

Dutch proposal for implementation of ATAD2 published for consultation

Introduction: ATAD2

The Dutch Cabinet on 29 October 2018 published a draft legislative proposal implementing rules on hybrid mismatches as required under the amended EU Anti-Tax Avoidance Directive (so called ATAD2). The origin of the EU directives lies in the Base Erosion and Profit Shifting (BEPS) project of the Organization for Economic Cooperation and Development (OECD). In the context of the fight against base erosion and profit shifting, the OECD presented action reports on 5 October 2015, including an action report that aims at the neutralization of the effects of hybrid mismatches. ATAD2 prescribes rules to combat tax avoidance within a group of companies using hybrid mismatches within the group.

This proposal is again, as happens more often in the Netherlands, published for consultation purposes. It is open for consultation until 10 December 2018. The ATAD2 rules should be implemented by the Member States on 31 December 2019, albeit that the rule targeting reverse hybrid entities (see below) may be implemented later, but at the least on 31 December 2021.

There is a lot that can be said about the proposal legislation. The proposed regulations are far-reaching, and all this will require a great deal of effort from the administrative and compliance departments of multinational companies. The magic word in all this is: 'hybrid mismatch'. This means – simplified – that certain tax burdens within a multinational sometimes are deducted twice (in two countries) or certain profits are recognized as tax exempt income and therefore not taxed at all. This simply because there are differences in tax systems between countries.

Method used in ATAD2 legislation

That said, the ATAD2 proposal contains three types of rules:

1. Certain denial of deduction: in certain cases, deduction of payments by a Dutch corporate tax payer will be denied if the payment is not regarded taxable income in the state of the recipient as a result of a hybrid mismatch or in case payments can be deducted twice as a result of such hybrid mismatch.
2. Certain inclusion in income: in certain cases, it will be required to include in the taxable income of a Dutch corporate tax payer the payments to such tax payer, which would normally be exempt from Dutch corporate income tax or would not be recognized as income, but nevertheless can be deducted in the state of the payer due to a hybrid mismatch.

3. Certain taxation of reverse hybrid entities: reverse hybrid entities (transparent for Dutch tax law purposes but opaque for tax purposes in the residency states of the participants in the entity) will be regarded as Dutch corporate tax payers in case they are incorporated, established or registered in the Netherlands.

In addition to the latter (hybrid entities) the following can be said. According to the Cabid, so-called cv / bv structures have in recent years become the symbol for hybrid mismatches. Through these structures US -based corporations have been able to postpone the taxation of their worldwide profits over a (very) long period of time. With the implementation of ATAD2 it is believed that this will end.

Where will the issues arise?

In the years behind us, a lot of 'hybrids' were used. One can think of – amongst others – hybrid financial instruments, hybrid entities, hybrid permanent establishments and dual resident entities. All these can constitute a hybrid mismatch.

It is proposed to apply the first two types of rules as from 1 January 2020 and the rule on reverse hybrid entities as from 1 January 2022, both in accordance with ATAD2.

General advice by Cervus

We assume that it will be quite clear that all international structures in which a Dutch entity is directly or indirectly involved in a hybrid mismatch need to be reviewed. Apart from that, all compliance departments of multinational groups (whether the group in total is big or small) should implant checks and balances to determine in which 'intra group arrangements' over the years their Dutch subsidiaries were involved.

Contact

Obviously Cervus is most willing to assist internationally operating companies on implementation of ATAD within your company. Should you require our assistance, please contact Maarten Jan Brouwer (tax partner) at Cervus via +31 6 1493 2773.

For more information, please see:

<https://www.internetconsultatie.nl/consultatiedocumentatad2>

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