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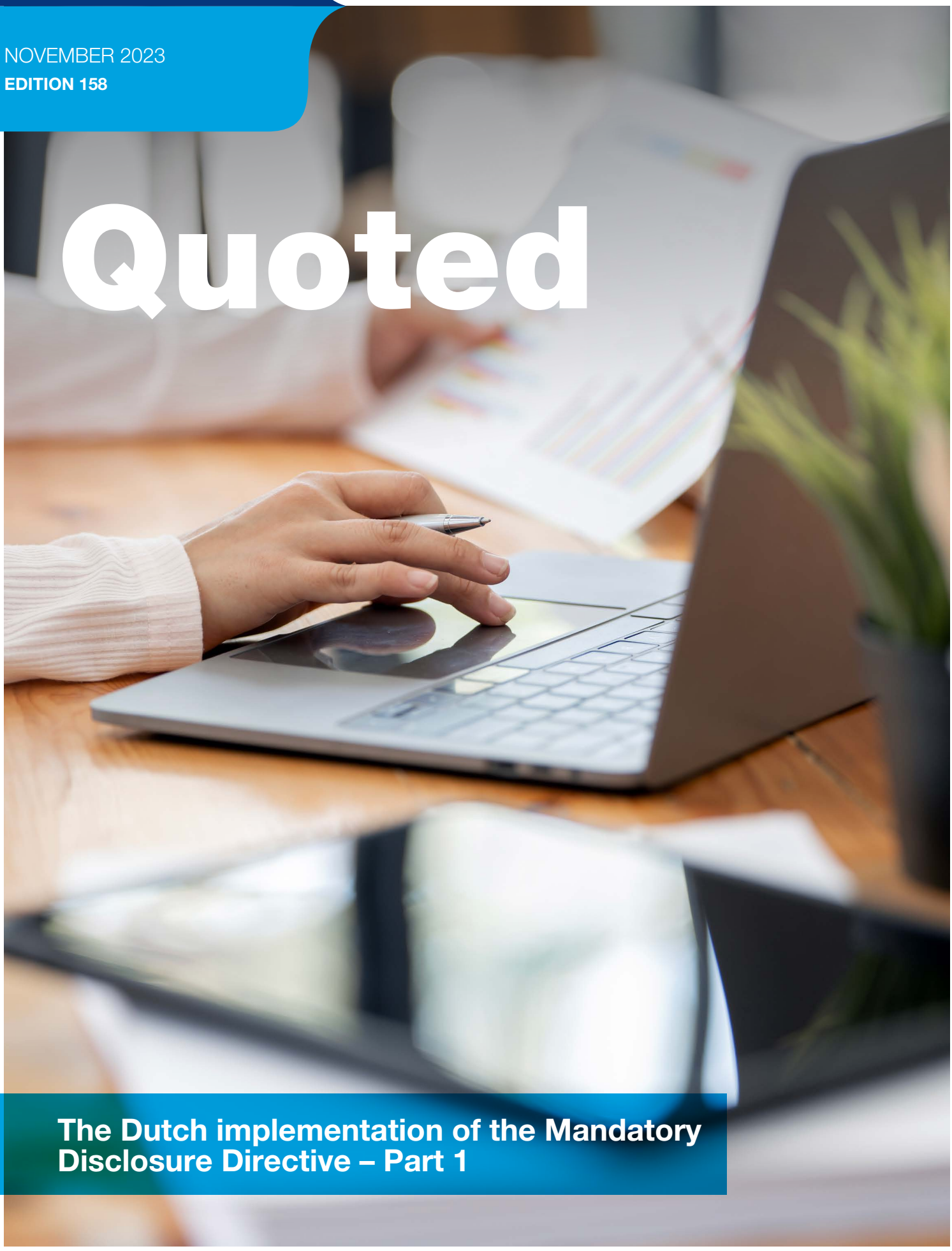

The Dutch implementation of the Mandatory Disclosure Directive – Part 1

LOYENS & LOEFF

In this edition

1. Introduction

In brief, the Mandatory Disclosure Directive[1] (the **Directive**) imposes the obligation on intermediaries and - under certain circumstances - relevant taxpayers to report certain cross-border arrangements with an EU link to the tax authorities.

