
Opinion Statement PAC 1|2024 on Evaluation of the Directive on Administrative Cooperation in The Field of Taxation in The European Union (DAC – Directive 2011/16/EU)

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CFE Tax Advisers Europe is the European association of tax institutes and associations of tax advisers. Founded in 1959, CFE brings together 33 national tax institutes, associations and tax advisers' chambers from 24 European countries. CFE was the initiator of the Global Tax Advisers Platform through which it is associated with more than 600,000 tax advisers worldwide. CFE is part of the EU Transparency Register no. 3543183647-05.

We would be pleased to answer any questions you may have regarding our Opinion Statement. For further information, please contact Philippe Vanclooster, Chairman of the CFE Professional Affairs Committee or Dr Aleksandar Ivanovski, Director of Tax Policy at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

The EU Directive on Administrative Cooperation in the field of taxation (2016/16/EU), “DAC”, is the key instrument of the European Union for exchange of tax-related information and cooperation among revenue administrations of Member states in the area of direct taxation. The overall objective is to provide tools to better fight tax evasion and fraud, and to contribute to better assessment and overview of arrangements that fall within scope of the directive through exchange of relevant information among tax administrations. CFE’s comments focus on DAC6, the iteration of the Directive that introduces mandatory disclosure rules in the European Union.

Supporting Policymakers in Achieving the Objectives of DAC Legislation

CFE Tax Advisers Europe participated in the European Commission high-level consultation in 2023 focusing on interviews with various stakeholders. This submission aims to reinforce the assessment provided to the European Commission, with an aim to simplify and unify the DAC directive, evaluate the compliance burden, and identify effective and ineffective aspects of DAC.

We believe that the European Commission should use this opportunity to evaluate whether the rules are still fit for purpose and proportionate, and to explore policy options that could simplify the rules overall. Our overall aim is to support policy-makers in achieving the objectives above while ensuring that secondary EU law and reporting obligations are proportionate and do not over-burden businesses or advisers, thereby undermining the policy goals of such initiatives and ultimately the competitiveness and the resilience of the Single Market.

General Simplification of the Directive & Recast of Consolidated Version

Generally, the Directive of Administrative Cooperation has become very complex due to multiple amendments over time. As an immediate action, CFE Tax Advisers Europe would welcome a formal or informal recast into one consolidated document.

An analysis of the costs and benefits of the often-burdensome reporting obligations could also help identify how EU Member States can use the reported and exchanged information more effectively and efficiently. This would allow for the adjustment of requirements and establish more effective mechanisms that are better suited to achieve the overall objectives of the Directive.

We would also suggest taking into account new technological solutions that will simplify the reporting but achieve the objectives in a more efficient way by way of advanced IT technology.

Transparency of Reporting & Broad Hallmarks

Furthermore, with respect to DAC6, the broad and complex hallmarks that determine the reporting of specified cross-border arrangements may serve as a pertinent example of ineffective mechanisms that are not suited to achieve the overall objectives of the Directive.

There is no reliable evidence which demonstrates how the reports under these hallmarks have contributed to the overall aims of the Directive. The absence of transparency over how the rules are being used by tax authorities has contributed to lack of understanding by tax advisers as obliged entities for reports, on the necessity of the rules and the “buy-in” to continue reporting. As anecdotal evidence, there have been reports that, initially at least, there has been overreporting in good faith, just to be on the safe side of compliance, which in itself speaks to the broadness of the reporting requirement under the hallmarks. In return, overreporting or underreporting may indicate that the rules are not fit for purpose and that there is a sort of “compliance fatigue” with poorly conceived rules. Moreover, due to the inconsistency in the implementation and fragmented approach by Member states in the application of the Directive, the overall compliance burden needs further assessment and follow-up.

Pillar 2 Compatibility

Additionally, the extent of reporting under DAC should be evaluated alongside the additional obligations imposed by the Minimum Tax Directive (2022/2523/EU) and the OECD Pillar Two rules, which have become hard law in the European Union. It is therefore a timely opportunity to revise any rules of the Directive which create an unnecessary compliance burden or potentially overlap with other reporting rules introduced in the European Union.

Professional Privilege

In the course of the implementation of the Directive, CFE has set out its expectation that European Union Member states will fully respect the legal professional privilege reporting waiver of Article

8ab(5) of DAC6 in the transposition of this Directive, in those Member states where such rights exist for tax advisers under domestic law, in line with the applicable case-law of the Court of Justice of the European Union. We believe that these developments should be taken into account by the European Commission in any recast of the Directive, given that professional privilege exists in law to protect the taxpayer/ citizen/ company.

Revision of Hallmarks – Commercially Valid Transactions

In absence of a thorough revision of the Directive DAC6, CFE Tax Advisers Europe suggests introduction of a review mechanism where those hallmarks that have not produced any tangible outcomes in terms of identifying aggressive tax planning arrangements should be flagged for revision and deletion in the next iterations. In the absence of such revision, a large number of commercially valid transactions will continue to be flagged up under the broad DAC6 hallmarks, producing potentially insignificant reports, which defeats the purpose and objectives of this legislation.

Penalties

Finally, with respect to penalties, harmonising penalties would be beneficial for taxpayers across the Single Market given the significant differences under national implementing acts of the Directive, which undermines the confidence in the Single Market, the ease of doing business as well as tax and legal certainty overall. Such revisions and harmonisation of penalties of national DAC6 implementing legislation in Member states would bring wide ranging penalties in line with the objectives of the Directive of dissuasive and proportional disincentives.

For example, the Belgian Council of State struck down the penalties in the Belgian DAC6 implementing legislation as disproportionate, and contrary to Article 6 of the EU Charter of Fundamental Rights.¹

¹ Decision of 10.05.2023 of the Belgian Council of State (Arrest nr. 256.483 van 10 mei 2023 Raad van Staat, Bestuursrechtsspraak XIVE Kamer; in de zaak A. 231.487/XIV-38.448)

Taxpayers Rights – Overall Balance of Rights and Obligations in the Single Market

Finally, we would like to draw the attention of policymakers to the fundamental importance of taxpayers' rights and their positive role on tax good governance, and the role that clear statements of taxpayer and tax administration rights and obligations can play in this respect.

We therefore entirely endorsed the view expressed by the European Commission in November 2016 (Guidelines for a Model for A European Taxpayers' Code) that a Code, or Charter, can enhance the efficiency and effectiveness of a tax system and can also increase the tax morale of Europe's citizens. We accept that some countries will prefer to include the principles of taxpayer rights in their legislation rather than in a code/charter. It should be for each country to determine the approach which it decides is most appropriate. CFE has led the work in this area and published The Model Taxpayer Charter intended as a blueprint for what a good tax system should contain including best practice examples. It aims to provide a model based on mutual trust to be used and embedded in national laws.

CFE and its Member Organisations stand ready to assist the Commission in considering the issues above in the course of policy dialogue and public consultation.