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

Directorate-General for Tax Policy and Legislation, Consumer Taxes, Customs and International Affairs

Decree of 14 June 2022, no. 2022-0000139020, Government Gazette 2022, no. 16685

The State Secretary for Finance has ordered as follows.

This Decree elaborates on the application of the arm's length principle. In 2002 the arm's length principle was codified in the Netherlands by article 8b of the Corporation Tax Act 1969 (VPB 1969).[1]

There is consensus among the OECD[2] *member countries on the arm's length principle set out in article 9 of the OECD Model Tax Convention. Further details are provided in the OECD Commentary on article 9 of the OECD Model Tax Convention and in the OECD Guidelines.*

The term 'multinational enterprise' or MNE occurs often in the OECD Guidelines. A multinational enterprise is defined in the OECD Guidelines as a company that is part of an MNE group. An MNE group is defined as a group of associated companies with business establishments in two or more jurisdictions. In this Decree, 'group' means a group of associated companies that operate nationally and/or internationally.

In this Decree, 'chapters', 'sections' and 'paragraphs' refer to the OECD Guidelines 2022, unless stated otherwise.

1. Introduction

1.1 Abbreviations and terms

AWR	State Taxes Act
BEPS	Base Erosion and Profit Shifting

[1] The arm's length principle is also codified in article 3.2 of the Withholding Tax Act 2021. The interpretation of the arm's length principle in this Order also applies to article 3.2 of the Withholding Tax Act 2021.
[2] Organisation for Economic Co-operation and Development.

CCA	Cost Contribution Arrangement
CUP	Comparable Uncontrolled Price
DEMPE	Development, Enhancement, Maintenance, Protection and Exploitation
DVL	Financial service entity
MNE	Multinational enterprise
NOW	Temporary Emergency Bridging Measure for Sustained Employment
OECD	Organisation for Economic Co-operation and Development
OECD Guidelines	Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
ORA	Options Realistically Available
R&D	Research & Development
TNMM	Transactional Net Margin Method
VPB 1969	Corporation Tax Act 1969
WACC	Weighted Average Cost of Capital
WEV	Open market value

1.2 Reason for this Decree

This Decree replaces the Decree of the State Secretary for Finance of 22 April 2018, no. 2018-6865, Government Gazette 2018, 26874. This Decree addresses, *inter alia*, recent developments that have led to changes to the OECD Guidelines. Insofar as these changes further clarify the application of the arm's length principle, I am of the opinion that these amendments also apply to years in which these changes were not yet published.

Key changes compared with the previous Decree are:
- Amendment of the section on financial transactions;
- Amendment of section 6 of this Decree on intra-group services;
- Expansion of the section on government policy, with a subsection on government support measures in response to the COVID-19 pandemic, for example; and
- Textual changes to bring the terminology more into line with that used in the OECD Guidelines and in Dutch legislation.

In the past years, the OECD Guidelines have changed, also as a result of the BEPS[3] project. The OECD Guidelines are still being developed and will continue to be regularly expanded and amended in the future. If necessary, this Decree will be replaced by a new Decree in response to new developments.

1.3 Transfer prices and supervision

When assessing transfer pricing, it should be borne in mind, as also stated in the OECD Guidelines, that determining transfer prices is not an exact science. Therefore tax administrations are encouraged to be flexible in their approach and not to demand taxpayers to determine their transfer prices with an accuracy that is unrealistic in view of all the facts and circumstances. The Dutch Tax Administration will take these principles

[3] Base Erosion and Profit Shifting.

into account.

In the field of transfer pricing, constructive cooperation between the Tax Administration and the taxpayer is appropriate. It is important for each party to understand the position and interests of the other.[4]

1.4 Certainty in advance

A taxpayer can obtain certainty by making advance pricing arrangements. As to whether or not it is possible to obtain certainty about the application of the arm's length principle in international relations, the Decree of 19 June 2019, no. 2019/13003 (Government Gazette, 28 June 2019, no. 35519)[5] on prior consultation regarding rulings of an international nature is relevant.

1.5 Relationship with the OECD Guidelines

The OECD Guidelines are intended to provide insight to how the arm's length principle should be applied in practice. In addition, internationally the OECD Guidelines play an important role in the application of treaties and the avoidance of no or double taxation. As the OECD Guidelines provide an internationally accepted interpretation of the arm's length principle, I hold the Guidelines as an appropriate explanation and clarification of article 8b of the Corporation Tax Act 1969.

On several topics the OECD Guidelines leave room for own interpretations. On other topics, practice requires clarification of the OECD Guidelines. On these topics this Decree provides insight to the Dutch viewpoints and, where possible, removes ambiguities.

If the interpretation and/or application of the OECD Guidelines leads to a situation where a transfer price dispute arises within an internationally operating group which may result in part of the group's profits not being subject to profit-based taxation, the Tax Administration may deviate from the interpretation in this Decree to prevent the transfer price difference, provided this leads to an outcome based on the arm's length principle.

1.6 Relationship with the EU Joint Transfer Pricing Forum

A major task of the EU Joint Transfer Pricing Forum is to eliminate double taxation and remove administrative obstacles to the efficient application of the arm's length principle. The Netherlands follows the recommendations of the EU Joint Transfer Pricing Forum as much as possible, except where it makes a reservation.

[4] The foregoing does not alter the fact that there may be situations where there is non-arm's length profit shifting and action is required. In such cases, the Tax Administration will assess the extent to which the imposition of a fine is appropriate in the light of the relevant facts and circumstances. Departures from the policy set out in this Order will not automatically lead to the imposition of a fine.
[5] Including subsequent amendments to this Order, such as that of 9 August 2021, no. 2021 – 16465.

1.7 Coordination of implementation

At the Tax Administration, coordination of implementation in the area of transfer pricing is in the hands of the Transfer Pricing Coordination Group (Decree no. 2018-4380 establishing the Transfer Pricing Coordination Group).

In the fight against non-arm's length profit shifting, the Tax Administration's Transfer Pricing Coordination Group will, if necessary, work with the Tax Havens and Group Financing Group and the Anti-Tax Avoidance Coordination Group.

2. Application of the arm's length principle (chapters I and III)

2.1 Introduction

The starting point of the arm's length principle is that for tax purposes associated entities are assumed to act towards each other under the same conditions as independent companies would act in similar circumstances. This means that a result must be achieved in which the taxable profit made by associated entities on their transactions with each other is comparable with the profit that independent entities would make in similar circumstances with similar transactions.

Given the importance of the arm's length principle, this section will first describe the general view on the application of this principle as set out in this Decree and the OECD Guidelines.

2.2 Characterisation of the transaction

Every transfer pricing analysis must be based on a good understanding of the role of each member of the group, the commercial and financial relations between them and the transactions (whether identified by the group or not) in which those relations are expressed (see paragraphs 1.34, 1.35 and 1.50).

Before the price of a specific transaction between associated parties can be determined, the transaction as such must be characterised ('delineation of the actual transaction'). This requires an analysis of the economically relevant characteristics of the transaction, based on all the characteristics set out in paragraph 1.36.

The starting point in the delineation of the actual transaction, prior to the application of the arm's length principle, is the transaction as structured between the associated parties with contractual terms in the agreement(s), if necessary supplemented with information from other documents on mutual rights and obligations.

This information must then be supplemented with an analysis of the other economically relevant characteristics of the transaction. All this information together provides insight into the actual conduct of the parties involved. If the actual conduct does not correspond to the contractual elements of the transaction, the actual conduct will in general be decisive for the characterisation of the transaction.

An analysis must be prepared of the functions performed and the economically relevant risks associated with the transaction. The analysis of the risks in a controlled transaction should consist of the steps set out in paragraph 1.60.

In practice, situations are conceivable in which several parties exercise control (see paragraph 1.65) over the risks and have the financial capacity (see paragraph 1.64) to bear those risks, while only one of those parties has contractually assumed the risks. In such cases, paragraph 1.94 stipulates that the contractual risk allocation is to be respected. This does not alter the fact that the other party or parties must be compensated at arm's length for exercising the control function performed by that party or those parties. Paragraph 1.105 stipulates that this compensation, if commensurate with the contribution to the control function, can also be a share in the upside and downside consequences of the risks. In my view, this means that in such cases the transactional profit split method (see section 3 of this Decree) may be appropriate. It does not seem at arm's length that, on the basis of paragraph 1.94, a party which bears risks under the contract but actually makes only a partial contribution to control is allocated all downside and upside consequences of the risks concerned while the other party or parties receive limited, routine compensation. If the risk allocation used by the parties concerned actually occurs in comparable transactions in comparable circumstances between independent parties, the conclusion of this analysis could be different.

After all the steps in the analysis of the risks have been taken, the transaction is characterised. This characterised transaction can therefore deviate from what has been contractually agreed between the associated parties or their interpretation thereof. On the basis of the characterised transaction, an appropriate price must be determined, taking into account the arm's length risk allocation. In principle, this should be done on the basis of comparable transactions between independent parties that result from a comparability analysis. The economically relevant characteristics mentioned in the OECD Guidelines also form the elements of this comparability analysis.

2.3 Disregarding the transaction

In the OECD Guidelines, questioning a transaction as such is only possible if the characterised transaction (including the possible adjustment of the risk allocation), viewed in its totality, differs from what independent parties acting in a commercially rational manner would have agreed in similar circumstances, so that it is not possible to set a price acceptable to all parties. The perspective of both parties and the options realistically available (ORA) to each of them must be taken into account at the time the transaction is entered into (see paragraphs 1.142 to 1.144). In this situation, the consequences of such a transaction should be disregarded for tax purposes.

Paragraph 1.142 provides the possibility to question the transaction itself in extreme cases. This prevents the contractual design from making the application of the arm's length principle impossible. If possible and appropriate, according to this paragraph, the transaction can be replaced by an alternative transaction for which arm's length conditions can be found. This alternative transaction should be based as much as possible on the established facts and circumstances of the case (see paragraph 1.144).

Disregarding the transaction and possibly replacing it with an alternative transaction take place for the purpose of determining the taxable profit.

Paragraphs 1.11 and 1.142 recognise that associated parties enter into transactions that independent parties would not enter into. In such situations, a comparison of conditions within the meaning of paragraph 1.6 with conditions agreed in comparable transactions between independent parties is not possible. However, the mere fact that comparable transactions between independent parties cannot be found does not mean that the controlled transaction is not arm's length. In such a case, it will have to be examined whether conditions can be found under which it is conceivable that independent parties acting in a commercially rational manner would enter into such a transaction in comparable circumstances. It must then be determined whether these conditions match the conditions of the controlled transaction. If arm's length conditions for the relevant transaction can be found in this way, these must be used and the transaction as such must be recognised.

2.4 Comparability analysis

The functional analysis of the parties involved in the transaction, which is important in the delineation of the actual transaction , is also an essential part of applying the arm's length principle and the required comparability analysis. After all, the functions performed, the associated risks assumed and the assets used determine the remuneration for the parties involved.

In the context of paragraph 1.6, the price is only one of the conditions (see paragraph 1.7). A number of principles play an important role in this comparison of conditions. For example, paragraph 1.38 stipulates that account must be taken of the ORA. It is also important that the conditions should be compared from the perspective of all parties involved in the transaction.

If only the price of the controlled transaction deviates from the price that would have been established between independent parties, a price adjustment can be made for tax purposes. When adjusting the price and/or other conditions of an individual transaction or specific group of transactions, an analysis must be made, depending on the facts and circumstances of the case, of whether there is still an arm's length profit for the entity concerned after that adjustment, given the functions performed, the assets used and the risks assumed. In some cases, the price and/or other conditions of other transactions with other group entities may also have to be adjusted if they have not been determined in accordance with this Decree.[6]

2.5 Aggregation of transactions (paragraphs 3.9 to 3.12)

Based on the OECD Guidelines, arm's length compensation must in principle be determined on a transactional basis. Such a determination on a transactional basis can lead to problems in practice. If an assessment per transaction is not really possible, for instance because there are a large number of similar transactions, the transactions can

[6] A downward adjustment is not always possible.

be assessed on an aggregated basis in order to determine the arm's length character. In that situation, the taxpayer is expected to be able to demonstrate that the transfer price taken into account with regard to the aggregated transactions as a whole complies with the arm's length principle.

The following should be taken into account, partly with a view to avoiding double taxation and double non-taxation. If the transactions have been or will be entered into with various entities and a transfer pricing method that does not directly correspond to an individual transaction is applied, it must always be possible to trace which part of the total profit relates to which entity. Only in this way can it be determined to which part of the profit (by using that transfer pricing method) which transactions with which entity relates .

