
Opinion Statement PAC 1/2020 Calling for an EU Action Concerning the Mandatory Reporting of Cross Border Arrangements Imposed by Council Directive EU/2018/822 (“DAC6”)

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CFE Tax Advisers Europe is a Brussels-based association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 European countries, associated via the Global Tax Advisers Platform with more than 600,000 tax advisers. CFE is part of the European Union Transparency Register no. 3543183647-05. We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Wim Gohres, Chair of the CFE Professional Affairs Committee or Aleksandar Ivanovski, Tax Policy Manager, at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

Statement

This CFE statement concerns the Council Directive EU/2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, commonly referred to as “DAC6”, which entered into force on 25 June 2018.

CFE Tax Advisers Europe is supportive of the policy objectives of the Directive and we recognise the importance of ensuring effective and uniform application of the mandatory disclosure rules across the European Union. Effective application of EU law depends on Member states implementation and the ability of addressees of the rights and obligations set out in EU law to adhere to them.

Due to the extraordinary consequences of the Covid-19 outbreak which results in severe disruption in the life of citizens, as well as business activity across the European economy, we consider that many intermediaries and taxpayers will face exceptional challenges and business pressures in seeking to fulfil the obligations arising out of the Directive. Equally, Member states’ tax administrations will be similarly hampered to issue guidance specifying the practical application of the rules.

As a result of the consequences arising out of the Covid-19 outbreak, as well as various public health measures such as quarantine/ home confinement imposed by governments, we are urging an EU action in this respect. Considering that the DAC6 obligations for intermediaries, as enacted by Member states laws¹, arise out of an EU directive, we would welcome a positive intervention by the Council of the EU and the European Commission to mitigate these challenges within the legislative framework in place. Such an EU-wide action would be particularly appreciated in times of crisis and would allow leniency by Member states in delaying the enforcement of penalties related to compliance with the national DAC6 implementing legislation. Our aim is to support high quality reporting in a commercial framework.

Mainstream Reporting under DAC6 – Article 8ab(1) and Article 8ab(2)

As set out in the Directive, reporting needs to take place within 30 days as of the reportable cross-border arrangements being made available or being ready for implementation, or after the first step of implementation has been taken, whichever happens first.

At the moment, this is an enormous challenge and we envisage that it will continue to be so. Intermediaries need to work closely with taxpayers in order to identify, track and follow potential cross-border arrangements falling within the material scope of DAC6. Our members strongly believe that the deadline of 31 August 2020 now presents exceptional challenges, given the severe disruption of life as a result of Covid-19 due to public health measures and government restrictions of various nature. Apart from the constraints of remote working, the professionals represented by our members, and their

¹ Some Member states have not yet implemented the Directive, yet intermediaries might be subject to the obligations set out in EU law

clients, may already suffer from the inevitable, exceptional increase in staff absences due to illness which requires hospital treatment or isolation.

In addition, tax administrations across Member states are similarly hampered in their task of providing essential guidance to help taxpayers and intermediaries to understand what transactions are reportable under this very broad legislation.

Equally, Member states' tax administrations will be unable to issue guidance on the content requirements for taxpayers and intermediaries regarding the periodic report on marketable arrangements and the update of the client list, as required by Article 8ab(2) of the Directive.

One-off Reporting – Article 8b(12)

As set out in Article 8b(12), if a reportable cross-border arrangement takes place between 25 June 2018 and 30 June 2020 that arrangement has to be reported before 31 August 2020.

Such as task of retroactive reporting seems particularly challenging under the present circumstances. Our members will thus be obliged to perform scrutiny of past transactions potentially without being able to reach key client contacts or a tax administration officials who may be unable to provide the necessary input due to government-imposed restrictions.

Significantly, there are severe penalties imposed for non-adherence to these obligations, which under the present circumstances would potentially amount to breach of the principle of proportionality of penalties, as guaranteed by primary EU law, i.e. Article 49 of the EU Charter of Fundamental Rights, if the penalties are applied without regard for the exceptional circumstances.

Furthermore, in accordance with Article 51 of the Charter, Member states when implementing EU law, fall within the scope of application of the Charter and are therefore obliged to observe and protect these constitutional principles.²

Leniency on the DAC6 Penalties Framework Agreed at EU Level

We are calling for an EU action to give time and appropriate opportunity to our members, taxpayers and tax administrations to be able to fully administer their respective obligations arising out of the Directive in times of crisis. An action at EU level would be the most effective means of aligning outcomes across the Single Market. As such, we would in particular welcome a public commitment by the Member states' governments and the EU that penalties would not be enforced for a certain period of time.

The challenges for us all arising from the Covid-19 outbreak are clearly unprecedented, which in absence of such leniency, would impede adherence to the legislation. Such leniency on the penalties enforcement, and certain deferral of the mandatory reporting obligations agreed at EU level would

² Following the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights has the legal status of primary EU law, equal to the European Union treaties, and hence takes precedence over Directives and any conflicting national law

also help make the compliance effective and efficient by preventing underreporting as much as possible.

Guidance on Practical Solutions in Times of Crisis

CFE would welcome guidance for the concerned stakeholders on practical solutions within the current legal framework, in order to ensure a uniform application across Member states in time of crisis.

Consistent implementation of DAC6 in all EU Member States is required to ensure compliance with EU law, minimise the unnecessary excessive administrative costs and limit misperception for taxpayers and service providers about their responsibilities.

Given the impact of this crisis, however, we strongly urge action at EU level in order to achieve full consistency across the EU, in particular because some EU Member States have deviated from EU law by supplementing the Directive with their own policy preferences.

Concluding Remarks and Acknowledgment of Taken Actions

We would welcome an action by the European Commission and the Council of the European Union/ Member States as swiftly as possible in order to ensure consistent, unimpeded and correct application of the Directive across the EU, taking into account the extraordinary disruption and consequences for the European Union as we contend the impact of Covid-19.

CFE Tax Advisers Europe and its Member organisations stand ready to discuss these issues with the European institutions, as well as other relevant stakeholders. As ever, we would welcome any means of having a dialogue and opportunities to contribute to better and effective application of EU law.