

Article

The (Absence of) Member State Autonomy in the Interpretation of DAC6: A Call for EU Guidance

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DAC6 concerns the spontaneous exchange of information on potentially aggressive tax arrangements. With the implementation of DAC6 into the national laws of the Member States comes a lot of uncertainty, along with diverging interpretations among Member States. In this article, the authors analyze the autonomy of Member States in the definition and interpretation of the concepts used in DAC6. The authors also analyze the relevant sources of the interpretation of DAC6, such as the relevant BEPS reports. The authors argue that DAC6 lays down a uniform framework for the spontaneous exchange of information of potentially aggressive tax arrangements. Member States do not have a margin of discretion regarding the interpretation of the concepts that are essential to the uniform framework. Other concepts may leave a margin of discretion for the Member States, such as several concepts used in the Hallmarks. In their margin of discretion, the Member States must ensure the full effectiveness of Union law. On the basis of that, the concepts must be defined (and interpreted) in line with the object and purpose of the Directive. Member States should use BEPS Action 12 as a source of interpretation and illustration insofar DAC6 is based on this report.

Keywords: DAC6, Directive 2018/822, Main Benefit Test, Reporting, BEPS, Union concepts, quasi-Union concepts, autonomy of Member States, Interpretation of Directives, EU Guidance.

1 INTRODUCTION

Mandatory disclosure is of growing importance to both Member States and taxpayers. Undoubtedly one of the one of the most highlighted directives in the field of mandatory disclosure is Council Directive (EU) 2018/822, which was the fifth amendment of the 2011 Directive on Administrative Cooperation and is hence commonly referred to as ‘DAC6’.¹ DAC6 concerns the exchange of information on ‘potentially aggressive tax arrangements’.

Along with the implementation of the Directive comes a lot of uncertainty, as DAC6 contains new (often undefined) concepts. Member States have tried to tackle this uncertainty by introducing official guidance, which may lead to diverging interpretations of the concepts used in DAC6.²

This contribution analyses the autonomy of Member States in defining and interpreting the concepts in DAC6.

The contribution is structured as follows. Paragraph 2 contains a description of the purpose and scope of the DAC6, based on the preamble. Paragraph 3 discusses the different categories of concepts that can be derived from the case law of the Court of Justice of the European Union (ECJ). Paragraph 4 analyses the autonomy of Member States for the concepts used in DAC6 and the implications for existing guidance on DAC6. Paragraph 5 summarizes the findings with the conclusion.

2 OBJECT AND PURPOSE OF DAC6

In 2015, the OECD published its Action Plan on Base Erosion and Profit Shifting (BEPS). The BEPS Action Plan consists of fifteen reports, one of which is the introduction of mandatory disclosure rules (BEPS Action 12).³

The European Commission was subsequently requested, by the ECOFIN, to take initiatives to require the reporting of information on potentially aggressive tax planning schemes in accordance with BEPS Action 12.⁴ This has led to

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¹ Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation on cross-border structures subject to notification (hereinafter ‘DAC6’).

² For instance, the Netherlands issued the Guidance on Reportable cross-border arrangement (‘Leidraad meldingsplichtige grensoverschrijdende constructies’). See J. Korving, *A Guide to the Netherlands DAC6 Guidelines*, 61 Eur. Tax’n. 1, s. 6 (2021), Journal Articles & Opinion Pieces IBFD. For a (non-exhaustive) overview of the interpretation of DAC6 by other countries, see I. Andrzejewska-Czernek et al., *How Do You Do It? MDR in Different EU Member States*, 61 Eur. Tax’n. 9 (2021), J. Articles & Opinion Pieces IBFD.

³ OECD, *Mandatory Disclosure Rules, Action 12–2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, Paris 2015), <http://dx.doi.org/10.1787/9789264241442-en> (accessed 18 Oct. 2021).

⁴ DAC6, Preamble Recital 4. See also the Council conclusions on an external taxation strategy and measures against tax treaty abuse, 25 May 2016, point 12 in which the ECOFIN invited ‘the Commission to consider legislative initiatives on Mandatory Disclosure Rules inspired by BEPS Action 12 of the OECD project in order to introduce more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes’.

amendments on the existing Council Directive 2011/16/EU on administrative cooperation in the field of taxation.⁵

DAC6 acknowledges that ‘Member States find it increasingly difficult to protect their national tax bases from erosion as tax-planning structures have evolved to be particularly sophisticated and often take advantage of the increased mobility of both capital and persons within the internal market’.⁶ This makes it:

critical that Member States’ tax authorities obtain comprehensive and relevant information about potentially aggressive tax arrangements. Such information would enable those authorities to react promptly against harmful tax practices and to close loopholes by enacting legislation or by undertaking adequate risk assessments and carrying out tax audits.⁷

Given the cross-border nature of many of the potentially aggressive structures, the measures would be more effective if information is shared between Member States.⁸ This cross-border nature, as well as the potential impact on the functioning of the internal market, justifies the adoption of a common (i.e., uniform) set of rules, rather than Member States regulating the matter at national level.⁹