The Dutch legislation implementing the Directive (the **Dutch DAC6 legislation**) entered, as required, into effect on 1 July 2020, having retroactive effect until 25 June 2018. This issue of Quoted includes a detailed description of the Dutch DAC6 legislation (including clarifications and insights as provided in a policy decree (the **Decree**[2])). Paragraph 2 contains an executive summary of this Quoted. Paragraph 3 provides for a short overview of the background of the Dutch DAC6 legislation. Paragraph 4 focuses on the (interpretation of the) most relevant provisions and definitions of the Dutch DAC6 legislation. In paragraph 5, the potential impact for taxpayers is addressed followed by some guidance on how taxpayers can be in control of the potential impact of the Dutch DAC6 legislation. This Quoted (Part 1) is an update of the Quoted 143 published in November 2021.[3]

In Part 2[4] of this Quoted, specific elements of the Directive and the Dutch implementation thereof, such as the main benefit test, the hallmarks and certain examples with respect to the hallmarks will be outlined. For more detailed information on the Directive, see our Quoted 120, published in October 2018.[5]

2. Executive summary

- The Dutch DAC6 legislation imposes the obligation on intermediaries and – under certain circumstances – relevant taxpayers to report certain cross-border arrangements to the Dutch tax authorities from 1 January 2021 onwards.
- The obligation to report may not be enforceable upon an intermediary due to a legal professional privilege, or because the intermediary does not have a presence within the EU. In these circumstances, the disclosure obligation shifts to the taxpayer, if no other intermediary is involved. This is also the case if there is no intermediary involved because the taxpayer designs and implements a reportable cross-border arrangement in-house.
- In the Netherlands, taxpayers should be aware that they can be considered an intermediary, and as a result have to disclose information on a reportable cross-border arrangement to the Dutch tax authorities.

3. Background

Directive 2011/16/EU[6] (the **DAC**) contains - in certain circumstances - a general obligation for the national tax authorities to spontaneously exchange information to the other tax authorities within the European Union (**EU**). On 21 June 2017, the European Commission presented a proposal amending the DAC in respect of the mandatory automatic exchange of information in the field of taxation in relation to “reportable cross-border arrangements”. The Directive is the fifth amendment to the DAC and is therefore also referred to as DAC6. The aim of the Directive is to increase transparency and to have access to information about potentially aggressive cross-border tax arrangements at an early stage. This should allow the Member States to close possible loopholes by enacting legislation or by undertaking adequate risk assessment and carrying out tax audits.

4. The Dutch DAC6 legislation

4.1 Introduction to a step-by-step plan

In general, the Dutch DAC6 legislation follows the minimum standard of the Directive (it does not contain additional requirements compared to the wording of the Directive). In addition to the guidance provided in parliamentary history, the Dutch State Secretary of Finance published a Decree that provided further guidance on the Dutch DAC6 legislation. The Decree was originally published in 2020 and it was updated in April 2023.

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1 Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

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

3 Quoted 143, November 2021.

4 Quoted 159, November 2023.

5 Quoted 120, October 2018.

6 Directive 2011/16/EU on administrative cooperation in the field of taxation.

In this description of the (interpretation of the) most relevant provisions and definitions of the Dutch DAC6 legislation, a step-by-step plan is used as guidance. This step-by-step plan covers several steps to analyse the potential impact of the Dutch DAC6 legislation in respect of a cross-border arrangement.

4.2 Covered taxes

The Directive in principle applies to all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities. Exceptions apply to value added tax, custom duties, excise duties and compulsory social security contributions payable to the Member State or a subdivision of the Member State or to social security institutions established under public law.

Some Member States deviate from the Directive with respect to the covered taxes and therefore broadened the scope of the Directive in their domestic DAC6 legislation. The Dutch DAC6 legislation does however not differ from the covered taxes defined in the Directive.

4.3 Step 1 | Cross-border arrangement

The first question is whether there is a cross-border arrangement for Dutch DAC6 legislation purposes. The Directive does not provide for a definition of the term arrangement. The reason being that it was not considered necessary nor desirable to include a definition.[7] The term 'arrangement' is not further defined in the Dutch DAC6 legislation either. In parliamentary history and in the Decree it is stated that an arrangement could be a transaction, action, agreement, loan, commitment or a combination thereof. Furthermore, an arrangement can consist of different elements and shall also include a series of arrangements. Following the above, a low threshold is applied for the term arrangement. In the Netherlands both marketable and bespoke arrangements should be reported.[8]

It has been clarified in the Decree that an amendment to an existing arrangement may be subject to a new reporting obligation if the circumstances underlying the cross-border arrangement change. This could include the situation where, because of an action, there are changes with respect to the participants (like the legal form or tax residency) or if new participants are added to the reportable cross-border arrangement.