2.6 The use of the arm's length range (paragraphs 3.55 to 3.66)

Sometimes it is possible to arrive at a single transfer price that reliably reflects the conditions of a transaction agreed at arm's length. Because transfer pricing is not an exact science, however, it will often be the case that the application of one or more transfer pricing methods leads to a range of transfer prices based on a certain degree of comparability.[7] This raises the following question: which observations are appropriate to determine the arm's length nature of the transaction (the arm's length range) and to which observation must an adjustment be made if the transfer price applied is outside that arm's length range.

In determining an arm's length range, a distinction must be made between situations in which the comparables consist of highly reliable figures and a situation where use is made of comparables which, in terms of comparability, have shortcomings which cannot be qualified and/or quantified. In the first situation, the range is composed of all comparables. In the second situation, the use of statistical methods, such as the interquartile range, can improve the reliability of the comparables. The use of such statistical methods reduces the range, so that a relevant arm's length range remains which is expected to consist of better comparables.

After the arm's length range has been determined, an assessment must be made to verify whether the price of the transaction(s) falls within this range. If the compensation falls within the range, no adjustment will be made (see paragraph 3.60). If the compensation falls outside the range and the taxpayer cannot provide adequate reasons for this, an adjustment will be made. In the first situation described in the previous paragraph, an adjustment can be made to any point in the range. If it is plausible that one specific point within the range best matches the conditions of the transaction, an adjustment should be made to this point. In the second situation described in the previous paragraph, I am of the opinion that an adjustment should be made to the median (see paragraph 3.62) to reduce the risk of errors due to unknown or unquantifiable comparability defects,.

[7] Ranges can also relate to margins, for example when using the transactional net margin method (TNMM) as an appropriate transfer pricing method.

2.7 Use of multiple year data (paragraphs 3.75 to 3.79)

When assessing a transaction, it can be useful to examine data covering multiple years. The use of multiple year data can prevent adjustments being applied in a certain year whereas, when several years are considered, the group member in question receives compensation that is in line with the arm's length principle. However, application of multiple year data can also lead to insights developed later being used to assess a situation that occurred previously (hindsight). The OECD Guidelines indicate that tax administrations are not allowed to use hindsight. Therefore, when using multiple year data, only data from the year in question and previous years can be used. An example of this is working with a moving average. This leads to the following methodology:

- First it is assessed whether the compensation for the transaction to be assessed lies within the arm's length range determined for the year in question. If the compensation lies within the annual range, no adjustment is applied.
- If the compensation lies outside the annual range, the above assessment is repeated on the basis of moving averages over a number of years. The length of the period will partly depend on the length of the life cycle of the product or service. If the average compensation for the transaction being assessed falls within the multiple year range, no adjustment is applied.
- If the compensation lies outside both the arm's length annual range and the arm's length multiple year range, an adjustment is applied in accordance with section 2.6 of this Decree.

2.8 Government policy

2.8.1 The effect of government policy (paragraphs 1.152 to 1.156)

Some government interventions can be regarded as market factors in the country concerned and must be taken into account as such in the transfer price. Paragraph 1.156 describes two possible approaches in a situation where, for instance, a country prevents or blocks the payment of an amount of money.

Under Dutch tax law, the compensation related to the deliverable must be recognised in the result, however it may be in accordance with good business practice to (partly) write down a receivable that has arisen in connection with the provision of deliverables. The costs associated with the transaction can be taken into account in this regard.

2.8.2 Grants, tax incentive measures and partly deductible costs

In situations where a cost-related remuneration is used to determine the arm's length price, it is commonly asked whether grants and tax benefits received can be deducted from the cost base.

In the Netherlands, it can be assumed that grants are deductible from the cost base if there is a direct connection between the grant and the provision of the product or service, and compensation is granted in the form of a discount on or a contribution to the costs. Examples include a grant for the use of more expensive but more

environmentally friendly raw materials, a bonus on the acquisition of an energy-efficient business asset or a contribution under the investment allowance scheme (IPR). Reductions in tax and social insurance remittances referred to in section 3 of the Salaries Tax and Social Insurance Contributions (Reduced Remittances) Act reduce the wage costs and also the cost base on which the profit mark-up is calculated.

Conversely, extra levies, for instance for the use of environmentally harmful raw materials, lead to an increase in the cost base applied.

Grants and tax benefits which are awarded to the entity as such and have no causal connection with the activity to which a cost-related remuneration is attributed are not deductible from the cost base used. In so far as they belong to the taxable profit, they are credited separately to the profit and loss account.

If tax allowances are granted in the form of a deduction from the taxable profit, such as the investment tax credit, they are not deductible from the cost base. First the profit is calculated on the basis of the allocated costs and then the allowance is deducted separately from the taxable profit.

Under tax legislation, certain cost categories are only deductible to a limited extent, for instance the costs referred to in article 3.14 of the Income Tax Act 2001 in conjunction with article 8 of the Corporation Tax Act 1969, the costs of depreciation of buildings pursuant to article 3.30a of the Income Tax Act 2001 in conjunction with article 8 of the Corporation Tax Act 1969 and the costs referred to in article 10, paragraph 1 (j) of the Corporation Tax Act 1969. These costs are part of the cost base on which the profit mark-up is calculated. The restriction on deducting these costs is applied by adding the non-deductible part of the costs to the profit when determining the taxable profit.

2.8.3 Support measures

Certain events can have a major impact on the economy and companies' (financial) situation. An example of such an event is a credit crisis or a pandemic, such as the COVID-19 pandemic. The Dutch government can take various support measures in relation to these and similar events. A recent example of such a support measure is the Temporary Emergency Bridging Measure for Sustained Employment (NOW).

Entities face the question of how a support measure (such as the NOW) affects the conditions (including the price) used by parties in their mutual legal relationships and what the consequences of such measures are for taxation. This applies, for example, in situations where a cost-based remuneration has been agreed between associated parties.

In applying the arm's length principle, it should be assessed whether comparable independent parties receiving such support take account of this government contribution in the conditions (including the price) of their transactions. It is plausible that a large decrease in turnover and/or a temporary halt in production due to a risk that cannot be influenced may cause independent parties to renegotiate their conditions (including the price). The consequences of the aforementioned risk will lie with the most obvious party

or parties. In these renegotiations the parties may take into account the possible granting of a support measure (such as the NOW) to one or more parties.

If support received or expected to be received plays a role in the conditions of transactions between independent parties, this also applies to the conditions of transactions between associated parties under article 8b of the Corporation Tax Act 1969. For controlled transactions, the support measure can therefore also be a reason to amend the conditions (including the price), taking into account the support measure (such as the NOW) which one or more parties may receive.

If a taxpayer wishes to amend the conditions (including the price) due to the support received or expected to be received, the taxpayer must make a plausible case that comparable independent entities would, in similar circumstances, have agreed to a similar amendment. Such an amendment must be made at arm's length and must not be aimed at achieving a reduction in turnover that may provide entitlement to the support measure.[8]

2.9 Requests for reduction of a transfer pricing adjustment (paragraphs 3.13 to 3.17)

If, as a result of a tax audit, the Tax Administration proposes an adjustment of a transfer price applied in respect of a certain transaction, the taxpayer may request a reduction of the adjustment if it is of the opinion that the Tax Administration's proposal does not take account of an intentional set-off in (an)other transaction(s). Under the OECD Guidelines, tax administrations have a discretionary power as to whether or not to grant such requests. The distinction in the OECD Guidelines between making a plausible case for an intentional set-off when submitting a tax return and asserting (and making a plausible case for) an intentional set-off at the moment that adjustments are proposed following a tax audit is not relevant to Dutch practices. In both cases the taxpayer retains its statutory right to lodge an objection and apply for judicial review.

3. Transfer pricing methods (chapter II)

3.1 Introduction

The OECD Guidelines discuss five transfer pricing methods. Depending on the circumstances, one of these methods should be chosen.[9]

The Dutch Tax Administration will always start its transfer pricing audit from the perspective of the method used by the taxpayer at the time of the transaction. In principle, the taxpayer has the liberty to choose a transfer pricing method, provided that

[8] See also article 6a, paragraph 4 (a) of the first Temporary Emergency Bridging Measure for Sustained Employment (similar provisions are included in article 7, paragraph 3 (a) of the second scheme and article 6, paragraph 3 (a) of the third scheme), which lays down the condition that the decrease in turnover must not result from changes to transfer pricing rules or accounting policies. However, a price adjustment *is* allowed if it falls within the transfer pricing methodology ('transfer pricing rules') already applied by the group if it is found that independent parties in similar situations also make a price adjustment.

[9] See paragraph 2.9 when it's possible to deviate from these methods.

the chosen method leads to an arm's length result for the specific transaction.

In certain situations, however, one method will be more suitable than another. Although a taxpayer is expected to take into account the reliability of the method for the situation in question when choosing a transfer pricing method, it is explicitly not necessary for the taxpayer to assess all methods and then explain why the method it has chosen in the given circumstances leads to the best outcome (the best method rule). In some situations, a combination of methods can also be used. A taxpayer is not obliged to use multiple methods. A taxpayer will have to make a plausible case for its choice.

In general, it can be noted that the comparable uncontrolled price (CUP) method is difficult to apply in practice because comparable uncontrolled transactions are hardly available.[10] This is one of the reasons why, in practice, the TNMM is often used as transfer pricing method.

If a transfer pricing method is chosen where the results of the transactions of one of the associated parties are compared with the results of comparable transactions of independent parties, the basic principle is that this comparison is made with the associated party with the least complex functions (the 'tested party'; see also paragraph 3.18). In general, this will not be the party which, in view of its functions, assets and risks, is entitled to the proceeds with a strong relationship to the intangible fixed assets in use.

3.2 Points to consider when applying cost-based transfer pricing methods

In the case of the cost plus method and the TNMM (with a profit margin on the costs as a profit level indicator), the determination of the cost base is an essential part of applying the method.

3.2.1 Budgeting versus actual costs

In general, prices will be determined in advance on the basis of the budgeted costs associated with the transactions. If the actual costs are higher than these budgeted costs, it depends on the cause of this difference whether this will lead to a price adjustment. In general, it can be assumed that higher costs due to inefficiency will be borne by the contracting party performing the activities. After all, it is the contracting party that can influence these costs. An independent party will not accept a price adjustment in this situation.

A condition for correct determination of the transfer prices based on budgets, is that these budgets are set in a commercially correct way.

[10] An exception to this is financial transactions, because comparable uncontrolled transactions *can* often be found for financial transactions.

3.2.2 Cost base and disbursements

Paragraph 2.98 describes that a transfer pricing method that bases the transaction-related profit on the costs is only appropriate if these costs are the relevant indicator of the value of the functions performed, assets used and risks assumed. In such a situation, this means that the costs that do not constitute a relevant indicator for this value should not form part of the cost base for calculating the profit.

Although paragraph 2.99 states that when the TNMM is applied and the profit is related to the costs incurred, the full costs are often included in the base, the possibility is left open to keep part of the costs outside the base if an independent party would be prepared not to make a profit in relation to such costs in a similar transaction.

For an illustration of the above, see paragraph 7.34 where it is concluded that an (associated) agent that purchases services from an independent party is only entitled to a mark-up on the costs with a relation to its own functions, assets and risks. The (associated) agent is not entitled to a mark-up on the costs of the services provided by independent parties.

Costs with a 'disbursement' character remain outside the cost base on which a profit mark-up is calculated. Well-known examples of disbursements are costs that are initially paid by the contracting party, but are generally charged separately to the client, such as legal fees, court fees and costs of services provided by third parties.

The costs of raw materials that are processed by a producer, without this party given its functionality[11] exercising control over the risks associated with those raw materials, can in general also be left out of the cost base. This is because, in such a case, only the operational costs of this producer are, in principle, the relevant indicator for the value of the functions it performs, the assets used and the risks assumed.[12] The above applies irrespective of how the raw materials in question are accounted for.

3.2.3 Cost-related remuneration for sales of goods through an intermediary

In practice, a party that is a member of a group may sell goods through an associated Dutch intermediary that does not itself carry out relevant sales activities but mainly provides administrative services for the sales transaction. The sales realised in such cases are sometimes recognised in the annual accounts (profit and loss account) of the intermediary.

Paragraph 2.39 stipulates that an associated intermediary of this kind, which does not perform any economic function in the value chain that increases the value of the goods, or which bears no risks in relation to the sales activities on the basis of the characterisation of the transaction, should not obtain a share in the profit, because it would not have been granted this in the case of independent parties. Such an intermediary will in principle have to be rewarded with a profit mark-up based on its own

[11] For example if the producer in such cases does not perform any relevant functions with respect to the purchase of the raw materials.
[12] Such a manufacturer is usually referred to as a toll manufacturer.

relevant operational costs, including the costs related to its administrative services, and not through a turnover-related remuneration.

