

ETAF statement on the proposal for an eighth amendment to the Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC8)

The European Tax Adviser Federation (ETAF), which represents 215 000 regulated tax advisers, would like to thank the European Commission for the opportunity to comment on its proposal for an [eighth amendment](#) to the Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC8), published on 8 December 2022.

We welcome the main purpose of this proposal, which is to extend the mandatory automatic exchange of information between EU Member States to income earned through crypto assets. However, the Commission also took this opportunity to include broader changes to the directive, some of them being of high concerns for ETAF members.

I. General comments on the proposed extensions

In principle, ETAF welcomes the extension of the mandatory automatic exchange of information to income earned through crypto assets as well as to information to advance cross-border rulings to high-net-worth individuals and to non-custodial dividend income. We believe that these measures will help tax administrations to better identify and fight tax fraud and money laundering. However, these extensions will again result in more administrative burden for tax advisers and tax authorities.

On a more general note, we have to point out that the successive changes to the Directive on administrative cooperation in the field of taxation (DAC) have been adopted at an incredible speed these last years and the tax professionals have had difficulties to keep up with the fast-changing rules and assimilate them properly, in particular in small tax firms.

The latest change to the DAC, to extend the automatic exchange of information to digital platforms (DAC7), started to apply just a few months ago, on 1 January 2023, and Member States are already about to adopt the next change. The EU needs to take some perspective and assess the effectiveness of previous changes to the Directive before releasing new measures.

Therefore, ETAF is very much looking forward to the planned evaluation of the “*effectiveness, efficiency and continued relevance of the DAC and its amendments (DAC2 to DAC6)*” during the third quarter 2024, as [announced](#) by the Commission.

II. Specific comments on the proposed minimum penalties

On the legality of the measure

The main concern of ETAF relates to the proposed minimum penalties. While the current Directive only foresees that Member States shall lay down rules on penalties that should be “*effective, proportionate and dissuasive*”, the DAC8 proposal would introduce a set of different minimum penalties depending on the infringement, the turnover of the non-compliant entity and on whether it concerns a company or an individual.

According to the proposal, the minimum level of financial penalty would apply only after two valid administrative reminders or when the provided information contains incomplete, incorrect or false data, amounting to more than 25% of the information that should be reported. This would apply to the DAC8 reporting requirements but also for the public country by country reporting (DAC4), cross-border arrangements (DAC6) and revenues made by sellers on online platforms (DAC7).

The Commission justifies the need for such harmonization by the fact that the differences in the level of penalties between Member States would jeopardize the efficiency of the DAC. We highly reject this argument. In the case of DAC6 for instance, a [study](#) ordered by the FISC subcommittee of the European Parliament in March 2022¹ clearly shows that the failure of the Directive to achieve the effects anticipated by the Commission can be to a large extent attributed to the vagueness of the hallmarks introduced to identify and report on potentially aggressive tax planning schemes as well as to the absence of definitions of fundamental terms.

Going further, we would like to express our doubts about the legality of the determination of penalties levels by the European Commission. According to article 83(1) of the Treaty on the Functioning of the European Union (TFEU), the European legislators may establish minimum rules for penalties if it concerns particularly serious crimes with a cross-border dimension. In particular, the article lists the following areas of crime: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. However, a breach of the obligation to report cross-border tax arrangements cannot be attributed to any of these offences.

Pursuant to article 83(2), approximation of criminal law provisions of Member States is still possible in other areas than the ones listed above to ensure the effective implementation of an EU policy. However, this would suppose proving that the measure is essential for the effectiveness of the implementation of the policy concerned or the lack of any alternative. However, as far as ETAF is aware, an investigation of other possible measures, such as a better control in the Member States or the use of more user-friendly software in the implementation of the reporting obligations, has not been carried out.

