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Global Tax Alert

Dutch Government issues Decree with tax authorities' guidance on reportable cross-border arrangements

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Executive summary

The Dutch Government issued a decree, on 30 June 2020, containing tax authorities' guidance (the Guidance) on the application of the Dutch legislation which implements the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

The Dutch Tax Authorities (the Tax Authorities) state that the Guidance may be updated on the basis of answers to questions that may arise in the near future. The Guidance is broadly aligned to the requirements of the Directive.

In a separate decree issued on 26 June 2020, the Netherlands officially announced the deferral of the DAC6 filing deadlines by six months. Under DAC6, taxpayers and intermediaries are required to report cross-border reportable arrangements from 1 July 2020. However, Member States are permitted to defer by up to six months the time limits for the filing and exchange of reportable arrangements in accordance with the amendments to EU Directive 2011/16 adopted and announced by the Council of the EU on 24 June 2020.[1]

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Detailed discussion

Background

The Council of the EU Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation, entered into force on 25 June 2018.[2]

The Directive requires intermediaries (including EU-based tax consultants, banks and lawyers) and in some situations, taxpayers, to report certain cross-border arrangements (reportable arrangements) to the relevant EU member state tax authority. This disclosure regime applies to all taxes except value-added tax (VAT), customs duties, excise duties and compulsory social security contributions.[3] Cross-border arrangements will be reportable if they contain certain features (known as hallmarks). The hallmarks cover a broad range of structures and transactions. For more background, see EY Global Tax Alert, *Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers*, dated 14 March 2018.

As discussed in the previous EY Global Tax Alert, *Netherlands passes Act to implement Mandatory Disclosure Rules*, dated 7 January 2020 addressing the Dutch Mandatory Disclosure Regime (MDR) legislation, the Dutch implementation legislation is broadly aligned with the Directive. The same applies to the newly issued Guidance.

This Alert summarizes where the Guidance deviates from interpretation in earlier tax alerts[4] on Dutch MDR legislation or where it gives new clarifications. It also addresses how the deferral will practically work out.

Reportable arrangements

Under the Directive, an arrangement is reportable if:

- The arrangement meets the definition of a cross-border arrangement; and
- The arrangement meets at least one of the hallmarks A-E specified in Annex IV of the Directive.

In accordance with DAC6, under the Dutch MDR legislation, cross-border arrangements are defined as arrangements concerning more than one Member State or a Member State and a third country.

The Guidance contains an example in relation to what qualifies as "cross-border" from a Dutch perspective. According to the Guidance, a legal merger between two Dutch sister companies held by a foreign parent company qualifies as cross-border.

Hallmarks A-E of the Directive

The hallmarks can be distinguished as hallmarks which are subject to the main benefit test (MBT), and those which by themselves trigger a reporting obligation without being subject to the MBT.

Most elements of the hallmarks included in DAC6 and mirrored in the Dutch legislation are not defined. The Guidance provides some clarification on these elements by giving examples. The most relevant examples are included below.

Hallmark A3 (standardized documentation and structures)

The Guidance provides three examples that are in principle **not** reportable under hallmark A3 concerning standardized documentation and structures.

- The first example involves a company that offers various investment products, including mutual funds and legal entities that have the legal status of fiscal investment institution as referred to in article 28 of the Dutch *Corporate Income Tax Act* (CITA, in Dutch "Wet Vpb") with the aim to collectively invest in various assets resulting in spreading of risks and realizing efficiencies. The conclusion by the Tax Authorities is that these products/documents, both tax and non-tax related, should be considered as standardized documentation as referred to in hallmark A3. It is unclear but this seems to broaden the scope of hallmark A3 by including non-tax related standardized documents. The Guidance does however indicate that the use of such products would not typically be reportable since the MBT shall usually not be met, as the use of these products is (generally) not aimed at achieving a tax benefit.
- Another example involves intragroup loans at arm's-length conditions. All loans are agreed upon under the same standardized loan agreement. The conclusion by the Tax Authorities is that these types of standard loan agreements could qualify as standardized documents as referred to in hallmark A3, but that, generally speaking, the MBT will not be met.
- The last example involves a company that provides currency hedging instruments. The instruments are frequently used and based on a certain standard that is used throughout the market. Although the generic form of the product is known, it must (always) be customized to the taxpayer's needs. Therefore, in the view of the Tax Authorities, it is not in scope of hallmark A3.

Hallmark B2 (conversion of income)

Hallmark B2 covers the conversion of income into capital, gifts or other categories of revenue which are taxed at a lower level or are exempt from tax. Five examples are provided to clarify this hallmark, but they still contain many uncertainties.

