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The Dutch implementation of the Mandatory Disclosure Directive – Part 2

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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, with retroactive effect until 25 June 2018. In general, the Dutch DAC6 legislation follows the minimum standard of the Directive. In particular, it does not contain additional requirements compared to the Directive. In addition, the Dutch Ministry of Finance published a decree providing additional guidance in respect of the Dutch DAC6 legislation (the **Decree**[2]).

This issue of Quoted (Part 2) includes a detailed description of the implementation of the main benefit test (the **MBT**) and certain categories of hallmarks B, C and E in the Dutch DAC6 legislation that result in the most reportable cross-border arrangements. These hallmarks are: B(2), B(3), C(1), C(4), E(1) and E(3).[3] The Decree provides, amongst others, further additional relevant guidance with respect to these hallmarks. In addition, certain examples with respect to these hallmarks are discussed. For detailed information on the Directive as such or a detailed overview of the general aspects of the Dutch DAC6 legislation, reference is made to our Quoted 120 published in October 2018[4] and our Quoted 158 (Part 1) published in November 2023.[5]

2. Reportable cross-border arrangement

The following questions need to be answered to assess whether an arrangement qualifies as a reportable cross-border arrangement:

1. First, is there a cross-border arrangement with an EU link?
2. If there is such a cross-border arrangement, does this cross-border arrangement meet one of the hallmarks and, if applicable the MBT, to be considered a reportable cross-border arrangement?
3. If there is a reportable cross-border arrangement, who has the reporting obligation and when should the reportable cross-border arrangement be reported?

This Quoted (Part 2) focuses on the second question only. For more background on the other questions, reference is made to our Quoted 158 (Part 1) published in November 2023.

3. Main benefit test

Certain of the hallmarks only apply if the MBT is satisfied. This test is met 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.

Guidance with respect to the MBT is provided in the Decree. The Decree notes that the objective facts and circumstances of the case and not the subjective assessment or intentions of the intermediary or taxpayer involved are relevant for determining whether a tax advantage is the main benefit or one of the main benefits of the arrangement.[6] Based on the Decree, the MBT will be satisfied in generally two situations:

a. if the arrangement would not be pursued without the expected tax advantage and the tax advantage can be considered 'decisive' for implementing the arrangement; or,
b. if the arrangement includes elements that have been added to the arrangement to obtain the tax advantage and this tax advantage is the most important - or one of the most important - advantages that could be expected from the arrangement.

To assess whether one of the two situations is applicable, the Decree states that it is important to compare the situation where the applicable tax law leads to the respective tax advantage, with the situation where the applicable tax law cannot be applied. If the arrangement

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 Cross-border arrangements reported under the other hallmarks are negligible and/or insignificant in the Netherlands.

4 Quoted 120, October 2018.

5 Quoted 158, November 2023.

6 Decree of 14 April 2023, nr. 2023-6233, p. 8.

would not be pursued (or implemented in a different way) if the respective tax advantage would not be available, the tax advantage can be considered one of the main benefits expected from the arrangement. If so, the MBT should be met according to the Decree.

Tax advantage

The concept of 'tax advantage' is not defined in the Directive but guidance has been provided in parliamentary history and in the Decree. From both parliamentary history[7] and the Decree it follows that a tax advantage covers tax advantages that arise both within and outside the EU. Furthermore, reference is made to the Recommendation of the European Commission on aggressive tax planning[8], according to which tax advantages include for example an exemption, tax loss compensation, tax deferral, no inclusion of a certain amount in the tax base or benefitting from a deduction. It is noted that the prevention of double taxation should not automatically result in the MBT being met.[9] Furthermore, the elimination or prevention of a tax disadvantage may also be considered a tax advantage within the meaning of the MBT.

Policy intent

If a tax advantage is expressly anticipated or intended by the legislator this is known as policy intent. An example of Dutch policy intent is the possibility to convert share premium into nominal share capital followed by a statutory reduction of nominal share capital. Such a transaction is not subject to Dutch dividend withholding tax by operation of law, whereas a distribution of share premium would be taxable to the extent there are - in brief - retained earnings or unrealized profits. From Dutch parliamentary history it follows that if an arrangement is in line with policy intent, the MBT should not be met.[10] The Decree states, however, that policy intent can be taken into account for purposes of assessing the MBT, but is not considered decisive.

In chapter 4-6 we discuss a selection of the most common hallmarks.

4. Hallmarks B

Hallmark category B includes arrangements that are linked to the MBT. Hallmark category B consists of three hallmarks. As mentioned in the Introduction, this Quoted focuses solely on hallmarks B(2) and B(3).

