

## Netherlands issues new MAP decree

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### Executive summary

On 22 June 2020, the Dutch State Secretary of Finance published a [new decree relating to mutual agreement procedures](#) (MAP Decree). This new decree provides further guidance and clarifications on mutual agreement procedures (MAPs) in the Netherlands and replaces the decree dated 29 September 2008. The MAP Decree is intended to align the guidance with recent developments, including: (i) the international minimum standard on MAP as stipulated in the G20/Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) Action 14; (ii) the implementation of the [European Union's \(EU\) Directive on Tax Dispute Resolution Mechanisms](#) (the EU Dispute Resolution Directive) in the Netherlands through the *Dutch Tax Arbitration Act* (DTAA); and (iii) the incorporation of new MAP provisions in the Netherlands' tax treaties covered under the multilateral instrument (MLI).<sup>1</sup>

Key changes as compared to the previous decree include:

- ▶ The MAP process under the DTAA has been included.
- ▶ The distinction between regular, early and extra early MAP is no longer applicable.
- ▶ The MAP Decree now includes policy covering situations in which no outcome can be reached under MAP because of a court decision in another jurisdiction.

- ▶ Conditions are provided under which the tax inspector can apply a corresponding adjustment after the statute of limitations has passed.
- ▶ It describes how the Dutch Competent Authority (DCA) deals with triangular situations.
- ▶ The new MAP Decree stipulates that the requirements for requesting a bilateral advance pricing agreement (BAPA) or multilateral advance pricing agreement (MAPA) are the same as a request for a unilateral advance pricing agreement (APA).
- ▶ An updated policy regarding unilateral compensation of interest by the Netherlands.

## Detailed discussion

### Background

The Netherlands has a large tax treaty network with over 90 tax treaties, has signed and ratified the EU Arbitration Convention, and has implemented the EU Dispute Resolution Directive in its national legislation through the DTAA. Furthermore, the Netherlands has signed the MLI without any reservations on the MAP article. The Netherlands has an established MAP program and long-standing and significant experience with resolving MAP cases. This was confirmed in the [Stage 2 Peer Review Report](#) relating to the implementation of the BEPS minimum standard under Action 14 that the OECD published on 13 August 2019 regarding the Netherlands (Stage 2 Peer Review Report).<sup>2</sup> This report also confirmed that the Netherlands meets the elements of the Action 14 minimum standard.

### Scope of the MAP Decree

The MAP Decree is applicable to all requests to initiate a MAP; i.e., both those related to transfer pricing cases and other, so-called interpretation cases. The latter category includes procedures to determine the place of residence of an entity under a tax treaty, also known as MAP-tiebreaker cases. The Netherlands has opted for application of the MAP-tiebreaker option under the MLI. On 20 December 2019, the Dutch State Secretary of Finance also published a [decree on the MAP-tiebreaker rules for dual residents](#), which is effective as of 1 January 2020.<sup>3</sup>

### Legal basis for MAP: three options

A request to initiate a MAP can be based on three different legal grounds in the Netherlands, being the DTAA, a bilateral tax treaty or the EU's Arbitration Convention. The MAP

Decree describes the procedures for all three options. Through the DTAA, the Netherlands have implemented the EU Dispute Resolution Directive. The DTAA is applicable as of 1 July 2019 for fiscal years that started on or after 1 January 2018. The Netherlands will accept cases under the DTAA for earlier years, but only if the other competent authority also accepts that the case will be handled based on the conditions applicable under the EU Dispute Resolution Directive.

An important feature of the DTAA is that taxpayers can enforce arbitration if the competent authorities have not found a (potential) solution during the MAP within the prescribed two (or three) year time limit. Taxpayers can request the competent authorities to move to the arbitration stage and may even enforce this move through a court procedure. Filing a request under the DTAA often will be attractive for taxpayers, compared to filing under a bilateral tax treaty or the EU Arbitration Convention. The applicable bilateral tax treaty between the Netherlands and another jurisdiction may not always include an arbitration clause, even though the [Dutch tax treaty policy](#) is to include such a clause in its tax treaties. The EU Arbitration Convention includes an arbitration clause with a two-year time period starting from the date the MAP request is considered to be complete. Compared to the DTAA, the EU Arbitration Convention only covers transfer pricing cases and does not provide the option to taxpayers to enforce arbitration through a national court if both competent authorities reject the MAP request, nor the option to request for arbitration if one of the competent authorities rejects the request.

In some situations, multiple legal bases to request the initiation of a MAP are available to a taxpayer. The MAP Decree mentions that it should be indicated upon which legal basis the request is made. In determining which legal basis is available and preferred, the benefits and limitations of each option should be carefully considered.

