Mandatory Disclosure Rules (MDR): Dutch legislative proposal

The Netherlands: July 2019

In Brief

On 12 July 2019, the Dutch Ministry of Finance published the legislative proposal containing the Dutch implementation of the Mandatory Disclosure Rules (Directive 2018/22/EU) or the 6th amendment to the EU directive on Administrative Cooperation (Directive 2011/16/EU) (hereinafter 'DAC6'). The proposal includes a bill and an explanatory memorandum. A consultation document was already published on 19 December 2018. Further guidance in relation to the legislative proposal is expected.

As required under the directive, the proposed legislation is intended to be implemented as per 1 July 2020. However, the directive already entered into force per 25 June 2018, with the obligation to report with retroactive effect per 1 August 2020 on transactions entered into between 25 June 2018 and 1 July 2020.

We refer to our previous communications in relation to DAC6 for more detail on the directive. In relation to the legislative proposal, please find below our initial observations for the real estate (RE) and financial services (FS) industry.

Proposal in general

The legislative proposal imposes mandatory disclosure (reporting) requirements for arrangements with an EU cross-border element that meet one or more of a specific list of "hallmarks". For certain hallmarks it is required that also the main benefit test is met in order for the arrangement to be reportable. The main benefit test will be satisfied if it can be established, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage. The so-called intermediary, the person assisting the taxpayer, has the reporting responsibility. In absence of an intermediary that reports, the taxpayer is required to report.

The Dutch draft bill does not go beyond the minimum standards of the directive.

PwC observation: *As expected, the legislative proposal is largely in line with the consultation document but provides some new and important insights. We will further elaborate on these items below.*

Guidance notes (*Leidraad*) will be published, with, inter alia, a number of examples to illustrate what transactions should or should not be in scope. This is in response to the observation of the advisory committee (*Adviescollege toetsing regeldruk*) that in practice, it may be challenging for intermediaries to determine whether or not an arrangement would be reportable. Also, responses to the internet consultation requested more guidance.

PwC observation: *The guidance notes are anxiously awaited. As market parties are working on implementing processes, sometimes supported by IT systems that require an 18-month lead time to get adjusted, more guidance should come rather sooner than later.*

A separate five to ten FTE Mandatory Disclosure (MDR) team will be established by the Dutch tax authorities to analyse the reportable arrangements and to conduct oversight. Next to the MDR team, a team of maximum ten FTEs will pursue risk indicator signals.

The legislative proposal indicates that having reportable arrangement data does not hamper tax inspectors in stating that there is a "new fact", which is a requirement to issue an additional tax assessment within the statute of limitation.

PwC observation: The Dutch tax authorities are readying themselves to actually analyse the data they receive, using data-analytics. Capacity is budgeted to pursue signals. This shows that the Netherlands intends to ask inquiries, etc based on DAC6 information.

The legislative proposal also includes the possibility to impose a monetary penalty if the intermediary or taxpayer does not comply with its reporting obligations. For 2019, such penalties can be as high as €830,000 in case of gross negligence or willful misconduct (*opzet of grove schuld*). The legislative proposal indicates that any such penalties should at all times be proportionate. In case of a so-called filing position *(pleitbaar standpunt*), penalties should however not apply. In extraordinary situations, the authorities can pursue criminal prosecution.

PwC observation: The proposed maximum monetary penalty of €830,000 can be assessed per missed reportable arrangement resulting from gross negligence or willful misconduct (opzet of grove schuld). The proposal does however suggest that any penalties would need to be proportionate.

Intermediaries

With regard to the scope of the intermediary-definition, helpful clarifications are given.

– There is no 'duty to investigate' for extended intermediaries. Only the available information needs to be assessed, in order to determine whether there is a reportable arrangement. A person that lacks sufficient information or control to establish that there is a reportable arrangement is not an (extended) intermediary.

– It is clarified that the "specific expertise" in the extended intermediary-definition is the expertise that is required (by the person that is offering the service) to offer the products of services.

  PwC observation: The clarification on the "specific expertise" is helpful. It is not required that the expertise of the tax department of a bank or asset manager is applied when assessing transactions for DAC6 purposes. The expertise of the (front-office) person offering the service or product is the standard.

– Intermediaries that are tax resident of the Netherlands and that offer products or services with regard to a reportable arrangement via a branch in a third country are not required to report in the Netherlands, as long as the Dutch part of the entity has no involvement. In that case, the relevant taxpayer that has the link with the EU should do the reporting.

  PwC observation: The clarification on the branches, particularly branches of banks that operate outside the EU, is helpful. This suggests that there should not be a reporting obligation in the Netherlands for the bank when for example the Asian branch of a Dutch bank offers a product to an EU customer without any involvement from the Dutch part of the bank. In absence of an intermediary (as the branch would not be considered as such in the Netherlands), the relevant taxpayer should do the reporting. The relevant taxpayer is the party to whom the arrangement is made available. That would lead to the conclusion that the EU customer of the bank's Asian branch should do the assessment and reporting (if applicable).