Hallmark B(2)

Hallmark B(2) covers 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**.

In order to assess whether a cross-border arrangement is considered reportable under hallmark B(2), the following two questions are of importance:

1. Does the arrangement constitute a conversion of income?
2. If there is such a conversion, is the item of income converted into an income category which is taxed at a lower level or exempt from tax?

The conversion of income

The Decree clarifies that the conversion of income only relates to the conversion of existing income. There is for example a conversion of income when a Dutch entity repurchases its own shares which is treated as a tax-exempt capital gain following application of a tax treaty, while previous dividend distributions have been subject to Dutch dividend withholding tax.

The abovementioned clarification is helpful in practice as based on earlier guidance one could also take the position that non-existing income could be converted into an income category which is taxed at a lower level or tax exempt.

Taxed at lower level or exempt

In Dutch practice, the view is held that it should be assessed from the perspective of the recipient of the income whether there is a 'conversion of income' within the meaning of hallmark B(2). This is different in, for example, Luxembourg, where the conversion of income can be assessed from the perspective of the payor, the recipient or both.[11] In our view, the legal qualification of

7 Parliamentary proceedings II 2018-2019, 35 255, no. 3, p. 22 – 23.

8 Recommendation of the European Commission of 6 December 2012 on aggressive tax planning (2012/772/EU) (PbEU 2012, L 338).

9 Parliamentary proceedings II 2018-2019, 35 255, no. 3, p. 23.

10 Parliamentary proceedings II 2018-2019, 32 255, no. 6, p. 28.

11 Foire aux questions (FAQ) Dispositifs transfrontières devant faire l'objet d'une déclaration Version du 4 mai 2022, 11.2.2.

the income serves solely as an indicator for the question whether an arrangement constitutes a 'conversion'. If the tax qualification of the income differs from the legal qualification, the latter should in our view be decisive.

If the conclusion is that there is a conversion of income from the recipients' perspective, it should be assessed whether the conversion results in the income being taxed at a lower level or being tax exempt. In this regard, we note that even if the tax treatment of the same income category is different, a conversion can be recognized for purposes of hallmark B(2). This is for instance the case in the situation where a repurchase of shares is considered a dividend for domestic tax purposes while it is requalified as a capital gain for tax treaty purposes.

Examples of hallmark B(2)

Example I – the contribution of a receivable into the capital of a subsidiary

A Luxembourg tax resident entity, entity A, holds all shares in a Dutch tax resident entity, entity B. Entity A has a receivable from Entity B in the amount of EUR 100. The receivable carries an interest rate of 3%. Entity A would like to capitalise the receivable by way of a contribution in kind. Following the contribution in kind of the receivable, entity A receives additional shares in entity B. As the receivable no longer exists, entity A will no longer receive taxable interest income but will rather receive dividends that are treated tax exempt.

This example constitutes a conversion of income (i.e., debt into equity) which could be taxed at a lower level or be exempt (i.e., taxable interest income versus exempt dividends). It is noted that hallmark B(2) only applies if the MBT is also met.

Hallmark (B3)

Hallmark B(3) covers 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**.

In order to analyse whether a cross-border arrangement is considered reportable under hallmark B(3), it is important how to assess whether a circular transaction exists.

Circular transaction

It follows from parliamentary history that the existence of a circular transaction is a key element for hallmark B(3) to apply.[12] However, it does not follow from parliamentary history what a circular transaction exactly entails. The circular transaction either requires a return of the funds to the same taxpayer or the same jurisdiction.

In order for hallmark B(3) to apply, the circular transaction should result in 'round-tripping' of 'funds'. The term 'funds' is generally broadly interpreted and could also concern assets, like shares. The 'round-tripping' should occur through (i) entities that are interposed without having another primary commercial function or (ii) transactions that offset or cancel each other or (iii) that have other similar features. Parliamentary history is silent on what is to be considered 'an interposed entity without other primary commercial function'. In this respect, the phrase 'without other primary commercial function' may refer to either (i) the entity or (ii) the *interposition* of that entity.To what extent transactions offset or cancel each other depends on the question whether a return of funds to the same taxpayer or jurisdiction would be needed in combination with the underlying facts and circumstances.

