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Mandatory disclosure directive

Dutch implementation

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Mandatory Disclosure Directive - Dutch implementation

What do the Mandatory Disclosure rules imply?

Based on the Dutch implementation of the EU Mandatory Disclosure Directive (**DAC6**), Dutch intermediaries and - under certain circumstances - Dutch taxpayers need to report certain cross-border arrangements to the Dutch tax authorities (**DTA**) from 1 January 2021 onwards.

In general, the Dutch implementation follows the minimum standard of DAC6 (no additional requirements compared to the wording of DAC6 and no additional information needs to be reported). The scope of the Dutch reporting obligations is outlined in further detail below.

What is reportable under Dutch legislation?

To be considered a reportable cross-border arrangement (**RCBA**), an arrangement must (i) have a cross-border dimension and (ii) meet one of the "hallmarks". These hallmarks are characteristics or features of a cross-border arrangement that present an indication of a potential risk of tax avoidance. The list of the hallmarks included in the Dutch implementation is the same as the annex of DAC6. Some of the cross-border arrangements should only be reported if both the hallmark and the "main benefit test" (**MBT**) are satisfied as described in further detail below.

Applicable taxes

The Dutch legislation applies to arrangements in the context of all taxes except for value added tax, custom duties, excises and social security premiums.

Arrangement

The term "arrangement" is not further defined in the Dutch implementation of DAC6. An arrangement could be a transaction, action, agreement, loan, commitment, or a combination thereof.

Cross-border

For an arrangement to be "cross-border", it must concern more than one EU Member State or an EU Member State and a non-EU country, where:

- not all participants are tax resident of the same jurisdiction;
- one of the participants is a dual tax resident;
- the arrangement relates to a PE;
- an activity is carried on in a jurisdiction without a taxable presence in that jurisdiction; or
- the arrangement potentially impacts the automatic exchange of information or the identification of the ultimate beneficial owner.

Hallmarks

An overview of the hallmarks is included in the Annex to this brochure.

Main benefit test

The MBT is satisfied if it can be established that the main 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.

In the Dutch parliamentary guidance, it is mentioned that a deferral of taxation qualifies as a tax advantage as meant in the MBT. To the contrary, solely avoiding double taxation does not per se qualify as a tax advantage. Following the above, the question whether the MBT is satisfied requires a case-by-case analysis.

Administrative guidance

The Dutch Ministry of Finance published a decree providing additional guidance in respect of the Dutch implementation of DAC6.[1]

Which intermediaries and/or taxpayers have the reporting obligation?

Dutch intermediaries

The primary responsibility to report in the Netherlands rests with Dutch intermediaries (individuals or legal entities) and in some cases taxpayers. Who is considered as an intermediary depends on all facts and circumstances. A Dutch intermediary is any person with a nexus with the Netherlands that (i) designs, markets, organizes or makes available for implementation or manages the implementation of an RCBA or (ii) has undertaken to provide, directly or by means of other persons, aid, assistance or advice in this respect.

In the case an individual adviser is employed by a firm, the firm in principle qualifies as the intermediary ('office-approach').

Foreign intermediaries

Foreign intermediaries without a link to the Netherlands will have no reporting obligations in the Netherlands under the Dutch implementation of DAC6.

In-house legal/tax teams of taxpayers

In some situations, the entity employing in-house adviser(s) (e.g. an in-house tax or legal department) will be considered the intermediary. This is the case if an in-house adviser of a taxpayer is involved in advising an affiliated group entity on an RCBA whereas the group entity that employs the in-house adviser is not involved in the arrangement itself. The entity that employs the in-house adviser is in principle considered the intermediary and not the individual adviser.

Reporting obligation for taxpayers

The disclosure obligation may shift to the taxpayer in one the following situations:

- none of the intermediaries involved have a link to an EU Member State;
- all the intermediaries involved have a legal professional privilege (e.g. Dutch attorneys and civil-law notaries); or
- the RCBA is designed and implemented in-house without involvement of any intermediary.

In the case the intermediary is exempt from filing information on an RCBA because of the legal professional privilege, an intermediary must immediately notify their client, that other intermediaries involved (if any) or the client themself will have a reporting obligation. Please note that if other intermediaries are involved, we advise you as client to consult with the other intermediaries and ask them whether they need to comply with a potential reporting obligation.

1 Decree of 24 June 2020, nr. 2020-11382 and updated with decree of 14 April 2023, Nr. 2023-6233.



What are the reporting deadlines?

From 1 January 2021 onwards, Dutch intermediaries or taxpayers are required to file information on the RCBAs within thirty days beginning; (i) on the day after the arrangement is made available for implementation; (ii) on the day after the arrangement is ready for implementation; or (iii) when the first step in the implementation has been made - whichever occurs first.

An RCBA is ready for implementation if it is conceived for a specific taxpayer and capable of being implemented by this taxpayer. This includes cross-border arrangements conceived for and targeted at a specific taxpayer but eventually not implemented.

What is the scope of the information to be disclosed?

The information which should be reported by the intermediaries and taxpayers to the DTA include, where applicable:

a. identification of intermediaries and relevant taxpayers;
b. details of the relevant hallmarks;
c. summary of the content of the arrangement;
d. date of the first step of implementation;
e. details of the national provisions forming the basis of the arrangement;
f. value of the arrangement;
g. Member States involved in the arrangement;
h. identification of any other Member State likely to be affected by the arrangement.

The reporting with the DTA must be done via the relevant web portal (*Gegevensportaal*).

Penalties

Dutch intermediaries and taxpayers who infringe the Dutch legislation may be subject to penalties up to a maximum of EUR 900,000 (in 2023) or, in certain cases, criminal prosecution. According to the Dutch parliamentary guidance, in principle no sanctions will be imposed if the Dutch intermediary or the taxpayer has a reportable position ("*pleitbaar standpunt*") that the cross-border arrangement was not reportable.

If you would like to find out more, or should you have any questions, please feel free to get in touch with your trusted adviser at Loyens & Loeff or send an email to info@loyensloeff.com.

Annex - Hallmarks

Main benefit test

Generic hallmarks under category A and specific hallmarks under category B and under points (b)(i), (c) and (d) of paragraph 1 of category C may only be taken into account where they fulfil the "main benefit test".

The main benefit test (**MBT**) is satisfied if it can be established that the main or one of the main benefits which having regard to all relevant facts and circumstances, a person may reasonable expect to derive from an arrangement, is the obtaining of a tax advantage.

A. Generic hallmarks linked to the main benefit test

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:
   a. the amount of the tax advantage derived from the arrangement; or
   b. whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.
3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

B. Specific hallmarks linked to the main benefit test

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.
2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.
3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

C. Specific hallmarks related to cross-border transactions

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:
   a. the recipient is not resident for tax purposes in any tax jurisdiction;
   b. although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:
      i. does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; (+MBT) or
      ii. is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative;
   c. the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes; (+MBT)
   d. the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes; (+MBT)
2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.
3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.
4. There is 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.

D. Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Such arrangements include at least the following:
   a. the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;
   b. the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer;
   c. the reclassification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information;
   d. the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to reporting under the automatic exchange of Financial Account information;
   e. the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information;
   f. arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.
2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:
   a. that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and
   b. that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and
   c. where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.

E. Specific hallmarks concerning transfer pricing

1. An arrangement which involves the use of unilateral safe harbour rules.
2. An arrangement involving the transfer of hard-to-value intangibles. The term "hard-to-value intangibles" covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:
   a. no reliable comparables exist; and
   b. at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.
3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50% of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

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