Bloomberg Tax

Tax Management
International Journal™

The Newly Updated Dutch Transfer Pricing Guidance, Part 2: Treatment of Intercompany Financial Transactions

By Monique van Herksen and Clive Jie-A-Joen
Simmons & Simmons LLP
Amsterdam

INTRODUCTION

On July 1, 2022, a new Dutch Transfer Pricing Decree, identified as Decree No.2022-0000139020 dated June 14 (hereinafter "new TP Decree")[1] was published in the Gazette.[2]

Perhaps the most material change or update in the new TP Decree is the inclusion of extensive guidance on transfer pricing for financial transactions. The new TP Decree largely copies new Chapter X of the OECD Transfer Pricing Guidelines (OECD TPG)[3] in this respect, but also presents an approach that deviates from previous practice and Dutch case law. As the Dutch Tax Authorities (DTA) apply a dynamic interpretation to the OECD TPG, they may very well consider the guidance on transfer pricing for financial transactions as "further clarifications" of the application of the arm's-length principle rather than new rules. Whether that will be feasible is still to be seen.

In this second part, the authors discuss the newly inserted transfer pricing guidance and positions of the DTA on financial transactions, as it applies to loans, cash pooling, guarantees, and captive insurance.

FINANCIAL TRANSACTIONS

The new TP Decree addresses financial transactions materially different and more elaborate than the way they were before and references the updated OECD TPG. In light of years of challenges and ample court cases in the Netherlands regarding the requalification of debt into equity and non-market-price or not-at-arm's-length loans (in Dutch: *onzakelijke* leningen), there appears to be a clear interest by the DTA to peg down the new and relevant transfer pricing rules for financial transactions in the new TP Decree. Whether a transaction presented by (associated) parties as a loan should be characterized as a loan is explicitly mentioned as being part of the delineation process described in Chapter I and part B of Chapter X of the OECD TPG. An interesting question will be how the arm's-length principle will be applied to financing where the debt-equity ratio is challenged, considering existing Dutch Supreme Court jurisprudence on this issue.

Also, with financial transactions, a party's lack of control and/or of financial capacity in relation to certain risks can lead to the allocation of that risk and

---

* Monique van Herksen is a partner and Clive Jie-A-Joen is counsel in the Financial Markets practice group of Simmons & Simmons LLP with a focus on transfer pricing controversy. Clive also lectures at the Erasmus School of Law.

This article may be cited as Monique van Herksen and Clive Jie-A-Joen, **The Newly Updated Dutch Transfer Pricing Guidance, Part 2: Treatment of Intercompany Financial Transactions**, 51 Tax Mgmt. Int'l J. No. 8 (Aug. 5, 2022).

[1] https://zoek.officielebekendmakingen.nl/stcrt-2022-16685.html.

[2] *See Netherlands Gazettes Decree Clarifying OECD Guidelines on Arm's Length Principle, Transfer Pricing for Multinational Enterprises*, Daily Tax Report International (July 6, 2022).

[3] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022, https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2022_0e655865-en#page348.

therefore also allocation of the related remuneration to a party that does control the risk and has adequate financial capacity to do so. Whether this remuneration can be characterized as a service fee or as interest is unclear, but it will likely have implications for application of the interest limitation rules (based on a percentage of earnings before interest, taxes, depreciation, and amortization (EBITDA)), VAT, and other relevant aspects.

INTERCOMPANY LOANS

In case a financial transaction is characterized as a loan, the conditions of the loan need to be tested on the basis of the arm's-length principle. This also applies to the terms of intra-group loans and includes the price of the loan. The end result of this test ought to be a price (interest cost/earnings) that meets the requirements of article 8b of the Dutch Corporate Income Tax Act (CITA). If the transaction cannot be made arm's length with an adjustment of the price and/or of other conditions that can lead to ignoring or requalifying (part of) the loan in extreme scenarios according to the new TP Decree. Subsequently, the arm's-length interest cost/earnings can be determined for the remainder (or the qualifying part) of the loan. Pursuant to Dutch Supreme Court jurisprudence regarding non-market-price or not-at-arm's-length loans, the entire loan (not just a part of it) is to be regarded as a not-at-arm's-length loan. Therefore, it will be interesting to see how this position in the new TP Decree will be applied in practice going forward.

The new Decree acknowledges that the Supreme Court case law makes use of other specific criteria for the qualification of a loan as equity. There may therefore be tension between the OECD TPG and Dutch case law. The new Decree states that if a taxpayer requests advance certainty regarding the application of the arm's-length principle, the OECD TPG will be taken as a starting point, because unilaterally given advance certainty should also be defensible internationally.

