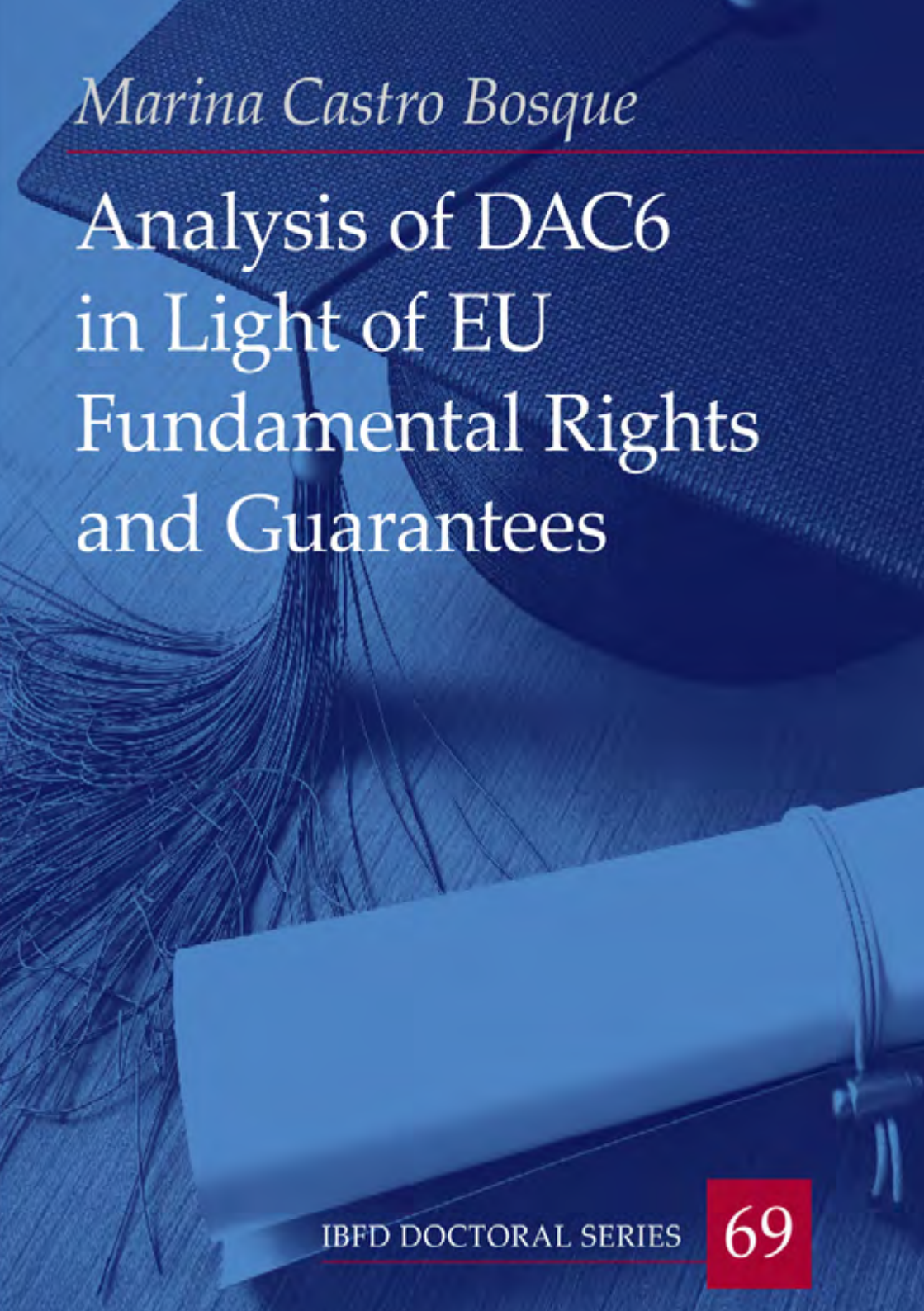
Marina Castro Bosque

Analysis of DAC6 in Light of EU Fundamental Rights and Guarantees



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Analysis of the DAC6 in Light of EU Fundamental Rights and Guarantees

Why this book?
Since its adoption in 2018, an intense debate has arisen among academics at the international level on whether Council Directive (EU) 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 (DAC6) is sufficiently protective from a taxpayers' rights point of view. That is, opinions differ on whether the measure respects the most basic tenets of EU law: the fundamental rights and general principles of the European Union. Under the domain of EU law, measures that do not respect the general principles or fundamental rights are not considered proportional to the objective they are intended to achieve. The same holds true in relation to measures affecting direct taxation. Further, in this regard, not only Member States but also EU legislators must respect all treaty provisions. Against this background, Recital 18 to DAC6 points out that "this Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". However, is this statement true in practice? This analysis necessarily involves assessing whether DAC6 as a piece of secondary legislation respects the requirements of EU primary law. This is therefore the research question of this book: is DAC6 compliant with the requirements of EU primary law concerning fundamental rights and guarantees? The analysis focuses on whether the Directive respects certain specific rights and guarantees: inter alia, the principle of legal certainty, the rights of defence (in particular, professional secrecy and the right not to incriminate oneself), the right to privacy, the principles of proportionality and legality in their punitive demand, and the principle of culpability.

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This book is based on the thesis submitted for a doctoral degree at the Public University of Navarre

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Acknowledgments

Anyone who has faced the process of writing a doctoral thesis knows that it requires time, effort and discipline. However, it often lacks guidance: what do I want to say? Where do I want to go? Does what I am saying make sense? The process can also challenge one's motivation and confidence (i.e. am I capable of pulling this off?). Guidance, motivation and confidence are just as important as time, effort and discipline when carrying out a work of this magnitude, and most of the time they come from the support of others. Therefore, I would like to thank all the people who have guided me in some way and have had trust in me during these 4 years of the research process.

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Last but not least, I would like to mention the network that supports me: my family and friends. Thank you for your confidence, for putting up with me in the moments of greatest pressure and for showing that you are interested in my study even if you are not able to understand a word of it.

Preface

Hugo López López

It truly is an honour for me to preface this book that is publishing the doctoral thesis defended by Marina Castro Bosque at the Public University of Navarre on 3 November 2022. Because a prestigious commission evaluated the work and unanimously awarded it with summa cum laude, I feel relieved of the duty generally imposed on PhD supervisors to formulate a judgment on its quality.

