European Commission’s Public Consultation on the Evaluation of the Directive on Administrative Co-operation (DAC)

Position Paper

19 July 2024

1. About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland's Chartered Tax Advisers (CTA) and is the country's only professional body exclusively dedicated to tax.

The Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice. We benchmark our education programme against the very best in the world. The continued development of our syllabus, delivery model and assessment methods ensure that our CTAs have the skills and knowledge they need to meet the ever-changing needs of their workplaces.

Our membership of over 6,000 is part of the international CTA network which has more than 33,000 members. It includes the Chartered Institute of Taxation UK, The Tax Institute (Australia), the Taxation Institute of Hong Kong and the South African Institute of Taxation. The Institute is also a member of CFE Tax Advisers Europe (CFE), the European umbrella body for tax professionals.

Our members provide tax services and business expertise to thousands of Irish owned and multinational businesses as well as to individuals in Ireland and internationally. Many also hold senior roles in professional service firms, global companies, Government, Revenue, state bodies and in the European Commission.

The Institute is, first and foremost, an educational body but since its foundation in 1967, it has played an active role in the development of tax administration and tax policy in Ireland. We are deeply committed to playing our part in building an efficient and innovative tax system that serves a successful economy and a fair society. We are also committed to the future of the tax profession, our members, and our role in serving the best interests of Ireland's taxpayers in a new international world order.

Irish Tax Institute - Leading through tax education

2. Introduction

We welcome the opportunity to engage with the European Commission on its evaluation of Council Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, known as the DAC. We note that the evaluation covers the functioning of the DAC in the period from 2018 to 2022. Therefore, DAC7[1] and DAC8[2] are not covered by the current evaluation as they were not implemented in that period.

The Commission Work Programme 2024 acknowledges that reducing administrative burdens is crucial to maintaining the competitiveness of European businesses. The Commission has set a target of reducing burdens associated with reporting requirements for businesses by 25%. We understand that the Commission's intention is to rationalise and streamline reporting requirements which have a disproportionate impact on businesses while ensuring they fulfil their intended purpose.[3]

Since its introduction, the scope of the reporting requirements under the DAC has significantly expanded and the rules have become increasingly complex with each iteration. Compliance with these reporting requirements, in particular DAC6, is administratively burdensome and costly for taxpayers and advisers.

In keeping with the Commission Work Programme 2024, we firmly believe that a crucial focus of the Commission's evaluation of the DAC and consequential recommendations should be to streamline the reporting requirements to the greatest extent possible to help ease the administrative burden and cost imposed on businesses.

In Sections 3 and 4 below, we outline specific feedback we have received from our members in relation to DAC2[4] and DAC6.[5]

3. DAC2

DAC2, which brought the operation of the Common Reporting Standard (CRS) into EU law, extended the scope of Automatic Exchange of Information (AEOI) to certain financial assets held by non-residents and income accruing from such assets.

Our members have advised us that there is currently a lack of understanding regarding certain DAC2 requirements, such as the self-certification procedures. In our view, efforts should be made to promote greater awareness of the correct self-certification procedures.

In addition, in order to minimise the administrative burden associated with DAC2, consideration could be given to the better alignment of the classifications under Foreign Account Tax Compliance Act (FATCA) and DAC2. We understand that there can be

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[1] Council Directive (EU) 2021/514
[2] Council Directive (EU) 2023/2226
[3] Paragraph 2.1, Commission Work Programme 2024, COM(2023) 638 final.
[4] Council Directive 2014/107/EU,
[5] Council Directive (EU) 2018/822

uncertainty regarding the classification of derivatives for the purposes of DAC2 which can generate excessive documentation. It would be helpful if clarification could be provided that derivatives only constitute a financial account for the purposes of DAC2 when there is a cash value element.

4. DAC6

DAC6 provides for the disclosure and the automatic exchange of information in relation to potentially harmful cross border tax arrangements. Compliance with the reporting requirements under DAC6 is a significant administrative burden for taxpayers and their advisers.

In the period since the proposal for DAC6 was first put forward by the Commission, a range of initiatives have been implemented across EU Member States such as Public CbCR, Pillar Two and the Anti-Tax Avoidance Directives which have similar objectives to DAC6.

Given these developments, we believe the reporting requirements under DAC6 place a disproportionate compliance burden on taxpayers and their advisers and therefore, the continued necessity for these reporting obligations should be reviewed. We would strongly urge that a key objective of the Commission's evaluation of DAC6 should be to streamline the reporting requirements and reduce the administrative burden imposed by DAC6 on taxpayers and their advisers, where possible.

Minimising the reporting of arrangements that have a clear commercial purpose

Transactions with a clear commercial purpose may be reportable under the broad scope of the DAC6 hallmarks in certain instances. This results in an unnecessary compliance burden and cost for taxpayers and advisers and would not appear to be in line with the objective of the DAC of tackling aggressive tax planning.

