25 The Directive on Administrative Cooperation

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25.1 Introduction

With effect from 1 January 2013 the 'old' Directive on Mutual Assistance 77/799/ EEC was repealed by Art. 28 of the Directive on Administrative Cooperation 2011/16/EU (DAC) and, at the same time, Member States had to have implemented the DAC (Art. 29).

At the moment of writing (February 2022) the DAC has already been amended six times - not counting the language corrections and the COVID-19 extension of DAC6[2] – with a seventh amendment (DAC8) being announced,[3] a change through the so called 'Unshell' (also known as ATAD3 [SJOERD, is er een hoofdstuk aandacht aan ATAD3 besteedt zodat ik daar naar kan verwijzen?]) Directive[4] being proposed and plans for a future DAC for the exchange of tax rulings for high-worth individuals.[5]

On 12 February 2020, the European Commission published a proposal for a codification of the DAC which would fully preserve the content of the DAC and would not do more than bring them together with only such formal amendments as are required by the codification exercise itself.[6] This proposal is in the preparatory phase in the European Parliament.[7] This is a very useful initiative. Because of the expansion of automatic exchange of information, the numbering of the DAC, especially in the language versions based on the French numbering (8 bis, 8 bis bis, 8 bis ter, 8 ter), has become rather complex. However, as the DAC has been and will be changed again after this proposal was published, it would be wise to wait with this codification until all intended changes to the DAC have been made and when it is clear that no more changes will be made in the near future. Until that moment we will have to make do

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[2] Council Directive 2020/876 of 24 June 2020 amending Directive 2011/16/EU to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic, O.J. 26 July 2020, L 204, p. 46.

[3] 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.

[4] Proposal of 21 december 2021 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.

[5] EU Tax Commissioner Gentilioni quoted in Sarah Paez, European Commission Supports Broader Scope for Tax Info Exchange, *Tax Notes Today International* 16 September 2021, 178-2 and Benjamin Angel director of indirect taxation at the Directorate General for Taxation and Customs Union quoted in Stephanie Soong Johnston, Countries Keep Making AEIO Progress, OECD Transparency Body Says, *Tax Notes International* 22 November 2021, p. 932.

[6] Proposal for a Council Directive on administrative cooperation in the field of taxation (codification), COM(2020) 49 final, preamble 4.

[7] 2020/0022 (CNS), https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/0022(CNS)&l=en.

with the complex numbering[8] and the consolidated versions of the DAC which are published on EUR-Lex.[9]

The original DAC without amendments is commonly referred to as DAC1. The first change which introduced Common Reporting Standards is known as DAC2.[10] The second change, requiring automatic exchange of cross-border rulings, is called DAC3.[11] The third change, introducing Country by Country Reporting is known as DAC4.[12] The fourth change, regarding access to anti-money-laundering information by tax authorities is called DAC5.[13] The fifth, and probably most well-known, change is the introduction of mandatory disclosure on tax arrangements: DAC6.[14] This will be discussed separately in Chapter 26. DAC7[15] includes both changes to various provisions of the DAC and introduces mandatory disclosure for platform operators. Member States must apply the DAC7 changes as of 1 January 2023 (the provisions on joint audits: at the latest from 1 January 2024). The Unshell amendments are envisaged to have an application date of 1 January 2024. Because of these amendments, it is important to always consult the updated consolidated version of the DAC.[16]

25.2 General Provisions; Minimum Standard; Language, Scope and Organisation

The DAC lays down rules and procedures under which the Member States must cooperate in the exchange of information which is 'foreseeably relevant' to the administration and enforcement of Member States' domestic tax laws (Art. 1(1), see Section 25.2.3). Within the context of exchange of information, the State or authority that makes a request for assistance, is referred to as the 'requesting State' or 'requesting authority', the authority that receives a request for assistance, is referred to as the 'requested State' or 'requested authority'.[17] This terminology is also used in this book.

Unlike the old Directive, the DAC is not confined to assistance as regards assessment (determination of the tax liability) but calls for cooperation in all respects of application ('administration and enforcement') of national tax law, therefore including the recovery of tax, the service of documents and the (administrative) punishment of tax irregularities. The

[8] The numbering is a little less complex (8a, 8aa, 8ab, 8b) in the English language version used in this chapter than in the French version. For clarity's sake it would be desirable that if changes are made in a future codified new DAC, only one kind of sub numbering is used, preferably the English numbering which is more comprehensible.

[9] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0016.

[10] 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, O.J. 16 December 2014, L 359, p. 1.

[11] Council Directive 2015/2376/EU of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, O.J. 18 December 2015, L 332, p. 1.

[12] Council Directive 2016/881/EU of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, O.J. 3 June 2016, L 146, p. 8.

[13] Council Directive 2016/2258/EU of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, O.J. 16 December 2016, L 342, p. 1.

[14] Council Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, O.J. 5 July 2018, L 139, p. 1.

[15] Council Directive 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, O.J. 25 March 2021, L 104, p. 1.

[16] A helpful reference point is the Document Information tab on the DAC EUR- Lex internet page which, among others, includes information on amendments, available consolidated versions, national transposition measures and case law of the CJEU on this Directive: EUR-Lex 32011L0016, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0016. Please note that the DAC7 amendments will only be included in the consolidated version from the date these must be applied by the Member States.

[17] Arts. 3(5) and 3(6) DAC and Joined Cases C-245/19 and C-246/19, *B and others*, EU:C:2020:795, point 109.

DAC also includes provisions for electronic exchange of information (Art. 1(2)). Preamble 9 of the DAC states that the procedural requirements of Art. 20 must be interpreted liberally in order not to frustrate the effective exchange of information.

The DAC provides for common minimum rules (see preamble 21). Consequently, Member States may agree to cooperate on a wider scale. However, if two or more Member States bilaterally or multilaterally negotiate automatic exchange of information on other categories of income or capital than those listed in Art. 8(1) (see Section 25.3.2.1), they must send their agreement to the Commission, which will make it available to the other Member States (Art. 8(8)). Furthermore, the DAC does not affect the application on rules on mutual assistance in criminal matters and it does not in any way limit Member State commitments to wider cooperation ensuing from other legal instruments (Art. 1(3)). The purpose of the DAC is to extend and improve administrative cooperation rather than to limit any existing obligations and possibilities.

Requests and attached documents may be submitted in any language agreed between the requesting and the requested authorities. A translation of the request in the official language of the requested State is only necessary 'in special cases' in which the requested authority gives reasons for requiring a translation (Art. 21(4)).

The DAC contains an explicit most-favoured nation clause (Union preference): if a Member State agrees with a non-Member State on wider cooperation than that provided for by the DAC, it may not refuse to provide the same wider cooperation to any other Member State wishing to enter into such mutual wider cooperation with it (Art. 19). For example, preamble 8 of amending Directive 2014/ 107/EU[18] (introduction of the CRS, see Section 25.3.2.2), stated that Member States which had concluded an Intergovernmental Agreement (IGA)[19] relating to FATCA with the US were providing for wider cooperation within the meaning of Art. 19 and were thus under an obligation to provide such wider cooperation to other Member States as well. Apparently, this Union preference clause does not apply within the EU. If Member States A and B decide to cooperate more closely than the DAC calls for, apparently Member State C cannot oblige Member State A or B to enter into the same wider mutual cooperation with Member State C.

The DAC contains a number of provisions which offer flexibility as regards allowing future extension and improvement, especially:

- the gradual extension – on the basis of statistic evaluation, impact assessment, and new Commission proposals – of mandatory automatic exchange (Art. 8b),
- the possibility of wider bilateral and multilateral arrangements (Arts. 1(3) and 8(8)),
- the sharing of best practices and experience with a view to producing guidelines (Art. 15),
- evaluation and yearly effectiveness reports on the automatic exchange of information (Art. 23), and
- the adoption of implementation measures, practical arrangements for standard forms, computerised formats, feedback, evaluation, and the use of the Common Communication Network (CCN) by 'comitology'[20] procedure (see Arts. 8(7), 14(1), 20, 21 and 23, *juncto* Art. 26). This implies that as regards these implementation measures, Commission proposals are adopted by qualified majority in a Committee (see Art. 26) functioning on the basis of the Comitology Regulation (EU) No. 182/ 2011. Like the RAD (see Chapter 27), the DAC thus provides for a 'light' delegated qualified majority decision-making in

[18] 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, O.J. 16 December 2014, L 359, p. 1.

[19] See for an extensive discussion on the implementation of IGAs in the EU: Leopoldo Parada, Intergovernmental Agreements and the implementation of FATCA in Europe, *World Tax Journal*, June 2015, pp. 201-240.

[20] See Chapter 3.

tax matters. The use, as much as possible, of the CCN for all communications based on the DAC reflects the Commission's intentions to get all tax systems using the same channel. The CCN was already used for value added tax (VAT) and excises.

25.2.1 **Taxes Covered; Not Just Direct Taxes**

Art. 2, which defines which taxes are covered, takes its lead from the 1987 Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (see Chapter 28). In principle, the DAC applies to all taxes (Art. 2(1): 'all taxes of any kind'), including regional and local taxes. In principle, indirect taxes are included as well, which means that, for example, inheritance taxes, gift tax,[21] real estate transfer taxes, car taxes and environmental taxes are covered. However, VAT, customs duties and excise duties covered by other Union legislation on administrative cooperation are explicitly excluded (Art. 2(2)).[22] In this respect, it is noted that the new article 8ac(2)(f) that is inserted by DAC7, obliges to report the VAT identification number of reportable sellers. In addition, DAC7 amends article 16(1) such that it states that information exchanged under the DAC may be used for the assessment, administration and enforcement of both taxes referred to in Art. 2 as well as VAT and other indirect taxes. According to preamble 30 of DAC7, this is just a clarification as the use of information for VAT was not precluded so far.

Art. 2(2) also excludes compulsory social security contributions. The concept of 'taxes' refers, in this respect, to general levies (funding general public means), not to fees for specific public services such as for certificates or other documents issued by public authorities or to contractual remunerations such as considerations for public utilities (Art. 2(3)). Given the broad scope of the DAC the demarcation vis-à-vis mandatory social security contributions (not covered) and the question of how wide the term 'all taxes of any kind' is, are of relevance. This is especially the case for levies which are not fees for public services, but not really general taxes either, as their proceeds are earmarked for a specific spending. There may be in-between cases, but the general tone of the Preambles to the DAC is that as wide a scope as possible was envisaged.

25.2.2 **Personal Scope; Anyone or Anything Subject to Tax**

No limitations exist as regards nationality or residence of the taxpayer(s) involved, or on their legal status (individual, corporate or anything in between). Information on both residents and nonresidents may be exchanged, even for nonresidents who are neither nationals nor residents of any of the Member States, as long as the information is 'foreseeably relevant' in the administration or enforcement of any of the Member States' taxes covered. Art. 3(11) defines 'person' in a very wide sense in order to also catch partnerships, trusts, foundations, investment funds and any other 'legal arrangement' which owns or manages assets which, including the income derived therefrom, are subject to any of the taxes covered.

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[21] AG Kokott explicitly mentioned in para 61 of her opinion delivered on 2 October 2014 in Case C 133/13, *Q (Bean House)*, EU:C:2014:2255 (a request for a preliminary ruling from the Raad van State of the Kingdom of the Netherlands regarding the application of a Dutch gift tax exemption on the Bean House, an estate in the United Kingdom) that, given the fact that the DAC applies to all taxes according to Art. 2(1) and as gift tax is not among the taxes that are excluded from its scope in Art. 2.2, the DAC applies to gift tax.

[22] See on administrative cooperation and VAT and the problems resulting from the separation of the direct tax system: Giorgio Beretta, VAT and Administrative Cooperation in the EU, *Tax Notes International* 5 October 2020, pp. 71-79.

25.2.3 **Objective Scope: 'Foreseeably Relevant' Information**

Cooperation is obligatory if the information requested is 'foreseeably relevant' to the administration and enforcement of domestic tax law (Art. 1). The term 'foreseeably relevant' is also used in Art. 26 OECD-MC, in which the term 'necessary' was changed into 'foreseeably relevant' in 2005.

Until the adoption of DAC7, the DAC did not define what 'foreseeably relevant' meant. The European Court of Justice (ECJ) was called upon to interpret the term in the *Berlioz* Case,[23] the *B and others* Case (also known as the *Shakira* Case)[24] and the *L* Case.[25] In the *Berlioz* Case[26] the Court held that the words 'foreseeably relevant' describe a necessary characteristic of the requested information (*Berlioz* points 63 and 64). It observed that the concept of foreseeable relevance in the DAC reflects that of the OECD-MC. The reasons are the similarity between the concepts used, and the reference to the OECD-MC in the explanatory memorandum to the proposal[27] which led to the adoption of the DAC. In addition, the Court referred to the Commentary on article 26 of the OECD-MC (*Berlioz* point 67). In the *L* Case (point 69-70) the Court also held that the interpretation of the provisions of the DAC corresponds to that of the concept of 'foreseeable relevance' of Art. 26(1) OECD-MC and refers to point 67 of the *Berlioz* Case. Furthermore, in point 71 of the *L* Case, the Court directly referred to paragraphs 5.1 and 5.2 of the Commentary on the OECD-MC.

Preamble 3 of DAC7 states that to ensure the effectiveness of the exchanges of information and to prevent unjustified refusals of requests as well as to provide legal certainty for both tax administrations and taxpayers, 'the internationally agreed standard of foreseeably relevance' should be clearly delineated and codified. For that reason, Art. 5a is inserted in the DAC.

Art.5a(1) states that information is foreseeably relevant where, at the time the request is made, the requesting authority considers that, in accordance with its national law, there is a reasonable possibility that the requested information will be relevant to the tax affairs of one or several taxpayers and that it must be justified for the purposes of the investigation. This is in line with paragraph 5 of the Commentary on article 26 OECD-MC and with the case law of the Court. Paragraph 5 of the Commentary to Art. 26 of the OECD-MC states that the test must be done at the time the request is made and adds that whether the information, once provided, actually proves to be relevant, is immaterial. In *Berlioz* (points 70, 71 and 76) the Court held that the 'foreseeable relevance' of a request must be assessed by the requesting Member State implying little scope for review of the requested Member State. According to the Court, the requested authority must, in principle, start from the premise that the request complies with the domestic law of the requesting authority and that the information is necessary for the purposes of its investigation. The requested authority cannot substitute its own assessment of the possible usefulness of the information for that of the requesting authority (*Berlioz*, point 77). However, the requesting authority cannot request information that is of no relevance to the investigation concerned (*Berlioz* point 71). The requested authority must verify whether the information is not devoid of any foreseeable relevance to the investigation being carried out by the requesting authority (*Berlioz* point 78). Art. 5a(2) DAC now helps the requested authority by requiring that the requesting authority must at least provide the following information to demonstrate the foreseeable relevance of the requested

[23] Case C-682/15, *Berlioz*, EU:C:2017:373.
[24] Joined Cases C-245/19 and C-246/19, *B and others*, EU:C:2020:795.
[25] Case C-437/19, *L.*, EU:C:2021:953.
[26] Case C-682/15, *Berlioz*, EU:C:2017:373.
[27] Proposal for a Council Directive COM(2009) 29 final of 2 February 2009 on administrative cooperation in the field of taxation.

information: (i) the tax purpose for which the information is sought, and (ii) a specification of the information required for the administration or enforcement of its national law. The Court included similar requirements in *Berlioz* (point 80).

Both in the Commentary on Art. 26 OECD-MC and in the case law of the ECJ, an important border which the requesting State cannot cross is 'fishing expeditions'. Paragraph 5 of the Commentary on Art. 26 of the OECD-MC states that the requested State does not have to provide information in response to requests that are fishing expeditions which the Commentary defines as 'speculative requests that have no apparent nexus to an open inquiry or investigation.' According to Preamble 9 of the DAC, the standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent, but Member States are not at liberty to engage in – or obliged to assist in – 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. In point 68 of the *Berlioz* Case, the Court observed, with a reference to the Commentary on the OECD-MC, that the aim of the concept of foreseeable relevance according to Preamble 9 of the DAC is to enable the requesting authority to obtain any information that seems to it to be justified for the purpose of its investigation, while not authorising it manifestly to exceed the parameters of that investigation or to place an excessive burden on the requested authority. In the *Shakira* Case the Court also had to decide on what is and what is not a fishing expedition and more specifically, what information and persons must be identified by the requesting State. The Court held that a request relating to contracts, invoices and payments which, although not specifically identified, are defined by criteria relating, first, to the fact that they were concluded or carried out by the person holding the information, secondly, to the fact that they took place during the period covered by that investigation and, thirdly, to their connection with the taxpayer concerned, is not manifestly devoid of any foreseeable relevance where it states the identity of the person holding the information in question, that of the taxpayer concerned by the investigation giving rise to the request for exchange of information, and the period covered by that investigation.[28] In the *L* Case[29] the Court observed that the risk of a 'fishing expedition' is particularly high where the request for information relates to a group of taxpayers who are not identified individually and by name (point 64). However, with reference to paragraphs 5.1 and 5.2 of the Commentary on the OECD-MC regarding the concept of a 'fishing expedition' (point 71), the Court held that a request for information must be regarded as relating to information which does not appear to be manifestly devoid of any foreseeable relevance, where persons are not identified individually and by name but the requesting authority provides a clear and sufficient explanation that it is conducting a targeted investigation into a limited group of persons, justified by reasonable suspicions of non-compliance with a specific legal obligation (point 72).

