EU Direct Tax Newsalert

Draft bill implementing DAC6 submitted to Dutch parliament

On 12 July 2019, a legislative proposal implementing the Council Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (the so-called "DAC6") has been submitted to the Dutch parliament. In brief, the DAC6 obliges service providers or, alternatively, taxpayers to report on cross-border tax planning arrangements that meet certain hallmarks.

Dutch implementation in a nutshell

The proposal follows the terminology of the DAC6. In that regard, certain terms, such as "arrangement" or "intermediary", are intentionally not explained in detail in the proposal that explicitly refers to the DAC6 definitions.

Moreover, the proposal clarifies that there is no reporting obligation for cross-border arrangements which, although designed for a specific taxpayer, ultimately they are not completed. Therefore, if an arrangement is not implemented by the taxpayer, for example because he does not want to carry out transactions that are subject to mandatory disclosure rules, the design of an arrangement does not become reportable. Furthermore, the proposal and its explanatory memorandum provide further guidance on the application of the main benefit test and the application of certain hallmarks.

Guidance on the application of the main benefit test

Under the DAC6, in relation to certain hallmarks, the arrangement becomes reportable only if the so-called "main benefit test" is fulfilled. This is the case if it can be established that the most important benefit or one of the most important benefits that can be reasonably expected from an arrangement, taking into account all relevant facts and circumstances, is the obtaining of a tax advantage. According to the explanatory memorandum, this tax advantage can arise both within and outside the EU.

If there are sound business reasons for an arrangement, without artificial elements being added, it can be assumed that the arrangement does not aim at obtaining a tax advantage. According to the explanatory memorandum, deferral of taxation may be an advantage under the main benefit test. On the other hand, the test is not automatically fulfilled if double taxation is avoided.

The explanatory memorandum regards the use of a favorable tax regime (e.g. the tonnage regime and the innovation box) not to aim at obtaining a tax advantage. This is because an arrangement to which a favorable tax regime applies will usually be set up in accordance with the underlying idea of the tax regime.

Guidance on the application of the hallmarks

With regard to hallmark C1(b)(i) (for which the main benefit test needs to be fulfilled) the explanatory memorandum clarifies that "corporate tax at almost zero" means a tax levied at a tax rate of between 0% and 1%. In addition, hallmark C1(c) (for which the main benefit test also needs to be fulfilled) refers to an objective exception (and thus not to a subjective exception). Finally, concerning hallmark E1 (arrangement that involves the use of unilateral safe harbour rules), the explanatory memorandum clarifies that if safe harbour rules are based on international standards, the hallmark is not applicable.

Further guidance expected

The Dutch tax authorities (DTA) are currently working on a Guideline on the application of the DAC6 in the Netherlands. Furthermore, a specialised team will be set up within the DTA to act as a help desk for intermediaries and taxpayers. This team will prepare the aforementioned Guideline as well. The team will also be responsible for communication with other countries and the European Commission.

Takeaway

The legislative proposal and its explanatory memorandum broadly follow the Directive. The proposal has yet to be discussed in the Dutch parliament and the Senate, respectively. This will not take place until September at the earliest. Adoption by the Senate is not expected to take place until December of this year.

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