In order to reduce the reporting of purely commercial transactions, the Commission could consider providing confirmation that certain specified transactions do not give rise to a DAC6 reporting obligation. For example, confirmation could be provided that transactions such as a liquidation, a cross-border merger, or availing of a relief which is clearly provided for under the national law of a jurisdiction, do not give rise to a reporting requirement.

We understand that *Hallmark E.1 An arrangement which involves the use of unilateral safe harbour rules* can result in the reporting of transactions which are uncontroversial and are clearly commercial in nature. In order to reduce the reporting of such transactions, the Commission could consider providing a list of unilateral safe harbours which do not give rise to a reporting requirement under Hallmark E.1.

Legal Professional Privilege

Legal professional privilege is an important safeguard for taxpayers and citizens which is recognised in the national law of some EU Member States. Article 8ab(5) of DAC6 recognises the existence of legal professional privilege and states that each Member State may undertake measures necessary to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach legal professional privilege under the national law of that Member State. In such circumstances, DAC6 provides that each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations.

In Ireland, where tax advice is provided by a legal professional (i.e., a solicitor or barrister) it may be subject to legal professional privilege. If the same tax advice is provided by a tax adviser, who is not a legal professional, it is not subject to legal professional privilege. We understand a similar fragmented approach to legal professional privilege exists across other EU Member States.

In our view, it is illogical that advice regarding the same subject matter and underlying legislation may be considered reportable when provided by one professional adviser but not another. Given the importance of legal professional privilege in safeguarding taxpayers' rights, we believe consideration should be given to extending the scope of professional privilege solely for the purpose of DAC6 to tax advisers.

In some cases, there may be two intermediaries, each with varying levels of knowledge regarding a reportable cross-border arrangement. In circumstances where one of the intermediaries has a waiver from reporting a cross-border arrangement due to legal professional privilege, this does not remove the obligation from the other intermediary to report, albeit they may have limited knowledge regarding the arrangement. Where the specified information has been reported by a relevant taxpayer, we consider that flexibility could be provided to exempt an intermediary from the requirement to report in certain circumstances involving legal professional privilege.

Furthermore, it is becoming apparent from caselaw emerging from the European Courts[6] that some of the obligations imposed on intermediaries under DAC6 may infringe the rights protected under Article 7 of the Charter of Fundamental Rights of the European Union (the Charter). While DAC6 provides exclusions from reporting to reflect obligations imposed on intermediaries under domestic legal privilege regimes, it appears that the same regard has not been given to Article 7 of the Charter. The evaluation of the DAC6 should consist of a review of the rights protected by the Charter and appropriately limit the breadth of the obligations imposed to ensure that the protection afforded by the Charter is respected.

[6] Opinion of Advocate General KoKott delivered on 30 May 2024 - Case C-432/23.

Timeframe for reporting

DAC6 requires intermediaries to report in-scope cross-border arrangements to the relevant competent authorities within a 30-day timeframe. This is an extremely short timeframe within which a tax adviser must assess whether a transaction falls within the scope of the broad and complex hallmarks set out in the Directive.

Such a short timeframe can potentially lead to over-reporting of arrangements that do not fall within the scope of the rules as there is insufficient time to fully consider the application of the rules to the transaction. In such scenarios, advisers or taxpayers may choose to err on the side of caution by reporting the transaction to ensure they do not inadvertently fall foul of the rules.

There is further uncertainty establishing the correct date from which the 30-day reporting requirement commences given the difficulties interpretating when an arrangement is "ready for implementation" or "made available for implementation."

In our view, extending the timeframe for reporting from 30 days to 90 days would ensure that tax advisers have sufficient time to fully consider whether an arrangement meets the criteria for disclosure under the DAC6 rules.

5. Conclusion

The Commission has acknowledged that excessive reporting obligations for business operating in the EU has the potential to impact the competitiveness of the Single Market. While we recognise the role of the DAC in tackling aggressive tax planning, it is important that reporting obligations under the DAC do not place a disproportionate administrative burden on businesses. The Institute strongly supports the Commission's goal of reducing burdens associated with reporting requirements by 25% without undermining the policy objectives of the concerned initiatives.[7]

In keeping with this goal, we urge that the Commission makes recommendations to streamline the existing reporting requirements under the DAC as part of its evaluation, to help reduce the administrative burden for taxpayers and their advisers. We believe now is the right time to do this given the significant changes to the policy landscape since DAC6, in particular, was first proposed, following the implementation of Public CbCR, Pillar Two and the Anti-Tax Avoidance Directives across the EU.

[7] Commission's Work Programme 2024