



Belastingdienst

# APA/ATR-practice In The Netherlands

Visit TAXE special committee  
May. 29. 2015



## Rulings – general remarks

- Right for every taxpayer in our society to get certainty about the tax consequences of the legislation in relation to certain (intended) facts and circumstances
- Point of view of the Tax Administration or agreement between Tax Administration & taxpayer



## Rulings – general remarks II

- Within the framework of law, jurisprudence and policy
- No discretionary power of the Tax Administration
- No agreement regarding the tax rate
  
- Equal treatment for same situations
- Same treatment in- & outbound situations
  
- **No difference in tax-base with or without a ruling!**



## Rulings – general remarks III

- Transparent system
- Policy decrees 'beleidsbesluiten' published on internet
  - Decrees regarding the explanation of the tax law
  - Decrees regarding the procedures (e.g the APA/ATR practice)
- OECD report 'Cooperative compliance: A Framework: From Enhanced Relationship to Cooperative compliance'
- Certainty in advance fits within this framework
- Part of compliance strategy.



# Advance Pricing Agreement (APA)

Arm's length remuneration for

- functions performed
- assets used
- risks assumed

Based on OECD-Transfer Pricing Guidelines



PIE CHART

Same treatment for tax purposes related and unrelated parties

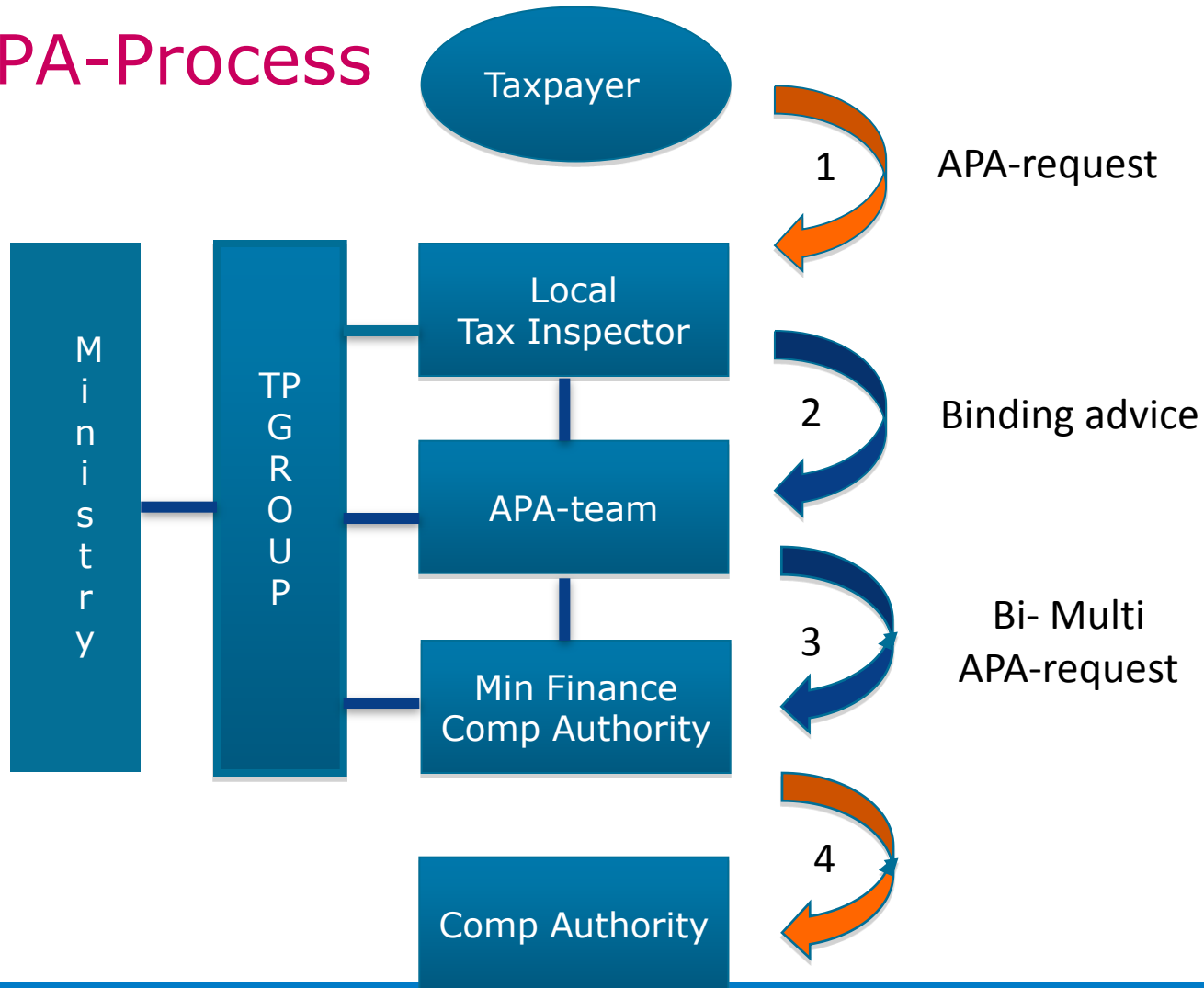


# Legal context Transfer Pricing & APA

- Art. 8b CIT
- Art. 9 OECD model tax convention
- OECD guidelines on transfer pricing (OECD TPGL)
- Publication EU Joint Transfer Pricing Forum  
(recommendation APA-program Brussel 26.2.2007 OM(2007) 71 def)
- Decree with respect to profit allocation to Permanent Establishments (IFZ 2010/457M, Jan. 15 2011)
- Transfer Pricing Decree (IFZ 2013/184M, Nov. 14 2013)
  
- Chapter 4 OECD TPGL
- MAP-article in the different tax treaties
- APA-decree (12-06-2014, nr. DGB2014/3098)