While DAC6 establishes a common framework, it nonetheless leaves it to the Member States to lay down penalties against the violation of national rules that implement DAC6.¹⁰

Member States are allowed take further reaching national reporting measures of a similar nature. However, information gathered in addition to the obligations imposed by this Directive should not be communicated automatically to the competent authorities of the other Member States. Such information could be exchanged on request or spontaneously in accordance with existing national rules.¹¹

3 UNION, QUASI-NATIONAL AND QUASI-UNION CONCEPTS

3.1 General

Based on ECJ case law and academic literature, the concepts in a Directive can be categorized into so-called Union, quasi-national and quasi-Union concepts.¹² The different categories effectively determine the extent to which the Member States (or the ECJ) have autonomy

in the interpretation of the concepts in a Directive. This autonomy depends on the specific concept and may be extensive (quasi-national), limited (quasi-Union) or non-existent (Union).

3.2 Union Concepts and Quasi-national Concepts

3.2.1 Union Concepts

A landmark judgment in this regard is case C-51/76 (VNO).¹³ In the VNO case, the ECJ ruled on a preliminary question of the Dutch Supreme Court (*Hoge Raad*). The Hoge Raad asked what the correct interpretation is of the concept ‘capital goods’ in Article 17 of the Second VAT Directive.¹⁴ The ECJ noted that ‘the expression [DWJS: capital goods] at issue forms part of a provision of Community law which does not refer to the law of the Member States for the determining of its meaning and its scope’. On the basis of that, ‘the interpretation, in general terms, of the expression cannot be left to the discretion of each Member States’.¹⁵ The same reasoning can be found in the case C-154/80 (*Coöperatieve Aardappelbewaarpplaats GA*), which concerned the interpretation of the concept ‘consideration’ in Article 8(a) of the Second VAT Directive.¹⁶

In case C-139/84 (*Van Dijk’s Boekhuis BV*), the ECJ ruled on the concept of ‘a contract to make up work from customers’ materials’ in Article 5(5)(a) of the Sixth VAT Directive. The ECJ ruled that by using the phrase ‘that is to say’ after the concept, the EU legislator clearly showed that it is intended that the concept should have an independent meaning in EU law.¹⁷

J.J.P. Swinkels argues in his dissertation that concepts which are important to the objectives of the Directive must be defined on the basis of uniform criteria.¹⁸ These uniform criteria are interpreted by the ECJ, as a result of which these concepts have an independent character in EU law (the Union concepts, or, until the until the Treaty of Lisbon ‘Community concepts’). This position can, among other cases, be deduced from case C-252/86 (*Bergandi*), in which the ECJ considered that the concept of ‘tax which can be characterized as a turnover tax’ in Article 33 of the Sixth VAT Directive is a Community

⁵ Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64/1, 11 Mar. 2011.

⁶ DAC6, Recital 2.

⁷ DAC6, Recital 2.

⁸ DAC6, Recital 3.

⁹ DAC6, Recital 10.

¹⁰ DAC6, Recital 15.

¹¹ DAC6, Recital 10.

¹² J. J. P. Swinkels, *The Taxable Person in European VAT*, 51 (Central Printing Works, University of Amsterdam 2000).

¹³ ECJ 1 Feb. 1977, C-51/76, *Verbond van Nederlandse Ondernemingen tegen Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1977:12.

¹⁴ Second Council Directive 67/228/EEC of 11 Apr. 1967 on the harmonization of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax, OJ 71/1303, 14 Apr. 1967.

¹⁵ ECJ 1 Feb. 1977, C-51/76, *Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1977:12, para. 9–11.

¹⁶ ECJ, 5 Feb. 1981, C-154/80, *Staatssecretaris van Financiën v. Association coopérative Coöperatieve Aardappelenbewaarpplaats GA*, ECLI:EU:C:1981:38.

¹⁷ ECJ 14 May 1985, C-139/84, *Van Dijk’s Boekhuis BV v. Staatssecretaris van Financiën*, ECLI:EU:C:1985:195, para. 16.

¹⁸ Swinkels, *supra* n. 12, at 54.

concept in so far as it is relied upon with a view to the attainment of the objective pursued by Article 33.¹⁹

Similarly, in cases C-68/92, C-69/92 and C-73/92 (*advertisement cases*), the ECJ held that the concept of ‘advertising services’ in Article 9(2)(e) of the Sixth VAT Directive is a Community concept which must be interpreted uniformly in order to prevent situations of double taxation or double non-taxation arising from conflicting interpretations.²⁰

This reasoning also seems to apply to Directives in the field of direct taxation. In C-115/16 (*N Luxembourg 1*), the ECJ ruled that the term ‘beneficial owner of the interest’ which appears in Article 1(1) of the Interest and Royalties Directive²¹ cannot refer to concepts of national law that vary in scope.²² This would lead to double taxation or double non-taxation, which is contrary to the purpose and scope of both the Interest and Royalties Directive and the concept of ‘beneficial owner of the interest’.²³ Although the ECJ does not explicitly consider that a uniform interpretation attains the objective and purpose of the Interest and Royalties Directive, such reasoning does fit within the framework of the ECJ case law. After all, for the concept of ‘beneficial owner of the interest’ the EU legislator does not refer to national legislation, and the concept attains to the objective of the Interest and Royalties Directive (the avoidance of double taxation and double non-taxation).