3.3 Valuation methods (sections D.2.6.3 and D.2.6.4 of chapter VI)

Valuation methods, and in particular the discounted cash flow method, may be used depending on the facts and circumstances by taxpayers and the Tax Administration as part of the five transfer pricing methods or as a valuation method that can be used to determine an arm's length price when using or transferring an intangible asset. The OECD Guidelines set out points to consider regarding the use of valuation methods and the interpretation of the various parameters.

It is important that paragraph 6.157 prescribes that the valuations must take place from the perspective of all parties involved in the transaction in order to arrive at an arm's length price. The arm's length price will then be between the value of the intangible asset from the seller's perspective and the value from the buyer's perspective (unless the value from the seller's perspective is higher than the value from the buyer's perspective). The value resulting from the application of a valuation method is therefore not the same as the arm's length price for the transaction.

When determining the arm's length price, the tax consequences of the transfer must be taken into account. In the event of a transaction, the seller's perspective must take account of the possible taxability of the book profit resulting from the transfer of the (intangible) asset. The seller will want to be compensated for this. In the event of a transaction, the buyer's perspective must take account of the consequences of possible tax benefits from the amortisation of the (intangible) asset acquired (see paragraph 6.178 and example 29 in chapter VI).

A transaction where the value from the seller's perspective is higher than the value from the buyer's perspective will not take place between independent parties acting in a commercially rational manner. After all, both parties have a better alternative, namely not entering into the transaction. In such cases, section D.2 of chapter I is applicable.

Paragraphs 6.170 to 6.173 look at the discount factor for determining the present value of the expected future cash flow. With regard to the choice of the correct discount factor, based for example on the weighted average cost of capital (WACC), the risk profile of the parties involved, the asset to be valued and the activity to be valued must be taken into account.

4. Secondary adjustments (paragraphs 4.68 to 4.78)

Paragraphs 4.68 to 4.78 deal with the consequences of secondary transactions. In many countries, the application of a transfer pricing adjustment is not restricted to an adjustment to the profit, but the accounts must also demonstrate how the adjustment has been processed in the profit and loss account and the balance sheet of the taxpayer by creating a secondary transaction. A secondary transaction can for instance be a set-off in the current account, a distribution of profit or an informal capital contribution. From the Dutch point of view, a secondary transaction is, in principle, necessary for

processing of the transfer pricing adjustment.[13] A secondary adjustment can arise from a secondary transaction, for instance taking into account interest on the ensuing receivable or a subsequent dividend tax assessment on a profit distribution.

Not all countries have the same system. This may lead to a situation where the other state involved is not prepared to set off the, for instance, dividend tax levied as a secondary adjustment, because the fictitious dividend payment is not acknowledged. If the taxpayer makes a plausible case that the other state involved cannot offset the dividend tax (as the secondary adjustment) and there is no abuse aimed at avoiding dividend tax, the secondary adjustment is omitted.

The levying of dividend tax as a secondary adjustment will not be omitted if the other state involved is designated in the Decree on Low-Tax States and Non-Cooperative Jurisdictions for Tax Purposes[14] in the year in which the secondary adjustment is made.

5. Tangible/intangible fixed assets

5.1 Transactions concerning tangible/intangible fixed assets

The transfer of tangible/intangible fixed assets to a group company will not satisfy the arm's length principle if this group company does not add value to the relevant assets, because it lacks the required functionality and is therefore unable to control the risks relating to the asset.

On the basis of the arm's length principle, associated parties are expected to strive for profit maximisation. Independent parties will normally only enter into a transaction relating to a tangible/intangible fixed asset if both can expect an increase in their own profit. This expectation is only a realistic possibility for the seller and buyer if it involves an increase in the joint profits of the buyer and seller compared to the joint profits of both without the transaction. The expected profit increase can only occur if the buyer adds value in in one way or another. This is only possible if the buyer possesses the relevant functionality and is therefore able to control the relevant risks. If there is no expected increase in the joint profit, the bid price of a potential buyer will be lower than the price asked by a potential seller. In that case, the transfer of the asset is not commercially rational and will not take place, partly because the transfer also entails (transaction)costs. Such a transaction between associated parties is not in line with the arm's length principle.

In addition, in the arm's length assessment, attention must be paid from the perspective of both the seller and the buyer to whether the seller and/or the buyer have other options realistically available. In the situation described above, it is a realistically available and more attractive option for both the seller and the buyer not to enter into the transaction. The total operating profit that the parties would achieve jointly is no higher than if the transfer had not taken place. Because the transfer would be accompanied by extra (transaction)costs (for example, the drafting of contracts), the

[13] This may work out differently if sections 8ba et seq. of the Corporation Tax Act 1969 apply.
[14] Order of the State Secretary for Finance of 31 December 2018 designating low-tax states and states on the EU list of non-cooperative jurisdictions for tax purposes.

joint operational result is expected to be even lower than if no transfer had taken place.

Sometimes the buyer of a tangible/intangible fixed asset is established in a low-tax jurisdiction. The mere fact that the buyer is established in a low-tax jurisdiction does not lead to an increase in the joint profit if the buyer does not have the relevant functionality in relation to the asset in question. In a situation where the functionality in relation to the tangible/intangible fixed asset remains with the seller after the transfer, the buyer will become entirely dependent on the seller for the future value development and the exploitation of the asset. In the case of independent parties, the buyer cannot expect an operating profit. As a result, under arm's length conditions, it cannot benefit from the lower tax rate.

On the basis of the arm's length principle, the difference in profit resulting from the use of conditions deviating from those that independent entities would have used must be eliminated from the taxable profit of the Dutch seller. This is the difference in profit compared with a situation where the transfer did not take place.

For an illustrative example, see example 1 in paragraph 1.145 and the example in paragraphs 9.122 to 9.124.

In some situations, the legal ownership of tangible/intangible fixed assets is held by group entities without a preceding transfer by another group entity. If the legal owner also lacks the relevant functionality in these situations, the treatment by the Tax Administration will take place in accordance with the principles outlined in this section. This means that only a relatively limited remuneration can be attributed to the legal owner of the tangible/intangible fixed asset if it does not perform the relevant functions in respect of the asset.

The OECD Guidelines often refer to the DEMPE functions in describing relevant functions regarding intangible fixed assets. These functions relate to Development, Enhancement, Maintenance, Protection and Exploitation. Depending on the facts and circumstances, an assessment must be carried out of the relative importance of the various DEMPE functions. In general, the Development and Enhancement functions will be given more weight in the assessment of the relative contribution to the value of the intangible asset in question than the Maintenance, Protection and Exploitation functions.

5.2 Determination of the arm's length price when the valuation at the time of the transaction is highly uncertain (paragraphs 6.181 to 6.185)

When transferring intangible assets, it can be difficult to determine the value at the time of the transfer, because insufficient insight exists into the future benefits and risks. Paragraph 6.185 notes that if independent entities would have agreed a price adjustment clause in similar circumstances, a tax administration should be permitted to determine the pricing on the basis of such a clause.[15] This refers to an arrangement in which the compensation is in line with the benefits that the intangible asset generates in

[15] Paragraph 6.185 also leaves open the possibility of renegotiation if independent parties would also have renegotiated in the case of anomalous values.

the future. Agreeing a benefit-dependent payment helps to ensure that taxation is more in line with the benefits actually achieved.

The Dutch Tax Administration will also take the position that it is not arm's length to agree on a fixed price if the valuation at the time of the transaction is highly uncertain and independent parties acting in a commercially rational manner would not have agreed on a fixed price in a similar situation. In such cases, for example, an adjustment clause should be included in the agreement between the associated parties where the price is partly dependent on the benefits generated by the intangible fixed asset in the future.

An example is a situation where a new intangible asset has been developed that is transferred to an associated entity at a time when its success is still insufficiently visible, for example because the intangible asset has not yet generated any revenue and the estimation of its future revenues is linked to major uncertainties. In this situation, the valuation at the time of the transaction is highly uncertain and the inclusion of a price adjustment clause is reasonable.[16] It should be noted that a price adjustment clause may lead to both an upward and a downward adjustment of the price originally agreed.

5.3 Hard-to-value intangibles (paragraphs 6.186 to 6.195)

In the case of the transfer or licensing of intangible assets as described in paragraph 6.189, it is difficult for the Tax Administration to assess the value in relation to the present transactions due to major uncertainties regarding future value development. In these cases, the Tax Administration can use the results actually realised with the relevant intangible assets when assessing the arm's length nature of the price at the time the transaction occurred.

The Tax Administration can still bring the price determined at the time of entering into the transaction up for discussion if, with a reference to the results actually realised, it is found that:

- there are major discrepancies between the results achieved and the expectations and resulting forecasts that formed the basis for the price determination at the time of the transaction; and
- these discrepancies cannot be explained on the basis of facts and circumstances occurring after the date of the price determination.

A major discrepancy is a difference of over 20% compared with the projections that formed the basis for the price originally set. The intangible assets will not be regarded as hard-to-value intangibles if such a discrepancy occurs only after a period of five years after revenues were realised for the first time with the intangible asset in transactions with independent parties.

[16] See also the Supreme Court judgment of 17 August 1998, no. 32997, ECLI:NL:HR:1998:AA2288.

5.4 The purchase of shares in an independent entity followed by a business restructuring

In practice, it often happens that an entity belonging to a group buys shares in an independent entity, after which the intangible assets present in it are transferred to another entity within the group. This can lead to discussions between taxpayers and the Tax Administration about the arm's length price to be determined for the transfer of the intangible assets. Prior to this, it is important to determine whether, in addition to the legal ownership of the intangible assets, the associated functionality and the related risks are also transferred. The other sections of this Decree (including sections 5.2 and 5.3) also apply thereto in full.

In paragraph 6.147 and example 23 in the annex to chapter VI, it is stated that the arm's length price for the shares of the purchased entity contains useful information for the valuation of this entity. I am therefore of the opinion that the acquisition file (with the exception of those elements that taxpayers can show to be irrelevant for tax purposes), which is usually held by the buyer of the shares, is an essential part of the transfer pricing documentation to be provided by the taxpayer in support of the price of the intangible fixed assets transferred.

In addition, when determining the arm's length price for the transfer of the intangible assets, in any case chapters VI and IX play a role. Attention should also be paid, *inter alia*, to the allocation of the expected synergy benefits, the tax interpretation of the control premium, the valuation of the routine function(s) that remain behind (taking into account the assets used and risks incurred) and the effects of taxes.

Although the price of the purchased shares is arm's length because the seller is an independent party, this does not imply that the value of the shares for the buyer is equal to this price. On the contrary, the buyer will generally only make a purchase if it expects to create more value with the acquired entity than the price it has to pay for it. The value that the buyer of the shares, when determining their value, has assigned to the intangible assets in the acquired entity may well be a good indicator of the minimum price it would like to receive when transferring these assets.

In addition, in the case of a transfer of the intangible assets, the seller must take account of the fact that, in contrast to a transfer of shares, corporation tax will have to be paid on any book profit in the event of a transfer of the assets. In general, the seller will, taking into account the corporation tax payable, want to receive at least a sales return equal to the value it attributes to the intangible assets plus the tax due on a possible book profit.

The Tax Administration is sometimes confronted with situations where the entrepreneurial functions and associated intangible assets of an acquired entity are transferred to another group member and only a routine function is left behind in the acquired entity. In such cases, the transfer price is sometimes determined by taxpayers by deducting the expected 'perpetual' cash flow of the routine function (discounted using a discount factor based on this routine function) from the discounted expected total cash flow of the acquired entity if no transfer had taken place. When assessing a transfer

price determined in this way, the Tax Administration will generally take the view, especially if only one (exclusively) controlled contract is left behind, that the expected cash flow of a routine function cannot be discounted as perpetual, because such functions can be replaced relatively easily in the market and, partly for that reason, contracts with such functions generally have a relatively short duration.

5.5 The determination of the remuneration for the use of intangible assets

In practice, the remuneration for the use of intangible assets by taxpayers is often determined using royalty percentages from various databases. The question, however, is whether this publicly available information is sufficiently detailed to conduct a comparability analysis in a responsible manner. The OECD Guidelines state that in the case of intangible assets, a comparability analysis will in any event often show that no comparable uncontrolled transactions can be found. The Tax Administration will therefore critically assess the use of such databases.

In analyses in which the resale price method, the cost plus method or the TNMM is the most appropriate method, the entity with the least complex functions, which does not use its own intangible assets, is chosen as the tested party. In such cases, an arm's length price or an arm's length profit for the tested party can be determined without having to determine the value of an intangible asset used in the transaction itself. Paragraph 6.141 stipulates that the one-sided methods mentioned above are themselves not reliable methods for directly determining the value of an intangible asset. In certain circumstances, however, these methods can result in a residual profit attributable to the intangible asset by first determining the remuneration for the tested party. This residual profit then forms the reward for the intangible asset used and the related functions performed. A condition, however, is that the residual profit must be allocated to the intangible asset and that all other functions, risks and assets must have been sufficiently remunerated. Where appropriate, in the absence of comparable transactions between independent parties, it is therefore acceptable to determine the amount of the compensation to be paid by the tested party for the use of an intangible asset in this manner, provided the above-mentioned conditions are met.