The need to analyse parties' perspectives and so-called Options Realistically Available (ORAs)[4] applies to financial transactions as it does to any other intercompany transactions. An unrelated party is generally expected to limit its risk considering the functions it performs and its position in the market. The decision to issue a loan will generally depend on whether the unrelated borrower can repay the loan and can pay the calculated interest due. It is more likely that a loan will be issued to an unrelated party whose creditworthiness, considering the intended intra-group loan, will not decrease below a certain level.

Creditworthiness is commonly expressed by way of credit rating. Credit ratings ranging from AAA to BBB- (based on Standard & Poor's designation; Moody's applies the ratings Aaa to Baa3) indicate a high to adequate creditworthiness where the chance that a borrower will not be able to meet interest and repayment obligations is deemed low. The creditworthiness of the borrower will then be considered as ''investment grade.'' Potential borrowers with a credit rating below BBB- are considered as ''non-investment grade,'' because the likelihood that they will eventually not meet interest and repayment obligations is considered to be too high.

The new TP Decree emphasizes that credit rating is determined based on objective indicators, including interest coverage (e.g., the company's earnings before interest and taxes divided by interest expense during a given period) and the debt-equity ratio. Only in exceptional situations will a lender accept an unrelated borrower with a credit rating that is lower than BBB-, according to the new TP Decree. Furthermore, a lender with a diversified portfolio of loans is considered more likely to issue a loan to an unrelated party that is non-investment grade than a lender that only has one or a very few loans outstanding, according to the new TP Decree. Therefore, if a loan is issued to a non-investment-grade associated enterprise it will need to be substantiated that the loan has been agreed on arm's-length conditions. In this respect, taxpayers may perform a cashflow analysis showing that the borrower can pay the interest and principal of the loan or analyse market evidence substantiating that an independent borrower with the same credit rating as the borrower can obtain a loan from a third-party lender on a stand-alone basis. The new TP Decree concludes in general that higher risks arguably lead to higher interest rates.

The new TP Decree furthermore provides that an unrelated borrower will strive to organize the financing of its business activities efficiently and with the lowest possible cost of capital, which is referenced as the Weighted Average Cost of Capital (''WACC''). The size of equity as compared to debt plays an important role when determining the cost of capital. On one hand, debt financing has certain benefits, as the interest due is usually tax deductible which increases the efficiency of invested capital. On the other hand, the additional cost of raising debt will increase so much as of a certain moment that the efficiency of the invested capital decreases. In that scenario, the better option will be to raise equity, according to the new TP Decree.

The cost of debt is largely dependent on the creditworthiness of the borrower. The new TP Decree con-

[4] ORAs are mentioned in paragraph 1.38 of the OECD TPG.

ISSN 0090-4600

cludes that an unrelated borrower will generally not enter into a loan if that will reduce its creditworthiness below investment grade/BBB-. That level of creditworthiness means it cannot obtain debt or can do so only at very high expense. In addition, calamities would not be covered and the risk of bankruptcy would be high.

Considering the above, the new TP Decree provides that related-party financial transactions that lead to an equity ratio and interest expense which, after putting in place the intercompany loan, reduce the borrower's creditworthiness to below investment grade, require substantiation that the conditions of the loan are at arm's length.

When determining the credit rating of an entity, the level of implicit support between the associated enterprises of the group can play a role. In practice, the degree to which implicit support affects the credit rating of the borrowing entity often leads to disagreements between taxpayers and tax authorities. Based on the new TP Decree, implicit support must be considered as a benefit exclusively allocable to the fact that an enterprise is part of the group. Including remuneration for such implicit support is not considered at arm's length. Implicit support results in a derived credit rating for the borrower. That credit rating considers the fact that the borrower is part of a group of entities. When determining the level of implicit support from the group and the impact on the credit rating for the borrower, the role and position of the entity within the group must be considered, according to the new TP Decree. Entities whose existence is crucial to the group will have a credit rating equal to or close to that of the group. When relevant information is missing, the OECD TPG provide that in case a pricing approach based on a separate entity credit rating and implicit support analysis approach may be considered unreliable, the group credit rating approach (paragraphs 10.81 and 10.82) may need to be considered.

It is relevant to note that when entering into a financial transaction, implicit support that may impact the credit rating can be relevant for evaluating the debt-equity ratio of the related-party borrower in addition to determining the interest rate.

