

The Netherlands publishes draft Mandatory Disclosure Rules

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Executive summary

The Dutch Ministry of Finance has published a draft proposal, including explanatory notes, implementing the European Union (EU) Mandatory Disclosure Directive. The draft proposal was issued on 19 December 2018 and public comments on the proposals were requested by 1 February 2019.

The draft Dutch legislation is going through the formal legislative process and may likely be amended before final enactment. If implemented as currently proposed, the Dutch Mandatory Disclosure Regime (MDR) legislation will be broadly aligned with the requirements of the EU Mandatory Disclosure Directive. The draft explanatory notes also contain some useful interpretations which clarify the concepts used in the EU Mandatory Disclosure Directive.

Detailed discussion

Background

The Council of the European Union Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation (the Directive or DAC6) entered into force on 25 June 2018.¹

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 tax authority. This disclosure regime applies to all taxes except value added tax (VAT), customs duties, excise duties and compulsory social security contributions.² Cross-border arrangements will be reportable if they contain certain features (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.

EU Member States are to adopt and publish national laws required to comply with the Directive by 31 December 2019. The Netherlands, among the first EU Member States to issue draft legislation, will introduce domestic legislation, which will take effect from 1 July 2020.

The key differences between the draft Dutch legislation and the Directive are set out below.

Scope

The scope of the draft Dutch legislation is fully aligned with the scope of the Directive. No additional reporting obligations or different reporting deadlines are proposed.

Reportable arrangements

- ▶ In line with DAC6, cross-border arrangements are defined as arrangements concerning more than one Member State or a Member State and a third country. Any cross-border arrangement or series of arrangements that meets at least one of the hallmarks (as set out in Annex IV of DAC6) must be reported.
- ▶ The draft Dutch legislation suggests that not all arrangements or schemes are intended to be caught by DAC6, but rather only those arrangements that likely represent aggressive tax avoidance. For example, it indicates that an arrangement that is only designed to prevent double taxation does not meet the "main benefit test." An intermediary must use its own judgment to assess whether there is a reporting obligation.
- ▶ The draft Dutch legislation confirms that bespoke arrangements for specific taxpayers do not need to be reported if they never reach the point of being specifically tailored to enable a decision to proceed to be made. This is especially important for the period after 1 July 2020, as from this date arrangements must be reported within 30 days of a trigger event occurring.

- ▶ One of the trigger events for reporting (from 1 July 2020) is when the arrangement "is ready for implementation." For bespoke arrangements, the draft Dutch legislation clarifies that the arrangement is only "ready for implementation" if one or more relevant taxpayers who can implement the arrangement have been identified and an agreement for implementation has been reached.
- ▶ The draft Dutch legislation draws a distinction between the trigger events for reporting applicable to marketable arrangements and bespoke arrangements. Marketable arrangements must be reported if the arrangement has been made available for implementation (Art. 8ab para 1(a) of the Directive). Bespoke arrangements must be reported if they are ready for implementation or if the first step of implementation has been made (Art. 8ab para 1(b) and (c) of the Directive).

Intermediaries

The draft Dutch legislation is aligned with the DAC6 definition of "intermediary," but the accompanying explanatory notes give some useful clarifications:

- ▶ Under DAC6, it is unclear who should be regarded as the intermediary where an individual is employed as a tax expert by an entity providing tax advisory services. The draft Dutch legislation clarifies that the entity will qualify as the intermediary, subject to the following two conditions: (1) the entity has concluded a service contract with the relevant taxpayer; and (2) the individual tax advisor is an employee of the entity.
- ▶ Where an individual is employed as a tax expert by an entity that is a relevant taxpayer (an in-house tax advisor), the draft guidance seems to indicate that the reporting obligation lies with the entity that is the relevant taxpayer, and not with the individual. The individual will therefore not be considered an intermediary.
- ▶ The draft guidance is not entirely clear on whether there are any circumstances in which an individual in-house tax advisor or the entity which houses the tax team can qualify as an intermediary. On the one hand, the draft guidance clarifies that if individual tax advisors (including members of an in-house tax team) are employed by the entity that is the Relevant Taxpayer, the individual in-house tax advisors should not be regarded as intermediaries even if they design the arrangement. However, it is not clear whether such individual advisors or an entity that houses the tax team (who play a role in designing the arrangement)

could be regarded as an intermediary in relation to an arrangement made available to the Relevant Taxpayer, if they are separately employed by an associated entity.