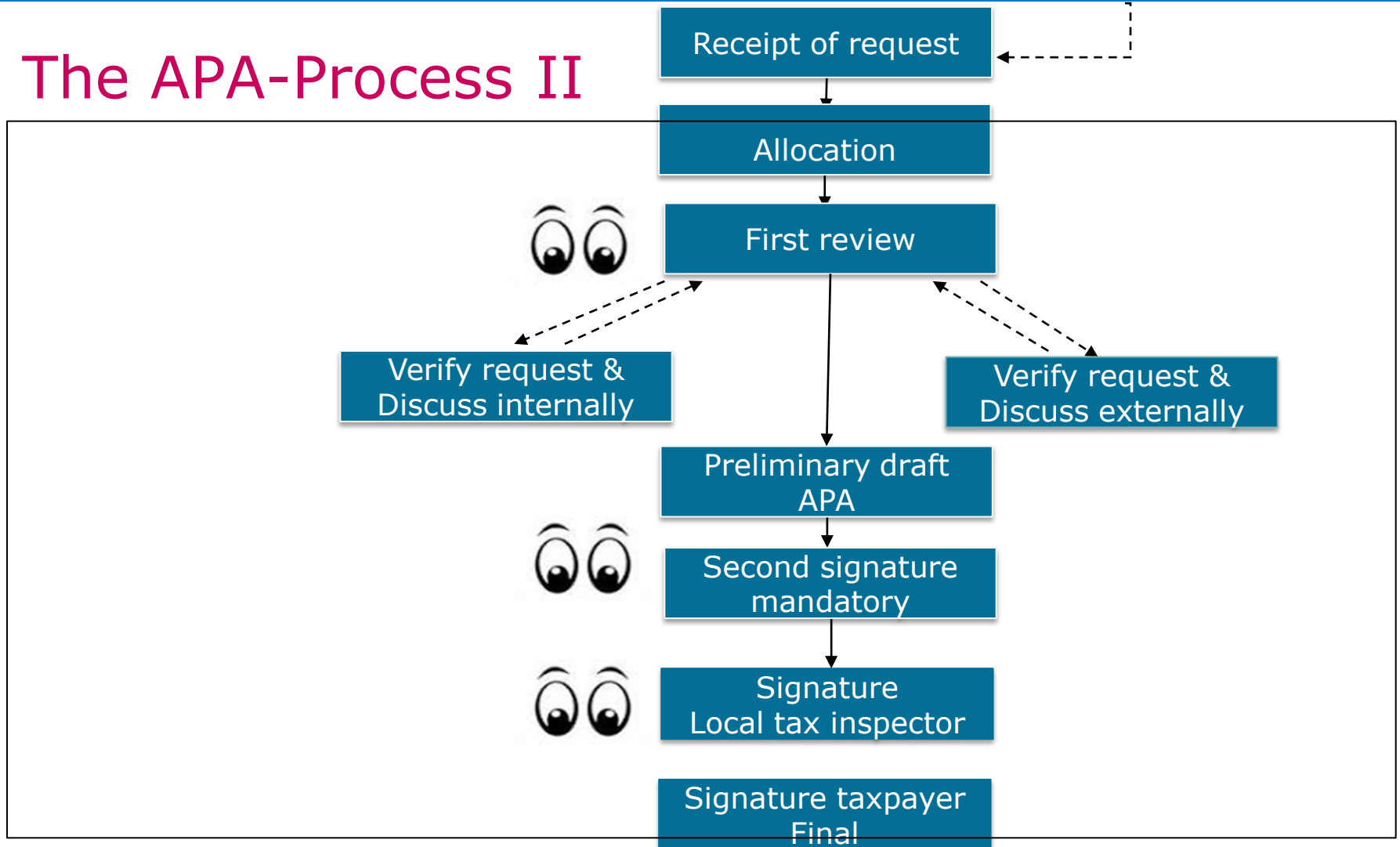
# The APA-Process





Pre filing

## The APA-Process II







## The APA-Process III

- Centralized in Rotterdam
- No inspectorate shopping by taxpayers
- Equal treatment / Consistency of policy
- Binding advice to local tax inspector
  
- Overall responsibility for implementation of transfer pricing policy by Coordination Group on Transfer Pricing (CGTP)



## Information to be provided (DGB 2014/3098)

- The transactions, products, businesses or arrangements that will be covered by the proposal
- The enterprises and or PE's involved in the transactions/agreements
- The other States which have been requested to participate
- Information regarding the world-wide organisational structure, history, financial statement data, products, functions (including risks assumed) and assets (tangible and intangible) of the enterprises involved
- **Comparability analysis and proposed TP-Method (TP-study)**
- Assumptions underpinning the proposal and a discussion of the effect of changes in those assumptions or other events
- The accounting period or fiscal years to be covered
- General description of market conditions





## Comparability analysis

- It's not possible to test an unique function
- We want to test the least complex function
- Use of databases for TP purposes
- Reference in OECD TP Guidelines to Databases  
*Commercial databases can be a valuable tool in comparability analyses to review, challenge, or assess an arm's length price*
- Commercial Databases contain financial information of millions of companies
- Info providers are chambers of commerce, security exchange commissions etc.



## Comparability analysis III

- Search criteria databases
  - › Industry code > selection on type of activity
  - › Geographical area
  - › Independent companies
  - › Unconsolidated accounts
  - › Active companies
  - › Size criteria (turnover, employees, assets)
- Adding info from other sources, manual review
- Calculation of an arm's length range (statistical methods, e.g. interquartile range)



## Content of APA's

- Description of facts and circumstances
- Agreed arm's length price or method
- Critical assumptions
  - No change in relevant facts and circumstances
  - No change in legislation
  - On request of a foreign tax authority the taxpayer has to inform about:
    - » The facts and circumstances &
    - » Fiscal treatment in The Netherlands
- Duration (4/5 years exceptions are possible (e.g loan agreement))