The OECD TPG describe a number of methods to determine an arm's-length interest rate, with an apparent preference for the CUP (comparable uncontrolled price) method. This method determines the interest rate of loans on the basis of available information on comparable transactions of borrowers with a similar credit rating. In addition to the CUP method, the OECD TPG also describe a ''cost of funds'' approach. This method increases the cost of the issuer to borrow the funds itself with a margin for costs, a risk premium and a fee for the required equity. There will be particular scrutiny for cases where unrelated parties make funds available that eventually end up with an associated-party borrower via several group entities. If the group entities solely function as agents or intermediaries they are only eligible for a (modest) margin on their (operational) cost. This is further discussed in a section of the new TP Decree regarding financial service entities and further addressed in Part 5 on financial services entities.

Interest charged in relation to a loan is indicated as a ''risk-adjusted rate of return.'' This consists of a risk-free rate of return and a premium as reward for the risk that is allocated to the issuer at arm's length. Facts relevant for determining a risk-adjusted rate of return are included in paragraphs 1.117–1.126 of the OECD TPG. While the return for the financing party that does not control the risk may be limited to a risk-free rate of return, the borrower does have the right to deduct an arm's-length interest rate. The risk-free rate of return can in general be determined in line with qualified government bonds (paragraphs 1.108–1.116 of the OECD TPG), although it is acknowledged that an investment without risk of loss does not exist. Any difference between the arm's-length interest rate and the risk-free rate of return (the risk premium) will have to be allocated to the party that is in control of the risk related to the investment in the financial asset, according to the new TP Decree. The starting point here is that the entire interest income is included in taxable profit of the other party. In this particular respect, reference is made to the fact that the DTA is authorized to deviate from the arm's-length principle (as described in Part 1 previously).

The Dutch Supreme Court considered the question whether in domestic relations a related-party loan can be depreciated/written down.[5] The Dutch Supreme Court determined that if the interest on a loan between associated enterprises does not conform with the arm's-length principle, an interest rate needs to be considered for tax purposes that does meet the arm's-length principle. For purposes of determining that interest rate, it is explicitly made clear that the new TP Decree is considered as a starting point. If adjustment of the interest leads the loan to *de facto* become profit sharing, the characterization of what parties had initially agreed is compromised. If no interest rate independent of profitability can be determined that unrelated parties would have agreed to charge the borrowing group entity under similar conditions and circumstances, the Dutch Supreme Court considers that the (associated) lender incurs debtor risk that a third party would not have accepted. In that case it should be considered that the lending group entity has accepted this risk based (solely) on its shareholder re-

[5] Supreme Court of 25 November 2011, nr. 08/05323, ECLI:NL:PHR:2011:BN3442.

ISSN 0090-4600

lationship. The Dutch Supreme Court labels this a "non-market price or not-at-arm's-length loan." Any depreciation/write-down of such a loan will not be deductible from the taxable profit of the lender. For such non-market price or not-at-arm's-length loans, the interest rate that is to be applicable for tax purposes needs to be considered. For this, the Dutch Supreme Court provides that one of two methods can be used: a rule of thumb or the market value. Whichever of the two ends up being the lowest will be the interest rate to be applied.

The rule of thumb considers that interest on a non-market price or not-at-arm's-length loan must be based on the interest rate that a borrowing group entity would have had to pay if it would borrow the funds from a third party with a guarantee from the associated-party lender. The resulting interest rate is deductible at the level of the borrowing group entity and taxable at the level of the lending group entity. The difference between the actually charged interest rate and the interest rate determined based on the creditworthiness of the lending group entity will remain in the realm of equity. The market value approach is particularly relevant when the non-market price or not-at-arm's-length loan carries no interest or the interest agreed remains outstanding. The interest rate that is to be considered for tax purposes is in those cases determined based on the market value of each respective interest term at the moment it becomes due.

Testing the arm's-length nature of a loan can take place either at the moment of issuance of the loan or during the term of the loan according to the new TP Decree. Regardless, this test must be applied double sided, i.e., from the perspectives of the lender and of the borrower. There also can be a non-market price or not-at-arm's-length loan in case an associated lender issues a loan to an associated borrower which subsequently ends up being insufficiently creditworthy. The same applies if the associated borrower sees its creditworthiness fall below BBB- as a result of the intragroup loan.