3.2.2 The Interpretation of Union Concepts

The interpretation of a Union concept often only arises after interpretation by the ECJ.²⁴ In that regard, it must be noted that a Union concept does not prohibit the ECJ from using other sources for its interpretation. When interpreting a Union concept, the ECJ may for example refer to the interpretation of similar concepts used in other Directives.²⁵ The ECJ may even refer to national provisions in order to provide further interpretation of the Union concept.²⁶

Similarly, the ECJ may follow the interpretation of a similar concept used by other international bodies. A recent example of the latter is in case C-115/16 (*N Luxembourg 1*), where the ECJ first considered that the concept ‘beneficial owner of the interest’ in Article 1(1) of the Interest and Royalties Directive must be regarded as a Union concept.²⁷ Subsequently, the ECJ considers that the Interest and Royalties Directive draws upon Article 11 of the OECD 1996 Model Tax Convention,²⁸ and both aim to avoid international double taxation.²⁹ On the basis of that, the ECJ considers the 1996 OECD Model, successive amendments of the OECD Model, and the OECD Commentaries³⁰ to be relevant when interpreting the concept of ‘beneficial owner’ in the Interest and Royalties Directive.³¹

3.2.3 Quasi-national Concepts

Paragraphs 10 and 11 of case C-51/76 (*VNO*) define a Community concept as ‘a provision of Community law which does not refer to the law of the Member States for the determination of its meaning and its scope’.³² *A contrario*, it can be deduced from this consideration that a concept is not a Union concept if it (explicitly or implicitly) refers to the law of the Member States for the determination of its meaning and its scope.³³ These so-called ‘quasi-national concepts’ are not necessary to be defined on the basis of uniform criteria. In the authors’ view, such a quasi-national concept can therefore only exist if a uniform interpretation of the concept does not attain to the purpose of a Directive.

As a quasi-national concept explicitly or implicitly refers to domestic law, the Member States are in principle allowed to interpret the terms in line with existing provisions of national law. In other words, national courts have the autonomy in defining the quasi-national concepts.

3.3 Quasi-Union Concepts

Union concepts are in principle to be interpreted uniformly. The ECJ ultimately determines the interpretation of these concepts. Nonetheless, national courts are also obliged to interpret Union concepts. Some Union concepts may leave the national courts a certain margin of discretion in the interpretation and/or application of the Union concepts. Hence, the ECJ determines to a certain

¹⁹ ECJ 3 Mar. 1988, C-252/86, *Gabriel Bergandi v. Directeur général des impôts*, ECLI:EU:C:1988:12, para. 13.

²⁰ ECJ 17 Nov. 1993, C-68/92 *Commission v. France*, ECLI:EU:C:1993:888; ECJ 17 Nov. 1993, C-69/92 *Commission v. Luxembourg*, ECLI:EU:C:1993:889, para. 15; ECJ 17 Nov. 1993, C-73/92, *Commission v. Spain*, ECLI:EU:C:1993:891, para. 12.

²¹ Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157/49, 26 June 2003 (‘Interest and Royalty Directive’).

²² ECJ 26 Feb. 2019, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and Others v. Skatteministeriet*, ECLI:EU:C:2019:134, para. 84.

²³ Interest and Royalty Directive, recital 3: ‘It is necessary to ensure that interest and royalty payments are subject to tax once in a Member State’.

²⁴ Swinkels, *supra* n. 12, at 54.

²⁵ *Ibid.* and ECJ 25 Feb. 1999, C-349/96, *Card Protection Plan Ltd (CPP) v. Commissioners of Customs & Excise*, ECLI:EU:C:1999:93, para. 16–18.

²⁶ Swinkels, *supra* n. 12, at 54.

²⁷ See fn. 24.

²⁸ OECD, *Model Tax Convention on Income and on Capital* (1996).

²⁹ ECJ 26 Feb. 2019, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and Others v. Skatteministeriet*, ECLI:EU:C:2019:134, para. 90.

³⁰ See inter alia OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris (2019), <https://doi.org/10.1787/g2g972ee-en> (accessed 18 Oct. 2021).

³¹ See fn. 31.

³² See fn. 17.

