



# Tax Integrity Guideline

of Holland Quaestor members

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# TAX INTEGRITY GUIDELINE

## HOLLAND QUAESTOR

### PREFACE

Holland Quaestor (HQ) is the sector association of Dutch trust offices. Trust offices assist foreign undertakings wishing to establish themselves in the Netherlands and provide correspondence address services, managerial services and administrative services. The objective of HQ is to guarantee the quality and professionalism of its members in a sustainable<sup>1</sup> way. In short<sup>2</sup> this stance includes:

- Adoption of guidelines which the members must observe, including additional requirements relating to the statutory compliance and audit functions, CSR, transaction monitoring and the SIRA;
- Substantial increase and broadening of the education and lifelong learning programmes for our members' employees (including the certified trust office training programme at the University of Maastricht); and
- Affiliation to the DSI (Dutch Securities Institute) of compliance officers working with our members.

This guideline took effect on 16 April 2019 and prescribes how trust offices ought to conduct themselves and which measures they should take in tax matters. The reason for writing this guideline is the changing social climate. The guideline's objective is preventing (inadvertent) risks of tax evasion and avoiding aggressive tax planning. Continuously evolving global financial dealings have increased the risks of tax evasion. This requires trust offices to define their role as gatekeeper at the entrance to the Dutch tax system more clearly. Aggressive tax planning is not appropriate, as we will set out in this guideline. Basic principle in this is that "everything that is possible, is not necessarily a must". This means that we do not use a strict legalistic approach.

The guideline is in part a codification of methods that various members have already initiated. It ties in with existing and expected legislation, but takes it one step further. Ever since its founding, HQ has embraced measures in the international framework and their impact in the Netherlands. Specific reference is made to the OECD BEPS package and the ATAD directives, the DAC6 directive and the EU Working papers, which contain various measures that are conducive to implementing this guideline.<sup>3</sup>



The derivative function of the guideline is to make clear to other stakeholders and interested parties what the HQ members stand for, i.e., that paying taxes must be regarded as a contribution to the society in which the taxpayer operates.

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<sup>1</sup> That means appropriate to the principles of corporate social responsibility, so serving the public interest.

<sup>2</sup> For more information, please visit the HQ website: [www.hollandquaestor.nl](http://www.hollandquaestor.nl).

<sup>3</sup> Among others CbCR (Country by Country Reporting), MLI (Multilateral instrument), DAC6 (EU Directive on Administrative Cooperation) and the exchange of information between tax authorities.



Naturally, the relationship with clients is about much more than tax structures only. The Dutch Trust Offices (Supervision) Act 2018 among other things requires a thorough periodical client due diligence. In 2017, in anticipation thereof, HQ wrote a CSR policy and client acceptance guideline. Tax integrity is a part of corporate social responsibility (CSR) and more specifically, the way in which the concept of “social propriety” is given shape. It follows from the statutory obligation under which trust offices have to reflect on the social propriety of their provision of services, and take appropriate measures on the basis of that reflection.

The guideline replaces and elaborates on the tax paragraph in the guideline on CSR policy and client acceptance. The guideline applies to both existing and new clients.

The guideline is quite detailed and of a technical nature. We made a deliberate choice to do so in order to be as clear and concrete as possible and not just use general basic premises and principles. After all, they only give clarity once implemented. Tax policy and regulations are very much in a state of flux both nationally and internationally. That is why the guideline will be reviewed on a regular basis.

Finally: the first draft version of the guideline was discussed with a number of stakeholders. These discussions resulted in various substantive refinements and textual improvements. We are grateful for their attention and constructive contributions<sup>4</sup>.

The Board of Holland Quaestor

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<sup>4</sup> NOB, NVB, VNO-NCW, PGGM, ABN AMRO

## INTRODUCTION

The members of HQ provide management, control and administrative services to internationally operating companies, investors and affluent private individuals who settle in the Netherlands or invest through the Netherlands. The reasons for our clients to settle in the Netherlands are diverse and differ from one type of client to the next. Because of its open economy and excellent logistic, banking, legal and tax facilities, the Netherlands generally is highly appealing to internationally operating companies and investors. The Netherlands is renowned for being a safe place of domicile and operating base for investments and doing international business.

Companies and investors that want to set themselves up in the Netherlands based on legitimate economic, business or social grounds and consequently contributing to the general development of the global or Dutch economy, are most welcome to become our clients. It is a well-known fact that tax considerations (regular tax planning) play a part in companies and private individuals setting up a legal structure. This is logical and in many cases even necessary.

The members of HQ are well aware that the appeal of the Netherlands has a downside. There is a risk that private individuals, companies or investors want to use the Netherlands as an intermediary link or final destination in a premeditated plan to avoid or even evade tax. On the basis of their gatekeeper task, the members of HQ have a key role in preventing this risk from materialising.

The general guideline applied in this context is that paying taxes is regarded as a contribution to the society in which the HQ members and its clients operate.

## SCOPE AND OBJECTIVE

This guideline relates to all structures and transactions of object companies in which a trust office is involved because of its clients.

The objective of this guideline is the members of HQ providing sustainable services. Providing sustainable services means that providing these services is socially responsible, does not harm the general interest, and is in line with the current societal views on the permissibility and appropriateness of products, clients or services. This guideline is restricted to the tax component of providing sustainable services.

## CORE VALUES

HQ members act on the basis of a code of conduct, in which five core values are guiding:

1. integrity;
2. professionalism;
3. reliability;
4. independence;
5. sustainability.

The core value of **integrity** means that HQ members perform their work on the basis of the applicable laws and regulations, observing the generally accepted values and standards. The core value of **sustainability** means that the trust office pursues partnerships in which acting in a socially responsible manner is paramount.

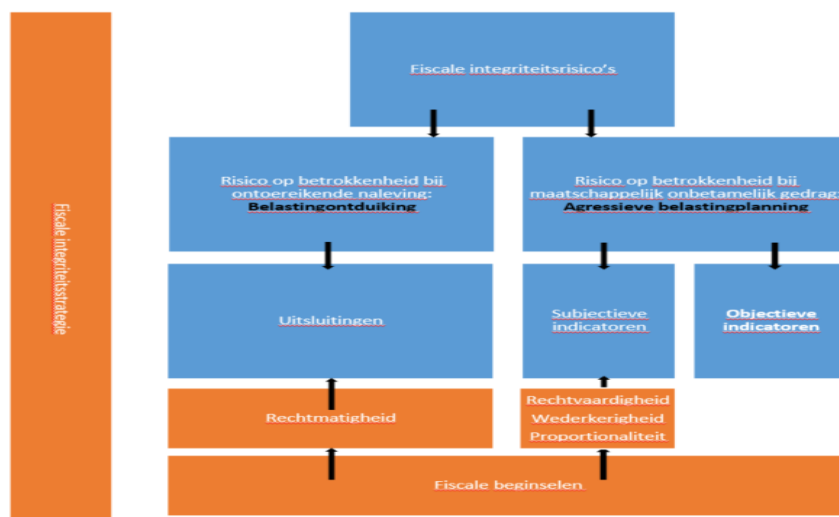
In this guideline, the **tax integrity strategy** is set out in more detail and prescribed bindingly for HQ members<sup>5</sup>.

## SYSTEM

In broad outline the system is as follows: HQ makes a distinction between the risk of involvement in tax evasion on the one hand and involvement in aggressive tax planning on the other. The risk of tax evasion arises as a result of a structure in its character and purport being intended to obscure information. Unless the risk of tax evasion can be fully mitigated, HQ members do not accept clients and/or object companies that have such structures.