According to the Dutch Supreme Court, the interest rate of a not-at-arm's-length loan with debtor risk which is not at arm's length ought to be determined based on the creditworthiness of the lending entity. The Dutch Supreme Court has not clarified how the creditworthiness of the lending group entity is to be considered as compared to the creditworthiness of the borrowing group entity, however. In case the lender has a higher creditworthiness than the borrower, the interest rate that the lending group entity itself would have been charged will be considered as the interest rate to be applied. If the lending group entity does not have a better creditworthiness than the borrowing group entity (i.e., that entity is not investment grade), a fictitious guarantee will not make any difference. In that case, no more than a risk-free interest rate can be applied with respect to the loan according to the new TP Decree.

CASH POOLING

The new TP Decree also discusses the benefit that can be obtained when short-term receivables and loans of group entities outstanding with unrelated parties are consolidated in the form of a cash pool. The related party coordinating the cash pool is called a cash pool leader. Zero-balancing cash pooling and notional cash pooling are two common types of these arrangements.

When characterizing a cash pool, attention is required as regards the fluctuating debit and credit positions in the cash pool by individual participants. In the event the debit or credit positions last longer, a determination must be made whether a long-term deposit or loan is at stake. That could demand a different arm's-length remuneration than would be appropriate for a short-term position of the participant.

Associated enterprises are expected to participate in a cash pool only if this does not result in a less favourable result than another option, according to the new TP Decree. Also in this case the ORAs of the cash pool participants will need to be considered. The benefit of a cash pool is not necessarily just a more favourable interest rate. It can also lead to a reduced need for entering into external loans, less administration, and more efficient management of the company's liquidity. Savings and other benefits of a cash pool can include group synergies resulting from a structuring within the group that serves to realize these benefits (a so-called "deliberate concerted group action"). Such synergy benefits will need to be allocated amongst the cash pool participants corresponding with what has been described for group procurement activities (in Part 4, on intragroup services).

The benefits of the cash pool should be allocated through the determination of the interest rates on the debit and credit positions of the cash pool participants taking into account an appropriate remuneration for the cash pool leader (paragraph 10.143 of the OECD TPG). The determination of such interest rates applies to so-called zero-balancing cash pooling structures. However, under notional cash pooling there will be virtual balancing of the debit and credit positions of the cash pool participants (i.e., no transfers of balances between participants and the main account). As such, the determination of such arm's-length interest rates may not be relevant for notional cash pooling structures.

A key criticism of the arm's-length principle is that it does not account for economies of scale or benefits

ISSN 0090-4600

of integration (paragraph 1.10 of the OECD TPG). As such, the OECD TPG (paragraph 1.182) provide the guidance that synergy benefits in the context of cash pooling and group procurement activities resulting from ''deliberate concerted group action'' should in general be allocated to the group participants that have contributed to the synergy benefits. The new TP Decree provides that the cash pool leader will contribute less value under notional cash pooling as compared to zero-balancing cash pooling, which will impact its remuneration.

Individual participants will normally have no influence on who participates in the cash pool and how high the amounts are for which they possibly serve as guarantor, according to the new TP Decree. Cash pool participants will not have relevant information as regards the other cash pool participants. In general, there will also be no cross-guarantee fee among the parties. The support provided to a cost pool participant, in case one or more of the other participants defaults, is considered to take place in the realm of equity and does not have any effect on the taxable income of the respective parties.

GUARANTEES

The new TP decree also provides transfer pricing guidance relevant for guarantees. The issuance of guarantees for debt of unrelated parties, without a demand for a high level of certainty or collateral is not likely to arise. Therefore, when a guarantee is provided to a related party it needs to be determined under what conditions unrelated parties acting commercially rational would have been willing to enter into such a transaction. The arm's-length nature of a related-party guarantee will need to be determined based on a double-sided analysis including a determination of whether the borrower obtains a benefit from the guarantee, also considering the effect of already-existing implicit support.

A prime benefit of having a guarantee for the borrower is the negotiation of better terms for the loan. In essence, the borrower obtains funds at an interest rate based on the credit rating of the issuer of the guarantee. If this lowers costs for the borrower, the borrower will be willing to pay a fee for the guarantee. The cost of the guarantee will need to be offset against the cost for funding the loan (without a guarantee) but including implicit support. Another benefit of a guarantee may be that the borrower can obtain a larger loan than otherwise would have been possible. In that case, having the guarantee not only helps secure a lower interest rate, but also augments borrowing capacity.