Example II - financing of a restructuring

As part of a corporate restructuring, amongst others the following steps are implemented:

- A Dutch tax resident entity (**DutchCo**) attracts a bank loan to finance the granting of a loan to a new Luxembourg group entity (**LuxCo**). This loan is used by LuxCo to acquire preference shares in DutchCo.
- LuxCo makes a capital contribution on the preference shares. These funds are used by DutchCo to repay its debt towards the bank.
- Depending on whether the MBT is met, hallmark B(3) applies as this example entails a round-tripping of funds as the funds start and return to DutchCo.

5. Hallmarks C

Hallmark category C includes specific arrangements relating to cross-border transactions. Hallmark category C consists of four hallmarks, whereby hallmark C(1) has been subdivided to cover different situations. In addition, certain of the hallmarks under C(1) are linked to the MBT. This Quoted focuses solely on hallmark C(1) and C(4).

12 Parliamentary proceedings II 2019/20, 35 255, no. 6. page 23.

Hallmark C(2) and C(3) are therefore not further described in this Quoted.

Hallmark C(1)

Hallmark C(1) covers arrangements that involve **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**; 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;
d. the payment benefits from a **preferential tax regime** in the jurisdiction where the recipient is resident for tax purposes[13];

Hallmark C(1) focuses on cross-border arrangements that involve a deductible payment without an inclusion. In most cases, this hallmark therefore covers interest and royalty payments, as dividends are in general not deductible. In order to analyse whether a cross-border arrangement is considered reportable under hallmark C(1), the following questions should be answered:

1. Is there a deductible cross-border payment?
2. Is there a payment between associated enterprises?
3. Who is considered the recipient for the payment?
4. Does the recipient fall within the scope of C(1)(a), C(1)(b)(i), C(1)(b)(ii), C(1)(c) and/or C(1)(d)?[14]

Is there a deductible cross-border payment?

The term 'payment' is neither defined in the Directive nor in the Dutch DAC6 legislation. Parliamentary history mentions that in addition to a 'regular payment' the term payment also includes payments that are only deemed to be made for tax purposes (e.g. imputed interest).
It should be analysed whether the payment is deductible in the payer jurisdiction. No definition is provided on the concept of 'deductible' in the Directive or in the Dutch DAC6 legislation. In general, the concept of deduction refers to an expense that is eligible to be deducted or offset from the income that is relevant to calculate the taxable income of the taxpayer. If a cross-border payment is for example not deductible due to the application of the anti-hybrid rules under the EU Anti-tax Avoidance Directives or an interest deduction limitation rule, the arrangement will not be reportable under hallmark C(1).

Is there a payment between associated enterprises?

Hallmark C(1) only covers deductible cross-border payments between two or more associated enterprises. The term 'associated enterprise' is defined in article 3(23) of the Directive and the Dutch DAC6 legislation refers to this article. According to the Directive, enterprises are in general associated in cases in which there is a participation in the voting rights, capital or profits that exceeds 25%.

The Directive stipulates that if a person acts together with another person in respect of the voting rights or capital ownership of an entity, this person shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

Who is considered the recipient for the payment?

The associated enterprise is in general considered the recipient of the payment. For tax transparent entities this can be different. Parliamentary history mentions that in the case the recipient of the payment is transparent for tax purposes, a 'look-through' approach may be applied. This entails that if all participants of the tax transparent entity are directly and immediately taxed for the receipt of the payment, the participants are considered the recipient of the payment. In the case of hybrid mismatches this look-through approach in general cannot be applied.
A hybrid mismatch will arise when the participants consider the entity as opaque for tax purposes.

13 For this hallmark, the Dutch legislator makes reference to the definition of preferential tax regime as developed in the OECD BEPS action 5.
14 For the hallmarks under C(1)(b)(i), C(1)(c) and C(1)(d), the MBT should be met to constitute a reportable cross-border arrangement.

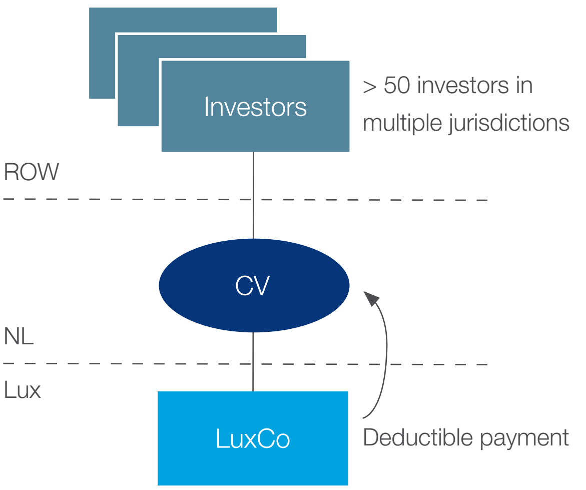
Does the recipient fall within the scope of C(1)(a), C(1)(b)(i), C(1)(b)(ii), C(1)(c) and/or C(1)(d)?