Once it has been established that the client's structure is unsuited for tax evasion, the possibility of aggressive tax planning is scrutinised. There are **objective indicators** to be able to check this. On that basis, it can be identified whether a structure or transaction under consideration could involve aggressive tax planning. Additional investigation into factors such as contraindications and potential escalation will have to show whether this is actually the case. If so, the trust office cannot accept the client. In case the objective indicators give no reason to assume aggressive tax planning, a test on the basis of **subjective indicators** follows. The final step is then made by the board or an authorised manager. This person is ultimately responsible for client acceptance and will set out the considerations for accepting or not accepting the client in an **acceptance memorandum**. This involves a thorough check against the subjective indicators and tax principles.

The procedure can be represented as follows in a chart:



The structures that entail an intrinsically high risk of tax evasion are described in annex 1 to this document. The indicators and examples of contraindications are stated in annex 2. Annex 3 states types of structures that have no tax effects and as a consequence, in principle, are within the scope of this guideline.<sup>6</sup> This regards

<sup>5</sup> This applies to both new and existing clients.

<sup>6</sup> Before placing structures out of scope, it must be established whether they have actually been set up with the intention of collective investment or securitisation. "Sham structures" or false collective investments or securitisations, insofar as permissible at all, are in any case also within the scope of this guideline.

collective or alternative investment fund structures, standard holding structures and structured finance structures.

### *Taxation Guideline I (NL)*

## **1. STATUTORY FRAMEWORK**

The members of HQ are all trust offices within the meaning of the Trust Offices (Supervision) Act 2018 (Wtt18). As such, they have to comply with all that is required of trust offices by or pursuant to the laws and regulations. The legislator gave trust offices the primary task of fulfilling a so-called **gatekeeper task**. This means that before and while providing their services, trust offices must endeavour to prevent the Dutch financial and legal systems from being used for money laundering, financing terrorism or for actions that could be considered inappropriate in social and economic life.

In order to fulfil their gatekeeper role, trust offices should organise their business operations such as to enable them to recognise and analyse integrity risks. When faced with such risks, they must consider whether they can adequately control them or whether they had better avoid these risks altogether.

Integrity risks are defined in the Wtt18. A distinction is made between the risk of inadequate compliance with the applicable laws and regulations (the letter of the law) and the risk of the trust office being involved in actions that are in conflict with what is generally accepted in society or according to unwritten law (including the spirit of the law).

The legislator does not give content to “inadequate compliance with laws and regulations”. HQ understands this to mean that a trust office should not be involved in crimes and contraventions. This goes without saying and of course no bona fide trust office would knowingly and wilfully be complicit in such acts. What complicates matters is the fact that trust offices are often involved with one or several links within extremely complex structures, consisting of all sorts of legal entities and legal arrangements in various jurisdictions. The trust office has to make an assessment of the risk that somewhere in this structure a statutory provision is not properly or not fully complied with. Translated into the fiscal context, this means that a trust office maps the risks of whether somewhere in the structure taxes are not or not fully being paid.

If a trust office arrives at the conclusion that there is a risk that a client does not or does not fully comply with the statutory provisions, there are two things it can do:

1. It can take measures to control the risk, aimed at preventing it from becoming a fact; or
2. It can decide not to provide services.

Knowingly not or not fully making a tax payment due, may be the result of fraud (misinformation) or concealment (providing incomplete information). Providing the authorities with incorrect or incomplete information results in inadequate compliance and as a consequence constitutes a (tax) integrity risk.

The first aspect of integrity risks (tax evasion) is black-and-white: something is either allowed or it is not. The second aspect of integrity risks (aggressive tax planning) is far less tangible. This involves structures or transactions which are



incompatible with the objective and purport of the law or with what is appropriate in social and economic life under unwritten law. An additional condition here is that this incompatibility seriously harms confidence in the financial markets or in an individual trust office. That means it is about structures or transactions against which there is no legal obstacle, but which are undesirable and harmful (cumulative) nonetheless. The legislator does not give further content to this either. Over the past years there has been a lot of public and political attention for what is called “aggressive tax planning”. This type of tax planning results in social unrest and is the prelude to changes in the international and national fiscal context, such as actions by the OECD and the EU.

Aggressive tax planning forms the second aspect of integrity risks but is also an open standard and a catch-all term. The challenge for trust offices is to turn aggressive tax planning into a concrete and practicable tax integrity risk.

Pursuant to Section 14 of the Wtt18 a trust office must pursue an adequate policy and organise the business operations such that they are ethical and controlled. A policy formulated on the basis of that section will at least need to contain the standards described in this guideline.

## **2. TAX PRINCIPLES AND TERMS**

### *Tax planning*

Tax planning is the (cross-border) organisation of private or business interests, based on the opportunities to that end provided by laws and treaties, with the intention of limiting the payment of taxes. A distinction can be made between regular tax planning and aggressive tax planning.

### *Regular tax planning*

Regular tax planning is tax planning based on the opportunities to that end provided by laws and treaties, in line with the (policy) objectives with which the government authorities created those opportunities and whereby the tax situation is in accordance with or based on the taxpayer’s realistic economic or business situation.

### *Aggressive tax planning*

Aggressive tax planning is tax planning aimed at reducing taxes, by using technical discrepancies in a tax system or through arbitration between two or more tax systems, which is inconsistent with the spirit of the law.



### *Tax evasion*

Tax evasion is tax planning in which the tax authorities are deliberately misinformed (fraud) or provided with incomplete information, as a result of which the lawful and correct levying of taxes cannot take place or cannot take place to its full extent.

### *Integrity risk*

Integrity risk is

- a. the risk of inadequate compliance with the provisions laid down by or pursuant to any statutory regulation (tax evasion); and
- b. the risk of the trust office or its staff members being involved in acts that are incompatible with what is generally accepted according to unwritten law to such an



extent that confidence in the trust office or in the financial markets may be seriously harmed (aggressive tax planning).

*Tax integrity risk*

This is the integrity risk associated with tax evasion or aggressive tax planning.



### *Tax integrity strategy*

Tax integrity strategy is the combination of policy, procedures and measures of a trust office expressing the tolerance for tax integrity risks. This is reflected in several documents including the Integrity Risk Appetite ("IRA") Statement and the Systematic Integrity Risk Analysis ("SIRA").

### **3. CORE TAX PRINCIPLES**

Companies (and to a lesser degree natural persons) ever more increasingly and ever more expansively operate internationally. As a result, they have to deal with widely differing national tax regimes. These differences are the result of historical factors, but can also be explained by divergent policy objectives. Within the European Union tax legislation is not harmonised. At the initiative of international organisations such as the OECD, and by extension the EU, harmonisation is getting off to a start, but major differences continue to exist. Many bilateral or multilateral treaties have been concluded which, by preventing double taxation, should be conducive to international commerce. Preventing double taxation is considered regular tax planning: such planning will not result in social harm or disruption of social institutions. Regular tax planning indeed results in an optimal allocation of flows of money and capital and as such contributes to the general global economic development.

In addition, many investment treaties have been concluded, the purpose of which is to protect investments from the Netherlands in foreign countries. Historically, this need was the very reason the trust sector came into being.

Over the years, the client's tax wishes resulted in the trust sector growing, but it has reached its tipping point. Global harmonisation will marginalise the Dutch tax advantage. However, this will not diminish the importance of the Netherlands as an investment platform. The Dutch treaty network affords protection and access to the Dutch legal system for investors wishing to invest in developing states under the rule of law. In short: clients tend to ask increasingly less for tax driven structures, but have a need for *governance* enabling them to invest responsibly.

