

Ministry of Finance of the Netherlands
Directorate-General for Tax Affairs

Online submission

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Response to Public Consultation – Additional Measures against Dividend Stripping

The Association of Financial Markets in Europe ('AFME') and the International Swaps and Derivatives Association ('ISDA') welcome the opportunity to respond to the Dutch Ministry of Finance's "Consultation Document - Additional Measures Against Dividend Stripping" (the "**Consultation Document**"). AFME and ISDA members engage with Netherlands equities in various roles, including as investors, traders, brokers, and custodians. They may also borrow, lend, or use equities as collateral in derivatives, repo, and stock loan transactions.

AFME and ISDA, in conjunction with the International Securities Lending Association (ISLA), recently responded to the European Commission's Tax Omnibus Call for Evidence with respect to beneficial ownership, expressing the concern of our members about the many different approaches to beneficial ownership applied in the context of withholding tax on dividends across EU Member States and noting that these multiple approaches gave rise to a fragmented tax landscape across the EU, thus creating uncertainty and burdens for capital markets participants and adversely impacting the competitiveness of the EU capital markets. In line with that approach, we would recommend that none of the additional measures numbered 1, 2 and 4 in the Consultation Document are adopted given they exacerbate these issues. In addition, our members understand that the Netherlands already has extensive anti-dividend stripping rules which have been further strengthened in 2024 (including the burden-of-proof shift), as well as other tools to tackle tax abusive transactions such as a general anti-abuse rule and "principal purpose tests" in double tax treaties. It would be helpful for the Ministry of Finance to explain the remaining gap these proposed additional measures are intended to address, and how they interact with the post-2024 rules.

Furthermore, we would submit that the proposed additional measures rules should only target artificial and contrived transactions rather the multiple standard transactions in listed Dutch shares that take place daily in the capital markets, including cash equities trading, securities lending transactions, derivatives, repos, transferring shares as collateral and so on. There are many valid commercial reasons why, for example, a banking group may have an entity in its group facing a client and a different entity in its group holding the listed Dutch shares which hedge the position, why Dutch listed shares may be held for a period less than 45 days with the investor still exposed to the risk and rewards of share ownership, and why many genuine trading and investment strategies involve hedging with a long equity position in part or in whole. We believe the proposed additional measures as drafted would capture many standard commercial transactions which are not tax motivated and thus are likely to create unnecessary uncertainty. If investors do not have clarity from the start of the transaction about the net dividend outcome they can expect after tax under current law, they may not be able to sensibly quote or agree prices with clients and counterparties. That uncertainty may, in turn, impair market liquidity and weaken the efficiency and transparency of the Dutch equity market.

General Consultation Questions

Question 1: How do you weigh measures 1 through 4 in this consultation document (factors that may be relevant include, inter alia, effectiveness, enforceability, and the relationship with EU and international law)?

Question 2: What consequences do you expect the consulted measures to have for yourself, your organisation, or your sector?

Question 3: Which consulted measure or measures have your preference, and why?

In relation to the three questions above and focusing on the “net return approach, “the “German-Austrian measure” and the “spreading of dividend stripping elements within a group” (i.e. proposed additional measures 1, 2 and 4) we would make the following general points:

- We welcome the aim of the “regular business activities” exception to protect bona fide banking and financial operations, but we believe that as currently drafted the proposed exemption is unduly limited and risks excluding legitimate market-making (as defined by regulators) and risk-management activity. It is important that this exception explicitly covers all genuine trading and hedging conducted in the ordinary course of a bank’s or financial institution’s business, including acquiring shares to hedge OTC derivatives and other client-driven structured transactions, even where (for example) such positions are held to maturity of a derivative (where it is a hedge) rather than immediately resold. This is because a bank’s/financial institution’s routine equity and equity-derivative hedging – carried out to facilitate client transactions, manage risk, and maintain market liquidity – is commercially motivated and a core part of its everyday operations, not a vehicle for dividend arbitrage. Where a financial intermediary is properly authorised to act for clients or on its own behalf - under the MiFID Directive/MiFIR Regulation (or an equivalent framework in a non-EU jurisdiction) - or where an investment fund or pension fund is duly registered with its home regulator, transactions carried out in the normal course of business should, by themselves, qualify for the regular business exemption. That should be the case regardless of the length of time the securities are held. In particular, the proposed notion of “immediate resale” appears difficult to reconcile with any meaningful holding period. Accordingly, we believe the definition of “regular business activities” should be broadened (and clarified via regulation or guidance) to encompass these typical activities, so that none of the proposed additional measures 1, 2 or 4 inadvertently penalises standard trading practices that are recognised as market-making by regulators and undertaken for non-tax reasons.
- It is not clear to us whether the regular business activities exemption is proposed for investors entitled to benefit from double taxation treaties as such investors are exempt from Dutch taxation and do not carry out activities within the meaning of the exception for regular business activities. If this is correct, the assumption that the investors are exempt from tax is incorrect as the Netherlands has entered into a number of double tax treaties which reduce the rate of withholding tax from 15% to 10%, and many investors entitled to benefit under such double tax treaties do so as part of their “regular business activities.”
- Additionally, we encourage reconsideration of the proposed ‘surplus listed shares’ test (110% of a 364-day average), as its complexity and rigidity may yield disincentives and false positives – for example, treating normal volatility-driven or client-demand-driven hedging adjustments as suspect – thus disproportionately burdening compliance and risk management functions while not clearly targeting deliberate tax-driven behaviours. Our view is that a significant amount of client demand for financial products is driven by sentiment around earnings and factors leading to increased activity in the period leading up to record date are largely not dividend arbitrage related. Accordingly we would submit that such a test is

