de Nederlandse Orde van Belastingadviseurs

Response public consultation "Administrative Cooperation on direct taxation – evaluation"

Amsterdam, 29 July 2024

Dear Madam / Sir,

The Dutch Association of Tax Advisers (de Nederlandse Orde van Belastingadviseurs, also referred to as '**NOB**' – more information about the NOB is included at the end of this document) is pleased to herewith provide comments on the public consultation "Administrative Cooperation on direct taxation – evaluation" on the directive on administrative cooperation – DAC (Council Directive 2011/16/EU of February 15, 2011 on administrative cooperation in the field of taxation).

The comments will focus on Council Directive 2018/822 amending the Directive 2011/16/EU (**Directive**) as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements in order to disclose potentially aggressive tax planning arrangements (also commonly referred to as '**DAC6**').

The NOB addresses the concerns observed in relation to DAC6: a lack of uniform definitions and guidance, and differences in implementation and interpretation by the Member States. Consequently, the NOB requests the Commission to provide more and better centralised guidance on the interpretation of undefined concepts and the application of DAC6's definitions and hallmarks, as this would contribute to a more uniform interpretation of the Directive and should reduce interpretational differences among the Member States.

Kind Regards
The Dutch Association of Tax Advisers

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Introduction

The main purpose of DAC6 is to strengthen tax transparency and fight against aggressive tax planning. The NOB recognises the relevance of tax transparency. Notwithstanding, the NOB wishes to highlight areas where DAC6 and its application could be improved.

In Section 2 below, we included our general observations. In the Appendix we included our comments and observations in relation to definitions, hallmarks and the main benefit test.

General observations

We understand that the objective of the use of a directive as an instrument is to provide Member States some margin in the implementation of the ultimate goal to be achieved by the directive. Consequently, individual Member States are free to choose the form in which they aim to achieve this objective.

In the Appendix, we will address some specific concerns on implementation and interpretation in the field of certain definitions, hallmarks and the main benefit test. More generally, the concerns described below relate to more general deficiencies observed in relation to DAC6: a lack of uniform definitions and guidance, and differences in implementation and interpretation by the Member States.

The lack of clear and uniform definitions probably relates to the chosen instrument, having as a consequence that individual Member States should transpose DAC6 into domestic law in the way they deem fit, by using terminology and concepts they are familiar with in domestic law. At the same time, very limited guidance and background is provided on the legislative process that led to DAC6. As a result, the interpretation of DAC6 varies widely between Member States.

As discussed in more detail below, this divergence in application and interpretation between Member States can result in a reporting obligation of the same cross-border arrangement in one Member State, while the other Member State interprets in a way that no reporting obligation arises. This can lead to both overreporting and underreporting. Consequently, there is a distortion of the level playing field amongst Member States and a lack of legal certainty for stakeholders. The NOB suggests providing more centralised guidance on DAC6, including the interpretation of undefined concepts and definitions by means of some sort of Commentary to DAC6.

After all, it would also be to the benefit of the tax authorities that all Member States exchange the same information and apply DAC6 consistently to comparable situations. All Member States should be able to trust that they receive information in a comparable way, but also that they receive the information they would like to receive.

The NOB understands the objectives of DAC6 and does not necessarily challenge the existence thereof and its effects. However, the NOB does request the Commission to provide more and better centralised guidance on the interpretation of undefined concepts and the application of DAC6's definitions and hallmarks, as this would contribute to a more uniform interpretation of the Directive and should reduce interpretational differences among the Member States. Due to the application of the legal professional privilege, not only intermediaries but also taxpayers with cross-border activities would benefit from this more uniformly applied interpretation.

In the Appendix, the NOB will address some specific interpretational discussions or questions to consider during the evaluation process in relation to the concepts and terminologies used in DAC6.

In conclusion

The NOB is available to further elaborate on this response to the evaluation. A copy of this response will be published on our website.

