STUDY

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Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6)

Policy Department for Economic, Scientific and Quality of Life Policies
Directorate-General for Internal Policies
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Abstract

This study aims to provide an overview of the recently implemented anti-tax avoidance and evasion measures, notably the ATAD and DAC 6. It reviews the implementation of these directives across different Member States and assesses the problems that arise with regard to the interpretation of some of the directives' provisions.

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LIST OF ABBREVIATIONS

AEOI	Automatic Exchange of Information
AMLD	Anti-Money Laundering Directive
APA	Advance Pricing Agreement
ATAD	Anti-Tax Avoidance Directive
BEPS	Base Erosion and Profit Shifting (an OECD initiative)
BFH	Bundesfinanzhof (Germany's Federal Fiscal Court)
CFC	Controlled Foreign Company
CJEU	Court of Justice of the European Union
CRS	Common Reporting Standard
DAC	Directive on Administrative Cooperation
EU	European Union
EPP	Group of the European People's Party (Christian Democrats)
EU	European Union
GAAR	General Anti-Abuse Rule
MBT	Main Benefit Test
MDR	Mandatory Disclosure Rule(s)
MNE	Multi-National Enterprise
SAAR	Specific Anti-Avoidance Rule
TAAR	Targeted Anti-Abuse Rule
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Background

The ATAD[1] is the key part of the EU's answer to the global BEPS project. It marks a break-through in direct tax harmonization in the EU, aiming to converge Member State legislation as regards base erosion and profit shifting through the introduction of a GAAR and several other SAARs. To ensure compatibility of national law with the newly-created minimum standard on combatting tax avoidance, Member States introduced new rules, amended their existing rules, or relied on an interpretation of existing rules that would comply with the ATAD provisions. The resulting national norms still vary in accordance with Member States' freedom to introduce more stringent anti-avoidance provisions than those required by the Directive and the different options foreseen by it.

Over the last 50 years, the EU introduced several policy measures to enhance administrative cooperation between its Member States. The first Directive on Administrative Cooperation (DAC 1), Council Directive 2011/16/EU, was introduced in 2011 to enhance the exchange of tax information. The DAC 1 has been amended several times in recent years, most recently on 22 March 2021 by Council Directive 2021/514/EU (DAC 7), which remains to be implemented. The latest previous change came by the so-called DAC 6, which was adopted on 25 May 2018 under Council Directive 2018/288/EU, to be implemented by 31 December 2019. DAC 6 includes a requirement for intermediaries, such as consultants, lawyers or financial institutions, to report certain tax arrangements to local tax authorities who would subsequently automatically exchange the collected information across the EU. However, the reporting obligation extends to the taxpayers in case, for example, the intermediary may claim legally recognized professional secrecy or the intermediary is not a resident of the European Union or there is no intermediary involved in a transaction. This implies that the new disclosure requirements imposed under DAC 6 can have far-reaching consequences with respect to increased reporting duties for both individuals and corporations, regardless of the industry in which they operate.

Member State Tax authorities obtain an exhaustive set of information on each transaction used in a cross-border setting to achieve a tax benefit. Having this information on potentially aggressive tax arrangements early should help to close not only the loopholes in the local tax system of each EU Member State but also the gaps in the interactions of such tax systems, which are a result of the lack of full harmonization within the EU. However, whether Member State governments will effectively use the data collected and exchanged under DAC 6 to prevent the use of abusive arrangements is not yet fully clear.

[1] Anti-Tax Avoidance Directive: Council Directive 2016/1164 of 12 July 2016 laid down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (19 July 2016). The Anti-Tax Avoidance Directive 2: Council Directive 2017/952 of 29 May 2017 amended Directive (EU) 2016/1164 regarding hybrid mismatches with third countries, OJ L144/1 (7 June 2017).

Aim

The purpose of this Study is to provide a general assessment of the implementation of the Anti-Tax Avoidance Directive (ATAD) and the latest update to the Administrative Cooperation Directive (DAC), whose implementation period is now over.

It is prepared with a view to give MEPs a general understanding of:

(1) the status of implementation of the examined secondary law instruments;
(2) problems arising as to the interpretation of the requirements set by particular provisions in the directives, and, to the extent possible; and
(3) the effect of the implementation in light of the directives' objectives.

To this end, this study will undertake a review of the academic and professional literature covering the directives' implementation combined with an analysis of infringement procedures opened by the Commission in relation to an alleged failure to implement its provisions as required. Instead of being exhaustive and dealing with all relevant aspects in 27 EU Member States, it is intended to be illustrative of the issues that have arisen in the context of implementation, highlighting particularly important questions that may eventually require the attention of legislators

Key Findings

The EU directives analysed in this study are effective tools to reach their common objectives of combatting tax avoidance and abuse. Although several uncertainties exist regarding the application of certain norms, the authors make no concrete recommendations for initiatives to amend them. It remains to be seen how the (domestic and EU) courts respond to cases raising such questions.

1) Anti-Tax Avoidance Directive (ATAD)

The ATAD has been faithfully and timely implemented in virtually all aspects by all Member States. The Commission is due to publish a comprehensive evaluation report concerning the completeness and conformity of transposition in January 2022. Of the infringement proceedings opened against Member States, only three currently concern questions of correct implementation. Given the level of detail and complexity of the Directive's rules, this is a low number.

Although questions **regarding the legality of the ATAD** have been raised frequently in academic literature on various grounds, **there is no great risk of undermining the effectiveness of the Directive** considering the CJEU's jurisprudence. More likely concerns exist with respect to the ATAD rules' implementation in line with both primary EU law and Member State constitutions. No recommendations for legislative action are made in this respect as these concerns may be resolved by the EU courts.

Uncertainties of interpretation and the practicality of applying the ATAD's complex rules transposed into national law continue to exist. This is partly due to the nature of anti-avoidance rules, which inherently require a level of uncertainty, and partly due to the absence of case law addressing those issues. It would appear **too early to seek legislative action to aim for a resolution of the open question identified in the study**. The publication of guidance by the Commission on its view regarding interpretation and application of the rules would be welcome, however.

The impact of the ATAD on Member State laws differs widely between different rules of the Directive and among Member States. Overall, the **existing options granted in the ATAD give rise to a certain fragmentation**. While this is lower than it would be in the absence of the Directive's minimum harmonisation effect, **a reduction of the number of options should be considered for a more homogenous anti-avoidance landscape** across all Member States.

Questions as to the effectiveness of the rules to curb tax planning have been raised, in particular with respect to the CFC rule. Considering the CJEU's evolving case law on the influence of the general anti-abuse principle, the validity of those concerns cannot yet be finally assessed. The same applies with respect to the ATAD's impact on potential double taxation as a consequence of the rules' over-inclusiveness. In both instances, further study will in future provide a basis for more robust conclusions.

2) Directive on Administrative Cooperation (DAC)

Six DACs have already been **implemented across Member States**, the latest one being DAC 6 which entered into force in July 2020. DAC 6, the focus of this report, can be characterized as the most advanced directive in the disclosure and exchange of tax information towards the curtailment of tax evasion and tax avoidance. While its implementation is quite recent, DAC 6 has already received a lot of criticism in literature for **failing to achieve a common level playing field** across the Union that could, in turn, undermine its effectiveness.

Indeed, as this report identifies, the directive has allowed a lot of leeway to Member States in the implementation process, either because of the **absence of definitions** of fundamental terms and concepts in the directive, or because of a **deliberate reliance on national laws**. The **uncertainties** caused by these two elements have resulted in a multi-fragmented implementation of the directive across the Union, where even the objective and the subjective scope of the directly have been applied differently. Consequently, different information is reported (and, thus, exchanged) among Member States and different persons, if at all, are required to disclose this information depending on the implementing laws. Despite this lack of uniformity, the goal of DAC 6 is not entirely compromised, as the disclosure requirement will certainly deter (at least some) intermediaries from designing and setting up potentially aggressive tax arrangements. While there is room for improvement in the design of the directive both in what regards the uncertainties it entails and some legality questions, if assessed also in the given context (global framework, previous harmonization efforts), it can be considered as a success.

1. PART 1 – THE ANTI-TAX AVOIDANCE DIRECTIVE

KEY FINDINGS

The ATAD has been faithfully and timely implemented in virtually all aspects by all Member States. The Commission is due to publish a comprehensive evaluation report concerning the completeness and conformity of transposition in January 2022. Of the infringement proceedings opened against Member States, only three currently concern questions of correct implementation. Given the level of detail and complexity of the Directive's rules, this is a low number.

1.1. Status of Implementation

1.1.1. Principles of implementation and implementation deadline(s)

The Anti-Tax Avoidance Directive (EU 2016/1164) came into force in August 2016, obliging all Member States to transpose and apply five corporate anti-tax avoidance rules in their domestic laws by 1st January 2019. For certain rules and under certain circumstances, later implementation was foreseen. For an overview see the table below.

Table 1: Anti-Tax Avoidance Directive's overview

	text	text	text	text
Interest Limitation	**31 December 2018** 31 December 2023 for MS with pre-existing equally effective rules			
Exit Taxation	31 December 2019			
GAAR	31 December 2018			
CFC	31 December 2018			
Anti-hybrid	31 December 2019			

Source: Authors' own elaboration.

As the ATAD provides only for a minimum level of harmonisation, the actual form of implementing measures taken by any individual Member State can vary widely. Member States were not required to take any legislative action if they already had rules in place that would have the same effect as those prescribed in the Directive. However, it appears that almost all Member States newly adopted or modified existing rules by the requisite deadline. (See further below 4.1.)

Member States remain free to adopt stricter anti-avoidance rules by virtue of Article 3 ATAD. Although the precise nature of what constitutes a stricter rule is not defined, this uncertainty does not appear to create practical problems, as most MS stick rather closely to the precise requirements of each Directive norm.

1.1.2. Implementation status by country and rule

Table 2: Implementation status by country and rule

EU 27	Interest limitation	Exit taxation	GAAR[2]	CFC		Anti-hybrid
				Var. A	Var. B	
Austria	X	X	X	X		X
Belgium	X	X	X		X	X
Bulgaria	X	X	X	X		X
Croatia	X	X	X	X		X
Cyprus	X	X	X		X	X
Czech Republic	X	X	X	X		X
Denmark	X	X	X	X		X
Estonia	X	X	X		X	X
Finland	X	X	X	X		X
France	X	X	X	X[3]		X
Germany	X	X	X	X		X
Greece	X	X	X	X		X
Hungary	X	X	X		X	X
Ireland	X[4]	X	X		X	X
Italy	X	X	X	X		X
Latvia	X	X	X		X	X
Lithuania	X	X	X	X		X
Luxembourg	X	X	X		X	X
Malta	X	X	X		X	X
Netherlands	X	X	X	X	(X)	X
Poland	X	X	X	X		X
Portugal	X	X	X	X		X
Romania	X	X	X	X		X
Slovakia	X	X	X		X	X
Slovenia	equivalent rule	X	X	X		X
Spain	X	X	X	X		X
Sweden	X	X	X	X		X

Source: Authors' own elaboration.

[2] In bold indicated the countries who changed their existing GAARs or newly implemented a GAAR (Slovenia).

[3] France has not (yet) amended its old CFC provision, which in certain respects differs from the requirements of the ATAD (e.g. it does not include entities in respect of which the French parent merely is entitled to >50% of profits without holding either a majority of its capital or voting rights). Other differences appear to be covered by the right to go beyond requirements as per Article 3 ATAD.

[4] Applicable from 1 January 2022.

All currently still pending infringement investigations opened by the Commission appear to be not for lack of implementation, but suspected inappropriate implementation:

- **Belgium** (Case INFR(2020)2215, reasoned opinion 2/12/2021)
  Inappropriate implementation of CFC rule: non-granting of credit for tax paid by the CFC. Questionable whether Article 8(7) really contains an obligation to grant a credit (pro: "Member State … *shall* allow a deduction"; contra: Article 3: provision more protective of national tax base. No credit also likely violation of Freedom of Establishment);

- **Cyprus** (Case INFR(2021)2094, formal notice 23/9/2021)
  Inappropriate implementation of interest-limitation rule: while making use of the option to exclude financial undertakings, Cyprus provides for full deductibility of interest payments for securitisation companies, which the Commission does not consider to fall under any of the 'financial undertakings' exhaustively listed in Article 2(5) ATAD;

- **Germany** (Case INFR(2020)0024, reasoned opinion 9/6/2021)
  Failure to communicate all measures implementing the exit taxation rule and the anti-hybrid rule;

- **Ireland** (Case INFR(2019)2156, reasoned opinion 27/11/2019)
  Ireland had not implemented the interest-limitation rule, considering its old national rule for limiting interest deductibility to be equally effective. The Commission disagreed. Ireland has meanwhile relented and adopted a 30%-EBITDA interest limitation rule effective from 1 January 2022. The case is thus expected to be closed;

- **Luxembourg** (Case INFR(2020)2183, reasoned opinion 2/12/2021)
  Inappropriate implementation of interest-limitation rule: while making use of the option to exclude financial undertakings, Luxembourg allows full deduction of interest payments for securitisation companies, which the Commission does not consider to qualify as 'financial undertaking' within the meaning of Article 2(5) ATAD;

- **Spain** (Case INFR(2019)0040, formal notice 30/1/2019, and Case INFR(2020)0045, formal notice 9/6/2021)
  No further information has currently been published on these two cases, but the classification in the Commission database indicates that they are due to a lack of communication of implementing measures on ATAD1 and ATAD2, respectively.

2. OPEN QUESTIONS ON LEGALITY

KEY FINDINGS

Although questions **regarding the legality of the ATAD** have been raised frequently in academic literature on various grounds, **there is no great risk of undermining the effectiveness of the Directive** considering the CJEU's jurisprudence.

More likely concerns exist with respect to the ATAD rules' implementation in line with both primary EU law and Member State constitutions. No recommendations for legislative action are made in this respect as these concerns may be resolved by the EU courts.