inappropriate to determine if a bank or financial institution is receiving income as part of its regular business activities, We would welcome explanations on why a factor of 1.1 has been deemed appropriate and would ask the Ministry of Finance to consider evidence that would suggest such tests are inappropriate (e.g. increases in transaction volumes in dividend markets over record date where there is no withholding tax (e.g. the UK) where volumes would not be impacted by dividend arbitrage).

- It is not entirely clear to us whether the rules are intended to catch both Dutch and non-Dutch resident investors, but on the assumption that this is the case, we would stress the importance of aligning the rules with the Netherlands' obligations under bilateral tax treaties and not imposing additional requirements, thus essentially overriding treaty terms unilaterally (for example, the net interest return measure would seem to prevent WHT relief to which an investor is entitled under a double tax treaty). This approach will ensure certainty for cross-border investors and maintain the Netherlands' reputation for treaty compliance, by avoiding any unilateral denial of treaty benefits that could undermine confidence in tax treaties or deviate from their intended purpose. In this respect we would note that for portfolio dividends (i.e. <10% shareholding) whilst Germany has introduced a requirement for a minimum holding period of 45 days and a continuous risk exposure of at least 70%, the rules only apply to German resident taxpayers and non-resident taxpayers which are entitled to claim less than a 15% rate of withholding tax under a double tax treaty (i.e. the rules do not apply to non-German resident taxpayers who under a double tax treaty suffer a withholding tax of at least 15%). Accordingly, we would propose a similar approach be adopted in the Netherlands for portfolio dividends, so that where the recipient of a dividend claims relief under a relevant double tax treaty and the applicable treaty rate is at least 10%, none of these measures apply.
- We would note that if the rules are intended to catch non-Dutch investors., the proposed additional measures could place an unduly heavy burden on non-Dutch investors who hold listed Dutch shares, and that burden is likely to be uneven. In practice, the effect would vary based on an investor's country of residence and on whether a double tax treaty with the Netherlands exists—and, if so, the specific terms of that treaty. We find it surprising that the Netherlands would appear to treat international investors in its capital markets differently on this basis, and we question whether this outcome is truly what the measures are intended to achieve. To expand on this, these proposals may create an anomaly: they could end up disadvantaging investors resident in treaty jurisdictions that currently enjoy a "better" reduced rate (i.e., below 15%), while leaving unaffected investors in jurisdictions where the treaty does not bring the Dutch withholding tax below the standard 15% rate. Where the treaty rate remains at 15%, investors may still be able to neutralize the Dutch withholding tax by claiming a corresponding foreign tax credit in their country of residence, which would produce an uneven outcome across investor groups. By contrast, investors who would ordinarily qualify for a reduced treaty rate may be unable to access that rate under the proposed rules, and - if Dutch anti-avoidance provisions are applied - may also encounter difficulties obtaining a home-country tax credit to offset the full 15% withholding tax. Accordingly, none of the proposed additional measures 1, 2, or 4 provides the level of certainty of tax treatment or consistency in the application of the law across similarly situated non-Dutch taxpayers - both of which are fundamental principles of a well-developed legal and tax system.
- We would welcome consideration of other safe harbours. For example, we would note that the German rules contain an exception where shares are held for more than one year recognising that such holding period is not consistent with dividend arbitrage.