In this respect, DAC7 aimed to provide a clear legal framework in Art. 5a for so called group requests, request for information that concern groups of taxpayers who cannot be identified individually and in which cases the foreseeable relevance of the requested information can only be described on the basis of a common set of characteristics (preamble 4). In her opinion on the *L* Case,[30] AG Kokott held that it follows from this preamble 4 that this is a declaratory amendment to the directive and that group requests were also permissible previously. In her opinion, the amendment was made for reasons of legal certainty and legal clarity, both for persons required to pay taxes and provide information and for the tax administrations.

[28] Joined Cases C-245/19 and C-246/19, *B and others*, EU:C:2020:795, point 124.
[29] Case C-437/19, *L.*, EU:C:2021:953.
[30] Case C-437/19, *L.*, EU:C:2021:450, point 72.

In Art. 5a(1) it is made clear that the one or several taxpayers for whose tax affairs the information must be foreseeably relevant may be identified by name or otherwise. Article 5a(3) requires that if a request relates to a group of taxpayers who cannot be identified individually, the requesting authority must provide the requested authority at least with the following information: (a) a detailed description of the group, (b) an explanation of the applicable law and of the facts based on which there is reason to believe that the taxpayers in the group have not complied with the applicable law, (c) an explanation how the requested information would assist in determining compliance by the taxpayers in the group, and (d) where relevant, facts and circumstances related to the involvement of a third party that actively contributed to the potential non-compliance with the applicable law of the taxpayers in the group.

In the *Bean House* Case[31] Germany argued that the DAC does not apply to administrative proceedings which precede taxation, such as a declaratory procedure on the tax status of an asset. Advocate General (AG) Kokott did not agree. According to her the scope of the DAC is broad and includes all information that is 'foreseeably relevant' to the administration and enforcement of the domestic laws concerning taxes. If a binding declaration can affect the determination of a tax within the scope of the DAC, information regarding that declaration is, in her view, also foreseeably relevant to taxation. On the other hand, she observes in point 63 that the monitoring of compliance with conditions for a waiver of inheritance tax (the inheritance tax assessment would not be collected if certain conditions were met for a long period of time), does not fall under the scope of the DAC because as regards conditions of recovery of tax, the RAD 2010/24 applies instead of the DAC. The Court did not touch upon this question.[32]

Some (older) bilateral tax treaties contain restrictions as to the nature or the availability of the data requested. Under those treaties, no obligation exists to supply information which is not readily available, or which is held by banks or insurance companies. The DAC recognises no such restrictions. Art. 6 explicitly requires Member States to carry out administrative enquiries in order to obtain the information requested by the other Member State. With DAC7, 'a specific administrative enquiry' is replaced by 'an administrative enquiry' in Art 6(2), first sentence. The concept of administrative enquiries is defined in Art. 3(7). It means 'all controls, checks and other action taken by Member States in the performance of their duties with a view to ensuring the proper application of tax legislation'. According to AG Kokott in point 67 of her opinion in the *Bean House* case (C-133/13), this is a broad definition which easily includes on-site controls, as the requested authority is to carry out 'any … enquiries necessary to obtain the information'. The requested authority must follow the same procedures as it would when acting on its own initiative (Art. 6(3)).

The opinion of the AG illustrates the wide scope of the Directive. However, there are still some limitations on the obligation to cooperate, which are discussed in Section 25.10.

25.2.4 **Channel of Exchange**

Art. 4 describes how the Member States must organise the administrative cooperation. It draws on the organisation of tasks contained in the VAT Regulation on administrative cooperation with the necessary adaptations. The general idea is that, in order to avoid inefficiency and under-use of instruments, exchange of information should take place as much as possible through direct contact between Member States' officials in charge of cooperation. Communication between national liaison offices should be the rule. To that end, every

[31] Opinion of AG Kokott of 2 October 2014 in Case C-133/13, *Q (Bean House)*, EU:C:2014:2255.
[32] Opinion of AG Kokott of 2 October 2014 in Case C-133/13, *Q (Bean House)*, EU:C:2014:2255.

Member State must not only designate a competent authority (Art. 4(1)), but also a single central liaison office (Art. 4(2)). It may further designate competent liaison departments or competent officials to directly exchange information. The central liaison office is responsible for keeping the list of these departments and persons up to date and to make them available to the central offices of other Member States and to the Commission (Arts. 4(3) and (4) *juncto* Arts. 3(3) and (4)). These delegated departments and officials may therefore directly call or email their counterparts in other Member States. Arts. 1(2) and 21 provide that as far as possible, exchange of information should take place by electronic means, using the CCN.

Art. 22 specifically points out to the Member States that they must ensure that their part of the common cooperation system actually works in all respects: effective internal coordination of the liaison organisation, direct contact with the officials of other Member States and smooth operation of all cooperation modalities.

25.2.5 **Temporal Scope**

For the largest part the DAC had immediate effect as from 1 January 2013. As it concerns procedural issues as regards administrative cooperation, immediate effect does not imply any retroactive taxation effect. In the *Sabou* Case[33] the Court observed in point 3 that if a case refers to facts which date from before the repeal of the old Directive, such proceedings are still governed by Directive 77/799. Furthermore, in the *Sparkasse Allgäu* Case,[34] the Court held that for a fundamental freedoms analysis, if facts occurred before the entry into force of a specific provision in the Directive, a later provision cannot retroactively restrict Member States in ensuring the effectiveness of fiscal supervision before the entry into force of the later provision.

Art. 18(3) allows Member States to refuse cooperation as regards requests for information concerning taxable periods prior to 2011 where Art. 8(1) of Directive 77/799/EEC would have allowed them to refuse cooperation before 2011. This article provided that a requested State was not obliged to furnish information if it would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes. In practice, Art. 18(3) has the effect that Austria, Luxembourg and Belgium may continue to decline requests concerning bank account information on tax years before 2011.

25.3 **Three Types of Exchange of Information**

Chapter II of the DAC distinguishes in three separate sections three ways in which information may be exchanged: on request (Section I: Arts. 5, 5a, 6, 7), automatically (Section II: Arts. 8, 8a, 8aa, 8ab, 8ac, 8b) or spontaneously (Section III: Arts. 9, 10). Where the section on exchange on request was changed for the first time with DAC7 and the section on spontaneous exchange has not changed since the DAC was adopted, the section on automatic exchange of information has been amended significantly and regularly. Below, the three types of exchange of information are discussed.

25.3.1 **Mandatory Exchange upon Request**

Subject to the (few) exceptions discussed in Section 25.10, a requested State is required to supply the information requested by the applying State (Art. 5). However, the obligation to

[33] Case C-276/12, *Sabou*, EU:C:2013:678.
[34] Case C-522/14, *Sparkasse Allgäu*, EU:C:2016:253.

cooperate does not extend to information that is not considered to be 'foreseeably relevant' (see Section 25.2.3).

The requesting State must provide at least the identity of the person under scrutiny (in the case of group requests (see Section 25.2.3): a detailed description of the group) and the tax purpose for which it requests the information (Art. 20(2)). If the information is not available, the requested State must carry out the necessary administrative enquiries to get it (Art. 6(1)). Art. 3(7) defines 'administrative enquiries' as all controls, checks and other actions taken by Member States in the performance of their duties with a view to ensuring the proper application of tax legislation. This includes on-site controls.[35] Furthermore, these administrative enquiries outside offices may be carried out in the whole territory of the requested Member State, according to AG Kokott and the Commission.[36]

A State must conduct administrative enquiries for the requiring authority as if it were enquiring for its own taxation purposes or upon the request of a domestic authority instead of a foreign authority ('national treatment' of foreign requests; Art. 6(3)), even if the information is irrelevant for its own tax purposes (Art. 18(1)).

In the *Berlioz* Case[37] the Court observed that in order to ensure that the DAC has practical effect, the measures to obtain the requested information must include arrangements which ensure that there is sufficient incentive for the relevant person to respond to tax authorities' requests, and thereby enable the requested authority to fulfil its obligations towards the requesting authority. Even though the DAC at that time did not explicitly mention pecuniary penalties,[38] these can be encompassed under 'measures aimed at gathering information (Art. 18) and under the 'necessary measures to ensure the smooth operation of the administrative cooperation arrangements' (Art. 22(1)(c)). It is irrelevant that the national provision in which the penalty is included was not adopted specifically to transpose the Directive, as long as it enables the Member State to comply with the DAC and can thus be regarded as implementing the DAC (*Berlioz* points 37-41).

The requesting State may ask for an administrative enquiry in the requested State, but it has to state reasons for that. If the requested authority considers such enquiry unnecessary, it must 'immediately' inform the requesting authority of its reasons (Art. 6(2)). If specifically asked for, the requested authority is obligated to supply original documents, unless that is contrary to the requested State's provisions (Art. 6(4)).

The information must be provided as soon as possible, at any rate within three (until DAC7 applied: six) months; if no enquiries are necessary (*i.e.* the information is available) within two months (Art. 7(1)). If the requested authority is unable to respond to the request by the three month time limit, it must inform the requesting authority immediately – at any rate within three months after the request was made – stating reasons for its failure, and the date by which it considers it might be able to respond. The time limit may not be longer than six months from the date of the receipt of the request (7(1)). By way of exception, other time limits may be agreed upon (Art. 7(2)). The receipt of the request must be confirmed immediately, preferably electronically (Art. 7(3)). If there are deficiencies in the request, the requested State must notify the applying State immediately - in any case within a month – also of the need for any additional background information (Art. 7(4)). If the requested State does not have the information and is unable to get it, or refuses to respond on the grounds provided for in Art. 17, it must relate the reasons thereof immediately and in any case within a month of receipt of the request (Art. 7(6)).

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[35] Opinion of AG Kokott of 2 October 2014 in Case C-133/13, *Q (Bean House)*, EU:C:2014:2255, para 67.

[36] Opinion of AG Kokott of 2 October 2014 in Case C-133/13, *Q (Bean House)*, EU:C:2014:2255, para 67.

[37] Case C-682/15, *Berlioz*, EU:C:2017:373, point 38.

[38] As of 5 June 2017 the DAC includes Art. 25a on penalties; however, this only refers to Arts. 8aa, 8ab, and 8ac (see Section 25.11).

All communications on requests must, as far as possible, be sent using a standard form (Art. 20(1)) and, as far as possible, by electronic means, using the CCN (Art. 21). Feedback motivates officials in the field to make better use of the various forms of information exchange. Therefore, if the supplying State asks for feedback, the requesting State must provide it as soon as possible and no later than three months after the outcome of the use of the information is known, but respecting its national provisions on tax secrecy and data protection (Art. 14(1)). Art. 20(3) requires the use of a standard form, developed by the European Commission in a comitology procedure asking and providing this feedback.

25.3.2 **Mandatory Automatic Exchange**

The preambles to the DAC recognise that mandatory automatic exchange of information without preconditions by all Member States alike is the most effective means of enhancing correct assessments and fighting fraud in cross-border situations. Automatic exchange of information is also regarded an important instrument to fight base erosion and profit shifting (BEPS). For that reason, automatic exchange has been extended significantly. In addition to the already existing automatic exchange on available information on specific categories of income and capital in Art. 8(1) (see Section 25.3.2.1), provisions were included in Art. 8(3a) with DAC2 regarding automatic exchange of information obtained from financial institutions under the Common Reporting Standard (CRS) (see Section 25.3.2.2), Art. 8a with DAC3 regarding the automatic exchange of advance cross-border rulings and advance pricing agreements (see Section 25.3.2.3), Art. 8aa with DAC4 on the automatic exchange of information on country-by-country reports of multinational entities (see Section 25.3.2.4), Art. 8ab with DAC6 on mandatory automatic exchange of information on reportable cross-border arrangements (see Chapter 26) and, with DAC7, Art. 8ac on mandatory exchange of information reported by platform operators (see Section 25.3.2.5).

Art. 3(9) provides for three definitions of ‘automatic exchange’. For the Arts. 8(1), and 8a to 8ac it means the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals (Art. 3(9)(a)). For Art. 8(3a) it means the systematic communication of predefined information on residents of other Member States to the relevant Member State of residence, without prior request, at pre-established regular intervals (Art. 3(9)(b). For the purposes of other provisions than those mentioned before, it means the systematic communication of predefined information mentioned in Art. 3(9)(a) and 3(9)(b) (Art. 3(9)(c)).

Once a year, Member States must send each other feedback on the automatic exchange of information, in accordance with practical arrangements agreed upon bilaterally (Art. 14(2)). This feedback must be provided through a standard form, developed by the European Commission in a comitology procedure (Art. 20(3)).

25.3.2.1 **Available Information on Specific Categories of Income and Capital (Art. 8(1))**

Art. 8(1)) provides for the automatic exchange of six (until DAC7: five) categories of all (the word ‘all’ is introduced by DAC7) available information on: (a) employment income; (b) directors’ fees; (c) life insurance products not covered by other exchange instruments; (d) pensions; (e) ownership and income from real estate; and – as of DAC7- (f) royalties. This information must be exchanged at least once a year, within six months following the end of the tax year of the Member State during which the information became available (Art. 8(6)(a)). For countries in which the tax year and the calendar year coincide, this means that the information must be exchanged before 1 July of the following year. Art. 3(9)(a) (second

sentence) clarifies that for the purposes of Art. 8(1), reference to available information relates to information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State. DAC7 added to Art ((1)(a) that for taxable periods starting on or after 1 January 2024, Member States must endeavor to include the Tax Identification Number (TIN) of residents that is issued by the Member State of residence.

The condition that only 'available' information is automatically exchanged may lead to imbalances of exchange content between different Member States. Therefore, the Member States were required to inform the Commission before 1 January 2014 of the categories for which they had information available and had to report subsequent changes thereto (Art. 8(2) before DAC7). DAC7 deleted that provision and instead requires Member States to annually inform the Commission of at least two categories with regard to which they communicate information concerning residents of another Member State (Art. 8(1) last sentence). In addition, as of DAC7 Art. 8(2) requires Member States to inform the Commission before 1 January 2024 of at least four categories on which they will automatically exchange information concerning taxable periods starting on or after 1 January 2025.

Member States may indicate to other Member States that they do not wish to receive information on one or several of the listed categories of income and capital and must inform the Commission thereof (Art. 8(3)). The idea is to provide each other with useful information, not to be snowed under bulk information. The format of this automatic exchange is a standard computerised format adopted by the Commission in a comitology procedure (Art. 20(4) *juncto* Art. 26(2)).

Both the European Commission[39] and the European Court of Auditors evaluated the exchange of information under Art. 8(1). The European Court of Auditors came to the conclusion that there are weaknesses related to the timeliness and accuracy: the data exchanged is not always complete and information is sometimes shared late.[40]

25.3.2.2 **The Common Reporting Standard (CRS): Information on Foreign Account Holders and Their Accounts to be reported by Financial Institutions (DAC2)**[41]

All over the world, tax evasion by not including (income on) foreign accounts and other assets in one's tax return has been regarded problematic for years. In 2010, the US forced a breakthrough by introducing an unconventional measure which lead to the end of bank secrecy in third States such as, notably Switzerland, but also in all EU Member States, as the old DAC contained a Union preference clause requiring Member States to share information with other Member States at least at the same level as they share information with any third State. The US Foreign Account Tax Compliance Act (FATCA) aimed at enforcing the filing of foreign accounts by requiring foreign financial institutions and certain other non-financial foreign entities to either report foreign assets held by their US account holders or face a 30% withholding tax on all of their US income. To reduce the administrative burden on their

[39] Commission staff working document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC {SWD(2019) 328 final, https://ec.europa.eu/taxation_customs/system/files/2019-09/2019_staff_working_document_evaluation_on_dac.pdf.

[40] European Court of Auditors, *Exchanging tax information in the EU: solid foundation, cracks in the implementation*, 2021, p. 24, https://www.eca.europa.eu/Lists/ECADocuments/SR21_03/SR_Exchange_tax_inform_EN.pdf.

[41] For an extensive discussion I refer to Maryte Somare and Viktoria Wöhrer, Automatic Exchange of Financial Information under the Directive on Administrative Cooperation in the Light of the Global Movement towards Transparency, *Intertax*, 2015 no. 12, pp. 804-815.

financial institutions, various countries, including all Member States, have negotiated bilateral automatic exchange agreements with the US to implement FATCA.

Following this development, the G20 mandated the OECD to build on these intergovernmental agreements (IGAs) to develop a single global standard for automatic exchange of financial account information in tax matters. This global standard was released in 2014 in the form of a package: a Model Competent Authority Agreement, a Common Reporting Standard (CRS), Commentaries on the Model Competent Authority Agreement and Common Reporting Standard and the Information Technology Modalities for implementing the global standard.[42] The influence of FATCA is clear: even though there are differences (most importantly, FATCA's 30% withholding tax obligation is not included), FATCA and the CRS are very similar.[43]

In 2014, the OECD's Multilateral Competent Authority Agreement for the Common Reporting Standard (CRS MCAA)[44] to automatically exchange foreign account information was opened for signing. This agreement specifies the details of what information will be exchanged and when, as set out in the Standard. The CRS MCAA is based on Art. 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (see Chapter 28). A total of 92 jurisdictions had signed the agreement on 31 January 2022.[45] The US is not one of them as it relies on its bilateral IGAs.