2.1. The question of competence

In academic circles, the question whether the ATAD's adoption has been in line with the EU's competences as set out by the treaties has been controversially discussed since it has been first proposed by the Commission[5]. This was triggered by the sense of a marked directional shift with regard to the purpose of direct tax harmonisation. While previous direct tax legislative measures have almost exclusively acted to break down obstacles to cross-border movement and investment arising from uncoordinated and often-times discriminatory national tax rules, the ATAD has been perceived as erecting precisely such obstacles.

The Directive was adopted in accordance with Article 115 TFEU, which allows the approximation of national laws "as directly affect the establishment or functioning of the internal market". The Commission relied on a dual justification to bring the ATAD within this frame: First, the necessity for coordinating the implementation by Member States of the outcome of the conclusions from the international effort to address base erosion and profit shifting; second, the negative distortive impact that tax avoidance behaviour within the EU would have on the internal market. Both justifications are no doubt admissible, although they have been criticised, at times forcefully, in academic literature.

Equally, the compliance of the legislation with the constitutional principles of subsidiarity and proportionality has been questioned, including by the Swedish parliament. The political challenge to the adoption of the ATAD not having been successful, the legal argument is very weak, however. The CJEU consistently grants a broad margin of discretion to the EU legislature with respect to these two principles and would interfere only if the adoption of an act were manifestly in breach of the proportionality or subsidiarity conditions[6].

In conclusion, therefore, no serious doubts exist regarding the EU's competence to adopt the ATAD. Nevertheless, it must be kept in mind that the EU's ability to harmonise taxation among Member States remains limited by the principle of conferral and the attendant rules laid down in the treaties.

2.2. Compatibility with Primary EU Law

Several of the provisions of the ATAD have been questioned with regard to their compatibility with the EU Freedoms, because they may lead to the different treatment of (certain) cross-border situations compared to domestic cases. This is especially the case with respect to exit taxation and the CFC rule, since both are modelled after norms that have been fairly common in Member States' laws prior to the

[5] See a detailed discussion by Haslehner in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 32-65 (38-44).

[6] See Kofler in Panayi, Haslehner & Traversa (eds), Research Handbook on European Union Taxation Law (Edward Elgar 2020) 11-50 (32).

ATAD's adoption and have also been subject to several rulings by the CJEU setting out limitations to their legality.

As a preliminary remark, it needs to be mentioned that the fact that a norm is prescribed by secondary EU law does not immunise it from a charge of incompatibility with EU law. Although the CJEU accepts that national law is "shielded" from scrutiny under primary law to the extent that it is based on "exhaustive harmonisation", this cannot protect the rules at issue, for two reasons:

First, the ATAD cannot be said to introduce such "exhaustive harmonisation". Although the precise nature of the criterion will require further clarification by the CJEU (in particular with respect to the applicability of the notion in the context of "minimum harmonisation" directives), it is clear that no exhaustive harmonisation can be said to exist insofar as Member States are left with the option to adopt specific measures.

Second, even though Member State rules would not be scrutinised in respect of the Freedoms, if they were found to result from exhaustive harmonisation, the harmonising measures themselves, being only secondary law, would remain fully subject to primary EU law. This being so, it is important to consider the rules of the ATAD and the possibility of their implementation in a way that complies with existing case law on taxpayer freedoms guaranteed by the treaties. For this analysis, two additional notes must be made.

First, whenever the Directive leaves Member States the option to implement rules in a way that is non-discriminatory – be it by interpreting the requirements laid down by it in line with CJEU jurisprudence or be it by designing domestic rules in a non-discriminatory manner with respect to aspects not determined by the Directive – the CJEU will not find the secondary law act in breach of primary law. In such cases the violation of primary law would remain fully imputable to the Member State and scrutinised as such.

Second, it appears highly likely that the CJEU will apply a more lenient standard in its analysis of secondary EU law when compared to the scrutiny of national law. However, while this view reflects the majority view in academic circles, it has not yet been clearly confirmed in case law, leaving doubts relating to the primary-law compatibility of specific features of the ATAD norms resolved on the basis of pre-existing case law relating to domestic anti-avoidance rules.

2.2.1. Exit taxation rule: compatibility questions

Exit taxation has been confirmed to constitute a discriminatory obstacle to the freedom of establishment. This follows immediately from the fact that a tax charge is levied on the mere change of location where it involves a crossing of borders within the EU, while no such charge arises upon relocation within one Member State. In a long series of cases[7], the CJEU has also developed conditions under which the levy of such a tax can nevertheless be justified in light of the need to ensure that increases in asset values are taxed in the country where they arise without giving rise to double taxation or opportunities to escape taxation as a consequence of bilateral tax treaties dividing taxing rights based on physical location of assets or residence (the CJEU brings this within the justification ground of the "balanced allocation of taxing rights linked to its temporal component").

The ATAD clearly tries to replicate the precise requirements set out be the CJEU for EU-law compliant exit taxation rules, in particular in light of the *DMC*[8] and *Verder Labtec*[9] jurisprudence.

7 Judgment of 11 March 2004, Case C-9/02 de Lasteyrie du Saillant, EU:C:2004:138; judgment of 7 September 2006, Case C-470/04 N, EU:C:2006:525; judgment of 26 October 2006, Case C-345/04 Commission v Portugal, EU:C:2006:685; judgment of 12 July 2012, Case C-269/09 Commission v Spain, EU:C:2012:439.

8 Judgment of 23 January 2014, Case C-164/12 DMC, EU:C:2014:20.

9 Judgment of 21 May 2015, Case C-657/13 Verder LabTec, EU:C:2015:331.

However, the case law is in itself not entirely consistent. The difference in approaches taken by the Grand Chamber decision in *National Grid Indus*[10] and those later judgments has not been explained satisfactorily. In addition, the CJEU's decision in later exit taxation cases[11] involving the change of residence of individuals has cast renewed doubt on whether the law has been finally settled on the matter.

This doubt concerns, first, the compatibility of a collection in instalments over a fixed period of five years for the taxation of unrealised capital gains assessed upon a change of tax jurisdiction. While the CJEU had previously held that the taxpayer ought to be given at least the option for tax collection to be deferred to the point of actual realisation, it had accepted such collection by instalments – for companies – in *DMC* and *Verder Labtec*. Given the discriminatory nature of an exit tax – which is not levied upon asset or residence movements within a country – it is not easily understandable why this should be accepted as the least restrictive measure to safeguard the balanced allocation of taxing rights between the Member States involved in all cases.

Another concern arises, second, from the option given to Member States to require both interest payment (Art. 5 para. 3 subpara. 1 ATAD) and guarantees (Art. 5 para. 3 subpara. 2 ATAD) in case a taxpayer takes advantage of taxes paid in instalments. Even if mere staggered collection of the tax were a necessary and appropriate measure, for example in relation to depreciating profit-generating assets, the charge of interest in addition appears excessive. While these have also been indicated to be proportionate measures by the CJEU, it remains ultimately unconvincing to consider the payment of instalments backed up with interest charges for the instalments as a measure less restrictive than requiring immediate payment, given the presumptive equivalence in burden imposed on the taxpayer in both situations.

2.2.2. CFC rule: compatibility questions

Similar to exit taxation, CFC regimes have been confirmed to constitute a prima facie discriminatory restriction on the freedom of establishment (as well as capital movement) as they specifically target the establishment of foreign controlled entities in contrast to domestic subsidiaries.[12] The CJEU accepted the need for such rules under the narrow condition that they be specifically targeting "wholly artificial arrangements" instead of making generalising assumptions about the tax avoiding nature of foreign entities based on, for instance, a lower corporate tax rate being available in another Member State.

The ATAD generally aims to implement the boundaries set by the CJEU by allowing Member States to exclude foreign CFCs with "substantive economic activities" from the scope of the income inclusion rule[13]. While Member States would anyway be bound to follow that rule based on primary law[14], the ATAD gives Member States the option not to apply the same exception to controlled entities established in third countries, even if they undertake substantive economic activities there.

The compatibility of CFC provisions with the EU Freedoms is in doubt because of this feature: the option to treat controlled entities in third countries worse by excluding them from the "economic substance" exception, which is questionable in light of the CJEU's extension of its Cadbury Schweppes jurisprudence to third country situations in *X GmbH* (C-135/17) if the Member State of the controlling company has concluded a bilateral agreement with the third country that provides for effective

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10 Judgment of 29 November 2011, Case C-371/10 National Grid Indus, EU:C:2011:785.

11 Judgment of 26 February 2019, Case C-581/17 Wächtler, EU:C:2019:138.

12 See Judgment of 12 September 2006, Case C-196/04 Cadbury Schweppes, EU:C:2006:544; Judgment of 23 April 2008, Case C-201/05, Test Claimants in the CFC and Dividend Group Litigation, EU:C:2008:239.

13 Cf. Recital 12 ATAD.

14 rt. 7 para. 2 lit. a ATAD.

exchange of information[15]. Although questions have been raised about the adequacy of the economic substance exception to comply with the CJEU's jurisprudence[16], that is less likely an obstacle to the Directive's legality, since a primary-law conform interpretation of the exception is certainly available.

2.2.3. A possible solution to the concerns: preventing discrimination by extending anti-avoidance regimes to purely domestic situations

It has been posited that an easy solution for an EU-law compliant implementation of the Directive's rules involves the extension of any burdens imposed by it to purely domestic situations. As the fundamental freedoms merely prohibit the less favourable treatment of cross-border situations when compared to a more favourably treated comparable domestic case, any concerns raised above would appear to be resolved thereby.

One problem may be that such extension could raise concerns under national constitutional law, because it would impose burdens on purely domestic situations that cannot be justified on the basis of an anti-avoidance motive. Countries with strong constitutional protections – i.e. MS in which constitutional courts exercise relatively strict control over ordinary legislation, in particular as regards the equal treatment requirement – may struggle to introduce such rules as a domestic CFC rule that applies in a domestic setting under the same conditions as the ATAD requires for the cross-border cases, insofar as they would create a difference in treatment between two sets of domestic cases (in scope and out of scope of the CFC rules) without a legal or factual difference from the standpoint of the legislation's ostensible purpose, i.e. to combat tax avoidance. While it is of course impossible to predict the likelihood of such a situation to be ruled unconstitutional by e.g. the German constitutional court, the risk must be considered.

From another angle, imposing an exit-tax like charge on internal location changes of assets to remove any potentially discriminatory effects of an exit tax would amount to highly questionable policy, as it would seriously harm enterprises' ability flexibly to rearrange the deployment of assets in accordance with business needs. In addition, such an approach would also bring up its own constitutionality concerns, insofar as it might be seen to violate the ability-to-pay principle; on this, see further in the next section.

[15] See, already prior to this judgment, Danon in Pistone & Weber (eds), The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study (IBFD 2018) 379-407; see also Rust in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 174-199 (179-180).

[16] See, e.g. Panayi in Pistone & Weber (eds), The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study (IBFD 2018) 355-378.

2.3. Constitutionality concerns

It is well known that the ATAD's interest limitation rule was inspired the equivalent provision in Germany's domestic law, which it had introduced in 2007. [17] As the main features of these rules are the same, it is significant that the German Federal Fiscal Court (BFH) has considered that norm to violate Germany's constitution and asked the German Constitutional Court to give a binding ruling on that matter[18].

In the BFH's view, the denial of deductibility of a real cost violates the net base taxation principle (*objektives Nettoprinzip*), which as an aspect of the ability-to-pay principle is a main condition for direct taxation in compliance with the equality principle[19]. The court rejected the view that the possibility to carry non-deductible interest costs forward into later tax years would be sufficient to comply with that requirement, as such carry forward will often not result in a later deduction for a lack of interest income.

The court also rejected justifications based on the legislative prerogative to steer taxpayer behaviour and to "typify" cases of abusive use of debt to shift profits out of Germany's tax jurisdiction as insufficiently targeted. This was due to the low number of cases actually captured by the rule (according to the BFH, less than 0,1% of corporate taxpayers) and the overly inclusive scope of the rule to combat tax base shifts by including payments to German resident taxpayers.

Similar issues may arise in other Member States with similar constitutional law doctrines, such as Spain and Italy, although at the time of writing this report, no similar cases are known to have been brought before the respective courts in those countries. The issue has been debated in some detail at least in Italy, however[20].

Yet, while there is still a lot of uncertainty as regards the compatibility of a relatively simple fixed interest deduction limitation rule with the national constitutional principle of equality (and its corollary in the field of direct taxation, the ability-to-pay principle), it is relatively certain that the primacy of EU law would have to be considered to win out over a constitutional prohibition to limit deductions in this way[21]. The primacy of EU law over constitutional law is generally accepted by the relevant courts except for cases that concern fundamental constitutional principles. Even for countries whose constitutions explicitly demand net-base taxation, it seems excessive to claim that it arises to such status as a fundamental constitutional principle[22].

As no similar right to net-base taxation has been recognised either by the Charter of Fundamental Rights or the CJEU as a general principle of EU law, it seems also very unlikely that the ATAD provision itself could be considered to violate higher ranking EU law on analogous grounds to those raised by the German Federal Fiscal Court[23].

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17 For an early discussion in particular in light of the ATAD rules, see Lampert, Meickmann & Reinert, Article 4 of the EU Anti Tax Avoidance Directive in Light of the Questionable Constitutionality of the German "Interest Barrier" Rule, European Taxation (2016) 323-327. For an overview of the latest doctrinal discussion in Germany refer to Kessler, DStR-Beihefter 2020, 1 (3).

18 Judgment of the Fiscal Court (*Bundesfinanzhof – BFH*) of 14 October 2015, case I R 20/15, accessible online at https://www.bundesfinanzhof.de/de/entscheidung/entscheidungen-online/detail/STRE201610031 (last accessed 22 February 2022). Pending Case before the Constitutional Court (*Bundesverfassungsgericht – BVerfG*) registered as case 2 BvL 1/16.

