ETAF
European Tax Adviser Federation

ETAF statement on the rationalisation of EU reporting requirements

Introduction

The European Commission recently committed to make a fresh push to rationalise reporting requirements originating from EU legislation and weighing on companies. In this context, the Commission is actively seeking indications from stakeholders of the areas where requirements are particularly problematic and concrete ideas for rationalisation.

Representing the voice at EU level of 215 000 regulated tax advisers, ETAF is happy to provide its feedback to the European Commission on inefficient and problematic EU reporting requirements in the tax area.

As preliminary remarks, we would like to say that we highly support this initiative and acknowledge its potential to create an efficient and favourable regulatory framework for companies, as outlined by the EU Commission.

Although we recognize that reporting requirements might be useful to ensure proper implementation and monitoring of EU legislation, some of them are too cumbersome or costly for businesses, especially for small and medium-sized enterprises (SMEs).

Due to their proximity with companies, tax advisers find themselves at the epicentre of this regulatory landscape. When they are not themselves in charge of the filing obligations resulting from EU law, they help businesses navigate the intricacies of EU tax legislation.

General comments on the initiative

1. Scope of the exercise

For the purpose of this public consultation, the Commission defined “reporting requirement” as *“a requirement stemming from EU legislation that obliges Member States authorities, private organisations and/or public organisations to provide (in principle periodically) structured or unstructured data (qualitative or quantitative) to competent authorities at EU or national level”*. It clarified that the notion of reporting requirements also includes the provision of information from businesses to other businesses or from businesses to consumers but not certification, labelling, permitting, and similar processes.

Although we support such a definition, we deem necessary to point out that reporting obligations only constitute a part of the broader picture of bureaucratic burden for companies. Documentation obligations, authorisation procedures, certifications, labelling obligations and administrative requirements also contribute to imposing excessive bureaucracy on companies.

Excluding them from the scope of the exercise entails the risk of gaps in the identification of disproportionate, duplicated or inappropriate administrative burden. For this reason, we recommend extending such initiative to other bureaucratic requirements in the future.

2. A permanent exercise

Going even further, we believe that this rationalisation exercise should not be an isolated announcement from time to time but should rather become a permanent exercise. Such call for evidence should be published at regular intervals in the future, at least twice within a Commission's mandate.

This needs to be part of a wider and consistent framework. Existing instruments for streamlining reporting obligations, such as the Regulatory Fitness and Performance Programme (REFIT), the SME test and the "once only" principle, must also be applied consistently in the future.

The "one in, one out" principle, according to which newly introduced burdens in one policy area should be offset by removing equivalent burdens in the same policy area, must also be observed throughout the entire legislative process.

In addition, any implemented EU legislation that contains new reporting obligations should undergo a thorough cost/benefit analysis no later than three years after its introduction.

DAC6: the main problematic reporting requirement for the tax profession

1. Quantifying the burden

After consultation with our members, we found that the main current problematic reporting requirement for the tax profession originates from the Directive (EU) 2018/822 regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6). It has been in force since June 2018 and the rules started to apply in July 2020, which allows us to have sufficient hindsight to analyse its efficiency.

The Directive imposes a disclosure obligation for intermediaries, including tax advisers, for "reportable cross-border arrangements" and the use of "hallmarks" to determine whether a tax planning in question is reportable. While the legislation aims at primarily targeting potentially aggressive tax planning structures, its scope is in fact very broad.

The disclosure obligation requires the review of every single tax arrangement, even if it has already been reported multiple times. Often, these are not new information for the tax administration. New tax arrangements are generally clarified through a binding inquiry with the tax administration. These binding inquiries are then reported to other Member States within the framework of cross-border exchange.

Through DAC6 reporting requirements, tax administrations ultimately receive all necessary information that would be available by the time of tax declaration submission or at the latest by the time of the operational audit. Thus, DAC6 mainly leads to a temporal shift in the information horizon of the tax authorities. However, this only applies if the tax administrations process the information received from the reports promptly and effectively.

Due to the diversity of the reports received in our members' countries, it is not possible to determine the average costs or time expenditure incurred as a result of the DAC6 reporting obligations.

However, we would like to point out that the actual time and staff required to carry out the reporting only represents a small proportion of the total effective costs of the reporting obligations. Not least due to the vague definitions laid down in the Directive, tax advisers are required to undergo continuous training and gather information on potential reports.

Furthermore, tax advisers must every time weigh up in which cases there is a duty of disclosure and in which cases the relationship of trust with the client must (professional secrecy) be maintained. This leads to additional research work, further meetings and additional communication work with the client.

2. Limited efficiency

Our members reported that the DAC6 reporting requirements have a limited effect in practice as very few of the numerous reports received are actually followed by a legal action.

The inefficiency is partly due to unclear legal terms within the directive, such as "arrangement", "participants in an arrangement", "hallmark" or "main benefit test". The definition of intermediaries is also too imprecise.