- The Guidance contains one example where the reporting obligation under hallmark B2 is excluded. It involves a Dutch company, tax resident in the Netherlands, that recruits an employee who is (at that time) resident in another EU country. The employee moves to the Netherlands, meets the conditions of the so-called 30%-facility as set forth in article 10ea of the Wage tax decree (in Dutch: "Uitvoeringsbesluit loonbelasting 1965") and as a result, 30% of the gross salary is not taxed. In the view of the Tax Authorities, as the income (the salary) is not "converted" in any way, the application of the 30%-facility is not in scope of hallmark B2.
- An example given by the Guidance that is stated as falling within the scope of hallmark B2 consists of a Dutch company with freely distributable profit reserves that has a nonresident substantial interest shareholder. The nonresident shareholder is tax resident in a state that has concluded a tax treaty with the Netherlands. The company decides (not for commercial reasons) to repurchase shares. Based on Dutch legislation, distributions in excess of the paid-up capital are subject to Dutch dividend withholding tax, and thus the proceeds from the repurchase of shares are subject to withholding tax. Under application of the tax treaty between the Netherlands and the country of residence of the shareholder, the proceeds of the share repurchase are treated as a capital gain (there is no provision that qualifies the revenues as dividend income) and on the basis of the tax treaty, the right to levy tax on the capital gain is allocated exclusively to the country of residence of the shareholder. As a result of the arrangement, dividend withholding tax is not due, leading to a tax saving for the nonresident shareholder.

  Some elements are not clear in this example. For instance, whether it is relevant to consider the tax treatment in the country of residence of the shareholder (in relation to the withholding tax in the Netherlands after application of the tax treaty). It is also unclear in respect of such arrangements, who the Relevant Taxpayer is, e.g., the nonresident shareholder who is subject to tax or the withholding agent (i.e., Dutch company making the repurchase), and thus has the reporting obligation (in the absence of an intermediary being involved in the arrangement). Based on the ranking order rule in Dutch tax law, it may be concluded that the withholding agent has the principal reporting obligation.
- Another example given by the Guidance is that of a company residing outside of the Netherlands which has employees. The employees of that company perform work in the Netherlands on the basis of an assignment agreement between the Dutch company and the nonresident company. From a legal point of view, the Dutch company is simply the client requesting a service from the nonresident company, but in practice the Dutch company is functioning as an employer. The intermediary advising on this arrangement is of the view that, due to the assignment agreement, the arrangement leads to a tax benefit, because in the other jurisdiction the tax burden relating to the employees' salary is lower compared to the Netherlands.

  It is unclear what should be considered the conversion element in this case, especially when this way of working is not unusual for companies. Furthermore, it seems that the tax treatment of the foreign company is taken into account in this case, this is in contrast to other examples where this does not seem to be relevant.

Hallmark B3 (roundtripping of funds)

Hallmark B3 concerns arrangements which include circular transactions resulting in the round-tripping of funds, namely through interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features. The following scenarios do not explore the specific concepts concerning this hallmark but are included in the Guidance as examples of falling within the scope of hallmark B3:

- A profit-making company resident outside the Netherlands holds shares in a loss-making company established in the Netherlands. The nonresident company decides to contribute capital to the Dutch subsidiary. The Dutch company uses the capital almost immediately to grant an interest-bearing loan to the nonresident parent company. In the Netherlands, the interest income is offset against the tax losses, while in the other jurisdiction the interest is deducted, because that jurisdiction does not apply anti-abuse measures.
- A nonresident company holds all the shares in a Dutch intermediary holding company. The latter company owns real estate located in the Netherlands and owns all the shares in an operational subsidiary resident in the

Netherlands. The activities of this subsidiary are carried out in respect of the immovable property which is leased from the parent company. The nonresident shareholder wants to set up an arrangement that involves the sale of the real estate to a third party without the imposition of Dutch real estate transfer tax. Instead of selling the real estate directly to the third party, the shares in the Dutch parent company and therefore also the shares in the operational subsidiary are sold to the third party. No real estate transfer tax is due on this share transaction. Part of the arrangement is that the shares in the operational subsidiary are then returned to the nonresident holding company, as a result of which ultimately only the company that owns the immovable property is acquired by the third party. The acquisition of only the shares in the Dutch parent company, i.e., without the shares in the subsidiary, would in principle be a taxable transaction for the purposes of real estate transfer tax.

Hallmark C1 (cross-border payments between associated enterprises)

The Guidance provides five examples for hallmark C1. Hallmark C1 covers deductible cross-border payments between associated enterprises that additionally meet one specific condition.