6. Intra-group services (chapter VII)

Under the OECD Guidelines, an intra-group service exists if an activity is carried out for the benefit of a group member which adds economic or commercial value and for which that group member would normally be willing to pay. This does not include activities that are carried out in the capacity of a shareholder.

With regard to the method to be used for determining the transfer price for a service, a choice can be made between:[17]

1. application of the arm's length principle using the methods set out in this Decree and the OECD Guidelines (see section 6.1 of this Decree); or
2. the simplified method for low value-adding intra-group services (see section 6.2 of

[17] If these methods are not used, but paragraph 7.37 is invoked, all the conditions of that paragraph must be met. In addition, all financing costs must be included. The Tax Administration has a discretionary power in deciding whether or not to apply paragraph 7.37.

this Decree).

6.1 Application of the arm's length principle

In practice, it appears that a cost-based remuneration on the basis of the TNMM is often chosen. A functional analysis will have to be carried out to determine whether the remuneration for the intra-group services in question should be determined in this way. This approach will after all usually be applied only with regard to the more routine services. In applying this approach (remuneration based on costs), an arm's length remuneration can, in principle, only exist if a suitable profit mark-up was taken into account when determining the remuneration.

With regard to on-charging of intra-group services, there is a clear preference for a direct method. However, in practice an indirect method is also widely used because the application of the direct method leads to practical problems. If such practical problems exist, the Tax Administration will follow the indirect method chosen by the taxpayer. Here, too, the method must of course lead to an outcome in accordance with the arm's length principle. Suitable allocation keys could be turnover, the number of employees or personnel costs (see also paragraph 7.25). An allocation key where the payment to be charged depends on the profit is not very likely to lead to an outcome in accordance with the arm's length principle.

6.2 Shareholder activities and mixed activities (paragraphs 7.9 to 7.10)

Shareholder activities are not considered to be intra-group services if and in so far as they do not add any economic or commercial value for group members and if and in so far as a group member would not normally be willing to pay for them. Other group companies should not be charged for shareholder activities.

In assessing whether shareholder activities are involved, the Tax Administration will assume, having regard to the provisions of section 6.6.2 of this Decree, that at least the activities referred to in the list below have been performed in the capacity of shareholder. Under each category of activities several examples are mentioned of activities falling into that category.

6.2.1 List of shareholder activities

1. Activities associated with the legal structure of the entity itself
   1.1 Implementation of requirements from Book 2 of the Civil Code
      - organising, preparing and holding the shareholders' meeting
      - the activities involved in preparing and adopting the annual accounts and filing them with the Chamber of Commerce
      - the activities of the Supervisory Board in so far as they relate to the performance of its statutory supervisory duties
      - the activities of the Works Council
   1.2 Implementation of the State Taxes Act (AWR) in so far as this relates to the tax obligations of the entity itself
      - keeping accounts

- compliance with the obligation to retain records
- filing tax returns
- compliance with the obligation to provide information

2. Activities associated with placing/issuing/splitting shares in the entity itself or comparable instruments on the capital markets and activities relating to applying for or retaining a (foreign) stock exchange listing of the entity itself
   - compliance with the admission requirements of a stock exchange
   - the activities associated with a stock exchange listing, for instance the preparation of forms provided to the US Securities and Exchange Commission in connection with the listing, the provision (free of charge) of the annual accounts, annual report, etc.
   - the membership of the associations and other bodies representing the stock exchanges

3. Activities associated with the introduction and enforcement of statutory rules regarding supervision of share transactions
   - the introduction and maintenance of a registration system pursuant to the Financial Supervision Act
   - the entity's personnel reporting share transactions under this legislation

4. Activities associated with the introduction of and compliance with statutory rules and rules of conduct concerning corporate governance of the entity itself or the group as a whole
   - introduction of corporate governance supervision prescribed by legislation, including inclusion of a section on this subject in the annual report

5. Activities associated with reports to various interested parties regarding the entity itself or the group as a whole
   - press conferences and other costs of communication with shareholders and other interested parties, such as financial analysts, in so far as the communication is associated with external reporting, financial performance and future expectations of the entity itself or the group as a whole.

The above list is not exhaustive. This means that activities not included in this list must always be assessed individually to determine whether intra-group services or activities performed in the capacity of shareholder are involved.

6.2.2 Mixed activities

When qualifying activities as intra-group services or shareholder activities, there may be so called mixed activities. Mixed activities are activities that qualify partly as intra-group services and partly as shareholder activities. Examples of mixed activities are consolidation activities, activities relating to mergers and acquisitions, activities associated with the introduction of and compliance with statutory rules and rules of conduct concerning corporate governance, and activities of the Board of Directors. The qualification of the activities as intra-group services or as shareholder activities can take place on the basis of any method leading to an outcome in accordance with the arm's

length principle.

6.2.3 Examples

The following examples describe situations involving activities that are either mixed or not mixed.

A. Example: consolidation activities

A group operates a management information system incorporating the results of all group companies. This information is used for budget decisions, control and assessment of the group entities concerned and for the preparation of the quarterly, biannual and annual consolidation figures forming the basis for the annual accounts.

Conclusion: As regards the establishment and maintenance of the management information system and the processing of information for controlling the group companies, these are intra-group services. As regards the ultimate preparation of the periodically consolidated figures of the holding entity (or intermediate holding company), on the basis of the information obtained, these are activities which are carried out as a shareholder.

B. Example: merger and acquisition activities

A department at the group's European head office deals with mergers and acquisitions. The group needs an extra production location in Europe and the department analyses which companies in the various European countries are eligible for a potential acquisition, which will be carried out by the European head office itself.

Conclusion: The analysis by the mergers and acquisitions department is an activity carried out in the capacity of a shareholder. No compensation should therefore be demanded from the group companies for this activity.

C. Example: merger and acquisition activities

The mergers and acquisitions department in the example referred to above analyses which entity on continent X (not Europe) are eligible for a potential acquisition in order to increase the market share on that continent. The analysis leads the acquisition of an entity by the regional head office of continent X.

Conclusion: An intra-group service is provided to the regional head office of continent X. An amount must be charged for this activity, which leads to arm's length remuneration.

D. Example: merger and acquisition activities

A department of the group that deals with mergers and acquisitions assists an acquired entity with the legal implementation of the acquisition (for instance removal of the shares from the stock exchange), the adaptation to the group's system and corporate

identity and the formulation and implementation of the plan for the staff. Through this assistance, economic and/or commercial value is added to the acquired group entity for which an independent party would have been prepared to pay in similar circumstances.

Conclusion: An intra-group service is provided to the group company concerned. An amount must be charged for this activity, which leads to an arm's length remuneration.

6.3 The simplified method for low value-adding services (paragraphs 7.43 to 7.65)

The OECD Guidelines include paragraphs focusing on a specific group of services: 'low value-adding intra-group services'.[18] These paragraphs set out an optional simplified approach for taxpayers to determine the remuneration for these specific services, which I endorse. Supported by appropriate documentation, it is possible to recharge relevant costs of these services with a limited fixed profit mark-up of 5% via an appropriate allocation key to the eligible group members. This simplified approach goes hand-in-hand with a simplified and more limited benefits test[19] from the perspective of the recipient of the services concerned. The recipient should then convincingly demonstrate the benefit of certain categories of services more generally (see paragraphs 7.54 and 7.55). The criteria for and several examples of low value-adding intra-group services are set out in paragraphs 7.45 to 7.49.

In the case of services provided by an associated party, the Tax Administration applies the benefits test to assess whether a service for which compensation is appropriate has actually been performed. However, in so far as the fee charged relates to services that qualify for the simplified method, the Tax Administration will adopt a pragmatic approach when assessing whether compensation is appropriate. The benefit to the recipient of the services in question only needs to be substantiated in general terms and does not need to be traced back to individual transactions. The fixed profit mark-up does not need to be substantiated by a comparability study. However, the conditions set out in the OECD Guidelines must be met, including the appropriate documentation (see paragraph 7.64) and the appropriate method of calculating the amounts charged (see paragraphs 7.56 to 7.58). For the details of the allocation key to be selected, see paragraphs 7.59 and 7.60.

In view of the nature of the services described here (low value-adding intra-group services), I assume that recharging the relevant costs with a limited fixed profit mark-up of 5% via an appropriate allocation key will lead to an arm's length outcome.

The cost base includes the direct costs and indirect costs associated with the relevant support services as well as the overhead costs. The relevant costs also include special expenses (such as redundancy costs, reorganisation costs and wages in kind). Which costs are relevant follows from the functional analysis that underlies the taxpayer's transfer pricing system.

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[18] In this context, see also the 'Guidelines on low value-adding intra-group services' of the EU Joint Transfer Pricing Forum (Brussels, February 2010, JTPF/020/REV3/2009/EN), partly in relation to section 1.6 of this Order.
[19] See paragraph 7.6.

6.3.1 Examples

E. Example

A group is active in the provision of legal services to independent parties. An employee of one of the group entities provides advice on local legal matters to a foreign group company involved in advising a client on an international transaction.

Conclusion: The simplified approach cannot be applied to this activity because it involves activities that are part of the group's core business. Moreover, the services concerned are also provided to independent parties on a more than incidental basis.

F. Example

A legal department of a bank is intensively involved in the development of a bank product that another group entity wants to offer. The activity of the legal department is an activity that adds more than marginal value to the group's core business.

Conclusion: The simplified approach cannot be applied to this activity because it adds more than marginal value to the group.

G. Example

A helpdesk department only deals with questions from employees of various group entities about the computer system, the software used and solving minor user problems. Based on the nature of the activities, the relative scale of the activities within the group and the added value of the activities, the taxpayer demonstrates convincingly that the activities do not involve one of the group's core business processes and do not add more than marginal value to the group's core business.

Conclusion: In this case, it is sufficient to recharge all relevant actual costs with a profit mark-up of 5% (application of the simplified approach).

H. Example

A group operates an international chain of hotels. A department engages in the construction and maintenance of a computer application within the group, which automates the booking system, the invoicing and the inventory system.

Conclusion: The department's activities probably do not belong to the group's core business but in any event add more than marginal value to the group's core business. The simplified approach cannot be applied to this activity.

I. Example

An entity is engaged in the production of semi-finished products under the direction and for the risk of another group entity (as contract manufacturer). Such production activities are generally part of the group's core business. In addition, these activities,

together with similar or related activities (such as the production activities of the client), generally constitute a relevant part of the group's total activities in absolute or relative terms.

Conclusion: The fact that the added value of this activity may be marginal is not sufficient to characterise the activity as a support activity. The simplified approach cannot be applied to this activity.

6.4 Contract research and contract manufacturing

In a situation where group entities A and B agree contractually that A will develop intangible fixed assets (contract research) or produce products (contract manufacturing) at the expense and risk of B, a remuneration for B based on costs may be regarded as arm's length.

However, for the transfer price analysis the transaction must first be delineated in accordance with the principles set out in section 2 of this Decree. A cost-based remuneration is arm's length if contract research or contract manufacturing activities are carried out by A and if B manages the research or manufacturing activities, bears the costs and risks, and becomes the beneficial owner of the assets developed or products produced. B must exercise control over the risks involved and have the financial capacity to be able to bear the consequences of the risks involved (see section 2.1 of this Decree for these terms). The analysis thereof must in any event be based on the specific facts and circumstances.

The following elements play a role in deciding who manages the research activities and exercises control over the associated risks: decision-making, planning, budgeting, measuring performance, remuneration, adjusting/redefining areas of activity, determining the commercially valuable areas and assessing the likelihood of research being successful or unsuccessful.

6.4.1 Examples

J. Example

A group is headquartered in country X. The group engages in the production and sale of consumer products. In order to maintain its market position and, where possible, improve it, ongoing research is carried out into the possible improvement of existing products and the development of new products. To this end, the group has two R&D centres that are part of a separate entity, established in country X (R&D X, as part of the head office) and in the Netherlands (R&D NL) respectively.

The research programmes for the group as a whole are drawn up by R&D X after the strategic decision-making by the group management. Based on separate contracts, R&D NL is then used to carry out part of this research programme. R&D NL must submit to R&D X the detailed project plans drawn up to execute the part of the research programme assigned to it. R&D X approves these project plans and the related budgets. Even if R&D NL has suggestions regarding the adjustment of the research programme

and/or the project plans already submitted, these suggestions must be explicitly submitted to R&D X. R&D NL regularly reports to R&D X on the progress of the research and the depletion of the budgets. If the budgets are exceeded, R&D NL must request additional financial resources from R&D X.

