



Mobility: Tax alert

January 2023

The Netherlands

New legislation applicable from 1 January 2023 regarding the taxation of employee stock option benefits

Executive summary

New stock option legislation was approved by the Dutch Parliament and applies from 1 January 2023.

Under this new legislation, the benefit from employee stock option plans is taxed on the date that the shares, received when exercising the stock options, become tradeable.

However, employees may instead choose to be taxed on the date the option is exercised.

Background

The Dutch legislation regarding the taxation of employee stock options is amended after discussions initiated by the start-up and scale-up community. Employees of such companies are commonly remunerated with employee stock options. However, it has not always been possible for these employees to immediately sell some of the shares in order to pay the tax due which led to cash-flow issues.

Adjusted taxable event: tradability of the shares

Under the new legislation, the point of taxation is the date that the shares become tradeable. While the legislation does not define 'tradeable', shares should be considered tradeable when the employee is able to sell the shares to any other person, even if only to a limited group of potential buyers. It is irrelevant whether the shares are actually sold. Specific (partial) buy-out situations will require careful consideration.

In practice, the new rules will have a significant impact for shares in non-listed companies. The new rules will have no impact if the shares are immediately tradeable.

Where there are legal or contractual sales restrictions on the shares, the new legislation will also have an impact on companies that are listed or become listed. The rules include exceptions where there are legal or contractual restrictions. Shares with legal sale restrictions are not considered tradeable until the restrictions end. For contractual restrictions, there is a specific rule to avoid a long-term tax deferral. In case of contractual restrictions, if the company is listed, the shares are deemed to be tradeable after a maximum of five years post-exercise. If the company is listed after exercise, the shares are deemed to be tradeable at most five years after the stock exchange listing date.

For clarity, the change of the taxable event date does not itself result in a more favourable income tax position for the employee, but rather offers a solution to the cashflow issue. The taxable benefit is the fair market value of the shares at the taxable date less the employee purchase price. Thus, by taxing at the time of tradability, an increase in value of the shares will produce a higher tax liability.

Choosing the taxable event at exercise

The new rules permit an employee to choose the tax position to be determined on exercise of the option. To do so, an employee must submit a written request to the employer (the wage tax withholding agent), and it should be retained by the payroll administration. If a timely request is not made or has not been filed correctly, the new rule will apply (i.e., deferral until the shares are tradeable).

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 is available (upon application) to 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, whereby the salary on which the 30%-facility can be applied, is capped from 2024; transitional rules apply. This facility can also be applied on income from employee stock options, but only if the point of taxation is within the duration of the 30%-facility. Employees benefitting from the facility should consider whether taxation at the time of tradability still falls within the duration of the 30%-facility, and within the income cap and make an informed decision regarding the optimum time of taxation.

Further implications

The following should also be considered:

- ▶ Dividends paid between the date of exercise and the date of tradability are considered taxable employment income for Dutch taxation purposes
- ▶ The start-up facility for stock options, which provided a tax-free benefit, is cancelled
- ▶ In case of employee termination, special attention is needed to evaluate the impact of stock options on possible excessive redundancy payments.

Next steps for employers

- ▶ Inform employees of the new rules and consequences and, in particular, that a clear decision must be received before any options are exercised perhaps by adjusting the company exercise form (if used), taking into account:
 - ▶ Their personal cashflow situation
 - ▶ The potential higher tax liability in cases where the share value increases in the future
 - ▶ The possibility to apply the 30%-facility on their option gains
- ▶ Recognise when the shares become tradeable, based on whether there are market, contractual or legal sales restrictions.
- ▶ In the case of legal or contractual restrictions, the deemed taxable event date should be monitored
- ▶ Track written requests from employees who choose to pay the tax due at exercise in their payroll administration records
- ▶ Process dividend payments as taxable employment income if received between the date from when the option can be exercised and the date from when the share become tradeable
- ▶ Stock option gains received by employees can be considered for the purpose of the potential employer tax levy which can apply to excessive redundancy payments where the shares have not yet been taxed as employment income
- ▶ Keep monitoring global employees for trailing liabilities until any shares received become tradeable, for cases where the tax is not paid on exercise.

EY can assist you reviewing the impact of the new legislation on your existing stock option plans, or design a new stock option plan for you, and assist you with the implementation of the 'next steps'.

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ED None

ey.com

Jelle Romeijn

Partner - People Advisory Services
Tel: +31 6 29084235
Email: jelle.romeijn@nl.ey.com

Rianne van Halem-van der Linden

Senior Manager - People Advisory Services
Tel: +31 6 29083455
Email: rienne.van.halem@nl.ey.com

Sander Agterhof

Senior Manager - People Advisory Services
Tel: +31 6 29083711
Email: sander.agterhof@nl.ey.com