*Oana Popa and Carla Valério**

The (Most Recent) Proposal for an EU Directive to Amend the Rules on Administrative Cooperation in the Field of Taxation (DAC8)

This note describes measures proposed by the European Commission on 8 December 2022 to amend the rules on administrative cooperation in the field of taxation (i.e. the DAC8 proposal).

1. Introduction

On 8 December 2022, the European Commission adopted a proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC8 proposal).[1]

In essence, the DAC8 proposal includes three key novelties, which will be analysed in further detail:
- extending the existing scope of automatic exchange of information (EoI) under the DAC Directives to information on cryptoassets and e-money;
- extending the automatic EoI of advance cross-border rulings and advance pricing agreements to cover cross-border rulings concerning high-net-worth individuals (HNWI); and
- the establishment of minimum penalties for infringement of domestic rules that transpose the Directive on Administrative Cooperation (2011/16) (DAC).[2]

In addition to these main developments, the DAC8 proposal also introduces mandatory automatic EoI for non-custodial dividend income (article 1(1)(b) and 1(2) of the DAC8 proposal), and two taxpayer identification number (TIN) reporting obligations: by reporting entities regarding the TIN of reported individuals and entities, and by the Member States, when exchanging information subject to mandatory automatic EoI (article 1(15) of the DAC8 proposal).

If adopted as proposed, Member States will have to transpose most of DAC8's provisions by 31 December 2025, with the provisions applying from 1 January 2026 (article 2 of the DAC8 proposal).

2. Brief DAC History

The adoption of the DAC was intended to "give Member States the power to efficiently cooperate at international level to overcome the negative effects of an ever-increasing globalisation on the internal market",[3] which the Mutual Assistance Directive (77/799)[4] was no longer suited to address. The first DAC laid the foundations for a framework for administrative cooperation, establishing, among others, rules on the EoI on request, as well as spontaneous exchange, both of which applied from 1 January 2013. It also provided for the automatic EoI for five categories of income (employment income, directors' fees, pensions, life insurance products and immovable property), which applied from 2015.

The scope of automatic EoI has been regularly expanded since. The Amending Directive to the 2011 Directive on Administrative Cooperation (2014/107) (DAC2)[5] introduced it for accounts, including interest, dividends and other income generated by financial accounts, gross proceeds from a sale or redemption, and account balances; the Amending Directive to the 2011 Directive on Administrative Cooperation (2015/2376) (DAC3)[6] for in-scope tax rulings and advance pricing arrangements; and the Amending Directive to the 2011 Directive on Administrative Cooperation (2016/881) (DAC4)[7] for certain financial information in respect of country-by-country reports, notably revenue, profits, taxes paid and accrued, accumulated earnings, number of employees and certain assets.

The Amending Directive to the 2011 Directive on Administrative Cooperation (2016/2258) (DAC5)[8] enabled tax authorities to access beneficial ownership information obtained under anti-money laundering legislation

* **IBFD EU Tax Law Study Group. The authors can be contacted at o.popa@ibfd.org and c.valerio@ibfd.org, respectively.**

1. European Commission, Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM (2022)707 final (8 Dec. 2022), available at https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2022)707&lang=en.
2. Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L 64 (2011), Primary Sources IBFD.
3. Recital 3 of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64 (2011), Primary Sources IBFD.
4. Directive 77/799/EEC of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation and Taxation of Insurance Premiums, Primary Sources IBFD.
5. Council Directive 2014/107/EU of 9 December 2014 as regards mandatory automatic exchange of information in the field of taxation, OJ L 359 (2014), Primary Sources IBFD.
6. Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332 (2015), Primary Sources IBFD.
7. Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 146 (2016), Primary Sources IBFD.
8. Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, OJ L 342 (2016).