### Filing a request for MAP

Under the DTAA a request to initiate a MAP should be sent (simultaneously) to the Competent Authority in the Netherlands and in the other EU Member State(s) involved in the dispute. For the EU Arbitration Convention, the request has to be submitted in the jurisdiction in which the entity is a tax resident with submission of a copy of the request for information to the Competent Authority of the other State concerned. Under the tax treaty, the request should be filed with the jurisdiction in which the entity is a tax resident,

although an increasing number of tax treaties also provide for the option to submit the request in the other jurisdiction or both jurisdictions.

The MAP initiation request should be submitted to the DCA in writing and can be sent by post or e-mail. Although the format is form free, Annex A (for DTAA) and Annex B (for other cases) of the MAP Decree provide a list of information that should be included in the request at a minimum. Generally, the type of information taxpayers are required to provide is similar in both lists. For a transfer pricing MAP request, a standard form also has to be submitted. Under the DTAA and the EU AC the term to submit the MAP request is within three years after the first notification of taxation not in accordance with the tax treaty (e.g., the tax assessment containing the adjustment, the tax audit report noting that an adjustment will be made). For most tax treaties, but not all, the term also is three years.

If a request to initiate a MAP is submitted and the taxpayer is also making use of its national legal processes (i.e., tax audit procedure or court proceedings), this can impact the start of the MAP process. The start of the MAP process may be suspended until a decision has been made by a national court or the legal remedies have been discontinued. Alternatively, the DCA can request the taxpayer to confirm that the national legal processes are put on hold until a decision has been reached under the MAP or subsequent arbitration. The MAP Decree now also provides clarity on the situation that an appeal has been filed in the other jurisdiction. In that case, the DCA will discuss the way forward with the other Competent Authority, or if the MAP is based on the DTAA, await until such foreign procedures have ended, are withdrawn or suspended.

### Judging a request for MAP

Upon receipt of a MAP initiation request, the DCA will assess whether the (specific) requirements of the selected legal basis under which the MAP initiation request is made, have been met. Depending on the legal basis chosen, the DCA will assess among others timeliness, submission to the right Competent Authority, provision of necessary information and applicability of exclusion because of severe penalties applied.

If the MAP initiation request would be rejected, no MAP would be initiated. Under the DTAA, if both competent authorities deny the MAP initiation request, taxpayers can submit an appeal against this decision to the local court.

If one of the competent authorities rejects the MAP initiation request, this decision can be subject to arbitration. Also an appeal can be filed with the local court against decisions by the DCA to reject a MAP initiation request that was based on the tax treaty or EU arbitration convention.

The Netherlands had already indicated in the Stage 1 Peer Review Report that audit settlements do not preclude access to MAP. The MAP Decree now explicitly clarifies this.

If a MAP initiation request has been accepted, the DCA in the first instance will analyze whether they can resolve the double taxation themselves. If the DCA comes to the conclusion that they cannot unilaterally fix the dispute, the MAP process is initiated.

### Procedure for accepted MAP cases

The DCA endeavors to complete MAP cases within two years, which is in line with the minimum standard as described in BEPS Action 14 as well as the main rule under the DTAA and EU Arbitration Convention. The Stage 2 Peer Review Report indicated that the average time necessary for the DCA to close MAP cases during 2016 and 2017 is below the targeted average of 24 months.

The Decree splits the procedure itself into three phases: the pre-consultation phase, the consultation phase, and the post-consultation phase.

With respect to the role of the Dutch tax administration in MAP cases, the DCA have the possibility to request for advice and support during a MAP from the Dutch tax administration, including the Coordination Group on Transfer Pricing of the Dutch tax administration (CGTP), which is mandated with the responsibility that matters relating to transfer pricing are handled in a consistent manner. The BEPS peer review process identified that the organization of the competent authority function in the Netherlands was such that there was a minor risk that the competent authority function was not entirely performed independently from tax administration personnel directly involved in the adjustment at issue. As mentioned in the Stage 2 Peer Review Report, since then, the Netherlands has worked on measures that eliminated this risk, following which the Netherlands is considered to function independently from this personnel and the audit function of the tax authorities. The MAP Decree clarifies the role of the Dutch tax administration.

## Outcome and implementation

The potential outcomes of the MAP can be that taxation not in accordance with the treaty is completely, partially or not resolved, or that no taxation not in accordance with the treaty is determined. If the taxation not in accordance with the treaty is not (completely) resolved, the possibility to enter into arbitration is open, depending on the legal basis of the MAP.

