

# ***Emergency measures Dutch fiscal unity regime – What is the impact on your business?***

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## **In Brief**

On 6 June 2018, the Dutch government published the legislative proposal regarding the Dutch corporate income tax fiscal unity regime by introducing an equal treatment of domestic and cross-border EU situations for certain tax provisions. The proposal is a response to case law of the Court of Justice of the European Union (CJEU). The proposed measures will enter into force retroactively as per 25 October 2017.

## ***Legislative proposal***

The legislative proposal results in disregarding the fiscal unity in certain situations, listed below.

### ***Interest on related party debts***

Article 10a, paragraph 1 of the Corporate Income Tax Act (CITA) prohibits the deduction of interest on related party debts, insofar these debts relate to certain tainted transactions.

The proposal states that article 10a CITA must be applied as if there was no fiscal unity. This means that concerned transactions that were previously not visible because they took place within the fiscal unity, could now trigger the application of article 10a CITA. This also applies to transactions in the past. Loans within the fiscal unity will also become visible if they fall under the scope of article 10a CITA.

However, interest on a debt that falls within the scope of article 10a CITA will nonetheless remain deductible if 'counter evidence' is provided successfully, as referred to in article 10a, paragraph 3 CITA. This applies (a) in case of (predominant) business considerations with regard to both the debt and the related transaction, and/or (b) sufficient taxation at the level of the creditor with regard to the interest income.

## ***Excessive participation interest***

Article 13l CITA prohibits the deduction of interest on debts, insofar these debts are deemed to be related to the excessive financing of participations eligible for the participation exemption of article 13 CITA. In case of a Dutch fiscal unity, the proposal states that article 13l CITA must be applied to each company of this fiscal unity, as if there was no fiscal unity. This also applies to the EUR 750,000 threshold before the limitation applies.

## ***Portfolio investment participations***

One of the proposed measures is the application of article 13, paragraph 9-15 CITA to each company of the fiscal unity, as if there was no fiscal unity.

For example, the participation exemption only applies to a portfolio investment if it is a so-called 'qualifying portfolio participation' (article 13, paragraphs 9-15 CITA). A participation is considered a qualifying portfolio participation if (a) it is subject to tax at a level which is considered sufficient according to Dutch corporate income tax standards, or (b) less than half of the assets of the company in which an interest is held, consist of so-called low-taxed free portfolio investments.

This means that the assessment that a company is a qualifying portfolio participation must be made for every subsidiary within the fiscal unity. It is expected such subsidiary is subject to a sufficient level of taxation to qualify for the participation exemption.

In addition to the earlier announced measures, it is proposed to include article 13a CITA in the 'emergency measures'. Article 13a CITA requires that a non-qualifying participation has to be valued at fair market value under certain conditions. The proposal states that this also applies to non-qualifying participations within the fiscal unity. Since the amendment to this provision was not announced on 25 October 2017, this amendment will not have retrospective effect but will enter into force on 1 January 2019.

### ***Anti-mismatch rule in participation exemption regime***

Article 13, paragraph 17 CITA denies the participation exemption with respect to a benefit from a participation where the corresponding payment/compensation is tax deductible at the level of the subsidiary granting the benefit. This provision, which is included in the CITA as per 2016, follows from an amendment to the EU Parent-Subsidiary Directive in order to prevent hybrid mismatches. The emergency measures state that article 13, paragraph 17 CITA applies to each company of the fiscal unity, as if there was no fiscal unity.

### ***Utilisation of losses***

If the ownership in a company with available tax losses changes significantly (i.e. 30% or more), all losses incurred up to this change in ownership may under conditions be no longer offsettable (article 20a CITA). Under the legislative proposal these rules need to be assessed at the level of the individual companies.

Article 20, paragraph 4-6 CITA contains a limitation on the loss utilisation of holding and financing companies. It might be possible that this provision is not in accordance with EU law. However, this provision is currently not amended with this legislative proposal.

### ***Dividend withholding tax***

Article 11, paragraph 4 of the Dividend Withholding Tax Act (DwTA) contains specific provisions for cases where a company receives (foreign) dividend income, which is immediately paid out as a dividend to the shareholder(s) of the company receiving/paying out the dividends.

In case of a Dutch fiscal unity, the specific provision of article 11, paragraph 4 DwTA applies. This provision will be abolished under the legislative proposal.

### ***Entry into force***

The legislative proposal will be discussed in the Dutch parliament in the upcoming months. The new rules will only be final if the Lower House and the Senate have both approved the bills.

If adopted, the amendments will apply retroactively as per 25 October 2017, 11.00 a.m. (the moment the provisional amendments were announced), unless stated otherwise.

### ***A new tax group system***

The Dutch Ministry of Finance announced earlier that the Dutch fiscal unity regime will eventually be replaced by a tax grouping system that is more sustainable towards the future. However, this new system might not feature a tax consolidation. The replacement of the fiscal unity regime is expected to take several years.

### ***Our view***

This legislative proposal could have a significant impact on your business: Several Dutch corporate income tax rules will become applicable to your fiscal unity as if there was no fiscal unity.

It cannot be ruled out that other provisions in combination with the fiscal unity are not in accordance with EU law. Thus, it may be important to assess whether these other provisions are relevant for your company.

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