© IBFD

Exported / Printed on 3 May 2023 by IBFD.

and the Amending Directive to the 2011 Directive on Administrative Cooperation [on reportable cross-border arrangements] (2018/822) (DAC6)[9] introduced mandatory disclosure rules for intermediaries and automatic EoI on reportable cross-border arrangements, notably those that potentially constitute aggressive tax planning. Finally, the Amending Directive to the 2011 Directive on Administrative Cooperation (2021/514) (DAC7)[10] introduced reporting obligations applicable to Platform Operators and automatic EoI of the reported elements.

3. Setting the Scene for DAC8 – Existing Provisions and the Proposal's Link to Them

The proposed DAC8 rules are intended to complement the Markets in Crypto-assets (MiCA) Regulation[11] (referred to in the proposal as Regulation XXX, endorsed by the committee of permanent representatives – Coreper – on 5 October 2022 and currently pending under a formal adoption procedure) and the anti-money laundering rules, the scope of which is currently being extended to include transfers of cryptoassets.[12] The MiCA Regulation provides conditions for access to the EU market for cryptoassets, aiming to ensure a clear and transparent framework for this market. This Regulation does not, however, provide the basis for tax authorities to collect and exchange the needed information in order to tax cryptoasset income; the DAC8 proposal is therefore intended to fill this gap. DAC8 is aligned with the definitions in the MiCA Regulation and relies on the authorization requirement introduced by it. As described below, however, cryptoasset operators that do not fall under the scope of MiCA still fall within the scope of DAC8 reporting requirements.

DAC8 is also consistent with the OECD Crypto-asset Reporting Framework (CARF), as well as the amendments to its Common Reporting Standard (CRS), released on 10 October 2022.[13] The CARF, which the OECD approved in August 2022, provides for the reporting of tax information on cryptoasset transactions in a standardized manner, with a view to automatically exchanging such information with the jurisdictions of residence of taxpayers on an annual basis. The scope of DAC8 is broader than the OECD CARF standards, as the DAC8 rules would also apply to non-EU cryptoasset operators with reportable users in the European Union. The amendments to the CRS, which was first published by the OECD in 2014 and designed to promote tax transparency with respect to financial accounts held abroad, brings within its scope certain electronic money products and central bank digital currencies.

4. Mandatory Automatic Exchange of Information on Cryptoassets and E-Money

The DAC8 proposal extends the existing scope of automatic EoI under the DAC Directives to information reported by reporting cryptoasset service providers. In line with the amendments to the CRS, the DAC8 proposal further provides that financial institutions must report on e-money and central bank digital currencies.

According to the proposed rules, reporting cryptoasset service providers, irrespective of their size or location, will have to report transactions of their clients residing in the European Union. The proposal covers both domestic and cross-border transactions.

As emphasized by the European Commission in the *Questions and Answers* accompanying the DAC8 proposal, the scope of the rules is global and EU service providers will have nothing to gain from leaving the European Union.

The mandatory automatic exchange of information reported by reporting cryptoasset service providers is regulated by the newly inserted article 8ad and can be structured in three steps:

Under the first step, the reporting cryptoasset service provider must collect and verify information on cryptoasset users in line with due diligence procedures laid down by the proposal in Annex VI. The due diligence procedures included in the proposal are meant to identify reportable users. There are different due diligence procedures proposed in respect of individual cryptoasset users and legal entity cryptoasset users.

Cryptoasset service providers, cryptoasset operators and reporting cryptoasset service providers are defined in Annex V of the Proposal. Reporting crypto-asset service providers include: (i) cryptoasset service providers as defined in the MiCa Regulation and (ii) cryptoasset operators that do not fall under the scope of MiCA and are therefore not regulated and authorized, although they have users resident in the European Union.

A cryptoasset user is an individual or entity that is a customer of a reporting cryptoasset service provider for the purposes of carrying out reportable transactions. The proposal provides for excluded persons, as follows: (a) an entity the stock of which is regularly traded on one or more established securities markets; (b) any entity that is a related entity of an entity described in clause (a); (c) a governmental entity; (d) an international organization; (e) a central bank; or (f) a financial institution other than an investment entity described in section IV E(5)(b).