# Advance Tax Ruling I

- Application of **participation exemption** to holding companies in international structures;
  - › Art. 13 CIT
  - › Decree Participation exemption (July 12 2010, DGB2010/2154M)
- **Hybrid financing** instruments
  - › Art 10, 1, d CIT
  - › Decisions Dutch Supreme Court
- **Hybrid entities**
  - › Art. 2(3)(c) General Tax Code
  - › Decree hybrid entities (Dec. 11 2009, nr. CPP2009/519M)



## Advance Tax Ruling II

- Is a non-resident entity is **subject to tax** in NL?
  - » Permanent establishment
  - » Substantial interest regime
  - › Art. 17 & 17a CIT
- **Dividend withholding tax** cooperative association
  - › Art 1, 7 Dividend Withholding Tax Act



# Participation Exemption



~~Participation Exemption?~~  
Art. 13 CIT



Dividend & Capital gains



Profit taxed with Local CIT  
In & outside EU





# Substantial Interest



~~Taxable NL  
17,3,5 CIT?~~



Dividend  
Capital gains  
Interest





# Hybrid financing instrument



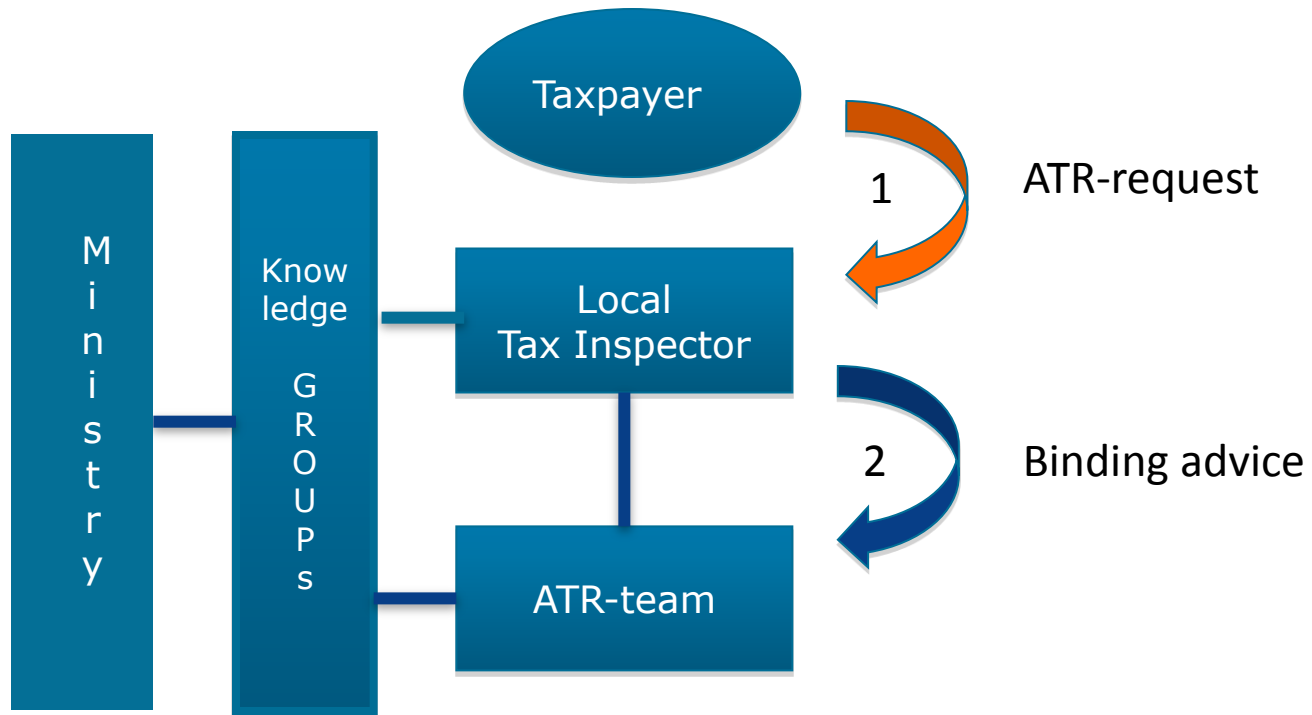


# Hybrid entity



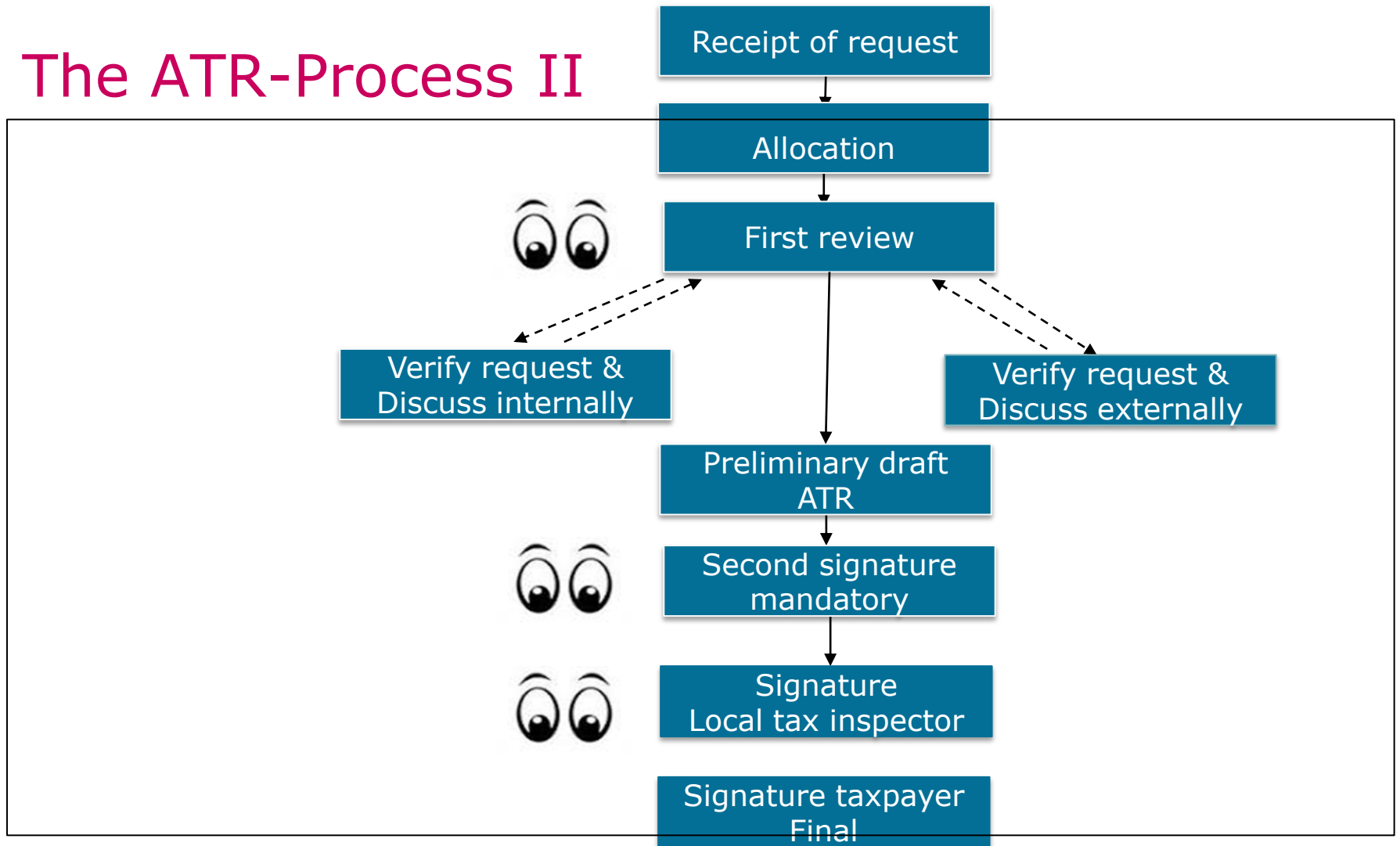


# The ATR-Process





# The ATR-Process II





## Some features

### Process

- › Decree ATR-process (June. 12 2014, nr.DGB2014/3099)
- › Information required, process, content similar to APA-process
- › 4/5 years



## Figures 2011-2014

APA's & ATR's agreed

	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
APA's	248	247	228	203
ATR's	408	468	441	429
Totaal	656	715	669	632



## Figures 2011-2014

### APA's & ATR's Declined/withdrawn

- › Not within the framework of law, jurisprudence and policy
- › Good faith towards our treaty partners

	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
APA's	71	74	72	63
ATR's	109	89	111	96