An arrangement is a cross-border arrangement if the arrangement concerns more than one Member State or a Member State and a third country, where at least one of the following conditions is fulfilled:

- not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
- one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
- one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;
- one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction; or
- the arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

If there is no cross-border arrangement, there is no reporting obligation under the Dutch DAC6 legislation. Purely domestic situations and situations having no link to any Member State do not constitute a cross-border arrangement in this respect.

It appears from the Decree that the concept of 'cross-border' can cover a variety of situations. The Decree includes as an example the legal merger of two Dutch group companies owned by a joint foreign parent company, although it is stated that this does not necessarily constitute a reportable cross-border arrangement.

The term 'participant' has been clarified to a certain extent in the Decree. It depends on the facts and circumstances, including the applicable hallmark(s) in a specific case, which persons (whether tax transparent or not) are participants with respect to the arrangement. It is noted that a person should be involved to some extent in the arrangement to qualify as a participant. It is clarified

7 See the Directive, preamble paragraph 9 and see our Quoted 120 issued in October 2018.

8 A 'marketable arrangement' is a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised, while a 'bespoke arrangement' is any cross-border arrangement that is not a marketable arrangement.

that a person is considered to be sufficiently involved if - for instance - a board resolution is taken or if the arrangement leads to accounting or tax consequences. In connection with the Decree, the Dutch tax authorities indicated that a check-the-box election of a Dutch BV as such does not have the effect that the Dutch BV is considered to be a participant in the cross-border arrangement. It is furthermore clarified that a cross-border arrangement can be recognized if there is only one participant. A transaction between a head office and a foreign permanent establishment is an example of a cross-border arrangement with only one participant. The Decree mentions that, in respect of both hallmark C(1) and E(3), a separate entity approach should be applied in relation to permanent establishments.

On 19 September 2023 (Budget Day), the Dutch Ministry of Finance submitted the 2024 Dutch Budget to parliament. The 2024 Dutch Budget contains various tax proposals, including that as of 1 January 2025 all Dutch partnerships are transparent for Dutch tax purposes. As a consequence, non-transparent partnerships are deemed to transfer their assets to their partners when becoming transparent. For such deemed transfers it has been confirmed in the proposal that the partners are not considered participants for Dutch DAC6 purposes as they are not actively involved in the arrangement. This may be different if a request for a rollover facility is filed by the partnership and the limited partners. In that case, the active involvement of the partnership and the limited partners may have the effect that the parties involved will be considered participants in the arrangement - which depending on the jurisdictions involved - may result in a (reportable) cross-border arrangement.

4.4 Step 2 | Reportable cross-border arrangement

If there is a cross-border arrangement, the second question is whether this cross-border arrangement is reportable.

A cross-border arrangement is a reportable cross-border arrangement if the cross-border arrangement contains at least one of the hallmarks listed in Annex IV to the Directive. These hallmarks are characteristics or features of a cross-border arrangement that present an indication of a potential risk of tax avoidance. For the list of hallmarks the Dutch DAC6 legislation refers to the list of hallmarks included in Annex IV to the Directive. Therefore, no additional hallmarks have been included in the Dutch DAC6 legislation. The hallmarks are divided into five categories:

A Generic hallmarks linked to the main benefit test;
B Specific hallmarks linked to the main benefit test;
C Specific hallmarks related to cross-border transactions;
D Specific hallmarks concerning automatic exchange of information and beneficial ownership; and
E Specific hallmarks concerning transfer pricing.

All generic hallmarks in Category A, all specific hallmarks in Category B and some hallmarks in Category C[9] are only applicable if the main benefit test is satisfied. 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. If there is no reportable cross-border arrangement, there is no reporting obligation.

4.5 Step 3 | Who has the obligation to report?

If there is a reportable cross-border arrangement, the third question is who has the reporting obligation.

Dutch intermediaries

In principle, the intermediary has the reporting obligation. Intermediary means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement. Furthermore, intermediary means any person that on the basis of the information available and the expertise necessary to carry out services, is reasonably expected to know that this person has undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement. In parliamentary history it is mentioned that the expertise is tested at the level of the individual involved instead of at the level of the firm such individual works for, even though an entity approach is applied in determining who is the intermediary (as discussed below).