9. Council Directive (EU) 2018/822/EU of 25 May 2018 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139/1 (2018), Primary Sources IBFD.
10. Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ST/12908/2020/INIT, OJ L 104 (25 Mar. 2021), Primary Sources IBFD.
11. European Commission, Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM/2020/593 final (24 Sept. 2020), available at EUR-Lex - 52020PC0593 - EN - EUR-Lex (europa.eu).
12. Council of the European Union, Anti-money laundering: Provisional agreement reached on transparency of crypto-asset transfers (29 June 2022), available at https://www.consilium.europa.eu/en/press/press-releases/2022/06/29/anti-money-laundering-provisional-agreement-reached-on-transparency-of-crypto-asset-transfers/.
13. OECD, Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard (10 Oct. 2022), available at https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-to-the-common-reporting-standard.htm.

© IBFD

Exported / Printed on 3 May 2023 by IBFD.

Under the second step, the reporting cryptoasset service providers have to report to the relevant competent authority information on the cryptoasset users.

The information, as collected and verified, must be reported no later than 31 January of the year following the relevant calendar year or other appropriate reporting period of the reportable transaction to the competent authority by the reporting cryptoasset service provider.

Cryptoasset service providers that receive authorization under MiCA will report in the Member State of the legal entity. Cryptoasset operators (who have users in the European Union but do not fall within the scope of MiCA) are subject to single registration with a Member State of their choice and the reporting will take place in such Member State. The proposal provides that the European Commission will adopt a standard form for the registration and identification of reporting cryptoasset service providers.

The obligation of single registration and reporting for non-European Union operators may be relieved if adequate arrangements exist ensuring that corresponding information is exchanged between a non-Union jurisdiction and Member States.

Only the transactions of a reportable user are reportable. Reportable transactions are defined as exchange transactions and transfers of reportable cryptoassets. Both domestic and cross-border transactions are in the scope of the proposal and are aggregated by type of reportable cryptoassets.

The third step provides that the reported information is to be communicated by the competent authority of the Member State that has received the information from the reporting cryptoasset service provider to the competent authority of the relevant Member State where the reportable cryptoasset user is resident.

For the automatic EoI under this proposal, the information will be communicated to a central directory developed by the European Commission and already used for the automatic EoI on advance cross-border tax rulings and cross-border arrangements.

5. EoI of Cross-Border Rulings of High-Net-Worth Individuals

Under article 1(3), the DAC8 proposal extends the application of article 8a of the DAC on mandatory automatic exchange of advance cross-border rulings and advanced pricing agreements to cross-border rulings of high-net-worth individuals (HNWIs).

For the purposes of the proposal, a HNWI is defined as an individual that, at any time during the calendar year for which the exchange takes place, holds in total a minimum of EUR 1 million in financial or investable wealth or assets under management, excluding that individual's main private residence (article 1(1)(b) of the DAC8 Proposal).

According to the proposed version of paragraph 1 of article 8a, the competent authority of a Member State will communicate information by automatic exchange to the competent authorities of all other Member States when it issues, amends or renews an advance cross-border ruling for a HNWI after 31 December 2023 (*see* article 1(3)(a) of the DAC8 proposal).

As a transitional rule, to be included in paragraph 2 of article 8a, the competent authority of a Member State will communicate to the competent authorities of all other Member States, as well as to the European Commission, information on advance cross-border rulings for HNWI issued, amended or renewed during the five years before 1 January 2026 (*see* article 1(3)(b)(i) of the DAC8 proposal). According to the text of the proposal, however, advance cross-border rulings for HNWI that are issued, amended or renewed between 1 January 2020 and 31 December 2025 are to be communicated only if they are still valid on 1 January 2026 (*see* article 1(3)(b)(ii) of the DAC8 proposal). This would imply a transitional communication obligation of reportable advance cross-border rulings for HNWI over a six-year period (instead of five), so a clarification concerning the timeframes is expected in the final text of the Directive.