This work addresses the novel reporting obligation of tax planning mechanisms arising from DAC6, mainly focusing on its compatibility with EU primary law. More specifically, it analyses whether the Directive respects the fundamental rights and legal principles recognized by the Charter of Fundamental Rights of the European Union. The work undertaken by Castro Bosque is of great interest, taking into account the controversies that this new reporting obligation is raising in the context of the European Union. The recent decision of the Court of Justice of the European Union (ECJ) in *Orde van Vlaamse Balies* (Case C-694/20) is surely only the first of many yet to come. All this makes this book particularly useful, as it rigorously analyses the main problems of compatibility of DAC6 with EU primary law. Beyond this, it points out some of the main difficulties faced by Member States in implementing the Directive. It is therefore worth highlighting Castro Bosque's courage in having chosen a novel topic with the aim to alleviate the lack of monographic research thereon. She introduces interesting elements of discussion and proposals that allow for serious reflection on the current design of the "reportable cross-border arrangements obligation" at the EU level.

Over the past decade, we have been witnessing a phenomenon baptized as a "new era of international tax transparency", from which DAC6 is just one more measure providing tax authorities with information on certain types of transactions or arrangements. Tax transparency is not a goal in itself, but is merely an instrument to achieve the ultimate purpose behind it: the proper application of tax systems and the prevention and fight against tax avoidance and evasion. It is almost a truism that adequately identifying a measure's purpose is an indispensable preliminary step for properly designing the tool for its achievement. However, this essential aspect seems to not be clearly reflected in DAC6. Firstly, the Directive sometimes confuses purposes with tools to achieve such purposes. Secondly, and more importantly, the purpose

of the new reporting is far from clear. Indeed, a close examination of the aims allegedly pursued by DAC6 shows an apparent lack of coherence. In this respect, Castro Bosque places the very origin of DAC6 in the Seoul declaration of September 2006. That political agreement noted the need to coordinate measures of a global nature to allow tax administrations early knowledge of certain tax planning practices and thereby react promptly, making appropriate regulatory changes to prevent the continuation of those undesired tax advantages.

The subsequent evolution both of BEPS Action 12 and DAC6, in the specific European framework, might well be labelled a mutation or even a revolution of the original purpose of this reporting duty. In fact, these reporting duties go beyond tax planning (aggressive or not) and also focus on abuse and even criminal tax evasion. Setting aside the non-existence of a natural concept of abuse in tax law[1] and the great differences in policies regarding the boundaries of tax evasion, in my opinion, the extension of the original purpose of DAC6 beyond tax planning was somewhat naive. Indeed, expecting financial intermediaries or taxpayers to notify the tax administration of criminal or even abusive behaviour is just pie in the sky. Moreover, threatening to impose penalties for failure to report may be perfectly useless. As this failure is a necessary behaviour to commit the more serious offence of not paying the tax, it would prove not subject to any sanction in view of the general theory of medial concurrence of offences. Be it as it may, as clearly shown by Castro Bosque, the broad purpose of DAC6 lies at the root of many legal problems currently posed by the Directive, particularly those concerning professional secrecy privilege and the principle of non-self-incrimination.

In short, extending the obligation to report beyond tax planning does not seem appropriate. It is, therefore, not surprising that some countries have narrowed the scope of DAC6 to exclude abusive or illicit behaviours.

DAC6 is not free of problems when it comes to reporting lawful behaviours. The uncertainties concerning its legal contours are notorious. Castro Bosque devotes much of her efforts to analysing this in detail. Her analytical and rigorous country-by-country study reveals the differences between the Members States' implementation of DAC6. Hence, an intrinsic defect

1 As pointed out by W. Schön, *Chapter 12: The Role of "Commercial Reasons" and "Economic Reality" in the Principal Purpose Test under Article 29(9) of the 2017 OECD Model*, in *Building Global International Tax Law: Essays in Honour of Guglielmo Maisto* sec. 12.4.2.1. (P. Pistone ed., IBFD 2022), (Books IBFD), the very notion of "tax avoidance" lacks contours in itself.

of DAC6 emerges in her research: the lack of clarity of DAC6 goes beyond the delimitation of its purposes to also affect both the objective (arrangements to be reported) and subjective (subjects oblige to report) elements of the reporting obligation. Indeed, this lack of clarity seriously concerns the legal delimitation of the hallmarks and, given their relevance in the design of the reporting obligation, calls into question the most elementary requirements of legal certainty.

This lack of legal certainty is also detrimental to the true effectiveness of this and may, in many cases, lead to situations of both over and under-reporting. For this reason, it should come as no surprise that the national reports of some Member States already point out that the initial results of the implementation of DAC6 are rather poor. On the one hand, no relevant information is being obtained regarding tax planning schemes unknown to the tax authorities. On the other hand, neither abusive nor tax evasion schemes are being reported. In my opinion, tax evasion schemes will never be reported, particularly those potentially leading to the commission of tax crimes.

All this should lead us to a fundamental reflection on the very usefulness of DAC6 and the corresponding need to redirect hallmarks towards less ambitious but more realistic objectives focused on the impartial and precise identification of financial results realistically subject to scrutiny and effective reaction by legislators and tax authorities. Otherwise, all the efforts will be in vain.

In addition to lacking legal certainty, DAC6 raises severe compatibility issues with basic requirements deriving from taxpayers' rights. DAC6 avoids these problems to a certain extent by putting the modulation (restriction) of this duty when transposing the Directive on the Member States' shoulders. However, as demonstrated by Castro Bosque, this is not even mainly a question of domestic regulation. Rather, DAC6 is already establishing a series of obligations clearly clashing with EU primary law; therefore, its implementation into domestic law would also prove incompatible with EU law, even if it were compatible with domestic law. In this respect, the author's analysis of taxpayers' rights of defence and privacy in light of ECJ and European Court of Human Rights case law stands out, leading her to argue the incompatibility of certain aspects of DAC6 with the reasoning of both courts. The criticism made by the author on the position held by the ECJ and the Advocate General's Opinion in *Orde van Vlaamse Balies* is of particular interest. The lack of finesse with which the Court operates when assessing DAC6 and its potential effects in certain reporting scenarios

envisaged in DAC6 comes to the fore. In short, it does not seem that the shortcomings of DAC6 can be resolved by means of an interpretation in accordance with EU law, as the Court has so far preferred.

Castro Bosque's work also has clear implications when analysing constitutional principles governing the imposition of penalties as a consequence of both not reporting and reporting illegal tax arrangements considered. This analysis goes beyond the initial object of the research as shown by its title. However, the author does not evade these problems. Based on her analysis of DAC6 and the existing disparities between the Member States' implementation, she highlights the potentially arising intermediary shopping situations. Additionally, her reflections on the legal difficulties originating when determining the commission of tax offences will also be very helpful when undertaking the appropriate domestic law analysis. Specifically, regarding the principle of culpability, the reflections made on the lack of clarity of some hallmarks and the scope of the reporting obligation imposed on intermediaries or individuals highlight the inappropriateness of sanctioning breaches of the reporting obligation where they are not the result of a fault by the intermediary, but rather of defects of DAC6.