- It is important that any measures that are introduced to prevent dividend stripping, are designed so that they are practical and manageable for all parties i.e. the end investor/beneficial owner, intermediaries in the custody chain, the withholding agent, and the tax authorities. Currently we believe the proposals rely on concepts that will be difficult to apply consistently at scale without clear implementing guidance (e.g., “real changes in value,” the scope of “costs relating to income” and “set of transactions,” “how to evidence the 70% downside exposure test over a 46-day period, and how group/connected-party attribution works in practice). If these measures are pursued, we would strongly encourage clear implementing guidance, objective tests/safe harbours, and practical documentation standards to avoid inconsistent outcomes.
- Whilst we would prefer neither of proposals 1 and 2 to be adopted, of the two we think the 45-day test rule/70% hedging is less problematic as this is already applied in other EU/EEA markets and so reduces fragmentation (that said, in our members experience, reclaim review cycles in Germany and Austria are often lengthy and outcomes can be uncertain, creating operational backlog and market friction and there can be particular complexity for a tax authority trying to determine if a particular market risk was borne). As regards this test, we would welcome a rule that temporary transfers of title of securities, such as securities lending transactions and sale and repurchase transactions (repos), do not constitute a disposal for the purposes of any minimum period on the basis that the investor retains economic exposure to the securities. Otherwise, a 45-day holding period requirement prevents investors from utilising their securities portfolios efficiently and effectively to generate additional income. Transfers of legal title to listed shares as part of collateral arrangements are also, in substance, temporary title transfers - comparable to securities lending or repo transactions - and listed Dutch shares are commonly used as eligible collateral between market counterparties to manage and reduce credit exposure. A holding-period “day count” rule could, however, deter or prevent their use for collateral purposes if the transfer interrupts the ownership period, thereby reducing the usefulness (and ultimately the value) of listed Dutch shares. To avoid that outcome, it should be made explicit that a title transfer effected solely for collateral does not reset or suspend the day count. Our members see real difficulties with the net return approach as financial institutions typically hedge derivatives by continuously buying and selling equities to hedge the net derivative position at the end of day or otherwise (i.e. the hedging is dynamic and in many instances the equities held will only hedge a proportion of the net exposure and other derivatives or stock lending transactions may be entered into as part of the overall hedging strategy). It will be difficult given this model to determine what costs and results relate to a dividend on a particular equity, and any attribution of costs will acquire a high degree of subjectivity and modelling and will be operationally impractical. We believe that this uncertainty could lead to inconsistent application across different audits and taxpayers and the potential for litigation.
- Additional measure 4 aggregates transactions across connected parties and can deny reclaims even if there is no anti-avoidance motive as it is an objective test. Moreover, unlike the additional measures 1 and 2 there is no exemption for “regular business activities”. We believe this measure, if implemented in its current form, could result in denying any entity within a banking or financial group a reclaim to which it is otherwise entitled under a relevant double tax treaty and could lead to a bank being uncompetitive with other banks. This is because many global banks use a “back-to-back” booking model for equity derivatives. Under this model a client facing entity (Entity A) will typically write a total return swap to a client and hedge its exposure by writing an internal swap with another entity (Entity B) effectively exposing Entity B to the equity’s economic exposure . Entity B is typically an entity which centralizes risk management for the group and so may acquire Dutch shares as a hedge of the net derivative exposure. Under Measure 4’s group-attribution rule, Entity A’s internal swap

and Entity B's share purchase could be viewed collectively as one group-wide series of transactions. So if Entity B is based in a jurisdiction with a less favourable double tax treaty with the Netherlands than the jurisdiction in which Entity A is based, it seems that no entity in the group can claim a refund even though the structure is not motivated by tax but by, for example, client and regulatory requirements. Unlike the proposed additional measures 1 and 2 with measure 4 there is no expressed safe harbour for "regular business activities". Perversely a banking entity which has client facing and risk management in one legal entity may be in a better position than a group in which the functions are split between legal entities given the absence of the regular business exemption in measure 4.

- We would also highlight the interaction of these proposals with derivatives documentation and market-standard contractual frameworks, including the ISDA Master Agreement and the 2002 and 2011 ISDA Equity Definitions.

