ETAF statement on the evaluation of the Directive on administrative cooperation in tax matters (DAC)

Introduction

The European Tax Adviser Federation (ETAF) would like to thank the European Commission for the opportunity to comment on its evaluation of the Directive on administrative cooperation in tax matters (DAC) and its successive amendments (from DAC2 to DAC6).

ETAF welcomes very much the evaluation of the Directive 2011/16/EU as a first concrete action in the framework of the ongoing European Commission's effort to rationalise EU reporting requirements.

In principle, ETAF views the DAC as an effective tool for enhancing cooperation among tax authorities in the European Union and combatting tax evasion and money laundering. While we acknowledge that DAC Directives have significantly increased information exchange, we must also recognize that they have resulted in a substantial volume of data that tax administrations must now manage. It is questionable whether all the information requested by the successive DACs are really in use and of use for the tax authorities. Furthermore, more and more reporting obligations were shifted onto taxpayers.

As previously explained in our answer to the public consultation on the rationalisation of EU reporting requirements, our members 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). The co-existence of the country-by-country disclosure requirements foreseen in Directive (EU) 2016/881 (DAC4) and other EU Directives is also creating some double reporting issues.

Therefore, after some preliminary comments on the evaluation itself, the present statement will focus on DAC6 and DAC4 notification requirements.

I. Preliminary comments on the evaluation

a. On the scope of the evaluation

The European Commission's evaluation is intended to assess the DAC effectiveness, efficiency and ongoing relevance, as well as its coherence with other policy initiatives and priorities and the added value for the EU. In this context, we believe that it should also assess if the DAC provisions are still proportionate compared to the objective and if the legal basis for such measures is still valid.

Unlike at the time of the DAC evaluation in 2019, the goal of reducing reporting obligations and bureaucracy must now be seen as a priority of EU policies. In terms of coherence, priorities and added value for the EU, these areas must therefore be taken into account to a high degree in the evaluation of the DAC.

In its call for evidence, the European Commission says that it is also important to *"examine whether the DAC has any deterrent effect and to assess the impact of the DAC on the objective of safeguarding Member States' tax revenue and the functioning of the single market"*. In the introduction of the public consultation questionnaire, it further asserts that the *"DAC safeguards Member States' tax revenue and improves the fairness of the tax system"*.

If we take the example of DAC6, it is questionable whether the DAC6 reporting obligation has a deterrent effect in the fight against tax avoidance or tax evasion. This would be the case if an intermediary were prevented from marketing, designing, providing or managing cross-

border tax arrangements solely due to the existence of the DAC6 notification obligation. We would like to warn that, without sufficient data, relying on this argument may unjustifiably uphold ineffective legislative measures and hinder legislative improvement and simplification. As the DAC itself rightly states, the Commission should carry out an assessment of the efficiency of administrative cooperation based on statistical data.

The DAC evaluation should transcend an internal bureaucratic process within the European Commission and adopt an open-ended approach aimed at improving and simplifying legislation while adhering to principles like proportionality and subsidiarity. The recent implementation of the OECD's Pillar Two rules and new EU Public Country-by-Country reporting requirements, which share transparency goals with the DAC, have created redundancies and inefficiencies. Therefore, the evaluation should focus on eliminating redundant DAC provisions and simplifying.

Simplification must be the top priority in this evaluation. As an immediate simplification tool, ETAF members would welcome a consolidation of the initial DAC and its subsequent amendments into a single text.

b. On the tools for evaluation

ETAF very much supports the European Commission in its will to ensure the DAC is meeting its objectives while not overburdening tax advisers and companies. For this reason, our members duly participated to the targeted consultations and interviews conducted by DG TAXUD in 2023.

Alongside the present statement, ETAF also responded to the general questionnaire provided by the European Commission. However, we would like to highlight that the questionnaire did not adequately allow for thorough and critical feedback, and as such, it does not fully represent our position. Our stance is more accurately detailed in the current document. Therefore, our responses to the questionnaire should not be interpreted as an endorsement of the effectiveness of the DAC.

II. Specific comments on DAC6

a. Ineffective use of DAC6 data

The Directive (EU) 2018/822 regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6) has been in force since June 2018 and the rules started to apply in July 2020. 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. This is due in particular to the "conversion of income" criterion, which already includes the transfer of receivables or other income-generating assets to a corporation. 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 submitting tax declaration or at the latest by the time of the operational audit. Thus, DAC6 mainly leads to a temporal shift in the information

influx to the tax authorities. However, this only applies if the tax administrations process the information received from the reports promptly and effectively.

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 also 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, 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.

To date, there is no solid evidence indicating how reports under these hallmarks have supported the Directive's overall objectives. ETAF expects the Commission's evaluation to clearly show the amount and the kind of abusive tax arrangements which have been the most reported and by which companies.

b. DAC6 provisions challenged in Court

DAC6 has also raised several legal uncertainties. A 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.

The definitions and the hallmarks are not the only elements of DAC6 challenged in Court. It was also demonstrated that the current version of DAC6 does not adequately protect the professional secrecy of both lawyer-intermediaries and tax advisers. In a judgment released in December 2022 in case C-694/20, the Court of Justice of the European Union already invalidated a provision from DAC6, which infringed the legal professional privilege of lawyer-intermediaries. An amendment in Directive (EU) 2023/222 (DAC8) was subsequently necessary to clarify the provision after the CJEU ruling.

In case C-423/23, the Court Advocate General further clarified that, in its opinion, the special protection of legal professional privilege in DAC6 must *"apply not only to lawyers but also to tax advisers and other groups of professionals, in so far as these, as independent collaborators in the interests of justice, are treated in the same way as lawyers under the relevant national law and are therefore authorised to give legal advice to clients and represent them in court".*

c. DAC6: an old-fashioned tool

We believe that the evaluation should closely scrutinise whether the DAC6 reporting obligation is in general a suitable instrument for achieving the objective of the DAC.