C(1)(a) – Not resident for tax purposes in any tax jurisdiction

Hallmark C(1)(a) applies in general to deductible cross-border payments made to tax transparent entities or hybrid entities (whereby the look-through approach cannot be applied).

Example

The Dutch tax transparent limited partnership (*besloten commanditaire vennootschap*; **CV**) is in principle in scope of hallmark C(1)(a). In the structure as depicted below, LuxCo makes a cross-border deductible payment to CV. LuxCo and CV are associated enterprises because CV holds a 100% equity interest in LuxCo. CV is considered tax transparent in both the Netherlands and Luxembourg. The >50 investors in CV are established/located in multiple jurisdictions. It is not known whether the investors are directly taxed for the interest payment in their respective jurisdictions. The look-through approach therefore cannot be applied. As such, CV is considered the recipient of the deductible cross-border payment. Considering that CV is not resident for tax purposes in any jurisdiction, hallmark C(1)(a) applies.



C(1)(b) – Corporate tax rate of (almost) zero or EU and/or OECD list of non-cooperative jurisdictions

Dutch parliamentary history mentions that, for the purposes of hallmark C(1)(b)(i), a tax rate is 'almost zero' if it is less than 1%. The statutory tax rate is relevant in this respect.

In assessing whether hallmark C(1)(b)(ii) applies, it should be established that a payment is made to an associated enterprise in a jurisdiction that is included in the EU and/or OECD blacklist of non-cooperative jurisdictions. The Dutch Decree on low-taxed and non-cooperative jurisdictions[15] is therefore not relevant. The list of non-cooperative jurisdictions of the EU and/or OECD should be examined on the date that the reporting obligation arises. The Decree mentions that if this list subsequently changes and a jurisdiction is included on the list at a later moment in time, no reporting obligation will arise.

C(1)(c) – Full exemption from tax

For hallmark C(1)(c) it should be determined whether the payment is fully exempt from tax in the state of the recipient. Dutch parliamentary history states that this concerns an object exemption rather than a subject exemption. Examples of regimes that qualify for hallmark C(1)(c) are remittance base regimes and territorial tax systems.

C(1)(d) – Preferential tax regime

Hallmark C(1)(d) applies to deductible payments that fall under a preferential tax regime at the level of the recipient. From the Decree it can be derived that the starting point is that a regime is considered a preferential tax regime if there is a certain form of tax advantage (in the area of corporate taxation concerning geographically mobile income) compared to the generally applicable tax laws and regulations in a specific jurisdiction. In practical terms, this means that at least all regimes assessed (in scope) by the OECD (Forum on Harmful Tax Practices) are considered preferential tax regimes. This list is not exhaustive, so regimes that are not (yet) included in the list can also qualify as preferential tax regimes.

In the Decree the imputation of interest is provided as an example of a preferential tax regime, but also IP regimes, shipping regimes and offshore regimes may qualify under hallmark C(1)(d). For the Netherlands both the tonnage

15 Decree low-tax and non-cooperative jurisdictions for tax purposes.

regime as well as the innovation box regime qualify as a preferential tax regime.

The Decree furthermore clarifies that if the remuneration that arises according to the applicable foreign tax laws and regulations is deviating from a remuneration within the arm's length range, it will also be necessary to assess whether the deviation from the arm's length principle qualifies as a preferential tax regime under hallmark C(1)(d).

Hallmark C(4)

Hallmark C(4) consists of arrangements that include transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in the jurisdictions involved.

Transfers under hallmark C(4) include both legal transfers as well as transfers from a tax perspective (e.g. between head office and a permanent establishment). Reportable arrangements under hallmark C(4) may for instance include cross-border transfers from US entities to Dutch entities (e.g. a Dutch limited liability company) that are considered tax transparent from a US tax perspective. The transaction is in principle recorded at fair market value in the Netherlands, but for US tax purposes the transaction is disregarded, so no value is taken into account for the transaction. Hence, for tax purposes there is a material difference in the consideration amount treated as payable in the jurisdictions involved and hallmark C(4) will in principle apply.

6. Hallmarks E

Hallmark category E relates to transfer pricing. For this hallmark, the MBT does not have to be satisfied. Hallmark category E consists of three hallmarks. This Quoted focuses solely on hallmark E(1) and E(3).