19 Art. 3 para. 1 *Grundgesetz* (German Constitution).

20 See e.g. Vanz, The Italian Interest Limitation Rule: Constitutional Issues, European Taxation (2018) 173-175.

21 Subject only to the above-discussed questions concerning the Directive's adoption in line with the competence norms of the EU Treaties. See e.g. Förster in Gosch (ed) KStG (4. Edition, Beck 2020) § 8a m.no. 56, who denies the immunisation against constitutional challenges by virtue of the primacy of EU law on that ground. That author also notes that, while the Directive as a whole may fall within the EU's legislative competence in light of its aims, Art. 4 ATAD may specifically exceed that competence because of its potentially especially harmful effects in terms of double taxation, distortions between sectors, and for businesses in crisis.

22 For the contrary view see Vanz at 175.

23 On the idea of a European "ability-to-pay principle" see e.g. Lang & Englisch, A European Legal Tax Order Based on Ability to Pay, in Amatucci (ed), International Tax Law (2nd edition, Kluwer 2012), 261.

2.4. Interaction with international law

The precise relationship of secondary EU law and public international law has not yet been entirely settled. Concretely the question arises which obligations will take precedence in cases of conflict. While Art. 351 TFEU makes it clear that agreements among Member States are fully subject to EU law, it excludes pre-accession agreements with third countries from such effect.

While secondary law benefits from the primacy of EU law and would thus generally be expected to override any obligations arising from tax treaties, the ATAD appears intent not to override Member States' obligations under bilateral tax treaties concluded with third countries, which can be clearly seen from the proviso in Art. 9 para. 5 ATAD regarding the taxation of the income attributed to a foreign permanent establishment[24]. The EU is considered to be bound by public international law and committed to a strict observance of its rules (see Art. 3 para. 5 TEU).

However, there are clearly instances where a conflict may nevertheless arise (e.g. Article 9a ATAD,[25] Art. 7 para. 2 ATAD[26]). It is for these instances that a solution has to be found. Given the apparent intent of the Directive not to override tax treaties, it would seem logical to interpret it as much as possible in a way that avoids a conflict. Naturally, this logic ought to apply to the interpretation of both the tax treaties and the Directive.

Where a concordant interpretation is not possible, Member States will be required to give priority to complying with the obligations from the Directive. For Member States in which bilateral treaties have a status that is superior to ordinary legislation, this can create practical challenges. For certain Member States, this may also result in a potential conflict between EU law and national constitutional law; compared to the above-discussed ability-to-pay principle, the principle of compliance with international law has a greater likelihood of being considered a fundamental constitutional principle and thus to prevail over the primacy of EU law[27].

24 See also recital 11 of Directive 2017/952.

25 Spies in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 229-255 (252).

26 Rust in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 174-199 (182).

27 For that conclusion with respect to the Polish constitution, see e.g. Kuzniacki, The (In)Compatibility of Polish CFC Rules with the Constitution Pre and Post-Implementation of the EU Anti-Tax Avoidance Directive (2016/1164), European Taxation (2018) 149-162 (161).

3. UNCERTAINTIES OF INTERPRETATION AND IMPLEMENTATION

KEY FINDINGS

Uncertainties of interpretation and the practicality of applying the ATAD's complex rules transposed into national law continue to exist. This is partly due to the nature of anti-avoidance rules, which inherently require a level of uncertainty, and partly due to the absence of case law addressing those issues. It would appear **too early to seek legislative action to aim for a resolution of the open question identified in the study**. The publication of guidance by the Commission on its view regarding interpretation and application of the rules would be welcome, however.

More than five years after the ATAD's adoption, a number of questions has not yet been resolved. Without the claim to comprehensively cover all open questions in this report, we present and discuss four important uncertainties concerning the interpretation and implementation of the ATAD rules in this section.

3.1. Treatment of exempt assets under the exit tax rule:

Art. 5 para. 1 ATAD specifies that corporate taxpayers "shall be subject to tax at an amount equal to the market value of the transferred assets … less their value for tax purposes". A question that is not directly addressed thereby is whether the ATAD creates an obligation on Member States to tax cross-border transactions and asset movements under circumstances where an actual realisation of such asset's capital gain in a purely domestic setting would not have given raise to any tax obligation, i.e. where a company moves an exempt asset out of a Member State's tax jurisdiction.

It should be clear that such transfers ought not to be covered by the exit taxation provision, not least because a mandatory tax charge would in this situation create an obvious discrimination of cross-border transfers compared to purely domestic transactions that could not be justified. Consequently, since the exit tax charge should not be imposed on domestically exempt assets[28], a primary-law compliant interpretation of the Directive must be found.

One possible solution to this problem would be to consider exempt assets to be out of the scope of the ATAD[29]. Although this might be a possible approach given the fact that the ATAD does not define the term, it is not really consistent with the broad meaning generally assigned to the term[30].

On its face, the Directive's wording does not distinguish between different types of assets. It is also not obvious that the 'value for tax purposes' of an exempt asset could simply always be set to match its market value to avoid an obligatory tax charge. While the Directive defines the term 'market value' autonomously in Art. 5 para. 6 ATAD, there is no definition for the term 'value for tax purposes'. The same term is defined, however, in Directive 2009/133/EC (the 'recast Merger Directive') as "the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger division or partial division but independently of it" (Art. 4 para. 2 lit. a recast Merger Directive).

28 See Peters, Exit Taxation: From an Internal Market Barrier to a Tax Avoidance Prevention Tool? EC Tax Review (2017) 122 (130).

29 See Schwarz in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 105-126 (116).

30 Vermeulen in Pistone & Weber (eds), The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study (IBFD 2018) 287-299 (295).

If one took that definition to have some bearing on the meaning of the same term in the ATAD – which, given the similar facts patterns concerned by both legal acts is not unreasonable – the problem might be solved in this way as to have matching values and thus no tax to be levied in case of an exempt asset transfer.

A third solution would be to consider no loss of a taxing right in case of the transfer of an exempt asset from a Member State's jurisdiction, based on the argument that no taxing right could be lost where no taxing right was intended to be exercised. The ATAD also does not define the loss of a right to tax, but merely uses the term to define – in Art. 2 Nr. 6 ATAD – the term "transfer of assets". It is generally understood to be a matter to be decided by the national courts and thus might be open to the above-mentioned interpretation. The more convincing reading of this condition for the imposition of an exit tax charge lies, however, in the constraints bilateral tax treaties impose on a Member State; these are independent from the unilateral legislative choice whether certain assets are exempt from tax. Indeed, as a Member State can no longer withdraw an exemption from an asset once it has left its jurisdiction, which would have been possible prior to the transfer, something may clearly be said to be "lost". This loss being merely theoretical rather than tangible in terms of the Member State's revenue, it is not, however, a sufficient reason to impose an exit tax.

3.2. The relationship between the GAAR (Art. 6 ATAD) and other anti-avoidance provisions

The ATAD does not explicitly solve the relationship of the various anti-avoidance provisions it introduces to EU law. This may not seem problematic insofar as each norm has its own clear scope of application with no obvious overlaps. In particular, in relation to pre-existing general anti-abuse rules in other tax directives (i.e. the Parent-Subsidiary Directive, Tax Merger Directive, and Interest-Royalties Directive)[31], no problem should arise as all of these norms will be interpreted concordantly in light of the CJEU's jurisprudence on the general principle of avoiding an abuse of law in the area of taxation[32].

The situation is less clear with respect to the specific anti-avoidance rules of the ATAD (Arts 4, 5, 7-8, and 9-9b)[33]. It seems to be accepted in most, if not all, EU Member States that specific anti-avoidance rules take priority over general anti-abuse provisions following general principles of interpretation[34]. Consequently, potentially abusive arrangements will always be tested first as to whether they fall within the scope of a specific anti-avoidance rule. If they fall within that scope, but the specific anti-avoidance rule does not apply as not all of its conditions are fulfilled in the given case, the question arises whether the GAAR can operate as a backup norm to deny tax advantages.

This question is highly debated in some Member States, in particular in Germany, where the legislature has twice attempted to change the courts' interpretation that limits the effect of the GAAR in such circumstances. The majority academic view follows the German courts' analysis according to which the legislature's concrete decision as to the conditions that are considered to be abusive expressed in a specific anti-avoidance rule necessarily determines the assessment whether a certain arrangement can be seen as abusive.

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31 In academic literature, such general anti-abuse rules found to apply in specific areas of corporate taxation are often referred to as "TAARs" (Targeted Anti-Abuse Rules) in an effort to distinguish them from such rules with general application (GAARs – General Anti-Abuse Rules).

32 For an in-depth analysis of the various rules and their interaction see Garcia Prats et al, EU Report, in IFA Cahiers 2018 – Vol. 103A: Anti-avoidance measures of general nature and scope – GAAR and other rules, 5-35 (23-34).

33 In literature, the acronym SAAR (specific anti-abuse rules) denotes legal rules that apply neither generally within one tax (in contrast to a GAAR) nor generally for a particular area (in contrast to a TAAR), but only cover a narrow (singular) set of circumstances, such as, e.g. the undercapitalisation of a company (thin capitalisation rules, interest deduction limitations), manipulation of intra-group pricing (transfer pricing rules), shifting of profits to shell companies (controlled-foreign company rules).

34 Dourado in Dourado (ed), Tax Avoidance Revisited in the EU BEPS Context (IBFD 2017) 3-22 (20).

As a result, although it remains applicable to arrangements covered by more specific anti-avoidance rules, the GAAR would not generally be capable of operating as a backup norm to combat arrangements that escape more these. It could do so only if the specific anti-avoidance rule (1) has clearly only illustrative character or (2) if the characteristics of a transaction that give rise to the claim of an abuse had not been addressed at all by the specific rule. Furthermore, (3) it may be considered to cover situations in which a taxpayer abusively circumvented the application of a specific anti-avoidance rule[35].

To take a simple example, the definition of a two-year holding period to qualify for a dividend exemption, which can be characterised as a specific anti-avoidance rule with the aim to avoid dividend stripping arrangements, precludes the claim that an arrangement where a taxpayer received a dividend and immediately disposed of shares after exactly 2 years[36]. For another example from German case law, where a specific rule prohibits the transfer of losses by way of the merger of a loss-making into a profitable entity, but not the reverse situation, that reverse arrangement (i.e. merging a profitable entity into the loss-making entity) cannot be considered abusive simply because the outcome is the same as that which the legislature condemned[37].

For the ATAD specifically, recital 11 (of Directive 2016/1164) explains that GAARs (in general, although this can clearly be read to apply to Art. 6 ATAD specifically) are intended "to fill in gaps" that have been left open by more targeted anti-abuse rules. The same recital further specifies that this "should not affect the applicability of specific anti-abuse rules". While the gap-filling function of the GAAR is undisputed, which also explains and justifies the use of open and undefined terms ("one of the main purposes"; "valid commercial reasons", "economic reality"), it does not answer the question as to the provisions' application within the scope of more precise anti-avoidance rules[38]. So far, no jurisprudence has come to light that would clarify that issue.

3.3. Implementation of options granted to Member States as options for taxpayers

The ATAD contains a noticeable number of explicit options for Member States. These options typically give the possibility to Member States to foresee exceptions to the application of an anti-avoidance rule (e.g. the exclusion of financial undertakings from the interest limitation rule; the extension of the substance carve-out to third-country resident CFCs; the (temporary) exclusion from the scope of the anti-hybrid rule for certain mismatches resulting from interest payments). As provided by Article 3 ATAD, Member States generally have the option to deviate from the rules in a manner that provides for a greater level of protection against tax avoidance. It is not clear, however, whether it is compatible with the Directive for Member States to implement an option by giving the choice as to whether they prefer to fall within the scope of a specific anti-avoidance rule. In such a case, the option granted by the Directive to the Member State would turn into an option for the taxpayer.

The issue has not yet been addressed in jurisprudence; nor has it been analysed in detail in academic literature. Doubts as to the compatibility of such an implementation exist, because it would be expected for the EU legislature to have indicated that an option could be granted to taxpayers if that had been its intention.

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35 See e.g., Reimer in Dourado (ed), Tax Avoidance Revisited in the EU BEPS Context (IBFD 2017) 343-384 (381); Osterloh-Konrad, Die Steuerumgehung (Mohr-Siebeck 2019) 87; 736-737.

36 For this example, see Luts & Debelva, The General Anti-Abuse Rule of the Parent Subsidiary Directive, European Taxation (2015) 223 (232).

37 For this example, see Osterloh-Konrad, Die Steuerumgehung (Mohr-Siebeck 2019) 708; 736.

38 See Perdelwitz in Pistone & Weber (eds), The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study (IBFD 2018) 329-354 (350).

This is clearly the case, for instance, in Art. 5 para. 2 ATAD with respect to the exit tax deferral ("taxpayer shall be given the right to defer the payment") or Art. 4 para. 3 ATAD with respect to the de minimis threshold for applying the interest limitation rule ("the taxpayer may be given the right: …"). It follows that, where no such option is explicitly intended for the taxpayer, granting them the freedom to choose could reasonably be seen as falling below the minimum standard of protection against tax avoidance that the Directive seeks to establish. As a counterargument, the taxpayer would only be given the choice between two different rules which both are legal options under the rules of the Directive.

The same issue can be identified, albeit with a slight nuance, in relation to mandatory options (i.e. where Member States need to choose between two different forms of implementation). Most notably, the choice between the 'Model A' and 'Model B' for their CFC rule. This case is not one of a choice between the application or not of an anti-avoidance rule, however, but one between two different versions, both of which are equal from the perspective of the minimum standard. As a consequence, if a Member State were to give taxpayers the choice between applying one or the other model for purposes of calculating its tax base (which no Member State has done), the result would still be in line with the ATAD's wording.

3.4. Implementation and administration of anti-hybrid measures

It is generally assumed that the transposition and application of the anti-hybrid rules of Art. 9, 9a and 9b ATAD is a highly complex and challenging task for Member State legislatures, tax administrations and taxpayers alike. The rules are complex and wide-ranging, and the interaction of the lengthy definitions included in Art. 2 Nr. 9 ATAD with the substantive provisions of Art. 9-9b ATAD is itself a difficult task. The rules also leave a number of terms undefined[39] and issues unresolved, such as the procedural solution to timing mismatches[40]. In practice, the interpretation of the rules appears heavily to rely on the rather detailed guidance provided by the OECD BEPS Action 2 Report and its examples, which creates uncertainty since that guidance is not part of EU law and not fully consistent with the rules of the ATAD[41].