9 I.e., Hallmark C(1) paragraph 1, under b)(i) under c) and under d).

Parliamentary history and the Decree note - among others - that the preparation of a tax return or a tax due diligence report, an 'audit of tax' in the context of the annual audit and the drawing up of a 'tax fact book' in which only an existing tax structure is described (without any tax implications) are considered activities which should not result in a reporting obligation or an obligation to notify the taxpayer.

Only intermediaries who have a certain 'nexus' with the Netherlands are obliged to report in the Netherlands. Foreign intermediaries without a nexus to the Netherlands will have no reporting obligations in the Netherlands under the Dutch DAC6 legislation. To have such nexus, the intermediary should either:

1. be resident for tax purposes in the Netherlands;
2. have a permanent establishment in the Netherlands throughout which the services related to the reportable cross-border services are rendered;
3. be incorporated in, or governed by the laws of the Netherlands; or
4. be registered with a professional association related to legal, taxation or consultancy services in the Netherlands.

Dutch intermediaries - examples
The aforementioned broad definition of intermediaries includes all tax advisers, accountants, lawyers, civil-law notaries and other professionals who are advising taxpayers on cross-border arrangements. It may also include professionals involved in managing the implementation of a reportable cross-border arrangement such as trust service providers, financial institutions and family offices.

In parliamentary history it is noted that an intermediary can in principle be both a natural person or an entity. However, in the case an individual works for a firm, the firm is considered the intermediary ('office-approach'). In this respect it is relevant whether the individual acts on his or her own behalf or in the name and for the account of the firm.

In principle all intermediaries involved have the obligation to report a reportable cross-border arrangement. In case multiple intermediaries are involved, an intermediary can be exempt from filing the reportable cross-border arrangement if the intermediary has proof that such arrangement has already been reported by another intermediary. In the Netherlands, the Dutch tax authorities will provide a 'reference number' which will serve as proof that an arrangement has been reported.

Dutch intermediaries - attorney client privilege / legal professional privilege
In the Netherlands, attorneys and civil-law notaries are exempt from reporting due to their attorney client privilege / legal professional privilege. In its decision of 8 December 2022[10], the Court of Justice of the EU (**CJEU**) ruled that the Directive is invalid in the light of the right to respect private and family life as laid down in the Charter of Fundamental Rights of the European Union, in so far as it requires an attorney-intermediary who is subject to attorney client privilege to notify any other intermediary not being his or her client.

On 16 May 2022, the Council of the EU has reached political agreement to amend the DAC (**DAC8**). DAC8 provides that Member States may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require any intermediary that has been granted a waiver to notify, without delay, his or her client, of their reporting obligations. On 17 October 2023 DAC8 was adopted by Member States in the Council, by unanimity. Member States shall in principle adopt legislation to comply with DAC8 by 31 December 2025 and shall apply those provisions from 1 January 2026.

In anticipation of the Dutch implementation of DAC8, the Dutch tax authorities published on their website that both attorneys and civil-law notaries who can invoke the attorney client privilege only have to notify their client of their potential reporting obligations.[11]

Taxpayers being considered an intermediary (instead of 'relevant taxpayers')
The Dutch State Secretary of Finance noted in parliamentary history that a taxpayer can also be considered an intermediary (instead of a 'relevant taxpayer'

10 CJEU 8 December 2022, C-694/20.

11 Kennisdatabank Mandatory Disclosure Rules/DAC6 (belastingdienst.nl)

for the purposes of the Dutch DAC6 legislation). If an entity that forms part of a multinational group employs (an) in-house adviser(s) (for instance, an in-house tax or legal adviser), advising one or more affiliated group entities on a reportable cross-border arrangement, such entity (and not the in-house adviser) is considered an intermediary for the purposes of the Dutch DAC6 legislation. This is only the case if the group entity that employs the in-house adviser is not a party to the reportable cross-border arrangement itself (i.e. the arrangement relates to another group entity). If this entity is a party to in the arrangement concerned, such entity is considered to be the relevant taxpayer for the purposes of the Dutch DAC6 legislation.

Hence, taxpayers should be aware that they may, as an intermediary, have to disclose information on a reportable cross-border arrangement to the Dutch tax authorities. This does have the advantage that taxpayers have the possibility to report themselves and submit proof of the filing to the intermediaries involved. As a result, the other intermediaries do not have a filing obligation and the taxpayer has more control over the information that is reported to the relevant tax authorities.