HQ seeks a balance between the wish to limit tax payments on the one hand (usually a right enshrined in law) and paying tax without any kind of planning, for example in order to prevent double taxation. Taking the above considerations into account, HQ defined four tax principles as a basis for the tax integrity strategy:

1. Legitimacy;
2. Justice;
3. Reciprocity; and
4. Proportionality.

These principles constitute the substantive basis for this guideline, while also serving as the assessment framework for a sustainable, fair and balanced tax client acceptance policy, within the wider perspective of corporate social responsibility. In the opinion of the HQ members, these principles reflect, at the highest level of abstraction, the framework within which there is question of regular tax planning.

A check against the three latter principles could very well be addressed in the acceptance memorandum (Section 26(3) of the Wtt18). In said memo (the

management of) a trust office reflects on a client or object company. Making such a comprehensive analysis is the final step in the client acceptance process.

### *1. Legitimacy*

The core tax principle of legitimacy is linked to the risk of tax evasion. This means that HQ members ascertain that a structure is legal, that the taxpayer complies with all the reporting obligations and that he/she has disclosed all the relevant facts and circumstances. Members of HQ therefore are not involved in structures and transactions that are in conflict with any statutory provision from any jurisdiction involved whatsoever. A tax advantage arising from not declaring all relevant facts and circumstances to the respective tax authorities is fraudulent in HQ's opinion and therefore not legitimate. The most important test whether this principle has been complied with is defining the structure's or transaction's transparency (in terms of tax).

### *2. Justice*

Justice follows on from legitimacy, but is linked to the risk of involvement in aggressive tax planning. However, justice goes further than that. HQ members are not only mindful of the letter of the law (grammatical interpretation), but they also consider the objective and purport of the law (teleological interpretation). In actual practice this means that the focus is not on using gaps in the law, and that discrepancies between the various national tax systems are not actively sought. The principle of justice proceeds from governments having the responsibility for organising the tax system. In that system their dogmatic and ethical considerations have been incorporated and the prevailing societal views have been codified. Morality is therefore assumed to have been incorporated into the law. Following the objective and purport of the law therefore in principle results in fair taxation, without prejudice to what has been stated above about the existence of gaps and discrepancies.

### *3. Reciprocity*



Due to a number of tax policy choices the Dutch government made, the Netherlands has a favourable business climate. Moreover, it has an extensive network of treaties, among others to protect investments from the Netherlands. For many companies it is profitable to structure their international tax planning through the Netherlands and to protect their investments. The principle of reciprocity, which also comes into play in aggressive tax planning, means that a jurisdiction might expect "something in return", for instance in the form of taxes or jobs, if its legal system is used. Put differently: a company may not serve purely as a money conduit.

### *4. Proportionality*

This principle relates to the scope of economic activity, and the revenue and profit it generates, in relation to the actual tax paid in a specific jurisdiction. Starting point is that economic reality dovetails with tax reality. A tax advantage should result from transactions and structures initiated from a perspective of business economics. This principle is linked to aggressive tax planning as well.

## **4. PREVENTING INVOLVEMENT IN TAX EVASION**

Tax evasion does not comply with the core tax principle of justice. Tax evasion moreover results in conflicts with any statutory provision and as such falls under the first aspect of the definition of integrity risk. An HQ member therefore will not accept clients or object companies that propose structures or transactions that may result in



transgressing a statutory provision anywhere in the world, to obtain any kind of benefit therefrom.

The risk of involvement in tax evasion arises from a structure, arrangement or transaction which, by its nature and organisation, obstructs transparency. The structure may well have been set up with other intentions, but may nonetheless be used for tax evasion. Controlling the risk of involvement in tax evasion therefore is predominantly aimed at preventing beforehand that preconditions enabling tax evasion, are created. HQ members are convinced that the possibility to evade tax can best be prevented by ensuring that relevant tax authorities are informed of or able to ascertain the correct (and full) body of facts. We are talking about the risk of *ex ante* tax evasion here. The services trust offices provide must not be used for tax evasion. The efforts our members make should primarily be aimed at preventing involvement in (attempting) tax evasion. We consider tax evasion that is already completed (*tax evasion ex post*) as a regular money laundering risk. Handling this risk should take place in conformity with the existing AML policy and procedures and will not be further addressed in this guideline.

Annex 1 to this guideline describes a range of services and legal arrangements that may be associated with the structure of a client and/or object company. These services and legal arrangements are intended to separate legal and beneficial ownership and, by their nature or organisation, seek to limit the transparency for relevant tax authorities. However, the desire to prevent generally accessible awareness of identity may be legitimate. This may for instance be the case when strengthening a negotiating position, protecting ownership or rights in an instable governmental/political climate or for reasons of personal safety. Nonetheless the risk of abuse continues to exist, especially if the limited transparency extends to governments. This is why HQ members no longer accept new clients where the above-mentioned services and legal arrangements play a part.

## 5. PREVENTING INVOLVEMENT IN AGGRESSIVE TAX PLANNING

In HQ's view, aggressive tax planning does not comply with the core tax principles of justice, reciprocity and proportionality and is unacceptable for that reason. This is why HQ members may not be involved on an ongoing basis with clients and structures which envisage or, by their nature and organisation, focus on aggressive tax planning. Involvement with this type of client or structure may, when considered from a strictly legal point of view, be allowed. However, aggressive tax planning undermines the general interest and in the end the public support for levying taxes. Members of HQ consider this highly undesirable and will actively counteract it.<sup>7</sup>

The challenge mainly lies in translating the general definition into actual situations. For the purpose of determining whether regular or aggressive tax planning is at issue in an actual situation, annex 2 to this guideline states objective and subjective indicators. The existence of an objective indicator justifies the assumption that, in principle, a structure or transaction has to be classified as aggressive. It is also possible that, despite the lack of an objective indicator, aggressive tax planning is nonetheless at issue. This is obviated by the subjective indicators. The acceptance memorandum provides an opportunity for a final reflection. It enables the trust office to describe a final check against the core tax principles.

### Use of indicators

Once it has been ascertained that the client's or object company's structure under consideration does not involve any of the legal arrangements set out in annex 1, the

<sup>7</sup> For instance by using the reform procedure (see section 7).

next step in the client acceptance process can be taken. That step regards checking the structure (or transaction) against the indicators stated in annex 2. If no objective or subjective indicators are found, the process can be finalised in accordance with the regular procedures. In case a trust office does find indicators, however, this means that aggressive tax planning is presumably at issue.

The client can now only be accepted if there are sufficient relevant **contraindications**, to such an extent that it can be established that there is no aggressive tax planning. The members of HQ do not consider aggressive tax planning a risk that can be adequately controlled. This is because aggressive tax planning does not have practicable gradations: in short, a proposed structure or transaction is either aggressive or it is not. This is why a system of indicators and contra-indicators was adopted. Circumstances may occur (contraindications) that justify the conclusion that the tax planning, despite the existence of an objective indicator, can be considered regular. Examples of contraindications (not intended to be limitative) are also included in annex 2 to this guideline. Particular indicators need to be refuted by specific contra-indicators. Subject to this rule, there must be *at least three* contra-indicators in order to falsify an indicator.

