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# Transfer Pricing 2025

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**Netherlands: Trends and Developments**
Jan-Willem Kunen, Natalie Reypens and Gijs van Koeveringe
Loyens & Loeff

# Trends and Developments

**Contributed by:**
Jan-Willem Kunen, Natalie Reypens and Gijs van Koeveringe
**Loyens & Loeff**

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## Authors

**Jan-Willem Kunen** is a senior associate and tax adviser at Loyens & Loeff who advises clients on Dutch and international transfer pricing and tax issues such as mutual agreement procedures, (bilateral) advance pricing agreements and OECD Pillar One and Pillar Two. Jan-Willem also has broad experience in advising on business restructurings, transfer pricing disputes, financing, IP, acquisitions and the setting up of international structures. He teaches transfer pricing courses at the Dutch Association of Tax Advisers. From 2014 to 2016, he worked at Loyens & Loeff's Zurich office.

**Natalie Reypens** is a partner in the Amsterdam and Brussels office of Loyens & Loeff and heads the firm's global transfer pricing team. She has 25 years' experience in advising multinationals in international and corporate tax law. She assists multinationals formulating transfer pricing policies. She also advises on the setting up and conversion of business models, restructurings and profit allocation to permanent establishments. Natalie prepares and assists in preparing transfer pricing documentation. She also handles audits, rulings and APAs and disputes through MAP and arbitration. Natalie also has experience in EU state aid matters.

**Gijs van Koeveringe** is an associate and tax adviser at Loyens & Loeff who specialises in corporate restructuring, financial transactions, supply chains, transfer pricing documentation and dispute resolution for clients in various industries. He assists clients with economic and financial analyses of intragroup transactions, as well as the design, implementation, documentation and defence of transfer pricing policies. In addition, he has often been involved in mutual agreement procedures and the conclusion of advance pricing agreements with the Dutch Tax Authorities.

## Loyens & Loeff

Parnassusweg 300
1081 LC Amsterdam
The Netherlands
Tel: +31 20 578 57 85
Fax: +31 20 578 58 00
Email: info@loyensloeff.com
Web: www.loyensloeff.com

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## Introduction

The Dutch transfer pricing landscape underwent significant developments in 2024 and early 2025. Notably, these include the further clarifications on the transfer pricing mismatch legislation, Dutch case law addressing various transfer pricing matters, the implementation of Amount B, and the implementation of Public Country-by-Country Reporting legislation. Additionally, this article examines relevant European and international developments influencing the Dutch transfer pricing landscape.

## Clarification Around Transfer Pricing Mismatch Legislation

As of 1 January 2022, the Netherlands has incorporated legislation into its Corporate Income Tax Act (CITA) to prevent double non-taxation arising from transfer pricing mismatches. The legislation requires Dutch taxpayers to ensure that intercompany transactions are priced at arm's length and correctly documented. Failure to comply may lead to unfavourable Dutch corporate income tax (CIT) implications.

The legislation includes three main elements:

- Article 8bb of CITA – ie, no downward adjustment of the Dutch taxable profit without a corresponding adjustment;
- Article 8bc of CITA – ie, no adjustment in the Dutch tax basis to the arm's length value for assets and liabilities transfers to the extent that no corresponding adjustment is taken into account in the transferor's profit tax base; and
- Article 8bd of CITA – ie, applicable to contributions, distributions, and (de)mergers, pursuant to which the Dutch CIT base is at maximum (for assets) or at minimum (for liabilities) the value included in the transferor's tax base).

Also, the legislation contains a transitional rule which limits the amount of depreciation of a Dutch taxpayer on asset transfers that would have been affected by this legislation with retroactive effect to such transfers that took place between 1 July 2019 and 1 January 2022.