- A company established in country Y acquires the shares of a Dutch company. At the same time, the company in country Y also provides a loan to the Dutch company. The Dutch company pays interest to the company in country Y. At the time of entering into the loan agreement, country Y is not included in the list of non-cooperative jurisdictions and therefore there is no obligation to report. If, at a later date, the EU Member States decide to include country Y in the list of non-cooperative jurisdictions, according to the Guidance there is still no obligation to report.

  This example appears to concern hallmark C1(b)(ii) regarding non-cooperative jurisdictions, but this may also lead to the general conclusion that the moment of agreeing a contract that is the basis for a (possible) C1-payment is the decisive moment to test if any of the C1 hallmarks apply (and thus the testing point is not each time a payment is made).

- A foreign company provides an interest-free loan to a Dutch company. Interest is imputed for Dutch tax purposes. This means that, in principle, interest costs may be deducted by the Dutch company. In the foreign jurisdiction, the imputed interest income is not taken into account and therefore no interest income is included in the tax base.

  Informal capital contributions relating to expenses (e.g., deemed interest) are thus reportable under hallmark C1(c). Note that informal capital contributions relating to assets will be reportable under hallmark C4 (*transfers of assets where there is a material difference in the amount being treated as payable*).

- A foreign parent company lends money to its Dutch subsidiary in order to obtain a tax benefit. The Dutch company pays the interest on the loan to the parent company. The interest income is taxed at the parent company level, but the profit is taxed at a zero rate. The parent company performs hardly any activities. On the basis of the Controlled Foreign Company (CFC) legislation in the country of the shareholder of the parent company, interest income is included in the taxable basis of this shareholder (that is resident in any country). The shareholder of the parent company does not qualify as a recipient within the meaning of this hallmark (most likely C1(b)(i)) and therefore it is irrelevant that the interest income is taxed on the basis of CFC legislation.

  It is unclear if the approach in this example also applies to back-to-back loans (i.e., is there a formal or economical approach when determining the recipient), United States Global Intangible Low-Taxed Income (GILTI) rules and subpart F legislation.

Hallmark C2 (double depreciation)

This hallmark covers deductions for depreciation on an asset that are claimed in more than one jurisdiction.

- The examples on C2 are about: (i) a foreign transparent entity; and (ii) a financial lease agreement with a foreign company. Double depreciation is claimed in the first example due to the country differences in the tax qualification of the entity and in the second example due to the country differences in the tax qualification of the financial lease agreement.

Hallmark E2 (hard-to-value-intangibles)

The Guidance clarifies that agreeing on a price adjustment clause is not relevant for purposes of determining whether an intangible is a hard-to-value intangible.

Hallmark E3 (intragroup transfer of functions/risks/ assets with significant EBIT impact)

Hallmark E3 concerns arrangements involving intragroup cross-border transfers of assets, functions and/or risks with significant earnings before interest and taxes (EBIT) impact. The one example concerning this hallmark involves a merger between a Dutch company and a foreign subsidiary, where the latter is the disappearing company. All assets are legally transferred to the Dutch company, but a permanent establishment continues (part of) the business in the country of the disappearing entity. The (expected) EBIT of the disappearing entity (i.e., the transferor) drops from profit making to zero due to the merger, which makes this a reportable arrangement. Thus, note that it does not matter that a permanent establishment continues (part of) the activities in the jurisdiction where the subsidiary was established for such merger to be reportable under hallmark E3.

Main benefit test

In accordance with DAC6, under the Dutch MDR legislation, the MBT will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, is the obtaining of a tax advantage. This is dependent on the objective facts and circumstances.

- The Guidance refers to the policy intent for the purposes of interpreting the MBT, i.e., the situation where tax advantages are entirely in line with the policy intent of the legislation. The Guidance indicates that the "policy intent" of tax legislation must be considered an important (although not decisive) element in applying the MBT. The Guidance does not however indicate how important the policy intent is for the overall MBT assessment.
- Furthermore, the Guidance notes that in two distinct situations, the MBT is met:

(i) If the arrangement would not be set up/implemented without the expected tax benefit and the tax benefit can be considered as decisive for the arrangement.

(ii) The arrangement contains elements that have been added or adjusted in order to obtain a tax benefit and that tax benefit is (one of) the main benefit(s) that can be expected from the arrangement.

Intermediaries

Under the Directive, intermediaries with EU nexus have the primary obligation to report arrangements to the tax authority. The Directive gives Member States the option to exempt intermediaries from the obligation to report where the reporting obligation would breach legal professional privilege (LPP). If there are no intermediaries who can report, the reporting obligation will shift to the taxpayers.