Subsequently, the scope of Art. 8 DAC was extended to include the same information covered by the OECD Model Competent Authority Agreement and Common Reporting Standard.[46] These extensive measures are included in Art. 8(3a), (6), and (7a) and in Annexes I and II and had to be implemented before 1 January 2016 (for Austria: 1 January 2017). According to preamble 13 to Directive 2014/107/EU, the OECD Commentaries on the Model Competent Authority Agreement and Common Reporting Standard are a source of illustration or interpretation of the Directive. Given the much wider scope of the obligations under the DAC, the EU Savings Directive became obsolete and was repealed as of 1 January 2016.[47]

As of 2016, financial institutions (which include certain insurance companies) must report certain information on their non-resident account holders and their accounts to the tax authorities in the financial institution's Member State of residence. The residence of a financial institution is, in general, in the Member State that is able to enforce reporting (Annex II Art. 3). Special rules apply for trusts and financial institutions without a tax residence, *e.g.* because they are tax transparent.

Financial institutions must establish the tax residence of their account holders. This might not always be straightforward. In order to facilitate this, Section VI of Annex I obliges financial institutions to obtain a self-certification by new clients enabling financial institutions to determine the client's tax residence. Financial institutions may use their own templates. However, they may not rely on self-certifications and documentary evidence if they know or have reason to know that it is incorrect or unreliable. In these and some other cases the special due diligence rules of Section VII of Annex I apply. Annex II provides for some

[42] https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/.

[43] For an overview of the differences between the FATCA Model 1 IGA and the CRS, see OECD, Standard for Automatic Exchange of Financial Information in Tax Matters, Implementation Handbook, second edition (2018), Part III: The Standard Compared with FATCA Model 1 IGA, pp. 127-144, https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-account-information-in-tax-matters.htm.

[44] https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf.

[45] https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/CbC-MCAA-Signatories.pdf.

[46] 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, O.J. 16 December 2014, L 359, p. 1 (DAC2).

[47] Council Directive 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments, O.J. 18 November 2015, L 301, p. 1.

complementary due diligence rules. For accounts existing before 31 December 2015, separate due diligence rules applied, which, among others, exempted from the identification and reporting requirements all accounts with a balance below USD 250,000 (Section V of Annex I).

The scope of the reporting obligation is broad. First of all, 'financial institution' means a custodial institution, a depository institution, an investment entity, or a specified insurance company (all terms are defined in Section VIII A of Annex I of the Directive). However, not all financial institutions have to report under the CRS, as certain exemptions apply for institutions which are regarded to be low risk, such as governmental entities, certain pension funds and certain investment vehicles (Section VIII B of Annex I of the Directive; again, all terms used are defined there).

Second, 'financial account' is broadly defined in Section VIII C of Annex I. It does not only include depository accounts and custodial accounts, but also certain equity or debt interests in a financial institution and cash value insurance contracts and annuity insurance contracts (all terms used are defined in Section VIII C of Annex I).[48]

Third, the reporting obligations of the financial institutions have a broad scope. It includes information on the holder of the account, on the account or its value, and the interest, dividends and other income which were received in relation to the account (Section I of Annex I). The Member State must electronically (Art. 20(4), using the CCN), annually (Art. 8(6)(b)) and automatically exchange this information with the tax administration of the residence country of the account holder (Art. 8(3a)) within nine months following the end of the calendar year or other appropriate reporting period to which the information relates (Art. 8(6)(b)). In this regard it is important to notice that the condition that automatic exchange may be subject to the availability of the information requested as provided for in Art. 8(1) does not apply to the obligations under Art. 8(3a) (preamble 14 to Directive 2014/ 107/EU). Section IX of Annex I obliges Member States to have rules and administrative procedures in place to ensure effective implementation of, and compliance of financial institutions with, the reporting and due diligence procedures. These include (1) rules to prevent financial institutions, persons or intermediaries from adopting practices intended to circumvent the reporting and due diligence procedures, (2) rules requiring financial institutions to keep records on these procedures, (3) administrative procedures to verify compliance with the reporting and due diligence procedures and to follow up with a financial institution when undocumented accounts are reported, (4) administrative procedures to ensure that the non-reporting financial institutions and excluded accounts continue to have a low risk of being used to evade tax, and (5) effective enforcement provisions to address non-compliance. The latter may include financial penalties.

The Directive only has regard to the exchange of financial account information between Member States. However, the EU has also signed agreements on the automatic exchange of

[48] See on the similar CRS definitions of 'financial account' and 'investment entity' Grahame Jackson & Harriet Brown, 'The Common Reporting Standard, the "Managed By" Entity and the Purpose Test', 62 *European Taxation* 2 2022.

financial account information with Switzerland,[49] Liechtenstein,[50] San Marino,[51] Andorra,[52] Monaco[53] and Saint-Barthélemy.[54] These provide for the implementation of the OECD global standard for automatic exchange of financial account information and include provisions similar to those in the DAC. These jurisdictions will automatically exchange the information listed in Section I of Annex I to the DAC. The jurisdictions with which such agreement is in place are included in the definition of 'participating jurisdiction' of Annex I, Section VIII(D)(4)(c) of the DAC if they are identified in a list published by the European Commission.

For the purposes of data protection (see also Section 25.13.), reporting financial institutions and the competent authorities are 'data controllers' (Art. 25(2), as of DAC7 Art. 25(3)). This means that certain data protection obligations are imposed on financial institutions. Member States must ensure that financial institutions inform their clients that their information is collected and transferred in accordance with the DAC and provide to their clients all the information they are entitled to in sufficient time for the client to exercise his data protection rights, in any case before the information is reported (Art. 25(3), as of DAC7 25(4)). Just as is the case for any information exchanged under the DAC, financial institutions and Member States may not retain the information on the foreign account holders and their accounts for longer than necessary to achieve the purposes of the DAC and, in any case, must act in accordance with each data controller's domestic rules on statute of limitations (Art. 25(4), as of DAC7 25(5)). A breach of security must be reported to each individual person whose personal data this concerns if that breach is likely to adversely affect the protection of his personal data or privacy (Art. 21(2), third paragraph).

Both the European Commission[55] and the European Court of Auditors evaluated the exchange of information under Art. 8(3a). The European Court of Auditors came to the conclusion that DAC2 information exchange functions generally on time, but still lacks in data quality and completeness.[56]

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[49] Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, O.J. 19 December 2015, L 333, p. 12.

[50] Amending Protocol to the Agreement between the European Community and the Principality of Liechtenstein providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, O.J. 24 December 2015, L 339, p. 3.

[51] Amending Protocol to the Agreement between the European Community and the Republic of San Marino providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, O.J. 31 December 2015, L 346, p. 3.

[52] Amending Protocol to the Agreement between the European Community and the Principality of Andorra providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, O.J. 1 October 2016, L 268, p. 40.

[53] Amending Protocol to the Agreement between the European Community and the Principality of Monaco providing for measures equivalent to those laid down in Council Directive 2003/48/EC, O.J. 19 August 2016, L 225, p. 3.

[54] Agreement between the European Union and the French Republic concerning the application to the collectivity of Saint-Barthélemy of Union legislation on the taxation of savings and administrative cooperation in the field of taxation, O.J. 15 November 2014, L 330, p. 12.

[55] Commission staff working document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC {SWD(2019) 328 final, https://ec.europa.eu/taxation_customs/system/files/2019-09/2019_staff_working_document_evaluation_on_dac.pdf.

[56] European Court of Auditors, *Exchanging tax information in the EU: solid foundation, cracks in the implementation*, 2021, p. 27, https://www.eca.europa.eu/Lists/ECADocuments/SR21_03/SR_Exchange_tax_inform_EN.pdf.

25.3.2.3 **Mandatory Automatic Exchange of Information on Advance Cross-Border Rulings and Advance Pricing Arrangements (DAC3)**

Under OECD BEPS Action 5 on countering harmful tax practices, a framework was agreed for the compulsory spontaneous exchange of information on rulings that could give rise to BEPS concerns in the absence of such exchange.[57] The fight against cross-border tax avoidance, aggressive tax planning and harmful tax competition also inspired the introduction of Art. 8a on the automatic exchange of information on Advance Cross-Border Rulings (ACRs) and Advance Pricing Arrangements (APAs) through DAC3.[58] Member States had to implement the provisions on this form of automatic exchange of information before 1 January 2017.

Before 2017, information on rulings could also be exchanged based on Art. 1(1) in combination with Art. 5, but this only covered exchange on request. Tax administrations are not always aware of foreign rulings and thus will not actively request information on such rulings. Rulings may also fall under the scope of spontaneous exchange of information under Art. 9, but the initiative to exchange rulings under this article lies with the Member State which would have to exchange the information (similarly: preamble 4 of DAC3), and this might not have a high priority for that Member State. The Member States had agreed on spontaneous exchange of rulings within the Code of Conduct Group (see Chapter 23), but this soft law agreement was not very effective.

Preamble 1 of DAC3 observes that rulings concerning tax-driven structures have, in certain cases, led to a low level of taxation of artificially high amounts of income in the country issuing, amending or renewing the advance ruling and left artificially low amounts of income to be taxed in any other countries involved. According to this preamble, an increase in transparency was urgently required. It has to be mentioned that the preamble appreciates that the common practice of the issuance of advance tax rulings facilitates the consistent and transparent application of the law, providing certainty, and can thus encourage investment and compliance with the law and therefore be conducive to the objective of further developing the single market. Rulings are, therefore, not necessarily bad according to the preambles. The amendments to the DAC are not aimed at prohibiting rulings, but at increasing transparency. Nevertheless, the new rules seem to have had a negative effect on the appetite to request a ruling in some jurisdictions.

Member States must automatically exchange information on cross-border tax rulings and transfer-pricing arrangements with other EU Member States (Art. 8a(1)). The scope of this automatic exchange is very broad. This is intended as, according to preamble 6, the scope has to be sufficiently broad to cover a wide range of situations.

'ACR' and 'APA' are defined broadly and in general terms and not limited to what certain jurisdictions might use the word 'ruling' for. In addition, the definitions are broader than the more precise ones used in the BEPS Action 5 report. In para 95 (p. 47) of that report rulings are defined as "any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely". Furthermore, the report includes specific definitions of advance tax rulings and APAs. The latter is derived from the OECD Transfer Pricing Guidelines. Because of the difference in definitions, based on the DAC more information will have to be exchanged than under BEPS Action 5. Tax administrations and taxpayers struggle with the interpretation of the concepts, as the guidance regarding the DAC is rather limited.

[57] OECD, Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report, 5 October 2015.

[58] Council Directive 2015/2376/EU of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, O.J. 18 December 2015, L 332, p. 1.

‘Advance cross-border ruling’ means (Art. 3(14)) any agreement, communication, or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit, and which meets the following conditions: it (a) is issued, amended or renewed by or on behalf of the government of the tax authority of the Member State, irrespective of whether it is effectively used; (b) is issued, amended or renewed to a person or a group of persons (this includes legal persons, natural persons, joint ventures and legal constructs which own or manage assets and are liable to tax (Art. 3(11)), and upon which that person or a group of persons is entitled to rely; (c) concerns the interpretation or application of a legal provision on the administration or enforcement of tax legislation (including local tax legislation); (d) relates to a cross-border transaction or whether or not a permanent establishment is present; and (e) is made in advance of: (i) the cross-border transaction; (ii) the activities potentially creating a permanent establishment; or (iii) the filing of a tax return covering the period in which the transaction or series of transactions or activities took place.

In this respect, ‘cross-border transaction’ means that not all of the parties to the transaction or series of transactions are resident in the Member State issuing the ruling; or that any of the parties to the transactions or series of transactions is simultaneously resident in more than one jurisdiction; or that one of the parties to the transactions or series of transactions carries on business in another jurisdiction through a permanent establishment; or that the transactions or series of transactions have a cross-border impact (Art. 3(16)). The cross-border transaction may involve, but is not restricted to, the making of investments, the provision of goods, services, finance or the use of tangible or intangible assets and does not have to directly involve the person receiving the advance cross-border ruling.

‘Advance pricing arrangement’ is defined in Art. 3(15) as any agreement, communication or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit which: (a) is issued, amended or renewed by or on behalf of the government of the tax authority of the Member State, irrespective of whether it is effectively used; (b) is issued, amended or renewed to a person or a group of persons, and upon which that person or a group of persons is entitled to rely; and (c) determines in advance of cross-border transactions between related entities an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment.

Here, ‘cross-border transaction’ means that not all of the related entities to the transactions or series of transactions are resident in, or are not all resident in the territory of a single jurisdiction, or that the transaction or series of transactions have a cross-border impact (Art. 3(16) (last sentence)). Entities are deemed related where one entity participates directly or indirectly in the management, control or capital of another entity or the same persons participate directly or indirectly in the management, control or capital of the entities (Art. 3(15) (penultimate sentence)). Transfer prices are the prices at which an entity transfers physical goods and intangible property or provides services to related entities (Art. 3(15) (last sentence).

It is important to note that not the ACRs and APAs themselves are automatically exchanged, but only summary information on these ACRs and APAs. Exchange of the full text of the ACRs and APAs is, as before, possible upon request, but now the requesting Member State will have more information to assess the ‘foreseeable relevance’ of a request. The following information on ACRs and APAs must be exchanged automatically with other EU Member States (Art. 8a(6)): (a) the identification of the person, other than a natural person, and where appropriate the group of persons to which it belongs; (b) a summary of the content (as of DAC7 the wording ‘of the content’ is deleted) of the ACR or APA, including a description of the relevant business activities or transaction or series of transactions provided in abstract terms (as of DAC7 the wording ‘provided in abstract terms’ is deleted and as of

DAC7 the wording 'and any other information that could assist the competent authority in assessing a potential tax risk' is added) without leading to the disclosure of a commercial, industrial or professional secret or of information the disclosure of which would be contrary to public policy; (c) the dates of issuance, amendment or renewal of the ACR or APA; (d) the start date of the period of validity of the ACR or APA, if specified; (e) the end date of the period of validity of the ACR or APA, if specified; (f) the type of ACR or APA; (g) the amount of the transaction or series of transactions of the ACR or APA if such amount is referred to in the advance cross-border ruling or advance pricing arrangement; (h) the description of the set of criteria used for the determination of the ACR or APA itself in the case of an transfer-pricing arrangement; (i) the identification of the method used for determination of the transfer pricing or the transfer price itself in the case of an transfer pricing arrangement; (j) the identification of the other Member States, if any, likely to be concerned by the ACR or APA; (k) the identification of any person, other than a natural person, in the other Member States, if any, likely to be affected by the ACR or APA (indicating to which Member States the affected persons are linked); and (l) an indication of whether the information communicated is based upon the ACR or APA itself or upon a request to conclude a multilateral or bilateral transfer-pricing arrangement with a third country if this transfer-pricing arrangement may not be disclosed to third parties.

The exchange takes place through standard forms in a secure Member State central directory on administrative cooperation in the field of taxation (Arts. 20(5) and 21(5)). The competent authorities of all Member States have access to the information recorded in that directory. The European Commission also has access, except for the information under (a), (b), (h) and (k) (Art. 8a(8)). The necessary practical arrangements are adopted by comitology procedure, as referred to in Art. 26(2).

The information on ACRs or APAs issued, amended or renewed after 31 December 2016, must be exchanged must take place without delay after the ACRs or APAs have been issued, amended or renewed and at the latest three months within three months following the end of the half of the calendar year during which the ACRs or APAs have been issued, amended or renewed (before DAC7: within three months following the end of the half of the calendar year during which the ACRs or APAs have been issued, amended or renewed) (Arts. 8a(1), 8a(5)(a)). Information on rulings which were issued, amended or renewed on or after 1 January 2012 and before 1 January 2017 had to be exchanged before 1 January 2018 (Arts. 8a(1), 8a(5)(b)). No information is automatically exchanged on rulings which were no longer valid on 1 January 2014 (Art. 8a(2)). Furthermore, no information will be exchanged on rulings issued, amended or renewed before 1 April 2016 to a particular person or a group of persons, excluding those conducting mainly financial or investment activities, with a group-wide annual net turnover of less than EUR 40 million (Art. 8a(2)). If an ACR or APA exclusively concerns and involves the tax affairs of one or more natural persons, no information will be exchanged (Art. 8a(4)). The European Commission intends to change this.[59]

Bilateral or multilateral advance pricing arrangements with third countries are excluded where the international tax agreement under which the advance pricing arrangement was negotiated does not permit its disclosure to third parties. These APAs will be exchanged under Art. 9, where the international tax agreement under which the APA was negotiated permits its

[59] EU Tax Commissioner Gentilioni quoted in Sarah Paez, European Commission Supports Broader Scope for Tax Info Exchange, *Tax Notes Today International* 16 September 2021, 178-2 and Benjamin Angel director of indirect taxation at the Directorate General for Taxation and Customs Union quoted in Stephanie Soong Johnston, Countries Keep Making AEIO Progress, OECD Transparency Body Says, *Tax Notes International* 22 November 2021, p. 932.

disclosure, and the competent authority of the third country gives permission for the information to be disclosed (Art. 8a(3)).

Both the European Commission and the European Court of Auditors evaluated the exchange of information under Art 8a. The European Commission found that a few countries did not share any rulings and that no information is available on the actual use of DAC3 information and that information exchanged (especially, the summary of the ruling) is often too brief to be usable.[60] The European Court of Auditors came to the conclusion that information in the EU's DAC3 directory is mostly complete, but little used by Member States.[61]

25.3.2.4 **Country-by-Country Reporting (DAC4)**[62]

One of the problems for tax administrations is that when companies which are part of one multinational group trade with each other, this is not a regular market transaction. For that reason, the price agreed on by the two companies (the 'transfer price') might not resemble the market price which would have been agreed on by two unrelated companies. This transfer-pricing problem (see also Chapter 21) has been dealt with in international tax law by the so-called "at arm's length principle", which is endorsed by the OECD. This principle entails that any related party transaction or dealing is treated for tax purposes as if such transaction or dealing was agreed under the same terms and conditions as third party transactions or dealings would have been. However, establishing that internal cross-border transactions have taken place and whether a correct at arm's length price has been used can be difficult for tax administrations. This leaves room for base erosion and profit shifting by multinational enterprises (MNEs).