This issue is not new and has been recognized in a study ordered by the FISC Subcommittee of the European Parliament in March 2022[1], which shows that DAC6 failed to achieve the effects anticipated by the Commission. The study states that, in practice, it still remains unclear what exactly needs to be reported, as the introduced hallmarks are too vague. As a result, Member States added their own definitions in some cases with the result that different information regarding quality and quantity is being reported and exchanged. According to the study, the amount of reported information created by such a fragmented implementation does not only overburden tax authorities and intermediaries but can even affect legitimate transactions.

Another good example of the problems generated by the DAC6 reporting requirements is the case C-623/22 currently pending before the Court of Justice of the European Union. In the aforementioned request for preliminary ruling, the plaintiffs argue that several concepts used to determine the scope of the reporting obligation in respect of cross-border arrangements are not sufficiently clear and precise. According to them, this would be a serious infringement to the general principle of legal certainty. The plaintiffs also consider that the obligation to report cross-border arrangements for taxes other than corporation tax is disproportionate.

3. Possible solutions

In view of the disproportionate cost/benefit burden generated by the DAC6 reporting requirements, we propose that the Commission immediately begins the evaluation of the DAC announced for 2024 its Work Programme and critically questions the actual benefits of DAC6.

In particular, we expect this evaluation to clearly show the amount and the kind of abusive tax arrangements which have been the most reported and by which companies. Building on the results of the evaluation, an effective solution could be to create a white list of harmless tax arrangements – currently falling under the scope of the existing Directive – that would not need to be reported anymore in the future.

[1] HASLEHNER, W., PANTAZATOU, K., 2022, Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC6), Publication for the Subcommittee on tax matters (FISC), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

Other problematic EU reporting requirements

1. Recently adopted/implemented legislations

In this part, we have listed other proposals which have been adopted or implemented recently and where we have a strong suspicion that the reporting requirements will reveal problematic or overlapping.

➔ *Directive (EU) 2021/2101 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (Public CbCR)*

The Public CbCR Directive, which started to apply in June 2023, requires multinational enterprise groups with revenues exceeding €750 million to publish from year 2026 at the latest how much corporate tax they pay in each Member State as well as in non-cooperative jurisdictions for tax purposes.

The reports include contextual information in addition to taxes paid, such as the nature of activities, the list of subsidiaries, turnover, number of employees, retained earnings and profit before tax. The Directive adds another angle to the reporting by making such data public and thus available to a wider audience.

In general, we do not expect the Public CbCR Directive to cause significant additional effort as most of the required information can already be extracted from the company's balance sheet. The crucial aspect here is the implementation or use of the data by the tax administration afterwards. In some of our members, the first reports received so far reportedly remain largely unused.

Our fear is that the reporting obligations resulting from the EU Public CbCR Directive, combined with the new filing obligations introduced by the Minimum Tax Directive (see below), may result in double reporting.

This issue was recognized by the OECD, who published in December 2022, guidance on the introduction of a temporary country-by-country (CbCR) safe harbour intended to mitigate the complexity and compliance hurdle for taxpayers in relation to the minimum taxation rules (OECD Pillar Two). Concretely, the safe harbour would involve less extensive calculations on the basis of a smaller pool of already available data from the CbCR report. For the safe harbour to apply, the CbCR report must meet certain conditions to be found "qualifying". The safe harbour would however only apply during the transitional period i.e., beginning on or before 31 December 2026 but not including a fiscal year that ends after 30 June 2028.

In our view, one way to remedy the possible overlap would be to make the OECD CbCR safe harbour permanent rather than limited in time, as well to apply it also to public CbCR as set out in Directive (EU) 2021/2101.

➔ *Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (Minimum Tax Directive)*

The Minimum Tax Directive has been adopted in December 2022 and Member States have until 31 December 2023 to transpose it in their national orders. It transposes in the EU the so-called Pillar Two of the OECD agreement, introducing worldwide a minimum 15% effective tax rate for large multinational enterprises (MNE).

MNE groups within the scope of the Directive will be obliged to provide comprehensive and detailed information on their profits and effective tax rate in every jurisdiction where they have constituent entities – even if, they are already subject to an effective tax rate of at least 15%.

In particular, each constituent entity of a multinational group located in an EU Member State will have to file a yearly so-called "top-up tax information return", unless this return is filed in another jurisdiction with which the EU Member State has an agreement regarding the exchange of information.

The top-up tax information return must be filed within 15 months after the end of fiscal year of the constituent entity and shall notably include identification information on the constituent entities, (including their tax identification numbers), information on the overall corporate structure of the MNE group and information that is necessary in order to compute the effective tax rate for each jurisdiction and the top-up tax of each constituent entity.

We consider that with the introduction of the Minimum Tax Directive, most of the information required by the Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD1) should be waived for multinational companies meeting Pillar Two thresholds (i.e., more than €750 million of consolidated revenues in at least two of the four preceding years) in order to avoid duplication.