Not all research activities lead to success. The contractual conditions between R&D X and R&D NL stipulate that all risks associated with the activities developed by R&D NL are borne by R&D X. R&D X becomes the owner of all legal and economic rights arising from the research. R&D X has sufficient financial capacity to bear the financial risks associated with the research.

R&D X pays R&D NL a cost-based fee calculated on the basis of the TNMM, using the operating profit/costs ratio as a profit level indicator.

Conclusion: The functions of R&D NL are limited to the execution of the R&D activities. These are carried out on behalf of and under the supervision of R&D X (including control and decision-making). The risks associated with the R&D activities are borne by R&D X. R&D X exercises the necessary control over these risks and has the financial capacity to bear the consequences of these risks.. The activities of R&D NL are rightly deemed to be contract research. Applying a cost-based remuneration is appropriate in this case.

K. Example

A group is headquartered in country X. The group engages in the production and sale of consumer products. In order to maintain its market position and improve it where possible, ongoing research is carried out into the possible improvement of existing products and the development of new products.

The R&D activities concerning product line A are carried out in the Netherlands by a Dutch entity (R&D NL). Sales activities and the role of European head office are also carried out by this Dutch entity. R&D NL operates completely independently, within the framework of strategic decision-making by the group management. Entity Y, located in country Y, also forms part of the group. Y employs two people, both having an administrative and financial background. R&D NL and Y have entered into an agreement for an indefinite period with regard to R&D NL's R&D activities.

Not all of these research activities lead to success. The contractual conditions between Y and R&D NL stipulate that all risks associated with the activities developed by R&D NL are borne by Y. Y becomes the owner of all legal and economic rights arising from the research. Y has sufficient financial capacity to bear the financial risks associated with the research.

Y pays R&D NL a fee calculated on the basis of the costs incurred by R&D NL with a profit mark-up.

Conclusion: The functions of R&D NL encompass the entire R&D activity (from deciding what research to carry out, to its execution). R&D NL therefore independently manages the R&D activities. The contractual conditions stipulate that the risks associated with this

R&D activity are borne by Y. However, Y does not have the necessary expertise to exercise control over the risk it assumes. In reality, control is exercised by R&D NL, so that the risk should also be attributed to R&D NL. On the basis of the actual situation, no contract research activity is therefore carried out by R&D NL, with the result that the calculation of remuneration on the basis of the costs incurred with a profit mark-up for R&D NL does not result in an arm's length remuneration in this situation.

7. Contributions to a cost contribution arrangement (CCA) (chapter VIII)

7.1 Introduction

On the basis of the arm's length principle, the remuneration should be related to the functions performed, taking into account the risks assumed and assets used. This means that the remuneration of the participants in a CCA must not (fundamentally) differ from the remuneration that the companies in question would receive if they were to work together outside a CCA.

The basic principles set out in the other chapters (in particular chapters I and VI) apply in full to the question of whether the CCAs comply with the arm's length principle. This means, for example, that a participant in a CCA who assumes risks also has to exercise control over these risks and must have the financial capacity to bear the downside effects of them. For example, a participant in a CCA who provides only the financing of the CCA and exercises control only over risks related to that financing and therefore not over the risks regarding the other activities within the CCA is generally only entitled to arm's length compensation for financing, taking into account the financing risk (risk-adjusted return).

On the basis of chapter VIII, the relative share of each participant in the contributions to the CCA should correspond to that participant's relative share in the total expected benefits. In practice, whether this is the case must be assessed on a case-by-case basis. The arm's length principle implies that both the relative share of each participant in the contributions to the CCA and that participant's relative share in the total expected benefits should be determined on the basis of the open market value (WEV).[20]

Some countries do not accept the charging of a profit mark-up, while they do accept charging a fee for the assets involved in the activities. This is acceptable if the outcome is arm's length.

In assessing CCAs, the Tax Administration should take into account that transfer pricing is not an exact science. This does not alter the fact that taxpayers can be expected to make a plausible case that independent parties in similar circumstances would conclude a similar agreement under similar conditions.

Some examples of CCAs relating to R&D activities are given below to illustrate the above-mentioned principles.[21]

[20] For situations in which the contributions can be calculated against costs, see paragraphs 8.27 and 8.28.
[21] In the examples, for the sake of simplicity, no account is taken of a difference in the timing of

7.2 Examples

L. Example

Group entity A and group entity B act as the head office of continent A and the head office of continent B respectively. Both are engaged in the production and sale of products. Both have an R&D centre. The group decides to research the development of a new product. The market prospects for the product are good but major research has to be carried out before the product is ready for production and sale. The product has market potential on continents A and B.

A and B conclude a CCA for carrying out the required research. A provides the research capacity and the initial development results and B provides knowledge, know-how and researchers. A and B agree several dates when A and B will jointly decide on the next phase of the project. The ratio between the open market value of A's contribution and that of B is 1:1. The total expected value of the development result of the product is equally large on continents A and B.

A and B agree that each of the participants will bear the costs of their own contribution. In addition, it is agreed that A will become the legal and beneficial owner of the development result as far as continent A is concerned and that B will become the legal and beneficial owner of the development result as far as continent B is concerned. Strategic project planning and management (including oversight and decision-making on the project) take place on an equal basis.

Conclusion: Both A and B can be considered as participants in the CCA, because in return for their contributions both participants acquire part of the right being developed. They can also exploit/use it independently. Finally, both participants' relative share of the contributions corresponds to their relative share of the total benefits expected (i.e. the right that the participants acquire). The conditions of the CCA therefore lead to an arm's length result.

M. Example

Group entity A is engaged in the development, production and sale of consumer products on continent A. A has carried out initial research into the feasibility of developing a new product. The conclusion is that the product can probably be developed successfully. The market prospects for the product are good.

The product is also very suitable for the market on continents B and C. Group entities B and C are engaged in the development, production and sale of similar products for the markets on continents B and C. A, B and C conclude a CCA for the research necessary to

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the contribution made by each of the parties. In commercial relationships, such differences would be taken into account when determining the value of the contribution, in so far as they are relevant to the value of the contribution, so that this should be taken into consideration in practice when determining arm's length remuneration in a situation where a CCA is agreed between associated parties.

develop the new product.

In order to ensure successful development, the following arrangements are made:
- Equal contribution by all: formulation of a research programme and the decisions to be taken for each progress phase of the project identified in the research programme (strategic project planning and management, including oversight and decision-making, for the project).
- Contribution by A: results of the initial research. Costs incurred for development: €1 million. Open market value of the research result: €2 million.
- Contribution by B: development capacity (personnel + fixed assets). The expected costs associated with this development capacity are €1.8 million. If this development capacity had to be hired on a contract research basis from third parties, €2 million would have to be paid for this (= open market value).
- Contribution by C: liquid assets amounting to €2 million for the expected additional costs (procurement of materials from third parties and hiring of third parties).

The participants agree that each of the participants will bear the costs of their own contribution. The total expected value of the development result on continents A, B and C is expected to be the same, so that the value of the right to be developed is expected to be the same for all the continents. The group entities agree that A, B and C will become the legal and beneficial owners of the development result for continents A, B and C respectively.

Conclusion: A, B and C can be considered as participants in the CCA because in return for their contribution the participants obtain part of the right being developed. They can also operate/use it independently. Finally, the participants' relative share of the contributions corresponds to their share of the total benefits expected (i.e. the right that the participants acquire). The conditions of the CCA therefore lead to an arm's length result.

N. Example

Group entity A, group entity B and group entity C are engaged in the production and sale of similar consumer products on continent A, continent B and continent C respectively. A has an R&D centre. B and C employ several product experts who also have knowledge of product development, but they do not have their own R&D centre.

A carried out initial research into the development of a new product. The market prospects for the product are good for continents B and C, but major research needs to be carried out before the product is ready for production and sale. The expected total value of the development result on continents B and C is expected to be the same. The product does not appear to be interesting for continent A.

A, B and C conclude a CCA with the following conditions:
- B and C jointly set up a research programme, with equal contributions, for the further development of the product. In addition, they provide equal capacity to manage the project (strategic project planning and management, including oversight and decision-making).

- Contribution by A: results of the initial research. Costs incurred for development: €1 million. Open market value of the research result: €2 million.
- Contribution by A: development capacity (personnel + fixed assets): A's R&D department elaborates on the project plan and submits the details to B and C. A's R&D department then undertakes the implementation of the research, and regularly reports to B and C on the course of events. The expected costs associated with this development capacity are €1.8 million. The open market value of the development capacity, if work is carried out under contract, is €2 million.
- Contribution by B and C: they each pay A €2 million as compensation for A's contribution. In addition, each bears half of the additional costs paid to third parties (procurement of materials, hiring of third parties) amounting to €2 million.
- The participants each bear the costs of their own contribution.
- B and C acquire the legal and beneficial ownership of the development result for continent B and continent C respectively.

Conclusion: Under the OECD Guidelines A does not participate in the CCA under arm's length conditions because it cannot derive any benefit from the development result. A actually sells the initial development result to B and C in combination with the performance of contract research activities for B and C.

However, B and C can both be regarded as participants in the CCA because in return for their contributions (money and management) they acquire part of the right being developed and can also operate/use it independently. A provides development capacity and the initial development result with a total open market value of €4 million and it receives €4 million in compensation. Such compensation is arm's length.

The contribution of both participants in the CCA (B and C) and the benefit to be expected (the right that they acquire) are equal. Although the contract can therefore not be considered as a CCA for A, the remuneration arising from the contract conditions can be deemed to be arm's length for all participants.

O. Example

Group entity A is engaged in the development, production and sale of consumer products. Group entity B employs a limited number of persons with a financial and administrative background. A carried out initial research into the development of a new product. The market prospects for the product are good for continent A and continent B, but additional research needs to be carried out before the product is ready for production and sale. The expected total value of the development result for continents A and B is expected to be the same.

A and B conclude a CCA with the following conditions:
- Contribution by A: initial development results and development capacity. The total costs in this respect are €5 million. The total open market value is €10 million.
- B pays A €5 million and 50% of the costs in so far as they exceed the projected costs of €5 million.
- A and B become the beneficial owners of the development result in so far as it relates to continent A and continent B respectively.

- A becomes the legal owner.

The contractual conditions stipulate that 50% of the risks associated with this R&D activity will be borne by B (B pays €5 million and 50% of the costs in so far as they exceed the projected costs, and becomes the beneficial owner of the developed right).

An analysis of functions, assets used and risks assumed shows that A's functions encompass the entire R&D activity, from deciding which research will be carried out to execution itself. A thereby manages the R&D activity entirely independently. B is unable to exercise control over the relevant risks in relation to the R&D activity in view of the functions it performs. B's function is limited to financing the R&D activity and exercising control over the risks associated with that financing.

Conclusion: In reality, control over the entire risk associated with the R&D activity is exercised by A. In addition, A has the financial capacity to bear these risks. The entire risk associated with the R&D activities should therefore be attributed to A. The remuneration that A receives must be in line with the functions performed by A and the associated risks. Under the agreement between A and B, however, B shares the positive and negative consequences of the risk controlled by A with A. The conditions of the contract concluded between A and B are therefore not arm's length.

The remuneration of B, which exercises no control over any specific risk relating to the R&D activity, should only consist of arm's length compensation for financing A's R&D activities, taking into account the financing risk (see paragraph 6.61, which refers to a risk-adjusted return). If and in so far as B does not exercise any control over the risks relating to this financing, B is at most entitled to a risk-free return (see paragraph 1.103).

8. Intra-group procurement (section D.8 of chapter I)

Joint purchasing in a group context leads to benefits in many cases, including synergy benefits. Commercial arguments for deciding to centralise purchasing activities include cost savings (pooling purchasing power and/or procurement expertise), reducing the necessary operating capital and improving product quality. Often there is also a wish to establish a purchasing office close to the market where the products are purchased.

Procurement-related activities can range from carrying out support activities to purchasing activities that can be regarded as core functions of the group. The functional analysis focuses mainly on the relative interest of the purchasing function in the group's overall value chain. An assessment must then be made to decide which members of the group carry out the various purchasing activities.

If the purchasing activities are of a routine nature, few risks will be incurred. Such activities include:
- selection of potential suppliers;
- (local) coordination with suppliers;
- quality control of the purchases; and
- arranging transport and other logistics activities.

In practice, such activities entail few, if any, price or inventory risks.

Sometimes the activities are of a more complex nature and may also involve putting together the product range (which ought to be considered a separate function).

