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KPMG

Mandatory Disclosure Rules

The Netherlands enacts DAC6 transposition bill into law

This article provides a summary of the Dutch transposition of mandatory disclosure rules under DAC6 into domestic law.

Status

On December 17, 2019, the Dutch Parliament adopted a bill to transpose DAC6 into Dutch law. This follows a legislative process in the Dutch Parliament where the Deputy Minister of Finance provided clarifications to questions raised by various members of parliament in relation to certain terms and hallmarks.

The Dutch Ministry of Finance plans to issue more detailed guidance in the first quarter of 2020.

Please note that the summary is based on information available as at January 1, 2020.

Scope

The scope of the legislation is closely aligned with the Directive, with no extension of scope proposed for VAT, customs duties or excise duties. Dutch MDR will also only apply to "cross-border arrangements" (i.e. domestic transactions will not be in scope).

Definitions

The definitions in the new legislation are closely aligned with the Directive. In particular, the definitions of "relevant taxpayer", "associated enterprise", "marketable arrangement" and "cross-border arrangement" have the same meaning as in the Directive.

In addition, the legislation includes the following clarifications:

1) Intermediary

The definition of intermediary mirrors the definition presented in the Directive.

Guidance notes that where a professional services agreement is in place between a tax advisory firm and the taxpayer, the firm, and not the employee, should qualify as the intermediary.

Where a tax professional of an intermediary is outsourced to a taxpayer, it will depend on the specific circumstances whether the tax advisory firm qualifies as an intermediary in such cases. The formal (i.e. contractual) relationships here are not necessarily critical.

If an individual tax advisor who is employed by a tax consultancy firm is (temporarily) working in the office of a relevant taxpayer and is actually managed by that relevant taxpayer, the relevant taxpayer should in principle have the reporting obligation. In this context, the comments of the OECD on Article 15(2)(b), (see in particular sections 8.4 to 8.6) are relevant and can be used as guidance.

The explanatory memorandum further notes that the mere preparation of a tax return should not result in a classification as an intermediary or assistant (secondary) intermediary.

Similarly, the Deputy Minister has taken the position that an auditor's audit activities, work on a due diligence project or the drawing up a tax fact-book should not create a reporting obligation. However, analyzing the financial reporting consequences of a reportable arrangement would likely make an accounting firm an assistant intermediary.

Banks, insurers and similar institutions may qualify as assistant intermediaries if they are providing assistance, aid, or advice on the implementation of an arrangement.

The Deputy Minister has taken the position that a Dutch head office does not qualify as an intermediary if the reportable cross-border arrangement is devised by a permanent establishment (PE) of that office in a non-EU country. However, if the head office is involved in the arrangement, the head office could qualify as intermediary.

2) Tax Advantage & Main Benefit Test

The explanatory memorandum lists five cases where a tax advantage may be realized:

(i) an amount is not included in the tax base;

(ii) the taxpayer benefits from a deduction;

(iii) a loss for tax purposes is incurred;

(iv) no withholding tax is due; or

(v) foreign tax is offset.

According to the Deputy Minister, this list should not be considered to be exhaustive.

In addition, the guidance clarifies that a tax advantage will only be considered to arise where the obtaining of the advantage cannot reasonably be regarded as being consistent with the principles on which the provisions that are relevant to the reportable cross-border arrangement are based and the policy objectives of those provisions.

The Deputy Minister further notes that the Main Benefit Test applies to tax advantages generated both inside and outside the EU.

In the explanation on the consultation document, the Deputy Minister expressly indicated that the Main Benefit Test is not met when a tax disadvantage is avoided. This was not reiterated, as such, in the final Explanatory Memorandum. The Deputy Minister did however indicate that the mere fact that double taxation is avoided does not automatically mean the Main Benefit Test is met.

Hallmarks & Main Benefit Test

The list of hallmarks is aligned with Annex IV of the Directive as Dutch law refers to the applicable hallmarks in this annex directly.

The main benefit test should apply to the same hallmarks as those in the Directive (i.e. category A and B hallmarks and paragraph (1)(b)(i), (c) and (d) of the category C hallmarks).

When considering the application of the hallmarks, guidance notes that, where payments are made to a transparent entity, the payment should be considered to be made to the underlying participant(s) and not the transparent entity itself.