It is explicitly mentioned in the Guidance that an intermediary with EU nexus can have a reporting obligation regardless of the tax residency of the participants to the arrangement.

In principle all intermediaries involved in a reportable cross-border arrangement have a reporting obligation. However, an intermediary can be exempt if it has proof of filing by another intermediary in the arrangement. The proof of filing seems to be sufficient when an intermediary can evidence that a reference number has been received for the respective arrangement at the moment of filing with the tax authorities in any EU Member State.

DAC6 defines two categories of intermediaries: promoters and service providers (although the Dutch parliamentary proceedings referred to the latter as "auxiliary intermediary"). The Guidance elaborates on the term service provider and on the knowledge threshold of when someone qualifies as a service provider. First, a person that due to the nature of his service does not have the knowledge and ability to assess if a cross-border arrangement by reference to the hallmarks is reportable or not, does not qualify as a service provider. When the person receives more information than required for delivering the requested services, the person is not obliged to assess the extra information on the possibility of a reportable cross-border arrangement. On the other hand, when the person did not assess all the relevant information, he is still deemed to have the knowledge of all information that is relevant for providing the requested services (and thus to assess the potential MDR impact on the basis of this relevant information). Second, the MDR filing impact should only be assessed at the time of providing the service and on the information available at that time. No reporting obligation can arise at a later moment when new information is made available. Finally, the Guidance mentions that when a potential service provider is informed of a potential reporting obligation by an intermediary with LPP, this mere fact does not instantly mean that the potential service provider has the relevant information available to meet the knowledge threshold of becoming a service provider and having the obligation to report a cross-border reportable arrangement.

Relevant Taxpayer

Under the Directive and the Dutch MDR legislation, a relevant taxpayer means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement. The Guidance states that the term relevant taxpayer is assessed independently on the basis of the Dutch *Act on International Assistance in Taxation* and is not dependent on any applicable tax laws.

Reporting deadlines

Under the Directive, reporting would have started from 1 July 2020 and exchanges between jurisdictions would have been made from 31 October 2020. However, the Dutch Government formally announced by decree on 26 June 2020 that the reporting deadlines under the Dutch MDR legislation are amended and deferred by six months in accordance with the amendment (EU Directive 2018/855) to EU Directive 2011/16 adopted and announced by the Council of the European Union on 24 June 2020.[5]

The transitional period (from 25 June 2018 to 30 June 2020) remains as before and reportable arrangements from this period need to be filed ultimately by 28 February 2021. A new transitional period starts from 1 July 2020 until 31 December 2020. Arrangements from this period that are made available for implementation, are ready for implementation or where the first step of implementation has taken place need to be filed ultimately by 31 January 2021. The regular 30-day reporting obligation will start on 1 January 2021.

Although the deferral announcement does not say anything about a deferral of the notification obligation for intermediaries with LPP, we understand from discussions with the Dutch Government that notifications by intermediaries with LPP are deferred for six months as well. It is however permitted to notify other intermediaries and relevant taxpayers at an earlier stage.

The deferral announcement does not address the deferral of penalties, but in the legislative history of the Law implementing the Directive on reportable cross-border arrangements, it was mentioned that the Government will not generally seek to impose penalties relating to the reporting obligations in respect of the transition period (from 25 June 2018 to 30 June 2020).

From a practical filing point of view, the Tax Authorities will also delay making the submissions process available until January 2021.

Next steps

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Taxpayers and intermediaries who have operations in the Netherlands should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations.

The MDR Team of the Dutch Tax Authorities understands that there will still be questions about the scope and interpretations of the Act implementing the EU Directive on reportable cross-border arrangements. We will keep in close contact with the MDR Team through the Dutch Association of Tax Advisors (NOB) in order to get answers to these cases. The Tax Authorities guidance may be updated regularly on the basis of such questions, answers and interpretations.

Endnotes

1. See EY Global Tax Alert, *Council of the EU adopts amendments for deferral of MDR filing deadlines*, dated 24 June 2020.
2. For background on MDR, see EY Global Tax Alert, *EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers*, dated 5 June 2018.
3. DAC6 sets out a minimum standard. Member States can take further measures; for example, (i) introduce reporting obligations for purely domestic arrangements; (ii) extend the scope of taxes covered; (iii) bring forward the start date for reporting.
4. See EY Global Tax Alerts, *Netherlands issues Q&A notes as part of legislative process for mandatory disclosure regime*, dated 18 November 2019 and *The Netherlands publishes draft proposal on Mandatory Disclosure Rules*, dated 26 July 2019.
5. See EY Global Tax Alert, *Council of the EU adopts amendments for deferral of MDR filing deadlines*, dated 24 June 2020.

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