This book provides an inspiring analysis of these issues. I strongly recommend its careful analysis for the reader to discover the problematic navigation in finding the proper balance between the powers of the tax authorities and the taxpayers' rights. This is indeed the only way to fight aggressive tax planning.[2]

Finally, I congratulate Marina on the work carried out and wish her all the best in what I hope will be a promising academic career that has just begun. She has shown enormous courage in tackling a very cross-cutting subject that has forced her to cultivate various legal disciplines, which is the basis for an excellent legal education and achieving the most outstanding academic success.

2 On the necessity to find such a balance, *see* H. López López, *The New Spanish Reporting Obligation for Assets Located Abroad and Its Compatibility with EU Law*, 54 Eur. Taxn. 6, pp. 235-239 (2014), Journal Articles & Opinion Pieces IBFD criticizing the Spanish reporting obligation set up in 2012 and declared incompatible with EU law almost 10 years later in ES: ECJ, 27 Jan. 2022, Case C-788/19, *European Commission v. Kingdom of Spain*, Case Law IBFD.

Abbreviations

AG	Advocate General
AEDAF	*Asociación Española de Asesores Fiscales* (Spanish Association of Tax Advisors)
ATAD	Anti-Tax Avoidance Directive (2016/1164)
ATAD 2	Amending Directive to the 2016 Anti-Tax Avoidance Directive (2017/952)
BEPS	Base erosion and profit shifting
CFR	Charter of Fundamental Rights of the European Union
CRS	Common reporting standard
DAC1	Directive on Administrative Cooperation (2011/16)
DAC6	Amending Directive to the 2011 Directive on Administrative Cooperation [on reportable cross-border arrangements] (2018/822)
DOTAS	Disclosure of Tax Avoidance Schemes (UK Legislation)
EBIT	Earnings before interest and taxes
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECOFIN	Economic and Financial Affairs Council
ECtHR	European Court of Human Rights
FATCA	Foreign Account Tax Compliance Act
GAAR	General anti-avoidance rule
HMRC	HM Revenue and Customs (United Kingdom)
IRS	Internal Revenue Service (United States)
MDR	Mandatory disclosure rules
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
MNE	Multinational enterprise
PPT	Principal purpose test
SAAR	Specific anti-avoidance rule
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
TIEA	Tax information exchange agreements

Chapter 1

Introduction: Analysis of DAC6 in Light of EU Fundamental Rights and Guarantees*

Every introduction also serves as a justification. The author explains why they undertook the study: what is intended and what is new in their contribution. At the same time, the introduction serves as an expository synthesis in which the reader is given a preview of the basic structure of the work, which summarizes the chapters that compose it and the main argumentative lines. With this in mind, this introduction explains (i) the context in which the measure under study (i.e. Amending Directive to the 2011 Directive on Administrative Cooperation [on reportable cross-border arrangements] (2018/822) (DAC6)) is framed, as well as its relevance and novelty; (ii) the research question explored in this book and a summary of the conclusions posed at the end of this book; (iii) the methodology that has been used; and (iv) the structure that the book follows.

1.1. State of the art: Why an EU mandatory disclosure regime?

In the last few years some of the world's largest multinationals have been inspected for their technically legal but highly aggressive tax planning practices (e.g. by making use of transfer pricing, intercompany lending, royalty payments for licensing agreements, cost sharing agreements, etc.).[1] Further, scandals such as the Panama Papers and LuxLeaks[2] have shown that some intermediaries actively help companies and individuals to facilitate tax

* This contribution is part of the research project "*Obtención e intercambio de informacion en la lucha contra el fraude y la evasion fiscal: equilibrio entre potestades administrativas y derechos de los obligados tributarios*" [Obtaining and exchanging information in the fight against tax fraud and tax evasion: balancing administrative powers and the rights of taxpayers] (DER2016-78929-P), led by Prof. Dr Hugo López López, and the research project "*Instrumentos normativos preventivos en la lucha contra el fraude y la corrupción*" [*Preventive policy instruments in the fight against fraud and corruption*] (PID2020-118854GB-I00) led by Prof. Dr Hugo López López and Prof. Dr Inés Olaizola Nogales.

1. C.H.J.I. Panayi, *Is Aggressive Tax Planning Socially Irresponsible?*, 43 Intertax 10, pp. 544-558 (2015).

2. In fact, social concern has been raised as a result of scandals such as Liechtenstein LGT Bank (2008), HSBC Bank Falciani List (2010), Offshore Leaks (2013), Luxleaks

minimization generally through complex cross-border arrangements.[3] The problem is that the so-called aggressive tax planning is a phenomenon that emerges and develops in parallel to tax systems.

In fact, until the mid-1990s, international tax competition was generally considered as a phenomenon that boosted national tax systems to optimize the levels of taxation necessary to sustain public expenditures. Tax savings obtained at international level, provided that they were not the result of a violation or avoidance of tax provisions, were regarded as a legitimate expression of each taxpayer's right to minimize their tax burden.[4] In this context, as observed by Pistone, the growth of aggressive tax planning structures was based on two factors.[5]

First, for nearly a century, tax systems were developed in a national context within closed economies. With the increasing globalization of the world economy, taxpayers started to carry out activities at the international level. In order to reduce the impact of international double taxation, provisions were gradually added. However, no measures were established to deal with the issue of non-taxation and such a situation was exploited by taxpayers. As a result, the magnitude of international tax planning grew progressively to the detriment of national revenues. In this context, a sort of "tax competition"[6] was fuelled, causing a "race to the bottom" in tax policies and conditioning the free competition of economic operators in the global

(2014), Panama Papers (2016), Bahamasleaks (2016), Futbolleaks (2016) and Paradise Papers (2017). *See*, on the tax gap, E. Toder, *What Is the Tax Gap?*, Tax Notes International (2007).

3. The same position was taken by the European Parliament in its *Resolution on tax rulings and other measures similar in nature or effect (2016/2038(INI))*, adopted on 6 July 2016.

4. In this sense, according to the Court of Justice of the European Union (ECJ), an EU taxpayer was entitled to exercise a fundamental freedom or to engage in operations in order to benefit from a more favourable tax regime. *See* UK: ECJ, 21 Feb. 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise, BUPA Hospitals Ltd, Goldsborough Developments Ltd v. Commissioners of Customs and Excise and University of Huddersfield Higher Education Corporation v. Commissioners of Customs and Excise*, Case Law IBFD; and UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, Case Law IBFD.

5. P. Pistone, *La planificación fiscal agresiva y las categorías conceptuales del Derecho tributario global*, Quincena Fiscal 170, p. 4 et seq. (2016).

