow, invoicing structure (including retrospective price adjustments), special arrangements (e.g. tools, machines, goods or materials provided to the manufacturer – so-called ‘assists’), royalties, warranty and marketing.
- Reports of foreign customs audits.

A copy of the customs valuation report is usually forwarded to the corporate income tax authorities. In principle, any transfer pricing adjustments made for corporate income tax purposes should be reported to the customs authorities, unless the
adjustments relate to items that are not dutiable for customs purposes. A request for a refund of customs duties, in the event that the import prices are adjusted downwards, should be submitted within three years of the date of actual importation. In the event that the import prices are adjusted upwards, an adjustment should be reported to the customs authorities. The customs authorities then issue an assessment for the underpaid customs duties. The customs authorities can impose an additional assessment within three years of the date of actual importation. In cases where the customs authorities feel that the underpayment of customs duties was a deliberate action to avoid payment of customs duties, the period for assessing the duties may be extended to five years. Recently, the customs authorities have raised more queries on the intragroup purchase prices in situations where the group company purchasing the goods has little or no real economic risk. This may apply to distribution centres with a cost plus remuneration but which are still part of a buy/sell structure, or to low-risk distribution companies. In these situations, the customs authorities may attempt to argue that the intragroup purchase price, although in line with the transfer pricing policy, does not qualify as transaction value according to the customs valuation regulations. This is because the customs authorities believe the purchase prices do not represent normal market prices, due to lack of economic risk by the purchasing company. In addition, the customs authorities will verify whether there are additional payments with respect to the imported products (e.g. royalties) and if so whether these should be included in the customs value and thus become subject to customs duties. Therefore, it is advisable to also consider customs valuation issues when implementing transfer pricing or corporate income tax arrangements (this is relevant only when the imported products are subject to an actual duty levy). Furthermore, if the customs authorities do not accept a transaction value, some questions need to be dealt with from a value added tax perspective (i.e. who may deduct the value added tax at import and what is the value added tax status of the service provider in the case of a cost plus arrangement).

**OECD issues**
The Netherlands is a member of the OECD, and according to the transfer pricing decrees of 30 March 2001 and 21 August 2004, the OECD Guidelines are directly applicable in the Netherlands. Also, the explanatory memorandum to the October 2001 proposals on the transfer pricing legislation, effective from January 2002, reconfirms the adoption of the OECD Guidelines by the Dutch tax authorities.

**Joint investigations**
In principle, the Netherlands could join with another country to undertake a joint investigation of a MNE for transfer pricing purposes. In the few circumstances when a joint investigation has taken place, it was usually initiated by the foreign tax authorities.