The practical application and administration of anti-hybrid rules is highly complex given the need for information about taxation in other countries, including outside the EU. It remains an open question whether undue burden is put on taxpayers where they have no conceivable means of providing the required information and whether such burden is compatible with taxpayers' fundamental rights and freedoms.

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[39] Even such fundamental terms as 'payment'.

[40] See Parada in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 200-228; and Spies in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 229-255.

[41] For a general, and critical, assessment of the potential impact of the BEPS project on the interpretation of EU law, see Schön, Interpreting European Law in the Light of the OECD/G20 Base Erosion and Profit Shifting Action Plan, Bulletin for International Taxation (2020) 286-302.

4. IMPLEMENTATION EFFECTS

KEY FINDINGS

The impact of the ATAD on Member State laws differs widely between different rules of the Directive and among Member States. Overall, the **existing options granted in the ATAD give rise to a certain fragmentation**. While this is lower than it would be in the absence of the Directive's minimum harmonisation effect, **a reduction of the number of options should be considered for a more homogenous anti-avoidance landscape** across all Member States.

Questions as to the **effectiveness of the rules** to curb tax planning have been raised, in particular with respect to the CFC rule. Considering the CJEU's evolving case law on the influence of the general anti-abuse principle, the validity of those concerns cannot yet be finally assessed. The same applies with respect to the ATAD's **impact on potential double taxation** as a consequence of the rules' over-inclusiveness.

In this section, we aim to give our assessment of the effects that can be seen from the adoption of the ATAD. By nature of this study, we are not aiming to make an empirical analysis of the impact on taxpayer behaviour, Member State revenues or broader macroeconomic effects. Instead, this section is limited to a general overview over the changes that have been made in Member State laws in response to the ATAD and a brief outlook on possible steps that might be considered to be addressed in future legislative proposals.

4.1. Changes in Member State Laws in response to the ATAD

No general overview exists over which countries had to introduce entirely new anti-avoidance rules in response to the ATAD. Some studies have focussed specifically on a selection of norms that were missing in certain Member States. For the interest limitation rule, the Commission's assessment as to which Member States are allowed to continue their "equally effective rules" gives an indication that a rather small number applied such rule[42]. This is not particularly surprising, given the prevalence of alternative approaches to address the undercapitalisation of corporate structures, in particular through thin capitalisation rules and more generally through transfer pricing. According to a PWC study, only twelve Member States did not apply exit taxation rules prior to the ATAD's adoption[43]. According to the same study, all Member States already applied a GAAR prior to the ATAD, although sixteen[44] made changes or adopted new GAARs in order to ensure compliance with Art. 6 ATAD. In the case of the ATAD's anti-hybrid rules, which are both the newest and most complex type of anti-avoidance rules included in the Directive, all Member States had to introduce new provisions to comply.

[42] Greece, France, Slovakia, Slovenia and Spain. See Commission Notice: Measures considered equally effective to Article 4 of the Anti-Tax Avoidance Directive, OJ 2018 C 441, 1-2. Germany, whose domestic rule was the model for the ATAD provision, obviously also applied such a rule prior to the Directive's adoption.

[43] Croatia, Cyprus, Czech Republic, Estonia, Finland, Greece, Hungary, Lithuania, Poland, Romania, Slovakia, Slovenia. Cf. PwC NL Tax Knowledge Centre, ATAD I and II implementation overview (July 2021, https://www.pwc.nl/nl/dienstverlening/tax/documents/atad-1-and-2-overview-july-2021.pdf last accessed 21 February 2022), page 19.

[44] Excluding the UK, which has also been included in that study.

4.2. How has the ATAD changed the situation?

Where no rules previously existed, it seems obvious that the ATAD should have had a positive impact on combatting tax avoidance possibilities for corporate entities. Where similar rules already existed, this is less clear, although in those cases a benefit should result from the perspective of certainty and administrability from the perspective of taxpayers through greater conformity of the rules.

However, the practical positive impact in this respect is potentially quite limited due to the lack of closer harmonisation of the anti-avoidance rules as a consequence of the number of options granted in the Directive. Several academic commentators thus note that they rather expect a greater fragmentation of the internal market compared to the situation prior to the Directive[45]. Also the 2020 Implementation Report by the Commission[46] showed the significant divergence in implementation with respect to the various options provided for in the Directive, although that report did not yet include exit taxation or anti-hybrid rules. However, when assessing the success of the ATAD's implementation, this criticism must be balanced against the alternative of even greater fragmentation that would have resulted from completely uncoordinated development anti-avoidance rules to implement the BEPS consensus.

4.3. Are there loopholes or gaps that need to be addressed?

4.3.1. The CFC rule models A and B

Questions have been raised concerning the rather narrow framing of the "model B" CFC rule in Art. 7 para. 2 lit b ATAD, which, as a mere backstop to robust transfer pricing rules, may not fully address the range of concerns typically considered to be at the heart of policy makers' considerations. In adopting this type of CFC rule, a Member State targets only shifts of income from its own jurisdiction to the CFC jurisdiction and excludes so-called foreign-to-foreign stripping of income[47]. This is sufficient to protect that Member State's tax base but does not fully contribute to the wider goal of avoiding profit shifting between third states. Since all EU Member States (and an increasing number of third countries) have adopted CFC provisions, this is less of a concern, as any country where the relevant functions are effectively exercised, will tax the income generated by those functions under its own rules. The other concern of such narrower rules, namely that they are vulnerable to an uncertain determination of where the relevant income is generated (i.e. where the income-creating functions are exercised), is increasingly alleviated by the strengthening of the international standard for transfer pricing – which inform the meaning of "significant people functions" as a key element of Art. 7 para. 2 lit. b ATAD – through publication of the 2017 Update to the OECD Transfer Pricing Guidelines.

In light of this analysis, questions as to the strength of the CFC rule may instead arise also with regard to Art. 7 para. 2 lit. a ATAD ("model A") insofar as it allows companies to escape the application of the CFC rule by evidencing "a substantive economic activity supported by staff, equipment, assets and premises". In particular, the provision's wording ("where") stands in noticeable contrast to the definition of a "genuine arrangement" in the GAAR of Art. 6 ATAD, which can be absent even where a taxpayer proves economic substance as the wording captures arrangements "to the extent that" they do not reflect economic reality[48].

45 E.g. Rust in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 174-199 (199).

46 Report from the Commission to the European Parliament and the Council on the Implementation of Council Directive (EU) 2016/1164 of 12 July 2016, COM(2020) 383 final.

47 See OECD (2015), Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, http://dx.doi.org/10.1787/9789264241152-en (last accessed 6 January 2022) page 16.

48 See recital 8 of Directive 2015/121, which first introduced the GAAR in the Parent-Subsidiary Directive – which was the model for Art. 6 ATAD: ("*While Member States should use the anti-abuse clause to tackle arrangements which are, in their entirety, not genuine, there may also be cases where single steps or parts of an arrangement are, on a stand-alone basis, not genuine. Member States should be able to use the anti-abuse clause also to tackle those specific steps or parts, without prejudice to the remaining genuine steps or parts of the arrangement. That would maximise the effectiveness of the anti-abuse clause while guaranteeing its proportionality. The 'to the extent approach' can be effective*

As a consequence, there is a risk that profit shifting arrangements that rely on companies with sufficient substance could escape the application of the CFC rule[49]. That risk may be reduced by the evolving nature of the Court's case law in respect of the general anti-abuse principle, which is bound to affect the interpretation of the need to include taxpayer safeguards such as the substance carve-out in anti-avoidance rules. It appears likely, in light of the recent developments[50] that the Court will not insist on a literal interpretation focussed on fine-grained differences in wording of different provisions but rather apply a common concept to them in an effort to ensure a fair balance between robust anti-avoidance rules and taxpayer freedoms[51].

4.3.2. Uncertainty of applying the GAAR and penalties

The uncertainties arising from the lack of jurisprudence on the interpretation of the GAAR both at the national and the European level are inherent in the nature of a GAAR and as such do not give rise to a need for legislative action. In fact, any changes to the terms of the GAAR might well be counterproductive as it would be likely to raise new uncertainties rather than effectively clarifying open questions.

One aspect that the ATAD leaves open and that could be considered to be subject for harmonisation is whether the application especially of the GAAR ought to be combined with the imposition of administrative fines. This issue appears currently to be addressed quite differently across the EU and there is no obviously correct answer from a legal perspective. In general, administrative fines are imposed on taxpayers for a failure to comply with applicable procedural laws, in particular related to full and timely disclosure of facts and circumstances that is required by law. The sanction of the GAAR, in contrast, lies in denying of a tax advantage because it would go against the object or purpose of the applicable tax law. Recital 11 ATAD makes it clear, however, that taxpayers should have the "right to choose the most tax efficient structure" for their commercial affairs, limited only by the requirement that they not be "non-genuine". The considerable uncertainty surrounding this term speaks against imposing an additional sanction on taxpayers based merely on the fact that the GAAR was held to apply to a chosen structure, insofar as this would amount to imposing a fine on a taxpayer for 'getting it wrong' in the face of uncertainty.

4.3.3. Substance conditions for companies

The Commission recently proposed a further step addressing tax avoidance structures by introducing minimum substance requirements as a precondition for a Member State to issue tax residence certificates as a basis for companies to gain tax benefits in cross-border situations[52].

This is a welcome step for the easier administration of the fight against abusive structures and it should also improve the recognition of "real" establishments across the EU in a way that is in line with the

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in cases where the entities concerned, as such, are genuine but where, for example, shares from which the profit distribution arises are not genuinely attributed to a taxpayer that is established in a Member State, that is, if the arrangement based on its legal form transfers the ownership of the shares but its features do not reflect economic reality.")

[49] See Rust in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 174-199 (197) who notes that the economic substance rule leaves the CFC legislation to "no longer be an effective instrument against profit shifting as it only covers mere letterbox companies".

[50] In particular, the Court's acknowledgment of the concept of abuse as a general principle and its impact on the interpretation of direct tax directives in the famous 'Danish Beneficial Ownership' cases (combined cases C-115/16, C-118/16, C-119/16 and C-299/16; as well as combined cases C-116/16 and C-117/16) should be mentioned here.

[51] Arguing for a uniform understanding of the differently worded definitions of abusive practices in Art. 6, Art. 7 para. 2 lit. a and lit. b also Geringer, Criteria for the Application of Anti-Abuse Provisions to Holding Companies under ECJ Case Law: Their Significance in Interpreting and Applying ATAD Provisions, European Taxation (2020) 443-450 (449-450), who seems in favour of a continued narrow understanding insisting on the Cadbury Schweppes' reference to "wholly artificial arrangements".

[52] While this proposal has frequently been referred to in advance as "ATAD 3", it was actually proposed to be a self-standing directive now commonly known as the "Unshell Directive"; see Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, COM(2021) 565 final.

internal market principle. It also introduces taxation mandates for Member States in relation to income that accrues to companies characterised as having insufficient substance, further buttressing the ATAD's CFC and anti-hybrid rules. Considering the primacy of the freedom of establishment, it needs to be ensured that the required substance criteria do not go beyond what the CJEU would consider to be a bona fide exercise of that freedom, however. In that respect, it is notable that the proposed directive does not aim to provide a safe haven from anti-abuse provisions for companies deemed to have sufficient substance[53]. Nevertheless, if adopted, that directive would decrease the level of uncertainty concerning the applicability of the substance carve-out under CFC rules following 'Model A'.

4.4. Potential inconsistency (and double taxation) due to over-inclusive rules

Despite the ATAD's declared objective to "avoid creating other obstacles to the market" through double taxation[54], a double inclusion of economic income in the tax base of several Member States can occur commonly as a consequence of applying its rules even without Member States going beyond the Directive's "minimum standard". Key examples include (1) the application of the interest-limitation rule to the extent that a non-deductible interest payment is included in the tax base of the recipient company, (2) divergences in valuation of 'exiting' assets[55], (3) the inclusion of a CFC's low-taxed income in two different 'parent' jurisdictions[56], and (4) instances of merely ostensible hybrid mismatches resulting in a double non-deduction or dual inclusion of income[57]. In principle, the stated goal to prevent occurrences of double taxation may justify Member States implementing the Directive in a way that would provide for exceptions to applying the rules stringently in such circumstances and to give, for instance, a tax credit for any "overcharged" tax[58]. However, such implementation has not been identified in this study, and taxpayers are unlikely to be able to rely on recital 5 directly where national law does not provide a basis for relief.

[53] See recital 3 of the Proposal COM(2021) 565 final.

[54] See recital 5 of Directive 1164/2016.

[55] The Directive clearly envisages that such divergences should not arise, yet it does not establish a clear mechanism to achieve this result in practice if tax authorities of two Member States reach different conclusions as to an asset's 'market value'.

[56] Several instances of such dual inclusion can be identified: for instance, different 'taxpayers' can fulfil different criteria for 'control' (as ownership of capital, voting rights, and entitlement to profits may be spread between different entities); another example is that of a combined direct and indirect control of a CFC by both its immediate parent and that parent's parent. See Schwarz in in Haslehner, Pantazatou et al (eds), A Guide to the Anti-Tax Avoidance Directive (Edward Elgar 2020) 105-126 (125).

[57] For instance, where the inclusion of a payment in the tax base of the recipient is (merely) delayed due to timing differences in recognition. Recital 22 of Directive 952/2017 indicates that such mismatches ought to be covered only if the timing difference exceeds a 'reasonable time' (12 months); yet double taxation would also arise if recognition in the recipient jurisdiction occurred after a 12-month period.

[58] See Soom, Double Taxation Resulting from the ATAD: Is There Relief?, Intertax (2020) 273-285.

PART 2 – DIRECTIVE(S) ON ADMINISTRATIVE COOPERATION WITH EMPHASIS ON DAC 6

KEY FINDINGS

The DACs have been amended several times reflecting the tendency towards more tax transparency through information exchange in the EU. While DAC 6 is not the last amendment to DAC 1, it is the last directive that has already been implemented across the Union. It is very closely related to the ATAD in that they both aim to combat tax avoidance practices. Yet, DAC 6 has a much broader scope than the ATAD and it constitutes the pinnacle of tax transparency in the extent of information it requires to be reported and automatically exchanged among Member States.

