

The Netherlands publishes draft proposal on Mandatory Disclosure Rules

NEW! EY Tax News Update: Global Edition

EY's new Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration [here](#).

Also available is our [EY Global Tax Alert Library](#) on ey.com.

Executive summary

The Dutch Government has published formal draft legislation, accompanied by explanatory notes implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive). The draft legislation was issued on 12 July 2019. Previously, a draft proposal for public consultation was issued by the Dutch Government on 19 December 2018.¹ The differences between the public consultation document and the formal draft legislation are limited.

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

The draft legislation is expected to be finalized by the end of October 2019.

Detailed discussion

Background

The Council of the European Union Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (the Directive or DAC6), 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.

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

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

Scope of taxes covered

The scope of the taxes covered under the Dutch draft legislation is fully aligned with the Directive and applies to all taxes except VAT, customs duties, excise duties and compulsory social security contributions.

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.

Under DAC6, cross-border arrangements are defined as arrangements concerning more than one Member State or a Member State and a third country. 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.

Under the Dutch draft legislation, an arrangement is reportable under the same circumstances as described by the Directive. The Dutch draft explanatory notes indicate that cross-border arrangements or schemes which potentially indicate tax avoidance are intended to be covered by DAC6. Such is assumed to be the case if one or more hallmarks are triggered (in some cases in combination with the MBT).

The Dutch draft explanatory notes confirm that bespoke arrangements designed for and tailored to a specific taxpayer do not need to be reported if no decision to implement has ever been taken, nor any steps to implement the arrangement have ever been set. An arrangement is assumed to be ready for implementation if one or more specific relevant taxpayers are identified which will participate in the implementation of the arrangement and an agreement has been reached that this arrangement will be implemented. This is especially important for the period after 1 July 2020, as from this date onwards arrangements must be reported within 30 days of a trigger event occurring.

The Dutch draft legislation does not cover domestic arrangements and does not include any hallmarks in addition to Hallmarks A-E of DAC6.

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The Dutch draft legislation and explanatory notes provides some clarification on these elements.

Hallmark A

- ▶ Hallmark A3 captures arrangements that have substantially standardized documentation and/or structure. Due to its nature, hallmark A3 should be considered in relation to marketable arrangements. This hallmark therefore refers to so-called "off the shelf" products, which are suitable for purchase and direct implementation by a relevant taxpayer. The mere inclusion of the names or other identity information in the legal documents which are part of the arrangement and other standard legal actions necessary to execute the advice (such as for example actions by notaries to register immovable property) are not considered substantial modifications as referred to in this hallmark. "Common" tax arrangements do not automatically fall within the scope of this hallmark, as for those types of arrangements, substantial additional tax advice may be required before implementation. Certain standard banking products, which are not aimed at obtaining a tax advantage, will not be reportable under A3 as the MBT will not be met.

Hallmark B

- ▶ Hallmark B3 concerns arrangements which include circular transactions. A specific example of Hallmark B3 are legal acts as referred to in Section 10a, first paragraph, of the *Corporate Income Tax Act 1969* (in Dutch: “Wet Vpb 1969”), which is an interest deduction limitation rule and generally covers the limitation of deductibility of interest on debt used for profit distributions, capital contributions or acquisition (or extension) of shareholding interests in associated enterprises.

Hallmark C

- ▶ An almost zero tax rate as referred to in hallmark C1(b)(i) is a statutory tax rate between 0% and 1%.
- ▶ A preferential tax regime as referred to in hallmark C1(d), is broader than a “harmful tax regime.” In the Netherlands, for example, the innovation box and the tonnage tax regimes qualify as preferential tax regimes.
- ▶ With respect to hallmark C2 (claims for deductions for the same depreciation on an asset in more than one jurisdiction), it is noted that this also relates to the situation in which a deduction by the head office is claimed, as well as a deduction at the level of the permanent establishment of the same entity.
- ▶ 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). It is clarified that hallmark C3 only covers multiple claims of double tax relief which have the effect of eliminating tax being paid in respect of that item of income or capital in any jurisdiction.
- ▶ With respect to hallmark C4 (an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved), it is noted that, for the avoidance of doubt, “transfer of assets” also includes the “transfer” (or attribution) involving a head office and permanent establishment. The words “amount being treated as payable” also includes the situation where a debt arises in connection with the transfer.