The OECD TPG prescribe that the additional part of the loan obtained by the borrower as a result of the guarantee should be treated as a loan to the guarantor. This loan is subsequently contributed by the guarantor to the borrower. No guarantee fee applies for this additional part of the loan. Only the part of the loan that qualifies as a loan to the borrower that has obtained the guarantee can be considered for determining an arm's-length (guarantee) fee. The new TP Decree acknowledges that it is not certain whether the above characterisation will also be followed by the judiciary if challenged, however, considering existing Dutch jurisprudence.

The OECD TPG provide in relevant part that the provision of a guarantee to a group entity which by itself would not have been able to borrow as such in the market without a guarantee results in treatment of the part of the loan that would not have been obtainable as a capital contribution. This means that it consists of a service for which no fee can be charged to the borrower who has obtained the guarantee. If the guarantee is called upon by the lender, it will first be allocated to that part of the loan that could not independently be obtained and the consequences thereof will not result in an outlay for tax purposes. If the guarantee is considered as a service, for tax purposes the guarantee fee cannot exceed the benefit received by the party receiving that service.

The OECD TPG describes five methods to determine a guarantee fee in the context of guarantees as a service. To the extent the CUP method cannot be used, the new TP Decree expresses a preference for determining the guarantee fee by way of the yield approach. The following example is provided of how that would be calculated: Assume the following interest rates based on the credit rating:

- Stand-alone rating: 6%;
- Derived rating: between 4% and 6%, let's assume 5%;
- Group rating: 4%

Based on the yield approach, a maximum guarantee fee would be the difference between the interest rate based on the group rating (4%) and the interest rate based on the derived rating (5%), which is 1%.

The new TP Decree provides that if no specific arm's-length guarantee fee can be determined in a particular case, the fee can be considered to be 50% of the benefit (as calculated through the yield approach) obtained by the borrower as a result of the guarantee.

Similar to cash pooling, where group members guarantee each other's obligations, the effect of cross-guarantees ought to be considered. The OECD TPG observe that it is complicated, if not impossible, to determine the value and effect of such individual guarantees. Usually the benefit of such cross-guarantees does not exceed the benefit resulting from passive as-

ISSN 0090-4600

sociation or from being a member of the group (implicit support). In such a case, no guarantee fee is required and the support provided through these guarantees in the event of default of one or more members takes place in the sphere of the shareholder relationship and is not considered for tax purposes.

The above observation is impacted by a Dutch Supreme Court decision[6] determining that in case a guarantee is provided to a borrower pursuant to an umbrella credit facility, the acceptance of joint and several liability for all debt of the other entities participating in the credit facility takes place in the corporate relationship between the borrower and the other entities. The transactions between the entities are governed by group interest. The entities will accept a liability that exceeds the liability they independently would have incurred when borrowing externally. A similar form of joint and several liability will not likely be taken on by unrelated parties. It will rarely be possible to establish an arm's-length fee for such an internal guarantee for the respective related parties. The consequences of the joint and several liability fall within the shareholder relationship (and is not considered for tax purposes).

CAPTIVE INSURANCE

The new TP Decree also provides transfer pricing guidance for captives. Within a group, entities may act contractually as internal (re)insurance entities. These are referred to as captives. The new TP Decree is sceptical as to the arm's-length nature of captive insurance and greatly restricts their acceptance. To determine whether the transactions involved can be delineated as insurance transactions by the captives, relevant questions to be answered include:

(1) Is there diversification and pooling within the captives?

(2) Does the capital position of the group members improve as a result of the diversification?

(3) Is the captive as regulated entity subject to rules relating to the taking on of risk and the required capital?

(4) Would the insured risk qualify for insurance outside of the group?

(5) Does the captive have the required know-how and experience in relation to the insurance activities and the investment of premiums received?

(6) Is there a realistic possibility that the captive would incur losses?

In order to be able to conclude that there is a *de facto* insurance transaction, all the above questions must be answered affirmatively.

The new TP Decree furthermore challenges the business rationale for captive insurance. In the case of a captive there generally is a lower rate of diversification than with an external insurer that insures comparable risks, since the group of insured parties is smaller. The lower diversification will in principle lead the captive to charge a higher premium to accept the risk. Without that higher premium, the captive would not generate sufficient revenue to incur the risks and generate a margin for the capital at risk. A reduction of the capital at risk would possibly lead to a lower premium but would not make the insurance transaction possible from a rational business perspective. This is because the reduced capital would be insufficient to cover any damages in the event negative consequences of insured risk materialize. As a result of that, the insured parties would have to incur part of the risk themselves. Considering the higher premium that the captive will have to charge, the insured parties would be better off if they transfer the risk to an unrelated and more diversified insurer. In that case, the insurance transaction with the captive would not arise.