Hallmark E(1)

Hallmark E(1) includes an arrangement which involves the use of **unilateral safe harbour rules**.

Unilateral safe harbour rules

The availability of unilateral safe harbour rules targeting specific categories of taxpayers or transactions may potentially result in undesired tax consequences from a legislator's perspective. This concern arises from the fact that the application of a safe harbour (e.g. the applicable federal rate in the United States (**AFR**), Swiss safe harbour rules and the Mexican Maquiladora regime) may lead to taxable income being reported that is not in accordance with the at arm's length principle. The Decree clarifies that the definition of 'safe harbour' should be aligned with the definition used in the OECD transfer pricing guidelines. It concerns rules that solely apply to specific groups of taxpayers or transactions which exempt taxpayers from the obligations that are normally imposed by that country's general transfer pricing rules. In other words, different (often simpler) obligations are imposed than under that country's general transfer pricing rules. Safe harbour rules may also exempt a particular category or categories of transactions from the application of all or part of the general transfer pricing rules.

A typical example of the application of hallmark E(1) is for example a loan bearing an AFR interest rate which is provided by a US tax resident entity to a Dutch tax resident entity. In the case the AFR interest rate is not benchmarked or substantiated by a transfer pricing study and for US tax purposes the relevant taxpayers rely on the AFR interest rate, hallmark E(1) is applicable. If there is a benchmark or transfer pricing study and the arm's length range includes the range of the unilateral safe harbour rule, hallmark E(1) is not applicable as the unilateral safe harbour rule is effectively not used.

Hallmark E(3)

Hallmark E(3) includes 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 (referred to as the **EBIT test**).

Intragroup cross-border transfer

Hallmark E(3) targets intragroup cross-border transfers which result in profit shifting. In contrast to hallmark C.1, the definition "intragroup" is used instead of associated enterprises. This definition is not explained in the Directive. However, according to the European Commission's Working Group on Direct Taxation, the term "intragroup" refers to the definition of associated enterprises of article 3(23) of the Directive. From parliamentary history it can be derived that a transfer between a head office and permanent establishment could also be considered an intragroup cross-border transfer.

The term "transfer" should be interpreted broadly and can include transfers for legal and/or tax purposes. In an example in the Decree, it is clarified that a cross-border merger is in principle in scope of hallmark E(3). This could also be the case if the activities of the disappearing entity are not transferred cross-border but are continued by the acquiring entity through a permanent establishment.

EBIT test

EBIT stands for Earnings Before Interest and Taxation. Neither the Directive nor Dutch law contains a definition of EBIT. However, parliamentary history mentions that it concerns the figures for accounting purposes. Therefore, the most common approach is to use the EBIT included in the annual accounts based on the relevant company's accounting policy.

Many companies use 'subtotals' in the annual accounts because this provides insight in the business performance broken down by operating activities, financial activities and results from participations. The EBIT is generally reflected under the breakdown *operating income*. Thus, financing income and financing expenses are typically not part of the operating income. However, the Decree includes a new position for entities with a (mere) financial objective (e.g. holding and/or financing entities) with respect to the application of the EBIT-test for purposes of hallmark E(3). For entities with a financial objective, the Decree states one should look at the core business of the relevant entity. This means that if an entity conducts financing activities, the financing results should be taken into account as EBIT in assessing the application of hallmark E(3). The EBIT test could furthermore also be met in case of a negative EBIT.

The next question is *when* the EBIT test needs to be performed. The test takes place only once, at the moment of (potential) reporting of the arrangement. At that moment, it must be assessed whether the projection of the overall annual EBIT during the period of three book years after the book year of the transfer decreases to less than 50% of the annual EBIT in the situation the transfer had not taken place.

Hallmark E(3) has a broad scope and has, in practice, the highest number of reportings of all hallmarks. Many ordinary restructurings fall in scope of this hallmark, regardless of the tax treatment. This means that an intragroup cross-border transfer of a participation may fall within hallmark E(3), despite the fact that the income derived following such transfer is typically exempt by virtue of the participation exemption. Furthermore, typical examples of cross-border arrangements that fall within the scope of hallmark E(3) are cross-border mergers, liquidations and cross-border conversions. The Decree provides an example regarding a cross-border merger and notes that it is irrelevant whether the activities can be allocated to a permanent establishment in the jurisdiction of the disappearing entity after the cross-border merger. In other countries, like Luxembourg and Belgium, a different approach is taken as in those countries it is relevant whether a permanent establishment is left behind.

7. 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 first 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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