1. BACKGROUND ON DACS

Tax transparency became a key goal at international and EU level, especially after the revelations about multiple tax evasion and tax avoidance scandals. According to the OECD, 'tax transparency is about putting an end to bank secrecy and tax evasion through global tax co-operation[59].' Transparency constitutes one of the pillars of the 15 BEPS Actions, and it includes Actions 11, 12 (which is the precursor to DAC 6), 13 and 14. Several OECD actions have as their purpose the promotion of tax transparency, including the Global Forum on Transparency and Exchange of Information for Tax Purposes and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Furthermore, transparency at EU level, through tax cooperation, that is information collection, exchange and monitoring was echoed in the EU Anti-Tax Avoidance Package[60]. The revision of the Administrative Cooperation Directive (DAC) constituted, thus, one of the key pillars in the EU's strategy to combat tax avoidance and evasion.[61] These mechanisms of disclosure requirements and exchange of information among the Member States are built in the seven DACs[62].

1.1. DACs: The way so far

At EU level, an unprecedent wave of legislative initiatives has been witnessed in the field of transparency through information exchange. Within 10 years, the primary piece of legislation 'DAC 1' has been amended six times. In accordance with Article 115 TFEU, these amendments have been unanimously agreed upon by all Member States. DAC 1, the cornerstone of the exchange of information repealed the 'mutual assistance Directive'[63] and established a more elaborate, in comparison to the past, system of exchange of taxpayers' information. It distinguishes between three types of exchange of information: exchange of information on request (referring to a specific case); spontaneous exchanges (no prior request by the recipient state, no systematic basis of exchange) and automatic exchanges (AEOI, systematic exchange of predefined tax information on a regular basis).

[59] https://www.oecd.org/tax/beps/tax-transparency/.

[60] European Commission, Anti-Tax Avoidance Package (January 2016), available at: https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en.

[61] Ibid.

[62] DAC 1 (Directive 2011/16/EU); DAC 2 (Directive 2014/107/EU); DAC 3 (Directive (EU) 2015/2376); DAC 4 (Directive (EU) 2016/881); DAC 5 (Directive (EU) 2016/2258) ; DAC 6 (Directive (EU) 2018/822) and DAC7 (Directive (EU) 2021/514).

[63] Council Directive 77/799/EEC was repealed by Directive 2011/16/EU (DAC 1).

Subsequently, in the EU, the Common Reporting Standard (CRS)[64] was implemented through the EU Revised Directive (DAC 2) on Administrative Cooperation.[65] DAC 2 amended DAC 1 and it, *inter alia*, broadened the scope of the collection of data that is covered by AEOI. Under DAC 2, Member States are obliged to *automatically* exchange financial account information, abolishing effectively bank secrecy within the EU[66].

In the aftermath of LuxLeaks and the state aid investigations (at the time) of Advance Pricing Arrangements (APAs) and Tax Rulings, DAC 1 was further amended by Directive (EU) 2015/2376 (DAC 3) on mandatory automatic exchange of information in the field of taxation. DAC 3 concerns the mandatory automatic exchange of tax information on advance cross-border rulings and Advance Pricing Agreements (APAs).

DAC 4 was adopted in May 2016[67]. It constituted one of the first elements of the January 2016 package of the Commission proposals to strengthen the rules against corporate tax avoidance[68]. The directive builds on the 2015 OECD recommendations to address BEPS (Action 13)[69]. DAC 4 provides for AEOI regarding country-by-country reports of a multinational company's group allocation of income, tax and business activities on a country-by-country basis. The rules only apply to multinational enterprises (MNEs) with a minimum consolidated group turnover of EUR 750 million. The relevant reporting entity will have to submit to the tax authorities of its residence Member State certain information (including turnover, pre-tax profit, income tax paid and accrued, number of employees, capital, tangible assets, and business activities) on an annual basis and for each tax jurisdiction where they do business. The residence Member State will then have to automatically exchange data with the other relevant Member States (i.e. where the MNEs are either resident or subject to tax through a permanent establishment). The idea behind DAC 4 is that tax avoidance risks related to transfer pricing are minimized and that the exchange of information will "enable the tax authorities to react to harmful tax practices through changes in the legislation or adequate risk assessments and tax audits[70]".

Furthermore, the Commission being aware of the fact that tax authorities need greater access to information on the beneficial owners of intermediary entities in order to combat tax evasion proposed another Directive to amend DAC 1 and the 4th Anti-Money Laundering Directive (AMLD) [71]. DAC 5[72] gives the possibility to tax authorities to access beneficial ownership and due diligence information as those are collected in the context of the anti-money laundering legal framework.

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64 The Common Reporting Standard (CRS), developed in response to the G20 request and approved by the OECD Council on 15 July 2014, calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis.

65 Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation ('DAC 2').

66 Already under Article 18 (2) of DAC 1 a Member State could not refuse to provide information just because 'this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.' Prior to that, see the Savings income Directive that provided for mandatory and automatic exchange of savings account information between Member States.

67 Council Directive (EU) 2016/881 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation

68 See http://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en (last accessed 2 January 2022).

69 OECD/G 20 Base Erosion and Profit Shifting (BEPS) Project, Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting.

70 Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation ('DAC 4'), Preamble Recital 3.

71 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

72 Council Directive (EU) 2016/2258 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities ('DAC 5').

The EU's answer to Panama Papers was DAC 6, which will be the focus of this report[73]. According to DAC 6, intermediaries, that is, for instance, accountants, advisers, lawyers and banks who sell reportable cross-border tax arrangements to their clients, should report information on the arrangement to the tax authorities of their home Member State. DAC 6 does not only establish mandatory disclosure rules for intermediaries on potentially aggressive tax-planning arrangements but also provides for the automatic exchange of this information on tax planning cross-border arrangements[74].

The most recent piece of legislation is DAC 7 which provides for the automatic exchange of information on the revenues generated by sellers on digital platforms, whether the platform is located in the EU or not[75]. DAC 7 must be implemented into domestic law by 31 December 2022 and the new provisions will be applicable as from 1 January 2023 (for the provisions on joint audits, 31 December 2023 / 1 January 2024, respectively).

Currently, another update to the DAC is anticipated (DAC 8) that aims to expand the Directive's scope to crypto-assets and e-money.

1.2. DAC 6: Relevance to anti-tax avoidance and its relationship with the ATAD

DAC 6 has been the most recent piece of EU legislation in the field of tax transparency *whose implementation deadline is now over*[76]. All Member States have, by now, implemented DAC 6. The last countries to do so were Cyprus and Spain, that did so in March and April 2021 respectively. The Commission had opened infringement procedures against these two countries for lack of transposition of the Directive, however, upon transposition, the cases have been closed[77].

DAC 6 entered into force on 1 July 2020, however, because of the severe disruptions caused by the COVID-19 pandemic, the EU allowed EU Member States to defer the DAC 6 reporting deadlines by up to six months.

Despite the ever-increasing secondary legislation on tax-related information exchange, until DAC 6, no general provisions were in place requiring Member States to exchange information in the case of tax avoidance and/or evasion schemes that come to their attention.[78] All previous DACs contain a general obligation for the national tax authorities to spontaneously or automatically communicate information to the other tax authorities within the EU in certain circumstances, such as the loss of tax in a Member State or tax savings resulting from artificial transfers of profits within groups of companies[79]. DAC 6 is, hence, complimentary to all other DACs covering, however, a remaining need to reinforce certain specific transparency aspects of the existing taxation framework[80]. It is, therefore, probably the culmination of the amount and extent of information to be reported and automatically exchanged between Member States and thus, the pinnacle of tax transparency and anti-tax avoidance.

[73] 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 ('DAC 6).

[74] Article 8ab (13) provides that 'The competent authority of a Member State where the information was filed pursuant to paragraphs 1 to 12 of this Article shall, by means of an *automatic exchange*, communicate the information specified in paragraph 14 of this Article to the competent authorities of all other Member States.

[75] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ('DAC 7'), OJ L 104, 25.3.2021, p. 1–26.

[76] According to Article 2 of DAC6, Member States shall adopt and publish, by 31 December 2019 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall apply those provisions from 1 July 2020.

[77] For Spain, Commission infringement procedure number INFR(2020)0048 and for Cyprus INFR(2020)0012.

[78] Proposal DAC 6, 5.

[79] *Ibid*.

[80] DAC 6, Recital 1, Preamble.

The idea behind DAC 6, namely to disincentivize the intermediaries to design and market tax avoidance schemes, was welcomed by all Member States as evinced by the very short period (9 months) within which the proposal was adopted. This anti-tax avoidance effect can be achieved, according to DAC 6, through the early disclosure requirement of potentially aggressive tax arrangements and the subsequent automatic exchange of the reported information across the EU.

One can already identify that while the two sets of Directives (ATAD and the DACs, and DAC 6, in particular), pursue the same anti-tax avoidance goal, the means through which they intend to achieve that, differ. In the context of the ATAD, the GAAR targets arrangements 'having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part[81].' DAC 6's scope is understandably much broader than the ATAD's, in that DAC 6 constitutes a prerequisite, an earlier step, for the successful implementation of the ATAD. Indeed, the reportable cross-border arrangements of DAC 6 need to fulfil at least one of the hallmarks set out in Annex IV[82], many of which (hallmarks) do *not* require to establish that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from the arrangement is the obtaining of a tax advantage[83].

Specifically, the relationship between GAARs and Mandatory Disclosure Rules (MDR) has been highlighted in the BEPS Action 12 Final Report (2015) as complementary from a *compliance perspective*. However, as the purpose of the MDR is "to provide the tax administration with information on a wider range of tax policy and revenue *risks other than those raised by transactions that would be classified as avoidance under a GAAR*[84]", the scheme to be reported will be defined more broadly than the tax avoidance schemes covered by a GAAR[85].

In this sense, the arrangements that need to be reported will include arrangements that would not necessarily be caught by the ATAD's GAAR.

81 ATAD, Article 6.

82 DAC 6, Article 3(19).

83 *Ibid*., Annex IV, Part I.

84 BEPS Action 12, Final Report (2015), p. 24

85 *Ibid*.

2. GENERAL CRITICISMS OF DAC6

KEY FINDINGS

DAC 6 has been criticised in literature on two main grounds: First, because it includes a number of undefined terms that create uncertainties and, accordingly, allow Member States much leeway in the implementation process. Second, because it, reportedly, does not comply with EU law, in what regards fundamental EU law principles, the fundamental freedoms and EU fundamental rights.

2.1. Uncertainties

Despite its primary role in addressing aggressive tax planning (i.e. the means towards tax avoidance) and the wide acknowledgment that the MDR promoted in the Directive contributes to fighting tax avoidance and evasion, DAC 6 has received extensive criticism regarding certain unclarities and ambiguities in many terms included therein. While this non-exhausting and broad drafting appears understandable from a political perspective in order to ensure consensus for adoption at the Council, the wide discretion left to the Member States to interpret those terms in the implementation process, risks jeopardizing altogether the Directive's effectiveness and its uniform application across the Union[86].

The most prominent problems associated with the Directive relate to i) to the overinclusion of arrangements to be reported and ii) the broad way certain terms have been drafted, leaving much autonomy/leeway to the Member States in the implementation process. Weber and Steenbergen rightly advance the theory that these concepts must be interpreted in line with the object and purpose of the Directive aiming to ensure the full effectiveness of EU law and, whenever possible, draw inspiration from BEPS Action 12[87]. However, while this can serve as a general guideline, it becomes very difficult to be implemented in practice across the 27 Member States.

Below, we provide a list of the **most common uncertainties and ambiguities** and/or potential **sources of discrepancies** arising from the implementation of the DAC 6. In the next section, we will review how these have played out after the DAC 6 implementation across different Member States. Notably, the implementation by Member States might vary widely as to the reportable persons, the reportable arrangements, the coverage of legal privilege/professional secrecy, the interpretation of the hallmarks and the penalties in case of infringement.

[86] Bart Peeters and Lars Vanneste, 'An Additional Common EU Reporting Standard?' World Tax Journal (August 2020), pp. 499 – 564; Dennis Weber and Jorn Steenbergen, 'The (Absence of) Member State Autonomy in the Interpretation of DAC6: A Call for EU Guidance', EC Tax Review Volume 30, Issue 5/6 (2021) pp. 254 – 261; Arthur Bianco, 'DAC6 and the Challenges Arising from Its Disclosure Obligation', EC Tax Review Volume 30, Issue 1 (2021) pp. 8 – 23; Katerina Pantazatou, 'Effective Implementation of the ATAD: Information Collection, Exchange and Monitoring through DAC 6' in Haslehner, Werner; Pantazatou, Katerina; Kofler, Georg; Rust, Alexander (Eds.) *A Guide to the Anti-Tax Avoidance Directive* (Edward Elgar, 2020), pp. 277 – 303.

[87] Weber and Steenbergen, supra, n. 87.

2.1.1. Objective scope: Cross border reportable arrangements

- The absence of the definition of what constitutes an 'arrangement' is intentional, as the Commission was of the opinion that the inclusion of a definition would counter an as wide a disclosure obligation as possible[88]. This is why, it opted for premising the arrangements to be reported on a list of hallmarks that would successfully catch a wide array of continuously adapting tax-aggressive arrangements[89]. Member States, however, have included in their implementing laws various definitions of 'an arrangement' or have completely omitted such a definition;
- Different examples across Member States are identified of what constitutes a cross-border arrangement, while some Member States include also domestic arrangements to be reported;
- Divergences are observed as to the exact documentation that needs to be submitted/pre-filled or not/ and what kind of information should be included.