The Dutch Association of Tax Advisers

The Dutch Association of Tax Advisers, established in 1954, is the professional association of the university educated tax advisers in the Netherlands. It has over 5,200 members (including 600 corporate tax advisers), who must meet high standards in terms of expertise, professional skills and ethics. These standards form a guarantee for the quality of service and are important because the occupation of tax adviser is not legally protected in the Netherlands. As years of practice have shown, we are in a most excellent position to monitor the quality, integrity and recognizability of the profession of tax adviser for the general public, without legal regulation. We do this through our entry requirements, our professional education and our independent disciplinary boards.

The NOB has a long tradition in the area of legal commentaries. Since 1981, we have had a special Legislative Proposal Committee, which, over the years, has submitted extensive commentaries on proposed Dutch and EU tax legislations and made them available to parliament.

Appendix 1 – Observations regarding definitions, hallmarks and the main benefit test

1.1. Definitions

Arrangement

The determination of the 'arrangement' is of importance to analyse whether there is a reporting obligation under DAC6. Although no clear definition is provided in the Directive, in the definition of cross-border arrangement is stated that an arrangement shall also include a series of arrangements. In addition, it is mentioned that an arrangement may comprise of more than one step or part. In practice it is not clear, when steps or different parts are considered to be sufficiently connected to form one arrangement.

Cross-border arrangement (article 3 paragraph 18)

A cross-border arrangement means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the conditions of article 3 paragraph 18 (a) through (e) of the Directive is met. It is unclear whether the EU-nexus requirement refers to the participant in the arrangement or to the word 'concerning', implying that a non-active participant in a furthermore non-EU arrangement could trigger the cross-border element. In addition, it is unclear how the term 'concerning' should be interpreted and whether a non-participant can fulfill the EU-nexus requirement.

Participant (article 3 paragraph 18)

The term participant has not been defined in the Directive. There is ambiguity regarding whether active involvement is required to qualify as a participant. Additionally, it is unclear if a participant is always a person within the meaning of article 3 paragraph 11 of the Directive.

Associated enterprise (article 3 paragraph 23)

The NOB requests the Commission to provide more guidance on when a person is in a position to exercise a significant influence over the other person to be considered an associated enterprise.

Value of an arrangement (article 8ab paragraph 14 sub f)

The NOB is of the view that it is not clear how the 'value' of an arrangement should be determined The NOB also remarks that in many situations, the value of an arrangement cannot be estimated, especially in the situation when the arrangement concerned is in a phase where it has only been 'made available for implementation' to the relevant taxpayer. The NOB requests whether guidelines can be provided for determining the value for the different kinds of arrangements.

Concerned Member States (article 8ab paragraph 14 sub g & h)

Information on the Member States which are 'likely to be concerned' by the reportable cross-border arrangement should be reported to the competent authorities. The NOB requests for more clarity on the determination of which Member States are 'likely to be concerned' by the arrangement.

Affected persons (article 8ab paragraph 14 sub h)

The identification of the persons which are 'affected' by the reportable cross-border arrangement should be reported to the competent authorities, indicating to which Member States such person is linked. Establishing which persons are 'likely to be affected' by the arrangement remains a challenge and therefore the NOB requests additional guidance on the interpretation of 'affected persons'.

Penalties

Another issue that the NOB would like to bring to the Commission's attention is the penalties adopted in the various Member States. The Directive provides that in order to improve the prospects for the effectiveness of the Directive, Member States should lay down penalties against the violation of the DAC6 rules. Member States should ensure that these penalties actually apply in practice, that they are proportionate and have a dissuasive effect. Implementation of the DAC6 rules into national legislation resulted into an extensive difference in the amount of the penalties imposed by the Member States.

Where the penalties are as little as EUR 500 (per day) in Ireland, the Netherlands may impose a penalty up to an amount of EUR 1,030,000 and Poland may even impose penalties up to an amount of PLN 25,000,000 (approximately EUR 5,300,000). The NOB is of the opinion that some kind of harmonisation of the penalties is desirable.