The functional analysis is followed by an assessment of what is a suitable transfer pricing method for the activities carried out to determine an arm's length remuneration. This remuneration can range from a routine remuneration (based on the operational costs incurred, or compensation related to the purchase value) for activities of a routine nature to a transactional profit split-type remuneration if the activities can be considered a core function of the group.

Local independent procurement agents are known to mainly provide support activities. They generally receive compensation related to the purchase value. Logically, the compensation percentage will increase in proportion to an increase in the agent's responsibilities and will decrease in proportion to an increase in the purchase volume.

When looking for reliable comparables, it proves difficult in practice to make a comparison on the basis of a percentage of the purchase value. That is why, in those situations, the Tax Administration will usually apply the TNMM (with the net operating profit being linked to cost) when assessing the arm's length nature of the remuneration. In this regard, the cost base remains limited in principle to the purchasing office's operational costs, in view of the routine nature of the purchasing activities. The cost price of the purchases does not form part of the cost base.

If, by centralising the purchasing activities, the group manages to realise higher discounts than before as a result of the increased purchase volume, in principle this extra benefit cannot be allocated to the centralised purchasing office. Such a benefit must be allocated to the members of the group that enable the purchasing office to realise the extra discounts by their joint purchase volumes. Only if and in so far as extra discounts are realised by the specific knowledge and skills at the purchasing office, allocation of part of this to the purchasing office will be arm's length.[22]

9. Financial transactions

9.1 Loans

9.1.1 Characterisation of the transaction

Based on the OECD Guidelines, the arm's length test for intra-group loans starts with the characterisation of those transactions (see also section 2.1 of this Decree). The assessment of whether a transaction presented by the parties as a loan should in fact be characterised as a loan is part of the characterisation process described in chapter I (see section B of chapter X and specifically paragraphs 10.4 to 10.18).

[22] Supreme Court judgment of 23 April 2004, no. 39 542, ECLI:NL:HR:2004:AO9474.

Also in the case of intra-group loans the lack of control and/or financial capacity of a party in relation to certain risks may mean that the relevant risks, and the associated compensation, must be allocated to the party that does exercise control over those risks and has sufficient financial capacity.

If a financial transaction is characterised as a loan, the conditions applied must be checked against the arm's length principle. In the case of an intra-group loan, this also involves checking all conditions, including the price. In principle, the end result of this assessment should be a price (interest expense/interest income) that meets the criteria of article 8b of the Corporation Tax Act 1969.

If the transaction cannot be made arm's length by adjusting the price and/or the other conditions, this can in extreme cases lead to the loan (or part of it) being disregarded or recharacterized (see paragraph 1.142 of the OECD Guidelines and section 2 of this Decree). Taking into account the foregoing, an arm's length interest income/interest expense can then be determined for the remaining loan.

9.1.2 The two-sided perspective

An analysis of the parties' perspectives and their options realistically available also plays an important role in financial transactions (see section C.1.1.1 of chapter X). For example, an independent lender, taking into account the functions it performs and its position in the market, will generally want to minimise its risks. Its decision to provide the loan will usually depend on whether the independent borrower will be able to (re)pay the loan and the interest charged on it. It is therefore more likely to grant a loan to an independent party whose creditworthiness, taking into account the intended intra-group loan, does not fall below a certain level.

9.1.3 Credit rating and investment grade

Creditworthiness is often expressed in a credit rating. Credit ratings from AAA to BBB- denote high to satisfactory creditworthiness.[23] In these cases, the likelihood that the borrower will ultimately not be able to pay interest and repay the loan is deemed to be low. The creditworthiness of the borrower is considered to be 'investment grade'. Potential borrowers with a credit rating below BBB- are not regarded as investment grade, because the likelihood that they will ultimately not be able to pay the interest and repay the loan is considered too high.

The credit rating is determined on the basis of certain objective indicators, including interest coverage[24] and the debt-to-equity ratio. Only in special situations a lender will be willing to accept a lower credit rating than BBB- for the independent borrower. Moreover, a lender with a diversified loan portfolio is more likely to provide a loan to an independent entity that is not investment grade than a lender that has only one or a very limited number of loans outstanding. On the basis of the foregoing, in the case of a loan granted to an associated entity that is not investment grade, it must be

[23] Standard & Poor's names. Moody's uses the ratings Aaa to Baa3 as investment grade on the basis of its methodology.
[24] The extent to which the interest can be borne.

demonstrated that the loan was agreed under arm's length conditions.

An independent borrower will strive to organise the financing of its business activities so efficiently that the cost of capital is minimised.[25] The amount of debt relative to equity plays an important role in the level of the cost of capital. On the one hand, it is advantageous to finance part of the business activities with borrowed capital. This increases the return on the invested equity capital, partly because the interest payment is in principle tax-deductible. On the other hand, above a certain threshold the additional costs of raising borrowed capital become so high that this has a negative impact on the cost of capital and reduces the return on the invested equity capital. In such a situation, it is a better option to raise equity capital.

The costs of borrowed capital largely depend on the borrower's creditworthiness. An independent borrower will generally not get a loan that causes its credit rating to fall below investment grade/BBB-. Such a rating means that borrowed capital either cannot be raised or can be raised only at very high cost. In addition, emergencies cannot be dealt with and the bankruptcy risk becomes too high.

In view of the above, in the case of a controlled financing transaction that leads to a capital ratio and interest costs in a way that, after the intra-group loan has been entered into, the borrowing entity is no longer investment grade, it must be demonstrated that the loan was agreed under arm's length conditions.

9.1.4 Implicit support

In determining an entity's credit rating, the degree of implicit support from associated entities within the group may play a role. For example, when entering into a financing transaction, this can affect the interest rate or the size of a loan. Implicit support should be regarded as a benefit attributable solely to being part of the group. With reference to paragraph 1.178 and example 1 in paragraphs 1.184 to 1.186, charging a fee for implicit support resulting from being part of a group is not arm's length.

Implicit support results in a derivative credit rating for the borrowing entity. This credit rating takes account of the fact that the entity is part of a group.

In determining the degree of implicit support from the group and how this affects the credit rating of the borrowing entity, factors such as the entity's role and status within the group are taken into account. For entities whose existence is essential to the group, the credit rating will be the same as or very close to the group rating. In the absence of sufficient relevant information, paragraphs 10.81 and 10.82 may be relevant.

9.1.5 The arm's length interest rate

The OECD Guidelines describe a number of methods for determining the arm's length interest rate. The Guidelines seem to prefer the CUP method (see section C.1.2.1 of chapter X). This method involves determining the interest rate of loans on the basis of

[25] This is also referred to in the literature as Weighted Average Cost of Capital (WACC).

available data regarding comparable transactions with borrowers with a similar credit rating.

In addition to the CUP method, the OECD Guidelines describe the 'cost of funds approach'. In this method, the costs incurred by the lender itself to borrow the loaned money are increased by cover for costs, a risk premium and compensation for the required equity capital.

In this context, the OECD Guidelines pay specific attention to cases in which a sum of money is borrowed from independent parties and eventually ends up with the ultimate associated borrower via one or more entities within the group. If such entities only perform an intermediary or agency function, they are only entitled to a remuneration consisting of a mark-up on the costs of their own function (see also paragraph 7.34). Section 9.2 of this Decree, on financial service entities, discusses this in more detail.

Interest charged in connection with a loan is referred to in the OECD Guidelines as a 'risk-adjusted rate of return'. This consists of the risk-free rate of return and a premium as remuneration for the risk allocated to the financier at arm's length. Paragraphs 1.117 to 1.126 are relevant for determining the risk-adjusted rate of return.

Paragraph 1.103 stipulates that the party that does not control the risks associated with investing in a financial asset is only entitled to a risk-free rate of return. The risk-free rate of return is defined as the rate of return on an investment with no risk of loss. The Guidelines recognise that there is no investment with zero risk. Therefore, based on existing practices, the determination of the risk-free rate of return is generally based on the interest rate on eligible government bonds (see paragraphs 1.108 to 1.116).

Although the remuneration for the financier may be limited to a risk-free rate of return, the borrower *is* entitled to deduct the arm's length interest. The difference between the arm's length interest rate and the risk-free rate of return (the risk premium) accrues to the party that controls the risks associated with the investment in the financial asset. The basic premise here is that the total interest income is included in a tax on profit. The possibility for the Tax Administration to deviate from the interpretation in this Decree, as referred to in section 1.5 of this Decree, is also relevant.

9.1.6 Dutch case law

The Supreme Court has ruled on the question of whether a controlled loan could be written down in a domestic context.[26] The Supreme Court stated that if the interest rate on a loan between associated parties is not set in accordance with the arm's length principle, the taxable profit must be calculated on the basis of an interest rate that does comply with this principle.

I am of the opinion that the starting point for determining that interest rate should be what has been stated above concerning the determination of the arm's length interest rate.

[26] Supreme Court judgment of 25 November 2011, no. 08/05323, ECLI:NL:PHR:2011:BN3442.

If this interest rate adjustment as prescribed by the Supreme Court results in the loan becoming essentially profit-sharing, the Supreme Court states that the nature of what the parties have agreed is affected. If it is impossible to determine profit-independent interest rates under which an independent third party would have been willing to grant the same loan to a borrowing group entity under otherwise the same conditions and circumstances, the Supreme Court assumes that the provision of such a loan by the lending group entity would entail a debtor risk that the third party would not have taken. In that case, barring special circumstances, it must be assumed that the lending group entity has accepted this risk with the intention of serving the interest of the associated entity in the capacity of shareholder or sister company/subsidiary. The Supreme Court calls this an unbusinesslike loan. Any write-down loss on such a loan therefore may not be deducted from the lender's (taxable) profit.

The interest to be taken into account for tax purposes must then be determined for the unbusinesslike loan. To this end, the Supreme Court applies two rules:
(i) the rule of thumb[27]
(ii) the open market value rule.[28]

The lower of the rates of interest determined by applying the rules is to be taken into account for tax purposes.

Re (i) the rule of thumb

The interest on the unbusinesslike loan is based on the interest that the borrowing group entity would have to pay if it were to borrow from a third party with a guarantee from the lending group entity under otherwise the same conditions and circumstances. The interest thus determined is deductible by the borrowing group entity and tax on it is paid by the lending group entity. The difference between the interest actually charged and the interest determined on the basis of the creditworthiness of the lending group entity lies in the capital domain.

Re (ii) the open market value rule

The application of the open market value rule is particularly relevant if the non-arm's length loan is interest-free or the agreed interest remains outstanding. The interest to be taken into account for tax purposes is then determined on the basis of the open market value of each interest instalment at the time it falls due.

The assessment of the arm's length nature of the loan can take place both at the time it is issued and during its term. This assessment must take place from the perspective of the lending and the borrowing entity. Referring to what has been stated above regarding the perspective of the entities concerned, in the case of an associated lender that provides a loan to a borrowing group entity that is subsequently insufficiently creditworthy, the loan may also be unbusinesslike under the approach set out in the

[27] Supreme Court judgment of 25 November 2011, no. 08/05323.
[28] Supreme Court judgment of 15 March 2013, no. 11/02248, ECLI:NL:HR:2013:BW6552.

above-mentioned judgment. In my opinion, the same applies to a borrower which, as a result of the controlled intra-group loan, sees its credit rating drop below BBB-.

The Supreme Court holds that the interest on a unbusinesslike loan, a loan with a non-arm's length debtor risk, should be determined on the basis of the creditworthiness of the lending entity. In its judgment, the Supreme Court did not explain how to deal with the creditworthiness of the lending group entity in relation to the creditworthiness of the borrowing entity. If the lender has a higher credit rating than the borrower, the interest that the lending group entity itself would be charged will count as the appropriate interest to be taken into account for tax purposes. If the lending group entity does not have a better credit rating than the borrowing group entity, in other words if this entity is not itself investment grade, the fictitious guarantee does not add anything. In that case, no more than the risk-free interest on the loan can in any case be taken into account.

9.2 Financial service entities

9.2.1 Intra-group financial service activities

A special form of financial services that occurs within a group involves transactions entered into by taxpayers where the associated activities mainly consist of the de jure or de facto direct or indirect receipt and payment of interest, royalties, or rental or lease instalments, under any name and in any form. Entities in which these activities mainly take place are referred to in this Decree as financial service entities (DVLs).[29] This section pertains to transactions of financial service entities with associated entities, including guarantees and transactions under guarantees.

Financial service entities are characterised by service activities where there is often a close relationship between the incoming and outgoing cash flows. Such financial service entities typically engage in routine activities. In some cases, however, they may also engage in activities that justify incurring credit and market risks.

Based on the arm's length principle, the remuneration of the financial service entity must be assessed against its functions, activities and risks. Chapter X is used to determine the arm's length remuneration of a financial service entity. It addresses, *inter alia*, the consequences of the risk allocation for determining the arm's length price of the transaction(s) to be assessed. For the allocation of risks to a financial service entity, the financial service entity is required to exercise sufficient control over these risks and have sufficient financial capacity to bear any negative consequences of the risks incurred.