In practice, the (non-)applicability of Article 8bd of CITA led to significant uncertainty for taxpayers on the Dutch tax consequences of contributions, especially those involving entities that are disregarded for US tax purposes and exempt entities. On 31 January 2025, the Dutch Tax Authorities (DTA) published the third helpful Knowledge Group (KG) Position on the scope of Article 8bd of CITA. The literal wording of the article led to uncertainty as to whether Dutch parent companies could be adversely impacted in cases of deemed dividend distributions due to non-arm's length transactions between two foreign subsidiaries. The third KG Position clarifies that such deemed dividend distributions, in the view of the KG, do not result in the acquisition (*verkrijging*) of an asset by the Dutch parent company and are, therefore, not in scope of the transfer pricing mismatch legislation. The first two KG Positions concerned the contribution of impaired receivables, which were also not considered in scope of the transfer pricing mismatch legislation.

KG Positions contain the DTA's interpretation of the tax aspects of specific issues that were presented to the respective KG. They constitute the policy of the DTA. Based on the principle of legitimate expectations (*vertrouwensbeginsel*), taxpayers can rely on them as of their publication date.

Following the publication of the latest KG Position on 31 January 2025, a total of three KG Positions have now been issued concerning the scope of Article 8bd of CITA. Additionally, the decree issued by the State Secretary on 24 January 2023 (the *"8bd Decree"*) clarifies that capital contributions to, and distributions from, a Dutch entity by an entity not subject to profit taxation are not impacted by the transfer pricing mismatch legislation introduced in 2022, provided that the fair market value is duly reflected in the relevant civil law documentation and annual accounts.

In conjunction with the various advance tax rulings issued in the meantime, the KG Positions and the 8bd Decree provide valuable guidance and support to taxpayers regarding the interpretation of the scope of Article 8bd of CITA. Taxpayers may rely on this guidance for comparable cases and also as a basis for obtaining advance tax rulings to confirm the non-applicability of Article 8bd of CITA to other cases.

## Dispute Resolution and Prevention

The Netherlands has experienced a significant increase in tax audits concerning transfer pricing over the past few years. These audits frequently target applied interest rates, business restructurings – including the onshoring of intellectual property – and the overall transfer pricing policies of MNEs. Given the rising number of transfer pricing disputes, mechanisms for alternative dispute resolution and prevention are becoming increasingly important.

To avoid discussions, taxpayers may consider entering into a (bilateral) advance pricing agreement (APA). Although there is no obligation for the competent authorities to reach an agreement on a bilateral APA, successful outcomes are in most cases reached by the Dutch competent authority.

Furthermore, taxpayers could end up in discussions with auditors upon the annual audit of their financial statements, including discussions on deferred tax assets and deferred tax liabilities. Auditors have tended to have become more critical of tax issues over recent years, so taxpayers should ensure they have sufficient substantiation and documentation of their transfer pricing prior to the audit. With the introduction of Pillar Two, more discussions with auditors are expected due to the increased relevance of financial statements in determining potential Pillar Two tax liability.

Internationally, discussions with tax auditors may lead to a mutual agreement procedure (MAP). The number of MAPs is expected to continue to increase, as transfer pricing discussions arise more frequently, and more MAPs are expected in order to limit the impact of the transfer pricing mismatch legislation. MAPs remain an attractive cross-border mechanism to resolve the double taxation that often results from a unilateral correction by a tax authority, and one in which the Dutch competent authorities reach a resolution in most cases even without mandatory binding arbitration.

## Recent Relevant Dutch Case Law on Transfer Pricing

Following the increase in transfer pricing audits, the Netherlands has also seen an increase in transfer pricing cases. Two recent transfer pricing cases, on business restructuring and shareholder loans, that could be relevant for the practice are discussed below.

### *Business restructuring case*

On 11 July 2024, the Dutch Court of Appeal (the *"Court of Appeal"*) ruled on a transfer pricing dispute in relation to a business reorganisation from the Netherlands to Switzerland. Amongst other things, this case covered:

- whether *"something of value"* was transferred in addition to the market value of assets and liabilities;
- the burden of proof; and
- the usefulness of an independent valuation expert's input on the *"minimum value"*.