30-day reporting period

Intermediaries are required to file information within 30 days beginning on (amongst others) the day after the reportable cross-border arrangement is made available for implementation by the intermediary. In practice it is often unclear when a reportable cross-border arrangement is considered to be made available or ready for implementation. The NOB would welcome additional guidance on which elements should be considered in order to determine whether a reportable cross-border arrangement is made available for implementation. Elements such as (i) the intention of the taxpayer, (ii) the taxpayer's knowledge to be able to implement such cross-border arrangement, (iii) tax implications and (iv) internal/external factors that could actually bar the arrangement to be implemented in the end, could be of importance to the question whether a reportable cross-border arrangement is actually made available for implementation or ready for implementation.

In addition, the NOB would like to know whether information that is considered confidential from a legal or competitive standpoint (e.g., during a tender process in relation to a potential acquisition) should be shared with the tax authorities. This question is also important in the phase of the transaction where disclosure of such information could have a negative impact for a transaction (i.e., proposed mergers or acquisitions).

In the preamble to DAC6 it is indicated that mandatory disclosure should enable Member States to (i) enact legislation to close loopholes or (ii) by undertaking adequate risk assessments and carrying out tax audits. The NOB observes that reportings made under certain hallmarks are typically only relevant for undertaking adequate risk assessments and carrying out tax audits. Examples are reportings made under hallmark E2 and E3. For these hallmarks, it would make perfect sense that arrangements are only reported when these are actually implemented.

1.2 Hallmarks

The wording of various hallmarks leaves significant room for interpretation. On the one hand, this is understandable to avoid arrangements being structured in such a way that they fall outside the scope of a hallmark. On the other hand, it is difficult to enforce rules with a high degree of unclarity, as insufficiently clear rules should exclude sanctions under the lex certa requirement (also, article 49 of the Charter of Fundamental Rights of the European Union and article 7 of the European Convention of Human Rights).

Although some Member States apply the literal text of the hallmarks in their implementation legislation, in general, there is little consistency in the explanation and interpretation among Member States. This leads, in extremis to a remarkable outcome where the same factual arrangements are reportable depending on the Member State where the reporting obligation lies.

In light of the above, we hereby share our comments and observations in relation to certain hallmarks.

General

The hallmarks seem to be written from a (corporate) profit tax perspective, whereas the hallmarks apply to the taxes within the scope of the Directive, as defined in article 2 of this Directive. The NOB proposes to explicitly limit the scope of DAC6 – at least for certain hallmarks – to profit and withholding taxes irrespective of their form or name, effectively excluding other taxes, such as local levies (to the extent not being profit taxes), inheritance and gift taxes, etcetera. The NOB proposes to create tailor-made hallmarks in relation to these other taxes and levies, to the extent deemed necessary.

Hallmark B1

Hallmark B1 has cumulative conditions that should be met (i.e., acquisition of a loss-making company, discontinuing activities, using the losses to reduce the tax liability of the acquirer). Therefore, this hallmark is only met in (very) specific situations. Many Member States have rules against loss acquisition, while based on the EU case law (ECJ 13 December 2005, C-446/03, ECLI:EU:C:2005:763) transfer of loss should be allowed to a certain extent by Member States. Taking this into account, and since the rules on cross-border loss compensation have not yet been harmonised within the EU, the overall aim of this hallmark seems ambiguous.

Hallmark B2

Hallmark B2 seems to be derived from pre-existing national Mandatory Disclosure Rules. Within the legal system of one jurisdiction, there is generally a clear distinction between capital, income, gifts, etc. In an international context such clear distinction is not apparent. Also, it is not clear whether hallmark B2 covers not yet existing but potential future income, latent income and/or already existing income. The Dutch DAC6 guidance, for example, clarifies that B2 covers only already existing income. In the absence of any guidance at EU level, the interpretation of this hallmark remains unclear. Furthermore, it should be made (more) clear what the exact meaning of the phrase 'other category of revenue' is. The NOB considers that a detailed clarification of the meaning of this requirement is very desirable.