### **Keeping the indicators up-to-date**

Laws and regulations change regularly and the developments in the international and national area of taxation take place in quick succession. It is therefore self-evident that the list of indicators will be periodically reviewed and updated. The objective indicators are partly inspired by the hallmarks, or essential characteristics, referred to in Directive 2018/822/EU (better known as DAC-6). The subjective indicators will particularly relate to “reasonableness, accessibility and logic”, in other words: common sense, public information and an analysis of the amount of profit. We expect our members to share with other members the characteristics of structures or transactions which, for instance through the application of the subjective indicators, have been classified as aggressive. To facilitate this, a tax taskforce will remain active within HQ. It will periodically discuss indicators and check them against social and legislative developments that provide further content to the concept of aggressive tax planning. The taskforce will make suggestions for the, at least annual, review of annex 2 to this guideline.

## **6. HANDLING TAX INTEGRITY RISKS WITHIN THE ORGANISATION**

### **Staff**

Recognising aggressive tax planning requires tax knowledge within the trust office’s ranks. This means that front office staff will need to be further educated on the definitions used in this guideline and the characteristics and indicators used in the annexes. They will need to know how to recognise tax integrity risks in the course of the client acceptance process, transaction monitoring and in the course of periodical reviews. The compliance officers and audit officers need to be equipped to monitor this process in the front office. It is a duty of the trust office board to organise the provision of education and training.

### **Compiling files**

Adequately compiling files is the basis of the effectiveness of transaction monitoring, and as a consequence of compliance with one’s own policy and the relevant laws and regulations. Compiling files should result in an information position enabling the trust office to identify all relevant integrity risks. If the identification is complete, a correct

analysis can be made. On that basis it can be decided whether an individual client, either conditionally or not, fits within the trust office's risk appetite. The acceptance process can then be stopped, or mitigating measures can be taken with the due observance of which the client acceptance can be finalised.

In most cases, the investigation into the purpose of the structure will have resulted in a substantiated tax advice that can be used here as well. It is important that the trust office comprehends this tax advice and is capable of recognising the tax integrity risks associated with the advice. Tax advisers are not by law bound to the same broad definition of integrity risks as trust offices. In principle a tax adviser only needs to take the risk of money laundering or the financing of terrorism into account. Other integrity risks, which on the basis of the legal framework for trust offices are particularly relevant, therefore are not necessarily discussed in the tax advice.

HQ members see to it that they only work together with firms of excellent repute. In case of Dutch tax advisers, membership of the Dutch Association of Tax Advisers (NOB) or the Dutch Register of Tax Advisers (RB) is a condition.

If a trust office provides services to a client on the basis of a tax advice, the advice should at least materially comply with the following standards:

- Up-to-date (1): the advice is based on the current tax laws and regulations and takes future changes, in so far as announced, into account.
- Up-to-date (2): the applicability of the advice is validated, and if required adjusted, if in the course of the business relationship, changes occur in the structure or the laws and regulations the advice refers to.
- Accurate and comprehensive: the advice should describe the structure under consideration, including all the intra-group relations relevant to the object company (including at least the tax aspects in respect of the parent company/companies and subsidiary/subsidiaries).
- Transparent: in a comprehensible and conveniently ordered manner the advice shows the operation of the (vertical) structure, in such a way as to enable the trust office to recognise the tax integrity risks. If the advice is inscrutable or a trust office does not have the required tax know-how, the HQ member will ask for the advice to be clarified or request a second opinion.

## **7. CLIENT ACCEPTANCE: PERIODICAL REVIEWS, TRANSACTION MONITORING AND REFORM**

### **New clients**

This guideline applies in full to new clients and/or new object companies. Clients or object companies possessing a characteristic or construct described in annex 1, will no longer be accepted as from the moment this guideline becomes effective. Clients or object companies with whom an indicator described in annex 2 is found, can only be accepted by the trust office once it has been established that, for instance due to the existence of one or more contraindications, aggressive tax planning is not at issue. In the acceptance memorandum, the trust office can reflect on the relation between the wanted services to be provided on the one hand and the core tax principles and indicators as set out in detail in section 3 and annex 2, respectively, on the other hand. If that relation does not result in a conflict, the trust office may proceed to formal acceptance.

## Existing clients

Depending on the client's and/or object company's risk profile, the trust office will have to perform the client due diligence with predetermined periodicity once more. Section 74 of the Wtt18 stipulates that client acceptance files must be converted into service provision files "at the earliest convenience". The trust office must give risk-based content to the term "at the earliest convenience". This moment of accepting anew or review is also the right moment to investigate whether the service provision to the existing client is compatible with the stipulations in this guideline. During a review, the new developments and correctness of the information documented earlier on is usually confirmed. Should the periodical review show that the structure complies with the characteristics or constructs as set out in annex 1, or that there are indicators as set out in annex 2, the business relationship cannot be continued without adjustments being made. If characteristics or constructs are found that are named in annex 1 to this guideline, the structure must be adjusted or the business relationship must be terminated. The same applies, in principle, if indicators stated in annex 2 to this guideline, are found. In such cases, however, it should first be verified whether aggressive tax planning is actually at issue or whether the presence of one or more contraindications justifies the conclusion that this is a case of regular tax planning.

## Transaction monitoring

The tax integrity risk of aggressive tax planning may also occur in an individual transaction or a set of related transactions. The indicators as referred to in annex 2 need to be converted into alerts for the transaction monitoring.

## Reform procedure

The reform procedure is a procedure newly introduced for clients and/or object companies for whom a trust office started providing services prior to this guideline becoming effective. The trust office will start this procedure if it finds, normally during the periodical review, that the structure involves characteristics, arrangements or indicators that are named in annexes 1 and 2 to this guideline, while there are no contraindications.

The procedure requires a hands-on approach of the client, to discuss in concurrence why the chosen structure no longer fits within the trust office's tax integrity strategy. It is important here that, considering Section 17 of the Wtt18, the trust office does not assume the role of the tax adviser. The trust office will restrict itself to explaining the objections against the existing structure and may in broad terms outline what would be acceptable indeed. It will be up to the client, either in consultation with his tax adviser or not, to come to a change in the structure.

After having been approached, the client will, within a reasonable period of time<sup>8</sup>, have to declare (in writing) that they are willing to reform the structure in such a way that transparency is no longer obstructed or that there is no question of aggressive tax planning any longer. Should such a confirmation not be forthcoming, the business relationship must be terminated.

The moment the client records their intention to reform, the reform procedure starts immediately. The client has to prepare a milestone plan and submit it to the trust office. The trust office must assess whether the implementation of the milestone plan

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<sup>8</sup> In principle, this period is three months.



will lead to a result that is in accordance with this guideline. If the milestone plan is not forthcoming or does not lead to an acceptable result, the business relationship must be terminated. In addition, the trust office assesses whether the milestone plan is sufficiently specific and shows sufficient urgency. Subsequently, it will have to monitor the timely implementation. The period as from the above-mentioned written declaration by the client up until the implementation of adjustments, should take no more than one year.

## 8. STATUTORY BASIS AND IMPLEMENTATION IN BUSINESS OPERATIONS

### The IRA

A trust office is required to define and lay down their *integrity risk appetite* in writing beforehand in the IRA. In this document, a trust office indicates which risks are, either conditionally or unconditionally, acceptable or unacceptable. The risk appetite is continuously developing, and is for instance affected by the developments on the market in which the trust office is active, the trust office's commercial strategy and technological, geopolitical and local developments. In the Wtt18, Section 14 constitutes the legal basis for the IRA.

