



Position Paper

of the German Bar Association prepared by the
Committee on European Affairs

on the Public Consultation of the European
Commission regarding directive on
administrative cooperation (DAC) evaluation

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising about 60.000 German lawyers and lawyer-notaries in 253 local bar associations in Germany and abroad. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession on German, European and international level. The DAV is registered in the Lobby Registry for the representation of special interests vis-à-vis the German Bundestag and the Federal Government under register number R000952.

Introduction

In response to the public consultation by the European Commission on the Directive on administrative cooperation in the field of direct taxation the German Bar Association (DAV) would like to support the introductory part of the answer by the Council of Bars and Law Societies of Europe (CCBE) to the Public Consultation (here below under I. with minor editorial changes). In a second part (II.) we would like to provide some comments with regard to the lack of competence/ a legal basis.

I.

In our comments we deem it necessary to have a distinction between the assessment of DAC 1-5 on the one hand, and DAC6 on the other hand.

The purpose of DAC 1-5 is essentially to regulate administrative cooperation between the tax authorities of the Member States in direct taxation and to enable requests for official investigations in other Member States. Most of the data and information collected and exchanged under the DAC, especially under the AEOI (Automatic Exchange of Information) pursuant to DAC 3, provides Member State authorities with information relevant to the objective of the Directive (combat tax fraud and tax evasion). They have a significant positive impact on the efficiency of the tax system for EU citizens and businesses.

However, this is not the case for DAC6. First, the directive should be reviewed to verify whether all hallmarks are useful. They should furthermore be clarified. In the current legal state, in some Member States the provisions of the Directive transposed into the

national law (e.g. Poland) do not allow for a clear and succinct definition of taxpayers' information obligations. This leads, on the one hand, to taxpayers 'just in case' providing useless information or information that the tax administration already has in its possession by way of enforcement of ancillary legal mechanisms. On the other hand, it is by no means certain that a taxpayer can be effectively held liable for failure to provide relevant information due to the uncertainty as to the scope of his obligations. It therefore creates an unnecessary compliance and filing burden for the taxpayers without providing the Member States' authorities with reliable information and data to effectively combat tax fraud and tax evasion (compared to any of the other means and materials resulting from DAC 1-5).

Moreover, the provision regarding reporting by intermediaries (Article 8ab par.5) should be reviewed to include an obligation for Member States to exempt persons and entities subject to legal professional privilege from filing information that is subject to their professional confidentiality obligation. In this regard, particular reference is made to the statement at the European Parliament Plenary by President Ursula von der Leyen, then candidate for a second mandate 2024-2029, on 18 July 2024: "We need less reporting, less bureaucracy, and more trust". In addition, the EU legislators should consider recent developments of the CJEU case law regarding DAC6.

Furthermore, since the mandatory application of DAC6 came into force, no amendment and/or revision of the hallmarks has been undertaken and as a result, it is our understanding that no additional and/or significant potentially aggressive cross-border tax planning arrangements have been further identified. Therefore, the question arises as to whether the high administrative costs associated with DAC6 can be justified at all, both on the part of the tax authorities and on the part of the taxpayers and the stated intermediaries (esp. lawyers).

II.

Furthermore, the German Bar Association would like to point out the following with regard to the lack of competence/ a legal basis:

Taxpayers within the limits set by the law may through appropriate structures minimise their tax burden (cif. Attorney General Maduro in Halifax (cases C-255/02, C-419/02, C-223/03). As regards the legal limits to tax minimization including total avoidance, most Member States tax laws provide as one such limit that tax laws must not be abused, and so does EU law as well.

Such abuse of tax laws must be distinguished from evasion of tax laws. In the case of an abuse the structure used as such is not forbidden; it is legal and valid under civil and corporate laws. However, the intended effect of minimization or total avoidance of tax is denied taxwise (cif Art. 6 ATAD). An evasion of tax laws has no tax law effect either, however outside the tax laws there is a very basic difference: different from tax abuse tax evasion is forbidden by the law, it is illegal and in most Member States even a criminal act, and the structures used are invalid.

Against that background, the German Bar Association concludes that the obligations and prohibitions imposed on intermediaries through the DAC 6 in the context of a client's tax avoidance and a client's abuse (not evasion) of tax laws, and the consequences to be imposed in case of violation (fine, deregistration) are to be regarded as part of professional regulation by means of regulatory rules similar to the obligations in connection with the fight against money laundering, for which no legal basis exists. Shifting these obligations to other intermediaries (if any) or, at the end, to the taxpayer, if an intermediary is protected by legal professional privilege, is serious infringement of the taxpayer's right to advice from his lawyer or tax advisor. A pivotal element in the administration of justice is the worldwide-recognized human right of access to justice, which includes the right to legal advice and legal assistance by legal counsel. In particular, in view of the generally high taxation levels in a number of EU Member States, tax law is not and must not be exempt from that fundamental guarantee. A lawyer is one of the instruments under the rule of law to ensure such right of client. Therefore, the right of access to justice encompasses the right of access to a lawyer. The obvious intention of the DAC 6 and its succeeding DACs is to prevent taxpayers from retaining counsel to lawfully minimise their tax burden.