Hallmark B3

Both text and background of hallmark B3 makes this hallmark difficult, if not impossible, to interpret. The hallmark's key term 'Round-tripping' is an undefined term and has a large variety of meanings. It is unclear what meaning it has in hallmark B3. The NOB proposes to clarify the meaning of 'Round-tripping' in the context of hallmark B3.

From the published Working Party document of 21 September 2017 (WK 9981/2017 INIT) it appears that this hallmark is derived from the South African Mandatory Disclosure Rules. The only example given in this Working Party document that seems relevant, is the example of diversion of funds via a foreign entity to present the funds as a foreign direct investment (FDI), to be eligible for a preferential tax regime (the other two examples in the Working Party document seem solely business motivated and, thus, not reportable). Preferential tax regimes that only apply to FDI seem to raise primarily a State Aid concern, and it is therefore questionable whether such concern should be addressed through DAC6 rules.

Hallmark C1

Hallmark C1(a)

Where (deductible) payments are made to partnerships, based on the Dutch interpretation, the starting point is that the partnership is the recipient of the payment for purposes of hallmark C1(a), irrespective of whether the partnership is transparent in its jurisdiction of establishment or the jurisdiction from which the payment is made. Under the Dutch interpretation a look through approach applies in case the participants of the (transparent) partnership are immediately and directly taxed for the receipt of the deductible payment. Where the jurisdiction of a partner views the partnership as opaque, the look through approach would, however, not apply. The NOB has observed that other jurisdictions within the EU take a different view, resulting in potential misalignment on reporting positions. The NOB requests to clarify the application of hallmark C1(a) in respect of partnerships.

Hallmark C1(a) vs hallmark C1(b)(i)

It is unclear what the relation/difference is between hallmark C1(a) and hallmark C1(b)(i) in a situation where a jurisdiction does not impose corporate tax. For hallmark C1(a) the recipient of the deductible cross-border payments should not be resident in any tax jurisdiction, while hallmark C1(b)(i) covers situations where the recipient is resident for tax purposes in a jurisdiction that does not impose any corporate tax. The first-mentioned hallmark is not subject to the Main Benefit Test, while the latter is. The NOB requests to clarify which situations are intended to be covered by the respective hallmarks.

Hallmark C1(b)(ii)

For hallmark C1(b)(ii) the recipient should be resident for tax purposes in a jurisdiction that is included in a list of third-country jurisdictions which have been assessed as non-cooperative by Member States collectively or within the framework of the Organisation for Economic Co-operation and Development (**OECD**).

This hallmark refers to jurisdictions listed by the EU or the OECD. There seems to be a consensus between the Member States on what the EU list entails, i.e., the EU list of non-cooperative jurisdictions. However, it appears uncertain to which OECD list the hallmark refers, e.g., the list of non-cooperative tax haven by the Committee on Fiscal Affairs of the OECD (that does not contain any jurisdictions currently), the list of jurisdictions that are considered 'non-compliant' following peer reviews against the standards of EOIR, or any other OECD list. The NOB requests clarification as to which list is referred to in hallmark C1(b)(ii).

Hallmark C1(d)
The NOB requests to clarify based on what elements and criteria a certain tax treatment is considered to benefit from a preferential tax regime. In case the OECD BEPS Action 5 report is leading in this respect, the NOB suggests clarifying that this hallmark will be limited to preferential tax regimes relating to mobile income.

Hallmark C4

For hallmark C4, there should be a material difference in the amount being treated payable as in consideration for transferred assets in the jurisdictions involved. It is unclear whether this concerns differences in commercial transfer prices, fiscal transfer prices or both, or even differences between commercial and fiscal transfer prices. Furthermore, NOB requests to quantify when a difference is deemed 'material'. The Belgian DAC6 guidance, for example, applies a 10% difference in the amounts taken into account.