³³ Swinkels, *supra* n. 12, at 55.

extent the uniform meaning under EU law, and to some extent leaves autonomy to the Member States in the interpretation of these concepts.³⁴ In literature, these concepts are known as Quasi-Union concepts (or, until the Treaty of Lisbon, as ‘Quasi-Community concepts’).³⁵

Based on ECJ case law, the national court may in two instances have a margin of discretion in the interpretation of Union concepts. Firstly, the autonomy may arise if the concept explicitly indicates a shared competence in the Directive.³⁶ Second and more importantly, Member States have a certain margin of discretion if the concept leaves the legislative or administrative authorities of the Member State a margin of discretion ‘through the indefinite nature of the concepts used’.³⁷ This indefinite character occurs if the Directive ‘does not contain explicit guidance for defining uniformly and precisely the requirement which must be satisfied’.³⁸ In other words, insofar Union concepts cannot (or are not meant to be) interpreted uniformly, Member States have a certain autonomy in the further definition of such concepts.

Some concepts leave a margin of discretion as they refer to the national laws of the Member States. A reference to the national laws of the Member States does however not withhold the ECJ from defining such a concept. An example is the concept of ‘duly recognized establishment’ in Article 132(1)(b) of the VAT Directive. Here, Advocate General Hogan considered that the:

autonomous nature of the concept of a “duly recognised establishment” used in Article 132(1)(b) of the VAT Directive must not, however, be confused with the fact that this concept, as it is to be understood under EU law, refers, for its application, to a particular factual circumstance, namely, the situation of the establishment in question with regard to national legislation.³⁹

Another example is case C-448/15 (*Wereldhave*).⁴⁰ In this case, the ECJ provided an interpretation of the concept ‘subject to tax’ in Article 5(4) of the Parent-Subsidiary Directive.^{41,42} Whether a company is subject

to tax, mainly depends on the national laws of the Member States. Nonetheless, the ECJ provided a further definition to the concept and ruled that a company is not ‘subject to tax’ for the purposes of the Parent-Subsidiary Directive if it is subject to tax at a zero rate.⁴³

Where Member States have a margin of discretion, it must be exercised within the limits imposed by EU law. Importantly, the margin of discretion cannot call into question the boundaries of the concept laid down in the Directive.⁴⁴ Moreover, when a Member State exercises its discretion, it must ensure that it does not do so in a way that would compromise any of the objectives of EU law.⁴⁵ In interpreting the content and scope of a quasi-Union provision, the national court must therefore take account of the context and the purpose of the legislation concerned.

We note that the margin of discretion of a Member State does not prevent the direct effect of the Directive provisions. It must therefore be assessed whether the Member State has not exceeded its margin of discretion. Insofar as a national measure exceeds its margin of discretion, the Directive (and the basis for the Union concept contained therein) would still have direct effect.⁴⁶ Similarly, as the concepts remain to be Union-concepts in its essence, Member States can refer preliminary questions on the interpretation of these quasi-Union concepts to the ECJ.⁴⁷

4 THE INTERPRETATION OF UNION CONCEPTS UNDER DAC6

4.1 Relevant Sources for the Definition and Interpretation of BEPS Inspired Directives

In paragraph 3.2.2. we noticed that a Union concept does not prohibit the ECJ from using other (non-EU law) sources for its interpretation. This raises the question what other sources the ECJ could use in its interpretation of DAC6. In this respect, it is mainly relevant whether the preamble connects to other sources.⁴⁸

³⁴ Similar: Opinion of Advocate General Hogan, C-228/20, *I GmbH v. Finanzamt H*, ECLI:EU:C:2021:762, para. 54: ‘However, it is settled case-law that, where Member States have a discretionary power, this power must be exercised within the limits imposed by EU law. In particular, the existence of such a discretionary power cannot call into question the boundaries of the concept of “due recognition” of a medical establishment within the meaning of Art. 132(1)(b) of the VAT Directive. Moreover, when a Member State exercises its discretion, it must ensure that it does not do so in a way that would compromise any of the objectives of EU law’.

³⁵ Swinkels, *supra* n. 12, at 55.

³⁶ *Ibid.*, at 57–77.

³⁷ ECJ 1 Feb. 1977, C-51/76, *Verbond van Nederlandse Ondernemingen tegen Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1977:12, para. 28.

³⁸ ECJ 1 Feb. 1977, C-51/76, *Verbond van Nederlandse Ondernemingen tegen Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1977:12, paras 16 and 17.

³⁹ Opinion of Advocate General Hogan, C-228/20, *I GmbH v. Finanzamt H*, ECLI:EU:C:2021:762, para. 53.

⁴⁰ ECJ 8 Mar. 2017, C-448/15, *Wereldhave*, ECLI:EU:C:2017:180.

⁴¹ *Ibid.*

⁴² Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 225/6, 20 Aug. 1990.

⁴³ ECJ 8 Mar. 2017, C-448/15, *Wereldhave*, ECLI:EU:C:2017:180, para. 33.

⁴⁴ Opinion of Advocate General Hogan, C-228/20, *I GmbH v. Finanzamt H*, ECLI:EU:C:2021:762, para. 54.

⁴⁵ *Ibid.*

⁴⁶ See Swinkels, *supra* n. 12, at 63. This follows from ECJ 1 Feb. 1977, C-51/76, *Verbond van Nederlandse Ondernemingen tegen Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1977:12, para. 29. Similarly, see ECJ, 5 Feb. 1963, C-26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1 and ECJ, 15 July 1964, C-6/64 *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66.