Hallmark D

- ▶ Hallmark D1(b) covers the transfer of financial accounts or assets to, or use of, jurisdictions not bound by the automatic exchange of information on financial accounts with the State of residence of the relevant taxpayer. It is noted that the United States is also considered

to be a jurisdiction bound to the automatic exchange of information on financial accounts with the State of residence of the relevant taxable person, where such exchange takes place under the *Foreign Account Tax Compliance Act* Convention.

Hallmark E

- ▶ It is explicitly stated that, from a Dutch perspective, conversion of “low-value-adding Intragroup services” from the Organisation for Economic Co-operation and Development (OECD) guidelines in the Dutch Transfer Pricing Decree do not trigger hallmark E1 regarding unilateral safe harbor rules.
- ▶ It is explicitly stated that hallmark E3 concerns the commercial figures (EBIT - earnings before interest and taxes) and not the tax figures (EBITDA - earnings before interest, taxes, depreciation and amortization).

Main benefit test

In accordance with DAC6, 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.

The Dutch draft legislation confirms that the “tax advantage” referred to in the MBT also covers tax advantages realized in non-EU Member States.

The Dutch draft legislation analyzes the European Commission recommendation of 6 December 2012 on aggressive tax planning as it is considered relevant for the interpretation of the MBT. Based on that analysis, the MBT is met if an arrangement (or series of arrangements) at least in part has artificial character and is at a minimum also aimed at obtaining a tax benefit. The explanatory notes are clear in relation to the application of certain preferential provisions or regimes included in Dutch tax law. The use of such preferential provisions or regimes does not necessarily mean that the MBT is met, as long as valid business reasons exist and no artificial elements are added to create or enhance a tax benefit. In such case, it can be assumed that the arrangement does not have the effect of obtaining a tax benefit under the MBT. In this context, the term “tax benefit” also includes deferral of taxation (roll-over relief). The explanatory notes provide the following example in relation to the roll-over relief provided for in Dutch tax law in cases where an individual contributes its business enterprise to a legal entity in exchange for shares issued by the latter; this

can also be applied in cross-border situations. However, the application of this roll-over relief does not in itself mean that the MBT is met.

The burden of proof in respect of the MBT lies with the person who would otherwise have the reporting obligation and does not report because the MBT is considered not to be met.

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 which can report, the obligation will shift to the taxpayers.

The Dutch draft legislation exempts Dutch lawyers/legal advisers/attorneys from the reporting obligation due to LPP, the derived right of non-disclosure by service providers hired by such persons. However, intermediaries that claim LPP are still required to inform other intermediaries or relevant taxpayers of their obligations to report.

The Dutch draft legislation defines a Dutch intermediary as someone who meets one of the following criteria:

1. Has its tax residency in the Netherlands
2. Has a permanent establishment in the Netherlands
3. Is incorporated under the laws of the Netherlands or falls under the application of Dutch law
4. Is registered in the Netherlands with a professional organization in connection with the provision of legal, tax or advisory services

The definition of "intermediary" in the draft legislation does not materially differ from the draft text that was provided for in the internet consultation at the start of 2019. However, interestingly, the explanatory notes are now clearer since they explicitly refer to the fact that the reporting obligation rests on "Dutch intermediaries." A specific example is provided: a Dutch resident entity has a branch office in a third country and that branch office provides services in relation to a cross-border reportable arrangement and the Dutch head office is not involved in these services. In that case, the Dutch head office (although qualifying as an "intermediary" as per 1 and/or 3 above) does not have a reporting obligation under Dutch law. In that case, the relevant taxpayer with sufficient EU nexus will have a reporting obligation.

The Dutch explanatory notes explain that the rule of thumb on the term "intermediary" is that a firm (in the form of a legal entity), and not the individual tax advisor who acts on behalf of the firm/legal entity, qualifies as the intermediary. This is subject to the conditions that:

1. The firm/legal entity has concluded a service contract with the relevant taxpayer
2. The individual tax advisor is an employee of the firm/legal entity

The same conclusion applies to the situation in which an individual tax advisor is employed by the intermediary and works at the premises of the relevant taxpayer. If an individual "in-house tax advisor" is employed by the relevant taxpayer, still this individual "in-house tax advisor" does not qualify as an intermediary and therefore the obligation to report lies with the relevant taxpayer.