In particular, we deem it necessary to examine whether the recital 2 of DAC6 stating that it is becoming increasingly difficult for Member States to protect their national tax bases against erosion still corresponds to today's reality. Due to national and EU legislative acts that have come into force in the meantime and due to increasing digitalisation, a corresponding assessment could come to the opposite conclusion.

The OECD's Pillar Two rules restrict multinational companies' ability to benefit from low-tax regimes and engage in aggressive tax planning practices, thus reducing the need for DAC6. The evaluation should absolutely focus on checking the compatibility and overlapping of DAC6 and Pillar Two rules, especially as the Commission plans to issue in 2024 a proposal for a ninth amendment to the Directive on administrative cooperation (DAC) in tax matters, to accompany the implementation of Pillar Two and avoid multiple reporting for companies in the scope.

Moreover, ETAF has strong concerns about the direction the proposal for a Directive laying down rules to fight the misuse of shell entities (UNSHELL) is taking. To our knowledge, the new approach proposed in June 2024 by the European Commission to unlock the negotiations in the Council of the EU may resemble DAC6 hallmarks and create some more overlaps or confusion for obliged entities, thus further undermining the effectiveness of the Directive.

d. Our recommendation: remove the DAC6 reporting obligation

In view of the disproportionate costs/benefits combined with the legal uncertainties and the overlaps with more recent EU legislations, ETAF advises the European Commission to submit a proposal that would completely remove the reporting obligation of DAC6 from the legal text. Eliminating the DAC6 reporting obligation would not affect the object of the DAC, which is solely the cooperation of the Member States on the exchange of information.

One alternative to the elimination of the DAC6 reporting obligation would be of course to modernise it. This could take the form of a reform by limiting its scope of application, by improving the existing definitions or by improving digital processes to reduce the number of identical notifications.

However, we would like to stress that such improvements could only reduce the time or the financial burden on intermediaries or taxpayers but would not generate any additional benefit increasing the effectiveness of the measure in the fight against tax evasion, tax offences or aggressive tax planning. Moreover, adjusting to these new changes would again generate more administrative burden for companies and their tax advisers.

III. Specific comments on DAC4

a. Limited informative value of CbCR reports

Besides DAC6, the country-by-country reporting required in DAC4 is problematic for some of our members. The primary objective of DAC4 is to provide the tax authorities with relevant information by reporting profits at the place of value creation. However, the informative value of CbCR must be regarded as very limited. This can firstly be explained by the fact that the information is not comparable between Member States as there is no uniform data basis.

Instead, the company groups are free to decide whether they use the data from their consolidation reporting packages, from separate entity statutory financial statements, regulatory financial statements, or internal management accounts.

The forms are also very unspecific. In particular, the terms used are not consistent with previous terminology. It is questionable whether the reported information represents the actual situation of the group or whether it ultimately leads to a distortion. In our view, this makes it even more difficult for the tax authorities to assess risks.

Moreover, the DAC4 includes a template with three tables for the country-by-country report. Table 1 provides an overview of allocation of income, taxes and business activities by tax jurisdiction. Table 2 contains a list of all constituent entities of the MNE Group included in each aggregation per tax jurisdiction. In Table 3, the MNE group can list additional information, they consider as necessary. Table 1 in particular contains information that the tax authorities would not otherwise have access to. The information from Table 2, on the other hand, can in principle also be taken from the consolidated financial statements or the individual financial statements of the companies, which makes the benefit in this case rather limited.

b. Double reporting issues

DAC4 has a double reporting issue with the public CbCR set out in Directive (EU) 2021/2101. The two reporting standards are aimed at different addressees and therefore differ in their means. The DAC4 is a confidential report to the financial authorities while the Public CbCR is a publicly transparent report. However, both reporting standards are aimed at combating tax avoidance. Nevertheless, the information to be reported differs which ultimately leads to additional bureaucracy. This is because the data to be reported under DAC4 cannot simply be adopted for Public CbCR. Instead, there are considerable differences in content, which result in the need to submit another extensive and bureaucratic reporting standard. This also applies because DAC4 requires a country-by-country report, while Public CbCR requires the information of the individual group company to be reported.

Additional bureaucracy results from the fact that the terminology differs. For example, DAC4 refers to *"transactions with associated enterprises"* while Public CbCR refers to *"transactions with related parties"*. The use of different terminology leads to a considerable need for additional interpretation for taxpayers and their advisers.

The DAC4 is also linked to the Pillar Two rules as the OECD introduced a temporary CbCR Safe Harbour intended to mitigate the complexity and compliance hurdle for taxpayers in relation to the Pillar Two rules. 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”.

c. Our recommendation: a permanent CbCR Safe Harbour

In order to relieve companies of the reporting obligations of the Pillar Two rules in the long term, the CbCR Safe Harbour, should be established as a permanent measure. This would enable synergy effects and prevent both directives from having to be implemented in parallel with their respective reporting obligations. In this context, it would also make sense to adapt and standardize the requirements for Public CbCR accordingly.

Conclusion

ETAF calls on the European Commission to draw all the lessons from this evaluation and not to shy away from taking radical decisions, including deleting the DAC6 reporting obligation, in order to achieve the announced goal of reducing EU reporting obligations.

Here, the European Commission can and must provide proof of whether it is seriously pursuing its commitment to reduce the bureaucratic burden weighing on companies by 25%.

We are looking forward to the final results of the evaluation, expected to be published in Q3 2024. ETAF remains available to constructively engage with the European Commission on this matter.

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 220 000 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.