Multinational groups / private equity firms
In parliamentary history examples are provided in respect of a multinational group and a private equity firm.

Example 1: multinational group
If a group entity of a multinational group employs a specialised transfer pricing team of 200 individuals providing services to affiliated entities, such group entity is considered an intermediary provided that all requirements for a reportable cross-border arrangement are met and the group entity is not a party to the arrangement itself.

Example 2: Private equity firms
If a group entity within a private equity firm employs in-house advisers providing services (for instance as manager) to the investment funds or subsidiaries of these funds, such group entity is considered an intermediary provided that all the requirements for a reportable cross-border arrangement are met and the group entity is not a party to the arrangement itself.

Relevant taxpayers having the reporting obligation
In certain circumstances the reporting obligation rests with the relevant taxpayer. This is the case if (i) no intermediary is involved (i.e. the arrangement is fully developed in-house), (ii) when the intermediary involved does not have a nexus with an Member State or (iii) in the case the obligation to disclose is not enforceable due to an attorney client privilege / legal professional privilege under Dutch law. Only relevant taxpayers with a nexus with the Netherlands are required to report in the Netherlands.
The relevant taxpayer means any person (a) to whom a reportable cross-border arrangement is made available for implementation, (b) who is ready to implement a reportable cross-border arrangement or (c) who has implemented the first step of a reportable cross-border arrangement.
In parliamentary history it has been clarified that only the taxpayer being the subject of the reportable cross-border arrangement, or the 'user' of the reportable cross-border arrangement, is considered as the relevant taxpayer.

4.6 Step 4 | When to report?

Intermediaries or taxpayers are required to file information on reportable cross-border arrangements, including both marketable and bespoke arrangements within 30 days beginning on the earlier of (i) the day after the arrangement is made available for implementation, (ii) the day after the arrangement is ready for implementation or (iii) when the first step in the implementation has been made.
If a relevant taxpayer is required to report a reportable cross-border arrangement because the intermediary or intermediaries involved is/are exempt from reporting due to a client attorney privilege / legal professional privilege, the Dutch DAC6 legislation states that the 30 days reporting term starts on the day the taxpayer is notified by the intermediary or intermediaries involved.

Ready for implementation
A reportable cross-border arrangement is ready for implementation if the arrangement is designed for a specific taxpayer and the arrangement is capable of being implemented by this specific taxpayer (without significant adjustments being necessary). Previously, the Dutch government announced that an arrangement 'is ready for implementation' if there is agreement that the arrangement will be implemented. This statement was however withdrawn in parliamentary history. As a result, also cross-border arrangements which are conceived for and targeted at a specific taxpayer but are eventually not pursued will have to be reported. The Decree states that a reportable cross-border arrangement is in any event 'ready for implementation' if the adviser completed its services and has delivered its advice to the relevant taxpayer.
Such advice can also be a draft advice, if it can reasonably be assumed that the advice can be implemented without material updates of the advice.

4.7 Step 5 | Where to report?

For situations in which the intermediary has a reporting obligation in more than one Member State, the information shall be filed only with the competent authorities in a Member State where the intermediary (in the following order): (i) is resident for tax purposes, (ii) has a permanent establishment through which the services with respect to the arrangement are provided, (iii) is incorporated in or is governed by the laws of such Member State, or (iv) is registered with a professional association related to legal, taxation or consultancy services. Where there is such a multiple reporting obligation, the intermediary shall be exempt from filing the information in a Member State if it has proof, in accordance with national law, that the same information has been filed in another Member State.

Similar for taxpayers, when there is a reporting obligation in more than one Member State, the information shall be filed only with the competent authorities in a Member State where a taxpayer (in the following order): (i) is resident for tax purposes, (ii) has a permanent establishment benefiting from the arrangement, (iii) receives income or generates profits without being a resident for tax purposes or having a permanent establishment, or (iv) carries on an activity. Where there is a multiple reporting obligation, the taxpayer shall be exempt from filing the information in a Member State if it has proof, in accordance with national law, that the same information has been filed in another Member State.

4.8 Step 6 | What to report?

The information that should be reported by the intermediaries and taxpayers to the Dutch tax authorities includes, 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; and
h. Identification of any other Member State likely to be affected by the arrangement.

