

## Dutch Government opens internet consultation on anti-hybrid measures of ATAD 2

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### Executive summary

On 29 October 2018, the Dutch Government initiated an internet consultation on the implementation of legislative proposals with respect to the European Union (EU) Anti-Tax Avoidance Directive 2 (ATAD 2) dealing with anti-abuse provisions aimed to tackle hybrid mismatch structures.

The legislative proposals published as part of this consultation are generally in line with ATAD 2 and in line with earlier announcements by the Dutch Government. In line with ATAD 2, the hybrid mismatch rules should be effective as of 1 January 2020 in the Netherlands. The so-called reverse hybrid mismatch rules are expected to be implemented as of 2022.

Parallel to the implementation of these anti-hybrid rules, is the Government announced that for application of the Netherlands-United States (US) tax treaty, the so-called CV/BV Decree<sup>1</sup> shall be withdrawn as of 1 January 2020. Consequently, as of 1 January 2020, the Netherlands-US tax treaty may no longer lower the Dutch dividend withholding tax on distributions to certain Dutch CVs.

This consultation process is separate from the current ongoing parliamentary discussions relating to the draft legislative proposals for ATAD 1. Those ATAD 1 rules are expected to take effect as of 1 January 2019.

## Detailed discussion

In its draft legislative proposals and explanatory notes opened for consultation, the Dutch Government outlines its intention to implement the anti-hybrid rules generally in line with ATAD 2. This includes the implementation of provisions for hybrid mismatches resulting from: (i) hybrid entities; (ii) hybrid financial instruments; (iii) hybrid permanent establishments; (iv) hybrid transfers; (v) imported mismatches; and (vi) dual residency cases.

Furthermore, application of the primary rule and secondary rule principles as outlined in ATAD 2 is proposed. If a payment or reimbursement is not subject to tax in the country of the recipient, based on the primary rule, the deduction of the corresponding payment will be denied at the level of the payer.

If the primary rule cannot be applied (e.g., if the payer is not located in an EU Member State), the secondary rule will generally be applicable, resulting in an inclusion of the payment or reimbursement at the level of the recipient.

As part of the implementation of the anti-hybrid rules, the typical "CV-BV-structures" will be impacted as of 1 January 2020. Payments from Dutch BVs to reverse hybrid entities will no longer be deductible after 31 December 2019.

Transfer pricing (TP) corrections as such are not in scope of the anti-hybrid rules, as also was confirmed in the BEPS<sup>2</sup> Action 2 report and ATAD 2. However, to the extent such TP

corrections are deemed to arise from a hybrid arrangement, an (imputed) deduction will also be denied under the proposed anti-hybrid rules.

Parallel to the implementation of these anti-hybrid rules, the Dutch Government announced the repeal of a Decree relating to the application of the Netherlands-US tax treaty to hybrid entities (CV/BV Decree). Under the CV/BV Decree, treaty benefits (e.g., lowered or exempt dividend withholding tax rates) may be granted if the investors in a (reverse) hybrid entity are tax treaty eligible. Upon repeal of the CV/BV Decree as of 1 January 2020, dividend distributions from Dutch BVs to certain CVs may become subject to the 15% Dutch dividend withholding tax, unless restructuring takes place before that time.

### Timing and next steps

The internet consultation is open from 29 October 2018 until 10 December 2018 for any stakeholders who wish to provide input regarding the draft legislative proposals through the website of the Dutch Ministry for Finance. After this period, the input received shall be processed by the Ministry for Finance, with expected formal legislative proposals to be sent to the Dutch Parliament during the first half of 2019. It is expected that the legislative proposals will come into effect as of 1 January 2020 (and 2022).

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## Endnotes

1. Decree of 6 July 2005 dealing with the (anti) hybrid provision in context of the Netherlands-US tax treaty.
2. Base Erosion and Profit Shifting.

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