For example, a broker writes a derivative, such as a contract for difference or a total return swap, with respect to listed securities issued by a Dutch issuer. The counterparty could take a long or short position. If the counterparty takes a long position, then the broker pays amounts equal to any increase in value in the underlying reference asset and amounts in respect of any distributions/income events to the counterparty; the counterparty pays the broker amounts in respect of any decrease in value in the underlying reference asset and financing costs. The broker has a genuine commercial exposure which arises from the derivative which it writes in the ordinary course of its business. As noted above, in most cases the broker will enter into a combination of long and short positions across its derivatives portfolio and hedging its net exposure under those positions requires constant rebalancing, i.e. for liquid shares it may enter into many single stock, basket and index swaps referencing that asset in any given day, resulting in a number of purchases and sales of the underlying securities. As part of this hedging, the broker may also choose (but is not obliged) to purchase the securities which a derivative references. The broker needs to consider all relevant payment flows, including any interest and dividend equivalents, to price its derivatives accurately.

Where Dutch equities are held as hedges to derivatives, changes to the way withholding tax is determined or administered on such hedges can lead to a change in the intended commercial outcomes under widely used standard market documentation for existing transactions which directly or indirectly reference such equities. Consequently, these transactions could be affected where such an event under the contractual terms gives rise to transaction adjustments or even early termination. Uncertainty over how the potential changes under Dutch law should be interpreted and applied in practice mean market participants may not be sure whether and which of these contractual outcomes could apply, resulting in widespread confusion and increased potential for disputes. This same lack of clarity could also negatively impact the pricing and flow of new trades. Consequently, and as noted above, guidance to assist in application of the proposed additional measures is crucial. Not knowing how the transaction will be taxed makes it difficult for taxpayers to enter into commercial transactions, including capital markets transactions such as securities lending and derivatives where securities are acquired as a hedge.

Where a change in law leads to a materially increased cost in performing a party's obligations under a derivative transaction and / or where there is an increased tax cost associated with acquiring, holding, or unwinding such hedging positions, a disruption event under the 2002 and 2011 ISDA Equity Definitions could occur. The occurrence of such a disruption event could have several consequences, including transaction adjustments, pricing implications, and termination of the transaction. Assuming the law is clear (so as not to create ongoing

uncertainty in application), this would primarily impact derivative transactions in place prior to the change in law coming into force.

Where measures restrict access to securities lending or impair liquidity, such disruptions may increase hedging costs, affect pricing, and may constitute a hedging disruption event, loss of stock borrow event, or increased costs of stock borrow event under the ISDA Equity Definitions (depending on the facts), which in turn could result in termination of the derivative transaction.

- We understand that Dutch legislation can, in certain circumstances, extend tax exposure beyond the primary taxpayer and impose a form of secondary liability on other parties involved in a transaction flow, even where the tax obligation properly belongs to a different and unrelated person. By way of context, intermediaries rarely have sight of the full sequence of linked trades. For example, a party transferring shares as part of a hedge may not know whether the recipient will use the listed Dutch shares to hedge a derivative exposure, cover an existing short, post margin (including to a CCP), meet regulatory collateral requirements, or pass the securities onward as part of another risk-management transaction. These are all ordinary, legitimate transactions. It is important to ensure that bona fide market activity does not inadvertently create secondary tax liability for any participant in the chain. Accordingly, we would ask that the Ministry of Finance confirm that no secondary liability would be imposed on unrelated third parties simply because they facilitate those hedging or derivative transaction flows.

- Given the technical nature of the proposed measures (e.g. the German/Austrian measure with a minimum holding period of 45 days and sufficient economic interest as well as the pension fund measure), if any of these proposed additional measures are to be pursued we would welcome (i) an effective date no earlier than 12-18 months post-publication of the final bill, (ii) grandfathering for pre-existing positions and (iii) timely guidance on key definitions and examples. These steps should assist intermediaries in the financial service industry to build and test detection frameworks, conduct client outreach, and update policies and procedures.

Consultation Questions – Measure 1 – Net Return Approach

- **Question 4:** How do you assess the concept of “real changes in value” in the context of this provision, and do you have additional ideas for its interpretation?
- **Question 5:** What do you consider an appropriate level for the materiality threshold, with the aim of excluding bona fide parties and small investment portfolios while ensuring that situations in which there is a risk of dividend stripping fall within the scope of the measure?
- **Question 6:** The intention is that the measure should impede regular exchange trading as little as possible. How do you assess the inclusion of the exception for income from regular business activities, and do you see other possible exceptions that protect regular exchange trading without undermining the effectiveness of the measure?
- **Question 7:** How do you assess the allocation of the burden of proof?
- **Question 8:** How do you assess an alternative whereby a declaration and record-keeping obligation is introduced, meaning that the taxpayer must explicitly declare in the tax return or refund request that they are not affected by the measure and must retain documentation substantiating that declaration?