In the BEPS Action 13 Report[63] it is suggested to tackle BEPS by enhancing transparency for tax administrations by revised standards for transfer-pricing documentation and a template for country-by-country (CbC) reporting of income, taxes paid and certain measures of economic activity.[64] It provides for a three-tiered standardised approach to transfer-pricing documentation which obliges MNEs to provide for (1) a master file with high-level information on their global business operations and transfer-pricing policies which has to be available to all relevant tax administrations; (2) a local file with detailed transactional transfer-pricing documentation specific to a country; and for large MNEs (3) a CbC Report that provides annually and for each tax jurisdiction in which they do business for certain information. The CbC reports must be filed in the residence country of the ultimate parent and be shared between countries through automatic exchange of information. The aim of these three documents is to require taxpayers to articulate consistent transfer-pricing positions and to provide tax administrations with useful information to assess transfer-pricing risks.

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[60] Commission staff working document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC {SWD(2019) 328 final, p. 21, https://ec.europa.eu/taxation_customs/system/files/2019-09/2019_staff_working_document_evaluation_on_dac.pdf.

[61] European Court of Auditors, *Exchanging tax information in the EU: solid foundation, cracks in the implementation*, 2021, p. 33, https://www.eca.europa.eu/Lists/ECADocuments/SR21_03/SR_Exchange_tax_inform_EN.pdf.

[62] See for an extensive discussion: Roman Seer and Anna Lena Wilms, Tax Transparency in the European Union Regarding Country by Country Reporting (BEPS Action 13), *EC Tax Review*, 2016 no. 5/6, pp. 325-334.

[63] OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report*, 5 October 2015.

[64] See also on CbC: Annet Wanyana Oguttu, Curtailing BEPS through Enforcing Corporate Transparency: The Challenges of Implementing Country-by-Country Reporting in Developing Countries and the Case for Making Public Country-by-Country Reporting Mandatory, 12 *World Tax Journal* 2020 no. 12.

The 2006 Code of Conduct on transfer pricing documentation in the EU (EU TPD),[65] initiated by the EU Joint Transfer Pricing forum, already set out an EU-wide common approach to transfer pricing documentation requirements. The EU TPD includes a master file available to all Member States involved and a local file available to the specific Member State concerned. The EU TPD is soft law which does not impose obligations on Member States. At the time the Commission felt that transfer pricing was not an area in which it had a clear mandate to present more than soft-law initiatives.[66] The EU TPD did not provide for a mechanism for the provision of a CbC report.

One of the elements of the January 2016 Anti-Tax Avoidance Package[67] regarded a revision of the DAC to include country-by-country reporting. DAC4[68] introduced this CbC report of BEPS Action 13 and the mandatory automatic exchange thereof as hard law in the DAC (most importantly: Art. 8aa and Annex III). The CbC provisions had to be implemented by 4 June 2017 and applied as of 5 June 2017. The first CbC report had to be filed over fiscal years starting on or after 1 January 2016, but Member States were allowed to postpone this to 1 January 2017 (Art. 2(1) third paragraph of Annex III). The EU CbC provisions closely follow the standards developed by the OECD in Action 13 in order to minimise costs and administrative burdens both for tax administrations and for MNE groups (preamble 13 and 14 of DAC4). Preamble 17 of DAC4 holds that to ensure a consistent implementation in the EU, Member States must use the 2015 Action 13 Report as a source of illustration or interpretation when implementing the Directive. This means that the Action 13 Report is an important source of information when interpreting the EU CbC rules.

Preamble 3 of DAC4 emphasises the need for Member States' tax authorities to have comprehensive and relevant information on MNE Groups regarding their structure, transfer-pricing policy and internal transactions in and outside the EU in order to react on harmful practices by making changes in legislation, undertaking risk assessments and tax audits and to identify whether companies have artificially shifted profits to low tax countries. Furthermore, the idea is that increased tax transparency could induce MNEs to abandon BEPS practices (preamble 4). The amendments to the DAC both included the inclusion of filing rules for groups of MNEs in Annex III of the Directive, the introduction of mandatory automatic exchange of information on the CbC report in Art. 8aa and Art. 25a (See Section 25.11) on penalties for MNEs failing to comply with the CbC reporting obligations.

Art. 8aa(1) requires Member States to take the necessary measures to require an MNE group's ultimate parent (as defined in Art. 1(7) of Annex III) that is tax resident in their territory to file a CbC report within 12 months after the end of the fiscal year. Section I of Annex III defines the terms used in this regard. In this respect, 'Group' means a collection of enterprises related through ownership or control such that it is either required to prepare consolidated financial statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange (Art. 1(1) of Annex III). Art. 1(3) defines an 'MNE group' as any group of companies that includes two or more enterprises with tax residence in different

[65] Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), O.J. 28 July 2006, C 176, p. 1.

[66] European Commission, Code of Conduct on transfer pricing documentation in the EU – Frequently Asked Questions, MEMO/05/414, 10 November 2005.

[67] Communication from the Commission to the European Parliament and the Council, Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the EU, 28 January 2016, COM(2016) 23 final.

[68] Council Directive 2016/88/EU of 25 May 2016 amending Directive 2011/16/ EU as regards mandatory automatic exchange of information in the field of taxation, O.J. 3 June 2016, L 146, p. 8.

jurisdictions, or that includes an enterprise that is tax resident in one jurisdiction and has a permanent establishment taxed in another jurisdiction. A group which, based on its consolidated financial statements, has a total consolidated group revenue of less than EUR 750 million during the preceding fiscal year is exempt from the CbC reporting obligation (Art. 1(4) of Annex III). If the ultimate parent entity is not obliged to file a CbC report in its tax residence jurisdiction or if this report is or cannot be exchanged,[69] each entity which is tax resident in a Member State must, in principle, file the CbC report in its tax jurisdiction (Art. 2(1) of Annex III). This could, for example, be the case if the ultimate parent company is tax resident outside the EU in a tax haven. When there are more entities tax resident in the EU, the MNE group may designate one of those entities to file the CbC report (Art. 2(1) (fifth paragraph) of Annex III). If the MNE group has appointed a 'surrogate parent entity' (as defined in Art. 1(8) of Annex III) which files the CbC report in its jurisdiction of tax residence on behalf of the MNE group, the other entities do not have to file a CbC report. The surrogate parent entity may be deemed a resident of a non-EU Member State if its country of residence requires the filing of CbC reports, information can be exchanged with this jurisdiction, the country does not systematically fail to do so and if notification requirements have been met (Art. 2(2) of Annex III).

Art. 8aa(3) states which information the CbC report must provide for. It must contain aggregate information relating to the amount of revenue, profit or loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE group operates. Furthermore, it must identify each entity of the group: the jurisdiction of tax residence and, where different from such jurisdiction, the jurisdiction under the laws of which it is organised and the nature of the main business activity or activities of such entities. Section III (A) of Annex III provides for a template for the CbC report which consists of three tables. Table 1 gives an overview of allocation of income, taxes and business activities by tax jurisdiction. Table 2 lists all entities and table 3 must include any further brief information or explanation which is considered necessary or that would facilitate the understanding of the compulsory information provided in the CbC report. Section III(B) and (C) of Annex III provide for general and specific (for each column of the template) instructions for filling in the CbC report.

The Member State which receives the CbC report from the ultimate parent entity or any other reporting entity must communicate this by way of automatic exchange to any other Member State in which, on the basis of the information in the CbC report, one or more entities of the MNE group are tax resident or subject to tax with respect to a business carried out through a permanent establishment (Art. 8aa(2)). The information must be provided by electronic means, using the CCN (Arts 20(6) and 21(6)). This has to take place within 15 months after the fiscal year to which the CbC report relates (for 2016: 18 months) (Art. 8aa(4)). As the reporting entity must file the report within 12 months (Art. 8aa(1)), the minimum period a Member State has to automatically exchange the information is three months.

Receiving tax administrations may use CbC reports for purposes of assessing high-level transfer pricing and other BEPS-related risks, including assessing the risk of non-compliance with transfer-pricing rules and, where appropriate, for economic and statistical analysis (Art. 16(6)). However, transfer-pricing adjustments may not be based on the CbC report, although the receiving tax administration may use the information as a basis for making further enquiries into the MNE Group's transfer-pricing arrangements or into other tax matters in the

[69] For example, because there is no agreement with the country of the ultimate parent based on which this is possible (this would not apply to EU Member States) or that country has systematically failed to provide CbC reports.

course of a tax audit, and, as a result, may make appropriate adjustments to the taxable income of an entity (Art. 16(6) (last two sentences)).

The OECD and the G20 did not promote public CbC reporting. However, the European Parliament was very much in favour of such tax transparency measure. According to Velte, the main goal of public CbC reporting is to increase transparency regarding the tax policies of multinational corporations which may lead to an incentive to managers to abandon unethical and unsustainable legal tax practices.[70] He questions whether the power of national regimes should be complemented by an additional monitoring channel of stakeholder pressure. For certain financial institutions[71] and firms in de commodities sector,[72] public CbC already applied. In 2016, the Commission published a proposal (COM 2016 (198))[73] for public CbC reporting, which was debated fiercely both in the Council and in the European Parliament (for the debate on the legal basis I refer to Chapter 24.7).[74] Some Member States feared that such obligation would lead to a competitive disadvantage of European companies vis a vi US and Chinese companies that do not have such obligation. In November 2019, the required majority was not obtained in the Council. In 2021, a compromise was found and a sufficient majority was reached in the Council. Although European Parliament Members would have preferred more far reaching public CbC reporting obligations,[75] they also adopted the compromise. On 24 November 2021, the amendment[76] of the Accounting Directive (AD)[77] was signed and it was published in the Official Journal on 1 December 2021.

Members States are required to oblige ultimate parent undertakings and standalone undertakings governed by their national laws with a consolidated revenue exceeding EUR 750 million for each of the last two consecutive years to draw up, publish and make accessible a report on income tax information (with the content required by Art. 48c AD) as regards the latter of those two consecutive financial years (Art. 48b(1) AD). This obligation does not apply to standalone undertakings or groups that are established within the territory of a single Member State and no other tax jurisdiction. The information must be published and made publicly accessible (for free) on a website of the entity to which the public CbC reporting obligation applies. This must be done in at least one of the official languages of the EU and within twelve months after the financial year (Art. 48d AD). The Member States must make the members of the administrative management and supervisory bodies of the company that has the reporting obligation responsible for meeting the public CbC reporting obligation (Art.

[70] P. Velte, The New European Public Country-by-Country-Reporting Requirement, 62 European Taxation 4 2022.

[71] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (CRD IV).

[72] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

[73] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0198.

[74] See also: Vikram Chand and Serena Picariello, The Revamping of Public CbCR in Europe: much ado about nothing? *Kluwer International Tax Blog*, 1 June 2021, http://kluwertaxblog.com/2021/06/01/the-revamping-of-public-cbcr-in-europe-much-ado-about-nothing/.

[75] European Parliament, Corporate tax transparency: MEPs okay new country-by-country reporting rules, Press release 11 November 2021, ref.: 20211108IPR16839, https://www.europarl.europa.eu/news/en/press-room/20211108IPR16839/corporate-tax-transparency-meps-okay-new-country-by-country-reporting-rules.

[76] Directive 2021/2101 of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.

[77] Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

48e AD). Member States must apply the public CbC reporting obligations at the latest from the commencement date of the first financial year starting on or after 22 June 2024 (art 48g AD).

Some companies already voluntary started to make tax information public, as part of their ESG (Environment, Social, Governance) policy. For example, since the financial year 2018, Shell publishes a yearly Tax Contribution Report,[78] and also reports on this in its yearly Sustainability Report.[79]

Art. 48h AD obliges the Commission to submit a report by 22 June 2027 on compliance with, and the impact of the public CbC reporting obligations. In addition, the Commission must review and asses whether it would be appropriate to extend the obligation to other companies and to extend the content of the report. In this assessment it must take into account the situation at OECD level, the need to ensure that there is a sufficient level of transparency and the need to preserve and ensure a competitive environment for undertakings and private investment.

The exchange of information under Art. 8aa has already been evaluated, both by the European Commission[80] and the European Court of Auditors. The European Court of Auditors came to the conclusion that DAC4 information is greatly under-used.[81] It will be interesting to see if the public CbC reporting obligation will have an effect on the use of CbC information by Member States.

25.3.2.5 **Reporting Obligations for Digital Platforms (DAC7)[82]**

DAC7[83] introduces a new category of information that must be collected and automatically exchanged and it makes various changes to different articles of the DAC. The latter changes are not discussed in this section, but in the sections on those provisions.[84]

The tax transparency requirements for digital platforms included in DAC7 are part of the Tax Package the European Commission launched on 15 July 2020 to support economic recovery and growth.[85] Again, the EU initiative cannot be seen separate from OECD developments. On 3 June 2020 the OECD published its report Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy (OECD Model Rules), followed, on 22 June 2021 by the report Model Reporting Rules for Digital Platforms:

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[78] https://reports.shell.com/report-home/2020/.

[79] https://reports.shell.com/sustainability-report/2020/our-core-values/business-ethics-and-transparency/tax-transparency.html.

[80] Commission staff working document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC {SWD(2019) 328 final, https://ec.europa.eu/taxation_customs/system/files/2019-09/2019_staff_working_document_evaluation_on_dac.pdf.

[81] European Court of Auditors, *Exchanging tax information in the EU: solid foundation, cracks in the implementation*, 2021, p. 38, https://www.eca.europa.eu/Lists/ECADocuments/SR21_03/SR_Exchange_tax_inform_EN.pdf.

[82] See also S.A. Stevens and J.T. van Wamelen, The DAC7 Proposal and Reporting Obligation for Online Platforms, *EC Tax Review* 2021, no. 1, pp. 24-30.

[83] Council Directive 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, O.J. 25 March 2021, L 104, p. 1.

[84] See on these provisions also: Ana Paula Dourado, 'Editorial: The European Commission Tax Package: The Condition of Foreseeable Relevance, Group Requests and Data Breaches ', 2020, 48, *Intertax*, Issue 11, pp. 949-952 and M. Manca, EU DAC7 Proposal Further Strengthens EU Tax Administrative Cooperation, Even in Respect of Digital Platforms, 61 *European Taxation* 4 2021.

[85] https://ec.europa.eu/taxation_customs/package-fair-and-simple-taxation_en.

International Exchange Framework and Optional Module for Sale of Goods.[86] The OECD reports provide for more guidance than DAC7. There are clear similarities. For example, the definitions of platform and platform operator are similar as is the information the platform operator is required to report. However, there are also differences: the OECD give to option to exclude smaller platform operators (sales less than EUR 1 million) and of platform operators that do not make a profit, where DAC7 does not include such options. Also, the scope of activities is more limited in the OECD report and the OECD does not apply to non-resident platform operators.[87]

Various EU Member States, for example France, Belgium, Italy, Latvia and Spain already oblige platform operators to submit certain information on traders using their platform. Currently, cases are pending before the ECJ on the question on whether the Italian[88] and Belgian[89] national obligations on providers such as Airbnb to collect information on short-term rental agreements concluded through them and to provide that information to the tax authority for the purpose of collecting taxes payable by the users of the service, are, amongst others, in line with the freedom to provide services (Art. 56 TFEU). The ECJ already decided on an obligation Latvia imposed on a provider of online advertisement services to forward data on second-hand car advertisements to ensure that the taxes on the sale of cars were properly collected.[90]This is in line with the General Data Protection Regulation (GDPR)[91] provided that the data requested are necessary for the specific purposes for which they are collected and that the period during which the data are collected is no longer than strictly necessary to accomplish the objective of general interest (point 85 of the judgment).

There is a certain overlap of the DAC7 requirements with the VAT rules for e-commerce that entered into force on 1 July 2021. To allow the control of the (Import) One Stop Shop (OSS/IOSS) VAT returns, traders are required to report certain information in a standard form to provide the records of their transactions declared under the OSS/IOSS schemes.[92] This information is subsequently exchanged by use of the CCN network. Some of this information will also be exchanged based on DAC7. The same applies to the legislative package adopted on 18 February 2020 which, in order to prevent VAT fraud, obliges payment service providers to transmit, as of 1 January 2024, certain information on cross-border payments originating from Member States and on the beneficiary of these cross-border payments.[93] This

[86] https://www.oecd.org/ctp/exchange-of-tax-information/model-rules-for-reporting-by-platform-operators-with-respect-to-sellers-in-the-sharing-and-gig-economy.htm.

[87] See for a comprehensive comparison between the OECD June 2020 report and the proposal for DAC7: Giorgio Beretta, The New Rules for Reporting by Sharing and Gig Economy Platforms Under the OECD and EU Initiatives, (2021), 30, *EC Tax Review*, Issue 1, pp. 31-38 and Giorgio Beretta, The EU Proposal for Tax Information Reporting by Sharing and Gig Economy Platforms, *Kluwer International Tax Blog*, 21 December 2020 http://kluwertaxblog.com/2020/12/21/the-eu-proposal-for-tax-information-reporting-by-sharing-and-gig-economy-platforms/.

[88] Case C-83/21, *Airbnb Ireland UC, Airbnb Payments UK Ltd v Agenzia delle Entrate*.