### The SIRA<sup>9</sup>

Based on Section 14 of the Wtt18, a trust office will periodically analyse the risks to sound operational practices. This is also known as a systematic integrity risk analysis (SIRA). It is about the risks defined in Section 1 of both the Rib and Wtt18. The SIRA is the basis of sound and controlled operational practices and is the basis on which procedures, processes and control measures are prepared. If it turns out that a procedure did not work, a control measure does not suffice or that an incident took place, the SIRA should in principle be adjusted.

### Relation IRA and SIRA

The SIRA should be checked against the IRA. Based on this check, a trust office may decide on the acceptance, limitation or exclusion of the integrity risks found. For risks that need to be kept within limits, the required control measures can be taken. For risks that have to be excluded, termination of the service provision will have to be the outcome. In short: The IRA is "leading document" determining the ranges. The SIRA then gives actual content to those ranges and shows which clients fall within the range and which fall outside of the range.

### Implementation of this guideline in business operations

1. This guideline should first of all result in adjustment of the IRA. HQ members and other trust offices, in so far as this has not already been done, need to prepare an IRA in which the exclusions included in this guideline (annex 1) have at least been incorporated.
2. Once the trust offices have prepared or adjusted the IRA, they will in principle need to review the SIRA as well. The integrity risks relating to the possibility of getting involved in conduct which – in short – is considered socially unacceptable, have to be incorporated in the SIRA. This also includes the risk of getting involved in aggressive tax planning.

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<sup>9</sup> Also see HQ guideline.

3. Considering the content of this guideline, it is obvious to include the structures with an unacceptably high tax integrity risk as exclusions in the IRA. Also the risk of involvement in aggressive tax planning should be excluded.
4. This can be further set out in detail in the SIRA: the indicators could be included in the SIRA in the form of scenarios. In principle, an indicator results in a standard gross risk that is beyond the *risk appetite* and that should be avoided. The presence of contraindications may, where there are grounds for doing so, justify the conclusion that aggressive tax planning is not at issue and that the structure or transaction indeed fits within the range delimited by the *risk appetite*.
5. When and in what way structures and transactions are checked against the objective and subjective indicators of aggressive tax planning must be laid down by HQ members in procedures. An escalation possibility should also be provided for.
6. The measures described in section 7 should also be enshrined into procedures in order to warrant effectiveness.

## **Annex 1: Characteristics and arrangements with a high inherent risk of tax evasion**

### **A. Unconditional exclusions**

Trust offices in the Netherlands are allowed to offer services which limit the external transparency of a structure. For example, a trust office may act as the (apparent) direct beneficial owner of shares (nominee shareholding), and transactions between third parties may be structured via a company of the trust office, both on paper and in reality. Such services prevent the public authorities from seeing the actual owner or beneficiary, or the parties actually involved. The HQ members will no longer offer these two trust services. Although clients may ask for this type of services for legitimate reasons, the risks of premeditated or opportunistic abuse are too high. The services can be used for the purpose of tax evasion, bribery and/or laundering criminal assets. In addition, there are legal constructs or arrangements whereby transparency is limited and full risk mitigation is difficult to imagine. The use of such arrangements in client structures also falls outside the risk appetite of the HQ members. Below is a list of the services and arrangements in which the HQ members will no longer be involved. New clients that want to procure these services or have included the following arrangements in their structure will not be accepted. A reform procedure is in place for existing clients.

#### **1. Service: Nominee shareholding**

A trust office may act as a nominee shareholder on a client's instructions. This means that, on paper, the trust office appears to be the owner of a parcel of shares. That the trust office holds the shares on a client's instructions is known in principle only to the trust office itself. The Financial Action Task Force (FATF) has (rightly) indicated that it regards this service as high-risk. The FATF therefore recommends that this service should be regulated. Despite HQ's wish for this service to be identified as a qualifying service in the Wtt18 (or previously in the (former) Wtt), this service is currently not regulated in the Netherlands or even reserved to licensed service providers. This means that in principle any person in the Netherlands can provide this service on a professional or commercial basis without the obligation applying that a licence is required and without any kind of supervision. The HQ members believe that this service entails an unduly high (tax) integrity risk and will therefore not provide this service.

#### **2. Service: Trust service C (conduit companies)**

Companies that are part of the same group as the trust office are referred to as conduit companies in the Wtt18. Such conduit companies must be explicitly distinguished from companies performing conduit activities and that are part of a structure of a client. By means of conduit companies, a trust office is able to carry out transactions for the benefit of a client. The members of HQ no longer consider the use of such conduit companies acceptable<sup>1</sup>, both from the perspective of a tax integrity risk and from the perspective of their own compliance risks.

#### **3. Dividend stripping (such as stocklending)**

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<sup>1</sup> Insofar as such a company is exclusively used for escrow services, it continues to be permitted. In this context, escrow services are understood to mean: in the role of independent third party receiving a sum of money, originating from a buyer, as security towards a seller, and retaining said sum of money until the seller has fulfilled his contractual obligation towards the buyer, and the buyer releases the sum of money kept in safekeeping to be paid to the seller.

An arrangement intended to avoid dividend tax that is characterised by the sale or loan of shares as soon as a distribution of dividend is announced and a buy-back of the shares once the dividend has been distributed. The dividend to be received is included in the selling price and once the dividend has been distributed, the shares are bought back at a lower price. In that way the dividend is in fact not distributed and dividend tax is not due either, or dividend tax is paid at too low a rate. Transactions known as Cum/Ex transactions are fraudulent and therefore fall outside the scope of this service. These transactions may result in a concurrence of punishable acts.

#### **4. Arrangement: Flash entities**

A trust office reviews the objective of the business relationship and thereby obtains clarity about its client's intention. By extension, the trust office gains insight into the purpose of the structure. If this review reveals that an entity is incorporated with the aim to process just one (single or composite) transaction and it appears that the purpose of this transaction is to obtain a tax effect, the trust office will not cooperate in this transaction. Such a "flash entity" entails a high risk of both tax evasion and aggressive tax planning. Because of the fleeting nature of such an entity, adequate risk mitigation is difficult to imagine. In business dealings, these entities are incorporated as part of proposed mergers, acquisitions and reorganisations. It can only be established retrospectively that an entity served a single purpose. This situation falls outside the scope of the exclusion.

#### **5. Arrangement: UBO claims residency for tax purposes in a jurisdiction earmarked as a golden passport jurisdiction by OECD**

There are jurisdictions promising a local passport in order to attract investors. The OECD maintains a list of these jurisdictions due to the risk of a UBO claiming (unjustified) tax residency and as a consequence (for example) frustrating the exchange of information, such as the Common Reporting Standard (CRS). The list can be found via this [link](#)<sup>2</sup>. The UBO uses his passport<sup>3</sup> to make it look to the service providers involved as if he resides in the golden passport country, whereas he does not actually or hardly ever resides there and is liable to pay tax elsewhere. Claiming residency for tax purposes in a golden passport jurisdiction means that taxes in the country where the ultimate beneficial owner is actually liable to pay tax, are wrongly avoided. If a trust office comes across such a UBO, the trust office will take measures<sup>4</sup> to establish whether the UBO does indeed reside in the golden passport country concerned or whether this is claimed only for tax purposes. In the latter case, the risk of tax evasion is very real.

## **B. Conditional exclusions**

This list contains arrangements which entail a high tax integrity risk. New clients who use these arrangements in their structure can only be accepted if the tax integrity risk can be mitigated in full. This list must therefore be read as a "no, unless". The involvement of an HQ member is possible, but only under strict conditions and only if there is a clear, objectifiable and sound reason for using an arrangement. The

<sup>2</sup> <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/>

<sup>3</sup> In this situation, the UBO has two or more passports. He uses the passport of the golden passport country to claim residency for tax purposes in that country. This is permissible, provided that the tax residency and actual residency are mutually consistent. This exclusion is meant to prevent a situation in which the UBO lives or has his main residence in country A, but claims (wrongly) that he is liable to tax in country B.