- ▶ The draft Dutch legislation exempts lawyers and notaries (among others) from the reporting obligation where Legal Professional Privilege (LPP) applies under Dutch law. However, Dutch tax advisors and auditors cannot invoke LPP and will therefore have a reporting obligation.
- ▶ Academics who publish details of a reportable arrangement should not be regarded as intermediaries unless they also publish details of the relevant taxpayer.

Main benefit test

An arrangement is only reportable if it meets at least one of the hallmarks. These hallmarks can be distinguished as hallmarks, which are subject to the main benefit test, and those which by themselves trigger a reporting obligation without being subject to the main benefit test. The main benefit test 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.

- ▶ The draft Dutch legislation confirms that the "tax advantage" referred to in the main benefit test also covers tax advantages realized in non-EU Member States.
- ▶ A specific example mentioned in the explanatory notes as not being caught by the main benefit test is a mortgage from a foreign lender with deductible interest. As this tax advantage is intended by the Dutch tax authorities and is connected to the regular ownership of a house, even though there is a tax advantage in this case, the tax advantage is not considered one of the main benefits of the arrangement.

Hallmarks A-E

Most elements of the hallmarks are not defined in DAC6. The draft Dutch legislation and explanatory notes provide some clarification on these elements. No additional hallmarks have been included in the draft proposal.

- ▶ An almost zero tax rate (hallmark C1(b)(i)) is a tax rate between 0% and a nominal 1% rate.
- ▶ The draft Dutch legislation clarifies that hallmark C1(c), "payments subject to a full tax exemption," relates to an exemption for the object of taxation (i.e., an exclusion

from tax for a specific type of income), not a "subject" exemption aimed at excluding a specific category of persons from being taxed (for example, a tax exemption for eligible pension funds).

- ▶ With respect to hallmark C1(d) - where the payment benefits from a preferential tax regime - the guidance indicates that usually, an arrangement subject to a preferential tax regime has the underlying purpose to obtain the preferential treatment afforded by that regime. This purpose on its own is not sufficient to meet the main benefit test. An additional element or tax advantage (other than the preferential treatment) should be obtained in order to satisfy the main benefit test.
- ▶ Hallmark C3 covers the prevention of double tax relief in respect of the same item of income or capital in multiple jurisdictions (including EU Member States and outside the EU). The draft guidance clarifies that hallmark C3 only covers multiple claims of double tax relief which have the effect of eliminating tax being paid in respect of that income or capital in any jurisdiction.
- ▶ The draft Dutch legislation clarifies the term "Controlling Persons" in hallmark D1(e). This term includes the "ultimate beneficial owner."

Penalties

- ▶ The burden of proof on whether cross-border arrangements should be reported lies with intermediaries and relevant taxpayers.
- ▶ Failure to comply with the MDR reporting obligations can result in monetary penalties amounting to a maximum of €830,000.

Next Steps

The draft Dutch legislation and explanatory notes have clarified some questions with respect to the interpretation and implementation of DAC6, however many questions remain unanswered. The consultation is set to end on 1 February 2019. After that, the State Secretary of Finance will present the formal draft legislation, which will then be debated by the Dutch Parliament. It is anticipated that the subsequent legislative process will provide more clarification.

Endnotes

1. For background on the MDR, see EY Global Tax Alert, [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018.
2. 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.

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EYG no. 000193-19Gbl

1508-1600216 NY
ED None

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