[89] Case C-674/20, *Airbnb Ireland UC v Région de Bruxelles-Capitale*.

[90]Case C-175/20, *'SS' SIA* ECLI:EU:C:2022:124.

[91] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) O.J. No. L 119 of 4 May2016, p. 1.

[92] Commission Implementing Regulation (EU) 2021/965 of 9 June 2021 amending Implementing Regulation 2020/194 as regards the exchange of records held by taxable persons or their intermediaries and the designation of competent authorities responsible for coordinating administrative enquiries, O.J. 17 June 2021, L 214, p. 1.

[93] Directive 2020/284 of 18 February 2020 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers O.J. 2 March 2020, L 62, p. 7 and Regulation 2020/283 of 18 February 2020 amending Regulation No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud, 2 March 2020, L 62, p. 1.

information is centralised in the Central Electronic System of Payment information (CESOP) where it is stored, aggregated and cross-checked with other European databases and then made available to anti-fraud experts of Member States via the Eurofisc network. Beretta notes that an important flaw common to the OECD and EU initiatives relates to the lack of coordination with other instruments for collection and exchange of information already available to tax administrations (e.g. information exchanged with tax authorities by means of electronic invoicing or due to anti-money laundering (AML)/know your customer (KYC) reporting).[94]

The DAC7 reporting obligation for digital platforms seems to build on the reporting obligations for tax intermediaries which were introduced in DAC6 (see Chapter 26). Again, it is an intermediary that has to collect and report the information in order to enable tax administrations to assess whether taxpayers (here: sellers on digital platforms) fulfilled their tax obligations. However, unlike DAC6, the DAC7 obligation covers both cross-border and non-cross-border activities in order to ensure the effectiveness of the reporting rules, the proper functioning of the internal market, a level playing field and the principle of non-discrimination and to reduce the administrative burden on digital platforms (preamble 10 DAC7). The reason to introduce these obligations is to increase tax compliance, reduce and detect tax fraud, tax evasion and tax avoidance (both regarding income taxes and VAT) and to introduce a standardized reporting requirement in the EU instead of unilateral, diverging reporting obligations (preambles 6-8 DAC 7).

DAC7 introduces a new Art. 8ac which obliges Member States to require so called reporting platform operators to carry out the due diligence procedures and fulfil reporting obligations that are included in the new Annex V to the DAC (Art. 8ac(1)). This Annex contains an extensive Section I with definitions, a Section II with the due diligence procedures, a Section III with reporting requirements and a Section IV with rules and administrative procedures Member States have to implement.

Platform operators are entities (broadly defined in Annex V(I)(C)(1)) that contract with sellers to make available a platform (Annex V(I)(A)(2)). The reporting obligation applies regardless of the legal nature of the seller as this term encompasses both individuals and entities (Annex V(I)(B)(1)). The latter term includes not only legal entities, such as corporations and foundations but also legal arrangements such as partnerships and trusts (Annex V(I)(C)(1)). However, governmental entities are excluded as sellers on whom platforms have to report as are entities of which the stock is regularly traded on an established securities market or a related entity thereof (Annex V(I)(B)(4) and (I)(C)(2)).

Sellers must be registered on the platform and carry out an activity for consideration that entails any of the following (Annex V(I)(A)(8)): (a) rental of immovable property; (b) personal service (defined in Annex V(I)(A)(11) as a service involving time- or task based work performed, upon request of a user, by one or more individuals independently or on behalf of an entity either online or physically after having been facilitated by a platform); (c) the sale of goods (tangible property (Annex V(I)(C)(9)). Activities carried out by a seller acting as employee of the platform operator do not fall withing the scope of reporting.

A platform is any software (including websites and apps) accessible by users and allowing sellers to be connected to users to carry out one of the activities mentioned above. This includes any arrangements for the collection and payment of the consideration for these activities (Annex V(I)(A)(1)). It excludes software that without any further intervention allows (a) processing of payments for such activities, (b) users to list or advertise such activity, redirecting or transferring users to a platform.

[94] Giorgio Beretta, The New Rules for Reporting by Sharing and Gig Economy Platforms Under the OECD and EU Initiatives, (2021), 30, *EC Tax Review*, Issue 1, p. 38.

Platforms must either be resident in a Member State, be incorporated in a Member State, have their place of management in a Member State, have a permanent establishment in a Member State or facilitate the carrying out of an in-scope activity by a seller that is resident in a Member State or a rental of immovable property located in a Member State (Annex V(I)(A)(4)). The reason for this broad scope is ensuring a level playing field and prevent unfair competition (preamble 14 DAC7). Platforms resident in third countries that have an agreement with all Member States that requires the automatic exchange of equivalent information are excluded from the reporting obligations (Annex V(I)(A)(4)-(7), the so called 'switch-off' mechanism). The OECD Model Rules mentioned before are expected to provide for the reporting of equivalent information in relation to relevant activities that are in scope of both the DAC and the OECD Model Rules, even though the latter are not identical to the DAC in terms of the in-scope sellers and platforms (preamble 16). The Commission determines whether information is equivalent. Such determination can upon request of a Member State take place before an agreement is concluded with a third country. Art. 8ac(7) gives the procedure for such decision (and the decision that information is no longer equivalent). In its decision, the Commission has to take into account defenitions of reporting platform operators, reportable sellers and relevant activities, due diligence procedures, reporting requirements and administrative procedures to ensure effective implementation and compliance with the due diligence procedures and reporting requirement in the third country.

Platforms must collect and report a range of information on sellers, including, amongst others, address, TIN, and VAT number (Annex V(II)(B)) and addresses of immovable property rented out (Annex V(II)(E)). In addition, they must verify whether the information is reliable (Annex V(II)(C)). They must do this by 31 December of the calendar year Annex V(II)(F)). They are allowed to rely on third party service providers to fulfil the due diligence obligations, but they remain responsible for this themselves (Annex V(II)(H)). If a seller does not provide the information required for the due diligence after two reminders of the platform, the platform must close the account of the seller and prevent it from re-registering or withhold payments to the seller as long as it does not provide the information.

The information on the seller (which includes the income they earned through the digital platform) must be reported no later than 31 January of the year following the calender year in which the seller is identified as being in scope (Annex V(III)(A)). The platform operator must both report information on itself (including name address, TIN) and information on the sellers (including the due diligence information) (Annex V(III)(B)). Members States must require platform operators to register themselves as such in the EU. Registration in one EU Member State must be allowed (Art. 8ac(4)).

Member States must automatically exchange the information reported by the platforms and that is listed in Art. 8ac (2) within two months after the end of the calendar year (Art. 8ac(3)) to the Member State in which the seller is resident and where it provides immovable property rental services to the Member State where it is located (Art. 8ac(2)). The automatic exchange of this information must be carried out electronically through the CCN (Art. 20(4) and preamble 29 of DAC7).

The European Commission must, by 31 December 2022, establish a central register in which the information will be recorded and that will be available to all Member States.

Member States must apply these provisions from 1 January 2023 (Art. 2(1) DAC7).

25.3.2.7 **Proposed exchange of information on entities in scope of the Unshell Directive (ATAD3)**

On 22 December 2021, the European Commission launched the proposal for the so called 'Unshell' (also known as ATAD3) Directive[95] on shell companies. This Directive is discussed in Chapter [SJOERD, is er een hoofdstuk aandacht aan ATAD3 besteedt zodat ik daar naar kan verwijzen?]. It applies to undertakings that cross three so called gateways, in short: (1) more than 75% passive income; (2) more than 60% of assets cross border or more than 60% of income earned or paid out was cross border; and (3) outsourced management and administration). If an entity crosses all three gateways, it is required to report information in its tax return. These so called "substance indicators" include information on on its premises in the Member State, its bank accounts, the tax residency of its directors and that of its employees. The declarations must be accompanied by supporting evidence. If an entity fails at least one of the substance indicators, it will be presumed to be a 'shell'. This is a rebuttable presumption.

Based on the proposed Art. 8ad DAC, Member States must automatically exchange the information on these substance indicators. they must do this within 30 days from receipt of that information through the CCN network (Art. 8ad(1)). If an undertaking has rebutted the presumption, or if it is exempt from the reporting of the substance indicators, the Member State must also communicate that information within 30 days through the CCN network (Art. 8ad(2)). The same applies to the conclusion that an undertaking does not meet the substance indicators (Art. 8ad(3)). The information that must be communicated includes the TIN, VAT number, identification of shareholders and beneficial owners, Member States likely to be concerned and any person in the other member states likely to be affected by the reporting, the declaration on the substance indicators and the evidence provided (Art. 8ad(4)). Certification of rebuttal or exemption and a summary of the evidence relevant for that certification (Art. 8ad(5)) and, if available, an audit report (Art. 8ad(6)) must be communicated as well through the CCN. The information will be retained for 5 years and no longer than necessary to achieve the purposes of the DAC (Art. 8ad(9)). Art. 8ad(11) provides that in the event of unauthorized disclosure of information on the substance indicators, Member States may suspend the exchange of information with the Member State where the unauthorized disclosure occurred. just as this is arranged for separately and does not link to Art 25(6) as introduced by DAC7, the Unshell Directive includes its own provision for penalties (Art. 14 Unshell, unlike Art. 25a DAC, this defines a minimum penalty), requests for tax audits (Art. 15 Unshell) and monitoring (Art. 16 Unshell).

Preamble 14 of the proposed Unshell Directive explicitly states that where necessary, the stage of mandatory automatic exchange of information can be followed by exchange on request, based on Art. 5 DAC.

25.3.2.8 **Possible Proposal for Exchange of Information on Cryptoassets and E-Money (DAC8)**

After the implementation of FATCA, CRS and DAC2, cryptocurrencies became an alternative for tax evaders who could no longer count on bank secrecy to hide their assets from tax administrations. On 18 February 2020, OECD's Committee on Fiscal Affairs (CFA) announced that the CRS would be reviewed to identify financial assets, such as e-money and cryptocurrencies, products and intermediaries that should be included in the scope of the CRS.[96] By 2022, the OECD hoped to publish the OECD cryptoasset reporting framework

[95] Proposal of 21 December 2021 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.

[96] paragraphs 16 and 48-49, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C(2020)47&docLanguage=En.

which will compliment the CRS.[97] In the meantime, some EU Member States have already imposed or are planning to impose reporting obligations on cryptoassets and e-money service providers. This might lead to additional administrative burdens of these service providers if the national approaches to this reporting obligation deviate. As part of the Tax Package for Fair and Simple Taxation of 15 July 2020,[98] the European Commission announced that it would expand the DAC to cover cryptoassets and e-money,[99] just as the 5th Anti-Money Laundering Directive (AMLD5)[100] extends the 4th Anti-Money Laundering Directive (AMLD4) obligations (including due diligence obligations and the obligation to report suspicious activities) to crypto-currency exchange providers and custodian wallet providers. Benjamin Angel, director of indirect taxation at the Directorate General for Taxation and Customs Union, mentioned in November 2021 (when DAC8 should already have been proposed according to the original time schedule) that the commission was working in parallel with the OECD on DAC8.[101]

DAC8 would oblige intermediaries to report information on cryptoassets and e-money. Member States should subsequently exchange this information automatically. Thus, cryptoassets and e-money institutions would have to comply with the DAC2 exchange requirements. This should enable tax administrations to properly identify taxpayers who are using cryptoassets and e-money and thus curb tax evasion. The idea is that DAC8 will work together with the Digital Finance Package the Commission launched on 24 September 2020.[102] On 23 November 2020, the Commission published a road map and a public consultation was held from 10 March 2021 to 2 June 2021.[103]

It was announced that, like DAC7, DAC8 will also include other measures to amend the DAC so that, in line with the wishes of the European Parliament,[104] it will include more ownership information, types of income and nonfinancial assets and ensure more coherence in tax information reporting and exchange requirements among EU Member States.[105]

25.3.3 **Spontaneous Exchange**

[97] Michelle Harding quotes in Sarah Paez, OECD's Cryptoasset Reporting Framework on Track for 2022 Release, *Tax Notes International*, 15 November 2021, p. 800.

[98] https://ec.europa.eu/taxation_customs/package-fair-and-simple-taxation_en.

[99] For an exploration of the problems DAC8 will attempt o address, I refer to Marwan Ahmed, Cryptocurrency Tax Compliance in the European Union: Reality or Mirage? 61 *European Taxation* 11 2021. He discusses the cryptocurrency stakeholders (users, miners, exchange platforms, trading platforms and wallet providers), cryptocurrency taxable events and tax compliance challenges and solutions.

[100] Directive 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, O.J. of 19 June 2018, L 156, p. 43.

[101] Quoted in Stephanie Soong Johnston, Countries Keep Making AEIO Progress, OECD Transparency Body Says, *Tax Notes International* 22 November 2021, p. 932.

[102] https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en. See also Luisa Scarcella, Exchange of Information on Crypto-Assets at the Dawn of DAC8, *Kluwer International Tax Blog* 29 March 2021, http://kluwertaxblog.com/2021/03/29/exchange-of-information-on-crypto-assets-at-the-dawn-of-dac8/.

[103] 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. For a discussion on the issues raised by the consultation I refer to Nana Ama Sarfo, The EU's Cryptoasset Tax Strategy Needs Coordination *Tax Notes International* 2 August 2021, p. 558-561.

[104] Stephanie Soong Johnston, EU Parliament Backs More Tax Cooperation on Digital Plaforms, *Tax Notes International* 15 March 2021, p. 144.

[105] EU Tax Commissioner Gentilioni quoted in Sarah Paez, European Commission Supports Broader Scope for Tax Info Exchange, *Tax Notes Today International* 16 September 2021, 178-2.

In the context of the DAC, 'spontaneous' does not mean 'voluntary', but merely without prior request (*ex officio*). Spontaneous exchange of information may, therefore, be either mandatory (Art. 9(1)) or voluntary (Art. 9(2)). A Member State must of its own motion forward information of which it has knowledge in five cases (Art. 9(1)):

– a possible loss of tax in another Member State. Such loss does not need to be certain or proven; a reasonable expectation is enough; the obligation exists where a Member State has reason to believe that without the information, an unjustified saving in tax, whatever its amount, may ensue in the other Member State;[106]
– a taxpayer obtains a tax reduction or exemption which should be followed by a corresponding tax liability or increase in another Member State. For instance: a taxpayer resident in country A receiving dividends from country B, and who is subject to country B withholding tax, credits that withholding tax against his country A income tax, but later, *e.g.* after litigation, obtains a refund in country B. In such a case, country B should forward the information to country A in order to enable the latter to undo the credit;
– taxpayers in two different Member States conduct business dealings through one or more countries in a way liable to reduce tax in a Member State (tax avoidance through conduit structures);
– a possible loss of tax as a result of 'artificial transfers of profits' within a multinational group of enterprises (*e.g.* transfer pricing not at arm's length);
– *do ut des:* where Member State A obtains information from Member State B which enables State A to get hold of new information possibly relevant to tax liability in State B, State A must return the favour by forwarding that new information on to State B.

In all other cases, Member States may forward information of which they are aware and which may be useful to another Member State (Art. 9(2)).

Art. 10(1) lays down a time limit for forwarding the information referred to in Art. 9(1). This must be forwarded as quickly as possible and no later than one month after it has become available. The receiving State must immediately confirm, if possible by electronic means, the receipt of the information and in any event within seven working days (Art. 10(2)).

If the supplying State asks for feedback on the information it provided under Art. 9, the requesting State must provide this as soon as possible and no later than three months after the outcome of the use of the information is known, respecting its national provisions on tax secrecy and data protection (Art. 14(1)).

Art. 20(3) requires the use of a standard form, developed by the European Commission in a comitology procedure, for providing spontaneous information, acknowledging its receipt and for asking and providing feedback.

25.4 **Admission of Foreign Officials**

It may be very efficient and effective to have tax officials of the requesting State present in the requested State during the investigation instituted by the requested State in order to comply with the request for information. This is especially the case where a person's premises or possessions must be inspected, where individuals must be interviewed or where books must be examined. The DAC already contains provisions for the presence of foreign officials. DAC7 aims to strengthen these provisions as is reflected in several changes in Art. 11.

Art. 11(1) provides that by agreement between the two States involved (as of DAC7 the formulation of the first subparagraph of Art. 11(1) is changed, amongst others, the reference to the agreement is omitted and instead it provides that the competent authority may request), officials of the applying State may be present in the offices of the requested State's tax

[106] Case C-420/98, *W.N.*, EU:C:2000:209.

administration (Art. 11(1)(a), as well as during administrative enquiries in the requested State's territory (Art. 11(19(b)). DAC7 adds participating in the administrative enquiries by the requested Member State through the use of electronic means of communication, where appropriate (Art. 11(1)(c)). DAC7 also adds the requirement in the second subparagraph of Art. 11(1) that the requested authority must respond to a request within 60 days to confirm its agreement or to communicate its reasoned refusal. This amendment is inserted for reasons of efficiency and legal certainty according to preamble 23 of DAC7. The officials of the requesting State must be given copies of documents available to the requested State's authorities which contain the requested information Art. 11(1), third paragraph).

If the requested State's national law permits, the foreign officials may be allowed, during administrative enquiries, to interview individuals and to examine records (Art. 11(2)). DAC7 rephrases this first subparagraph. Where officials of the requesting authority are present during administrative enquiries or participate in them through means of electronic communication, they may interview individuals and examine records subject to procedural arrangements laid down by the requested Member State. This makes it clear that the foreign officials are subject to the procedural arrangements of the requested state to directly interview individuals and examine records (preamble 22 DAC7).