⁴⁷ See Swinkels, *supra* n. 12, at 63. See also among other cases: ECJ, 6 Oct. 1982, C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, ECLI:EU:C:1982:335, paras 14–16.

⁴⁸ The purpose of a Directive can mainly be derived from its preamble. The preamble can however not by itself be considered a rule of EU law (see ECJ 7 Feb. 2018, C-643/16, *American Express Co. v.*

The preambles of recent Directives in the field of direct taxation show that the OECD BEPS reports had a major influence on the development of these Directives. For example, the Anti-Tax Avoidance Directive (ATAD-I) explicitly states in the preamble that the ‘Council conclusions stressed the need to find common, yet flexible, solutions at the EU level consistent with OECD BEPS conclusions’.⁴⁹ The preamble then goes on to state that the conclusions considered that ‘EU directives should be, where appropriate, the preferred vehicle for implementing OECD BEPS conclusions at the EU level’.⁵⁰ ATAD-II⁵¹ refers explicitly to BEPS Action 2⁵² as a source of illustration or interpretation to the extent that they are consistent with the provisions of this Directive and with Union law.⁵³ Similarly, it is mentioned in the preamble of DAC6 that ‘the Commission has been called on to embark on initiatives on the mandatory disclosure of information on potentially aggressive tax-planning arrangements *along the lines* of Action 12 of the OECD Base Erosion and Profit Shifting (BEPS) Project’ (Italics DW/JS).⁵⁴

In the authors’ view, the BEPS reports form part of the context and purpose of the Directives that are drafted on the basis of these reports. Therefore, the relevant BEPS reports are part of the context of the Directive and should be used as a source of interpretation and illustration. Such a line of reasoning also seems to follow from the aforementioned case C-115/16 (*N Luxembourg 1*), where the ECJ considered the OECD Model Convention and accompanying OECD Model Commentary to be relevant for the interpretation of the Interest and Royalties Directive, as this Directive draws upon article 11 of the 1996 OECD Model Convention.⁵⁵

The Lords Commissioners of Her Majesty’s Treasury, EU:C:2018:67, para. 51; ECJ 13 July 1989, C-215/88, *Casa Fleischhandels-GmbH v. Bundesanstalt für landwirtschaftliche Marktordnung*, EU:C:1989:331. Neither can the preamble be relied on as a ground for derogating from the text of the Directive, or for interpreting the provisions in a manner clearly contrary to their wording (ECJ 24 Nov. 2005, C-136/04 *Deutsches Milch-Kontor GmbH v. Hauptzollamt Hamburg-Jonas*, ECLI:EU:C:2005:716, para. 32.) Subject to these limitations, the preamble nonetheless plays an important role, if not the most important role, in interpreting the Directive.

⁴⁹ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19 July 2016, at 1–14 (‘ATAD-I’), recital 2 of the preamble.

⁵⁰ *Ibid.*

⁵¹ Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144, 7 June 2017, at 1–11 (‘ATAD II’).

⁵² OECD (2015), *Neutralising the Effects of Hybrid Mismatch Arrangements*, Action 2–2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241138-en> (accessed 18 Oct. 2021) (‘BEPS Action 2’).

⁵³ ATAD II, recital 28 of the preamble.

⁵⁴ DAC6, recital 4 of the preamble.

⁵⁵ See fn. 31.

4.2 Relevant Sources of Interpretation for DAC6

4.2.1 BEPS Action 12

It follows from the preamble of DAC6 that this Directive is drawn ‘along the lines’ of OECD BEPS Action 12. Therefore, BEPS Action 12 should serve as a source of illustration and inspiration for the interpretation of the Hallmarks and concepts that are derived from this report. During the negotiations of DAC6 the European Commission Services published an overview of ‘Examples and origin of the Hallmarks’,⁵⁶ from which it can be concluded that many concepts from DAC6 have their origin in BEPS Action 12, but are also sometimes inspired by BEPS Action 2 (in the case of hybrid mismatches) and by the national laws of some (Member) States. We believe that all these sources and examples can contribute to a better explanation of the concepts of DAC6.

4.2.2 Hallmarks on CRS and Transfer Pricing

In DAC6 a specific hallmark is introduced to address arrangements designed to circumvent reporting obligations involving automatic exchanges of information.⁵⁷ In recital 13 of the preamble of DAC6 it is noted that in:

implementing the parts of this Directive addressing CRS [Common Reporting Standards] avoidance arrangements and arrangements involving legal persons or legal arrangements or any other similar structures, Member States could use the work of the OECD, and more specifically its Model Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures and its Commentary, as a source of illustration or interpretation, in order to ensure consistency of application across Member States, insofar those texts are aligned with the provisions of Union law.

Here, too, a clear link is made with the work of the OECD.