The Court of Appeal ruled that the functional and risk profile of the transferor and the transferee changed significantly after the reorganisation as, in addition to the transfer of the assets and liabilities, ten to twenty employees were relocated to Switzerland. Moreover, the profit and cash flow of the transferor decreased significantly after the reorganisation, while the profit and cash flow of the transferee increased significantly. Notwithstanding that the business reorganisation had valid business reasons and the taxpayer had provided documentation supporting that solely *"specific assets and liabilities"* had been transferred, the Court of Appeal therefore concluded that *"more"* had been transferred.

The DTA did not agree with the value of the transfer that the taxpayer presented in its tax return and it stated that the taxpayer was aware, or should have been aware, that the taxable amount was too low at the moment the tax return was filed and, therefore, not objectively arguable (*naar objectieve maatstaven pleitbaar*). Together with the size of the correction made by the DTA, the Court of Appeal therefore decided that the taxpayer failed to file the appropriate CIT return (*vereiste aangifte*). Consequently, the (increased) burden of proof shifted to the taxpayer.

At first instance, the lower court had eventually called in an expert to resolve this dispute. The Court of Appeal agreed with the DTA's view that in making a reasonable estimate in a situation where there is a range of prices, the tax inspector does not necessarily have to take the minimum price at the bottom of the *"range"*. However, the Court of Appeal found that the expert aimed for the median due to the set of observations he used in his pricing. Insofar the DTA meant that the median or average of the DTA's and the expert's valuations should be used, the Court of Appeal disagreed with the DTA. The Court of Appeal, furthermore, ruled that the remuneration for the transfer should be grossed up (ie, for 80%), as the taxpayer had not provided any insight into the tax treatment in Switzerland. Also, the Court of Appeal considered the DTA's suggested projected inflation expectation of 2% for the remaining period to be reasonable, which was in line with the published expectation by the European Central Bank. Significantly influenced by the allocation of the burden of proof to the taxpayer, the Court of Appeal ultimately decided that the taxpayer should have received a significant remuneration (ie, approximately EUR128 million). Due to the aforementioned adjustments by the Court of Appeal, this value was higher than the value as determined by the expert.

This decision illustrates that business restructurings continue to be a topic that leads to discussions between the DTA and taxpayers. Taxpayers in the Netherlands involved in a substantial business reorganisation are therefore encouraged to ensure that their transfer pricing documentation provides a consistent and logical explanation for all aspects of the reorganisation, aligning with the OECD Transfer Pricing Guidelines (TPG) and all other information available to the DTA. This ruling serves as a pivotal reminder for multinational enterprises to prepare robust transfer pricing analyses to withstand scrutiny and avoid adverse tax adjustments. Furthermore, alternative dispute resolution mechanisms such as a mutual agreement procedure or entering into a (bilateral) APA can be considered by taxpayers in the case of (potential) discussions on business restructurings.

### *Shareholder loan case*

On 7 May 2024, the Court of Appeal ruled on a case involving the deductibility of a significant amount of interest payable on shareholder loans provided to a Dutch taxpayer that had acquired real estate. In this case, the Court of Appeal ruled that it should first be assessed whether the loans should be considered *"non-businesslike"*, which was the case according to the Court of Appeal. According to an earlier Supreme Court case, the interest on non-businesslike loans should be set at the interest that the taxpayer would be due if it were to borrow from a third party with a guarantee from the shareholders under otherwise identical conditions and circumstances – what is known as the *"Deemed Guarantee Approach"* (*borgstellingsanalogie*).

The Court of Appeal ruled that in establishing whether a loan is non-businesslike, the contractually agreed upon terms and conditions are decisive. Subsequently, the Court of Appeal ruled that the tax inspector – on which the burden of proof that the loan should be considered non-businesslike lay – was able to convincingly argue that the loan was non-businesslike. This was because:

- from the benchmarking analyses included in a first transfer pricing report, it followed that a third party would not have been willing to provide a loan to the Dutch company against similar conditions as the shareholder loans; and
- the contents of a second transfer pricing report could not be deemed to be prepared in accordance with the at arm's length principle.