Hallmarks linked to main benefit test

- Hallmark A(1) (confidentiality clauses): the explanatory memorandum states that it is not intended that standard legal and professional confidentiality clauses used in the general terms and conditions or in the engagement letter would fall in scope. As such, it should therefore be possible to include a confidentiality clause which provides that the arrangement would not be disclosed to third parties without the consent of the user. For a confidentiality clause to fall in scope, the confidentiality clause should relate to the (tax benefit envisaged in the) arrangement.
- Hallmark A(2) (performance-based remuneration of the intermediary): the explanatory memorandum notes that success fees should be reportable where the fee depends on the realization of a tax benefit or the amount of the tax benefit realized.
- Hallmark A(3) (standardized documentation and/or structure): the explanatory memorandum refers to "market-ready" arrangements that do not require any essential adjustments prior to implementation and are available for more than one taxpayer. The guidance notes that merely updating names is not a substantial adjustment. However, the use of standard tax advice which needs to be updated for an individual client's specific situation would not represent a standardized structure.
  The guidance also notes that the main benefit test must be satisfied in respect of hallmark A(3), which is a reason that standard bank products would not fall within the scope of the hallmark provided that the main benefit of the bank product is not tax related.
- Hallmark B(1) (acquiring loss-making companies): the guidance states that the hallmark concerns an arrangement whereby a series of planned steps are taken to acquire a loss making company, to end the main activities of that company and to use the losses to reduce taxes, amongst others by transferring the losses to another jurisdiction (inside or outside the EU) or accelerated use of the losses.

Hallmarks & Main Benefit Test (cont.)

- Hallmark B(2) (conversion of income): in answering one question which was raised, the Deputy Minister noted that it cannot be confirmed that an arrangement does not fall under hallmark B(2), due to a construction where income goes from one income 'box' to another income 'box' in the Personal Income Tax Act 2001 (WET IB 2001). The intention of this hallmark is to capture arrangements that result in revenue being converted into lower taxed income or a tax exemption.
- Hallmark B(3) (circular transactions that have an offsetting or cancelling effect): according to the guidance, this hallmark covers, for example, transactions such as those referred to in Section 10a(1) of the Corporate Income Tax Act 1969 (Wet Vpb 1969).
- Hallmark C(1)(b)(i) (corporate tax rate of zero or almost zero): the guidance notes that "almost zero" should mean a rate of between zero and 1%.
- Hallmark C(1)(c)/(d) (full tax exemption or preferential regimes): according to the guidance, a full exemption from tax is assumed where the payments are not included in the tax base calculation of the taxing state due to an objective exemption, not a subjective exemption.

  Instances where the income is treated as being outside the scope of tax or subject to tax at a rate of zero or almost zero are addressed separately in the preceding hallmarks.

  A preferential regime is assumed to exist, for example, where payments received by Dutch recipients are subject to a patent box regime or the Dutch tonnage tax regime. Arrangements subject to a favorable tax regime are generally set up in accordance with the law and, as such, a presumption may exist that the arrangement is not targeted at obtaining a tax benefit referred to in the "Main Benefit Test".
- Under payments in hallmark C, payments made under the 'informal capital doctrine' are also deemed to be in scope.

Hallmarks not linked to main benefit test

- Hallmark C(2) (multiple depreciation): the guidance notes that this could include situations where depreciation is claimed at the level of the head office and its permanent establishment. However, hallmark C(2) only applies if there is effectively / de facto a double depreciation.
- Hallmark C(3) (multiple relief from double taxation): the guidance cites situations where there are multiple applications of double tax relief such that effectively no tax is paid on the income. Reference is also made to the European Commission recommendation of December 6, 2012 in this regard.
- Hallmark C(4) (material value difference in asset transfers): the guidance refers to allocations between a company and its permanent establishment as falling within the scope of hallmark C(4). Transfers where the consideration remains outstanding should also fall in scope. Where one of the two countries does not recognize the transfer (and the other country does), this should be considered in scope of Hallmark C(4), as there would typically be a material difference in the consideration.
- Hallmarks D(1) and D(2) (automatic exchange of information and beneficial ownership): the guidance issued suggests that the work undertaken by the OECD can be used to assess, interpret and apply hallmark D.

  The guidance also clarifies that, in relation to hallmark D(1), consumer spending in a jurisdiction that does not apply the Common Reporting Standard should not fall within the scope of hallmark D(1) as the expenditure was not made to undermine a CRS reporting obligation.

  If the effect of a reorganization is that less information has to be exchanged than before, without that reorganization being in any way aimed at, and therefore not resulting in, the reporting obligation being undermined, the arrangement should not fall within the scope of hallmark D(1).
- Hallmark E(1) (unilateral safe harbor rules): the guidance clarifies that the use of bilateral or multilateral safe harbor rules should not fall within the scope of hallmark E(1).

Hallmarks & Main Benefit Test (cont.)

Similarly, unilateral safe harbor standards based on international standards such as OECD Transfer Pricing Guidelines or the EU Joint Transfer Pricing Forum should not be classified as unilateral safe harbors within the meaning of E(1). As an example, the guidance mentions low-value adding intra-group services in the Netherlands Transfer Pricing Decree, which is based on OECD guidelines.