The Treaties provide for an allocation of competences between EU and Member States by areas of subject matter or by fields of law. The ECJ has recognized one exemption:

The competence of EU to regulate by obligation or prohibition the conduct of addressees in each area of EU competence also encompasses, to strengthen such obligation or prohibition, the competence to provide, in case the obligation or prohibition is violated by any such addressee, to impose sanctions on such addressee. However, that nexus competence is ancillary to the original regulation and to its original addressees. It does not go as far as to allow the imposition of other sanctionable obligations and prohibitions on other addressees. Neither the EU nor the Member States can use nexus to extend a given competence field under the Treaties into the regulation of other addressees in other fields of law. If it were different, the entire system of competence allocation under the Treaties would become obsolete. In conclusion, the regulation of intermediaries requires its own legal basis. Without this legal basis, the desired obligations cannot be enforced by ultimately imposing them on the taxpayer.

The real issue is that the EU cannot force the Member States to harmonize their tax laws for lack of competence. The same applies when cross border structures are used with countries outside the EU. Neither Non-EU states nor Member States are prepared to forego the competition between tax systems. The DAC regulations will therefore remain largely ineffective, while the hindrance to independent advice between lawyer/tax advisor and client remains.

DAV answer to the public consultation regarding DAC evaluation

Part 1 - OVERALL ASSESSMENT OF DAC

To what extent are the following issues still a problem today?

	To a large extent	To a moderate extent	To a minor extent	Not at all	No opinion/ Don't know
Erosion of the tax-base following the increased movement of people and capital in the EU				X	
Aggressive tax planning by corporations				X	
Harmful tax competition among EU Member States				X	

To what extent have the following issues improved or worsened?

	Significantly improved	Improved	No change	Worsened	Significantly worsened	No opinion/ Don't know
Erosion of the tax-base following the increased movement of people and capital in the EU			X			
Aggressive tax planning by corporations			X			
Harmful tax competition among EU Member States			X			

To what extent do you agree with the following statements?

	To a large extent	To a moderate extent	To a minor extent	Not at all	No opinion/ Don't know
AEOI is useful to reduce tax evasion by individuals earning incomes or rents abroad				X	
AEOI is useful to reduce tax evasion by individuals holding financial assets abroad				X	
Knowledge by tax authorities about where multinationals gain profits and pay taxes helps increasing tax fairness and reducing harmful tax competition among EU Member States				X	
Knowledge by tax authorities of advance pricing arrangements, tax rulings and other cross-border arrangements helps increasing tax fairness and reducing harmful tax competition among EU Member States				X	
Knowledge by tax authorities of sellers' incomes earned via online platforms is useful to reduce tax evasion				X	

Please express your view on the extent to which DAC contributed to the following objectives

	To a large extent	To a moderate extent	To a minor extent	Not at all	No opinion/ Don't know
Reducing tax evasion / safeguarding tax revenues for Member States				X	
Increasing transparency of the tax system				X	
Increasing fairness of the tax system				X	
Improve the functioning of the EU Single Market				X	

To what extent do the following aspects of DAC work properly?

	To a large extent	To a moderate extent	To a minor extent	Not at all	No opinion/ Don't know
Identification of the taxpayers concerned				X	
Identification of the behaviours / arrangements / agreements in scope of reporting				X	
Clear identification of the information to be collected and reported				X	
Criteria for validating or verifying the accuracy of the information collected				X	

Please explain how certain aspects could be improved.

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In your opinion, would the same results have been achieved even without DAC (i.e., by means of international agreements only)? (one answer possible, to tick)

Yes, the same results would have been achieved without DAC

Most of the same results would have been achieved without DAC

Some of the results would have been achieved without DAC, but DAC was useful and/or instrumental to most of them

No, DAC was essential to achieve these results

Don't know

Please explain how the same results could have been achieved alternatively, and/or how DAC was useful to achieve them.

Member States adapt their tax legislation.
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Are the types of information automatically exchanged under the DAC relevant?

	To a large extent	To a moderate extent	To a minor extent	Not at all	No opinion/ Don't know
Income from employment					X
Pensions					X
Life insurance products					X
Director's fees					X
Capital gains					X
Information on financial accounts					X
Information on advance pricing agreements					X
Information on advance rulings					X
Country-by-Country reporting					X
Information on potentially harmful cross border arrangements					X

In your opinion, to what extent is DAC overall coherent with other EU legislation (i.e. AML Directive, ATAD Directive, VAT administrative cooperation regulation, Recovery Directive)?

To a large extent

To a moderate extent

To a minor extent

Not at all

No opinion/Don't know

In your opinion, to what extent is DAC overall coherent with the international tax framework (i.e. double taxation conventions, multilateral agreements, BEPS minimum standards)?

To a large extent

To a moderate extent

To a minor extent

Not at all

No opinion/Don't know

Part 2 - FOREIGN INCOMES AND ASSETS

Following the entry into force of DAC, what is your perception of the impact on behaviour of the taxpayers?

	Most of the taxpayers concerned	Some of the taxpayers concerned	Few of the taxpayers concerned	Not at all	No opinion / Don't know
Increased reporting of foreign incomes / assets					X
More taxes paid by taxpayers on foreign incomes / assets					X
Repatriation of financial assets to the country of residence					X
Moving financial assets to non-EU countries					X

Part 3 - TAX TRANSPARENCY

Additional views or information

Would you like to add any comments or suggestions on the current functioning of DAC?
1000 character(s) maximum

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You may upload here additional documents on the subject of this consultation. All additional documents provided will be published on the Commission website. Only files of the type pdf,txt,doc,docx,odt,rtf are allowed.

Mailing List

Europe

European Parliament

- Committee on Economic and Monetary Affairs (ECON)
- Committee on Legal Affairs (JURI)

European Commission

- Directorate-General for Taxation and Customs Union (DG TAXUD)

Permanent Representation of the Federal Republic of Germany to the European Union

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