<sup>4</sup> Examples include (periodic) requests for utility bills, a review of (social) media and other documents which suggest residency, in combination with the absence of contraindications in this respect.

possibility of mitigating the tax integrity risk does not alter the fact that other integrity risks may occur. Such an arrangement therefore requires the trust office to be alert at all times. The relationship with existing clients who use the arrangements listed below will have to be terminated, unless: 1) the risk of tax evasion can be mitigated in full; or 2) the client is willing to adjust the structure or transaction and can guarantee full risk mitigation during this adjustment. The trust office will have to ascertain whether the UBO has declared his or her interest in the structure in the country where he or she is a resident for tax purposes. There are several possible methods to do so. A statement from the UBO him/herself, without corroborating evidence from a reliable independent source, will not suffice.

**1. Arrangement: Closed limited partnership structures that are not transparent due to the concealment of the legal or de facto ownership:**

A closed limited partnership is an alliance in which under Dutch law the partners are liable to pay tax but the closed limited partnership itself is not. If the partners do not reside in the Netherlands, and do not have a permanent organisation in the Netherlands, the Netherlands is unable to levy tax on the income the closed limited partnership receives (often referred to as: separated private assets). Such closed limited partnerships can be used by affluent foreign individuals from jurisdictions offering possibilities for postponing taxation until the moment of distribution. Until then, these structures are not transparent, and it is virtually impossible for the authorities to link the assets and the beneficial owner. This type of closed limited partnership structures can only be tolerated if there is full and constant risk mitigation (see section C of this annex), but only if the necessity of the use of this arrangement has been sufficiently demonstrated.

**2. Arrangement: Nominee shareholders/concealment arrangements**

Nominee shareholders are service providers (legal entities or natural persons) who hold registered shares in a professional or business capacity on the instructions of a client<sup>5</sup>. They are the legal owner; however, the beneficial ownership or profit is the client's. The members of HQ are aware that the use of a nominee shareholder may involve an increased integrity risk. This arrangement expressly creates the circumstances in which a risk of tax evasion arises. The wish to pursue privacy or conceal assets from third parties may also cause a lack of tax transparency. Tax authorities are unable simply to recognise a nominee shareholder and subsequently ascertain on whose instructions they are acting. Nominee shareholders in the formal control structure can only be accepted or tolerated (in respect of existing clients) if the lack of tax transparency is fully and demonstrably removed. As an additional condition, the trust office must first initiate the reform procedure before accepting or re-accepting the client. The reform procedure can only be waived if there are good and objectifiable reasons for the use of a nominee shareholder and there is full tax transparency. A nominee shareholder can only be tolerated if there is full and constant risk mitigation (see section C of this annex), but only if the necessity of the use of this arrangement has been sufficiently demonstrated.

**3. Arrangement: UBO is a resident for tax purposes in a jurisdiction that does not participate in FACTA and/or CRS**

The CRS is an international agreement to exchange information on bank accounts for the purpose of counteracting tax evasion and undeclared savings. The *Foreign*

<sup>5</sup> This definition does not comprise regular "custodian transactions" in which shares are registered in the name of a bank in its capacity of custodian.

*Account Tax Compliance Act* (FATCA) is the US act combating tax evasion by US taxpayers worldwide. Through their tax authorities, countries participating in CRS and/or FATCA automatically exchange details about account holders that are residents in another country for tax purposes. If the ultimate beneficial owner is based in a jurisdiction that does not participate in FATCA and/or CRS, the transparency towards government authorities is seriously restricted. The members of HQ are of the opinion that such a restriction creates an important enabling condition for tax evasion and they do not want to be involved in this, unless certainty can be obtained that all the jurisdictions involved are individually aware of the structure, which means that there is full tax transparency. The number of countries conforming to FATCA and/or CRS is rising and the number of exchange relations is steadily growing. The list of countries that participate can be found via the websites of the [OECD](http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/)<sup>i</sup> and [FATCA](https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx)<sup>ii</sup>.

### **C. Mandatory mitigation for the cases listed under B.**

#### **1. Requesting a *Personal Income Tax* statement from or on behalf of the UBO in combination with corroborating evidence from an independent and reliable source**

Structures in which a natural person is the economic stakeholder but in which there is a theoretical possibility of successfully concealing such interest to the tax authorities, may still be acceptable if this tax integrity risk is kept under control. A method of doing so is having the UBO (or his adviser) make a statement that the (indirect) interest in the object company is declared to the authorities in conformity with the applicable rules in the jurisdiction where the UBO is liable to pay tax. Such a statement has value only if its correctness can be verified on the basis of objective and reliable documentary evidence. This may for instance be a local version of the income tax return that has already been submitted, proving that the material interest in the client or object company has been declared.

#### **2. Requesting a statement from an authorised person in combination with corroborating evidence from an independent and reliable source**

In variation on the above, the statement can also be given by an authorised representative of the UBO. Naturally, this authorised representative must have a complete picture of the UBO's tax position and also be involved in the UBO's tax accounts. Only if the latter is the case, will the statement have material value. Examples of such persons are lawyers, tax advisers, or where applicable, the managing director of an exclusively *family office*.

<sup>i</sup> <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/>

<sup>ii</sup> <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>.



## Annex 2: Aggressive tax planning

### Indicators and contra-indicators

*The taxes which companies pay are a contribution to society and subject them to the letter, objective and purport of tax legislation.*

Aggressive tax planning is not an integrity risk that can be adequately mitigated. A structure or transaction is either aggressive or it is not. The members of HQ do not have a risk appetite for structures or transactions that are covered by our common definition of aggressive tax planning. This overall definition can be found in the main document of this guideline. However, there is no generally applicable definition of aggressive tax planning. A best-efforts obligation applies here, and the HQ members have therefore formulated their own definition of aggressive tax planning. The definition is supported by and elaborated through a system of indicators. In this annex you will find a number of concrete objective indicators of circumstances surrounding structures and transactions indicating aggressive tax planning. Whether these structures and transactions actually are cases of aggressive tax planning depends on the specific circumstances of the case. This assessment is made with the aid of contra-indicators which, provided that they are present to a sufficient extent and are relevant to the specific indicator, may reasonably refute the assumption of aggressive tax planning. This will be the case if at least three possible contra-indicators are found, whereby particular indicators require a specific contra-indicator. For each indicator, it is stated which contra-indicators could apply and which contra-indicators must at least be present. Even if there are sufficient contra-indicators, it is still too early for a final conclusion that there is no question of aggressive tax planning. A test on the basis of subjective indicators will have to be carried out as well. The subjective indicators mainly serve to prevent that the methodology (and a check-the-box mentality) is relied on too much. *Common sense* should prevail and be decisive in any situation.

### Current developments

This guideline will be reviewed regularly (at least once a year) and be brought in line with the legislation in force at that time. If legislation mitigating the aggressive element of the structure should be introduced in the meantime, structures which meet one of the objective indicators may still be deemed acceptable if fewer than three of the six contraindications apply, but the indicator concerned is mitigated by the legislation. Likewise, if legislation is to be introduced within the foreseeable future<sup>1</sup>, this may serve as a mitigating factor and make the structure acceptable after all.