The risks that may arise from the financial transactions mainly consist of credit risks (debtor and currency risks), market risks and operational risks. In relation to financial service entities, the arm's length bearing of the credit risks (debtor and currency risks) that are closely related to the cash flows can justify a principal-related remuneration. Incurring only operational risks (arising from support activities performed by the

[29] This section focuses primarily on financial service entities, but the approach also applies to other service entities.

financial service entity) will not lead to the allocation of credit risks to the financial service entity.

In cases where the financial service entity has insufficient control and/or financial capacity, the risk must be allocated to the party that does exercise sufficient control over this risk and does have sufficient financial capacity (see paragraphs 1.98 and 10.25).

In this Decree, a distinction is made between three different situations for the assessment of the transfer pricing system of a financial service entity:
(i) the financial service entity has full control over the credit risks and has the financial capacity to assume the risks;
(ii) the financial service entity has no control over the credit risks and/or no financial capacity to assume the risks; and
(iii) the financial service entity has shared control over the credit risks and has the financial capacity to assume the risks.

Re (i) The financial *service entity has full control over the credit risks and has the financial capacity to assume the risks*

After it has been established that the financial service entity exercises full control over the credit risks, an assessment must be carried out to determine whether the financial service entity has the financial capacity to bear the consequences of the risks assumed. In this regard, account must be taken of whether and to what extent the financial service entity would independently (in the absence of a guarantee of related entities) be able to raise loan capital from an independent party (paragraph 1.64). Based on paragraph 10.161 the portion of the loan that can only be raised by the financial service entity under a guarantee from an associated entity, must be regarded as an equity contribution to the financial service entity. However, qualification as equity capital does not lead to an increase in the financial service entity's financial capacity on the basis of paragraph 1.64.[30]

The case law of the Supreme Court applies other specific criteria for qualifying a loan as equity. There may be a conflict between the OECD Guidelines and Dutch case law. If a taxpayer requests certainty in advance about the application of the arm's length principle, the OECD Guidelines will be taken as the starting point. The reason for this lies in the fact that unilaterally provided certainty in advance must also be defensible internationally.

If the financial service entity has full control and the financial capacity, an appropriate interest rate must be determined on the basis of a comparability study. This must take place for each incoming and outgoing controlled transaction and in conjunction with the financial service entity's overall funding position. The comparability study focuses on the comparability of the conditions of the controlled transaction with the conditions of comparable uncontrolled transactions. For intercompany loans, the CUP method will be

[30] Paragraph 10.161 states that if and in so far as entities cannot borrow from an associated entity without a guarantee, these loans must be regarded as loans to the guarantor, which then contributes the money to the financial service entity as equity capital (via the parent company or otherwise).

the most logical choice for determining an arm's length remuneration for each transaction.

Re (ii) The financial *service entity has no control over the credit risks and/or no financial capacity* to assume the risks

If control over the credit risks does not rest with the financial service entity and/or the financial service entity has no financial capacity to assume the credit risks, these risks cannot at arm's length be allocated to the financial service entity. A remuneration related to the size of the cash flows is therefore not arm's length. In the absence of control over the credit risk and/or no financial capacity to assume the credit risks, a remuneration related to the financial service entity's own operational costs is more appropriate.[31] This is because the financial service entity may in fact incur an operational risk in relation to the implementation of its own activities. These risks are generally not material in comparison with the credit risks.

Re (iii) The financial *service entity has shared control over the credit risks and has the financial capacity* to assume the risks

If both the financial service entity and the head office (or another associated entity) perform control activities as defined in paragraph 1.65 with regard to the credit risks (i.e. not just 'wider policy-setting' as defined in paragraph 1.76), the control is shared. This situation involves control activities in both a quantitative and qualitative sense. In both respects, the financial service entity must perform a certain amount of the activities before sufficient control exists to allocate (part of) the relevant risks to the financial service entity.

In the specific context of this particular form of financial services, it is unlikely to be common in comparable uncontrolled transactions in similar circumstances for the risk borne by the financial service entity to be contractually limited without taking into account the relative degree to which the parties exercise control over the relevant risks.

If a risk actually materialises, it seems appropriate to allocate the consequences pro rata among the entities depending on the relative degree of control they have in relation to the relevant transactions and the associated risks. Given the nature and extent of control activities in relation to such financial service activities, I assume that shared control within a group will be rare.

With regard to financial capacity and arm's length remuneration, the same observations apply as made in the first paragraph under Re (i) (the financial service entity has full control over the risks and has the financial capacity to assume the risks).

In situations where there is shared control of credit risks and the necessary financial capacity, an appropriate remuneration should be determined based on the facts and circumstances of the case.

[31] The cost base is determined in accordance with paragraph 10.100.

When determining the arm's length remuneration, account must be taken of the other party within the group that performs control activities and that must also be remunerated at arm's length.

9.2.2 Examples

The examples below are based on a situation where company X (BV X) is part of an internationally operating group. BV X raises funding from independent parties and provides funding to associated entities abroad.[32] All financial flows run over the books of BV X. The group's treasury department consists of 50 employees.

P. Example: full control

The group's entire treasury department is employed by BV X and works in the Netherlands. The treasury department exercises control over the credit risks and BV X has financial capacity to bear the credit risk.

Conclusion: The relevant functions for exercising control over the credit risks are located in the Netherlands and BV X has sufficient financial capacity to bear the consequences of the credit risk. BV X therefore bears the credit risk. An appropriate remuneration must be determined for each transaction. This can be done, for example, on the basis of a CUP.

Q. Example: no control

About 40 employees of the treasury department are employed by BV X and work in the Netherlands. These employees are mainly engaged in support and operational activities. The other 10 employees (CFO or head of treasury[33] and the employees working immediately below them) are employed by and work at an associated entity abroad.

Conclusion: The relevant functions for exercising control over the credit risks are not located in the Netherlands. The functionality available in the Netherlands is limited to support and operational activities. A remuneration based on the costs of the support and operational activities is appropriate (regardless of whether BV X has sufficient financial capacity to bear the risks).

A remuneration in which the costs and income (interest) related to the loans are included in the Dutch taxable profit base is not appropriate.

R. Example: shared control

Of the 50 employees of the treasury department, 45 are employed by BV X and work in the Netherlands. Within this group, 40 employees are mainly involved in support and operational activities. The other five employees partly control the risks associated with

[32] The funding does not come from a low-tax country and no funding is provided to a low-tax country. Possible application of the 30% EBITDA rule has not been taken into account in this example.
[33] The nature of the activities is more decisive here than the job title.

the funding of associated entities. The remaining five employees of the treasury department work in another associated entity abroad and, together with the aforementioned five employees in the Netherlands, control the risks associated with the funding of associated entities. Both entities exercise control over the credit risks as defined in paragraph 1.65 (so there is not just wider policy-setting) and have the financial capacity to bear the credit risks.

Conclusion: The relevant functions for exercising control over the credit risks are located partly in the Netherlands and partly abroad. Allocation of the risks is appropriate here as a consequence of the presence of the control functions at BV X and the associated foreign entity. If a risk actually materialises in such a situation, the consequences must be allocated pro rata between BV X and the associated foreign entity on the basis of that risk allocation.

In the above situation, an appropriate remuneration must be determined on the basis of the facts and circumstances. When determining the arm's length remuneration, account must be taken of the other party within the group that performs control activities and that must also be remunerated at arm's length.

The remuneration for BV X's support and operational activities must be determined in a similar manner to that in example Q above.

9.3 Cash pooling

9.3.1 Characterisation of the transaction

Entities within groups will generally have short-term receivables and debts with independent financial institutions. The group as a whole may obtain a benefit if they 'pool' these receivables and debts within the group in the form of a 'cash pool', in which various associated parties can deposit short-term receivables or incur short-term debts as cash pool participants. The associated cash pool coordinator is referred to as the 'cash pool leader'. Two common methods are 'zero balancing cash pooling' and 'notional cash pooling'.

In delineating a cash pool transaction, attention must be paid, *inter alia*, to an individual participant having varying debit and credit positions in the cash pool. In a situation where one or more cash pool participants hold a debit or credit position in the pool for an extended period of time, it is necessary to determine whether a different type of transaction is involved, such as a longer-term deposit or a loan. This means that, based on the arm's length principle, a different remuneration is appropriate compared with the remuneration for a short-term position of the cash pool participant.

9.3.2 Benefits of the cash pool

Group members are only expected to participate in a cash pool if it does not lead to a more disadvantageous outcome than another option. Here, too, the options realistically available to cash pool participants must therefore be taken into account. The benefit of participating in a cash pool does not solely need to consist of a favourable interest rate.

It may also entail a reduced need to raise external loans, less administrative work and more efficient management of the liquidity position.

Savings and other benefits resulting from participation in a cash pool may result from group synergies arising from a structuring within the group aimed at realising those benefits (a 'deliberate concerted group action'). In such cases, the synergy benefits must be shared among the cash pool participants in accordance with section D.8 of chapter I.

The distribution of these benefits must take place through the determination of the arm's length interest rate on the debit and credit positions of the cash pool participants, taking into account an appropriate remuneration for the cash pool leader.[34] Given the limited functionality, the cash pool leader in the case of notional cash pooling will add less value than the cash pool leader in the case of zero balancing. This will be reflected in the remuneration.

9.3.3 Cross-guarantees within the cash pool

In addition to the parent company's guarantee, the OECD Guidelines also address possible cross-guarantees within the cash pool arrangement whereby the participants stand surety for each other. Section C.2.3.3 of chapter X notes that individual participants generally have no influence on who participates in the cash pool and the amounts they may guarantee. In addition, the cash pool participants will not have relevant information about the other participants for which they are guarantors. In the case of cross-guarantees, no guarantee fee is generally payable between the parties. The support of a participant in the event of a default by one or more participants should be regarded as an act in the capital domain that does not affect the taxable profit of the participants concerned.

9.4 Guarantees

9.4.1 Characterisation of the transaction

The issuing of a guarantee for debts of an independent party is unlikely to be a common occurrence, and certainly not without stipulating substantial security. When providing a guarantee to an associated entity, it should therefore be investigated whether arm's length conditions can be found under which commercially rational independent parties would be willing to enter into such a transaction.

The arm's length nature of a guarantee by an associated entity must be assessed not only from the perspective of the entity issuing the guarantee, but also from the perspective of the entity for which the guarantee is issued. This includes determining whether the borrower benefits from the guarantee, taking into account the effect of any implicit support already present.

A benefit of a guarantee for the borrower may be that it can borrow under better conditions than without the guarantee. In effect, the borrower will then borrow on the

[34] See paragraph 10.143.

basis of the credit rating of the guarantor. If this leads to lower costs for the borrower, it will be willing to pay a fee for the guarantee. The costs of borrowing with a guarantee must then be compared with the costs without an explicit guarantee, but taking into account the implicit support.

Another benefit may be that the borrower is able to borrow more money with a guarantee than without one. In that case the guarantee does not only support the credit rating in a way that a lower interest rate is charged, but also increases the borrowing capacity.

Under the OECD Guidelines (in particular paragraph 10.161), the additional part of the loan to the guarantee recipient (made possible by the guarantee) must be deemed a loan to the guarantor. This is followed by a capital contribution by the guarantor to the guarantee recipient. No guarantee fee can be charged for this additional part. A guarantee fee can be taken into account only for the part of the loan that qualifies as a loan to the guarantee recipient.[35]

The current OECD Guidelines stipulate that if a group company is unable to raise a loan or part of the loan in the capital market independently, without this guarantee, the guarantee is in principle provided in the shareholders' domain for the part of the loan that could not be raised independently. For that part, no intra-group service is provided for which the guarantee recipient must be charged a fee. If the lender calls in the guarantee from the guarantor, it will first be attributed to the part of the loan that could not be raised independently, and in view of the above, the consequences will not give rise to a tax charge.

9.4.2 The arm's length guarantee fee

If the guarantee constitutes a service, the fee payable for it cannot in principle be higher for tax purposes than the benefit that the party receiving the service enjoys as a result of the guarantee.

The OECD Guidelines describe five methods for determining the guarantee fee. If the corresponding CUP method cannot be applied, it is preferable to determine the guarantee fee on the basis of the approach described below (also known as the 'yield approach').