  We derive from the memorandum of understanding that the non-EU branches of Dutch banks are not required to implement DAC6 processes. It does require that the Dutch bank is able to recognise when it has involvement (for example, by virtue of sales of an Asian banking product or, by virtue that the Asian branch sells a Dutch product/service).

Main benefit test

In relation to specific hallmarks, the arrangement is only reportable if the main benefit test is met.

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. In the legislative proposal, it is furthermore indicated if there are valid commercial reasons for an arrangement without additional artificial elements, it may be assumed that that arrangement does not serve to obtain a tax advantage in sense of the "main benefit test".

In relation to the main benefit test, it is stated that also the deferral of taxation may be considered a tax advantage.

Making use of for example a specific tax regime or exemption does not automatically mean that the main benefit test is met, e.g. when undertaking a facilitated tax exempt conversion without adding artificial elements.

PwC observation: The main benefit test should be assessed on the overall transaction, e.g. a business restructuring. Taxpayers are allowed to choose the more tax favourable option. When there is a business reason as the main driver for the transaction, the main benefit test should not be met (and hence not lead to a reportable arrangement). However when, as part of the transaction, artificial detours/elements are added for tax reasons, the main benefit test is likely met.

The proposal suggests a reasonable interpretation of the main benefit test.

Hallmarks

In the legislative proposal, comments are also made in relation to specific hallmarks:

– In relation to hallmark A.3 (standardised documentation and/or structure) it is noted that if a structure is common (‘*gangbare' fiscale structuren*), this does not mean that the structure is standardised in the context of the hallmark. When additional advice, based on the assessment of the individual facts and circumstances, is required, hallmark A.3 should not apply.

  Standard banking products should, unless designed as market-ready tax planning structures, not be captured under hallmark A.3.

  PwC observation: The guidance to hallmark A.3 standardised documentation in relation to a reportable arrangement, is particularly helpful. It implies that although certain structures are commonly used/advised, that this does not automatically lead to hallmark A.3 being applicable.

  Standard banking products should also not fall under hallmark A.3, as there needs to be an 'inherent' tax characteristic. Most banking products are offered to meet payment and settlement-, savings-, and financing needs, not to fulfil a tax planning need. As such, the main benefit test that is attached to hallmark A.3 should not be met and the standard banking products like bank accounts or mortgage loans should not be in scope.

– Hallmark D.1 (the avoidance of Common Reporting Standard (CRS) information reporting) clarifies once again that the transfer of a financial account to a non-participating CRS jurisdiction should lead to reporting.

  Furthermore, the legislative proposal stipulates that there should be an arrangement that leads to the avoidance of CRS-reporting.

  Lastly, the government, in line with OECD guidance, does not anticipate that routine bank transactions are sufficient to lead to adequate information to have reason to know that CRS avoidance takes place. A client that simply instructs the bank to transfer money from its bank account (in whole or in part) should not be in scope.

  PwC observation: Under hallmark D.1, the mere fact that there are undocumented account holders is in itself not sufficient to constitute a DAC6 reportable arrangement. There should be an arrangement that leads to the avoidance, and a client that is not providing documentation should not be regarded as an arrangement that leads to the avoidance of CRS reporting.

– Hallmark D.2 (non-transparent ownership-structures)

  In essence, when Dutch financial institutions comply with anti-money laundering and know-your-customer-rules, the ultimate beneficial owners (ubos)/pseudo ubos should be known, and as a result there should not be any reporting under hallmark D.2 (unless of course, the bank is actually involved in setting up the non-transparent ownership structure).

  PwC observation: Hallmark D.2 does not address for whom the ownership structure is not transparent. We assume that the tax authorities are the audience and not the wider public. It is assuring for banks and other FS players that there should be no DAC6 reporting under hallmark D.2 when the AML/KYC requirements are fulfilled , assuming that the banks etc. are not involved in setting up the non-transparent ownership structure.

Reporting obligations

In relation to the information to be reported, it is stated that the intermediary is only obliged to report information that the intermediary is aware of or has in its possession. The intermediary does not have to perform an additional investigation in this respect.

The 30-day term (that is applicable after 1 July 2020) starts for taxpayers after the taxpayer is notified by an intermediary with legal privilege that the DAC6 obligations are the responsibility of the tax payer. For extended intermediaries, the 30-day period starts when they become aware that they provide aid, advice or assistance in relation to a reportable arrangement.

An intermediary that relies on another intermediary can evidence that the reporting is done by reference to the reporting number under which the other intermediary filed.

PwC observation: *The 30-day period is much too short to align on which party reports, as well as the contents of the report. This requires that intermediaries and taxpayers are considering DAC6 already at the forefront of a transaction.*

Our view

Although the legislative proposal sheds more light and provides for helpful clarifications, many questions are still unanswered, including questions raised during the consultation.

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