Furthermore, the DTA and the Court of Appeal referred to the statements brought forward by the taxpayer, where the taxpayer argued that third-party financing would only be possible with more rigid conditions in respect of, for example, the loan-to-cost ratio, securities, maturity, and inclusion of a loan-to-value covenant. Ultimately, the Court of Appeal therefore ruled that the shareholder loans constituted non-businesslike loans, and that the interest should be set at the interest rate in accordance with the Deemed Guarantee Approach. The remaining interest was ruled to be non-deductible and was deemed to constitute a dividend to the shareholders.

From the case, it follows that it is crucial that a Dutch taxpayer can provide evidence of the fact that it would be able to obtain third-party financing under similar conditions to those that apply to shareholder loans. Furthermore, proper attention should be given to the terms and conditions of shareholder loans that are laid down in intercompany loan agreements. However, the relevance of this court ruling for Dutch taxpayers that have entered into real estate transactions in respect of future years may be rather limited, taking into account the additional restrictions for deductibility of interest under the earnings stripping rule. Moreover, the interest applicable to non-businesslike loans (ie, equal to the interest rate as set under the Deemed Guarantee Approach) may already be relatively high due to increased market interest rates. The decision may nonetheless still be relevant for Dutch dividend withholding tax purposes, because the difference between the at arm's length rate and the applied interest rate may be classified as a (deemed) dividend.

## Dutch Implementation of Amount B

Amount B of Pillar One is the optional simplified and streamlined approach (the *"S&S Approach"*) for the application of an approximation of the arm's length principle to baseline marketing and distribution activities (BMDA). Amount B provides a pricing framework which includes a three-step process to determine a return on sales (RoS) for in-scope wholesale distribution of goods. Jurisdictions can choose to apply Amount B for fiscal years beginning on or after 1 January 2025. There is no minimum revenue threshold for the application of Amount B.

The S&S Approach, as included in the Pillar One Amount B Report of February 2024 (the *"Report"*), is incorporated as an annex to Chapter IV of the OECD Transfer Pricing Guidelines and aims to reduce the compliance burden and to efficiently resolve disputes in respect of BMDA. Following the guidance that was published by the OECD Inclusive Framework (IF) on 17 June 2024 (the *"June Guidance"*), members of the IF commit to respect remuneration outcomes under the S&S Approach when applied by any of the *"Covered Jurisdictions"*. The definition Covered Jurisdictions generally refers to low-income and middle-income IF countries.

On 4 December 2024, the Dutch State Secretary of Finance (the *"State Secretary"*) published a decree (the *"Amount B Decree"*), outlining the Dutch implementation of Amount B. With the issuance of the Amount B Decree, the State Secretary outlines the Dutch implementation of the S&S Approach as formulated in the June Guidance.

Pursuant to the Amount B Decree, the S&S Approach will not be introduced for BMDA performed in the Netherlands. However, the outcome of the S&S Approach will, under certain conditions, be accepted for Dutch taxpayers that are involved in intercompany transactions covering BMDA that are performed in Covered Jurisdictions. The provisions in the Amount B Decree apply both to intercompany transactions and profit allocations to permanent establishments.

The DTA will accept the outcome under the S&S Approach for the fiscal year in question if the following criteria are satisfied in that same year:

- the BMDA must be performed in a Covered Jurisdiction;
- the S&S Approach must be implemented in the domestic legislation of the Covered Jurisdiction;
- a bilateral tax treaty between the Covered Jurisdiction and the Netherlands must be applicable; and
- the Covered Jurisdiction must apply the S&S Approach in accordance with the Report.

Based on the Report, June Guidance, and the Amount B Decree, taxpayers can evaluate whether (i) their wholesale distribution activities fall within the scope of Amount B and (ii) their remuneration aligns with the returns outlined in the pricing matrix, taking into account any applicable profitability adjustments. If alignment is established, this should be incorporated in the transfer pricing documentation to mitigate the risk of potential challenges. If discrepancies with Amount B exist, a further assessment should be conducted and, where possible, a substantiation should be provided. Also, Dutch taxpayers that are out of scope may still use Amount B as a sanity check for the remuneration of their distribution activities and integrate such in their transfer pricing documentation.