Question 5: As regards the materiality threshold, we understand that this must be assessed for each dividend distribution separately at the level of the taxpayer. In terms of thresholds, we would recommend alignment with other EU jurisdictions. We would note that Germany and Austria have a threshold of €20,000 and the FASTER Directive has a threshold of €100,000.

Question 6: Please see our response to the General Consultation Questions above.

Question 7 and 8: We agree that the burden of proof rests with the tax authorities, but it is critical that there is clear guidance as to what evidence should be produced by the taxpayer to defend the position.

Consultation Questions – Measure 2 – German/Austrian approach

- **Question 9:** How do you assess the design of the minimum period (45 days)? Do you expect that this design is effective in combating dividend stripping, or do you expect that this could be achieved equally or more effectively with a higher or lower number of days?
- **Question 10:** How do you assess the design of sufficient economic interest (70% economic exposure to a decrease in value of the shares)? Do you expect that this design is effective in combating dividend stripping, or could this be achieved equally or more effectively with a higher or lower percentage?
- **Question 11:** What do you consider an appropriate level for the materiality threshold, with the aim of excluding bona fide parties and small investment portfolios while ensuring that situations in which there is a risk of dividend stripping fall within the scope of the measure?
- **Question 12:** How do you assess the allocation of the burden of proof?
- **Question 13:** How do you assess an alternative whereby a declaration and record-keeping obligation is introduced, meaning that the taxpayer must explicitly declare in the tax return or refund request that they are not affected by the measure and must retain documentation substantiating that declaration?

Please see our response to the General Consultation Questions above.

Consultation Questions – Measure 3 - Measure Targeted at Pension Funds

- **Question 14:** How do you weigh the targeted pension-fund measure in comparison with the more generic measures (Measures 1 and 2)?
- **Question 15:** What do you consider an appropriate level for the materiality threshold, with the aim of excluding bona fide parties and small investment portfolios while ensuring that situations in which there is a risk of dividend stripping fall within the scope of the measure?

Regarding measure 3, targeted at Pension Funds, it proposes a change to - among others - the current exemption of art. 4A of the Dutch WHT Act. Under measure 3, the exemption (i.e. the Dutch domestic exemption) would be denied where:

- a. the income beneficiary is not subject to Dutch corporate income tax, or is established in another country and would likewise not be subject to Dutch CIT (currently demonstrated by the provision of an “exempt” certificate of residence); and

- b. the dividend income is attributable to a business activity other than the investment of contributed pension assets.

The above measure does not apply if the income per dividend distribution is less than €20K to €100k.

Condition (b) creates a transaction-specific anti abuse filter that overrides the general entitlement for that specific distribution. It is noted that the DTA inspector would bear the burden of proof to show that the conditions for the denial are met, after which the exemption can be denied for that dividend.

We understand that the assessment of whether there is a business activity other than the investment of contributed pension funds is not based on strict conditions and will therefore have to be assessed on a case-by-case basis, based on the facts and circumstances. This is particularly worrying as it creates uncertainty. It would be welcomed if instead the Dutch Tax Administration could indicate if other documentary evidence could be provided upfront to satisfy this requirement/condition. For example, articles of association and/or pension investment policy statement outlining the objectives, constraints, and guidelines for managing pension fund assets. Consideration should be given to pre-approvals with a defined period of validity (e.g. 3 years).

It would also be good to understand how measure 3, if implemented, would interact with other tax relief mechanisms already available, for example, quick refund, which is available to holders of a qualification letter issued by the DTA and is presently applied by Dutch paying agent with no other additional documentation required. Under the proposed measure, it is not clear if reliance on the qualification letter may be insufficient if the tax inspector can demonstrate that the income is attributable to non-investment business activity.

In this context, it is important to clarify timing and process: whether the Dutch withholding agent can still apply the exemption based on a qualification letter in real time, with subsequent audit challenge by the DTA inspector, or whether new declaration/recordkeeping obligations will apply upfront.

Measure 4 – Measure Concerning the Spreading of Dividend-Stripping Elements Within a Group

Please see our response to the General Consultation Questions above.

We would be happy to provide further information on the above points or schedule a call or a meeting to discuss our members concerns. Please do not hesitate to contact ian.sandles@afme.eu or acorbi@isda.org if you have any questions.

Finally, we have seen and support the response made to this consultation by ISLA.

Yours sincerely,

On behalf of AFME:

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On behalf of ISDA:

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Appendix

AFME

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors, and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society. AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 76 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms, and other service providers.