DAC6 also includes specific hallmarks concerning transfer pricing (Hallmark E). During the negotiations, the Presidency of the EU Council had added the following recital to the preamble on this subject:

A specific hallmark should be designed to address the issues related to transfer pricing. For the purposes of this hallmark, Member States could use the work of the OECD, and more specifically, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, as a source of illustration or interpretation, in order to ensure consistency of application across Member States, insofar these texts are aligned with the provisions of EU law.⁵⁸

⁵⁶ See Commission Services, *Examples and origin of the Hallmarks*, Brussels, 21 Sept. 2017, WK 9981/2017 INIT.

⁵⁷ Hallmark D1 concerns an arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information.

⁵⁸ See Presidency, *DAC6 – Presidency compromise*, Working paper, Brussels, 27 Feb. 2018.

This recital can no longer be found in the final version of DAC6 adopted by the Council. This makes it less clear whether the OECD work on transfer pricing can still (and to what extent) be used as a source of illustration or interpretation of DAC6 transfer pricing hallmarks. In the authors' view, this is still possible, also in light of the ECJ case law in which it was ruled that 'nor, in the allocation of fiscal jurisdiction, is it unreasonable for the Member States to base their agreements on international practice and the model convention drawn up by the OECD'.⁵⁹ In the authors' view, this case law can also be applied by analogy to the transfer pricing hallmarks.

4.2.3 *The Commission's Views*

The question is whether the Commission's views are relevant for the interpretation of the concepts of DAC6. Reference is sometimes made in literature⁶⁰ and in national Explanatory Memorandums⁶¹ to the 'Summary Record' of the Commission Services regarding a meeting of various experts from twenty-seven Member States about the interpretation of DAC6.⁶² The views expressed in the Summary Record cannot, in the authors' view, be binding on the interpretation of the DAC6, and this view is endorsed by the European Commission itself.⁶³ All views contained in this Summary Record should however be regarded as the European Commission's interpretation of DAC6 and, given that the Commission is a professional and well-informed interpreter in this matter, are therefore to that extent relevant in the interpretation.

Another question is whether and to what extent the 'Commission Recommendation on aggressive tax planning'⁶⁴ may be important for the interpretation of DAC6. The text of DAC6 and its preamble does not refer to this Recommendation. In general, it should be noted that pursuant to Article 288 Treaty on the Functioning of the European Union (TFEU) recommendations 'have no binding force'. In case C-322/88 (*Grimaldi*), however, the ECJ decided that 'the national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions'.⁶⁵ In this case, it cannot be argued that the Recommendation is

designed to supplement binding Union provisions. The Recommendation was published in 2012; more than five years before DAC6 was adopted by the EU Council (which was adopted in May 2018). In addition, the purpose and scope of the recommendation is also different from the purpose of DAC6. Where the purpose of DAC6 is to provide a common set of rules throughout the EU regarding the exchange of information on potentially aggressive arrangements, the purpose of the Recommendation is 'to encourage all Member States to take the same general approach towards aggressive tax planning'.⁶⁶ The Recommendation encourages the Member States to take measures against i) double non-taxation and ii) to include a General Anti-Abuse rule (GAAR) in their legislation, and makes a number of suggestions to the Member States in this regard. The purpose and scope of the Recommendation is therefore different from the purpose and scope of DAC6⁶⁷ and as a result, the Recommendation in the authors' opinion does not seem to be the most suitable source for the interpretation of the concepts of DAC6.

4.2.4 *Example*

The question which sources are important for the interpretation of the terms in DAC6 arises, for example, in the interpretation of the Main Benefit Test ('MBT'). The general and some specific hallmarks of DAC6 only apply where this MBT is fulfilled.⁶⁸ The text of the MBT is as follows: 'That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage'.⁶⁹ The question is how exactly this MBT should be interpreted; the question is, among other things, how it must be determined that a tax advantage is the 'main benefit or one of the main benefits' of the arrangement. The preamble to DAC6 is silent on this, but point 81 of BEPS Action 12 notes that such a test 'compares the value of the expected tax advantage with any other benefits likely to be obtained from the transaction and has the advantage of requiring an objective assessment of the tax benefits'.

Given that it appears from the preamble of DAC6 that it has been drafted along the lines of Action 12 BEPS, this further interpretation of Action 12 also seems relevant to the MBT in DAC6.

⁵⁹ ECJ 12 May 1998, C-336/96, *Gilly*, ECLI:EU:C:1998:221, para. 31.

⁶⁰ D-E. Philippe & E. Yüksel, *Mandatory Disclosure of Aggressive Cross-Border Tax Planning Arrangements: Implementation of DAC 6 in Belgium*, 60 *Eur. Tax'n.* 4 (2020), *Journal Articles & Opinion Pieces IBFD*, at 122.

⁶¹ For instance, in the Dutch implementation of DAC6, see *Parliamentary Papers, Lower Chamber, 2018/19, 35 255–3*, at 34.

⁶² Commission Services, Summary Record, Working Party IV – Direct Taxation, 24 Sept. 2018 ('Summary Record').

