Atlas
Tax lawyers / Fiscalisten

REACTION PUBLIC CONSULTATION DIRECTIVE 2011/16/EU

TO	:	European Commission
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1 GENERAL

Atlas Fiscalisten supports tax transparency and the close cooperation between EU Member States in the form of Directive 2011/16/EU. However, we note that initiatives around tax transparency follow each other rapidly. Unfortunately, we have to note that (i) it is not clear what tax authorities do concretely with the information exchanged, (ii) to what extent the objectives of the measures are achieved and (iii) what improvements could or should be made to monitor the balance between the administrative burden and objectives. We call on the European Commission to conduct such an assessment before proposing new transparency arrangements.

The remainder of our response focuses on Directive (EU) 2018/822 (**DAC6**).

2 DAC6

2.1 FAILED HARMONISATION

In the European Commission's call for an evaluation it is mentioned that the DAC created a common regime for cooperation among EU Member States. We strongly doubt that this objective has been achieved with regard to DAC6. In practice, we as intermediaries regularly have discussions with intermediaries from other EU Member States about the interpretation of DAC6 terms such as 'conversion', 'making available for implementation' and 'standard documentation'. In addition, authorities in EU Member States interpret the DAC6 hallmarks differently (e.g. whether or not to report a tax-facilitated merger under hallmark E3).

EU Member States should not lose sight of the purpose and effect of DAC6 when interpreting DAC6 concepts. In our view, when they give different interpretations to the definitions and hallmarks of DAC6, this leads to Europe-wide acquisition of 'contaminated data'. Such contaminated data introduce an effective brake on achieving the goal of DAC6. The system ultimately stands or falls with a uniform interpretation of the various concepts and hallmarks. Here lies a necessary role for the European Commission to eliminate such differences in interpretation as much as possible.

It would thereby contribute to further harmonisation if there was additional guidance from the Commission and/or if EU Member States exchanged views on how certain DAC6 concepts should be interpreted. We understand that the latter already happens sporadically in Fiscalis meetings. However, it would be helpful if minutes of such meetings were (partly) publicly published so that there is more clarity for taxpayers and intermediaries on this point (we also refer to our comment on transparency in paragraph 1).

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2.2 PURPOSE OF DAC6

The main purpose of DAC6 is to inform tax authorities of EU Member States about aggressive tax structures. However, the scope of DAC6 is much broader. For instance, non-tax-driven constructions also fall within its scope such as cross-border mergers (even if tax-facilitated), cross-border liquidations, certain transfer of participations, etc. It would be good if there is a review of the hallmarks that would exclude these types of constructions from DAC6. Linking the Main Benefit Test (**MBT**) to hallmark E3, for example, would already greatly reduce the administrative burden of taxpayers/intermediaries (see also paragraph 2.3) and shield the data from information that is not relevant to achieving the objective.

In addition, it is questionable what the added value of DAC6 is in light of aggressive tax structures given other initiatives such as public Country-by-Country Reporting, ATAD and Pillar Two that are also aimed at countering tax-aggressive structures. Is DAC6 still needed and, if so, what is its concrete purpose beyond the anti-abuse initiatives already mentioned? In our view, this question should be considered when reviewing the hallmarks.

2.3 COSTS AND BENEFITS

Paragraph 13 of the preamble to DAC6 states:

> *'In order to minimise costs and administrative burdens for both tax administrations and intermediaries and to ensure the effectiveness of this Directive in deterring aggressive tax-planning practices, the scope of automatic exchange of information in relation to reportable cross-border arrangements within the Union should be consistent with international developments.'*

We believe that DAC6 does anything but minimise costs and administrative burdens. DAC6 creates a large administrative burden and cost burden for intermediaries and taxpayers. The failed harmonisation and lack of clarity around certain concepts (see section 2.1) and the broad scope of DAC6 (see section 2.2) do not help in that respect. This is because so much time goes into the analyses and possible reports that the costs are often high. The question is whether these high costs outweigh the unclear benefits of DAC6 (see previous paragraphs).

In addition, taxpayers and/or intermediaries often have to make the analyses in a short period of time due to the 30-day time limit. Moreover, it is still very unclear when exactly this 30-day period starts to run. Advocate general Emiliou takes a clear position in that context by stating that the period starts to run when the conceptual stage of the construction turns into the operational stage that typically concerns one or more legal acts.[1]
For now, the lack of clarity on this point leads to even more discussion with other intermediaries and often results in accelerated reporting to ensure timely reporting. The question is whether this

1 Conclusion Advocate General Emiliou 29 February 2024, Belgian Association of Tax Lawyers and Others v. Premier minister, C-623/22, ECLI:EU:C:2024:189, paragraph 107.

improves the quality of reports. We would therefore recommend that, in addition to providing clarity as to when this deadline starts, it should also be extended to, say, 60 or 90 calendar days.

2.4 LEGAL PROFESSIONAL PRIVILEGE

DAC6 takes into account the legal professional privilege. In the Netherlands for example, tax advice provided by a tax adviser who is also a lawyer is covered by this privilege, but the advice of a tax adviser who is not a lawyer is not. We understand that some other EU Member States also follow this approach but that there are also EU Member States in which all tax advisers are excused from reporting.

In our view, it is illogical that such a difference exists. Ultimately, what matters is the advice that is given. In addition, this difference may create an imbalance in the number of reports filed by an intermediary per EU Member State when intermediaries from different Member States work on the same advice. This could be remedied by extending the scope of the legal professional privilege to tax advisers for DAC6 purposes only.

2.5 RECOMMENDATIONS

Based on our above findings, we summarise the following recommendations regarding DAC(6):

- Providing a clear overview of how the information gathered under DAC is used and/or what results it has led to. This will create more transparency towards taxpayers and intermediaries. In addition, it will contribute to the revision of some points regarding DAC6 (see below).

- Providing further European guidance on some DAC6 concepts to promote a common interpretation within the EU.

- Including the question 'Is DAC6 still needed and, if so, what is its concrete purpose in addition to the anti-abuse initiatives already mentioned?' when reviewing its hallmarks. Does reporting actually take place in line with the purpose of DAC6?

- Linking the MBT to hallmark E3 to keep mainly commercially driven and possibly (often) exempt mergers, liquidations and transfers out of the scope of DAC6.

- Extending the 30-day period to 60 or 90 calendar days.

- Extending the legal professional privilege for DAC6 purposes to tax advisers.

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