In particular, the relation between the Minimum Tax Directive and the Controlled Foreign Company (CFC) rule in the ATAD1 should be clarified as they both pursue the same objective, i.e. to prevent profit shifting in low-tax countries, and they overlap in their scope of application. The abolition of the information requirements in relation with ATAD1 CFC rule for the companies in scope of the Minimum Tax Directive would already lead to a considerable rationalisation of reporting obligations.

A closer look should also be given to the evidence to be provided in accordance with the anti-hybrid mismatches rules set out in ATAD1 and ATAD2, which could, in our view, also be reduced with the implementation of the Minimum Tax Directive.

2. Pending proposals

In addition to the reporting obligations already enacted in existing EU legislation, the legal acts that are currently still in the EU legislative process should also be kept in mind in order to avoid gaps in the streamlining of reporting obligations. This is all the more important as a significant number of tax proposals are currently pending and could possibly overlap.

➔ *Proposal for a Directive (EU) 2021/565 laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU (UNSHELL)*

The UNSHELL Directive proposal, which was presented in December 2021 and is currently still in the legislative process, introduces a complex filtering system ("gateway") through which companies based in the EU must demonstrate that they are not shell companies and that they pursue a real economic activity. Companies will entrust tax advisers with fulfilling these reporting obligations.

In an ETAF position paper published in April 2022, we already outlined that we expect a significant number of companies to cross the gateway and thus to fall under the reporting requirements because the criteria are too far-reaching.

One good example is the criterion aiming at verifying if the undertaking outsourced the decision-making on significant functions in the preceding two tax years. "Significant functions"

is too vague to figure in a text of law and should absolutely be specified. As it stands, we expect this criterion to be problematic to verify.

Proving the minimum economic substance every year will also generate a considerable effort for taxpayers and their tax advisers, that could easily be remedied if the presumption of economic substance would stay valid until there is a substantial change which may affect the ability of the undertaking to meet the economic minimum substance indicators.

Moreover, the burden for companies to provide evidence to activate the rebuttal mechanism or to request an exemption is too excessive, which could discourage taxpayers to invoke them.

We also believe that the ATAD1, the exchange of information covered by the successive modifications of the Directive on administrative cooperation in tax matters (DAC), the Transfer Pricing rules and the CFC rules already tackle many of the issues that the UNSHELL Directive is seeking to address and we are, therefore, not completely sure about the added value of the new reporting requirements.

➔ *Proposal for a Regulation (EU) 2021/420 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (AML Regulation)*

On 20 July 2021, the European Commission proposed to integrate all the existing obligations under the previous Anti-Money Laundering (AML) Directives into a single EU AML Regulation. At the same time, the Commission decided to introduce new reporting obligations, which would, in our view, lead to an unreasonable amount of additional bureaucracy, particularly for obliged entities in the non-financial sector and smaller tax advisory practices.

As “obliged entities”, tax advisers have the duty to check their client’s identity. As outlined in an ETAF position paper published in November 2021, the new proposal further expands the information to be collected to the extent that the tax identification number and, in the case of natural persons, the employment or the occupation shall also be recorded. In the meantime, the previously most important sources of information such as official documents, ID cards or excerpts from the commercial register, will no longer be sufficient for the collection and the verification of this data. For the obliged entity, this means a disproportionate and additional effort in identifying and verifying the identity, whereby it is not clear if this additional burden brings added value.

The above-mentioned statement applies even more to the collection and verification of information regarding the beneficial owner. The new proposal lists considerable extensions of the information to be collected. In contrast to the existing rules, the proposal no longer differentiates whether the beneficial owner actually represents an increased risk with regard to money laundering. Some of the information requested in the text about the beneficial owner, such as the national identification number or the tax identification number, e.g. in the case of the residence or company headquarters abroad, cannot be collected at all and often cannot be checked with the necessary care.

We believe that the Commission should immediately proceed to a comprehensive assessment of the added value of all the previous data collection for combating money adding over time until the 5th AML Directive. Then only, a reasonable consideration could be made as to which additional data shall be collected from contractual partners or beneficial owners.

Conclusion

One particular problem in EU tax policies that ETAF has often raised is the speed at which tax proposals have been proposed these recent years, without taking the time between each of them to really assess their full impact and possible overlaps. This leads to the introduction of further highly complex legislations, some of which pursue similar goals (often the fight against tax avoidance). At the same time, these legislations generate an always higher reporting burden for taxpayers and tax authorities.

As outlined above, DAC6 reporting requirements are the main problematic ones for the tax profession at the moment. But we suspect that, without changes, other reporting requirements in recently adopted/implemented EU legislations or in pending tax proposals might also reveal problematic.

In general, ETAF sees the introduction of white lists, threshold values, categories, or gradual implementation to reduce the reporting burden for SMEs compared to MNEs as good tools to rationalise reporting requirements.

Overall, we encourage the Commission to pursue regular and timely review of EU reporting obligations to ensure their effectiveness and relevance over time.

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, Austria and Croatia. ETAF is a registered organisation in the EU Transparency Register, with the register identification number 760084520382-92.