6. In this sense, Piantavigna describes tax competition as "the phenomenon where governments throughout the world adopt tax-favourable regimes and related policy environments purposively designed to attract growth within their borders as inbound investments or to avoid departure of capital and domestic business activities". *See* P. Piantavigna, *Tax competition and tax coordination in aggressive tax planning: A False Dichotomy*, 9 World Tax Journal 4, p. 480 (2017); and P. Piantavigna, *Reflections on the Fight against Aggressive Tax Planning (When the Law is Silent)*, 10 World Tax Journal 4, p. 560 (2018).

market. Aware of the loss of tax competitiveness at an international scale, many states introduced special tax regimes that, ultimately, led to the loss of other countries' tax revenues. In other words, aggressive tax planning benefited from such a competitive climate in which the different jurisdictions strived to implement an attractive tax regime that, eventually, allowed the displacement of wealth to their own territories. This way, aggressive tax planning resulted not only from the absence of harmonization between different national tax systems, but also from the aggravated interstate tax competition.[7] The greater the complexity of tax systems, the more these structures will proliferate.

Second, aggressive tax planning also benefited from the lack of effective mechanisms in the area of international tax control. Particularly, the context of international tax opacity and the lack of dialogue between tax administrations played an important role in this regard.[8] The outcome of this combination of factors is a general reduction in tax collection and the erosion of national economies.[9] The negative effects of this situation are clear: aggressive tax planning entails a problem of equity and a distortion of the contribution to the support of public expenditures. Thus, by the erosion of taxable revenues, the tax collection of a state is reduced and it is forced to increase the tax burden on other subjects that exhibit "ability to pay". This situation is aggravated since the exploitation of disparities is of, almost, exclusive benefit to multinational companies. All in all, this growing sophistication makes the fight against aggressive tax planning more difficult and requires the design of new counter measures.

For all these reasons, in recent years both at the EU level and within the OECD, awareness has been raised about the need to fight aggressive tax planning. This shift of paradigm can be clearly observed in Base Erosion and Profit Shifting (BEPS) Action Plan and the global tax transparency standard. In fact, BEPS Action 12 provided recommendations regarding the design of mandatory disclosure rules for aggressive tax planning schemes, taking into consideration the experience of countries such as United States (tax shelters regime) and the United Kingdom (DOTAS regime), among others.

7. The same opinion is held by J. Martín López, *Planificación fiscal agresiva y normas antiabuso en el derecho de la Unión Europea: análisis de las últimas tendencias*, Quincena Fiscal 8, p. 61 (2015); and M. Aujean, *Fighting Tax Fraud and Evasion: In Search of a Tax Strategy?*, EC Tax Review 2, p. 64 (2013).
8. Pistone, *La planificación fiscal agresiva y las categorías conceptuales del Derecho tributario global*, *op. cit.*, p. 5.
9. Martín López, *op. cit.*, p. 61; and Pistone, *La planificación fiscal agresiva y las categorías conceptuales del Derecho tributario global*, *op. cit.*, p. 21.

Against this background, DAC6 was approved at the EU level in 2018.[10] It provides for mandatory disclosure of cross-border arrangements by intermediaries or taxpayers to the tax authorities and mandates automatic exchange of this information among EU Member States. According to Preamble to the Directive, the stated purpose of DAC6 is to enhance transparency, reduce uncertainty over beneficial ownership and dissuade intermediaries from designing, marketing and implementing harmful tax structures. In a nutshell, the EU mandatory disclosure regime basically revolves around the following two key pillars: (i) a mandatory disclosure obligation that falls on tax intermediaries and, in certain cases, on the taxpayers, in relation to certain potentially aggressive tax planning arrangements; and (ii) a mechanism for the automatic exchange between Member States of the reported arrangements submitted by tax intermediaries and taxpayers that will allow EU tax authorities to have access to the aggressive tax planning structures. However, for the purposes of this contribution, only the disclosure regime will be addressed as it is the real novelty that DAC6 introduced. In other words, until DAC6, no general provisions were in place requiring taxpayers to disclose information on aggressive tax planning structures at the EU level.

In this sense, the disclosure implies the inversion of the administrative tax burden.[11] Taxpayers have been forced to increase their level of diligence in tax compliance. Not only substantively (due to the greater amount of information) but also formally as they are the ones who provide that information. All previous DACs contain a general obligation for the national tax authorities to communicate information spontaneously or automatically to the other

10. In order to achieve approximation in line with the Treaty of Functioning of the European Union (TFEU), the EU Treaties allow the European institutions to act in different spheres. Thus, the Treaties give the European Parliament and the Council of the European Union power to adopt harmonization measures that can remove barriers to the four freedoms or distortions of competition, which are created by diverging national laws. These measures may be adopted in the form of Regulations or Directives. Regulations are binding acts that must be applied in their entirety across the European Union whereas Directives, based on art. 288 TFEU, are legislative acts that set out a goal that Member States must achieve, leaving them free to decide how (which means that they require implementation into Member States' national law). This process is commonly referred to as "positive integration". *See*, in this regard, E. Dahlberg, *Legal obstacles in Member States to Single Market rules*, Study Requested by the IMCO Committee (2020), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/658189/IPOL_STU(2020)658189_EN.pdf (accessed 13 July 2023). For further information on the differences between directives and regulations *see* P. Craig & G. De Búrca, *EU Law. Text, Cases and Materials* p. 136 et seq. (7th ed., Oxford University Press 2020).

11. As acknowledged by J.M. Calderón Carrero, *La Cooperación internacional en la lucha contra el fraude fiscal*, in *El fraude fiscal en España* pp. 745-857 (E. Giménez-Reyna Rodríguez, S. Ruiz Gallud & I. Arráez Bertolí eds., Aranzadi 2018).

tax authorities within the European Union in certain circumstances. DAC6 is, hence, complimentary to all other DACs covering, however, a remaining necessity to reinforce certain specific transparency demands of the existing taxation system. Therefore, at the time at the time the research for this book was undertaken, there was little discussion nor many suggestions about a mandatory disclosure regime in the European Union. Further, the issues arising from the exchange of information could undoubtedly constitute, due to its importance, a specific and independent contribution. For these reasons, the scope of this contribution is limited to the issues arising from the mandatory disclosure regime in light of EU law, leaving aside the potential problems deriving from automatic exchange of information.

1.2. The research question

Since its adoption in 2018, an intense debate on whether the DAC6 is sufficiently protective from the point of view of taxpayers' rights has originated from academics at the international level. That is, whether the measure respects the most basic tenets of EU law (i.e. fundamental rights and the general principles of the European Union). This analysis necessarily involves assessing whether DAC6 (EU secondary law) respects the requirements of EU primary law. This is, therefore, the research question to be elucidated in this contribution: is the DAC6 as a piece of EU secondary law compliant with the requirements of EU primary law in terms of fundamental rights and guarantees?

