



Mobility: Tax alert

October 2021

The Netherlands

Changes announced to the taxable moment of employee stock options

Executive summary

New legislation for employee stock options was announced on 21 September 2021 and will go into effect on 1 January 2022. In the Netherlands, employee stock options are taxable as employment income as a benefit in kind (up to 49.5%). The taxable event of stock options is currently the moment of exercise (or alienation) of the stock option.

Per the newly announced legislation, the taxable event for stock options will in principle be moved to the moment that the shares, received by exercising the stock options, become tradeable. However, it is possible to choose for taxation at the moment of exercise if an employee makes this choice via a written request to the employer. Note that the plans are still subject to approval by the Dutch Parliament. The current facility for start-up companies with respect to employee stock options will be canceled.

Background

The Dutch stock option rules were analyzed in previous years following discussions that were initiated by the start-up/scale-up community in the Netherlands. The primary issue identified was a cash-flow issue. Currently, the Dutch wage/income tax is due at the moment when the stock options are exercised (or alienated). For employees of start-up or scale-up companies and other non-listed companies, it is not always possible to immediately sell (part of) the shares to pay the relevant tax liability. The proposed plans are expected to solve the current cash-flow issue and provide flexibility for employees to choose the moment of taxation.

Announced changes

The taxable event of stock options is currently the moment of exercise (or alienation) of the option. Under the proposed plan, the taxable event will change in principle to the moment that the shares received when exercising the stock options become tradeable. There is no proscribed definition of the term tradeable/tradability. However, tradeable should be the first moment that the employee has the possibility to sell the shares to any other person, even if this would only be a limited group of potential buyers. It is not relevant whether the shares are actually sold. Specific (partial) buy-out situations of the employee shares should be carefully analyzed. More guidance will be published in the future.

In practice, this means that the new rules will have a significant impact on most non-listed companies. For listed companies, the announced rules will have no (or a limited) impact if the shares are immediately tradeable. In the case of direct tradability, both under the current and the new legislation, the taxable moment is the moment when the stock options are exercised.

In the case of a legal or contractual sales restriction on the shares, the announced legislation will also have an impact on companies that are listed or become listed. The announced rules include exceptions in case of legal or contractual restrictions. Shares with legal sale restrictions are not considered tradeable (and, as such, are taxable) until the legal restrictions end. For contractual restrictions, there is a specific rule to avoid a long-term deferral of

taxation. In case of contractual restrictions, if the company is already listed, the shares are deemed to be tradeable after a maximum of five years from the moment of exercise. If the company gets listed after the moment of exercise, the shares will be deemed to be tradeable at most five years after the listing at a stock exchange market.

For the sake of clarity, we note that the change of the taxable event in principle does not lead to a benefit from an income tax liability perspective for the employee. It mainly leads to a solution to the cashflow issue. The taxable benefit is the fair market value of the shares at the taxable moment minus the purchase price paid by the employee. Thus, by taxing at the moment of tradability, an increase in value of the shares will lead to higher income tax liability.

Possibility to choose the taxable event at exercise

The announced rules also include a possibility for the employee to choose for taxation at the moment of exercise. However, an employee must act to arrange this and make this decision ultimately at exercise. A written request needs to be submitted with the employer (the wage tax withholding agent) and this request needs to be kept in the payroll administration. If no choice is made, if the choice has not been made in time, or if choice has not been filed correctly (i.e., written request), the new main rule applies (i.e., deferral until the shares are tradable).

Concurrence with the 30% facility

Special attention is needed for employees who exercise their stock options and benefit from the 30% facility. The 30% facility can be applied for by employees who are recruited from abroad and meet specific criteria. The facility can be granted for a maximum period of five years from the start of the employment in the Netherlands. The facility enables the employer to pay up to 30% of the taxable salary as a tax-free allowance. This facility can also be applied on income from employee stock options, but only if the taxable moment occurs within the duration of the 30% facility. Employees benefitting from the facility should consider whether taxation at the moment of tradability still falls within the duration of the 30% facility, and make an informed decision regarding the taxable moment of the stock option benefit.

Further implications

The following should also be considered:

- ▶ Dividends paid to the shareholder before the taxable moment of the shares will be considered taxable employment income. This is unfavorable for the employee compared to taxation at the moment of exercise
- ▶ The current start-up facility for stock options, which provide a tax-free benefit, will be canceled
- ▶ In case of termination of an employee, special attention is needed to gauge the impact of stock options on possible excessive redundancy payments

Next steps

- ▶ Employers should inform their employees about the adjusted stock option rules and consequences
- ▶ Employers should map out the moment the shares become tradable, based on whether there are market, contractual or legal sales restrictions
- ▶ In the case of legal or contractual restrictions, the deemed taxable event should be monitored
- ▶ Employers should keep track of the written request if an employee prefers to pay tax at exercise in their payroll administration per employee
- ▶ Employers should process dividend payments as taxable employment income in case dividends are received by the employee before the taxable moment of the shares, received by exercising the stock options
- ▶ Employers must take the shares received by exercising the stock options into account in their analysis for the potential employer tax levy for an excessive redundancy payment if these shares have not yet been taxed as employment income
- ▶ Employees must make a clear decision before the moment they want to exercise their stock options by taking into account:
 - ▶ Their personal cashflow situation
 - ▶ The potential higher tax liability in case the share value increases in the future
 - ▶ The possibility to apply the 30% facility on their option income taking into account the outstanding duration of their 30% facility. If the taxable moment of tradability is preferred, there is a risk that the 30% ruling cannot be applied on the eventual benefit

EY will continue to monitor these developments. Should you have any questions, please contact any of our professionals.

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