In the event of insurance transactions, a distinction needs to be made between the insured risk and the insurance risk related to insuring. The insured party is usually in control as regards the insured risk. The decision to take on risk and get insurance against the negative consequences of that risk is part of the control of the insured party over that risk. In case there is factual insurance, the captive will perform a risk mitigation function. This function is not part of the control function over the insured risk. Next it will need to be determined whether the captive is in control of the insurance risk. It is relevant that the underwriting function is considered as a control function with respect to insurance risk by the OECD TPG (paragraph 10.211). If the captive does not perform the described control functions, the insurance risk needs to be allocated to the party that does control the risk, and the net proceeds from investment of the insurance premiums need to be allocated to that party as well.

In case of passive pooling, group risk is bundled and handled by unrelated (re)insurers. Usually this regards the group's own risk that it wants to retain or is forced to maintain with external insurers. Passive pooling usually is considered an extension of functions of the head office's risk management division, which is obliged to accept all insured group members and is usually prohibited from insuring outside parties. There will be no underwriting function and no diversification, as well as a lack of required expertise and experience related to the insurance activity and

[6] Supreme Court 1 March 2013, nr. 11/01985, ECLI:NL:HR:2013:BW6520.

ISSN 0090-4600

the investment of the premiums received in that case. As a result, the requirements for transactions to be considered an insurance transaction are not met. The risk management entity mainly performs administration and brokering functions that merit a limited return in case of passive pooling.

The remaining benefits that arise through a captive, such as the benefit of bundling resulting from the need for less coverage capital, the benefit of central procurement with possible (re)insurers and the benefit from the investments resulting from the premiums should accrue to the group entities that bundle their forces this way.

Where insurance is a side product (e.g., cancellation insurance or extended warranty insurance) offered with a non-insurance product or by a service seller, the (unrelated) buyer's policy will be in the name of a locally regulated insurer unrelated to the seller. The premium will, after deduction of the fee for the insurer, be passed on to the internal related re-insurer as re-insurance premium. In practice the group entity performing the main activities of the group will be the party offering the insurance as a side product to unrelated customers. That group entity achieves diversification through its client portfolio which leads to the insurance benefits for the group. The internal re-insurer will usually not perform the underwriting function, not diversify and also not have the required expertise and experience in relation to the insurance activity and investment of received premiums. Therefore, the requirements for the transactions between the internal re-insurer and the group entity that performs the main activities of the group to qualify as an insurance transaction will not be met. Such an entity merely performs a limited administrative function that qualifies for a limited remuneration.[7]

Chapter X of the OECD TPG describes the sale of insurance via a related intermediary, where the profit that the insurer makes exceeds that of a comparable transaction between comparable third parties. The group entity *de facto* performs insurance activities considering the same six key questions listed above. Chapter X includes an example in which the sale of high-end technical products by a retail company is paired with insurance against damage and theft with a related insurer. In a situation like this, to determine an arm's-length fee, particular attention is required for the circumstances that allow for the resulting (high) profit. If the (high) profitability is attributable to the opportunity to also offer insurance at the moment and place of sale of the product and service, the additional revenue resulting from this opportunity should not be allocated to the related insurer. The related insurer should in a situation like that get a remuneration that is comparable to that of comparable unrelated insurers.

SUMMARY FINDINGS

The new TP Decree includes the OECD TPG financial transaction guidance but acknowledges that it presents a departure of a previously applied analysis with respect to the requalification of debt into equity and non-market-price or not-at-arm's-length loans. In sync with the new guidance, the DTA has been recruiting financial transaction experts and is risk-testing and starting to challenge intercompany financial transactions that do not comply with the principles laid out in Chapter X of the OECD TPG. While the updated TP guidance and positions of the DTA are more consistent with what is internationally observed, it is still to be seen how the Dutch courts will consider the inconsistency with previous jurisprudence.

As the new guidance is likely to be applied to older years and existing financing arrangements, taxpayers are strongly advised to (re)evaluate their TP policies with respect to financial transactions based on the new TP Decree.

[7] The new TP Decree (fn. 38) makes reference in this respect to a lower court decision of the Court of The Hague of 11 July 2011, AWB/9105, LJN BR4966.

ISSN 0090-4600