### Public Country-by-Country Reporting

On 14 April 2016, the European Commission published its first proposal requiring certain multinational enterprises (MNEs) to publish an annual report on profits and taxes paid in each country where they are active – ie, a Country-by-Country Report. The aim of this Country-by-Country Report is to enable citizens to assess the tax strategies of MNEs and to see how much they contribute to public coffers in each country.

On 11 November 2021, the European Parliament gave its final green light to introduce public Country-by-Country Reporting obligations in the EU in the form of an amendment of the Directive 2013/34/EU (the *"Directive"*).

By decree of 14 February 2024 (the *"Public CbCR Decree"*), the Netherlands has implemented public-Country-by-Country Reporting. In-scope MNEs are required to publicly disclose a Country-by-Country Report including tax and tax-related information for financial years starting on or after 22 June 2024. Most in-scope MNEs will therefore have to publish their first Country-by-Country Report by 31 December 2026, in relation to financial year 2025.

The Public CbCR Decree provides that, in principle, management of the following entities is required to publish a Country-by-Country Report.

I. An undertaking governed by Dutch civil law and which is considered an ultimate parent undertaking of an MNE (*"NL Headquartered MNE"*), reporting consolidated revenues exceeding EUR750 million for each of the last two consecutive financial years.

II. A medium-sized and large subsidiary as referred to in Article 2:24a of the Dutch Civil Code that is controlled by an ultimate parent entity of an MNE that is not governed by the laws of a member state (a *"Non-EU Headquartered MNE"*), reporting consolidated revenues exceeding EUR750 million for each of the last two consecutive financial years; and

III. A Dutch branch that is controlled by a Non-EU Headquartered MNE that reports consolidated revenues exceeding EUR750 million for each of the last two consecutive financial years, unless there is already a medium-sized or large subsidiary that has a reporting obligation (as mentioned under point II. above).

The management of an NL Headquartered MNE and the management of a Dutch medium-sized and large subsidiary should file the Country-by-Country Report ultimately within twelve months after the end of the respective financial year with the Dutch Chamber of Commerce.

The Country-by-Country Report should be made accessible to the public in at least one of the official languages of the EU, free of charge, and no later than twelve months after the end of the financial year. This should occur on the website of:

- the ultimate parent entity, in the case of an NL Headquartered MNE;
- the subsidiary, in case of a Non-EU Headquartered MNE; or
- the branch, the undertaking which opened the branch or an affiliated undertaking, if it is controlled by a Non-EU Headquartered MNE.

Furthermore, the Country-by-Country Report should be presented using the model and machine-readable electronic reporting format as determined by the European Commission.

Lastly, Dutch medium-sized and large subsidiaries and branches are not required to publicly disclose a Country-by-Country Report if the ultimate parent entity of a Non-EU Headquartered

MNE publishes the Country-by-Country Report on its own website and the aforementioned relevant criteria are met. An MNE no longer has to publicly disclose a Country-by-Country Report when its consolidated revenues cease to exceed EUR750 million over a period of two consecutive financial years.

As opposed to the definitions used by the OECD for Country-by-Country Reporting purposes, the Public CbCR Decree lacks some clarity with respect to the definition of an *"MNE"* (ie, OECD Country-by-Country Reporting explicitly indicates that affiliated undertakings that are excluded from the consolidated group based on size or materiality grounds should be considered a subsidiary for public Country-by-Country Reporting purposes) and use of conversion rates (ie, OECD Country-by-Country Reporting refers to January 2015). It should therefore be verified to what extent a Dutch ultimate parent undertaking, a Dutch medium-sized or large subsidiary, or a Dutch branch is required to publicly disclose a Country-by-Country Report on its own website and which conversion rate should be used.