An example mentioned in the answers to questions of MPs is a situation in which an entity in country X provides a loan to a Dutch group company with an arm's-length interest rate of 5%. The loan is therefore provided at this rate as, according to the regulations in country X, an interest rate on an intercompany loan is always considered to be at arm's length if the rate is higher than 4%. If the 5% interest rate in the given example would also be considered to be an arm's-length interest rate based on a transfer pricing study, the unilateral safe harbor is deemed to not be used and hallmark E(1) should not be triggered.

- Hallmark E(2) (hard-to-value intangibles): the Deputy Minister has indicated that the hallmark E(2) deals with the issue of OECD/BEPS Action 8, which is known as 'hard-to-value intangibles' (see chapter VI paragraph D.4 of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TPG)) and that the proposed reporting obligation will ensure that the Tax Administration is able to spot such cross-border transactions at an early stage in the process.
- Hallmark E(3) (intragroup cross-border transfer of functions, risks and/or assets): the guidance confirms that commercial EBIT (as opposed EBIT for tax purposes) should be used. 'Annual' refers to the financial year and not to the calendar year. A transfer of assets or functions from the head office to a permanent establishment (or vice versa) also falls under the scope of E(3). The same is true of the transfer of participations or subsidiaries as they are considered to be assets.

Reporting - Intermediaries

The intermediary is only obliged to report if it has a presence in the Netherlands (local residency, PE, incorporation or professional registration).

The reporting timelines mirror the requirements of the Directive. A secondary intermediary does not (in principle) have to report earlier than the main intermediary.

The information that is required to be disclosed largely mirrors the requirements of DAC6.

According to the explanatory memorandum, an intermediary is only required to report information of which they are aware or possesses (i.e. the intermediary should not have an obligation or duty to investigate). An intermediary will not be required to report if:

- The intermediary has evidence that it reported the same information in another Member State; or
- There is evidence that the same information has already been reported by another intermediary.

To convincingly demonstrate that the arrangement was reported by another intermediary, providing the reference number received by the other intermediary when it reported the arrangement should suffice.

Treatment of Branches:

Dutch guidance has clarified that Dutch tax desks in non-EU countries are not required to report even though persons working on those tax desks may be registered with the Dutch Association of Tax Advisors ("NOB").

Legal Professional Privilege

For intermediaries that are protected by legal professional privilege according to Section 53a of the General Taxes Act (AWR), a reporting obligation should not arise.

Tax advisors and accountants do not fall under the provisions of Section 53a of the General Taxes Act and therefore cannot rely on the legal professional privilege.

Intermediaries relying on legal professional privilege should notify other intermediaries and relevant taxpayers without delay. No guidance has been given on the term 'without delay'.

Where intermediaries are subject to legal professional privilege, there is no requirement for the intermediary to submit certain information on a "no name"/"abstract" basis.

Reporting – Relevant Taxpayer

In cases where there is no qualifying intermediary or where legal professional privilege applies, the relevant taxpayer is only obliged to report if it has a presence in the Netherlands (tax residence, PE, generation of profits or business activity in the Netherlands).

The reporting timelines for relevant taxpayers should mirror the requirements of the Directive.

Where multiple taxpayers are involved, the relevant taxpayer that is to file information will be the one that features first in the list below:

1) Taxpayer that agreed the arrangement with the intermediary;
2) Taxpayer that is managing the implementation of the arrangement.

A taxpayer will not be required to report if:

- There is evidence that the arrangement has been reported by an intermediary; or
- There is evidence that the arrangement has been reported by another taxable person; or
- The taxpayer has evidence that it reported the arrangement in another Member State (in line with the rules on the order of reporting under the Directive).

To convincingly demonstrate the arrangement was reported by another intermediary or taxpayer, providing the reference number received by the intermediary or other taxpayer when it reported the arrangement should suffice.

Penalties

The sanction, where the reporting of an arrangement is not timely, complete or correct, is a maximum penalty of EUR 870,000.

An intermediary will not be subject to a penalty if it concludes, based on a tenable position, that a cross-border arrangement is not reportable.

A restrictive application of the rules (and penalties) will be applied in relation to the transitional period (June 25, 2018 – July 1, 2020).

In recent responses provided to written questions from members of the Dutch Parliament, the Deputy Minister also announced that a dedicated MDR team had been established by the Dutch tax authorities and that it is anticipated that 20,000 reports would be filed annually in the Netherlands.

For more information, please refer to KPMG's EU Mandatory Disclosure Rules page or contact the following:

Robert van der Jagt
Partner
Head of KPMG's EU Tax Centre
KPMG in the Netherlands
VanderJagt.Robert@kpmg.com

Raluca Enache
Director
KPMG's EU Tax Centre
Enache.Raluca@kpmg.com

kpmg.com/socialmedia