It is not clear whether an entity that houses the tax team, which plays a role in designing the arrangement (an "in-house" tax team) could be regarded as an intermediary in relation to arrangements which are ready for implementation by members of the group of which it is part, but where the entity employing the in-house tax team does not participate in the arrangement.

The Dutch explanatory notes refer to the service provider category of "intermediary" as the "auxiliary intermediary." It is noted that there is a reporting obligation if, on the basis of the information available and the expertise and understanding necessary to provide the respective services, this person knows or should reasonably have known that he/she has (directly or through other persons) committed to provide aid, assistance or advice. Consequently, this person does not have an obligation to further investigate his reporting responsibility beyond making an assessment based on the information available to him. Furthermore, assistance with filing a tax return does not qualify as either providing aid, assistance or advice or as designing, marketing, organizing making available for implementation or managing the implementation of a reportable cross-border arrangement.

Reporting deadlines

Under DAC6, for intermediaries (and relevant taxpayers), the trigger events for reporting under the Directive (from 1 July 2020) are when the reportable arrangement is "made available for implementation"; or when the reportable arrangement is "ready for implementation" or when "the first step of implementation has been made."

Under the Directive, reporting starts from 1 July 2020 and exchanges between jurisdictions from 31 October 2020. However, reports will retroactively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.

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 are to implement the arrangement have been identified and an agreement for implementation has been reached.

The Dutch draft legislation draws a distinction between the triggering 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).

For auxiliary intermediaries, the draft legislation indicates that reporting is only expected after an arrangement is considered ready for implementation or a first step of implementation has been set. If aid and assistance is provided after this event (for example on managing the implementation), then reporting will need to take place within 30 days after the date when the aid or assistance is provided.

Part of the data required when reporting the arrangement is the “value of the arrangement.” It is noted in the explanatory notes that this does not mean the tax benefit of the arrangement.

The Dutch reporting deadlines are expected to fully align with DAC6.

Penalties

- The burden of proof on whether cross-border arrangements should be reported lies with the intermediary and relevant taxpayer.

- An administrative fine not exceeding the amount of the sixth category (€830,000) will be imposed in the case of:
 - Intentional or gross failure to comply with these obligations
 - Non-compliance
 - Not complying in time
 - Not complying in full, or
 - Not complying correctly
- The above fine should be proportionate, which means that it depends on the facts and circumstances of the case and both reducing and aggravating circumstances will be taken into account.
- Serious cases of non-compliance may lead to criminal prosecution.
- The above is applicable for intermediaries, relevant taxpayers and LPP exempt intermediaries.

Next steps

The Dutch formal draft legislation has clarified some questions with respect to the interpretation and implementation of DAC6, however many questions remain unanswered. The formal draft legislation will be debated by the Dutch Parliament. It is anticipated that the subsequent legislative process will provide additional clarification.

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.

Lastly, it is relevant to note that a guide containing more extensive administrative guidance will be drafted by the Ministry of Finance, which will give further details of the obligations for intermediaries and relevant taxpayers arising from DAC6. The guide will, among other things, contain information on certain specific arrangements and indicate whether they trigger (one of) the hallmarks.

Endnotes

1. See EY Global Tax Alert, [The Netherlands publishes draft mandatory disclosure rules](#), dated 31 January 2019.
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.

For additional information with respect to this Alert, please contact the following:

Ernst & Young Belastingadviseurs LLP, Rotterdam

- | | |
|-------------------------|---------------------------------|
| ▶ Marlies de Ruiter | marlies.de.ruiter@nl.ey.com |
| ▶ Arjo van Eijdsen | arjo.van.eijdsen@nl.ey.com |
| ▶ Theodoor Huiskes | theodoor.huiskes@nl.ey.com |
| ▶ Coen Bergenhenegouwen | coen.bergenhenegouwen@nl.ey.com |

About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

© 2019 EYGM Limited.
All Rights Reserved.

EYG no. 003536-19Gbl

1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com