By way of example, the capital market may, in a given situation, apply the following interest rates:

- On the basis of the standalone rating: 6%
- On the basis of the derivative rating: between 4% and 6%
- On the basis of the group rating: 4%

In this situation, the guarantee fee based on the yield approach could not be higher than

[35] It is still uncertain whether such characterisation of the additional part of the loan to the guarantee recipient will be followed by the courts, in view of prevailing case law in the context of the Corporation Tax Act 1969.

the difference between the interest rate corresponding to the derivative rating (see section 9.1 of this Decree) and the interest rate corresponding to the group rating. That is the maximum benefit that the guarantee recipient could obtain with the explicit guarantee.

The role and status of the entity within the group are among the factors to be taken into account when determining the degree of implicit support and its effect on the entity's derivative credit rating. The derivative rating will be between the standalone rating of the group entity and the group rating.

If in an individual case it is not possible to determine a specific arm's length guarantee fee, I agree that the guarantee fee should be set at half of the benefit obtained by the guarantee recipient.

9.4.3 Cross-guarantees within the group

As with cash pooling, section D.1.2 of chapter X considers the effects of cross-guarantees, where group members guarantee one another's liabilities. The OECD Guidelines note that it is difficult, if not impossible, to determine the value and effects of each individual guarantee between two group members, while at the same time other group members are also guaranteeing the same risk.

An analysis of the facts and circumstances will generally lead to the conclusion that the benefit of such a cross-guarantee does not exceed the benefit resulting from passive association and being a member of a group (implicit support). In such cases, no guarantee fee is payable and the support resulting from the guarantee provided in the event of a default by one or more participants takes place in the capital domain and does not affect the taxable profit.

In addition to the above, a Supreme Court judgment is also relevant in this context.[36] It stipulates that in the case of a guarantee under an umbrella credit facility, an entity's acceptance of joint and several liability for all the debts of other entities taking part in the credit arrangement arises from the corporate relations between that entity and those other entities. The acts of the entities are in that case governed by the group interest. The entities thereby accept a liability exceeding the liability that exists when capital is raised independently.

Comparable joint and several liability will not easily be found among independent parties. It will rarely be possible to determine an arm's length fee for the mutual guarantees of the various associated parties. In those cases, the consequences of joint and several liability lie in the capital domain.

[36] Supreme Court judgment of 1 March 2013, no. 11/01985, ECLI:NL:HR:2013:BW6520.

9.5 Captives

9.5.1 Characterisation of the transaction

Within groups there are entities that contractually act as internal (re)insurers. These are hereafter referred to as 'captives'.

In order to assess, as part of the delineation process, whether there are in fact insurance transactions carried out by captives, the following indicators are relevant:
- Is there diversification and pooling of risk in the captive insurance?
- Has the economic capital position of the entities within the group improved as a result of diversification?
- Is the captive, as a regulated entity, subject to rules relating to the actual assumption of risks and the capital required in this regard?
- Would the insured risk otherwise be insurable outside the group?
- Does the captive have the required skills and experience in relation to the insurance activity and the investment of the premiums received?
- Is there a real possibility that the captive will suffer losses?

In order to conclude that actual insurance transactions exist, all the above questions must, in principle, be answered in the affirmative.

As regards diversification, it should be borne in mind that a captive generally has a lower degree of diversification than an external insurer insuring similar risks, because it usually has a more limited circle of insured parties. A lower degree of diversification means in principle that the captive would have to charge a higher premium in order to assume the insured risk. Without a higher premium, the captive would not generate sufficient return to bear the risks incurred and to realise the remuneration for its risk capital.

A reduction of the risk capital, which could possibly lead to a lower premium, would also not make the insurance transaction possible from a rational economic perspective. The reduced capital would not be sufficient to cover the entire expected loss in the event of the negative consequences of the insured risks occurring, so that the insured parties would have to bear part of the risk themselves. As a result of the higher premium that would have to be charged from the captive's perspective, the insured entity would be better-off placing the risks with an independent, more diversified insurer. The insurance transaction with the captive would therefore not materialise in such a situation.

9.5.2 Insured risk and insurance risk

When analysing an insurance transaction, it is important to distinguish between:
(i) the insurance risk associated with insurance; and
(ii) the insured risk.

In general, the insured party controls the insured risk. After all, the decision to assume the risk and to insure against the negative consequences of that risk is part of the insured party's control over that risk (see paragraph 1.61, (i) and (ii)). If insurance is actually involved, the captive performs a 'risk mitigation function'. This function is not

part of the control function regarding the insured risk (see paragraph 1.61 (iii) and paragraph 1.65).

It must then be determined whether the captive controls the insurance risk. It is important to note that the OECD Guidelines[37] consider the 'underwriting function' described in the OECD PE Report[38] as the control function in respect of the insurance risk. If the captive does not perform the control functions described, the risks must be allocated to the party that does perform them. In that case, the (net) income from the invested premiums must also be allocated to that party (see paragraph 10.212).

9.5.3 Passive pooling of insurance risks

In a so called passive pooler, group risks are placed or bundled and placed through it with independent (re)insurers. In the former situation, this is often the uninsured risk which the group itself wishes to retain and/or to which it is obliged by external insurers. Usually, the passive pooler is an extension of the head office's risk management department.

Such an entity is usually forced to accept all insured parties within the group and is often forbidden to insure risks of parties outside the group. It does not perform the aforementioned underwriting function, does not diversify and does not have the required expertise and experience in relation to the insurance activity and investment of the premiums received. This means that the above requirements for qualifying the transactions as insurance transactions are not met. The entity mainly performs an administrative and/or intermediary function, which only justifies limited remuneration.

The other benefits created via this entity, such as the pooling benefit resulting from the fact that less capital needs to be retained jointly (see paragraph 10.207), the benefits resulting from centralised negotiations with any (re)insurers and the investment income generated by it with the premiums received accrue to the group members pooling their resources in this way (see paragraph 10.212).

9.5.4 Insurance as a by-product

There are situations where the insurance is offered as a by-product to independent customers of products or services by a group with activities outside the insurance sector, such as cancellation insurance or insurance for an extra warranty period. The policy for the customer is generally in the name of an independent insurer under the supervision of a local regulator. After deduction of a fee for the independent insurer, the premium is passed on as a reinsurance premium to the internal associated reinsurer.

In practice, it is not the internal reinsurer, but the group member that carries out the main activity of the group, that offers the insurance as a by-product to the independent customer. That group member achieves diversification via its customer base and is thereby able to generate the insurance benefits for the group. The internal reinsurer

[37] See paragraph 10.211.
[38] OECD (2010). *Report on the Attribution of Profits to Permanent Establishments*. OECD Publishing: Paris.

generally does not perform the aforementioned underwriting function, does not diversify and does not have the required expertise and experience in relation to the insurance activity and investment of the premiums received. This means that the requirements set out above for transactions between the internal reinsurer and the group member that carries out the main activity of the group to qualify as insurance transactions are not met. Such an entity performs only a minor administrative role, which justifies limited remuneration.[39]

9.5.5 Sale of insurance via an agent

Section E.3.4 of chapter X describes the sale of insurance via an associated intermediary, where the profit made by the insurer is higher than in comparable transactions with similar third parties. This only concerns a group entity that, based on the criteria set out in section 9.5.1 of this Decree, also actually provides insurance. In the example, the sale of high-quality technical products by a retailer is accompanied by insurance against damage and theft from an associated insurer. In such a situation, in order to determine the arm's length compensation for the intermediary, particular attention must be paid to the circumstances leading to that high profit. If the high profit is attributable to the possibility of also offering insurance at the time and place of sale of a product or service through the intermediary's direct contact with the customer, the ensuing (additional) benefit must not be allocated to the associated insurer. In such a situation, the associated insurer should receive compensation equal to that of comparable independent insurers.

10. The documentation requirement

In the Corporation Tax Act 1969 the documentation requirement with regard to transfer pricing is regulated in two places: in article 8b, paragraph 3 and in articles 29b to 29h, 34f and 34g (country-by-country report, master file and local file). The country-by-country report, the master file and the local file are discussed first below, followed by the article 8b documentation.

10.1 Country-by country report, master file and local file

Sections 29b to 29h of the Corporation Tax Act 1969 apply to taxpayers who meet certain standards. The Decree of 30 December 2015 laying down supplementary documentation requirements for transfer pricing (DB2015/462M) contains further rules on the form and content of the country-by-country report, the master file and the local file.

The obligations set out in article 29b to 29h of the Corporation Tax Act 1969 only relate to cross-border transactions between associated group entities and the provision of evidence supporting an arm's length profit attribution to permanent establishments.

10.2 Article 8b documentation

[39] See also: judgment of The Hague District Court, 11 July 2011, AWB08/9105, LJN BR4966.

The documentation requirement set out in article 8b, paragraph 3 of the Corporation Tax Act 1969 consists of a description of the five comparability factors of the controlled transactions as described in chapter I, a substantiation of the choice of the transfer pricing method used and a substantiation of the conditions, including the price, applicable to the transactions. This requirement covers both domestic and cross-border transactions with associated entities.

When codifying the documentation requirement under article 8b, paragraph 3 of the Corporation Tax Act 1969, it was deliberately decided not to give an exhaustive list of the documentation required to support the arm's length nature of the transactions. In that sense, it is an open standard. The proportionality principle plays an important role in assessing the adequacy of this documentation. The basic premise is that the additional administrative burden resulting from article 8b, paragraph 3 of the Corporation Tax Act 1969 must be minimised.[40]

In view of the open standard used, I realise that there may be uncertainty among taxpayers as to whether the documentation available will be deemed sufficient by the Tax Administration. It is therefore possible to obtain certainty from the competent inspector about whether the documentation requirement set out in article 8b, paragraph 3 of the Corporation Tax Act 1969 has been met.[41]

I am of the opinion that entities that comply with the documentation requirements set out in article 29g of the Corporation Tax Act 1969 in terms of content, also comply with the obligation set out in article 8b, paragraph 3 of the Corporation Tax Act 1969 in so far it concerns cross-border transactions. If the requirements set out in article 29g of the Corporation Tax Act 1969 are also applied by entities to domestic transactions with associated entities, I agree that the documentation requirement set out in article 8b, paragraph 3 of the Corporation Tax Act 1969 is met.

11. Early consultation about possible double taxation

Double taxation resulting from transfer pricing adjustments is undesirable. Taxpayers confronted with taxation that is not in accordance with the provisions of a treaty can request a mutual agreement procedure. The competent authority for the Netherlands is the Minister of Finance. The General Manager of the Tax Administration's Large Companies Division has been granted a mandate to carry out the duties of the competent authority.

The basic principle of a mutual agreement procedure is that double taxation will be eliminated as quickly and efficiently as possible. This assistance is provided on the basis of concluded tax treaties, the EU Arbitration Convention[42] and the EU Arbitration

[40] In the case of taxpayers that need to have transfer pricing documentation on the basis of article 8b, paragraph 3 of the Corporation Tax Act 1969, the absence of any research or study into the prices (in databases) that are established in comparable situations between independent parties will not necessarily lead to the conclusion that the documentation is incomplete.
[41] Order no. 2018-4380 establishing the Transfer Pricing Coordination Group.
[42] Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC).

Directive[43] as implemented in the Netherlands in the Tax Arbitration Act.[44] The Netherlands seeks to start mutual agreement procedures with treaty partners early. Further details can be found in the Decree of 15 November 2021, no. 2021-0000226675, Government Gazette 2021, 47634.

Experience shows that in some cases double taxation can be eliminated in a relatively simple manner during the mutual agreement procedure by sharing facts and circumstances of relevance to the case in question. That is why, if a taxpayer expects to be faced with double taxation in the area of transfer pricing as a result of the actions of the Tax Administration or of a tax administration in a country with which the Netherlands has the possibility of exchanging information, the Tax Administration is prepared to examine ways of avoiding possible double taxation at the earliest possible stage by sharing information or jointly carrying out audit activities. Taxpayers may submit a request to that end to the Dutch tax inspector.

The chance that the actions of a foreign tax administration will lead to a transfer pricing adjustment must be present. The taxpayer must demonstrate this in their written request. The scope for avoiding double taxation by exchanging information or jointly carrying out audit activities will depend on the legal options available and the willingness of other countries to cooperate in such a process.

12. Entry into force

This Decree enters into force on the day after the date of publication of the Government Gazette in which it appears.

13. Repealed orders

The following Decrees are repealed with effect from the entry into force of this Decree:
- Decree of the State Secretary for Finance of 22 April 2018, no. 2018-6865, Government Gazette 2018, 26874; and
- Part V of the Questions and answers financial service entities Decree, no. DGB 2014/3102.

14. Short title

This Decree may be cited as the Transfer Pricing Decree 2022.

This Decree will be published in the Government Gazette.

The Hague, 14 June 2022

M.L.A. van Rij
State Secretary for Finance

[43] Council Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union.
[44] Act of 10 July 2019 introducing a statutory mechanism for the resolution of tax disputes between member states of the European Union, Bulletin of Acts and Decrees 2019, 261.