2.1.2. Subjective scope (who needs to report): Intermediaries and taxpayers

- The Directive explicitly targets intermediaries and taxpayers. It provides a very broad definition of who is/can be an intermediary, encompassing all actors that are usually involved in designing, marketing, organizing or managing the implementation of a reportable cross-border transaction or a series of such transactions, as well as those who provide assistance or advice('secondary intermediaries')[90]. The definition of intermediaries varies across different Member States. Furthermore, certain Member States, like Germany, have completely excluded secondary intermediaries from reporting obligations;
- Another uncertainty/variation relates to the discretion left to the Member States on who may be exempted from reporting on grounds of their professional secrecy. DAC 6 itself provides that each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State[91]. The professions to be exempted from this obligation, passing on the burden of disclosure to the taxpayer, vary across the Union;
- Whenever there is no intermediary or the intermediary does not have to disclose, the disclosure obligation is passed on to the taxpayer. One question that arises is the extent of the taxpayer's right to silence (nemo tenetur principle or right against self-incrimination). Whenever this obligation arises, each Member State relies on its national procedural rules to define the extent of this right (whether it covers only criminal proceedings or also administrative tax law procedures). One can observe a different implementation across Member States, both in what regards the explicit provision of the taxpayer's right or its extent.

2.1.3. Hallmarks and Main Benefit Test (MBT)

- The terms included in the different hallmarks allow for different interpretations across Member States, which, in turn, will result in divergences across the Union with regard to the fulfilment of the hallmarks' requirements. Furthermore, some States (like Poland) have included additional hallmarks, beyond the minimum standard established by the directive.

[88] European Commission, Summary Record – prepared by the Commission Services, Working Party IV – Direct Taxation, September 2018.

[89] DAC 6, Preamble, Recital 9.

[90] *Ibid.*, Article 1(21).

[91] *Ibid.*, Article 8ab(5).

- Certain hallmarks require the MBT to be fulfilled for the cross-border arrangement to be reportable[92]. This MBT incorporates the notion of the tax advantage, which differs across Member States. Thus, the answer to the question whether the MBT is fulfilled, and accordingly whether the hallmark is met, will vary depending on each Member State's understanding of the tax advantage.

2.1.4. Penalties

DAC 6 provides that Member States should lay down penalties against the violation of national rules that implement this Directive. Such penalties should be effective, proportionate and dissuasive[93]. Currently, the range of penalties across different legislation varies between 3,000 EUR and 4,700,000 EUR.

2.2. Legality

A second set of criticisms relates to the legality of the Directive and its compliance with EU legal principles, including its compliance with the subsidiarity and proportionality principles. These are standalone points that exist regardless of the Directive's implementation into national law, and, thus, will only be briefly discussed below.

The first point of criticism relates to the legal basis of the directive, specifically, Article 113 and 115 thereof. In light of the very broad hallmarks included in the directive, it has been argued that, often, perfectly legitimate transactions may be caught by the disclosure obligation94. This has made certain authors wonder whether these measures are a meaningful and necessary means to ensure the functioning of the internal market; and even if that were the case, whether the underlying concept und understanding of the internal market is in line with the underlying previous acts of harmonization95.

A second criticism pertains to the compliance of the directive with primary EU law, notably the fundamental freedoms. Indeed, the directive instead of enhancing the taxpayers' free movement in the internal market, it imposes additional (reporting) obstacles to them. The underlying reason for that is taming tax evasion and tax avoidance, yet, one may wonder whether the abstract risk of tax avoidance may serve as a justification (enough) for such a curtailment of fundamental freedoms[96].

Compliance with taxpayers' fundamental rights, as enshrined in the Charter also raise concerns. The most 'problematic' rights in this case are the fundamental rights of privacy (Article 7, Charter), the protection of personal data (Article 8, Charter), together with the right against self-incrimination (Articles 47 and 48, Charter). While the directive provides, in general, that it respects fundamental rights, it is doubtful whether a violation of one of the aforementioned rights would withstand the proportionality test enshrined in Article 52(1) of the Charter, for reasons of protection against *potential tax avoidance.*

The retroactivity of DAC 6, that is, the introduction of the look back period (reporting of cross-border arrangements if the first step of the arrangement was implemented between 25 June 2018 and 1 July 2020) raises several concerns[97]. The first one pertains to the practical difficulties associated with the obligation to report before the directive has been implemented into national law.

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92 The Directive provides in Annex IV that the MBT test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

93 DAC 6, Article 8ab (6).

94 Pantazatou, supra n. 87, at 290 – 291.

95 Daniel W. Blum and Andreas Langer, 'At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 1' in European Taxation (June 2019), pp. 282 – 290, 282. In agreement, Peeters and Vanneste, supra n. 87, at 504.

96 Indicatively, Blum and Langer, Peeters and Vanneste, Pantazatou, supra, n. 87.

97 Article 8(ab)(12).

It is clear that there are inherent difficulties in this undertaking, including the uncertainty whether the national law (would) provide that certain intermediaries (and if so which ones) could waive their reporting obligation by reason of their legal professional privilege. This interim period would possibly burden the intermediaries with the additional cost of revisiting potentially reportable transactions for the two-year period in place[98]. The second problem relates to the constitutional and institutional ramifications of such a look back period. Such a retroactive application from 25 June 2018 appears to allow the directive to have direct effect before its implementation into national law[99].

98 Christian Kaeser, Mark Orlic and Arne Schnitger, 'DAC 6 reporting requirements pose numerous compliance problems' International Tax Review (12 December 2018).

99 DAC 6, Article 8ab(12).

3. IMPLEMENTATION ACROSS DIFFERENT MEMBER STATES

KEY FINDINGS

The many undefined terms in the directive and, therefore, the leeway allowed to the Member States in the implementation process have resulted in a fragmented implementation of DAC 6 across the Union. The divergences observed cover the entire spectrum of the directive, including fundamental parts, like its subjective and objective scope. For those reasons, one cannot speak of a level playing field in the EU when it comes to Mandatory Disclosure Rules and the subsequent automatic exchange of information.

This section will briefly review the implementation process across **a selection of Member States.** The selected Member States will be those that present 'interesting' interpretations of the broad terms included in DAC 6 and/or those 'outlier' states that apply the most diverging interpretations, for instance with regard to penalties or by excluding certain categories of arrangements or intermediaries to be reported.

The aim of this section is to describe how DAC 6 has been implemented, with particular emphasis on the thorny and unclear points that are discussed in the previous section. The review of the implementation process relies either on primary sources (the implementing law itself) or on country reports that have been published in reputable outlets.

3.1. Scope: Beyond the minimum standard

As the Directive is a minimum Directive, it is worthwhile to point out from the outset that the vast majority of Member States do not go beyond the minimum standards enshrined therein. Two Member States, however, have gone further than the directive's mandate in different aspects, including by adding hallmarks or taxes or by incorporating in their domestic legislation the need for *domestic* arrangements to be reported.

In this context, **Poland and Portugal** deserve special attention as they are the outlier Member State that have gone well beyond the scope of the directive in several ways and they have established a much stricter framework. One such way is through the inclusion of additional taxes to be disclosed. DAC 6 excludes most indirect taxes from the scope of reporting. However, in **Poland** and in **Portugal** the local MDR cover a wider range of taxes than those required by the directive, including VAT. Specifically, in the case of Poland all taxes are covered with the exception of custom duties, whereas in Portugal the reportable arrangements include all taxes with the exception of custom and excise duties.

Furthermore, according to DAC 6, a "reportable cross-border arrangement" means *any cross-border* arrangement that contains at least one of the hallmarks set out in Annex IV. However, once again, **Poland and Portugal** opted to include *domestic* transactions among the reportable arrangements[100].

Poland stands out, moreover, for including in the implementing law at least ten more additional hallmarks than the ones included in the directive, four of which do not require the Main Benefit Test (MBT) to be met. It also imposes by far the most severe maximum penalties for non-compliance with the MDR, amounting up to EUR 4,7 million.

[100] Note that both Germany and Sweden considered of adding domestic arrangements in the arrangements to disclosed. However, this idea was abandoned in both Member States, in the latter case, despite the Swedish government's insistence to include it in the final Swedish bill.

3.2. Implementation and extension of reporting deadlines

The DAC 6 entered into force on 1 July 2020. However, certain Member States transposed the directive into domestic law earlier (**Malta, Poland, Romania**).

According to DAC 6, the deadline for intermediaries to disclose reportable transactions the first step of which was implemented between 25 June 2018 and 1 July 2020 (the look-back period) was set initially on 31 August 2020[101]. However, due to the disruption caused by the COVID-19 pandemic, the EU allowed Member States to defer the DAC 6 reporting deadlines by up to six months as follows:

- to 28 February 2021 for the look-back period;
- to 1 January 2021 for the start date of the 30-day reporting deadline and for arrangements that met one of the reporting triggers during the deferral period.

Most EU Member States opted for the six-month deferral, with the exceptions of **Austria** (that provided a three-month extension), **Finland and Germany** (no deferral).

3.3. Objective scope: Cross-border arrangement

DAC 6 provides an extended definition of what constitutes a "cross border arrangement"[102]. The emphasis on this definition is put on the cross-border element of the arrangement, leaving the term "arrangement", a term very central throughout the directive, undefined therein. Most Member States have adopted verbatim the definition of the cross-border arrangement (including Austria, Belgium, Cyprus and Luxembourg), however, as already stated above, certain countries, notably **Poland** and **Portugal**, have opted to include also domestic arrangements in the reportable arrangements. According to the directive, however, this (additional) information should not be exchanged with the other Member States.

Another essential term in the definition of the *cross-border* arrangement is the "participant" in the arrangement, which is also left undefined in the directive. This has left leeway to Member States to decide who is a participant in the arrangement. For instance, in the Netherlands, despite the absence of the definition of a participant, in practice, the position is taken that a person can only be a participant if that person has an *active* involvement in the arrangement[103]. Certain Member States, like **Belgium** and **Germany** have considered that an intermediary is not a participant to the arrangement. Thus, if the intermediary is the only part of the arrangement that is located in another State, the arrangement will not be considered to be cross-border[104].

The "reportability" of the arrangement relates, in principle, to meeting at least one of the hallmarks included in the directive (discussed below)[105]. In line with the absence of a specific definition of the term 'arrangement' in DAC 6, most Member States have opted not to include a specific definition of this term (for instance France, Sweden), although explanations of the term have been given a) on parliamentary discussions in some Member States have reflected that the threshold of what may constitute an arrangement is low, not requiring any particular level of complexity (**Sweden**)[106]; b) in guidelines issued by certain governments (**France, Germany and the Netherlands**) [107]. For instance,

[101] For ongoing reporting as of 1 July 2020, the deadline is set to 30 days from the triggering reporting action.

[102] DAC 6 Article 3 (18).

[103] Loyens & Loeff, 'The Dutch implementation of the Mandatory Disclosure Directive – Part 1', Quoted, November 2021, p.

[104] D-E. Philippe & E. Yüksel, 'Belgium - Mandatory Disclosure of Aggressive Cross-Border Tax Planning Arrangements: Implementation of DAC 6 in Belgium', European Taxation, Volume 60, No.4, 2020; M. Dietrich, 'Germany – Mandatory Disclosure Rules: Spotlight on Germany', European Taxation, Volume 60, No.2/3, 2020.

[105] Ibid, Article 3(19)

[106] See for instance, David Kleist, 'DAC6 Implementation in Sweden' in European Taxation (January 2021), pp. 21 – 28, 24 and references listed therein.

[107] Such guidance has been provided in France: Direction Générale des Finances Publiques, Extrait du Bulletin Officiel des Finances Publiques-Impôts, BOICF-CPF-30-40-10-10-20200309, March 2020. The relevant Dutch decree, Decree of 24 June 2020, nr. 2020-11382,

according to the **German** administrative decree that provides guidance in the implementation of the law[108], the definition of a tax arrangement necessitates a deliberate and active initial set-up or change in a structure, process or situation, with tax relevance[109].

The European Commission, however, stated that Member States were free to include a definition, as long as it would not restrict the scope of the directive. Some such examples can be found in the implementing **Italian** law[110] which defines an arrangement in a similar way to BEPS Action 12 and distinguishes between a scheme, an agreement and a plan, each one of these terms referring to different degrees of complexity of a structure. Overall, the concept of an arrangement should be interpreted in a broad manner, the only minimum requisite being that it should originate from a legally binding circumstance[111].

The **Irish** implementing law[112], contains a lengthy and very broad definition of the term arrangement that encompass also 'promises', signifying that an arrangement can be either implied or express.

3.4. Subjective scope: Intermediary and taxpayer

As stated in the previous section, discrepancies may arise from the different definitions of intermediaries and the subsequent different subjective scope of the directive, across different Member States. This differentiation entails also the different categories of the persons to be exempted from reporting, as well as the right of the taxpayers – when the reporting obligation is shifted to them – to disclose the reportable arrangements.

DAC 6 provides an extensive definition of the term "intermediary", dividing intermediaries essentially into persons that set up the arrangements (primary intermediary or 'promoters') and persons that have assisted in setting up this arrangement (secondary intermediary or 'service providers') [113]. Most Member States adopt a very similar approach to the one in the directive. Certain Member States, however, have opted not to include the (very broad) category of secondary intermediaries (**Bulgaria, Germany**), while some others have included an additional requirement, that of a nexus of the intermediary with the Member State at issue (for instance **Austria and Romania**) or of a nexus in a Member State (for instance, **Luxembourg and Cyprus**). **Spain** has specified that where an intermediary has only *partial knowledge* of the relevant arrangement, it will not be subject to a reporting obligation since it will not be deemed to constitute an intermediary[114].

According to DAC 6, each Member State *may* take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State[115]. In these cases, it rests with the Member States to take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the

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also sets a low threshold for the fulfillment of the 'arrangement', including that an arrangement could be a transaction, action, agreement, loan, commitment or a combination thereof.

108 Germany: Tax administrative decree on the application of the provisions on the reporting obligation for cross-border tax arrangements (BMF-Schreiben betreffend die Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuerverwaltungen) IV A 3 – S 0304/19/10006: 010 (29 Mar. 2021).

109 Petra Eckl and Felix Schill, DAC6 Implementation in Germany, in European Taxation (July 2021), pp. 273 – 284, 275, with references to the relevant law.