Total	180	163	183	159





# The Netherlands Court of Audit & EC DG-Competition

- The Netherlands Court of Audit (dec. 2014)  
Careful execution in accordance with the clear and transparent design of the APA/ATR-practice
- EC DG-competition (press release June 2014)  
“In particular, the Commission notes that The Netherlands seem to generally proceed with a thorough assessment based on comprehensive information required from the tax payer. The Commission therefore does not expect to encounter systematic irregularities in tax rulings.”



## Good practice suggestions

- Tax rulings should be issued in writing. ✓
- Taxpayers should apply in writing and give a full description of the underlying operations or transactions. Any additional information or relevant facts which are brought to the attention of the competent authority orally (i.e. in meetings or oral presentations) shall take the form of written minutes and be included in the file of the application for a ruling. ✓
- Either the application file (preferable) or the ruling decision (confirmation) itself shall include a full set of information on the applicant (taxpayer with name, residence, VAT n° or tax identification n° , commercial register n° for corporations and companies), the tax adviser/tax consultant involved. ✓
- Tax rulings should be binding on the tax authority provided that the applicable legislation and disclosed structures and facts of the case do not change *ex post*. Changes in the economic environment that alter the relevant and significant underlying facts and circumstances of a specific case [i.e. significant changes in personnel cost or cost of raw material; in the number of staff or increases /reduction in the sales) should trigger a revision or withdrawal of a ruling, even within the period for which it was originally issued to apply. ✓
