

Dutch decree falls short of TP certainty

Leanna Reeves July 21, 2022

The Dutch secretary for tax affairs and tax administration's TP decree could leave taxpayers uncertain despite greater clarity around inter-company loans and financial intermediaries.

The Dutch transfer pricing decree helps clarify the application of the arm's-length principle and intermediate financial services, but it relies too much on past rules, according to tax directors.

"The goal was to provide new guidance, specifically on financial intermediaries as they tried to incorporate the key concepts of TP guideline – but there is no additional guidance from past practice," says a global tax director of a streaming media company.

"Whether the goal has been achieved is a different story," adds the director.

Marnix van Rij, secretary for tax affairs and tax administration, issued the July 1 decree to build upon the last decree published in 2018, in which the 2017 OECD guidelines had brought some significant changes to the TP landscape.

This decree aims to align Dutch guidance with the OECD guidelines and considers the COVID-19 pandemic implications on TP.

TP 2.0

The decree offers three key areas of focus: the application of the ALP following the pandemic, changes in relation to inter-company services, and intermediate financial services companies.

For inter-company services, the decree involves 'contract manufacturing activities' and has removed the paragraph concerning advance certainty obtained by taxpayers.

Guidance around intermediate financial services companies is one of the most significant updates within the decree, according to some TP experts, as it impacts the remuneration of multinational enterprises (MNEs).

Gijs van Koeveringe, tax lawyer and TP specialist at firm Houthoff in The Randstad, says it is an impactful change for corporations operating in the Netherlands.

"Before the remuneration of these companies was based on a spread, whereas the guidance now recommends a cost-plus type of remuneration in case of no or limited substance and based on the risk analysis of these companies," he says

"This change could have further spill-over effects concerning the beneficial ownership of the relevant incoming and outgoing payments," adds van Koeveringe.

Rezan Okten, TP counsel at the same law firm, says that corporations must re-assess whether the intermediate financing companies still meet beneficial ownership requirements.

The decree brings clarity in relation to inter-company transactions that relate to financial intermediaries by referring to Chapter X of the OECD guidelines.

In short, if the financial intermediary has full control of risks, an appropriate interest rate would be applied, most likely using the comparable uncontrolled price method.

If the intermediary has no full control of risks, a cost-plus method would be applied. Finally, if the intermediate financial services companies have shared control of the risks, then it would be up to a third party to take control.

Cash pools

At the same time, the decree's focus on cash pools in Chapter X has also caught the attention of tax directors.

MNEs can use cash pools to lower interest rates and administrative costs, but the debit or credit positions of participants in the cash pool, if held for a longer term, could require an arm's length remuneration based on the type of transaction.

A senior director at an American multinational company, operating in the Netherlands, says the Dutch tax authority follows Germany and Switzerland's guidance on cash pooling.

"The old way was that you were lending the money and lending out the money. Apparently, this is outdated," says the director. "If you have a cash pool, then you need to arrange your multinational cash pools. To make yourself reliant or resilient to --- in the world. It would be wise to review their current cash pool arrangements."

It could therefore be a good moment for corporations to perform functional analysis (FAR) of their treasury functions to check if the pricing policy is according to FAR, says Krishna Gupta, TP expert in the Netherlands.

"For example, look at the new policy with respect to cash pooling and decide on the FAR of the pool header and see if the remuneration is according to the FAR. Ensure that the substance and form are the same," he explains.

Room for interpretation

The decree provides detailed information can only bring further clarity to taxpayers in the country. Some tax directors say the guidance's alignment with OECD standards could help corporations to better assess their risks, for instance.

David Zářecký, TP adviser at software company TP Tuned in Amsterdam, considers the tax administration's focus on risks to be a positive improvement for the jurisdiction's TP.

"The entire BEPS initiative has been about focusing less on contractual arrangements and on who is performing functions and controlling risks," he says. "The guidance contained some principles as to how you should allocate risks. It's positive and quite detailed."

While the decree aims to bring more clarity to Dutch TP rules, some areas are still left for interpretation, according to van Koeveringe.

"There is room for discussion as the decree does not seem to provide for the grandfathering of existing structures. For the part which leaves room for interpretation, one should aim to find more comfort provided by OECD guidelines," he says.

The global tax director at a streaming media company says the decree could create some degree of uncertainty for taxpayers in the Netherlands, which emphasises the importance of financial analysis.

ALP under pressure

Whether the Dutch tax administration's decree will lead to more audits remains to be seen but focus on inter-company transactions has certainly caught the eye of tax authorities.

With more guidance, corporations are better equipped to analyse the risks of certain transactions and could therefore avoid potential controversy.

Inter-company agreements must be updated regularly, and it is up to the tax directors to prove that old strategies are no longer working.

Dr Arthur Pleijsier, partner of TP at consultancy firm Eurofiscus in Amsterdam, says that while the ALP used to be simple by comparing a transaction with a comparable third party one, the process is no longer as easy.

"The ALP is under severe pressure. In many instances, the arm's-length principle doesn't provide a solution. The OECD developed many different interpretations to different transactions," he says.

"The challenge for tax directors and other TP practitioners is to constantly keep up-to-date with the changes on the OECD level but also to the country-specific deviations and modifications to the ALP, like the recently published Dutch decree for example," adds Pleijsier.

All in all, the Dutch decree sets as a reminder that tax directors must remain proactive when it comes to TP updates.

With more details around the ALP, inter-company transactions, and financial intermediaries, the guidance ultimately brings greater clarity to the rules – but any room for interpretation could allow uncertainty for taxpayers and lead to potential mismatches.