In a significant number of situations, a difference occurs without leading to a tax advantage. This may for example be the case of a business merger facilitated under the EU Merger Directive (Directive 2009/133/EC) or where the differences in transfer prices lead to a tax disadvantage because no step up in basis is provided by a jurisdiction involved. From this perspective, it seems reasonable, and leads to less irrelevant reporting, to bring hallmark C4 within the scope of the main benefit test.

Hallmark D2

One of the conditions of hallmark D2 is that Beneficial Owners, as defined in Directive 2015/849/EU (Anti-money laundering directive), are made unidentifiable. On the basis of Article 3 paragraph 6(a) of Directive 2015/849/EU there always seems to be an identifiable Beneficial Owner in the case of corporate entities, as ultimately the senior managing officials are considered the Beneficial Owner(s). This might be an unforeseen effect of the current wording of and referencing in hallmark D2.

Hallmark E3

In hallmark E3 the term 'earnings before interest and taxes (EBIT)' is included. The term EBIT is undefined in DAC6 and also in commonly known financial reporting standards. However, the term is often used in financial statements, but interpreted in various ways. The Dutch tax authorities take the position that if the transferor is not an operating company (e.g. a holding company, a financing company, a private equity company or a combination thereof), the recurring income from such activities should be taken into account rather than the EBIT on the basis of accounting policy, as these financial results are the core business of such companies. As the term EBIT is not defined in DAC6 or in the financial reporting standards, it is unclear what should be considered as EBIT in a specific situation. This seems to be subject to multiple interpretation in cross-border situations and thus creates uncertainty in practice.

Under hallmark E3 the EBIT comparison (projected vs. actual) should take place for 'the three-year period after the transfer'. It is unclear how the three-year period should be interpreted. For example, does the three-year period include the year of the transfer. It is also unclear what is meant by 'year'. For example, does it refer to financial years, calendar years or a period of twelve months (that does not start at 1 January and end at 31 December).

Furthermore, in practice, a substantial part of the arrangements reported under hallmark E3 consists of cross-border liquidations of a subsidiary due to financial and/or economical (and therefore entrepreneurial) difficulties that have no or limited tax effect or purpose and that also are already known to tax authorities, e.g. by disclosure in local commercial and/or trade registers. The NOB requests to clarify the application of the EBIT test.

Another important category of arrangements concerns cross-border mergers facilitated under the EU Merger Directive. The NOB is of the opinion that reporting of such arrangements does not contribute to the objectives of DAC6. Consideration should therefore be given to bring hallmark E3 within the scope of the main benefit test, and/or to make a clear exemption for cross-border liquidations of foreign subsidiaries and cross-border mergers. Alternatively, a de minimis threshold could be included in hallmark E3.

1.3 Main benefit test

Tax advantage

The concept of 'tax advantage' has not been defined in the Directive. When is a tax advantage present? The NOB suggests clarifying the term tax advantage by providing examples of what could be considered a tax advantage. Also, it would be helpful if more guidance could be provided on how a comparison should be made to see whether there is a tax advantage present.

Article 2, paragraph 1 of the Directive states that "This Directive shall apply to all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities." However, in respect of the term 'tax advantage', it is unclear whether a tax advantage can only arise within the EU or also outside of the EU and whether an advantage concerning a tax that does not fall within the scope of DAC6 should be considered a (non-)tax advantage. The NOB recommends providing further guidance in this respect.

Policy intent

Some Member States consider 'policy intent' (acting in accordance with the intent of the legislator) a relevant factor for the main benefit test, whereby other Member States only consider the intent of their national legislator relevant. The NOB proposes to clarify whether, also in light of the EU Freedoms, it is acceptable that Member States only consider policy intent in relation to national legislation and not that of the legislation of other Member States.

Application main benefit test to other hallmarks

As outlined above under hallmarks C4 and E3, in a significant number of situations reportings are made which do not contribute to the objectives of DAC6. The NOB proposes to consider extending the application of the main benefit test to hallmarks A, B, C and E to ensure that arrangements are only reported which are aimed at potentially aggressive tax planning, thereby also reducing the number of unnecessary reports.