In this regard, Recital 18 to DAC6 points out that "this Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". However, is this statement true in practice? Against this background, first of all, under the domain of EU law, measures that do not respect the general principles or fundamental rights of the European Union are not considered to be proportional to the objective they intend to achieve. The same holds true in relation to measures affecting direct taxation. In fact, from the very beginning of European integration, Member States have been extremely reluctant to transfer powers to the European Union level in the area of direct taxes, which remains their exclusive competence.[12] However, the Court of Justice

12. For this reason, what has been carried out is a process of approximation of national regulations through the enactment of multiple directives. For example, the Interest and Royalties Directive (2003/49), Merger Directive (2009/133), the Parent-Subsidiary Directive (2011/96), the Anti-Tax Avoidance Directive (2006/1164) (ATAD) and the Mutual Assistance Directive on Administrative Cooperation (2011/16). All these directives

of the European Union (ECJ) has consistently held that the powers retained by Member States must nevertheless be exercised consistently with EU law.[13] Further, in this regard, not only Member States but also EU legislators shall respect all Treaty provisions.[14] In fact, it is settled case law that a "directive must, like all secondary legislation, be interpreted in the light of the Treaty rules".[15] Thus, even as EU legislators pursue the same goal of free movement as the Treaty provisions, when EU secondary legislation is drafted it is inevitable that EU legislators will sometimes use some regulatory solutions that the ECJ has found to be breaches of EU law whenever they were

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demonstrate a transfer of powers from the Member States to the European Union. That is, Member States give up a part of their tax powers in favour of improving the conditions for taxpayers to exercise fundamental freedoms, pillars of the internal market. The directives were therefore adopted pursuant to arts. 113 and 115 TFEU, which allow the Council of the European Union to adopt directives for the harmonization/approximation of the legal provisions of the Member States that directly affect the establishment or functioning of the internal market. *See* on this topic R. Szudoczky & D. Weber, *Constitutional Foundations: EU Tax Competences*; *Treaty Basis for Tax Integration; Sources and Enactment of EU Tax Law*, in *European Tax Law. Volume I - General Topics and Direct Taxation* ch. 2 (P.J. Wattel, O. Marres & H. Vermeulen, Wolters Kluwer 2018); W. Haslehner, *Taxation at the Crossroads of Fundamental Rights and Fundamental Freedoms in the EU*, in *EU Tax Law and Policy in the 21st Century* pp. 157-177 (W. Haslehner, G. Kofler & A. Rust eds., Wolters Kluwer 2017); J. Gosh, *Tax Law and the Internal Market: A Critique of the Principle of Mutual Recognition*, Cambridge Yearbook of European Legal Studies, vol. 16, pp. 189-221 (2014); E.C.C.M. Kemmeren, *Sources of EU Law for European Integration: Well-Known and Alternative Legal Instruments*, in *Traditional and Alternatives Routes to European Tax Integration* pp. 29-50 (D. Weber ed., IBFD 2010), Books IBFD; G. Kofler & M. Tenore, *Fundamental Freedoms and Directives in the Area of Direct Taxation*, in *Traditional and Alternatives Routes to European Tax Integration* pp. 311-350 (D. Weber ed., IBFD 2010), Books IBFD; F. Vanistendael, *EU Freedoms and Taxation* (IBFD 2006), Books IBFD; and M.C. Barreiro Carril, *La controvertida base jurídica de la Directiva Antielusión fiscal. Un análisis a la luz de reglas de vinculación*, Revista de Derecho Comunitario Europeo 62, p. 162 (2019).

13. *See* the ECJ's landmark decision FR: ECJ, 28 Jan. 1986, Case C-270/83, *Commission of the European Communities v. French Republic (Avoir Fiscal)*, [1986] ECR 1-00273, Case Law IBFD. On this topic, *see* P. Wattel, O. Marres & H. Vermuelen, *European Tax Law. General Topics and Direct Taxation* (Wolters Kluwer 2019); B. Terra & P. Wattel, *European Tax Law* (Wolters Kluwer 2012); and A. Schrauwen, *Sources of EU Law for Integration in Taxation*, in *Traditional and Alternatives Routes to European Tax Integration* pp. 15-28 (D. Weber ed., IBFD 2010), Book IBFD.

14. DE: ECJ, 17 Oct. 1996, Case C-283/94, *Denkavit Internationaal BV, VITIC Amsterdam BV and Voormeer BV v. Bundesamt für Finanzen*, para. 15, Case Law IBFD; and BE: ECJ, 9 Aug. 1994, Case C-51/93, *Meyhui v. Schott Zwiesel Glaswerke*, para. 11.

15. DE: ECJ, Case C-315/92, *Verband Sozialer Wettbewerb eV v. Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH*. *See also* K. Enging Sørensen, *Review of Legality of Secondary Legislation Based on Infringements of the Rights of Free Movement*, in *Traditional and Alternatives Routes to European Tax Integration* pp. 143-168 (D. Weber ed., IBFD 2010), Books IBFD.

adopted by the Member States.[16] In these cases, the ECJ will review issues of validity, although with less intensity than when national measures create obstacles. The review of the validity of EU law normally focuses on whether secondary legislation infringes the general principles of EU law, fundamental rights or essential procedural requirements.[17]

Therefore, critically assessing whether or not a tax measure respects EU fundamental rights and principles is of great relevance in order to analyse whether the measure is proportionate to the aim it intends to achieve. For the purposes of this analysis, proportionality will be discussed in the context of an infringement of primary sources of EU law and, in particular, fundamental rights and principles. In fact, the principle of proportionality, which derives from the rule of law, has been described as the "most influential principle of EU law".[18] It permeates all the areas of EU law and has developed into the "main balancing tool".[19] Nowadays it has been codified in article 5(4) of the Treaty on the European Union (TEU) and article 51(4) of the Charter of Fundamental Rights of the European Union and fulfils three distinct but interrelated functions:[20] (i) it is a market integration mechanism used to determine the legality of national restrictions on free movement; (ii) it is an instrument for the protection of fundamental rights and

16. Enging Sørensen, *op. cit.*, pp. 143-168; and C. Barnard, *The substantive Law of the EU. The Four Freedoms* (Oxford University Press 2019). *See*, for example, DE: ECJ, 1 Oct. 2009, Case C-247/08, *Gaz de France - Berliner Investissement SA v. Bundeszentralamt für Steuern*, Case Law IBFD.

