

Guidelines on Mandatory Disclosure Rules (DAC6) published

As of July 1, 2020 the Mandatory Disclosure Rules (EU DAC6 Directive) take effect in the Netherlands. However, as a result of the corona crisis, the deadlines for reporting reportable cross-border arrangements have been extended. We refer to [our previous memorandum](#) on this.

During the parliamentary debates on the Dutch implementation of the Mandatory Disclosure Rules it was acknowledged that, in practice, it can be difficult to determine whether or not a certain arrangement is reportable. The Guidelines for Reportable Cross-border Arrangements (hereinafter: Guidelines) published on June 30, 2020 by Decree dated June 24, 2020, provide further details about the reporting obligation for 'Dutch' intermediaries or 'relevant taxpayers'. The Guidelines may be updated in the future.

For more general information about the Dutch implementation of the Mandatory Disclosure Rules we refer to this [fact sheet](#) prepared by the KPMG EU Tax Centre.

This memorandum addresses the most salient parts of the Guidelines.

(Cross-border) arrangement

Following on from the parliamentary records, the Guidelines note that the term 'arrangement' is intended to be neutral and that it can be multifaceted (for example, a transaction, act, agreement, loan or a combination thereof). An arrangement also means a series of arrangements and an arrangement can consist of several steps or parts. The Guidelines note that where an arrangement begins and ends can depend on the type of arrangement and the applicable hallmarks (see below).

According to the Guidelines, a merger between two Dutch sister companies of a parent company established outside the Netherlands is also an example of a *cross-border* arrangement.

For the purposes of determining whether an arrangement is cross-border, the European territory of the Kingdom of the Netherlands and Aruba, the BES islands, Curaçao and Sint Maarten are all separate legal territories or countries.

Intermediary and auxiliary intermediary

An intermediary is a person who devises, offers, or sets up a reportable cross-border arrangement or makes it available for implementation or who manages the implementation thereof.

Contained within the term 'intermediary' is the distinction of an 'auxiliary intermediary'. In short, this is a person who, directly or via other people, provides help, assistance or advice with regard to devising, offering or setting up a reportable cross-border arrangement or making it available for implementation or managing the implementation thereof. To qualify as an auxiliary intermediary this person must know or should reasonably know that they are providing such assistance.

The Guidelines elaborate on the circumstances under which an auxiliary intermediary has a reporting obligation. This is only the case if the auxiliary intermediary knows or could reasonably have known that they were involved with a reportable cross-border arrangement, to be assessed at the time the help, assistance or advice was provided. That an individual employee may actually have known that there is (the provision of help, etc. for) a cross-border arrangement is not decisive. Of importance is whether that person, in light of 'the expertise and understanding required to provide the services (which the person provides by virtue of their position)', can reasonably know that they are thus providing this help or assistance or advice. This also means that a person who, due to the nature of the service they provide, does not have the knowledge or expertise to interpret the arrangement on the basis of the hallmarks, does not qualify as an auxiliary intermediary.

It is also noted that a potential auxiliary intermediary does not have an obligation to investigate. They therefore do not have to gather additional information in order to assess whether they qualify as an auxiliary intermediary, if that additional information is not necessary to provide the relevant service.

If a potential auxiliary intermediary has more information than is necessary to be able to provide the relevant service, then for the purposes of assessing whether there is a reportable cross-border arrangement, they can, in principle, limit themselves to the facts and circumstances and information in the file that are necessary to provide the particular advice.

The mere fact that an auxiliary intermediary is informed of a (potential) reporting obligation by an intermediary with a right of non-disclosure, does not mean that this potential auxiliary intermediary thus has the available information to (reasonably) know that there is a reportable cross-border arrangement.

Relevant taxpayer

In certain circumstances the reporting obligation under the Mandatory Disclosure Rules may shift from the intermediary to the 'relevant taxpayer' (provided the relevant taxpayer has a nexus with the Netherlands).

According to the Guidelines, if a relevant taxpayer is obliged to report an arrangement because the intermediary/intermediaries involved invoke their right of non-disclosure, the reporting deadline for the relevant taxpayer will only take effect once the intermediaries involved inform the relevant taxpayer.

Main benefit test

Some arrangements only have to be reported if the main benefit test is also met. This concerns objective facts and circumstances; subjective assessments or intentions play no role.

The Guidelines note that, in practice, there are roughly two situations where the main benefit test will be met. Firstly, if an arrangement would not go ahead without the expected tax benefit, and the existence of that tax benefit can be regarded as 'decisive' for the arrangement. Secondly, if an arrangement contains elements that were added in order to obtain a tax benefit, provided the tax benefit is the main benefit – or one of the main benefits – that is expected from the arrangement.

According to the Guidelines, it is advisable in both situations to, in short, compare the situation in which the arrangement is set up with the applicable tax legislation with the situation without the tax legislation. Is the arrangement the same in both cases? The arrangement would then apparently also have gone ahead in the same way without any tax benefit that the application of the particular tax legislation may entail. In such cases, obtaining a tax benefit is not the main benefit (nor one of the main benefits) expected from an arrangement, so that the main benefit test is then not met.

It can be inferred from a reference made in the Guidelines that if the main benefit of an arrangement is to obtain a tax benefit, which is entirely in line with the policy intent, this, in itself, does not mean that the main benefit test has been met.

Hallmarks

The Guidelines address the hallmarks on the basis of more than 20 stylized examples. Examples are not mentioned for all the hallmarks. A useful practical example is the application of the 30% ruling for the purposes of payroll tax, of which it is noted that this does not fall under hallmark B2. Another useful example is that standard loan agreements for loans with 'arm's length conditions' do not fall under hallmark A3, because the main benefit test will usually not have been met.

According to the Guidelines, that an example is included does not say anything about its tax acceptability. Nor can any positions about the application of other legislation and regulations be inferred from it.

Should you have any questions about the above, Meijburg's advisors would be pleased to use their expertise to help you.

Meijburg & Co
July 1, 2020

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