¹ 1 HASLEHNER, W., PANTAZATOU, K., 2022, Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6), Publication for the Subcommittee on tax matters (FISC), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

On the proportionality of the measure

Furthermore, it is also questionable whether the sanction levels proposed can actually be qualified as “minimum penalties”. A minimum penalty is usually determined by approximating the average level of penalties in the Member States. In this case, Member States with a lower level of penalties would have to increase it accordingly, while Member States with a higher level of penalties would be able to go beyond the minimum penalties and maintain their own level.

However, ETAF doubts that the proposed penalties meet these criteria as they would in reality amount to the maximum penalty for the vast majority of Member States. In particular, in case of non-compliance with the mandatory exchange of information on reportable cross-border arrangements (DAC6), the proposal foresees that the minimum pecuniary penalty shall be not less than 50 000 € when the annual turnover of the intermediary or relevant taxpayer is below 6 million € and 150 000 € when the turnover is 6 million € or above. The minimum pecuniary penalty shall be not less than 20 000 € when the intermediary or the relevant taxpayer is a natural person.

In most ETAF members’ countries, the minimum penalties proposed by the Commission are way above the existing levels of penalties. In France, failure to comply with DAC6 requirements leads to the application of a fine which may not exceed 10 000 € or 5 000 € in the case of the first offence in the current calendar year and in the three preceding years². The maximum total amount of penalties that can be imposed on an intermediary or a taxpayer in a calendar year is also capped to 100 000 €. In Germany, the maximum penalty is currently 25 000 €³, in Romania it is up to 100 000 RON⁴, i.e. around 20 000 €, and in Hungary up to 5 million HUF, i.e. around 13 000 €⁵. In Belgium, the maximum level of penalty can reach 100 000 €. However, the country has chosen to make a distinction between incomplete reporting and no or late reporting and applies a much lower range of penalties from 1 250 € to 25 000 € for incomplete reporting⁶.

In our view, the minimum penalties proposed by the Commission are disproportionate and do not take into account the different economic situations and legal traditions of Member States.

It is also unclear how the 25% of information that should be reported will be calculated and whether all types of incomplete, incorrect or false information will be put on an equal footing. For instance, will a forgotten street number in the address count as much as a knowingly wrong turnover?

² Article 1729 C ter of the French General Tax Code

³ §379 para. 7 of the German Fiscal Code

⁴ Romanian ordinance Nr 5 of 28 January 2020

⁵ Paragraphs 220-221 of the 2017 Hungarian Act on the Rules of Taxation

⁶ Belgian royal decree on articles 18, 31, 33 et 47 of the 20 December 2019 law transposing Directive (UE) 2018/822

On the expected impact on the tax profession

According to the European Commission's proposal, the proposed minimum penalties would not only affect taxpayers but also intermediaries. For tax advisers, who would not be at all to blame in the case of false data transmission by the client, the penalty would not only be disproportionately high, but it would also be unfair.

ETAF would like to warn that, in the case of the inclusion of intermediaries in the minimum penalties, the premiums for liability insurances are likely to increase, including for those tax advisers who conscientiously fulfilled their obligation to report in due time. Furthermore, tax advisers who do not have any cross-border mandates at all would also be affected by this increase. In this regard, the proposed measure would amount to a collective punishment for the whole tax profession.

For the above-mentioned reasons, ETAF firmly supports the [reported](#) wish of a majority of Member States in the Council of the EU to reverse this encroachment to their very own competence and delete the proposed sanctions from the text.

ETAF will also stay vigilant on how the European Commission and Member States could attempt to use the DAC8 proposal to address the recent Court of Justice of the European Union [decision](#) invalidating DAC6 reporting requirements that infringe professional privilege and bring EU rules in conformity with the Court judgment.

Notes

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About ETAF

The European Tax Adviser Federation (ETAF) is a European umbrella organisation for tax professionals whose activities are regulated by law. It is set as an international not-for-profit organisation (AISBL) governed by Belgian law, based in Brussels and was launched on 15th December 2015. It represents more than 215,000 tax professionals from France, Germany, Belgium, Romania, Hungary and Austria. ETAF is a registered organisation in the EU Transparency Register, with the register identification number 760084520382-92.