- Tax rulings should be issued only within the limits of the relevant national tax law, i.e. how national tax laws apply to one or more specific operations and transactions intended or planned by the taxpayer. ✓
- Tax rulings should be issued in full compliance with EU law, and should not constitute state aid pursuant Article 107 (1) TFEU. ✓



## Good practice suggestions

- Tax rulings should respect double taxation conventions concluded by a Member State. ✓
- Official rules and administrative procedures on rulings should be identified in advance and published, e.g. fee structure, legal consequences, possible sanctions for incomplete or false information provided by a taxpayer within the framework of national rules. ✓
- Tax rulings should only be issued by the competent government office or authority in charge of this task. ✓
- It should be obligatory that at least two officials (either internally or externally shown) give their approval of decisions on rulings or confirm applications for rulings. ✓
- Before taking a decision, the competent authority(ies) should check that the description of facts and circumstances is sufficient and justifies the envisaged outcome of the ruling. ✓
- Duration: tax rulings should only be valid for a certain period of time, e.g. 5 years. ✓
- Information on the methods for determining some of the key elements (transfer prices, mark-ups, interest rates, profit margins; etc.) should be included in the file of the ruling. ✓
- The fact that a tax ruling has been issued to a company should be made public in a registry which should also state the key issues contained in the ruling and its duration.