⁶³ The Commission Services noted in the Summary Record: 'The views expressed during the meeting shall not be taken to be legally binding'.

⁶⁴ 2012/772/EU: Commission Recommendation of 6 Dec. 2012 on aggressive tax planning, OJ 2012, L 338/41 ('Recommendation').

⁶⁵ ECJ 13 Dec. 1989, C-322/88, *Grimaldi*, ECLI:EU:C:1989:646, para. 18. See more recent: ECJ 25 Mar. 2021, C-501/18, *BT*, ECLI:EU:C:2021:249, para. 80.

⁶⁶ See Recital 4 of the Recommendation.

⁶⁷ See also para. 35 of BEPS Action 12, where it is noted that on the one hand a GAAR and mandatory disclosure are mutually complementary, but on the other hand that mandatory disclosure is broader than a GAAR.

⁶⁸ See Hallmarks A en B in Annex IV of DAC6.

⁶⁹ Part I of Annex IV of DAC6.

4.3 Concepts in DAC6: Union, Quasi-national or quasi-Union?

4.3.1 Uniform Framework

It follows from its preamble that DAC6 intends to provide a common set of rules throughout the EU regarding the exchange of information on potentially aggressive arrangements.⁷⁰ This objective also follows from the wording of the Directive, which does not explicitly to national law for most of the concepts used in the Directive. Some concepts however explicitly refer to the national law of the Member States, such as the term ‘proof’,⁷¹ and ‘professional privilege’.⁷² Other concepts may implicitly refer to the national of the Member States, such as ‘resident for tax purposes’.⁷³

It is not likely that the EU legislator intends to fully control all the concepts in DAC6. The Directive aims to automatically exchange information on potentially aggressive arrangements.⁷⁴ Whether there is a potentially aggressive arrangement partly depends on the design of and differences between national tax laws. In that regard, it is important to realize that the design of the tax systems of the Member States falls within the competence of the Member States. Whether a potentially aggressive arrangement is present, should therefore to some extent be determined in reference to the national laws of the Member States.

Given its purpose, it seems that DAC6 aims to lay down a common *framework* for the automatic exchange of information on potentially aggressive arrangements. Such a common framework contributes to the objective of the Directive, which is to lay down uniform rules without regulating at the level of the EU beyond what is necessary to achieve the envisaged aims.⁷⁵

It can be argued that the EU legislator intends to give an entirely independent meaning to the concepts essential for the common framework.⁷⁶ Taking into account the aim of DAC6 to avoid divergent national concepts of the common framework, these concepts seem to be Union terms for which Member States do not have a margin of discretion in the interpretation.⁷⁷ In the authors’ view, concepts essential to the common framework are for instance the terms ‘reportable’ and ‘cross-

border’ in reportable cross-border arrangement, ‘intermediary’, and ‘relevant taxpayer’.⁷⁸

4.3.2 Margin of Discretion for the Member States in the Interpretation of DAC6 Concepts

As DAC6 does not refer to the law of the Member States for the interpretation of the concepts, these concepts are in principle Union concepts.⁷⁹ Nonetheless, some concepts cannot and should not be interpreted completely uniform, as they partly depend on national laws. These concepts are often used in the Hallmarks.⁸⁰

With regard to the undefined terms, a parallel arises with the aforementioned case C-51/76 (‘VNO’).⁸¹ In this case, too, a concept (‘capital goods’ in the Second VAT Directive) was not further defined, but neither did it contain a reference to national law. In this case, the ECJ ruled that such Member States have a certain margin of discretion in the definition of the Community concepts.

Such a margin of discretion does however not take away that Member States have to ensure the full effect of DAC6. In order to ensure the full effect of DAC6, Member States need to take into account its context, which can be derived from the preamble. Insofar DAC6 is based on BEPS Action 12 or BEPS Action 2, Member States should take into account the recommendations made in the BEPS Action 12 report. Insofar BEPS Action 12 does not provide a clear source of interpretation or illustration, Member States may use their own interpretation of the concept, especially if the interpretation of the DAC6 concepts depends de facto on non-harmonized national tax law. For example, Hallmark C2 relates to ‘deductions for the same depreciation on the asset claimed in more than one jurisdiction’. Hallmark C2 does not refer to national law for the interpretation of the term ‘depreciation’. In principle, this concept has an autonomous meaning under EU law. However, what a depreciation is, partly depends on national laws. The Member States therefore have a certain margin of appreciation in determining what a depreciation is.

Another example is the calculation of a ‘tax advantage’ for the purposes of the MBT. As noted above, DAC6 includes an MBT that ‘will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage’. In practice, the question arises when there is a ‘tax advantage’. In the authors’ view, the starting point is

⁷⁰ DAC6, Recital 10 of the preamble.

⁷¹ See Art. 1(2)(4) of DAC 6, or Art. 8ab(4) of the amended Council Directive 2011/16/EU.

⁷² See Art. 1(2)(5) of DAC 6, or Art. 8ab(5) of the amended Council Directive 2011/16/EU.