17. As observed by Enging Sørensen, *op. cit.*, p. 157.

18. T. Tridimas, *The Principle of Proportionality*, in *Oxford Principles of European Union Law* pp. 243-264 (R. Schütze & T. Tridimas eds., Oxford University Press 2018). *See also* DE: ECJ, 14 May 1974, Case C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission*.

19. For further information on the relative nature of proportionality (balancing principle) *see* R. Szudoczky, *The Influence of Primary Law on the Interpretation of Secondary Law in the Field of EU Citizenship and Direct Taxation: "Whatever works"...*, in *Traditional and Alternatives Routes to European Tax Integration* p. 216 (D. Weber ed., IBFD 2010), Books IBFD. For further information *see* J.F. Pinto Nogueira, *Direito Fiscal Europeu - O Paradigma da Proporcionalidade* (Wolters Kluwer 2010); A. Zalasiński, *The principle of Proportionality and (European) Tax Law*, in *Principles of Law: Funcion, Status and Impact in EU tax Law* pp. 303-318 (C. Brokelind, IBFD 2014), Books IBFD; J. Dácio Rolim, *Proportionality and Fair Taxation* (Wolters Kluwer 2014); and T. Tridimas, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in *The Principle of Proportionality in the Laws of Europe* pp. 65-84 (E. Ellis ed., Hart Publishing, 1999).

20. K. Leanerts, *Proportionality as a matrix principle promoting the effectiveness of EU law and the legitimacy of EU action*, ECB Legal Conference 2021: Continuity and change – how the challenges of today prepare the ground for tomorrow (25 Nov. 2021).

guarantees vis-á-vis public authorities; and (iii) it is a premise of the exercise of competences seeking to limit the scope and intensity of EU action.[21]

Proportionality might become an issue when a Directive is inconsistent with the requirements of EU general principles but is possibly justified by other legitimate objectives pursued by the European Union. It will furthermore become relevant when the imposition of a measure causes violations of fundamental rights. To frame it negatively, if a measure does not respect the fair balance between the legitimate interests in complying with the general principles of EU law and the protection of fundamental rights, it cannot be held proportionate.[22] Thus, as argued in *Carpenter* (Case C-60/00), "[a] Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures".[23] Thus, if the measure is not compatible with

21. Thus, the notion of proportionality, expressed in art. 5 Treaty on the European Union (TEU), is very different to that in other areas of EU law. In art. 5 TEU, the notion of "proportionality" provides that legislation should not go beyond what is necessary to achieve a Union-compliant objective. Its purpose is not to protect the freedom of citizens against interventions by the public authorities, but to ensure that the legislative powers of the European Union are exercised in the least aggressive manner possible in relation to the powers of the Member States. From this perspective, proportionality takes into account the relationship between the European Union and the Member States (division of powers) and not the relationship of the European Union or the Member States with individuals (i.e. taxpayers). In a nutshell, the purpose of the principle of proportionality here is to set specific limits on the actions of the EU institutions. *See* Gosh, *op. cit*., p. 194. *See*, in this regard, BE: ECJ, 28 Jan. 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State*, para. 27, Case Law IBFD; and SE: ECJ, 28 Apr. 1998, Case C-118/96, *Jessica Safir v. Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län*, para. 33, Case Law IBFD.

22. *See*, for example, A.S. De Vries, X. Groussot & G. Thor Petursson, *Balancing Fundamental Rights with the EU Treaty Freedoms: the European Court of Justice as 'tightrope' walker* pp. 50-51 (Eleven International Publishing 2012); R. Lyal, *Tax and Fundamental Rights in EU Law: Procedural Issues*, in *Human Rights and Taxation in Europe and the World* ch. 25 (G. Kofler, M. Poiares Maduro & P. Pistone eds., IBFD 2011), Books IBFD; Barnard, *op. cit*.; and A. Nieto Martín, *El Principio de Proporcionalidad*, in *Principios generales del Derecho Penal en la Unión Europea* p. 172 (R. Sicurella et al. eds., Agencia Estatal Boletín Oficial del Estado 2020).

23. UK: ECJ, 11 July 2002, Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, para. 40, Case Law IBFD. *See also* GR: ECJ, 18 June 1991, Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*; DE: ECJ, 29 Apr. 2004, Joined Cases C-482/01 and C-493/01, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*; ES: ECJ 13 Sept. 2016, Case C-165/14, *Alfredo Rendón Marín v. Administración del Estado*; and LT: ECJ, 6 Sept. 2016, Case C-182/15, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*.

fundamental rights it cannot be maintained that the restriction is proportionate from the perspective of EU law.

Similarly, a rule that does aim to meet a fair balance between general principles cannot be regarded as proportionate to the objectives pursued. That might happen, for example, in cases in which anti-abuse measures are adopted if those measures do not respect the principles of legal certainty, retroactivity or, even, as redundant it might sound, proportionality.[24] Thus, anti-abuse measures in the ECJ's free movement case law have been found to be disproportionate because, due to lack of clarity as to its applicability, the rule at issue did not meet the requirements of the principle of legal certainty (e.g. *SIAT* (Case C-318/10)).[25] This meant, in turn, that the rule was not deemed proportional. This might be especially the case whenever an uncertain rule may have unfavourable consequences for individuals and companies.[26] The proportionality of anti-avoidance measures implementing EU secondary legislation has also been assessed by the ECJ in cases such as *Leur-Bloem* (Case C-28/95).[27] This development in the case law has been referred to as "the public law element of proportionality" and entails that the proportionality test is sometimes reinforced with structural demands about, for example, legal certainty.[28]

24. A clear link between proportionality in free movements and proportionality itself is provided in UK: ECJ, 14 Dec. 2004, Case C-210/03, *The Queen, on the application of: Swedish Match AB, Swedish Match UK Ltd v. Secretary of State for Health*, Case Law IBFD.

25. BE: ECJ, 5 July 2012, Case C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT) v. État Belge*, Case Law IBFD; NL: ECJ, 7 June 2005, Case C-17/03, *Vereniging voor Energie, Milieu en Water and Others v. Directeur van de Dienst uitvoering en toezicht energie*; and IT: ECJ, 16 Feb. 2012, Joined Cases C-72/10 and C-77/10, *Marcello Costa and Ugo Cifone*. *See also*, in this regard, Zalasinski, *Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law*, *op. cit.*, pp. 310-321; and M. Hilling, *Justifications and Proportionality: An Analysis of the ECJ's Assessment of National Rules for the Prevention of Tax Avoidance*, 41 Intertax 5, pp. 294-307 (2013).

26. *See* PT: ECJ, 3 Oct. 2013, Case C-282/12, *Fazenda Pública v. Itelcar - Automóveis de Aluguer, Lda*, para. 44, Case Law IBFD. *See also VEMW and Others* (C-17/03), at para. 80; and FR: ECJ, 14 Mar. 2000, Case C-54/99, *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v. The Prime Minister*.