110 Italy: Legislative Decree No. 100 of July 30, 2020.

111 Gregorio Piran and Federico Sartori, 'DAC6 Implementation in Italy in Practice: A Further Complication of an Already Burdensome Regime?' in European Taxation (June 2021), pp. 242 – 250.

112 Ireland: Irish Finance Act 2019, paragraph 67, Article 817 RA.

113 DAC 6, Article 3(21).

114 KPMG, 'April 2021: Approval of the legislation and guidelines completing the transposition of DAC 6 in Spain' (May 2021), p. 3.

115 DAC 6, Article 8ab(5).

relevant taxpayer of their reporting obligations[116]. DAC 6 refers to the *legal professional privilege* in both Recital 8 and Article 8ab (5) meaning any communication covered by professional secrecy and not only the secrecy applying between attorney and client communication. Contrary to what a first reading of these provisions might suggest, i.e. that legal professionals are favoured when acting as intermediaries for being able to invoke the waiver, as opposed to, for instance accountants or other tax advisers, the wording of the Directive in other languages clearly refers to 'professional secrecy'[117].

Different legal traditions within the Union may protect, in the context of legal privilege, trainees and paralegals[118] whereas others may be restricted only to independent lawyers, excluding in-house lawyers.[119] As already mentioned, the Directive, however, does not restrict the waiver to cases of attorney-client privilege. In contrast, it, presumably, means professional secrecy according to *national law*. In **Luxembourg**, for instance, lawyers, tax advisers, accountants and other service providers are all bound by professional secrecy, which, if breached, can be punished with imprisonment and a fine[120]. According to DAC 6 and the 'broader' reading in terms of subjective scope, this means that in all the aforementioned cases, the disclosure obligation should be shifted to the taxpayer, unless he explicitly waives his right of confidentiality.

All Member States, with the exception of **Lithuania**, provide for different possibilities for intermediaries to be exempted from the reporting obligation. One category of Member States is represented by those that apply the exemption rule only to lawyers (including the **Netherlands, Sweden, Greece, Denmark, Cyprus**). Other Member States, such as **Germany,** focus on the nature of information to be exchanged. Accordingly, Germany requires that non-client specific information of the arrangement to be reported (the information is submitted anonymously), even if an exemption applies[121]. Similarly, **Finland,** exempts only the information that is covered by the privilege. **Austria and Poland** do not apply the exemption to marketable arrangements[122]. Other countries such as **Croatia and the Slovak Republic** apply the exemption to a wider category of professionals that are covered by professional secrecy, such as tax advisers and auditors.

When the intermediary is exempted from the obligation to report, the burden shifts to the taxpayer. Taxpayers, however, are covered by fundamental rights, including those enshrined in the Charter of fundamental rights of the EU and thus, the question arises whether they can refuse the disclosure of the requisite information on this basis, notably the protection of personal data and the freedom from self-incrimination. The principle against self-incrimination (*nemo tenetur* principle) applies at least in so far as criminal penalties are concerned. This fundamental right encapsulates the right of the taxpayer to silence when disclosure will lead to criminal liability, in particular in the context of tax audits.

The DAC provides that all information exchanged between Member States "be used in connection with judicial and administrative proceedings that may involve penalties, initiated as a result of infringements of tax law, *without prejudice to the general rules and provisions governing the rights of defendants and witnesses in such proceedings*"[123].

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[116] Ibid.

[117] *Secret professionnel* in the French version, *segreto professionale* in the Italian version, *secreto profesional* in the Spanish version. Interestingly, the Greek version distinguishes between professional secrecy ('επαγγελματικό απόρρητο') in Recital 8 and legal professional privilege or attorney-client privilege ('δικηγορικό απόρρητο') under Article 8ab (5). Judging by the other translations, I believe this discrepancy is unintentional.

[118] See for instance the UK. For a comparative approach, see DLA Piper, Legal Professional Privilege, available at: www.dlapiperintelligence.com/legalprivilege/ (last accessed on 13 June 2019).

[119] See also the seminal CJEU judgment of 18 May 1982, *AM & S Europe v Commission*, 155/79, EU:C:1982:157, para. 24.

[120] Article 458 of the Luxembourg Penal Code.

[121] Kristin Resenig, 'The Current State of DAC-6 Implementation in the European Union' European Taxation (December 2020), pp. 527 – 535, 530 and references listed therein.

[122] With regard to Austria, specifically, the exemption does not apply to the initial report applying to marketable arrangements.

[123] Article 16, Directive 2011/16/EU (DAC 1) (emphasis added).

In this context, the **Italian** decree[124], for instance, explicitly provides that **neither the intermediary nor the taxpayer** have an obligation to report the cross-border arrangement if the information reported could trigger criminal liability for them[125]. Yet, what remains unclear in several jurisdictions is the exact point in time from which it becomes clear that the taxpayer may be liable for a penalty or a criminal charge, so that they can invoke the right against self-incrimination.

3.5. Hallmarks

The general idea behind building on features (hallmarks) to identify potentially aggressive tax planning schemes, instead of providing a general definition of what would constitute such a scheme, is embedded in the difficulty of defining the concept of aggressive tax planning[126]. This is because aggressive tax planning structures have evolved over the years to become particularly complex and are always subject to constant modifications and adjustments to react to defensive counter-measures by the tax authorities[127].

In lack of a clear and concise definition of aggressive tax planning, it is understandable that the list of "hallmarks" can be quite general. The same method has been followed in other MDR, such as the disclosure of tax avoidance schemes (DOTAS) in the UK[128] and the Tax Shelter Reporting Rules in the US[129]. However, the definition of what constitutes a hallmark appears to be over-encompassing in itself: "hallmark" means a characteristic or feature of a cross-border arrangement that presents *an indication* of a *potential risk* of tax avoidance, as listed in Annex IV'.

The list of hallmarks can be divided into different categories; a) generic and specific hallmarks and b) those hallmarks that require fulfilling – in addition to the other requirements, the 'Main Benefit Test' (MBT). This test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining *of a tax advantage*[130]. Thus, the definition of a tax advantage, becomes central to the fulfilment of the MBT.

Certain Member States do not include such a definition in their laws as to what constitutes a tax advantage (**Belgium, Croatia, Hungary, Slovenia**), whereas other Member States do not apply their 'traditional' definition of the tax advantage when applying the MBT (**France, Luxembourg**). **Austria,** on the other hand, considers that the MBT is fulfilled when the tax advantage is realized in a third country. Other Member States, like **Ireland,** have introduced extensive guidelines as to what they consider a tax advantage and how they perform the MBT.

For Ireland, a tax advantage is defined broadly, including not only tax avoidance and tax reductions, but also tax reliefs, tax repayments and tax deferrals, as well as the avoidance of an obligation to deduct tax[131]. For the MBT to be satisfied the tax advantage to be obtained has to be one of the *main* benefits and not just *a* benefit. The test is deemed to be an objective test, requiring a comparison – in the context of the arrangement- of the value or significance of an expected tax advantage with any other

124 Italy: Legislative Decree No. 100 of July 30, 2020 Official Journal No. 200 of Aug. 11, 2020 and Ministerial Decree of 17 Nov. 2020. Available at https://www.finanze.gov.it/it/inevidenza/D.M.-17-novembre-2020-regole-tecniche-e-procedure-relative-allo-scambio-automatico-obbligatorio-di-informazionisui-meccanismi-transfrontalieri/

125 Note, however, that the non-compliance with the hallmarks of DAC 6 will usually not bring about any criminally punishable actions but only tax avoidance practices punishable with administrative penalties.

126 Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 21.6.2017, COM(2017) 335 final, 12.

127 *Ibid*., 12.

128 See for instance, Rebecca Bland, 'Legislative Comment: Hallmarks and the Direct Tax Disclosure Regime' (2016) British Tax Review 653.

129 See, indicatively, Joshua D. Blank, 'Overcoming Overdisclosure: Toward Tax Shelter Detection' (2009) 56 UCLA Law Review 1629, 1643.

130 *Ibid*., Annex IV, Part I.

131 René Offermanns and Rita Botelho Moniz, 'DAC6 in a Selection of EU Member States: The Practical Application of the Main Benefit Test and Its Hallmarks' in European Taxation (June 2021), pp. 229 – 241, 235.

benefit likely to be obtained from an arrangement[132]. **Luxembourg** has issued guidelines with regard to the MBT in DAC 6 according to which, the MBT is not met if the tax advantage in the context of the arrangement is in accordance with the object or purpose of the applicable legislation and is consistent with the legislator's intent.

As already stated, **Poland and Portugal** have included additional hallmarks in their implementing laws. Divergences have been also observed in the interpretation of the existing hallmarks across different Member States. Such examples may be drawn from hallmark A.3. whereby Member States like **Germany** and **the Netherlands** do not consider as 'standardised documentation', documentation that requires smaller adjustments for the individual needs of different taxpayers, making these arrangements not reportable, whereas in **Austria** arrangements must be "ready to be signed" to be reportable under hallmark A.3[133]. Notwithstanding the different interpretations and definitions of the different elements of the MBT, several variations are, furthermore, observed, across the implementation of other hallmarks. These variations can be attributed to the different definitions that may be given to the hallmark's terms across the Union, for instance the definition of what constitutes a 'cross-border payment' in hallmark C.1[134]. Similarly, some hallmarks, such as E.1. relating to the use of unilateral safe harbours may also bring legal uncertainty as to the information that needs to be disclosed. While some Member States, like **Belgium, Portugal, Sweden, the Netherlands, Ireland, and Germany**, have specified that safe harbours in line with the OECD guidance on the Low Value-Adding Services (LVAS) do not need to be reported, there is still uncertainty regarding the position of other Member States[135].

3.6. Penalties

DAC 6 provides that Member States should lay down penalties against the violation of national rules that implement this directive. Such penalties should be effective, proportionate and dissuasive[136]. The type of sanctions will have to be decided by each Member State and depending on their severity might affect the compliance/behaviour of the reportable persons[137]. Indeed, the severity of the different maximum penalties varies greatly across the Union. **Poland** imposes by far the strictest penalty for non-compliance with the reporting rules, amounting up to EUR 4,700,000, followed by **the Netherlands** that may impose a penalty of up to EUR 830,000. In contrast, in **France** the maximum penalty may reach EUR 10,000 whereas in **Bulgaria, Estonia, Ireland, Latvia and Lithuania** it varies between EUR 3,200 and EUR 6,000.

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[132] *Ibid*.

[133] Kristin Resenig, supra, 531 and references listed therein.

[134] See for instance Tetiana Polonska, 'A Comparative Analysis of Certain Aspects of the Application of Hallmark C1' in European Taxation (October 2020), pp. 431 – 442.

[135] Gabriela Capristano Cardoso, Balancing Tax Transparency and Tax Certainty: Reporting Obligations for Unilateral Safe Harbours Under DAC 6, pp. 691 – 701 at 700.

[136] DAC 6, Article 8ab (6).

[137] See indicatively, Leandra Lederman, 'Does Enforcement Reduce Voluntary Tax Compliance' (2018) BYU L. REV. 623; Michael Doran, 'Tax Penalties and Tax Compliance' (2009) 46 Harv. J. On. Legis. 111.

4. TRENDS AND IMPACT OF THE DIFFERENT IMPLEMENTATION

KEY FINDINGS

DAC 6 has been implemented in a multi-fragmented way across the Union, resulting in Member States that are "friendlier" to intermediaries or the taxpayer and those that require more information through more strenuous processes. The directive may also cause over-reporting and an overflow of information that some Member States' tax authorities are not prepared to handle. Both these factors may compromise the goals of the directive. Yet, seen in its context and considering the alternative scenario of the absence of such Mandatory Disclosure Rules in the EU, DAC 6 can be considered a success.

4.1. Multi-fragmented implementation across the Union

As already discussed, the directive allows for wide discretion in the implementation process. This outcome could be explained as a result of a political compromise for the directive to be unanimously adopted and the pressing need to adopt measures to curb tax evasion and tax avoidance. The result of this, often, broad framing has been encapsulated in what has been criticized as "lack of sufficient guidance" or uncertainties in DAC 6. The previous section has showed how a selection of Member States has used these uncertainties in drafting their implementing laws. One common risk that arises is the potential compromise of the effectiveness of the Directive due to its "**multi fragmented**" **implementation across the Union.** On this basis, each national tax authority may receive different information, both in terms of quantity and quality. Similarly, each reporting intermediary may be forced, more or less (depending on the penalties), to provide (or not to provide) this information, may have to go through strenuous processes to collect the information or may simply forward all taxpayers' information avoiding the burden of carefully sorting out the requisite reportable arrangements on the basis of DAC 6.

These variations in the implementation process may thus, result in:

- "friendlier" Member States for intermediaries;
    1. For reasons of very clear guidelines of what needs to be reported;
    2. For reasons of a narrow interpretation of what needs to be reported (including a narrow interpretation of the hallmarks);
    3. For reasons of coverage by professional secrecy and thus, a shift of the disclosure burden to the taxpayer;
    4. For reasons of very low penalties in case of non-compliance.
- Member States that are much more transparent than others in the information they exchange.

In light of all domestic differences in the implementation of DAC 6, combined with the inevitable cross-European reach on the other hand, the question arises whether DAC 6 a) achieves its goal of curtailing tax evasion and tax avoidance and related b) improves the proper functioning of the internal market, the prerequisite to justify the EU Commission's initiative[138]. In other words, if the two questions are combined, one may wonder whether the effective implementation of the directive necessitates a common approach across the Union.

[138] Peeters and Vanneste, supra n. 87, at 502. The authors rightly note that the Directive seems to be driven by a "general policy to combat different kinds of (possible worldwide) aggressive tax planning, the improvement of the internal market only serving as an additional subsidiary and underlying goal".

The need for a uniform implementation across the Union was stressed by the European Commission on its impact assessment of the DAC 6 where it was stated that "the internal market needs a robust mechanism to address these loopholes in a *uniform* fashion and rectify existing distortions by ensuring that tax authorities receive appropriate information, on a timely basis, about potentially aggressive tax planning arrangements with cross-border implications" [139]. It is clear that this uniformity has not been achieved, jeopardizing even the compliance of the directive with the subsidiarity principle[140].