If several hallmarks are applicable, all these hallmarks must be reported to the Dutch tax authorities. The Dutch tax authorities published the 'User instruction guide Portal DAC6'[12] in which additional guidance is provided on what in their view should be included in the DAC6 report, for example:

- the purposes and goals of the reportable cross-border arrangement;
- the description of how the value of the arrangement as stated in the DAC6 report has been calculated;
- the Arrangement ID and Disclosure ID (see below under the heading "*Proof of filing (reference number)*") of other reported cross-border arrangements which are in any way linked to the reported arrangement; and
- whether, and if so when, the reportable cross-border arrangement has been discussed with the Dutch tax authorities and/or whether a tax ruling has been obtained.

In the case the value of the arrangement is not known and/or no estimation on the value can be provided, the value '0' can be reported to the Dutch tax authorities but this should be substantiated in the summary.

The reporting with the Dutch tax authorities must be filed in English via the relevant web portal (*Gegevensportaal*). In the web portal there is a possibility to amend a submitted report when an incorrect or incomplete report has been filed.

Proof of filing (reference number)

If the reportable cross-border arrangement is reported with the Dutch tax authorities, the intermediary or the relevant taxpayer will receive a reference number. This reference number consists of an 'ArrangementID' and a 'DisclosureID'. With this reference number an intermediary or taxpayer can prove that the reportable cross-border arrangement has been reported with the Dutch tax authorities.

4.9 Sanctions

Intermediaries and taxpayers who infringe the reporting and notification obligations may be subject to penalties up to a maximum of € 900,000 (in 2023) or, in certain cases, criminal prosecution. Both mitigating and aggravating circumstances (e.g. recidivism) should be taken into account when penalties are imposed. In any case the penalties should be proportionate.

Under the Dutch DAC6 legislation, in principle no sanctions will be imposed if the intermediary or the taxpayer has

12 Version May 2022.

a reportable position (*een pleitbaar standpunt*) that the cross-border arrangement was not reportable.

If an intermediary or a relevant taxpayer reports arrangements which are clearly not reportable, sanctions may be imposed as well. Through the imposing of sanctions in those cases, the Dutch government is trying to counter any over-reporting by intermediaries and taxpayers.

4.10 Additional tax assessment

After a final Dutch corporate income tax assessment has been issued, the Dutch tax inspector may, under certain conditions, issue an additional assessment (*navorderingsaanslag*). In general, an additional assessment can only be issued if new information, a so-called "new fact", has come to light of which the Dutch tax inspector was not aware (and could not reasonably have been aware of) at the time that the final assessment was issued.

Facts underlying a reportable cross-border arrangement, of which the Dutch tax inspector becomes aware solely as a result of DAC6 (after issuing a final assessment), are considered to constitute a 'new fact' within the meaning of the rules for issuing an additional Dutch corporate income tax assessment.

4.11 Dutch tax authorities - DAC6 team

The Dutch tax authorities have installed a dedicated team that focuses on the application of the Dutch DAC6 legislation and monitors the compliance with the Dutch DAC6 legislation of intermediaries and relevant taxpayers. The tasks of this team are - among others - to (i) serve as a helpdesk for intermediaries and taxpayers, (ii) communicate with other countries and with the European Commission and (iii) update the Decree.

5. What can relevant taxpayers do to be in control?

To be in control of DAC6 obligations (both in the Netherlands and in other Member States, if applicable), relevant taxpayers should monitor all (cross-border) arrangements and arrange for a reportability assessment. For such reportability analysis, a prudent approach - applying a broad scope in determining the reportability - should be maintained. Secondly, relevant taxpayers should raise awareness within legal and business departments for typical reportable cross-border arrangements, also those without a(n) (important) tax component. Thirdly, relevant taxpayers should have a process to collect the relevant information to be reported and a process to complete filings in Member States. In this regard, it is important to be aware of local formalities and applicable data formats. Fourthly, it is recommended for relevant taxpayers to maintain a central record of reportable cross-border arrangements and the information that was reported and the proof of filing in relation thereto.

It is recommended to check with your advisers at an early stage if they believe that they have a filing obligation and, if so, what information they intend to file with the tax authorities. If various advisers are involved in a reportable cross-border arrangement it is recommended to coordinate with the advisers concerned who is going to report and agree that this adviser will share the proof of the filing with the other advisers involved.

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.

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