Sanctions on a refusal to cooperate by the persons inspected must be applied as if the refusal was committed against the national authorities (national treatment of refusals, Art. 11(2) second subparagraph).

The difficulty with admitting foreign tax officials to domestic tax offices and to domestic enquiries, and to have them interview people and check books, is that this may render meaningless the inspected person's or the taxpayer's rights under domestic law to apply for an injunction or to contest the intended exchange of information in Court prior to disclosure to the foreign authorities. If the foreign officials already know what they wanted to know from being present during the audit, or from interviewing individuals, it is of little use to file for an injunction or to litigate against the planned forwarding of information already known to the foreign officials. However, tax courts or criminal courts of the applying State may consider the information inadmissible as evidence if a court of the requested State *a posteriori* holds the information not to have been eligible for exchange. Also, the requested State may be liable for damages if the information already found its way across the border before the interested parties were able to raise legal objections and it is later established that national law was violated or overstepped, or that the taxpayer was right in objecting against the exchange of the information.

25.5 **Simultaneous Controls**

Art. 12 provides for simultaneous controls by two or more Member States, each in their own territory, of one or more persons of common or complementary interest with a view to exchanging the information so obtained. The Member States remain sovereign in their territories. They can only invite each other to join a simultaneous international tax audit where this appears to be more efficient than separate controls, by suggesting to each other cases and, persons and time spans within which to strike, and by giving reasons for these suggestions (Art. 12(2)). Member States are free to decide whether or not to participate, but if they refuse, they must give reasons for not obliging (Art. 12(3)). DAC7 adds to Art. 12(3) that this communication must be made within 60 days of receiving the proposal. All States involved in a joint operation must appoint a supervisor/coordinator for the operation (Art. 12(4)).

25.6 **Joint Audits**

In a joint audit, tax administrations cooperate in a tax audit of one or more taxpayers with cross-border activities. Čičin-Šain and English observed that joint audits enable national tax administrations to collect and analyse information more rapidly, more targeted and more comprehensively and in closer cooperation with their counterparts in other countries.[107] A benefit for tax payers is that they can serve as a dispute prevention tool, because they can solve complex cross-border situations at an early stage, allow the taxpayers to present the relevant facts and explain their legal position to all tax administrations involved and thus mitigate the risk of double taxation.[108]

In recent years, some EU Member States started pilot projects on joint audits with the support of the Fiscalis 2020 programme which allows developing and operating major trans-European IT systems together, as well as establishing networks by bringing together national tax administration officials from across Europe to create and exchange information and expertise.[109] These joint audits were usually based on Art. 11(2) on participation by foreign officials (see Section 25.4) occasionally combined with Art. 12 (simultaneous controls, see Section 25.5) Čičin-Šain and English noted, however, that the effective use of joint audits was hampered by a lack of clarity, even regarding the relevant legal basis.[110] This also lead to uncertainty as to the nature of public powers exercised by foreign officials and the applicable procedural law. Some Member States even doubted as to whether joint audits, were allowed at all under the DAC.

Because of the benefits of coordinated controls[111] and to ensure legal certainty (preamble 24 of DAC7), DAC7 introduces a separate section in the DAC, Section IIa, on joint audits. This section, that consists of a new Art 12a, provides a legal framework for these audits, including the initiation of joint audits, procedural aspects and the applicable national law. It must be implemented by 31 December 2023 and apply from 1 January 2024 at the latest (Art. 2(2) DAC7). This is a year later than the other DAC7 changes. For some Member States, joint audits were difficult to accept, leading to watering down of the original proposal on joint audits. For example, Art. 12a does not give the taxpayer the right to request a joint audit in its final form.[112] Čičin-Šain and English note that there is still ample room for improvement as

[107] Nevia Čičin-Šain and Joachim English, DAC 7: an entire new framework for joint audits in the EU: how do the taxpayers fare? *Intertax* vol. 50(1) 2022, pp. 7-27.

[108] OECD Forum on Tax Administration, *Joint Audit 2019 -Enhancing Tax Co-operation and Improving Tax Certainty* OECD 2019 https://www.oecd.org/tax/joint-audit-2019-enhancing-tax-co-operation-and-improving-tax-certainty-17bfa30d-en.htm and preamble 25 of DAC7.

[109] Regulation (EU) 2021/847 of the European Parliament and of the Council of 20 May 2021 establishing the 'Fiscalis' programme for cooperation in the field of taxation and repealing Regulation (EU) No 1286/2013, O.J. of 28 May 2021, L 188, p. 1.

[110] Nevia Čičin-Šain and Joachim English, Joint audits under the new DAC 7, *Kluwer International Tax Blog*, 22 March 2021, http://kluwertaxblog.com/2021/03/22/joint-audits-under-the-new-dac-7/.

[111] See for an extensive discussion on joint tax audits, the advantages and obstacles to conducting joint tax audits, measuring their possible impact and their beneficial effects Irene J.J. Burgers and Dana Criclivaia, Joint Tax Audits: Which Countries May Benefit Most? *World Tax Journal* October 2016, pp. 306-355. Other literature on this topic includes Nevia Čičin-Šain, Tina Ehrke-Rabel and Joachim Englisch, Joint Audits: Applicable Law and Taxpayer Rights, *World Tax Journal*, no. 4, 18, November 2018; N. Čičin-Šain, Joint and Simultaneous Audits, in P. Pistone ed. *Tax Procedure*, IBFD 2020; N. Čičin-Šain, Joint Audits, in: G. Kofler et al. eds. *CJEU, Recent Developments in Value Added Tax 2019*, Linde 2020; D. Criclivaia, Joint Audits – Ten Years of Experience: A Literature Review, 12 *World Tax Journal* 2020, Nevia Čičin-Šain and Joachim English, DAC 7: an entire new framework for joint audits in the EU: how do the taxpayers fare? *Intertax* vol. 50(1) 2022, pp. 7-27.

[112] See for a more elaborate discussion: Nevia Čičin-Šain and Joachim English, DAC 7: an entire new framework for joint audits in the EU: how do the taxpayers fare? *Intertax* vol. 50(1) 2022, pp. 7-27, section 4.1..

joint audits are still governed by domestic procedural rules, especially regarding taxpayer rights, which creates complexities and ambiguities.[113]

Art 3(26) defines a joint audit as an administrative enquiry jointly conducted by the competent authorities of two or more Member States and linked to one or more persons of common or complementary interest to the competent authorities of those Member States. This definition also has to apply as of 1 January 2024 at the latest (Art. 2(2) DAC7). Member States may request one or more other Member States to conduct a joint audit (Art. 12a(1)). The requested Member State(s) must respond withing 60 days and may reject the request on justified grounds (Art. 12a(1)). It is not specified what would constitute justified grounds. Čičin-Šain and English question specifically whether 'justified grounds' includes the lack of administrative capacity of the requested tax administration.[114]

Joint audits must be conducted in a pre-agreed and coordinated manner, including linguistic arrangements and in accordance with the laws and procedural requirements of the Member State where the activities of the joint audit take place. In addition, officials of the other Member State may not exercise any powers that they could not exercise under the laws of their own Member State. Therefore, the foreign officials are bound to the stricter rules of either the host State or the sending State. Each Member State where the activities of a joint audit take place, must appoint a representative responsible for supervision and coordination of the joint audit in that Member State (Art. 12a(2)).

Member State(s) where the activities of a joint audit take place must (a) permit that officials of other Member States interview individuals and examine records together with the officials of the Member State where the joint audit activities take place, (b) ensure that evidence collected during the joint audit can be assessed (which includes in a process of complaint, review or appeal), including on its admissibility, under the same legal conditions as would be the case for a regular audit in that Member State, and (c) ensure that the person(s) subject to a joint audit or affected by it enjoy the same rights and have the same obligations as would be the case in a regular audit in that Member State (Art. 12a(3).

The competent authorities must endeavour to agree on the facts, circumstances relevant to the joint audit and to reach an agreement on the tax position of the audited person(s) based on the results of the joint audit. The findings must be incorporated in a final report which reflects the issues on which competent authorities agree. Those issues must be taken into account in the relevant instruments issued by the competent authorities issued following the joint audit. Where the original proposal for DAC7 included obligations to make the findings of the audit legally binding for the follow-up national instruments, this is not the case in the current Art. 12a. The actions following the joint audit and any further processes in a Member State, such as decisions, appeal and settlements, must take place in accordance with the national law of that Member State (Art. 12a(4)).

The audited person(s) must be informed of the outcome of the joint audit, This includes receiving a copy of the final report within 60 days of its issuance (Art. 12a(5)).

25.7 **Notification of Foreign Decisions and Instruments**

In various Member States, national law requires the tax authorities to notify taxpayers within a specific span of time of any decision or instrument concerning their tax position, such as

[113] Nevia Čičin-Šain and Joachim English, DAC 7: an entire new framework for joint audits in the EU: how do the taxpayers fare? *Intertax* vol. 50(1) 2022, pp. 7-27 and Nevia Čičin-Šain and Joachim English, Joint audits under the new DAC 7, *Kluwer International Tax Blog*, 22 March 2021, http://kluwertaxblog.com/2021/03/22/joint-audits-under-the-new-dac-7/.

[114] Nevia Čičin-Šain and Joachim English, Joint audits under the new DAC 7, *Kluwer International Tax Blog*, 22 March 2021, http://kluwertaxblog.com/2021/03/22/joint-audits-under-the-new-dac-7/.

assessments, interest or penalty decisions, decisions on objections, enforcement orders, writs, summons, etc. As taxpayers become increasingly internationally mobile, it is becoming more difficult for Member States to comply with such requirement. In order to obviate this bureaucratic difficulty as regards taxpayers who relocated to another Member State, Art. 13 requires national treatment of foreign instruments and decisions relating to taxes covered by the DAC.

Member States are required, upon request of another Member State, to notify to addressees within their territory any decision or instrument of the tax authorities of the requesting Member State as if it were their own similar decision or instrument (Art. 13(1)). The request for notification must indicate the instrument or decision to be notified and must include the name and address of the addressee together with other information which may facilitate identification of the addressee. Standard forms are used for the exchange of this information (Art. 20(3)). The DAC contains a limiting provision (Art. 13(4)), stating that (i) notification requests shall only be made if it is impossible or disproportionally difficult for the requesting State to notify according to its own rules, and (ii) competent authorities of a Member State may notify documents directly to addressees in another Member State by registered mail or electronically.

25.8 Access to Anti-Money-Laundering Information, Including Information on Ultimate Beneficial Owners (DAC5)

As was discussed in Section 25.3.2.2, Art. 8(3a) provides for automatic exchange of information on foreign account holders and their accounts provided for by financial institutions under the CRS. If the account holder is an intermediary structure, the financial institution must look through that structure and identify and report on its beneficial owners (Section VIII(E)(1) of Annex I). This element of the customer due-diligence procedure relies on anti-money laundering (AML) information obtained pursuant to the 4th Anti-Money Laundering Directive (AMLD4)[115] for the identification of beneficial owners.

In order for Member States to monitor, confirm and audit that financial institutions apply their CRS obligations properly by correctly identifying and reporting on the beneficial owners of intermediary structures, Member States need to have access to the AML information (preamble 2 to Directive DAC5[116]). This may also be the case for other forms of administrative cooperation and the monitoring thereof.

For that reason, Art. 22(1a) DAC obliges Member States to provide for access by tax authorities to certain personal data referred to in AMLD4. In order to comply with the privacy requirements of Art. 8(2) of the European Convention on Human Rights (ECHR) and of the EU Charter of Fundamental Rights of the European Union, access to the information must be provided for by law. This law must be clear and precise and its application must be clear and foreseeable to persons subject to it in order to comply with the case law of the Court of Justice and the European Court of Human Rights (ECtHR).

The information tax authorities must have access to based on Art. 22(1a) includes the mechanisms, procedures, documents and information referred to in Arts. 13 (customer due diligence procedures), 30 (UBO register for corporate and other legal entities), 31 (UBO register for trusts) and 40 (documents necessary to comply with the customers due diligence

[115] Council Directive 2015/849/EU 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, O.J. 5 June 2015, L 141, p. 73.

[116] Council Directive 2016/2258/EU of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, O.J. 16 December 2016, L 342, p. 1.

requirements and supporting evidence and records of transactions which are necessary to identify transactions) of AMLD4. These provisions had to be applied as of 1 January 2018. DAC7 adds Art. 32a AMLD4 (centralised automated mechanisms allowing the identification of persons holding or controlling payment accounts and bank accounts and safe-deposit boxes) to the information tax authorities must have access to.

25.9 **Disclosure, Use and Forwarding of Information Obtained**

Information obtained under the DAC is covered by the obligation for official secrecy and must enjoy the same protection in the receiving State as similar information received under its domestic legislation (national confidentiality treatment (Art. 16(1)). In the *Berlioz* Case,[117] the Court held that such secrecy is accounted for by the discretion which the requesting authority must normally display at the information-gathering stage and which it is entitled to expect of the requested authority if the effectiveness of its investigation is to avoid jeopardy. Consequently, the Court held that anyone can be barred from having access to a request for information, *i.e.* the Competent Authority Letter, in an investigation on account of the fact that it is secret. This also applies to the person involved. In order for that person to be given a full hearing of his case in relation to the lack of any foreseeable relevance of the requested information, the Court deems it sufficient that he is given the information which should at least be included on the standard form for a request for information: the identity of the taxpayer concerned and the tax purpose for which the information is sought (Art. 20(2)). If the requested Member State asks for additional information, that additional information must be provided as well, while taking due account of the possible confidentiality of some of that information.

The information obtained may be used for (Arts. 16(1)-(3) and 24(2)):

- the 'administration and enforcement' of the domestic laws on taxes covered. This is wider than 'assessment' of taxes covered; it includes, *e.g.*, recovery of taxes, imposition of penalty increases (administrative fines) for tax offences, holding third parties liable for unpaid tax debt (*e.g.* the (ex-)spouse, employer, principal, or partnership partner, etc.), and initiating judicial proceedings, not only as regards the taxpayer, but also as regards third persons liable for or contributing to the tax debt of the taxpayer (Art. 16(1) first subparagraph);
- the 'assessment and enforcement' of other taxes and duties covered by Art. 2 of the RAD; therefore, also, notably VAT, excise duties and customs duties are covered (Art. 16(1) second subparagraph), which have, however, their own concurrent exchange circuit. DAC7 explicitly inserts in the first subparagraph of art 16(1) that the information may be used for VAT and other indirect taxes. According to preamble 30 of DAC7 this is a clarification;
- the assessment and enforcement of compulsory social security contributions, even though the exchange itself for that purpose is outside the scope of the DAC (Art. 2(3)). This may tempt officials to be rather vague or broad in their requests or to state a tax purpose (*e.g.* additional assessment of payroll tax) rather than the real purpose (Art. 16(1) second subparagraph);
- judicial and administrative proceedings which may involve penalties and which are initiated because of tax law infringements, provided the rights of defendants and witnesses in such proceedings are respected (therefore, the right not to incriminate oneself and the other fair hearing requirements ex Art. 6 ECHR and the EU Charter of Fundamental Rights must be respected); this means that the information may also be used in criminal

[117] Case C-682/15, *Berlioz*, EU:C:2017:373, paras 94 and 95 and 100-101.

proceedings against tax offenders, provided their defense rights are respected (Art. 16(1) third subparagraph);

– with the permission of the supplying State, any other purpose for which the use of the information is legally permitted in the receiving Member State. The supplying State is obliged to grant such permission if the envisaged use is legally permitted within its own jurisdiction (Art. 16(2) first subparagraph). DAC7 inserts a second subparagraph in art 16(2) stating that each Member State may communicate to all other Member States a list of purposes, other than those mentioned in Art. 16(1), for which, in accordance with its national law, information and documents may be used. For such use the receiving Member State does not need a specific permission. The list must be communicated using the standard forms adopted by the Commission in accordance with the comitology procedure of Art. 26(2) (Art. 20(3)(3));
– forwarding to a third Member State, if such forwarding accords with the rules and procedures of the directive. The Member State of origin must be informed beforehand and may oppose the sharing of the information within ten working days (Art. 16(3)). DAC7 inserts the requirement in Art. 20(4) that these communications must be done using the standard forms adopted by the Commission in accordance with the comitology procedure of Art. 26(2); and
– forwarding to a non-Member State, provided (i) the supplying Member State consents, and (ii) the non-Member State has given an undertaking to cooperate in combating tax avoidance and fraud (the OECD minimum standard) (Art. 24(2)). DAC7 inserts the requirement in Art. 20(4) that these communications must be done using the standard forms adopted by the Commission in accordance with the comitology procedure of Art. 26(2).

Art. 16(5) provides that any information, report, statement, document or certified copy or extract thereof provided by the authorities of the requested State according to the DAC may be relied on as evidence by the competent bodies of the receiving State on the same basis as similar evidence provided by a domestic authority. Art. 16(6) limits the purposes for which the CbC information may be used (see Section 25.3.2.2).

25.10 Grounds for Refusal of Cooperation

Art. 17 contains five narrowly defined limitations on Member States' obligation to exchange information: (i) the requesting authority has not exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives; (ii) it would be contrary to the legislation of the requested Member State to conduct the requested enquiries or to collect the information requested for its own purposes; (iii) the requesting Member State is unable, for legal reasons, to provide similar information; (iv) the provision of the requested information would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process; and (v) the disclosure of the requested information would be contrary to public policy. These categories will be discussed in the next subsections.