27. NL: ECJ, 17 July 1997, Case C-28/95, *A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam* 2, Case Law IBFD.

28. T. Tridimas, *The General Principles of EU Law* (Oxford University Press 2007). *See also* J.M. Calderón Carrero, *La seguridad jurídica como límite comunitario a la lucha contra el fraude y la evasión fiscal: una nota sobre la STJUE de 5 de Julio de 2012, asunto SIAT (C-318/10)*, *op. cit.*, pp. 81-104.

In the author's view, if this is the ECJ's position with regard to conduct that is more reprehensible than aggressive tax planning (i.e. as argued in this book, abuse entails damage to the public interest that aggressive structures do not cause), the same should apply to measures that seek to combat aggressive tax planning but exceed certain limits of fundamental rights, legal certainty or proportionality itself. That is, if the way in which the measure is configured restricts fundamental rights or general principles in an excessive manner, that measure is not proportional as it goes beyond what is necessary to achieve its objective (i.e. to obtain information on aggressive tax planning potentially allowing to close loopholes in the internal market). This includes secondary law measures adopted by the European Union itself that must respect primary law.

In other words, the Directive may be disproportionate when the balance of a state's interest overrides the taxpayer's interest in a manifestly inappropriate way by not respecting fundamental EU principles and rights (e.g. the principles of legal certainty, non-retroactivity or proportionality). Consequently, it is deemed not to meet the requirements of EU primary law. On the other hand, problems of a different nature (i.e. lack of effectiveness or tax competition), although undesirable, do not imply that the measure is disproportionate from the point of view of taxpayers' rights. As a result, whenever there are intrusions and violations it is necessary to assess if these intrusions are proportional: that is, if they strike a fair balance between the interest of the European Union and the Member States on the one hand, and the rights and freedoms of taxpayers on the other.

However, only in extreme situations will the ECJ set aside secondary legislation,[29] as it usually prefers a reconciliatory interpretation. Reconciliatory interpretation requires that secondary EU law must be interpreted as far as possible in a way that is consistent with the requirements of primary law (higher ranking rules). This process has been described as "*in dubio pro communitate*" (i.e. to interpret a provision in a manner that is consistent with the Treaty).[30]

Further, it might be the case that some of these problems arise from the interplay between the Directive, the implementing measures and the

29. GR: ECJ, 5 Oct. 2004, Case C-475/01*, Commission of the European Communities v. Hellenic Republic*, Case Law IBFD. In this case, the ECJ balances the requirement of stability and the requirement of legality.
30. Szudoczky, *The Influence of Primary Law on the Interpretation of Secondary Law in the Field of EU Citizenship and Direct Taxation: "Whatever works"...*, *op. cit.*, pp. 191-227.

national laws of the Member States. That is, it is not a problem that derives only from secondary law or national law, rather, the puzzling between the two results in a violation of taxpayers' rights and guarantees. Therefore, the question to be resolved is whether disproportionality is attributed and must be resolved within the Directive or whether, on the contrary, it is a problem that must be faced by the Member States when drafting their implementing measures.[31] In the latter case, the result is that the Directive itself complies with the postulates of EU law.

1.3. Methodology

The analysis in this book has been carried out using both a doctrinal legal approach and a comparative legal approach. Undertaking doctrinal research involves source-based research. Thus, the doctrinal approach to research focuses on traditional legal sources, such as legislation, case law and other legal documents. Comparative legal approach is the study of the differences and similarities that exist between the law (legal systems) of different countries.

The author addresses the research question from a European perspective. In this regard, ever since the ECJ's landmark decision in *Van Gend & Loos* (Case C-26-62),[32] the Court has consistently repeated that the European Union is a separate and autonomous legal order. However, autonomy could

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31. In this regard, it shall be noted that the EU legislator also enjoys wider discretion in this proportionality requirement than the Member States. In particular, according to the Court:

> With regard to judicial review of those conditions, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is *manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue. [Emphasis added.]

See UK: ECJ, 12 July 2005, Joined Cases C-154/04 and C-155/04, *The Queen, on the application of Alliance for Natural Health and Others v Secretary of State for Health and National Assembly for Wales*, paras. 51-52. *See also* LU: ECJ, 25 June 1997, Case C-114/96, *Criminal proceedings against René Kieffer and Romain Thill*, para. 37, Case Law IBFD. Thus, if the European legislator's measure is not manifestly inappropriate it will be proportionate, whereas in the case of Member States this analysis focuses on whether the measure goes beyond what is necessary to achieve its objective (if not, it will be disproportional). *See* Enging Sørensen, *op. cit*., pp. 143-168.

32. NL: ECJ, 5 Feb. 1963, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Case Law IBFD.

hardly be achieved in a legal system that is not self-sufficient and coherent.[33] To this aim, general principles of EU law have played a major role. These general principles are regarded as a part of primary EU law and they serve as a tool in the development, application and interpretation of EU tax law.[34] Thus, as EU general principles, they have the status of higher legal norms and their infringement is considered as having the same impact as the breach of any provisions of the founding Treaties of the European Union.[35] In addition, fundamental rights play a key role in this purpose, as inferred from the case law from the ECJ (e.g. *Kadi and Al Barakaat* (Case C-415/05).[36] Therefore, EU sources are of great importance throughout this contribution. In this regard, the position of both the ECJ[37] and the European Court of Human Rights (ECtHR) on the challenging issues are analysed. The study of EU law is based not only on primary empirical sources but mostly on secondary theoretical sources (general textbooks, academic monographies and journal articles focusing directly or indirectly on the selected topics).

In those cases in which problems of compliance with EU primary law are identified, a comparative analysis of the implementation of the measure in the Member States is carried out. The idea is to assess whether these problems identified at a theoretical level have actually occurred in practice. This also makes it possible to consider whether the problem really comes from the Directive or whether, on the contrary, it is a problem that originates within the Member States. The review of the implementation process relies either on primary sources (the implementing law itself and the guidelines

33. As argued by K. Lenaerts & J.A. Gutierrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, Common Market Law Review 47, pp. 1629-1669 (2010).
34. For further information on the topic *see*, for example, R. Szudoczky, *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation* p. 100 (IBFD 2014), Books IBFD.
35. DE: ECJ, 3 May 1978, Case C-112/77, *Töpfer v. Commission ECR*, para 19.
36. *See*, for example, ECJ, 3 Sept. 2008, Case C-415/05 P, *Kadi and Al Barakaat*, paras. 283 and 284: "In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures."
37. Regarding the influence of the ECJ on the exercise of national tax sovereignty within the European Union to make it compatible with the supremacy of EU law, *see* M. Maduro, *We the Court: The European Court of Justice and European Economic Constitution* (Hart Publishing 1998); A. Rosas, E. Levits & Y. Bot, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Springer 2013); P. Pistone, *The Impact of ECJ Case Law on National Taxation*, 64 Bull. Intl. Taxn. 8-9, pp. 412-428 (2010), Journal Articles & Opinion Pieces IBFD; B. Peeters, *The Uniform Application of European Union Law: The Court of Justice Confirms its Role as Ultimate Cerberus*, EC Tax Review 3, pp. 122-124 (2019); and E. Kemmeren, *The CJEU and the Internal Market Concept in Direct Taxation*, in *EU Tax Law and Policy in the 21st Century* p. 7 (W. Haslehner, G. Kofler & A. Rust eds., Wolters Kluwer 2017).

issued by tax authorities) or on country reports that have been published in reputable journals and platforms.