### DAC6

On 25 June 2018, the directive on mandatory automatic exchange of information in relation to reportable cross-border arrangements ("DAC6" for short) entered into force. The link to the directive can be found [here](#)<sup>2</sup>. On 1 January 2020, the directive was implemented in the Dutch legislation which now largely constitutes the basis for the indicators.

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<sup>1</sup> Within two years

<sup>2</sup> <https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A32018L0822>



## A. The objective indicators



The objective indicators can be found below, including a short description.

### 1. DAC6 hallmarks

These hallmarks relate to arrangements:

1. which involve a loss-making company whose main activity was discontinued and whose losses are used to reduce the tax liability, among other things by transferring those losses to another jurisdiction or by accelerating the use of those losses (hallmark B1);
2. which have the effect, among other things, of income being converted into assets, gifts or other categories of revenue which are taxed at a lower level or are exempt from tax (hallmark B2);
3. which involve circular transactions resulting in the round-tripping of funds, more specifically by using interposed entities without any other primary commercial function (hallmark B3);
4. which involve a deductible cross-border payment between a company and a related company whereby:
  - a. the recipient is not resident for tax purposes in any tax jurisdiction (hallmark C1a);
  - b. i. the recipient is resident in a country which imposes little to no tax (0-1%) (hallmark C1bi); or  
ii. the recipient is resident in a country included in the EU blacklist<sup>3</sup> (hallmark C1bi);
  - c. the payment is fully exempt (hallmark C1c);
  - d. the payment is subject to a preferential tax regime (hallmark C1d);
5. whereby the same assets are depreciated in more than one jurisdiction (hallmark C2);
6. whereby relief for double taxation is claimed in respect of the same assets in more than one jurisdiction (hallmark C3);
7. which involve transfers of assets whereby there is a material difference in the manner in which the jurisdictions concerned treat the consideration payable (hallmark C4);
8. which ensure that no information needs to be exchanged about a financial account and the associated persons to be disclosed, whereas this would have been required had this arrangement not been used (hallmark D1);
9. whereby the beneficial owners are made unidentifiable. The legal or beneficial ownership chain is non-transparent due to the use of persons, legal arrangements or structures (hallmark D2) which:
  - a. do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises;
  - b. are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and
  - c. whereby the beneficial owners have been made unidentifiable;
10. which involve the use of unilateral safe harbour rules, whereby the country concerned has adopted a standard Transfer Pricing rule (hallmark E1);
11. which involve a transfer of hard-to-value intangibles, such as trademark rights (hallmark E2);

<sup>3</sup> <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>

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12. which involve a transfer of assets, functions and risks, if the transferor's projected annual EBIT during the three-year period after the transfer decreases by more than 50% (hallmark E3).

**Possible contra-indicators:** B1, B2, B3, B4, B5, B6

**Extra attention:** If the Main Benefit Test is not met in respect of hallmarks B1-B3, C1bi, C1c and C1d, this hallmark will not be regarded as an objective indicator. Where the remaining hallmarks are concerned (with the exception of D1 and D2), the rule is that this hallmark will not be regarded as an objective indicator either if no demonstrable tax gain is obtained.

## 2. Clients from the world of sports and entertainment

These clients often make use of conduit companies. Even if the client uses different structures, extra vigilance should be exercised. Such structures may involve risks to the tax integrity and risks of money laundering or corruption.

**Possible contra-indicators:** B1, B2, B3, B4, B5, B6

**Extra attention called for:** possible concurrence of punishable or otherwise improper acts

## 3. Evading transfer tax in real estate transactions

The utilisation of a Dutch legal entity or company for holding a specific interest in real estate or other property subject to registration in such a way that, in the country in which the real estate is situated, the holder of the real estate is exempted due to the lack of a qualified interest. Such companies are also called *real estate transfer tax blockers* or *RETT blockers*.

**Possible contra-indicators:** B1 is required in any case, with B2, B4, B5 and B6 being supplementary

## 4. Cross-border transfer of registered office or de facto management – information exchange

Transferring the registered office and/or de facto management may entail a risk of tax evasion if this transfer is made to a jurisdiction where there is no Automatic Exchange of Information (AEOI).

**Possible contra-indicators:** B1, B2, B3, B4, B5, B6



# B. Contraindications

Below are six possible contraindications relating to the objective indicators of aggressive tax planning. If one of these indicators is present, further investigation is called for. In principle, there will be no aggressive tax planning if at least three of the eight contraindications are found.

## 1. Tax advice in conformity with the highest standards

In most cases, tax advice is the construction drawing on which the structure is based. The manner in which aggressive tax planning is given content to, is subjective and also differs depending on time and location. It is therefore advisable that tax advice is updated in good time, with the ethical nature of the structure being assessed as well as the technical aspects. Tax advice issued by members of the Dutch Association of Tax Advisers (NOB), the Dutch Register of Tax Advisers (RB) or members of associations in foreign countries that are equivalent to these organisations, will be regarded as a contraindication. In addition, the tax advice:

- must be up to date;
- may not be older than three years;
- must be confirmed as accurate every other year in accordance with the tax legislation in force at that time; and

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- must take the form of, for example: a memorandum, tax structuring paper, strawman paper or email advice issued by or copied to a tax partner which reflects the latter's agreement.

## 2. Entities from jurisdictions with inadequate AEOI, AML/CTF or tax-haven status

If a structure or a transaction involves only entities based in countries that are not listed as non-cooperative jurisdictions and do not have tax-haven status, this will be regarded as a contra-indicator of aggressive tax planning.

- **Non-cooperative jurisdictions:** Countries which the Council of the European Union has placed on the list of non-cooperative jurisdictions are countries that encourage unfair tax practices. [This list](#)<sup>4</sup> is updated regularly.
- **Tax-haven status:** The Dutch government uses a list of low-tax jurisdictions. These are countries that apply a statutory tax rate of 9% or less. [This list](#)<sup>5</sup> is updated once a year.

## 3. AEOI

If the countries involved in a structure exchange tax information between them, this will be a contra-indication of aggressive tax planning. The following AEOIs are considered relevant:

- **CRS:** financial institutions are obliged to provide their national tax authorities with details of the accounts of individuals and organisations that are liable to pay tax abroad. These details exchanged and foreign tax authorities verify the details themselves.  
<http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/>
- **FATCA**<sup>6</sup>Based on this US law and arrangements made between the US and other government authorities, it is established whether clients fall within the scope of these regulations. These regulations require clients to provide their service provider with tax information. The service provider provides these details to the relevant national tax authority who then exchanges them with the US Internal Revenue Service (IRS).
- **Country-by-Country Reporting (CbCR):** Multinational companies with turnover upwards of €750 million are obliged to provide information to the tax authority of one of the countries involved. On this occasion, details must be submitted for each country in which the multinational company operates. This involves details such as the turnover of third parties and of group companies, the number of employees and the amount of tax paid.

## 4. Arm's length principle and ATAD II documentation requirement

The *arm's length* principle is internationally accepted and laid down in OECD guidelines. The principle was transposed in the Netherlands in Section 8b of the Dutch Corporation Tax Act 1969. Transactions within a group, between tax-related entities, should be adjusted according to the conditions and pricing that would apply if independent parties had concluded the agreement under similar circumstances. This can be demonstrated with the aid of a master file and a local file. This requirement applies to group entities of a multinational company that has realised at least €50 million in consolidated group revenues. These two files count as substantiation of the transfer prices charged and must be part of the local accounting records. The Dutch Tax and Customs Administration may request them. The *master file* describes an overview of the transfer pricing policy of the entire company. The *local file* describes the intra-group transactions of the local branch.

