

Bill implementing the Mandatory Disclosure Directive (DAC6) presented to Lower House

On July 12, 2019, the bill to implement the EU Directive on mandatory disclosure (DAC6), which took effect on June 25, 2018, was presented to the Lower House. This Directive provides for the mandatory automatic exchange of information on reportable cross-border arrangements. A public consultation on a draft of the bill took place at the end of 2018/beginning of 2019; see [our previous memorandum](#) on this. The bill that has now been presented to the Lower House is addressed below.

DAC6 in brief

DAC6, in principle, obliges intermediaries (including so-called 'auxiliary intermediaries') to report potentially aggressive cross-border tax planning arrangements, so that this information can be exchanged between the tax authorities of the EU Member States. Due to the broad definition of intermediary, not only tax advisors will fall under this definition, but potentially also lawyers, accountants, notaries, financial advisors, banks, and trust offices for example. In certain circumstances the reporting obligation can shift to the taxpayer.

The Annex to DAC6 includes a number of hallmarks that act as indicators of a possible risk of tax avoidance. If a tax planning arrangement has one or more of these hallmarks, the arrangement must, in principle, be reported to the tax authorities of the relevant EU Member State. However, a number of these hallmarks will only trigger a reporting obligation if a 'main benefit test' is also met. That is the case if it can be convincingly demonstrated that the most important benefit or one of the most important benefits that, given all the relevant facts and circumstances, can reasonably be expected from an arrangement is obtaining a tax benefit.

Implementation by the Netherlands – the bill

The Netherlands must transpose DAC6 into national law by December 31, 2019 at the latest. On the basis of the bill before the Lower House and the accompanying explanatory notes, the Dutch implementation appears to remain close to the text of the Directive in terms of its wording. With regard to the most important terms and the hallmarks, there is a one-on-one reference to the (Annex to the) Directive.

Compared to the draft bill, the explanatory notes to the pending bill attempt to provide more clarity about how the Netherlands interprets the obligations and terms. Also sometimes another position appears to have been taken than during the public consultation. To highlight a few points:

- An intermediary can be relieved from its reporting obligation if a reportable cross-border arrangement has already been reported by another intermediary. To convincingly demonstrate the reporting by another intermediary, referring to the reference number received by the other intermediary when it reported the arrangement will suffice.
- If an intermediary is of the opinion that there is no reportable cross-border arrangement and this is a tenable tax position, no penalty can be imposed.

- Contrary to what was argued in the consultation stage, an arrangement that was set up to avoid double taxation may however meet the main benefit test.
- Clarification is provided in the case of multiple hallmarks and for some hallmarks the explanatory notes have changed compared to the consultation.

Also of importance is that the pecuniary penalty of a maximum of the sixth category (in 2019: EUR 830,000) is maintained in the bill before the Lower House. This pecuniary penalty may be imposed if the fact that the reporting obligation was not complied with, was not complied with on time, or was not fully or accurately complied with, is due to the gross negligence or deliberate actions of the intermediary or the taxpayer.

Effective date and transitional rules

Although the Netherlands must have implemented DAC6 by December 31, 2019 at the latest, the bill will take effect as of July 1, 2020 in accordance with DAC6. As of the effective date, reportable cross-border arrangements must, in principle, be reported within 30 days of their having been made available for implementation, being ready for implementation or the first step in their implementation was taken (whichever occurs first). Transitional rules apply to reportable cross-border arrangements:

1. of which the first step in their implementation was taken during the period June 25, 2018 and July 1, 2020 (the transitional period): these must be reported no later than August 31, 2020;
2. which were ready for implementation during the transitional period and the first step of which was taken on or after July 1, 2020: these must be reported no later than within 30 days of the first step having been taken.

Final remarks

Despite the fact that the explanatory notes to the bill before the Lower House provide more clarity, many practical questions still remain. The term 'arrangement' in DAC6 was (deliberately) also not further defined in the explanatory notes. However, it was promised that guidance would be provided, which would include examples of when hallmarks are and are not met in a number of specific situations.

The Dutch bill does not go beyond the requirements prescribed by the Directive. For example, unlike the implementation of DAC6 in some other EU Member States, the Dutch bill does not include any other hallmarks and taxes than those appearing in DAC6.

If the remaining parliamentary process and/or guidance give reason to do so, we will of course inform you of this. Please feel free to contact your Meijburg advisor if you have any questions or would like to discuss the above matters.

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