These limitations largely coincide with those set out in Art. 26(2) of the OECD-MC. In the *Berlioz* Case,[118] the Court held that some of the limits included in Art. 17(1) could be taken into account when determining the legality of a request for information, but that these would not have any bearing on a review of the foreseeable relevance of that information. In the *Établissements Rimbaud* Case[119] the court held that the predecessor of Art. 17 in the old

[118] Case C-682/15, *Berlioz*, EU:C:2017:373, para 88.
[119] Case C-72/09, *Établissements Rimbaud*, EU:C:2010:645, para 48.

Directive only provided for exceptions to the exchange of information by way of derogation. It thus has to be narrowly construed and, by virtue of the principle of sincere cooperation (now Art. 4(3) TEU), the Member States are required to engage fully in the exchange of information provided for under the Directive. I agree with AG Kokott in her opinion in the *Bean House* Case[120] that this case law also applies to the current Directive.

Evidently, a general ground for refusal may be that the information requested lies outside the scope of the DAC (*e.g.* social security contributions or fees for public services rather than taxes). If a requested Member State refuses cooperation, it must inform the requesting State of its ground(s) for refusal (Art. 17(5)). A Member State cannot refuse to cooperate on the ground(s) that it has no domestic interest in the information requested (Art. 18(1)).

25.10.1 **Non-Exhaustion of Appropriate Domestic Means**

Art. 17(1) allows the requested State to refuse a request for information where the applying State has not exhausted the usual sources of information which it could have used in the circumstances without jeopardising the result sought. A requested State can hardly verify whether this requirement is met. In practice, requested States content themselves with a statement of the applying State that domestic means were used, but did not produce the result desired.

25.10.2 **Lack of Domestic Legal Basis**

The requested State is not required to carry out enquiries or to communicate information if it would be contrary to its own laws to carry out such enquiries or to collect the information for its own purposes (Art. 17(2)). Under Art. 8(1) of the old Directive, this limitation stopped requests for information resting with Luxembourg and Austrian banks. However, the DAC explicitly precludes Member States from relying on national rules on banking secrecy or ownership secrecy in order to decline information requests as regards bank information (Art. 18(2)). Thus, banking secrecy is done away with, albeit only with prospective effect: Art. 18(3) provides that bank information may still be refused if the request concerns tax years prior to 2011.

The DAC only recognises limitations in national statutory law; it does not recognise limitations imposed by national 'administrative practices', as was the case under Art. 8(1) of the old Directive.

The lack of a legal basis clause also has the effect of allowing a Member State to exclude from the benefits of its tax treaties nonresident companies which in their State of residence are not required to provide tax information to their tax administration. This follows on from the *ELISA* Case[121] concerning the French-Luxembourg tax treaty. That treaty excluded (participants in) a Luxembourg 'Société Holding 1929' because these were exempt from tax and they were not required to provide any information for Luxembourg income taxation purposes.

The wording of Art. 17(2) does not seem to allow a Member State to refuse communicating information which it would not be competent to collect, but which it nonetheless has readily available. Indeed, if it is unnecessary 'to conduct enquiries' or 'to collect the information requested for its own purposes' because it is already there, then Art. 17(2) does not seem to provide any ground for refusal. The fact that a tax administration would not have been competent to require certain information does not exclude that it

[120] Opinion of AG Kokott of 2 October 2014 in Case C-133/13, *Q (Bean House)*, EU: C:2014:2255, para 70.
[121] Case C-451/05, *ELISA*, EU:C:2007:594.

nevertheless legally comes across such information. For example, the microfiches containing data on KB Lux bank accounts were found by the Belgian judicial authorities in the course of a house search. They were transmitted to the Belgian tax authorities. Under the (old) Directive, the Belgian tax authorities forwarded copies of the fiches to the Netherlands tax authorities. Another example is the CD-ROM containing bank account information which Germany bought from an ex-employee of a Liechtenstein bank and which was shared with other Member States in so far as relevant for them.[122]

AG Kokott in her opinion in the *Bean House* Case[123] did not see a justification in Art. 17(2) to refuse to monitor public access to an immovable property without prior notice as the information concerned was publicly available and obtaining it would not require the exercise of sovereignty. However, should it transpire that, by reason of a corresponding prohibition in its procedural law, the requested Member State would, in fact, be prevented from monitoring public access to an immovable property without prior notice, she was of the opinion that the requesting State could still carry out the necessary controls as regards public access to the immovable property on the basis of pre-announced on-site checks and additional evidence, such as witness statements.

25.10.3 **Lack of Reciprocity**

Where the applying State is legally unable itself to provide similar information upon request in the inverse situation, the requested State is under no obligation to comply (Art. 17(3)). A Member State thus cannot take advantage of the tax information system of another Member State which offers wider possibilities than its own system. This means that no Member State is obliged to provide banking information to Luxembourg and Austria concerning tax years prior to 2011.

Refusal is, unlike as was the case in the old Directive, not allowed if the applying State for reasons of fact is unable itself to provide similar information. Apparently, such limitation hinders exchange, as Member State A would probably not be enthusiastic about conducting investigations for the benefit of Member State B which, in the inverse position, replies that it does not have the resources to comply. In any case, Member State B is not allowed to reply in that way; even if it were true that its competent authority does not have the necessary possibilities, that is no excuse: it should bring its administration up to standard.

25.10.4 **Protection of Commercial Secrets**

Member States may refuse to provide information if it would mean disclosing a commercial, industrial or professional secret or a commercial process (Art. 17(4)). This exception is aimed at protecting the legitimate competitive interests of the undertakings concerned, but also at protecting Member States' economies against economic espionage. By way of endorsement, Art. 18(2) explicitly provides that banking secrets and ownership secrets are not commercial or industrial secrets. This refusal ground cannot be relied on to refuse automatic exchange of ruling information (see Section 25.3.2.3). However, it can be used to refuse a request to exchange the full text of a ruling.

25.10.5 **Protection of the Ordre Public**

[122] The legitimacy of the initial obtaining of the information is less clear in the last example (is this not sovereign fencing?), but the Member States to which the information was forwarded did nothing wrong, and in any case the purpose of the fencing provisions in criminal codes is not to protect tax fraudsters.

[123] Opinion of AG Kokott of 2 October 2014 in Case C-133/13, *Q* (*Bean House*), EU:C:2014:2255, paras 71-72.

Member States may refuse to exchange information if that would be contrary to public policy *(ordre public)* (Art.17(4)). An example might be a Member State requesting another Member State with which it has concluded a bilateral tax treaty for information which the applying State intends to use for applying a treaty override in its domestic legislation, precisely to override the treaty with the requested State. The requested State can hardly be expected to assist its tax treaty partner in frustrating or even violating its tax treaty obligations as regards the requested State.

25.11 **Penalties**

In order to ensure the timely compliance with the CbC reporting obligations (Art. 8aa), the mandatory disclosure obligations (Art. 8ab) and the reporting obligations for digital platforms (Art. 8ac), Art. 25a obliges Member States to provide for penalties for non-compliance. The DAC does not give any specifications regarding these penalties, other than that these must be effective, proportionate and dissuasive (Art. 25a, last sentence).

The choice of penalties thus remains within the discretion of the Member States. Member States can incorporate these in the national system for tax penalties. This has led to substantial differences between Member States. For example, in the Netherlands the maximum penalty in 2022 was EUR 900,000, where in Germany the maximum penalty was EUR 25,000 in 2021. This might induce certain companies to structure themselves such that the reporting entity is tax resident in a country with a low penalty. This is especially easy for companies with an ultimate parent outside the EU. Thus, this penalty freedom of the DAC might distort competition in the internal market. The European Commission has the requirements of 'effectiveness' and 'dissuasiveness' to curtail Member States in this respect, but it remains to be seen how the European Court of Justice will apply these requirements. The same applies for the protection of taxpayers by the proportionality requirement which taxpayers can invoke when a Member State has imposed a penalty for not complying with the CbC requirements.

According to the DAC8 impact assessment,[124] DAC8 should address the limited provisions on sanctions and other necessary punctual adjustments and improvements (e.g. possible updates needed to align with the OECD). The proposal should also, according to this impact assessment address the extensive differences between Member States with regard to the effectiveness of sanctions.

25.12 **Taxpayers' Judicial Protection**

The DAC does not provide for judicial protection other than the official secrecy obligation Art. 16(1) imposes on the Member States, and the referral in the third subparagraph of 16(1) to 'the general rules and provisions governing the rights of defendants and witnesses' in proceedings initiated as a result of tax law infringements. Giusy De Flora observed that European (just as international) legislation on the exchange of information does not have a specific provision governing the relations between taxpayers and tax authorities.[125] Persons (potentially) affected by an exchange of tax information can thus rely only on domestic legislation for:

(i) a possible right to be notified prior to an intended transmission of information;

[124] European Commission, Inception Impact Assessment, Ref. Ares(2020)7030524, 23 November 2020, 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.

[125] Menita Giusy De Flora, Protection of the Taxpayer in the Information Exchange Procedure, *Intertax*, 2017, no. 6/7, pp. 447-460.

(ii) a right to be heard before information is transmitted (consultation right); in such case the decision to transmit information remains at the discretion of the requested tax authority;
(iii) a possible injunction against an intention to transmit information (intervention right), which gives the taxpayer the right to block the transmission of the information in cases where there are formal or substantive defects; and
(iv) a possible claim of damages in the event of unlawful exchange of information or violation of confidentiality or data protection.

Only if taxpayers are informed in advance, legal protection can be effective. However, this might delay the transmission of information or make it ineffective. The level of domestic legal protection varies considerably between Member States, especially as regards prior notification and the possibilities for (timely) obtaining judicial interim decisions such as a provisional injunction.[126] Therefore, Giusy De Flora is of the opinion that referral to the domestic legislation of the Member States is not sufficient to achieve a full balance between the interests of the requesting State and those of the taxpayer.[127] Furthermore, according to her, this legislation has limited or no consideration of the legal position of the taxpayer. In her view States are more interested in obtaining the required information rather than ensuring the procedural rights of taxpayers in the phase of exchange of information. Also, other authors have argued that more attention to taxpayer's rights is needed due to the increase of automatic exchange of information, which may lead to less control over the accuracy and use of the information by the requesting and the requested States.[128] Zagà adds that also the protection of third parties, which includes the holders of tax information and parties affected by information obtained by information requests, is at issue.[129]

25.12.1 **No Right to Be Involved**

[126] See Roman Seer and Isabel Gabert, 'European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements', *Bulletin for International Taxation* February 2011, pp. 88-98, p. 96.
[127] Menita Giusy De Flora, Protection of the Taxpayer in the Information Exchange Procedure, *Intertax*, 2017, no. 6/7, pp. 447-460.
[128] For example: Giuseppe Marino, General Report, in: Giuseppe Marino (ed.) *New exchange of information versus tax solutions of equivalent effect*, IBFD 2015, pp. 3- 46, pp.45-46, F. Alfredo García Prats, The Legitimacy of AEOI and measures other than AEOI, in: Giuseppe Marino (ed.) *New exchange of information versus tax solutions of equivalent effect*, IBFD 2015, pp. 133-162, Giuseppe Melis, AEOI and Protection of Taxpayers' Procedural Rights, in: Giuseppe Marino (ed.) *New exchange of information versus tax solutions of equivalent effect*, IBFD 2015, pp. 3-46, pp. 45-46, Niels Diepvens, Filip Debelva, The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights under Pressure, *EC Tax Review*, 2015, no. 4, pp. 210-219; Marcel Schaper, Data Protection Rights and Tax Information Exchange in the European Union: An Uneasy Combination, *Maastricht Journal of European and Comparative Law*, 2016, 23(3), pp. 514-530; Saturnina Moreno González, The Automatic Exchange of Tax Information and the Protection of Personal Data in the European Union: Reflections on the Latest Jurisprudential and Normative Advances, *EC Tax Review*, 2016, no. 3, pp. 146-161; Filip Debelva and Irma Mosquera, Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, many Issues, but few Solutions, *Intertax* 2017, No. 5, pp. 362-381, which article includes a wealth of references to other literature on this topic, V. Wöhrer, *Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information*, IBFD 2018, P. Baker, CRS/DAC, FATCA and the GDPR, *British Tax Review* 3, p. 252 2016, C.E. Weffe, Highlights and Trends in Global Taxpayers' Rights 2020, 75 *Bulletin for International Taxation* 7 2021, and Ana Paula Dourado, 'Editorial: Fake Tax Transparency? Leaks and Taxpayer Rights', *Intertax* 2018, vol. 46, no. 2, pp. 100-103.
[129] Stefano Zagà, 'The protection of individual taxpayer rights regarding exchange of information on request in the European Union' 62 *European Taxation* 2/3 2022.

In the *WebMindLicenses* Case,[130] the Court held that tax authorities may use evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure, in order to establish the existence of an abusive VAT practice, as long as the obtaining of that evidence in the context of the criminal procedure and its use in the context of the administrative procedure do not infringe any rights guaranteed by EU law. The national court had to assess whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. Furthermore, it had to assess whether, in accordance with the general principle of observance of the rights of the defense, the taxable person had the opportunity, in the context of the administrative procedure, to gain access to that evidence and to be heard concerning it. The Court observed that if a Directive includes a duty to cooperate, a request for information may prove expedient or even necessary. This is in particular the case where the tax authorities of a Member State know or should reasonably know that the tax authorities of another Member State have information which is useful, or even essential, for determining the tax liability in the first Member State. Taxpayers will probably not find much argument in this case law to require involvement in the exchange of information (except in relation to the rights of defence at a later stage).[131]

In the *Sabou* Case,[132] the Court had to answer the question whether the old Directive 77/799/EEC did provide rights to taxpayers to be involved in the exchange of information. The Court held that it had jurisdiction to interpret the Directive and that it could impose obligations on Member States. A Member State is not obliged to submit a request (paras 33, 36), but where it decides to make use of that assistance, it must comply with the rules laid down in the Directive (point 26). This does not differ under the DAC. The Court made clear that the rights of the defense do not give a taxpayer a right to participate in the exchange of information between the competent authorities. In this respect the court distinguished in point 40 the investigation stage, during which information is collected and which includes the request for information by one tax authority to another, from the contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment. The rights of the defense have to be respected in the latter stage. Where the authorities gather information, including by making a request for assistance, they are, however, not required to notify the taxpayer or to obtain his point of view, as this is not part of the contentious stage. Thus, a taxpayer does not have the right to be informed of a request for assistance, to take part in formulating the request, or to take part in an examination of witnesses organised by the requested Member State. However, Member States are allowed (but not obliged) to extend the right to be heard to other parts of the investigation stage by involving the taxpayer in various stages of the gathering of information, in particular the examination of witnesses (point 45). Furthermore, it is up to domestic legislation whether or not the taxpayer may challenge the accuracy of the information conveyed by the requested Member State, as the old Directive did not address such right of the taxpayer. The same applies regarding obligations with regard to the content of the information conveyed, such as the sources of information or how it was gathered (points 47-50). In the *Berlioz* Case[133] the Court made clear that the same applies under the current Directive.

[130] Case C-419/14, *WebMindLicenses*, EU:C:2015:832.

[131] See for an extensive discussion of both cases in relation to exchange of information: Ine Lejeune and Liesbeth Vermeire, The Influence of the EU Charter of Fundamental Rights on ECJ Case Law on the International exchange of Information, 57 *European Taxation* 4 2017.

[132] Case C-276/12, *Sabou*, EU:C:2013:678. See for an extensive discussion of this case: José Manuel Calderón Carrero and Alberto Quintas Seara, The Taxpayer's Right of Defence in Cross-Border Exchange-of-Information Procedures, *Bulletin for International Taxation* September 2014, pp. 498-507.

[133] Case C-682/15, *Berlioz*, EU:C:2017:373, paras 46-47.

The ECtHR decided in the 2015 *Othyma Investments* Case that the transfer of information pursuant to the old Directive without a prior notification did not interfere with the company's right to private life of Art. 8 ECHR.[134] The Court observed that as the Directive was transposed into domestic law, there was an adequate statutory basis for this interference. Furthermore, this interference was found to be necessary, in which reasoning the Court relied on the *Sabou* Case. In this respect the Court did not deem it of relevance that the focus of the *Sabou* Case was on the taxpayer, whereas the *Othyma Investments* Case was on a third party. The Court referred to its case law in the context of 'the interests of national security', 'public safety' and 'the prevention of crime' in which it held that investigative methods may have to be used covertly even against persons who are not themselves objects of investigation or surveillance. It considered that the same applies in matters of taxation. It is not a requirement of Art. 8 that prior notice of lawful tax investigations or exchanges of tax-related information must be given to all persons potentially implicated (point 44). Even though exchange of information is an interference with Art. 8, it is justified if it is (i) in accordance with the law (which will be the case if the DAC has been implemented in national legislation correctly); (ii) in the interest of the economic well-being of the country (which requirement will usually be met as well); and (3) necessary in a democratic society to achieve that aim (a criterion met based on the reasoning of the *Sabou* Case).Thus, the Convention also does not give a right to prior notification or other involvement.