Yet, the deadline of the first reporting period, being so recent (1 January 2021) does not allow to draw conclusions with certainty. Additional factors, foreign to the directive, such as the effectiveness of the tax administrations in processing such volumes of documentation will certainly play a role in assessing the effectiveness of the directive. The same applies with regard to the behaviour of the intermediaries, especially in absence of penalties in national legislations for over-reporting.

4.2. Variations as to the 'reaction'

In addition, the Directive does not regulate the *reaction* of the Member States[141]. In terms of *assessment*, DAC 6 suggests that the covered aggressive cross-border tax-planning arrangements are subject to the GAAR of the ATAD[142]. In terms of reaction, however, it provides in the preamble that, as the underlying goal is to deter the employment of tax avoidance schemes, the early disclosure of the information should lead to the enactment of legislation or the undertaking of adequate risk assessments and the carrying out of tax audits[143]. This begs the question of whether a level playing field towards the curtailment of tax avoidance is possible within the internal market. As DAC 6 does not establish a threshold or a minimum of reaction depending on the 'severity' of the disclosed schemes, domestic reactions vary widely between enacting legislation, as the most severe and encompassing counter-measure, and conducting a tax audit as the most targeted and of limited impact reaction.

4.3. Who will bear the burden?

Intermediaries and taxpayers are not the only persons impacted by the directive. Tax authorities will also be heavily impacted due to the expecting volume of disclosed information they will receive. The danger of over-reporting due to the over-inclusion and multiplicity of hallmarks and the absence of the MBT in many of them, is a real one, and may cause tax authorities missing some 'red flags'. This over-reporting will place an unduly burden not only on the intermediaries who will have to collect and report this information but also on the tax authorities who will have to manage all this information in an effort to identify the problematic schemes from tax perspective. Member States whose tax administration is understaffed or unfamiliar with up to date technological tools may be unable to process this information in a meaningful manner, risking, thus, of compromising the goal of the directive.

[139] European Commission, Commission Staff Working Document – Impact Assessment, Accompanying the document Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, SWD (2017) 236 final, p. 4 (21 June 2017), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0236&from=EN.

[140] Peeters and Vanneste, supra n. 87, at 563.

[141] Pantazatou, supra n. 87, at 298.

[142] DAC 6, Recital 14, Preamble.

[143] *Ibid*, Recital 2, Preamble.

4.4. The effect of DAC 6 at a global level: Minimum standard vs. no standard

As already stated, DAC 6 is a minimum directive. Despite its different implementation across Member States, one has to acknowledge that if compared to the global setting, DAC 6 achieves a degree of a minimum legal framework. If compared to the 'world' and the OECD/BEPS success – whereby the MDR in Action 12 does *not* represent a minimum standard, the EU appears to be winning the anti-tax avoidance wars. Earlier studies undertaken in countries that already had MDR in place show that the obligation, introduced with DAC 6, to report these cross-border arrangements will not have an impact on the locational decision of intermediaries[144].

Thus, one has to assess the success of DAC 6 also *in context*, notwithstanding the inherent uncertainties regarding its scope and other technical matters that have led to a non-uniform implementation across the Union. Seen both from an EU and a global angle, the adoption and implementation of DAC 6 can only be considered as a success, for establishing a minimum standard and for being adopted in such short time despite imposing onerous obligations to intermediaries, taxpayers and tax authorities. In addition, when assessing the directive, one has to consider, the much greater fragmentation and the many possibilities for tax avoidance that would persist in absence of DAC 6.

[144] Pantazatou, supra n. 87, at 296 and references listed therein.

5. BEYOND DAC 6: PROSPECTS FOR DAC 7 AND DAC 8 AND OUTLOOK

KEY FINDINGS

DAC 7 is the latest amendment to DAC 1, that has not been implemented yet across the Union. It aims to provide a legal framework to curtail the tax evasion that has been observed in the sharing economy. By providing for many and detailed definitions, unlike DAC 6, DAC 7 is not expected to create many uncertainties in its implementation by Member States. The discussions on DAC 8 signify that the Union is preparing to tackle all potential sources of tax avoidance and tax evasion. If adopted, DAC 8 will have to be consistent with other legislation on crypto-assets.

There is no doubt that the progress made so far, in the context of EU transparency and administrative cooperation through information exchange, is tremendous. This progress can, further, be attested by the recent developments in this area, the adoption of DAC 7 and the discussions on DAC 8.

DAC 7 was adopted on 22 March 2021 and it extended the scope of the automatic exchange of information under DAC to the information reported by digital platform operators[145]. The directive will enter into force on 1 January 2023, therefore, it is still too early to report on any implementation discrepancies and inconsistencies that may arise. Accordingly, this study will focus on two points with regard to this piece of legislation that has not been implemented yet: first, the need for its adoption and the lacuna(e) it fills and second, any potential inconsistencies or omissions in the directive itself.

DAC 7 covers a big gap in tax transparency, that of the reporting and information exchange in the area of the sharing or collaborative economy[146]. Although no specific numbers of the lost revenue for the EU exist[147], it is common ground that income accrued from sharing economy platforms largely escapes the attention of tax authorities, as service providers choose not to report it[148]. Until the adoption of DAC 7, the approach throughout the EU was rather fragmented with regard to reporting, enforcement and collection. Some Member States required the digital platforms to collect some taxes or to report on the service providers using them while others provided incentives to the service providers to report their income from their sharing economy activities[149].

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145 Besides expanding the tax transparency framework to digital platforms, DAC 7 also expanded administrative assistance rules by introducing an automatic exchange of information obligation on royalties and by providing a legal framework for the facilitation of joint audits.

146 There are various definitions and variations of what is defined as sharing economy and what activities fall within its scope, but, in general, these terms describe an economic model in which individuals are able to borrow or rent assets owned by someone else.

147 An EP study provides that the 'potential economic gain linked with a better use of capacities (otherwise under-used) as a result of the sharing economy is €572 billion in annual consumption across the EU-28.' However, the report does not consider gains only from the introduction of a more efficient tax framework but it is premised on a combination of factors. For more details see, Pierre Goudin, 'The Cost of NonEurope in the Sharing Economy Economic - Social and Legal Challenges and Opportunities', European Parliamentary Research Service (January 2016),

Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2016/558777/EPRS_STU(2016)558777_EN.pdf.

148 See indicatively, Malthe Mikkel Munkøe, 'Regulating the European Sharing Economy: State of Play and Challenges' Intereconomics (2017), ISSN 1613-964X, Springer, Heidelberg, Vol. 52, Iss. 1, pp. 38-44; C. O. Migai, J. de Jong and J. Owens, The Sharing Economy: Turning Challenges into Compliance Opportunities for Tax Administrations, in: eJournal of Tax Research, 16 (2018) 1 , Available at: https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/The-sharing-economy-turning-challenges-into-compliance-CM-JdJ-JO.pdf; Katerina Pantazatou, 'Taxation of the Platform Economy: Challenges and Lessons for Social Security' in U. Becker and O. Chesalina (Eds.), *Social Law 4.0: New Approaches for Ensuring Financing Social Security in the Digital Age,* (Nomos Verlagsgesellschaft 2021), pp. 363 – 393. See also, DAC 7, Preamble, p. 6: '[t]here is a lack of tax compliance and the value of unreported income is significant'.

149 For an overview of the different approaches, see D. Ogembo and V. Lehdonvirta, Taxing Earnings from the Platform Economy: An EU Digital Single Window for Income Data?, in: British Tax Review, 82 (2020) 1, pp. 82 – 101 and K. Pantazatou, supra, n. 149.

By requiring (i) reporting platform operators to collect and report prescribed information on reportable sellers using their platforms for certain commercial activities[150], and (ii) EU member states to automatically exchange this information, DAC 7 is expected to put a halt in tax evasion due to the non-reportability of the income by the reportable sellers[151].

DAC 7 was adopted after the OECD published the Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy ('Model Rules') [152]. The directive specifically states that it is hoped that non-EU jurisdictions will implement the collection and mutual automatic exchange of information on reportable sellers as per the Model Rules[153]. DAC 7 is much broader both in terms of scope and businesses affected than the OECD Model rules. In order to prevent, as much as possible, tax fraud, tax evasion and tax avoidance, DAC 7 has extended the reporting of commercial activity to rental of immovable property, personal services, sale of goods and rental of any mode of transport[154]. The last two categories were initially excluded from the OECD Model Rules, however, upon pressure by some jurisdictions, the OECD developed an optional module that extended the scope of the Model Rules to the sale of goods and the rental of means of transportation[155] .

DAC 7 has, further, established a novel simplified and cost-efficient framework for exchange of information between EU Member States and third countries. Accordingly, 'foreign platforms' ('Qualified Non-Union Platform Operator') – must be relieved from an obligation to report tax information to an EU Member State, under conditions[156]. If these conditions are met, the information will be provided to the tax administrations of the EU Member States directly by the non-EU country's tax administration (i.e. 'Qualified Non-Union Jurisdiction').

DAC 7 has established a much-anticipated reporting and information exchange legal framework that is expected to significantly curtail tax evasion practices observed at large in the area of the sharing economy. Within the confines of political feasibility, the directive has adopted an as wide scope as possible, going beyond the OECD Model Rules and extending -through the inclusion of 'sale of goods' platforms, such as Amazon and e-Bay – its reach to as many platforms as possible. To counter the possible overflow of information, the directive has further established a simplified information exchange system between Member States and non-Member States. Unlike DAC 6, DAC 7 provides a long list of definitions that will contribute to a more homogenous implementation across the Union, reducing fragmentations in the implementation process. While some uncertainties exist, especially in what regards the Commission's discretion in assessing the equivalence of the information exchanged between a non-EU and an EU Member State[157], the directive does not appear to suffer from severe uncertainties.

Furthermore, in continuation of the efforts towards greater tax transparency, the European Commission aims to strengthen the existing rules and expand the exchange of information framework in the field of taxation to include crypto assets and e-money, through the adoption of the so-called

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150 The reporting obligation applies to digital platforms located both inside and outside the EU.

151 According to the directive a reportable seller is a platform user that is registered at any moment during the Reportable Period on the Platform and carries out a Relevant Activity and is resident in a Member State or rents out immovable property located in a Member State.

152 OECD, Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy (3 July 2020), available at: https://www.oecd.org/tax/exchange-of-tax-information/model-rules-for-reporting-by-platform-operators-with-respect-to-sellers-in-the-sharing-and-gig-economy.pdf.

153 DAC 7, Preamble, Recital 16.

154 DAC 7, Preamble, Recital 18.

155 OECD, Model Reporting Rules for Digital Platforms: International Exchange Framework and Optional Module for Sale of Goods (22 June 2021), available at: https://www.oecd.org/tax/exchange-of-tax-information/model-reporting-rules-for-digital-platforms-international-exchange-framework-and-optional-module-for-sale-of-goods.pdf.

156 DAC 7, A(7) of Section I of Annex V. In order to relieve platform operators that reported in a non-Union jurisdiction from an obligation to report in a Member State, the information received by the Member State from a non-EU jurisdiction in relation to the activities and the reportable sellers must be equivalent to the information required under the reporting rules set out in the directive.

157 DAC 7, Article 8ac (7).

DAC 8. In this context, the Commission published an Inception Impact Assessment and launched a public consultation to receive feedback from the various stakeholders[158]. As no draft directive exists yet, at this stage, one can only welcome such an initiative due to the existing heterogeneity in the rules that the Member States are applying and the various features of many crypto-assets such as pseudo-anonymity, valuation difficulties, and global reach that may cause under-reporting or no reporting of the taxable income[159]. However, attention must be paid in ensuring that the directive is consistent with existing legislation or other legislative initiatives with regard to crypto-assets, especially the anti-money laundering legal framework and the proposed EU Regulation on Markets on Markets in Crypto-assets (MICA)[160].

158 For these two initiatives, see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12632-Tax-fraud-&-evasion-strengthening-rules-on-administrative-cooperation-and-expanding-the-exchange-of-information_en.

159 See Luisa Scarcella, 'Exchange of Information on Crypto-Assets at the Dawn of DAC8' Kluwer International Tax Blog (29 March 2021).

160 Antonios Broumas, 'Impact of the MiCA proposal on the taxation of crypto-assets within the EU' International Tax Review (19 October 2021).

6. CONCLUSION

DAC 6 is a cornerstone in the fight against tax avoidance and thus, an equal complement to the ATAD. In light of the inherent vagueness of certain terms, such as aggressive tax planning and tax avoidance, the European Commission chose to leave many terms in the directive either undefined or define them very broadly. This allowed Member States more freedom in the implementation process and facilitated the swift adoption of the directive. On the downside, it resulted in its implementation in a multi-fragmented way across the European Union on issues as fundamental as the subjective and the objective scope of the directive to more 'technical' matters, like the implementation of the different hallmarks.

Considering that the deadline of the first reporting period in most Member States ended recently (January 2021), one cannot draw clear conclusions as to the practical effect of the directive for both the intermediaries and the Member States. However, as all Member States have by now transposed the directive into their national law, it has become obvious that the different interpretations of many terms will result in the provision of different information, both in terms of quality and quantity to be reported and thus, exchanged. The effectiveness of the directive should also be assessed in light of elements that stay outside the scope of DAC 6, such as the tax administrations' capacities to process information and the intermediaries' 'willingness' to report and to 'sort out' the relevant documentation. Seeing the directive, however, from a contextual perspective, one cannot but acknowledge how far the Member States have come in recent years, by adopting such a strict – in terms of anti-tax avoidance obligations – framework. Finally, the tax transparency efforts have been intensified with the adoption of DAC 7 and the discussions on the adoption of DAC 8, signifying that the European Commission and the EU as a whole have fully caught up with tax avoidance practices and opportunities.

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Abstract

This study aims to provide an overview of the recently implemented anti-tax avoidance and evasion measures, notably the ATAD and DAC 6. It reviews the implementation of these directives across different Member States and assesses the problems that arise with regard to the interpretation of some of the directives' provisions.

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