⁷³ Included in (among others) Art. 1(2)(3)(a) DAC6, or Art. 8ab(3)(a) of the amended Council Directive 2011/16/EU.

⁷⁴ DAC6, Recitals 4–11 of the preamble.

⁷⁵ See DAC6, Recital 10. A similar reasoning can be inferred from the Danish cases, see fn. 31.

⁷⁶ See fn. 19.

⁷⁷ National courts, as the interpreter of EU law, must therefore refer to the ECJ for preliminary questions on the interpretation of these concepts, unless there is an *acte clair*, or an *acte éclairé*. See ECJ, 6 Oct. 1982, C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, ECLI:EU:C:1982:335, para. 14–16.

⁷⁸ Note that all these concepts are defined in Art. 1(1)(b) of DAC6.

⁷⁹ DAC6 does however refer to national law with regard to the determination of the penalties (see DAC6, Recital 15 of the preamble).

⁸⁰ See Annex IV to DAC6.

⁸¹ ECJ 1 Feb. 1977, C-51/76, *Verbond van Nederlandse Ondernemingen tegen Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1977:12.

that this is a Union concept. The content of the term tax advantage will in principle be given by the ECJ. For example, about whether a tax advantage only relates to taxes levied by EU Member States or whether it can also relate to taxes levied by third countries. Another question is whether tax *deferral* can be considered a tax advantage. In addition, the ECJ can provide indications as to whether (and how) a comparison should be made with regard to the question of whether there is an advantage. On the other hand, Member States do have a margin of discretion when interpreting the concept of tax advantages. Whether, how and from whom a tax is levied lies within sovereignty of the Member States. This should be determined by Member States on the basis of national law. In the calculation of a 'tax advantage' they have a margin of discretion. In other words: an arrangement that yields tax advantages in the Netherlands does not have to yield the same advantage in Germany (or vice versa); to that extent, the concept of 'tax advantage' is therefore a quasi-Union concept.

The margin of discretion may however not lead to a narrower scope of application of DAC6, as Member States have to ensure the full effect of EU law.⁸² It is up to the ECJ (and the national court) to properly safeguard the scope of application of DAC6. Referring to the MBT as an example, in some Member States – such as Austria, France and Luxembourg⁸³ – the MBT is not fulfilled when the arrangement is in accordance with the policy intent, i.e., in accordance with the intention of the legislator. As the exception of the policy intent is not expressly included in the text of the MBT, the question is whether these Member States are not interpreting the MBT too narrow.

5 CONCLUDING REMARKS AND A CALL FOR EU GUIDANCE

DAC6 aims to lay down a common framework for the automatic exchange of information on potentially aggressive arrangements. The concepts that are essential for this common framework should be interpreted on a uniform basis. Hence, Member States do not have a margin of

discretion when it comes to the definition of the concepts that are relevant for the uniform framework of DAC6.

Member States do have a margin of discretion with regard to the other concepts in DAC6, as they partly depend on the definition under national law. However, as DAC6 finds itself on the border between a harmonizing Directive and non-harmonized national tax laws, it remains difficult – in general – to determine the margin of discretion that Member States may have.

That being said, in their margin of discretion, the Member States must ensure the full effectiveness of Union law. On the basis of that, the concepts must be defined (and interpreted) in line with the object and purpose of the Directive. Member States should use BEPS Action 12 as a source of interpretation and illustration insofar DAC6 is based on this report. However, insofar BEPS Action 12 is not clear on or relevant for the definition of a concept, Member States would have the autonomy to define these terms under national law, especially if the interpretation of the DAC6 concepts depends de facto on non-harmonized national tax law. Such an autonomy may not lead to a narrower scope of DAC6 than intended by the EU legislator.

It should be reminded that recital 10 of DAC6 states that 'due to the potential impact on the functioning of the internal market, one can justify the need for enacting a common set of rules, rather than leaving the matter to be dealt with at the national level'. However, the diverging views of Member States on the concepts in DAC6 effectively lead to the 'matter to be dealt with at the national level', instead of the common framework that was envisaged by the EU legislator. To prevent diverging definitions of the common framework across Member States, the authors conclude this article with a suggestion to the Commission to publish guidance (in the form of a recommendation) on the definition of the concepts essential to the common framework. Although this guidance will not be legally binding, under the *Grimaldi* case law⁸⁴ it will have to be taken into consideration by the taxpayer, intermediary, tax authorities, national legislator and national court and will therefore be able to provide (some) legal certainty on this point.

⁸² This applies to both administrative authorities and national courts. See for instance, ECJ 14 Sept. 2017, C-628, *The Trustees of the BT Pension Scheme v. Commissioners for Her Majesty's Revenue and Customs*, ECLI:EU:C:2017:687, para. 54 and case law cited.

⁸³ See Andrzejewska-Czernek et al., *supra* n. 2, para. 2.6 (Austria), para. 3.3 (France) and para. 9.3 (Luxembourg).

⁸⁴ See fn. 67.