## International Developments Impacting the Dutch Transfer Pricing Landscape

### *The proposal for an EU Directive on Transfer Pricing*

On 12 September 2023, the European Commission released a legislative proposal for a Council Directive that integrates key transfer pricing (TP) principles into EU law (TP Proposal). The TP Proposal seeks to harmonise TP norms within the EU through the incorporation of the arm's length principle into EU law and the clarification of the role and status of the 2022 TPG. To ensure a common application of the arm's length principle, the TP Proposal provides that the 2022 version of the TPG is binding when applying the arm's length principle in EU member states.

The current Dutch government sees the inclusion of the arm's length principle in EU legislation as a step in the right direction, but is not positive about the way this has been incorporated in TP Proposal. The Dutch government agrees with the TP Proposal that the TPG provide the most appropriate interpretation of the arm's length principle. However, they question whether a common application of the arm's length principle is achieved when interpretations are confined to EU legislation alone. In addition, the Dutch government has stated that the TP Proposal seems to hold EU member states responsible for ensuring that transactions are in line with the arm's length principle. Instead, the Netherlands would prefer the TP Proposal to require that taxpayers themselves carry the primary responsibility for ensuring that cross-border transactions are entered into in accordance with the arm's length principle.

In view of the above Dutch reservations and those of other EU member states, the TP Proposal has not yet gathered sufficient support from EU member states. Instead, other non-legislative options are currently being explored to improve co-operation on transfer pricing practices at an EU level. Such options include the possibility of setting up a transfer pricing platform outside the framework of a Council Directive. The Dutch government has stated that it supports these developments.

### *Pillar One – Amount A*

Pillar One's Amount A seeks to create a new taxing right for market jurisdictions, which will be independent of the physical presence requirement and determined using a formulaic approach. Although having come close to a final agreement, the Multilateral Convention (MLC) text released on 11 October 2023 is still not open for signature yet.

The State Secretary informed the Dutch Parliament that, even though the Netherlands remains in favour of an international agreement on Pillar One by means of an MLC, alternatives should be considered if a global agreement becomes less feasible. In this regard, the Netherlands would then prefer a European solution over a unilateral digital services tax.

### *BEFIT*

On 12 September 2023, the European Commission proposed a Council Directive on Business in Europe: Framework for Income Taxation (the *"BEFIT Proposal"*). The BEFIT Proposal contains a common CIT framework for groups active in the EU. If adopted within the timeframe envisaged by the Commission, EU member states must implement the BEFIT proposal by 1 January 2028 and apply its provisions as of 1 July 2028.

The BEFIT Proposal stipulates that in the first seven fiscal years post-implementation, transactions between entities that are subject to the BEFIT rules (ie, intra-BEFIT group transactions) are considered at arm's length if they are considered to be in *"a low-risk zone"*. The *"low-risk zone"* would cover the expense incurred/income earned by a BEFIT group member from an intra-BEFIT group transaction that increases by less than 10% compared to the average amount of the income or expense in the previous three fiscal years. If this threshold is exceeded, the transaction is presumed not to be consistent with the arm's length principle, unless the BEFIT group member can provide evidence that the relevant intra-BEFIT group transaction was priced at arm's length.

The State Secretary informed the Dutch Parliament that the Netherlands expects BEFIT to increase compliance costs for tax authorities as well as for taxpayers, which would undermine BEFIT's goal of decreasing the administrative burden for tax authorities and taxpayers. The Dutch parliament has therefore also requested the Dutch government not to vote in favour of BEFIT. As BEFIT will have a major administrative impact for MNEs with a European footprint and considering there is little support among EU member states, it remains highly uncertain whether EU member states will reach an agreement on the adoption of BEFIT.

## Concluding Remarks

The Netherlands has seen several significant transfer pricing developments in 2024 and early 2025, with the further clarifications on the scope of the transfer pricing mismatch legislation, the implementation of Amount B and the implementation of Public Country-by-Country Reporting legislation. Additionally, recent Dutch case law concerning transfer pricing further underlines the growing need for taxpayers to prepare and maintain comprehensive transfer pricing documentation. Taxpayers are also advised to closely monitor ongoing European and broader international developments impacting the Dutch transfer pricing landscape, specifically developments coming from the OECD and EU.

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