<sup>4</sup> <https://www.consilium.europa.eu/nl/policies/eu-list-of-non-cooperative-jurisdictions/>

<sup>5</sup> <https://wetten.overheid.nl/BWBR0041785/2021-01-01> (Section 2a)

<sup>6</sup> <https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act>

In other cases, the substantiation of the arm's length nature of the transfer prices must be shown in the tax advice.

In addition to the documentation requirement under the arm's length principle, the files on international structures involving intra-group transactions must also include documentation substantiating compliance with the ATAD II rules. This file must explain whether intra-group payments are made directly or indirectly to hybrid entities or via hybrid instruments, resulting in double deduction or in a deduction that is not subject to taxation.

The following are examples of documentation substantiating the applicability or non-applicability of this legislation:

- Overview of the international tax structure;
- Copies of foreign tax returns and assessments;
- Legal or tax opinion relating to the financial instrument or entity.

### **5. Substantial presence in the Netherlands**

An object company that has a demonstrable and substantial presence in the Netherlands and does not merely serve to allow money to "pass through" or serve as a "letter box", is a contraindication of aggressive tax planning. Substantial presence can, among other things, be demonstrated if an APA/ATR can be applied for: such applications are only taken into consideration by the Dutch Tax and Customs Administration if the group of companies can demonstrate in advance that it operates within a field with sufficient "nexus" (connection) with the Netherlands. The nexus may consist of substantial presence or the existence of a serious plan to create nexus. Substantial presence for instance exists if the requirements applicable to service providing entities have been met. Another possibility to demonstrate substantial presence is "passing" the so-called *principal purpose test* (PPT). Treaty benefits from bilateral tax treaties may for instance be refused if it can be concluded in reason that obtaining such a benefit is one of the structure's main purposes. The treaty benefit is indeed granted if it is in concurrence with the purpose and scope of the treaty provision in question.

### **6. Obtaining a tax ruling**

A tax ruling is a tax arrangement concluded by a competent tax authority (a tax office) which provides advance certainty about the application of tax laws and regulations. A tax ruling is issued if the structure has been made transparent to the government authorities and reflects the authorities' position on a certain degree of tax planning. The authorities' agreement may be regarded as a signal that the tax planning is in accordance with the objective and purport of the law. Obviously, the tax ruling must (at least) relate to the supposed aggressive element.

## **c. Sound judgement analysis**

Whether tax planning can be considered regular or aggressive, cannot be determined exclusively on the basis of the presence or absence of the above-mentioned indicators and contra-indicators. Despite the absence of objective indicators, a structure may in some cases nevertheless meet the definition of aggressive tax planning. To prevent ticking off lists, it is important that a trust office makes a final analysis before it proceeds to acceptance. It should ascertain whether the tax treaties and facilities are used for the purposes for which they were created.

In performing the sound judgement analysis, the trust office can consider factors such as the following. These factors must be regarded as examples and are not exhaustive.

### **1. Complex structures with many transactions**

This indication will apply if a structure is used that involves multiple layers, jurisdictions or legal concepts without there being an evident commercial, historical or legal reason for doing so.

### **2. No or low taxable amount of profit**

The core question is what the effective tax burden of the entire structure is and whether the payment, considering the size of the money flow and economic activities, is justifiable. A low effective tax burden of the entire structure is an important indication for aggressive tax planning, even if the above-mentioned indicators are not found. The effective tax payment in the jurisdiction where the operational activities mainly take place could for instance be taken a particular look at. This concerns corporation tax and dividend tax in particular. The legal entity running the company will undoubtedly pay local types of taxes on goods, capital and labour. Particularly relevant is if there is a profit from business activities, can the jurisdiction in which this profit is made, realise an actual levy on this profit?

### **3. Historical analysis**

Investigating information from public sources, including a so-called *bad press check*, is part of the standard actions to be carried out within the context of a client due diligence. A client previously being associated with aggressive tax planning, is a reason to look at the structure under consideration with an extra critical eye.

### **4. A substantial amount of turnover is generated by related parties**

A large amount of turnover generated by related parties may be an indication of aggressive tax planning, even if the above-mentioned indicators do not occur. In this context, the trust office must examine in particular whether these money flows are artificially diverted for the purpose of obtaining a tax advantage. If the money flows are disproportionate to the activities carried out in the Netherlands, this may be an indicator of aggressive tax planning.



## Annex 3: Structures that are not tax-driven

**The members of HQ are of the opinion that a number of structures that frequently occur within the international course of business are not tax-driven by definition and as such involve a low tax integrity risk. Naturally, such structures are subject to the requirements stated in annexes 1 and 2 of this guideline.**

### **These structures concern:**

#### **1. Collective and alternative investment funds**

This type of structures is assigned the so-called *tax neutral* status. The basic assumption is that the tax position of an investor should not change as a result of its participation in a collective or alternative investment. The Netherlands endorses this principle. The investor pays its tax on the yield received in conformity with the conditions applicable in its jurisdiction. Funds such as these are predominantly established in a standardised manner under the laws of a limited number of jurisdictions. A few of those jurisdictions, such as the Cayman Islands, are included in lists of "tax havens". Being listed as such is connected to the fact that (for instance on the Cayman Islands) there is no levy on incoming dividends. However, this is unrelated to the circumstance that the Cayman Islands are a standard fund jurisdiction. The latter is related to a juridical and financial infrastructure aimed at accommodating this type of funds. Considering the neutral status of investment funds, the specific tax climate on the Cayman Islands is in fact irrelevant. Important is that participants or investors at some point pay their tax on the yield received. To ensure this, it is of importance to find out whether the investments through a fund are known to the tax authorities. As shown in the OECD information, the latter is in fact the case. The Cayman Islands fully participate in programmes such as FATCA and CRS and actively exchange information with over 75 jurisdictions including the Netherlands. Other typical jurisdictions for investment funds are for instance Ireland and Luxembourg. What applies to the Cayman Islands, to a large extent also applies to these two countries.

#### **2. Structured finance/securitisation**

Securitisation is a well-known and frequently used technique developed for making assets negotiable in the form of securities. Securities thus acquire the characteristics of an investment product. The central element of a securitisation transaction is that the repayment of the issuance only or predominantly takes place through the cash flow connected to the collateral and does not depend on the financial strength of the initiator. Securitisation helps the initiator to have assets in the capital market refinanced by a special purpose vehicle (SPV), which issues securities to finance the acquisition of collateral. The primary purpose of an SPV is to supervise the securitisation of the assets and to make sure that the SPV is set up as a separate entity, independent from the initiator, so should the initiator go into liquidation, the SPV will not be dragged along into it as well. This is among other things motivated by decrease in balance sheet total, creating financial scope, improving liquidity and risk reduction. As a rule, trust offices provide their services to the SPV, which is set up in the form of a legal entity that should be sufficiently remote from the initiator. Consequently, trust offices provide a manager service to the SPV, and also keep the accounts. The success of the securitisation is strongly related to tax neutrality. Rating agencies involved in the rating of the securities demand as much security as possible and taking tax risks is therefore highly undesirable.

### 3. Standard holdings

The Netherlands has built up an extensive network of bilateral treaties. Those treaties provide protection to investments and/or prevent double levying of taxes. It may be advisable to include a Dutch holding company in a group structure in the absence of a bilateral tax treaty between two countries within the structure. The situation may be such that tax is levied in both countries on the same basis. Including the Dutch holding company may prevent this. HQ considers such structures regular tax planning aimed at the prevention of a double taxation and explicitly not at preventing or minimising a single taxation.