6. Penalties Framework

The Commission proposes to amend article 25a of the DAC to impose an obligation on Member States to lay down rules on penalties applicable to infringements of domestic provisions transposing the DAC where such provisions and infringements concern articles 8(3a), 8aa, 8ab, 8ac and 8ad of the DAC.

Without prejudice to other penalties and compliance measures imposed by Member States, the DAC8 proposal establishes mandatory minimum pecuniary penalties (article 1(13) of the DAC Proposal). Minimum penalties are applicable either in the event of a failure to report after two valid administrative reminders, or when the information provided contains incomplete, incorrect or false data that amounts to more than 25% of the information that should have been reported:

– by Reporting Financial Institutions (article 8(3a) of the DAC) – at least EUR 50,000 or EUR 150,000, depending on whether the annual turnover of the Reporting Financial Institution is below or above EUR 6 million;
– by multinational enterprise Reporting Entities, on country-by-country reports (article 8aa of the DAC) – at least EUR 500,000;
– by intermediaries or relevant taxpayers (article 8ab of the DAC) – at least EUR 50,000 or EUR 150,000 depending on whether the annual turnover of the intermediary or relevant taxpayer is below or above EUR 6 million, and at least EUR 20,000 if the intermediary or relevant taxpayer is a natural person;
– by Reporting Platform Operators (article 8ac of the DAC) – at least EUR 50,000 or EUR 150,000, depending on whether the annual turnover of the Reporting Platform Operator is below or above EUR 6 million, and at least EUR 20,000 if the Reporting Platform Operator is a natural person; and

Exported / Printed on 3 May 2023 by IBFD.

- by reporting Crypto-Asset Service Providers (article 8ad of the DAC) – at least EUR 50,000 or EUR 150,000 depending on whether the annual turnover of the Reporting Crypto-Asset Service Provider is below or above EUR 6 million, and at least EUR 20,000 when the Reporting Crypto-Asset Service Provider is a natural person.

According to the proposed version of the provision, domestic rules must ensure that legal persons can be held liable for non-compliance with the provisions transposing the DAC by any person with a leading position within the legal person, either acting individually or as part of an organ of the legal person.

When dealing with cross-border cases, the competent authorities of Member States must cooperate closely and coordinate actions on the imposition of penalties and other compliance measures. The objective of the Member States' obligation to cooperate and coordinate actions is not expressly mentioned in the text of the proposal. It is unclear whether it is aimed at encouraging traditional forms of mutual assistance between tax administrations, or at protecting taxpayers from, for instance, multiple penalties.

7. Conclusion

The DAC8 proposal is a response to the evolving economy and to the need to improve the existing framework for EoI and administrative cooperation in the European Union. It is meant to target the lack of specific provisions covering cryptoassets, e-money and central bank digital currencies, cross-border tax rulings for HNWIs and the lack of clarity of some compliance measures. The DAC8 proposal mirrors (with some variations) parallel work in the OECD on a standard for the EoI for tax purposes in relation to cryptoassets (the CARF) and the extension of the scope of the CRS to cover e-money. It also complements existing legislation regulating the EU market for cryptoassets. Some preliminary observations based on the proposed measures are as follows:

- cryptoasset operators that are not resident in the European Union but have EU users and do not fall within the scope of MiCA are subject to the DAC8 reporting requirements (the scope of EoI is also broader than that of the CARF);
- clarifications are required with regard to the transitional period of communication on advance cross-border rulings of HNWI; and
- cooperation between Member States becomes important not only for the efficiency of tax administrations but, under the new penalties framework, could help ensure that the imposition of penalties and other compliance measures is not excessive.

The proposal is currently open for feedback, from 8 December 2022 to 2 February 2023, for citizens and stakeholders to express their views. The feedback received will be summarized and presented to the European Parliament and Council to feed the legislative debate and will be published on the European Commission's website.

The DAC8 proposal will be negotiated in the Council of the European Union, and the European Parliament will be consulted to provide a non-binding opinion.

© IBFD

Exported / Printed on 3 May 2023 by IBFD.