The outcome of the MAP will be implemented regardless of whether the regular statute of limitations has lapsed. This can also be the case if the Netherlands unilaterally decides to make a downward corresponding adjustment after a MAP under the DTAA has been ended because of a domestic court ruling in the other jurisdiction.

## Corresponding adjustment

In the case of a transfer pricing dispute, taxpayers can request the tax inspector to make a unilateral corresponding adjustment outside the context of a MAP, meaning that the Netherlands will unilaterally resolve the dispute if the inspector agrees with the position taken by the other country. The CGTP will provide binding advice in these situations. If the request for corresponding adjustment is denied, the national legal remedies (including the possibility to object and appeal for a tax assessment, depending on the status of the tax assessment) and MAP option are still available to the taxpayer. The MAP Decree approves, under certain conditions, that a unilateral corresponding adjustment be applied even if the 5-year period for an ex officio adjustment by the inspector has lapsed.

## Triangular cases

The MAP Decree determines that in the case of a MAP request related to connected incoming and outgoing intercompany transactions with different jurisdictions, the taxpayer should involve all three jurisdictions and also submit a MAP initiation request for the connected, corresponding transaction. In these triangular cases, the DCA will do its best to involve both jurisdictions in one procedure in order to prevent double taxation.

The MAP Decree also mentions that the DCA will only accept the corresponding adjustment with respect to one of the connected transactions to the extent that the profits remaining in the Netherlands can be considered at arm's length. To avoid double taxation, the taxpayer should then initiate a MAP request with respect to the other connected transaction and the third jurisdiction.

## BAPA and MAPA

The MAP Decree also refers to the option that a taxpayer can request the DCA to enter into BAPA or MAPA discussions with other jurisdictions as a means to prevent or solve (potential) tax disputes based on the applicable tax treaty. In this respect, a BAPA or MAPA can also cover transactions that have already been implemented and applied for roll back years as long as the facts and circumstances have remained comparable and the other jurisdiction(s) agrees to follow this procedure.

The requirements for these types of APAs are the same as for unilateral APAs, and are as outlined in the [Decree on International Tax Ruling Policy](#) dated 19 June 2019.<sup>4</sup> This means that no (advance) certainty will be provided if: (i) there is no relevant economic nexus in the Netherlands; (ii) the sole or decisive purpose of the relevant case or structure is to reduce Dutch or foreign taxes; or (iii) entities are involved that are established in non-cooperative tax jurisdictions (EU list) or in a low-taxed jurisdiction (jurisdictions with a corporate income tax rate below 9%). Different from a unilateral APA, however, requests for BAPAs and MAPAs are handled by the Ministry of Finance (i.e., the DCA), instead of the APA team of the Dutch tax administration.

## Interest

In the case of an appeal against an adjustment by the Dutch tax inspector, deferral of payment of tax related to the adjustment is automatically granted. Such deferral can also be requested in the MAP initiate request in other situations. In this way, the Netherlands has attempted to resolve any liquidity issues that may arise from the application of MAP procedures. The MAP Decree recognizes that this deferral may result in high amounts of tax- and collection interest being due.

Apart from the potential double taxation caused by an adjustment by one of the countries, the non-alignment of tax interest payable in one country and refundable in the other country may effectively lead to double taxation. The DCA will, under certain conditions, reduce the Dutch tax and/or late payment interest to the extent reasonable in the context of a MAP to align with the interest in the other country. The taxpayer can request such alignment in the MAP initiation request or supplement the request within three weeks after the communication of the outcome of the MAP, if quantification of the request to align interest was not possible before.

## Implications

In a post-BEPS world, where multinational enterprises face tremendous pressures and scrutiny from tax authorities, the importance of effective dispute resolution mechanisms has increased significantly. The Netherlands is considered a country that has an extensive treaty network and an effective and practical MAP practice in place. The release

of the new MAP Decree further strengthens this view and provides for welcome clarity and certainty for taxpayers that are considering MAP as means to resolve taxation not in accordance the applicable treaty, including double taxation. Taxpayers should consider the use of the full spectrum of possibilities to resolve or prevent double taxation, including MAP, unilateral APAs and bi-or multilateral APAs.

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## Endnotes

1. The Netherlands ratified the MLI on 29 March 2019. For an overview of the positions taken by the Netherlands under the MLI, please visit: <https://mli.ey.com/match/Netherlands>.
2. See EY Global Tax Alert, [OECD releases the Netherlands Stage 2 peer review report on implementation of Action 14 minimum standard](#), dated 26 August 2019.
3. See EY Global Tax Alert, [The Latest on BEPS and Beyond - January 2020](#), dated 21 January 2020.
4. See EY Global Tax Alert, [The Netherlands announces new tax ruling policy](#), dated 26 November 2018.

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