Finally, note that the nature of the contribution is not only descriptive but also analytical. It aims to assess the most recent academic debates in a neutral and critical way and offer a different perspective on the EU mandatory disclosure regime. With this objective in mind, in some cases alternative suggestions and proposals are made.

1.4. Structure

This book is divided into nine chapters, including the introduction (chapter 1) and conclusion (chapter 9).

Chapter 2, which is primarily descriptive, seeks to answer the following questions:

– Why are mandatory disclosure rules necessary?

– How should mandatory disclosure rules be drafted to work effectively?

– How does the EU mandatory disclosure regime work?

For this, the historical context in which mandatory disclosure rules originated is described. Subsequently, a detailed analysis of the approach of the OECD in relation to mandatory disclosure and, especially, of BEPS Action 12 as an international standard is carried out. Finally, the chapter makes a descriptive analysis of DAC6 as the unified mandatory disclosure regime in the European Union with the aim of highlighting its characteristic elements and major points of concern.

Chapter 3 analyses the objective element of the Directive in light of the principle of legal certainty. In particular, the issues to be addressed in this chapter are (i) what is legal certainty and when it is understood to be violated in the European Union; and (ii) whether DAC6, as regards its objective and material scope, contravenes the postulates of this principle of legal certainty. Either in its clarity aspect (objective demand) or in its foreseeability aspect (subjective demand). This is observed from the analysis of the wording directive (e.g. lacks clarity) and is demonstrated through an analysis of the implementing measures (i.e. the lack of clarity has led to differing implementations).

Further, the chapter discusses whether retrospective legislation may be employed to combat aggressive tax planning arrangements disclosed under mandatory disclosure rules. In other words, how do EU mandatory disclosure rules affect the temporal dimension of the taxpayers' right to legal certainty and legitimate expectations? To this aim, the chapter first analyses the requirements of the prohibition of retroactivity as stemming from the principle of legal certainty and legitimate expectations. At this point it is noted that it is generally accepted that under certain circumstances the legislator is allowed to deviate from this prohibition. The concept of legitimate expectations has a key role in this respect. The chapter concludes with a section dedicated to the application of the key concepts developed around the prohibition of non-retroactivity in the field of DAC6.

Chapter 4 analyses whether the EU mandatory disclosure regime actually violates the rights of defence of the affected intermediaries and taxpayers. In particular, attention is paid to the right/duty of professional secrecy and the right against self-incrimination from a European perspective. Thus, in the first place, the right/duty of professional secrecy of tax intermediaries in the European Union and the protection granted to it by the Directive is analysed. In this way, it will be concluded whether or not the right is affected by DAC6. Second, the chapter discusses the right against self-incrimination from a European perspective. Again, the idea is to what extent compelled disclosure under DAC6 obligations may lead to self-incrimination in the case of the relevant taxpayers.

Chapter 5 discusses the respect of privacy rights in the scope of the disclosure obligation. Thus, the chapter elaborates on the protection of the right to privacy in tax matters within the EU. To this aim, the ECJ judgment and the Advocate General's Opinion in *Orde van Vlaamse Balies and Others* (Case C-694/20) are of particular interest. Subsequently, it is analysed whether this right may be invoked under the DAC6 regime. In this regard, to assess whether the taxpayer's right to privacy is violated, it is necessary to consider whether the rules provide for the disclosure of personal information. If so whether such disclosure is justified and the intromission is proportionate.

Chapter 6 deals with the limits in the regulation of penalties as derived from the principle of proportionality. In this regard, note that the EU mandatory disclosure rule can give rise to sanctions at two different levels. On the one hand, the sanction for not declaring the required information (i.e. for failing to comply with the reporting obligation), and, on the other hand, the potential sanction for the information declared. That is, the sanction

that the subject may face in the event of reporting a mechanism that falls within the scope of illegal behaviour. Chapter 6 deals with the first level of sanctions. In particular, with the limits arising from the principle of proportionality faced by Member States when regulating penalties for possible breaches of the obligation to declare.

Chapter 7 discusses the limits deriving from the principle of legality when applying penalties. Particularly, in the case in question, the chapter discusses whether the information disclosed may give rise to the imposition of a sanction of a criminal nature. To this aim, it is important to distinguish the type of arrangement declared (i.e. aggressive tax planning versus tax abuse/avoidance). Additionally, note that in some of these cases the fundamental rights of the taxpayer and the intermediary may be affected. Therefore, this chapter also be addresses who imposes these sanctions and under what circumstances.

Finally, in chapter 8 the principle of culpability when imposing a penalty is discussed. That is, do Member States comply with necessary requirements and guarantees that might be respected for the application of such penalties? This is relevant in the area of DAC6 as it will not only allow for an analysis of what guarantees taxpayers have when a sanction is imposed, but also in which situations Member States should not impose the sanction because the requirements for doing so are not met (i.e. the subject did not know that he was committing the infraction). In this sense, not all sanctions are subject to the same guarantees and limits. Thus, "criminal" sanctions are subject to a higher standard of protection.

Against this background it is important to note that although independent, all the chapters work together as a whole. In this regard, as an example, it is not possible to conclude whether fundamental rights are violated (chapter 4) without discussing the objective of the Directive, the arrangements that fall within its scope (chapter 3) and the punitive response that might arise from the disclosure obligation (chapter 7). To frame it negatively, without discussing the penalties that might be imposed in a case in which certain arrangements are disclosed, it is not possible to assess whether professional secrecy and the right not to incriminate oneself are undermined. The answer to this question enables the author to conclude whether the DAC6 follows the line of mandatory disclosure rules and international tax policy in the last few years or if, on the contrary, it requires a new step to be added to the tax transparency agenda. To this aim, the background of the Directive is especially relevant (chapter 2).

Finally, the book concludes with some general remarks by way of summary. In this chapter, the author's main ideas, critiques and suggestions are highlighted.

Notes

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