25.12.2 **Right to Legal Remedy**

In the *Berlioz* Case[135] (points 48-52) the Court made it clear that if a penalty is imposed in relation to the DAC, the right to an effective remedy and to a fair trial under Art. 47 of the EU Charter of Fundamental Rights (Charter) applies. In this case a penalty was imposed, because Berlioz did not provide all the information Luxembourg needed to comply with a French request for information based on the DAC. The Court observed that penalties can be encompassed under 'measures aimed at gathering information' (Art. 18) and 'necessary measures to ensure the smooth operation of the administrative cooperation arrangements', and that the Luxembourg penalty was thus an implementation of EU law, more specifically the DAC, in the meaning of Art. 51(1) of the Charter. It was not deemed relevant that the Luxembourg provision on the penalty was not adopted to transpose the DAC, as it enabled the Member State to comply with the DAC and could thus be regarded as implementing the DAC (points 37-41). This means that the Charter is applicable and that in cases in which a penalty is imposed in order to ensure that a Member State can fulfil the obligations it has under the Directive, the safeguards of the DAC apply, including the right to a remedy of Art. 47. This protection can be invoked by a relevant person in respect of a measure adversely affecting him. Such measures include an information order and a penalty. Thus, through the Charter some legal protection is obtained regarding measures stemming from the Directive. In the *L* Case.[136] (point 89) the Court repeated the right of an effective legal remedy for the person on whom a penalty is imposed for failing to comply with an order to provide information in the context of the DAC.

However, the Court makes clear in the *Berlioz* Case that under the DAC a taxpayer who is the subject of a request for information as between national tax administrations does not have a right to be heard or to participate in that process. The legal protection in *Berlioz* has regard to the right of a person on whom a penalty has been imposed to challenge the legality of that decision. An argument to challenge an information order can be that the information

[134] Application No. 75292/10, *Othymia Investments*, CE:ECHR:2015:0616DEC007529210.
[135] Case C-682/15, *Berlioz*, EU:C:2017:373, paras 46-47.
[136] Case C-437/19, *L.*, EU:C:2021:953.

requested by the other Member State is not 'foreseeably relevant', which means that the requested Member State would not have to comply with the request (point 74). However, as was discussed in Section 25.2.3, the courts' review of the foreseeable relevance of the requested information is limited to verification that the requested information manifestly has no such relevance.

In the *Shakira* Case[137] the Court went further and made it clear that a person cannot be forced to incur a penalty in order to obtain an effective legal remedy. It observed that Art. 47 of the Charter, the right to an effective remedy, also applies to legislation implementing the DAC in particular where that legislation provides for the possibility, for the competent authority, of taking a decision that obliges a person holding information to provide it with that information (point 46 and 54). In order to have access to a court, a person cannot be compelled to infringe a legal rule or obligation or to be subject to the penalty attached to that offence (point 66). A person who is obliged to provide information, but who is of the opinion that the decision ordering him to provide that information is arbitrary or disproportionate should have a legal remedy without being forced to refuse to comply to the order upon which a penalty is imposed for which a legal remedy does exist (point 68). Legislation, which excludes the possibility for a person holding information of bringing a direct action against an order to provide that information does not respect the essence of the right to an effective remedy guaranteed by Article 47 of the Charter (point 69). In the *L* Case[138] the Court repeated the right of an effective legal remedy for the person who has received an order to provide information (point 88). In addition, it made clear that if the legality of the order to provide information is upheld, the person must be given the opportunity to comply with that order within the time limit initially prescribed by national law as of the moment of which the order was upheld. Only if the information is not provided within that time limit after the order has been upheld, a penalty would legitimately become payable (point 98-99).

The tax payer whom the information concerns, but who is not ordered to provide information himself does not have that right to a legal remedy (*Shakira* Case point 93) and the same applies to third parties whom the information may concern, but who are not required to provide information themselves (point 102). So only the person, may it be the taxpayer or another person, who is under the legal obligation to provide information, must have the right to a legal remedy.

Furthermore, the right does not go further than necessary to provide a legal remedy. Thus, even though the court reviewing the case must have access to the request for information, the relevant person does not have a right of access to the whole of the request (*Berlioz* point 101, *L* point 91). This request is to remain a secret document in accordance with Art. 16 DAC. In order to give the relevant person a full hearing in relation to possible lack of foreseeable relevance, it is sufficient, in principle, that he is informed of the identity of the person under examination or investigation and of the tax purpose for which the information is sought (the minimum information referred to in Art. 20(2)). If the court reviewing the case considers that that minimum is not sufficient and therefore asks the requested authority for additional information which it may have obtained from the requesting authority and which may be necessary to rule out the possibility of a manifest lack of foreseeable relevance, it must forward that additional information to the relevant person, while taking due account of the possible confidentiality of some of that information. However, in the *L* Case, the court made it

[137] Joined Cases C-245/19 and C-246/19, *B and others*, EU:C:2020:795. See also for an elaborate discussion: Stefano Zagà, 'The protection of individual taxpayer rights regarding exchange of information on request in the European Union' 62 *European Taxation* 2/3 2022.
[138] Case C-437/19, *L.*, EU:C:2021:953.

clear that the person concerned must be able to ascertain the reasons upon which an information order is based so that he can decide whether or not to challenge it. [139]

25.13 **Data Protection**[140]

Schapers observed that three developments imply that greater scrutiny must be paid to data protection in relation to exchange of information: (i) the shift from exchange on request of specific information to automatic exchange of bulk information; (ii) the increase in the scope of information that must be exchanged automatically; and (iii) the need to provide a counterbalance to the measures against tax underreporting by ensuring the protection of private rights of taxpayers in a State governed by the rule of law: as the scope of anti-avoidance and anti-evasion measures expands, the scope of taxpayer rights, such as data protection rights, should be reassessed accordingly.[141] Other authors also voiced data protection concerns in relation to exchange of information.[142]

Art. 25(1) DAC brings all information exchanged under the data protection provided by the (national implementation of) the General Data Protection Regulation[143] (GDPR).[144]

The DAC explicitly requires the Member States to restrict their data protection, based on the exception provided for in Art. 23(1)(e) GDPR (Art. 25(1)). This exception includes important economic or financial interests of a Member State or of the EU, including monetary, budgetary and taxation matters and public health and social security. The exception applies to the extent necessary to safeguard the protection of national tax revenue and to effectively fight fraud (preamble 27 DAC). As the DAC requires Member States to implement this exception in national law, this meets the requirement of the Court of Justice that restrictions of data protection rights must be based on legislative measures and must be appropriate and necessary for the purpose of attaining the objectives pursued (see, for example the *Puškár* Case).[145]

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[139] Case C-437/19, *L.*, EU:C:2021:953, point 92 and 93.

[140] See for an extensive discussion of data protection in relation to the DAC: Saturnina Moreno González, The Automatic Exchange of Tax Information and the Protection of Personal Data in the European Union: Reflections on the Latest Jurisprudential and Normative Advances, *EC Tax Review*, 2016, no. 3, pp. 146-161.

[141] Marcel Schaper, Data Protection Rights and Tax Information Exchange in the European Union: An Uneasy Combination, *Maastricht Journal of European and Comparative Law*, 2016 23(3), pp. 514-530.

[142] See for example: Stefano Maria Ronco S.M, Data Protection in Direct Tax Matters and Developments from the EU Standpoint: The Case of Automatic Exchange of Information, *International Tax Studies* 4 2020 and Gianmaria Alberto Carlo Favaloro, The Exchange of Tax Information between EU Member States and Third Countries: Privacy and Data Protection Concerns, 61 *European Taxation* 4 2021.

[143] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/ EC (General Data Protection Regulation) O.J. No. L 119 of 4 May2016, p. 1.

[144] Until DAC7 Art. 25(1) made reference to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. No. L 281 of 23 November 1995, p. 31. This Data Protection Directive (DPD) was replaced by Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, O.J. No. L 119 of 4 May 2016, p. 89 and the GDPR on 25 May 2018 (Art. 94(2) GDPR). Art. 94 (2) GDPR provides that references to the repealed DPD must be construed as references to the GDPR. For that reason, I will only refer to the equivalent provisions in the GDPR, even though the DAC before DAC7 still refers to the DPD-provisions.

[145] Case C-73/16, *Puškár*, EU:C:2017:725, paras 96 and 116.

The exception restricts the obligations and rights of the so-called data subject (Art. 4(1) GDPR). In the context of the DAC the data subject would usually be the person on whom information is being exchanged. The rights which are restricted are the following:

– Art. 13 GDPR, concerning the information which must be given to the data subject in case of data collection from the data subject;
– Art. 14(1) GDPR, concerning the information which must be given to the data subject in cases of data collection from another person than the data subject; and
– Art. 15 GDPR, concerning the right of access of the data subject;

In the *Smaranda Bara* Case,[146] concerning the implementation of the Data Protection Directive (DPD),[147] the predecessor of the GDPR, the Court held that a public administrative body may not transfer personal data to another public administrative body without informing the data subjects on the transfer or processing. This case concerned data necessary to certify that the person concerned qualified for health insurance. It seems that the relevance of this judgment is rather limited for information that is exchanged based on the DAC, as Art. 23(1)(e) GDPR restricts the right to be informed if this is necessary to safeguard, among others, taxation matters. Giusy De Flora observed that the protection of personal data can hardly be relied on as an effective limit to the exchange of information, given the major significance of the financial interests of the State aimed at safeguarding the proper and equitable distribution of the tax burden among taxpayers.[148]

Art. 25(2) DAC[149] ensures that Regulation (EU) 2018/1725[150] applies to any processing of personal data under the DAC by the EU institutions, bodies, offices and agencies (the latter two were added by DAC7). This Regulation includes the European Data Protection Supervisor (EDPS), the authority responsible for monitoring the application of the data protection rules by EU institutions and bodies. It also sets out the rules to ensure that personal data managed by EU institutions and bodies is protected and defines citizens' rights in this respect.

The rights provided for in the following provisions of this Regulation are restricted to the extent required to safeguard objectives of general public interests of the EU or a Member State, amongst others, an important economic or financial interest, including monetary, budgetary and taxation matters, public health and social security (as referred to in Art. 25(1)(c) of the Regulation):

– Art 15 concerning information which must be given to the data subject if the data have been obtained from the data subject;
– Art. 16(1) concerning information which must be given to the data subject if the data have not been obtained from the data subject;
– Art. 17 concerning right of access of the data subject to the data;
– Art. 18 concerning the right to rectification;

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[146] Case C-201/14, *Smaranda Bara*, EU:C:2015:638.

[147] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. No. L 281 of 23 November 1995, p. 31.

[148] Menita Giusy De Flora, Protection of the Taxpayer in the Information Exchange Procedure, *Intertax*, 2017, no. 6/7, pp. 447-460.

[149] Until DA7: Art. 25(1a) with a reference to Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the institutions and bodies of the Community and on the free movement of such data, O.J. 12 January 2001, L008, p. 1.

[150] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, O.J. 21 November 2018, L295, p. 39.

– Art. 19 concerning the right to be forgotten;
– Art. 20 concerning the right to restriction of processing, and
– Art. 21 concerning the obligation for the data controller to notify any rectification or erasure of personal data or restriction of processing to each recipient to whom personal data have been disclosed and informing the data subject about this if he requests it.

Arts. 25(3) and (4) impose data protection obligations on financial institutions with reporting obligations on foreign account holders and their accounts (DAC2, see Section 25.3.2.2), on intermediaries (DAC6, See Chapter 26) and reporting platform operators (DAC7, see Section 25.3.2.5). This includes informing individuals that information will be collected and transferred in accordance with the DAC and providing all information he is entitled to in sufficient time to exercise his data protection rights and, in any case, before the information is reported. Each Member State must lay down rules obliging platform operators to inform sellers of the reported consideration.

Information processed in accordance with the DAC may not be retained for any longer than necessary to achieve the purposes of the Directive, and in any case in accordance with each data controller's domestic rules on statute of limitations (Art. 25(5)).

Because of the broadening scope of the DAC and the increase in information that is automatically exchanged, data protection will become an even more pressing issue in the coming years. This is even more so given all the data leaks which have happened over the past years. If more information is available in more places, this might increase the risk of such data leaks.

DAC7 partly addresses these concerns by inserting procedures in the event of data breaches in Art 25(6). A Member State where a data breach occurred is obliged to report the data breach and any subsequent remedial action to the Commission without delay which is subsequently reported to all Member States. Each Member State may suspend, with immediate effect, the exchange of information to the Member State(s) where the data breach occurred by giving notice to the Commission and the Member State concerned. The Member State where the data breach occurred must investigate, contain and remedy the data breach and by giving notice to the Commission request the suspension of CCN access for the purposes of the DAC if the data breach cannot be contained immediately and appropriately. If the Member State reports that the data breach has been remedied, the Commission will give CCN access again. If one or Member States asked the Commission to verify whether the remediation of the data breach was successful, CCN access is only resumed upon such verification.

If the data breach occurs to the CCN and exchanges through the CCN can potentially be affected, the Commission must inform the Member States of the data breach and any remedial actions taken without undue delay. These may include suspending access to the CCN for purposes of the DAC until the data breach is remedied.

Art 25(7), which is also inserted by DAC7 stipulated that Member States, assisted by the Commission, must agree on the practical arrangements for the implementation of Art. 25, including data breach management processes which are aligned with internationally recognized good practices and where appropriate a joint data controller agreement, a data processor-data controller agreement or models thereof. Preamble 32 makes clear that only persons duly accredited by the Security Accreditation Authority of the Commission may have access to the information communicated pursuant to the DAC and provided by the CCN and only in so far as it is necessary for the care, maintenance and development of the central directory and the CCN. The Commission is responsible for ensuring the security of the central directory and the CCN.

25.14 Confidentiality Obligation of the European Commission

Art. 23a imposes a confidentially obligation on the European Commission regarding information communicated to the Commission pursuant to the DAC. The Commission may not use this information for any purposes other than those required to determine whether and to what extent Member States comply with the DAC (Art 23(1)).

Information sent to the Commission for evaluation purposes under Art. 23 and reports produced by the Commission using such information may be transmitted to other Member States, but it is covered by the obligation of official secrecy and is protected in the same way as similar information under the national law of the receiving Member State (Art. 23(2), first subparagraph). Member States may only use these reports for analytical purposes, and they may not be published or made available to any other person or body without the express agreement of the European Commission (Art. 23(2), second subparagraph).

DAC7 adds a third subparagraph to Art. 25(2) allowing the Commission to annually publish anonymised summaries of the statistical data that Member States communicate in accordance with the obligation in Art. 23(4) to provide the Commission with data for evaluation purposes as defined in Art. 23.

25.15 **Information Overload?**

In 2001, Vording and Caminada suggested that "Meaningful international tax cooperation may well require that in the near future, a substantial part of national tax administrations' efforts is to provide services to other national tax administrations."[151] The subsequent (and envisaged) amendments to the DAC have definitely increased the obligations on Member States' tax administrations to collect information and make it available to other Member States. In January 2017, the Dutch tax administration reported that the obligation to exchange rulings had imposed a large administrative burden on the tax administration which means that these resources could not be used for regular checks and audits.[152] As a result, the tax administration shifted part of the administrative burden to the taxpayer. The CbC obligation imposes a heavy burden on tax administrations and companies as well, as do the CRS, DAC6 and DAC7 obligations. However, information exchange should not be a purpose in itself, but a means to improve tax compliance. As Steward observed: "obtaining tax information is only one step towards the real goal of collection of adequate tax revenues and effective and fair division of the global tax base."[153] For that purpose, tax administrations must have enough human and ICT resources to handle big data and to perform effective searches. Brodzka observes that the main barriers to the effective functioning of the EU system of tax information exchange seem to be the capabilities and resources required to handle the process of data exchange for tax purposes.[154] If Member States get snowed under by both the information gathered by them to exchange and the information exchanged to them, there may not be enough resources left to effectively analyse the information received and to put it into use.

The effective use of the information exchanged should, therefore, be carefully monitored in order to avoid huge efforts being wasted on sending out bulk information not being effectively used at the other end. As Mariano observed: "behind DAC implementation in each

[151] H. Vording and K. Caminada (2001), 'Tax co-ordination: crossing the Rubicon?' in: D.A. Albregtse, A.L. Bovenberg en L.G.M. Stevens (red.) *Er zal geheven worden!, Opstellen aangeboden aan Prof. dr. S. Cnossen*, Kluwer, Deventer, pp. 335-345, p. 345.

[152] State Secretary of Finance, letter of 11 January 2017, no. 2017-0000005643.

[153] Miranda Stewart, Transnational Tax Information Exchange Network: Steps towards a Globalized, Legitimate Tax Administration, *World Tax Journal*, June 2012, pp. 152-179, p. 179.

[154] Alicja Brodzka, Automatic Exchange of Tax Information in the European Union – The Standard for the Future, 56 *European Taxation* 1 2015, p. 30.

Member State, there are going to be huge investments in information technology, the costs of which will probably be shifted to society".[155]

It is worrying that the focus in the past years and for the near future seems to have been and to remain on expanding (automatic) exchange of information under the DAC (quantity) instead of on its effectiveness (quality). In 2021, the European Court of Auditors concluded that the system for exchange of tax information has been well established, but that more needs to be done in terms of monitoring, ensuring data quality and using the information received. It reproached the European Commission for not proactively providing guidance and insufficiently measuring the outcomes and impact of the use of the information exchanged. It observed that the information collected by Member States lacks in quality, completeness and accuracy. and that although Member States identify the relevant taxpayers, information exchanged automatically is under-used.[156] The question is, therefore, whether Member States and their taxpayers get enough value for the money the public and private sector invest in DAC-exchange of information obligations.

[155] Giuseppe Marino, General Report, in: Giuseppe Marino (ed.) *New exchange of information versus tax solutions of equivalent effect*, IBFD 2015, p. 14.

[156] European Court of Auditors, *Exchanging tax information in the EU: solid foundation, cracks in the implementation*, 2021, p. 4-5, https://www.eca.europa.eu/Lists/ECADocuments/SR21_03/SR_Exchange_tax_inform_EN.pdf.